

Neutral Citation Number: [2023] ECC Bla 5



Faculty – Petition for the reservation of a cremated remains space within the churchyard next to the grave of the petitioner’s late son – Petitioner (in her late forties) a long-standing resident of the parish – Only sufficient space remaining within the churchyard for cremated remains for about the next nine years – Whether, and for what period of time, and on what terms, the petition should be granted – Faculty granted for ten years with permission to apply by letter to extend beyond that time

Petition No: 40 of 2021

**IN THE CONSISTORY COURT OF
THE DIOCESE OF BLACKBURN**

Date: Wednesday, 19 July 2023

Before:

THE WORSHIPFUL DAVID HODGE KC, CHANCELLOR

In the matter of:

St Mary, Newchurch-in-Pendle

THE PETITION OF:

Sarah Nutter

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

There were no objections to the petition

The following authorities are referred to in the judgment:

Re St John, Stockcross [2023] ECC Oxf 8

Re St Mark, Ocker Hill Tipton [2022] ECC Lic 4

Re St Mark, Ocker Hill Tipton [2022] ECC Lic 5

Re St Mary Magdalene, Bolney [2022] ECC Chi 4

Re St Mary, Standon [2023] ECC StA 1

Re St Mary, Thame [2022] ECC Oxf 2

Re St Peter, Wolviston [2023] ECC Dur 1

JUDGMENT

Introduction and background

1. By a petition, dated 30 March 2021, Ms Sarah Nutter, who is now in her late forties, seeks a faculty authorising the reservation of a single plot for the interment of her cremated remains next to the grave of her late son, Harry Isaac Lee, whose cremated remains were interred in the churchyard of St Mary, Newchurch-in-Pendle, in 2019. Ms Nutter has lived in the parish for some 17 years; and she had previously lived there when she was growing up as a baby and a child. Initially, Ms Nutter’s petition had sought a second ashes plot to contain the cremated remains of another immediate family member; but in my initial email response to the petition (referenced below) I made it clear that, because of the few burial spaces remaining within the churchyard, I could see no justification for granting a reservation for two spaces; and I understand that this aspect of the petition is no longer pursued.

2. The minutes of a meeting of the PCC that took place by Zoom on 4 May 2021 invite the PCC “to note that further to the emails sent out the PCC voted 11 to 2 to allow Sarah Nutter to reserve two spaces for the burial of ashes next to her son Harry Lee in the churchyard”.

3. The minister and the churchwardens have certified that, as at the date of the petition, only two grave spaces, and approximately nine spaces for the burial of ashes, remained unfilled within the churchyard. There are said to be about one burial, and one interment of cremated remains, within the churchyard every year. The nearest local cemetery is said to be at Barrowford, which is a little over three miles away.

4. The vicar has duly certified that the required public notices were displayed for the requisite 28 day period in May and June 2021; and no objections have been received to the petition.

5. When the petition was first placed before me in October 2021, I expressed my concern about granting a faculty for the reservation of a cremated remains space for Ms Nutter’s cremated remains next to her late son’s grave. I acknowledged that she had lived in the parish for the previous 15 years, and that there were good reasons underlying Ms Nutter’s wish to have her cremated remains laid to rest next to those of her late son. However, two members of the PCC had voted against the proposal (with 11 in favour) and, with only nine cremated remains spaces remaining, and in view of Ms Nutter’s relative youth (she was only 46), I pointed out that the churchyard was likely to run out of space long before her time should come. I asked the Registry to inquire whether it would be possible for Ms Nutter’s cremated remains to be laid to rest in her

son's existing grave, so that they could be united in death. If so, I indicated that I would grant a faculty to that effect. If not, I asked the Registry to refer the matter back to me. In any event, and as previously stated, I made it clear that I could see no justification for granting a reservation for two spaces, with one to be used in favour of any other (unspecified) family member who might wish to make use of the second ashes plot.

6. It was not until January 2023 that I heard anything more about this petition from the Registry. Apparently, Ms Nutter had been unwell; and she had only responded to my concerns by email dated 4 January 2023. Correcting obvious typographical errors, this reads as follows:

I don't wish to be interred with Harry as I do not wish his grave to be disturbed.

So that is why I was wanting to reserve a space so that my ashes can be interred next to him.

I believe that one day when I die we will be reunited in heaven with my son not in a grave.

I am not with Harry's father so I don't feel it's fair to him either as I wouldn't want to be interred with him as we do not really have a good relationship since Harry's death due to the nature of his sudden accidental death.

I hope this clarifies my reasons.

7. In view of the time that had passed since the petition had been presented, I invited the Registry to ask the vicar about the present position regarding space remaining within the churchyard, and whether the space next to the grave of the petitioner's son is truly a cremated remains plot rather than a full burial plot. I indicated that the Registry might wish to explain to the vicar that, whilst I was sympathetic to the petitioner's loss, and to her wish for her remains to be laid to rest next to those of her son, my concern was the petitioner's relative youth, and the fact that the churchyard would be full long before she had passed on; and I invited any comments the vicar might have about that.

8. There was a further delay, until the middle of June, before I received the vicar's response. She confirmed that there remained two spaces for new burials within the main churchyard and approximately nine spaces left for the burial of ashes. So far as the vicar was aware, the space next to the grave of the petitioner's son was a cremated remains plot rather than a full burial plot. Ms Nutter was said to be "*fully aware that the churchyard is nearly full but she doesn't seem to see this as a cause for concern*". The vicar truly believed "*that the peace she will get knowing she will be able to rest next to her beloved son will help her in her continuing grief which at times threatens to overwhelm her*".

9. Following the receipt of this further information, I invited the Registry to write to Ms Nutter informing her that I considered it to be expedient, in the interests of justice, and in furtherance of the overriding objective of the Faculty Jurisdiction Rules 2015 (as amended) of dealing with this case justly, cost-effectively, proportionately, expeditiously and fairly, for me to determine this petition without any hearing, and on the basis of the written materials that had been presented to the court. I invited the Registry to ask Ms Nutter if she was content with that course and, if so, to let me have any further written representations that she might wish to make in support of her petition within the next 14 days. If she was not content to proceed in this way,

then she should let me have her reasons in writing within the course of the next 14 days, failing which I would proceed to determine the petition on the papers.

10. Ms Nutter responded within the 14 day period indicating that she was content for the petition to be disposed of on the basis of written representations. Her email continued:

I would just like to add that I appreciate I am relatively young to be requesting a faculty space.

However since losing my only child in a horrific accident four years ago, I have suffered serious mental & physical health problems so knowing that I can be laid to rest next to my son would give me peace of mind for whatever time I have left.

Plus my family would know my wishes.

The legal framework

11. In my judgment in *Re St Mary, Thame* [2022] ECC Oxf 2, handed down on 28 April 2022, I had occasion, as Chancellor of the diocese of Oxford, to consider the principles upon which a petition to reserve a grave space should be determined where there was only sufficient space remaining in the churchyard for another seven to ten years of burials. The petitioner wished to reserve a double grave for herself and her partner. The petitioner had been resident in the parish until 2013, the remains of her father and her stillborn child were buried in the churchyard, and all her immediate family still lived in the area. The normal period allowed for the reservation of a grave in the diocese of Oxford was 25 years, but the evidence suggested that there was only room in the churchyard for burials for a further seven to 10 years. I granted a faculty, but I limited it to 10 years, giving permission for the petitioner to apply for an extension within six months of the expiry of the 10 years. My judgment contains a review of previous decisions relating to grave reservations by other Chancellors, including cases where the relevant parochial church council had adopted a policy of not supporting grave reservations. At paragraph 27 of my judgment, I concluded as follows:

From this review of the authorities, I derive the following propositions (which are not intended to be exhaustive):

- (1) The reservation of a grave space is entirely within the discretion of the consistory court, to be exercised having regard to the particular circumstances of the case.
- (2) The court will be more inclined to grant a faculty to a petitioner with the right to be buried in the churchyard than to one without such an entitlement. Those who have such a right are the persons living within the parish, and those on the electoral roll of the parish church.
- (3) The court may nevertheless grant a faculty to a petitioner with no right to be buried in the churchyard where they can demonstrate a personal, or a substantial family, connection to the church and/or its churchyard, or some other some good and sufficient reason to be buried there.
- (4) Where there is sufficient space within the churchyard, and the incumbent minister gives their consent, the court may well grant a faculty to such a

petitioner, unless the Parochial Church Council have a policy of opposing the reservation of grave spaces.

(5) Such a policy cannot be conclusive, and it cannot remove the court's overarching discretion; but where the PCC have adopted a policy that is considered, reasonable and fair, the court will only be justified in departing from that policy in exceptional circumstances; and anyone seeking to reserve a grave space in the face of such a policy will need to show that their case is markedly out of the ordinary.

(6) Where, however, the remaining space within the churchyard is limited, then a faculty will not normally be granted, and the petitioner will have to demonstrate sufficient justification for the court to take the exceptional course of allowing a reservation in such circumstances, because of the risk that such a reservation will prejudice the rights of those parishioners or worshippers who would otherwise be entitled to be buried in the churchyard.

(7) Even where such a justification is demonstrated, it will not usually be right to extend the duration of the faculty beyond the period for which the churchyard is likely to have space for burials, unless there are exceptional circumstances (including evidence of a particularly strong connection to the church and/or the churchyard) in favour of doing so.

(8) Should a faculty for a grave space reservation be granted for a limited duration, it remains open to the petitioner to apply for an extension of the period of its validity. Whether or not any extension is to be granted will depend upon the prevailing circumstances, including: (1) the petitioner's personal circumstances; (2) whether arrangements have been made to provide additional space for burials, whether by the acquisition of further land, or the re-use of parts of the churchyard, or otherwise; (3) the views of the incumbent minister; and (4) any current policy of the PCC towards the reservation of grave spaces.

At paragraph 30, I concluded that:

Even though the petitioner has shown sufficient justification for the grant of a faculty for the reservation of a grave space in the churchyard, however, it would not be right to extend the initial period of duration of that faculty beyond the time during which the churchyard is likely to have sufficient space available for future burials.

12. Since my decision on that petition, there have been a number of further decisions of other Chancellors on petitions seeking to reserve a grave space within a churchyard. In *Re St Mary Magdalene, Bolney* [2022] ECC Chi 4, in the diocese of Chichester, the petitioner, who did not live in the parish, and therefore had no legal right to be buried within it, wished to reserve a double depth grave in the churchyard for himself and his wife, next to the grave of their son, who had died in a tragic accident at the age of 24. The associate priest objected (without becoming a party opponent) on the grounds that spaces for burial were limited, and since 2021 the parish had had a policy of not approving further grave reservations, as the churchyard was

likely to be full within about six years. In the circumstances, Chancellor Hill KC felt that it would be unfair to override the parish policy; and he refused to grant a faculty.

13. Expressly endorsing my view in *Re St Mary, Thame* that “*it will not usually be right to extend the duration of the faculty beyond the period for which the churchyard is likely to have space for burials, unless there are exceptional circumstances ...*”, in *Re St Mark, Ocker Hill Tipton* [2022] ECC Lic 4 Deputy Chancellor Verduyn, in the diocese of Lichfield, granted a faculty for the reservation of a grave space for 20 years, rather than for the customary 50 years. In view of the number of spaces available, and the rate of interments, the graveyard could be full and closed before any longer reservation would need to be exercised. The Chancellor gave the petitioner leave to apply for an extension of the period of 20 years within six months of its expiry. In the contemporaneous case of *Re St Mark Ocker Hill Tipton* [2022] ECC Lic 5, the same Deputy Chancellor granted a faculty for the reservation of a double depth grave space for the full period of 50 years usually allowed. In a brief judgment, he explained why he had not followed the recent precedent of allowing 20 years (with a possible extension) for a double reservation for burial in the same graveyard: in the later case, one of the joint petitioners was terminally ill, so that the double plot would be in use quite soon.

14. In *Re St Peter, Wolviston* [2023] ECC Dur 1 Chancellor Iles, in the diocese of Durham, refused to grant a faculty for the reservation of a grave space. Although several relatives of the petitioner were buried in the churchyard, the petitioner was not a parishioner – indeed, he did not even live within the diocese of Durham - and he did not have a legal right to be buried in the churchyard. Also, the reservation of a grave would use up a space in a churchyard which would be full in about two years, and would prevent the burial of another person, who would otherwise have had a legal right to be buried there.

15. In *Re St Mary, Standon* [2023] ECC StA 1, in the diocese of St Albans, the petitioner wished to reserve a single depth grave space in the churchyard. She was a resident of the parish and was on the church electoral roll, and she attended church occasionally. There were an estimated 248 graves available. However, the parochial church council had passed a resolution in 2021 adopting a policy of not supporting any further grave reservations, except in exceptional circumstances. Chancellor Lyndsey de Mestre KC considered that the reasons given for the policy were reasonable, and that there were no sufficiently exceptional circumstances to justify the grant of a faculty. At paragraphs 7 and 8, the Chancellor emphasised that although not necessarily determinative of the outcome of a faculty application in all cases, a “*clearly expressed thread running through those cases where PCCs had adopted policies of not supporting grave reservations is that the Consistory Court will generally support a policy of non-reservation unless such a policy reveals bad faith or is unreasonable*”.

16. Finally, there is my recent decision in *Re St John, Stockcross* [2023] ECC Oxf 8 (in the diocese of Oxford). There the petitioner, who was 60 years of age, had been resident in the parish for the past 15 years. The Rector had certified that the average number of burials in the churchyard was three per year; and he estimated that the remaining space in the churchyard would be sufficient for the needs of the parish “*for 11+ years*”. I granted a faculty for the reservation of a grave space, but limited in duration, in the first instance, to a period of eleven years from the date of grant, with permission to the petitioner to apply by letter (and for no further fee), within the last year of the term of the faculty, for its duration to be extended. I indicated that I had every sympathy for the petitioner’s wish to have some degree of assurance that, when his time should come, he would be laid to rest in the churchyard of the village in

which he lived, and which he had come to love. However, I considered that there were no special reasons why I should grant a faculty for the standard period of 25 years from the outset (as the petitioner had invited the court to do). I recognise, however, that the present case is stronger than the *Stockcross* case because there was no suggestion there that the petitioner wished his remains to be laid to rest in close proximity to those of a departed loved one or a close relation, such as a deceased child.

17. I do not consider that any of these later cases should lead me to reconsider the (non-exhaustive) list of propositions I formulated in the *Thame* case, and which I have recently followed and applied in the *Stockcross* case.

Analysis and conclusions

18. Since this is an unopposed faculty petition, and the petitioner is content with this course, I am satisfied that it is expedient, in the interests of justice, and in furtherance of the overriding objective of the Faculty Jurisdiction Rules 2015 (as amended) of dealing with this case justly, cost-effectively, proportionately, expeditiously and fairly, for me to determine this petition without any hearing, and on the basis of the written materials that have been presented to the court.

19. I have every sympathy for the petitioner in her tragically sad loss. I have no reason to disbelieve the vicar's assessment of Ms Nutter "*that the peace she will get knowing she will be able to rest next to her beloved son will help her in her continuing grief which at times threatens to overwhelm her*". The petitioner is a resident of the parish and she presently has a right of burial in the churchyard. I accept that she has very good reason to wish to be laid to rest in this churchyard, next to the remains of her only child, who died in a horrific accident only four years ago. The PCC (albeit with two dissenters) support her petition; and no-one has raised any objection to the proposed cremated remains space reservation. However, I cannot ignore the fact that the petitioner is only in her late forties, and that there are only nine cremated remains spaces still available within the churchyard, which are all likely to be used up within the space of the next decade.

20. For these reasons, I will grant the faculty as asked, but I will limit it, in the first instance, to a period of ten years from the date of the grant, with permission to the petitioner to apply by letter (and for no further fee), within the last year of the term of the faculty, for its duration to be extended. Whether or not the faculty is extended will be for my successor, who, I am sure, will pay all due regard to the personal loss suffered by the petitioner, and the fact that this particular plot has already been the subject of a reservation in her favour. But whether the faculty is extended will depend upon all the circumstances prevailing at that time, including the availability of space for the interment of cremated remains within the churchyard, the views of the incumbent and the PCC, and the personal circumstances of Ms Nutter. The faculty will be subject to the following conditions:

- (1) The benefit of the reservation is personal to Ms Nutter and is non-assignable.
- (2) Any fees payable under the current diocesan parochial fees order must be paid to the minister and the PCC of the parish within 56 days of the grant of the faculty.
- (3) The reservation shall be for the period of ten years from the date of the grant of the faculty.

- (4) Permission is granted to apply for an extension to the duration of the reservation by letter to the court (and for no further fee) within the last year of the term of the faculty.
- (5) The reservation shall be recorded in the parish records; and the location of the reserved cremated ashes space shall be marked on the ground by a suitable, and durable, marker.
21. In the usual way I will charge no fee for this written judgment.

David R. Hodge

The Worshipful Chancellor Hodge KC

19 July 2023