



Neutral citation: [2017] ECC WIN 3

**IN THE CONSISTORY COURT OF THE  
DIOCESE OF WINCHESTER**

**21 November 2017**

**Before:**

**THE WORSHIPFUL MATTHEW CAIN ORMONDROYD,  
CHANCELLOR**

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**In the matter of:  
All Saints' churchyard, Bransgore with Thorney Hill  
On the petitions of:  
(1) Mrs Lisa Preston  
(2) Mr David Brown**

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The Petitioners in person  
Petition determined on consideration of written representations

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**JUDGMENT**

1. These petitions relate to the churchyard at All Saints', Bransgore with Thorney Hill. The church is grade I listed, having been built in 1906 for Lord Manners of Avon Tyrell. It is set in an attractive country churchyard with a feeling of seclusion. Although much of the front of the churchyard is mown, there are areas of scrub and bramble. As it is located in the New Forest, the gate must be kept closed to prevent ponies from wandering in.
2. By a petition dated 21 June 2017 the First Petitioner, Mrs Lisa Preston, applies to the court for a faculty to allow the introduction of a memorial comprising a headstone and kerbs in polished black granite. The headstone would bear an inscription and an engraved and painted scene of a fisherman against a sunset, and the area within the kerbs would be filled with blue chippings. Mrs Preston has helpfully indicated that she is open to the possibility of changing the colour of the stone or the chippings if necessary.
3. By a petition dated 12 May 2017 (but sent under cover of a letter dated 11 July 2017) the Second Petitioner, Mr David Brown, applies to the court for a faculty to allow the introduction of a memorial also comprising a headstone and kerbs in polished black granite. The headstone would bear a stained glass window insert, an etched and coloured depiction of an angel, and an inscription. A request that the memorial should incorporate flower holders is no longer pursued by Mr Brown.
4. Both Petitioners therefore seek approval for memorials which fall outside the terms of the churchyard regulations. In each case, the PCC voted to support the application by a majority of 11 to 3 at its meeting of 16 June 2017. In each case, the DAC has recommended refusal. The Petitioners are content for me to determine the matter on the basis of the written representations I have seen. I have also had the benefit of a site visit. In the light of the similarities between the petitions, I have addressed them both in one judgment, although I have of course considered each petition individually.
5. This judgment is set out in two halves. In the first half I consider the relevant legal principles when assessing applications such as this, which fall outside the terms of the churchyard regulations. In the second half, which I apprehend will be of more direct interest to the Petitioners, I apply those principles to the facts of the present case.

### **The legal principles**

6. In this section of the judgment I set out the legal principles which are relevant to applications for faculty permission outside the churchyard regulations. Although such regulations appear to be in force in all dioceses, they do not have any obvious statutory or regulatory basis. I am not aware of any decision of the Canterbury Court of Arches or the Chancery Court of York which considers the nature and status of such regulations. There appears to be a consensus that they serve as instruments of delegation in respect of faculty petitions concerning churchyards; whether they serve

any further purpose in decision making appears to be more contentious, as I explain below.

*The approach to applications outside the regulations*

7. The decisions of my fellow Chancellors in this area display marked differences of approach. It is possible to illustrate this difference by reference to two recent decisions.
8. The first is *Re Church Lawford: St Peter* [2016] ECC Cov 3, in which HHJ Eyre QC Ch explained, by reference to an earlier decision of his own, that a “powerful reason” would be required before a memorial outside the scope of the churchyard regulations would be permitted. This requirement echoed that in the regulations themselves, which stated that a “substantial reason” would be required before permission would be given for a memorial outside their terms. He justified it as follows (at [7]):

The requirement that there be a powerful reason if a memorial which does not conform to the Chancellor’s Regulations is to be permitted is a matter of justice and fairness to those who have erected conforming memorials. There are many families and individuals whose personal preference would be to have a memorial to a departed loved one in a form going beyond the Chancellor’s Regulations. In the vast majority of cases such persons accept the approach laid down in the Regulations and erect a memorial conforming to the Regulations. In doing so they put aside their personal preferences and accept a memorial in a form different from that which they would have chosen if given a free hand. In many instances this will involve acceptance of a memorial which they regard as second-best or otherwise unsatisfactory and such acceptance will often be combined with a feeling of unhappiness and distress. Such people would have a legitimate sense of grievance if others (perhaps more articulate or forceful or with more time, money, or personal skills) were able easily to obtain faculties for non-conforming memorials. Fairness to those who have reluctantly complied with the Chancellor’s Regulations requires the Court to confine exceptions to cases which are truly exceptional.

9. He also referred to considerations of fairness to those who have interred relatives in the churchyard and to those who had paid fees to reserve grave spaces therein; both groups would have an expectation that the churchyard would continue to be maintained in accordance with the regulations.
10. The second case is *Re St John the Baptist, Adel* [2016] ECC Lee 6. In this decision, at [3], Hill Ch explained the nature and purpose of the churchyard regulations in the recently created Diocese of Leeds:

they are an instrument of delegation pursuant to which the discretion to permit the introduction into churchyards of certain categories of memorial is devolved from the chancellor to the parish priest. Parochial clergy have delegated authority to allow memorials which fall within the certain specified categories; but they are perfectly at liberty, should they wish, to decline to permit a memorial even though it complies with the Regulations.

11. As such, he declined at [5]-[6] to follow the practice of some consistory courts in requiring a “powerful reason”, or similar, before permitting memorials outside the scope of the regulations. Instead, he would follow the simple approach explained by McGregor Ch in *Re St John’s Churchyard, Whitchurch Hill* (Oxford Consistory Court, 31 May 2014):

As is the case with any petition, the burden of proof lies on the petitioner to show why a faculty should be granted to authorise the particular proposal set out in the petition.

12. He went on to explain, however, that within that framework “the terms and content of the Churchyard Regulations will, of course, be a relevant factor – often highly relevant and doubtless on occasion determinative” ([7]). As he had already stated that there would be no extra burden on a petitioner seeking a memorial outside the terms of the regulations, I take this to mean that if a memorial falls *within* the terms of the regulations, it is more likely to be permitted.
13. There is therefore a divergence of view as to the approach to be taken to applications for memorials outside the terms of the regulations. Is there a presumption against such applications which can only be overcome by showing “powerful reasons”? Or, on the other hand, is the court simply to apply the normal burden of proof applicable in faculty proceedings?
14. Fortunately it does not fall to me to resolve this divergence. I say ‘fortunately’ because I would be very hesitant to pronounce on the correctness or otherwise of the views of the very experienced and learned Chancellors who have taken opposing views on this matter. As it is, however, none of these judgments is binding on me and I simply have to articulate the approach that will be applied by the Winchester Consistory Court pending any ruling on the matter from the Court of Arches.
15. That approach, it seems to me, must stem from the nature of the regulations. Whatever else they may be, it seems to be reasonably well established that they are an instrument of delegation. However, that does not explain why some matters are delegated but others are not. In theory, regulations could delegate all decisions on memorials to incumbents. The court would then only need to become involved if an applicant was unhappy with the incumbent’s decision.

16. Where the decision has been taken to delegate certain matters but not others, however, it seems to me that this decision ought to have a logical basis. In the diocese of Winchester, that basis is the inherent acceptability, or unacceptability as the case may be, of different sorts of memorial. Thus the regulations allow incumbents to make decisions in respect of memorials which are more likely to be acceptable in the churchyards of the diocese. Proposals for such memorials can therefore be expected to generate less controversy and to require a lesser degree of scrutiny. It may well be that something which falls within the regulations is nevertheless not acceptable for some reason; if so then the incumbent can refuse permission – although he will have to justify that decision to the court if the applicant then seeks a faculty.
17. Pausing there, it would seem that to this extent the practice in Winchester diocese is consistent with both of the divergent views set out above. As I explained at paragraph 12 above, it appears that even Hill Ch in *St John the Baptist, Adel* considered that a memorial falling within the terms of the regulations is more likely to be considered favourably by the court.
18. It is of course with respect to memorials outside the terms of the relevant regulations that the divergence of view arises. It seems to me perfectly possible, and logically defensible, to say that certain types of memorial are excluded from the scope of the regulations because they are considered to be generally unacceptable in the churchyards of the diocese. If that is the reason for excluding them, then it inevitably follows that any application for a faculty for such a memorial will be refused unless the petitioner can show good reason why it ought to be permitted. This is not at all to prejudice any particular application, any more than the inclusion of a particular type of memorial within the regulations prejudices applications for such memorials. It is simply to explain the starting point for consideration.
19. The question is therefore whether the regulations do exclude particular items because they are considered generally unsuitable for inclusion in churchyards of the diocese.
20. It seems to me that the current regulations in Winchester do make clear, in respect of certain features at least, that they are excluded for just this reason, namely that they are generally unsuitable for inclusion in churchyards of the diocese. The following extracts are perhaps the most relevant to the present petitions:

The **standard guidelines** do **not include memorials...** with **kerbed surrounds...** **Kerbed surrounds** used to be popular, but they often contain chippings which birds scatter over the grass and are not allowed apart from in exceptional circumstances. (D1)

Similar considerations apply to proposals for memorials in **highly polished dark granite, in synthetic stone or in marble...** Unfortunately, polished black or red granite, or white marble, tends to stand out in a churchyard. Such stone rarely blends in with the church itself, and looks out of place amongst

memorials made from the more traditional kinds of stone used in Hampshire and Dorset. The contrast between Purbeck limestone, on the one hand, and polished black granite on the other, can seem very uncomfortable and off-putting. So the fact that memorials of the latter kind may already exist in a churchyard is no indication that another one will be permitted. All depends on the particular circumstances. (D3)

Nor is permission likely to be granted for **large painted engravings**. (D7)

Any proposed memorial with ... **chippings or glass shades may only be allowed in exceptional circumstances**. (D8)

21. The natural starting point when considering an application for such memorials is therefore to refuse permission for them unless some good reason can be shown for a departure from the stance indicated by the regulations.
22. For the reasons give above, I do not see any obstacle to such an approach to the regulations. Indeed, it seems to me to have the advantages of fairness to which HHJ Eyre QC Ch referred in *Church Lawford: St Peter*. It also has the advantage of clarity and consistency of decision making given that many of the issues which render particular types of memorials unsuitable in one churchyard will also render them unsuitable in another. It follows that this is the approach that will be applied by the court to the current regulations and the replacement regulations currently being prepared.

#### *Factors of relevance to applications for memorials*

23. Each application for a memorial must be considered on its own merits, and by reference to the particular facts and circumstances that pertain to it. It is not possible to predict all the permutations that may arise. That said, certain issues will be common to many applications and will generally need to be considered by the court. The most obvious common issues are as follows:
  - a. Theology: memorials in a consecrated churchyard must not be “contrary to, or indicative of any departure from, the doctrine of the Church of England in any essential matter”, as Hill Ch put it in *St John the Baptist, Adel* at [6], although in a secular and multicultural age they “do not have to be positively Christian in character”: *In re Christ Church, Harwood* [2002] 1 WLR 2055 at 2061A;
  - b. Aesthetics: the appearance of the memorial in itself is important. It should not have an appearance which is discordant or likely to detract from the atmosphere of the churchyard as a place of quiet prayer, reflection and commemoration. The court will not seek to impose any particular style or subjective judgment as to what is aesthetically pleasing, however;

- c. Setting: the churchyard frequently forms the immediate setting of a church, and it will be necessary to consider whether the proposed memorial will add to or detract from that setting. This is particularly important where the church is listed, as the setting of a listed building is given enhanced status for consideration in the secular system by statute;
  - d. Practicality: the impact of a proposed memorial on practical aspects of the life of the church such as churchyard maintenance and health and safety are important considerations for the court which should not be overlooked.
24. It would be of great assistance if applicants and objectors, and also the DAC, could as a minimum address these four matters when providing evidence or submissions to the court.
25. I now turn to address the particular proposals before the court.

## **The Petitions**

### *The advice of the DAC*

26. I have set out the details of the memorials applied for, and also some of the relevant passages from the churchyard regulations. Against that background, the DAC recommended refusal of both petitions. In respect of Mrs Preston's petition, it gave the following reasons:
- (1) The use of blue chippings detracts from the desired atmosphere within the churchyard.
  - (2) The design itself creates problems with churchyard maintenance, in particular the raised curb will make mowing between memorials difficult.
  - (3) The design itself is considered is considered [sic] to gather and encourage clutter within the churchyard.
  - (4) The proposal is too different to the guidance on churchyard memorials and the existing regulations.
  - (5) Although other memorials exist of a similar style, the committee do not feel this gives suitable grounds to approve this new memorial which creates the above problems.
27. The DAC's reasons in respect of Mr Brown's petition were in very similar form, as follows:
- (1) The design of the headstone is considered confused and its style is considered incoherent with the atmosphere of a churchyard.
  - (2) The design is predicted to create problems with churchyard maintenance, in particular the raised kerb will make mowing between memorials difficult.
  - (3) The design is predicted to gather and encourage clutter within the churchyard.

- (4) The proposal is too different to the guidance on churchyard memorials and the existing regulations.
- (5) Although other memorials exist of a similar style, the committee do not feel this gives suitable grounds to approve this new memorial which creates the above problems.

28. I offered Mrs Preston and Mr Brown the opportunity to respond to the DAC's advice. They have both taken that opportunity, setting out their views clearly and persuasively in letters which I have considered carefully in the process of writing this judgment. Rather than set out the substance of those letters here, I refer to them at appropriate points in the analysis below.

29. In the light of certain comments from Mr Brown, I would stress that I have looked at the matter totally afresh. I have taken what the DAC has to say into consideration, but I am perfectly prepared to depart from its advice if I think that is right. I have formed my own judgment having visited the churchyard and read all the materials provided by the Petitioners.

### *Consideration*

30. I start by looking at the relevant terms of the churchyard regulations, and considering whether the memorials proposed fall within them. The answer is that they clearly do not. This was identified in both cases by the DAC and has not been disputed by the Petitioners. The divergence is large and extends to the proposed materials (polished black marble), general design (kerbed surrounds) and decoration (involving large coloured engravings and inserts). The regulations indicate that such features are generally inappropriate in churchyards within this diocese. I therefore ask myself whether the Petitioners have shown any good reason why, notwithstanding the divergence from the regulations, these petitions should be granted.

31. I begin by considering the subject of practicality, namely the maintenance of the churchyard. The DAC observes that kerbed surrounds hinder mowing between memorials, as do the regulations. Mrs Preston replies that the grass around the graves "is done by family members with trimmers" and that "the maintenance plan for the graveyard does not entail the mowing of graves". Mr Brown likewise refers to mowing/trimming being done by unpaid volunteers. The PCC has not raised any objection on this basis either. I conclude that kerbs would not pose any immediate problem for maintenance, although of course that may change if maintenance is done differently in future. Had this been the only concern about the memorials then I would have been minded to grant the petitions as the local maintenance arrangements provide a good reason to depart from what is usually permissible under the regulations.

32. However, that is not the only issue. It seems to me that there is also an issue with the design of these memorials and the impact of that design on the setting of the Grade I listed church. At present it seems to me that the churchyard is well integrated with



the surrounding countryside. It serves to 'frame' the church without separating it from its wider context. The memorials already present in the churchyard blend in to that context. That is so despite the existence of a small number of plots with kerbs. Where these have been present for some time they are grown through with grass and are unobtrusive.

33. In my judgment, introducing further kerbed surrounds into the setting of the church would detract from the rural character of the churchyard and would begin to isolate the church from its wider setting. This effect would be exacerbated if the kerbs, and associated memorials, were executed in polished black marble. I find that the concerns expressed in the regulations about the jarring nature of this material are particularly relevant in this case. Furthermore, if the kerbed surrounds are filled with chippings or other material (and in practice it would be very difficult to prevent this), those chippings will prevent grass from growing within the surrounds, presenting a further urbanising and discordant feature.
34. I therefore find that there would be harm both to the character of the churchyard, and to the contribution it makes to the setting of the listed building, if I were to permit the memorials sought (even with the suggested modifications offered by the Petitioners). This would be my view on the facts of these cases regardless of what the regulations have to say on the matter in general terms. I therefore look to the Petitioners' representations to see if there is nevertheless some good reason to permit the memorials, or either of them.
35. Both Mrs Preston and Mr Brown have referred to the variety within the memorials currently present in the churchyard. Mrs Preston refers to a memorial with kerbs having been permitted in 2013, and to "many older graves with kerbs", concluding that "kerbs are completely in keeping with the appearance of the churchyard". Mr Brown makes a similar point when he says in general terms that "Thorney Hill is already at variance to the regulations". I agree that there is some variety in the memorials present, and I have taken that into account in my assessment of the character of the churchyard. However, I do not agree that the character of the churchyard is such that either of the memorials proposed by the Petitioners would fit in unobtrusively. The existing memorials to which the Petitioners have alluded do not in that sense create a precedent for further, similar memorials.
36. Indeed, I think that the appeal to precedent works against the Petitioners. There remains considerable space in the churchyard for further burials, particularly to the front of the church in areas more visible from the road and/or when walking from the road to the church. Mrs Preston has observed that the church "has a Romany community identity" which is "reflected in the fact that most graves have more ornate monuments than in other churchyards". There is clearly a demand from the community currently associated with the church for memorials in polished black marble with kerbed surrounds. If the memorials now sought are permitted, it seems to me very likely that others will seek similar memorials in future. There would be no

obvious point at which to draw the line. The very real possibility exists, therefore, that if I were to permit the present petitions a large portion of the remainder of the churchyard would be filled with similar memorials. That would greatly exacerbate the harm to the character of the churchyard and the setting of the listed church which would arise from the granting of these petitions.

37. It seems to me that a line does have to be drawn, and I will draw it here and now by refusing these petitions. I have found a departure from the regulations, plus harm to the churchyard and the setting of the listed church, and have not found any good reason to grant the petitions despite that harm.

38. I appreciate this result will be disappointing to Mrs Preston and Mr Brown. In particular, I can well see how they would feel aggrieved at this decision given the existence of the other memorials they have mentioned in their submissions. All I can say in that regard is that if specific complaints about particular memorials are brought to my attention, those complaints will be fully investigated and considered without favouritism or discrimination of any kind.

39. Finally I would add a note on the design of the headstones. This is a deeply personal matter and the court will not seek to impose some uniform aesthetic standard on grieving relatives. However, here again regard must be had to a broader range of interests than those of the Petitioners. From that point of view it does seem to me that the designs proposed are overly ornate and dominant. In the specific context of this churchyard I do not see any objection in principle to the inclusion of a coloured engraving nor to the use of gold painted lettering. However, the large coloured engraving currently proposed by Mrs Preston and the smaller coloured 'inset' proposed by Mr Brown do seem to me to be too obtrusive. The Petitioners should bear these remarks in mind when submitting any revised designs for consideration.

40. I refuse the petitions. There will be no order as to costs.

Matthew Cain Ormondroyd  
Chancellor