Property Rights and Graves

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> Let's talk of graves, of worms, and epitaphs; . . .
> And nothing can we call our own but death
> And that small model of the barren earth
> Which serves as paste and cover to our bones.
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> —WILLIAM SHAKESPEARE, RICHARD II, act 3, sc. 2

ABSTRACT: The ability to acquire the landownership rights of another through adverse possession is a fundamental part of American property law. Yet to laypeople, the adverse possessor often seems hardly more than a thief. In contrast, scholars have justified the doctrine on a number of grounds: as punishment against original landowners who fail consistently to fly flags of ownership and protect their rights; as a reward to the adverse possessor, who presumably is making a higher and better use of the land than did its original owner; and as an acknowledgement that the adverse possessor's uninterrupted and continuous use over time—combined with a claim of ownership—leads to a psychological or emotional attachment held by the adverse possessor that far exceeds any such attachment held by the original owner.

While each of these justifications has merit when applied to realty that is freely alienable and whose use may change over time, the justifications are less convincing when applied to certain kinds of realty. Real property interests exist in which we do not reasonably expect the holder to engage in routine inspection against trespass; in which there will be no higher and better use over the course of time; and in which the psychological and emotional attachments of an interloper are less, or no greater, than those of the original owner. In these instances, the trespasser who knowingly claims title through adverse possession indeed seems much like a thief. In such instances, should traditional property rules apply? What role do equitable considerations have to play?

This Article examines these questions in a specific but illuminating instance: disputes among competing claimants to gravesites. Examining the unique attributes of burial lots in American property law, the Article demonstrates

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why traditional property rules are often an inappropriate mechanism for settling such disputes. The Article does not suggest a complete abandonment of adverse possession and traditional remedies for resolving disputes over burial sites. Instead, the Article argues for a more nuanced application of legal and equitable principles and invites further discussion of traditional property rules as currently applied to other forms of property that are not just unusual, but instead truly unique.

INTRODUCTION

Lately, I've been thinking more often about my grave.[1] In particular, I've been concerned about protecting my cemetery lot from claims of third parties prior to my death.[2]

Lest you consider my thoughts unduly macabre, please note that I am old, a long-time professor of elder law, decedents' estates, and property, and the president of a cemetery association.[3] Reluctantly, I add this further note: I have the ignominious distinction of being a property professor owning land that was adversely possessed by naked trespassers—those very folks against whom I have been warning my first-year students for over thirty years.[4]

My age, experience, career, and foibles go far towards explaining why, in my doddering years, I am increasingly obsessed with property rights in burial spaces. The small, bucolic cemetery containing my gravesite is rapidly filling

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1. Many individuals as they grow older become concerned about the disposition of their remains. *Cf.* King v. Frame, 216 N.W. 630, 632 (Iowa 1927) ("Most people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject.").

2. Before turning to state statute, case law, or general principles of law, an aggrieved party should first carefully examine the agreement (particularly if it exists in writing) between that party and the transferor of the burial rights. For example, in a Louisiana case involving burial of one person in another person's lot, the court found that the lot-owner's tort action was foreclosed by the language in the cemetery rules and regulations incorporated by reference into the contract conveying burial rights to the first purchaser. Rhodes v. Congregation of St. Francis De Sales Roman Cath. Church, 476 So. 2d 461, 462–64 (La. Ct. App. 1985). The court noted that, under the rules and regulations:

> [I]n the event of an error such as took place in this case, whether or not such was the result of negligence imputable to the defendant or the result of some fortuitous event, a cryptholder's sole remedy is to accept either a substitute crypt of equal value and similar location (to the best of defendant's ability to provide such), or, in defendant's discretion, a refund of the money paid. The language of this provision clearly indicates an intent that this alternative constitutes plaintiffs' sole remedy in the event of precisely the error such as occurred here, precluding a claim in tort for damages.

Id. at 463.

3. In the interest of full disclosure, I should state that the cemetery association for which I serve as president is not the cemetery where my burial lot is located. Yet in my position I have witnessed first-hand some of the difficult property problems that can arise among competing claimants to gravesites.

4. I readily acknowledge that my past ownership errors may invite sympathy or derision. One day I may be willing to tell the sordid and embarrassing adverse possession tale in its entirety, confessing publicly the enormity of my shortcomings as the owner of real property. For now, the reader must rest content (though not yet "in peace") knowing that while trespassers did adversely possess land in which I have an interest and should have prevailed in the ejectment action brought against them, the adverse possessors inexplicably failed to assert adverse possession as an affirmative defense. Despite their having met all elements required for adverse possession, I was able to retain ownership because of their pleading error. I tell my adverse possession tale to my property class to remind them that while property law is undoubtedly the most important and fascinating first-year course in law school, the rules of civil procedure can also at times be a beautiful thing—such as when they salvage the ownership rights of a sloppy property professor.

up and is hundreds of miles from where I live. If someone should claim my lot before I am laid to rest,[5] what will happen to my mortal remains?[6]

You might reasonably ask, "Are gravesite disputes important in the modern world?"[7] Humbly, I respond, they are indeed.[8] While cremation rates increase across the country,[9] millions of Americans still choose traditional burial practices.[10] Moreover, even individuals who are cremated may wish to have

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5. Is "laid to rest" a less disturbing term than "buried"? Apparently, the Victorians thought so. *See* Hugh Rawson, *Fowl Talk for Thanksgiving*, CAMBRIDGE DICTIONARY: ABOUT WORDS (Nov. 19, 2012), https://dictionaryblog.cambridge.org/2012/11/19/fowl-talk-for-thanksgiving [https://perma.cc/2BMU-RBDA] (noting the "euphemistically fertile period" of the Victorian era in which terms such as "laid to rest, not buried" became increasingly popular).

6. Like most folks I have no alternative burial clause in my will stating, "If I can't be buried at Place A, then I wish to be buried at Place B." Perhaps we should all have such clauses in our wills. *See infra* notes 231–58 (discussing gravesite disputes).

7. Various matters concerning death and burial have been studied in several law reviews in recent years. *See generally, e.g.*, Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469 (discussing the right to access graves of ancestors and how it fits with the right of property owners to exclude all others); Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487 (2005–2006) (discussing the special treatment required for property used for burial and how critical race theory applies with respect to the legal treatment of different races' burial sites); Peter Zablotsky, *"Curst Be He That Moves My Bones:" The Surprisingly Controlling Role of Religion in Equitable Disinterment Decisions*, 83 N.D. L. REV. 361 (2007) (examining how religion can play a controlling role in disinterment cases when it is relevant); Katie M. Alfus, Note, *Better Homes and Scattered Gardens: Why Iowa Should Legalize "Human Composting" as a Method of Final Disposition*, 106 IOWA L. REV. 325 (2020) (describing the benefits of and practice of human composting as a means for final disposition and advocating for its legalization in Iowa); C. Allen Shaffer, Comment, *The Standing of the Dead: Solving the Problem of Abandoned Graveyards*, 32 CAP. U. L. REV. 479 (2003) (exploring the property rights of decedents once they have been buried and their graveyard has been abandoned).

8. At one time, the need for every individual to have a cemetery lot was largely taken for granted. *See, e.g.*, Locke v. Locke, 280 So. 2d 773, 775 (Ala. 1973) (observing that "[t]he eventual need for a cemetery lot is something no one can escape, and its purchase at some time is inevitable").

9. *See* CREMATION ASS'N OF N. AM., CANA ANNUAL STATISTICS REPORT: 2020–A YEAR OF UNPRECEDENTED CREMATION NUMBERS AND CONTINUED PREDICTABLE GROWTH RATE 1–2 (2021), https://cdn.ymaws.com/www.cremationassociation.org/resource/resmgr/members_statistics/StatisticsReport2021-short.pdf [https://perma.cc/487K-EL4J] (charting notable increase in cremation rates across most of the country between 2014 and 2019); *see also* Michael Waters, *Cremation Borrows a Page from the Direct-to-Consumer Playbook*, N.Y. TIMES (Feb. 3, 2022), https://www.nytimes.com/2022/02/03/business/cremation-startups-direct-to-consumer.html?searchResultPosition=1 [https://perma.cc/H3HR-8XQG] (estimating that cremation services will cover sixty-three percent of deaths in the United States by 2025); NAT'L FUNERAL DIRS. ASS'N, 2021 NFDA CREMATION & BURIAL REPORT 6 (July 2021), https://dailymontanan.com/wp-content/uploads/2021/09/2021-nfda-cremation-and-burial-report.pdf [https://perma.cc/29EP-747G] (projecting by 2040 cremation rate projection will be at 78.4 percent of deaths).

10. Americans sixty-five and older, for example—which includes millions of Baby Boomers—are more likely to choose traditional burial. NAT'L FUNERAL DIRS. ASS'N, *supra* note 9, at 6 (discussing preferences of adults sixty-five and older and size of group). According to the website cremationassociation.org, 54.4 percent of deaths in the United States resulted in cremation in 2019, with that rate expected to rise to 64.1 percent by 2025. *Industry Statistical Information*,

their ashes buried in a cemetery near the graves of loved ones who have chosen traditional burial.[11]

In short, property rights in cemetery lots have long been and will long remain important in American property law.[12] As cemeteries across the country fill with our fleshly detritus in various forms and rates, conflicting claims to graveyard spots will continue and perhaps increase.[13]

This Article explores the confused and confusing nature of property rights in burial lots,[14] how those rights may be lost or altered,[15] and how disputes among competing claimants may be best resolved.[16] The Article suggests that

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CREMATION ASS'N N. AM. (2022), https://www.cremationassociation.org/page/IndustryStatistics [https://perma.cc/B99H-U53J]. In 2020, the states in which cremation was least likely to occur were Mississippi, Kentucky, Louisiana, Mississippi, and Utah. *Id.* Nationally, cremation rates are highest in the western states (excepting Utah). *Id.* In Colorado, Hawaii, Maine, Montana, Nevada, New Hampshire, Oregon, Vermont, Washington, and Wyoming, cremation rates in 2018 exceeded seventy percent. *Id.*

11. *See* Ethan Darby, *Burying Cremated Remains: Why You Should Bury Ashes in a Cemetery*, TRIGARD (Aug. 14, 2019, 3:45 AM), https://www.trigard.com/blog/burying-cremated-remains [https://perma.cc/7AVP-PFUC] ("By burying cremated remains in a cemetery, you dedicate a permanent resting place for both their cremated remains and their memory.").

12. *See* NAT'L FUNERAL DIRS. ASS'N, *supra* note 9, at 4–6 (discussing preference of older Americans for traditional burial).

13. Those who do not peruse the cemetery case law regularly might be surprised at the frequency with which the owners of cemetery lots assert that third parties have been wrongfully buried in their lot or lots. Among the recent cases discussing the problem are *Jakeman v. Lawrence Grp. Mgmt. Co.*, 151 So. 3d 1083, 1085–87, 1090–91 (Ala. 2014) (discussing scenario in which non-family member was wrongfully buried in owner's family lot, disinterred and then mistakenly reburied *again* in another spot in owner's family lot; also explaining descent of cemetery lot ownership and applicability of statute of limitations); *King v. French*, 383 S.W.3d 426, 427–31 (Ark. Ct. App. 2011) (discussing plots owned by two different families and plaintiff's claim that three members of the neighboring lot-owner's family had been buried in his family plot; also discussing applicability of laches); *Hill v. City of Fort Valley*, 554 S.E.2d 783, 784–86 (Ga. Ct. App. 2001) (discussing tort claims by family members of decedent who was buried in wrong plot for sixteen years and then disinterred and reburied elsewhere); *Salyer v. Wash. Regular Baptist Church Cemetery*, 141 N.E.3d 384, 385–87 (Ind. 2020) (holding for original lot-owner, who discovered that three decades after her purchase that cemetery had resold lot to another and later purchaser had buried relative there; original lot-owner was entitled to removal of decedent's remains under state wrongful burial statute); *Hardin v. York Mem'l Park*, 730 S.E.2d 768, 772–73, 775–76 (N.C. Ct. App. 2012) (discussing scenario in which wife purchased three cemetery lots and buried husband in one, but then cemetery resold the other two lots and a third party had been buried next to wife's husband for a decade, precluding wife from being buried next to her husband; also discussing application of statute of limitations against cemetery for wrongful resale of lots); and *Corp. of Roslyn Presbyterian Church v. Perlman*, 747 N.Y.S.2d 304, 305–07 (Sup. Ct. 2002) (discussing grounds for disinterment when in 1997 a man was buried in a plot owned by another family since 1873).

14. *See infra* notes 20–137 and accompanying text (discussing theories of ownership of rights in cemetery lots).

15. *See infra* notes 138–211 and accompanying text (discussing actions between competing claimants to cemetery lots).

16. *See infra* notes 243–58 and accompanying text (discussing propriety of traditional property claims and suggesting alternatives).

while existing property rules can provide a helpful basis for determining priority of claims in some instances,[17] neither equitable concerns nor traditional land law alone provides a proper mechanism for addressing many conflicting claims to burial spots.[18] Observing that many sticks in the bundle pertaining to use and ownership of cemetery lots are sui generis, the Article explains why traditional property rules, such as those for adverse possession, should be inapplicable—or at least substantially tempered—in resolving competing claims when property has become "more than" property.[19]

I. PROPERTY PRINCIPLES: OWNERSHIP OF GRAVESITES

Before discussing how a subsequent claimant might go about asserting rights in the spot to which some prior claim claimant (say, a law professor like me) is psychologically wedded as a burial place,[20] we should examine the rights the prior claimant[21] received in writing or—as is common in small, rural, or family cemeteries—through oral permission of those who (somehow or other) appear to be in charge of distributing lots.[22]

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17. *See infra* notes 212–18 and accompanying text (suggesting instances in which traditional adverse possession claims could remain viable in cemetery lot disputes).

18. S*ee infra* notes 243–58 and accompanying text (suggesting instances in which nontraditional alternatives could provide fairer results in resolving cemetery lot disputes).

19. Recognizing the harshness and logical impropriety of applying traditional adverse possession principles in particular scenarios, some jurisdictions have developed alternatives. Such is the case, for example, in disputed claims to ownership of personal property. Perhaps the most famous opinion on point is *O'Keeffe v. Snyder*, 416 A.2d 862, 869–77 (N.J. 1980) (adopting discovery rule in case involving long missing painting by Georgia O'Keeffe). The *O'Keeffe* court emphasized the difference between personality and realty in supporting its decision. *Id.* This Article suggests that cemetery lots where loved ones are buried are unique in the world of realty and, in fact, become "more than" real property; thus, deviation from traditional principles of disputed ownership—such as through adverse possession claims—is warranted. *See infra* notes 133–37 and accompanying text (discussing rights in cemetery lots as sui generis).

20. *See infra* notes 138–211 and accompanying text (discussing theories that subsequent claimant might assert to disputed cemetery lots).

21. When a cemetery lot has been sold twice, the "first in time" principle is sometimes cited as a basis for protecting the rights of the first purchaser. *See, e.g.*, Salyer v. Wash. Regular Baptist Church Cemetery, 135 N.E.3d 955, 962 (Ind. Ct. App. 2019) (Kirsch, J., dissenting) (noting proper application of foundational legal principle of "[f]irst in time, first in right" weighs in favor of first purchaser's request to disinter family member of second purchaser), *vacated*, 141 N.E.3d 384 (Ind. 2020). On appeal, the Indiana Supreme Court agreed with Judge Kirsch's view regarding disinterment. *See generally* Salyer v. Wash. Regular Baptist Church Cemetery, 141 N.E.3d 384, 387 (Ind. 2020) (agreeing with Judge Kirsch's dissent). For more on "first in time is first in right," see *infra* note 186 and accompanying text.

22. Some courts have noted that if indeed a writing exists, it need not comply with the statute of frauds. *See, e.g.*, Ebenezer Baptist Church, Inc. v. White, 513 So. 2d 1011, 1014 (Ala. 1987) (noting that a "formal deed is not necessary to" obtain a cemetery lot); Cates v. Taylor, 428 So. 2d 637, 641 (Ala. 1983) (Torebert, C.J., concurring) (noting in concurrence that parol transfer of cemetery lot is possible); Billings v. Paine, 319 S.W.2d 653, 657–58 (Mo. 1959) (finding "that the instrument need not . . . comply with the formalities of a deed"). Note that the original deed to an older cemetery, if it ever existed, may also be lost or unrecorded. *See, e.g.*, C.L. Gray Lumber

Once we examine the current mishmash of approaches to cemetery lot ownership,[23] we can address property theories that a subsequent claimant might use to assert a superior right.[24] We can then also discuss the limitations of applying traditional property rules, particularly the rules of adverse possession, to competing claims to gravesites.[25]

A. EASEMENT IN GROSS

Courts often state that the holder of rights in a cemetery lot has an easement in gross.[26] This conclusion is particularly likely if the grantor is a formal cemetery association holding fee to numerous lots.[27] Even when the grantor is a private individual, courts have noted that the grantor is unlikely to intend a transfer of fee simple when the grant involves a cemetery lot landlocked within the grantor's larger parcel.[28] Some courts interpret the

Co. v. Pickard, 71 So. 2d 211, 213 (Miss. 1954) (observing that the alleged deed to cemetery was not found "of record" or otherwise).

23. *See, e.g.*, Hornblower v. Masonic Cemetery Ass'n of City & Cnty. of S.F., 214 P. 978, 979–81 (Cal. 1923) (observing that state courts across the country have disagreed upon the proper classification of the estate or interest a deed confers to a cemetery lot).

24. *See infra* notes 138–211 and accompanying text (discussing theories subsequent claimant might assert).

25. *See infra* notes 245–57 and accompanying text (discussing nontraditional methods of resolving disputed claims to cemetery lots).

26. *See, e.g.*, Mannheimer v. Wolff, 187 N.E.2d 1, 4 (Ill. App. Ct. 1962) (observing that ownership by purchaser of cemetery lot receives easement for burial only which is different from ownership of other realty); *Ex parte* Adlof, 215 S.W. 222, 224–25 (Tex. Crim. App. 1918) (assuming that the right of holder of cemetery lot title "was not that of a holder of realty in fee simple, but that it extended only to confer upon her a right of sepulchre, which is an easement"). *See generally* A.M. Swarthout, Annotation, *Deed as Conveying Fee or Easement*, 136 A.L.R. 379 § IV (2021) (discussing cemetery deeds, noting that most courts find the holder has an easement in gross, and further stating that "in only a relatively few of them is it held that the particular deed in question passed a fee simple estate").

27. *See* Swarthout, *supra* note 26, § IV (noting language from court opinions indicating that "there is more reason for construing [the conveyance] as passing only an easement" when the lots are in a public cemetery than in a private cemetery).

28. In *Heiligman v. Chambers*, the Oklahoma Supreme Court addressed the nature of burial rights in a family plot. Heiligman v. Chambers, 338 P.2d 144, 146–49 (Okla. 1959). A non-family member owned the surrounding land and, seeking to disinter those buried in the plot, also claimed the fee to the land on which the family plot existed. *Id.* The court noted that "while the naked legal title" to the fee had passed to the non-family member, the fee was nevertheless encumbered by an easement in favor of the person who established the burial plot and that person's heirs. *Id.* Other courts have made similar observations. *See, e.g.*, Boyd v. Brabham, 414 So. 2d 931, 933–34 (Ala. 1982) (noting Alabama had adopted the law established in *Heiligman*); *see also In re* Estate of Harding, 878 A.2d 201, 202–07 (Vt. 2005) (holding that grantor who excepted a family burial plot from the conveyance in question created an easement in the grantor and the grantor's heirs).

grant of a burial lot as the conveyance of an easement regardless of the actual language used in the transfer.[29] Occasionally, a court will state this fact bluntly.[30]

Easements represent a nonpossessory interest in land,[31] but not an estate in land.[32] This distinction is important, because property law provides greater deference to the holder of an estate. For example, an easement holder is traditionally more limited than a fee holder in the actions the easement holder can bring concerning trespass and ejectment.[33] Holders of a personal easement in gross are also less likely to have the freedom of alienation afforded to fee holders.[34]

Moreover, by general rule, while the holder of a perfected fee simple interest cannot abandon that estate, the holder of an easement can abandon the easement.[35] Although courts state that mere non-use over a long period

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29. *See* Swarthout, *supra* note 26, § IV (observing that courts commonly conclude that a cemetery lot holder has an easement and stating, "it seems safe to conclude that the actual language used in [the] deed is of comparatively little importance").

30. *See, e.g.*, *In re* First Trinity Evangelical Lutheran Church in City of Pittsburgh, 251 A.2d 685, 689 (Pa. Super. Ct. 1969). In *First Trinity*, the court stated as follows:

> The purchase of a lot in a cemetery, although under a deed absolute in form and containing words of inheritance, is regarded as conveying only a privilege, easement, or license to make interments in the lot purchased, exclusively of others, so long as the lot remains a cemetery, the fee remaining in the grantor subject to the grantee's right to the exclusive use of the lot for burial purposes.

Id.

31. *See, e.g.*, Blazer v. Wall, 183 P.3d 84, 93 (Mont. 2008) ("An easement is a nonpossessory interest in land—a right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon the land."). *See generally* 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.01 (Michael Allen Wolf ed., 2022) (noting that an easement is a nonpossessory interest in land).

32. *See* RESTATEMENT (FIRST) OF PROP. § 471 (AM. L. INST. 1944) (distinguishing possessory right of estate holder from nonpossessory interest of easement holder).

33. *See* Carlson v. Latvian Lutheran Exile Church of Bos. & Vicinity Patrons, Inc., 171 A.3d 1227, 1232 (N.H. 2017) (noting historical limitation that "easement owners cannot bring actions that are traditionally established to protect possession, such as trespass and ejectment"). The *Carlson* opinion notes, however, that the easement holder can generally obtain injunctive relief against a trespasser whose use interferes with the use of the easement holder. *Id.* at 1229–32. The opinion also notes (and rejects) a minority view that grants standing to the easement holder to prevent trespass even without a showing of interference by the trespasser "with the easement holder's use." *Id.* at 1232–33.

34. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. c (AM. L. INST., Tentative Draft No. 2, 1991) ("Generally, greater restraints are justified on . . . nonpossessory interests than on possessory estates.").

35. *See, e.g.*, A.F. Hutchinson Land Co. v. Whitehead Bros., 217 N.Y.S. 413, 419–24 (Sup. Ct. 1926), *aff'd*, 219 N.Y.S. 413 (App. Div. 1926) (finding that cemetery lot holders who have an easement can abandon that easement). The issue of abandonment often arises when a railroad terminates use of its tracks. *See, e.g.*, Dep't of Conservation *ex rel.* People v. Fairless, 653 N.E.2d 446, 452–53 (Ill. App. Ct. 1995) (discussing easements and fee estates in case involving alleged abandonment of railroad's interest).

of time does not in itself constitute abandonment,[36] cases exist in which the holder of a burial easement has abandoned the interest.[37]

An easement in gross provides someone who is not the fee owner a right of use to that owner's land.[38] An easement in gross, unlike its relative the easement appurtenant, contains only a burdened or servient parcel.[39] The easement in gross implicitly includes not only a right of burial,[40] but also a right of grave visitation by family members following the burial.[41]

Courts have observed that because the burial plot interest is not a conveyance in fee, a document transferring the interest need not comply with all of the formal requirements for transfer of a fee.[42] Absent such a writing,[43]

36. *See, e.g.*, City of Sandy Springs v. Mills, 771 S.E.2d 405, 408 (Ga. Ct. App. 2015) (discussing the importance of intent in ascertaining whether family cemetery has been abandoned); Clarke v. Keating, 169 N.Y.S. 24, 26–27 (Sup. Ct. 1917) (noting in case where family burial ground had not been used for decades and where all former graves had been removed, that "[i]t cannot be said that the use of the land in question for burial purposes has been abandoned, simply because it has not been so used for some years and the bodies have now been removed"), *modified on reh'g*, 170 N.Y.S. 187 (App. Div. 1918).

37. *See, e.g.*, Walker v. Ga. Power Co., 339 S.E.2d 728, 730–32 (Ga. Ct. App. 1986) (holding that burial easement was abandoned when holder "acquiesce[d] without objection to the removal and reinterment of the remains of her ancestors" elsewhere); Poe v. Gaunce, 371 S.W.3d 769, 775–76 (Ky. Ct. App. 2011) (finding that easement for burial purposes had been abandoned by its holders); Bockel v. Fid. Dev. Co., 101 S.W.2d 628, 630–31 (Tex. App. 1937) (noting that holders of family burial ground abandoned it by removing the bodies of their deceased relatives).

38. 3 HERBERT THORNDIKE TIFFANY, TIFFANY REAL PROPERTY § 756 (3d ed. 2022), Westlaw (updated Sept. 2022) ("While an easement is an interest in land . . . it gives no right to possess land upon which it is imposed, but a right merely to the party in whom it is vested to enjoy it.").

39. *See id.* § 758 (observing that an appurtenant easement requires a dominant estate that benefits from the easement and further observing that "an easement in gross is merely a personal interest in land of another").

40. *See, e.g.*, Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911) (providing affirmative answer to the question of if descendants "have a right or easement of burial in the cemetery, and of ingress and egress for the purposes of burial, visiting, repairing, and keeping in proper condition the graves and grounds around the same").

41. *See, e.g.*, Com., Dep't of Fish & Wildlife Res. v. Garner, 896 S.W.2d 10, 12–13 (Ky. 1995) (recognizing an "unquestioned right of [a loved one] to visit the grave of a relative" and classifying such right itself as an easement); *cf.* Fletcher v. Evans, 2 N.E. 837, 838–39 (Mass. 1885) (holding that widow had the right to erect a monument on burial lot, and such right included the right to give her contractor license to enter the lot to build the monument).

42. *See* Billings v. Paine, 319 S.W.2d 653, 658 (Mo. 1959) ("It seems clear that the conveyance or transfer of a cemetery lot in a public cemetery . . . does not constitute the conveyance of a fee simple absolute, and that the instrument need not, of necessity, comply with the formalities of a deed of real estate generally."). Despite such statements, because an easement is an interest in land, the prudent grantee will secure a writing signed by the grantor conveying rights to the cemetery lot.

43. *See* 3 TIFFANY, *supra* note 38, § 776 (noting that a writing is required under the Statute of Frauds to create an easement by express grant).

however, the grantee claiming an easement may have to rely on theories of implication,[44] prescription,[45] or estoppel[46] to circumvent the Statute of Frauds.[47]

Unlike the typical holder of a personal easement in gross,[48] the holder of a cemetery lot remains in constant use of the servient tenement once burial occurs.[49] In contrast, the individual holder of a noncommercial easement in gross often comes and goes on the servient estate.[50] Moreover, such personal easements typically exist for no longer than the life of the holder.[51] In contrast, a corpse remains in the servient estate potentially forever; the servient estate is permanently, continuously burdened with the departed's remains.[52]

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44. *See, e.g.*, Machado v. Ryan, 280 P.3d 715, 721–23 (Idaho 2012) (discussing express and implied easements and noting that an express easement can "only be created by a written instrument" (quoting Tower Asset Sub Inc. v. Lawrence, 152 P.3d 581, 585 (Idaho 2007))).

45. *See, e.g.*, Beckstead v. Price, 190 P.3d 876, 882 (Idaho 2008) (listing elements of easement by prescription and standard of proof required of claimant); JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n, Inc., 493 P.3d 340, 355–57 (Mont. 2021) (discussing elements of prescriptive easement); Newman v. Michel, 688 S.E.2d 610, 618–21 (W. Va. 2009) (discussing the differences between a fee obtained by adverse possession and an easement by prescription).

46. *See, e.g.*, Hall v. Peterson, 409 P.3d 133, 142–43 (Utah Ct. App. 2017) (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10 (AM. L. INST. 2000)) (discussing elements of an easement by estoppel).

47. *See, e.g.*, Meyers Lake Sportsman's Club, Inc. v. Meyers Lake Pres., Inc., 996 N.E.2d 1016, 1023 (Ohio Ct. App. 2013) ("If the Statute of Frauds applied, there could not be implied easements."); *see also JRN Holdings*, 493 P.3d at 352 ("An easement may be created by . . . writing, by operation of law, or by prescription.") (quoting Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 264 P.3d 1065, 1076 (Mont. 2011)).

48. On whether the benefit of an easement in gross is personal, see RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.5 (AM. L. INST. 2000). On the modern approach to transferability of easements, see RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.6 (AM. L. INST. 2000) (indicating that "[a] servitude . . . is not transferable if personal").

49. For a discussion of distinctions between commercial and noncommercial easements in gross, see *Sandy Island Corp. v. Ragsdale*, 143 S.E.2d 803, 807–08 (S.C. 1965). The court noted that while easements in gross of a personal nature can be made alienable, a personal easement in gross "demonstrably intended to benefit" the first recipient remains untransferable. *Id.*

50. *See, e.g.*, Arcidi v. Town of Rye, 846 A.2d 535, 541 (N.H. 2004) (noting that easement holder has only a nonpossessory right of use and "may not occupy and possess it as does an estate owner" (quoting JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 1:1, at 1–3 (2001))).

51. *See* O'Keefe v. Mustang Ranches HOA, 446 P.3d 509, 516 n.8 (Mont. 2019) ("Easements in gross burden a parcel of land to the personal benefit of an individual and thus do not perpetually run with title to the burdened parcel.") (citation omitted); *see also* Herrick v. Marshall, 66 Me. 435, 438–39 (1877) (observing personal nature of an easement in gross negatively impacts the argument that such easement is perpetual); Lathrop v. Elsner, 53 N.W. 791, 791–92 (Mich. 1892) (observing that an easement personal in nature is unlikely to be perpetual).

52. *See, e.g.*, Ebenezer Baptist Church, Inc. v. White, 513 So. 2d 1011, 1013 (Ala. 1987) (noting that the purchaser of a cemetery lot acquires "a privilege, easement, or license" so long as the cemetery use exists (quoting Whitesell v. City of Montgomery, 355 So. 2d 701, 702 (Ala. 1978))).

Courts have frequently concluded that rights to an unused cemetery lot pass to the survivors of the holder.[53] This, too, is at odds with the traditional view that a noncommercial easement in gross, personal in nature, is not transferable.[54] Yet, when a transferee receives more than one lot, the parties' understanding is almost certainly that rights to the unused lots will pass to the transferee's survivors at the transferee's death. Moreover, modern commentary and case law recognize that nothing necessarily prevents a noncommercial easement in gross from being made transferable if the parties so intend.[55]

In sum, the holder's rights in a cemetery lot do not line up precisely with those of an easement in gross.[56] Unsurprisingly, courts have also characterized those rights in other ways.

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53. *See, e.g.*, Jakeman v. Lawrence Grp. Mgmt. Co., 151 So. 3d 1083, 1088 (Ala. 2014) (explaining that as early as the nineteenth century the state high court recognized that a purchaser's right to burial ground descended to the purchaser's heirs); McAndrew v. Quirk, 108 N.E.2d 667, 668–69 (Mass. 1952) (finding that a holder's interest in his/her cemetery lot passed by intestate succession if holder died intestate or if the holder had a will making no express disposition of the burial lot).

54. *See* Crane v. Crane, 683 P.2d 1062, 1066 (Utah 1984), in which the court states as follows:

> According to the traditional general rule, an easement in gross is merely a personal interest in the real estate of another, and it cannot be transferred by assignment, inheritance, or otherwise. . . . An easement in gross that is not transferable is often referred to as "a noncommercial easement in gross" . . . . In contrast, modern cases generally state that easements in gross are transferable when they are commercial in character.

Id. (quoting Maw v. Weber Basin Water Conservancy Dist., 436 P.2d 230, 232 (Utah 1968)); *see also* Newman v. Michel, 688 S.E.2d 610, 617 (W. Va. 2009) ("Other courts have stated that an easement in gross is purely personal and usually ends with the death of the grantee. . . . An easement in gross is not assignable and applies to specific people and not to guests or assignees.") (citations omitted).

55. *See* Kelly v. Ivler, 450 A.2d 817, 821 (Conn. 1982) (noting that where language does not include "words of limitation, i.e., heirs and assigns, we would ordinarily presume that a mere easement in gross" was created and was nontransferable). *But see* RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.6 cmt. b (AM. L. INST. 2000) (indicating that a benefit in gross that is not personal is transferable, with commentary noting that what historically was an exception for easements that served commercial purposes is now the general rule, with an exception for personal easements).

56. An interesting aside is whether the right to use a cemetery lot might be considered, at least in part, a profit à prendre. A profit is historically distinguished from an easement in gross in that the profit gives its holder the right to sever and remove the soil (or its products) on another person's land. *See* Goss v. C.A.N. Wildlife Tr., Inc., 852 A.2d 996, 1002 (Md. Ct. App. 2004) ("A profit a prendre . . . like an easement, is an incorporeal interest in land. But, while an easement confers a right to use another's land for a specific limited purpose, a profit a prendre confers the right to enter upon another's land and remove something of value from the soil or the products of the soil . . . ." (citations omitted)). Indeed, in the typical use of a cemetery lot for underground burial of human remains, a necessary part of the burial process is removal of at least some of the soil from the cemetery lot. The family does not keep the soil, however, and the cadaver is an item added to the soil. Ultimately, treating cemetery lot rights as a profit would be yet another unconvincing classification.

B. LICENSE

Some courts have stated that the grant of a cemetery lot is a mere license or privilege.[57] A number of courts have stated that the grant is in the nature of an easement *or* a license, without further elaboration.[58] Yet easements and licenses are notably different property interests.[59] Still, in some instances a license may evolve into an easement in gross.[60]

Under common law principles, a license, unlike an easement, is a revocable *privilege* of use.[61] Because the license does not rise even to the status of an interest in land, the license does not fall within the Statute of Frauds and requires no writing to exist validly.[62] In some circumstances, the licensee who purchased the license may be able to recover damages if the licensor breaches the parties' agreement; however, the licensee of a privilege of use to land is unlikely to be awarded specific performance of the original agreement.[63]

One instance in which rights in a cemetery lot may be similar to a license is when the transferee initially receives oral permission for burial in a cemetery lot.[64] This not infrequently happens in small, informal, or private

57. *See, e.g.*, Walter v. Baldwin, 193 A. 146, 149 (Pa. Super. Ct. 1937) (observing that the grant of a cemetery lot was "not a conveyance of a fee or interest in the soil itself; it was a mere license or privilege to make interments").

58. *See, e.g.*, Billings v. Paine, 319 S.W.2d 653, 656 (Mo. 1959) ("[T]he authorities in Missouri and elsewhere which hold that a conveyance of a cemetery lot, though absolute in form, transfers merely an easement or *privilege of burial*, and that the fee title to the land remains in the grantor." (emphasis added)); Willows v. City of Lewiston, 461 P.2d 120, 125 (Idaho 1969) (holding that a deed conveying cemetery lot "for the sole purpose of human sepulture of and in the real property" was a privilege, license, or easement); *see also* Anderson v. Acheson, 110 N.W. 335, 337–38 (Iowa 1907) (discussing cemetery plot as a license or a license coupled with an interest).

59. Moreover, an attempted oral grant of an easement is typically treated as a mere license. *See, e.g.*, 3 TIFFANY, *supra* note 38, § 776 ("[A]n attempted oral grant of an easement is no more than a license" and by default "the court will presume that a parol agreement to impress real property with a servitude was made with a knowledge of the provisions of the Statute of Frauds, and was intended as a license, not as an easement.").

60. *See infra* notes 61–70 and accompanying text (discussing revocability of license).

61. *See, e.g.*, Kitchen v. Kitchen, 641 N.W.2d 245, 248–50 (Mich. 2002) (noting that license is generally revocable at the will of the licensor and automatically revoked upon transfer of title by licensor or licensee). *See generally* 3 TIFFANY, *supra* note 38, § 829 (discussing general characteristics of license).

62. *See* Boland v. Walters, 178 N.E. 359, 361 (Ill. 1931) ("A license in respect of real property . . . is a permission or authority to do a particular act or series of acts upon the land of another without possessing any estate or interest in such land."); *see also* Joseph Mill Prop., LLC v. S&V Props., LLC, 455 P.3d 526, 528–29 (Or. Ct. App. 2019) (noting that while Oregon's statute of frauds requires an agreement concerning a real property interest to be in writing, "an oral agreement can give rise to a license to use real property").

63. *See, e.g.*, Sharf v. Mishken Drug Corp., 249 N.Y.S. 28, 29–30 (App. Term 1930) (stating that licensee who acquired "only a license" was still entitled to damages for breach of license agreement by licensor).

64. *See generally* 3 TIFFANY, *supra* note 38, § 830 (discussing instances and citing cases in which licenses have been created orally or by implication).

cemeteries where few if any records or documents are executed or retained.[65] Arguably, if there is no writing to indicate the transfer of a fee or an interest in land at the time of transfer, the transferee has acquired a mere privilege of use.[66]

If the right acquired is a license only, however, then such licensees who take no further action, believing their cemetery lot will be waiting for them when they die, are—literally and figuratively—taking a grave risk.[67] Traditional license rules would seemingly dictate that the licensee having only a revocable privilege of use has no cause of action against a third party who later receives the fee holder's permission to use the same unused cemetery lot.[68] In fact, if the third party purchases such permission, the third party's knowledge of the earlier license may not even deprive the buyer of bona fide purchaser status. Why? Because in selling to the later purchaser, the fee holder impliedly exercised the power of revocation over the prior license.[69]

In sum, if one receives only a license to use a cemetery lot in the future, the tenuousness of the holder's right makes the license potentially worthless.[70] Despite language indicating that the holder's cemetery rights are a license, courts are quite unlikely to treat them as such. Courts do not hesitate to provide remedies to the aggrieved holder when a third party knowingly interferes

65. *See, e.g.*, Rial v. Boykin, 237 S.W.3d 489, 492–93 (Ark. Ct. App. 2006) (acknowledging that a gravesite may be established without written documentation); Mingledorff v. Crum, 388 So. 2d 632, 635 (Fla. Dist. Ct. App. 1980) (noting with regard to cemetery on private land that "[t]here have been no documents relating to the cemetery use"); Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986) (noting "that owners may . . . establish and set aside a place of burial for the benefit of" others even in the absence of a writing (quoting *Mingledorff*, 388 So. 2d at 635–36)).

66. *See, e.g.*, *Boland*, 178 N.E. at 361 ("Unless the evidence be clearly to the contrary, a court will presume that a parol agreement to impress real property with a servitude was made with a knowledge of the provisions of the statute of frauds, and was therefore intended as a license only, and not as an easement.").

67. *See, e.g.*, Kitchen v. Kitchen, 641 N.W.2d 245, 249 (Mich. 2002) (discussing revocability of license).

68. *See generally* 3 TIFFANY, *supra* note 38, § 829. In fact, a third party who goes onto the land claiming the cemetery lot as her own may, *without permission* of the holder of the fee may be a trespasser against the holder of the fee, but under traditional property principles the licensee may well have no right to complain. *See id.*

69. *See, e.g.*, Chicago & N.W. Transp. Co. v. City of Winthrop, 257 N.W.2d 302, 303–04 (Minn. 1977) (noting that conveyance of land by licensor generally revokes existing license); R.I. Marine Transp. Co. v. Interstate Navigation Co., 161 A. 108, 109 (R.I. 1932) (per curiam) ("When the licensor conveyed the property to the plaintiff, that act in itself revoked the license."). If the first licensee holds only a revocable license for a particular use that has not yet occurred, then the licensor's grant of a license to a second licensee for the same use would logically have to revoke the first license by implication if use by the second licensee would preclude use by the first. *See, e.g.*, TIFFANY, *supra* note 38, § 836.

70. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.8 (AM. L. INST. 2000) (outlining a general rule that when a "conveyance intended to create a servitude does not comply with the Statute of Frauds, the burden . . . is not enforceable and the benefit is terminable at will"); 3 TIFFANY, *supra* note 38, § 833 (discussing the general rules of revocability of license).

with those rights.[71] Except in cases involving successful claims of adverse possession, courts are likely to consider the relative innocence of the parties in resolving gravesite conflicts between competing claimants.[72] Thus, a prospective buyer who knows of another's interest in the lot is unlikely to find favor as a bona fide purchaser.[73]

The license analogy may not be completely inapt. A license is not necessarily forever subject to a right of revocation in the licensor.[74] In many states, if licensees reasonably rely to their detriment on the continuing validity of the license, the licensor is estopped from revoking the license.[75] In the typical case, the detriment occurs when, reasonably relying on the continuing validity of the license, the licensee spends substantial amounts or exerts substantial effort on the license.[76] Alternatively, a license may become irrevocable if coupled with an interest.[77]

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71. *See, e.g.*, Brown v. Hill, 119 N.E. 977, 980 (Ill. 1918) (noting that the holder of a cemetery lot "has a property right in his lot which the law recognizes and protects from invasion," even if the right is a mere privilege or license). The opinion also notes that the holder "may maintain either trespass for damages or obtain a remedy by injunction to enforce and uphold his rights whenever necessary." *Id.*

72. The adverse possession line of cemetery cases is currently the principal one in which the innocence of the subsequent claimant is unlikely to be important. But the good faith of a subsequent claimant can also be disregarded when the cemetery lot dispute is in a jurisdiction that follows a race recording statute. *See infra* notes 189–91 and accompanying text (noting that subsequent purchaser who records first prevails over prior purchaser, even if subsequent purchaser knew of prior purchaser's interest before recordation).

73. The good faith of the claimants at the time of purchase is often emphasized in the case law. *See, e.g.*, Evergreen Cemetery Ass'n v. Jurgensen, 309 N.Y.S.2d 847, 849–50 (App. Div. 1970) (holding that subsequent good-faith purchaser who was first to be buried in lot should not be disinterred in favor of prior purchaser).

74. *See infra* notes 75–87 and accompanying text (discussing irrevocable licenses). *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10 (AM. L. INST. 2000) (discussing how and when permissive use can become a servitude).

75. This principle may be codified. *See, e.g.*, GA. CODE ANN. § 44-9-4 (West 2022) (providing that while parol license to use another's land is generally revocable, such license becomes irrevocable "when the licensee has acted pursuant thereto and in so doing has incurred expense; in such case, it becomes an easement running with the land").

76. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10 (AM. L. INST. 2000) (discussing how "[i]f injustice can be avoided only by establishment of a servitude," estoppel applies when "the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief").

77. *See, e.g.*, Anchor Stone & Materials Co. v. Carlin, 436 P.2d 650, 652–53 (Okla. 1967) (observing that license may become irrevocable "where the licensee has incurred expenses in making valuable improvements to the property" or where the license is coupled with an interest). The *Anchor* opinion notes, however, that a license coupled with an interest applies "only where the licensee has an interest in the property . . . and the continuation of the license is necessary for him to make use of such interest." *Id.* at 653. Both exceptions to the general rule of license revocability would appear to be applicable in many cases involving cemetery lots, at least once the licensee has buried a loved one there.

Thus, in some courts,[78] a license for a cemetery lot might become irrevocable—even prior to any burial in the lot—if the licensee erects an expensive monument or places a costly gravestone on the lot.[79] In effect, the revocable privilege of use held by the licensee transforms into an actual interest in the land.[80] Once the holder has an interest in land of which others have or should have noticed, subsequent claimants would be unable to claim bona fide purchaser status.[81]

Similarly, a license for a cemetery lot would become irrevocable once the licensee or the licensee's loved ones are buried in that lot, for even the simplest traditional burial requires a substantial expenditure of money and an accompanying belief that the site will not be disturbed following interment.[82] Evidence of burial in the lot would be sufficient to provide actual—or, at the very least, inquiry—notice of the prior interest.[83]

78. Not all states permit an oral license to become irrevocable through estoppel principles. *See, e.g.*, Kitchen v. Kitchen, 641 N.W.2d 245, 250 (Mich. 2002) (rejecting Restatement approach concerning licensee "who makes expenditures in reliance on representations about the license" and noting that the Restatement approach is based on estoppel, and "Michigan does not permit an interest in land to transfer only on the basis of estoppel"); *cf.* Wetherby v. City of Jackson, 249 N.W. 484, 485–86 (Mich. 1933) ("The entry of the lot owner and his possession is by permission, a license under a right of burial . . . [that] cannot ripen into an absolute title in fee.").

79. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10 (AM. L. INST. 2000) (emphasizing that foreseeability by that licensee would substantially change position in reasonable reliance that license would not be revoked).

80. Modern authority makes this transformation explicit. *See, e.g.*, Barnes v. Hussa, 39 Cal. Rptr. 3d 659, 667 (Ct. App. 2006) ("An irrevocable license . . . is for all intents and purposes the equivalent of an easement."); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(4) (AM. L. INST. 2000) ("As used in this Restatement, the term 'easement' includes an irrevocable license to enter and use land in the possession of another . . . .").

81. *See* Sundance Oil & Gas, LLC v. Hess Corp., 903 N.W.2d 712, 718–19 (N.D. 2017) (discussing actual, record, and inquiry notice, any of which will deprive a claimant of good-faith purchaser status); *see also infra* notes 192–94 and accompanying text (discussing notice under recording acts).

82. *See* Lena Borrelli, *Average Funeral Cost*, BANKRATE (Aug. 12, 2022), https://www.bankrate.com/insurance/life-insurance/average-funeral-cost [https://perma.cc/V3GZ-MJDR] ("[F]unerals with a viewing and burial in 2021 cost around $7,848 on average," and, with a vault, that amount increases to $9,420). Observing that cremations typically generate less revenue than burials, the National Funeral Directors Association has detailed the continuing decline in the percentage of casketed burials. The Association predicts that, by 2040, the cremation rate will grow to over seventy-eight percent of all U.S. deaths. NAT'L FUNERAL DIRS. ASS'N, 2021 NFDA CREMATION & BURIAL REPORT 2–3, 7 (July 2021), https://dailymontanan.com/wp-content/uploads/2021/09/2021-nfda-cremation-and-burial-report.pdf [https://perma.cc/JM7A-JNP7].

83. Actual or inquiry notice of another's interest in the land will deprive a subsequent purchaser of good-faith purchaser status. *See, e.g.*, Henschke v. Christian, 36 N.W.2d 547, 550 (Minn. 1949) (observing that purchaser is not bona fide if purchaser "had knowledge of facts which ought to have put him on an inquiry that would have led to a knowledge of" a prior unrecorded conveyance).

When a license has become irrevocable through principles of estoppel,[84] the license becomes in effect is an easement.[85] Presumably, in most instances the easement would also be descendible or devisable at the easement holder's death.[86]

In sum, it seems that when courts equate a license with an easement in gross in cemetery lot cases, most often they may have the irrevocable license in mind.[87]

C. FEE

Occasionally, courts state that the lot holder has acquired a fee simple.[88] The holder of a fee has rights substantially greater than those of the holder of an easement in gross or license.[89] As a possessory interest, the fee simple

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84. *See supra* notes 74–81 and accompanying text (discussing how license may become irrevocable). *Cf.* Appeal of Kincaid, 66 Pa. 411, 421 (1870) ("The lot-holder purchased a license—nothing more—irrevocable as long as the place continued a burying-ground—but giving no title to the soil.").

85. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (AM. L. INST. 2000) (treating irrevocable license as an easement). *See generally* 3 TIFFANY, *supra* note 38, § 831 (noting that when a license becomes irrevocable, it "should remain irrevocable for a period sufficient to enable the licensee to capitalize on his or her investment").

86. At common law, unused cemetery lots pass at the owner's death to the owner's heirs, in the absence of a specific devise. General and residuary devises are insufficient to keep the heirs from receiving the lots. S*ee generally* A. L. Schwartz, Annotation, *To Whom Does Title to Burial Lot Pass on Testator's Death, in Absence of Specific Provision in His Will*, 26 A.L.R.3d 1425 (1969) (discussing the passage of title for burial lots). The general rule may be altered by state statute or by contract between the purchaser of the lots and the cemetery association. *See, e.g.*, Terry v. Rickett, No. 171410, 2018 WL 6695892, at *2–3 (Va. Dec. 20, 2018) (discussing ownership of unused lots when cemetery lot owner dies; noting agreement between lot owner and seller of lots concerning passing of lots at lot owner's death).

87. While many courts simply state that the purchaser obtains a license for burial, other courts make clear that the license is irrevocable from inception. *See, e.g.*, Antoniewicz v. Del Prete, 166 N.E.2d 706, 707 (Mass. 1960) (noting that purchaser acquired "not a fee but a right in the nature of an easement or irrevocable license to use the lot for the burial of the dead"); Sherman v. Gray, 102 A.2d 867, 869 (Me. 1954) ("Permission to bury a body in the cemetery lot of another when exercised constitutes an irrevocable license in the licensee for at least so long as the premises continue to be used as a cemetery.").

88. *See, e.g.*, N.Y. Bay Cemetery Co. v. Buckmaster, 9 A. 591, 591–92 (N.J. 1887) (holding that deed in question conveyed to the purchaser a "fee" to a large number of cemetery lots). The underlying facts and history of the transaction are explored more fully in a subsequent case involving related parties. N.Y. Bay Cemetery Co. v. Buckmaster, 24 A. 2, 7 (N.J. Ch. 1892); *see also* Black v. Ga. Mem'l Park Cemetery, Inc., 325 S.E.2d 901, 903 (Ga. Ct. App. 1985) (finding that conveyance to "'the buyer, his heirs and assigns'" transferred fee simple); Pitcairn v. Homewood Cemetery Co., 77 A. 1105, 1105 (Pa. 1910) (finding that the conveyance from the original deed did "grant, bargain, sell and convey" to "his heirs and assigns, to have and to hold the same to him, his heirs and assigns forever").

89. *See, e.g.*, Michigan Dep't of Nat. Res. v. Carmody-Lahti Real Est., Inc., 699 N.W.2d 272, 279–86 (Mich. 2005) (distinguishing estate in fee from an easement interest in land); Hanson Indus., Inc. v. City of Spokane, 58 P.3d 910, 913–16 (Wash. Ct. App. 2002) (noting argument that conveyance was "an estate in fee simple" and counter-argument that conveyance was only an easement

entitles its holder to bring an ejectment action unavailable to the holder of an easement or license.[90] Moreover, the holder of a perfected title in fee generally cannot lose ownership through abandonment, unlike the holder of an easement or license.[91]

Courts may base their conclusion on a literal interpretation of deed language, an approach that at first blush seems unobjectionable.[92] Yet in so doing, these courts may disregard the unique character of a lot within a larger cemetery by failing to consider the reciprocal duties and rights of the transferor and transferee.[93] Thus, it may not matter that the purchaser's use is limited to

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interest); *see also* Hancock v. McAvoy, 25 A. 47, 47–48 (Pa. 1892) (noting limitation on ejectment actions for license and easement holders).

90. *See, e.g.*, *Buckmaster*, 9 A. at 591–92 (concluding that purchaser's daughter, as successor holder to the fee, could sue the cemetery company in ejectment). Had the plaintiff's interest been an easement, her property interest would have been insufficient to maintain the ejectment action. *Id.* (distinguishing case in which lot owner was held to have only an easement or license); *see also* Stewart v. Garrett, 46 S.E. 427, 427–28 (Ga. 1904) (concluding that holder of cemetery lot had only easement, license, or right of limited use, and thus could not bring ejectment action; distinguishing *Buckmaster*); Smith v. Wiggin, 48 N.H. 105, 108–09 (1868) (noting general rule that ejectment action could not lie where claimant had only an easement).

91. *See, e.g.*, Hochstetler Living Tr. v. Friends of Pumpkinvine Nature Trail, Inc., 947 N.E.2d 928, 931–33 (Ind. Ct. App. 2011) (noting that easements and lesser property interests can be lost by abandonment, whereas abandonment does not result in loss of fee simple ownership).

92. When courts state that the holder of cemetery lot rights has acquired a fee, they typically appear to have the fee simple absolute in mind. Judges and lawyers routinely use the terms "fee" or "fee simple" to mean fee simple absolute, not fee simple defeasible. *See, e.g.*, Watson v. Dalton, 20 N.W.2d 610, 615 (Neb. 1945) (observing treatise statement that terms fee, fee simple, and fee simple absolute "are substantially synonymous"). At least some courts, however, have suggested that the holder of a cemetery lot has acquired a fee simple determinable. *See, e.g.*, People *ex rel.* Paxton v. Bloomington Cemetery Ass'n, 187 N.E. 455, 457–40 (Ill. 1933) (providing an example of a court that found the holder acquired a fee simple determinable). In *People ex rel. Paxton*, the court, without indicating the precise terms of the instrument presently in question, said: "The sale of a lot in a public cemetery does not pass the title in fee, but assures to the grantee an easement for burial purposes so long as the ground is used for a cemetery . . . ." *Id.* at 538–39. The term "so long as" is durational language that often serves as a basis for concluding that the estate acquired is determinable. *See id. But see Pitcairn*, 77 A. at 1106–08 (rejecting argument that cemetery lot owner held fee simple determinable). Of the ownership in question, the *Pitcairn* court stated as follows:

> [I]t can hardly be regarded as a determinable or base fee, which is one that may be terminated abnormally. An estate created by deed, in which there is a prohibition against following certain lines or business upon the land, has never been regarded as a base fee. "A base fee is in no way distinguishable from an absolute fee simple, except by the liability to an abnormal termination." The estate which Robert Pitcairn took is not liable to an abnormal termination. It goes to his heirs generally without limit in duration; and there is no provision for a forfeiture or reversion.

Id. (citations omitted).

93. *See, e.g.*, *infra* note 95 and accompanying text (quoting dissent from majority finding that lot holder held in fee and noting that lot owner could hardly be found to have exclusive possession against cemetery company with extensive management obligations).

sepulture and is subject to strict and substantial cemetery regulations.[94] These courts may also ignore broad obligations—such as those for care and protection of the cemetery—retained by the transferor that are essential to successful cemetery operation.[95]

Undoubtedly, the law of servitudes permits a transferor to convey fee simple to part of its property while imposing rights and duties on the conveyed and retained tracts.[96] Nevertheless, when a cemetery association has continuing obligations of maintenance and care for the entire cemetery, including the surface of all lots within, some judges have noted that it seems unlikely the transferor intended to convey a fee simple, regardless of the language used.[97]

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94. *See, e.g.*, *Pitcairn* 77 A. at 1106 (concluding that estate was fee simple "restricted as to alienation generally and as to use, and . . . held subject to the rules and regulations contained in the deed and to those which may be adopted in a lawful way").

95. Indeed, the dissenting justice in *New York Bay Cemetery Co. v. Buckmaster* recognized a similar problem with the majority opinion:

> A rule which permits every lot-owner, under such circumstances, to vex the company with an ejectment suit, and must prove ruinous to the best interest of the company, and disable it to perform those duties which are cast upon it by its charter. The lot-owner is not entitled to the exclusive possession as against the company. Her right is not inconsistent with the continued possession of the company, and until that right is denied her I cannot comprehend how she can maintain any action against the corporation, which, so far as appears, has done nothing to exclude the lot-owner from the full enjoyment of her rights.

Buckmaster, 9 A. at 592 (Van Syckel, J., dissenting).

96. *See, e.g.*, *id.* (noting that the broad duties and powers retained by the cemetery concerning care and management were not incompatible with a fee interest in the plaintiff); State v. Terwilliger, 139 A.2d 454, 456–57 (N.J. Super. Ct. App. Div. 1958) (noting that even though fee was conveyed to purchaser, fee remained subject to cemetery restrictions concerning erection of monuments, markers, and the planting of trees).

97. For a detailed example see, e.g., *Anderson v. Acheson*, 110 N.W. 335, 338–39 (Iowa 1907), where the court stated as follows:

> In Hancock v. McAvoy, 151 Pa. 460, 25 Atl. 47, 31 Am. St. Rep. 774, 18 L. R. A. 781, the court held that the right of sepulture was not an interest in the land such as will support an action in ejectment, in the course of the opinion saying: "As was said in Black v. Hepbourne, 2 Yeates (Pa.) 331, 'ejectment will only lie for things whereof possession may be delivered by the sheriff.' If a recovery in ejectment, founded on a mere right or license, such as that acquired by the grantee in the deed above referred to, were permitted, how could the sheriff, under a writ of habere facias, put the plaintiff in possession without interfering with the rights, powers, and duties of the cemetery association." In Stewart v. Garrett (Ga.) 100 Am. St. Rep. 179, 64 L. R. A. 99, 46 S. E. 427, a like conclusion was reached; the court observing that the action seemed inappropriate "to the ascertainment of any right in a burial lot. If any fiction is pardonable in a case of this kind, it would be fitter to hold that the fee in these sacred precincts belongs to the dead. Within these hallowed precincts no court would desire to send the sheriff with a writ of possession. The instinct of humanity is loyalty to a statute impressed upon all hearts." . . . We are of opinion that the interest of plaintiff in the lot was not such as is requisite to support an action in ejectment.

In sum, while most courts state that a lot holder's rights are held as an easement, a license, or (less frequently) in fee, such statements are not fully convincing.[98] Moreover, classification can be extremely important. Fortunately, courts do not inevitably limit themselves to these three classifications.[99] We now turn to some other ways in which to view property rights in cemetery lots.

D. Other Theories

1. A Future Interest

In many instances, the transferee is purchasing or acquiring rights in a cemetery lot not to accommodate an immediate need for burial, but rather to acquire a right for burial *when death eventually occurs*. When the lot purchaser acquires the lots for future use, courts focusing on the intentions of parties to the transaction might find an apt description of the conveyance as a future interest.[100]

Because in such instances the transferee's use does not occur until some future time, a court could classify the transfer as a *springing executory interest*, with the transferor retaining present possessory rights subject to the future interest springing into effect when death and burial occur.[101] Viewing the recipient's property rights as a future interest creates possibilities and imposes limitations different from those that arise when the recipient is deemed to have received a current estate, interest, or privilege of use.[102]

Id. at 338–39. *But see Terwilliger*, 139 A.2d at 456 (holding that cemetery lot deeds granted lot holders fee "subject, however, to the restriction that the plot or lot shall be used for the purpose of burial only and subject to complete supervision of the association with reference to the erection of monuments, markets, the planting of trees, etc.").

98. In a rare case, a court may find that a transferor granted fee simple to some lots and easement in others. *See, e.g.*, Haas v. Gahlinger, 248 S.W.2d 349, 350–52 (Ky. 1952). Two burial grounds were located on the land in question. *Id.* The court noted that the prior owner of unencumbered fee simple granted part of the land in fee to one grantee, the deed containing no indication of the grantee's purpose. *Id.* That grantee then used the granted parcel for a burial ground. *Id.* The owner then gave burial privileges to others. *Id.* In contrast to the grantees under the first deed, the court noted that the recipients of burial privileges received only an easement. *Id.*

99. *See infra* notes 100–37 and accompanying text (discussing other theories of cemetery lot ownership).

100. *Cf. supra* notes 26–99 and accompanying text (discussing ownership as an easement, a license, or a fee).

101. In essence, the transfer could be viewed as follows: "[The transferor, such as a cemetery association] conveys [insert lot number(s)] to [transferee] when the need for the burial [of the transferee or the transferee's loved ones] arises." *See* RESTATEMENT (FIRST) OF PROP. § 25 (AM. L. INST. 1944) (discussing executory limitations and providing an illustration of a springing use). In light of modern statutory amendments to the common law Rule Against Perpetuities, such a conveyance should be unobjectionable. *See* UNIF. STAT. RULE AGAINST PERPETUITIES § 1 (UNIF. L. COMM'N 1986) (adopting a flat ninety-year wait-and-see alternative to the common-law Rule Against Perpetuities).

102. *See infra* notes 140–48 and accompanying text (discussing adverse possession in the context of future interests).

For example, adverse possession of the transferee's springing executory interest would be more difficult if not impossible, since in most states one cannot adversely possess against a future interest existing when the adverse possession begins.[103] Classifying the transferee's interest initially as a springing executory interest at first would seem to provide the transferee with substantial protection of the transferee's rights in the time before the transferee uses the lot for burial. Upon reflection, however, the efficacy of such theoretical protection diminishes.

Prior to the time the future interest springs into effect, an adverse possessor could still possibly obtain the present interest retained by the *transferor*.[104] If that adverse possession were accomplished through burial, it may be unlikely that a court would order disinterment when the original transferee's executory interest later ripens by death into a right of present use.[105] Thus, the future interest analogy could work to protect the interest of the grantee under a future interest analysis in some cases, but not all.

Moreover, when the transferee receives rights to the cemetery lot for immediate burial of a loved one, the rights cannot be a future interest.[106] If the recipient is purchasing multiple lots, however, and only one will be used for immediate burial purposes, a court could find a transfer of present rights in the gravesite to be used currently and yet find a future interest in the remaining gravesites.[107] Such a bifurcated interpretation may seem cumbersome.

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103. *See, e.g.*, Dieterich Int'l Truck Sales, Inc. v. J.S. & J. Servs., Inc., 5 Cal. Rptr. 2d 388, 393–94 (Ct. App. 1992) (observing that state code "explicitly recognizes that a future estate cannot be harmed during the pendency of the intervening estate").

104. *See, e.g.*, Price v. Eastham, 75 P.3d 1051, 1056–59 (Alaska 2003) (indicating that a prescriptive easement can be obtained against a present holder of less than a fee simple); Ludwig v. Gosline, 465 A.2d 946, 947–48 (N.J. Super. Ct. App. Div. 1983) (holding that "[a]n easement by prescription may be obtained against the holder of a present interest" but that that prescriptive easement is "subject to divestment if and when the property passes to the holder of a future interest"); Newhoff v. Mayo, 23 A. 265, 267–68 (N.J. 1891) (noting that when a right is acquired from a terminable dominant estate, the right ceases when that estate is terminated); Thar v. Edwin N. Moran Revocable Tr., 905 P.2d 413, 414 (Wyo. 1995) (noting that interest acquired from the holder of a present estate "is subject to divestment if and when the property passes to the" future interest holder (citing *Ludwig*, 465 A.2d at 947)).

105. *See infra* notes 231–42 and accompanying text (examining history and policy against disinterment). *But see also infra* notes 243–49 and accompanying text (discussing the role of bad faith in disinterment cases). *Cf.* Antoniewicz v. Del Prete, 166 N.E.2d 706, 707 (Mass. 1960) (deciding "with considerable reluctance" to order disinterment where Defendant made the first burial in a family lot owned by Plaintiff; Defendant showed no justification for burial in Plaintiff's lot).

106. While a current burial in the lot would foreclose the possibility of the transfer for that lot being considered a future interest, it does not mean that the transfer should be considered a fee, easement, or license. Note also that a current burial in the lot would seemingly foreclose the possibility of that lot being adversely possessed by a later claimant, although surrounding unused lots would still be subject to adverse possession.

107. Consider, for example, a conveyance of multiple cemetery lots "to transferee for the burial of himself, his wife, and her children." If the transferee purchases the lots at the time of

Yet such disparate classification of multiple lots is arguably consistent with the treatment of executory interests when some members of a potential class are ready to take possession at the time for distribution and yet others are not.[108]

If the holder of a cemetery lot has an immediate right to place markers at the gravesites even though the first burial may be years away, then a future interest analysis also makes little sense.[109] In such instances, the immediate right of use or possession—in the form of headstones, monuments, mausoleums, fencing, etc.—would appear to doom any assertion that the recipient has received a future interest.[110]

In any event, if a court were to find that a purchaser of a lot for future use has received an executory interest, the court's findings would still be incomplete. Like all future interests, the executory interest must be a future interest in *something*.[111] And here we have come full circle: If it is an executory

his wife's death, her burial spot is immediately used, but burial of the transferee and his stepchildren will occur at some unknown future time.

108. Consider, for example, a conveyance "to the children of X [a deceased individual] who reach 25 years of age." Any of X's children who are twenty-five at the time of the conveyance have a fee simple subject to an executory limitation in the other children who are not yet twenty-five. Those children of X who are under age twenty-five, however, have a shifting executory interest. In the context of cemetery conveyances, a somewhat analogous conveyance would be "to the children of X [a deceased individual] for burial purposes." If the conveyance is made because one child has died and requires immediate burial, but other children of X are still living, then the unused burial spaces would appear to be held as executory interests.

109. While most cemeteries permit headstones, monuments, or flat markers, eco-cemeteries and green burials are increasingly popular. *See Natural Burial FAQ*, GREEN BURIAL COUNCIL, https://www.greenburialcouncil.org/green_burial_defined.html [https://perma.cc/9U4T-7WRC]; *see also* Alex Brown, *More People Want a Green Burial, but Cemetery Law Hasn't Caught Up*, PEW CHARITABLE TRS. (Nov. 19, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/11/20/more-people-want-a-green-burial-but-cemetery-law-hasnt-caught-up [https://perma.cc/5ESQ-JYUP] (discussing hurdles faced by green burial cemeteries). For a list of burial requirements by state, see *Legal Burial Requirements by State*, N.H. FUNERAL RES. & EDUC., https://www.nhfuneral.org/legal-requirements-by-state.html [https://perma.cc/W884-CHJU].

110. The purchaser could attempt to persuade the court that judicial focus should be on the purpose of the cemetery lots for *future* burials, not upon the incidental right to place markers at the gravesites in anticipation of such use. One surmises that such an attempt would rarely be successful, however.

111. For example, the holder's executory interest could be in fee simple or an easement. *See, e.g.*, RESTATEMENT (FIRST) OF PROP. div. III, pt. 1, intro. note (AM. L. INST. 1936) (defining "[t]he term 'future interest' . . . sufficiently broadly to include a postponed right to the enjoyment of an easement, profit, rent or similar interest in the land of another," but noting that "[d]espite the theoretical possibility of such rights, few adjudications exist concerning them").

interest, is it an executory interest in an easement,[112] a fee,[113] or something else?[114]

2. Equitable Interest in Trust

On rare occasions, courts have suggested that the holder of a cemetery lot has an interest similar to that of a trust beneficiary.[115] Under this view, when a cemetery association or other transferor grants cemetery lots but retains a legal interest, the transferor is making a declaration—presumably

112. Cases discussing future interests in easements are uncommon. *But see* Kirk v. Wescott, 382 P.3d 342, 350 (Idaho 2016) ("As an easement is an interest in real property and this Court has long recognized that a deed may grant a future interest in real property, we see no reason why a deed may not create a future easement."); *see also* RESTATEMENT (FIRST) OF PROP. div. III, pt. 1, intro. note (noting possibility of future interests in easements, profits, and similar interests, though adjudications are few). A leading treatise on future interests discusses the historical limitations on creating future interests from certain incorporeal hereditaments but then provides as follows: "Today no difficulty would be encountered in the conveyance of an existing incorporeal interest to take effect in enjoyment in the future, or in creating future interests in an incorporeal interest, provided the interest were of a sort which was alienable at all." 1 JOHN A. BORRON, JR., SIMES AND SMITH THE LAW OF FUTURE INTERESTS § 70 (3d ed. Jan. 2022 update).

113. *See* 1 BORRON, *supra* note 112, § 64 (observing that a future interest may be in "a fee simple, a fee tail, a life estate, or a tenancy for years or at will"); *see also* Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533, 537–38 (1988) (examining the traditional basis for classifying defeasible fees and servitudes, stating that "[r]ecognizing different rules and results for servitudes and defeasible fees, however, is illogical when the only true distinction between them is language—the imperfect signs chosen to express the parties' intent—and the parties' underlying understandings are essentially the same").

114. *See infra* notes 115–37 and accompanying text (suggesting other potential theories for classifying rights to cemetery lots); *see also* Korngold, *supra* note 113, at 533 (listing a number of nonpossessory rights in land, including "covenants, equitable servitudes, easements, rights of entry, possibilities of reverter, and executory interests," and suggesting that they are "functional equivalents").

115. *See, e.g.*, Aldridge v. Puckett, 278 So. 2d 364, 366 (Ala. 1973) (noting holdings that "the establishment of a private or family cemetery may result in the creation of an easement, a trust, a license, or a fee"); Brock v. Richmond-Berea Cemetery Dist., 957 P.2d 505, 510 (Kan. 1998) (observing prior holding "that a cemetery, by its inherent nature, is not subject to the laws of ordinary property" and that "cemetery property was in the manner of a trust"); Smallwood v. Midfield Oil Co., 89 S.W.2d 1086, 1090 (Tex. Civ. App. 1935) (discussing trust theory and stating that "[i]n reverence of the dead, the law segregates and removes from the realm of commerce property dedicated as a cemetery, and it is no longer a subject-matter of conveyance or inheritance as other property so as to interfere with the use and possession to which it has been devoted").

irrevocable[116] so long as the cemetery exists[117]—that the transferor as settlor is now holding the lot as trustee for the benefit of the transferee.[118]

Under the trust analogy, legal title to cemetery lots remains in the cemetery association; beneficiaries receive equitable title.[119] Bifurcation of title into legal and equitable components does not arise when the transfer of a cemetery lot is viewed as the direct conveyance of an easement, a license, a fee, or a future interest.

The trust analogy leaves many questions unanswered, though, especially in light of the substantial developments in trust law over the past two decades. Can the declaration of trust be oral even though it involves realty?[120] What is the extent of the fiduciary obligation of the cemetery association to the beneficiaries?[121] Can the trust be made spendthrift or is it spendthrift by default, so that beneficiaries cannot transfer their interest?[122] If the trust is not spendthrift, can creditors of a beneficiary force a sale of the lot?[123]

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116. *But see* UNIF. TR. CODE § 602 (UNIF. L. COMM'N 2000) (indicating that trust is revocable unless its terms expressly provide that it is irrevocable). The trust code rule reverses the common law rule of presumed irrevocability unless the terms provide that the trust is revocable. *See id.* § 602 cmt. (acknowledging trust code's departure from common law rule and stating that "[m]ost States follow the rule that a trust is presumed irrevocable absent evidence of contrary intent").

117. *See id.* § 401 (recognizing trust creation by declaration); *see also supra* note 92 (discussing durational language in the context of a fee simple determinable).

118. *See, e.g.*, Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911) (observing that "[w]hen once dedicated to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust"). *See generally* UNIF. TR. CODE §§ 801–817 (discussing duties and powers of trustee).

119. *See, e.g.*, Shearrer v. Holley, 952 S.W.2d 74, 78 (Tex. App. 1997) ("It is basic trust law that 'for a trust to be a trust, the legal title of the [trust property] must immediately pass to the trustee, and beneficial or equitable interest to the beneficiaries.'" (alteration in original) (quoting *Cutrer v. Cutrer*, 334 S.W.2d 599, 605 (Tex. Ct. Civ. App. 1960), *aff'd*, 345 S.W.2d 513 (1961))); *cf.* AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 1 (2022) ("A trustee's title usually is legal, but it may be equitable if the settlor expresses the intent to give such an interest and has the capacity to do so.").

120. *See* UNIF. TR. CODE § 407 ("Except as required by a statute other than this [Code], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence." (alteration in original)). Despite the provision in the trust code, many states still do not permit the creation of an oral trust of realty. *See* STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS 545 (6th ed. 2019) (discussing oral trusts of realty and quoting trust code but noting that "most American jurisdictions purport to require writings for trusts of land").

121. *See* UNIF. TR. CODE § 801 (providing trustee has duty to administer trust in good faith); *see also id.* §§ 802–807, 809–817 (discussing various trustee duties and powers, including duty of loyalty, impartiality, and prudent administration).

122. *See id.* § 502 (providing for spendthrift trusts).

123. For cemeteries incorporated under state law, the answer to this question is often "no." *See, e.g.*, KAN. STAT. ANN. § 17-1302 (West 2022) (covering cemetery corporations and providing generally, "[e]very lot sold and conveyed in such cemetery shall be held by the proprietor, for the purpose of sepulture only, and shall not be subject to attachment or execution"). *Cf.* UNIF. TR. CODE § 501 (providing for rights of creditors of trust beneficiary).

The trust analogy is a double-edged sword for both the transferor and transferee. As a trustee with continuing management duties,[124] a transferor (such as a cemetery association) would perhaps be more readily able to determine and develop reasonable rules and regulations for the cemetery than when transferees hold free of trust.[125] As trustee, however, the transferor must also always act in good faith, within the scope of its authority, and in furtherance of the purposes of the trust.[126] At least in some cases of self-dealing, the trustee's actions lead to an irrebuttable presumption of fiduciary breach, and no further inquiry is required even though the trustee reaped no financial or other benefit.[127]

No specific language is required to create an express trust.[128] Once again, if a court focus on the parties' implicit intent rather than the particular language of the transfer, the trust analogy could be appropriate in some circumstances and completely inappropriate in others.[129] If the transferor is a

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124. *See, e.g.*, UNIF. TR. CODE § 804 ("A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.").

125. In contrast, when the lot owners have legal property rights, cemetery rules and regulations are (or are at least akin to) restrictive covenants. *Cf.* Moore v. Serafin, 301 A.2d 238, 241–44 (Conn. 1972) (discussing and enforcing cemetery deed limitation as a restrictive covenant). Once established, amendments to those covenants typically require approval by a substantial number of lot owners; in contrast, a trustee may be able to make changes unilaterally in the prudent management of the cemetery. *Compare* Hardy v. Aiken, 631 S.E.2d 539, 542 (S.C. 2006) (observing that restrictive covenants are to "be strictly construed with all doubts resolved in favor of free use of the property"), *with* UNIF. TR. CODE § 815 (Unif. L. Comm'n 2000) (providing that a trustee, without court authorization, may generally exercise all powers "that an unmarried competent owner has over individually owned property" and "any other powers appropriate to achieve the proper investment, management, and distribution of the trust property").

126. *See, e.g.*, UNIF. TR. CODE § 1008 (discussing exculpation of trustee). The comment to the section provides as follows: "Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. . . . [A] trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries." *Id.*

127. *See, e.g.*, UNIF. TR. CODE § 802(b) & cmt. (UNIF. L. COMM'N 2000) ("[C]arr[ying] out the 'no further inquiry' rule . . . [providing that] transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof."). The comment further notes that "[s]uch transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration." *Id.*

128. *See, e.g.*, UNIF. TR. CODE § 402 (providing elements for creation of trust; requiring intention to create trust but not requiring any particular language to express such intent); *see also* McAnally v. Friends of WCC, Inc., 113 S.W.3d 875, 882 (Tex. Ct. App. 2003) ("There are no particular words required to create a trust if there exists reasonable certainty as to the intended property, object, and beneficiary.").

129. Many state codes have provisions regarding cemetery trusts. *See, e.g.*, N.H. REV. STAT. ANN. § 564:10-a (1955) (discussing distribution of trust funds upon the death of "a trustee appointed in a will over a trust for the benefit of a cemetery lot or lots"). These statutes may cover entire cemeteries or, alternatively, pertain to trusts created by a lot owner for the care and maintenance of cemetery lots. *See, e.g.*, *id.*

cemetery association intending to impose upon itself continuing, mandatory duties in favor of the transferee, the trust analogy may work.[130] Such would be the case when the transferor agrees (explicitly or implicitly) to impose and enforce cemetery rules and regulations and maintain the grounds and cemetery records for the benefit of all lot holders in the cemetery.[131] In contrast, if the transferor intends to have no ongoing management duties once the transfer occurs, which is often the case in transfers for lots in small, informal cemeteries, then the trust analogy falls flat.[132]

3. Interest That Is Sui Generis

When adjudicating disputes among competing claimants to cemetery lots, at least some courts have refused to pigeonhole rights to a cemetery lot within traditional categories of property.[133] Noting that cemetery lots are unique in the world of property law, these courts instead observe that rights in cemetery lots are sui generis.[134]

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130. Where the cemetery is a corporation registered with the state, the state may require the cemetery to have a trust for permanent maintenance of the cemetery. *See, e.g.*, KAN. STAT. ANN. § 17-1311 (mandating permanent trust fund); N.Y. NOT-FOR-PROFIT CORP. LAW § 1507 (McKinney 2022) (detailing provisions for cemetery trust funds required of cemetery corporations); *see also* ARIZ. REV. STAT. ANN. (1986) § 32-2194.25 (stating that owners of a cemetery selling "or contract[ing] to sell lots . . . with a provision for perpetual or endowed care" may not "advertise or otherwise hold out to the public that such cemetery or any individual lot therein is entitled to perpetual or endowed care unless and until the owner shall have established a trust fund for the care of the cemetery"). In such instances, the individual lot owners are indirect beneficiaries of the trust fund, but that status does not preclude a state court finding that the lot owner holds a fee, an easement, a license, or some other property interest or privilege. *See, e.g.*, MO. ANN. STAT. § 137.1040 (West 2010) (discussing cemetery maintenance trust fund "to be used for the upkeep and maintenance of cemeteries" but providing no indication concerning actual ownership or rights in cemetery lots).

131. *See generally* Annotation, *Validity and Reasonableness of Rules and Regulations of Cemetery Company or Association as to Improvement or Care of Lots*, 47 A.L.R. 70 (1927) (discussing cemetery association's exercise of power to regulate). For a recent case involving a municipal cemetery, see *Bailey v. City of Leeds*, 304 So. 3d 719, 736–37 (Ala. Civ. App. 2020) (noting that while the right of burial is a property right, the municipality owning cemetery has right to enact and enforce reasonable regulations).

132. *See supra* note 22 and accompanying text (discussing scenarios and citing cases involving informal cemetery arrangements).

133. *See, e.g.*, Saulia v. Saulia, 250 N.E.2d 197, 200 (N.Y. 1969) ("[T]hat the ordinary concepts of title, ownership, and devolution of title applicable to real property do not apply to cemetery plots."); *see also* Mansker v. City of Astoria, 198 P. 199, 204 (Or. 1921) (noting that lot holder did not receive fee, and that while holder's rights were somewhat similar to those of an easement or license holder, "[t]he right with which we are now dealing is in reality sui generis, for the reason that the places where the dead sleep are by all humankind treated as holy ground and by us are withdrawn from many of the rules which govern ordinary property"); Huxfield Cemetery Ass'n v. Elliott, 698 S.E.2d 591, 594 (S.C. 2010) (discussing interest as an easement but stating, "[b]ecause this land is a cemetery, traditional property laws are not applicable").

134. *See, e.g.*, Schaefer v. West Lawn Mem'l Cemetery, 352 P.2d 744, 746 (Or. 1960) (noting that holder obtains a right that is sui generis, which mainly "grants to the purchaser the right of

Indeed, the classifications of cemetery lot rights previously discussed in this Article are all deficient in various ways.[135] The refreshing admission that rights in cemetery lots do not fall neatly into any of the traditional categories of property permits courts—at least those not bound by statute[136] or case law—to fashion rules and settle disputes in a manner they believe to be fair and equitable.[137]

Unfortunately, such pronouncements can also seem ad hoc, endangering concerns for predictable and efficient outcomes in future disputes, especially when conflicting solutions for dispute resolution come from lower courts within one jurisdiction.

II. LOSS OF RIGHT: WHY THE THEORY OF OWNERSHIP MATTERS

When no disputes arise regarding ownership of cemetery lots, then the property theory (and its propriety) under which cemetery lot rights exist is irrelevant. Happily, in most instances, one purchases, inherits, or otherwise receives the right to the lot; one dies and is buried there; and one never encounters disputes. Yet in a surprising number of instances, conflicts arise. In these instances, a court's classification of cemetery ownership can be the determining factor in resolving the dispute.

The following discussion examines various kinds of conflicts and how the theory of ownership may affect the outcome.

A. ADVERSE POSSESSION

In some instances, Claimant A was unquestionably the first to receive rights to the burial lot in question; unable to refute this fact, Claimant B may nonetheless assert that B should prevail over A under principles of adverse possession or prescription.[138] The fate of B's argument will probably require

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burial therein exclusive of others, and a right to the living to 'express their affection and respect for those dead by marking and decorating the place of interment'" (quoting *Mansker*, 198 P. at 205)).

135. *See supra* notes 26–99 and accompanying text (discussing shortcomings in classifying a cemetery lot holder's rights to a fee, easement, or license).

136. All of the preceding approaches to the treatment of property rights in cemetery lots presuppose that no statutory authority covers the disputes in question. State statutes governing property disputes among claimants to cemetery lots vary significantly in their detail and coverage. Even among those states with extensive provisions, however, many particular disputes between competing claimants—the primary point addressed in this Article—are unlikely to be addressed.

137. *See, e.g.*, Rial v. Boykin, 237 S.W.3d 489, 492–93 (Ark. Ct. App. 2006) (noting that "[t]he special consideration accorded burial plots requires that, in some respects, they not be treated as subject to the laws of ordinary property").

138. If the right to the use of a cemetery lot is viewed as an easement, then the subsequent claimant will claim an easement by prescription, not title by adverse possession. *See, e.g.*, Brunton v. Roberts, 97 S.W.2d 413, 415 (Ky. 1936) (observing that right to cemetery lot is an easement or license and stating that: "It is generally accepted that the foregoing right or title [to a cemetery lot] may be acquired by prescription . . . ."). In *Hebert v. City of Fifty Lakes*, the court noted that the elements for proving adverse possession and prescriptive easement are the same, but the result

a fact-intensive investigation to determine whether B has satisfied the myriad requirements for adverse holding.[139]

Before traveling down that path, however, one should note that under certain theories of ownership or rights in burial lots, B's claim of adverse possession is (or should be) completely unavailable.

1. Burial Rights as a Future Interest

If a cemetery association sells or otherwise grants by deed a lot to A and then B begins to satisfy the elements for adverse possession of that lot while A is living, B's claim of adverse possession may ultimately succeed if A is deemed to have received a present estate under the deed and B satisfies the time requirement for adverse possession prior to A's death.[140] In contrast, the traditional (and still majority) rule is that one cannot adversely possess a future interest.[141]

Thus, if A is deemed to have received a springing executory interest that will become possessory only when the time for burial arises, B cannot adversely possess against A while A is living.[142] True, before A's death B could conceivably adversely possess the transferor's present interest (which is a fee simple subject to A's executory interest) in the lot, but B would only receive the transferor's present estate; A's executory interest would be unaffected under adverse possession principles.[143]

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of a successful claim is different. *See* Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 230–31, 230 n.3 (Minn. 2008); *see also* Matoush v. Lovingood, 177 P.3d 1262, 1268–73 (Colo. 2008) (discussing elements required to create an easement "by adverse possession"); Cole v. Gilvin, 59 S.W.3d 468, 475–78 (Ky. Ct. App. 2001) (observing that elements required for prescriptive easement are similar to those required for adverse possession of fee, but the standard of use is less stringent for an easement because the easement is an incorporeal hereditament). As *Cole* indicates, the prescriptive easement is a servitude on the land giving its holder no title; in contrast, adverse possession gives title to the adverse holder. *Id.*

139. *See, e.g.*, Little Med. Creek Ranch, Inc. v. D'Elia, 450 P.3d 222, 228 (Wyo. 2019) (noting that "adverse possession claims are inherently fact-intensive").

140. *See supra* notes 89–97 and accompanying text (discussing judicial holdings that conveyance of cemetery lot transfers fee interest).

141. *See e.g.*, Mayor of Ocean City v. Taber, 367 A.2d 1233, 1241–42 (Md. 1977) (observing that "the statutory period for adverse possession would not start to run [against the future interest] until . . . the date of the occurrence of the event terminating the estate of fee simple determinable"); Bradford v. Fed. Land Bank of New Orleans, 338 So. 2d 388, 389 (Miss. 1976) ("In an adverse possession case, the statute of limitations will not run against a holder of any future interest until he had an immediate right to possession.").

142. *See, e.g.*, Collins v. Church of God of Prophecy, 800 S.W.2d 418, 419–20 (Ark. 1990) (noting a case in which executory interest was not ripe for application of adverse possession doctrine).

143. When an adverse possessor enters onto a defeasible fee—i.e., the fee simple determinable, the fee simple subject to a condition subsequent, or a fee simple subject to an executory limitation—and successfully meets the requirements for adverse possession, the adverse possessor acquires only that defeasible fee at the end of the applicable adverse possession period. The possessor does not acquire the corresponding future interest—i.e., the possibility of reverter, the right of entry, or the executory interest. *See, e.g.*, Nat. Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d

If A's rights are deemed to be a license for burial in the future, then whether A can block B's assertion of adverse possession is murky.[144] If A's rights are equated with an irrevocable license to begin in the future, then A should be successful.[145] If A's rights are initially deemed a revocable license for future burial, then B may attempt to assert that B's acts of adverse possession constituted an implied revocation of the license by the cemetery association.[146] (B's argument, in essence, would be that the cemetery association must have known of B's notorious, visible, and open acts of adverse possession; by doing nothing, the cemetery association ratified B's acts and revoked A's license.) Under the license theory of burial rights, then, an important question is at what point (if at all) A's license becomes irrevocable (and effectively becomes an easement by estoppel).[147] One doubts whether, in most instances, A could successfully argue that the mere purchase of the lot makes A's license an irrevocable license from inception.[148]

Although the treatment of burial rights as a future interest has gone largely unexplored in reported law, in some instances it could present at least a colorable theory for warding off assertions of adverse possession by a subsequent claimant.

188, 199 (Tex. 2003) (concluding that adverse possessor "acquired the same interest that they adversely and peaceably possessed," which was "fee simple determinable interests in the respective properties on the same terms and conditions as the original leases").

Note the possibility that B might be successful in arguing for a prescriptive easement. *See* RESTATEMENT (FIRST) OF PROP. § 458 cmt. b (AM. L. INST. 1944) (discussing that while in most instances the adverse use is only to the current possessor of land, it can be adverse to the holder of future interest and thereby continue to affect the land when the future interest becomes possessory). Despite the Restatement view, cases frequently state that the prescriptive easement is subject to termination by the future interest holder when the future interest becomes possessory. *See, e.g.*, Ludwig v. Gosline, 465 A.2d 946, 947–48 (N.J. Super. Ct. App. Div. 1983) (observing that "[a]n easement by prescription may be obtained against the holder of a present interest subject to divestment if and when the property passes to the holder of a future interest"). Even under the Restatement, if Claimant A has only a future interest with no right to bring an action for injunctive relief or damages against Claimant B, a court may conclude that the prescriptive period cannot run in favor of Claimant B against Claimant A. *See* RESTATEMENT (FIRST) OF PROP. § 223 (AM. L. INST. 1936) (discussing prescriptive period not commencing when future interest hold has no right to seek injunctive relief or damages).

144. *See supra* notes 57–87 and accompanying text (discussing generally judicial opinions referring to cemetery lot use as a license).

145. *See supra* notes 74–87 and accompanying text (suggesting that even if the right to use a cemetery lot begins as a license, it probably evolves to an irrevocable license once burial occurs).

146. *See, e.g.*, Conley v. Windston, 92 A.2d 860, 861–62 (N.J. Super. Ct. Ch. Div. 1952) (observing that "[a] permissive user of a license is subject to revocation by [the] will of the licensor . . . or . . . conveyance of the land upon which it was intended to operate, unless coupled with an interest or creation of an equity"); Whitaker v. Cawthorne, 14 N.C. (3 Dev.) 389, 390 (N.C. 1832) (holding that license was revoked when licensor conveyed to another).

147. *See supra* notes 74–87 and accompanying text (discussing the irrevocable license).

148. *See* Stinson v. Hardy, 41 P. 116, 118–19 (Or. 1895) (discussing license coupled with an interest as an incorporeal hereditament that is irrevocable based on parties' intent and licensee's expenditures).

2. Satisfying the Elements

"TOUCH EVAN" is an acronym I have often used in teaching the elements of adverse possession.[149] The acronym contains redundancies,[150] and even aside from that irritant, is far from perfect.[151] Nevertheless, it is a helpful starting point. "T" is for the time period required by the jurisdiction to perfect title by adverse possession[152]; "O" is for open possession[153]; "U" is for uninterrupted possession[154]; "C" is for continuous possession[155]; "H" is for

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149. A typical statement of the elements of adverse possession is found in *Royal v. McKee*, where the court stated as follows:

> A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.

Royal v. McKee, 905 N.W.2d 51, 56 (Neb. 2017). The statutory period varies from state to state. *See infra* note 152 and accompanying text (discussing limitations periods).

150. For example, the acronym covers "open," "visible," and "notorious," which can be synonymous in at least some cases. Some commentary also states that "continuous" and "uninterrupted" are synonymous, but others disagree. *See infra* note 154 (discussing the difference between continuous possession and uninterrupted possession).

151. For example, the acronym does not cover the special rules concerning color of title and the general prohibition of adversely possessing against a future interest in existence when the possession begins. For a discussion of the latter point, see *supra* notes 140–48 and accompanying text.

152. *See* 4 HERBERT THORNDIKE TIFFANY, TIFFANY REAL PROPERTY § 1133 (3d ed. 2022) ("The period of 20 years . . . has been adopted in the legislation of a number of the states, while in a few the lapse of a greater period is required to bar the right of action, and in some a much less period."). The limitations period may be substantially altered by disabilities of the landowner existing at the time the adverse possession begins. *See id.* § 1169 ("The statute of limitations invariably extends the period for bringing an action to recover land in case the plaintiff was under disability at the time the right of action accrued.").

153. *See id.* § 1137 (discussing evidence of open possession).

154. *See* Roller v. Logan Landfill, Inc., 307 N.E.2d 424, 429–30 (Ill. App. Ct. 1974) ("When the courts of this jurisdiction speak of the period of time during which the use is Uninterrupted they are referring to that period of time in which there are no acts on the part of the potential servient owner that succeed in causing a discontinuance of the use."); Maloney v. Wreyford, 804 P.2d 412, 415 (N.M. Ct. App. 1990) ("The term 'continuous' is concerned with the behavior of the party claiming a prescriptive easement. The term 'uninterrupted' deals with the behavior of the potential servient owner of the prescriptive easement."). *But see* 31A TEX. JURIS., EASEMENTS & LICS. IN REAL PROPERTY § 53 (3d ed. 2022) ("'Uninterrupted' means unbroken, and is synonymous with the word 'continuous.'").

155. *See* 4 TIFFANY, *supra* note 152, § 1145 (discussing the element of continuity; noting that a break in continuity interrupts the running of the statute of limitations; also citing cases indicating that "continuous" possession is not interpreted literally, but instead may depend upon how a typical owner of such land would have used it); *see also supra* note 153 (distinguishing continuous possession and uninterrupted possession).

hostile possession or holding adversely[156]; "E" is for exclusive possession;[157] "V" is for visible possession[158]; "A" is for actual possession[159]; and "N" is for notorious possession.[160]

Armed with this convenient if imperfect laundry list of elements—assuming that the adverse possession assertion by Claimant B is a viable theory against the rights of Claimant A[161]—how does B go about demonstrating that B has satisfied the elements of adverse possession regarding a cemetery lot?

i. Actual Burial

If Claimant A has received a present fee simple, easement (including the license that has become irrevocable under estoppel principles[162]), or other rights to one or more unused cemetery lots, perhaps the most obvious way Claimant B (a subsequent claimant) can adversely possess A's title or interest is for B to bury a loved one in the lot for the required time period[163] before A attempts to interrupt that adverse possession.[164]

If Claimant A has title to a fee that includes multiple burial spots and yet has never taken possession of any land described in the title, B's act of burial

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156. *See* 4 TIFFANY, *supra* note 152, § 1142 ("The matter of hostility of the possessor is one of his intent, determinable ordinarily from what he has done with respect to the land in question."). Courts have taken varied approaches to the element of hostility. On these approaches and their importance for purposes of adverse possession of cemetery lots, see *infra* notes 183–85 and accompanying text.

157. *See* 4 TIFFANY, *supra* note 152, § 1141 (discussing the meaning of "exclusive" as an element of adverse possession).

158. *See id.* § 1137 (discussing evidence of visible possession, giving owners the opportunity to know of the adverse claim and protect their ownership rights).

159. *See id.* § 1155 ("As a general rule, one can acquire by adverse possession the title to so great an extent of land only as is covered by his acts of actual possession . . . ."). The discussion notes, however, the well-recognized doctrine that an adverse possessor with color of title may, upon may actual entry against some part of the owner's land, constructively adversely possess land described within that color of title even though the adverse possessor makes no actual use of that part of the land. *See id.* ("[C]onstructive possession is confined to such portion of the tract as he intends to take possession of and to such portion as is not in possession of another.").

160. *See id.* § 1140 ("[P]ossession must . . . be 'visible' or 'open and notorious,' so that the owner may have an opportunity to learn of the adverse claim, and to protect his rights.").

161. *See supra* Section III.A.1 (discussing interest in unused cemetery lot as a future interest and noting general inability of third parties to adversely possess a future interest).

162. *See supra* notes 74–87 and accompanying text (discussing how licenses that begin as a mere privilege of use may evolve into an easement by estoppel).

163. In most states, B's use of the lot for actual burial would likely satisfy the "TOUCH EVAN" requirements for successful adverse possession, especially if the burial included a marker, headstone, or monument. *See supra* notes 149–60 and accompanying text (discussing the typical requirements to make a successful claim of adverse possession). In at least some states, however, B cannot adversely possess if B's actions are undertaken in bad faith. *See infra* notes 183–85 and accompanying text (discussing the adverse possession element of hostility).

164. Before the statutory period for adverse possession by Claimant B had been satisfied, Claimant A could seek disinterment of the cadaver buried on A's lot. For more on disinterment claims, see *infra* notes 231–42 and accompanying text.

in one spot could be sufficient to allow B to claim title to all of the burial spots if B has color of title[165] to those multiple spots.[166] If B has no such color of title, the general rule is that B can only acquire that area which B adversely possesses; in this instance, B would only acquire the one spot in which B's loved one is buried. A would still hold title to the remaining spots.[167]

If the body of B's loved one has been buried for the required time period, in most instances and under most state laws the remaining elements of adverse possession would probably be satisfied.[168] This is almost certainly the case if, in addition to burial, B has placed a gravestone or other marker at the grave for the required time period, giving actual notice to A of B's claim.[169]

In some instances, however, burial may not be enough to constitute open, notorious, visible adverse possession.[170] Occasionally, interment occurs without leaving any lingering evidence of the burial[171]; no permanent gravestone indicates the place of burial, and grass covers the burial spot within a few months.[172] If remains are buried in the spot without any gravestone, grass may cover the burial spot even more quickly, thus failing to put A (or anyone else) on notice of B's claim.[173] The same is true for "green burials."[174]

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165. Color of title is a document that "purports to be a valid muniment of title." 4 TIFFANY, *supra* note 152, § 1155. In the context of a cemetery lot, for example, the color of title could be an invalid deed to the cemetery lot(s) in question, or a specific devise in a will from someone who did not in fact own the lot(s).

166. *See supra* note 159 (discussing constructive adverse possession that may occur when adverse possessor makes actual entry, has color of title, and owner is not in possession of lands claimed to be constructively adversely possessed).

167. *See supra* note 159 (noting general rule that adverse possessor can only obtain what adverse possessor actually possesses; constructive adverse possession is a viable theory only when adverse possessor has color of title and owner is not in possession of land that claimed to be constructively adversely possessed).

168. *See supra* notes 149–60 and accompanying text (discussing elements of adverse possession).

169. A marker, headstone, or monument with the name and date of the individual buried in the grave would inevitably seem to satisfy the requirements that the adverse possession be open, visible, and notorious and indicate the actual, exclusive use of that burial spot by the adverse possession claimant. In most states, it would also satisfy the element of hostility. *But see infra* note 185 and accompanying text (discussing a minority approach that purports to prohibit adverse possession by bad-faith actors).

170. *See supra* notes 149–60 and accompanying text (discussing elements).

171. *See infra* notes 172–74 and accompanying text (discussing the burial of cremains and green burials).

172. *See, e.g.*, Hannah Chanatry, *Greening the Grave: Why More People Are Choosing Climate-Friendly Burials*, WBUR (May 6, 2021), https://www.wbur.org/news/2021/05/06/green-burials-climate-change-massachusetts [https://perma.cc/E3YX-UUSH] (including photographs showing minimal impact and evidence of burial).

173. *See supra* note 9 and accompanying text (discussing increasing frequency of cremation in the United States).

174. *See* Chanatry, *supra* note 172 and accompanying text (citing article with photographs demonstrating minimal environmental and visual impact of green burials).

General principles of adverse possession do not demand that the original holder of rights maintain constant vigilance against adverse possessors.[175] Especially when A and A's successors reside far from the cemetery—a not uncommon scenario today—requiring constant inspection of their cemetery lots would be both inefficient and unfair. Instead, it is incumbent upon B to satisfy the evidentiary requirement of open, visible, and notorious possession for a period of years.[176]

ii. Marker Placement and Color of Title Concerns

If Claimant B places a marker with B's name—or the name of B's loved ones—on the lot in question at a time when no burials have yet occurred, has Claimant B successfully adversely possessed the lot once the period for adverse possession has passed?

B has seemingly adversely possessed at least the immediate ground under which the marker lies, for the marker would provide clear and convincing evidence of an actual, continuous, uninterrupted, visible, open, notorious, and exclusive use of that ground.[177] But Claimant A may have some valid objections to B's asserted ownership of the entire lot.

Claimant A could argue that a marker is evidence only that B intends to claim the entire spot in the future.[178] The marker without an accompanying grave is comparable to the title of a book not yet written: We do not know when the conclusion will be reached. Until interment occurs, A would argue, no actual adverse possession by B has taken place beyond the spot in which the marker is located.[179] Moreover, in the absence of a color of title to the entire lot held by Claimant B, B could not assert constructive adverse possession of the entire lot.[180]

If the burial plot in question consists of multiple lots, the question of constructive adverse possession becomes an even greater concern. If A has prior rights to a burial lot with two spaces and B, having no color of title, buries B's spouse in one of the two spaces, superior rights to the remaining

175. Indeed, one purpose of the statute of limitations is to provide an owner ample opportunity over a lengthy period in which to assert ownership rights against the adverse claimant.

176. *See supra* notes 153, 158, 160, and accompanying text (discussing open, visible, and notorious requirements for adverse possession).

177. *See supra* notes 149–60 and accompanying text (discussing generally the elements of adverse possession).

178. *See supra* note 159 and accompanying text (discussing general rule that adverse possessor must make actual entry and can acquire no more than that actually adversely possessed).

179. *See supra* note 159 and accompanying text (noting principles of constructive adverse possession).

180. *See supra* note 159 and accompanying text (discussing the possibility of constructive adverse possession when adverse possessor makes actual entry, has color of title to area extending beyond the boundaries of the actual adverse possession, and owner is not in possession of that additional area).

spot still belong to A.[181] The potential complexity of the scenario increases where the lot contains a number of gravesites and B, again without color of title, buries family members in only some of those sites. With color of title, in contrast, B can acquire the entire burial area described in the color of title as long as the prior claimant is not in possession of any part.[182]

iii. Claim of Right and "Hostility"

If B buries a family member in a space to which A had previously received an interest, for adverse possession purposes should it matter whether B buried her family member there in good faith, believing that B had the right to do so? Does it matter whether B buried her family member there in bad faith, knowing that B did not have the right to do so? Is it enough that B buried her family member and claimed the right to do so, regardless of whether B trespassed innocently or knowingly?

States disagree on the answers to these questions. Most states today appear to require only that B has used the land in question as B's own for the required time period. These states do not inquire into B's subjective mindset to ascertain B's status as a good- or bad-faith trespasser.[183]

Laws in a few jurisdictions, however, permit adverse possession only if B makes use of the spot in the innocent belief that B has the right to do so.[184] In other words, B can only adversely possess A's rights if B is a good-faith trespasser. If B buried a loved one in the spot knowing that A has superior

181. Constructive adverse possession in this context is even more disturbing for both Claimant A and Claimant B, because neither of them in this setting would be able to be buried alongside his or her spouse in these two lots.

182. *See* 4 TIFFANY, *supra* note 152, § 1155 (discussing constructive adverse possession).

183. *See, e.g.*, Ridgely v. Lewis, 105 A.2d 212, 213 (Md. 1954) (observing that under the "modern trend and the better rule . . . it is immaterial that the holder supposed the visible boundary to be correct" and "in other words, the fact that the possession was due to inadvertence, ignorance, or mistake, is entirely immaterial"; rejecting arguments that the holding must be "with the full knowledge that legal title to the land held is in another; [and] must not be held under a mistaken belief" that adverse possessor owned the land). The *Ridgely* court indicated that what is important is that there be "evidence of unequivocal acts of ownership." *Id.*

184. *See, e.g.*, Uhl v. Krupsky, 294 P.3d 559, 562 (Or. Ct. App. 2013) (discussing state enactment of statute in 1989 codifying common law but adding requirement "that a party seeking to acquire fee simple title to real property by adverse possession must have had an 'honest belief of actual ownership' when he or she first entered into possession of the property." (quoting OR. REV. STAT. ANN. § 105.620 (West 1989))). At one time, it mattered not whether the adverse possessor in Oregon acted in good faith or bad faith. *See* Lattie-Morrison v. Holladay, 39 P. 1100, 1104–05 (Or. 1895) (finding that lower court was wrong in stating that "adverse holding under color of title must be with an honest belief on the part of the claimant that his title is good"); *see also* N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 2008) (noting that "[s]ignificant changes to the laws of adverse possession were enacted in 2008 . . . those amendments only apply where the allegedly adverse possessory right vest[s] subsequent to the 2008 enactment"; noting further that "[p]erhaps the most significant change is that a claimant to adverse possession ripening after the 2008 enactments must show a 'reasonable basis for the belief that the property belongs to the adverse possessor'" (quoting Children's Magical Garden, Inc. v. Norfolk St. Dev., LLC, 82 N.Y.S.3d 354 (App. Div. 2018))).

rights, B cannot adversely possess the spot. In direct opposition to the good-faith trespass approach, some opinions indicate that B can only adversely possess A's spot if B is a knowing trespasser, claiming a right of use despite awareness of A's superior title.[185]

In sum, in a minority of states, B's mindset is relevant in determining B's claim as an adverse possessor.

B. RECORDING ACTS AND CHAIN OF TITLE

"First in time is first in right" is an ancient principle that undergirds much, but hardly all, of property law.[186] Adverse possession is only one way in which B's subsequent claim may trump the prior rights of A. In all states, recording acts—provisions by which persons with an interest or an estate in realty may register their claim in a public office and thereby give the world notice of that claim—afford another way in which B's subsequent claim may trump that of A.[187]

American states typically use one of three systems of recording: the race system, the notice system, or the race-notice system.[188]

The race system is the least common of the three, employed only in a very small minority of states.[189] Under a race system, a subsequent purchaser of an

185. This minority approach now appears to be going by the wayside. Where bad-faith trespassing is required, the adverse possessor must know the land belongs to another and thus must be a knowing trespasser during the period of adverse possession. *See e.g.*, Preble v. Maine Cent. R. Co., 27 A. 149, 150 (Me. 1893) ("'[T]here must be an intention on the part of the party assuming possession to assert title in himself.' Indeed, the authorities all agree that this intention of the occupant to claim the ownership of land not embraced in his title is a necessary element of adverse possession . . . .") (quoting Worcester v. Lord, 56 Me. 265, 269 (1868)), *overruled by* Dombkowski v. Ferland, 893 A.2d 599, 603–06 (Me. 2006) (rejecting former Maine approach; noting state legislature's earlier apparent but "inartful" attempt to overrule the so-called Maine approach; noting also that such approach was a minority approach in the country). *Cf.* Mannillo v. Gorski, 255 A.2d 258, 262 (N.J. 1969) (discarding "the requirement that the entry and continued possession must be accompanied by a knowing intentional hostility," holding instead "that any entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious, even though under mistaken claim of title, is sufficient to support a claim of title by adverse possession").

186. *See generally* Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right,"* 64 NEB. L. REV. 349 (1985) (discussing history and pervasive use of first in time as a property doctrine); Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393 (1995) (noting at the article's outset that rules of first possession "are the dominant method of initially establishing property rights").

187. *See, e.g.*, Kordecki v. Rizzo, 317 N.W.2d 479, 481–82 (Wis. 1982) (contrasting common law first in time approach to conveyancing with result under state recording statute).

188. *See* 1 JOYCE PALOMAR, PATTON AND PALOMAR ON LAND TITLES § 17 (3d ed. 2022) (discussing principal kinds of recording acts and their goals). A few states may use one approach for certain interests and another approach for other kinds of interests. *See infra* note 189 and accompanying text (noting that race statute applies statewide only in a very few states; however, some states use the race system for certain kinds of property interests).

189. *See* 1 PALOMAR, *supra* note 188, § 6 (discussing race systems in North Carolina and Louisiana and noting a few other states that apply race system to certain property interests).

interest or estate will prevail over a prior holder of that interest of estate if the subsequent purchaser properly registers the interest first in time.[190] Thus, if a cemetery association sells a lot to A and then sells the same lot to B and B registers her deed first, B's claim to the lot prevails over that of A. Whether B was aware of A's claim at the time B received her deed is irrelevant. One might note that, in a way, the "first in time" principle is at work here—based on the order of registration, however, not on acquisition of initial rights from the common grantor.[191]

The notice system focuses on whether subsequent purchaser B was (or is deemed to have been) aware of A's claim at the time B received B's deed to the lot.[192] Thus, if A informed B of A's valid interest before B purchased from the cemetery, A would prevail over B regardless of which claimant recorded first. Similarly, if prior to B's purchase A had placed a marker on the lot in question indicating A's interest, B would at least have a duty to inquire why the marker was there. Inquiry notice on B's part would again cause A to prevail.[193] Finally, if A recorded prior to B's purchase, B would be on record notice of A's interest, and again A would prevail over B.[194]

The race-notice system combines elements of the notice and race systems.[195] B will prevail over A only if B is a bona fide purchaser—that is, B has no notice of A's interest at the time B purchases—and B records first.[196]

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190. *See, e.g.*, Dep't of Transp. v. Humphries, 496 S.E.2d 563, 566 (N.C. 1998) (discussing North Carolina's pure race statute and noting its "effect . . . is to protect any purchaser for value who records first, whether or not he has notice of a prior unrecorded conveyance and whether he is a prior or subsequent purchaser").

191. What if B prevails because she is the first to register her interest and then A is the first to bury a loved one in the cemetery lot? In that case, A would be a trespasser, and, depending on A's knowledge and the jurisdiction's approach to claim of right ("hostility"), A could begin to adversely possess against B's rights.

192. *See* 1 PALOMAR, *supra* note 188, § 7 (describing notice statutes and noting that an earlier purchaser who is unrecorded will lose to a subsequent bona fide purchaser).

193. *See, e.g.*, Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959) (finding defendant was on notice that the plot was dedicated for burial purposes where the "plot was enclosed with a sandstone wall, three bodies were buried therein, two above the surface and one in the ground, with suitable markers"; defendant was on notice even though interest "was not reserved in the chain of title").

194. *See, e.g.*, Devine v. Nantucket, 870 N.E.2d 591, 597 (Mass. 2007) (observing that state recording statute is "designed to protect purchasers who acquire interests in real property for a valuable consideration and without notice of prior interests from the enforcement of those claims" (quoting Board of Selectmen v. Lindsay, 829 N.E.2d 1105, 1109 (Mass. 2005))).

195. *See* 1 PALOMAR, *supra* note 188, § 8 (noting that a race-notice statute protects a subsequent purchaser for value without notice only if that purchaser would also secure priority under race statutes).

196. *See, e.g.*, Wash. Mut. Bank, F.A. v. Elfelt, 756 N.W.2d 501, 506 (Minn. Ct. App. 2008) (observing that "Minnesota is a race-notice jurisdiction," which gives priority to a subsequent bona fide purchaser who records first over a prior purchaser who failed to record).

If A or B—or A *and* B—convey rights to the lot to others, simple recording act questions can turn into complex chain-of-title problems.[197] Such inter vivos conveyances of unused cemetery lots from A and B are less common, however, than descent of such unused lots when A and B die. In many instances, the heirs of A and B may be numerous, each heir succeeding to a claim as a tenant in common with the other heirs.[198]

When A and B are living, the lots are unused, and neither A nor B has conveyed to a third party, state recording acts could be properly applied to settle their conflicting claims.[199] This is especially so if neither A nor B has spent substantial sums on improving the lot such as with the placement of expensive gravestones or the erection of a mausoleum. In these instances, the lot still seems primarily to have the attributes of real property.[200] According to many courts and observers over the course of history, however, once burial has occurred the lot become "more than" real property.[201] As we shall see, this view reflects the psychological and spiritual[202] attributes human beings attach to graves.[203]

C. ABANDONMENT

A perfected fee title typically cannot be voluntarily abandoned by oral or written disclaimer or nonuse.[204] Thus, again we see that the classification of

197. *See, e.g.*, Harry M. Cross, *The Record "Chain of Title" Hypocrisy*, 57 COLUM. L. REV. 787, 790–99 (1957) (providing a critique of traditional chain of title rules).

198. *See, e.g.*, Foshee v. Foshee, 177 So. 2d 99, 100–01 (Ala. 1965) (discussing disagreement among descendants of original co-owners of cemetery lots).

199. In some scenarios, neither Claimant A nor B may have any form of documentation reflecting permission from cemetery management concerning the lot in question. This scenario is particularly likely to arise in small, informal cemeteries. Under common law principles, if neither claimant satisfies the applicable recording act, then typically the "first in time, first in right" principle prevails. Thus, A would prevail if a court were to conclude that A received an irrevocable property interest initially; however, if a court were to conclude that A received a revocable license, then B might prevail. *See supra* note 69 and accompanying text (noting that later grant of use to B could constitute an implicit revocation of earlier license to A).

200. One is likely to attach less psychological and spiritual meaning to a future burial place for oneself or one's loved ones than to a burial spot where loved ones are already buried. *See infra* note 229 and accompanying text (discussing judicial recognition that the graves of our loved ones have special significance).

201. *See infra* notes 234–35 and accompanying text (discussing historical view of sacredness of gravesites).

202. *See, e.g.*, King v. Frame, 216 N.W. 630, 632 (Iowa 1927) ("Sepulture of dead has been regarded in all ages of the world as a religious rite, and the place where the remains of friends have been deposited is always esteemed as consecrated and hallowed.").

203. *See infra* notes 229–35 and accompanying text (discussing emotional and spiritual aspects of occupied gravesites).

204. *See, e.g.*, Gerhard v. Stephens, 442 P.2d 692, 704 (Cal. 1968) ("[T]he general rule that 'fee interests' in real property cannot be abandoned . . . ."); A.D. Graham & Co. v. Pa. Tpk. Comm'n, 33 A.2d 22, 29 n.2 (Pa. 1943) (indicating that perfected title in fee cannot be abandoned; in

the holding is important. If Claimant A (who is first in time) is deemed to hold fee simple absolute in the gravesite,[205] then Claimant B is unlikely to be successful in asserting abandonment by A.[206]

In contrast, lesser interests such as easements and licenses can be abandoned by their holders.[207] The burden of proof is generally on the party asserting abandonment,[208] however, and courts have frequently indicated that nonuse and the mere passage of time, without more, are insufficient indicators of the holder's intent to abandon an easement or other property rights.[209]

What evidence would B need to prove A's abandonment of the gravesite in question? B would need to present evidence indicating A's voluntary and intentional relinquishment of rights.[210] Such evidence will depend upon the facts of the particular case. Although proof of A's nonuse and the passage of time alone are unlikely to satisfy that burden, those factors are not irrelevant;

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contrast, imperfect titles can be abandoned); *cf.* Johnson v. Burlington N., Inc., 294 N.W.2d 63, 66–67 (Iowa Ct. App. 1980) (holding that railroad acquired the property by easement, not in fee, and thus its interest could be abandoned). On why a fee typically cannot be abandoned, but an easement can be, see RESTATEMENT (FIRST) OF PROP. § 504 cmt. a (AM. L. INST. 1944), which states, "[i]n many cases, of which the ownership of land in fee is an example, an abandonment, if permitted, would result in a void in the ownership of the affected thing, the filling of which would be largely a question of chance and would probably produce grave uncertainty of title." The Restatement does not state an absolute prohibition on the abandonment of a fee, however. Instead, the comment states, "abandonment [of a fee], *if permitted at all*, is permitted only under rules stricter than those which prevail in the case of the abandonment of easements." *Id.* (emphasis added).

205. *See supra* notes 88–97 and accompanying text (discussing opinions stating that cemetery lot holder acquired fee upon conveyance).

206. *See supra* note 204 and accompanying text (discussing general principle that holder of perfected title cannot abandon that title). Of course, cemeteries may be among real estate subject to a taking by a governmental authority. *See, e.g.*, St. John's United Church of Christ v. Chicago, 401 F. Supp. 2d 887, 890, 895–906 (N.D. Ill. 2005) (analyzing and rejecting cemetery's challenge to city's proposed expansion of O'Hare airport to include land used by cemetery). *See generally* Annotation, *Right to Take Property Under Eminent Domain as Affected by Fact That Property Is Already Devoted to Cemetery Purposes,* 109 A.L.R. 1502 (1937) (discussing condemnation as a basis for acquiring cemetery property for other public uses). Moreover, states may have statutory provisions concerning abandoned cemeteries. *See, e.g.*, KAN. STAT. ANN. § 80-916 (West 2022) (providing for care of abandoned cemeteries); MISS. CODE. ANN. § 39-5-19 (West 2022) (providing for restoration and maintenance of abandoned cemeteries); OHIO REV. CODE ANN. § 759.07 (West 2022) (discussing conveyance of land abandoned for cemetery purposes). Such settings, however, are substantially different from disputes between competing claimants to one or more cemetery lots in an existing cemetery.

207. *See, e.g.*, Consol. Rail Corp. v. Lewellen, 682 N.E.2d 779, 781–85 (Ind. 1997) (noting that railroad easement could be abandoned in contrast to fee interests held by railroad).

208. *See, e.g.*, Strahin v. Lantz, 456 S.E.2d 12, 14–16 (W. Va. 1995) (holding that party asserting abandonment of easement has burden of proving abandonment with clear and convincing evidence).

209. *See, e.g.*, *id.* (noting burden to prove abandonment is on party asserting abandonment and stating that evidence of owner's nonuse alone is insufficient to satisfy that burden).

210. *See* RESTATEMENT (FIRST) OF PROP. § 504 (AM. L. INST. 1944) ("An easement may be extinguished by an intentional relinquishment thereof indicated by conduct respecting the use authorized thereby.").

they are likely to strengthen other evidence demonstrating A had no further interest in the gravesite.[211]

III. WHEN PROPERTY BECOMES "MORE THAN" PROPERTY: PROFUNDITY AND EQUITY

In some circumstances, such as when no one is yet buried in a cemetery lot to which there are competing claimants such as A (who is first in time) and B, traditional property rules may effectively resolve disputes over a gravesite.[212] Chain-of-title principles may clearly favor one claimant over another. B's erection of a fence around the lot could lead to title in B through adverse possession.[213] Alternatively, B's placement of a marker could, in conjunction with constructive adverse possession principles, work in B's favor in some instances where B has color of title to the lot.[214] As in many adverse possession settings, however, conflicting interpretations of the requisite elements such as hostility, continuous, open, and exclusive use could throw a wrench into the decision-making process.[215] Moreover, the mere passage of time following A's

211. *See* Mueller v. Bohannon, 589 N.W.2d 852, 857–58 (Neb. 1999). *Mueller* states the general rule that "[a]bandonment of an easement must be pled and proved, the burden of proof being on the party alleging it." *Id.* The court then states, however, that if the easement has not been used by its predecessors "within the prescriptive period, a presumption of abandonment arises and the burden of rebutting the presumption is on the easement holder by proving that it and/or its predecessors did not intend to abandon the easement." *Id.*

Even if the earlier claimant has not voluntarily and intentionally relinquished rights to the gravesite, various equitable theories often asserted in property disputes may come into play. If the subsequent claimant buried a loved one in the gravesite, spending substantial sums to its detriment while the prior claimant took no action to protect its rights being fully aware of what the subsequent claimant was doing, the prior claimant may be estopped from asserting what would otherwise be superior rights to the gravesite. Estoppel may apply whether the earlier claimant has a freehold or a lesser interest and can be particularly important where the subsequent claimant's use has not met the statutory period for adverse possession. Other theories such as the doctrine of acquiescence may also apply in proper circumstances to protect the subsequent claimant. *See infra* notes 243–49 and accompanying text (discussing potential ramifications if owner of cemetery lot is deemed to have acted in bad faith).

212. *See supra* notes 186–203 and accompanying text (discussing recording act principles); *see also infra* notes 231–35 and accompanying text (discussing sacred nature of burial sites and noting that both psychological and spiritual attachment to a gravesite are less pronounced prior to burial of a loved one). Theoretically, a Solomonic solution is possible when the equities seem equally divided among claimants to an unoccupied gravesite. Acknowledging that Americans increasingly choose cremation over full cadaver burial, a court might order—or threaten to order—the division of a single burial lot between two claimants, each of whom could then bury the ashes of their loved ones in the part of the gravesite allotted them. It seems likely that few claimants would be happy with such a solution.

213. *See supra* notes 138–85 and accompanying text (discussing adverse possession of gravesites).

214. *See supra* note 159 and accompanying text (discussing principles of constructive adverse possession).

215. *See supra* notes 183–85 and accompanying text (discussing differing interpretations of hostility element of adverse possession).

purchase and preceding any burial of A's loved ones is unlikely to be sufficient evidence for B to prove A's abandonment of the gravesite.[216]

The tenor of the dispute is often completely changed—and much more emotionally charged—when the competing claim first becomes apparent after a loved one of A or B is buried.[217] As courts have long realized, property rules alone are unlikely to provide a satisfactory mechanism for dispute resolution in this setting.[218]

A. DEATH AND THE GRAVE

Death marks the end of every human being's earthly journey.[219] Most people who choose interment also choose their burial place with care.[220] Once chosen, the burial place is likely to be imbued with increased significance for them.[221] Importantly, once a loved one is buried, the gravesite is also likely to

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216. *See supra* notes 204–11 and accompanying text (discussing proof of abandonment).

217. *See infra* notes 219–25 and accompanying text (discussing psychological and spiritual factors that survivors often attach to the burial site of loved ones).

218. *See, e.g.*, Gallaher v. Trustees of Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc., 399 A.2d 936, 941 (Md. Ct. Spec. App. 1979) (distinguishing between vacant and occupied cemetery lots in settling ownership controversies); Evergreen Cemetery Ass'n v. Jurgensen, 309 N.Y.S.2d 847, 849 (App. Div. 1970) (observing that title and ownership are important in a dispute where no burials have yet occurred, but title is merely one factor for a court to consider when the dispute involves disinterment; in disinterment disputes, the exercise of judicial discretion and equitable jurisdiction are also important); *see also* Holland v. Metalious, 198 A.2d 654, 655 (N.H. 1964) (noting disinterment matters are governed "by rules of propriety and reasonableness determinable by a court of equity").

219. Importantly, though, a large majority of Americans believe in an afterlife. *See, e.g.*, JUSTIN NORTEY, MICHAEL LIPKA & JOSHUA ALVARADO, PEW RSCH. CTR., FEW AMERICANS BLAME GOD OR SAY FAITH HAS BEEN SHAKEN AMID PANDEMIC, OTHER TRAGEDIES 28–29 (2021), https://www.pewresearch.org/religion/2021/11/23/few-americans-blame-god-or-say-faith-has-been-shaken-amid-pandemic-other-tragedies [https://perma.cc/FHC2-9R63] (indicating only seventeen percent of respondents "do not believe in any afterlife"). One might surmise that for non-believers, the place in which their human remains are buried, kept, or scattered would be relatively unimportant; however, that does not seem to be the case. *Cf.* Anderson v. Acheson, 110 N.W. 335, 337–39 (Iowa 1907) (discussing cemetery plots). In a multi-paragraph discussion of rights in a cemetery plot, the court noted as follows: "The place where the dead are deposited all civilized nations and many barbarous ones regard in some measure, at least, as consecrated ground. In the old Saxon tongue the burial ground of the dead was 'God's Acre . . . .'" *Id.* at 337 (quoting Dwenger v. Geary, 14 N.E. 903, 907 (Ind. 1888)).

220. *See generally* Chris Raymond, *Reasons to Buy a Cemetery Plot in Advance*, VERYWELL HEALTH (Jan. 30, 2021), https://www.verywellhealth.com/reasons-to-buy-a-cemetery-plot-in-advance-1131906 [https://perma.cc/Q4MC-J2QF] (noting increasing scarcity of cemetery space and advantages of choosing a plot before the need to use it arises).

221. *Cf.* King v. Frame, 216 N.W. 630, 632 (Iowa 1927) ("In all countries, both ancient and modern . . . the first care of the people has always been to select a place for the burial of their dead, and many of these burial places are immense."). Choosing one's burial site in advance provides the comfort of knowing that one's survivors will not have to make that decision or pay the cost at a time when the survivors are grieving and when they will not have the luxury of shopping among existing "vacancies" at a leisurely pace. If one chooses his or her gravesite based on proximity to the graves of loved ones, the choice once made is also likely to have increased psychological and perhaps spiritual meaning.

be imbued with particular emotional significance for the loved one's survivors.[222] For many individuals, gravesites also hold spiritual significance.[223]

Historically, most individuals have chosen to be buried near their loved ones,[224] for many human beings anticipate being joined with their loved ones in some manner following death.[225] While human beings may disagree on the existence and nature of an afterlife, many of us still have a strong desire to have our remains ultimately placed near those whom we have most loved during our life.

But it is not only the emotional and spiritual attachment to gravesites that make them unique among other real property. People often own several parcels of realty simultaneously or consecutively during a lifetime, and each of those parcels may be important to their owners for varying reasons. By contrast, with rare exception each of us will have one and only one final earthly resting place, and the sole purpose for acquiring the lot is for the "eternal" placement of our remains.[226]

Burial thus not only has intangible import, but also typically removes forever a parcel of realty from use by the living.[227] This permanent removal of the lot from the real property marketplace is at odds with modern rules designed to enhance land alienability and to permit land use changes to

222. *See infra* notes 224–26 and accompanying text (discussing increased emotional and spiritual significance survivors often attach to the graves of loved ones).

223. *See, e.g.*, *Anderson*, 110 N.W. at 336–39 (quoting from older case indicating that burial sites for both "all civilized" and "many barbarous" nations are considered to some extent "consecrated" (quoting Dwenger v. Geary, 14 N.E. 903, 907 (1888)).

224. *But see* Jazmin Goodwin, *More Americans Are Choosing Cremation Over Traditional Burials, Survey Finds*, USA TODAY (Jan. 24, 2020 10:19 PM), https://www.usatoday.com/story/money/2020/01/21/more-americans-choose-cremation-over-traditional-burials-survey-finds/4530268002 [https://perma.cc/K6PX-MZDM] (indicating that forty percent of individuals choosing cremation wish to have their ashes spread at a specific location, whereas only thirty-six percent wish to have a family member keep their ashes).

225. One can verify this empirically by a casual stroll through a cemetery. Moreover, in many states, if the decedent has not made arrangements for his or her burial during life or by express will provision, the decedent's surviving spouse generally has priority in determining where decedent will be buried. *See, e.g.*, Puckey v. Blake, 160 A. 222, 223 (Pa. 1932) (observing "the paramount right in the disposition of remains of a deceased husband or wife is, under ordinary circumstances, in a surviving spouse" but noting further that "the rule is not unbending").

226. *See, e.g.*, Brunton v. Roberts, 97 S.W.2d 413, 416 (Ky. 1936) (noting that most of us have a "natural desire . . . that there shall forever be an uninterrupted repose of our own bodies, and a considerate regard for the sensibilities, reverence, and love of the kindred and friends of the deceased," and consequently "sepulchers shall not be violated except for compelling reasons").

227. In *Brunton*, the court quoted the famous epitaph chosen by Shakespeare for his own grave: "Good frend, for Jesus sake forbeare To digg the dust encloased heare; Bleste be the man that spares thes stones, And curst be he that moves my bones." *Id.* (noting also Shakespeare's aversion to the potential disturbance of his remains); *see also* Yome v. Gorman, 152 N.E. 126, 129 (N.Y. 1926) ("The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose.").

accommodate varying needs of society over time.[228] Respect for the dead and their graves has remained constant over the centuries.[229] Once human remains are properly interred in a graveyard, we usually do not question whether a higher and better use exists for the cemetery property.[230]

B. ON DISINTERMENT

Courts have noted that when competing claims exist concerning cemetery lots *where no one is yet buried*, the question of title and ownership is of great importance in resolving the dispute.[231] Once human remains are placed in the ground and a battle ensues about rights to the burial spot, however, traditional rules for settling property disputes will often prove unconvincing.[232]

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228. *See* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1405 (2009) (observing initially that "alienability [is] one of the standard incidents of ownership"); Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 392 (2006) ("The emergence of the modern system of private property is . . . often described as a steady march toward free alienability . . . .").

229. *See, e.g.*, Rial v. Boykin, 237 S.W.3d 489, 492 (Ark. Ct. App. 2006) (noting commentary that discusses "the custom of setting aside individual places for burial may be traced to ancient times, and this long history 'bespeaks the special protection that society has deemed appropriate for these final resting places'") (quoting 4 POWELL, *supra note* 31, § 18.02[1]); Dwenger v. Geary, 14 N.E. 903, 907 (Ind. 1888) ("[A]ll civilized nations and many barbarous ones regard [the place where the dead are buried], in some measure at least, as consecrated ground.").

230. Over the course of decades and centuries, however, smaller cemeteries may be abandoned. The question of relocation and changing use may then become important. *See, e.g.*, Shaffer, *supra* note 7, at 479 (discussing the problem of abandoned cemeteries and stating, "[b]ecause of the strong sense of community, faith, and tradition in rural America, property law never took into account the possibility of a day when there would be . . . pressure to reuse cemetery land" (footnotes omitted)).

231. *See, e.g.*, Gallaher v. Trustees of Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc., 399 A.2d 936, 940–42 (Md. Ct. Spec. App. 1979) (distinguishing ownership controversies over cemetery lots not yet containing mortal remains from those where interment has already occurred); Corp. of Roslyn Presbyterian Church v. Perlman, 747 N.Y.S.2d 304, 306–08 (Sup. Ct. 2002) (observing that disputes over lots containing no burials are different from disputes over lots where one or more persons have already been buried); Evergreen Cemetery Ass'n v. Jurgensen, 309 N.Y.S.2d 847, 849–50 (App. Div. 1970) (finding that "the question of title and ownership of the burial lot is obviously of great import" in a dispute where no burials have yet occurred; in contrast, "the question of disinterment of a body is dependent upon the exercise of discretion or equitable jurisdiction and in either event, the effect of legal title is merely a reason to be considered by the court").

232. Instead, courts typically resort to equitable considerations. *See, e.g.*, *In re* Disinterment of Swing, 26 N.E.3d 827, 830 (Ohio Ct. App. 2014) (noting in disinterment case a "non-exhaustive list of factors to be considered" by the court). The court listed the following factors:

> (1) the degree of relationship that the party seeking reinterment bears to the decedent, (2) the degree of relationship that the party seeking to prevent reinterment bears to the decedent, (3) the desire of the decedent, (4) the conduct of the person seeking reinterment, especially as it may relate to the circumstances of the original interment, (5) the conduct of the person seeking to prevent reinterment, (6) the length of time that has elapsed since the original interment, and (7) the strength of the reasons offered both in favor of and in opposition to reinterment.

Id. (quoting *In re* Disinterment of Frobose, 840 N.E.2d 249, 252 (Ohio Ct. App. 2005)).

Human beings have from time immemorial considered burial to be profoundly important.[233] Graves and graveyards are unique in the human psyche and in their treatment as realty by society.[234] They are far more than "just property," especially once a loved one has been buried there.[235] Thus, when interment has occurred and a dispute later arises concerning the cemetery lot, abstract discussion of superior title under traditional property principles fades in importance, and courts often resort to discretion and equity.[236]

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233. *See, e.g.*, *Rial*, 237 S.W.3d at 491–93 (discussing the ancient practice of setting aside burial places, which continues into modern times and demonstrates the special protection society deems burial places should receive); King v. Frame, 216 N.W. 630, 633 (Iowa 1927) ("[D]epositories of the dead have ever been respected by mankind whether civilized or uncivilized."); Anderson v. Acheson, 110 N.W. 335, 337 (Iowa 1907) (noting long history of treating burial places as "consecrated ground"); Brunton v. Roberts, 97 S.W.2d 413, 416 (Ky. 1936) (observing that "the policy of the law to protect the dead from disturbance and maintain the sanctity of the grave . . . [is] written into the statute books and the judicial decisions[] [and] came to us from the ecclesiastical law").

234. *See, e.g.*, *Anderson*, 110 N.W. at 337 (discussing history of burial grounds and observing that "[i]n the old Saxon tongue the burial ground of the dead was 'God's Acre'"); *In re* West, 801 S.E.2d 237, 242 (W. Va. 2017) (noting purpose of state statute to defend sanctity and safety of unmarked graves); *see also infra* note 235 (noting repeated judicial references to the "sanctity" of the grave).

235. Numerous cases refer to "the sanctity of the grave." Foshee v. Foshee, 143 So. 2d 301, 303 (Ala. 1962) (involving dispute over grave marker); *Brunton*, 97 S.W.2d at 416 (Ky. 1936) (observing the long-held "policy . . . to . . . maintain the sanctity of the grave"); Humphreys v. Bennett Oil Corp., 197 So. 222, 228 (La. 1940) (finding that defendant's "use of the cemetery plot . . . violated and profaned the sanctity of the graves"); Massey v. Hoffman, 647 S.E.2d 457, 460–62 (N.C. Ct. App. 2007) ("Our [c]ourts have long held that preservation of the sanctity of grave sites is a proper exercise of police power by the State . . . ."); Hairston v. Gen. Pipeline Constr., Inc., 704 S.E.2d 663, 669–74 (W. Va. 2010) (expressing concern for the safety of unmarked graves); *cf.* Holland v. Metalious, 198 A.2d 654, 655–56 (N.H. 1964) (finding, in the case involving funeral service of author Grace Metalious, "that rights in matters of burial or disinterment are not absolute, and [they] will be governed 'by rules of propriety and reasonableness determinable by a court of equity'" (quoting Wilson v. Read, 74 N.H. 322, 68 A. 37, 40 (N.H. 1907))).

236. *See, e.g.*, Maffei v. Woodlawn Mem'l Park, 29 Cal. Rptr. 3d 679, 682–83 (Ct. App. 2005) (discussing precedent indicating that "each [disinterment] case . . . 'must be considered [on its own merits] in equity'" (quoting *In re* Keck 171 P.2d 933, 936 (Cal. Dist. Ct. App. 1946); Evergreen Cemetery Ass'n v. Jurgensen, 309 N.Y.S.2d 847, 849–50 (App. Div. 1970) (noting importance of questions of title and ownership when no burials have occurred in a lot, but "question[s] of disinterment . . . depend[] upon the exercise of discretion or equitable jurisdiction"). The New York court further stated that "in either event, the effect of legal title is merely a reason to be considered by the court." *Id.*; *see also* Corp. of Roslyn Presbyterian Church v. Perlman, 747 N.Y.S.2d 304, 306–07 (Sup. Ct. 2002) (noting the importance of "benevolent discretion" in resolving questions of disinterment (citation omitted)).

Although court opinions frequently note a strong public policy against disinterment,[237] courts order disinterment in some circumstances.[238] One such circumstance is when the burial has occurred in a lot contrary to the decedent's clearly expressed wishes;[239] another is when the decedent's remains were mistakenly buried in someone else's lot and the original purchaser/owner is deemed to be without fault.[240] The old "first in time is first in right" maxim may be a foundational principle undergirding much of property law, but it is especially unlikely to be determinative when the person who is first in time to bury a loved one on a cemetery lot is a knowing trespasser.[241] Courts have noted that burial in the lot of another, even if based on innocent mistake, does not prevent disinterment upon the lot owner's request.[242]

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237. *See, e.g.*, Currier v. Woodlawn Cemetery, 90 N.E.2d 18, 19 (N.Y. 1949). In *Currier*, the Court stated as follows:

> The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned . . . . While the disposition of each case is dependent upon its own peculiar facts and circumstances and while no all-inclusive rule is possible, the courts[] [must] 1191xercise[e] a "benevolent discretion" . . . .

Id. (citation omitted); *see also* Choppin v. Labranche, 20 So. 681, 682 (La. 1896) (observing generally that "the sanctity of the grave should be maintained"); Viscomi v. McGuire, 647 N.Y.S.2d 397, 399–400 (Sup. Ct. 1996) (examining factors to be considered, including "[t]he religious convictions of the deceased," who chose the burial site, "the desires and motives of those" seeking a change of location, and the sanctity of the burial ground (citing Frost v. St. Paul's Cemetery Ass'n, 254 N.Y.S.2d 316, 318 (Sup. Ct. 1964))). On the question of motives of the survivors seeking disinterment, see generally *In re Adams*, 172 N.Y.S. 612 (Sup. Ct. 1918) (refusing to allow widow to remove husband's body from cemetery lot to which he had had sentimental attachment; although widow appeared to have been well-provided for in trusts established by husband, cemetery lots had appreciated in value and sale of lot would have given her even more money on which to live).

238. *See* R.F. Martin, Annotation, *Removal and Reinterment of Remains*, 21 A.L.R.2d 472 § 1[a] (1952) ("While the normal ultimate destiny of Western man, so far as his bodily parts are concerned, is a single and permanent commitment to the soil, it is recognized that circumstances may require, or at least justify, temporary disturbance of what is often euphemistically called final repose.").

239. *See, e.g.*, Long v. Alford, 374 S.W.3d 219, 223–24 (Ark. Ct. App. 2010) (noting, in case involving request for disinterment, that judicial holdings "have held that a decedent's wishes concerning the ultimate disposition of his or her remains are entitled to consideration and should be carried out as far as possible").

240. *See, e.g.*, Gallaher v. Trustees of the Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc., 399 A.2d 936, 940–42 (Md. Ct. Spec. App. 1979) (noting that although later bona fide purchaser had been first to inter a family member in cemetery lot, prior purchaser was entitled to disinterment because prior purchaser had routinely visited cemetery, attempted to protect his rights by retaining sales receipts, and had done nothing to cause wrongful resale of lot by church cemetery trustees).

241. *See infra* notes 243–49 and accompanying text (discussing "bad faith" burial); *see also* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1871–74 (2007) (discussing the judicial treatment of intentional trespassers).

242. *See, e.g.*, Antoniewicz v. Del Prete, 166 N.E.2d 706, 707 (Mass. 1960) (ruling for plaintiff, original lot owner, noting "[t]hat the defendants were able to make the first burial in lot 38 could not operate to extinguish the plaintiff's right").

In the following discussion, I suggest ways in which property law might be expanded, limited, or modified to resolve disputes between competing claimants to cemetery lots. These suggestions are based on the initial observation that rights in cemetery lots are most commonly sui generis—not falling neatly into traditional categories such as fees, easements, and licenses.

1. Bad-Faith Burials

When someone intentionally buries a loved one in the plot that he or she knows is owned by another person, and does so without that person's permission, I suggest that the law should typically order disinterment at the request of the original owner.[243] Indeed, if the original owner or a member of the owner's family is *already buried* in a group of owned lots when the intentional trespass occurs, only rarely should a court refuse to order disinterment.[244]

Further, because of the "consecrated" nature of burial spaces courts have deemed worthy of "special protection,"[245] I suggest that the law ignore claims of adverse possession by those who acted in knowing disregard of another's ownership of the plot.[246] If, however, the law continues to apply adverse possession rules in such situations, I suggest that the length of time required to adversely possess a lot knowingly owned by another should be significantly increased, perhaps at least to the common law period of twenty years.[247] If at least one of the original owner's family members is already buried in a group of lots when the third party is buried with knowledge that the lots are owned by another, perhaps the time required for adverse possession should be even longer.[248]

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243. *Cf.* Hill v. City of Fort Valley, 554 S.E.2d 783, 785–87 (Ga. Ct. App. 2001) (rejecting plaintiffs' trespass claim for wrongful burial because plaintiffs themselves had no property interest in the lot in question). The owner may, in an appropriate case, be able to bring a claim of intentional infliction of emotional distress against the knowing trespasser. *See id.* (discussing, in case of wrongful burial, elements for claim of intentional emotional distress). That topic, however, is beyond the scope of this Article.

244. *See, e.g.*, O'Shaughnessy v. John J. Barrett, Inc., 66 N.Y.S.2d 4, 5 (Sup. Ct. 1946) (observing that wrongful burial occurred in 1939 but was a continuing trespass in lot purchased by deceased brother to which the plaintiffs, his siblings, were entitled to use; striking defendant's motion to dismiss based on three-year statute of limitations for injury to property).

245. *See supra* notes 229, 235, and accompanying text (discussing "sanctity" of gravesites often mentioned by courts).

246. In essence, I suggest that in the context of trespassing burials, courts or legislatures adopt the minority approach to adverse possession that precludes a knowing trespasser from adversely possessing land. *See supra* note 184 and accompanying text (discussing the meaning of "hostility" for adverse possession purposes).

247. *See* discussion *supra* note 152 (discussing statutory period required for successful assertion of adverse possession claims).

248. Some states have adverse possession periods considerably longer than twenty years. *See, e.g.*, J & M Land Co. v. First Union Nat. Bank, 766 A.2d 1110, 1123–24 (N.J. 2001) (construing N.J. STAT. ANN. tit. 2A, § 14-30 (2013) which requires thirty years of actual possession of any real estate excepting woodlands or uncultivated tracts and sixty years of actual possession of woodlands or uncultivated tracts).

Removing the bad-faith actor's ability to assert adverse possession, or at least requiring a much longer period of adverse use, would and should not eliminate other theories in which the interloper could acquire superior rights to the lot. Most notably, equity may favor the interloper if the original owners fail knowingly to protect their rights or act in ways that demonstrate bad faith even more egregious than the interloper's. For example, earnestly believing the known owner of lots will not care, an interloper at significant expense might bury several family members in those lots. In such a case, the interloper is still a bad-faith actor, but one with a good-faith belief that the trespass is inoffensive to the owner. If the owner is aware of the interloper's actions and yet makes no effort to prevent the burials, the owner's inaction seems to demonstrate bad faith without any justification.[249]

2. Innocent Interlopers

The most difficult decisions concerning the propriety of disinterment arise when the wrongful burial was made in the good-faith belief that the decedent or the decedent's family owned the lot where the burial occurs.

Once again, a distinction might first be made between innocent burials in lots where the original owner has yet to bury any family member and innocent burials in lots where the owner has already buried a family member when the subsequent claimant buries a loved one.

When original owners have not buried any family member in a *group of lots* they own, the owners may be less likely to feel the same level of psychological or spiritual ties to the spot they would feel had they already buried one or more family members there.[250] In such cases, the innocent interloper might well be able to assert principles of adverse possession successfully, perhaps without even extending the period of possession required

249. In such circumstances, the "relatively innocent" trespasser might assert that the original owner is estopped by the owner's failure to take timely action to protect the owner's rights. This is especially so if the trespasser mistakenly believed he or she had the implicit permission of the owner to bury a loved one on the owner's property. *Cf.* 4 TIFFANY, *supra* note 152, § 1235 (noting "it has frequently been decided that if one, having title to land, as he knows or has reason to know, disclaims any rights therein, or fails to assert his rights" causing "one, excusably ignorant of the true state of the title, to purchase the land from a third person, he cannot thereafter assert any claim to the land" (footnotes omitted); Oliver Wendell Holmes Jr., *The Path of Law*, 10 HARV. L. REV. 457, 476 (1897) ("Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example."). Alternatively, if a sufficient time period has passed since the burial, the trespasser might assert that the statute of limitations has run. *But see O'Shaughnessy*, 66 N.Y.S.2d at 5 (finding that three-year statute of limitations for injury to property was inapplicable affirmative defense, since the act of wrongful burial was a continuing trespass).

250. *See* discussion *supra* notes 219–25 and accompanying text (discussing import of a loved one's burial place to survivors).

to make a successful claim.[251] This approach is most likely to be warranted when ample unused, adjoining lots remain in the cemetery for the original owners and the family members.[252]

Yet even when the original owners have not buried any family members when the interloper is buried, it is probably inaccurate to conclude that the owners have *no* emotional ties or expectations concerning the lots in question.[253] Moreover, cemetery lots are unique among real property, and society does not expect the owners to engage in the same level of routine inspection that owners are expected to invest in other privately owned realty.[254] Thus, while the innocent trespasser might acquire the owner's cemetery lots by adverse possession, I suggest that courts impose a compensation requirement upon the successful adverse possessor of the lots in question.[255] In a case where the burial by interlopers is among a group of lots owned by another, and the burial by the interlopers leaves inadequate lots for the owners and their families, the law could require the interlopers and their successors to compensate owners for the entire group of lots.

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251. *See* discussion *supra* notes 212–16 and accompanying text (suggesting that traditional adverse possession rules might work effectively if the owner has not yet buried anyone in the cemetery lot). *Cf.* Antoniewicz v. Del Prete, 166 N.E.2d 706, 707 (Mass. 1960) (noting that original owner who had not yet buried anyone in lot could nevertheless seek disinterment of defendant's loved one buried in owner's lot).

252. When a wrongful burial has occurred in an owner's lot, in some cases the owner has been offered an alternative lot in the cemetery. Even though the owner has not yet buried any loved ones in the original lot, the owner may prefer to retain all of the spaces in that original lot and thus request disinterment necessitated by the wrongful burial. *See, e.g.*, *Antoniewicz*, 166 N.E.2d at 707 (noting that owner sought disinterment of body wrongfully buried in its lot because it preferred to retain original lot, which contained space for twelve graves, to other lots available in the cemetery; granting, "with considerable reluctance," owner's request).

253. *See supra* notes 219–25 and accompanying text (discussing psychological and emotional relevance of gravesites).

254. *See supra* notes 175–76, 226–30 and accompanying text (discussing different expectations concerning owners of "typical" realty and owners of gravesites).

255. This suggestion, of course, is contrary to the established rules of adverse possession. *See, e.g.*, Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 485 (2014) (observing that "when losing her land through adverse possession, the owner receives no compensation"); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 669 (1988) (noting that "[t]he adverse possessor gains title to the property without any legal obligation to compensate the true owner for the loss of her property"); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2466 (2001) (noting that "[w]hen *AP* [adverse possessor] gains title by adverse possession, she is not required to pay *RO* [record owner] for the land"). *But see* Merrill & Smith, *supra* note 241, at 1876 (noting that "[t]he European Court of Human Rights recently declared the English common law rule of adverse possession to violate the European Convention on Human Rights, insofar as it permits the transfer of title to property to the adverse possessor without notice or compensation to the true owner"). *Cf.* Noel Elfant, Comment, *Compensation for the Involuntary Transfer of Property Between Private Parties: Application of a Liability Rule to the Law of Adverse Possession*, 79 NW. U. L. REV. 758, 761–62 (1984) (proposing that a successful adverse possessor should then have the "right to purchase the property interest in question from the original owner for a judicially determined compensation equal to the market value of the property interest at the time the right to purchase vested in the adverse possessor").

When innocent interlopers cannot satisfy the requirements of adverse possession, equity may again come to their aid.[256] If good-faith interlopers conduct burials in the lots of owners who knowingly allow such burials without taking prompt act to protect their rights, failure of the owners to act may be viewed as bad faith.[257] At the very least, equitable principles such as laches, waiver, or estoppel may come in to play to favor the interloper.[258] Moreover, in such cases, imposing a compensation requirement upon the interloper would be unwarranted.

CONCLUSION

Thousands of cemeteries dot the American landscape. In many instances, current ownership of and rights of use to cemetery land is unclear. Especially in small, rural cemeteries, often few or no deeds exist dedicating the land to cemetery use and detailing the respective ownership of lots. Even when a tract of land is dedicated to cemetery use by recorded deed, often deeds or licenses granting burial rights to individual lots within the cemetery will be nonexistent, lost, destroyed, or unrecorded. Further complications arise when such rights originated generations earlier, and the devolution of those rights through devise, inheritance, and lifetime transfers over the years is unclear.

This Article has examined both the applicability and limitations of traditional property principles in resolving disputes over gravesites. This Article suggests that, instead of categorizing rights to cemetery lots solely within the historical taxonomy of private property ownership, rights in such lots are sui generis. While at least some courts have recognized the unique nature of rights in cemetery lots, many courts tend to fall back upon traditional property rules when determining priority among competing claimants to those lots. This Article suggests that while traditional property rules may remain important in disputes over cemetery lots, they should be molded in ways that better reflect the profundity of burial and its psychological and emotional impact upon a decedent's survivors.

The easiest cases for resolution are those where competing claimants vie for superior rights in lots where no family members of either claimant have yet been buried. I have suggested that in such instances, traditional property

256. *See, e.g.*, Corp. of the Roslyn Presbyterian Church & Congregation v. Perlman, 747 N.Y.S.2d 304, 306 (Sup. Ct. 2002) ("The court in determining whether disinterment is appropriate must exercise 'benevolent discretion.'" (quoting Viscomi v. McGuire, 647 N.Y.S.2d 397, 399 (Sup. Ct. 1996)); *In re* West, 801 S.E.2d 237, 241–42 (W. Va. 2017) (noting that "it remains within the jurisdiction of the circuit court to rule in equity" on the question of disinterment).

257. *Cf.* King v. Frame, 216 N.W. 630, 630–33 (Iowa 1927) (noting that widow purchased lot "without knowledge" of plaintiff's prior purchase of the same lot and that lot was "wholly unoccupied and unimproved" and "there was nothing on the lot at the time to warn her or to indicate that any other person had any rights in or could make any claim to said lot"; holding that equities rested with widow, denying plaintiff's claim for trespass and request for disinterment).

258. *See supra* note 231 (citing cases that discuss equitable concerns and discretion on matters of disinterment).

rules have greater utility. Before burial, the psychological and emotional attachment of prospective occupants of the lot or lots is likely to be considerably less than when their loved ones are already interred. Thus, a court may properly settle disputes in such instances through deed records, chain-of-title rules, and equitable principles. Even in cases such as these, however, I have expressed doubt that adverse possession has a convincing role to play in some disputes. If one claimant demonstrates superiority of rights based on the venerated principle of being first in time, how can the competing claimant continuously and exclusively occupy an entire gravesite within a cemetery if no one is buried there? If the first claimant has only the right of use of the subsurface and the surface ownership is in a cemetery association, can a third party assert adverse possession of rights below the surface without using the subsurface? If the first claimant has a future interest in burying family members of the lot, can such a future interest be adversely possessed? Can a marker placed on the surface by a subsequent claimant result in adverse possession of anything more than the precise place where it stands?

In contrast, dispute resolution between competing claimants is much more difficult when one or both claimants have already buried family members adjacent to the lot or lots in question, or when a family member has been buried in the very lot claimed by another. Disinterment against the wishes of family members is traumatic, and the law is reluctant to issue removal in such cases. When a claimant has acted in bad faith, knowingly burying a family member on the lot of another, more often than not a court should nevertheless order disinterment. Not all acts of knowing trespass are necessarily reflective of literal bad faith, though, and the claimant who was first in time but who fails to take reasonable steps when confronted with an impending trespass by another may be equally if not more at fault.

Even when the loved one of someone with inferior rights to the lot in question has been buried for many years, I have argued that a strict application of traditional principles of adverse possession may be less than convincing, regardless of whether the burial occurred as the result of a good- or bad-faith trespass and the jurisdiction's general approach to the element of hostility. Because rights in burial lots are sui generis, the law should not expect the holders of superior rights to make frequent inspections of their burial lots in the same manner it expects of holders of typical real estate. I again have argued that equitable concerns are more important than the doctrine of adverse possession; if, however, the law continues to treat adverse possession as a viable theory in burial lot claims, I have suggested that in some cases the time frame for a successful claim should be extended. Moreover, perhaps states should deviate from the majority approach to hostility in general adverse possession cases, instead requiring the adverse possession claimant to demonstrate that the burial was made in good faith as the result of an innocent mistake. Finally, I have suggested that if title to the lot is transferred

to the subsequent claimant, then that claimant should be obligated to reimburse the prior claimant for the forced transfer.

Centuries have passed since Shakespeare observed that, following death, what remains is "that small model of the barren earth" serving "as paste and cover to our bones."[259] Yet when the barren earth is used to cover our bones, it becomes "more than" real property, and the rules we ultimately use to settle disputes to burial lots should reflect this uniqueness.[260]

259. WILLIAM SHAKESPEARE, RICHARD II, act 3, sc. 2.

260. *Id.*