

## CONSISTORY COURT OF THE DIOCESE OF ROCHESTER

re St Lawrence, Mereworth

### Introduction

1. Alan Waller died, the victim of a tragic accident while out walking with his family, in June 1955. He is buried in the churchyard of St Lawrence, in Mereworth. His memorial has been restored, and his family now seek a confirmatory faculty in respect of that work.
2. I am grateful for the patience of the petitioner and other interested parties, and I should also record my gratitude to Burslem Stonemasons, who responded willingly and promptly to my direction for the disclosure of correspondence passing between them and the parties.

### The work undertaken

3. I have seen photographs of the grave before and after the works have been done. The memorial comprises a small headstone and a kerb surrounding a paved area, all seated on a capping stone. It appears that the capping stone had subsided unevenly; this has been levelled. The stonework has been significantly cleaned, and the original flat leaded lettering has been replaced with engraved and painted lettering. All in all, although the memorial now has the appearance of being brand-new, I am told by the petitioners that this is not the case; the works have solely been of restoration using the original materials. However, this is not quite accurate, at least in two respects.
4. First, the space surrounded by the grave kerbs has been filled with bright blue glass or stone chippings, where there were no stones before (the petitioner tells me that there had originally been green stones filling the space; but there was, by the time

the work was undertaken, no sign of them). The PCC comments on the petition that it would favour the replacement of those chippings with some natural-coloured brown gravel; and as the petitioner has already undertaken to do this, I need say no more about it.

5. Secondly, the engraving on the memorial has been altered in one material respect, in that the deceased's date of death has been amended. I am told that in her grief, the deceased's widow caused the memorial to record the date of death as 30<sup>th</sup> September 1955 (although I cannot read that detail on the photograph of the unrestored stone). In restoring the stone, the family has caused this to be corrected to record the month as June.

### **The family**

6. I have referred compendiously – and, so far, inaccurately – to the family of the deceased. Before I go further, it is important to record the details of that family, both to identify the parties and to inform a significant decision concerning the ownership of the memorial.
7. Alan Waller had six children; I hope they will forgive me if I refer to them solely by their first names. They were: David (8 at the time of his father's death); Keith (then 6); John (4); Winston (18 months); and twins Alan and Christine, at the time unborn. David and Keith have died. Christine (the petitioner) has caused the works to be carried out, in consultation with Winston; Alan tells me he played no part, but supports the work done. However, John tells me that he is deeply dismayed at the work, feeling that he and the memorial had grown old together; and he opposes the grant of a confirmatory faculty.
8. Although Christine tells me that John previously agreed to the works being done, there is apparently nothing in contemporaneous correspondence to support this. Perhaps significantly, I am told that the rift between John and the other three siblings is so severe that none of the three was able to provide John's contact details, which had to be obtained from the incumbent.

9. I am aware that whatever decision I come to on this petition, some continuing pain will be caused to one or more members of Alan Waller's family. I am in no position to impute any blame to any individual for whatever may have happened to their family relationships throughout their lives, and could not begin to conclude that the views of one party or the other should inherently carry more weight, or that one party or the other is more worthy of being protected from that pain by making a particular decision. I regret that pain, but it appears to be unavoidable. All I can do is comply with my duty to decide the case by applying the law to the facts as I find them to be. The law in this area is complex and, in places, surprising, which at least partly explains the time I have taken to write this judgment.

### **Confirmatory faculties – the principles**

10. As I have noted in previous cases, as a general principle, a confirmatory faculty should only be granted if a faculty would have been granted for the work if one had been sought at the appropriate time, before the work was carried out: see, for example, *re Buncton, All Saints* [2018] ECC Chi 1. It requires exceptional circumstances to diverge from this principle; and the mere fact that work has been carried out without authorisation, and expenditure incurred, is not a relevant factor.
11. It is clear that pastoral reasons can be sufficiently compelling to warrant the grant of a confirmatory faculty in circumstances where a prospective faculty would not have been granted. However, recent cases concerning memorials where this has been found to be the case have tended to have the distinguishing feature that those in positions of responsibility in the parish had been involved, even to the point of approving a memorial, before its introduction: see for example *re Middleton, St Mary* [2022] ECC Lee 3 and *re Kinson, St Andrew* [2024] ECC Sal 3. In this case, I have seen an email from the incumbent in 2021, indicating that while a faculty would normally be required for the removal of a memorial from a churchyard, the Archdeacon had said that he could give permission for the restoration work to go ahead.

12. I am alive to the difficulties – conceptual and practical – of works having been done that are neither reversible (or, in any event, not ordered to be restored) nor legitimised by a confirmatory faculty. This, as pointed out in *re Buncton, All Saints* [2018] ECC Chi 1 and reiterated in *re Stevington, St Mary the Virgin* [2024] ECC StA 1, is rarely a sensible solution. But there may be sound reasons for this intermediate position, such as in *re St Michael, Twerton-on-Avon* [2024] ECC B&W 1, whereby the faculty jurisdiction was maintained over pews that, having been lawfully removed, had been unlawfully disposed of. It may also be cogently argued that the principle might carry less force when the court is considering private petitions for faculties in relation to memorials: the refusal of a confirmatory faculty might well be a reasonable and pastoral recognition of the rights or views of those who would have opposed the irreversible work, and an appropriate response in anticipation of any future applications for similar works; while the intermediate position in such a case would be less likely to cause future practical or legal difficulties than it might in the case of, for example, internal works to a church.

### **Works to memorials: the law**

13. Before I can consider granting a faculty for works to an existing memorial, I have to grapple with the question of the ownership of the memorial. The reasons for that are set out in the paragraphs below.
14. Section 66 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 provides:
- “(1) The consistory court of a diocese may grant a faculty for the moving, demolition, alteration or carrying out of other work to a monument erected in or on, or on the curtilage of, a church or other consecrated building or on consecrated ground, even if the owner of the monument—
- (a) withholds consent to the faculty, or
  - (b) cannot be found after reasonable efforts to find him or her have been made.”

15. Thus, the court cannot consider a petition for such a faculty unless and until it has addressed the following questions:
- a. Who the owner of the memorial is;
  - b. If the owner can be identified, whether the owner consents to the work or not (whether or not a failure to consent takes the form of failure to respond, neutral withholding of consent or active opposition); and
  - c. If the owner cannot be identified, whether reasonable efforts to find the owner have been made.
16. The history of the provision is worth noting. Until 1964, the refusal or failure of an owner to consent to work being done on a monument was, it appears, a complete bar to a faculty for any such work. The position was altered by the Faculty Jurisdiction Measure 1964. The Bishop of Chester, in moving the House of Lords motion that that Measure be presented for Royal Assent, said:

“Clause 3 provides for a faculty to be granted for the removal of a monument, notwithstanding the fact that the owner objects or cannot be found. Experience has shown that entirely desirable schemes of improvement in both churches and churchyards have been held up because the consent of one owner of a monument cannot be obtained. He would have the right to object and have the case heard, but his objection would not be conclusive.”

17. Accordingly, s.3 of the Faculty Jurisdiction Measure 1964 provided:

**“3 Faculties affecting monuments owned by persons withholding consent thereto.**

- (1) This section shall apply to faculties for the moving, demolition, alteration or execution of other work to any monument erected, whether before or after the passing of this Measure, in or upon any church or other consecrated building or the curtilage thereof or upon consecrated ground other than consecrated burial grounds to which section eleven of the Open Spaces Act 1906 applies or has been applied.

- (2) Subject to the provisions of the succeeding sub-section a court may grant a faculty to which this section applies:—
- (i) although the owner of the monument withholds his consent thereto or cannot be found after reasonable efforts to find him have been made ...”
18. s.7 of the Church of England (Miscellaneous Provisions) Measure 2014 amended s.3, to permit the grant of a faculty in cases of such urgency that it would not be reasonable for the petitioner to seek the consent referred to. This amended provision was repealed and re-enacted in the Ecclesiastical Jurisdiction and Care of Churches Measure 2018. As this is a consolidating Measure, it is presumed not to have changed the law.

### **Ownership of a memorial**

19. Both section 3(4) of the 1964 Measure and section 66(5) of the 2018 Measure provide that for the purposes of that section, “owner” means the person who erected the monument in question; and, after that person’s death, the heir or heirs at law of the person or persons in whose memory the monument was erected.
20. This is, at first sight, surprising; on the death of the person who erected the memorial, the power to object to work to it, as an incidence of ownership, passes from what would otherwise be their estate to the heir of the person commemorated, even if there had been no familial or other connection between the two. But this is no mere statutory or limited deeming provision; it reflects the common law, which can be stated as follows.
21. At common law, a monument is the property of the person who erected it, while they live. On that person’s death, the monument becomes the property of the heir of the deceased in whose honour it was erected, and descended to the heirs of the latter, as being in the nature of an heirloom. (*Corven’s Case* (1612, 12 Co. Rep. 105); Halsbury’s Laws of England, Ecclesiastical Law (volume 34 (2025)), paragraph 794.) See also *re St Andrew’s, Thornhaugh* [1976] Fam 230; the statement of principle to this effect in *In*

*re Keynsham Cemetery* [2003] 1 WLR 66, at para 17, was affirmed by the Court of Arches in *In re Welford Road Cemetery, Leicester* [2007] Fam 15, at para 31. See also “Churchyards: ownership of monuments and trees” in the Legal Opinions concerning the Church of England, where the relevant Opinion dates from the Eighth Edition (2007), apparently pre-dating the *Welford Road Cemetery* case but consonant with it. The evolution of this common law rule, which (as noted in *re Keynsham Cemetery*) owes much to the creativity of Sir Edward Coke CJ, is laid out in Professor Sir John Baker’s essay “Funeral Monuments and the Heir”, reprinted in his “The Common Law Tradition: Lawyers, Books and the Law”.

### ***“Heir at law”***

22. Who then is the “heir at law”? According to Megarry & Wade: *The Law of Property*:

“If property is limited after 1925, whether inter vivos or by will, to the heir of a deceased person, the “heir” is ascertained according to the general law in force before 1926. This is not a case of descent on intestacy, for the heir takes as purchaser.” [10th ed, para 13-126]

*[footnotes: LPA 1925, s.132; AEA 1925 s.51(1). By the former section the heir appears to take only an equitable interest, even in the (highly unlikely) event of an immediate conveyance by deed.]*

23. As to “the general law”, Blackstone’s *Commentaries on the Laws of England* (Book II, Ch. 14) provides the classical formulation that English courts and statutes have always taken as their starting-point:

“Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor.”

Under the pre-1926 common law canons of descent, the heir at law of a deceased person who died intestate and seized of freehold land was identified by the following principles:

- Primogeniture and male preference: the preference of males to females, and the right of primogeniture among the males;
- Representation: descendants of a deceased son stood in his place, so the eldest son's eldest son was preferred over a surviving younger son;
- Whole blood: the heir at common law must be of the whole blood; not illegitimate; nor an alien (that is, the subject of a foreign power);
- Lineal over collateral: lineal descendants were exhausted before collateral relatives were considered.

The heir at law could only ever be a single person (unless they were coparceners in the case of daughters inheriting together in the absence of sons). This is fundamentally different from the modern intestacy distribution, which divides the estate among a class of relatives.

#### **Who owns the memorial in this case?**

24. I am grateful to the petitioner and to John Waller for their patience in explaining to me the details of Alan Waller's family tree – details which, I imagine, must have seemed to them to be utterly irrelevant to my considerations. I hope that after the explanations above, it might now be clearer why I needed to ask about it.
25. Alan Waller's eldest son was David. He would have been the first heir of Alan. He is now deceased, having had one son – David junior, who (if he had survived David) would in turn have been the heir. David junior died aged 18, without children. After both David and David junior, Alan's second son, Keith, would then have been the heir, if he survived them. In any event, he has also died, without children. This means that, there being no male descendants from John's two elder brothers, the next son, John, is now Alan's heir. Consequently, John is the owner of the memorial.



## The present petition

26. The above analysis gives me the answer to the prior questions I identified in paragraph 15 above: the owner of the memorial does not consent to the grant of a faculty. What principles should I apply when considering the petition in the light of this conclusion?
27. Decisions of consistory courts in other dioceses are not binding on me, ecclesiastical law having no common law doctrine of binding precedent; but consistory courts have long treated prior decisions of the courts of other dioceses as carrying real weight, in the interests of consistency and equal treatment of petitioners. So the court should have regard to, and ordinarily follow, a reasoned decision of a different consistory court on the same point, departing from it only for good reason.
28. Cases on this particular question are rare. In *Oldswinford, St Mary* (1997) 17 CCCC 37 (as cited in *re Droitwich Spa, St Augustine* [2016] ECC Wor 2), the court considered a petition to remove a headstone whose inscription was said to be factually inaccurate – in its reference to the parentage of the deceased. It considered the circumstances in which it would be appropriate for a court to exercise its powers under section 3(1) of the Faculty Jurisdiction Measure 1964 to grant a faculty either for the removal of words forming part of such an inscription and their replacement by different words, or for the removal of the stone and its replacement by a stone bearing a different inscription. Mynors Ch held as follows:

“[30] ... the circumstances, to justify the grant of a faculty in such a case, must be altogether exceptional. It would not be sufficient, for example, for a petitioner to point to the alleged inaccuracy of words within an inscription on a headstone that constituted a statement of opinion or a value judgement. Phrases, commonly found, such as “much loved father”; “loyal servant”; or, as in the present case, “precious son”, may be the subject of much honest disagreement; and it should not be open to someone to produce evidence tending to suggest that the father was violent, or the servant disloyal. If the position were

otherwise, there could be a succession of such claims, each indicating a revised inscription.

[31] Secondly, if it were to be discovered that part of an inscription purporting to be a fact was inaccurate, and if it was felt to matter, it is unlikely that the owner of the stone would object to the offending words being altered. So, for example, if the place of birth or death was shown beyond reasonable doubt to have been wrongly recorded on a stone, a petition to replace it with the correct location would probably not be opposed, and would be readily granted by the Court. That might not always be the case, however – where, for example, a dispute about the precise date of birth of the deceased was in reality a dispute as to whether his or her birth was legitimate; in such a case, if the facts were uncertain, it would not be right to allow the stone to be altered against the wishes of its owner.

[32] Thirdly, however, it may occasionally happen that a person seeking permission to erect a headstone proposes to put on it words which are either altogether inaccurate or at best highly misleading. That may be done either dishonestly or in the mistaken belief that the proposed words, though inaccurate, are appropriate. If the inaccuracy is discovered in time by the incumbent (or, as the case may be, the chancellor), it is very unlikely that the memorial would be authorised. However, where the inaccuracy was at the time of the granting of consent unknown, then if it subsequently comes to light, it may be that in an appropriate case a faculty would be granted for the inscription on the stone to be altered.

[33] The reason for that is, first, that a headstone is a public statement relating to a deceased person; it follows that accuracy is in general important. Secondly, and following on from that, any consent for a headstone is based on an application made to the incumbent or to the chancellor; it is reasonable for the person to whom that application is made to rely on it as being accurate in all particulars,

especially as to facts of which he can have no personal knowledge but which lie peculiarly in the knowledge of the applicant.

[36] ... An incumbent should always be alert to the possibility that there may be several claimants to the right to erect a headstone over a grave, and should always inquire of applicants whether a proposed memorial has been approved by the widow/er, parents, children, brothers and sisters of the deceased, as appropriate, as well as by any person (including a former spouse) with whom the deceased may have been living for a significant period. If the incumbent forms the view that there is likely to be any dispute, he or she should attempt if at all possible to resolve it informally with the applicant and with any others involved, before consent is granted; if that proves impossible, it is always open to him or her to refuse to grant consent, and refer the matter to this Court with an indication of the nature of the possible problem. But I do not consider that there is any specific duty on an incumbent to check the accuracy of any information supplied as part of an application, including any proposed inscription.”

29. However, the suggestion that a faculty should be granted against the wishes of a memorial owner in “altogether exceptional” circumstances has been doubted. In *re Kilnhurst, St Thomas* (2012, Sheffield consistory court), Maclean Ch said:

“21. The views of the owner of a memorial are not necessarily conclusive. It has been said in some of the cases that the courts will act against the wishes of the owner only in exceptional circumstances. I am not sure that the practice shows the courts applying that rather strict test. Or, at least, it is clear the ‘exceptional circumstances’ include the sort of intra-family dispute that lies at the heart of the present case. In *Re St Mary Oldswinford* the headstone commemorated a young man who died in his twenties. It identified his mother and her husband as his parents, and a petition to change the wording was presented by the natural father of the deceased. The faculty was granted despite the opposition of those who were owners of the headstone. The same

principles were, it seems, applied by Henty Ch in *Re St John the Baptist, Bishop's Castle* (1999) which unfortunately is not fully reported.”

30. In my judgement, the test to be applied to any such petition must recognise not only the burden on any petitioner to persuade the court to grant the faculty they seek (expressed in the *Duffield* questions as “the ordinary presumption in faculty proceedings ‘in favour of things as they stand’”), but additionally give due weight to the views of the memorial owner who (in the words of the Bishop of Chester cited at paragraph 16 above) “would have the right to object and have the case heard”. The cases in which such a test may be met could very well be described as “exceptional” – albeit not in the sense of “exceptionally unusual” but in the more nuanced meaning of the word as expounded in *re Blagdon Cemetery* [2002] Fam 299, meaning “forming an exception”. In *re Blagdon Cemetery*, the question was whether the facts of a case formed an exception to the general rule of permanence of burial; in a case such as this, the question is whether the facts of the case form an exception to the general rule that the owner of a memorial may determine what is done to it. Whether the facts in a particular case warrant a finding that the case is to be treated as an exception is for the chancellor to determine on the balance of probabilities (as in *re Blagdon Cemetery* at [33]).

## Disposal

31. In the present case, I have concluded that I should grant a confirmatory faculty as sought. My reasons are as follows.
32. If I had been presented with a petition for a faculty before the work had been carried out, together with John’s grounds for opposing the petition, I would have taken the opportunity to engage with him on the issue of the incorrect recording of the date on his father’s memorial. As noted in paragraph [31] of the *Oldwindsford* judgment set out at paragraph 28 above, the court would – even if against the wishes of the owner – readily grant a faculty for the correction of a factual error such as the place or date

of death (even if applying the test of, if I may put it this way, “altogether exceptionality” set out in that case, which is a more stringent test than that which I consider to be appropriate).

33. I have considered carefully John’s reasons for not having wished the memorial to be restored; I perceive that he feels robbed of the comfort he has derived over many years from the memorial as it has gracefully aged, and I do not minimise the pain that the work has caused him. However, I recall the well-known dictum, that a grave memorial has a threefold purpose: to honour the dead, to comfort the living, and to inform posterity about the deceased. The memorial is not merely to be a source of comfort to Alan’s family; it must also honour Alan and inform posterity about him. The memorial, as shown in the photographs taken before the work was done was, it has to be said, in such an objectively poor condition that it was failing to meet its first and third purposes. True, it was darkened and spotted with lichen through age; and if this had been the extent of the issues, I might have been troubled by the prospect of its being cleaned to the point of looking “as new”. But additionally, there appeared to have been significant ground movement; the slab within the kerbstones appears to have fractured and cracked, and the whole memorial was listing so much that the tops of the kerbs at the bottom on the right-hand side were at or below ground level. The inscription was (it appears from the photograph) barely legible. It was not an ornament to Alan’s memory. And at least in the respect previously identified, to the extent that it was legible it was misinforming posterity about him.
34. All in all, I am satisfied that, even against the wishes of John as the owner, I would have granted a faculty for the proposed works if one had been sought.
35. If I were wrong about that, I also ask myself whether this case would fall within the principle set out at paragraph 11 above – wherein a confirmatory faculty might be granted for works which would not have been approved, on pastoral grounds. The work was undertaken with the ostensible permission of the incumbent, although I bear in mind that the permission was given in ignorance of the ownership of the

memorial, or of the significance of the point. And it was, I am afraid, a misstatement of the true position to indicate that the work could be carried out without a faculty, although I am sure this would have been an oversight. On balance, bearing all these matters into account, I would in any event grant the confirmatory faculty sought.

36. I therefore direct that a confirmatory faculty pass the seal as sought, subject to the condition that the blue chippings will be removed within three months of the date of this judgment, any replacement having been approved by the incumbent and the PCC before being introduced.
37. I waive my fee for preparing this judgment. However, this matter has taken up a significant amount of Registry time, and I authorise the recovery of the costs of Registry time from the petitioner, as may be specified by the Registrar.

The Wp<sup>ful</sup> David Willink  
Chancellor

18 August 2026