

Neutral Citation No: [2023] ECC Oxf 7



Faculty – Grade II listed Victorian village church – Proposal for memorial falling outside the churchyard regulations – Memorial similar to one approved by faculty in 2011 for the petitioner’s late mother and reflecting the family’s gypsy heritage and culture – Minister supportive of the proposal – DAC not recommending the proposal for approval – No objections received to the petition – Faculty granted

Petition No: 10978

IN THE CONSISTORY COURT
OF THE DIOCESE OF OXFORD

Date: Sunday, 4 June 2023

Before:

THE WORSHIPFUL DAVID HODGE KC, CHANCELLOR

In the matter of:

St James, Barkham

THE PETITION OF:

WILLIAM JAMES PRICE

This is an unopposed faculty petition determined on the papers and without a hearing.

There were no objections to the petition but the Diocesan Advisory Committee did not recommend the proposal for approval by the court.

The following cases are referred to in the judgment:

Re Christ Church, Harwood [2002] 1 WLR 2055

Re St Giles, Exhall [2021] EACC 1, [2021] PTSR 1622

Re St Mary, Great Chart [2022] ECC Can 2

Re St Mary the Virgin, Ashbury [2021] ECC Oxf 5

JUDGMENT

Introduction and background

1. By a petition dated 9 February 2023, Mr William James Price applies for a faculty authorising the installation of a dark grey, unpolished, upright granite memorial to mark the grave of his late wife which is situated approximately 20 metres away from the Grade II listed church of St James, Barkham, near Wokingham. According to the listing entry at Historic England and the description at page 146 of the 2nd (2010) edition of the volume of *Pevsner's Buildings of England* for Berkshire, the church was built in 1860-1 by J B. Clacy & Son, in the Early English style, on the site of an earlier village church, with a shallow chancel and transepts being added in 1887. The memorial is intended to commemorate the petitioner's late wife, Mrs Margaret Philomena Price, who was buried in the churchyard on 16 December 2022. A faculty is required because the proposed memorial falls outside the scope of the authority delegated to the incumbent minister by the applicable churchyard regulations for the Diocese of Oxford.

2. In his statement in support of the faculty application, dated 2 May 2023, Mr Price states that he is applying for a headstone of this design "... because it is like the one for my mum who died in 2009. Me and my family were very grateful that my mum's headstone was approved because the design reflects more of our family culture. My wife Margaret died so suddenly and only 44. It would mean so much to me, her children and grandchildren if her stone could match my mum's."

3. I have seen a copy of the faculty (No 8314) which was granted to the present petitioner by my predecessor, Chancellor Bursell QC, on 23 June 2011. This authorised Mr Price to erect a "dark grey granite churchyard memorial commemorating Agnes Price" on the sole condition "that if the memorial does not precisely reflect the application, it is removed forthwith, by or on behalf of the Incumbent, churchwardens and PCC". I have reproduced an image of this memorial at the end of this judgment. It stands one row back from, and one grave plot to the left of, the grave of the petitioner's wife. Both graves can be seen on the second of the images I have reproduced at the end of this judgment. The two memorials would stand within about three metres of each other.

4. Correcting an obvious error in the word order, the proposed inscription reads:

IN LOVING MEMORY OF
A DEAR WIFE, MOTHER,
NANNY, DAUGHTER AND SISTER
MARGARET PRICE

WHO FELL ASLEEP
26TH NOVEMBER 2022
AGED 44 YEARS

YOU ALWAYS KNEW JUST WHAT TO SAY
THE LOVE YOU GAVE US EVERY DAY
NOW YOU'RE IN HEAVEN AND WE'RE APART
WE'LL ALWAYS KEEP YOU IN OUR HEART

That inscription is in keeping with the inscription on the memorial to the petitioner's late mother.

5. On 28 February 2023 the minister, the Reverend Julian Bidgood, completed the Diocese's standard-form questionnaire accompanying the petition. He had no comments to make about the proposed inscription, which he described as "*suitable*". The minister advised that the proposed memorial was "*suitable*" in relation to the fabric of the church. He reported that there was one other similar memorial in the vicinity of the grave. To the question: "*Will this memorial hamper the cutting of grass or maintenance of the churchyard generally?*" the minister responded: "No." The minister also commented, in conclusion, that: "*I am personally supportive of this application as the memorial matches another for the applicant's mother which we supported and was granted in 2009.*"

6. The minister has also written a letter, dated 2 May 2023, in the following terms:

Having indicated my support for Mr Price's application on the form, I am writing to further explain why I think it is a reasonable application.

First, although the design is outside normal regulations, in my view it is not overwhelming. Back in 2009, the family had initially wanted a much more elaborate memorial for Agnes Price, but we worked hard with them to come up with this same design as a suitable compromise.

Secondly, I think local context is key. People who live in and around Barkham know that we have several well established and long-term gypsy families in the area. I believe people recognise that their 'heart on sleeve' culture means they prefer more elaborate designs. I have not had heard [sic] any complaints about these designs from churchyard visitors.

Thirdly, the local context has also led to local precedent: The Diocese gave its approval to this family when they applied for the same design in 2009 and also approved another heart design in 2013 (Lee and Cruz Elgar). I would struggle to explain why the design is deemed unsuitable this time.

I'm aware that the diocese needs to consider the likelihood of similar future applications. It may be helpful to know that the churchyard is close to capacity for full burials, so I don't anticipate that the character of the churchyard is likely to change as a result of this.

I hope this information is helpful as Mr Price's application is considered.

7. In addition to the memorial to the petitioner's late mother, I have also been referred to images of two further non-compliant memorials within the churchyard. One is a single, heart-shaped upright stone memorial to twin brothers who both tragically died within a few days of

their birth in October 2011. The other is a memorial incorporating the figure of an angel which commemorates a gentleman from a gypsy cultural background who passed away in June 1990, well before the present minister came to the church.

8. On 3 May 2023 the Diocesan Advisory Committee (the **DAC**) issued a Notification of Advice in which they stated that they did not recommend the proposed memorial for approval by the court for the following principal reasons:

The DAC's concern is based on an additional non-compliant memorial increasing the difficulty of maintaining good order in the churchyard in line with the regulations. In this case, there is only one memorial already in existence of this type and it is felt that the proposed degree of non-compliance is significant.

As required by rule 4.9 (6) (b) of the Faculty Jurisdiction Rules 2015 as amended (the **FJR**), the Notification of Advice records that, despite the DAC's advice, Mr Price might, if he so wished, apply to the court for a faculty authorising the proposed memorial (which he has duly done). The DAC advised that the proposed memorial was not likely to affect either the character of the church as a building of special architectural or historic interest, or the archaeological importance of the church, or any archaeological remains existing within the church or its curtilage.

9. No objections have been received in response to the usual public notices, which were displayed between 3 and 31 May 2023 (inclusive) on the outside church notice board and inside the church porch.

10. When this petition was first referred to me, I invited the Registry to ask the minister:

- (1) precisely how many grave spaces were left in the churchyard for full body burials and cremations, and how long these were likely to last; and
- (2) whether he had consulted the churchwardens and the Parochial Church Council (the **PCC**) about this application, and what they had to say about it.

11. The minister responded that it was hard to be precise about the number of possible future full-burial plots due to two factors: the irregular shape of the churchyard and the fact that the remaining space includes an area that can become terribly waterlogged. He estimated that the churchyard could accommodate 12-15 further burials, which might last another five to eight years. Ashes plots were obviously significantly smaller, and the parish had recently started using a new area which could easily accommodate 25-30 new plots. The minister confirmed that he had brought the application before the sole churchwarden, and that the PCC had considered the matter at its meeting on 20 March 2023 and had unanimously approved the design for the proposed memorial. The PCC were content that it followed the precedent set by their previous decision, and they were also happy that the suggested grey material fitted in well with its surroundings. The actual resolution was passed unanimously and was in the following terms:

Barkham PCC supports Mr Price's application because the proposed memorial stone design for the late Margaret Smith [sic] is similar to the memorial to Mr Price's mother nearby.

12. Had I been minded to consider refusing this petition, I would have canvassed the views of the petitioner on whether, having regard to the overriding objective in Part 1 of the FJR of dealing with the case justly, proportionately, expeditiously and fairly, whilst saving expense, I should determine the matter on consideration of written representations or should dispose of it at a hearing, to be conducted remotely using a video-platform. However, since I propose to grant

this petition, I will proceed by way of a determination on the papers, thereby avoiding any unnecessary delay, and saving unnecessary expense.

The applicable law

13. There is no right to erect a memorial over any grave without either the permission of the diocesan chancellor, pursuant to a faculty, or the permission of the incumbent minister where the chancellor has delegated authority to that incumbent to grant permission for memorials under churchyard regulations. In principle, the introduction of any item into a consecrated Church of England churchyard requires a faculty; but it is conventional for chancellors to make schemes of delegation, usually by means of what are termed ‘*Churchyard Regulations*’, although these have no formal basis in statute. If a memorial does not wholly conform to the specifications set out in the applicable churchyard regulations, the incumbent will lack any delegated authority to permit that memorial, and it will be necessary to apply to the chancellor for a faculty.

14. The Churchyard Regulations made by my immediate predecessor as Chancellor of the Diocese of Oxford, on 8 November 2016, apply to this churchyard. By regulation 30, a monument “*must not take the form of a statue or of a particular object such as a heart, a person, animal or other figure*”. However, regulation 4 g of the Oxford Churchyard Regulations expressly recognises that any ‘*reference to a matter being permitted or not permitted applies only for the purposes of these Regulations; and it does not prevent any monument or ledger being introduced or removed under the authority of a faculty or other order issued by the Consistory Court*’.

15. Until June 2021, the caselaw disclosed two competing approaches to applications for a faculty where there had been non-compliance with the relevant Churchyard Regulations: one required ‘*exceptional*’, ‘*powerful*’ or ‘*substantial*’ reasons for departing from the Regulations; the other simply asked whether the proposed memorial was ‘*suitable*’. In *Re St Giles, Exhall* [2021] EACC 1, [2021] PTSR 1622 the Arches Court of Canterbury (Morag Ellis QC, Dean, Chancellor Turner QC and Chancellor Arlow) considered these different approaches and how churchyard regulations should be used in decision-making. At paragraph 11.8, the Arches Court considered the right approach to be the ‘*merits-based*’ one:

Clearly, any Regulations in place for the parish or diocese concerned will be part of a matrix of relevant considerations, but we do not think that consideration of a faculty petition should start with a presumption against allowing a memorial outside the parameters of the Regulations ...

16. The Arches Court cited with approval the approach articulated in a number of first-instance judgments. I would summarise this approach as follows:

- (1) As is the case with any faculty petition, the burden of proof lies on the petitioner to show why a faculty should be granted to authorise the particular proposed memorial.
- (2) The terms and content of the applicable churchyard regulations will, of course, be a relevant factor – often highly relevant, and doubtless, on occasion, determinative. But they will only be one of the constellation of infinitely variable factors which the court must consider on a case-by-case basis.

(3) The court should approach the suitability of the proposed memorial on its own merits, the only constraint being the inability of the court to permit something which is contrary to, or indicative of any departure from, the doctrines of the Church of England in any essential matter.

(4) Mere non-compliance with the regulations, of itself, can never be the only basis on which to refuse a faculty petition. It is necessary to consider whether the particular memorial in question is inherently desirable, or at any rate not undesirable, whether or not it complies with the standards of the regulations.

The Arches Court noted that this section of their judgment was not essential to the determination of the appeal in the case that was before them; but they expressly stated that they intended it “*to be of assistance to chancellors, clergy and all others involved in administering the faculty jurisdiction in relation to memorials in consecrated churchyards*”.

17. In *Re St Mary, Great Chart* [2022] ECC Can 2 (in the Diocese of Canterbury) the petitioner wished to install a replacement memorial on his parents' grave. The design included images of a dove, a stairway to heaven, and two swans. The inscription included a verse of poetry written by the petitioner's daughter; and it ended with an x (the symbol of a kiss). There was an objection that the proposed design would not be in keeping with that part of the churchyard where the memorial would be located; and that this might set a precedent for future headstones with designs that were out of kilter with that section of the churchyard. The PCC were supportive of this petition, as was the incumbent; and the DAC had also recommended the design for approval by the court. The Commissary General (Robin Hopkins) granted a faculty for the proposed design of the memorial, subject to a condition relating to the inscription. In the course of his judgment (at paragraph 11), the Commissary General recorded that in assessing the appropriateness of the proposed design, in particular in light of the points of objection, he had derived assistance from the principles discussed in a number of other decisions of the consistory courts of other dioceses. So far as relevant to this present petition (where there is no issue as to the proposed inscription), the Commissary General highlighted (on a non-exhaustive basis) the following examples of such principles and decisions:

(1) There is no right to erect a monument in a churchyard except by permission granted by a faculty (though this is often delegated to the incumbent minister). Headstone wording and imagery must be consistent with the consecrated status of churchyards; and they must be appropriate, not only from the perspective of petitioners, but also (as far as can reasonably be assessed) for future generations. In *Re Christ Church, Harwood* [2002] 1 W.L.R. 2055 at page 2056, Chancellor Holden put it this way:

The overall beauty and tranquillity of a churchyard is only as good as its constituent parts allow it to be. The rights and interests of private individuals, of the worshipping congregation, of all parishioners, of the local community, and of the Church and society at large all have to be considered in permitting a memorial, which is likely to last for ever, to be placed in a churchyard. There cannot be a carte blanche situation where a family of the deceased has the sole right to decide what is, and what is not, appropriate by way of memorial, not least because ... the family do not own the land in which the remains are placed, or on which the memorial is meant to be placed.

(2) Where a proposed design is contrary to the applicable churchyard regulations, the fact that there are other memorial headstones in the same churchyard that are also contrary to those

regulations will not be a sufficient justification without more. On the other hand, the presence of other headstones that similarly fall outside the relevant regulations is a relevant consideration.

(3) It is appropriate to give weight not only to the views of the PCC and the incumbent, but also to pastoral considerations.

In giving reasons for his decision, the Commissary General noted (at paragraph 13 (vi)) that whilst he had given weight to the objectors' concern about the risk of the instant faculty setting a precedent for others in this churchyard, each petition for the introduction of a new or replacement headstone would be assessed on its own merits, including by reference to the proposed design, and its positioning in relation to the church and to other headstones. The grant of the faculty in that case did not mean that a faculty would necessarily be granted for other comparable proposals in future.

Analysis and conclusions

18. The DAC is charged by statute with acting as an advisory body on matters affecting places of worship in the diocese and, in particular, it is required to give advice to me, as Chancellor, in relation to the grant of faculties. As I explained in *Re St Mary the Virgin, Ashbury* [2021] ECC Oxf 5 at [12]:

The Oxford DAC comprises a body of people with great collective expertise and wisdom. They make a hugely important contribution to the faculty process in advising the Chancellor on faculty applications. I am particularly fortunate that the Diocese of Oxford also benefits from the services of a number of professionally qualified, and highly experienced and dedicated, Church Buildings Officers who support the DAC. I always welcome, and I am grateful for, the DAC's advice; and I always consider it very carefully and thoughtfully. However, it is, and remains, advice; and the actual decision on any faculty application is my own. The court must take all the relevant features and circumstances of the case into account when arriving at its decision, including the advice of the DAC. Whilst considerable weight must always be afforded to the expertise and experience of the DAC in the exercise of its statutory duty to advise the court, a chancellor cannot fetter his or her discretion by routinely rubber-stamping any and every notification of advice which the DAC produce. The Chancellor's function is independent of the diocese and is to be exercised having regard to all the relevant material, and any applicable law. Where the Chancellor's decision relates to matters requiring or involving technical expertise, the DAC's advice is particularly helpful. In the present case, however, the issue in dispute essentially involves an aesthetic evaluation of the type of bench proposed by the petitioners, and its suitability for this particular rural churchyard.

19. The issue in this case is whether it is appropriate to permit this particular memorial to be introduced into this particular churchyard. The DAC's concern is expressly directed to the effect that permitting this one additional, non-compliant memorial might have upon maintaining good order in the churchyard in line with the diocesan churchyard regulations. The DAC expressly proceeded on the basis that there was only one memorial of this type already in existence; and they felt the proposed degree of non-compliance to be significant. I share the DAC's concerns about both the extent to which this particular memorial would diverge from the form of memorial permitted by the churchyard regulations, and also its suitability in this particular village churchyard setting. I recognise that the burden falls on the petitioner to satisfy the court, to the

civil standard (namely, on the balance of probabilities), that a faculty should issue authorising the installation of this particular form of memorial.

20. Against these considerations, however, I must bear in mind that the DAC have advised me that this proposal is not likely to affect the character of the church as a building of special architectural or historic interest. I also note that the DAC proceeded on the basis that there was only one memorial of this type already present in the churchyard whereas I have evidence that this church contains another heart-shaped memorial, and also one further non-compliant memorial incorporating the statute of an angel. I must also have regard to the fact that, according to the minister, the churchyard can only accommodate 12-15 further burials so the DAC's concern about the effect that permitting this one additional, non-compliant memorial might have upon maintaining good order in the churchyard is somewhat limited. I also bear firmly in mind that any petition for the future introduction of any further non-compliant memorial will fall to be assessed on its own merits, and that the grant of a faculty in this particular case does not mean that a faculty will necessarily be granted for any similar memorial in the future. This consideration has a particular, and in my judgment an overarching, significance in the present case because this petitioner has already secured faculty approval for a similar memorial to his late mother which stands close to the grave of the wife whose memory he now seeks to commemorate in a similar way. No other petitioner will be able to pray such a powerful consideration in aid of any faculty application they may seek to make. I must also bear in mind the local context: the minister has explained that people who live in and around Barkham know that there are several well established and long-term gypsy families in the area who prefer more elaborate memorial designs. This is no doubt why the proposal has the full support of the PCC, and why no objections have been received in response to the display of the usual public notices. I also attach considerable weight to the grant of the previous faculty, which authorised a similar memorial honouring the petitioner's own mother, and the need for consistency of approach, which leads me to sympathise with the minister's concern about how he "*would struggle to explain why the design is deemed unsuitable this time*". In the present case, there are powerful pastoral considerations which support the grant of this faculty. Indeed, the reality is that, so far at least as this family are concerned, it was the thin end of the wedge when my predecessor granted a faculty for a similar memorial back in 2011. In my judgment, the values required of an inclusive, compassionate, Christ-like church cannot possibly sanction refusing to allow the petitioner to commemorate his late wife in precisely the same way that it allowed him to commemorate his own mother little more than a decade ago.

21. In my judgment, therefore, the petitioner has discharged the burden (which lies upon him) of demonstrating why a faculty should be granted authorising him to install this memorial to commemorate his late wife. Although the general prohibition against such a memorial, contained within the applicable churchyard regulations, is a highly relevant factor, it is not determinative but is only one of the constellation of infinitely variable factors which the court must consider on the facts of the particular case. Mere non-compliance with the applicable churchyard regulations, of itself, can never be the only basis on which to refuse a faculty petition. It is necessary to consider whether the particular memorial is inherently desirable in its proposed location within this churchyard even though it fails to comply with the requirement of the applicable churchyard regulations. I have concluded that it is so desirable for the reasons I have previously given.

Disposal

22. For these reasons, the court will grant the petitioner's application for a faculty authorising the installation of this memorial to mark his late wife's grave. I will impose a similar condition to that contained in the previous faculty: that if the memorial does not precisely reflect the application, it is to be removed forthwith, by or on behalf of the incumbent, the churchwardens and the PCC. In the first instance, the period allowed for this memorial to be installed will be six (6) months from the date of the grant of the faculty.

23. In the usual way, I charge no fee for this written judgment. The petitioner must pay the costs of this petition.

24. In conclusion, I must emphasise that this decision should not be taken as setting any precedent for any future application for a faculty for the erection of any memorial in this churchyard which falls outside the scope of this diocese's churchyard regulations .

David R. Hodge

The Worshipful Chancellor Hodge KC

Trinity Sunday

4 June 2023

Image of the memorial to Mrs Agnes Price (d.8.10.2009)



The grave of the petitioner's wife, with his mother's
grave visible in the row behind and to the left

