

In the matter of St Thomas à Becket and St Thomas the Apostle, Heptonstall

Judgment

1. This is a private petition seeking a faculty for the reservation of a grave space. It is slightly unusual due to the lack of an obvious nexus between the petitioner and the churchyard where she wishes, in due course, to be buried. Mindful of the petitioner's right to a private and family life, I do not consider it appropriate that she be identified in this judgment. I direct that her identity is not to be disclosed and that any press or social media comment which does identify her will be treated as a contempt of court.

Public and private activities of the Church of England

2. The seminal decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, concerned the enforcement of chancel repair liability following the introduction of the Human Rights Act 1998. But the Law Lords spent some time addressing the public and private nature of the Church of England, in its various emanations. It concluded, Lord Scott dissenting, that a Parochial Church Council was not a public authority and that the enforcement of chancel repair liability was a private function, not a public one.
3. Lord Nicholls of Birkenhead observed at paragraph [13] that: "As the established church, [the Church of England] still has special links with central government. But the Church of England remains essentially a religious organisation." He continued: "this is so even though some of the emanations of the church discharge functions which may qualify as governmental." He identified the conduct of marriage services as a governmental function, as did Lord Scott of Foscote at paragraph [130], who also noted that: "Members of other denominations, or even other religions, are, if parishioners, entitled to burial in the parish churchyard."
4. For present purposes, it is sufficient to recognise (i) the right to be married in the parish church, and (ii) the right to be buried in the churchyard, if there be room. These rights, though highly personal to the individuals concerned, have a public element to them. Whilst there are some similarities between the right of marriage and that of burial, there are some significant differences. The right to marry attaches to those resident in the parish and those whose names are included on its electoral roll. But since 2008, the right has been extended to those with a "qualifying connection" to the parish church: see generally M. Hill, *Ecclesiastical Law* (Fourth edition, 2018),

paragraph 5.29. Unless the couple come within the categories that provide a right to marry, the solemnisation of matrimony cannot lawfully take place.

5. As to burial, the right similarly attaches to those resident in parishes and those on the electoral roll. It also includes those dying in the parish. However, it does not extend to those with a qualifying connection: this feature applies solely in relation to marriage. However, unlike marriage, there is a discretion which vests in parish clergy who can consent to the burial of whosoever they choose in the churchyard of their benefice, although only the Chancellor may authorise the reservation of a grave space.

Ecclesiastical law on the reservation of grave spaces

6. A faculty may be granted for the reservation of a particular grave space for a parishioner or non-parishioner, the matter being entirely within the discretion of the consistory court. Due weight will be given to any PCC policy and to the consent or otherwise of the incumbent. If granted, a faculty will prevent the incumbent from conducting a future burial in the plot to which it relates.
7. The Court will be more disposed to grant a faculty in respect of a person with a right to be buried in the churchyard, as opposed to one without such an entitlement. The Court will have to be satisfied that there is sufficient space in the churchyard so that those with a right to burial are not prejudiced. In my earlier decision in this diocese in *Re St Oswald, Methley with Mickletown* [2016] ECC Lee 2, I formulated certain principles which were largely derived from the judgment of Newsom Ch in *Re West Pennard Churchyard* [1991] 4 All ER 125. I repeat them here with minor revisions, and incorporating changes to the statutory provisions occasioned by a recent consolidating Measure.
 - i. At common law, every parishioner has a right of burial in the churchyard of the parish unless it is closed by due legal process;
 - ii. The common law right extends also to all persons dying in the parish, whether or not they are parishioners;
 - iii. By statute, a similar right is enjoyed by all persons whose names are on the electoral roll of the parish: see section 86(1) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018;¹
 - iv. A person who does not have the right of burial in the churchyard, may not be buried there without the consent of the parish priest: 86(4) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.
 - v. The parish priest has power at common law to prescribe where in the churchyard any burial is to take place: but that is the extent of their discretion in respect of cases where the deceased had a legal right of burial;
 - vi. As freehold owner of the churchyard, the parish priest may grant consent to the burial of the remains of a person who has no legal right of burial. In doing

¹ This provision was formerly to be found in section 6(1) of the Church of England (Miscellaneous Provisions) Measure 1976.

so, they should consider the space available in the churchyard and the extent to which those with rights of burial may be prejudiced.

- vii. In deciding whether to give consent, the parish priest is also required to “have regard to any general guidance given by the parochial church council of the parish with respect to the matter”: see section 86(2) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018;
- viii. These common law and statutory rights crystallise only when the person in question dies.

8. In a key section of his judgment in *Re West Pennard Churchyard*, Newsom Ch says this:

If a person with a legal right of burial wishes in his lifetime to assure his personal representatives of a right to bury his remains in a particular place in the churchyard, he must apply to this court for a faculty to reserve that grave space. Whether such a faculty shall be granted rests wholly in the judicial discretion of the court. If there is plenty of room in the churchyard it is freely granted to a petitioner who has a legal right of burial. What such a faculty does is to protect the petitioner against the hazard of losing his legal right in his lifetime (eg by ceasing to live in the parish), and to require whoever is the incumbent when the petitioner dies to allow his remains to be buried in the position in the churchyard defined in the faculty. To this extent, therefore, the faculty deprives the incumbent of his right to prescribe the position where a burial is to take place; and it deprives the parishioners generally of the space becoming available if the petitioner moves away. [126j-127b]

Such a faculty can also be applied for, with the concurrence of the incumbent, by a person who does not have a legal right of burial. The grounds on which such a faculty is granted vary; among them are the association of the petitioner with the church or with the parish, or the presence in the churchyard of the remains of relatives of the petitioner.

9. Approving and applying this passage, Briden Ch, sitting in the Consistory Court of the Diocese of Bath and Wells in *Re Churchyard of Wick, St Lawrence* (4 November 2013), stated as follows:

Thus in deciding whether or not to grant a faculty [to reserve a grave space] the Court must consider whether the minister’s consent to the burial has been signified, and in its absence the petition ought to be dismissed. To do otherwise would be to subvert the purpose of [what is now section 86(4) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018], since the provision of a space reserved by faculty would override the minister’s power to give or withhold consent to the eventual burial.

10. Where churchyards are nearly full, there is a general presumption that reservations will not be granted. This is particularly the case in respect of persons who do not have a legal right of burial. As I observed in *Re St Oswald, Methley*, at paragraph 10:

Where, as here, pressure of space is acute, it would be wrong for any Consistory Court to grant the reservation of a grave space such as to prejudice future burials. Those with a legal right of burial must therefore be interred in the order in which they die until such time as the churchyard is full.

11. Against this broad background, the current petition falls to be considered.

The petitioner's case

12. The facts of the case can be shortly stated. The petitioner (who is not to be identified) is some 44 years of age. Her home is in Oxfordshire. She states in her petition that she is part of a local Anglican parish and is "a committed and confirmed Christian". She wishes to be buried in consecrated ground. She describes visiting a family member in Huddersfield and becoming intrigued by Brontë country. She comments that *Villette* by Charlotte Brontë has long been her favourite novel.

13. The petitioner continues:

A few years ago I visited Heptonstall with my mother to visit the grave of the troubled poet, Sylvia Plath, wife of poet laureate Ted Hughes. We did not stay long as the last bus down the steep hill to Hebdon Bridge was due, yet I felt profoundly spiritual in this place.

My siblings and their families know I love literature and will understand why I wish to be buried in St Thomas's cemetery in the parish of St Thomas the Apostle in Heptonstall in Yorkshire.

14. The petitioner has indicated her consent to this matter being determined on written representations, and has confirmed that there is no additional material she wishes to put before the Court, or further representations she wishes to make.

The position of the incumbent and PCC

15. The interim priest-in-charge at St Thomas' is the Reverend Karen Marshall. She has provided a note of the PCC decision, which records that all the members "were contacted by email and all replied with no objections". Rule M29 of the Church Representations Rules expressly empowers the business of the PCC to be conducted by correspondence, which extends to email. This has become commonplace during the Covid pandemic.

16. The Supplementary Information in the petition was also completed by Ms Marshall. She indicated in the tick box that the application was approved by the PCC, and that in her estimation there was sufficient space in the churchyard to fulfil the needs of parishioners for at least 30 years: there were in excess of 450 grave spaces available and that the average number of burials per year was put at five. The form identifies the particular grave space which will be allocated to the petitioner in the event that a faculty is granted.

17. In response to a request for clarification which the Court made of Ms Marshall, she very helpfully provided some additional background as follows:

St Thomas's PCC do not currently have a written policy with respect to burials or grave reservations. I understand from the Churchwardens that it has been custom and practice to permit anyone who asks to be buried there to have a grave on the basis that there is plenty of room, and the church wish to offer that hospitality to those who ask for it. There is a lot of interest in the history of the village and its connection with Sylvia Plath, and although most people who are buried here are local, it is by no means the case for all of the burials. However, to

my knowledge no one to date has cited their reason for wishing to be buried here as being on account of literary associations.

Since I have been here (14 months) there have been 3 burials of people who lived in parishes elsewhere and who have not been resident in the parish and who have not ever lived in the parish. Those people have had a local connection through a relative who either currently lived here or who has previously lived in the village. There have, however been occasions in the past (before my time) where people from other parts of the country and who have not had a local connection to the parish have been buried here. [...]

The PCC was asked if it was happy for this application to go to faculty and they said that they were. They were happy for this to happen and the application was proposed and seconded. [...] It is also my intention to put it to the PCC that a written policy may be helpful with respect to future applications.

Discussion

18. An unusual feature of this case is the superabundance of space for burials in this particular churchyard. The norm elsewhere seems to be that burial grounds have either been closed by Order in Council or are nearing full capacity.
19. The petitioner has given as the reason why she wishes this particular churchyard to be her final resting place, an enduring affection for literature and the proximity of the grave of Sylvia Plath. The parish priest has signified her consent, and there is more than ample room. It follows that the Court may grant a reservation without subverting the purpose of section 86(4) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (consent of minister of the parish) and without prejudicing the public interest (right of burial in the churchyard).
20. On the basis that there is a discretion to grant a faculty reserving a grave space, should it be exercised in this petitioner's favour? As already stated, the reason for seeking a faculty is unusual, possibly unique. It is not for this Court to investigate the objective reasonableness of the petitioner's justification, especially where there is so much available space. Were there to be fewer grave spaces remaining, then the Court would be entitled – even obligated – to examine critically the petitioner's reasoning. In this instance, it is sufficient to note that there is a clearly expressed reason and no basis to doubt the petitioner's good faith.
21. That then leaves the floodgates argument. Should a faculty be refused in this case because it might lead to a vast number of similar petitions in the future seeking reservations of grave spaces up and down the country where the petitioner has no familial nexus with the churchyard in question, merely a whim or desire to be buried there when they die? Might there be a vast flurry of applications from people wanting to be buried in close proximity to their literary heroes and heroines?
22. I have never found floodgates arguments to be particularly helpful or principled. If it is right to allow a petition, then the fact there may be a number of future applications

should not be a reason for a denial of justice in the instant case. I do not consider that the special facts of this case are likely to create any form of precedent. People generally are buried in the communities where they have lived, and where their graves can conveniently be visited by family and friends. As Ms Marshall makes clear, this is an exceptional petition: the parish has not hitherto been inundated with unconnected persons (such as the petitioner) wishing to be buried in the same graveyard as Sylvia Plath. In any event, there are a number of features which will act as limiting devices in the future: the availability of space, the consent of the parish priest, the policy of the PCC, and the reason for the reservation.

Decision

23. For the reasons set out above, there is no reason for refusing a faculty and every reason why it should be granted. The high number of remaining grave spaces means that the Court does not need to adopt a restrictive approach in order to safeguard the public interest in the burial rights of parishioners. The consent of the parish priest is effectively determinative in this case. I therefore direct that a faculty pass the seal on the following conditions:
- (a) that the reservation be for a period of 25 years in the first instance, renewable at the behest of the petitioner and without cost, for further periods of 10 years each. This is to permit a change of mind on the petitioner's part and to ensure that if the grave space is no longer wanted, the reservation will come to an end in a timely fashion;
 - (b) that the grave space be clearly marked on the churchyard plan, and identified on the ground by an appropriate wooden marker or otherwise. This is to be done by the petitioner, or her agent, and at her own expense.
 - (c) that the faculty is not to issue until the court costs have been paid in full.

Future conduct

24. I recommend to the petitioner that she communicates the fact of this reservation to her next of kin and to the solicitor whom she has appointed as her executor. It would be wise to retain a copy of the faculty and the deed of reservation with her will. I note from the papers lodged with the petition that the petitioner has provided detailed instructions for her desired headstone. She has asked for the inscription *Resurgam*, a Latin term which translates as 'I shall rise again'. Her reason, she says, is because it is inscribed on a tablet which Jane Eyre adds to her friend Helen Burns' grave in Charlotte Brontë's novel of that name. The use of foreign languages on headstones, including Latin, is currently permitted in this diocese: *Re St Mary, Woodkirk* [2020] ECC Lee 3, although that may perhaps need to be revisited consequent upon the judgment of the Court of Arches in *Re St Giles, Exall*,² oral argument having been heard on 24 February 2021, concluding with a declaration that the appeal will be allowed, with the Court's reasons to follow.

² [2020] ECC Cov 1 (at first instance).

25. Secondly, I endorse the Reverend Karen Marshall's indication that she will encourage the PCC to consider framing a reservations policy. It may think of adopting the "qualifying connection" criteria from the marriage jurisdiction as a framework for the classes of cases where reservation might be approved. But it would be wise also to leave open an exceptional category broad enough to include the present case. A policy would foster a consistency of approach and assist Ms Marshall, and her successors, in dealing with future cases. I also commend adopting the test of "approval" rather than "not objecting", as this will assist the Court in gauging and articulating the true level of support within the PCC.

Costs

26. The Court costs are to be paid by the petitioner.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Leeds

25 February 2021