Cemeteries and Graveyards…

I am sure you are reading that title and saying, "Graveyards and cemeteries are the same thing right?" True that they are quite similar, but one difference exists. The term graveyard has typically been used to describe the burial ground next to a church or house of worship. The term cemetery usually is a designated area set aside for the burial of human remains by a municipality, county or state government. But as far as title to lands in those places known by either name, they operate pretty much the same way.

The burial of human remains is a tradition in many cultures that traces its roots back over 7,000 years, long before the burial of kings and pharaohs in Egypt. Our American concept of burial grounds, cemeteries and graveyards is tied to our colonial period. The original 13 colonies of the United States followed much of Christianity in their burial practices. Churches took the majority of the work of burying the dead. However, due to the mortality rate of settlors to the new world, many cities had to establish areas outside of church yards to bury the dead.

That leads us to our current concept of the cemetery and the state of the title to lands used for cemeteries. Most cemeteries are created under state law. The state retains the right to regulate the location, type and management of cemeteries. The owner of a cemetery plot or lot is said to have a limited property right to bury remains on that property, erect a monument and a perpetual easement to and from the plot for heirs, descendants and family to visit the plot in perpetuity. The easement is the real kicker in this case. Because it is not affected by the law against perpetuities, the easement basically creates a property that can never be used for any other purpose into eternity.

Three interesting stores about cemeteries come to mind. The first is the story of my uncle's gravesite in Florida, Missouri. In the 1980s, the Army Corp of Engineers built a hydroelectric dam in northeastern Missouri. The dam would create a large lake and flood thousands of acres of land, including part of the Missouri city known as Florida. The city of Florida, Missouri, also happens to be Mark Twain's birthplace. In 1936 my uncle was still born, and my grandparents buried him within the Florida, Missouri, public cemetery. The lake to be created (now called Mark Twain Lake) would flood the small city cemetery. Descendants of those buried there were contacted and given authority under the auspices of the Missouri Department of Health to exhume the remains of those who lie there and transfer them to another cemetery. My grandparents chose to move my uncle's remains to the family plot in the cemetery in Clarence, Missouri. This highlights the great care and respect the state gives to the conversion of a cemetery land to another use. Very few cemeteries are ever converted to other land use after bodies are interred there.

The second story is one I am sure is told over and over to trick-or-treaters in a certain subdivision I worked on as a land title agent. My title agency was very fortunate to work with a large homebuilder in the 1980s and 90s. This developer was developing a large rural farm of over 100 acres into a single-family subdivision. He had built many phases and was down to the last phase. The last 18 lots were platted and the resulting survey of the land left a small triangle piece of ground in a remote corner where five rear lot corners would have otherwise come together. This parcel of ground was no more than 30 feet on each of the three sides, and as it turned out contained the family burial ground of the family who had owned the farm for over 100 years prior to the builder buying it in 1988. The triangle private cemetery contained about -four grave markers and an unknown number of actual gravesites. In very simple terms, the cemetery was not included in any lot or parcel being developed or sold. The builder was very careful not to disturb the graves and he even saved a large oak tree that was on the triangle cemetery. However, the challenge for me as a title agent was how to deal with the perpetual easement that is automatically granted to heirs, descendants and family of those buried. Because the triangle cemetery was land locked, those easement rights were going to run over the five lots that touched the cemetery. In the end, our underwriter determined that because the easement for descendants to visit a gravesite was a function of state police power, and not due to an actual recorded easement, the 1970 ALTA policy properly excepted the easement with the exclusions language in the jacket of the policy. No additional exception on schedule B was needed. Only one of the buyers of the five lots objected to having a cemetery adjoining his property.

The third story is the unique way cemeteries are used in New Orleans. Known as the "cities of the dead," New Orleans cemeteries are mostly above ground. Rows of ornate tombs and mausoleums date back to the city's founding and house the remains of many famous New Orleans residents. Each crypt is maintained by a family and new burials are

placed in the upper vault. Remains of the last soul to be buried in the vault are then removed, the casket burned and the bones placed in the lower vault with the remains of the others buried in that particular tomb. Beyond above-ground burial being widely used in New Orleans, the use and reuse of the crypt to bury multiple family members makes the crypt system in New Orleans very unique from a land title perspective. Each tomb is maintained by a family, and the personal property right to place remains in the crypt is passed on to future family members. However, when a family ceases to have any heirs, the tomb is made available for sale to another family and the crypt can be put to use again as a burial site.

In Flanders fields the poppies blow
Between the crosses, row on row,
That mark our place, and in the sky,
The larks, still bravely singing, fly,
Scarce heard amid the guns below.

We are the dead; short days ago
We lived, felt dawn, saw sunset glow,
Loved and were loved, and now we lie
In Flanders fields….

Beginning of “In Flanders Fields,” World War I poem, written by John McCrae, 1872-1918