

LEGAL ACCESS TO PRIVATE CEMETERIES IN VIRGINIA

Description

Even America's most notorious dueling families have found themselves in a legal fight over cemetery access. In Kentucky, a McCoy descendant filed suit against a Hatfield descendant who had blocked access to a cemetery on his land where deceased McCoy relatives are buried. *McCoy v. Vance*, No. 2005-CA-000501-MR, 2006 WL 507599 (Ky. Ct. App. Mar. 3, 2006). Six members of the McCoy family who died during the Hatfield-McCoy family feud in the 1880s were buried in a cemetery located along Kentucky State Road 319. *Id.* at *1. A great-great grandson of a Hatfield man that was involved in the McCoy murders owns the land on which the cemetery is located as well as an unpaved road leading from Kentucky State Road 319 to the cemetery. *Id.* While the Hatfield descendant, Vance, previously kept the cemetery open to visitors and maintained the unpaved road, after the Hatfield-McCoy feud gained more national interest, and therefore more visitors to the cemetery, Vance and his wife closed the road to the cemetery and posted "No Trespassing" signs. *Id.* at *3. The Vances argued that the unpaved road was an easement such that allowing the McCoyes to use it to access the cemetery would unreasonably burden their estate. *Id.* McCoy descendants, Bo and Ronald McCoy, brought a declaratory judgment suit against the Vances, seeking a declaration that the unpaved road, which had been designated as "reserved" on a 1957 deed, was a public road and that the Vances could not interfere with the McCoy descendants' rights to visit the cemetery. *Id.* at *8. The court held that under Kentucky law, the right of a relative to visit their deceased family members' graves is an easement—a right that cannot be extinguished by the servient estate owner. *Id.* Further, the court held that the right of visitation must be exercised reasonably, meaning only to the extent necessary. *Id.* The court held that use of the easement and visitation of the cemetery was limited to relatives of the McCoyes who are buried in the cemetery and could not be extended to any commercial use. *Id.* at *7.

Though perhaps not as dramatic or infamous as the Hatfields and McCoyes, families and landowners in Virginia occasionally are involved in disputes over legal access to family cemeteries located on private property. This article focuses on legal access to private cemeteries in Virginia. It briefly describes the legislative history of cemetery access, explains the current statutory scheme, and identifies and analyzes notable applicable Virginia cases.

A. Brief History of Cemetery Legislation in Virginia

Virginia has "the most detailed statutory scheme" in providing a cemetery right of access. Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 6 BYU L. R. 1469, 1482 (2006). This scheme developed beginning in the late 1800s. At the 1890 Annual Meeting of the Richmond Bar Association, President Preston Cooke addressed an 1890 Act of Assembly "provid[ing] for the removal of remains interred in graveyards and sale of land vacated by such removal." *Richmond Lawyers: Annual Meeting of the Bar Association*, Daily Times, Oct. 30, 1890. Mr. Cooke simply explained, "[a]s this is an act which few, if any of us will ever have occasion to proceed under, I deem it unnecessary to comment on it, further than to say that it seems very inartificially drawn." *Id.*

Importantly, the Act provided that "[n]o graveyard to which there is no right of way except over or through some person's land shall be sold hereunder without the consent of such person." 1890 Va. Acts 139. Today, the statute is codified as Virginia Code Â§57-39.

In 1989, Senate Joint Resolution 177 requested the Department of Historic Resources (DHR) to study problems of small community and family cemeteries that were neglected or abandoned and to determine if there was an appropriate role for the Commonwealth to play in the care of such cemeteries. Dept. Hist. Res., Report on The Problems of Small Community, Family-Type Cemeteries to the Governor and the General Assembly of Virginia (Senate Doc. No. 31, 1990). Pursuant to the study, among other things, the DHR recommended that Virginia (a) undertake a program to locate and record such cemeteries, (b) enact legislation to provide for greater protection of the cemeteries, and (c) ensure family members access to cemeteries in the cases where the family no longer owns the land on which the cemetery is located. *Id.* The study found that no Virginia law directly addressed legal access to cemeteries by family members and other relatives and that it had become "the cause of a great deal of confusion." *Id.*

Following the study, in 1993, Virginia passed Code Â§ 54.1-2310, currently Code Â§ 57.27-1, which now guarantees access to family members of deceased persons buried in cemeteries located on private property. The statute originally only provided access to private or family cemeteries for "representatives of local historical commissions." Va. Code Ann. Â§57-27.1. The statute was amended numerous times, including the most comprehensive amendment in 2004, which expanded the required access to private or family cemeteries to family members of deceased persons buried there, cemetery plot owners, and genealogical researchers. *Id.*

B. What is a Cemetery?

A cemetery is simply defined as "a piece of land that is reserved for the internment of human remains." *Cemetery*, Black's Law Dictionary (11th Ed. 2019). Virginia Code Â§ 54.1-2310 further defines a cemetery as "any land or structure used or intended to be used for the interment of human remains. The sprinkling of ashes or their burial in a biodegradable container on church grounds or their placement in a columbarium on church property shall not constitute the creation of a cemetery." Further, it defines internment as meaning "all forms of final disposal of human remains including, but not limited to, earth burial, mausoleum entombment and niche or columbarium inurnment. The sprinkling of ashes on church grounds shall not constitute interment." *Id.*

In Virginia, unlike some other jurisdictions, a private cemetery can be established by dedication without the requirement of dedication by deed or writing. Douglass W. Dewing, A Virginia Title Examiner's Manual 62 (5th ed. 2022). Additionally, in a Supreme Court of Virginia case decided in 2010, the Court held that under common law and Virginia statutes, some form of actual burial is required to create a cemetery. *Shilling v. Baker*, 279 Va. 720, 727-28 (2010). The Court explained that the mere scattering of remains, without a "final disposal" of human remains, is insufficient to create a cemetery, even where markers and other forms of memorial are erected on location. *Id.*

C. What Legal Access is Required in Virginia?

Under Virginia law, certain groups have access to cemeteries and graves located on private property. This access can be obtained through easement by prescription, easement by necessity, express easement, or statutory easement. Virginia Code Â§ 57-27.1 permits (1) family members and descendants of the deceased that are buried on the property; (2) any cemetery plot owner; and (3) any person engaging in genealogy research access to the property. Va. Code Ann. Â§ 57.27-1(A). The visitors must provide reasonable notice to the property owner, occupant, or both, of the land the cemetery is located on, and the purpose of visits must be reasonable and limited to visiting or maintaining the graves or conducting research. *Id.* at (A). If a traditional access route is not clearly visible, the landowner may regulate access, including the frequency, hours, and duration. *Id.* at (A). Visitors are liable to the landowner for any damage caused by their access, but the landowner is immune from liability for any action arising out of the access in the absence of gross negligence or willful misconduct. *Id.* at (C). Any person denied reasonable access may bring an action to enjoin the landowner from denying access. *Id.* at (D). Notably, â??[t]he provisions of this section shall not apply to any deed or other written instrument that creates or reserves a cemetery or gravesite on private property.â?? *Id.* at (E).

In 1999, a case decided by the Circuit Court for the County of Spotsylvania explored the boundaries of â??familyâ?? and the rights that family has in accessing and using a family cemetery. *Turner v. Turner*, 48 Va. Cir. 114 (Spotsylvania Cnty. 1999). In *Turner*, all the litigants were descendants or spouses of descendants of a common ancestor, Mordecai Sullivan, who had conveyed twenty-two acres of his farm by deed to his son in 1897 with an express reservation for two acres to be reserved as a burying ground for the â??family.â?? *Id.* at 114. Though the property had been deeded multiple times since, each without mention of the cemetery, the cemetery consisted of approximately thirty graves of family members. *Id.* at 114-15. The defendants, who owned the tract on which the cemetery was located, agreed that the plaintiffs have access to the cemetery but denied that the plaintiffs had the right to be buried there. *Id.* at 114. Finding against the defendants, the court held that â??familyâ?? should be construed broadly to mean â??all descendants of a common progenitorâ?? and thus included all descendants of Sullivan. *Id.* at 115. The court held that Sullivan could not have intended to reserve a burial ground for only his immediate family, because his ancestors were already interred in the cemetery at the time of conveyance and Sullivan would not have conveyed his son the property without reserving his son a burial ground. *Id.* Further, the court noted that, in the context of family cemeteries, â??familyâ?? extends beyond immediate family and encompasses several generations. *Id.* at 115-16.

Citing to a 1916 case, the Spotsylvania Circuit Court clarified that the defendants were actually owners in fee of the entire two-acre reserved parcel, including the cemetery, because the word â??reservedâ?? is interchangeable with the word â??excepted,â?? as a grantor who â??reservesâ?? a family cemetery intends to convey the fee subject to the right of the grantorâ??s family to use the cemetery. *Id.* at 116 (citing *Bradley v. Virginia Ry. and Power Co.*, 118 Va. 233 (1916)). Thus, the court held that Sullivan excepted from the 1897 conveyance a specific right, often described as â??incorporeal hereditament,â?? which is an easement in gross, for his descendants to continue to use the cemetery for their family burials. *Id.* Regarding the extent of the use, the court held that the plaintiffsâ?? rights to the cemetery included reasonable access, the right to maintain the grave sites, the right to visit to pay respect, and the right to be buried there. *Id.* at 117. Importantly, the Spotsylvania Circuit Court held that all these rights must be exercised reasonably so as to not unduly interfere with the defendantsâ?? rights as property owners, and that the plaintiffs could lose these rights by repeated abuses and misconduct. *Id.* The court also granted the parties additional time to agree upon specific â??rules and regulationsâ?? for access to and use of the cemetery, holding that the court would impose its own if the parties could not come to an agreement. *Id.* at 118.

Similarly, in 2019, the Mathews County Circuit Court entered a decree granting the plaintiffs, family members of deceased persons buried in a cemetery, a declaratory judgment for an easement by necessity to access the cemetery. *Haynes v. Roane*, CL 16-45 (Mathews Cnty. Jan. 15, 2019). The court found a right-of-way, twelve feet in width, over several properties which were all derived from the same original parent tract of land upon which a family cemetery was located. *Id.* The court held that the easement was one of necessity, as there was no other roadway available to provide legal access to the cemetery. *Id.* Further, the court held that all heirs of the deceased had the right to legally access the cemetery “at all times,” to maintain it, including removing brush and trees and erecting an appropriate fence, and to be buried in the cemetery. *Id.* All rights were granted in perpetuity. *Id.*

Virginia courts have also allowed plaintiffs to acquire access to family cemeteries by adverse possession. In a 1999 case in the Circuit Court of Nelson County, the plaintiffs were all related to deceased persons buried in a cemetery known as Claypool Cemetery and brought suit seeking legal access to the cemetery. *Morris v. Whitley*, 50 Va. Cir. 320, 320 (Nelson Cnty. 1999). The defendants owned the property on which Claypool Cemetery was located. *Id.* The court relied upon the Supreme Court of Virginia’s previous holding that “[t]he purchaser of a lot from [a private cemetery company] holds it by a peculiar title. [A purchaser] acquires no absolute interest in or dominion over such lot, but merely a qualified right for the purposes to which the lots are devoted. [The purchaser’s interest] is in the nature of an easement, with the exclusive right to bury in the lots, subject to the general proprietorship and control of the association, in whom the legal title is lodged.” *Id.* at 321 (quoting *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 610 (1903)). Further, the Nelson County Circuit Court explained that where land is set apart by the owner as a cemetery, those who use the land as a cemetery may acquire a right to the plots through adverse possession. *Id.* at 322. The court held that because the plaintiffs all descended from the persons buried in Claypool Cemetery, they had acquired rights by adverse possession in the cemetery on the defendants’ property. *Id.* The plaintiff’s rights by adverse possession included the right to inter future deceased family members. *Id.* at 323. However, as to access to Claypool Cemetery, the court held that the plaintiffs did *not* have an easement by prescription across the defendants’ driveway and field to access the cemetery because the plaintiffs’ use of the path was neither adverse, continuous, nor exclusive. *Id.* at 323-24. Rather, the court held that plaintiffs could access the cemetery from the state highway, and thereby ordered the defendants to remove a section of fence on their property that bordered the state highway. *Id.* at 325. The court held that it lacked further authority to order the defendants to maintain the fence around the cemetery, but it did enjoin the defendants from causing any imminent, irreparable harm to the cemetery. *Id.*

Demonstrating the complexities of parties involved in cemetery access litigation, a Supreme Court of Virginia case decided in 1997 determined who is a necessary and indispensable party in such litigation. In *Atkisson v. Wexford Associates*, the parties had been involved in over eleven years of litigation revolving around the Atkissons’ access to their family cemetery located on private property. 254 Va. 449, 451-52 (1997). The Atkissons originally filed suit against the Fairfax County Park Authority, Wexford Associates, and fifty-six owners of lots located in the Wendover Subdivision. *Id.* at 451. The Atkissons alleged that they had an easement that provided access to their family cemetery and that the defendants had caused obstructions that interfered with their use of the easement. *Id.* at 452. A lengthy procedural posture included a 1993 ruling that required (a) each lot owner whose lot obstructed the easement pay \$100 to the Atkissons, (b) the Wexford Associates pay \$10,000 in punitive damages to the Atkissons, and (c) the Park Authority provide a new easement for the Atkissons on Park Authority’s land. *Id.* at 452. The court’s ruling was appealed to the Supreme Court of Virginia, which affirmed the holding that the Atkissons had an express easement for access to the cemetery but

also held that the chancellor was without authority to require the Park Authority to create a new easement. *Id.*

While the case was pending on a second remand, the Oâ??Brien family, owners of a lot in the Wendover Subdivision, discovered that the easement may transverse their lot. *Id.* at 453. While the previous lot owners had been named as defendants in the initial suit and were later nonsuited, the Oâ??Briens purchased their lot without actual or constructive notice of the pending litigation. *Id.* Thus, the Oâ??Briens filed a petition to intervene and further requested the chancellor vacate the 1993 order and award a new trial. *Id.* The chancellor held that because the Oâ??Briens were necessary parties and the 1993 judgment was made after the Oâ??Briens were owners of the property, a new trial was necessary. *Id.* At the new trial, the chancellor heard â??vastly differentâ?? evidence from the first trial and found that no express easement was located on the Oâ??Brien property. *Id.* at 453-54. However, the chancellor held that the 1993 judgment was still binding on all defendants who participated in the first trial. *Id.* at 454. Thus, the chancellorâ??s final decree provided for an easement that did not permit the Atkissons access to the cemetery. *Id.*

The Supreme Court of Virginia then granted the Atkissonsâ?? appeal, which argued that the trial court erred by failing to comply with the Courtâ??s previous directive to enter an order requiring an easement for the Atkissons to access the family cemetery. *Id.* The Oâ??Briens argued that the 1993 judgment could not be enforced against them, as they were necessary parties, and other defendants from the 1993 judgment argued that the judgment was void because the Oâ??Briens were necessary parties. *Id.* The defendants who were parties at the time of the 1993 decree also assigned cross error to the chancellorâ??s finding that they are bound by the 1993 judgment because their interests are not separable from the Oâ??Briensâ?? interests. *Id.* The Supreme Court of Virginia held for the defendants, finding that a court cannot enter a valid judgment when necessary parties to the proceeding are not before the court. *Id.* at 455-56. Because their property rights were affected by the easement, the Oâ??Briens had an interest in the outcome of the trial and thus were necessary parties to the first trial. *Id.* The Court further held that the interests of the defendants who were parties in 1993 and the Oâ??Briens are inseparable, because the purpose of the easement is to permit the Atkissons access to their family cemetery, and if any lot owner can demonstrate that the express easement did not transverse his or her property, the Atkissons would not be able to gain access to the cemetery. *Id.* at 456. The Court therefore held that the 1993 judgment was void *against everyone*. *Id.* Further, because the Atkissons did not assign error to the chancellorâ??s findings in the second trial, the Court entered final judgment in favor of the defendants, holding the Atkissons do not have an express easement. *Id.* at 456-57.

A recent Court of Appeals of Virginia opinion, *Wintergreen Homestead, LLC v. Pennington*, held that under Virginia Code Â§57-27.1, property owners whose land is adjacent to a private cemetery and contains a traditional access route to such cemetery do not have a duty to allow cemetery visitors a path across the adjacent property. No. 0136-22-3, 2022 Va. App. LEXIS 604 (Va. Ct. App. Nov. 29, 2022). The cemetery in question was located on a 47-acre tract of land owned by Wintergreen Homestead, LLC. *Id.* at *2. The tract was previously part of a 59-acre tract owned by Ms. Wine, who devised the property to her four children. *Id.* The children partitioned the property, ultimately leading to 47 acres, including the Cemetery, being owned by Wintergreen, and the remaining 12 acres being subdivided into two smaller tracts owned by Jacobs and Brink. *Id.* at *3. Family members of deceased persons buried in the cemetery previously accessed the cemetery through the â??traditional route,â?? which required entering onto and crossing both Jacobs and Brinksâ?? properties before reaching the tract on which the cemetery is located. *Id.* Around 2013 or 2014, Jacobs and Brink began refusing

visitors access over their properties. *Id.* at *4. Visitors to the cemetery then started accessing the cemetery using the “east gate route,” which only crossed Wintergreen’s property. *Id.* Family members of deceased persons buried in the cemetery subsequently brought suit against Wintergreen, Jacobs, and Brink, arguing that they had a right, based on Virginia Code Â§ 57-27.1, to use the traditional access route, regardless of whether it was located on the same parcel as the cemetery. *Id.* at *4-5.

The trial court, the Nelson County Circuit Court, held that the path through Jacobs and Brinks’s properties was a traditional access route pursuant to the statute but that the statute does not give the visitors the right to cross Jacobs and Brinks’s properties. *Id.* at *5. The Court of Appeals affirmed. *Id.* at *13. In doing so, the court held that the plain meaning of the words of the statute apply only to landowners on whose property a cemetery or graves are located. *Id.* at *7. Thus, landowners, like Jacobs and Brink, whose property does not contain a cemetery, are not required under the statute to allow ingress and egress by visitors accessing cemeteries. *Id.* The Court of Appeals explained that as other states have explicitly codified the right to cross over property on which no cemetery is located when no other means are available, the General Assembly clearly chose not to do so. *Id.* at *11-12. Rather than protecting the *means* by which descendants can access the cemeteries and graves of their deceased family members, the General Assembly only intended to protect the *right* of access. *Id.* at *13. The court emphasized that the appellees still have access to the cemetery through the east gate route, even if it is not their preferred means of access. *Id.* Further, the court did agree with the appellees that its interpretation of the statute may open the door for landowners to convey a portion of their property that contains a traditional access route to a third party in order to remove the conveyed property from the scope of the statute. *Id.* at *12. However, the court explained that, in such a case, (1) the statute still requires the landowner of the property on which the cemetery is located to provide reasonable ingress and egress to access the cemetery and (2) the doctrines of easement by prescription, prior use, or necessity still apply. *Id.*

D. Conclusion

As evidenced by the statutes, cases, and other authorities above, when considering legal access to cemeteries located on private property, numerous issues and complexities must be addressed. While the plain language of Virginia Code Â§ 57-27.1 provides a right of legal access to family members of deceased persons’s burial grounds located on private property, it must be determined whether the deceased are interred in such a manner so as to constitute a cemetery on such property, whether the family member is truly a “family member” as defined by statute, the history of the land in question, the nature of the surrounding property and physical access to the cemetery, and the parties’s relationship to any past or present litigation, just to name a few issues. These inquiries can help to determine whether the family member is granted an easement as a right of access to reasonably visit their ancestors’s remains. So, when you consider issues which arise from having a private cemetery located on property in Virginia, the issue of legal access to the cemetery is perhaps paramount in terms of its potential impact on such property.

**James L. Windsor**

Jim is the Chairman of the firm's Real Estate Claims & Title Insurance Solutions Group. He is AVA® Preeminent rated by Martindale-Hubbell, is named a Top Rated Lawyer in Insurance Law by Martindale-Hubbell and was selected by peers and recognized by Best Lawyers in America 2018-2023 in the area of Real Estate law. Jim's practice includes a broad range of civil litigation and counseling, with an emphasis on title insurance, real estate, construction, legal malpractice defense, creditor's rights and banking.

**Catrina C. Waltz**

Catrina is an Associate in the Richmond office and a member of the Litigation Practice Group. She has experience in civil litigation, including real property law.

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