PROTECTING AND PRESERVING THE DEAD: GEORGIA CEMETERY LAW AND SEA LEVEL RISE

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Abstract

Georgia coastal cemeteries are one of many facets of modern life that are at-risk due to the sea level rise—and its increased erosion, flooding, and storm surge—brought on by climate change. The unique historical development and property rights associated with the graveyard require investigation to better understand the opportunities available for environmental mitigation and cemetery relocation. Georgia law, like the law in many states, includes statutes regulating modern "perpetual care" cemeteries, as well as older "abandoned" cemeteries. The statutory factors and requirements for disinterment and relocation require careful analysis and thoughtful planning. Common law in the state also sheds light on the nature of the cemetery easement—the right to access the grave. The unique rights associated with this easement, particularly its inheritability and its potential transferability, are legal concepts to understand and utilize when a cemetery becomes endangered by sea level rise. Key cases emphasize both that a statutory presumption exists in favor of leaving the dead undisturbed and that this presumption may be overcome if preserving human remains requires removing them. Overcoming this presumption involves mixed questions of law and fact, difficult conversations with descendants, changing land use, and considering important equity issues. This Article identifies the current state of cemetery law in Georgia and highlights the strategic tools that courts, communities, municipalities, and advocates can use to disinter and relocate human remains where necessary, as well as the legal ambiguities and practical challenges likely to be encountered along the way.

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I. INTRODUCTION: CLIMATE CHANGE AND COASTAL CEMETERIES[1]

According to a recent report by the Union of Concerned Scientists, sea-level rise alone—not including heavy rains or storms—will put more than 300,000 homes and commercial properties, valued at about $136 billion, at risk of chronic, disruptive flooding by 2045.[2] Awareness of the quantity and quality of this kind of research is also on the rise, as industries as disparate and diverse as oyster farming and the Department of Defense analyze the impact that climate change will have on their business interests and make plans accordingly.[3]

Increasingly, activists and scholars emphasize the fact that frontline communities, especially those of color and those with less means, will be especially hard hit by climactic changes.[4] These voices argue that policymakers must "get ahead of the storm," or it will be more difficult, if not impossible, to implement effective policies later, especially policies that produce fairness and equity.[5] One of the first steps is to take a hard look at where the greatest impacts will be in order to discern who will bear the brunt of climate change devastation and loss.[6] Not only should

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1. The idea for this Article originated with Frank Alexander, Professor Emeritus at Emory Law School. Professor Alexander's work with the Vulnerable Coastal Communities Initiative is an inspiration. The Author would like to thank Professor Alexander for the idea behind this project, continued engagement, and the opportunity to pursue it.

2. LINDSAY OWENS, THE GREAT DEMOCRACY INITIATIVE, SOAKED: A POLICY AGENDA TO PREPARE FOR A CLIMATE-TRIGGERED HOUSING CRASH 7 (July 2020) (noting this figure is expected to increase exponentially, with $1.07 trillion worth of property in today's dollars at risk of flooding by the century's end).

3. *Shellfish Growers Climate Coalition*, THE NATURE CONSERVANCY, https://www.nature.org/en-us/what-we-do/our-priorities/tackle-climate-change/climate-change-stories/shellfish-growers-climate-coalition/ [https://perma.cc/48QA-FZSL] (last visited Feb. 19, 2022); DEP'T OF DEF., OFF. OF THE UNDERSECRETARY FOR POL'Y, CLIMATE RISK ANALYSIS 2 (Oct. 2021), https://media.defense.gov/2021/Oct/21/2002877353/-1/-1/0/DOD-CLIMATE-RISK-ANALYSIS-FINAL.PDF [https://perma.cc/794K-ZWQN].

4. OWENS, *supra* note 2, at 11 (explaining how historic discrimination has placed minorities in the lowest-lying areas, making those communities more likely to experience blight and abandonment instead of receiving aid to rebuild, evidenced in modern experience by Hurricane Katrina in New Orleans).

5. *Id.* at 3, 11.

6. *Id.*

these responses focus on the disparate impacts brought on by climate change in these frontline communities, but they should also prepare to "manage retreat" where the continuous climate risk of flooding, erosion, storm surge, and natural disaster makes living impossible.[7]

On the long list of places, properties, and industries that will suffer serious if not irreparable damage from climate change are cemeteries.[8] Rising sea levels bring water into new places, uncovering graves, and in some cases, sweeping them away entirely.[9] While at-risk states have some hypothetical options with other forms of property—such as buying out homes prone to flooding—cemeteries have a different, if not more complex, set of legal, social, spiritual, and financial considerations, including but not limited to: ownership, access, public health, religious norms, and relocation cost considerations.[10]

With a focus on sea level rise and the environmental and economic coastal resiliency required to combat it, this Article describes key aspects of Georgia cemetery law. Part II provides background on cemeteries, particularly in the American experience and common law context. Part III contains an examination of two statutes, one regulating modern "perpetual care" cemeteries and the other defining "abandoned" cemeteries, as well as the process for cemetery disinterment and relocation permits. Part IV covers Georgia case law that sheds light on the rights and responsibilities of those claiming ownership or access rights to the grave, as well as the public and private sphere context where these rights and responsibilities get exercised. Part V analyzes the key principles of Georgia cemetery law and includes a discussion of other commentators' suggestions for cemetery law, such as court-appointed guardians, land trusts, and equity considerations that might help protect, preserve, and organize cemeteries at-risk of serious damage due to sea level rise.[11] Part VI concludes by refocusing the discussion on climate change. While the special rights and responsibilities of federal and state historical listings and the requirements related to federal and state

7. *See id.* at 5, 26 (arguing that because communities of color will almost certainly experience the deepest economic destruction and are less likely to have insurance or the resources to rebuild, it is important to design a just transition that begins the process of retreat and relocation now, "in the light of day").

8. *See* Adam Aton, *Even the Dead Cannot Escape Climate Change*, SCI. AM. (Oct. 31, 2019), https://www.scientificamerican.com/article/even-the-dead-cannot-escape-climate-change/ [https://perma.cc/U3LR-SYW7] (claiming thousands of cemeteries will be affected by sea level rise).

9. *Id.*

10. *See id.* (noting cemetery damage mitigation attempts in Charleston, Boston, and across Louisiana).

11. *See generally* Hughes v. Cobb Cnty., 441 S.E.2d 406, 407 (Ga. 1994) (recognizing the key difference between private and public cemeteries).

American Indian law are noted in an Appendix to this Article,[12] these subjects ultimately require separate treatment elsewhere.

Because Georgia cemetery law contains an intricate web of considerations—from perpetual care and maintenance to abandonment and from public dedication to private access via inherited easements—communities interested in protecting and preserving their vulnerable cemeteries and related rights in the face of sea level rise need to be proactive about planning and obtaining the funding, labor, expertise, and permits to accomplish their goals. Georgia cemetery law not only creates practical costs that communities must consider, but the subject itself also implicates religious and spiritual considerations—shall the dust be returned to dust (or sea)? Or, shall graves be dug up, removed, and redeposited with a modern American impulse for preservation? Either way, these obstacles require informed, community-based action to have a chance at self-determination with these complicated decisions and perhaps a chance at peace with them when the time (and water) comes.

II. BACKGROUND, HISTORY, AND OVERVIEW OF CEMETERIES AND RELATED RIGHTS

According to historians, burials in the early United States took place in four key places: (1) by pioneers in isolated and unorganized places on the "frontier"; (2) on private family farms, sometimes in a multifamily burying ground; (3) in churchyards, probably open to the public; and (4) for the poor, unknown or criminal, in "potter's fields."[13] The rise of the modern cemetery and the memorial park began with the establishment of the Mount Auburn Cemetery outside Boston, Massachusetts, in 1831.[14] The contemporary form of these cemeteries now contains care and maintenance provisions, intensive recordkeeping, state regulation, and expectations about, as well as plans for, burial plots and graveside services.[15] While abandoned, rural, family, and church cemeteries can present unexpected surprises for property owners and developers, publicly dedicated memorial parks or private commercial enterprises are not as often an issue because they are clearly marked, owned, and organized.[16]

Sea level rise brought on by climate change creates a new dynamic for cemetery issues. While state and federal law has developed mechanisms

12. *See infra* Appendix.

13. C. Allen Shaffer, *The Standing of the Dead: Solving the Problem of Abandoned Graveyards*, 32 CAP. U. L. REV. 479, 482 (2003).

14. *Id.* at 485.

15. *See id.* (explaining today's use of "perpetual care provisions such as maintenance trusts, modern recordkeeping, state regulation, and widely agreed-upon expectations and plans" for cemetery caretaking).

16. *See id.* (noting such parcels are "not an issue" for landowners and developers).

to mitigate damage to cemeteries from trespassing and development, it has not been faced with the prospect of needing to relocate cemeteries to preserve them until recently.[17] Many different types of cemeteries may be at-risk as sea levels rise, and coastal and rural, family and church cemeteries, as well as unknown or abandoned cemeteries, present different types of legal problems related to rights and responsibilities, such as ownership, access, maintenance, and development.[18] These cemetery rights and responsibilities also vary across a spectrum, with fully public, municipally owned and operated graveyards with public rights of access on the one end.[19] On the other end are modern, privatized perpetual care cemeteries with governing rules, regulations, registration requirements, and contractual agreements.[20] In between these two ends lie small, private, largely rural burial grounds located on a tract of family or church land that may have been long ago sold to other private individuals or entities. The individual or entity may not even know about the cemetery on the premises and legal maps, plats, deeds or surveys may not designate the burial ground, churches may no longer exist even though their cemeteries remain, or the law may recognize an implied public dedication of a cemetery that is now on private land.[21] Here, legal rights of access—cemetery easements—may restrict the land's private uses, or the issue of cemetery care and maintenance may be more pronounced.[22] Complicating the matter further can be national and state listings for historic places[23] or the inadvertent stumbling upon unknown African-American or Native American burial grounds during development.[24]

The public and private spectrum of scenarios where cemetery rights can be exercised provides important context for the options that may be available to advocates and descendants when cemetery mitigation or relocation become necessary due to sea level rise. While privatized "perpetual care" cemeteries may have more options at their disposal for climate change mitigation through trust funds, relatively clear contractual agreements, and operating procedures, even these more modern iterations of the cemetery plot are probably not enough to handle the soaring costs that mitigation may require, nor do they take into consideration the

17. *See* Aton, *supra* note 8 (noting that "[r]elocation is the most certain solution" to the impact that climate change is having on cemeteries).

18. CHRISTINE VAN VOORHIES, GRAVE INTENTIONS: A COMPREHENSIVE GUIDE TO PRESERVING HISTORIC CEMETERIES IN GEORGIA 3, 5–6 (2003).

19. *Id.* at 41–42.

20. *Id.* at 1.

21. *Id.* at 5, 7, 9, 26.

22. *Id*. at 6.

23. *See infra* Appendix.

24. VAN VOORHIES, *supra* note 18, at 5, 7; *see infra* Appendix.

relocation requirements in Georgia law.[25] In contrast, older family and church cemeteries will likely have more limited resources coupled with additional difficulties such as contacting descendants of those long ago buried in largely abandoned cemetery plots.[26] Ultimately, at-risk coastal cemeteries will have three options with sea level rise—mitigation, relocation, or abandonment—and cemetery property law will ultimately play a role in any of these scenarios.

III. GEORGIA CEMETERY LAW IN TWO KEY ACTS: CARE AND ABANDONMENT / RELOCATION

In 1905, the Georgia Supreme Court professed:

> Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A [hu]man who but yesterday breathed, and thought, and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the [hu]man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death . . . In doing this, the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead, and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between [humans] and brutes.[27]

This Section provides an overview of the Georgia statutes governing cemeteries in the state. While the Georgia General Assembly passed the alternately named Abandoned Cemeteries Act or Georgia Cemetery Relocation Act (the Abandonment and Relocation Act or A&R Act) in 1991, the Georgia Cemetery and Funeral Services Act (the Perpetual Care Act) of 2000 created a more basic framework for what is expected of modern owners of "perpetual care cemeteries."[28] Part A of this Section outlines the Perpetual Care Act's requirements and exemptions to provide a basic understanding of how the law regulates modern cemeteries and which types of cemeteries are *not* regulated. These cemeteries, such as rural family or church plots, may be more at risk to climate change because of their lack of funding, their unclear legal status, and the fact

25. *See infra* Appendix.

26. *See* Aton, *supra* note 8 (arguing that money is the central problem partially because the business in question—cemeteries—are expected to operate forever, but also noting that the Federal Emergency Management Agency can offer financial assistance if someone can prove a family member's grave was disinterred by a presidentially-declared disaster).

27. Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 24 (Ga. 1905).

28. GA. CODE ANN. § 10-14-1 (West 2022).

that they are not required to undertake care and maintenance, the lack of which could lead to abandonment. Part B, somewhat anachronistically, takes up where Part A leaves off by outlining the key provisions in the prior A&R Act of 1991, including the definition of "abandonment" and the key requirements of cemetery disinterment and relocation permits.

A. *Act One: The Georgia Cemetery and Funeral Services Act of 2000*

The Perpetual Care Act, codified starting in Section 10-14-1, Georgia Code Annotated (2022), begins with a practical point: "[T]he failure to maintain cemetery grounds properly may cause significant emotional distress."[29] This pronouncement is followed by the normative statement that "every competent adult has the right to control the decisions relating to his or her own funeral arrangements."[30] Together, these parameters guide the Perpetual Care Act's provisions and restrictions for purchasing burial rights, regulating cemetery companies, and other industry services surrounding human burial and cemetery maintenance.[31]

In Georgia, the Secretary of State's Office manages the registration and administration of the state's cemeteries under the Perpetual Care Act, and through the State Board of Cemetarians, cemetery owners must officially register with the Secretary of State.[32] Statutory violations are punishable as misdemeanors with a maximum $1,000 fine or one year imprisonment, unless they involve trust fund misbehavior, which constitutes a felony punishable by a maximum $10,000 fine or one to five years imprisonment.[33] Every cause of action in the statute survives the death of any person who might have been a plaintiff or defendant, indicating some of the long-term implications implicit in cemetery law, and the statute explicitly states that it is intended to limit any other statutory or common-law rights related to burial lots, rights, merchandise, or services.[34] The Secretary of State's Office provides due process, with

29. *Id.* § 10-14-2(a).

30. *Id.* § 10-14-2(b).

31. *Id.* § 10-14-2(a).

32. *About the Georgia Board of Cemeterians*, GA. SEC'Y OF STATE, https://sos.ga.gov/page/about-georgia-board-cemeterians [https://perma.cc/B5SX-68KP] (last visited Aug. 24, 2022); *Georgia Cemetery and Funeral Services Act of 2000 and Rules*, GA. SEC'Y OF STATE, https://sos.ga.gov/page/georgia-cemetery-and-funeral-services-act-2000-and-rules [https://perma.cc/JR5W-4LLX] (last visited Aug. 24, 2022).

33. GA. CODE ANN. § 10-14-20 (West 2022).

34. *Id.* §§ 10-14-20 (c)–(d), -21(e). The statute does indicate, however, that prior law governed actions under facts and circumstances occurring before July 1, 2000, the date of the Perpetual Care Act's passage, so those actions may no longer be brought under the current Act. Administrative orders and conditions upon registration, however, technically remain in effect. *See id.* § 10-14-28.

appeals to the Superior Court of Fulton County, and immunity from liability.[35]

1. Cemetery Defined

The Perpetual Care Act defines the term "cemetery" as "a place dedicated to and used, or intended to be used, for permanent interment of human remains."[36] Perhaps more importantly, however, is what a cemetery is *not*. The statute exempts a significant swath of traditional cemeteries by indicating that the term "shall not include governmentally owned cemeteries, fraternal cemeteries, cemeteries owned and operated by churches, synagogues, or communities or family burial plots."[37] This definition was challenged in federal court under the Equal Protection Clause, but the Eleventh Circuit held that the state had a reasonably conceived rational basis for distinguishing between the various cemeteries.[38]

2. Registration

As noted, at the center of the Perpetual Care Act is the registration requirement.[39] The statute makes it illegal in Georgia for any person to offer or sell any cemetery burial rights, mausoleum interment rights, columbarium inurnment rights,[40] grave spaces, or other physical locations for the final disposition of human remains unless the person is registered as, employed by, or acting under the direction of a cemetery owner.[41] In order to register, prospective cemetery owners must submit a separate application for each cemetery to be owned.[42] Each application must contain, among other things, the name, address, and phone number of the legal owner of the land upon which the cemetery is located, the location of all records related to the cemetery, a copy of the cemetery rules and regulations, any litigation with which the cemetery is involved, any other entities owned by the applicant, the name and address of anyone able to sell grave lots, burial rights, funeral merchandise or burial services

35. *Id.* §§ 10-14-22, -23, -26.

36. *Id.* § 10-14-3(8).

37. *Id.*

38. *See* Ga. Cemetery Ass'n, Inc. v. Cox, 353 F.3d 1319, 1320, 1322 (11th Cir. 2003) (citing record evidence that the Georgia Secretary of State's Office mostly received complaints about *church* cemeteries as opposed to *private* cemeteries and that 50–60% of church cemeteries are "abandoned and in complete disrepair" but finding a conceivable rational basis for church or fraternal organizations to be more likely to care for their cemeteries and have a closer relationship with their customers as to avoid the fraud the statute intended to prevent).

39. GA. CODE ANN. § 10-14-4 (West 2022).

40. Columbarium inurnments are spaces for placing urns with cremated human remains, usually within a wall or vault.

41. GA. CODE. ANN. § 10-14-4(a)(1) (West 2022).

42. *Id.* § 10-14-4(b)(1).

by the cemetery, a balance sheet of the most recent fiscal year, evidence of fee simple title to the necessary land and a copy of a plat of survey, and evidence that the land is in the public records of the proper county.[43] This public record must also contain a notice that the property cannot be "sold, conveyed, leased, mortgaged, or encumbered" except by prior written approval of the Secretary of State.[44] Finally, the applicant must provide contact information for a "perpetual trust account," including the trustees, a copy of the perpetual trust fund agreement, and filing fee of $100.[45] The statute also outlines specific application information for "preneed" dealers and burial and merchandise dealers.[46] Registration and application records must be maintained for a period of five years.[47]

After receiving applications, the Secretary of State's Office is required to review them for character, experience, and financial responsibility and then issue a certificate of registration if approved.[48] In August of each year, approved applicants must renew their registration using a renewal application containing any new or additional information,[49] a sworn statement, and a $50 filing fee.[50] Notably, the Secretary of State may issue exceptions to the registration requirement if it finds that registration is not in the "public interest," though these exceptions may only apply to cemeteries that: (1) were in existence before the year the statute was passed (July 1, 2000); (2) contain less than twenty-five acres in size; and (3) are operated by nonprofit entities.[51]

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43. *Id.* Regulations further indicate that a certified copy of the plat of land must indicate that the land has been recorded with the appropriate government agency with the appropriate index number, the name of the cemetery, and the total acreage of the cemetery property. GA. COMP. R. & REGS. 590-3-3-.01(1) (2022). The regulations reiterate that the applicant must demonstrate "unencumbered fee simple title" to the minimum number of required acres (generally ten) but may show encumbrance for undeveloped property more than that minimum if the cemetery hopes to develop more land. *Id.* 590-3-3-.01(2).

44. GA. CODE ANN. § 10-14-4(b)(1)(L) (West 2022).

45. *Id.* § 10-14-4(b)(1)(M)–(Q). Additional regulations apply to the trustees of perpetual care trust funds, including a list of pre-approved entities who may serve as trustees, as well as a process for notifying the Secretary of State's Office of any requested changes to trustees. *See* GA. COMP. R. & REGS. 590-3-3-.06 (2022).

46. GA. CODE ANN. § 10-14-4(b)(2)–(3) (West 2022).

47. *Id.* § 10-14-5(k).

48. *Id.* § 10-14-4(c).

49. Internal changes to rules or amendments to registration application are also subject to additional regulation. *See* GA. COMP. R. & REGS. 590-3-1-.12(1) (2022) ("No internal rule or regulation or schedule of charges of a cemetery shall be effective until filed with the State Board of Cemeterians and posted as required by Sec. 10-14-16(a) of the Act.").

50. GA. CODE ANN. § 10-14-4(d) (West 2022).

51. *Id.* § 10-14-4(e). Regulation extends the nonprofit cemetery registration exemption to cemeteries that meet a number of factors centered around nonprofit status, lack of compensation to ownership, or lack of any other form of consideration, even if those cemeteries were created after July 1, 2000, so long as they remain under twenty-five acres in size. GA. COMP. R. & REGS. 590-3-3-.11 (2022).

3. Care and Maintenance

The Perpetual Care Act defines "perpetual care" as "the care and maintenance and the reasonable administration of the cemetery grounds and buildings at the present time and in the future."[52] "Care and maintenance" is further defined as "the perpetual process of keeping a cemetery and its lots, graves, grounds, . . . vaults, crypts, utilities, and other . . . structures . . . in a well-cared for and dignified condition, so that the cemetery does not become a *nuisance* or place of reproach and desolation in the community."[53] The definition continues:

> Care and maintenance may include, but is not limited to, any or all of the following activities: mowing the grass at reasonable intervals; raking and cleaning the grave spaces and adjacent areas; pruning of shrubs and trees; suppression of weeds and exotic flora; and maintenance, upkeep, and repair of drains, water lines, roads, buildings, and other improvements. Care and maintenance may include, but is not limited to, reasonable overhead expenses necessary for such purposes, including maintenance of machinery, tools, and equipment used for such purposes. Care and maintenance may also include repair or restoration of improvements necessary or desirable as a result of wear, deterioration, accident, damage, or destruction. Care and maintenance do not include expenses for the construction and development of new grave spaces or interment structures to be sold to the public.[54]

The statute also creates an exception to the required "perpetual care" status for cemeteries in operation on or before August 1, 1986.[55] These cemeteries may continue to operate as nonperpetual care cemeteries without any registration renewal requirement.[56] This exception also applies to "any nonperpetual care cemetery which is shown to be of historical significance and is operated solely for historical nonprofit purposes shall be exempt from registration."[57] Otherwise, the Perpetual Care Act makes it illegal to operate a nonperpetual care cemetery,[58] and perpetual care cemeteries are legally required to provide for "care and maintenance."[59]

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52. GA. CODE ANN. § 10-14-3(28) (West 2022).
53. *Id.* § 10-14-3(6) (emphasis added).
54. *Id.*
55. *Id.* § 10-14-4(g)(1).
56. *Id.* § 10-14-4(g)(2).
57. GA. CODE ANN. § 10-14-4(g)(3) (West 2022).
58. *Id.* § 10-14-4(g)(4).
59. *Id.* § 10-14-17(i).

4. Trust Funds

The Perpetual Care Act ensures care and maintenance by requiring registered cemeteries to establish and maintain an irrevocable trust fund to pay for it.[60] The initial required deposit is $10,000 and must be made before the cemetery sells any burial rights.[61] If the trust fund balance drops below the $10,000 minimum, the cemetery owner must deposit an amount equal to the "shortfall" within fifteen days of awareness or notice by the Secretary of State.[62] In addition to the initial deposit, cemeteries must make additional minimum deposits to the trust fund when selling burial rights or grave space—either 15% of the burial right sales price or 7.5% of the mausoleum, urn, or crypt price—at a minimum of fifty dollars.[63] Notably, this additional deposit is still required in the event of "repurchase and subsequent sale" of a right or grave or an "in-kind trade" of a right or grave.[64] If the cemetery owner sells more than 50% of the lots on the property, however, the owner may withdraw 95% of the *income* from the trust fund after written notice to the Secretary of State.[65] If the cemetery owner sells the cemetery or a controlling interest in the cemetery, the seller is still liable for any funds that should have been deposited in the perpetual care trust fund.[66]

The cemetery's trustee is required to give the Secretary of State an annual financial report regarding the perpetual care trust fund,[67] and cemetery owners may be held jointly and severally liable for any deficiencies in the trust.[68] A cemetery owner or an officer or director of a cemetery company may be a trustee of the perpetual care trust fund of

60. *Id.* § 10-14-6(b)(1); *see* GA. COMP. R. & REGS. § 590-3-3-.05(2) (2022) (indicating that cemeteries may use trust funds for restoration and maintenance of monuments in disrepair).

61. GA. CODE ANN. §§ 10-14-6(b)(2), (b)(4) (West 2022).

62. *Id.* § 10-14-6(g)(4).

63. *Id.* § 10-14-6(c). The fifty-dollar minimum is also adjusted every three years based on the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the U.S. Department of Labor. GA. ADMIN. CODE § 590-3-3-.05(5) (West 2022).

64. GA. ADMIN. CODE §§ 590-3-3-.08(2)–(3) (West 2022). The deposit is not required if a person with rights or a grave makes an "intra-cemetery trade" for a new or different right or grave location or type. *Id.* § 590-3-3-.08(4).

65. The cemetery owner does have a continuing duty to notify the Secretary of State about any additional land developed for burial purposes. If the further development results in less than 50% of available lots unsold, the income earned from the trust must again be retained by the perpetual care trust fund until more than 50% of the available lots are sold again. *Id.* § 590-3-3-.05(3).

66. Before a sale or transfer, the seller must notify the Secretary of State of the proposed transfer and submit any documents or records required to demonstrate that the seller is not indebted to the perpetual care trust fund. Of course, the purchaser must also submit a registration application with the appropriate information and fees to receive a certificate of registration and begin operation. GA. CODE ANN. § 10-14-9 (West 2022).

67. *Id.* § 10-14-6(i).

68. *Id.* § 10-14-6(j).

their own cemetery if approved by the Secretary of State.[69] The Secretary of State has the authority to "prescribe or approve" trust agreements and otherwise administer, investigate, and enforce all provisions of the Act, but otherwise Georgia trust law governs trust formation and operation.[70]

5. Cemetery Lot Size

Statutory provisions also govern cemetery size, depending on when the cemetery came into existence. Generally, all cemeteries registered after July 1, 1998, must consist of at least ten acres of land.[71] All cemeteries registered prior to August 1, 1986, however, are not subject to this requirement.[72] Cemeteries registered between 1986 and 1998 must consist of at least twenty-five acres of land.[73] However, an exception permits smaller cemeteries in smaller counties where the cemetery contains at least ten acres of land "dedicated solely for burial purposes and located in counties having a population of less than 10,000 according to the United States decennial census of 1990 or any future such census."[74]

6. Other Rules and Regulations

Cemetery owners, of course, may adopt their own rules and regulations governing the "use, care, control, management, restriction, and protection" of the cemetery above and beyond what is required by statute.[75] These rules may include restricting, limiting, and regulating the use of all property within the cemetery, regulating people and gatherings on the property, and otherwise safeguarding the premises and "the principles, plans, and ideas on which the cemetery was organized."[76] Cemetery owners do not have the power to adopt rules or regulations that conflict with statute or are otherwise "in derogation of the contract rights of lot owners or owners of burial rights."[77] The statute does not define what these "burial rights" are.

The Perpetual Care Act also requires cemetery owners to take other actions like marking the place on graves where burial items or "merchandise" are to be installed and then inspecting those places after installation, presumably to ensure the installation occurs in the correct

69. *Id.* § 10-14-12(c).
70. *Id.* §§ 10-14-12(d), -14, -15.
71. GA. CODE ANN. § 10-14-10(a) (West 2022).
72. *Id.* § 10-14-10(b)(1).
73. *Id.* § 10-14-10(b)(2).
74. *Id.*
75. *Id.* § 10-14-16(a).
76. GA. CODE ANN. § 10-14-16(a) (West 2022).
77. *Id*.

place and does not disrupt other burial sites.[78] Regulations allow cemetery owners to require insurance from "merchandise" providers but at set limits.[79] Relatedly, cemetery owners are prohibited from refusing to provide "care and maintenance" for any part of a grave site that has a "monument."[80] The Perpetual Care Act also offers a disclaimer related to "lawful disinterment" that allows cemetery owners to charge a reasonable fee for those services so long as the fee does not exceed either the cemetery owner's normal and customary charges for interment or the actual costs incurred by the cemetery directly attributable to such disinterment, whichever is greater.[81]

B. *Act Two: The Abandonment and Relocation Act of 1991*

Similar to the Georgia Cemetery and Funeral Services Act, the A&R Act begins with a lofty, philosophical view of the dead, declaring that "human remains and burial objects are a part of the finite irreplaceable, and nonrenewable cultural heritage of the people of Georgia which should be protected."[82] The purpose of the Act, therefore, is to "require respectful treatment of human remains in accord with the equal and innate dignity of every human being and consistent with the identifiable ethnic, cultural, and religious affiliation of the deceased individual as indicated by the method of burial or other historical evidence or reliable information."[83]

These aspirations are followed by a set of practical considerations for determining whether a cemetery is "abandoned" and a list of permitting requirements that counties and municipalities must follow to change the land use, maintain the cemetery, or disinter and relocate human remains.[84] The A&R Act also establishes a "presumption in favor of leaving the cemetery or burial ground undisturbed"[85] but leaves some details unexamined, such as the legal designation of easement rights for access to burial sites and the regulation of more modern perpetual care cemeteries outlined above. Penalties are steep statutory violations that constitute misdemeanors of a high and aggravated nature with a fine of up to $5,000 for each grave disturbed without a permit.[86] If the violator

78. *Id.* § 10-14-17(c)(3).

79. GA. ADMIN. CODE § 590-3-5-.01 (West 2022).

80. GA. CODE ANN. § 10-14-17(c)(6) (West 2022). Monument is defined as "any product used for identifying or permanently decorating a grave site, including, without limitation, monuments, markers, benches, and vases and any base or foundation on which they rest or are mounted. *Id.* § 10-14-3(24).

81. *Id.* § 10-14-17(d).

82. GA. CODE ANN. § 36-72-1(a) (West 2022).

83. *Id.*

84. *Id.* § 36-72-8.

85. *Id.*

86. *Id.* § 36-72-16.

knowingly violates the statute, there is additional risk of up to six months imprisonment.[87]

1. Abandonment

The A&R Act defines an "abandoned cemetery" as:

> [A] cemetery which shows signs of neglect including, without limitation, the unchecked growth of vegetation, repeated and unchecked acts of vandalism, or the disintegration of grave markers or boundaries and for which no person can be found who is legally responsible and financially capable of the upkeep of such cemetery.[88]

The Act authorizes counties and municipalities to preserve and protect abandoned cemeteries and burial grounds if they are not being maintained by the individual or entity legally responsible for their upkeep.[89] Counties and municipalities are not, however, required by law to do so.[90] Individuals and entities cannot "knowingly" disturb cemeteries, burial grounds, human remains, or burial objects—even if on land they own or otherwise occupy—without a permit, *if* the disturbance is "for the purposes of developing or changing the use of any part of such land."[91] Because abandoned cemeteries by definition have no owner or operator or even a known location, perhaps they are more commonly the recipients of unintended disturbance. The A&R Act, however, does not limit relocation permits to abandoned cemeteries in any way.

2. Permit Requirements

The statute next outlines the application process for a permit to disinter and relocate human remains requiring: (1) evidence of land ownership "in the form of a legal opinion based on a title search;" (2) a report prepared by an archaeologist containing the number and location of graves; (3) a professional survey showing the location and boundaries of the cemetery or burial ground; (4) a genealogist plan for identifying and notifying the descendants of those buried or believed to be buried in the cemetery or burial ground; and (5) a mitigation proposal specifying "the method of disinterment, the location and method of disposition of

87. GA. CODE ANN. § 36-72-16 (West 2022).

88. *Id.* § 36-72-2.

89. *Id.* § 36-72-3. This "upkeep" is the requisite "care and maintenance" outlined above. While "abandonment" is a term containing deeper property law roots, for Georgia cemetery law purposes it is important to note its relationship with the Perpetual Care Act's "care and maintenance"—terms that seem defined intentionally to prevent the prior A&R Act's definition of abandonment.

90. *Id.*

91. *Id.* § 36-72-4.

the remains, the approximate cost of the process, and the approximate number of graves affected."[92] These requirements also include related action items.[93] Within fifteen days of the completion of this process, the local governing authority must schedule a public hearing with proper notice, and then inform the permittee of its decision in writing within thirty days after the hearing.[94] Notably, the permit, if granted, may still require additional conditions, "including but not limited to relocation of the proposed project, reservation of the cemetery or burial ground as an undeveloped area within the proposed development or use of land, and respectful disinterment and proper disposition of the human remains."[95]

3. Permit Guidance

The A&R Act provides mandatory guidance for the local governing authority in making its decision on permits. First and foremost, the statute creates a "presumption in favor of leaving the cemetery or burial ground undisturbed."[96] Then, the law requires consideration of the concerns and comments of any descendants "and any other interested parties"; the economic and other costs of mitigation; the adequacy of the applicant's plans for disinterment and proper disposition of any human remains or burial objects; and "the balancing of the applicant's interest in disinterment with the public's and any descendant's interest in the value of the undisturbed cultural and natural environment." Finally, the sixth guidance point is a catch-all for any other compelling factors that the governing authority deems relevant.[97]

The A&R Act allows the local governing authority to appoint a board or commission to hear, review, and make decisions on permit applications, but only if the county population exceeded 290,000 in any census since 1980.[98] Appeals to permit application decisions may be made to the superior court of the county in which the cemetery or burial ground is located.[99] The local governing authority, local law enforcement, or presumably any appointed board or commission must inspect the

92. GA. CODE ANN. § 36-72-5 (West 2022).

93. For example, if the human remains include people of aboriginal or American Indian descent, the permittee must contact the Council on American Indian Concerns and notify any culturally affiliated American Indian tribes as part of the genealogist plan. *Id.* § 36-72-5(4). Also, the county or municipality (or other "governing authority") may require "additional reasonable attempts" to identify, locate, and notify descendants to give descendants an opportunity to express interest, be informed of the permit terms, or appear at hearings or appeals related to the disposition of human remains or burial objects. *Id.* § 36-72-6.

94. *Id.* § 36-72-7. The hearing is also important in terms of notifying descendants.

95. *Id.* § 36-72-7(b).

96. GA. CODE ANN. § 36-72-8(1) (West 2022).

97. *Id.* § 36-72-8.

98. *Id.* § 36-72-9.

99. *Id.* § 36-72-11.

application "as necessary" to make sure the permit applicant has (a) ceased or limited development activity pending a grant of the permit, if such cessation was required before permitting or (b) complied with the terms of the permit if the permit has already been issued.[100]

Different procedures apply if the entity requesting a permit is an agency, authority, or other political subdivision of the state. If so, the superior court having jurisdiction over the cemetery or burial ground property has "exclusive jurisdiction" over the permit application and must conduct an investigation to make a determination under the previously outlined statutory provisions.[101] If any adverse effect occurs to the cemetery or burial ground, the agency, authority, or political subdivision must bear the cost of mitigating the harm with the authorized use of public funds to do so.[102] Likewise, if individuals or other entities cause any adverse effects, they must bear the cost of mitigating the harm.[103] Notably, the governing authority bears the cost of mitigating harm caused by unidentified vandalism or *erosion*, though the statute does not indicate in this subsection whether the local governing authority can simply decline to intervene with this type of cemetery maintenance as it does at the outset by "authorizing," but not requiring, intervention with abandoned cemeteries.[104]

Lastly, the A&R Act establishes an exception for the Department of Transportation, which is not required to apply for a permit unless it plans to relocate human remains, though it must confirm the absence of human remains in development projects through an archeological report.[105] The statute confirms that any relocation of human remains must be supervised, monitored, and carried out by the permit applicant's archeologist at the expense of the permittee.[106]

C. *Statutory Takeaways*

The Perpetual Care Act's requirement for statutorily defined "care and maintenance" paid for by a statutorily enumerated trust fund is relevant to Georgia cemetery law for several reasons. First, the *lack* of care and maintenance forms part of the analysis of what constitutes an "abandoned" cemetery, which is defined by law and outlined in cases. Second, "care and maintenance" is precisely what will become financially and practically impossible after repeated flooding or storm damage due to climate change. While modern, privatized, perpetual care

100. *Id.* § 36-72-13.
101. GA. CODE ANN. § 36-72-14 (West 2022).
102. *Id.* § 36-72-14(b).
103. *Id.*
104. *Id.*
105. *Id.* § 36-72-14(c).
106. GA. CODE ANN. § 36-72-15 (West 2022).

cemeteries are required to provide this care and maintenance through a trust fund,[107] certain exemptions apply for older cemeteries and nonprofit entities, as well as more traditional types of cemeteries on family plots or church grounds that do not meet the statutory definition of a "cemetery."[108] While a grandfathering period exists for cemeteries created between 1986 and 2000, pre-1986 cemeteries are subject to prior law, which does not require perpetual care status,[109] nor does it provide for legal action after the Perpetual Care Act's passing in 2000, even if some prior conditions theoretically apply. Pre-1986 nonperpetual care cemeteries are not required to establish trust funds and likely do not have them, so any funding for basic care and maintenance—or much more for climate change mitigation—must come from other financial resources or concerted community action. The financial reality of regular care and maintenance likely makes these pre-1986 nonperpetual care cemeteries or statutorily exempted cemeteries at much greater risk of both legal abandonment and subject to the dangers of sea level rise, with much less money to meet that risk.

The A&R Act, while less regulatory in nature, contains key substantive provisions for taking any action related to an unknown or abandoned cemetery, as well as determining the cemetery's future. Presumably enacted to handle construction and development concerns and to preserve human remains as a part of cultural heritage, the statute also provides a clear mechanism for dealing with disinterment and relocation *for any reason*. The requirements are steep but not insurmountable. Property law principles like ownership or control, proper notice, and title searches apply, as well as the balancing of descendant and development interests. Moreover, while the Perpetual Care Act applies to one specific subgroup of cemetery types, the A&R Act appears to apply any cemetery, known or unknown, whether publicly used or discovered on private land. The A&R Act is thus a bigger piece of the Georgia cemetery law puzzle when considered in the context of threats related to sea level rise. Whereas the Perpetual Care Act highlights the difficult financial realities of modern cemetery mitigation efforts, the A&R Act provides the substantive and procedural process for making relocation possible.

The right to disinter, however, also requires a permit from the "local registrar" under the law governing Georgia public health and vital records.[110] Department of Public Health (DPH) regulations indicate the

107. GA. CODE ANN. § 10-14-6(b)(1) (West 2022).

108. *Id.* § 10-14-3(8).

109. *Id.* § 10-14-4(g)(1)–(2).

110. *See* GA. CODE ANN. § 31-10-20(f) (West 2022) ("Authorization for disinterment and reinterment shall be required prior to disinterment of a dead body or fetus. Such authorization shall be issued by the local registrar to a licensed funeral director or other person acting as such,

"local registrar" may include hospitals, hospices, and funeral homes for the first disposition of human remains.[111] While it is not entirely clear if this permit is distinct from the permit under the A&R Act, DPH regulations also require the "local registrar" to issue a permit for disinterment and reinterment "upon receipt of an order of a court of competent jurisdiction."[112] As a matter of public health, courts may have to at least rubber stamp cemetery relocation permits otherwise granted under the statutory authority of the A&R Act.

IV. GEORGIA COMMON LAW: HISTORY AND RELEVANCE

Georgia cemetery cases demonstrate the historical development of common law in the State and how that law interacts with more modern state statutes. The statutes above, passed in 1991 and 2000, came later than most of the common law rules related to burial rights, such as descendant notification, cemetery and burial ground easements, and the public and private status of burial sites. Cases decided after the statutes were passed still indicate some confusion about who has rights to the dead, probably because the statutes do not address the entire framework of cemetery law, and many cases predate the statutes. The cases discussed below, particularly the *Walker*, *Hughes*, and *Mills* cases, contain more guidance for advocates, descendants, or other individuals and entities hoping to protect and preserve cemeteries as climate change progresses and as the rising of sea levels threatens their communities.

A. *Cemetery Easement Rights*

Perhaps the oldest iteration of the right to access or use a grave site in Georgia common law is found in *Jacobus v. Congregation of Children of Israel*, where the Georgia Supreme Court held that "one who purchases and has conveyed to him a lot in a public cemetery does not acquire the fee to the soil, but only the easement or license of burial.[113] So long as the purchaser has rightful possession of the cemetery lot—the burial place—or holds title to the interest, the purchaser can maintain an action for damages against anyone who trespasses upon, desecrates, or

upon proper application, in the county in which the dead body or dead fetus was originally interred and a local registrar who issues such authorization shall not be civilly or criminally liable therefor if it is issued in good faith. A permit shall not be required when disinterment and reinterment are in the same cemetery.").

111. GA. COMP. R. & REGS. 511-1-3-.23(1)(a) (West 2022).

112. *Id.* 511-1-3-.23(2)(a). While neither this regulation nor the A&R Act create a clear process for challenging disinterment, the requirement of a court order indicates that the matter may ultimately require court intervention, even if the city or county or "local governing authority" grants a permit to relocate under the A&R Act. Likewise, the noted caselaw indicates that individual descendants, entities, municipalities, and even cemeteries can be plaintiffs, defendants or intervenors contesting such orders.

113. Jacobus v. Congregation of Child. of Israel, 33 S.E. 853, 854 (Ga. 1899).

otherwise invades that lot.[114] At issue in *Jacobus* was the unrequested and ultimately unlawful disinterment of two children from a "public" cemetery in Augusta.[115] The children died in infancy, predeceasing their parents who died sometime later and were buried nearby.[116] The court noted that the plaintiffs had actual possession of the easement and they were the heirs at law of the parents, giving them complete title to the easement of burial place—by prescription.[117] The court found that the plaintiffs stated a valid claim based on these facts, not only with regard to the children's disinterment but also for the removal of the children's gravestones, particularly because of their status as heirs.[118] In *Jacobus*, possession and status were enough to allow access and tort actions for invasion of property.

1. Establishing Easement Rights

A few years later, in *Stewart v. Garrett*, the Georgia Supreme Court reiterated the *Jacobus* rule that the heirs of the dead and buried have a right of easement or license to the grave with regard to another "public" cemetery, this time in Columbus.[119] However, the *Stewart* court held that heirs' property rights do not include the right of ejectment—the right to remove others.[120] In another cemetery case, *Nicholson v. Daffin*, the Georgia Supreme Court again relied on the language in *Jacobus*—that one who owns or has an interest in a cemetery for burial purposes "does not acquire any title to the soil, but only an easement or license for the use intended."[121] The *Nicholson* court applied the *Jacobus* rule, which had previously only been applied by courts in cases involving public cemeteries, to a private, family cemetery.[122] The *Jacobus* rule was later adopted by an Oklahoma court in *Heiligman v. Chambers*, which built upon *Jacobus* by determining that the cemetery access easement or license to the grave passes with the fee title of the entire cemetery property.[123] The *Heiligman* case also appears to have settled the idea that

114. *Id.*
115. *Id.* at 854.
116. *Id.*
117. *Id.* at 855.
118. *Jacobus*, 33 S.E. at 855.
119. Stewart v. Garrett, 46 S.E. 427, 427 (Ga. 1904).
120. *Id.*
121. Nicholson v. Daffin, 83 S.E. 658, 658 (Ga. 1914).
122. *Id.*
123. Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959); *see* Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911) ("[W]hen land has been definitely appropriated to burial purposes, it cannot be conveyed or devised as other property, so as to interfere with the use and purposes to which it has been devoted, and when 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.").

easement and associated rights in a cemetery lot survive until the lot is abandoned, either by the person establishing the plot or the heirs, or by removal of the bodies by the person granted statutory authority.[124]

Later Georgia courts continued to hold that easement rights remain with the descendants or heirs at law by prescription, effectively establishing adverse possession as the opposite of abandonment.[125] The easement gives heirs the right to prevent or to be compensated for trespasses that disturb burial places, the right to consent to or prevent the disinterment of bodies, the right of ingress and egress for visitation of graves, and the right to decorate them.[126] Georgia courts increasingly justified these legal rules philosophically[127] but also showed more willingness to intervene on either side of a cemetery dispute.[128] Still later, in *Walker v. Georgia Power*, a key case that restated the traditional understanding of Georgia cemetery law, the Georgia Court of Appeals found for the first time that a cemetery easement can be abandoned, based in part on the *Heiligman* case.[129]

2. Abandoning Easement Rights

Georgia law currently defines an "abandoned cemetery" as one that "shows signs of neglect" where "no person can be found who is legally responsible and financially capable of the upkeep."[130] Georgia courts

124. *Heiligman*, 338 P.2d at 148.

125. *E.g.*, Turner v. Joiner, 48 S.E.2d 907, 908 (Ga. Ct. App. 1948) (finding right and title derived by prescription where family dead had been buried in rural churchyard cemetery for 36 years as a "matter of courtesy and custom," reasoning the family's cemetery rights with respect to the grave were paramount to anyone except someone who could show a superior title).

126. *See* Habersham Mem'l Park, Inc. v. Moore, 297 S.E.2d 315, 320–21 (Ga. Ct. App. 1982) (finding an easement for right to burial passes to heirs at law, as well as tort actions for interfering with burial); *see also Turner*, 48 S.E.2d at 908 (finding a cause of action existed for intentional interference of a burial); Rivers v. Greenwood Cemetery, 22 S.E.2d 134, 134–35 (Ga. 1942) (finding that while the right of removal is not uniformly recognized as an absolute one belonging to the surviving husband or wife, many courts have held that reinterment rights should be permitted as part of the cemetery easement or license).

127. *See* Tully v. Tully, 177 S.E.2d 49, 49–50 (Ga. 1970) (arguing that disinterment of a body and removal to another burial place is not favored by the law because it is state policy that "the sanctity of the grave should be maintained," and that a body once suitably buried should remain undisturbed).

128. *See* Taylor v. Evans, 208 S.E.2d 492, 492–93 (Ga. 1974) (ordering removal of a headstone and slab erected on a grave by a family member of the deceased who was not an heir at law); *see also* Mayes v. Simons, 8 S.E.2d 73, 74–75 (Ga. 1940) (allowing a purchaser of land, who lacked notice of an abandoned cemetery lying in an obscure location on the land, to continue cultivating over the site).

129. Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986) (calling *Heiligman* the "most frequently acclaimed and followed" case on the subject and claiming that Georgia courts have inferentially followed the *Heiligman* public cemetery rule and applied it to family cemeteries, too).

130. GA. CODE ANN. § 36-72-2 (West 2022).

view the issue of abandonment as largely a question of intent—a "mixed question of law and fact"—especially with regard to restrictions on the use of private property for family burial purposes, most recently finding that "[t]his intent is inferable from the acts of the parties, interpreted in the light of all the surroundings."[131] Abandonment, however, applies not only to the cemetery itself but also to the easement, with courts generally requiring affirmative conduct to demonstrate intent to abandon on behalf of the easement holder.[132] But under the facts in *Walker*, even a cemetery easement holder's mere acquiescence to the conduct of the property owner can constitute abandonment, especially if it has the effect of destroying the easement's purpose and no timely objection is made.[133]

In *Walker*, Georgia Power sought to condemn a family cemetery located within a larger tract of land it owned in fee simple and then disinter and relocate the human remains to a tract of land it owned adjacent to a Methodist church.[134] Under the previously existing statutory authority of Section 36-60-6.1, Georgia Code Annotated, Georgia Power petitioned the Monroe County Superior Court to do so.[135] Georgia Power named thirty-one descendants of those buried in the cemetery as defendants but also sought to condemn the "incorporeal hereditaments" of others who might be buried there, seeking a special master to do so.[136] The Monroe County Commission granted a permit and accepted a special master's recommendation that the county condemn the land and compensate the descendants with twelve dollars, the "actual market value of the property."[137] Afterward, a licensed funeral director conducted the disinterment, relocation, and reinterment, enclosing the cemetery plot with a chain link fence and a wrought iron entrance built by Georgia Power.[138] The new plot contained space for fifty additional graves.[139]

131. City of Sandy Springs v. Mills, 771 S.E.2d 405, 408 (Ga. Ct. App. 2015); *see* Arlington Cemetery Corp. v. Bindig, 95 S.E.2d 378, 383 (Ga. 1956) (establishing the "mixed question of law and fact" standard for cemetery abandonment and acknowledging the dedication of land for a public cemetery as an intended restriction on private property use for family burial purposes).

132. *City of Sandy Springs*, 771 S.E.2d at 408; *Arlington Cemetery Corp.*, 95 S.E.2d at 383.

133. *Walker*, 339 S.E.2d at 730–31.

134. *Id.* at 728.

135. *Id. Walker* was decided in 1986, and the events leading up to the decision began in 1975, well before the passing of the A&R Act in 1991, with its permitting policies and procedures noted above. The Georgia Court of Appeals cited Section 36-60-6.1, the statutory section that previously housed more limited provisions related to disturbing burial grounds for land development. GA. CODE ANN. § 36-60-6.1 (repealed 1991). Section 31-21-6, a statute discussing procedures to be followed when human remains are discovered, was not passed until 1992. GA. CODE ANN. § 31-21-6 (West 2022).

136. *Walker*, 339 S.E.2d at 728.

137. *Id.*

138. *Id.* at 729.

139. *Id.*

While the administrative record contained no evidence of disagreement,[140] one descendant eventually filed an appeal against the award in a superior court, where the case sat inactive for five years.[141] After motions and affidavits, the superior court ultimately dismissed the appeal five years later—ten years after the disinterment—holding that the cemetery had been removed according to statute.[142] Importantly, the court found that the descendant retained the same rights she held in the previous cemetery, except in the new location.[143] Though the court did not clarify the legal theory or mechanism by which these rights were retained or transferred, the only candidate seems to be the cemetery easement.

In the Georgia Court of Appeals, the descendant argued she had lost "the right to be buried in the family cemetery with her ancestors, the right to visit, decorate[,] and honor the graves of her ancestors in the place they were laid to rest, and have unimpeded ingress to and egress from the cemetery for these purposes."[144] Georgia Power argued the descendant had no compensable right and therefore had no standing.[145] The court defined the issue as whether the descendant's interest was a compensable interest within the contemplation of the laws of eminent domain.[146] Finding no Georgia law on point, the court then cited other jurisdictions, noting:

> [T]he appropriation of land for a family burial plot is often described as a "dedication," without clarity as to whether a dedication in the strict legal sense is meant or whether a family burial ground was established in a manner other than by a legal dedication . . . , [but] [o]ther cases take the view that a private or family cemetery or rights incident to it can be established or acquired only by a means, other than dedication, which is legally sufficient to accomplish the creation or a transfer of an interest in real property, or an appropriation pursuant to the provisions of an applicable statute.[147]

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140. *See id.* ("The record shows no objection, complaint or appearance by appellant Walker or any other party before the Monroe County Commission . . . no objection to the grant of the permit or its execution, nor to the location of the relocated cemetery site. No answer, pleading or writing of any kind was filed by the defendants.").

141. *Walker*, 339 S.E.2d at 729.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Walker*, 339 S.E.2d at 730.

147. *Id.* (quoting H.D. Warren, Annotation, *Private or Family Cemeteries*, 75 A.L.R.2d 591, 594 (1961)) (internal quotations omitted) (last pair of brackets in original).

The court also noted:

> Though a common law dedication, in its sense of a commitment to the general public, does not arise to create a private or family burial ground, there is authority for the proposition that owners may, without formal written documentation, establish and set aside a place of burial for the benefit of those included within a family neighborhood and that such may be evidenced by acts, acquiescence or other conduct evincing clearly such a purpose . . . . Whether the legal creation of a family or community cemetery be labeled a "dedication," a "trust" or an "easement" the rights and limitations in the area of the fee owner and of others having an interest are the same and are reasonably well established.[148]

The court confirmed that when a family burial plot is established, an easement is created and legal title passes subject to the easement.[149] Quoting *Heiligman*, the court held: "The easement and rights created thereunder survive until the plot is abandoned either by the person establishing the plot or his heirs, or by removal of the bodies by the person granted statutory authority."[150] The *Walker* court explained, "While the *Nicholson* case cited by the *Heiligman* court involved a public cemetery, we believe the Georgia courts have inferentially followed the *Heiligman* rule as to family cemeteries as well."[151] The court then reiterated the rule that "one who owns or has an interest in a cemetery for burial purposes 'does not acquire any title to the soil, but only an easement or license for the use intended.'"[152] On the facts at hand, however, the court, ultimately found that the descendant had abandoned the easement "by virtue of her acquiescence without objection to the removal and reinterment of the remains of her ancestors in the cemetery."[153] In effect, it appears that a cemetery easement holder in Georgia—an heir or descendant of the dead and buried—who does not make a proper and timely objection to the removal of ancestors from the cemetery has legally abandoned the easement, at least in the original cemetery property, if not in the

148. *Id.* (quoting Mingledorff v. Crum, 388 So. 2d 632, 635–36 (Fla. Dist. Ct. App. 1980) (internal quotations omitted).

149. *Id.*

150. *Id.* (emphasis omitted from original).

151. *Walker*, 339 S.E.2d at 730; *see* Nicholson v. Daffin, 83 S.E. 658, 660 ("When the plaintiff acquired ownership of her easement, there was no rule or regulation passed . . . forbidding lot owners to employ competent and skillful persons to assist them in the care of their lot.").

152. *Walker*, 339 S.E.2d at 730 (quoting *Nicholson*, 83 S.E. at 660).

153. *Id.* at 730–31.

relocation site.[154] Whether this abandonment also requires non-use is unclear.

B. *The Public/Private Distinction and the Presumption Against Disturbance*

The distinction between municipal and family or community cemeteries also has a thread in Georgia cases. In *Hughes v. Cobb County*, the Georgia Supreme Court officially recognized two cemetery categories: public and private.[155] A public cemetery is one that has been "dedicated" for public use, as opposed to a private family cemetery that is more exclusive.[156] The line between the two, however, is not so clear and drawing this distinction may obscure the way cemeteries have historically developed and are encountered in the world.[157] For example, a cemetery dedicated to the public may exist on private land, especially if the dedication is implied, and access may or may not be restricted depending on the circumstances.[158] More traditionally, public cemeteries are owned and operated by counties and municipalities.[159] Private cemeteries can refer to family plots on private land, private cemetery businesses, or churches, and sometimes private church cemeteries still exist even if the church itself no longer does.[160] Yet under *Hughes*, a court may consider the leftover church cemetery "public" if the community that the church served used it frequently for burial.[161] The same is true for family cemeteries.[162] Modern commercial cemeteries are typically more

154. *See* Adam Leitman Bailey & Israel Katz, *Terminating Easements in States East of the Mississippi River*, 31 PROB. & PROP. 38, 39 (July/Aug. 2017) (explaining that *Walker*'s position on easement abandonment is unique because easement abandonment typically requires two things: (1) non-use of the easement and (2) affirmative conduct on the part of the easement holder that manifests an unequivocal intent to relinquish the easement). Bailey and Katz note that Georgia has codified easement abandonment in Section 44-9-6, Georgia Code Annotated (2022), which provides that "[a]n easement may be lost by abandonment or forfeited by nonuse if the abandonment or nonuse continues for a term sufficient to raise the presumption of release or abandonment." The authors further note that Georgia courts have interpreted this statute to require clear and unequivocal intent on the part of the easement holder to abandon. *Id.* However, nonuse of an easement for the "prescriptive period" or statutory time for adverse possession could be enough to raise a rebuttable presumption that an easement has been abandoned. *Id.*

155. *Hughes*, 441 S.E.2d at 407–08.

156. *Id.*; *see* Brannon v. Perryman Cemetery, Ltd., 709 S.E.2d 33, 36 (Ga. Ct. App. 2011) (finding a public cemetery by implication where the cemetery had been in existence for more than 40 years before the family acquired the property surrounding it in 1924, evidence existed that the public had long regarded it as a community cemetery, and the family had done nothing to suggest otherwise until 2005—81 years later—when the family tried to take control of it).

157. Shaffer, *supra* note 13.

158. *Id.*

159. VAN VOORHIES, *supra* note 18.

160. *Id.*

161. *Id.*

162. Brannon v. Perryman Cemetery, Ltd., 709 S.E.2d 33, 36 (Ga. Ct. App. 2011).

private in nature. This section explores the distinctions between public and private cemeteries., highlighting the key *Hughes* case in Georgia case law.

1. Public vs. Private

The first step to establishing public or private status, or any hybrid in between, is figuring out who owns the land on which the cemetery is located.[163] If the land is owned by a county or municipality, the cemetery is likely public, not only in ownership but also in operation in that the general public may bury their dead and visit the premises within reasonable time restrictions.[164] If the land is privately owned, however, the cemetery could still have an express or implied public dedication, found either in the deed records or by use, thereby giving the cemetery some "public" operational and visitation legal status, even though the land is located on private property whether family, church, or other.[165] In these situations, cemetery easement rights become particularly relevant and important for descendants seeking to access the grave site, and private property owners have some limitations and restrictions on what they can do on or with their land, even if those limitations are not express in a deed or contract.[166] These same cemeteries might also be more private, smaller plots on church-owned land that were never dedicated to the community or more generally used.[167] In short, public and private cemeteries are both equally subject to risk of abandonment, permit requirements to alter or move, and any corresponding legal issues.[168] This may be because a cemetery that is deemed abandoned has no owner and is easily subject to the A&R Act.[169] The public or private status in ownership or operation, however, is an important legal consideration and planning tool for cemeteries susceptible to climate change by erosion, flooding, or storm surge brought on by sea level rise.

As a general property law matter, public dedication requires actual or implied intent, actual or constructive delivery, and actual or constructive acceptance.[170] A related Georgia statute states:

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163. VAN VOORHIES, *supra* note 18, at 5.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. The Georgia Code makes no distinction between public and private cemeteries, especially not with regard to abandonment. *See* GA. CODE ANN. § 36-72-2 (West 2022).

169. *Id.*

170. Banks v. McIntosh Cnty., Ga., No: 2:16-cv-53, 2021 WL 3173597 at *5 (S.D. Ga. July 26, 2021); *see* Watson v. Clayton Cnty., 447 S.E.2d 162, 163 (Ga. Ct. App. 1994) (finding that a private landowner may dedicate land by setting it apart for public use, but it must be accepted by the county before it becomes a county road); Smith v. Gwinnett Cnty., 286 S.E.2d 739, 742 (Ga. 1982) (explaining that the acceptance of property set aside by the owner for a public use will be

> After an owner dedicates land to public use either expressly or by his actions, and the land is used by the public for such a length of time that accommodation of the public or private rights may be materially affected by interruption of the right to use such land, the owner may not afterwards appropriate the land to private purposes.[171]

In the cemetery context, Georgia cases have recognized the following elements for a valid dedication of land to public cemetery use: (1) an intention on the part of the owner to dedicate the property to a public use; (2) an acceptance by the public; and (3) where implied dedication is relied upon, an appearance that the property has been in the exclusive control of the public for a period long enough to raise the presumption of a gift.[172] After a cemetery is dedicated to public use, it cannot afterward be appropriated to private purposes, though case law citing Section 44-5-230, Georgia Code Annotated, often relates to private development and land use and says nothing direct about relocating cemeteries as method of preserving them for public use.[173] This idea is further outlined below.

2. Disturbance vs. Preservation

In *Hughes v. Cobb County*, a landowner applied for a permit to relocate a .196-acre cemetery located on a 12.196-acre tract of land he had purchased four years earlier.[174] As part of the application, the landowner identified and notified the descendants of the cemetery's fifty-two grave sites containing eleven inscriptions, and these descendants then opposed the landowner's application.[175] The local governing authority legally created a commission to review cemetery relocation permits because of the county's population.[176] The commission denied the landowner's permit application based on concerns about the relocation site, but the landowner modified his plan with a second relocation site before the full Cobb County Board of Commissioners granted the

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implied where it is improved and maintained for such use by authorized public officials out of tax funds).

171. GA. CODE ANN. § 44-5-230 (West 2022).

172. *See* Haslerig v. Watson, 54 S.E.2d 413, 421 (Ga. 1949) (ruling that no particular form of dedication is required—it may be made in writing, by parol, inferred from the landowner acts, or implied in certain cases from long use); *see also* Hutchinson v. Clark, 150 S.E. 905, 905 (Ga. 1929) (defining public cemeteries). *But see* Melwood, Inc. v. Dekalb Cnty., 336 S.E.2d 571, 571–73 (Ga. 1985) (finding no dedication where a two-parcel lot contained one parcel with a distinct cemetery and another parcel in which no burial had ever taken place and that was never actually or impliedly offered for cemetery use).

173. Brannon v. Perryman Cemetery, Ltd., 709 S.E.2d 33, 36 (Ga. Ct. App. 2011); Hughes v. Cobb Cnty., 441 S.E.2d 406, 407 (Ga. 1994).

174. *Hughes*, 441 S.E.2d at 407.

175. *Id.*

176. *Id.*

permit.[177] Pursuant to the statute, the descendants appealed to the Cobb County Superior Court, arguing that the cemetery had been publicly dedicated.[178] The court found the cemetery to be a family, neighborhood cemetery owned by the permittee whose application sufficiently met the mitigation and notice requirements under Georgia statutory law.[179] The court determined that no evidence suggested the cemetery was used by the public at large and also found the cemetery was abandoned under Section 36-72-2(1), Georgia Code Annotated.[180] The court held that it was appropriate to move the cemetery, reasoning that "relocation would preserve rather than destroy the cemetery's cultural and historical significance."[181]

In reviewing the superior court's decision,[182] the Georgia Supreme Court first identified the distinction between public and private cemeteries, finding a public cemetery requires dedication to the community without any significant use restriction by the landowner on relatives or other members of the public.[183] The court then noted the statutory provision that prohibits landowners who dedicate their land to public use from afterward appropriating the land for private purposes if the exercise of private rights would materially affect the accommodation of the public rights in the property.[184] The descendants argued that the attorney who provided the title opinion did not consider whether the original owner had made a dedication and that their evidence of dedication—consisting of several witnesses as opposed to the landowner's sole witness—was so overwhelming that the trial court erred in ruling that no dedication occurred.[185] The descendants further asserted that if a public dedication had occurred, the landowner would have had to show that the "reappropriation of the property [did] not materially affect the accommodation of the public rights in the property."[186]

177. *Id.*

178. *Id.*

179. *Hughes*, 441 S.E.2d at 407.

180. *Id.* at 408 & n.5.

181. *Id.* at 407.

182. The Georgia Supreme Court also noted the ambiguity in Georgia's abandoned cemetery statute about whether a superior court should conduct a de novo review of a local governing authority's decision on a relocation permit application, or if the superior court should sit as an appellate court but declined to decide the issue because both parties had accepted the de novo review. *Id.* at 408 n.4. An appeal through the superior court system resembles the Georgia statutory procedure for a writ of certiorari for the quasi-judicial decisions of local administrative bodies or authorities. GA. CODE ANN. § 5-4-1 (West 2022).

183. *Hughes*, 441 S.E.2d at 407–08.

184. *Id.* at 408.

185. *Id.* at 407–08.

186. *Id.* at 408 n.3.

However, the Georgia Supreme Court declined to substitute its opinion of the record evidence for that of the fact finder.[187] The court emphasized that the landowner's permit application contained all the requisite materials and that Section 36-72-7(b), Georgia Code Annotated, gives the local governing authority flexibility in adopting the relocation permit application and establishing additional conditions.[188] Therefore, the Cobb County Board of Commissioners had sufficient authority to accept the landowner's second proposed site after hearing before the full commission.[189]

Perhaps most importantly, the Georgia Supreme Court accepted the superior court's rationale that "due to lack of maintenance and inappropriate surroundings, relocation would preserve rather than destroy the 'cultural heritage of this county and this cemetery.'"[190] This rationale was deemed sufficient to overcome the statutory presumption in favor of leaving cemeteries undisturbed, as well as an appropriate balancing of the landowner's interest in disinterment against the "public's and descendants' 'interest in the value of the undisturbed cultural and natural environment.'"[191] *Hughes* thus indicates not only that the presumption in favor of leaving cemeteries undisturbed is surmountable but also that perhaps the best argument to make in favor of a request for relocation is preservation.

C. *The Right to Move Dead Bodies*

In Georgia, the property right to move a dead body from one burial place to another generally lies with the surviving spouse.[192] Under Georgia intestacy law, the surviving spouse has the right to at least one-third of the decedent's estate if the decedent dies intestate, with any children sharing the remainder—a relic of medieval English feudal

187. *Id.* at 408.

188. *Hughes*, 441 S.E.2d at 408.

189. *Id.*

190. *Id.* at 409.

191. *Id.* at 408–09.

192. Rivers v. Greenwood Cemetery, 22 S.E.2d 134, 134–35 (Ga. 1942); *see* Ga. Lion's Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) (citing Blackstone's Commentaries for the proposition that in the earlier days of the common law, no property right existed for the body and the matter was left for ecclesiastical courts but arguing that American courts created a "quasi-property right" in the body for relatives and next of kin because no ecclesiastical courts existed); *see also* Pollard v. Phelps, 193 S.E. 102, 107 (Ga. 1937) ("At common law no property right was held to exist in a dead body; and though this view is still maintained in a strict sense, the courts of civilized and Christian countries regard respect for the dead as not only a virtue but a duty, and hold that, in the absence of testamentary disposition, a quasi-property right belongs to the husband or wife, and, if neither, to the next of kin."); Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 24 (Ga. 1905) (allowing a widow to legally claim her spouse's dead body but not defining the precise nature of the interest).

custom that found its way into British and American common law.[193] In the absence of a surviving spouse, the next of kin or other descendants generally have these rights.[194] More recent cases reiterate that heirs of the deceased may have a "quasi-property right" in the body that can allow for tort claims such as trespass,[195] although some reasonable limitations exist on these claims, including a limit on claims for moving graves within the same cemetery, for which a permit is not required.[196] On the other hand, the removal of the deceased's eyeballs without consent of the surviving spouse apparently allows a quasi-property claim, along with other claims such as intentional infliction of emotional distress.[197] Georgia law establishes the circumstances in which graves may be moved.[198] The unique circumstances of the *Welch* case are explored below, but Georgia public policy officially continues to frown on the disinterment of a body and its removal to another burial place, and it remains good law that, "except in cases of necessity or for laudable

193. GA. CODE ANN. § 53-2-1(c)(1) (West 2022); *see* Welch v. Welch, 505 S.E.2d 470, 471 (Ga. 1998) (explaining that a husband has the right to bury his wife's dead body over and against the rights of her children but granting the children the right to disinter and relocate the body after the husband's death); *see also* William Engelhart, *Equality at the Cemetery Gates: Study of an African-American Burial Ground*, 25 MICH. J. RACE & L. 1, 3–4, 5 n.25 (Fall 2019) (attributing the "seemingly inadequate building blocks" of American cemetery law to the United States' rejection of a single state church, which exclusively governed burial in England, and explaining that under English common law the easement right—"a temporary appropriation of soil"—would terminate with the dissolution of the body).

194. GA. CODE ANN. § 53-2-1(c)(2) (West 2022); *Welch*, 505 S.E.2d at 471. Georgia law does not make it entirely clear whether (a) the body is simply part of the decedent's estate, at least initially, and the rights to the body pass to the descendants or heirs at law after burial, or (b) the body is never part of the decedent's estate, but an executor has the legal power to discharge the body according to testamentary wishes.

195. *See* Ceasar v. Shelton Land Co., Inc., 646 S.E.2d 689, 690–91 (Ga. Ct. App. 2007) (holding an heir of the deceased may bring an action for the desecration and destruction of a family cemetery, trespass, or other torts without having a legal title or easement for burial purposes in the soil where the remains of the deceased loved ones are laid to rest, if they prove they have not abandoned the cemetery); Davis v. Overall, 686 S.E.2d 839, 841–42 (Ga. Ct. App. 2009) (finding the holder of an easement for access to a family cemetery may bring an action for nominal damages or compensatory and punitive damages against a party who intentionally interferes with the use of that easement and an action for trespass against one who interferes with a cemetery easement may plead a claim for the actual damage inflicted and allowable punitive damages).

196. Hill v. City of Fort Valley, 554 S.E.2d 783, 786–87 (Ga. Ct. App. 2001) (explaining that the mere moving of a body in a casket to the wrong burial site, without causing any damage to it, may not be enough for a quasi-property claim, and the relatives of a disinterred and reburied decedent may lack standing to bring a claim of trespass against the persons responsible for the disinterment).

197. Alt. Health Care Sys., Inc. v. McCown, 514 S.E.2d 691, 695–97 (Ga. Ct. App. 1999).

198. GA. CODE ANN. § 36-72-4 (West 2022); *see* Tully v. Tully, 177 S.E.2d 49, 50 (Ga. 1970) (explaining that graves may be moved if there is a "strong showing that it is necessary and that the interests of justice require" relocation).

purposes, the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed."[199]

1. Family Dynamics and Questions of Law

Welch presents a unique set of facts and circumstances that illustrate some of the complexities of cemetery law. When someone dies testate, an executor may have a right to initially bury the decedent's body or remove the body to a different burial site based on the decedent's wishes expressed in their will or testament, but this right is not absolute.[200] In *Welch*, the decedent was buried in a church cemetery at the direction of her executor, who was her son, as stated in her will.[201] Almost two years after the burial, the decedent's husband sought and was granted a permit from the Georgia Department of Human Resources (DHR) under the authority of Section 31-10-20(f), Georgia Code Annotated, to disinter his wife's remains for reburial in land dedicated as the family's cemetery in Mountain City.[202] The husband died shortly thereafter, and the son applied for another permit to disinter his mother's remains and move them to Virginia, against the wishes of the other siblings.[203]

The trial court found that the executor son had "completely satisfied his obligation as executor by directing his mother's burial as instructed by the will."[204] The court further held: "after the initial burial and the death of the testator's husband, the right to control the remains rests in the next of kin, upon a showing that disinterment and reburial are justified by laudable purposes or necessity."[205] If an executor has authority relating to burial or disposition of a body, that authority "terminates after initially discharging any such obligation" in accordance with the will and testament, so the disinterment and reburial by the husband was valid.[206] The Georgia Supreme Court found that the trial court correctly entered a permanent injunction against the second disinterment request by the decedent's son because other siblings were also the next of kin and thus were entitled to authorize the disinterment.[207] Additionally, when looking for "necessity" or "laudable purposes" in allowing a disinterment, the

199. *Tully*, 177 S.E.2d at 50 (quoting 25A C.J.S. Dead Bodies § 4(1) at 496 (1966)); *see* GA. CODE ANN. § 36-72-1 (establishing that human remains are not property to be owned by the person or entity which owns the property where the human remains are interred or discovered but are a part of the "finite, irreplaceable, and nonrenewable cultural heritage" of Georgia and warrant protection).

200. Welch v. Welch, 505 S.E.2d 470, 472 (Ga. 1998).

201. *Id.* at 471.

202. *Id.* The DHR regulation cited by the Georgia Supreme Court no longer exists.

203. *Id.*

204. *Id.*

205. *Welch*, 505 S.E.2d at 471.

206. *Id.* at 472.

207. *Id.*

trial court did not abuse its discretion by considering the fact that decedent's body had already been disinterred and reburied once before.[208]

Welch was decided in 1998, and the Georgia Supreme Court cited secondary sources for the proposition that "equity has jurisdiction to afford relief in cases of threatened disinterment, disturbance, and removal of human remains,"[209] even though the A&R Act of 1991 places the power to make decisions and issue permits regarding cemeteries with counties or municipalities.[210] Though the court did not follow the factors outlined in the A&R Act, the court allowed the executor to carry out his fiduciary duties, supported the right of the husband as next of kin to disinter and relocate his wife's remains, and then balanced the rights and interests of the executor against the rights and interests of a *majority* of his next of kin siblings.[211] Where *Walker* supported disinterment and relocation when only one descendant among numerous others protested, *Welch* demonstrates the value of a majority of the next of kin descendants submitting a proper and timely request for a court to deny disinterment rights.

2. Questions of Fact and Changing Land Use

In the context of abandonment and relocation issues, the most recent case in Georgia cemetery law is *City of Sandy Springs v. Mills*. The case involved a 1900 deed that John Heard executed in favor of eight named individuals for a one-acre tract of land to be used only as a family burial ground.[212] One hundred and six years later, the plaintiff acquired the property after a tax sale with the grantor—listed as Carl Heard, one of the eight named individuals on the 1900 deed—and after an affidavit of descent and a series of quitclaim deeds.[213] The plaintiff-landowner then sought to build a single-family residence on the portion of the one-acre tract that did *not* have graves, but the city denied his permit application.[214] After the plaintiff-landowner filed suit and the city answered, twenty-eight descendants of John Heard intervened, seeking a declaratory judgement that the cemetery was not abandoned.[215] It was undisputed and confirmed by an archeologist that approximately one-fifth of the one-acre tract contained twenty or more human graves arranged in clusters and rows, as well as the remnants of a fence.[216]

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208. *Id.*
209. *Id.*
210. GA. CODE ANN. § 36-72-3 (West 2022).
211. *Welch*, 505 S.E.2d at 472.
212. City of Sandy Springs v. Mills, 771 S.E.2d 405, 406 (Ga. Ct. App. 2015).
213. *Id.*
214. *Id.*
215. *Id.* at 407.
216. *Id.*

The trial court and the Georgia Court of Appeals majority agreed that the descendants had an "easement in the cemetery limits," but a genuine issue of material fact existed as to whether the cemetery had been abandoned and precisely what portions of the land had been deeded—and thus dedicated—for cemetery purposes.[217] The appellate court cited *Walker* to emphasize that easement rights pass to descendants until descendants abandon the easement or the bodies are disinterred.[218] The court then explained that abandonment is a mixed question of law and fact and applied public cemetery dedication principles to the private, family cemetery at issue.[219] The court also noted several factual disagreements and arguments between the parties. One side pointed to the cemetery deed and community knowledge of the "Heard Family Cemetery," and the other side emphasized that no burials had occurred since 1971 and no descendants either maintained or paid the taxes on the cemetery property.[220] The Georgia Court of Appeals affirmed the trial court's ruling that denied summary judgement and sent the issue of abandonment to a jury.[221]

Judge McMillian concurred, specially noting the case lacked precedential value under Georgia law.[222] Judge McMillian then mapped out the key pillars in Georgia cemetery law, pointing out the expansion of Georgia law through the A&R Act, which had updated pre-existing provisions cited in *Walker*.[223] Judge McMillian's opinion also emphasized that disinterment and relocation permits for disinterment required by the A&R Act exist not only for land development but also for *changing land use*, which the judge argued was the key issue in the case given that the entire one-acre parcel had been deeded for cemetery use in 1900.[224] Finding the entire parcel to be a "burial ground" as defined by statute, Judge McMillian argued the entire parcel had been dedicated as a *private* family cemetery and had not been used for anything other than that purpose.[225] Judge McMillian then agreed that the issue of whether

217. *Mills*, 771 S.E.2d at 407.

218. *Id.* at 408.

219. *Id.*; *see* Arlington Cemetery Corp. v. Bindig, 95 S.E.2d 378, 382 (Ga. 1956) (finding a valid public dedication of a cemetery where no intent or fact of abandonment was alleged but reasoning that a license or permit to establish a cemetery is a personal privilege and once the public dedication for a cemetery occurs, a license or permit remains with the land even after subsequent sales and county zoning changes, so long as the cemetery has not been abandoned).

220. *Mills*, 771 S.E.2d at 408.

221. *Id.* at 409.

222. *Id.* at 409 n.1 (McMillian, J., concurring).

223. *Id.* at 410.

224. *Id.*

225. *See Mills*, 771 S.E.2d at 410 n.4 (McMillian, J., concurring) ("[A] burial ground is to 'include' privately owned burial plots, suggesting that the term 'burial ground' also includes other portions of the property used for its dedicated purpose.").

the cemetery had been abandoned was proper for a jury to decide, pointing out that even if the jury found the cemetery to be abandoned, the plaintiff would still need a permit from the city, which the city had already denied.[226] Judge McMillian argued that based on the text of Section 36-72-4, Georgia Code Annotated, the statute "appears to apply to the development of all burial grounds and cemeteries, whether abandoned or not," and creates municipal discretion on whether to preserve and protect abandoned cemeteries and burial grounds by controlling permits—a discretion related to the power to acquire land through eminent domain.[227] Finally, Judge McMillian noted that the confusing issue of the remnants of a fence dividing the land—a frequent situation in easement by prescription, adverse possession, and abandonment cases—was a key question to be resolved at trial, though that issue did not change his view that the entire one-acre tract had been deeded and thus dedicated for cemetery purposes.[228]

D. *Common Law Takeaways*

Georgia courts have generally followed and incorporated Oklahoma's *Heiligman* rule that descendants' cemetery easement rights pass with title.[229] Georgia courts also appear to follow this rule across the spectrum of "public" and "private" cemeteries, finding that easement rights only end with abandonment or permitted removal.[230] If a valid easement is created, a purchaser of land takes the land subject to the dedication and use for cemetery purposes.[231] Neither public dedication of cemetery property either for express or implied public use or to a city or municipality—nor private title to land that contains an exclusive right of burial for the owner or for a stranger—appear to be affected by the dissolution, mere nonuse, or sale of a cemetery.[232] At a minimum, the easement is not affected for the easement holder or the easement holder's

226. *Id.* at 410. *But see* Mary Catherine Joiner & Ryan M. Seidemann, *Rising from the Dead: A Jurisprudential Review of Recent Cemetery and Human Remains Cases*, 45 OHIO N.U. L. REV. 1, 21 (2019) ("[T]he only inquiry should be whether human remains, once interred or entombed, are removed from the property.").

227. *Mills*, 771 S.E.2d at 411 (McMillian, J., concurring).

228. *Id.*

229. *E.g.*, Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986) ("When a family burial plot is established, it creates an easement against the fee, and while the naked legal title will pass, it passes subject to the easement created . . . *The easement and rights created thereunder survive until the plot is abandoned either by the person establishing the plot or his heirs, or by removal of the bodies by the person granted statutory authority*.").

230. *Id.*; *see Mills*, 771 S.E.2d at 408 (majority opinion) (applying the *Heiligman* rule to a private, family cemetery).

231. *Walker*, 339 S.E.2d at 730.

232. *Id.*; *Mills*, 771 S.E.2d at 408.

descendants until abandonment or relocation with permit, and even with relocation, the easement may continue to exist in the new location.[233]

While the *Walker* case remains the most encompassing decision in Georgia regarding easement rights, questions remain as to the exact nature of such rights. *Walker* indicates that although easement rights terminate upon permitted removal at a given cemetery location, these rights might remain with the descendants of the buried at the relocated cemetery site—even if this easement "transfer" is not explicit in statutory law, common law, or general property law.[234] Other legal analysis and commentary, discussed below, supports this principle hypothetically, and perhaps certain legal mechanisms could be used to better pinpoint it as a practical matter.

Hughes is a key case for both understanding the line between public and private cemeteries and how reviewing courts may analyze relocation permitting decisions. The factual line between public and private cemeteries may be blurry and contested, as also seen in *Mills*. Upon a determination of abandonment, trial courts have the discretion to find facts that support relocation, and a reviewing court may be unlikely to overturn those factual findings.[235] While determining the public or private status of a cemetery may be crucial in some contexts, that determination may be less important than whether the cemetery can be relocated, especially when faced with increased flooding, erosion, and storm surge.[236] Either way, *Hughes* reiterates that relocation requires following the outlined statutory permitting process, with some flexibility and deference to the local governing authority.[237]

The most important takeaway from *Hughes* is not the holding but the rationale that removal and relocation can help preserve "cultural heritage" as well as ensure respect for human remains and burial objects.[238] While a statutory presumption exists "in favor of leaving the cemetery or burial ground undisturbed," this presumption can be outweighed if the permitting requirements are met and if the permitting factors are adequately addressed.[239] This *Hughes* reasoning points to a

233. *Walker*, 339 S.E.2d at 730.

234. *Id.*

235. *See* Hughes v. Cobb Cnty., 441 S.E.2d 406, 409 (Ga. 1994) ("There is evidence in the record which supports the trial court's conclusions of fact that, due to lack of maintenance and inappropriate surroundings, relocation would preserve rather than destroy 'cultural heritage of this county and this cemetery.'").

236. *Id.*

237. *See id.* at 408 ("The [lower] court found that [the] application [for relocation] contained all of the elements required under § 36–72–5.").

238. *Id.* at 409.

239. GA. CODE ANN. § 36-72-8 (West 2022); *see* Atilano v. Bd. of Comm'rs of Columbia Cnty., 541 S.E.2d 385, 385–86 (Ga. 2001) (finding that the trial court properly considered

path forward for the relocation of cemeteries and removal of human remains for communities that so desire in the face of climate change. If the presumption in favor of non-disturbance can be overcome *and* relocation can help preserve cemeteries, judicial decisions that primarily served to support and defend development interests might also inadvertently help cemeteries survive rising sea levels.

Welch, especially in contrast to *Walker*, shows the importance of family easement holders taking an interest in their cemetery plots. A clear majority of an easement holder's descendants may be sufficient to persuade courts to not only enjoin disinterment as in *Welch*,[240] but also to permit disinterment in the name of preservation as in *Hughes*.[241] The *Mills* case, especially Judge McMillian's concurrence, best summarizes the current status of Georgia cemetery law and highlights the tension between case law and statutory requirements—perhaps charting the best path forward.[242] Judge McMillian emphasized that the relocation permit provisions in the A&R Act apply to all Georgia cemeteries, regardless of public or private status and whether they are abandoned.[243] Moreover, relocation permits are intended and created for the very purpose of addressing changing land use, not only development interests.[244] With the increased erosion, flooding, and storm surge bringing on sea level rise, Georgia's coastal cemeteries will at least experience changing land use, to put it mildly.

V. ANALYSIS AND DISCUSSION

Georgia cemetery law involves an intricate web of considerations, from perpetual care and maintenance to abandonment and inherited (or perhaps relocated) easements and from public dedication to private access and changing land use. Communities interested in preserving and protecting their vulnerable cemeteries in the face of sea level rise have important decisions to make, and they need to be proactive about planning and obtaining the funding, labor, expertise, and permits to accomplish their goals. Regardless of what decisions communities make on whether to abandon or relocate cemeteries or how to mitigate the effects of sea level rise, legal and practical obstacles exist that require community-based decision-making.

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statutory factors and that the county's interest in relocating the cemetery outweighed all competing interests where only one of nine known descendants opposed the trial court's ruling).

240. Welch v. Welch, 505 S.E.2d 470, 472 (Ga. 1998).

241. *Hughes*, 441 S.E.2d at 409.

242. City of Sandy Springs v. Mills, 771 S.E.2d 405, 410–11 (Ga. Ct. App. 2015) (McMillian, J., concurring).

243. *Id.* at 411.

244. *Id.* at 410.

A. *"Easement Come, Easement Go"*:[245] *Deciphering the Cemetery Easement*

The cemetery lot is treated unlike almost any other piece of real or personal property.[246] Most states treat cemetery rights as easements or licenses that pass directly to heirs without the need for administration, and Georgia appears to be no exception.[247] While the easement right might also be acquired through adverse possession or prescription, this process seems to largely predate modern cemetery law, including Georgia's statutes for abandonment, relocation, and perpetual care.[248] Additional rights and responsibilities may develop, such as the right to sue for trespass, but other rights, such as the right of ejectment, often do not.[249] Constitutional takings claims are almost universally limited,[250] though Georgia case law indicates those seeking to disinter and relocate graves may need to pay just compensation for the cemetery plot easement, at least to descendants who protest,[251] even in the absence of a valid takings claim.[252]

Georgia law is clear enough that easement rights pass to the heirs at law, both at common law[253] and based on the A&R Act's requirement that a genealogist plan's must be used to locate and contact descendants.[254]

1. The Cemetery Easement

The precise legal nature of the cemetery easement right, however, is less clear. Allen Shaffer has referred to the right to access the grave as a "pseudo-easement," developed out of English common law because the burial of the human body was only a temporary appropriation of space, an "accession to realty."[255] The limited space in English churchyards led to this view—widely shared throughout Europe today—but perhaps the sheer physical space and sense of manifest destiny in the United States

245. *See generally* J. Dwight Tom, *Easement Come, Easement Go—The Cemetery Access Easement: The Exception to the Right to Exclude Whose Time Has Come to Facilitate the Preservation of Nineteenth-Century Texas Family Cemeteries*, 39 ENV'T. L. & POL'Y J. 173 *passim* (May 2016) (discussing cemetery easement rights in the context of Texas law).

246. R.S., *The Cemetery Lot: Rights and Restrictions*, 109 U. PA. L. REV. 378, 378 (Jan. 1961).

247. *Id.* at 379.

248. *Id.*

249. *Id.* at 393; Stewart v. Garrett, 46 S.E. 427, 427 (Ga. 1904).

250. R.S., *The Cemetery Lot*, *supra* note 246, at 381 n.25.

251. Walker v. Ga. Power Co., 339 S.E.2d 728, 731 (Ga. Ct. App. 1986).

252. City of Sandy Springs v. Mills, 771 S.E.2d 405, 407 (Ga. Ct. P.App. 2015) (finding no taking in the city's denial of a permit to develop cemetery property).

253. *Id.* at 408.

254. GA. CODE ANN. § 36-72-5(4) (West 2022).

255. Shaffer, *supra* note 13, at 486.

led American cemetery law down a different path. The American path opted instead for eloquent and sometimes grandiose court language that sanctified the dead and created legal fictions out of thin air,[256] eventually leading to the position that "when a body is once interred it shall so remain unless extreme necessity demands its disinterment."[257]

Alfred Brophy more recently deemed the right to access graves by descendants as an "implied easement in gross," which he traces to statutes and case law in many states.[258] Although the term "implied easement in gross" does not appear in the Georgia statutory scheme, it aligns with the way Georgia common law describes cemetery access easements.[259] Unpacking the implied easement in gross, Brophy describes the right as "an easement in gross to cross private property to access a cemetery . . . held by relatives of the person buried in the cemetery . . . [that] descends by operation of law but it is neither devisable [nor] alienable."[260] The permission to bury carries with it an implied permission for relatives to visit the property, and the fact of burial serves as the implied proof of that permission.[261]

Brophy's concept of an implied easement in gross is based on basic property law principles regarding easements. In property law parlance, the land used by or "serving" an easement is referred to as the servient tenement or estate, and the land served by or benefitting from the easement is known as the dominant tenement or estate.[262] While an easement appurtenant typically requires two tracts of land—both the servient and dominant estates—and runs with the land through changes in ownership by express mention in a deed, an easement in gross typically involves a personal right to ingress and egress over the land.[263] Easements in gross essentially belong to the individual but are not transferable, at

256. *E.g.*, Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 24 (Ga. 1905) ("Death is unique. It is unlike aught else in its certainty and its incidents."); Ga. Lion's Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) (discussing the "quasi property right" in a dead body).

257. Shaffer, *supra* note 13, at 486 (quoting King v. Frame, 216 N.W. 630, 633 (Iowa 1927)) (internal quotations omitted).

258. Alfred Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, BYU L. REV. 1469, 1472 (2006).

259. *Id.* According to Brophy, while the cemetery easement exists by statute in 20% of states, it exists by case law in many other states. Also, while some variation may exist between states, the common law easement seems to be the standard. *Id*. at 1482; Tom, *supra* note 245, at 175–76.

260. Brophy, *supra* note 258, at 1479.

261. *Id.* at 1479–80.

262. DANIEL F. HINKEL, PINDAR'S GEORGIA REAL ESTATE LAW AND PROCEDURE WITH FORMS § 8:2 (7th ed. 2021).

263. *Id.* §§ 8:3–4; Adam Leitman Bailey & Israel Katz, *Analyzing Easement Laws and Cases in the States East of the Mississippi River*, 31 PROB. & PROP. 1, 2–3 (Jan./Feb. 2017).

least not at common law, whereas easements appurtenant continue to exist after land ownership changes between individuals or entities.[264]

With cemeteries, if a cemetery is sold, the cemetery easement stays with the easement holder.[265] If the easement holder dies, the easement passes to the holder's descendants,[266] which is not common to easements in gross. While the cemetery easement appears to stay with the land like an easement appurtenant,[267] and does not terminate at the death of the easement holder like an easement in gross,[268] the easement in gross moniker for cemetery easements is appropriate because cemetery plots do not contain both a dominant and servient estate and instead involve one plot of land with an individually held right of access.

However, special considerations apply to cemetery easements that are nonexistent for easements in gross. For example, even when burial land is sold multiple times, the cemetery easement for relatives, or at least the next of kin, still exists.[269] Perhaps more importantly, the fact that the cemetery easement is tied to the next of kin and not the land implies that if the cemetery is relocated, the easement remains with the next of kin in the new location. This implication could be particularly important in the context of climate change.

2. The Climate Change Dilemma

While the bulk of Georgia case law relates to development pressure on cemetery property, sea level rise could create an alternate and seemingly counterintuitive situation in which cemetery advocates, descendants, or community groups might choose to remove and relocate a cemetery, reasoning like the *Hughes* court that relocation would preserve rather than destroy the cemetery's cultural and historical significance.[270] The special nature of the cemetery easement—an implied and inheritable easement in gross that is "neither devisable nor

264. Alan D. Hegi, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 110–11 (1986); Bailey & Katz, *supra* note 263.

265. Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986); Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959).

266. *See* Brophy, *supra* note 258, at 1479 ("The easement is held by the relatives of the person buried in the cemetery, and it descends by operation of law.").

267. Courts typically favor construction of easements appurtenant. HINKEL, *supra* note 262, § 8:4.

268. *See* Bailey & Katz, *supra* note 263, at 3 ("The traditional view is that all easements in gross are unassignable and non-inheritable.").

269. R.S., *The Cemetery Lot*, *supra* note 246; Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986); Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959); City of Sandy Springs v. Mills, 771 S.E.2d 405, 408 (Ga. Ct. App. 2015).

270. *See* Hughes v. Cobb Cnty., 441 S.E.2d 406, 409 (Ga. 1994) ("[R]elocation would preserve rather than destroy 'cultural heritage of this county and this cemetery.'").

alienable"[271]—could not only imply inheritability but also the ability to transfer or relocate the easement in a new reinterment location.

If descendants are able to meet the extensive statutory permitting requirements under the A&R Act,[272] raise the capital necessary to fund the requisite expertise, and acquire relocation land, the question arises as to whether descendants—as easement in gross holders—would retain the easement to visit their deceased ancestors in the new cemetery location, which is at least implied in *Walker*.[273] Since such an endeavor would likely require ownership of the new cemetery location by an individual or entity,[274] perhaps a non-profit or land trust, ownership could create or allow a right of access even if an easement right no longer existed. Problems could arise, however, as they do in much of Georgia cemetery case law, with future generations when those who relocated the cemetery are no longer alive and their descendants try to exercise in the new location what were formerly easement rights in the old location. These easement rights would not only have to be passed by descendancy—already an unusual quality of the cemetery easement—but also be able to transfer between two parcels of land, which is not even typical of an easement in gross.[275] Thinking to the future when dealing with old human remains is part of the puzzle. In short, climate change's implications for cemetery law are going to lead to a long game.

The *Walker* case offers some insight into how this game could play out. In that case, only one descendant protested the cemetery disinterment and relocation, and even in the context of what seemed like a long, drawn-out process, the descendant filed with the permitting county too late to have a valid claim.[276] The special master awarded "actual" market value, a mere twelve dollars to the descendant, and because the cemetery had been removed according to statute, the superior court claimed that the descendant retained the same rights she held in the previous cemetery, except in the new location.[277] This precedent at least indicates that a cemetery easement could move or otherwise transfer to a new location with the same easement holder. However, without statutory clarity, the *Walker* case—which predates both the Perpetual Care Act and the A&R Act—might rest on sinking sand for descendants seeking surety that their easements rights can relocate intact.

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271. Brophy, *supra* note 258, at 1479.

272. GA. CODE ANN. § 36-72-5 (West 2022).

273. *Walker*, 339 S.E.2d at 730–31.

274. This ownership would require compliance with the requirements of the Perpetual Care Act, such as registration. GA. CODE ANN. § 10-14-4 (West 2022).

275. Bailey & Katz, *supra* note 263.

276. *Walker*, 339 S.E.2d at 729.

277. *Id.*

B. *Land Ownership and Control Options: Court-Appointed Receivers and Trusts*

Some scholars point to the need for a more comprehensive approach to dealing with cemeteries, especially abandoned ones.[278] Shaffer argues that cemetery protectors and real estate developers alike are able and willing to represent and advocate for their perspectives but often overlook the rights of descendants.[279] Part of the problem Shaffer identifies is the political and economic pressure on local officials who are sometimes tasked with the under-funded care of cemetery sites.[280] Referencing an old church cemetery in Ohio, whose corresponding church long since dissolved, as a paradigm for small rural family and church cemeteries, Shaffer explains how the fee interest in the land was transferred to the trustees of a local township almost one hundred years later, after having been originally gifted by a Revolutionary War soldier to his church.[281] No maintenance funds were associated with the transfer, even though Ohio, like Georgia, appears to have more recently crafted legislation for the continuing maintenance and funding of modern cemeteries through trusts.[282] Distant relatives living in other areas found that they lacked legal standing to challenge the township trustees' performance in conducting care and maintenance of the cemetery, especially with encroaching highways, oil and gas speculation, and gas station development.[283] For Shaffer, this paradigm demonstrates that "the usual adversarial system fails because there is no one with standing to represent the dead."[284] He proposes a "court-appointed receiver" to manage cemetery property rights through the adversarial process.[285]

1. Court-Appointed Receivers

One of the problems that a court-appointed receiver would combat is local officials acquiring both the fee simple interest in the land constituting the cemetery and "the easement of the deceased in trust." Shaffer argues that various groups have economic interests in uninhibited land development, while others are averse to additional taxation for the maintenance of cemeteries containing distantly related or unrelated, long-dead persons.[286] Some may simply favor historic preservation and

278. Shaffer, *supra* note 13, at 480.

279. *Id.*

280. *Id.*

281. *Id.* at 480–81.

282. *Id.* at 481.

283. Shaffer, *supra* note 13, at 480–82. Apparently, the township claimed the cemetery grounds suffered from a rattlesnake infestation. *Id.* at 481.

284. *Id.* at 479–80.

285. *Id.* at 480.

286. *Id.* at 493.

resistance to urban sprawl.[287] The court-appointed receiver is thus intended to represent the interests of the dead and buried and "fulfill their original expectations of perpetual interment in that place with perpetual care of the site."[288] Shaffer envisions that the receiver would be chosen by the court as a paid but forced volunteer or as a legitimate volunteer from community or church groups, historical societies, or other non-profit entities.[289] The court-appointed receiver would be able to "receive" the easement interest in the cemetery plot as a separate legal interest from the cemetery itself, thus at a minimum providing "standing to the dead" for legal actions, fundraising issues, and lawful relocation—relying on the adversarial legal system to work out the details.[290] Shaffer further advocates coupling this receiver with a state-level funding scheme to carry out the statutory mandates and "fulfill the reasonable expectations of the decedents."[291] The combined effect would be to move maintenance costs of abandoned cemeteries to court-ordered trustees with funding.[292]

While Shaffer's suggestions do not exactly fit into Georgia's legal framework, his court-appointed receiver idea has some surface appeal for cemetery disinterment and relocation in the context of sea level rise. To begin, Georgia's relocation statute, the A&R Act, does not impose mandatory requirements on counties and municipalities to preserve and protect abandoned cemeteries—the decision on whether to do so is discretionary.[293] The fact that these decisions are merely discretionary for local officials further supports the idea of using a court-appointed guardian or receiver to better address the problems that coastal family and church cemeteries will face with erosion, flooding, and storm surge. Clear leadership with financial backing would almost certainly be productive for attempts at mitigation and relocation.

Georgia law does not indicate that cemetery easement rights escheat to the state or local governing authority, though the local authority does have the legal right to permit relocation over and above descendant

287. *Id.*

288. Shaffer, *supra* note 13, at 493. Notably, Shaffer cites two Georgia cases—*Warner v. Warner* and *Shingler v. Shingler*—for situations where a court of equity appointed receivers to handle family trust-related disputes and manage fiduciary duties. Neither of these cases, however, relate to Georgia cemetery law.

289. *Id.* at 496.

290. *Id.*

291. *See id.* at 497 (noting a failed attempt in Wisconsin to allocate 15% of cemetery sales to accomplish this goal and reasoning that perpetual care cemeteries with trust funds will not have these needs).

292. *Id.*

293. *See* GA. CODE ANN. § 36-72-3 (West 2022) (explaining that counties and municipalities are *authorized* to preserve and protect abandoned cemeteries); *see also* Smith v. Pulaski Cnty., 501 S.E.2d 213 (Ga. 1998) (holding that Section 36-72-3, Georgia Code Annotated, authorizes but does not compel a county to preserve and protect abandoned cemeteries).

protests,[294] so long as it appropriately follows the statutory requirements. Nonetheless, descendants or cemetery advocates who hope to preserve human remains or burial objects endangered by sea level rise—if they can accrue the property rights, money, and expertise needed to apply for a relocation permit[295]—may benefit from having a court-appointed authority to either support their efforts or serve as a point of access to the court system should a county or municipality choose not to issue a permit. A similar approach could be to seek a declaratory judgment from a court or court-appointed liaison that the appropriate statutory permit requirements were met, perhaps even authorizing or rubber-stamping final disposition permits as a type of "local registrar." This route is less likely to be effective for the very fact that the A&R Act leaves permit discretion to the locality.[296] A court will probably only review a permit application on its merits *after* a permit denial, not before.[297] A court-appointed receiver, on the other hand, could be a neutral individual to whom a court, county, or municipality would defer in precarious, time-sensitive, or emotionally and spiritually fraught circumstances. Indeed, the receiver could be the cemetery advocate, descendant, or community group itself.

2. Trusts

Another possible mitigation technique for cemetery advocates could be the use of trusts to raise and establish capital and to preserve and protect land. As noted, the Perpetual Care Act establishes legal registration and trust funding requirements for private, commercial perpetual care cemeteries.[298] The ownership, control, and financing achieved under the Act theoretically allows for more flexibility and means for preserving and protecting cemeteries. Commentators have noted, however, that even these funds are often not enough to provide for basic "care and maintenance," and perpetual care cemeteries are often subject to similar types of disagreements and conflicting priorities on when and what to take care of and how to maintain the grounds and headstones.[299] Nonetheless, some sort of fundraising mechanism that

294. *See* GA. CODE ANN. § 36-72-8(2) (West 2022) ("The governing authority shall consider the following in making its determination: . . . (2) The concerns and comments of any descendants of those buried in the burial ground or cemetery and any other interested parties."); *e.g.*, Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986) (allowing relocation of a cemetery despite protests by one descendant).

295. GA. CODE ANN. § 36-72-5 (West 2022).

296. *Id.* § 36-72-3.

297. *See id.* § 36-72-11 ("Should any applicant or descendant be dissatisfied with a decision of the governing authority, he or she, within 30 days of such decision, may file an appeal in the superior court of the county in which the cemetery or burial ground is located.").

298. GA. CODE ANN. § 10-14-4 (West 2022).

299. Aton, *supra* note 8.

could be organized and agreed upon by advocates and descendants is crucial for the possibility of disinterment and relocation when flooding, erosion, or storm surge brought on by sea level rise becomes an inescapable reality.

In fact, the fundraising should begin immediately in the most vulnerable areas based on predictions by the National Oceanic and Atmospheric Administration (NOAA) or other reasonable modeling. Family, church, and community groups should organize around cemeteries they know need protecting or have already invested preservation time, energy, and funds into maintaining. The most proactive and modern methods of raising, multiplying, and storing capital, however, may be too inefficient and ineffective to finance cemetery relocation without broader policy and statutory support. This support, unfortunately, might only come once the ice caps have melted and two, three, or four feet of sea level rise occurs. Only then, when concurrent erosion, flooding, storm surge, and standing water overwhelm places that have never experienced such phenomena, will broad policy changes be possible. Realistically, the best bet is to organize and prioritize at-risk communities and properties and arm them with the information and procedure needed to strategize their goals. The trust funding of modern perpetual care cemeteries exemplifies one way to set up this process.[300]

Land trusts and land banks are another worthwhile consideration. One of the few analyses of Georgia cemetery law, completed as a thesis project by a historic preservation student named Jason Smith, argues that private, nonprofit land trusts could serve as an effective organizational model for cemetery preservation.[301] Smith emphasizes the express purpose of land trusts in administering and protecting parcels of land in perpetuity, as well as their increasing popularity.[302] Smith also notes the quasi-public nature of many land trusts, including public management and frequent ties to government agencies, which could facilitate custodial monitoring and protection[303]—or in the case of rising seas and flooding, could facilitate disinterment and relocation permitting. In discussing conservation easements as a corollary to land trusts, Smith examines the tension between what he calls an easement in perpetuity, which lasts forever, and an easement in gross, which "takes rights away from one property while not simultaneously granting rights to another," claiming

300. GA. CODE ANN. § 10-14-6(b)(1) (West 2022).

301. Jason Oliver Smith, The Use of Land Trusts to Preserve Graveyards in the American Southeast *passim* (Dec. 2001) (Master of Historic Preservation thesis, University of Georgia).

302. *Id.* at 70–71.

303. *Id.* at 71.

very few state laws allow easements in perpetuity to be acquired by any party other than nonprofit corporations and government entities.[304]

The merits of this contention aside, Smith's primary concern lies with cemetery conservation, similar to much of Georgia case law. If, as *Hughes* suggests, preservation and protection are sometimes best accomplished by relocation,[305] the choice of entity by the relocators and their relation to state and local government remain very important considerations. Absent policy changes that require or encourage government actors to "take title" of cemeteries in need of relocation—a dubious legal proposition in itself—those desiring relocation could benefit from the quasi-public status of non-profit land trust organizations that facilitate acquisition of property rights. Perhaps these organizations could also help secure descendants' in-gross easement rights by establishing them more clearly "in perpetuity" through deeds or court orders. A land trust organization could own both the original and the relocated cemetery property and more easily manage the transfer of descendants' rights between the two. The organization could leverage that ownership to ensure the transfer of rights while also serving as an advocate before the county, municipality, court, or court-appointed guardian.

C. *Equity and Fairness with Human Remains in Marginalized Communities*

One final aspect of cemetery law largely absent from Georgia statutes and cases is the role that equity and fairness play in cemetery controversies. As noted at the outset, communities of color will be particularly hard hit by the changes that will come with sea level rise.[306] As in so many modern circumstances, the contrast will also be stark between those that have means and access to power and those that do not. Persuasive legal scholarship and practical experience related to these issues already exists.[307] A complete conversation about equity and fairness concerning Georgia coastal cemeteries merits specific analysis, probably by someone directly connected to frontline communities of color in impoverished coastal areas. The Author is likely not the ideal candidate for such analysis, but a few preliminary concerns are worth mentioning in the current context.

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304. *Id.* at 72.

305. Hughes v. Cobb Cnty., 441 S.E.2d 406, 409 (Ga. 1994).

306. OWENS, *supra* note 2.

307. Engelhart, *supra* note 193; Brad Schrade, *After Missteps and Criticism, UGA to Honor Memory of Slaves on Campus*, ATLANTA J. CONST. (Sept. 7, 2018), https://www.ajc.com/news/state--regional/after-missteps-and-criticism-uga-honor-memory-slaves-campus/dja1Kp61WyTrzzr7BNsRkI/ [https://perma.cc/6YZG-GUV6].

1. Recognizing the Remains

While not coastal or frontline community cemeteries, both the University of Virginia (UVA) and the University of Georgia (UGA) had public controversies related to the treatment of human remains in what were most likely slave cemeteries on the university campuses. William Engelhart examines the UVA controversy in detail and notes, "as a general matter and as a matter of outcomes, African American burial grounds have not received the same legal solicitude as White burial grounds."[308] Cemeteries, like other real property, have been historically "affected by . . . policies of racial segregation that appl[y] in both life and death."[309] This problem is exacerbated with abandoned cemeteries, where easement holders are unlikely to be known or found, leaving descendants with little or no rights even if notice is successful as part of a relocation permit.[310] The abandoned cemetery easement is also more likely to occur in the context of an unknown slave cemetery, where it may be "at worst extinguished, and at best, severely restricted."[311]

Another issue with abandonment when considering equity and fairness is the difference in the way communities choose to mark their burial grounds.[312] This issue has also been extensively documented with regard to African American and Native American cemeteries.[313]

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308. *See* Engelhart, *supra* note 193, at 1–9 (claiming that the cemetery rights of the descendants of those slaves interred to the northeast of the UVA cemetery are arguably extinguished, or at best unclear, and noting that known and unknown slave cemeteries exist in many other places, on both public and private land, but the uneven application of common law in the United States creates inequity); 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, 489–90 (2005) (arguing that the history of legal treatment of slave and other long-standing African-American burial grounds has been one of neglect or outright disregard, lacking the same or similar application of legal rights to the grave as white Americans).

309. Engelhart, *supra* note 193, at 10.

310. *See id.* at 11 ("[C]ourts typically require that a cemetery not be abandoned if burial ground rights holders are to have rights at all.").

311. *Id.* at 12.

312. *See id.* (citing a case where a cemetery was considered abandoned because no grave markers were found, even though the graves were not marked because the interred—who were Quakers—purposely did not erect tombstones out of fear of desecration).

313. *See* CHICORA FOUND., GRAVE MATTERS: THE PRESERVATION OF AFRICAN-AMERICAN CEMETERIES 4–7 (1996), https://www.chicora.org/pdfs/Grave%20Matters%20-%20The%20Preservation%20of%20African%20American%20Cemeteries.pdf [https://perma.cc/R9JS-J6Q5] (noting the variety of ways in which African American cemeteries were marked or not marked, including stones, shells, plants, wood slabs, and other "offerings" like pottery or human artifacts, often arranged in a non-linear or scattered manner around the burial ground in stark contrast, for example, to the neatly aligned rows of white crosses at Arlington Cemetery in Washington, D.C.); *see also* Zahra S. Karinshak, *Relics of the Past—To Whom Do They Belong? The Effect of an Archaeological Excavation on Property Rights*, 46 EMORY L. J. 867 *passim* (1997) (creating an analytical framework and key variables for land owners to understand the effect of significant archeological finds on their property); John B. Sinski, *There are Skeletons in the Closet: The*

Engelhart explains this lack of marking at UVA's African American burial ground as part the "oppressive reality of slavery and Jim Crow era policies," arguing it may be likely that slaves did not mark their graves out of fear of grave robbing.[314] In short, it is likely that the American legal regime tends to favor Eurocentric burial practices at the expense of various African American (and Native American) preferences found in the historical and archaeological record for different forms of memorialization.[315]

2. Establishing a Fair and Public Process

Equity issues with cemetery rights in abandoned cemeteries and the lack of recognition of the diversity of burial grounds formulate part of the fairness problem, but another concern is what to do with such burial grounds if or when they are found. This problem is relevant not only for known slave cemeteries but also for small coastal community cemeteries affiliated with churches or cemeteries now on private property that may be owned by wealthy families and were once inhabited by enslaved persons or owned by their descendants. The dialogue about appropriately addressing issues of equity and fairness in these situations is not a simple or straightforward conversation, as evidenced by the controversy regarding a discovered cemetery on UGA's campus.[316]

The UGA controversy arose when human remains were discovered while renovating Baldwin Hall, which is home to UGA's Anthropology and Political Science Departments.[317] After discovering the remains, UGA claimed to consult with the state's archaeology department on how to proceed, but it is not clear whether UGA sought a permit to disinter or relocate the human remains pursuant to Georgia law, and no party appears to have filed a lawsuit against UGA, which argues that it followed the law.[318] Community advocates, particularly in the African American

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Repatriation of Native American Human Remains and Burial Objects, 34 ARIZ. L. REV. 187 *passim* (1992) (arguing American common law clearly establishes the right of all people, including Native Americans, to protect the burial sites of their ancestors, and to repatriate those remains that have been wrongfully removed from the earth).

314. Engelhart, *supra* note 193, at 12.

315. *Id.*

316. Marc Parry, *Buried Past: How Far Should a University Go to Face its Slave Past?*, THE CHRON. HIGHER EDUC. (May 25, 2017), https://www.chronicle.com/article/buried-history/ [https://perma.cc/P85T-3PFU] (noting the stark contrast between the information UGA sought and followed from the state's archeology office regarding reburial of African-American remains and the strong feelings of local leaders in the university's African-American community who desired a significant and extended period of public discussion).

317. *Id.*

318. *Id.* The faculty report mentions the legal requirements and penalties for knowingly disturbing a grave or disinterring human remains without a permit but also claims that the "accidental" nature of UGA's discovery freed the university from the burden of acquiring these permits. *Id.*

community, took serious issue with the way UGA handled the unmarked graves, particularly after UGA belatedly admitted analysis revealing that most of the graves were African Americans, probably slaves.[319]

The controversy centered around the lack of a clear, deliberative, inclusive, public process about the human remains, what to do with them, and their place in the larger context of UGA's history with slavery—and around the fact that the remains were quietly reinterned in advance of a planned memorial service.[320] UGA's faculty largely supported further inquiry into what happened and eventually issued a report on the matter.[321] Further publicity led to the creation of a documentary film entitled *Below Baldwin* published on YouTube.[322] The UGA History Department and other university members who felt disenfranchised from the process have since published informational websites on UGA's relationship with slavery.[323] While UGA initially contended that it followed the appropriate steps—and some members of the university's and city's African-American community agree—UGA seems to have recognized that it could have created a more inclusive process for handling the matter and eventually appointed its own task force to look into the matter.[324]

Exactly what UGA, as well as UVA, could or should have done is not entirely clear. The fact that large, state public universities, with their diverse membership and interests, were unable to establish a process or tell a story that adequately addressed issues of equity and fairness—or included the communities that wanted to be part of the conversation—points to the difficulty of the issue. Similar dilemmas will undoubtedly be forced upon coastal, frontline communities and their cemeteries as sea

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319. *Id.*

320. Webpage about the Baldwin Hall Controversy, EHISTORY, https://slavery.ehistory.org/about [https://perma.cc/5ED5-ZZ9A] (last visited Sept. 3, 2022).

321. U. OF GA., REP. FROM THE AD HOC FAC. COMM. ON BALDWIN HALL TO THE FRANKLIN COLL. FAC. SENATE 4, 7, 10 (Apr. 17, 2019), https://www.franklin.uga.edu/sites/default/files/Faculty%20Senate%20ad%20hoc%20committee%20report%204-17-19.pdf [https://perma.cc/2NDB-JR5K] (noting the widely held community belief that Baldwin Hall was "built on the part of Old Athens Cemetery," "any time you have a historic cemetery, you almost always have graves outside the boundary," the lack of preliminary archeological review, and the "guiding principle" of those entrusted with the custody of human remains that the public should have their concerns addressed publicly and should hold some influence over decision-making).

322. Enlighten Media Prods., *Below Baldwin: How an Expansion Project Unearthed a University's Legacy of Slavery*, YOUTUBE (Oct. 9, 2020), https://www.youtube.com/watch?v=mwQcTfGqANQ [https://perma.cc/A4K7-VAR5].

323. *E.g.*, *African American Experience in Athens*, U. GA. LIBR., https://digihum.libs.uga.edu [https://perma.cc/9UZ3-WZL8] (last visited Sept. 3, 2022) ("[T]his site is a collaborative effort from community members and researchers from the University of Georgia from across the university examining the Black experience, an under-recorded history, in Athens and in the University from its founding to today.").

324. Parry, *supra* note 316.

levels rise. The lesson may be to plan ahead for difficult decision-making processes that need to be ably and fairly communicated to the public in a way that cedes power to participants designated by the affected communities while following the letter and spirit of the law.

VI. CONCLUSIONS AND NEXT STEPS: HOW TO PROTECT AND PRESERVE COASTAL CEMETERIES

Opportunities exist under current Georgia law to manage the threat of sea level rise by relocating at-risk coastal cemeteries. These opportunities, however, require community-based dialogue, financing, planning, expertise, and permits. Cemetery owners and advocates will need proof of ownership and control of the cemetery, expertise in the form of archaeologists and genealogists, comprehensive mitigation plans, and cost-covering measures. Owners and advocates must overcome the statutory presumption in favor of leaving the burial ground undisturbed by showing the county or court that relocation will preserve rather than destroy the cultural value of the cemetery.[325] A showing that failure to act will result in serious damage to or destruction of the cemetery—evidenced by changing land use already brought on by increased flooding, erosion, and storm surge of rising seas—may help.[326]

Understanding the human element of any proposed cemetery relocation effort is also crucial. Too often, abandoned or unidentified cemeteries have been the venue for a repetition of historical racial and tribal abuses. Advocates must go above and beyond what the law requires by opening the door to a significant and extended public discussion with descendants and community stakeholders about practical problems and spiritual concerns. This process would benefit from having court-appointed guardians or receivers to ensure the legal standing of the dead.[327] However, if courts, descendants, or community stakeholders resist relocation, one potential consequence could be the loss of cemeteries and human remains. Deciding who will be responsible for the costs of erosion and vandalism should be a part of any community decision not to relocate, since cemetery law may require these costs to be carried locally.[328] At some point, the costs may outweigh the benefits, and the best plan may be to leave the dead where they lay.

Lastly, descendants' legal rights to access relocated cemeteries need to be solidified. The cemetery easement has a winding history, and its application requires looking far into the future because cemetery issues most often arise generations after the dead are buried (or reburied). The

325. GA. CODE ANN. § 36-72-8 (West 2022); Hughes v. Cobb Cnty., 441 S.E.2d 406, 409 (Ga. 1994).

326. No such argument has been made in a Georgia court to date.

327. Shaffer, *supra* note 13, at 480.

328. GA. CODE ANN. § 36-72-14(b) (West 2022).

rights to the grave remain some of the most emotionally and spiritually tinged human rights, so the more that can be done to alleviate ambiguity in the law on how those rights can be exercised or transferred, the better. A statutory change or court order clarifying the right of descendants to access the graves of their ancestors in relocated locations could ease descendant concerns and help clarify the legal status of the cemetery easement in the future. As a practical matter, "the past never cooperates by staying in the past."[329]

329. Parry, *supra* note 316.

APPENDIX: OVERVIEW OF HISTORIC AND NATIVE AMERICAN CEMETERIES

While Georgia statutes and cases create a framework for negotiating cemetery licensing, abandonment, and relocation, there exists another set of rules and regulations governing two more cemetery designations, which may overlap with other statutory designations. A "historic designation"—meaning the cemetery is listed on the National Register of Historic Places (NR) or the State List of Historic Places—creates a series of benefits and hurdles that property owners must navigate, even if the owner retains the ability to use the property within state law.[330] The designation confers no absolute power to protect or rescue property from imminent destruction or damage.[331] Prehistoric, Native American burial sites may also be eligible for listing on national and state registers, but other requirements exist for such burial sites.[332] While this Appendix does not provide an in-depth analysis of historic registration rights and responsibilities or the intricacies of federal Indian law and tribal rights, certain key points are worth discussing in the context of cemetery protection and relocation in the event of damage or possible destruction brought on by rising seas.

A. *National Register of Historic Places*

The NR is a federal program administered by the National Park Service under the Department of the Interior.[333] A federal statute created the NR in 1966, and the Historic Preservation Division administers the program in Georgia.[334] Cemeteries hold a unique place in the NR listing because even if cemeteries have historic value, they may not be part of a "historic district" that meets NR criteria.[335] "National cemeteries," on the other hand, have been congressionally designated as nationally significant places of commemoration and burial, which means they meet the NR Criteria Considerations for cemeteries and graves that are less than fifty years old and qualify as "historic districts" on their own.[336]

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330. VAN VOORHIES, *supra* note 18, at 22–23.

331. *Id.*

332. *Id.*

333. *National Register of Historic Places*, NATIONAL PARK SERV., https://www.nps.gov/subjects/nationalregister/index.htm [https://perma.cc/ZY2N-K2RE] (last visited Sept. 3, 2022).

334. National Historic Preservation Act, 16 U.S.C. § 470; VAN VOORHIES, *supra* note 18.

335. ELIZABETH WALTON POTTER & BETH M. BOLAND, NATIONAL REGISTER BULLETIN 41: GUIDELINES FOR EVALUATING AND REGISTERING CEMETERIES AND BURIAL PLACES 15–16 (1992).

336. NAT'L PARK SERV., NATIONAL REGISTER ELIGIBILITY OF NATIONAL CEMETERIES – A CLARIFICATION OF POLICY (Sept. 8, 2011), https://www.nps.gov/subjects/nationalregister/upload/Final_Eligibility_of_VA_cemeteries_A_Clarification_of_Policy_rev.pdf [https://perma.cc/3YV3-KPCW].

Ordinarily, "cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past fifty years" are not considered eligible for the NR.[337] Certain exceptions apply, however, if cemeteries are already "integral parts" of historic districts.[338] These exceptions include: (1) religious properties that derive their "primary significance from architectural or artistic distinction or historical importance"; (2) a building or structure removed from its original location but is primarily significant for architectural value or is the surviving structure most importantly associated with a historic person or event; (3) a birthplace or grave of a historical figure of outstanding importance; (4) a cemetery that derives its "primary importance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events"; (5) a reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan and when no other building or structure with the same association has survived; (6) a property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; (7) a property achieving significance within the past fifty years if it is of exceptional importance.[339]

While these exceptions may not often include small family cemeteries or church cemeteries without a surviving church building, larger city or municipal cemeteries—such as Oakland Cemetery in Atlanta, Georgia, or Laurel Hill Cemetery in Savannah, Georgia—have each fell within an exception, as have a number of church cemeteries with adjoining and surviving historic church buildings.[340] Notably, structures that are removed could potentially be given an exception and listed on the NR if they are "importantly associated with a historic person or event"[341]—at least creating the possibility that coastal cemeteries relocated under the proper permitting procedures could obtain a listing that might help with funding or preservation when such cemeteries face erosion, flooding, or storm surge.

337. NAT'L PARK SERV., NATIONAL REGISTER CRITERIA CONSIDERATIONS: IMPLICATIONS FOR FEDERAL PRESERVATION OFFICERS 1 (Nov. 2008), https://www.nps.gov/fpi/Documents/NR%20Criteria%20Considerations.pdf [https://perma.cc/SA94-WJBK].

338. *Id.*

339. *Id.*

340. VAN VOORHIES, *supra* note 18, at 22–23.

341. NAT'L PARK SERV., *supra* note 337.

B. *Georgia List of Historic Places*

While the NR involves federal law on historic properties, state law also plays a parallel role. In 2020, Georgia amended its historic preservation law to transfer the Historic Preservation Commission out of the Department of Natural Resources and into the Department of Community Affairs (DCA).[342] The law empowers the DCA to coordinate with the federal government on its listings as well as maintain its own inventory and register of historic places, along with any plans, programs, project, or recommendations it chooses.[343] The law recognizes the Georgia List of Historic Places, which includes any listings on the NR, as well as any historic properties that meet the DCA's criteria.[344] The DCA also adopted substantive regulations in August 2020 that further define the criteria, application and grant procedures, and relationship between the national and state registers.[345]

C. *Native American Cemeteries*

Another exception to the historical listing rule exists for "prehistoric burial sites" if they likely contain information "important in prehistory or history."[346] The possibility of historical listing aside, a Georgia statute requires contacting the Georgia Council on American Indian Concerns (CAIC) if the genealogist of anyone seeking a permit to disinter and relocate human remains knows or believes that any of the human remains belong to individuals of aboriginal or American Indian descent.[347] The statute intends to protect Indian graves and burial objects from accidental and intentional desecration and facilitate the return of Indian remains and burial objects from Georgia museums whose collections are not subject to federal law.[348] The CAIC is the only state entity specifically authorized to address the concerns of the Native American population in Georgia.[349]

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342. GA. CODE ANN. § 12-3-50.1 (West 2022).

343. *Id.*

344. *Id.* § 12-3-50.2.

345. GA. COMP. R. & REGS. § 110-37-2-.01 (West 2022).

346. VAN VOORHIES, *supra* note 18, at 23.

347. GA. CODE ANN. § 36-72-5(4) (West 2022). For more information on the Council on American Indian concerns, *see* GA. CODE ANN. §§ 44-12-280(b)–(d) (West 2022) (establishing the Council and enumerating powers and duties). *See generally* GA. COUNCIL ON AM. INDIAN CONCERNS, https://georgiaindiancouncil.com [https://perma.cc/A6AN-C5VB] (last visited Sept. 3, 2022).

348. GA. CODE ANN. § 44-12-283 (West 2022). For an overview of federal law related to American Indian concerns, *see* SARAH BRONIN & RYAN ROWBERRY, HISTORIC PRESERVATION IN A NUTSHELL 373–409 (2d ed. 2018) (providing key terms and federal statutory analysis and explaining repatriation and consultation issues); *see also* Karinshack, *supra* note 313 (detailing the origins and complexities of Native American property rights).

349. GA. CODE ANN. § 44-12-283 (West 2022).