

In the Consistory Court in the Diocese of Ely

Practice Direction: Reservation of a Gravespace

BACKGROUND

1. Many churchyards in the Diocese are running out of room to provide gravespaces for parishioners and others who do not automatically have a right to be buried in a particular churchyard. Some parishes are fortunate to have land available adjacent to the church and which they have been able to purchase or which has been generously donated by the landowner. In other areas there are municipal cemeteries, parts of which are consecrated.
2. Reserving a space for the burial of ashes is not at present causing any difficulties. There seems to be sufficient space for the foreseeable future and/or churches are finding further areas within their churchyards which can be used for the burial or interment of ashes.
3. There seems to be little appetite in the diocese to reuse gravespaces, something which it is possible to do in respect of any grave which is more than 50 years old by way of an application for a faculty. Any remains are usually reburied within the gravespace rather than being removed to a Charnel House which was the historic practice. Headstones may be removed to a boundary wall or elsewhere. For many churches this is not a practical solution because it is believed that it would spoil the ambiance of the churchyard. It is likely that there are a number of churchyards within the diocese with substantial areas where there have been burials over 100 years ago and where no, or few, headstones remain. For those churches the reuse of consecrated land may provide a practical and environmentally acceptable solution to the lack of space.
4. The parish's legal responsibility to provide a gravespace for the burial of a body or ashes attaches to anyone who was at the date of death living in the parish, or on the electoral roll, or who died in the parish so long as space remains and so long as the churchyard has not been closed for burials by Order in Council. It is a common law right supported additionally by s.88 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.

5. By s.65(4) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 the exclusive right to a burial place may not be granted or acquired by a parishioner or non-parishioner otherwise than by faculty on application to the Chancellor of the Diocese, the matter being entirely within his discretion.
6. There has been an increasing number of applications for faculties to reserve a gravespace as those with a right to burial in the parish churchyard and those without such rights unless by way of the faculty jurisdiction realise that there is a pressure on available spaces,. There is some evidence to show that rural churches which surround large urban areas, where the churchyards have been closed, are seeing a particularly high number of applications for gravespace reservations. Each application which is granted reduces the number of spaces available to bury those who have a right to be buried in a churchyard, many of whom could not afford the fees charged for a reservation by faculty and who may die long before those who have obtained the right to be buried by way of a faculty.
7. Some parishes, especially those where there is limited space, have a policy approved by the PCC which provides that they will only support applications for a reservation made by those who have a significant or longstanding connection with the parish. Other parishes, and in what may be considered a fairer approach and one which does not require a value judgment to be made based on individual merit, resist all such applications leaving the parish in a position to comply with its legal requirements until such time as the churchyard is full.
8. Looking at the decisions of the Consistory Courts throughout the country the pre-eminent factor in determining a petition for reservation will be the number of spaces remaining for future burials; where little space remains a faculty will normally be refused or granted for a limited period which is determined by the number of years left for which there is the space to fulfil the needs of the parishioners.
9. The decision of Chancellor G H Newsom QC in Re West Pennard Churchyard [1991] 4 All ER125 sets out the principles affecting the grant of such discretionary applications:

- (a) At common law, every parishioner has a right of burial in the churchyard of the parish unless it is closed by due legal process;
- (b) The common law right extends also to all persons dying in the parish, whether or not they are parishioners;
- (c) By statute a similar right is enjoyed by all persons whose names are on the electoral roll of the parish;
- (d) The incumbent has power at common law to prescribe in what position in the churchyard any burial is to take place; but that is the extent of his power in respect of cases where the deceased had a legal right of burial;
- (e) As freeholder of the churchyard, the incumbent is also entitled to grant consent to the burial in the churchyard of the remains of a person who has no legal right of burial; in doing so he is to that extent ousting those who have existing prospective rights. In deciding whether to give consent in such a case, he is therefore required by statute to 'have regard to any general guidance given by the parochial church council of the parish with respect to the matter'
- (f) These common law and statutory rights crystallise only when the person in question dies.

10. He said:

“[Where] 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 (e.g. 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.

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.”

11. As to the exercise of judicial discretion in cases of this type, Newsom Ch. made the following helpful observations:

“The court is usually disposed to grant the reservation petition of a person who has a legal right of burial. Such a case may further be strengthened if the remains of one or more of the petitioner's relatives are buried nearby, as is the case here. Or it may be weakened if the churchyard is on the point of being full.”

12. In Re St Nicolas, Pevensey 2012 Ch 136/11 Hill Ch. considered applications by a husband and wife, who had a long association with the church; they were married there and so was their daughter; their grandson was baptised there. After an absence abroad the petitioners returned in 2000 and thereafter played an active rôle in the life of the church. The remains of the wife's parents were buried in the churchyard. Although they had tried to get planning permission to build a house there, they were not resident in the parish. The application to reserve a gravespace was unanimously supported by the Parochial Church Council and the incumbent and when they did so they knew that the churchyard was likely to be full within two years.

13. Hill Ch. reviewed the law and relied on the judgment in Re West Pennard Churchyard. In refusing the faculty he said:

“In relation to burial, it matters not whether the deceased is a Christian, has attended worship or has donated money to the church during his or her lifetime. All are treated alike. 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.

When space in a churchyard is limited, individuals with a legal right of burial must be interred in the order in which they die until such time as the churchyard is full. Neither the provision of alms in the past nor regular attendance and support of the Church's ministry can give rise to a presumptive priority for a certain class of individuals when the number of available burial plots has become so few.”

14. In Re St Benedict Biscop, Womborne [2019] Ecc Lic 2 Eyre Ch. said:

“The approach to be taken to reserving a gravespace in a churchyard is in part a matter of fact and degree. Any reservation has the potential for prejudicing the rights of others to be buried in the churchyard in question. The court will, however, look at the practicalities of the number of remaining spaces in a churchyard and the likely level of usage with a view to considering the degree of risk that a reservation would preclude the burial in the churchyard of someone who would otherwise be entitled to be buried there before the interment of the person in whose favour a reservation is made. The greater the risk that the grant of a reservation would mean that a parishioner was prevented from being buried in the churchyard because the reserved plot was being kept vacant and unoccupied awaiting the later death of the person with the benefit of a reservation then the less appropriate it will be to grant a reservation.... Accordingly, regard is to be had to the available space and the degree of risk that the reservation will prevent a person entitled to be interred ... from being buried there when there would otherwise be sufficient space.”

15. In St John the Baptist Ashley 2020 ECC Lic 1 Eyre Ch. considered the application for a faculty from a petitioner aged 31 whose father and other relations were buried in the churchyard. 50 spaces remained and on average seven spaces were used each year. He concluded that the churchyard would be full within 7 years; to grant the faculty sought will prevent a parishioner with a right of burial in the churchyard from exercising that right and that she had members of her family buried there did not amount to the exceptional grounds which would be needed to justify the grant of a faculty.

RESOLUTION

16. In my judgment the position in the diocese is becoming acute, particularly in churches surrounding large conurbations. The reservation of gravespaces is leading to parishioners being denied the opportunity to be buried in the churchyard of their parish church and it is preventing ministers from fulfilling their common law obligations to parishioners.

17. The right to reserve a gravespace is enshrined in statute but fairness to all dictates that there must be some restrictions placed on the grant of such faculties.
18. This Practice Direction is designed to permit the continued operation of the faculty system in the following way:
 - (a) Where a churchyard has sufficient room to accommodate burials for the next 25 years a faculty will be issued subject to the ordinary considerations which apply at present and which may include the age of the petitioner, their association with the church and any historical connections to the church. This is the present policy in any event.
 - (b) Where the space in the churchyard is expected to be exhausted in under 25 years, if a faculty is granted to reserve a gravespace, it will be for a period of time equivalent to the remaining years, subject to a right to renew for a further period if required.
 - (c) Where the space in the churchyard is expected to be exhausted in 2 years or less then an application for a faculty will, save in very exceptional circumstances, be refused.
19. Because there may be exceptional reasons for granting faculties for gravespaces outside of the strict time criteria, I will consider all applications for gravespace reservations on their merits but against the background of these time constraints. It is not possible to produce an exhaustive list of reasons why I may allow a faculty to be granted outside of these constraints but it is likely to be because of very exceptional pastoral concerns brought to my attention by the petitioner and/or the minister.
20. This Practice Direction also regularises the requirements for the marking of the gravespace by the petitioner and the duty of the parish to record the reservation on the churchyard plan. There have been unfortunate incidents in several dioceses of a reserved space being used in error for burial by someone for whom it was not reserved because there was no record of the reservation. If the Practice Direction is followed, that should not be possible.

PRACTICE DIRECTION: GRAVESPACE RESERVATIONS

1. This Practice Direction applies to applications for a faculty to reserve a gravespace on or after the Sixth day of April 2021. It does not apply to applications to reserve a space for the burial of ashes.
2. Each application for a reservation will be considered by the Chancellor on the information placed before him and on its individual merit. The grant of a faculty is entirely at his discretion.
3. Where the Chancellor grants an application it will be limited in time as follows:
 - (a) Where the minister who completed Part B of the Petition certified that there is space left in the churchyard for burials for more than 25 years, the faculty will expire, subject to an application for renewal, after 25 years.
 - (b) Where the minister who completed Part B of the Petition certified that there is space left in the churchyard for burials for any period between 3 and 25 years, the faculty will expire at the end of the certified period unless there are exceptional reasons for granting the application for a longer period. An application for renewal may be made when the period expires.
 - (c) Where the minister who completed Part B of the Petition certified that there is space left in the churchyard for burials for less than two years, the application will be refused unless there are exceptional reasons for granting the application.
4. It is the responsibility of the petitioner to mark the gravespace by a metal (or durable wooden) stake marked with the initials of the person to be buried followed by the year of the reservation in brackets and driven in at the head of the space, or by any method specifically approved by the Chancellor in granting the faculty. The petitioner should inspect the marker from time to time to ensure that it remains in place and to clear it of grass and vegetation so that it is clearly visible at all times.
5. The petitioner is required to make a contribution to the parish towards churchyard maintenance. An application to waive the contribution, usually with the support of the PCC, can be made to the Chancellor. The Chancellor will only allow waiver in

cases of exceptional hardship or where it would be unfair to require payment.

6. It is the parish's responsibility to ensure that the position of the reserved space is marked on the churchyard plan and identified by name and the date of the faculty. The Registry must be informed in writing (whether by email or letter) that this has been done when acknowledging receipt of the faculty.
7. An application to renew the petition should be made no later than 3 months before it is due to expire and will not require the payment of any additional fee. The Chancellor will consider the application to renew based on the submissions made by the petitioner and the application must include an updated certification by the minister as to the number of years for which there is space left in the churchyard for burials at that time. The Chancellor will allow an extension for the period certified unless it is less than two years where the Chancellor will only consider an extension if there are exceptional reasons for granting the application.
8. An "exceptional reason" may include, but is not limited to, exceptional pastoral concerns brought to the Chancellor's attention by the petitioner and/or the minister.

His Honour Judge Leonard QC
Chancellor of the Diocese of Ely
20th February 2021