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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

April 2, 2002

Rodger E. Stroup, Ph.D.
Director and State Historic Preservation Officer
S. C. Department of Archives and History
8301 Parklane Road
Columbia, South Carolina 29223-4905

Re: Visits to cemeteries or family burial plots on private land

Dear Dr. Stroup:

You have asked whether descendants of deceased persons have a right to visit and maintain family graves which are located on private land. The answer is a qualified yes, as will be seen herein.

For purposes of this opinion, it is assumed first, that the landowner or his predecessors in title actually dedicated the property for use as a cemetery. Such a dedication could occur expressly, such as in a deed, or impliedly, as where the landowner or his predecessor in title acquiesced in the use of the plot as a family burial ground.¹

Secondly, it is assumed that the cemetery has not been legally abandoned. Under the current state of the law in South Carolina, it is almost a practical impossibility for a cemetery to be deemed abandoned unless the graves themselves are moved, although a statutory procedure for the removal of graves does exist.²

¹ The term "dedication" is used herein in a nontechnical sense, that is, not limited strictly to such formal dedications as occur when a developer opens streets or parks to the public.

² Absent some positive evidence of abandonment, *see, e.g.*, § 27-43-40, *S.C. Code Ann.*, a family burying ground probably cannot be deemed abandoned until the graves are actually removed. *Frost v. Columbia Clay Co.*, 130 S.C. 72, 124 S.E. 767 (1924). Removal of the graves normally requires approval by the county or municipal government and thirty days' notice to any known relatives of the deceased persons. § 27-43-10 (Cum. Supp. 2001).

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As a third and final assumption, it almost goes without saying that the location of the cemetery is actually known. While we have found no case addressing the point, it is likely that a person who merely suspects the existence of a cemetery on someone's property would need to persuade either the landowner or if necessary, a court, that there are reasonable grounds for believing a cemetery might be present on the site.

The point of making all these assumptions is to indicate that in some cases, the real issue may not concern the existence of a right to visit a known burying ground, but instead may involve disputes the matters listed above: whether the cemetery even exists on the site, whether a dedication to burial uses has ever been made, or whether the cemetery has been abandoned. These issues can only be resolved on a case-by-case basis.³

If the answers to all the issues above are in the affirmative in a given situation, however, there is little question that relatives of the deceased persons have a right in the nature of an easement to visit and care for the graves. As one court has held:

A cemetery is a place not only for the burial of the dead, but for an expression of love and respect by the living for the dead. Hence there must be accorded to [living interested persons] not only the right of burial but also the right to visit, maintain and beautify the graves of relatives interred therein. . . .

Scruggs v. Beaton, 246 Ala. 405, 20 So.2d 774, 775 (1945). Such visitation rights must be exercised "in a reasonable manner and at seasonable times." *Hines v. State*, 126 Tenn. 1, 149 S.W. 1058, 1059 (1911). *Accord*, *Walker v. Georgia Power Co.*, 177 Ga. Ap. 493, 339 S.E.2d 728, 730 (1986) (descendant "own[ed] an easement to enter, care for and maintain the burial plots. . . ."); *Turner v. Turner*, 48 Vir. Cir. 114, 1999 WL 58735 (Va. Cir. Ct. 1999). While this precise issue has not arisen in a South Carolina case, there is little reason to think that our courts would not apply this general rule. The Supreme Court of South Carolina on at least two occasions has ruled strongly (in somewhat different contexts) in favor of descendants of persons interred in private cemeteries. In *Kelly v. Tiner*, 91 S.C. 41, 74 S.E. 30 (1912), the Court allowed relatives of deceased persons to file a trespass action against the owner of the surrounding land who, it was claimed, was trying to turn the cemetery into arable land. In *Frost v. Columbia Clay Co.*, 130 S.C. 72, 124 S.E. 767 (1924), the Court indicated a strong presumption that a graveyard was not to be deemed abandoned despite a period of neglect by the descendants.⁴

³ In this connection, see N.C. Gen. Stat. Ann. § 65-75 (2002), which sets forth procedures for petitioning a court "for an order allowing the petitioner to enter the property to discover, restore, maintain, or visit the grave or abandoned public cemetery."

⁴ In some states, these rights are codified in the state statutes. See, e.g., Fl. Stat. Ann. § 704.08, which provides as follows:

In summary, there is little question that the descendants of persons in a cemetery or private burial ground have a right to visit and maintain the graves, provided that their crossing of the lands of others to do so is done in a reasonable manner and at reasonable times. Obviously, the best course of action for availing oneself of such a right would be to try to work out an arrangement with the landowner as to the times of visits, the route to be taken to get to the cemetery, etc. The disputes which arise even when there is a clear right to visit the cemetery tend to involve persons trying to visit the cemetery in ways which are unnecessarily offensive to the landowner. See, e.g., *Turner v. Turner, supra*.

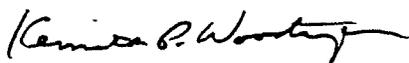
This is only a general statement of the law. It does not and cannot address the many specific questions which will arise over whether individual cemeteries or family burial grounds exist, were dedicated to burial uses, or have been abandoned.

You have also asked what recourse is available in cases where citizens report that local law enforcement officials will not enforce S.C. Code Ann. § 16-17-600, which provides for criminal penalties for various acts which constitute destruction or desecration of human remains or repositories thereof. We have no knowledge of the facts of any specific case in which this has occurred, but would advise that the South Carolina cases cited above clearly permit family members to bring actions for trespass and even for damages (if such can be proven) when cemeteries are being destroyed or desecrated. This civil remedy, of course, is in addition to any criminal action which the facts may warrant.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With best wishes, I am

Sincerely yours,



Kenneth P. Woodington
Senior Assistant Attorney General

The relatives and descendants of any person buried in a cemetery shall have an easement for ingress and egress for the purpose of visiting the cemetery at reasonable times and in a reasonable manner. The owner of the land may designate the easement. If the cemetery is abandoned or otherwise not being maintained, such relatives and descendants may request the owner to provide for reasonable maintenance of the cemetery, and, if the owner refuses or fails to maintain the cemetery, the relatives and descendants shall have the right to maintain the cemetery.