

# Digging a Little Deeper: Answers to Your Seventeen Completely Fascinating, Thought Provoking, and Previously Unanswered Questions about Vermont Cemetery Law

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for the

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## 1. Where do we find Vermont law governing cemetery operations?

The majority of Vermont statutory law on cemeteries can be found in Chapter 121 of Title 18, Vermont Statutes Annotated. Chapter 121 covers general provisions, town cemeteries, cemetery associations, acquisition of property by towns and associations, ownership of cemetery lots, and community mausoleums and columbarium. There are also some provisions of criminal law applying to cemeteries at Title 13, Chapter 181. The simplest place to find the statutes is online at <https://legislature.vermont.gov/statutes>. The statutes are also found in the “green books” in every town office.

Two relatively recent and fairly interesting Vermont Supreme Court decisions addressing family burial plots are *In re Estate of Harding*, 2005 VT 24 and *In re Guite*, 2011 VT 58. Both generally address the nature of property rights and obligations created by family burial plots on private property. The recent case of *Bernasconi v. City of Barre*, 2019 VT 6 addresses premises liability at a City-owned cemetery. The 1997 case of *Baisley v. Missisquoi Cemetery Ass'n*, 167 Vt. 473 (1998), addresses premises liability at an incorporated cemetery. Copies of all these decisions can be obtained online.

## 2. How should these cemetery statutes be read? Are there any guidelines for figuring out what they mean?

Understanding what the Legislature meant when it wrote a statute is not always a simple task. In the effort to interpret a statute, a court will apply what are termed “rules of statutory construction.”

Generally, the first step is to examine the statute's language as it is presumed that the Legislature intended the plain, ordinary meaning of the statutory language; if a statute is clear on its face, a court will accept and apply its plain meaning.

Where the statutory language creates ambiguity or uncertainty, a court will apply various rules of construction to ascertain the Legislature's intent:

- A statute should be construed as a whole and with reference to statutes dealing with the same subject matter.
- Where two statutes deal with the same subject matter, and one is general and the other specific, the more specific statute should control.
- When a statute lists item of an associated group or series, it can be inferred that items not mentioned were excluded by deliberate choice.

The general goal is to divine the intent of the Legislature, and a court will also look to the purpose of the statute and the history and record of its passage to find that intent. Of course, the best general resource for understanding Vermont cemetery law is *Digging Deep, Unearthing the Mysteries of Burial and Cemetery Law*, revised October 2017.

### **3. Does Chapter 121 of Title 18 apply to all Vermont cemeteries or just cemeteries organized after June 1, 1933?**

All Vermont cemeteries. 18 V.S.A. 5303 provides:

The object, purposes, and activities of a cemetery shall be restricted to those acts only that are necessary to enable it to accomplish the purposes for which it is created. It shall not be conducted for the purpose of private gain either directly or indirectly to any of the members of the agencies engaged in such business. **Lawfully organized cemeteries may be conducted and operated by those agencies now engaged in their conduct and operation, by churches, by religious and ecclesiastical societies, by cemetery associations incorporated as hereinafter provided, and by no others. However, this chapter [Chapter 121 of Title 18] is not intended to apply to any agency organized, existing, and operating the business of a cemetery prior to June 1, 1933, under any existing law, nor to affect any vested rights acquired thereunder.** Insofar, however, as the provisions of this chapter do not violate any vested rights, so acquired, it shall apply to all such agencies.

18 V.S.A. 5301 also provides:

**This chapter [Chapter 121 of Title 18] shall be applicable to all agencies now engaged in, or which shall hereafter engage in any business of a cemetery within this State,** and to all property used or intended to be used for the permanent disposition of the human dead.

The Vermont Legislature passed these two statutes in 1933. Two of the purposes of the 1933 law were to limit and regulate the entities that could operate a cemetery in Vermont and to prohibit for-profit cemeteries. However, there were already countless existing cemeteries that needed to be recognized and accommodated.

In my opinion, the intention of the underlined language was not to exempt an agency operating a cemetery prior to June 1, 1933, from the new law, but to make sure that the validity of cemeteries already existing on June 1, 1933, would be preserved.

#### **4. What is a cemetery agency's obligation to make its records available to the public? Do we have to research records if someone requests information?**

Statute requires a cemetery agency to "provide and maintain a suitable place of deposit" for its records, "of such character as will safely keep and preserve such records and files from loss and destruction." "The record of burials, interments, and cremations must be open to the public at all reasonable times." 18 V.S.A. §5313.

Also, the records of a municipal board of cemetery commissioners, or selectboard operating a municipal cemetery, are subject to the requirements of the Vermont Public Records Act and must be made available for public inspection and copying unless subject to one or more exemption under the Act. See 1 V.S.A. §315 et seq. Generally, the Act requires a record to be "promptly" produced for inspection and copying, or an explanation provided as to why it is considered exempt, typically within three business days.

This does not mean that a cemetery agency is legally obligated to research records to provide general information (e.g., "Is Great Aunt Hulda buried here?"). However, the agency would be legally obligated to conduct research to locate a record if a request is made for to inspect a specific record or all records about a specific topic (e.g., "Please provide me with any record you may have indicating that Great Aunt Hulda is buried here.")

#### **5. What rights does a person acquire when he or she purchases a cemetery lot?**

In Vermont, the purchaser of a cemetery lot does not acquire the land fee simple, but only a right of interment. 18 V.S.A. §5314. This right is described as being in the nature of an easement or license for burial and the right to use public areas of the cemetery to obtain access to the lot, so long as the cemetery remains a cemetery. 14 Am. Jur. 2d Cemeteries § 28. The Vermont Supreme Court has not ruled directly on this issue, but it did note, in the case of *In re Estate of Harding*, 2005 VT 24, that establishment of a family burial plot creates an easement that benefits the person who established the burial plot and which passes to the establisher's heirs. These rights survive until either the originator of the burial plot or the heirs, abandon the plot. Id at ¶11.

The right of interment acquired by a plot deed is subject to any rules and regulations imposed by the cemetery agency. Vermont law provides that an agency engaged in the business of a cemetery may, "make rules and regulations for the use, care, management, and protection thereof," 18 V.S.A. §5305, and that the sale of lots "may be made for the sole purpose of interments under such rules and regulations as may be imposed by the agency owning the cemetery." 18 V.S.A. §5314.

The purchaser also acquires a limited right to transfer the cemetery lot by will to another individual or to the cemetery agency in trust for the use and benefit of any person or persons designated in such will. 18 V.S.A. §5531(a).

**6. Is a cemetery required to have a plat for the cemetery agency to sell lots?**

Yes. A cemetery must have a plat showing the part that is in use, the part that is improved (i.e., ready for use), and the part held for future use. 18 V.S.A. § 5310. The plat of the improved part must show the land laid out in sections, lots, driveways, walks, and paths, with the sections designated by symbols and the lots numbered. Id. Once the plat is recorded, lots may be sold for burials under rules and regulations imposed by the agency owning the cemetery. 18 V.S.A. § 5314. However, if the plat does not conform to these requirements, it is void, and lots may not be sold. 18 V.S.A. §§ 5311, 5312.

Natural burial grounds are not subject to this platting requirement, so long as the exact location of each buried body can be identified and demarcated in the town land records. 18 V.S.A. §5323(a)(1).

**7. Can the resale of cemetery lots be prohibited or restricted?**

Yes. Cemetery rules and bylaws commonly require that unused lots be sold back to the cemetery agency. Rules and bylaws also sometimes provide that the resale of a lot requires the approval of the cemetery agency. Cemetery agencies may make rules and regulations for the use, care, management, and protection of the cemetery and “such agencies may by rule or regulation determine who may be buried or deposited therein.” 18 V.S.A. §5305. Also, “the sale of lots...may be made... under such rules and regulations as may be imposed by the agency owning the cemetery.” 18 V.S.A. §5314. See also, 18 V.S.A. 5531(d)(“Nothing contained in this section shall be construed as a limitation of the right of any agency owning and conducting a cemetery, either by rule and regulation, or by deed or contract...to prohibit or restrict the resale of any such lot or burial space.”

**8. Can the owner of a cemetery lot be prohibited from transferring the lot by will?**

No. “The owner of a cemetery lot may dispose of same by will to any one of his or her relatives who may survive him or her, or to any agency owning and conducting the cemetery in which the lot is situated, in trust, for the use and benefit of any person or persons designated in such will.” 18 V.S.A. §5531(a).

**9. How does a cemetery lot pass by will, or to the heirs of the deceased when there is no will?**

If the deceased made a specific bequest of the lot in his or her will, that bequest would control, and the beneficiary should receive the lot by a decree of distribution from the Probate Division of Superior Court.

If the deceased died without a will or left a will that makes no mention of the lot, or any member of the deceased’s family is buried in the lot, then the law provides that the lot will pass to the deceased’s heirs under the Vermont law of intestacy. 18 V.S.A. §5531(a). The intestacy laws are found at Title 14, Vermont Statutes Annotated, Chapter 42.

The intestacy laws are very specific and quite complicated. Below is an incomplete summary of Vermont’s intestacy laws:

- If the deceased died with a spouse but no descendants, the spouse inherits everything.
- If the deceased died with a spouse and only children or descendants who were shared with that spouse, the spouse inherits everything.
- If the deceased died with children but did not have a surviving spouse, the children inherit.
- If the deceased died with a spouse and with at least one descendant not shared with that spouse, the spouse inherits half of the intestate property and can ask for household goods and certain vehicles. The descendants inherit everything else.
- If the deceased died with surviving parents, but had no spouse or descendants, the parents inherit the deceased's entire estate.
- If the deceased died with siblings but did not have surviving parents, a spouse, or descendants, the siblings inherit.

**10. Do spouses have rights to interment in a burial lot?**

Yes. A husband or wife has the right to be interred in a lot owned by his or her spouse. If the spouses live separately, and one spouse owns a burial lot to which the other has no other legal right to share (e.g., no separate deed), the owner-spouse may defeat the other spouse's right to interment by filing a written objection with the cemetery organization at least 30 days before the other spouse dies. 18 V.S.A. § 5531(b).

**11. What process should a cemetery agency follow in determining the ownership of a cemetery lot when ownership is disputed?**

Great question! While the cemetery agency might play a role in resolving a dispute and assisting the parties coming to a resolution on their own, there is no statutory process by which a cemetery agency is authorized to resolve a dispute over spousal rights or ownership of a cemetery lot.

Statute provides that the Probate Division of Superior Court has jurisdiction over proceedings related to cemetery lots, all questions relating to the disposition of lots by will, and all questions relating to spousal rights. 4 V.S.A. §35(15), 18 V.S.A. §5531.

If the parties cannot come to a resolution on their own, the best course is probably to refer them to the Probate Division of Superior Court.

**12. What does a cemetery agency do with unoccupied cemetery lots when the whereabouts of the lot owners are unknown?**

Vermont law provides that if the whereabouts of the person having title to the unoccupied lot, or his or her heirs, have been unknown for 20 years, the cemetery agency can file a petition with the Probate Division of the Superior Court. The Probate Division will hold a hearing on the petition after giving notice of the hearing to the public. 18 V.S.A. §§ 5533, 5534.

If sufficient cause is not shown to the contrary, the Probate Court will issue an order that the lot will revert to the cemetery agency. 18 V.S.A. §5536. However, "If an heir or other person entitled to such lot appears

within 17 years from the date of such decree and files a claim with the Probate Division of the Superior Court which made such decree, and establishes his or her claim to such lot, he or she shall have possession of the same, or if sold, the agency shall be accountable for the avails of such sale, without interest, to the persons entitled thereto, after deducting charges and costs incurred by the agency in connection therewith. A claim not made within 17 years shall be barred.” 18 V.S.A. §5537.

## **12. What happens when the party having care of a private burial ground or incorporated cemetery is unable to continue its responsibilities?**

The first step is to remember that Vermont law recognizes three types of cemeteries: those operated by a municipality; those operated by a cemetery association (an “incorporated cemetery”), and those operated by a religious institution or ecclesiastical society. 18 V.S.A. §§5303, 5431. The statutes use the terms “public burial grounds” and “town cemeteries” interchangeably. See, 18 V.S.A. Chapter 121, Subchapter 2.

Vermont law also recognizes “private burial grounds.” See 18 V.S.A. §§5319,5321. Private burial grounds are generally those places that have been set aside by the owner of the property and used as a burial space for the members of his or her immediate family. See 18 V.S.A. §5319(a).

If we are dealing with a private burial ground, the law provides:

When the use and care of a private burial ground has been abandoned and such ground becomes unsightly from any cause, or when headstones or monuments have been displaced, the selectboard or board of cemetery commissioners having charge of the public cemeteries in the town where such burial ground is located, on written request of three legally qualified voters of such town, shall forthwith cause a notice to be published once a week on the same day of the week for three successive weeks in some newspaper circulating therein, calling upon any person interested in such burial ground to cause the same to be put in proper condition within three months from the date of such notice. At the expiration of such time, if such demand is not complied with, the selectboard or board shall proceed then and thereafter as if such ground were a public burial place. 18 V.S.A. § 5321.

This language deserves a close reading. First, it should be noted that the statute specifically addresses, “the use and care of a private burial ground.” In my opinion, the statute does not apply to incorporated cemeteries and cannot be used to compel a town to maintain an incorporated cemetery operated by a cemetery association.

Next, the “use and care” of the private burial ground must be “abandoned.” This means that the originator of the burial plot, or the heirs of the originator, must have ceased maintaining the burial plot, and, as a result, either the “ground becomes unsightly” or “headstones or monuments have been displaced.”

If we are dealing with an incorporated cemetery, a different statute applies:

A cemetery association, which is not owned and operated by a church or by a religious or ecclesiastical society, may be dissolved under the provisions of 11B V.S.A. chapter 14. Upon dissolution, all lands owned or held by it for cemetery purposes and all perpetual care funds, trust funds, and all other property held or owned by it, less dissolution expenses, may be transferred to the town in which the lands are located, and thereafter these lands may become public burial grounds, and the town shall hold the perpetual care funds and trust funds in trust for the care, improvement, and embellishment of the lots therein, according to the terms upon which they were held by the association. 18 V.S.A. §5439.

Note that the statute is permissive, specifically providing that the assets of the cemetery association “...may be transferred to the town in which the lands are located...” In my opinion, the may/shall distinction is important, as it indicates that an incorporated cemetery cannot be forced on the taxpayers of a town. Ultimately, dissolution and transfer to the town may prove to be the only practical solution to a difficult situation, but this statute does not make the transfer a legal obligation for the town. If it were otherwise, there would be no moral hazard for a cemetery association and the cemetery association would have far less incentive to be prudent and careful in the management of the cemetery and its assets.

In my opinion, the proper procedure for a cemetery association to transfer a cemetery to a town is by a written agreement. The agreement would provide for the dissolution of the association and transfer of the association’s assets to the town. The agreement should include a due diligence period for the town to review the business and financial records, deeds, etc. of the association, including:

- An accounting of all of the association’s assets, including perpetual care funds, trust funds, etc., and a full understanding by the town of the obligations that go with those funds.
- A review of the title to the cemetery property to determine if there are any title, permitting, or boundary issues.
- Review of the cemetery association records. Are there any issues regarding the location of burial plots, missing plot deeds, or other issues related to cemetery operations that should be considered?
- Any other information that is relevant to the existence and operation of the cemetery.

The dissolution process is set out at 11B V.S.A. chapter 14. It requires the association to approve articles of dissolution and file the articles to the Vermont Secretary of State. 11B V.S.A. §§14.01-14.03. The association after that continues its corporate existence but may not carry on any activities except those appropriate to wind up and liquidate its affairs, including the transfer of its property and assets. 11B V.S.A. §14.05. The steps should be followed in the proper order (i.e., dissolution then transfer) or questions might be raised regarding the validity of the transfer, creating issues or problems for the town and/or the association down the road.

**13. Should a cemetery caretaker or sexton be a member of the board of cemetery commissioners?  
How does a cemetery agency manage conflicts of interest?**

Is it a conflict of interest for a board of cemetery commissioners to hire one of its members to maintain the Town cemeteries? In March 2019, the Town of East Montpelier thought so and voted at Town meeting to return control of the Town's cemeteries to the selectboard. Conflicts of interest can be difficult to identify; sometimes they can be difficult to manage. Nevertheless, conflicts should never be ignored.

Most Vermont municipalities have adopted a policy on conflicts of interest that also applies to the board of cemetery commissioners, and by July 1, 2019, every Vermont municipality is required to adopt a conflict of interest policy. The policy must contain at least the following elements, which are found in 24 V.S.A. § 1984:

- a definition of "conflict of interest";
- a list of the elected and appointed officials covered by such prohibition;
- a method to determine whether a conflict of interest exists;
- actions that must be taken if a conflict of interest is determined to exist; and
- a method of enforcement against individuals violating such prohibition.

The best way to manage a conflict of interest is to locate your town's conflict of interest policy and follow it. Most policies will have a process for identifying conflicts and managing them through public disclosure and/or recusal. VLCT has published a model conflict of interest policy and a very helpful conflict of interest and ethics guidance document.