First Commerce Title

Office: 318-752-8080 Fax: 318-752-8426
2708 Village Lane, Bossier City, LA 71112
www.firstcommercetitle.com

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Requiescat in Pace

from the desk of David M. Touchstone

The title is a Latin expression that translates roughly as: "May he rest in peace." In a manner of speaking, this is the generalized answer of the Louisiana courts to Mike's question. In short, the courts of this state have been very protective of graves, cemeteries, and of surviving relatives' interests in the final resting places of their loved ones. A number of appellate court decisions have addressed cases arising out of desecration of cemeteries and the limits of regulations that can be imposed on cemeteries.

DAVID M. TOUCHSTONE
First Commerce Title, President

Before we get into the cases, let's define some terms. Nowadays, most folks have their loved ones interred in for profit cemeteries. We are not talking here about for profit cemeteries. This article will be focused on the little private cemeteries that are often near country churches or those constituting family plots located in the woods. Most of these private cemeteries were initiated many years ago when property was plentiful and cheap. In those days, people were often not very painstaking with the documents that established the legal rights in these private cemeteries and, in some instances, no legal documents were ever filed at the courthouse. Nevertheless, even in instances in which no legal documents have been recorded with the clerk of court, important legal rights are established simply by the fact of the burial.

The lawyer part of me can't help discussing (what to me) is an interesting phenomenon; I am referring to the *type* of legal right that the cemetery cases have created, a new and unique development in the fabric of Louisiana law. As most of you know, Louisiana is a Civil law jurisdiction. As such, our law is rooted in a majestic legal edifice that began 2500 years ago in old Rome. The body of the Civil law developed organically over this great sweep of time, a process of development that permitted countless thousands of the finest legal minds to take part in refining and perfecting the concepts, structure, language, and justice delivering capacity of our law. The immense antiquity of our law has resulted in prior treatment and legal categorization of most of the types of issues that can arise in the course of human relationships. Apparently though, this was not the case with respect to private cemeteries.

While I presume no special knowledge regarding the history of burial practices through European history, Justice Albert Tate, one of our finest Louisiana Supreme Court Justices was not similarly daunted. In *Vidrine v. Vidrine,* 225 So. 2d 691 (3rd Cir. 1969), Justice Tate opined: "Public cemeteries [what your author has been referring to as 'private cemeteries'] such as the present are a *frontier social institution*. They recognize a species of real right not founded on legislation but instead upon judicial recognition of burial rights created by the custom of the New World." In other words, what Justice Tate was saying was that this type of burial pattern was unknown in the past, and, therefore, the ancients never had an opportunity to provide us with any legal structure to address conflicts arising out of the establishment of and use of such cemeteries. Louisiana real estate lawyers are accustomed to dealing with rights of "ownership", "predial servitudes", and "personal servitudes". Because of the way each of these legal institutions is defined, none of them is adequate to delineate the rights of persons in conflict over private cemeteries and the courts of this state have had to invent a new type of legal structure to resolve conflicts arising out of burials in private cemeteries.

Accordingly, with respect to legal rights pertaining to private cemeteries, the courts of this state have had to build up a body of law on a case by case basis. I will not labor you with the history of the development of these cases. I will, instead, refer your attention to a very nice summarization of the rules as they were announced in the Vidrine case. First, a little guidance to the terminology is in order. The Vidrine rules assume that one of the parties to the conflict will be the owner of the land on which the cemetery is situated, and the other party will be the relative of a person who is buried on the owner's land. Now the Vidrine rules:

"The owner is bound to the following:

(1) He cannot remove or disturb any grave.
(2) Relatives and friends have unrestricted rights to visit and care for the graves.
(3) Property included in the cemetery cannot be used by the owner for any purpose inconsistent with cemetery purposes.
(4) The owner cannot reduce the size of the lands set apart as a cemetery. On the other hand, the owner retains ownership of the land, and he may: (A) Charge for the lots or he may donate the lots. (B) Make and enforce regulations as to where burial plots will be placed. (C) Make and enforce regulations as to how burial shall be made so long as those regulations are consistent with the manner in which burials have been accomplished in that cemetery."

Now, let's think about how these rules could play out in a potential real life context. Suppose you have a client who lists with you a 100 acre tract, and suppose that tract is heavily wooded, and suppose that unknown to you or your seller that in the middle of the woods smack dab in the middle of that tract there is a 10 plot family cemetery that has been extant for seventy five years, and suppose you find a buyer for this property who wishes to develop it as a residential subdivision. In our hypothetical, the buyer does his due diligence (zoning, availability to utilities, etc.), some preliminary engineering work and then closes on the sale. Three months later the buyer's surveyor, while laying out the corners for the lots, discovers this cemetery;

its location is such that the buyer's development plan is severely disrupted. Not good! In the Louisiana decisions, the courts have ruled that cemetery rights are imprescriptable. Putting that in layman's terms, they *never* go away. Plain and simple, the buyer cannot touch the cemetery, no matter how long it has been there, no matter how long a previous owner has used the land on which the cemetery is situated in ways that are incompatible with the cemetery. In our hypothetical, the buyer developer simply cannot disregard the cemetery. He must suffer it to remain and he must develop his subdivision in such manner as to preserve physical access to the cemetery for the benefit of the relatives and friends of those buried in the plots. Then there is the question of reduced marketability of the lots; some people don't like the idea of living next to a cemetery. Actualization of this very plausible hypothetical would probably result in a nasty lawsuit, with the real estate agents likely being included as defendants.

How can this be avoided? If you are the listing agent, it is a good idea to walk the tract; carefully observe as you walk the land to see if you can detect any condition that a potential buyer might wish to know (e. g. errant fence lines, pipelines, squatters, encroachments, evidence of archaeological sites, cemeteries, etc.) Insist that your seller disclose all such information and require that both the buy/sell agreement and the deed include a waiver of claims to matters of this nature. If you are assisting the buyer, again, you and your buyer should carefully walk the ground to identify any problems; identification of such problems can often be taken into account when negotiating the price. You can also protect yourself and your buyer by insisting that your buyer order a boundary survey. If your client intends some type of intensive use of the land, such as a commercial or residential development, insist on a *topographical* survey. A topographical survey will require the surveyor to map virtually every point in the area of the land, not just the boundaries. Further, a topographical survey will shift liability to the surveyor. Whether the buyer selects a boundary survey or a topographical survey, it should be delivered to the prospective buyer and certified to the buyer by the surveyor *before* the buyer closes on the sale. Finally, an owner's title insurance policy can protect a buyer against unpleasant surprises, although it will not protect the seller against a lawsuit from the title insurance company unless you have limited the seller's exposure in the buy/sell agree-