

A.C.A. § 14-14-812

West's Arkansas Code Annotated [Currentness](#)

Title 14. Local Government

Subtitle 2. County Government (Chapters 13 to 35)

▪ [Chapter 14](#). County Government Code ([Refs & Annos](#))

▪ [Subchapter 8](#). Legislative Powers

▪ **§ 14-14-812. Cemetery access roads**

(a) A "cemetery", as used in this section, means any burying place for the dead, a burial plot, a graveyard, or any land, public or private, dedicated and used for the interment of human remains which includes at least six (6) grave markers.

(b)(1) The county judges of the several county governments in Arkansas shall be authorized to improve and maintain any roads across public or private lands used or to be used for access to a cemetery.

(2) The cemetery access roads shall be constructed to a standard and nature to permit their use by automobiles.

CREDIT(S)

[Acts of 1995, Act 1317, § 2; Acts of 1997, Act 1286, § 2.](#)

CROSS REFERENCES

Criminal offenses, obstruction of cemetery access, see [§ 5-39-212](#).

A.C.A. § 5-39-212

West's Arkansas Code Annotated [Currentness](#)

Title 5. Criminal Offenses ([Refs & Annos](#))

Subtitle 4. Offenses Against Property (Chapters 35 to 49)

▪ [Chapter 39](#). Burglary, Trespass, and Other Intrusions

▪ [Subchapter 2](#). Offenses Generally ([Refs & Annos](#))

▪ **§ 5-39-212. Cemeteries--Access--Debris--Disturbance**

(a)(1) It is unlawful for any person, firm, corporation, partnership, or association to construct any fence on any property in such a manner as to enclose any cemetery, graveyard, or burying place unless reasonable access by automobile to the cemetery is provided by gate or otherwise.

(2) As used in this subsection, "cemetery" is not intended to apply to any private family burial plot that:

(A) Contains fewer than six (6) commercial grave markers;

(B) Has not been used for a burial purpose for at least twenty-five (25) years; and

(C) Has not had an access road to the burial plot for at least thirty (30) years.

(3) Nothing in this section prohibits the placement of a fence around any cemetery for the purpose of defining a boundary or protection of a grave site, if any fence or gate is sufficiently maintained.

(b)(1) Any person, firm, corporation, partnership, or association violating any provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100).

(2) Every day that the violation exists is a separate offense.

CREDIT(S)

Acts of 1955, Act 108, §§ 1 to 3; Acts of 1983, Act 742, § 1; [Acts of 1995, Act 1317, § 1](#); [Acts of 1997, Act 1244, § 3](#); [Acts of 1997, Act 1286, § 1](#); [Acts of 2005, Act 1994, § 48, eff. Aug. 12, 2005](#); [Acts of 2005, Act 2232, § 2, eff. Aug. 12, 2005](#).

Not Reported in S.W.2d, 1998 WL 566699 (Ark.App.)

Court of Appeals of Arkansas.

Winston G. CHANDLER Appellant

v.

Kenneth HENRY and Cheryl Henry Appellees

No. CA97-1530.

Sept. 2, 1998.

An Appeal from Van Buren County Chancery Court, No. E-96-237. Honorable Linda P. Collier, Chancellor. Affirmed.

[ROGERS, J.](#)

*1 This case concerns an attempt by appellant to gain access to a cemetery located on appellees' property. The chancellor found that a right of ingress and egress existed for all persons wishing to visit the cemetery. However, she limited access to a four-foot-wide pedestrian path, with the route to be chosen by appellees and the cost of constructing the path to be borne by appellant. On appeal, appellant contends that the remedy fashioned by the chancellor was erroneous, as were other findings made in the final decree. We find no error and affirm.

Appellees own land in Van Buren County on both the north and south sides of Highway 95. A house, which appellees rent to a tenant, is located just north of the highway. The cemetery in question is situated approximately 814 feet northwest of the house. According to appellant, the cemetery was established in the 1830s and several of his ancestors are buried there. The proof below put the number of graves at between fifteen and thirty. On August 16, 1996, appellant filed suit in Van Buren County Chancery Court, alleging that appellees had denied him access to the cemetery. He contended at trial that an old road which led from Highway 95 to the cemetery, and which was located just west of appellees' rent house, should be improved to allow vehicular access. Appellees, who initially denied the existence of the cemetery, told the chancellor that they did not mind appellant crossing their property on foot, but they did not want a road to the cemetery.

After the presentation of evidence at trial, the chancellor ruled from the bench and incorporated her findings into a decree as follows:

There is a cemetery called the Brickey Cemetery (the "Cemetery") and it is situated on certain lands which are now owned by the [appellees] in this cause. That Cemetery has not been abandoned but it is closed for future burials.

There has been no road to the Cemetery for more than eighty (80) years and there will be no road to the Cemetery hereafter. There is, however, a right of ingress and egress for all persons who desire to visit the Cemetery for lawful purposes but that access shall be limited to a path from State Highway 95 to the Cemetery having a maximum width of four (4) feet and which shall be wheel chair accessible, but shall otherwise be accessible only to pedestrian traffic.... Such path shall be constructed along a route that is selected by the [appellees], and may be constructed of gravel, shale or concrete. The entire cost of constructing and maintaining such path shall be borne by the [appellant] and other persons who may now or hereafter desire to improve or visit the Cemetery or contribute to the care and maintenance of the Cemetery and the path.

The Cemetery as it presently exists shall be precisely located and all corners thereof established and marked by survey of a licensed surveyor, which shall be at the [appellant's] expense. Thereafter the Cemetery shall not be extended or enlarged.

*2 The existing headstones may be replaced with headstones or monuments designating the person or persons known to be buried therein, but the number of headstones may not be increased beyond two more than the number of stones presently in place, nor shall headstones or monuments be placed or maintained for persons not buried therein.

The [appellant] may cause the Cemetery to be marked by a very small, inconspicuous marker on the right-of-way of State Highway No. 95, in order that interested persons will know the location of the Cemetery and can park their vehicles on said Highway and proceed from that point along the path to the Cemetery.

Appellant contends on appeal that the chancellor's decree was erroneous in the following respects: (1) closing the road from Highway 95 to the cemetery; (2) finding that there had been no road to the cemetery for eighty years and that there would be no road hereafter; (3) changing the means of access to the cemetery from a road to a pedestrian path; and (4) closing the cemetery to future burials. Appellant's first three arguments are, in essence, that access to the cemetery must be allowed over the old road rather than a newly created path and that the old road should be improved to allow its use by vehicles. We therefore address those three arguments together.

On appeal, chancery cases are reviewed *de novo*. [Fields v. Ginger, 54 Ark.App. 216, 925 S.W.2d 794 \(1996\)](#). However, we will not reverse the chancellor's findings unless they are clearly erroneous. *Id.* Appellant first contends that he and members of the public have gained the right to use the old road through prescription. A prescriptive easement may be created by the adverse use of a privilege with knowledge of the person against whom the easement is claimed, or by use so open, notorious, and uninterrupted that knowledge will be presumed. [Kelley v. Westover, 56 Ark.App. 56, 938 S.W.2d 235 \(1997\)](#). An individual asserting an easement by prescription has the burden of proving by a preponderance of the evidence that use of the roadway has been adverse to the owner and his predecessors in title under a claim of right for the statutory period. *Fields v. Ginger, supra*. The statutory period is seven years. [Neyland v. Hunter, 282 Ark. 323, 668 S.W.2d 530 \(1984\)](#). Likewise, the public may acquire an easement by prescription if a

road is used by the public openly, continually, and adversely for seven years. [Hall v. Clayton, 270 Ark. 626, 606 S.W.2d 102 \(Ark.App.1980\)](#).

Appellant's prescriptive easement argument fails for several reasons. First, the theory of prescriptive easement was never pled by appellant nor was it raised at trial. We do not consider arguments that are raised for the first time on appeal. [Meadors v. Meadors, 58 Ark.App. 96, 946 S.W.2d 724 \(1997\)](#). Secondly, there was evidence from which the chancellor, if she realized that appellant was relying on the theory of prescriptive easement, could have concluded that appellant did not prove his right or the public's right to use the old road to gain access to the cemetery. The proof at trial was in conflict regarding the actual existence of the road. Five of appellant's witnesses and appellant himself testified that such a road existed. Three of appellees' witnesses-Virdie Bradford, who had visited the land as a child in the early 1900s; Vaughn Lay, who had owned the property between 1977 and 1995 and whose family had owned the property since 1876; and appellee Cheryl Henry-denied the existence of a road from the highway to the cemetery. However, Mrs. Bradford and Mr. Lay acknowledged that a passageway of some sort, possibly a log trail or a wagon road, existed. Mrs. Bradford testified that she had seen the passageway used to convey a casket to the cemetery in 1918. Appellant's witnesses acknowledged that the old road was in poor shape and had not been traveled in several years. Photographs introduced into evidence confirmed this. Witness Lula Morrow testified that her last visit to the cemetery was approximately thirty years ago and that, even then, a car could not be driven on the road. No witness, other than appellant, testified to anything other than infrequent use of the road to reach the cemetery. Appellant said that he had used the road "several" times but did not testify as to a precise number of years of continuous use. He further testified that his use of the road prior to 1995 was with Vaughn Lay's permission.

*3 The chancellor in this case may well have determined from the testimony that what appellant referred to as "the old road" was nothing more than a logging trail and that it had not been used by the public since the 1918 burial witnessed by Mrs. Bradford. Further, she may have found that none of the testimony presented by appellant showed open and continuous use of the road for a period of seven years, nor did appellant prove his use of the road was adverse, as opposed to permissive. Permissive use of a means of ingress and egress cannot ripen into a legal right merely by the passage of time. [St. Louis Southwestern Ry. Co. v. Wallace, 217 Ark. 278, 229 S.W.2d 659 \(1950\)](#). In any event, conflicts in testimony are to be resolved by the trier of fact. [Buckman v. Gay, 27 Ark.App. 184, 768 S.W.2d 547 \(1989\)](#). We defer to the chancellor's superior position to evaluate the credibility of the witnesses. *Id.* Further, the weight of evidence is determined not by the number of witnesses testifying on each side, but by the effect of their testimony. [Wilson v. Kemp, 7 Ark.App. 44, 644 S.W.2d 306 \(1982\)](#).

Next, appellant argues that the chancellor's findings were erroneous in light of [Ark.Code Ann. § 14-14-812 \(Repl.1998\)](#), which reads as follows:

(a) A "cemetery", as used in this section, means any burying place for the dead, a burial plot, a graveyard, or any land, public or private, dedicated and used for the interment of human remains which includes at least six (6) grave markers.

(b)(1) The county judges of the several county governments in Arkansas shall be authorized to improve and maintain any roads across public or private lands used or to be used for access to a cemetery.

(2) The cemetery access roads shall be constructed to a standard and nature to permit their use by automobiles.

This statute affords appellant no relief. First, it was not in force when the chancellor's decree was entered on June 9, 1997. The statute, in its present form, became law on August 1, 1997. See Act 1286 of 1997; Attorney General's Opinion 97-144. Prior to that date, the statute applied only to cemeteries which included "at least five commercial grave markers." See Act 1317(1)(a)(i) of 1995. It is undisputed that the cemetery in this case had no commercial grave markers. Secondly, while the statute allows a county judge to improve or maintain a road leading to a cemetery, it does not authorize construction of a new road. The evidence was sufficient to support the chancellor's finding that no road had existed from Highway 95 to the cemetery for many years. Therefore, there is no road for a county judge to maintain or improve, pursuant to [section 14-14-812](#).

Appellant's next argument focuses on the chancellor's decision to permit the creation of a foot path to be used as ingress to and egress from the cemetery. Appellant claims first that the chancellor's solution was erroneous because neither party asked for it. It is true that neither appellant nor appellees presented this option to the court. However, a court of equity may fashion any reasonable remedy justified by the proof. [Jones v. Ray, 54 Ark.App. 336, 925 S.W.2d 805 \(1996\)](#). The remedy is reasonable in this case because it allows access to the cemetery while maintaining appellees' and their tenants' peaceable enjoyment of the property. The remedy is justified by the proof because appellees presented evidence that the construction of a road along the path chosen by appellant would disrupt their tenants' parking area and would damage septic lines leading from the house.

*4 Appellant further contends on this point that the proposed footpath violated the Americans With Disabilities Act (ADA). See [42 U.S.C. §§ 12101 to 12213 \(1997\)](#). In particular, he claims that the foot path contains a slope of 7% which exceeds that allowed by the Act. He refers to section 14.2.1 of the "Accessibility Guidelines for Buildings and Facilities" contained at 36 C.F.R. § 1191.2 (1997). That section provides that public sidewalk cross slopes shall not exceed 2%. Appellant made no argument to the chancellor with regard to the ADA, and we do not consider arguments raised for the first time on appeal. *Meadors v. Meadors, supra*. Further, appellant cites no authority nor does he make any convincing argument regarding the applicability of the cited federal regulation to this case. Assignments of error unsupported by convincing argument or authority will not be considered on appeal. [Rogers v. Rogers, 46 Ark.App. 136, 877 S.W.2d 936 \(1994\)](#). Finally, there is no evidence in the record of the proposed path having a 7% grade. Appellant, acting as pro se counsel, inquired of a witness as to whether the path had a 7% grade, but the witness did not know.

For his final argument, appellant claims that the chancellor erred in closing the cemetery to future burials. Appellant does not express his desire on appeal, nor did he express a desire below, to be interred at the cemetery. As a layman, he cannot act as counsel for others. [Duty v. Watkins, 298 Ark. 437, 768 S.W.2d 526 \(1989\)](#). Therefore, his argument is academic. Appellate courts do not issue advisory opinions or answer academic questions. [Dougan v. Gray, 318 Ark. 6, 884 S.W.2d 239 \(1994\)](#). Further, appellant indicated to the chancellor that he had no intention to use the cemetery for burials. Thus, he is asking for relief on appeal that he did not ask for below. See *Meadors v. Meadors, supra*.

Finally, we address appellees' contention that appellant's jurisdictional statement and statement of the case were argumentative and that appellant improperly included matters outside the record in his statement of the case. Although these errors do not warrant striking appellant's brief, we assure the parties that no matters outside the record were considered by this court. See [Purtle v. McAdams, 317 Ark. 499, 879 S.W.2d 401 \(1994\)](#); [Northwest Nat'l Bank v. Merrill Lynch Pierce Fenner & Smith, Inc., 25 Ark.App. 279, 757 S.W.2d 182 \(1988\)](#).

Affirmed.

[PITTMAN](#) and [GRIFFEN, JJ.](#), agree.

Ark.App.,1998.

Ark. Op. Atty. Gen. No. 2008-117, 2008 WL 3982398 (Ark.A.G.)

Office of the Attorney General
State of Arkansas

Opinion No. 2008-117

**1* August 21, 2008

The Honorable Lance Reynolds
State Representative
Post Office Box 477
Quitman, Arkansas 72131-0477

Dear Representative Reynolds:

This is in response to your request for an opinion on two questions regarding access to cemeteries. Your request states that the gates to an "abandoned" cemetery have been locked, preventing family members from visiting and taking care of the graves therein. Your specific questions in this regard are as follows:

1. Is there any method or mechanism in which private citizens can gain access to an abandoned cemetery against the wishes of the surface right's owners?
2. If the answer to question 1 is "yes," what involvement does the county have in this event?

RESPONSE

The answer to your first question regarding access will depend largely upon the nature of the cemetery to which access has been blocked. The provisions of [A.C.A. § 5-39-212](#) prohibit blocking access to certain cemeteries, excepting certain private family burial plots that contain fewer than six (6) commercial grave markers. Violation of the statute is punishable by a fine for every day that a violation exists. In response to your second question, the prosecuting attorney (a state official), is the person empowered to enforce [A.C.A. § 5-39-212](#), assuming the particular cemetery is covered by the provisions of that statute.

Question 1 — Is there any method or mechanism in which private citizens can gain access to an abandoned cemetery against the wishes of the surface right's owners?

The answer to the question regarding enforcement of access will depend largely upon the nature of the cemetery to which access has been blocked. An Arkansas statute prohibits blocking access to certain cemeteries. [Arkansas Code § 5-39-212 \(Repl. 2006\)](#) provides as follows:

(a)(1) It is unlawful for any person, firm, corporation, partnership, or association to construct any fence on any property in such a manner as to enclose any cemetery, graveyard, or burying place unless reasonable access by automobile to the cemetery is provided by gate or otherwise.

(2) As used in this subsection, "**cemetery**" is not intended to apply to any private family burial plot that:

(A) Contains fewer than six (6) commercial grave markers;

(B) Has not been used for a burial purpose for at least twenty-five (25) years; and

(C) Has not had an access **road** to the burial plot for at least thirty (30) years.

(3) Nothing in this section prohibits the placement of a fence around any cemetery for the purpose of defining a boundary or protection of a grave site, if any fence or gate is sufficiently maintained.

Violation of this provision constitutes a misdemeanor and subjects the violator to a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). [A.C.A. § 5-39-212\(b\)\(1\)](#). Every day that the violation exists constitutes a separate offense. *Id.* at (b)(2).

*2 Whether the cemetery in question will come within the protection provided by [A.C.A. § 5-39-212](#) will depend upon whether it meets the criteria listed. If so, access may be enforced by the filing, or threat of filing criminal charges by the prosecuting attorney. If not, blocking access to such cemetery is not a criminal offense. In that event, the interested private citizens should consult private counsel as to any available avenues of relief. See, e.g., *Bow en v. Hooper*, 237 Ark. 250, 372 S.W.2d 257 (1963).

Question 2 — If the answer to question 1 is “yes,” what involvement does the county have in this event?

As noted above, [A.C.A. § 5-39-212](#), as a criminal statute, is enforced by the local prosecuting attorney (a state official). I will note, however, that state law provides for the creation of county “abandoned cemetery registration boards,” which may provide for “minimum maintenance” of certain abandoned cemeteries. [A.C.A. § 20-17-907](#) through - 911 (Repl. 2005). The members of the board are appointed by the county judge. [A.C.A. § 20-17-907\(a\)](#). If there is no existing public access to the cemetery, the private landowner’s permission is required for the maintenance to occur. [A.C.A. f 20-17-907\(a\)\(2\)](#) and 910(a). Again, barring one of these remedies, the parties involved should consult private legal counsel to determine any other available avenues of relief.

Deputy Attorney General Elana C. Wills prepared the foregoing opinion, which I hereby approve.

Sincerely,

Dustin McDaniel
Attorney General

Ark. Op. Atty. Gen. No. 2008-117, 2008 WL 3982398 (Ark.A.G.)

END OF DOCUMENT
237 Ark. 250, 372 S.W.2d 257

Supreme Court of Arkansas.
W. Ray BOWEN et ux., Appellants,
v.
J. R. HOOKER et al., Appellees.
No. 5-3106.
Nov. 18, 1963.


Suit by relatives of loved ones buried in property, brought as class action, to establish right to use such as cemetery against quitclaim grantees of the property. The Chancery Court, Pike County, Royce Weisenberger, Chancellor, rendered judgment for plaintiffs and defendants appealed. The Court of Appeals, Holt, J., held, inter alia, that grantees took subject to public's use of property for cemetery where deed to them referred to tract conveyed as a graveyard, they knew of its use as cemetery, and when their father had deeded property to church, he had described it as graveyard.

Affirmed.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

 [71 Cemeteries](#)


 [71k10 Acquisition of and Title to Lands](#)

 [71k13 k. Power to Sell or Mortgage or Lease. \[Most Cited Cases\]\(#\)](#)

Purchaser of land is charged with notice that such has been dedicated to public use for cemetery purposes where there are visible signs and suitable markings to call his attention to existence of such cemetery, and he takes it subject to such public rights.

[2]  [KeyCite Citing References for this Headnote](#)

 [71 Cemeteries](#)


 [71k10 Acquisition of and Title to Lands](#)


 [71k13 k. Power to Sell or Mortgage or Lease. \[Most Cited Cases\]\(#\)](#)

Grantees from church took subject to public's use of property for cemetery where deed to them referred to tract conveyed as a graveyard, they knew of its use as cemetery, and when their father had deeded property to church, he had described it as graveyard.

[3]  [KeyCite Citing References for this Headnote](#)

 [71 Cemeteries](#)


 [71k10 Acquisition of and Title to Lands](#)


 [71k14 k. Abandonment. \[Most Cited Cases\]\(#\)](#)

That no graves existed in south half of originally enclosed portion of acre deeded to church for cemetery purposes and subsequently deeded by church to children of original grantor did not show abandonment of such portion for cemetery purposes where it had been enclosed by fence and used for auxiliary purposes in conducting burial ceremonies, there was some maintenance of the area, and relatives of loved ones interred in other portion desired burial therein.

[4]  [KeyCite Citing References for this Headnote](#)

 [71 Cemeteries](#)


 [71k10](#) Acquisition of and Title to Lands


 [71k14](#) k. Abandonment. [Most Cited Cases](#)

A cemetery is never abandoned nor loses its character and identity as such, by general rule, until bodies reposing therein are removed by friends or relatives or by proper public authority, and mere disuse or lack of continued interments does not constitute abandonment.

[5]  [KeyCite Citing References for this Headnote](#)

 [71](#) Cemeteries

 [71k10](#) Acquisition of and Title to Lands

 [71k14](#) k. Abandonment. [Most Cited Cases](#)

Cemetery continues subject to use as cemetery so long as burials there awaken sacred memories in minds of living.

*250 **257 J. E. Still, Arkadelphia, for appellants.

Boyd Tackett and LeRoy Autrey, Texarkana, for appellees.

HOLT, Justice.

The dispute in this case concerns a one acre tract of land on which is located a cemetery known as the 'Bowen Graveyard'. The appellees, as the heirs and relatives of loved ones buried in this cemetery, brought this suit as a class action to establish the right to use 'Bowen Graveyard' as a public cemetery. The appellants denied that a public cemetery existed and, also, any interference to appellees or the public as to existing graves.


Appellants bring this appeal from a decree favorable to the position of appellees as to a part of this one *251 acre. For reversal appellants contend that (1) they are the owners of the legal title to this portion by virtue of a 1946 deed and (2) that appellees have abandoned any right to use it for burial purposes.

**258 In 1913 A. M. Bowen and his wife, parents of appellant W. Ray Bowen, conveyed by warranty deed to the Trustees of the Pisgah Methodist Church one acre of land on which existed a cemetery '* * * known as the Bowen Graveyard'. In 1946 the Trustees of the Pisgah Methodist Church conveyed by quitclaim deed to the appellants this same one acre tract of land '* * * known as the Bowen Graveyard'. In 1947 this cemetery was the subject of an action instituted in Pike County Chancery Court against appellants with reference to appellees' rights of ingress and egress. There was no formal decree rendered in the case. The docket notation recites that appellants were required to allow appellees access '* * * to cemetery until such times as a road can be constructed * * *'.

From 1915 until 1962 a fence enclosed the east half of this one acre tract. It is undisputed that the fence was maintained in this same location from 1915 until 1962 when the fence was removed by appellants from the south boundary of this enclosed portion. The south fence was moved northward and relocated. As a result, the new south boundary fence then enclosed about one-half of the area previously enclosed by fence. All of the graves were contained in this newly constricted area of one-fourth acre. Before relocation of the fence by appellants the south portion of the fenced area was utilized to some extent by use of the trees for shade during funeral services. This south portion, where no graves are found, received some care and attention from appellees and the community. There have been no burials in the cemetery since 1950. Several witnesses testified that since the north portion was almost filled to capacity they desired and


expected to be buried in this south portion of the cemetery and, thus, near their loved ones.

In rendering his opinion, the Chancellor divided the one acre into three parts. Tract No. 1: The area now *252 enclosed by fence, or that portion containing the graves [approximately one-fourth acre]. Tract No. 2: That part of the area from which appellants removed the fence and containing no graves but previously enclosed with Tract No. 1 [approximately one-fourth acre]. This is the 'disputed area' which is the basis for this appeal. Tract No. 3: The remaining part of the one acre tract which was never enclosed [approximately one-half acre]. The Chancellor found that the appellees have no right or interest in Tract No. 3 and awarded it to appellants since it is undisputed that it was never enclosed nor used for cemetery purposes and that since 1915 until the present time it has been used by the appellants, or their predecessors in title, for agricultural purposes. The court further found that the area represented by tracts one and two is a public cemetery and that any legal title which appellants hold from the Church was subject to the easement that accrues from a public cemetery and that appellees have never abandoned their rights to such cemetery. Accordingly, the Chancellor ordered the appellants to remove the new fence and relocate it where it existed originally so that the enclosure, as restored, would contain approximately one-half acre. The appellants were also enjoined from interfering with the appellees' and the public's right to use 'Bowen Graveyard' as a cemetery. On appeal the appellants question only the court's disposition of Tract No. 2. There is no cross-appeal by appellees.

[1]  We do not agree with appellants' contention that they are the owners in fee simple absolute of this disputed portion of land, Tract No. 2, by virtue of a 1946 quitclaim deed. A purchaser of land is charged with notice that such has been dedicated to public use for cemetery purposes where there are visible signs and suitable markings to call his attention to the existence of such a cemetery and he takes it subject to such public rights. In [Roundtree v. Hutchinson, 57 Wash. 414, 107 P. 345, 27 L.R.A., N.S., 875](#), the court said:

'It is true that there are no reservations in the deeds of appellant's chain of title, but both he and his *253 grantor, Wooley, had notice of the existence of **259 the burying ground, and purchased subject to the rights the public had acquired in the property.'

Also see [United Cemeteries v. Strother, 332 Mo. 971, 61 S.W.2d 907](#), and [Heiligman v. Chambers, \(Okl.\) 338 P.2d 144, 25 A.L.R.2d 583](#).


[2]  In the case at bar, however, in addition to appellants' knowledge of the existence of the cemetery, it is to be noted that the warranty deed by appellant's father in 1913 clearly stated that the conveyance of the property in question was for cemetery purposes and described it as the 'Bowen Graveyard'. Also, in 1946 the quitclaim deed from the Pisgah Methodist Church Trustees to the appellants referred to the one acre being conveyed as the 'Bowen Graveyard'. It cannot be said that appellants purchased this property without knowledge of the existence of this cemetery.



From our review of the cases in other jurisdictions, since we find none applicable in our own, we think the rule that a purchaser of land takes it subject to any dedication and use for cemetery purposes is best stated in the case of [State v. Forest Lawn Lot Owners Association, 152 Tex. 41, 254 S.W.2d 87](#). There the court said:

'* * * The substance of what is said by the courts in all the cited cases is that property once dedicated to cemetery purposes and in use as a burial ground for the dead *may not be sold*, either voluntarily or through judicial proceedings, *in such manner as to interfere with the uses and purposes to which it has been dedicated and devoted.*' [Emphasis added]

See also [10 Am.Jur., Cemeteries, § 6, p. 490](#); [14 C.J.S. Cemeteries § 25, p. 84](#); [130 A.L.R. 264](#) and [75 A.L.R.2d 599](#).

We think the Chancellor was correct in his holding that appellants' legal title is subject to the appellees' and the public's use of the Bowen Cemetery.

[3]  Appellants next contend that since no graves exist in the south half of the originally enclosed portion the *254 appellees have abandoned it for cemetery purposes. We do not agree. It is undisputed that this portion was enclosed by fence from 1915 until the appellants removed the fence therefrom in 1962 and that such portion has been used for auxiliary purposes in conducting burial ceremonies. Further, the evidence indicates some maintenance by appellees and that relatives and loved ones of those interred in the north portion desire burial in Tract No. 2, the area in dispute. The appellants attempt to refute this proposed future use since there have been no burials in the cemetery since 1950.

[4]  [5]  The general rule is that a cemetery is never abandoned nor loses its character and identity as such until the bodies reposing there are removed by friends or relatives or by proper public authority and mere disuse or the lack of continued interments does not constitute abandonment. It continues subject to use as a cemetery so long as the burials there awaken sacred memories in the minds of the living. [10 Am.Jur., Cemeteries, § 36, p. 512](#); [14 C.J.S. Cemeteries § 22, p. 82](#). Also see [Wooldridge v. Smith, 243 Mo. 190, 147 S.W. 1019, 40 L.R.A., N.S., 752](#) and [Currier v. Woodlawn Cemetery, 300 N.Y. 132, 90 N.E.2d 18, 21 A.L.R.2d 465](#).

In [Morgan, et al. v. Collins School House, 160 Miss. 321, 133 So. 675](#), the court said:

'* * * The custom of ages has been for people to bury their relatives together or in the same cemetery as far as reasonably possible and giving a privilege to bury should be understood as carrying this right.'

Although there are no graves in Tract No. 2, the south portion, we think that from the facts in this case it is unquestionably a part of the cemetery as a whole.

In [County Board of Commissioners for Clarendon County v. Holladay, et al., 182 S.C. 510, 189 S.E. 885, 109 A.L.R. 1496](#), the court had before it the question as to whether**260 the cemetery was confined to that area actually occupied by graves. In that case the court said:

'* * * A cemetery includes not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery and ornamental purposes. *255 All must be regarded alike as consecrated to a public and sacred use.'

We think that the south portion, Tract No. 2, was dedicated and consecrated to the sacred use of a public cemetery.

We agree with the Chancellor that the entire area enclosed by the fence from 1915 until 1962, Tracts No. 1 and No. 2, constituted a public cemetery and that the appellees are entitled to the unrestricted use thereof as such.

Affirmed.

Ark. 1963

BOWEN v. HOOKER

Ark. Op. Atty. Gen. No. 2006-211, 2007 WL 459409 (Ark.A.G.)

Office of the Attorney General
State of Arkansas

*1 Opinion No. 2006-211

February 8, 2007

Dr. Ann M. Early
State Archeologist

Dr. Tom Green
Director
Arkansas Archeological Survey
Coordinating Office
2475 North Hatch Avenue
Fayetteville, Arkansas 72704

Dear Drs. Green and Early:

I am writing in response to your request for an opinion concerning the ownership of grave goods or "burial furniture" that might inadvertently be unearthed during construction projects of the United States Corps of Engineers within the State of Arkansas. You reference [A.C.A. §§ 13-6-401](#) to -409 (Repl. 2000 and Supp. 2005), and ask whether Arkansas law covers this issue, or whether an amendment to current law is needed to address the problem.

Specifically, in pertinent part, you recite the following information relating to your request:

We are requesting an opinion from the Attorney General's Office regarding interpretation of the Arkansas Unmarked Burial Act, Act 753 of 1991, amended in 1999, now [Arkansas Code 13-6-401](#) through 409. [\[FN1\]](#) Our specific concern is in the disposition of grave goods that are associated with human burial skeletal remains, or that are found in a grave where the human remains have deteriorated. These latter are often referred to as unassociated grave goods. Questions have been raised by the U.S. Corps of Engineers, Memphis District, regarding their interpretation of the Arkansas law in the context of Corps construction projects in Arkansas.

The U.S. Corps of Engineers is required to prepare for the possibility of encountering archeological sites, including unmarked cemeteries, during their construction projects in Arkansas. Two of these large projects are on the Grand Prairie and Bayou Meto landforms. In drafting an agreement between the Memphis Corps and American Indian Tribes and Nations that have an interest in Arkansas sites, the Corps has proposed that if human graves are inadvertently found during their construction projects, one option will

be to disinter the deceased in accordance with the Unmarked Burial Act provisions, to consult with potential descendants with regard to the disposition of the human remains, and to give any grave goods to the landowner if he/she wishes to have them.

We believe this violates the intent of the Unmarked Burial Act, and flies in the face of both custom and expectations of any racial or ethnic group in the state, but we cannot find language in the Arkansas Code that specifically addresses this point of ownership. We believe that we need clarification about the legal prerogatives of individuals with unmarked cemeteries (and marked cemeteries as well) on their property versus potential descendants of persons in those cemeteries and the objects buried with them... .

Your question is "whether Arkansas law actually covers this situation, or whether we need to seek amendments to current law to address this problem." [\[FN2\]](#)

RESPONSE

In my opinion the issue is not clearly addressed by Arkansas statutes or case law. Although the relevant Arkansas statutes are fairly clear concerning the disposition of "human skeletal burial remains" and "artifacts" uncovered on private land, the statutes do not clearly address the proper disposition of "burial furniture" as defined in those statutes. The state statutory scheme is silent on this issue. Failing any applicable statute governing the disposition of such burial furniture, reference to the common law of Arkansas may be appropriate to determine ownership. Unfortunately, I can find no clearly controlling Arkansas common law doctrine applicable to the ownership of grave goods uncovered on private lands. In my opinion, therefore, as you have suggested, legislative clarification is warranted.

***2** As an initial matter, I understand your question to concern only the "grave goods" or objects placed with human remains at burial. I assume your question does not concern the ownership or proper disposition of actual human remains or any artifacts not placed in relation to burial sites. Indeed, as discussed below, the disposition of those items is clearly addressed by Arkansas law. In addition, you have not relayed any particular facts surrounding the Corps of Engineers' projects at issue. I am not empowered as a fact-finder in the issuance of Attorney General opinions. Because your main concern appears to be the Corps of Engineers proposal to give any such grave goods to the "landowner," however, I assume that your question applies to such objects inadvertently found on privately-owned land that is the subject of a Corps of Engineers' project.

Native American objects of this sort found on federal land [\[FN3\]](#) are clearly governed by the "Native American Graves Protection and Repatriation Act" or "NAGPRA," codified at [25 U.S.C. §§ 3001 to -3013](#). See also, [43 C.F.R. §§ 10.1 to 10.17](#). As stated in [Yankton Sioux Tribe v. U .S. Army Corps of Engineers, 209 F.Supp.2d 1008 \(D.S.D. 2002\)](#):

Under NAGPRA, ownership or control of Native American human remains and associated funerary objects rests with the lineal descendants of the Native American who has left the remains or funerary objects. See [25 U.S.C. § 3002\(a\)\(1\)](#). In cases in which the lineal descendants cannot be ascertained, or which involve unassociated funerary objects, sacred objects, and objects of cultural patrimony, NAGPRA develops a scheme for determining which tribe [\[FN4\]](#) has the closest relationship, and hence the strongest entitlement, to the items, based on geographic and cultural factors. See [25 U.S.C. § 3002\(a\)\(2\)](#). The regulations require federal agency officials to determine who is entitled

to custody of the cultural items, and set forth procedures for the notification of potential lineal descendants and interested tribes. See [43 C.F.R. § 10.6](#).

* * *

In addition to intentional excavation and removal, NAGPRA governs the inadvertent discovery of Native American cultural items on federal or tribal lands:

* * *

As with Native American cultural items intentionally excavated or removed, cultural items that are inadvertently discovered are subject to the ownership and control provisions of [25 U.S.C. § 3002\(a\)](#).

Id. at 1016, 1017. "NAGPRA" regulations provide for a "Plan of Action" or "POA" to manage Native American cultural items that may be encountered during the project. See [43 C.F.R. § 10.3](#).

Ownership of non-Native American archeological resources found on federal land apparently continues to be dictated by the earlier adopted provisions of the "Archeological Resources Protection Act," or ("ARPA"), [16 U.S.C. § 470aa](#) to [§ 470mm](#), which requires any resources excavated or removed to "remain the property of the United States." [16 U.S.C. § 470cc\(b\)\(3\)](#). See also [43 C.F.R. § 7.13](#). This law, like "NAGPRA," does not apply to private lands.

***3** As stated above, I interpret your question as applying to grave goods found on private, rather than federal lands. I will thus assume that the "ownership" provisions of NAGPRA and ARPA are not implicated by your question.

Other federal laws, however, govern the process to be undertaken by federal agencies even on private land. One primary law is the National Historic Preservation Act or "NHPA," which requires what is commonly referred to as a "Section 106 review." This law requires federal agencies to consider the effect of their projects on places included in or "eligible for inclusion" in the National Register of Historic Places. [16 U.S.C. § 470f](#). See also 36 C.F.R. § 800 et seq. Although this law might not at first blush appear to be applicable to the facts at hand, it has been stated that "NHPA created most of the institutions that are central to the historic preservation part of [cultural resource management] today." Thomas King, CULTURAL RESOURCE LAW AND PRACTICE (2d. ed.) at 22. The regulations implementing it require a pre-project "Section 106" review if the activity is "the type of activity that has the potential to cause effects on historic properties." [36 C.F.R. 800.3\(a\)](#). (Emphasis added.) Although this law, and its applicable regulations, allows the entry of "memorandums of agreements" or "programmatic agreements" to govern the undertaking, it does not conclusively dictate ownership of burial items uncovered on private land. See C.F.R. § 800.6.

Another federal statutory scheme of potential applicability, which apparently applies to public or private land, is [16 U.S.C. §§ 469](#) to [-469c-1](#), originally titled the "Reservoir Salvage Act of 1960" and amended by unnamed legislation commonly called the "Moss-Bennett Act," the "Archeological Data Preservation Act of 1974" ("ADPA"), or the "Archeological and Historic Preservation Act" ("AHPA"). The purpose of this law is to "provid[e] for the preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed" as a result of dam construction by an agency of the United States or by "any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program."

These statutes provide methods for the preservation of such specimens ([16 U.S.C. § 469a-1](#)), but do not definitively address the ownership of any objects unearthed, stating only that: "The Secretary shall consult with any interested Federal and State agencies, educational and scientific organizations, and private institutions and qualified individuals, with a view to determining the ownership of and the most appropriate repository for any relics and specimens recovered as a result of any work performed as provided for in this section." *Id.* at § 469a-3. Although this federal statute appears to be the controlling one with regard to the facts giving rise to your question, I should note that it has been called "something of an anachronism, since it is largely redundant with Section 106 review." Thomas King, *CULTURAL RESOURCE LAW AND PRACTICE* (2d Ed.) at 256. In any event, this law and the other federal laws and regulations mentioned, dictate the process to be used to determine ownership of the grave goods about which you inquire. In this regard, you have not indicated, and I am therefore uncertain, whether the agreement you mention is a "Plan of Action" or "POA" under NAGPRA, a "memorandum of agreement" ("MOA"), or a "programmatic agreement" under NHPA, or some other form of agreement made pursuant to federal law or regulations. [\[FN5\]](#) I thus cannot conclusively determine the precise provisions of any applicable federal law. Although federal law dictates the process by which ownership may be determined, it does not appear to dictate the ownership of grave goods when the land at issue is not owned or controlled by the United States. [\[FN6\]](#) Your question focuses on state law, which is now where our discussion must lead.

***4** To the extent state law is applied, the relevant statutes in Arkansas are found, as you note, at [A.C.A. §§ 13-6-401](#) to -409 (Repl. 2003 and Supp. 2005) and were first adopted in 1991. The legislative intent of this law is found at [A.C.A. § 13-6-401](#), which provides that:

(a) It is a declaration and statement of the General Assembly's intent that all human burials and human skeletal burial remains shall be accorded equal treatment and respect for human dignity without reference to their ethnic origins, cultural backgrounds, religious affiliations, or date of burial.

(b) The provisions of this subchapter shall apply to all human burials or human skeletal burial remains found on or in all public or private lands or waters of Arkansas.

The statutes first define the applicable terms, as follows:

(1) "Artifacts" means arrowheads, other bone and stone tools, pottery, pottery fragments, china, metal objects or other material objects made by Native American settlers, or other residents of Arkansas, which were left or lost in or on the ground, except those items which were placed in direct association with human skeletal burial remains or burial furniture as defined in this subchapter;

(2) "Burial furniture" means any items which were placed with human remains at the time of burial or in apparent intentional association with the burial and would include burial markers, items of personal adornment, casket and casket hardware, stone and bone tools, pottery vessels, or other similar objects or materials;

(3) "Burial grounds" means any place where human skeletal remains are or have been buried;

(4) "Desecration" means the intentional, willful, or knowing removal or disturbance of human skeletal burial remains or burial furniture which was placed with a buried human body, or treating such human skeletal burial remains in an irreverent and contemptuous

manner; and

(5) "Human skeletal burial remains" means the calcified portion of a human body which remains after the flesh has decomposed.

I assume your question primarily focuses on "burial furniture" as defined above, and not "human skeletal burial remains" or "artifacts," the latter of which is specifically defined as excluding "burial furniture."

The substantive provisions of the subchapter in question accomplish several objectives. The buying, selling, or bartering of "human skeletal burial remains" or their associated "burial furniture" is prohibited and subjected to a criminal penalty. [A.C.A. § 13-6-406\(a\)](#). ("Artifacts" are excluded from this prohibition.) [A.C.A. § 13-6-406\(b\) and \(c\)](#). [FN7] Displaying human skeletal burial remains is criminalized. [A.C.A. § 13-6-407](#).

"Desecration" of burial grounds and associated burial furniture is criminalized. An exception is made, however, for "the disturbance of human skeletal burial remains or burial furniture by landowners or agricultural tenants as a consequence of agricultural activity or any other activity unless the landowner or agricultural tenant knowingly desecrates or knowingly allows desecration of a cemetery or burial site." [A.C.A. § 13-6-408\(c\) \(Supp. 2005\)](#). If human remains are "exhumed for relocation," then at the request of a direct descendant, specific church, or federally recognized tribal group, and upon the providing of evidence of descent or affiliation, the human remains shall be conveyed to such person or entity. [A.C.A. § 13-6-404](#). This last-cited section, however, is restricted to human remains and does not address "burial furniture."

***5** The applicable subchapter is fairly clear as to the disposition of "human skeletal burial remains" and the treatment of "artifacts." "Human skeletal burial remains" are transferred to the descendant, church or federally-recognized tribal group, depending on the evidence produced. "Artifacts" may be collected by landowners (see [A.C.A. § 13-6-406\(b\) and \(c\)](#) (n. 1, supra), and it is not unlawful to buy, sell, or barter such artifacts. Id. The subchapter is less clear with regard to the disposition of "burial furniture." It is clear that it is unlawful to buy, sell or barter "associated burial furniture." [A.C.A. § 13-6-406\(a\)](#). [FN8] Otherwise, the disposition or ownership of these types of objects is not specifically addressed in the statutes.

Some evidence of legislative intent as to the disposition of these items may be gleaned from the provisions set out in [A.C.A. § 13-6-403](#), which provides as follows:

(a) The public has a right to the knowledge to be derived and gained from the scientific study of human skeletal burial remains and burial furniture.

(b) Therefore, when justified by "A State Plan for the Conservation of Archeological Resources in Arkansas" as promulgated by the State Archeologist and the State Historic Preservation Officer, the investigation, excavation, removal, and analysis of human skeletal burial remains and burial furniture is authorized and, if done, must be carried out with the consent of the landowner and consul[t]ation with the appropriate tribe, if identifiable, and under the direction of archeologists employed by the state or the United States Government or by archeologists meeting the United States Department of Interior's professional qualifications standards found in the current Code of Federal Regulations.

This statute expresses a public interest in burial furniture. It addresses the excavation and removal of human skeletal burial remains and burial furniture. Any such removal must be carried out "under the direction of archeologists employed by the state or the United States Government or by archeologists meeting the United States Department of Interior's

professional qualifications standards found in the current Code of Federal Regulations" and only with the consent of the landowner and in consultation with the appropriate tribe, if identifiable. These provisions suggest that "burial furniture" is not the type of item subject to the sole dominion of the landowner.

A question may arise, however, as to whether this statute is applicable when burial furniture is inadvertently discovered during the course of non-archeologically related earth-moving activities on private land by or with the consent of the landowner. In my opinion the statute above is broad enough to cover that occurrence. The applicable subchapter clearly applies on both public and private lands. [A.C.A. § 13-6-401\(b\)](#). [Subsection \(a\) of A.C.A. § 13-6-403](#) expresses a "public interest" in the knowledge to be gained from the scientific study of burial furniture. No distinction is made in subsection (a) between burial furniture intentionally excavated and burial furniture inadvertently unearthed. It is therefore reasonable to infer that this "public interest" attaches even to the inadvertent discovery of burial furniture on private land. The public interest in such burial furniture is protected by having only the authorized officials listed above direct any excavation and removal of the objects. [A.C.A. § 13-6-406\(b\)](#). This of course must be undertaken with the consent of the landowner and in consultation with the appropriate tribe, if identifiable. In my opinion, therefore, any excavation or removal of such items may only be undertaken under the direction of the authorized officials listed above, with consent of the landowner, and in consultation with the appropriate tribe. See also, Op. Att'y Gen. 91-112 ("If authorized ... the actual investigation, excavation, removal, and analysis of ... burial furniture must be carried out under the direction of archeologists employed by the State, or U.S. Government, or by archeologists meeting the U.S. Department of the Interior's professional qualification standards"). [\[FN9\]](#)

***6** In my opinion this conclusion is not inconsistent with [A.C.A. § 13-6-408\(c\)](#), which creates an exception to the crime of "desecration" for certain inadvertent disturbances of burial furniture ("Exempted from this section is disturbance of human skeletal burial remains or burial furniture by landowners or agricultural tenants as a consequence of agricultural activity or any other activity unless the landowner knowingly desecrates or knowingly allows desecration of a cemetery or burial site"). This is the only provision of the applicable subchapter that clearly addresses the inadvertent discovery of human remains and burial furniture. It is not a crime for landowners and agricultural tenants to inadvertently "disturb" such human remains and burial furniture. In my opinion, however, the express language of that subsection does not specifically sanction or authorize such persons to actually excavate or remove such items, once inadvertently "disturbed." Although it is not a criminal offense for such a landowner or agricultural tenant to inadvertently "disturb" such objects, this is not tantamount to an authorization for the landowner or tenant to remove, excavate, and retain such items. The public interest mentioned above attaches to any such items. In my opinion, therefore, the excavation and removal of such items, must, according to [A.C.A. § 13-6-403](#) above, be undertaken only under the direction of the authorized officials mentioned in that subsection.

Although the discussion above, and any applicable federal law (see discussion, supra), may resolve any issues as to the proper procedure for the excavation or removal of burial furniture, questions nonetheless remain concerning the ownership of any items excavated. The applicable subchapter is simply silent on this point. [\[FN10\]](#) Where the statutory scheme is silent, resort to the common law of Arkansas is required. [\[FN11\]](#) See e .g., [District No. 21 United Mine Workers or America v. Bourland, 169 Ark. 796, 277 S.W. 546](#)

[\(1925\)](#) ("In the absence of a statute on the subject we are bound by the rule of the common law..."). See also, [A.C.A. § 1-2-119 \(Repl. 1996\)](#) (adopting English common law not inconsistent with the U.S. or Arkansas Constitutions or law).

The Arkansas Supreme Court most recently discussed the common law relating to "found property" in [Terry v. Lock, 343 Ark. 452, 37 S.W.3d 202 \(2001\)](#). In Terry, the court upheld a trial court's finding that \$38,200 of dusty currency concealed behind ceiling tiles in a motel was "mislaidd" property and therefore belonged to the motel owner as against a claim by the independent contractors who found it while renovating the motel. In order to understand the distinctions between various kinds of found property, it is necessary to quote from that opinion at some length:

We have not previously analyzed the various distinctions between different kinds of found property but those distinctions have been made in the common law, and have been analyzed in decisions from other jurisdictions. The Supreme Court of Iowa has explained that "under the common law, there are four categories of found property: (1) abandoned property, (2) lost property, (3) mislaidd property, and (4) treasure trove." [Benjamin v. Linder Aviation, Inc., 534 N.W.2d 400 \(Iowa 1995\)](#); see also [Jackson v. Steinberg, 186 Or. 129, 200 P.2d 376 \(1948\)](#). "The rights of a finder of property depend on how the found property is classified." Benjamin, supra. The character of the property should be determined by evaluating all the facts and circumstances present in the particular case. See [Schley v. Couch, 284 S.W.2d 333 \(Tex. 1955\)](#).

*7 We next consider the classification of found property described in Benjamin, supra.

A. Abandoned property

Property is said to be "abandoned" when it is thrown away, or its possession is voluntarily forsaken by the owner, in which case it will become the property of the first occupant; or when it is involuntarily lost or left without the hope and expectation of again acquiring it, and then it becomes the property of the finder, subject to the superior claim of the owner. [Eads v. Brazelton, 22 Ark. 499 \(1861\)](#); see also [Crosston v. Lion Oil & Refining Co., 169 Ark. 561, 275 S.W. 899 \(1925\)](#).

B. Lost property

"Lost property" is property which the owner has involuntarily parted with through neglect, carelessness, or inadvertence, that is, property which the owner has unwittingly suffered to pass out of his possession, and of whose whereabouts he has no knowledge. Property is deemed lost when it is unintentionally separated from the dominion of its owner. Popularly, property is lost when the owner does not know, and cannot ascertain, where it is, the essential test of lost property is whether the owner parted with the possession of the property intentionally, casually or involuntarily; only in the latter contingency may it be lost property. Property is not "lost" unless the owner parts with it involuntarily and unintentionally, and does not, at any time thereafter, know where to find it. A loss is always involuntary; there can be no intent to part with the ownership of lost property. [Citations omitted.]

The finder of lost property does not acquire absolute ownership, but acquires such property interest or right as will enable him to keep it against all the world but the rightful owner. This rule is not affected by the place of finding, as the finder of lost property has a

right to possession of the article superior to that of the owner or occupant of the premises where it is found. [Citations omitted.]

C. Mislaid property

"Mislaid property" is that which is intentionally put into a certain place and later forgotten. The place where money or property claimed as lost is found is an important factor in the determination of the question of whether it was lost or only mislaid. But where articles are accidentally dropped in any public place, public thoroughfare, or street, they are lost in the legal sense. In short, property will not be considered to have been lost unless the circumstances are such that, considering the place where, and the conditions under which, it is found, there is an inference that it was left there unintentionally.

[Citations omitted.]

A finder of mislaid property acquires no ownership rights in it, and, where such property is found upon another's premises, he has no right to its possession, but is required to turn it over to the owner of the premises. This is true whether the finder is an employee or occupier of the premises on which the mislaid article is found or a customer of the owner or occupant.

*8 The right of possession, as against all except the true owner, is in the owner or occupant of the premises where the property is discovered, for mislaid property is presumed to have been left in the custody of the owner or occupier of the premises upon which it is found. The result is that the proprietor of the premises is entitled to retain possession of the thing, pending a search by him to discover the owner, or during such time as the owner may be considered to be engaged in trying to recover his property. When the owner of premises takes possession of mislaid personal property left by an invitee he becomes a gratuitous bailee by operation of law, with a duty to use ordinary care to return it to the owner.

The finder of mislaid property must turn it over to the owner or occupier of the premises where it is found; it is the latter's duty to keep mislaid property for the owner, and he must use the care required of a gratuitous bailee for its safekeeping until the true owner calls for it. As against everyone but the true owner, the owner of such premises has the duty to defend his custody and possession of the mislaid property, and he is absolutely liable for a misdelivery. [Citations omitted.]

D. Treasure trove

According to the common law, treasure trove is any gold or silver in coin, plate, or bullion, whose owner is unknown, found concealed in the earth or in a house or other private place, but not lying on the ground. Where the common-law treasure trove doctrine has been applied to determine the ownership of a find, property considered as treasure trove has included gold or silver coin, and its paper representatives, buried in the earth or hidden in some other private place, including a mattress, a cabinet sink, and a piano. It is not essential to its character as treasure trove that the thing shall have been hidden in the ground; it is sufficient if it is found concealed in other articles, such as bureaus, safes, or machinery. While, strictly speaking, treasure trove is gold or silver, it has been held to include the paper representatives thereof, especially where found hidden with those precious metals. [Citations omitted.]

"Treasure trove carries with it the thought of antiquity; to be classed as treasure trove, the treasure must have been hidden or concealed so long as to indicate that the owner is probably dead or unknown." [Citation omitted.] "Title to treasure trove belongs to the finder, against all the world except the true owner." [Citations omitted.]

Id. at 460 to -463. See also, [Franks v. Pritchett](#), 88 Ark. App. 243, 197 S.W.3d 5 (2004) (\$14,200 in dresser drawer of hotel found by hotel resident was "mislaidd" property and belonged to hotel owners).

It is difficult to characterize items placed in connection with a burial or grave as "abandoned," "lost," or "mislaidd." Items placed with the deceased at burial are not "thrown away" and the owner does not "voluntarily" forsake possession. Such items are not "lost" because the owner has not "involuntarily" parted with them through neglect or carelessness, and the items are not "mislaidd" because although the items are intentionally placed, the "owner" has not "forgotten" them. In addition, the items are not "treasure trove," because that category only applies to money. See e .g., Zahra S. Karinshak Comment: [Relics of the Past--To Whom Do They Belong? The Effect of an Archaeological Excavation on Property Rights](#), 46 Emory L.J. 867, 895 (Spring, 1997) ("It is most appropriate to view artifacts as a separate category of find because they do not meet the traditional categories of being mislaidd, lost, or treasure trove"). See also, Gene A. Marsh, [Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items](#), 24 Ariz. St. L.J. 79, 118 (Spring, 1992) (stating, in referring to the introductory expression of legislative intent in [Arkansas Code 13-6-401](#) with regard to equal treatment of human burials without reference to their ethnic origins or date of burial, that: "Th[is] provision removes the problem that other states have faced when ancient burial sites have been viewed as abandoned and thus not entitled to protection under burial or cemetery desecration statutes"). [FN12] See also, [Charrier v. Bell](#), 496 So.2d 601 (La. Ct. App. 1986) (burial of Native American items with the dead does not constitute an abandonment and burial objects belong to Indian tribe as descendants).

*9 The courts of some states have adopted an exception to the categories set out above for "property embedded in the soil." As stated in [Ritz v. Selma United Methodist Church](#), 467 N.W.2d 266 (Iowa 1991):

Property which has become part of the natural earth is not subject to the general rule of lost or mislaidd property. [Goddard](#), 86 Iowa at 85, 52 N.W. at 1125. Such property belongs to the owner of the real estate on which it is found. Id. Examples of this type of property are a meteorite, a prehistoric boat, valuable earthenware and gold-bearing quartz. 1 Am.Jur.2d, § 4 at 6; [Allred v. Biegel](#), 240 Mo.App. 818, 820, 219 S.W.2d 665, 666 (1949); [Burdick v. Chesebrough](#), 94 A.D. 532, 537, 88 N.Y.S. 13, 15 (1904).

Id. at 269. See also, [U .S. v. Shivers](#), 96 F.3d 120 (5th Cir. 1996) (where federal statute was inapplicable due to insufficient age of the item found, federal common law gave U.S. Government (as landowner) ownership of metal tokens "embedded" in national park lands).

The Arkansas Supreme Court has never had occasion to address the status of "property embedded in the soil." I thus cannot opine with confidence that this concept would be applied in Arkansas, or to facts involving burial items. (See, e .g., John B. Winski, [There are Skeletons in the Closet: The Repatriation of Native American Human Remains and Burial Objects](#), 34 Ariz. L. Rev. 187, 204 (1992) (asserting that "common law cases agree that burial objects, if removed from the grave, belong to the person who buried the deceased, or that person's descendants" and do not fall within the doctrine of "property

embedded in the soil.") Again, the issue has not been addressed in Arkansas. As a consequence, it is impossible to apply the state common law analysis which would ordinarily be undertaken to determine ownership of the found items in question. As you indicate in your request, therefore, legislative clarification is warranted. Deputy Attorney General Elana C. Wills prepared the foregoing opinion, which I hereby approve.

Sincerely,

Dustin McDaniel
Attorney General

[FN1](#). This Act was adopted without a formal title, so I assume your reference to it as the "Arkansas Unmarked Burial Act" is a common name.

[FN2](#). I should note that HB1068, currently pending in the 86th General Assembly, amends various provisions of [A.C.A. §§ 13-6-301](#) to -308. It addresses "archeological sites" including "burial grounds." This bill has not become law as of this date.

[FN3](#). "Federal land," is defined in NAGPRA as "any lands other than tribal lands which are controlled or owned by the United States... ." [25 U.S.C. § 3001\(5\)](#). See also [43 C.F.R. 10.2\(f\)\(2\)](#).

[FN4](#). "Indian tribe" is defined in NAGPRA as "any tribe, band, nation, or other organized group or community of Indians ... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." [25 U.S.C. § 3001\(7\)](#).

[FN5](#). Certain "alternative" procedures are authorized by the NHPA regulations. See [36 C.F.R. § 800.14](#).

[FN6](#). I should note, however, that one regulation adopted under the authority of NHPA, ARPA and the "Moss-Bennett Act" mentions ownership of "material remains" on private lands by stating that "'Material remains' as defined in § 79.4 of this part, that are excavated or removed from a prehistoric or historic resource generally are the property of the landowner." [36 C.F.R. § 79.3](#). This part of the federal regulations has been described as a "[National Park Service] regulation, applicable government-wide, that governs the 'curation' of federally owned archeological material and data... . The regulations establish standards for curatorial facilities that house federal collections, and procedures by which federal agencies are to ensure that their collections are properly housed in such facilities." See, King, *supra*, at 257. Although I have found no reported cases discussing the precise impact of this regulation, legal commentators do not appear to characterize it as invariably dictating landowner ownership of grave goods found on private land. *Id.* Cf. also, [Bonnichsen v. U.S.](#), [217 F. Supp. 2d 1116 \(D. Ore. 2000\)](#) at 1665-67 (discussing the impact of this regulation on remains removed from federal land under an ARPA permit).

[FN7](#). These subsections provide respectively that: "Artifacts as defined in this subchapter and private collections legally acquired prior to July 15, 1991, are exempted from this

section" and "Nothing in this subchapter prohibits the collecting of such artifacts by landowners or others who do so with the landowner's permission."

[FN8](#). Although [A.C.A. § 13-6-403\(a\)](#) prohibits the selling of human skeletal burial remains and their "associated burial furniture," the applicable subchapter provides no separate definition for "associated burial furniture." It defines only "burial furniture." [A.C.A. § 13-6-402\(2\)](#).

[FN9](#). In this regard, the "State Plan" provides that "NO ONE, not even a landowner nor someone with the landowner's permission, can purposefully dig in a grave other than for scientific purposes." A State Plan for the Conservation of Archeological Resources in Arkansas, Part I, Protection Strategies for Archeologic Resources in Arkansas (Davis, Edition 1982, Rev. 1994) at PS 6.

[FN10](#). I will note, however, that separate statutes in preceding subchapters provide that all "artifacts, fossils, relics, and other personal property discovered, donated, or otherwise acquired in pursuance of th[e Arkansas Archeological Survey] shall be the property of the State of Arkansas held in trust by the University of Arkansas. A.C.A. § 13- 6-213(a) (Repl. 2003). See also, [A.C.A. § 13-6-214\(a\)](#) ("The Arkansas Archeological Survey shall hold title to and have primary responsibility for all archeological objects and material obtained pursuant to this program or otherwise accruing to the survey.") In addition, "[a]ll information and objects deriving from state lands shall be utilized solely for scientific or public educational purposes and shall remain the property of the state." [A.C.A. § 13-6-301\(a\)\(2\) \(Repl. 2003\)](#) (emphasis added). I assume that your question involves the unearthing of objects on private, rather than state land, and that it may involve instances in which the discovery is not undertaken as a part of the program of the Arkansas Archeological Survey. These provisions are therefore not necessarily controlling as to the facts upon which your question is premised.

[FN11](#). Arkansas does not have a generally applicable "Lost Goods" Act, which would dictate the disposition of such property. In addition, the "Unclaimed Property Act" codified at [A.C.A. §§ 18-28-201](#) to -230 (Repl. 2003) does not cover the type of items you describe. See [A.C.A. § 18-28-201\(13\)\(A\)](#) and [§ 18-28-203 \(Repl. 2003\)](#).

[FN12](#). In my opinion [A.C.A. § 20-17-905 \(Repl. 2005\)](#), which authorizes a circuit judge to order the removal of the dead from an "abandoned cemetery" in certain locations, is likely inapplicable to the facts at hand. In the absence of this or some other official process, the "general rule is that a cemetery is never abandoned ... until the bodies reposing there are removed by friends or relatives or by proper public authority and the mere disuse or the lack of continued interments does not constitute abandonment." [Bowen v. Hooker, 237 Ark. 250, 372 S.W.2d 257 \(1963\)](#).

Ark. Op. Atty. Gen. No. 2006-211, 2007 WL 459409 (Ark.A.G.)

282 Ark. 472, 669 S.W.2d 447
Supreme Court of Arkansas.
GROWTH PROPERTIES I et al., Appellants,
v.
Druie CANNON et al., Appellees.

No. 84-53.

May 21, 1984.


Children of decedents and surviving spouse of one of the decedents brought action against cemetery which had constructed a temporary access road for movement of heavy equipment across gravesites of decedents. The Circuit Court, Clark County, J. Hugh Lookadoo, J., awarded compensatory and punitive damages, and cemetery appealed. The Supreme Court, Hays, J., held that: (1) evidence supported court's finding that cemetery had committed tort of outrage; (2) evidence supported award of compensatory and punitive damages even though actual out-of-pocket expenses were not proved; but (3) one plaintiff, who was a party in name only in that he had not testified nor appeared at trial, was not entitled to award of damages for emotional distress in absence of specific proof.


Affirmed as modified.

West Headnotes


[1]  [KeyCite Citing References for this Headnote](#)


 [115 Damages](#)

 [115III](#) Grounds and Subjects of Compensatory Damages

 [115III\(A\)](#) Direct or Remote, Contingent, or Prospective Consequences or Losses


 [115III\(A\)2](#) Mental Suffering and Emotional Distress

 [115k57.19](#) Intentional or Reckless Infliction of Emotional Distress; Outrage

 [115k57.20](#) k. In General. [Most Cited Cases](#)


(Formerly 115k50.10)

 [115 Damages](#)  [KeyCite Citing References for this Headnote](#)

 [115III](#) Grounds and Subjects of Compensatory Damages

 [115III\(A\)](#) Direct or Remote, Contingent, or Prospective Consequences or Losses

 [115III\(A\)2](#) Mental Suffering and Emotional Distress

 [115k57.19](#) Intentional or Reckless Infliction of Emotional Distress; Outrage

 [115k57.22](#) k. Nature of Conduct. [Most Cited Cases](#)

(Formerly 115k50.10)

Essence of tort of outrage is injury to plaintiff's emotional well-being because of outrageous treatment by defendant; if the conduct is sufficiently flagrant to give rise to the tort, then injury law seeks to redress is the anguish itself and it need not rest, parasitically, on more demonstrative loss or injury, that is, mental anguish itself is the actual damage and proof of special damage in terms of out-of-pocket expenses of exact pecuniary measurement is not essential to a recovery of compensatory damages.

[2]  [KeyCite Citing References for this Headnote](#)

 [115 Damages](#)

 [115V](#) Exemplary Damages

 [115k87](#) Nature and Theory of Damages Additional to Compensation

 [115k87\(2\)](#) k. Necessity of Actual Damage. [Most Cited Cases](#)

 [115 Damages](#)  [KeyCite Citing References for this Headnote](#)

 [115IX](#) Evidence

🔑 [115k183](#) Weight and Sufficiency

🔑 [115k192](#) k. Mental Suffering and Emotional Distress. [Most Cited Cases](#)
(Formerly 115k50.10)

Evidence supported trial court's finding that cemetery, by constructing a temporary access road for movement of heavy equipment across gravesites of plaintiffs' relatives when there was an alternate means of accomplishing the construction project, committed tort of outrage; therefore, trial court did not err in awarding plaintiffs both compensatory and punitive damages, even though there was no proof of any out-of-pocket expenses incurred by plaintiffs and even though no inference of willful malice could be drawn from the evidence.

[3]  [KeyCite Citing References for this Headnote](#)

🔑 [115](#) Damages

🔑 [115V](#) Exemplary Damages

🔑 [115k87](#) Nature and Theory of Damages Additional to Compensation

🔑 [115k87\(2\)](#) k. Necessity of Actual Damage. [Most Cited Cases](#)

Rule that there can be no recovery of punitive damages without actual damages has no application where jury or trial judge awards compensatory damages; it only applies where no compensatory or actual damages are awarded.

[4]  [KeyCite Citing References for this Headnote](#)

🔑 [115](#) Damages

🔑 [115V](#) Exemplary Damages

🔑 [115k91.5](#) Grounds for Exemplary Damages

🔑 [115k91.5\(1\)](#) k. In General. [Most Cited Cases](#)
(Formerly 115k91(1))

An intent to do an act from which suffering can be expected to result will sustain an award of punitive damages if sufficiently wanton.

[5]  [KeyCite Citing References for this Headnote](#)

🔑 [115](#) Damages

🔑 [115IX](#) Evidence

🔑 [115k183](#) Weight and Sufficiency

🔑 [115k192](#) k. Mental Suffering and Emotional Distress. [Most Cited Cases](#)

In action for alleged tort of outrage, trial court's finding that cemetery, which constructed a temporary access road for movement of heavy equipment across gravesites of plaintiffs' relatives, did not act in good faith based on belief that they had a contractual right and obligation under their bylaws to proceed as they did was not inconsistent with the evidence.

[6]  [KeyCite Citing References for this Headnote](#)

🔑 [115](#) Damages

🔑 [115IX](#) Evidence

🔑 [115k163](#) Presumptions and Burden of Proof

🔑 [115k163\(1\)](#) k. Necessity of Proof as to Damages in General. [Most Cited Cases](#)


Damages for mental suffering that results from tort of outrage cannot be justified on behalf of one who is a party to the action in name only and who does not testify nor appear at trial.

[7]  [KeyCite Citing References for this Headnote](#)

 [115 Damages](#)

 [115IX Evidence](#)

 [115k163 Presumptions and Burden of Proof](#)

 [115k163\(1\) k. Necessity of Proof as to Damages in General. \[Most Cited Cases\]\(#\)](#)


Plaintiff, who was named in action seeking damages from cemetery which had constructed a temporary road access for movement of heavy equipment across gravesites of plaintiffs' relatives and who did not testify nor appear at the trial, was not entitled to award of damages for emotional distress in absence of specific proof.

[8]  [KeyCite Citing References for this Headnote](#)

 [115 Damages](#)

 [115IX Evidence](#)

 [115k163 Presumptions and Burden of Proof](#)

 [115k163\(1\) k. Necessity of Proof as to Damages in General. \[Most Cited Cases\]\(#\)](#)

Mental anguish may not be inferred on behalf of someone who fails to testify concerning his own experience.


**448 *473 Eudox Patterson, Hot Springs, for appellants.

McMillan, Turner & McCorkle, Arkadelphia, for appellees.

HAYS, Justice.

This case involves the tort of outrage. Appellees are the children of Kell Cannon and the surviving spouse and children of Mildred Fouts Cannon. Appellees filed suit against the appellants, corporations which operate Rest Haven Memorial Gardens, alleging that during 1982 the appellants, notwithstanding their express obligation to supply proper, perpetual care, committed a willful trespass to the graves of Kell Cannon and Mildred Cannon by constructing a road across the gravesites for the movement of heavy equipment, to the severe mental anguish and distress of the appellees. The cause was tried before the circuit judge sitting as a jury, who awarded \$2,500 in compensatory damages to some and \$1,500 to others, with an *474 additional \$5,000 in punitive damages to each of eight appellees, a total judgment of \$55,000 [FN1](#).

[FN1](#). The judgment makes no mention of plaintiff Minnie Cannon.


[1]  Appellants' first two points for reversal may be treated as one—that it was error to award either compensatory or punitive damages in the absence of proof of actual damage. They submit that none of the appellees testified to any loss or injury “except some rather vague references to feeling bad about it, or being ‘heartsick’.” But the answer to the argument lies in the fact that the essence of the tort of outrage is the injury to the plaintiff’s emotional well-being because of outrageous treatment by the defendant. If the conduct is sufficiently flagrant to give rise to the tort, then the injury the law seeks to redress is the anguish itself and it need not rest, parasitically, on more demonstrative loss or injury. [M.B.M. v. Counce, 268 Ark. 269, 596 S.W.2d 681 \(1980\)](#);

Prosser, Law of Torts, 4th Edition, § 12, p. 59-60; [Restatement of Torts, 2d, § 905\(b\) p. 456](#). In two early cases this court pointed the way for what Professors Calvert Magruder ^{FN2} and William L. Prosser ^{FN3} a decade later defined as an emerging tort based on the intentional infliction of mental suffering. [Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 \(1930\)](#); [Lyons v. Smith, 176 Ark. 728, 3 S.W.2d 982 \(1928\)](#). We said that physical injury as a prerequisite to a recovery for mental suffering did not apply to wrongs committed deliberately or wantonly and in both cases we upheld awards of punitive damages superimposed on compensatory damages where the insult was injured feelings without corporal injury. See also [Geyer v. Western Union Telegraph Co., 192 Ark. 578, 93 S.W.2d 660 \(1936\)](#). Here, the circuit judge determined that as a result of appellants' conduct, which he found consistent with the tort of outrage, actual damages of \$1,500 by five plaintiffs and \$2,500 by three others, were sustained because of mental anguish. Hence, mental anguish itself is the actual damage, and proof of special damage in terms of out-of-pocket expenses of exact *475 pecuniary measurement is not essential to a recovery of compensatory damages.


^{FN2}. Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harvard Law Review 1033.


^{FN3}. Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Michigan Law Review 814.


In *M.B.M. v. Counce, supra*, this court examined what has come to be called the tort of outrageous conduct, drawing a careful distinction between our earlier cases in which recovery for mental suffering without physical injury had been allowed, as in [Erwin v. Milligan, 188 Ark. 658, 67 S.W.2d 592 \(1934\)](#); *Wilson v. Wilkins, supra*; and [Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 \(1920\)](#), or denied, as in **449 [Geyer v. Western Union Telegraph Co., 192 Ark. 578, 93 S.W.2d 660 \(1936\)](#) and [Davis v. Richardson, 76 Ark. 348, 89 S.W. 318 \(1905\)](#) and [St. Louis Iron Mt. & So. Ry. Co. v. Bragg, 69 Ark. 402, 64 S.W. 226 \(1901\)](#). There is no need to repeat the uncertain progress that brought us to the rule announced in *M.B.M. v. Counce*, as that is done with care in the *Counce* opinion, where we subscribed to the view of William L. Prosser that the wrong of intentional infliction of mental suffering had been created by case law and was entitled to recognition as a separate tort. All that was required of the judiciary was to abandon the contrivance of finding a constructive or theoretical tort to justify an award of damages for mental anguish. In acknowledging the existence of this "new" tort the court in *M.B.M. v. Counce* emphasized that the conduct, to be actionable, required that it be so extreme and outrageous as to be intolerable in a civilized society. Later cases recognizing the tort of outrage as such are [Givens v. Hixon, 275 Ark. 370, 631 S.W.2d 263 \(1982\)](#); [Dalrymple v. Fields, 276 Ark. 185, 633 S.W.2d 362 \(1982\)](#), and [Orlando v. Alamo, 646 F.2d 1288 \(8th Cir.1981\)](#).

[2]  There was proof in this case that the appellees, a close-knit family, had acquired four connecting gravesites in appellants' Rest Haven Memorial Gardens, which they attended and beautified with some regularity after the burial of Kell Cannon in 1969 and Mildred Fouts Cannon in 1974. In the winter or early spring of 1982 and for several months thereafter appellants constructed a lawn crypt near the Cannon graves. The construction interfered with existing drainage and water collected at the gravesites after a rainfall. To alleviate the problem, appellants began the installation of a french drain and in the course of construction heavy *476 vehicles were driven across the graves. There was testimony from witnesses other than the appellees that the Cannon vaults became exposed as a result of the excavation work. Some of the appellees complained, others refrained from coming during the construction. One appellee was told by one of appellants' employees, evidently with some abruptness, not to come back until the work was finished if she found it upsetting.




Appellants urge that the work was necessary to correct a drainage problem and that no means of access existed which did not require passage over existing graves. But those arguments cannot be sustained, as there was proof the standing water was the result of the lawn crypt, which appellants elected to construct, and, beyond that, proof that the appellants could have avoided damaging the gravesites by simply removing and rebuilding what appears to be a low brick wall. Without attempting to recount the testimony in detail, it is enough to say photographic exhibits show considerable excavation occurred around the graves and heavy vehicles passed back and forth over the gravesites to within a foot or two of the headstones, and that appellees were anguished to the satisfaction of the trial judge by what they regarded as the desecration of their family burial plot. Had there been no other means of accomplishing the drain construction it might be more difficult to justify the result in this case, but the proof showed that the appellants had an alternative open to them as a means of access which did not require movement over gravesites, which they opted against, evidently because it meant removing and rebuilding a brick wall adjacent to the crypt.

[3]  Appellants remind us that there can be no recovery of punitive damages without actual damages. [Williams v. Carr, 263 Ark. 326, 565 S.W.2d 400 \(1978\)](#); [Williams v. Walker, 256 Ark. 421, 508 S.W.2d 52 \(1974\)](#). But it is only where no compensatory or actual damages are awarded that the rule pertains-it has no application where the jury or trial judge awards compensatory damages, as is true of the case before us.

[4]  Next, appellants insist that evidence of malice, willfulness*477 or wantonness is lacking and therefore it was error to award punitive damages. But the argument tends to confuse the intent to cause suffering with the intent to do an act from which suffering can be expected to result. The **450 former may be maliciously intended while the latter may be merely the result of a conscious indifference to the consequences. But even the latter, if sufficiently wanton, will sustain the award. [Southern Farm Bureau Casualty Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582 \(1969\)](#); [Vogler v. O'Neal, 226 Ark. 1007, 295 S.W.2d 629 \(1956\)](#); [Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 \(1948\)](#); [Texarkana Gas & Electric Co. v. Orr, 59 Ark. 215, 27 S.W. 66 \(1894\)](#). We concede that no inference of willful malice may be drawn from the evidence in this case, but we do not agree that punitive damages are not recoverable as a matter of law on the evidence presented. Appellees proved the appellants not only breached a duty to provide perpetual care to appellees' family members but engaged in a prolonged and callous desecration of the graves of their kinsmen. Opinions can differ widely, of course, as to where the line falls between conduct that merely offends and that which is so outrageous as to be intolerable in a civilized society. Here, the trial court sitting as a jury determined that appellants' conduct was intolerable and we cannot say the supporting evidence was wholly without substance in view of the deep human feelings involved. The grounds where close family members-wives, parents, children-lie buried have a special place in the minds and sentiments of men and women of every race and culture. They are places to be preserved from the erosions of time and nature, if possible, and certainly from the wanton desecration of those who have entered into a covenant to keep them perpetually protected. [Matthews v. Forrest, 235 N.C. 281, 69 S.E.2d 553 \(1952\)](#); [Bessemer Land and Improvement Co. v. Jenkins, 111 Ala. 135, 18 So. 565 \(Ala.1895\)](#); Mental Suffering for Trespass to Burial Lot, 6 Vand.L.Rev. 799 at p. 801. The argument that it was unavoidable was obviously rejected by the trier of fact.

[5]  The final argument, that appellants acted in good faith based on the belief that they had a contractual right and obligation under the by-laws to proceed as they did was rejected by the trial court and we cannot say the finding is inconsistent with the

evidence. Quite aside from the fact the *478 by-laws were adopted well after the Cannons were buried, the argument ignores the fact that having created the problem, appellants chose to remedy it by using the Cannon gravesites as a thoroughfare for construction vehicles, when an alternative route, albeit less convenient, was open to them. The evidence is not so lacking in substance that we can conclude that the findings of the trial court are unsupported. [Shuffield v. Hunter, 268 Ark. 1003, 597 S.W.2d 852 \(1980\)](#); [Charlie Stuart Oldsmobile, Inc. v. Smith 171 Ind.App. 315, 357 N.E.2d 247 \(Ind., In Banc 1976\)](#).

[6]  [7]  [8]  We agree with appellants in one respect-damages for the mental suffering that results from the tort of outrage cannot be justified on behalf of one who is a party in name only. Don Cannon did not testify nor appear at the trial and it was error to award damages for emotional distress in the absence of specific proof. The overtones of conjecture which attach to claims of mental suffering unaccompanied by physical injury have led to the view that mental anguish may not be inferred on behalf of someone who fails to testify concerning his own experience. See [Dale v. Sutton, 273 Ark. 396, 620 S.W.2d 293 \(1981\)](#) and [Peugh v. Oliger, Admx., 233 Ark. 281, 345 S.W.2d 610 \(1961\)](#). The award of damages to Don Cannon is disallowed and the judgment is modified accordingly.

Affirmed as modified.

Ark., 1984.

Growth Properties I v. Cannon

Subchapter 9. Cemeteries Generally

§ 20-17-901. Registration generally

All cemeteries now existing in the state shall be registered with the county judge, if under his or her jurisdiction, or with the mayor, as the case may be, and a copy of the registration shall be filed with the Division of Health of the Department of Health and Human Services. This registration shall show the location and boundaries of the cemetery.

Cemeteries Generally

§ 20-17-902. Unlawful activities; recordkeeping requirements

(a) It shall be unlawful to bury a dead body outside of a registered cemetery.

(b) The sexton or person in charge of the cemetery shall keep a correct record on a form prescribed by the Division of Health of the Department of Health and Human Services of each body buried in the cemetery.

[§ 20-17-903. Extension; location; application](#)

(a) Whenever it is proposed to locate a cemetery or to extend the boundaries of an existing cemetery, the party so proposing shall make written application to the county judge or to the mayor of an incorporated city or town, according to whether the cemetery or extension of a cemetery is to be located in the jurisdiction of one (1) or the other of these authorities. The written description shall describe accurately the location and boundaries of the proposed cemetery or extension of a cemetery.

(b) Before acting upon the application, the county judge or the mayor, as the case may be, shall refer the application to the Division of Health of the Department of Health and Human Services for investigation from a sanitary standpoint. In making such an investigation the division shall take into consideration the proximity of the proposed cemetery or extension of a cemetery to human habitations, the nature of the soil, the drainage of the ground, the danger of pollution of valuable springs or streams of water, and such other conditions as would bear upon the situation.

(c) Having completed its investigation as promptly as can be done, the division shall submit a report to the judge or the mayor, as the case may be, and either approve or disapprove the application.

(d) Having received the report from the division, the judge or the mayor, as the case may be, as recommended by the division, shall either grant or deny the application.

(e) Should the application be granted, the judge or the mayor, as the case may be, shall issue to the party making the application in such form as may be prescribed by the division a permit to establish or extend the cemetery in question.

(f) The permit shall be recorded in the office of the county judge or the mayor and a copy forwarded to the division.

Construction and application

Statute relating to application to county judge for location of cemetery or extension of boundaries of existing cemetery applies only to cemeteries owned by a church, a municipal corporation or a family or community not employing salesmen or paying sales commissions. Ark.Stats. §§ 82-401, 82-411 to 82-426. [Assembly of God Church, Lambert v. Ford, 1973, 255 Ark. 132, 499 S.W.2d 273. Cemeteries](#) ↩7

2. Discretion of court

County judge had no discretion under statute to refuse church a permit to establish cemetery upon land adjoining its church building once state health department had given its approval. Ark.Stats. §§ 82-401, 82-411 to 82-426. [Assembly of God Church, Lambert v. Ford, 1973, 255 Ark. 132, 499 S.W.2d 273. Cemeteries](#) ↩9

3. Nuisance

The use of land as a cemetery is not a nuisance per se, and where a cemetery was not found to be a nuisance in action to set aside a permit for its operation, it could not be deemed to constitute an invasion of property rights of adjoining and nearby residents, and therefore no notice under the common law or by statute was required to be furnished to

adjoining or nearby property owners expressing intention of establishing the cemetery. Ark.Stats. §§ 82-411 to 82-426, 82-412, 82-414, 82-415, 82-418, 82-419. [North Hill Memorial Gardens v. Hicks, 1959, 230 Ark. 787, 326 S.W.2d 797. Cemeteries ↩9; Nuisance ↩3\(7\)](#)

4. Jurisdiction

Jurisdiction of the chancery court to hear an appeal from board's decision authorizing a cemetery could not be questioned for the first time on appeal, but the matter was waived by failure to seek a transfer of the cause to circuit court. Ark.Stats. § 82-414. [Arkansas Memorial Gardens, Inc. v. Simpson, 1964, 238 Ark. 184, 381 S.W.2d 462. Cemeteries ↩9](#)

5. Burden of proof

Where the State Cemetery Board found that an applicant for a cemetery permit met all the requirements of act regulating the creation, maintenance and operation of perpetual care cemeteries, and issued applicant a permit burden of proving that the Board's action in granting the permit was arbitrary rested on those parties seeking cancellation thereof. Ark.Stats. §§ 82-411 to 82-426, 82-412, 82-414, 82-415, 82-418, 82-419. [North Hill Memorial Gardens v. Hicks, 1959, 230 Ark. 787, 326 S.W.2d 797. Cemeteries ↩9](#)

6. Sufficiency of evidence

Evidence, in proceeding for review of cemetery board's approval of an application to establish a cemetery, sustained finding of public need for cemetery in question. [Arkansas Memorial Gardens, Inc. v. Simpson, 1964, 238 Ark. 184, 381 S.W.2d 462. Cemeteries ↩9](#)

In action by property owners and/or residents in the vicinity of a proposed cemetery to enjoin it from operating as such, and to have a permit issued to the cemetery by the State Cemetery Board canceled, evidence was insufficient to establish that action of the Cemetery Board in granting a permit to the cemetery was arbitrary. Ark.Stats. §§ 82-411 to 82-426, 82-412, 82-414, 82-415, 82-418, 82-419. [North Hill Memorial Gardens v. Hicks, 1959, 230 Ark. 787, 326 S.W.2d 797. Cemeteries ↩9; Injunction ↩128\(8\)](#)

7. Res judicata

Cemetery board's original denial of a corporation's application to establish a cemetery was not res judicata on right of corporation to establish a cemetery on site in question, but board could approve the application after a second hearing at which further evidence was presented. [Arkansas Memorial Gardens, Inc. v. Simpson, 1964, 238 Ark. 184, 381 S.W.2d 462. Cemeteries ↩9](#)

8. Review

An action for review of cemetery board's approval of an application to establish a cemetery is not tried de novo, but decision of the board must be approved if not arbitrary. [Arkansas Memorial Gardens, Inc. v. Simpson, 1964, 238 Ark. 184, 381 S.W.2d 462. Cemeteries ↩9](#)

Action of the cemetery board in approving an application to establish a cemetery was valid even though only three members acted and two additional members had not been appointed, where the three members acted unanimously, and, in any event, opposer of the application would not be permitted to challenge validity of constitution of the board after it had rendered a decision unfavorable to opposer where opposer made no such objection prior to rendition of the decision. Ark.Stats. § 82-414. [Arkansas Memorial Gardens, Inc. v. Simpson, 1964, 238 Ark. 184, 381 S.W.2d 462. Cemeteries ↩9](#)

A.C.A. § 20-17-903, AR ST § 20-17-903

[§ 20-17-904. Perpetual care trust](#)

(a) By trust instrument or will, any person may establish a trust fund in perpetuity with the income from the trust fund to go to the upkeep of certain specified burial lots or plots in one (1) or more cemeteries or burial grounds in the State of Arkansas.

(b)(1) No amount placed in trust pursuant to subsection (a) of this section by any one (1) trustor or testator shall be in excess of the sum of two hundred thousand dollars (\$200,000).

(2) The trust fund shall be:

(A) Invested in state, municipal, or federal obligations;

(B) Deposited for interest in a savings and loan association whose funds are insured by the Federal Savings and Loan Insurance Corporation; or

(C) Placed on interest-bearing time deposit in a bank whose funds are guaranteed by the Federal Deposit Insurance Corporation.

(3) The trust fund shall be so invested or deposited as directed by the circuit court of the county in which are located the burial grounds specified in the trust instrument of the trustor or will of the testator.

(c) The trustee of the fund shall file an annual report in the circuit court of the county in which the burial grounds are located showing the receipts and disbursements from the trust fund.

(d) The provisions of subsections (a)-(c) of this section are in addition to any other laws relating to cemeteries and trust funds.

(e) No rule against perpetuities shall apply to property or funds set aside or trust created for the perpetual care of burial lots in cemeteries.

NOTES OF DECISIONS

Action for accounting [3](#)

Charges for marker installation [1](#)

Sale of cemetery [2](#)

[1](#). Charges for marker installation

A charge of seven cents per square inch for installation of marker by cemetery association under regulation requiring all markers to be installed by the association was not unreasonable as discriminatory but was invalid with respect to such charge for the perpetual care fund where the purchaser of the lot had already contributed to the fund. [Pine Crest Memorial Park v. Burton, 1958, 229 Ark. 1, 312 S.W.2d 919. Cemeteries ↪ 17; Cemeteries ↪ 18](#)

[2](#). Sale of cemetery

Where ex parte decree in chancery authorizing sale of land of cemetery association to cemetery corporation was reversed and a lien imposed on such land for amount due perpetual care fund from proceeds of prior sales of lots under recorded declaration of trust, cemetery corporation would be permitted to rescind its contract upon a proper accounting, but if purchaser should elect to affirm contract, perpetual care fund should be safeguarded by appropriate order in such a way that graves in old cemetery area would not be discriminated against in the matter of upkeep. [Page v. Harr, 1955, 224 Ark. 961, 278 S.W.2d 121. Cemeteries ↵5; Cemeteries ↵17](#)

Land held by cemetery association under written declaration of trust, requiring that 20 per cent of proceeds of sale of lots be set aside and dedicated as perpetual care fund, stood charged with a sum equal to 20 per cent of proceeds of lot sales until entire acreage subject to trust should be disposed of, and such obligation could not be altered by decree in chancery authorizing sale of the land. [Page v. Harr, 1955, 224 Ark. 961, 278 S.W.2d 121. Cemeteries ↵17](#)

Land sold by cemetery association to cemetery corporation pursuant to authority granted by ex parte decree in chancery was subject in hands of purchaser to a lien for amount due perpetual care fund from proceeds of prior sales of cemetery lots under recorded declaration of trust requiring that 20 per cent of proceeds of such sales be set aside and dedicated as perpetual care fund. [Page v. Harr, 1955, 224 Ark. 961, 278 S.W.2d 121. Cemeteries ↵17](#)

3. Action for accounting

Cause of action by owners of cemetery lots for an accounting and to enforce declaration of trust under which organizers of cemetery association had agreed that land should be held and used was barred by limitations and laches as to trustees, where all individuals who had subscribed to declaration of trust had been dead for more than seven years when action was commenced. [Page v. Harr, 1955, 224 Ark. 961, 278 S.W.2d 121. Cemeteries ↵17](#)

§ 20-17-905. Abandoned cemetery; removal of dead

(a) The circuit court of the county may order the removal of the dead from an abandoned cemetery which lies outside the limits of any city of the first class of one hundred thousand (100,000) or more in population.

(b) Notice of the filing of a petition for the removal of the dead from an abandoned cemetery under this section shall be in a newspaper having general circulation in the county where the cemetery is located, and hearing on the petition shall be held not earlier than twenty (20) days following this publication.

(c) Upon the hearing, if the court finds that the cemetery is abandoned as defined in subsection (e) of this section, it shall authorize the removal of the dead to another cemetery for which a permanent maintenance fund has been established as provided in [§ 20-17-1013](#).

(d) After removal of the dead from a cemetery pursuant to this section, the petitioners shall file with the court a report that the removal has been done, and thereupon the court shall enter an order declaring the cemetery abandoned for cemetery purposes. Upon the entry of the order, the property shall become subject to taxation like other property.

(e) For the purposes of this section, an “abandoned cemetery” is a cemetery:

- (1) For which no permanent maintenance fund as provided in [§ 20-17-1013](#) has been established;
- (2) Which is not suitably maintained and preserved as a cemetery;
- (3) In which there have been no interments for a period of fifteen (15) years; and
- (4) Which contains at least six (6) permanent grave markers.

NOTES OF DECISIONS

In general [1](#)

Lack of continued interments [2](#)

Portion of cemetery not used for burial [3](#)

[1](#). In general

Cemetery continues subject to use as cemetery so long as burials there awaken sacred memories in minds of living. [Bowen v. Hooker, 1963, 237 Ark. 250, 372 S.W.2d 257. Cemeteries ↪14](#)

[2](#). Lack of continued interments

A cemetery is never abandoned nor loses its character and identity as such, by general rule, until bodies reposing therein are removed by friends or relatives or by proper public authority, and mere disuse or lack of continued interments does not constitute abandonment. [Bowen v. Hooker, 1963, 237 Ark. 250, 372 S.W.2d 257. Cemeteries ↪14](#)

[3](#). Portion of cemetery not used for burial

That no graves existed in south half of originally enclosed portion of acre deeded to church for cemetery purposes and subsequently deeded by church to children of original grantor did not show abandonment of such portion for cemetery purposes where it had been enclosed by fence and used for auxiliary purposes in conducting burial ceremonies, there was some maintenance of the area, and relatives of loved ones interred in other portion desired burial therein. [Bowen v. Hooker, 1963, 237 Ark. 250, 372 S.W.2d 257. Cemeteries ↪14](#)

[§ 20-17-906. Abandoned cemetery disposition](#)

(a) As used in this section, “lot” means any lot or portion of a lot in a cemetery owned by a county or municipality which has not been used for the interment of human remains and for which no provision for perpetual care was made at the time the lot was sold or at any time subsequent to the time the lot was sold.

(b) The governing body of any county or municipality or other officials having control over a cemetery may maintain in the circuit court in the county within which the cemetery is located a proceeding for the termination and forfeiture of the rights and interests of an owner of any lot or lots in the cemetery whenever the present owner of the lot is unknown to the governing body of the county or municipality or other officials and

a period of at least seventy-five (75) years has passed since any portion of the lot has been used for interment purposes.

(c)(1) The proceeding shall be commenced by the filing of a verified petition with the clerk of the circuit court.

(2) The petition shall:

(A) Identify the lot or lots;

(B) State that the portion of the lot to be reclaimed has not been used for the interment of human remains and that a core or sound test has been conducted to determine that the portion contains no remains;

(C) State that the present owner of the lot is unknown to the governing body of the county or municipality or other officials having control over the cemetery;

(D) State that a period of at least seventy-five (75) years has passed since any portion of the lot was used for interment purposes; and

(E) Request that the court issue an order declaring the lot abandoned and further declaring all of the rights and interests of the owner terminated and forfeited.

(3) The petition shall be accompanied by an affidavit by the governing body of the county or municipality or other officials that a diligent search to locate the present owner of the lot has been made but that the owner has not been located.

(d) Upon the filing of the petition and affidavit, the clerk of the circuit court shall fix a time for a hearing on the petition not less than thirty (30) days nor more than ninety (90) days after the date of the filing.

(e)(1) The governing body of the county or municipality or other officials shall give notice of the hearing:

(A) By posting copies of the notice in three (3) conspicuous places in the cemetery which is owned or operated by the governing body or other officials;

(B) By mailing a copy of the notice by registered mail to the last known owner of the lot; and

(C) By publishing the notice one (1) time each week for three (3) successive weeks in some newspaper of general circulation in the county within which the cemetery is located, the first publication being made not less than thirty (30) days before the date of hearing.

(2) The notice shall identify the lot and shall state:

(A) The name and address of the last known owner of the lot;

(B) That a hearing will be held to determine whether or not the present owner of the lot shall have his or her right and interest terminated and forfeited by a declaration of abandonment of the lot; and

(C) The time and place of the hearing.

(f) If upon the hearing the court determines from the evidence presented that the present owner of the lot is unknown, that the governing body or other officials have made a diligent search to locate the present owner, that a period of seventy-five (75) years or more has passed since any portion of the lot has been used for human interment, and that a core or sound test has been conducted to determine that the lot contains no remains, then a decree shall be entered adjudicating the lot, lots, or parts thereof, to have been abandoned and, further, ordering the subsequent termination and forfeiture of all rights and interests of the owner.

(g) The court shall dismiss the proceeding if it determines any of the following from the evidence which is presented:

(1) That any of the material facts stated in the petition are not true;

(2) That the identity of the present owner of the lot is known; or

(3) That the governing body or other official has not made a diligent search to locate the present owner.

(h)(1) Upon order of the court declaring the lot to be abandoned, the full title to the lot shall revert to the cemetery.

(2) The order of the court shall not become final until one (1) year after the date on which it is entered. During that time, any person may petition the court to reopen the proceeding, and the court, after notice to the governing body or other officials, may reopen the proceeding and may hear and consider any additional evidence regarding the ownership of the lot and may modify or amend the order which it made or, if the court makes any of the determinations under subsection (g) of this section, it shall dismiss the proceeding.

(i)(1) Within thirty (30) days after the date on which the court order is entered, the governing body or other officials shall publish notice of the order:

(A) One (1) time in a newspaper of general circulation in the county in which the cemetery is located; and

(B) By mailing a copy of the order by registered mail to the last known owner of the lot or to the last known owner of the right of interment in the lot.

(2) The notice which is mailed and published shall identify the lot which is covered by the order and shall state:

(A) The name and address of the last known owner of the lot;

(B) That the court has ordered that the lot is to be declared abandoned and that the court has further ordered that the rights and interests of the owner are to be subsequently terminated and forfeited; and

(C) The date upon which the order of the court will become final.

(j) The lot shall be deemed abandoned, and the rights and interests of the present owner shall be terminated and forfeited as of the date upon which the order of the court becomes final. Thereafter, the cemetery shall be the owner of the lot and may resell or otherwise recover it.

(k) The proceeds derived from any sale of a lot, the ownership of which is obtained as provided in this section, shall be used as follows:

(1) First, to reimburse the petitioner for the costs of suit and necessary expenses including attorneys' fees incurred by the petitioner in the proceeding;

(2) Then, of the remainder of the proceeds:

(A) Not less than seventy-five percent (75%) shall be held in trust and shall be used only for expenses of administration, maintenance, restoration, preservation, and other improvements of the cemetery; and

(B) Any amounts remaining thereafter shall be used for immediate improvements and maintenance of the cemetery.

(l) In no event shall any existing monument, retaining wall, fence, bench, or other ornamentation be altered or removed by the petitioner or his or her agent or employee or by any subsequent owner of a lot reclaimed and sold as provided in this section.

[§ 20-17-907. County abandoned cemetery registration boards](#)

(a) The county judge shall appoint three (3) members to an abandoned cemetery registration board if:

(1) At least ten (10) qualified voters within the county petition the county judge to provide minimum maintenance for a specific abandoned cemetery; and

(2) In the case of private property, the property owner agrees in writing that the abandoned cemetery may be accessed for minimum maintenance.

(b) Each member shall be a real property owner in the county.

(c)(1) The initial board members shall be appointed to serve for terms of one (1), two (2), and three (3) years.

(2) The length of the term of each member shall be determined by the county judge when making the appointment.

(d) As the terms of the board members expire, the judge shall appoint successor board members to hold office for a term of three (3) years.

(e) The county judge may reappoint a board member whose term is expiring.

(f) If a vacancy occurs before a board member's term expires, the county judge shall appoint a new member to complete the term.

(g) Members of the board shall serve without pay or other compensation for their services.

(h)(1) The board shall select one (1) of the board members as chair.

(2) The chair shall serve at the pleasure of the board.

[§ 20-17-908. Responsibilities of county abandoned cemetery registration boards](#)

(a) A county abandoned cemetery registration board shall have the authority to register abandoned cemeteries within the county as defined in [§ 20-17-905](#), but only after a petition has been filed pursuant to [§ 20-17-907](#).

(b) At any time, the board may conduct an examination of a petitioned abandoned cemetery within the county.

(c)(1) If funds and voluntary manpower are available, the board shall provide for the cleaning of petitioned abandoned cemeteries within the county that meet minimum requirements for maintenance at least one (1) time in the spring and one (1) time in the fall.

(2) Cleaning is intended to remove weeds, debris, and foreign material that degrade the burial site.

(d) The board may post a small sign to inform the public that the abandoned cemetery is under the care of the board.

[§ 20-17-909. Minimum maintenance for petitioned abandoned cemeteries](#)

Petitioned abandoned cemeteries that are no more than one (1) acre in size are eligible for minimum maintenance.

[§ 20-17-910. Abandoned cemeteries on private property](#)

(a) If a petitioned abandoned cemetery is on private property with no access by the public, the property owner may grant permission to the county abandoned cemetery registration board to enter for maintenance by providing a written statement.

(b) The statement shall be notarized and shall provide a conditional easement to the board

for ingress and egress for the purpose of maintenance.

(c) The easement shall be recorded at the county courthouse within sixty (60) days after signing.

[§ 20-17-911. Minimum maintenance providers](#)

Minimum maintenance for petitioned abandoned cemeteries may be secured from any source the county abandoned cemetery registration board can obtain, including work-release prisoners.

Subchapter 10. Cemetery Act for Perpetually Maintained Cemeteries [\(Refs & Annos\)](#)

[§ 20-17-1001. Citation](#)

This subchapter may be cited as the “Cemetery Act for Perpetually Maintained Cemeteries”.

[§ 20-17-1002. Definitions](#)

As used in this subchapter:

- (1) “Board” means the Arkansas Cemetery Board;
- (2) “Care and maintenance” means the continual maintenance of the cemetery grounds and graves in keeping with a properly maintained cemetery;
- (3) “Cemetery” means any land or structure in this state dedicated to and used or intended to be used for interment of human remains. It may be either a burial park for earth interments, a mausoleum for vault or crypt interments, or a combination of one (1) or more thereof;
- (4) “Cemetery company” means an individual, partnership, corporation, or association, now or hereafter organized, owning or controlling cemetery lands or property and conducting the business of a cemetery or making an application with the board to own or control the lands or conduct the business;
- (5) “Columbarium” means a structure or room or space in a building or structure used or intended to be used for the interment of cremated human remains;
- (6) “Crypt” means a chamber of sufficient size to inter the remains of a deceased person;
- (7) “Interment” means any lawful disposition of the remains of a deceased person as provided by law;
- (8) “Lot or grave space” means a space of ground in a cemetery used or intended to be used for interment therein;
- (9) “Mausoleum” means a community-type structure or room or space in a building or structure used or intended to be used for the interment of human remains in crypts or niches;
- (10) “Niche” means a space in a columbarium which is used or intended to be used for the interment of the cremated remains of one (1) or more deceased persons;
- (11) “Permit holder” means any cemetery company that holds a permit issued by the board to own or operate a perpetual care cemetery;
- (12) “Perpetual care cemetery” means a cemetery for the benefit of which a perpetual care fund has been established in accordance with this subchapter; and
- (13) Repealed by [Acts of 2007, Act 827, § 163, eff. July 31, 2007](#).

[§ 20-17-1003. Applicability of provisions: exceptions](#)

(a) This subchapter applies to all cemeteries and burial grounds located in the State of Arkansas unless the cemetery is owned and operated by:

- (1) A church or similar religious organization;
- (2) A municipality or county government;
- (3) A family, exclusively for its own family use; or
- (4) A community nonprofit association in which no person is entitled to receive pecuniary profit other than the bookkeeper and maintenance crew.

(b) Persons who do not and have never received more than two thousand dollars (\$2,000) gross proceeds in any one (1) year from the sale of parcels of realty to be used as human burial sites are exempt from this subchapter.

(c) All cemeteries that advertise or operate all or a part thereof as perpetual care or permanent maintenance cemeteries shall be subject to this subchapter regardless of the organization of the person or group owning and operating the cemetery or burial grounds

NOTES OF DECISIONS

Church or religious organization [1](#)

[1](#). Church or religious organization

Trustees for churches of a city were not proper parties to apply to county judge for permit to establish a cemetery, in light of fact that such a proposed cemetery would not be owned and operated by "a church or similar religious organization" within meaning of statute which provided in effect that permits for establishment of cemeteries were to be obtained from Cemetery Board rather than from county judge but which stated that rule did not apply to cemeteries owned and operated by "a church or similar religious organization." Ark.Stats. §§ 82-401, 82-426.2 to 82-426.4, 82-426.7, 82-426.14, 82-426.17. [Skinner v. Berry, 1979, 266 Ark. 91, 583 S.W.2d 27. Cemeteries ↵3](#)

[§ 20-17-1004. Arkansas Cemetery Board: establishment: membership](#)

(a) The Arkansas Cemetery Board is to consist of seven (7) members selected as follows:

- (1) The Securities Commissioner or his or her designated deputy shall be a voting member of the board;
- (2) Six (6) members shall be appointed by the Governor for terms of four (4) years, as follows:
 - (A) Four (4) of the six (6) members appointed by the Governor shall be owners or operators of licensed cemeteries in this state, and these members shall be appointed from lists of five (5) names for each appointment to be made which are submitted to the Governor by the Arkansas Cemetery Association;
 - (B) One (1) member shall be appointed by the Governor and shall be a citizen of the State of Arkansas, of good character, and a qualified elector, but this person shall not have any interest in a cemetery or funeral home either within or without the State of Arkansas; and
 - (C) One (1) member shall be sixty (60) years of age or older, appointed from the state at large, subject to the confirmation of the Senate, and shall represent the elderly. This

member shall not be actively engaged in or retired from any profession or occupation which is regulated by the board.

(b)(1) The Governor shall appoint one (1) alternate member for the same term and having the same qualifications as a regular member. This member shall substitute for any regular member when a conflict of interest disqualifies a regular member.

(2) Whenever a matter comes before the board involving a cemetery in which any member has a financial interest, then the member shall be disqualified from participating in the discussion or vote on the matter, and the alternate member shall substitute for the disqualified member in that instance only.

(c) Vacancies on the board due to death, resignation, or other cause of any appointed member shall be filled by appointment of the Governor for the unexpired portion of the term in the same manner as was required for the initial appointment.

(d) Members shall serve without pay or other compensation for their services except that members may receive expense reimbursement and stipends in accordance with [§ 25-16-901 et seq.](#)

[§ 20-17-1005. Boards; actions; meetings; quorum](#)

(a) Any action taken by the Arkansas Cemetery Board shall be by the majority vote of the board members who are present at the meeting when the action is taken.

(b) The cemeterian member of the board with the greatest seniority on the board shall be chair of the board, but if the person declines the chairship, then the cemeterian with the next highest seniority on the board shall be chair.

(c) Four (4) members of the board shall constitute a quorum.

(d) The board shall meet subject to call of the chair or upon written demand of any two (2) members.

(e) Any order by the board under this subchapter shall be subject to review by the Pulaski County Circuit Court or by the circuit court of the county in which any part of the cemetery lies, provided that an application for review of the order is made within thirty (30) days of the date of the order.

[§ 20-17-1006. Arkansas Cemetery Board--Powers and duties](#)

The Arkansas Cemetery Board shall have the authority to:

(1) Conduct at any time and from time to time such reasonable periodic, special, or other examination of any cemetery or cemetery company, including, but not limited to, an examination of the physical condition or appearance of the cemetery, the financial condition of the company and any trust funds maintained by the company, and such other examinations as the board or Securities Commissioner deems necessary or appropriate in the public interest. The examinations shall be made by members or representatives of the board or by a certified public accountant or registered public accountant as authorized in [§ 20-17-1007](#);

(2) Issue or amend permits to operate a cemetery in accordance with this subchapter;

(3) Suspend or revoke permits to operate a cemetery when any cemetery fails to comply with this subchapter, rules promulgated pursuant to this subchapter, or any order of the board;

(4) Make rules, regulations, and forms to enforce this subchapter;

(5) Require every cemetery company to observe minimum accounting principles and practices and make and keep such books and records in accordance therewith for such period of time as the board may by rule prescribe;

(6)(A) Subpoena witnesses, books, and records in connection with alleged violations of this subchapter or rules or orders of the board. With the approval of the chair of the board or two (2) board members, the Securities Commissioner may issue subpoenas.

(B) In case of contumacy or refusal to obey a subpoena issued to any person, the Pulaski County Circuit Court, upon application by the board, may issue to the person an order requiring him or her to appear before the board or the person designated by the board. Failure to obey the order of the court may be punished by the court as a contempt of court;

(7) Require additional contributions to the permanent maintenance fund of the cemetery where provided for in this subchapter, including, but not limited to, contributions not to exceed three thousand dollars (\$3,000) whenever any cemetery company fails to properly care for and maintain or preserve the cemetery;

(8)(A) Apply to the Pulaski County Circuit Court to enjoin any act or practice and to enforce compliance with this subchapter or any rule, regulation, or order pursuant to this subchapter whenever it appears to the board, upon sufficient grounds or evidence satisfactory to the board, that any person has engaged in or is about to engage in any act or practice constituting a violation of any provision of this subchapter or any rule or regulation pursuant to this subchapter.

(B) The court may not require the board to post a bond;

(9) Apply to the circuit court of the county in which the cemetery is located for appointment of a receiver or conservator of the cemetery corporation or its permanent maintenance fund when it appears to the board that a cemetery corporation is insolvent or that the cemetery corporation, its officers, directors, agents, or the trustees of its permanent maintenance fund have violated this subchapter and the rules promulgated under this subchapter or have failed to comply with any board order;

(10) Increase, in accordance with regulations adopted by the board, the percentage of the gross proceeds of the sale of any grave space, crypt, niche, or similar entombment required to be deposited into the permanent maintenance fund of the cemetery in accordance with [§ 20-17-1016](#) whenever it is determined that the principal of the permanent maintenance fund is or will be insufficient to generate enough income to operate and maintain the cemetery; and

(11)(A) Purchase insolvent, licensed perpetual care cemeteries that have been in court-ordered receivership or conservatorship for at least five (5) years.

(B) If the taking of legal possession of the cemetery requires the payment of consideration, any payment made by the board shall not exceed one thousand dollars (\$1,000).

[§ 20-17-1007. Examination; expenses; audit](#)

(a)(1)(A) Each cemetery company examined in accordance with [§ 20-17-1006](#) shall pay to the Arkansas Cemetery Board a fee for each examination as the board shall prescribe by rule.

(B) In addition, the cemetery company shall pay to the board the amount of expenses and stipends paid by the board to any board member examining the physical condition or appearance of a cemetery when the examination is ordered by the board on its own motion or on request of an interested individual.

(2) However, all examinations shall be conducted by a single examiner or board member, and the examinations shall be conducted only pursuant to an order of the board.

(b)(1) In lieu of any financial examination which the board shall be authorized to make, the board may accept the audit of an independent certified public accountant, provided that the Securities Commissioner has notified the cemetery company that the audit would be accepted and that the cemetery company has notified the commissioner in writing that an audit would be prepared.

(2) The costs of the audit shall be borne by the cemetery company, and the scope of the audit shall be at least equal to the scope of the examination required by the board.

[§ 20-17-1008. Permit--Application](#)

(a)(1) Prior to making application to the Arkansas Cemetery Board for a permit to establish and operate a new cemetery or for the extension of the boundaries of an existing cemetery, the person proposing to make application shall cause to be published weekly for three (3) weeks in a newspaper of general circulation in the county in which the proposed cemetery is located a notice that an application will be filed with the board to establish or extend the boundaries of a cemetery in the county.

(2) The publication shall contain a legal description of the land to be used as a cemetery and a statement that any individual or group of individuals desiring to protest the establishment or extension of the cemetery may do so by filing a statement in writing with the board.

(b)(1) Whenever it is proposed to locate a new cemetery or extend the boundaries of an existing cemetery under this subchapter, then the cemetery company so proposing shall file an application for the issuance of a permit with the board.

(2) The application shall describe accurately the location and boundaries of the proposed cemetery or addition.

(3) The application shall be accompanied by:

(A) The recommendation of the mayor or governing official of the municipality if the cemetery is to be located within the corporate limits of a municipality or the recommendation of the county judge of the county within which the cemetery is to be located if outside the corporate limits of a municipality. The recommendation shall state the need and desirability of the proposed cemetery or extension. This recommendation shall be in lieu of the application and permit required in [§ 20-17-903](#);

(B) A fee of:

(i) One thousand five hundred dollars (\$1,500) for filing an application for a new cemetery; or

(ii) Four hundred dollars (\$400) for filing an application to extend the boundaries of an existing cemetery;

(C) A survey and map of the cemetery or extension;

(D) A set of rules and regulations for the use, care, management, and protection of the cemetery;

(E) The proposed method of establishing a permanent maintenance fund;

(F) Proof of publication as set forth in subsection (a) of this section of the required notice of intention to apply with the board;

(G) A copy of a current title opinion by an Arkansas-licensed attorney or title insurance policy which reflects that the applicant has or will have good and merchantable title to the land covered by the permit or extension;

(H) A notarized statement disclosing any current or future lien or mortgage on the land covered by the permit;

(I) A notarized statement from any current or future lienholder or mortgage holder on the land covered by the permit or extension that all paid-in-full burial spaces will be released from the lien or mortgage at least semi-annually;

(J) A copy of the perpetual care trust agreement if the application is for a new cemetery permit;

(K) A current balance sheet of the applicant prepared by an independent certified public accountant in accordance with generally accepted accounting principles which reflects that the applicant has a minimum of twenty thousand dollars (\$20,000) net worth; and (L) Any other evidence which would tend to show a public need for the proposed cemetery or extension may be included, such as a petition from landowners in the county who believe that a need exists for any additional cemetery or extension.

(4) The burden of establishing public need shall be upon the applicant.

(c) All applications shall be made under oath and filed with the Securities Commissioner not less than twenty (20) days prior to the board meeting at which the application is to be considered.

(d) The board shall have authority to require any cemetery company to submit additional information as it may by rule or order prescribe.

[§ 20-17-1009. Investigation; proposed location or extension](#)

(a) Upon receipt of an application for the issuance of a permit for a new cemetery or for an extension of the boundaries of an existing cemetery, the Arkansas Cemetery Board shall cause the Division of Health of the Department of Health and Human Services to make an investigation of the proposed cemetery location or extension, with respect to a sanitary viewpoint.

(b) In making the investigation, the division shall take into consideration the proximity of the proposed cemetery, or extension, to human habitation, the nature of the soil, the drainage of the ground, the danger of pollution of springs or streams of water, and such other conditions as would bear upon the situation.

(c) Having completed this investigation, the division shall promptly submit in writing its approval or disapproval from a sanitary standpoint to the board. If the division disapproves the proposed cemetery location or extension, further action on the application shall be suspended until the applicant acquires a location which meets with the approval of the division or until other action, as necessary, is taken.

(d) The cemetery shall pay the division any fee required by law.

[§ 20-17-1010. Application for permit; approval](#)

(a) If the cemetery company has fully complied with this subchapter and if the Division of Health of the Department of Health and Human Services approves the location of the new cemetery or the extension of the boundaries of an existing cemetery, then the application shall be submitted to the Arkansas Cemetery Board for investigation and for approval or disapproval.

(b) Immediately upon the submission of each application, the board shall make such investigation as shall enable it to determine the fitness of the cemetery company, the need for the cemetery, and all other questions bearing directly or indirectly upon the need or desirability from the public standpoint of the proposed cemetery or extension.

(c)(1) If the application for a new cemetery is approved, the board shall issue a permit to the applicant only after the applicant has filed proof with the board that an initial principal deposit of at least five thousand dollars (\$5,000) has been made to the permanent maintenance fund. This initial five thousand dollars (\$5,000) can be used to meet the liability due the permanent maintenance fund for the first paid-in-full burial space sales sold by the permit holder.

(2) The permit shall be filed in the court of the county in which the cemetery is located and with the division.

[§ 20-17-1011. Application to amend permit](#)

(a) Whenever it is proposed that any cemetery subject to this subchapter amend its present permit, whether for construction of a mausoleum, reduction or increase in percentage of gross sales proceeds to be placed in the permanent maintenance fund, or other amendment, then the cemetery company shall file an application for amendment of the permit.

(b) The application shall be accompanied by:

(1) A fee of four hundred dollars (\$400);

(2) A statement of each proposed amendment;

(3) Statements, documents, and other information necessary to provide justification for the amendment;

(4) If the amendment is for construction of a mausoleum or similar structure, the application shall also include:

(A) Plans and specifications of the structure;

(B) A report of inspection of the plans by the Division of Health of the Department of Health and Human Services;

(C) A copy of the sales contracts and conveyance documents proposed to be used;

(D) A proposed contribution to the permanent maintenance fund;

(E) A statement of whether the amount of the sales force will be utilized and of how preconstruction sales and interments will be handled;

(F) The location of the proposed structure;

(G) The estimated completion date;

(H) Either of the following, when sales proceeds may be received by the cemetery company prior to completion of construction and payment in full of the structure:

(i) An executed escrow agreement approved by the Arkansas Cemetery Board with a federally insured financial institution or other financial institution approved by the board which provides among other things that one hundred percent (100%) of the sales proceeds collected prior to the completion and payment in full of the structure will be placed into escrow; or

(ii)(a) An executed copy of the construction agreement for the structure which sets forth the total construction cost and the date the construction will be completed with either an executed irrevocable letter of credit from a federally insured financial institution or other financial institution approved by the board equal to one hundred twenty-five percent (125%) of the total cost of the structure, a cash bond posted with a federally insured financial institution or other financial institution approved by the board equal to one hundred thirty percent (130%) of the total cost of the structure, or a construction performance bond payable to the board in the amount equal to the total cost of the structure as set forth in the construction agreement.

(b) All letters of credit and bonds, and their issuers, shall be approved by the board. The letter of credit shall state that the funds provided shall be paid to the board for the purpose of completing the construction of the structure or paying in full the completed structure if not done prior to the completion date set forth in the construction agreement.

The construction performance bond shall state that the insurer shall advance the funds necessary to complete the construction of the structure or pay for the completed structure, if not done prior to the date set forth in the construction agreement. The cash bond shall provide that the financial institution shall pay the cash proceeds of the bond upon order of the board. The letters of credit or construction bonds shall state that if the structure is not completed and paid for in full within the maximum time provided for construction under this section, such letters of credit and bonds shall be used to complete and pay for the structure; and

(I) Certification of an estimated start date for construction to take place no later than thirty-six (36) months after the date of the permit and further certifying completion within five (5) years after the date of the permit unless extended for good cause by the board; and

(J) Other information necessary to show that construction will be done in a good and workmanlike manner and be fireproof; and

(5) Other information as the board may by rule or order require.

(c) Eight (8) complete copies of the application for the amendment of the permit shall be filed with the Securities Commissioner at least twenty (20) calendar days prior to the meeting at which the board will consider the application.

[§ 20-17-1012. Permit--Transfer of ownership](#)

(a)(1) Whenever any change is proposed in the controlling interest or ownership of any perpetual care cemetery or any cemetery company or any organization that, directly or indirectly, owns a controlling interest in the cemetery company, the cemetery company that holds the current permit and the individual or organization proposing to obtain ownership or gain control shall file an application for the issuance of a new permit with the Arkansas Cemetery Board.

(2) The application shall be accompanied by:

(A) A fee of one thousand five hundred dollars (\$1,500);

(B) A statement of changes, if any, in the survey and map of the cemetery;

(C) A set of rules and regulations for the use, care, management, and protection of the cemetery;

(D) The proposed method of continuing the permanent maintenance fund presently in existence;

(E) A statement of the proposed transfer;

(F) A copy of a current title opinion by an Arkansas-licensed attorney or title insurance policy that reflects that the current permit holder has good and merchantable title to the land covered by the permit;

(G) A notarized statement from the seller and purchaser disclosing any current or future lien or mortgage on the land covered by the permit;

(H) A notarized statement from any current or future lienholder or mortgage holder on the land covered by the permit that all paid-in-full burial spaces will be released from the lien or mortgage at least semiannually;

(I)(i) A current detailed accounting of all paid-in-full merchandise contracts or accounts of the permit holder and seller for which the merchandise has not been delivered to the purchaser or placed in inventory for the benefit of the purchaser.

(ii) This accounting shall be on an individual contract or account basis and contain the name of the purchaser, the contract or account number, the date of the contract, the gross amount of the contract, a description of the merchandise purchased, the date the contract or account was paid in full, and the specific location where the merchandise is stored;

(J) A current notarized statement from the permit holder and seller that the application contains a complete and accurate accounting of all his or her outstanding accounts

receivable, discounted notes, and paid-in-full merchandise accounts or contracts for which the merchandise has not been delivered to the purchaser or placed in inventory for the benefit of the purchaser;

(K) A current notarized statement from the purchaser or organization gaining control that it will assume the responsibility and liability for all the accounts, notes, and contracts of the seller that are contained in the accountings and schedules that are filed as a part of the application;

(L) The financial statements of the applicant and purchaser required by the rules which reflect that the applicant and purchaser has a minimum net worth of twenty thousand dollars (\$20,000); and

(M) Any additional information required by the board or the Securities Commissioner.

(b) Each vendor or the transferor of the cemetery company or interest therein shall remain liable for any funds and transactions up to the date of the sale or transfer.

(c)(1) Prior to the sale or transfer, the vendor or the transferor shall notify the board of the proposed sale or transfer and shall submit to the board, under oath, any document or record the board may require in order to demonstrate that the vendor or transferor is not indebted to the permanent maintenance fund.

(2) After the transfer of ownership or control, the vendor or transferor shall present to the board proof of currency in the permanent maintenance fund.

(3) The board may additionally require the presentation of proof of the continued current status of the permanent maintenance fund by the vendee or transferee for such reasonable period of time as the board may determine to be necessary in the public interest.

(4) The board is further authorized to recover from that vendor or transferor or vendee or transferee, for the benefit of the permanent maintenance fund, all sums that the vendor or transferor or vendee or transferee has not properly accounted for and paid into the trust fund, together with reasonable expenses incurred by the board by bringing this action.

(d) The cemetery company that has been issued a permit to operate a cemetery under this subchapter shall remain liable for the maintenance and care of the cemetery and all amounts due the permanent maintenance fund until a new permit is issued to the vendee or transferee.

(e) No new permit shall be issued to the vendee or transferee of any cemetery until that vendee or transferee complies with this subchapter and the board orders a new permit to be issued to the vendee or transferee.

(f) Any vendor or transferor or vendee or transferee who violates this section shall be guilty of a violation and upon conviction shall be fined not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for the violation.

[§ 20-17-1013. Permanent maintenance fund generally](#)

(a)(1) The permanent maintenance fund is declared to be a trust fund for the purpose of administration, care, and maintenance of the cemetery, including lots, graves, spaces, crypts, niches, burial rights, or otherwise.

(2) The net income from the fund shall be paid to and be exclusively used and expended by the owners, managers, or officers and directors of the cemetery company for the care and maintenance of the cemetery and for no other purpose.

(3) The principal of the fund shall be invested and remain invested in such securities and funds as are permitted by the laws of Arkansas for the investment of policy reserves of life insurance companies as set forth in [§ 23-60-101 et seq.](#) and in the common trust funds of state or national banks.

(4) However, any permanent maintenance fund having assets of more than two hundred fifty thousand dollars (\$250,000) may invest not more than fifty percent (50%) of its assets in nonassessable common stocks which are listed on a national securities exchange, preferred stocks meeting the requirements of [§ 23-63-815](#), and investment trust securities meeting the requirements of [§ 23-63-820](#), and the diversification restrictions of [§ 23-63-805](#) shall not apply to investments in investment trust securities.

(5) In investing these funds, the trustee shall exercise the judgment and care under the circumstances then prevailing which persons of prudence, discretion, and intelligence exercise in management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income and capital appreciation as well as the probable safety of their capital.

(b) The permanent maintenance fund is authorized by this subchapter, and all sums paid into it or contributed to it shall be deemed to be for charitable and eleemosynary purposes.

(c) No rule against perpetuities shall be applicable to funds as mentioned in this section.

(d)(1) The trust fund shall be established by executing a written trust agreement approved by the Arkansas Cemetery Board.

(2) The agreement may provide that the cemetery company may change the trustee of its trust fund so long as the successor trustee is in accordance with [§ 20-17-1014](#) and the present trustee and successor trustee are parties to the amendment of the agreement.

(e) At a minimum, the trustee shall maintain the following:

(1) A general ledger and general journal or comparable books of entry showing all receipts, disbursements, assets, liabilities, and income of the trust fund;

(2) Documents supporting and verifying each asset of the trust fund; and

(3) A trust agreement.

(f) In establishing a permanent maintenance fund, the cemetery company may from time to time adopt plans for the general care and maintenance of its cemetery.

[§ 20-17-1014. Fund; establishment; transfer; trustees](#)

Each cemetery company subject to this subchapter shall establish or transfer the permanent maintenance fund, the income from which can only be used for general maintenance, administration, and preservation of the cemetery, to:

(1) A state or national bank with trust powers; or

(2) Three (3) trustees, only one (1) of whom may have any direct or indirect financial or pecuniary interest in the cemetery, provided all trustees who make disbursements from the trust fund shall furnish a fidelity bond with corporate surety thereon, payable to the trust fund, in a penal sum not less than one hundred percent (100%) of the value of the trust fund principal at the beginning of each calendar year. This bond shall be deposited with the Arkansas Cemetery Board; or

(3) An individual trustee, who in behalf of the cemetery company, shall deposit designated permanent maintenance funds directly into a savings account or certificate of deposit in a state or national bank or savings and loan association in this state not less than forty-five (45) days after collection, provided:

(A) All funds so deposited are federally insured;


(B) The funds are restricted so that the principal amount of the funds cannot be withdrawn without the written approval of, and on a form approved by, the Securities Commissioner; and

(C) Not less than one (1) time a year, interest from the funds may be withdrawn by the individual trustee in behalf of the cemetery company for purposes permitted by this subchapter.

NOTES OF DECISIONS

Court ordered compliance [1](#)

[1](#). Court ordered compliance

Arkansas Cemetery Board had no claims to contributions and penalties owed to permanent maintenance funds by debtor cemeteries, prior to issuance of state court orders directing compliance with the Arkansas statute requiring every cemetery to establish such a fund and to make deposits thereto. Bankr.Code, [11 U.S.C.A. § 101\(4\)](#); Ark.Stats. § 82-426.13. [In re Memorial Properties, Inc., 1982, 690 F.2d 158. Cemeteries](#)
 [3](#)

[§ 20-17-1015. Fund; reporting requirements](#)

(a) Within sixty (60) days after the end of each calendar year, the Arkansas Cemetery Board shall require the trustee of the permanent maintenance fund to file, under oath, a detailed annual report of the condition of the fund, setting forth the description of the assets of the fund, a description of any property upon which any security constitutes a lien, the cost of acquisition of the asset, the market value of any asset at the time of its acquisition with the current market value of the asset and its status with reference to default, and stating that they are not in any way encumbered by debt, that none of the assets of the fund constitute loans to the cemetery company for which the trust fund is established or to any officer or director thereof, and any other information the trustee or the board deems pertinent.

(b) The report shall show the amounts of principal and undistributed income of the fund at the beginning of the period, the amounts deposited by the cemetery company into the fund during the period, the income earned and disbursements made during the period, the details of any investment or reinvestment during the period, and the balances of principal and income at the end of the period being reported on.

(c)(1) If the trustee of the fund fails to meet the requirements of this section, then it shall be the duty of the board to apply to the Pulaski County Circuit Court for an order to require the trustee of the fund to file a proper report and to make any additional contributions due to the failure to timely file the annual report.

(2) If funds have been misappropriated by the trustee or are not being handled as required by law, then the board shall apply to the circuit court in the county in which the cemetery is located to have a receiver or conservator appointed by the court to take custody of the trust funds for the benefit of the cestui que trust. The receiver or conservator is vested with full power to file such suits against the defaulting trustee as

may be necessary to require a full accounting and restoration of the trust funds and to turn the residue over to another trustee as the cemetery shall select, in conformity with this subchapter, as the new trustee of the permanent maintenance fund.

(3) Failure by the trustee to make a timely filing of the annual report required by subsection (a) of this section shall be grounds for the trustee to pay an additional contribution to the permanent maintenance fund of fifty dollars (\$50.00) per day until the report is filed with the board.

[§ 20-17-1016. Fund; minimum deposits](#)

(a) Each cemetery company shall deposit not less than ten percent (10%) of the gross proceeds of each sale into the permanent maintenance fund, provided cemetery companies selling crypts, niches, or similar entombments shall be required to deposit into a permanent maintenance fund an amount not less than the Arkansas Cemetery Board shall by order require if the cemetery company can demonstrate to the board that such lesser amount will be sufficient for perpetual maintenance and upkeep.

(b)(1) The deposit shall be made by the cemetery company not later than forty-five (45) days after the final payment has been made.

(2) However, any cemetery company making sales on installment sales contracts shall deposit the required percentage in accordance with the following:

(A) If the cemetery company receives installment payments directly and if adequate records are maintained as to the full amount of sale, the receipts received, and the balance due, then the cemetery company shall deposit the required percentage of gross proceeds of sale into the permanent maintenance fund not later than the forty-fifth day after the final payment is made, or the cemetery company may deposit the required percentage of each amount received not later than the forty-fifth day after each installment payment by the purchaser; and

(B)(i) If the cemetery company elects to discount the installment sales contracts at a bank or other financial institution and receive a discounted value immediately in cash, the required percentage of the gross sales price shall be placed in a separate restricted escrow account at the time that the contract is discounted.

(ii) The amount so placed in escrow shall not be withdrawn until the lot purchaser defaults on or fully satisfies his or her contract obligations.

(iii) This restricted escrow account may be used by the bank or other financial institution as a part of its required reserve and may be used as recourse if the lot purchaser defaults on the contract.

(iv) Upon default, the required percentage of the gross sales price which was placed in this escrow account may be withdrawn and used by the cemetery company.

(v) Once final payment has been made, the required percentage of the gross sales price which was placed in an escrow account shall be withdrawn and placed immediately into the permanent maintenance fund.

(vi) If the cemetery corporation enters into an agreement with the bank or other financial institution, which in the Securities Commissioner's determination adequately provides for the safeguards set forth in subdivision (b)(2)(A) of this section, then that subdivision shall not be applicable to the cemetery corporation.

(3) If a cemetery company gives away a grave space or sells a grave space for a price less than the current market price, the gross sales proceeds received for a similar grave space in the immediately adjacent or similar location in the cemetery in a recent arms-length transaction shall be used as the basis to make the required permanent maintenance fund contribution for the gift or reduced price sale.

(c)(1) If the cemetery company fails to make the required deposits in accordance with this section or if the moneys placed in escrow are not deposited as required by this

subchapter, then the cemetery company shall be liable for and the board may collect as an additional contribution to the permanent maintenance fund ten dollars (\$10.00) per day but in no instance in amounts to exceed five thousand dollars (\$5,000) or the actual cost of the contract property or cemetery lots, whichever is greater, for the period of the failure.

(2) Upon the refusal of the cemetery company to pay the board the penalty, the board may institute suit to recover the contribution and costs and such other relief as the state in its judgment deems proper and necessary.

[§ 20-17-1017. Fund; contributions](#)

The permanent maintenance fund may also receive, take, and hold therefor and as part thereof or as incident thereto any real, personal, or mixed property bequeathed, devised, granted, given, or otherwise contributed to it.

[§ 20-17-1018. Fund; unlawful activities; fines](#)

(a) In addition to the civil provisions of this subchapter, it shall be unlawful for any person to:

(1) Advertise or operate all or part of a cemetery as a perpetual care or permanent maintenance cemetery without holding a valid permit issued by the Arkansas Cemetery Board; or

(2) Fail to place the required contributions into the permanent maintenance fund or to remove any principal of the permanent maintenance fund from trust.

(b) Any person who is in willful violation of subsection (a) of this section shall be guilty of a felony and upon conviction shall be punished by a fine of not more than six thousand dollars (\$6,000) or by imprisonment in the state penitentiary for not more than six (6) years, or by both fine and imprisonment.

[§ 20-17-1019. Sale of plots; procedures](#)

(a) An instrument of conveyance or deed for burial lots, plots, or parts thereof shall be issued to the purchaser upon complete payment of the purchase price.

(b) Only the cemetery company or its agents may sell or convey lots, grave spaces, crypts, niches, or parts thereof, except that:

(1) The owner of any lot, grave space, niche, crypt, or part thereof may sell his or her lot or part thereof if he or she first has offered its transfer in writing to the cemetery company at the purchase price then being charged by the cemetery company for similar lots and if the cemetery company refused the offer within thirty (30) days after the offer; or

(2) An owner may convey or devise to the cemetery company his or her right and title in and to any lot, grave space, niche, crypt, or part thereof.

(c) The secretary or other responsible officer of the cemetery company shall file and record in its books all instruments of transfer.

(d) The conveyance shall be signed by the persons having proper authority.

(e) Any mortgage or lien on the cemetery land by a permit holder shall not encumber any

burial space that has been sold prior to the granting of the mortgage or creation of the lien.

(f)(1) To ensure that all burial spaces remain unencumbered, the permit holder shall file with the Arkansas Cemetery Board before execution of any mortgage or creation of any lien a notarized statement reflecting the specific description of the land to be affected by the mortgage or lien and a waiver or release by the proposed mortgagee or lienholder of any claim or right to any burial space for which an instrument of conveyance or deed has been or may be executed.

(2) The failure of a permit holder to comply with the requirements of this subsection shall be grounds for the board to require an additional contribution to the permanent maintenance fund of the cemetery in an amount not exceeding one thousand dollars (\$1,000) for each burial space encumbered.

[§ 20-17-1020. Unlawful activity](#)

It shall be unlawful for any cemetery company to bury or inter a body in any path, alley, or walk.

Subchapter 10. Cemetery Act for Perpetually Maintained Cemeteries [\(Refs & Annos\)](#)

[§ 20-17-1021. Fees and contributions](#)

(a) All contributions imposed pursuant to this subchapter shall be deposited into the respective permanent maintenance fund of the cemetery company upon which the contribution is imposed.

(b) All fees imposed pursuant to this subchapter shall be paid to the Arkansas Cemetery Board.

[§ 20-17-1022. Recordkeeping requirements; accounts](#)

(a) All cemetery companies shall make and keep accounts and records which shall indicate that they have made the required contributions to the permanent maintenance fund. The burden is upon the cemetery company to maintain the accounts and records.

(b) Unless otherwise approved by the Arkansas Cemetery Board, all sales contracts and deeds issued by the cemetery company shall be numbered prior to when they are executed by the cemetery company and shall contain those items that the board by rule or order prescribes.

[§ 20-17-1023. Reports; filing fee; annual permit](#)

(a) Within sixty (60) days after the end of the calendar year, each cemetery company shall file with the Arkansas Cemetery Board a report, under oath, of its condition. The report shall contain at least the following information:

- (1) The name of the cemetery company, the location of the cemetery, the name of the person in charge of the records of the cemetery company, and the phone number of the company;
 - (2) The amount of sales of cemetery lots, graves, spaces, mausoleums, crypts, or niches for which payment has been made in full and certificates or deeds of conveyance have been issued during the preceding calendar year;
 - (3) The amounts paid into the permanent maintenance fund and the income received from the fund during the preceding calendar or fiscal year, including the total amount due the fund whether paid in or not, the amounts due the fund at the date of the report, and the amount expended for maintenance of the cemetery;
 - (4) The names and addresses of the owners of the cemetery company or the officers and directors of the company and stating any change of control which has occurred during the past fiscal or calendar year, the date of incorporation, and listing the resident agent and office if the cemetery company is a corporation; and
 - (5) Such other information as the board may by rule or order require.
- (b) The report shall be accompanied by:
- (1) A filing fee of three hundred twenty-five dollars (\$325); and
 - (2)(A) A fee of seven dollars (\$7.00) for each burial sale contract entered into after July 1, 2005, by the cemetery company regardless of the number of spaces sold under the contract regarding plots, crypts, and niches.
 - (B)(i) The first payment of fees under subdivision (b)(2)(A) of this section shall be due on or before March 1, 2006, and shall be based on the number of contract sales entered into during the period of July 1, 2005, through December 31, 2005.
 - (ii) Subsequent annual reports shall be based upon contract sales entered into for the previous calendar year.
- (c)(1) Failure by the cemetery company to make a timely filing of its annual report shall be grounds for an additional contribution to the permanent maintenance fund of fifty dollars (\$50.00) per day until the report is filed with the board.
- (2) If the cemetery company refuses to pay the contribution or fees, the board shall institute suit to recover the penalty and fee and costs and such other relief as the state in its judgment deems proper.
 - (3) If the cemetery company shall fail to meet the requirements of this section, then the board shall apply to the Pulaski County Circuit Court for the proper order to require a report.
- (d) The beginning and ending dates of the report shall coincide with the dates of the report of the trustee required in [§ 20-17-1015](#).
- (e) Upon receipt of a properly completed annual report from the trustee and the cemetery company, the board shall issue to the cemetery company an annual operating permit which shall be prominently displayed at the main entrance to the cemetery.

[§ 20-17-1024. Application of provisions: existing cemeteries](#)

- (a) All cemetery companies in existence at the time of the passage of this act shall be permitted to continue operation under their present permits except that those cemetery companies which are subject to this subchapter and have not been filing annual reports with the Arkansas Cemetery Board shall, by January 1, 1978, file the following information and shall be subject to the jurisdiction of the board:
 - (1) The name of the owner and operator of the cemetery and a statement of the form of business organization, that is, corporation, nonprofit corporation, partnership, etc., along with a copy of the articles, bylaws, or applicable organization documents;

- (2) The location and legal description of the cemetery, including a survey and map of the cemetery delineating the lots, plots, pathways, etc.;
 - (3) The rules and regulations for the use, care, management, and protection of the cemetery, including a list of lot prices and all charges and assessments made by the cemetery company;
 - (4) Details concerning the permanent maintenance trust fund including a copy of the trust agreement, the name of the trustee, the report of the trustee, etc.;
 - (5) A copy of the present permit and proof of registration with the Division of Health of the Department of Health and Human Services;
 - (6) A fee as the board by rule shall prescribe;
 - (7) A copy of the deed to the present cemetery company conveying land used as a cemetery and copies of any encumbrances, mortgages, etc., or a statement that there are none;
 - (8) The name and address of any officers, directors, managers, the degrees of ownership of each, and a statement concerning subsidiaries and affiliates or the organization controlling the cemetery company;
 - (9) A statement as to whether there are any mausoleums or similar structures; and
 - (10) Any additional information necessary to make the filing complete.
- (b) Failure to file the information shall result in the suspension or revocation of the permit, and the cemetery shall be considered not to be a registered cemetery. Until a new permit to operate a cemetery is obtained, all burials or sales shall be unlawful and the person operating the cemetery or allowing the burials shall be subject to the penalties and remedies set forth in [§§ 20-17-1006](#), [20-17-1012\(f\)](#), and [20-17-1018](#).

[§ 20-17-1025. Protection of cemeteries: power to lend](#)

- (a) On August 1, 2001, the Arkansas Cemetery Board shall segregate one hundred eighty thousand dollars (\$180,000) within its general operating fund to be administered by the Securities Commissioner and only used to lend a court-appointed receiver or conservator the funds necessary to assure that a cemetery will be properly maintained and will continue to be a going concern, including the funds necessary to pay any reasonable surety bond premium which is required to be posted by the court.
- (b) The board may take any legal action necessary against a cemetery company, receiver, or conservator to recover any funds loaned by the board to or for the benefit of the cemetery, the cemetery company, receiver, or conservator for the payment of maintenance expenses or unpaid loans.
- (c) Disbursement from such funds for loans to a receiver or conservator shall be made on a “first in, first out” basis as determined by the commissioner.
- (d) Donations to the board to fund such loans may be accepted by the commissioner from any cemetery company, organization, or individual.
- (e) The board may waive payment or extend the payment period for any loan made to a receiver or conservator if the board determines that it is unlikely that the receiver or conservator has or will receive sufficient funds to repay the loan and that the funds were or are needed to maintain and operate the cemetery for the benefit of the lot owners and the general public.

[§ 20-17-1026. Annual permit fee](#)

(a) By March 1 of each year, each permit holder shall pay to the Arkansas Cemetery Board a permit renewal fee in the amount of one hundred dollars (\$100).

(b) All annual permit fees shall be classified as general funds of the board and shall be used to make loans to receivers and conservators as provided in [§ 20-17-1025](#).

[§ 20-17-1027. Duties of State Securities Department](#)

(a) The State Securities Department shall assist the Arkansas Cemetery Board in the performance of its duties.

(b) Assistance under subsection (a) of this section shall include, but is not limited to:

(1) Receiving and disseminating filings, questions, and requests on behalf of the board to the members of the board in advance of each meeting;

(2) Reviewing all filings, questions, and requests on behalf of the board and offering its opinion on the resolution of the matter;

(3) Issuing written responses regarding complaints received by the board;

(4) Scheduling all meetings in conjunction with the Chair of the Arkansas Cemetery Board;

(5) Providing appropriate legal notices for all scheduled meetings;

(6) Establishing a site where meetings of the board may be held;

(7) Scheduling the services of a court reporter for all meetings of the board;

(8) Providing legal representation and assistance through the legal staff of the department to the board in matters pertaining to this subchapter;

(9) Acting as a liaison between the board and any court involved in the administration of any perpetual care cemetery placed in receivership;

(10) Performing inspections at cemeteries for which complaints have been received by the board;

(11) Performing special audits as necessary;

(12) Scheduling regular audits of perpetual care cemeteries;

(13) Administering the annual perpetual care reporting for all perpetual care cemeteries; and

(14) Assisting in the formulation of legislation on behalf of the cemetery industry and the board.

[§ 20-17-1028. Contracts with municipality or county where a cemetery is located](#)

(a)(1) The Arkansas Cemetery Board may contract with the municipality or county where a cemetery is located for the care and maintenance and the operation of the cemetery.

(2) Services relating to the care and maintenance and the operation of the cemetery include without limitation:

(A) The sale and conveyance of lots;

(B) The opening and closing of graves;

(C) The preparation of financial reports and legal documents;

(D) The maintenance of driveways;

(E) The removal of trash and debris;

(F) The cutting of grass;

(G) The planting and care of trees, shrubs, and flowers; and

(H) The necessary improvements to streets, avenues, walks, or other public grounds of the cemetery.

(3) The municipal or county government may subcontract with qualified persons to provide services under this section.

(b)(1) If the board contracts with a municipality or county under this section, the municipality or county, in addition to complying with any applicable statute, shall file with the board in March of each year a financial report showing all moneys received and expended during the preceding year, including without limitation:

- (A) The date of receipt of all moneys;
- (B) The source from which the moneys were received;
- (C) All moneys paid out;
- (D) The date the moneys were paid out;
- (E) The person to whom the moneys were paid out; and
- (F) The purpose of the payment.

(2) At the end of each calendar year, the municipality or county shall review the fiscal position of the cemetery and direct any excess moneys to the permanent maintenance fund.

(c) For the purposes of this section, a municipality or county may accept funds from public and private entities and direct the funds to:

- (1) General maintenance and improvement; or
- (2) The permanent maintenance fund.

(d) The state, a city, or a county shall be immune from liability in contract or in tort for actions taken to implement this section.

[§ 20-17-1029. Cemetery advisory boards--Membership--Organization--Authority](#)

(a) The Governor may create a cemetery advisory board for any cemetery purchased under [§ 20-17-1006](#) to assist the state and the municipality or county where the cemetery is located in achieving the efficient management, operation, maintenance, and preservation of the cemetery.

(b)(1) A cemetery advisory board shall be composed of seven (7) members appointed by the Governor as follows:

- (A) Three (3) members shall be owners of lots in the cemetery or have demonstrated an interest in the preservation of the cemetery;
- (B) Three (3) members shall be owners or operators of a licensed cemetery or funeral home in this state; and
- (C) One (1) member shall be a person actively engaged, by profession or as a volunteer, in activities promoting the historic preservation of cemeteries in the local community.

(2)(A) The terms of the members shall be for three (3) years.

(B) Members shall serve until their successors are appointed and qualified.

(C) The initial members shall draw lots so that three (3) members serve a term of one (1) year, two (2) members serve a term of two (2) years, and two (2) members serve a term of three (3) years.

(D)(i) Vacancies for any unexpired term of a member shall be filled in the same manner as the original appointment of the vacating member.

(ii) An appointee to fill a vacancy shall serve for the unexpired term and is eligible for reappointment.

(3) Members shall biannually elect a chair, vice chair, and a secretary from the membership, whose duties shall be those customarily exercised by the officers or specifically designated by the cemetery advisory board.

(4) No member shall be liable for any damages unless it is made to appear that he or she has acted with corrupt and malicious intent.

(5) Members shall serve without compensation.

(6) A cemetery advisory board shall meet as often as it deems necessary for the purpose of carrying out its duties under this section.

(c) A cemetery advisory board may:

(1) Establish itself as a section 501(c)(3) corporation under the Internal Revenue Code of 1986, as it existed on January 1, 2007;

(2) Raise private funds for the benefit of the cemetery general fund and the permanent maintenance fund;

(3) Recruit volunteers; and

(4)(A) Advise the Arkansas Cemetery Board and the municipality or county where the cemetery is located concerning long-term goals and plans for efficient cemetery operation and beautification.

(B) No policy of a cemetery advisory board relating to long-term goals and plans for efficient cemetery operation and beautification shall be adopted unless the municipality or county where the cemetery is located approves the policy.

Subchapter 11. Cemetery Improvement Districts

[§ 20-17-1101. Objectives; functions](#)

The purpose of the district shall be the building and maintaining of a cemetery or cemeteries for the use and benefit of the property holders within the district, and it is realized that the cemetery would be a benefit to all the real property located in the district.

[§ 20-17-1102. Petition; purpose](#)

(a) Upon the petition of a majority in value of the owners of real property in any designated area, it shall be the duty of the county court to lay off into an improvement district the territory described in the petition and to name three (3) commissioners of the district who are resident property holders in the district.

(b)(1) The petition for and the court order creating the district shall designate the maximum amount that may be expended for labor, materials, and personal services in any year in maintaining the grounds and facilities of the cemetery.

(2) The purpose for which the district is to be formed shall be stated in the petition, and the judgment establishing the district shall give it a name which shall be descriptive of the purpose. It shall also receive a number to prevent its being confused with other districts for similar purposes.

[§ 20-17-1103. Petition; filing; notice; publication](#)

(a)(1) It shall be the duty of the county clerk to give notice of the filing of the petition, describing the territory to be affected and calling upon all persons who wish to be heard upon the question of the establishment of the district to appear before the county court on a day to be fixed in the notice.

(2) The notice shall be published one (1) time a week for two (2) consecutive weeks in some newspaper published and having a bona fide circulation in the county where the lands affected are situated.

(3) This notice may be in the following form:

"Notice is hereby given that a petition has been filed praying for the formation of an improvement district for the purpose of Said petition is on file at the office of the County Clerk of County, where it is open to inspection. All persons desiring to be heard on the question of formation of said district will be heard by the County Court at ...M., on the ... day of, 20.... The following lands are affected: (Here give description of lands affected; the same may be described by using the largest subdivisions possible.)

.....
County Clerk"

(b) Any number of identical petitions may be circulated and identical petitions with identical names may be filed at any time until the county court acts.

(c)(1) On the day named in the notice it shall be the duty of the county court to meet to hear the petition and to determine whether those signing the petition constitute a majority in value.

(2) If the county court determines that a majority in value have petitioned for the improvement, it shall enter its judgment laying off the district as defined in the petition and appointing the commissioners.

(3) If it finds that a majority has not signed the petition, it shall enter its order denying the petition.

(d) Any petitioner or any opponents of the petition may appeal from the judgment of the county court creating or refusing to create the district, but the appeal must be taken and perfected within thirty (30) days. If no appeal is taken within that time, the judgment creating the district shall be final and conclusive upon all persons.

[§ 20-17-1104. Commissioners; appointment; term; compensation](#)

(a) The board of commissioners shall be resident property holders in the district and shall be citizens of integrity and good business ability.

(b)(1) The commissioners shall be appointed to serve for terms of one (1), two (2), and three (3) years, respectively. The length of the term of each commissioner shall be stated in the order of the county court making the appointment.

(2) As the terms of the commissioners expire, the county court shall appoint successors to hold office for a term of three (3) years.

(c)(1) The county court may reappoint a commissioner whose term is expiring.

(2) In case of a vacancy on the board of commissioners after the commissioners have organized, the county court shall appoint some resident property holder as his or her successor, who shall qualify in like manner and within a like time.

(d) The commissioners shall serve without compensation.

[§ 20-17-1105. Commissioners; authority; function](#)

(a) The board of commissioners may take charge of, purchase, and provide a site or grounds and additions thereto, to provide and maintain streets, aisles, outside fences,

drainage, and other necessary facilities, and to employ a caretaker or caretakers for the cutting of grass and the planting and care of trees, shrubs, and flowers.

(b) The commissioners shall establish lots, plots, or burial spaces within the space provided for a cemetery and issue permits for the interment of deceased persons therein.

[§ 20-17-1106. Commissioners; organization; employees; oaths](#)

(a)(1) Within thirty (30) days after their appointment, the commissioners shall take and file their oaths of office with the county clerk, in which they shall swear to support the Constitution of the United States and the Constitution of the State of Arkansas, to faithfully discharge their duties as commissioners, and that they will not be interested, directly or indirectly, in any contract let by the board.

(2) Any commissioner failing to file the oath within the period shall be deemed to have declined the office, and the county court shall appoint some resident property holder as his or her successor who shall qualify in like manner within a like time.

(b) The board shall organize by electing one (1) of its members chair, and it shall select a secretary.

(c) It may also employ such agents, servants, attorneys, and engineers as it deems best and fix their compensation.

(d) Each district shall be a body corporate with power to sue and be sued, and it shall have a corporate seal.

(e) The board shall also select some solvent bank or trust company as the depository of its funds, exacting of the depository a bond in an amount equal to the amount of money likely to come into its hands.

[§ 20-17-1107. Commissioners; liability](#)

No member of the board of commissioners shall be liable for any damages unless it shall be made to appear that he or she had acted with a corrupt and malicious intent.

[§ 20-17-1108. Improvement plans; assessors generally](#)

(a) Upon the qualification of the commissioners, they shall form plans for the improvements they intend to make and the property and equipment they intend to purchase.

(b)(1) The commissioners shall thereupon appoint three (3) assessors to assess the annual benefits which will accrue to the real property within the district from making the improvements upon and the operation of the cemetery and shall fix their compensation.

(2) The assessors shall take an oath that they will well and truly assess all annual benefits that will accrue to the landowners of the district by the making of the proposed improvement, and by the acquisition and operation of the cemetery.

(c) The assessors shall thereupon proceed to assess the annual benefits to the lands within the district, shall inscribe in a book each tract of land, and shall extend opposite each tract of land, the amount of annual benefits that will accrue each year to the land by reason of the improvement.

(d)(1) In case of any reassessment, the reassessment shall be advertised and equalized in the same manner as is provided in this section for making the original assessment.

(2) The owners of all property whose assessment has been raised shall have the right to be heard and to appeal from the decision of the assessors, as in the original assessment.

(e) The assessors shall place opposite each tract the name of the supposed owner, as shown by the last county assessment, but a mistake in the name shall not void the assessment, and the assessors shall correct errors which occur in the county assessment list.

(f) The commissioners shall have the authority to fill any vacancy in the position of assessor, and the assessors shall hold their offices at the pleasure of the board.

[§ 20-17-1109. Assessment; filing; notice; form](#)

(a) The assessment shall be filed with the county clerk of the county, and the secretary of the board shall thereupon give notice of its filing by publication one (1) time a week for two (2) weeks in a newspaper published and having a bona fide circulation in the county. This notice may be in the following form:

"Notice is hereby given that the assessment of annual benefits of District Number ... has been filed in the office of the County Clerk of County, where it is open for inspection. All persons wishing to be heard on said assessment will be heard by the assessors of said district in the office of the County Clerk between the hours of 1 p.m. and 4 p.m., at ..., on the day of, 20...."

(b)(1)(A) On the day named by the notice, it shall be the duty of the assessors to meet at the place named as a board of assessors, to hear all complaints against the assessment, and to equalize and adjust the assessment.

(B) If the board is unable to hear all complaints between the hours designated, it shall adjourn over from day to day until all parties have been heard.

(2) The board's determination shall be final, unless suit is brought in the circuit court within thirty (30) days to review it.

[§ 20-17-1110. Reassessment generally](#)

(a) The commissioners shall one (1) time a year order the assessors to reassess the annual benefits of the district, provided there have been improvements made or improvements destroyed or removed from one (1) or more tracts of land in the district making it necessary to have the annual benefits revised.

(b) Whereupon, it shall be the duty of the assessors to reassess the benefits of the district, and the annual benefits assessed may be raised or lowered as conditions of the property change. However, the annual benefits extended against any piece of property shall not be increased from the annual benefits originally extended unless improvements are made to the land that will be benefited by the operation of the cemetery.

[§ 20-17-1111. Assessment; judgment; lien; remedy](#)

(a) The board of commissioners of the district shall at the time that the annual benefit assessment is equalized or at any time thereafter enter upon its records an order, which shall have all the force of a judgment, provided that there shall be assessed upon the real property of the district and collected annually the annual benefit assessment set opposite each tract of land described. The annual benefit is to be paid by the owner of the real property in the district, payable as provided in the order.

(b)(1) The uncollected annual benefit assessment as extended shall be a lien upon the real property in the district against which it is extended from the time the same is levied, shall be entitled to preference over all demands, executions, encumbrances, or liens whensoever created, and shall continue until the assessment with any penalty and costs that may accrue thereon shall have been paid.

(2) Notice of the amount due shall be given to each landowner, if he or she fails to pay his or her assessment on or before the third Monday in April by mail at his or her last known address.

(3)(A) The remedy against the annual benefit assessment shall be by suit in equity, and the suit shall be brought within thirty (30) days from the time that the notice is mailed.

(B) On the appeal, the presumption shall be in favor of the legality of the annual benefit assessment.

[§ 20-17-1112. Collection of assessment](#)

(a) The original assessment record or any reassessment record shall be filed with the county clerk, whose duty it shall be to extend the annual benefit assessment annually upon the tax books of the county until the district is dissolved.

(b) It shall then be the duty of the collector to collect each year the annual benefit assessment extended upon the book along with the other taxes, and the taxes shall be paid over by the collector to the depository of the district at the same time that he or she pays over the county funds.

(c)(1)(A)(i) If there is any change in the annual benefits assessed, a certified copy of the revised assessment shall be filed with the county clerk who shall extend the revised assessment annually upon the tax books until a new assessment is made, which shall be extended upon the tax books in a similar manner.

(ii) The power to reassess and extend the assessment upon the tax books shall be a continuing power as long as the district continues to exist.

(B) It shall be the duty of the county collector to collect the taxes so extended.

(2) In lieu of filing the reassessment, the assessors may make the changes in the assessments in red ink on the assessment already on file, or the assessment record may contain many columns, at the head of which the year shall be designated, and in the column the new annual benefits may be shown in red ink, which will indicate any increase or decrease in the original annual benefits extended. When the change is made, a red ink line shall be drawn through the figures showing the original annual benefits extended.

[§ 20-17-1113. Assessment; payment; enforcement; penalty](#)

(a)(1) All annual benefits extended and levied under this subchapter shall be payable between the third Monday in February and the third Monday in April of each year.

(2) If any annual benefit assessments levied by the board under this subchapter are not paid at maturity, the collector shall not embrace the assessments in the taxes for which he or she shall sell the lands, but he or she shall report the delinquencies to the board of commissioners of the district who shall add to the amount of the annual benefit assessment a penalty of ten percent (10%).

(b) The board of commissioners shall enforce the collection by equitable proceedings in the circuit court of the county in the manner provided by [§§ 14-121-426 -- 14-121-432](#).

(c) However, the owner of property sold for taxes thereunder shall have the right to redeem it at any time within two (2) years from the time when his or her lands have been stricken off by the commissioner making the sale.

[§ 20-17-1114. Depository; payments; proceedings; reports](#)

(a) The depository shall pay out no money except under the order of the board of commissioners and upon a voucher check signed by at least two (2) of the commissioners. Every voucher check shall state upon its face to whom payable, the amount, and the purpose for which it is used. All voucher checks shall be dated and shall be numbered consecutively in a record to be kept by the board of the number and amount of each.

(b) All proceedings and transactions of the board shall be a matter of public record and shall be open to the inspection of the public.

(c) The board of commissioners shall file with the county clerk in January of each year a certified itemized report showing all moneys received, the date of receipt, and the source from which received, all moneys paid out, the date paid, to whom paid, and for what purpose, during the preceding year, together with an itemized list of all delinquent taxes, showing the owner, a description of the property, the years for which the tax is delinquent, and the amount of total delinquency.

[§ 20-17-1115. Acquisition of equipment; notes; issuance](#)

(a) In order to acquire equipment and to do the work, the board may issue the negotiable notes of the district signed by the members of the board and bearing a rate of interest not exceeding six percent (6%) per annum and may pledge and mortgage a portion of future annual benefit assessments as collected for the payment thereof.

(b) Any petitions for the creation of a district and the court order creating the district shall limit the total amount of notes that may be outstanding at any one (1) time in excess of ten thousand dollars (\$10,000).

(c) The district shall have no authority to issue bonds.

[§ 20-17-1116. Termination; petition](#)

(a) The district shall not cease to exist upon the completion of the improvement, but it shall continue to exist for the purpose of operating and maintaining the cemetery until such time as the owners of a majority in value of the real property within the district petition the county court for dissolution of the district.

(b) Publication of the petition for dissolution, as provided for in creating the district, shall be made, and if the county court finds that a majority in value of the real property in the district has petitioned for the dissolution of the district, the district shall be dissolved.

(c) Parties for or against the dissolution shall have the same right of appeal as in the creation of the district.

[§ 20-17-1117. Actions and proceedings: appeals](#)

(a) All cases involving the validity of the districts or the annual benefit assessments and all suits to foreclose the lien of annual benefit assessments shall be deemed matters of public interest, and they shall be advanced and disposed of at the earliest possible moment.

(b) All appeals therefrom shall be taken and perfected within thirty (30) days.

[§ 20-17-1118. Taxes; assessments; collection; fees](#)

In collecting annual benefit assessments in any district created under this subchapter, the collector of taxes in any county shall deduct one percent (1%) of the annual benefit assessments or taxes so collected, and retain one-half of one percent (0.5%) as the fee of the collector for collecting the assessments or taxes and pay over the remaining one-half of one percent (0.5%) of the assessments or taxes collected to the county clerk of the county as the fee of the county clerk for extending on the assessment records of the county the annual benefit assessments or taxes.

85 Ark.App. 23, 145 S.W.3d 389

[Briefs and Other Related Documents](#)

Court of Appeals of Arkansas,
Division III.

Lisa Michelle ALFORD and Carl Andrew Alford

v.

Eula Beatrice (Alford) HALE, Janice Ann (Alford) Richards, et al.

No. CA 03-655.

Feb. 4, 2004.

Background: Decedent's children petitioned Circuit Court for authority to disinter decedent's remains so that the remains could be reburied next to those of decedent's widow. The Circuit Court, Saline County, [Robert Wilson Garrett, J.](#), initially authorized disinterment, then granted motion of decedent's sisters to set aside the disinterment order. Children appealed.


Holding: The Court of Appeals, [John B. Robbins](#), J., held that children, as decedent's next of kin, were authorized to have remains disinterred.

Reversed.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

 [361 Statutes](#)


 [361VI Construction and Operation](#)

 [361VI\(A\) General Rules of Construction](#)


 [361k187 Meaning of Language](#)

 [361k188 k. In General. \[Most Cited Cases\]\(#\)](#)

 [361 Statutes](#)  [KeyCite Citing References for this Headnote](#)

 [361VI Construction and Operation](#)

 [361VI\(A\) General Rules of Construction](#)

 [361k187 Meaning of Language](#)


 [361k190 k. Existence of Ambiguity. \[Most Cited Cases\]\(#\)](#)

In interpreting a statute the appellate court will give the words in the statute their ordinary and common usage, and if the language is plain and unambiguous, the analysis need go no further.

[2]  [KeyCite Citing References for this Headnote](#)

 [116 Dead Bodies](#)

 [116k2 Burial](#)


 [116k5 k. Removal from Place of Former Burial. \[Most Cited Cases\]\(#\)](#)

Children of decedent, as decedent's next of kin, were authorized by statutes and regulations governing disinterment to have decedent's remains disinterred so that the remains could be reburied next to those of decedent's widow; children were not required to offer a compelling reason for the disinterment. [West's A.C.A. §§ 20-18-202, 20-18-604\(e\)](#).

[3]  [KeyCite Citing References for this Headnote](#)

 [116 Dead Bodies](#)

 [116k2 Burial](#)

 [116k5 k. Removal from Place of Former Burial. \[Most Cited Cases\]\(#\)](#)

The statutory authority of decedent's children, as decedent's next of kin, to have decedent's remains disinterred was not compromised by children's participation in the initial burial decision. [West's A.C.A. §§ 20-18-202, 20-18-604\(e\)](#).

**390 *24 Holiman & Kennedy, by: Kendall A.J. Sample, Sherwood, for appellants.

[Meredith Wineland](#), Benton, for appellees.

[JOHN B. ROBBINS](#), Judge.

The appellants in this case are Lisa Michelle Alford and Carl Andrew Alford, who are the only two children of Carl E. Alford, now deceased. The appellees are Eula Hale, Janice Richards, Connie Alford, Geneva Healey, and Alicia Meriweather. The appellees are Carl E. Alford's sisters. Carl E. Alford died on January 5, 1989, and was buried at Pinecrest Memorial Park in Alexander, Arkansas.

On October 1, 2002, the appellants filed a "petition for authority to disinter." In their petition, appellants asserted that their mother, June Alford, had died and could not be buried at the site where Carl E. Alford was currently buried. As a result, June Alford was buried at Chapel Hill Memorial Park in Jacksonville, Arkansas. The appellants petitioned the trial court to allow them to disinter their father's remains so that he could be buried beside their mother at Chapel Hill Memorial Park. The appellants alleged that they were carrying out their parents' wishes in trying to assure that their parents' final resting places were side by side.

On October 21, 2002, the trial court entered an order authorizing the appellants to have the remains of their father disinterred and moved to rest alongside their mother. The order recited, "All parties, entities, and companies, including, but not limited to, the Pinecrest Cemetery, shall allow said disinterment without inference." However, at the time the order for authority to disinter was entered, the trial court informed the appellants that they needed to serve all parties and wait thirty days before taking action on the order.

*25 The appellees were thereafter notified of the proceedings, and on October 29, 2002, filed a motion to set aside the order authorizing disinterment. On the same day, the trial court entered an order stating that no action shall take place in the matter until a full hearing is held and pending motions can be heard by the court.

A hearing was held on February 21, 2003, and by order entered March 6, 2003, the trial court granted the appellees' motion to set aside the previous order for **391 disinterment, and ordered that there shall not be any disinterment of Carl E. Alford. The order recites:

The Court makes its findings specifically upon the fact that the decision of the placement of Carl Eugene Alford was made prior to his death and he participated in the decision of his burial; that the son of the decedent, Carl Andrew Alford participated in the decision of this burial, as well as the wife of the decedent, June Alford, participating and writing checks for his burial. There was no evidence that there was any discussions or decisions for Carl Eugene Alford to be buried anywhere other than Pinecrest until after the death of June Alford.

The Court makes this finding contingent upon two other requirements. First, June Alford may be buried by Carl if the children desire. Second, the children shall decide upon the headstone for June Alford in the event they decide to move her to Pinecrest.

Lisa Michelle Alford and Carl Andrew Alford now appeal, arguing that the trial court erred in refusing to permit them to disinter their father. We agree, and we reverse.

Connie Alford testified on behalf of the appellees at the hearing. She stated that prior to Carl E. Alford's death, their father, Carl Lee Alford, had purchased four adjacent plots at Pinecrest Memorial Park. When Carl E. Alford died, he was buried in one of the plots. Connie testified that appellant Carl Andrew Alford purchased an extra plot for her below

the other four spaces, because Carl E. Alford was buried in the plot intended for her. Since that time, both of Carl E. Alford's parents have died. His father is buried to the left of his plot, and his mother is buried to the left of his father's plot. The plot to the right of Carl E. Alford's plot remains vacant.

Connie testified that when Carl E. Alford was dying of [cancer](#) she and her father offered her burial place at Pinecrest. Connie further asserted that Carl Andrew Alford and June Alford *26 were involved in the decision to bury him at Pinecrest. Carl Andrew Alford signed the interment order authorizing his father to be buried at Pinecrest, and June Alford paid for opening the grave and a headstone.

Connie testified that her relationship with the appellants was very close up until their mother's death. She further stated that at no time prior to their mother's death did either appellant talk about moving their father. They did, however, discuss burying their mother at Pinecrest, and it was not until after her death that Connie discovered she was to be buried elsewhere.

Connie acknowledged that, at the time her brother died, she agreed with her mother, father, and older sister not to put a double marker on his grave because June was young and might have remarried. However, June did not remarry, and Connie testified that she does not object to June being buried in the plot to the right of her brother. Connie maintained that Carl E. Alford took part in the decision to be buried at Pinecrest. [FN1](#) She further stated that it is very important to her that he remain there. She stated that since his death she has consistently visited and placed flowers on his grave.

[FN1](#). We note, however, that there is no evidence that Carl E. Alford executed a will with any provision regarding his place of burial. Nor did he execute a declaration governing the final disposition of his bodily remains as is authorized under [Ark.Code Ann. § 20-17-102 \(Supp.2003\)](#).

Alicia Meriweather also testified for the appellees. She stated that she visits Carl **392 E. Alford's grave often, and that the appellants never contacted her about having June Alford buried at Pinecrest. Alicia testified that she would welcome appellants' moving their mother from Jacksonville to rest beside Carl. E. Alford at Pinecrest. Alicia further stated, "I don't ever agree with disinterring a body, ever." Another of the appellees, Geneva Healey, stated, "Carl being buried where he is had special meaning to me for just family closeness, you don't want to bother him."

Betty Finley, the owner of Pinecrest Memorial Park, testified that Pinecrest has certain rules and regulations regarding interment and ownership. She stated that Pinecrest's policy is that the property owners have to give their approval for disinterment. Ms. Finley explained that this policy did not originate from any statute or regulation, but is simply designed to prevent her business from being sued. The plot where Carl E. Alford is buried was owned by his father, Carl Lee Alford, but because Carl Lee is *27 deceased his heirs, the appellees, own the plot. Pursuant to Pinecrest's policy, no disinterment would be permitted without the appellees' approval.

Carl Andrew Alford testified for the appellants. He stated that he checked into burying his mother at Pinecrest in September 2002, about a week before she died. According to Carl Andrew, he had a telephone conversation with a Pinecrest employee, who found a note from 1989 in the file. She read the note over the telephone, and the note says:

There are five sisters and one brother to Carl E. Alford. They are children of Carl L., who is the property owner. Siblings have spoken with father and according to Bea Hale, sister, they are in agreement that only a single marker may be purchased for Carl E. They do not wish for June to be interred in space 13. Do not sell or set a companion marker without authority of Carl L.

After hearing about the note, Carl Andrew thought the appellees did not want his mother buried at Pinecrest with their family. Therefore, he and his sister purchased plots at the cemetery in Jacksonville. Carl Andrew testified that "I want to disinter my dad so that he can be buried by my mother and us, my sister and I."

Sharon M. Leinbach, the State Registrar and Director of the Division of Vital Records for the Arkansas Department of Health, was unavailable to testify. However, she signed an affidavit that was admitted into evidence, and the affidavit states:

I, the undersigned, do state the following under oath. That I am the State Registrar and Director of the Division of Vital Records of the Arkansas Department of Health.

Under [Arkansas Code Annotated 20-18-604\(e\)](#), I, as the State Registrar, am required to issue an authorization for disinterment to a licensed funeral director, upon proper application.

According to Regulation 7.4 of the Rules and Regulations pertaining to Vital Records promulgated under the authority of Act 1254 of 1995, I, as the State Registrar, am given the exclusive authority to issue disinterment permits.

The attached Request to Disinter is the form that my office provides and requires when a disinterment is sought. The form *28 includes all of the requirements of our office and the instructions for proceeding with the disinterment process. No other information, notices or consents are required, other than those listed on this form. Although I will honor any court order, to my knowledge, court involvement is NOT required for disinterment. I require only that a licensed funeral director submit **393 the completed request to disinter which bears the signature of the next of kin.

The "Request to Disinter" form referred to in the above affidavit contains the following "next of kin authorization,"

I Certify That I Am The Deceased's Authorized Family Member To Request This Disinterment.

I Understand That Vital Records Law Recognizes A Deceased Person's Spouse, Children, Parents, Grandparents, and Grandchildren as Authorized to Receive Death Certificate Information. In The Spirit of This Law, I Have Notified These Family Members of This Disinterment.

On appeal, the appellants argue that the trial court's refusal to allow them to disinter their father was contrary to the controlling statutes and regulations of this state. The appellants cite [Ark.Code Ann. § 20-18-604\(e\) \(Repl.2000\)](#), which provides:




Authorization for disinterment and reinterment shall be required prior to disinterment of a dead body or fetus. The authorization shall be issued by the state registrar to a licensed funeral director, or person acting as such, upon proper application.

[Arkansas Code Annotated section 20-18-202 \(Repl.2000\)](#) governs the regulatory powers of the State Board of Health and contains the provision that, "The board is authorized to adopt, amend, and repeal rules and regulations for the purpose of carrying out the provisions of this chapter." Pursuant to the above authority the "Rules of Regulations pertaining to Vital Records" were promulgated. Regulation 7.4 provides, in pertinent part:

No dead human body shall be removed from its place of original interment except under the following conditions:

I. Unless a permit from the State Registrar or his designated representative marked "Disinterment Permit" be secured by a licensed funeral director in charge of the disinterment. The *29 qualified person making the application shall present to the State Registrar, the correct name, age, date of death of the body to be disinterred, place of disinterment, together with written consent of the next of kin or their authorized representative, by the local law enforcement officer, or by court order. The State Registrar may require a legal proof of such kinship or legal authority.

The appellants correctly assert that Regulation 7.4 requires consent of the next of kin, but does not require that notice be given to other family members or the owner of the cemetery plot. The registrar requires that the form be completed by a licensed funeral director and signed by next of kin. However, the appellants submit that no Arkansas law requires a court order for disinterment of a body when there has been written consent by the next of kin. The appellants further assert that there is no requirement that the next of kin provide any reasons for their desire to disinter. Therefore, the appellants argue that the trial court was without any legal basis to interfere with their desire to have their father's remains disinterred.

[1]  [2]  [3]  We agree with the appellants' argument as applied to the facts of this case. In interpreting a statute the appellate court will give the words in the statute their ordinary and common usage, and if the language is plain and unambiguous, the analysis need go no further. [Burcham v. City of Van Buren, 330 Ark. 451, 954 S.W.2d 266 \(1997\)](#). The relevant statutory authority for this case gives the board of health the authority to adopt rules and regulations, and gives the state registrar **394 the power to authorize the disinterment of a dead body. The regulations permit disinterment upon the satisfaction of certain conditions that include consent of the next of kin, but there is no requirement that the next of kin offer a compelling reason for disinterment with the application. Nor is there any statutory or regulatory provision suggesting that the next of kin's power to consent to disinterment is in any way compromised if the next of kin participated in the initial burial decision. By the plain wording of the Arkansas statutes and regulations pertaining to disinterment, the appellants, as next of kin, should not have been prevented from proceeding with disinterring their father and having him buried next to appellants' mother.

The appellees cite numerous cases that purport to justify the trial court's action in this case. In [Tully v. Tully, 226 Ga. 653, 177 S.E.2d 49 \(1970\)](#), the Georgia Supreme Court announced that while the right *30 to have a dead body remain undisturbed is not

absolute, a court will not ordinarily order or permit it to be disinterred unless there is a strong showing that it is necessary and that the interests of justice require it. In [Fidelity Union Trust Co. v. Heller, 16 N.J.Super. 285, 84 A.2d 485 \(1951\)](#), it was held that “after interment a body is in the custody of the law and removal is subject to the jurisdiction of a court of equity, but the power should not be exercised unless it be clearly shown that good cause and urgent necessity for such action exists.” In [Mestjian v. Town of Cerro Gordo, 131 Ill.App.3d 16, 86 Ill.Dec. 290, 475 N.E.2d 287 \(1985\)](#), it was stated that in light of the sanctity of a grave, permission to remove buried remains will not be lightly granted.

While appellees have identified caselaw from foreign jurisdictions in attempt to support their position, these cases are unavailing. This is because none of them address the same, or similar, statutory or regulatory provisions that we are bound to follow in deciding this case.

However, there are cases from other states that support the arguments of the appellants. In [Dueitt v. Dueitt, 802 S.W.2d 859 \(Tex.App.1991\)](#), it was held that because the applicable disinterment statute provides that a surviving spouse may agree with the cemetery association to remove a decedent's remains without obtaining a court order, there is no need to prove a necessity or compelling reason for disinterment. In that case, the appellate court stated that when the legislature enacts a statute that provides a clear and distinct right, it must be presumed the legislative enactment established the public policy of the state with respect thereto. Similarly, in [In re Elman, 152 Misc.2d 656, 578 N.Y.S.2d 95 \(1991\)](#), it was held that there is no need for application to a court for disinterment if all of the required statutory consents of the relatives are obtained, and that application is necessary only if the required consents cannot be obtained.

There is one case cited by the appellees where the appeals court upheld the denial of the surviving spouse's petition to disinter the remains of his ex-wife, notwithstanding a statute that provided him the right to do so. See [Spanich v. Reichelderfer, 90 Ohio App.3d 148, 628 N.E.2d 102 \(1993\)](#). However, in that case the petitioner had been separated from his wife and had a tenuous relationship with her prior to her death. The facts were so strong that the trial court found he was not even a “surviving spouse” under the meaning of the statute, and the appeals court used its equitable powers to prevent abuse of the statute. That case is clearly distinguishable from the case at bar, in that there is no *31 evidence in the instant case to suggest anything but a normal relationship between**395 the appellants and their father. Under the facts presented, we cannot say there has been any abuse of the regulation governing disinterment.

We hold that the trial court erred in ruling that there shall be no disinterment of the remains of Carl E. Alford. We, therefore, reverse the trial court's order entered March 6, 2003.

A.C.A. § 20-18-604

West's Arkansas Code Annotated [Currentness](#)

Title 20. Public Health and Welfare

Subtitle 2. Health and Safety (Chapters 6 to 44)

■ [Chapter 18](#). Vital Statistics Act ([Refs & Annos](#))

■ [Subchapter 6](#). Deaths

➡ **§ 20-18-604. Final disposition of bodies**

(a) The funeral director or the person acting as the funeral director who first assumes custody of a dead body shall obtain authorization for final disposition of the body as

provided in the regulations.

(b) Prior to final disposition of a dead fetus, irrespective of the duration of pregnancy, the funeral director, the person in charge of the institution, or other person assuming responsibility for final disposition of the fetus shall obtain from the parents authorization for final disposition on a form prescribed by the State Registrar of Vital Records.

(c) With the consent of the physician or State Medical Examiner or county coroner, who is to certify the cause of death, a dead body may be moved from the place of death for the purpose of being prepared for final disposition.

(d) An authorization for final disposition issued under the law of another state which accompanies a dead body or fetus brought into this state shall be authority for final disposition of the body or fetus in this state.

(e) Authorization for disinterment and reinterment shall be required prior to disinterment of a dead body or fetus. The authorization shall be issued by the state registrar to a licensed funeral director or person acting as such upon proper application.

CREDIT(S)

Acts of 1981, Act 120, § 17; Acts of 1989, Act 396, § 4; [Acts of 1995, Act 1254, § 28](#).

West's Arkansas Code Annotated [Currentness](#)

Title 13. Libraries, Archives, and Cultural Resources

Chapter 6. Archeological Research

◆ Subchapter 4. Human Skeletal Burial Remains

§ 13-6-401. Statement of intent

(a) It is a declaration and statement of the General Assembly's intent that all human burials and human skeletal burial remains shall be accorded equal treatment and respect for human dignity without reference to their ethnic origins, cultural backgrounds, religious affiliations, or date of burial.

(b) The provisions of this subchapter shall apply to all human burials or human skeletal burial remains found on or in all public or private lands or waters of Arkansas.

§ 13-6-402. Definitions

As used in this subchapter:

(1) "Artifacts" means arrowheads, other bone and stone tools, pottery, pottery fragments, china, metal objects or other material objects made by Native American settlers, or other residents of Arkansas, which were left or lost in or on the ground, except those items which were placed in direct association with human skeletal burial remains or burial furniture as defined in this subchapter;

(2) "Burial furniture" means any items which were placed with human remains at the time of burial or in apparent intentional association with the burial and would include

burial markers, items of personal adornment, casket and casket hardware, stone and bone tools, pottery vessels, or other similar objects or materials;

(3) "Burial grounds" means any place where human skeletal remains are or have been buried;

(4) "Desecration" means the intentional, willful, or knowing removal or disturbance of human skeletal burial remains or burial furniture which was placed with a buried human body, or treating such human skeletal burial remains in an irreverent and contemptuous manner; and

(5) "Human skeletal burial remains" means the calcified portion of a human body which remains after the flesh has decomposed.

§ 13-6-403. State Plan

(a) The public has a right to the knowledge to be derived and gained from the scientific study of human skeletal burial remains and burial furniture.

(b) Therefore, when justified by "A State Plan for the Conservation of Archeological Resources in Arkansas" as promulgated by the State Archeologist and the State Historic Preservation Officer, the investigation, excavation, removal, and analysis of human skeletal burial remains and burial furniture is authorized and, if done, must be carried out with the consent of the landowner and consultation [FN1] with the appropriate tribe, if identifiable, and under the direction of archeologists employed by the state or the United States Government or by archeologists meeting the United States Department of Interior's professional qualifications standards found in the current Code of Federal Regulations.

[FN1] So in original; probably should read "consultation".

§ 13-6-404. Exhumed remains; conveyance

(a) If human skeletal burial remains are exhumed for relocation, then at the request of a direct descendant, that of a specific church, or that of a Native American tribal group recognized by the United States Government who can provide written or scientific documentation of such descent, or of direct church or tribal affiliation with the human skeletal burial remains, the human skeletal burial remains will be conveyed to such an individual or entity.

(b) By consultation with the groups mentioned in subsection (a) of this section, scientific studies may be undertaken.

§ 13-6-405. Unclaimed remains; disposition

(a) If human skeletal burial remains are not claimed as set forth in [§ 13-6-404](#), the Arkansas Archeological Survey or a state-supported museum, or a museum accredited by the American Association of Museums, may serve as a depository for such skeletal remains as are required for scientific purposes.

(b) If not otherwise claimed as provided in this subchapter, skeletal burial remains shall

be disposed of in accordance with existing laws, rules, and regulations for disposing of human remains.

§ 13-6-406. Trade or collection of remains

(a) Anyone who knowingly buys, sells, or barter human skeletal burial remains or their associated burial furniture is committing a Class D felony for the first offense and a Class C felony on the second and subsequent offenses.

(b) Artifacts as defined in this subchapter and private collections legally acquired prior to July 15, 1991, are exempted from this section.

(c) Nothing in this subchapter prohibits the collecting of such artifacts by landowners or others who do so with the landowner's permission.

§ 13-6-407. Display of remains

Anyone who knowingly displays human skeletal burial remains for profit or to aid and abet a commercial enterprise is committing a Class C felony with each day of display being a separate offense.

§ 13-6-408. Desecration of burial grounds and burial furniture

(a) Anyone who intentionally or knowingly desecrates or permits desecration of a burial ground and associated burial furniture is committing on the first offense a Class D felony and on the second or subsequent offenses, a Class C felony.

(b) The presence in the ground of grave markers, caskets, or casket hardware creates a rebuttable presumption that these are burial furniture and of the existence or presence of a human burial ground.

(c) Exempted from this section is disturbance of human skeletal burial remains or burial furniture by landowners or agricultural tenants as a consequence of agricultural activity or any other activity unless the landowner or agricultural tenant knowingly desecrates or knowingly allows desecration of a cemetery or burial site.

§ 13-6-409. Possession of item

The mere possession of items defined in § 13-6-402 does not create a presumption of a violation of this subchapter, but the duty shall remain upon the state to prove any violation of this subchapter.

N THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

**THE REGIONAL NATIONAL CEMETERY
IMPROVEMENT CORPORATION**

PETITIONER

VS.

CASE NO.: CIV-06-

**REGISTRAR, BUREAU OF VITAL STATISTICS
FOR THE STATE OF ARKANSAS; THE
ARKANSAS STATE HISTORIC PRESERVATION
OFFICER; AND ROBERT PASCAL**

DEFENDANTS

PETITION

COMES now the Regional National Cemetery Improvement Corporation, by and through its President, Roger McLain, and Budd Saunders, Recorder, and states as follows:

1. That this Court has jurisdiction over the parties and subject matter hereto pursuant to A.C.A. 20-18-604 and Regulation 7.4 of the Registrar of the Bureau Vital Statistics for the State of Arkansas.
2. The Plaintiff is a Non-Profit Corporation organized under the laws of the State of Arkansas.
3. That the burial site of James Leeper and Margaret Leeper, husband and wife, and their unnamed infant has fallen into a state of disrepair on property in the Fayetteville Industrial Park owned by Robert Pascal, who has no objection to the disinterment of the Deceased. That the Petitioner and the Descendants of the

Deceased desire that said remains be disinterred and re-interred in the National Cemetery located in Fayetteville, Arkansas with full honors; the said James Leeper being a veteran of the American Revolutionary War.

4. That various statements and consents are attached hereto and incorporated herein as of set out word for word regarding this request.
5. That Beard Funeral Home has agreed to seek the necessary permit, and oversee the disinterment and re-interment.
6. That the State Registrar of the Bureau of Vital Statistics has declined to issue a permit without a court order due to the fact that no Death Certificates exist.
7. That said burial site is not on the State or National Registrar of Historic Places though Petitioner plans to make arrangements to preserve the original tombstones; however, it appears pursuant to A.C.A. §13-6-401 et seq., that The Arkansas State Historic Preservation Officer may have an interest in this matter.

WHEREFORE, the Petitioner prays that this court grant an order authorizing a permit for the disinterment and re-interment as stated above and all other relief to which it may prove his self entitled.

GEORGE E. BUTLER, JR.
Attorney at Law
Washington County Courthouse
280 N. College Ave., Suite 501
Fayetteville, AR 72701
Phone: (479) 973-8415
Fax: (479) 444-1889
E-Mail: gbutler@co.washington.ar.us
AR BAR NO.: 77022

For THE REGIONAL NATIONAL
CEMETERY IMPROVEMENT
CORPORATION

59 Cal.2d 412, 380 P.2d 390, 29 Cal.Rptr. 790

[View Cal./Cal.App. version](#)

Supreme Court of California, In Bank.
EDEN MEMORIAL PARK ASSOCIATION et al., Plaintiffs and Appellants,
v.
The DEPARTMENT OF PUBLIC WORKS et al., Defendants and Respondents.
L. A. 26983.
April 16, 1963.
Rehearing Denied May 14, 1963.

Action by cemetery and one of its directors as a taxpayer to enjoin Department of Public Works and state officials from constructing freeway across land cemetery had dedicated exclusively for cemetery purposes. The Superior Court, Los Angeles County, John Stuart Frazer, J., rendered judgment for the defendants, and the plaintiffs appealed. The Supreme Court, Traynor, J., held that Department of Public Works and state officials lawfully invoked power of Secretary of Commerce of United States to secure possession of cemetery land for construction of freeway as part of National System of Interstate and Defense Highways, where State Highway Engineer to whom Director of Public Works was authorized to delegate powers with respect to highways requested authorized representative of Secretary to have United States acquire the land.

Affirmed.

McComb, J., dissented.


Opinion, [27 Cal.Rptr. 503](#), vacated.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

 [360 States](#)

 [360I Political Status and Relations](#)

 [360I\(A\) In General](#)

 [360k4.19 k. Cooperation Between State and United States.](#) [Most Cited Cases](#)


Statutes whereby California assented to provisions of Federal Highway Act, Department of Public Works was authorized to make agreements with federal officials to acquire rights of way, and Director of Public Works was authorized to delegate his highway powers to state highway engineer, authorized engineer to act for state in requesting Secretary of Commerce to acquire land of cemetery for freeway construction as part of national highway system. [West's Ann.Streets](#)

[& High.Code. §§ 7, 50, 51, 820, 820.5; West's Ann.Gov.Code. §§ 14001, 14004; 23 U.S.C.A. § 107.](#)

[2]  [KeyCite Citing References for this Headnote](#)

 [360](#) States

 [360I](#) Political Status and Relations

 [360I\(A\)](#) In General


 [360k4.19](#) k. Cooperation Between State and United States. [Most Cited Cases](#)

Statutory authorization to Department of Public Works to do any and all things in connection with joint state and federal projects as may be done with reference to state highways does not limit power to department to invoke assistance of Secretary of Commerce to acquire lands for interstate highway system. [23 U.S.C.A. § 107\(a\); West's Ann.Streets & High.Code. § 820.5.](#)

[3]  [KeyCite Citing References for this Headnote](#)

 [360](#) States

 [360I](#) Political Status and Relations


 [360I\(A\)](#) In General


 [360k4.19](#) k. Cooperation Between State and United States. [Most Cited Cases](#)
(Formerly 360k19)


Even if statute were interpreted to include implied limitations on powers elsewhere granted to Department of Public Works, those limitations would be superseded by later statute authorizing Department to invoke aid of Secretary of Commerce in acquiring lands. [West's Ann.Streets & High.Code. §§ 820, 820.5; 23 U.S.C.A. § 107.](#)

[4]  [KeyCite Citing References for this Headnote](#)

 [148](#) Eminent Domain

 [148I](#) Nature, Extent, and Delegation of Power

 [148k6](#) Delegation of Power

 [148k6.1](#) k. In General. [Most Cited Cases](#)
(Formerly 148k6)

Department of Public Works and state officials lawfully invoked power of Secretary of Commerce to secure possession of cemetery land for construction of freeway as part of national highway system where state highway engineer, to whom director of public works was authorized to delegate powers, requested the authorized representative of the secretary to have United States acquire the land. [West's Ann.Gov.Code, §§ 7, 14001, 14004; West's Ann.Streets & High.Code, §§ 7, 50, 51; 23 U.S.C.A. § 107.](#)

Any comments I have added from the History of Marion County will be found below noted as "HMC")

Adams Cemetery: is located on Greasy Creek on a farm now owned by the Jeffersons. It is about 6 miles south of Yellville in Blue Springs township. It is grown up, stones are broken and falling down, and it is no longer used for burials. It is just off Hwy 235 in S25 T18 R16. (HMC: It was established as a family **cemetery** by the Pioneer Adams family on the farm they then owned. Most of the grave markers are of people who are related to the family.

The earliest marker is of George Adams who died in 1854. One of the latest ones is E.V. Wade, who died in 1938, whose mother was Louisa Adams Wade, known as Aunt "Sis" Wade.)

Anderson Flat Cemetery: is located about 1/2 mile off the State Hwy 235 between Bruno and Pindall. Most burials are from the early 1900s, but the **cemetery** began a bit earlier. It is large, well kept and has few stones with no names and dates. The **cemetery** is well fenced with a chain link fence. It is adjacent to Anderson Flat Church and firehouse. (HMC- Located in NW 1/4, S19, T17, R17. There are a few stones in the 1890's of the Anderson family from whom the **cemetery** and community got its name. For several years the Mennonites had a community there and used it. In the 1960s they all left this area and moved to South America.)

Anglin Cemetery: See Oakland **Cemetery**

Barb Cemetery: is located on White River, above Cotter. It is very near the site of the old Denton Ferry. It is grown up and no longer in use. Copied Sunday Dec 2, 1962 (MCH- Located in a field now owned by Lyle Wood. It is no longer used and was established there by the Barb Family who originally owned the farm. Most early graves are of members of that family. The latest grave is that of Lt. Albert G. Cravens, who died in 1931. He was a veteran of the Civil War, having been a Lieutenant in the 27th Arkansas Infantry. Later he became a steamboat captain on the White River. Before his death at 91 years of age, "Daddy" Cravens, as he was known, requested that he be buried there in sight of the White River. An inscription on his stone reads "Pioneer. Soldier. Patriot".

Beckham Cemetery: This **cemetery** is located in the extreme southwestern corner of Marion County. The nearest towns are Everton and Western Grove. It is in use now, and many are being buried there. It is a lovely **cemetery** and well kept. (MCH- located in SW 1/4, S14, T17, R18. It was established early and one of the earliest markers is of Sarah Tomblen, who was born in 1804 and died in 1882. Many graves have dates in the 1880s. Those buried there include the families of Shults, Slover, Swafford, Taylor, Tramwell, Trueblood, Willis and many others.)

Berry or Cowdrey Cemetery: This **cemetery** is NOT listed in the **Cemetery** Book unless I missed it. This information is from MCH: Is about 4 miles below Yellville on the Jefferson farm. It has not been used in years, but was a family **cemetery** used by Berry, Cowdrey and Wilson, who were all related. Only a few markers are now left standing, and the earliest burial date that can be read is 1855, the latest 1893.

Brantley Cemetery: this old **cemetery** is located in south Marion Co. It is now in Buffalo National River National Park. It was first established on the Brantley farm as a burial place for the family. Later, other people buried there. It is now fenced off by Buffalo National River and has no **access**. <Mysty McPherson adds this for your information: **Access** to cemeteries by roads fit for automobiles is an AR state law. However, this law does NOT apply to federal lands. Therefore, **access** to cemeteries within the boundaries of **Buffalo River National Park** has become the equivalent of non-existent. It's been fought out in courts etc. and, of course, the feds have won <groan> Special arrangements can be made with the park service, but I hear that's typical bureaucratic complicate-the-issue garbage. Arrangements include unlocking gates, taking down fences, 4X vehicles, backpack hikes, ad

infinitum - all at THEIR convenience, of course.> Family members tell us this couple lived there and owned this farm. They had 3 little boys. Rhoda died and 6 days later Jim died and was buried there on the farm by her. An older brother raised the 3 little boys. Also buried here is an Avey child, child of Olivan and Rosa Bell Humprey Avey. Other family members of the Brantley family are buried here in unmarked graves. Two stones only

United States Department of the Interior

NATIONAL PARK SERVICE

SLEEPING BEAR DUNES NATIONAL LAKESHORE

P.O. BOX 277, 9922 FRONT ST. (HWY M-72)

■BK,um10 EMPIRE, MICHIGAN 49630

June 27/ 1989

L1425(SLBE)

Sleeping Bear Dunes Policy Release Number 89-3

OPERATING PROCEDURE/POLICIES NORTH AND SOUTH MANITOU ISLAND CEMETERIES

This policy is new.

I. INTRODUCTION

Interest on the part of past residents of the Manitou Islands

to be buried (or to bury loved ones) in the island cemeteries

became evident in the 1980s. Title to both cemeteries was checked

with local township officials to determine ownership and who

had jurisdiction. Glen Arbor quitclaimed ownership of the South

Manitou **ceemetery** to the **National Park** Service in 1986. No record

of township or "association" ownership/administration was found

for the North Manitou plot. The deed transferring this property

to the **National Park** Service from the Angeli Foundation is assumed

to include this **ceemetery**.

II. ELIGIBILITY

Only past residents/ their descendants or heirs/ may be

buried in the cemeteries located on North and South Manitou Islands.

When the space within the boundaries of these cemeteries is filled/ the cemeteries will become inactive and additional burial requests will be denied. No burials will be allowed outside the present boundaries.

III. PROCEDURES

A. Burials shall be in compliance with State of Michigan statutes covering the internment of deceased persons.

A Transit/Burial

Permit shall be obtained by the party arranging for the burial and a copy provided to the Superintendent for Lakeshore record?.

B. A vault (outer burial container) will be provided by

the party arranging for a body burial. A light weight, fiberglass or plastic container is required. The isolation of the Manitou

Islands makes use of a light weight outer container necessary

as it would be extremely difficult to transport and set in place

a concrete vault.

C. All arrangements for burial or memorial services will be made 30 calendar days in advance with the Superintendent. This will allow for the planning and scheduling necessary to dig the grave and provide for the barge transportation of equipment, vault/ etc.

IV. VISITS TO CEMETERIES

The intent of this policy is to provide **access** to the cemeteries for all descendants, including the handicapped or elderly.

On South Manitou, families may continue to visit the **cemetery** at their convenience via transportation provided by the National Park Service concessioner - ferry boat and motor tour vehicles.

On North Manitou there is the "Wilderness" designation which

requires the **National Park** Service to take special measures when allowing motor vehicle use. These special measures follow: The week prior to and the week following Memorial Day will be designated for vehicle travel to and from the North Manitou **Cemetery** by descendants of those interred therein. During this period, the Superintendent or his designee shall be notified each time a motor vehicle trip is planned to the **cemetery**. At other times of the year, the Superintendent will consider special requests to visit the **cemetery** by vehicle. In granting this request, the disturbance to other island visitors will be given top consideration. Resident descendants on North Manitou who maintain their own vehicle on the island may use that vehicle to **access** the **cemetery** with prior approval of the Superintendent or his designee. Those non-resident descendants wishing to visit the **cemetery**, who need transportation, are asked to contact the Superintendent, in advance, so that their transportation needs can be met.

V. MAINTENANCE

The routine maintenance of these cemeteries is the responsibility of the **National Park** Service. This includes the replacing of the perimeter fences. It is assumed that where there are descendants, they will replace pickets around the family plot. Where there are no living descendants, the **National Park** Service will attempt to restore these fences also. In the past, volunteer labor has been used and a "trust fund" proposed by island residents which could fund maintenance work. The **National Park** Service will continue to work with those persons interested in this proposal.

In regards to **new** vegetation, only native flowers and low ground cover will be allowed to be planted to simplify maintenance and **to enhance the natural beauty of the area. Existing non-native plants will not be removed.**

Peterson

Superintendent

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29-010

104TH CONGRESS

Report
SENATE

1st Session

104-198

GRAND LAKE CEMETERY

December 22, 1995- Ordered to be printed
Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following
REPORT
[To accompany S. 509]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 509) to authorize the Secretary of the Interior to enter into an appropriate form of agreement with the town of Grand Lake, Colorado, authorizing the town to maintain permanently a cemetery in the Rocky Mountain National Park, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE MEASURE

The purpose of S. 509 is to authorize an agreement between the Secretary of the Interior and the Town of Grand Lake, Colorado, to authorize the town to maintain permanently a cemetery in Rocky Mountain National Park.

BACKGROUND AND NEED

When Rocky Mountain National Park was established in 1915, certain lands were withdrawn from the Arapaho National Forest. Included with these lands now within the park boundary is Grand Lake Cemetery. This cemetery has been in use since 1892. In 1905, a Homestead application was submitted to the General Land Office for a tract of land that included the cemetery but the application was canceled in 1913 and never acted upon.

There is no statutory authority conferring an explicit authorization for the cemetery's continued use and existence. Implied use has evolved from the date of the park's establishment to the present. The Bureau of Reclamation transferred twelve graves to the Grand Lake Cemetery as part of the Colorado-Big Thompson trans-mountain water diversion project in 1944 and the park has acknowledged this use through a series of agreements and special use permits over the years. However, a strict interpretation of National Park Service guidelines on special park uses states that a special use permit must not be granted unless the authority for allowing the action can be cited.

The residents of Grand Lake maintain strong emotional and personal attachments to the cemetery and are concerned about its continued existence. The community has expressed a willingness to assume responsibility for permanent management of the cemetery. The current permit is due to expire in 1996. All parties have agreed that a more permanent solution is necessary in order to meet park resource preservation requirements and community needs. The provisions in S. 509 represent the work of the National Park Service and Grand Lake representatives to permanently resolve the issue.

If enacted, S. 509 would direct the Secretary of the Interior to enter into an agreement with the town of Grand Lake authorizing the town to maintain the **cemetery** on a permanent basis. It also establishes the boundaries of the **cemetery**, which will be slightly expanded to encompass a total of approximately 5 acres. Title to the **cemetery** will not be conveyed to the town of Grand Lake, but will remain with the **National Park** Service.

LEGISLATIVE HISTORY

S. 509 was introduced by Senators Campbell and Brown on March 2, 1995. The Subcommittee on Parks, Historic Preservation, and Recreation held a hearing on S. 509 on November 9, 1995.

At the business meeting on December 6, 1995, the Committee on Energy and Natural Resources ordered S. 509 favorably reported.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTES

The Committee on Energy and Natural Resources, in open business session on December 6, 1995, by a unanimous voice vote of a quorum present, recommends that the Senate pass S. 509 without amendment.

SUMMARY OF S. 509

Subsection 1(a) directs the Secretary of the Interior (the 'Secretary'), within 6 months of enactment of this Act, to enter into an agreement with the town of Grand Lake to authorize the town to maintain permanently a **cemetery** within the boundary of Rocky Mountain **National Park**.

Subsection (b) states that the **cemetery** shall be approximately 5 acres in size and provides a map reference.

Subsection (c) directs the Secretary to make the map available for public inspection.

Subsection (d) states that the **cemetery** shall not be extended beyond the boundaries shown on the map described in subsection (b).

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. Congress,

Congressional Budget Office,

Washington, DC, December 12, 1995.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 509, a bill to authorize the Secretary of the Interior to enter into an appropriate form of agreement with the town of Grand Lake, Colorado, authorizing the town to maintain permanently a **cemetery** in the Rocky Mountain **National Park**. S. 509 was ordered reported by the Senate Committee on Energy and Natural Resources on December 6, 1995. CBO estimates that implementing the bill would have no significant impact on the budgets of federal, state, or local agencies. Enacting S.

509 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

S. 509 would direct the Secretary of the Interior to execute (within six months of the bill's enactment) an agreement authorizing the town of Grand Lake, Colorado to maintain permanently a five-acre **cemetery** within the boundaries of Rocky Mountain **National Park**.

At present, the Grand Lake **Cemetery** is operated and maintained by the town under a special use permit issued by the **National Park** Service (NPS), which is scheduled to expire in 1996. Once an agreement is executed pursuant to S. 509, Grand Lake would continue to maintain the **cemetery** and would also assume responsibility for maintenance of certain roads within the site, an activity that currently costs the NPS less than \$5,000 annually.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah S. Reis.

Sincerely,

JUNE E. O'NEILL, DIRECTOR.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 509. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 509, as ordered reported.

EXECUTIVE COMMUNICATIONS

The Committee on Energy and Natural Resources has requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth Executive agency recommendations on S. 509. These reports had not been received at the time of the report on S. 509 was filed. When these reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate. The testimony provided by the Department of the Interior at the November 9, 1995 hearing follows:

TESTIMONY OF DENIS P. GALVIN, ASSOCIATE DIRECTOR FOR
PROFESSIONAL SERVICE, **NATIONAL PARK** SERVICE, DEPARTMENT OF
THE INTERIOR

Mr. Chairman, it is a pleasure to be here today to discuss several bills that will benefit Rocky Mountain **National Park** and Walnut Canyon National Monument. I also am pleased to be here to testify on a bill that would create the New Bedford Whaling National Historical Park in New Bedford, Massachusetts.

The Administration supports S. 364, S. 509, S231, H.R. 562, and S. 608. Although we believe that S. 342 may have merit, we prefer this legislation be deferred until further study has been completed.

I will address each bill separately beginning with the three bills affecting Rocky Mountain **National Park**.

* * * * *

S. 509, ROCKY MOUNTAIN NATIONAL PARK GRAND LAKE CEMETERY ACT

The **National Park** Service strongly supports this bill. This bill would address a need that Rocky Mountain **National Park** and citizens of Grand Lake, Colorado, have been working on for more than forty years. During the last two years, officials of the NPS and Grand Lake and local citizens have negotiated in good faith to resolve this issue and all parties are supporting S. 509.

This bill would allow the **National Park** Service to enter into an agreement with the Town of Grand Lake to authorize the continued use of an existing **cemetary** that is located within the boundary of the park, on lands zoned by Grand County for such use.

The Grand Lake **cemetary** has been in existence since 1892. It predates the establishment of Rocky Mountain **National Park** in 1915. The current **cemetary** contains 4.24 acres, and its continued use has been authorized by Special Use Permit. The current Special Use Permit will expire in 1996. In order to avoid future uncertainty and time-consuming negotiations, park staff and local officials are anxious to achieve a permanent solution to this matter.

A draft agreement between the NPS and local officials would stipulate that the maximum size of the **cemetary** will be approximately 5 acres. The park will agree to allow the **cemetary** to expand slightly within the existing loop road in return for less land available for burials outside the road.

The permit also would contain provisions that would be designed to protect natural resources and the visitor experience within the park, and will transfer the responsibility for on-going maintenance of the **cemetary** and the **access** road to the Town of Grand Lake. The land will continue to be the property of the United States, and the agreement will only grant the authorization for **cemetary** use and **access**.

Benefits to Rocky Mountain **National Park** include reduced maintenance costs, final resolution to this sensitive issue, continued cooperation and goodwill with the community of Grand Lake, and recognition of the cemetery's historic and emotional significance to area residents.

The primary benefits to the Town of Grand Lake include a certain future for the **cemetary**, a substantial cost saving for land, and final resolution of a vexing concern.

The agreement also would require the Town of Grand Lake to acquire a second **cemetary** outside the boundaries of Rocky Mountain **National Park** within ten years to preclude enlargement of the existing **cemetary** beyond the boundaries of the agreement. The establishment of a second **cemetary** will protect the resources of Rocky Mountain **National Park**.

* * * * *

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the Act S. 509, as ordered reported.



Shenandoah **National Park**
3655 US Hwy. 211 East
Luray, Virginia 22835-9036
IN REPLY REFER TO:

A6415

PARK DIRECTIVE NO.

NCR - 406

Subject:

Cemetery Maintenance and Use

All cemeteries within Shenandoah **National Park** (SNP) existed prior to the establishment of Skyline Drive or the Park. Most were family burial places, although several were affiliated with community churches or organizations. Many have had burials within the past three decades and several are still in active use.

Legal case law and policy first instituted by the Director in 1931 established that descendants of individuals buried in the cemeteries within Park boundaries either have legal interest in the cemeteries or have specific rights to **access** and use. This directive is based on the recognition of that family interest.

MAINTENANCE

All cemeteries may be maintained by the families of those buried in the **cemetery** or by volunteers with the specific written approval of family members.

A key to fire roads providing **access** to cemeteries behind locked gates may be picked up and signed for at the entrance stations by family members wishing to deliver maintenance supplies and/or equipment to cemeteries. In specific instances where a recognized family organization or family **cemetery** manager exists, a key may be issued to the designee of that organization or to that manager.

No vegetation clearance will be allowed beyond the defined and established boundaries of the **cemetery**. Vegetation removed from the **cemetery** during maintenance operations may be scattered in the areas surrounding the **cemetery** and shall not be left in obvious piles.

Mechanized equipment (mowers, chainsaws, weed eaters, etc...) may be used to maintain cemeteries NOT in Congressionally designated Wilderness. No herbicides or pesticides may be used in **cemetery** maintenance without written review and approval from the Natural & Cultural Resources, Integrated Pest Management Specialist.

The Park may not, by law, furnish staff, equipment, or supplies for maintaining Park cemeteries for which families retain an interest. The Park will be willing to work with recognized family organizations to establish a cooperative agreement to mutually assist in specific **cemetery** preservation.

The Park will maintain the roads accessing the cemeteries provided the roads are on the current road list. The roads will only be maintained to current road standards and may not be suitable for automobile use. Families are allowed to maintain right-of-way **access** to family cemeteries, but such work must be approved in writing by the Natural & Cultural Resources, Landscape Architect.

Maintenance of existing **cemetery** fencing/gates is the responsibility of the family. New fencing and/or gates must be approved in writing, in advance, by the Landscape

Architect (NCR).

If cemeteries are not maintained by families or volunteers, natural vegetative succession will reclaim the sites. No Park Service action will be taken to slow or abate this process.

ACTIVE CEMETERY USE

The dimensions of all cemeteries have been established and, in most cases, corners have been marked. No burials may extend beyond these boundaries.

Only descendants of family members buried in cemeteries, or those approved by family associations, may be buried in cemeteries within the Park boundary. Once all grave sites within the designated boundary are filled, burials will cease.

The Landscape Architect for the Natural & Cultural Division must be informed of all proposed burials to assure that entrance stations are aware of the pending burial and to assure smooth coordination of the event. Funeral Homes should notify the SNP Communications Center (540)999-3422 prior to entering the park for grave preparation. A backhoe may be used by the funeral home to open the grave provided the cemetery is not in a Congressionally designated wilderness area and provided the backhoe has access to the site without damage to park resources.

No new cemeteries may be developed.

Inactive cemeteries may be activated by family members as long as the above standards are met.

All laws and policies of the Commonwealth of Virginia pertaining to burials and cemetery use are applicable to Park cemeteries.

Entrance fees will be waived for those persons maintaining cemeteries, family members visiting family cemeteries, or those attending funerals. Those for whom fees are waived will be asked to sign the cemetery visitor sheet at the entrance station.

PATROL AND INVESTIGATION OF CRIMES

Cemeteries located within the existing boundaries of the Park are patrolled and regulations enforced consistent with enforcement activities throughout the Park by Park protection rangers. Violations of park regulations (such as vandalism, tampering, disorderly conduct, etc..) observed by visiting family members should be reported to the SNP Communications Center (540) 999-3422 to ensure that a report is taken and an investigation conducted.

RECOMMENDATIONS TO FAMILY MEMBERS

Recognizing the historic and cultural importance of the cemeteries within the Park boundaries, the National Park Service (NPS) makes the following recommendations to families so that the long-term integrity of the cemeteries may be preserved:

New monuments should be in keeping with the style, size, color, and texture of the historic cemetery stone. Modern stones of greatly different color and/or style tend to disrupt the design and feeling of the burial ground.

It is recommended that individual grave sites not be enclosed by low fencing or hedges. Such enclosures are not traditional and, again, disrupt the landscape of the grounds.

Flowers placed on the graves should be artificial. Trees, shrubs, and flowers planted in the **cemetery** should be native and/or non-invasive so they do not spread from the **cemetery** onto adjacent park lands. The Park Natural Resource Specialists or headquarters personnel will be happy to work with family members on plant selections or recommendations. The park Cultural Resource Specialist will be willing to work with established family associations to develop standards for **cemetery** maintenance and plot markings. However, specific issues dealing with maintenance, monument and plot marking, and grave locations remain the responsibility of each cemetery's family association and will not be enforced by park staff.

Approved:

/s/ Douglas K. Morris

2/11/00

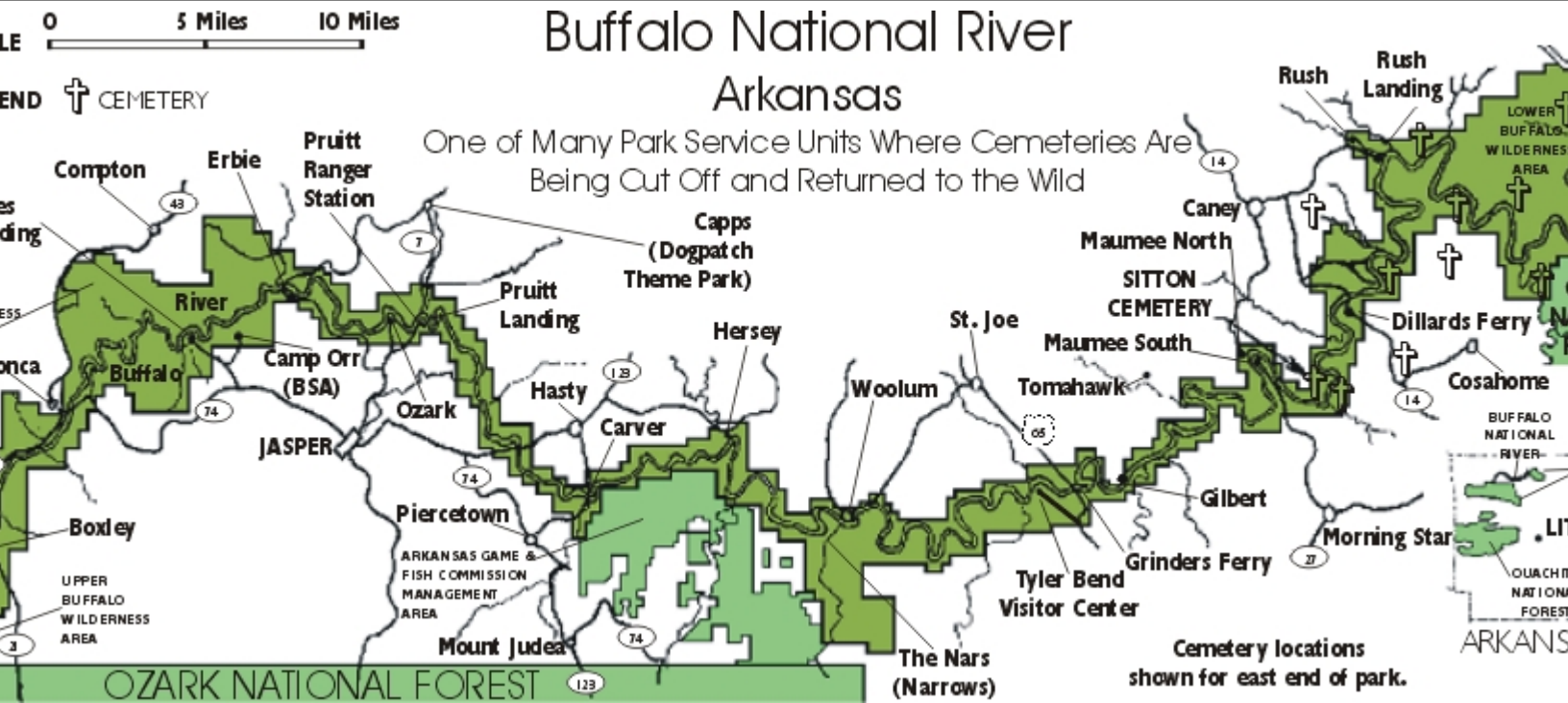
Douglas K. Morris

Date

Superintendent

reprinted from *Positions on Property*, Vol. 2, No. 1 (Jan. 1995)

**National Parks Service "Restoration" of Cemeteries to Wilderness
A Cultural, Historical and Religious Desecration**



Cemetery locations shown for east end of park. Map by Peter J. LaGrasse

Buffalo National River

Date established: 1972

Wilderness designated: 1978 (10,529 acres)

Total Acreage: 94,219 acres

Number of Cemeteries contained in National River: 37, by official NPS count, which does not include small family burial plots

Buffalo National River - A 90 mile biological corridor linking two sections of Ozark National Forest.

NPS Policy of Park Accessibility For Tourists

“Buffalo River Country is steep, rugged, and remote, but park management makes every effort to make the park and its programs accessible to all. The Tyler Bend Complex is completely accessible. An Accessibility Guide to programs and facilities is available at the visitor center or ranger stations or by writing to the park superintendent. There is a TDD-equipped telephone at park headquarters.”

Official Map and NPS Guide to Buffalo National River

National Park Service Methodology to Foreclose Access to Cemeteries For Families and Residents

1. **Wilderness** Designations
2. **Prohibitions** of Maintenance
3. **Closing** of official highways
4. **Prohibition** of motor vehicle access
5. **Prohibition** of highway maintenance by towns and counties
6. **Ceasing** of repair of washouts and seasonal damage
7. **Barricading** or blocking of highways with other construction
8. **Failure** to include protections of access of elderly and other local people to cemeteries in legislation and regulations
9. **Failure** to include historical, cultural and community impacts in policy analysis
10. **Failure** to respect common law legal rights of access

Leon Somerville, Jr. has called national attention to the National Park Service’s insensitivity toward family members and descendants who can no longer continue visiting and maintaining cemeteries since the National Park Service established the Buffalo National River. He was photographed recently at the Sitton Cemetery on the opposite side of the Buffalo River, a few miles from his home in Cozahome, Arkansas.











All photos: Leon Sommerville, Jr.



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[A Perception of Cultural Preservation](#)

