

IN THE CONSISTORY COURT OF THE DIOCESE OF OXFORD

IN THE MATTER OF THE CHURCHYARD OF ST MARY THE VIRGIN, BURGHFIELD

IN THE MATTER OF THE PETITION OF THE RECTOR AND CHURCHWARDENS

JUDGMENT

1. St Mary the Virgin, Burghfield, is a Victorian church standing on the site of an earlier church. In the churchyard the monuments, the earliest of which date from the seventeenth century, exhibit a number of styles and fashions. By the 1990s a number of additions had been made to the churchyard which did not comply with the then diocesan Churchyard Regulations and the parochial church council therefore amended its own churchyard regulations in order to correspond with those diocesan Regulations; thereafter a number of attempts were apparently made to regularise the position. Similar actions were apparently taken in the early 2000s which were successful in the removal of plastic railings around individual grave plots but not so successful in relation to other items not permitted by the Churchyard Regulations. It seems that the principal obstacle to this attempted regularisation arose because of the presence of a number of babies' graves which occupy a prominent position as one approaches the church.
2. The situation was then further exacerbated in 2007 when two teenagers died in tragic circumstances: one whilst serving with Her Majesty's forces in Iraq and the other in a motorcycle accident. The graves were visited by relatives on a daily basis and both became highly decorated. In these cases the parochial church council were apparently inclined for pastoral reasons not to enforce the Churchyard Regulations in their full vigour. Some parishioners, however, objected to the level of ornamentation whilst others were reluctant about any regularisation of the situation.
3. Indeed, it seems that over the past 20 years a number of such unpermitted additional items (such as kerbs, lights and ornaments) have been introduced into the churchyard and by the autumn of 2010 it was found that some 67 graves or cremation plots had such additions. It is unsurprising, therefore, that the parochial church council decided to attempt to regularise the position and in July 2010 it resolved after appropriate debate to request the relatives of relevant deceased persons to remove all items

(including unauthorised edgings) that did not fall within those permitted by the Churchyard Regulations. Contact was made with such relatives either directly where the relatives were known to the church officers or in other cases by leaving prominent notices in the churchyard as well as by letters left at the appropriate grave sides. This met with a mixed response: some accepted the council's decision and removed the relevant items; some made contact and, after discussion, also complied although in some cases very reluctantly; yet others acted in a more hostile manner demanding to know on whose authority any item might be removed without the express permission of their owners. In particular two persons argued that, as in their cases the items had been at the relevant grave sides for up to 15 years, those items were both acceptable and that they should not be removed because of effluxion, or the passing, of time.

4. Although a grave space may be reserved by a faculty issued by the diocesan chancellor (see *The Perivale Faculty, de Romana v Roberts* [1906] P 332 at 338; *Re West Pennard Churchyard* [1991] 4 All ER 124), the grave itself is not owned by the deceased or by his relatives whether before or after the burial (see *Cripps on Church and Clergy* (8th ed., 1937) at 572; Hill *Ecclesiastical Law* (3rd ed., 2007) at 7.113), even if there is an exclusive right of burial confirmed by faculty after 1964: see the Faculty Jurisdiction Measure 1964, section 8(1). Indeed, there is no right even to erect a monument over a grave without the permission of the diocesan chancellor, although this permission is usually given through an authority delegated to the incumbent: see *Re Woldingham Churchyard* [1957] 2 All ER 323. In fact, if an item is placed in a church or churchyard without permission, a faculty is required for its removal (see *Ritchings v Cordingley* (1868) LR 3 A & E 113 at 122; *Vincent v Eyton* [1897] P 1 at 12; *Newsom & Newsom Faculty Jurisdiction of the Church of England* (2nd ed., 1993) at 192-193), although a faculty is not required for its removal if the matter is a very minor matter: see *Newsom & Newsom, op. cit.* at 193; see, also, below. Indeed, the incumbent is under a responsibility to prevent breaches of the law: see, for example, *Re St Margaret's, Eartham* [1981] 1 WLR 1129 at 1134B; see, too, the Revised Canons Ecclesiastical, Canon F 13, para 2. In spite of this legal requirement in relation to removal, the continuance of an item within the churchyard cannot create a legal right to its retention: see *R v Twiss* (1869) LR 4 QB 407; Pastoral Measure 1983, section 56(2)(3).
5. It is worth noting the reason for the legal requirement for a faculty to remove an item unlawfully or irregularly placed in a church or churchyard, even though at first blush the rule may seem strange. It is because, even with the best of motives, unfortunate mistakes

may otherwise occur; for example, it may be overlooked or forgotten that permission has actually been given by the appropriate authority. In addition, it may place a break upon over enthusiastic liturgical change. It is also because pastoral reasons strongly militate against the one sided removal of items that are dear to those who placed them in the church or churchyard originally, especially as the passage of time may, as here, appear to give a semblance of legality.

6. Nonetheless, the current Churchyard Regulations for the diocese of Oxford state at paragraph 4.9:

"Upkeep: Graves may not be fenced or otherwise individually delineated; and

- Individual gardens, fencing or shrubs are not permitted, although the incumbent may permit the planting of a few bulbs or annuals.
- Only cut flowers or wreaths may be left at the graveside. These must be removed when withered or decaying....
- Toys or other similar ornaments may be left at the graveside for a period of twelve months after the burial or interment. They must then be removed by the family or by the incumbent (or area dean) after sensitive consultation with the family.
- Any objects left at the grave but not authorised by faculty or these regulations must be removed and returned to the relatives as soon as possible."

(Paragraph 4.4 also states: "No lighting in any form is permitted.") It follows that, for example, if a toy is introduced under the current Churchyard Regulations, it is introduced with permission and its presence is not irregular for the period of 12 months after the interment; thereafter it should be removed by the family or incumbent as soon as possible. These latter words would include a reasonable time for the exercise of pastoral sensitivity in the negotiations for the removal of the toy. Nonetheless, if an appreciable time passes by reason of the failure of the incumbent to fulfil his or her responsibilities, there comes a time when the toy can only lawfully be removed under the authority of a faculty. Similarly, if a toy or ornament were introduced without any authority (such as from a faculty or under the current Churchyard Regulations), a faculty is required for its lawful removal if it is not removed as soon as possible after its introduction.

7. In the present case it is apparent that some items have remained irregularly in the churchyard for an appreciable time and with the acquiescence of the parochial authorities. In these circumstances the incumbent and churchwardens were right in law to apply for a faculty for their removal rather than just going ahead with their removal. They applied for the faculty on the 4th February 2011 for_

"The removal from graves ... the following items which are disallowed under item 4.9 (upkeep) of the Revised Churchyard Regulations (2005) issued by the Oxford Diocese;

- Ornamentation and soft toys
- Lights (solar, lanterns and similar)
- Chippings and loose stones on graves (except when within authorised kerb sets)
- Glass vases and flower containers
- Wooden, plastic or stone edging and fencing around graves (excluding authorised kerb sets)."

On the 7th February 2011 the Diocesan Advisory Committee issued a certificate recommending the "removal of ornaments and solar lighting from churchyard"; in the circumstances I take this to be a loose description covering all the purposes covered by the petition. This advice was confirmed on the 11th February 2011.

8. However, before the petition had been issued Mrs Hill sent an e-mail to the incumbent and after its issue Mrs Walters also wrote to her. Although these are relatively long it is important to set them out in full, not only as cries from the heart from bereaved mothers but also, as is suggested, as an expression of the views of many people. Indeed, that this is so is reflected in the recent unreported case *In the matter of the Parish of Alwalton, Huntingdonshire* (1st June, 2011) where there was a petition to exhume a deceased relative when the relevant parochial church council sought to remove items from the grave which were not permitted under the Ely diocesan regulations.

9. Mrs Hill wrote on the 24th January 2011:

"Further to receiving a letter on our son's grave on the lead up to the New Year, we were shocked, upset and extremely disheartened to read that you wish us to remove all of our small ornaments and stone edging surrounding our son's final resting place and headstone.

We have since spoken with several families of other graves who have also received the letter from yourselves and who are also very upset at being told to remove all items on their loved ones' graves.

In particular, I have spoken with ... the mother of another child's grave near our son's, who tells me that she had an appointment with you before Christmas to express her distress at having to remove all or her items on her son's grave, and that you said you couldn't help, as the decision had been made by someone in Oxford!

I do not understand why you cannot do anything to make our voices heard on this matter. You have been given the privileged job of looking after St Mary's church and churchyard, together with being a support and voice to your parishioners. As you are the Reverend for our church, I would ask that this matter be taken up at the highest level and be given a better consultation, together with giving an opportunity to those families who do tend to their loved one's graves, a chance to voice their opinion and suggestions, rather than just be served a notice, without any consultation on the matter at all. As for Churchyard Regulations, I, along with others, feel that it is time for the Church to move into the 21st Century and revise their regulations to a more modern, more suited to everyone, set of guidelines, rather than have them as strict laws

Our son, Sean Hill, has laid in your churchyard for nearly 15 years without any issue surrounding what we place on the grave area, and it is very upsetting that we are suddenly told we cannot continue to have special trinkets on his grave. As for the stone edging, we erected this, due to finding that the strimmer had cut too close to the headstone and chipped the corner of it; it had also cut too close to the plants and small ornaments that we had placed on the grave and those too had been broken. We were very upset with this, and decided the best way to protect our son's area was to erect a nice stone edging, not too dissimilar to those found on older graves.

If we were to remove the edging, our son's area would once again fall foul to the strimmer and lawn mower, and the plants and headstone would furthermore be damaged. As such, we do not wish to remove the edging at any point of time. We feel it our right as Sean's parents, owners of that precious piece of land, that we can at least protect the small area and headstone from maintenance work that is carried out in the churchyard. I would also like to point out that chippings have been used for decades, along with grave edgings; you only have to look around to find them in every churchyard dating right back 100 years. Am I to assume that you will also be wanting to remove all the edgings that are attached to them?? With regards to

having a prayer book and candle lighting in the church for families of children, this does not compensate whatsoever. When you have a child taken away from you at such a young age, it is the most personal, and upsetting experience to have to live with. Therefore, you want to tend the child's grave because it's their resting place, and the only thing that is left on this earth that you feel you can do for that child. If you take away that right from parents, you will be taking away the only thing that they have left of their child, which we believe goes against our Human Rights as parents who want to express their love, emotion and loss of a child.

If you cannot support our plea as parents of these children who rest in your churchyard, then please give us the details of whom we need to contact, in order to take this matter further. In the meantime, until this matter is satisfactorily looked into and resolved by all parties involved, please do not remove anything from our son's grave area.

I do hope you understand the importance of our plea, and I look forward to hearing from you shortly." The incumbent responded both by e-mail and by a letter dated the 24th January 2011. In the latter the incumbent told Mrs Hill that she had represented her views to the diocesan authorities and that she and the churchwardens had decided to postpone any action until clear answers have been given to the concerns raised. On the 28th January 2011 Mr and Mrs Hill responded by a further e-mail pointing out that a different initial approach to relatives would have been a more sensitive way to have proceeded. It continued:

"... [T]he reason we put a proper stone edging around the grave was to protect the stone, plants and small ornaments that are currently on the grave from the strimmer/mower that had previously caused damage to the stone and several ornaments, which upset us at the time. All items have been on the grave for around 14 years with no issues, and we consider our son's resting place to be an appropriate level of remembrance.

We can understand why you feel compelled into making changes, as some graves, in our opinion have gone a bit extreme with the items or quantities of items they have chose to use. But feel that if there were guidelines issued as to what were appropriate items to leave on a grave, as opposed to strict regulations to remove everything, we feel this will be better received by families. As for having to remove everything after 1 year of the burial, is totally unacceptable. This comes across as being very dismissive of the bond between the living and

the deceased, and moving the remembrance to another place, does not solve the problem."

10. Mrs Walters wrote a letter dated the 23rd February 2011 *inter alia* to the diocesan registrar:

"I am writing to tell you how upset I was today, when visiting my father's grave at St Mary's at Burghfield Common, Reading, Berks, As it was my father's Birthday, I went to lay flowers and a card, only to find that the one Pottery Vase that was submerged into the soil had been removed _ if my father's Grave had been overly ornate I could have sympathised, but as it held this one Pottery Vase (not glass) for my flowers which I could not leave ! I was distraught. And now to learn also that only cut fresh flowers have to be left, which I nearly always do although they are eaten or destroyed by the deer and the animals as soon as I leave, I sometimes have left artificial ones, only one bunch, that is not allowed now. My main worry is that we have a weathered wooden cross marking my father's grave, that we have been trying to replace, but due to not being in a financial position to change it yet and now being told, crosses are also not allowed. (Why, as the cross is a symbol of the Christian faith.) I am worried that [it] will be taken away also, so that my father's grave will be an unloved, unmarked, plain spot. I believe these regulations are ridiculous and stupid. I wish to remember my father and choose to do that in the way I choose, within reason. To take one Pottery Vase

away, the only flower holder I had, and a card I left him discarded across the church ground, left as rubbish on the grass by the graves appalling. Please can you explain this madness." I will return to the points raised in these e-mails and letters later in this judgment. However, I gather that Mrs Waters' vase was removed because it was broken (apparently due to the extreme winter weather conditions) and shards of pottery were lying on the surface of the grave.

11. All of the families affected by the decision of the parochial church council were written to by the incumbent and churchwardens informing them of their right to object to the faculty application; furthermore, at my direction a notice was published in the local newspaper on two separate occasions in addition to the ordinary public notices in the church. In particular, both Mrs Hill and Mrs Waters were written to by the diocesan registrar telling them of their rights to object or to opt to have their letters considered as

written representations. The incumbent, however, has also had several conversations with a number of families as well as with Mrs Hill.

12. In response to the diocesan registrar's letter Mrs Hill responded on the 17th February 2011 stating that she was giving "our formal objections" to the letter she and her husband had received on New Year's Day asking them to remove all items from their son's grave; these she described as "small china ornaments and a stone edging". She continued:

"I would very much hope that we can at least come to a compromise on leaving some items on the graves, should relatives be in regular attendance, such as our items, which are non-perishable small items, and a stone edging used to protect our son's grave from the dreaded strimmer, which in my view should not be used around the graves, as like in our case, our headstone, ornaments and plants were badly damaged on one such occasion, hence why we erected the stone edging to protect what we hold so dear. On an extra note, my sister-in-law, who also has a child grave in Thatcham cemetery, told us that as long as her items were no higher than the grave stone and that perishable items were removed within a certain time frame, that there'd be no issue, no one has been asked to remove all their items. I feel this is a much more flexible attitude and one that is compassionate to families' feelings on losing a loved one, especially that of a child."

- 13.1 have already set out the general law applicable to graves. This, of course, is not a question of diocesan regulations but, rather, of the general law of the land. I emphasise this in order to underline that Mrs Hill is mistaken in her belief that she and her husband are "owners of that precious piece of land", although I suspect that many others share a similar belief. Relatives, therefore, do not have the right to turn graves into gardens or to fence them off or to create edgings. I appreciate that in the past kerbing was allowed in most, if not all, our churchyards but in many cases they have now been removed not only because they cause difficulties in maintaining churchyards in this modern era but also because they often create tripping hazards, particularly to the elderly. Chippings, too, have ceased to be permitted in churchyards as they tend to disperse onto surrounding areas and to become an eyesore. That is not to say, however, that those doing churchyard maintenance should not be careful so as not to damage grave stones

and items left at a grave stone; indeed, it is for that reason that in some churchyards the use of strimmers has been discontinued.

14. In so far as the Churchyard Regulations are concerned, these were revised in their present form by me after consultation, particularly with the Diocesan Advisory Committee. I would add that provision is made in the Regulations at 6.2 for parishes to adopt "local variations" after approval by me although such approval is given sparingly as local variations have in the past caused great difficulties within the diocese. No approach, however, has been made to me for such local variations in relation to Burghfield.

15.1 appreciate Mrs Hill's plea that "it is time for the Church to move into the 21st Century and revise their regulations to a more modern, more suited to everyone, set of guidelines, rather than have them as strict laws". Indeed, forms of grieving change as the relatively recent practice of placing flowers by the roadside after a fatal accident amply demonstrate. It was to respond to such changing practices that I for the first time permitted the introduction of "toys or other similar ornaments" (see above) in an endeavour especially to assist the grieving of children and those who have themselves lost children. Nonetheless, what is acceptable to some is not acceptable to others. I particularly note that Mrs Hill herself comments that _

"... some graves, in our opinion have gone a bit extreme with the items or quantities of items they have chose to use. But feel that if there were guidelines issued as to what were appropriate items to leave on a grave, as opposed to strict regulations to remove everything, we feel this will be better received by families." It is unlikely that those who in Mrs Hill's view have "gone a bit extreme" would agree with her; indeed, as Deputy Chancellor Gregory Jones said in *In the matter of the Parish of Alwalton, Huntingdonshire* at para 40:

"... it is most unlikely that there will ever be a consensus as to taste". Moreover, it would be impossible so to frame a set of regulations, or guidance, which would tread a path acceptable to all, especially as there are those who feel that our churchyards should have no extraneous items whatsoever other than the monuments and ledgers themselves. Indeed, as I have noted recently in two churchyards, there are even those who apparently feel it is acceptable to leave full bottles of beer at the graves of their loved ones, although this is an entirely pagan practice. As to Mrs Hill's plea that there should be guidelines as to what are "appropriate items to leave on a grave", that is

precisely what paragraph 4.9 sets out to do. In this regard I appreciate that there are those who wish to leave artificial flowers at the side of graves but such items (even silk flowers) wither and become an eyesore, just as wreathes and cut flowers do. Nor is it feasible to have one set of rules or guidance for those who are "in regular attendance" and another for those who are not; quite apart from deciding what is "regular" in the circumstances, different constraints apply to different situations. I cannot comment on the regulations applied in Thatcham local authority cemetery other than to note that even such cemeteries find it necessary to apply some regulation, although the contents of those regulations differ from local authority to local authority.

16. It is true that crosses are not permitted within the Churchyard Regulations but those Regulations only define the ambit of the incumbent's delegated authority to permit the erection of a memorial. Nonetheless, application can be made to me as the diocesan chancellor to permit the erection of crosses as has happened on a number of occasions. This is because the design of crosses in the past has proved in a number of cases to be dangerous. The limitation was introduced for reasons of safety so that I can ensure that the design is satisfactory. I certainly see no reason why Mrs Waters' wooden cross should not be replaced in due course although an application will have to be made through the diocesan registry.

17.1 now turn to Mrs Hill's appeal to human rights. The relevant provisions are set out in articles 8 and 9 of the European Convention on Human Rights and article 1 of the first protocol of that Convention, These state:

"Article 8: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Article 9: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice or observance. (2) Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a

democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. Article 1 to the first Protocol: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general provisions of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." A parochial church council is not a "public authority" (see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, especially at para 14) but the consistory court is: *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308.

18. The majority of reported cases considering the application of the European Convention on Human Rights in churchyards have been in relation to petitions for exhumations: see *Re Dorrington Cemetery* [2001] Fam 1; *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308. However, *Jones v United Kingdom* (application no. 42639/04) before the European Court of Human Rights was concerned with a question of a memorial, although in a local authority cemetery. In that case Mr Jones complained that his rights under Articles 8 & 9 had been breached when the Halkyn Community Council refused him permission to place a memorial in its cemetery which incorporated a photograph of his daughter. In declaring Mr Jones' application inadmissible the court stated in relation to Article 8:

"The Court would observe that the exercise of Article 8 rights of family and private life pertain, predominantly, to relationships between living human beings ... [There is no right as such to obtain any particular mode of funeral or attendant burial features.

In the present case, the Court recalls that the applicant's daughter was buried in a cemetery owned and managed by a burial authority. The regulations applicable to the cemetery required prior approval of all headstones and memorials.

Notwithstanding the applicant's personal preference for the addition of a photograph to the headstone and the fact that other burial authorities apparently

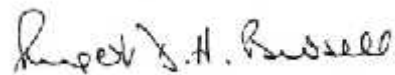
gave permission for such features, the Court does not find that the refusal of permission in this case can be regarded as impinging on the applicant's personal or relational sphere in such a manner or to such a degree as to disclose an interference with his right to respect for his family or private life."

As to the application of Article 9 the court stated:

"The term 'practice' as employed in Article 9 does not cover every act motivated by, or connected with, religious beliefs In the present case, the decision refusing permission for a photograph on the memorial cannot be regarded as preventing any manifestation of the applicant's religious beliefs in the sense protected by this provision. It is irrelevant for this purpose that the church of which the applicant is a member permitted such photographs, for it cannot be argued that the applicant's beliefs required a photograph on the memorial or that he could not properly pursue his religion and worship without permission for such a photograph being given."

19. In my view it is equally clear, and for similar reasons, that neither Article 8 nor 9 is engaged in the present case. Similarly, article 1 of the first protocol does not apply as long as Mr and Mrs Hill are given a reasonable opportunity to repossess their items and edgings once they have been removed. I therefore do not accept that in law the Hill's human rights are in any way affected.
20. There remains one outstanding matter, namely, the time during which the various items have been left on Sean Hill's grave, although similar considerations would also have applied to Mrs Waters' vase if it had not been broken. As I have pointed out, the effluxion of time does not create any legal right to the retention of items on a grave but, nevertheless, such a passing of time does in human terms create an expectation that I must take into consideration when reaching my decision. In my view this circumstance in the present case is a strong one. Nevertheless I must consider the matter in the light of all the other graves in the churchyard where similar items either have been, or will be, removed. In this regard I have regretfully reached the conclusion that it would be inequitable for the Hill's items and/or edgings to remain when others are being removed.
21. In my view the parochial church council was entirely within its rights in wishing to enforce the Churchyard Regulations, especially in the light of apparent breaches on a total of some 67 graves within the churchyard; in this respect the council was entitled to

consider the graves of the relatives of Mr and Mrs Hill and of Mrs Waters within the context of the churchyard as a whole. Indeed, both the incumbent and the churchwardens are under a duty to enforce the law. What is more, as has occurred in the present circumstances, if the Churchyard Regulations are not enforced there is a grave danger of very real pastoral upset occurring in the future, even when an original turning of a blind eye may itself have taken place for seemingly good pastoral reasons. In fact, the relatives of a deceased person are always entitled at any time to apply to the court (whether on pastoral or other reasons) to alleviate the strict letter of the Regulations and this ability in itself provides some flexibility in Regulation's application. However, in the present case neither Mr and Mrs Hill nor Mrs Waters made such an application, although I appreciate that in their grief they may well not have appreciated their need to do so; indeed, they were entitled to petition for a retrospective faculty for the retention of the relevant items even at this late stage, although (in effect) their objections to the present petition may be seen as the equivalent to such a petition. In the event none of the objections put forward either by Mr and Mrs Hill and/or Mrs Waters (whether singly or severally) are sufficient to undermine the case put forward by the petitioners and in these circumstances I direct that a faculty shall issue as prayed



Chancellor of the Diocese of Oxford
8th June 2011