

**IN THE CONSISTORY COURT OF YORK
PARISH OF WELTON WITH MELTON
CHURCH OF ST HELEN, WELTON**

Neutral Citation Number: [2017] ECC Yor 2

IN THE MATTER OF A PETITION REQUESTING A FACULTY FOR

- 1. The removal of a desk style memorial, placed where the ashes of Phyllis Margaret Hathway have been interred, at common Lane, burial ground, Welton.**
- 2. The siting of a memorial plaque which meets the regulations for the Burial Ground.**

Between

**The Venerable Andrew Clifford Broom,
Archdeacon of the East Riding**

Petitioner

and

Mark William Hathway

Respondent

JUDGMENT

1 The issue

1.1 The Archdeacon of the East Riding has applied to the Consistory Court for a faculty to enable him to remove a desktop memorial which has been placed above the cremated remains of Phyllis Margaret Hathway which are interred in the churchyard of St Helen, Welton. If successful, he further petitions for the introduction of a memorial consistent with the Churchyard Memorial Rules, 2013. The petition is opposed by Mark William Hathway on behalf of the family of the deceased.

2 Chronology

02.10.13 Phyllis Margaret Hathway died

14.10.13 The funeral of Phyllis Margaret Hathway was held at St Helen's, Welton.

- 07.11.13 The family of the deceased approached the Reverend Canon Elaine Bielby, the Vicar of St Helen's Welton about the burial of the ashes in the consecrated detached burial ground of St Helen's Church.
- 27.01.14 Canon Bielby being on sick leave, the Rev James Little, Rural Dean, supplied the family with a copy of the Churchyard Memorial Rules 2013.
- 25.02.14 An application was submitted for a desk top style memorial with a base of 20 inches in polished black granite.
- 07.03.14 The Rural Dean informed the family that the proposal fell outside the regulations in relation to style, material, and size.
- 27.03.14 The Rural Dean interred the ashes of the deceased in the churchyard.
- 16.06.14 Following a discussion with the Archdeacon's office a further copy of the Churchyard Memorial Rules 2013 was sent to the family.
- 03.07.14 An application was submitted for a memorial plaque which was within the Regulations.
- 17.07.14 The Rural Dean approved the application, under his delegated authority within the Regulations.
- July 2014 Sometime during the last week of July, Rotherham's, the stonemasons, introduced into the churchyard a memorial plaque in accordance with the original desktop style application rather than the one which had been approved.
- August 2014 The stonemason was approached by a different family asking for a similar desktop style memorial to be placed over the ashes of a member of their family, citing the Hathway Memorial as an example of what they wanted. The stonemason then appreciated his error in relation to the Hathway Memorial and offered to replace it at his own cost with a conforming style memorial, which offer was rejected by the Hathway family.
- 27.08.14 The stonemason reported the above history to Canon Bielby.
- 22.09.14 Following discussions with Venerable Peter Harrison, Acting Archdeacon, a meeting was held attended by members of the Hathway family, the acting Archdeacon and Canon Bielby. The family were advised that they could petition for a confirmatory faculty. They were further told that if they did not do so within one month, then the parish would take the initiative to have the memorial replaced.
- 20.10.14 The Archdeacon's Office was approached by the family for details as to how to contact the Diocesan Chancellor. Understanding that a petition for a confirmatory faculty was likely to be submitted the parish took no further action.
- 23.02.15 No application for a confirmatory faculty having been submitted, the current Archdeacon, the Venerable Andrew Broom submitted his petition.
- March 2015 The Archdeacon informed the Hathway family of their right to object to his petition.
- 01.05.15 I issued written directions in relation to the said petition. I said that I was "quite satisfied that in all the circumstances, which include the original agreement, the genuine mistake that took place and the need to uphold the rationale behind the Rules in this burial ground, it is appropriate for me to grant the application made by the

Archdeacon.” I therefore directed that if there were no objections in response to the Public notice or the notice which I directed should be served upon the Personal Representatives of the deceased then a faculty would pass the seal.

- 07.10.15 Unfortunately there was then some delay until this date when the Registrar informed the Archdeacon of the directions.
- 16.10.15 The Archdeacon informed the Hathway family of the directions.
- 08.12.15 The respondent objected to the grant of the faculty
- 28.03.16 I gave directions in which I set out the background to the petition; I rehearsed the account by the respondent and his plea that the memorial stone should be treated as an exception to the rules and permitted to remain; I recounted that I had visited the church and described what I had seen and I asked if the respondent would be willing for the matter to be dealt with on the basis of written representations.
- 23.04.16 The respondent suggested a compromise.
- 17.05.16 The Archdeacon and Canon Bielby stated that the compromise was not one that was acceptable to the parish.
- 24.08.16 I gave further directions as to how the matter should proceed under the Faculty Jurisdiction Rules 2015, with the parties filing witness statements. I gave directions that would lead to a trial of the issue before me.

3 Court hearing

3.1 On 23rd February 2017 I heard from the parties in a formal hearing of the Consistory Court, the respondent having declined my invitation to have the matter dealt with on written representations.

3.2 In advance of the hearing the parties had submitted written statements which were received as their evidence in chief. The petitioner had also submitted a statement from Canon Bielby and copies of email correspondence from 2014. The respondent has submitted a written statement along with a number of photographs.

3.3 Both parties were acting in person.

3.4 The petitioner, was cross-examined by the respondent. He said in answer to questions that his reason for bringing this petition was that the Welton Parochial Church Council had asked him to bring it because they wanted to keep their churchyard within the rules. The respondent asked a number of questions about the other desk style memorials, to which the petitioner replied by pointing out that they all predate 2000 when the current regulations requiring memorial stones in the area for cremated remains to be flush with the ground were introduced. He pointed out that since 2000 some 28 plaques had been introduced, all of which were compliant with the rules. He said that if this memorial was to be allowed as one exception, then you might as well rip up the rules; if you allow one exception it is very difficult to determine at what point you say no. He said that since this memorial had been introduced at least one more family had asked to have a memorial like it.

3.5 Canon Bielby said in addition to what was in her statement regarding the history of this matter that she would love to be able to say “yes” to all sorts of memorials with all sorts of variations - that would be much easier for her. However she said the key issue is being fair. When others have asked for memorials she has explained what the regulations permit and people have agreed to adhere to the regulations. She tells people that if they wish they can apply for a faculty for a memorial outside the rules, as she had explained to the Hathway family, but with no guarantee of success. Everyone else has accepted the regulations. She says that if I permit this exception it will be very difficult for her to deal with somebody coming in the future asking for an exceptional memorial.

3.6 She was cross-examined by the respondent who asked her a number of questions about the state of the cemetery. She was asked about how many people had complained about the Hathway Memorial. She said she had not been keeping a count, but that 10 or 12 people had commented on it over time, and that the passage of time meant that people were resigned to the fact that it was still there but felt that it was unfair.

3.7 The respondent said that there were a number of reasons why the family felt that the stone should remain. He tries hard to appreciate the importance of the rules but after three years he feels that this is an exceptional case, indeed that it has been an exceptional case from day one. The family are very upset about it. Talk about “swapping the stone” seems to him to be the equivalent of swapping a tyre on a car which he finds disrespectful. He also considers that the maintenance of the cemetery with mowers going over the memorials which are flush to the ground is disrespectful. It is not possible to move the ashes as they are in a biodegradable box. So for all these reasons he feels that this should be treated as an exceptional case and the stone permitted to remain.

3.8 He also told me that for a period of time the family thought that they were being allowed to leave the stone in place because there had been a change of heart and mind on the part of those responsible for these things. He said that the stonemason had said at one stage “it’s not what you know but who you know”. The problem with that is that the stonemason clearly told them within less than two months of the stone being placed in the churchyard that it was not an acceptable one.

3.9 In cross-examination by the petitioner as to why he had not applied for a confirmatory faculty to permit the stone to remain he said that he felt there was some confusion about the process that was to be followed and that the family was waiting for confirmation as to what the next step should be before submitting a petition.

4 The issues

4.1 There are a number of issues arising in this case which I need to address.

4.2 The Regulations

4.2.1 Each Diocesan Chancellor draws up Churchyard Memorial Rules so as to permit incumbents to use delegated authority to permit the introduction of memorials into churchyards provided that they comply with the regulations. The regulations deal with the size, materials, and other matters concerning the general type of memorial along also with regulations about inscriptions upon the memorial. There are also directions about flowers and other general issues concerning the management of the churchyard. It is always possible to apply for a faculty for a memorial that falls outside the regulations and outside incumbent’s delegated authority to permit.

4.2.2 My predecessor introduced a set of Churchyard Memorial Rules in 1992; he revised them in 1999 and 2005. I revised them again in 2013. Certainly since 1999 it has been a part of the rules that “the burial may be marked by a stone tablet laid flush to the ground measuring not more than 18” x 18”.” That is currently set out in rule 5.2.

4.2.3 These regulations are enforced. That is not say that there are never lapses where permission is given for what should not have been permitted. However that is not this case.

4.3 The rationale

4.3.1 The reason for this rule can be readily seen by what is said about not permitting upright memorials in areas set aside for the interment of cremated remains. At rule 5.5.2 it says “The Chancellor has indicated that he is not willing to authorise upright memorials to mark cremated remains in an area already set aside by faculty for cremated remains because such a memorial is out of proportion to the size of each plot and may cause a tripping hazard. Management of the ground between upright memorials in narrow rows can be difficult.”

4.3.2 Management of the churchyard includes cutting the grass. The reason that memorial plaques are required to be flush with the ground is to enable easier cutting of the grass. It is exactly the same reason that kerbs are no longer permitted in the main part of churchyard where there are upright memorials. Memorials remain and will remain after the family members who care for them have themselves died. The issue of churchyard management is as much about the long term future as it is about the immediate need for maintenance.

4.3.3 Although I cannot say for certain that this is a rule in every diocese I understand to be a rule generally adopted by chancellors for those very same reasons.

4.3.4 Mr Hathway says that such an approach is disrespectful of the dead. I do not agree. It is generally accepted that there is not any other reasonably practical method of cutting the grass in such an area where memorials are close to one another.

4.4 The history

4.4.1 I accept, of course, that the problem that has arisen was initially caused by an error on the part of the stonemason. The fault therefore was his, as he has readily acknowledged.

4.4.2 I have no doubt that this whole matter has caused distress to the Hathway family. I accept that they are upset at the prospect of the memorial which they have regularly tended will be removed and replaced by another one even though it will be very similar. I understand that bereaved families are in a sensitive place, often for a long time after their bereavement.

4.4.3 It is unfortunate that there have been a number of delays as this matter has developed. It does not help to attributed blame and I shall not do so.

4.4.4 Throughout, from the moment when he discovered his error, the stonemason has been willing to replace the stone with one that conforms to the regulations at his own expense.

4.5 Are there exceptional reasons for permitting this memorial to remain?

4.5.1 The question that I have to answer is whether this is an exceptional case in the sense that there are exceptional reasons for permitting this memorial to remain, notwithstanding that it does not conform to the regulations, but nevertheless to permit it to remain there unlike all the others that have been introduced since 2000. The particular matters that I am asked to consider are:

The mistake was not the family's. In other words they are without blame and so why should they in this sensitive situation be caused any further degree of upset. In my judgement the answer to that is the issue of fairness for others. First there are those who having seen this memorial have said they would like a similar one themselves, but have accepted that it is outside the regulations and so not permissible. Second there is fairness to the incumbent, Canon Bielby, who has had to deal with these families, and will in future have to deal with further families who will not be able to understand why this stone should be permitted to remain they cannot have one like it. It would put her and her successors in an impossible position.

Disrespect. This was a word Mr Hathway used several times in the course of his evidence. He felt that the method of mowing as well as the possibility of "replacing" the memorial were both disrespectful of the deceased. Again I am not able to agree with that. I have already referred to the practical management of churchyards including the cutting of grass. It simply is not practical to arrange for a cremated remains area to be regularly cut with hand shears; certainly not in the long term. The removal of this memorial and replacement with another would be carried out by experienced stonemasons with respect and with sensitivity. I have no doubt about that. From time to time memorials in churchyards do have to be removed sometimes permanently and without replacement. In this case there will be a replacement which will be almost identical to the one to be removed, save that it will be flat not desk style, and will be marginally smaller in size. I am not able to accept that in any of this there is disrespect.

Delay. I have already said that the number of periods of delay has been unfortunate in the course of the history of this matter. In my judgement the fact of delay, whether any particular part of it, or its cumulative effect, does not weigh against allowing the petitioner's request.

5 Conclusion

5.1 Taken separately and even coupling them together I am not persuaded that any of the reasons advanced by the respondent provide any exceptional reason why I should permit this memorial stone to remain in place.

5.2 I am aware that cases like this can easily attract publicity in the local media. The argument runs that it is only a small thing that is being asked, that to refuse a bereaved family to be allowed to keep what they want which itself was caused by a mistake made by others is harsh. In this case the petitioner told me that he had collected 120 signatures on a petition that he should be allowed to keep the memorial. As I told him in the course of the hearing, these things can never be decided by petition either. The other side is not often presented to people or to the press. In this case the other side is that the family initially accepted that their memorial should comply with the rules, but when the mistake was made and after it was pointed out to them that it was a mistake, they have been unwilling to accept that to allow it to remain would be unfair to others who have been prepared to accept and live within the rules.

5.3 I have no hesitation in coming to the conclusion that I cannot permit this stone to remain and that for the reasons I have given it must be removed. It can of course be replaced by the one that stonemason is willing to provide.

6. Order

6.1 I therefore direct that a faculty shall pass the seal as prayed by the petitioner.

6.2 I further direct that I shall therefore allow 56 days for the family of the deceased to make arrangements with the stonemason for the removal of the stone; failing which the petitioner may instruct the stonemason to remove the memorial stone and replace it with one that conforms to the regulations.

Canon Peter Collier QC

Diocesan Chancellor

17th March 2017