

Private Cemeteries in Virginia: The Law of Ownership, Maintenance, and Access

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Over the past decade, private cemeteries in Virginia have been the subject of intense, emotionally-charged debate. In 2013 workers discovered graves on the site of a proposed new high school sports complex in Prince William County. After work on relocating the bodies had begun, researchers identified likely descendants of those interred. Though apparently previously unaware of the cemetery's existence, some of them reacted with alarm upon learning that the bodies were being moved.¹

Not long after, in Mecklenburg County, surveyors of a property slated for development discovered cemetery gravestones in a wooded area. To the consternation of descendants, neither the county nor the property owner's representatives allegedly made any attempt to locate and consult with them on relocating the cemetery. Instead, authorities opted to simply meet the legal requirement of posting notices in the newspaper.² More recently, in 2021, again in Prince William County, the temporary blocking of an access route to a cemetery, and land clearance allegedly affecting another cemetery, led to bitter recriminations, new county policies, and legal wrangling.³

It is no surprise that issues surrounding cemeteries may be fraught with emotion. Complicating the matter is that the sentiments for identifying and marking private cemeteries can vary widely both among and within the parties typically involved. Landowners, for example, may believe that a

private cemetery diminishes the value of their property and thus choose not to investigate rumors or local lore about potential unmarked burial sites. Correspondingly, those who have an attachment to an isolated family or community cemetery may discourage more widespread knowledge of its existence for fear of vandalism, unwanted gatherings, or simply because they consider it a place of private refuge. Whatever the rationale, there is not universal agreement among cemetery owners, descendants of the interred, and visitors that the existence of private cemeteries should be widely known. **This naturally increases the likelihood that property owners will unintentionally find themselves owners of burial sites and that visitors to a private cemetery may find the site under threat or their traditional means of access and use curtailed or modified.**

A private cemetery refers to family or small community burial sites on private property; it intentionally excludes cemeteries controlled by or affiliated with a church organization, those owned or operated by a municipality or other governmental entity, and cemeteries with burial plots available for sale to the general public—all of which are subject to a different legal framework.

Ownership

Virginia statute and local government ordinances typically define a cemetery as any land or structure used or intended to be used for the interment of human remains.⁴ There is

no requirement for boundaries or markers. Nor is any deed or writing necessary. In the end, all that is ultimately required is an actual burial. While local governments in the Commonwealth have a variety of zoning and other regulations that apply to cemeteries, Virginia law specifically exempts “interment of members of a family on private property” from the requirement that cemeteries be authorized by zoning ordinance.⁵ Consequently, while the overwhelming majority of burials today indeed take place at public or church cemeteries, it is still possible for private property to serve as the final resting place of deceased family members, provided one complies with relevant health department and local regulations.

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More importantly, even if the Commonwealth outlawed all private burials tomorrow,⁶ Virginians would still confront innumerable private burial grounds already in place, marked and unmarked, known and unknown. Just how many there are no one knows. There is no comprehensive statewide map of private cemeteries in Virginia.⁷ Additionally, local government publication of map layers identifying known cemeteries varies.⁸ Then, of course, there are cemeteries of which local government officials are unaware.

Further complicating the matter is that in contrast to a number of other states, Virginia law does not require the disclosure of burial sites in all land conveyances. For public sales of publicly-owned property, governing bodies must provide notice that a known cemetery exists on the site,⁹ and local governments often mandate a survey, demarcation, and other measures related to cemeteries in the context of site or subdivision plans and rezoning applications.¹⁰ But there is no disclosure obligation in transactions among private parties. Rather, in such cases, Virginia largely remains a “buyer beware” state. Of course, sellers are subject to the normal obligations of truthfulness when making representations, and realtors would hopefully disclose the existence of a graveyard. But there is no requirement that a seller or their agent investigate or unilaterally disclose the presence of burials prior to sale.

Given all this, as some of the examples in the introduction suggest, it is not unheard of or perhaps even unusual for a property owner—particularly those who purchase large acreage in rural areas—to inadvertently find themselves owners of a private cemetery, with attendant obligations. In situations where the property owner is aware of the presence of a cemetery, they may still be confused about ownership issues and obligations, particularly if the local government mapper excludes ownership information, or the HOA in which they reside does not retain a professional management company.

Despite the possibility for confusion, in most instances ownership of private cemeteries is reasonably straightforward. The owner of the surrounding land on which the cemetery is situated is quite often the owner of the cemetery as well. In HOAs, the cemetery may be on the lot of an individual property owner, or more likely, in an area designated as part of the association’s common area. It is not unusual in older subdivisions with ambiguous, seldom-consulted covenants and declarations for residents to assume a local cemetery is the responsibility of the descendants of the interred. Some will find a reservation in deeds that seems to support that view.

Yet, in all likelihood, the cemetery is owned by the surrounding property owner or the HOA. Deeds that in the past conveyed property that now includes a cemetery often contain language that “reserves” a portion of the property for a cemetery. Virginia courts have repeatedly held that this reservation does not, however, withhold a fee interest in the land of the cemetery. Rather, the cemetery area is deemed conveyed to the grantee of the overall parcel, and the reservation is interpreted as conveying to particular parties an easement in gross of a specific right to use the cemetery.¹¹ Thus, in the majority of cases, it is likely that the owner of the land on which a cemetery sits is in fact the owner of the cemetery as well.

It is worth noting that in certain circumstances unwilling owners of private cemeteries may be able to relocate them. If the graveyard was previously unidentified or is an abandoned family graveyard, and there has been no reservation of rights or the beneficiaries of such rights waive them, and a body has not been interred in the graveyard for 25 years, Virginia Code § 57-38.1 permits the landowner to seek court approval for

removal and relocation. There are a variety of notice and publication requirements in such instances, and the court will consider, among other issues, the historical significance of the graveyard. But if the court is satisfied and the petitioner is willing to bear the expense, the courts are empowered to authorize removal and relocation of the human remains.¹²

Cemetery Maintenance

Despite the trepidation that might come with the realization that one inadvertently owns a private cemetery, the obligations of such ownership in Virginia are modest. Neither state statute nor common law require an owner to maintain a cemetery in any particular condition. One is free, for example, to allow it to become overgrown and unkept and for the grave markers to fall over or disintegrate. Ownership does not convey a right to remove remains or destroy, deface, or otherwise do injury to the site, and any willful or malicious action to such effect is a felony.¹³ But there is no affirmative duty on the part of the owner to maintain a cemetery; they are free to essentially abandon it.

In cases where an owner chooses this course, adjacent property owners may have remedies. State statute permits adjacent property owners or the local governing body where the private graveyard is located to petition the circuit court to require that the graveyard be put in a “suitable condition” if through neglect and disuse it becomes “unsightly and thereby lessens the desirability and value of adjacent land.”¹⁴ While this would seem to necessitate action on the part of the cemetery owner, even this potential obligation is limited, for if no grave or entombment right has ever been sold, statute indicates that the court will not force the owners to maintain the area. Instead, the court may allow the petitioning party to perform the maintenance of the cemetery at their own expense, provided they pay the costs of the case and post bond if requested by the court to address potential claims for injury or damage. In other words, though a property owner may find themselves the surprise owners of a cemetery that perhaps affects the resale value of their land, the Virginia legislature has formally protected them in certain circumstances from also assuming an unanticipated maintenance obligation.

Access

Generally speaking, the primary obligation of cemetery owners is to allow access to appropriate parties. Virginia Code § 57-27.1 specifically requires that cemetery owners allow access to the cemetery for the purpose of visitation by family members/descendants of people buried there, plot owners, and for genealogical research. This access right is not unlimited, however. Landowners can require reasonable notice and place restrictions on frequency, hours, and duration of access. While they can fence or wall off the cemetery, they must then incorporate a gate that permits authorized access. In addition, owners can designate the access route if no traditional access route is easily visible. By granting access the owner is immune from liability for such access absent gross negligence or willful misconduct.¹⁵

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Corresponding obligations also exist for those accessing the cemetery. Under § 57-27.1, for example, they are liable for any damage they cause. Additionally, in *Turner v. Turner* the court noted that a right of access can be lost by repeated abuses and misconduct.¹⁶

A relatively recent Virginia case clarified further the issue of access routes. In *Wintergreen Homestead, LLC v. Pennington* the court ruled that property owners whose land contains a traditional access route to a private cemetery, but not the cemetery itself, do not have to allow visitors to use that route across their property to access the cemetery. This does not, however, relieve the cemetery owner of the obligation for providing a route across the cemetery owner’s property. **When confronted with the hypothetical that a cemetery owner could in theory then sell all the land around a cemetery to third parties to block access, the court noted that the doctrines of easement by prescription, prior use, or necessity would still apply.**¹⁷ In other

words, absent repeated abuse and misconduct, cemetery owners will remain obligated to provide cemetery access to appropriate parties, subject to reasonable notice, hours, duration, and frequency constraints.

Conclusion

Issues arise with regard to private cemeteries that rarely occur when dealing with church or public graveyards. Tensions can run high, particularly when individuals are dealing with a sense of loss or perhaps even assumed guilt for a lack of knowledge of or neglect of a burial site. Increased awareness of the presence of private cemeteries and the basic legal obligations of owners and visitors may help prevent misunderstandings and avoid exacerbating situations already fraught with emotion. ⚖️



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Endnotes

- 1 Michael E. Ruane, “In Virginia, protests arise as a forlorn cemetery is dug up to make way for high school football,” *Washington Post*, December 2, 2013. “Exhumed remains may stay on site of Prince William’s 12th high school,” *InsideNova*, December 17, 2013 (Updated August 18, 2014).
- 2 Seth Freed Wessler, “Developers Found Graves in the Virginia Woods. Authorities Then Helped Erase the Historic Black Cemetery,” *ProPublica*, December 16, 2022, <https://perma.cc/3LYJ-ERXQ> (accessed March 31, 2023).
- 3 Jill Palermo, “County pledges new protections for old cemeteries,” *Prince William Times*, May 5, 2021 (Updated March 16, 2022).
- 4 See e.g., Va. Code § 54.1-2310; Prince William County, VA Code § 32-100. These definitions notably make clear that the sprinkling of ashes is not sufficient for an area to be defined as a cemetery. In this article I will use the terms cemetery, graveyard, and burial sites interchangeably.
- 5 Va. Code § 57-26(1). This same section, however, imposes other limits that apply to private cemeteries, including proximity to residences and wells.
- 6 Virginia allows municipal corporations to prohibit burials except in public cemeteries. Va. Code § 15.2-1111.
- 7 Members of the general public can help remedy the lack of information about private cemeteries by taking advantage of the Citizens Cemetery Recordation process offered by the Virginia Department of Historic Resources (DHR). By filling out a form on a previously unknown private cemetery, the cemetery can be added to the DHR database.
- 8 Va. Code § 15.2-978 specifically authorizes localities to set forth “a register of identified cemeteries, graveyards, or other places of burial located on private property,” with exceptions for significant historical and archaeological sites that would be jeopardized by public disclosure.
- 9 Va. Code § 15.2-978.
- 10 See e.g., Fairfax County, Va. Code § 101-2-2(22); Prince William County, Va. Code § 32-250.110; Stafford County, Va. Code § 28-39(o).
- 11 *Bradley v. Virginia Railway*, 118 Va. 233 (1916); *Turner v. Turner*, 48 Va. Cir. 114 (Spotsylvania Cnty. 1999). The right is known as “incorporeal hereditament.” At common law there was a substantive difference between an *exception* and a *reservation*. The latter technically involved a fee simple transfer to the grantee who in turn regranted a new (not pre-existing) easement to the grantor. In contrast, an *exception* specifically excluded from the transaction a pre-existing right (in this case the fee interest in the land used as a cemetery). Numerous sources, including *Bradly*, agree that the distinction between an *exception* and a *reservation* in American law has essentially evaporated and that the terms are likely to be treated synonymously.
- 12 Va. Code § 57-38.1.
- 13 Va. Code § 18.2-126 and Va. Code § 18.2-127. There may be circumstances in which an owner is required to protect a cemetery from grazing animals on its property.
- 14 Va. Code § 57-39.1.
- 15 Va. Code § 57-27.1.
- 16 *Turner v. Turner*, 48 Va. Cir. 114 (Spotsylvania Cnty. 1999).
- 17 *Wintergreen Homestead, LLC et. al. v. Bettie W. Pennington, et. al.* (No. 0136-22-2, 2022 Va. App. LEXIS 604 (Va. Ct. App., Nov. 29, 2022)).