

PROTECTING HALLOWED GROUND: OWNERSHIP AND MAINTENANCE OF HISTORICALLY BLACK CEMETERIES IN PENNSYLVANIA

By Daniel Stern © December 2022

INTRODUCTION

Those who wish to undertake the hard work of locating and restoring cemeteries often face serious legal and practical questions. This is true for all cemeteries, but it is particularly true for historically Black cemeteries, because their origins can be murky, their founding organizations defunct, their title to the land either non-existent or unclear in the records, their claim of ownership disputed in whole or in part, or their use disputed by their neighbors, who may block access, claim easements (a right to use part of the ground, typically for access to their own property).

They may lack a legally recognized organization, or the funds needed to establish their legal rights and to preserve their (and our American) heritage. Thus, those engaged in this work must begin by asking some fundamental questions:

1. Who owns the cemetery?
2. What are the legal boundaries of a cemetery property?
3. Who is “officially” in charge of the cemetery (association, church or others), or are they defunct or failing to carry out their responsibilities?
4. What laws protect cemeteries from development or destruction?
5. What laws protect historic cemeteries?
6. How can you establish ownership or control over a property?
7. Once ownership or control is established, how do you create an organization for cemetery stewardship?

A CASE STUDY: Midland Cemetery and the Friends of Midland

Many of the questions raised earlier were confronted in the effort to restore an abandoned, historic African-American cemetery located outside of Harrisburg in Dauphin County, Pennsylvania. What follows is an account of its successful effort to obtain legal control over a burial ground containing past and family members of the community, as well as United States Colored Troops, Buffalo Soldiers and all branches of the US Armed Forces.

No two cases are identical, but it is my hope that the lessons learned in the Midland case will help readers identify issues and potential solutions in dealing with their own cemeteries.

The legal filings in the case are a matter of public record, and they are attached.

Midland was established *circa* 1795 as the segregated cemetery for the “colored” in Dauphin County. The last burial occurred in or about 1986. The Friends of Midland (FOM) filed Articles of Incorporation under the Pennsylvania Non-Profit Corporation Law in June, 1993, “To rehabilitate and maintain the historical cemetery known as Midland Cemetery.”

Fortunately, the answer to the first question – who owns it? – was known.

Unfortunately, it was not the Friends of Midland. The same was true of question #3 – the “official” organization in charge was known – and it was not FOM.

Legal title, i.e., ownership was established by a recorded deed filed in 1935. That deed gave ownership to a non-profit corporation called the Midland Cemetery Association, incorporated the previous year, 1934, for the purposes of “properly maintaining, improving, keeping in repair and enlarging the original cemetery ... as well as the purchasing of additional land... .”

In short, the FOM were faced with question #3 – proving that the original manager, MCA, was defunct – and that FOM should take their place, as both owner and manager.

We (FOM) made no effort to get a new deed to the property, or to divest the original group, MCA, of its legal title. The reason for this was that it is very hard under the law to “undo” a legally executed and recorded deed. For example, if your ancestor, even centuries ago, owned a piece of land, and did nothing to it – no building, farming, etc., never talked about it, or created co-ownership with a relative, ownership would survive and pass down through inheritance, with or without a will, to his or her heirs, theoretically forever (absent a forfeiture, tax sale, foreclosure or condemnation, or other events whereby people can lose their property rights). The point is that mere inactivity by the owners does not cause them to lose their ownership rights. Therefore, Midland decided to ask the Court to declare that FOM should simply be substituted for MCA – to transfer all the legal rights to the Cemetery that MCA had to FOM.

Notably, *before* the FOM incorporated as a non-profit, volunteers had begun the restoration of the cemetery, and they continued to work at the cemetery for 27 years before they obtained any clear legal right to do so. This is not surprising, because no one objected – no landowner, no local or state government. The question of ownership or control simply never came up, so the volunteers did their good work and were left alone. But it is perilous to proceed without a clear legal right, for many reasons. Any challenge to FOM’s right of access might have been successful; and without a Court order recognizing the rights of the FOM, it could not apply for grants, nor defend the cemetery against encroachments, or initiate or defend against legal actions related to the cemetery.

How was the Court persuaded to grant the transfer of control to FOM?

FOM was able to assemble a powerful documentary record of its efforts, in the decades before it went to Court, on behalf of Midland. Its work, and that of Barbara Barksdale, was recognized during those decades by, among others, the Pennsylvania Historic and Museum Commission (a state agency); by Swatara Township, in which Midland is located; and in favorable press reports.

Additionally, a request was made to the State Attorney General’s office, which has

supervisory authority over the management of Charitable Trusts and Organizations (including cemetery associations), and it issued a letter stating it had no objection to transfer of legal rights from MCA to FOM.

The Court did not conduct a trial – its Order was based upon the documents presented. This illustrates the importance of making and presenting a clear, documented record of the work done by FOM, proving its voluntary assumption of all the duties that should have been, but were not, performed by MCA. That record was sufficiently persuasive to allow the Court to grant FOM’s request to be declared the legal successor to the defunct MCA. This is how FOM answered questions #1 (ownership), #3 (who’s in charge) and #6 (obtaining control).

REMAINING QUESTIONS

The Midland case did not have to find ownership or resolve boundary issues. What if you do?

Ownership of land is usually obtained and evidenced by a written deed. Deeds are customarily recorded in the county recorder of deeds office, which is open to the public and is searchable there, and increasingly, on-line. It is certainly possible that no deed exists regarding your cemetery. Early African-American cemeteries may have been created without any of the legal procedures we now take for granted, such as formally recognizing a transfer of ownership in a written deed that is recorded in a public courthouse.

How do you find the deed? You need to know the name of either the “grantor” (the person or entity that sold or transferred ownership) or the “grantee” (the recipient). What if you don’t know either name? If a deed cannot be located in the county Recorder of Deeds office, sometimes a search of the county Tax office may help. A tax map will provide the parcel number and identify adjoining properties. If faced with a situation in which you cannot locate the deed to the cemetery, the best course may be to hire a title company or “title searcher” who is skilled at examining and cross referencing different recorded documents to identify ownership.

Boundary issues can sometimes be resolved by reference to the deeds to your cemetery and to the properties which adjoin or border the cemetery. Well drawn deeds contain point to point descriptions of a property's borders. But sometimes the descriptions are unclear (e.g., proceed 50' to a rock – what rock?). In the absence of clear boundaries, or a disagreement as to the boundary, the best practice is to hire a certified surveyor who, based upon visual inspection and review of the recorded deeds surrounding the disputed property line, can offer an opinion as to the proper boundary location. If there remains a disagreement, even after you have a survey, the adverse party may hire its own surveyor, who may have a different opinion. At that point, without an agreement between the opposing parties, it becomes a matter for the courts. These cases, involving the hiring of experts and lawyers cost money which can make their prosecution or defense difficult for many cemetery owners or corporations (profit and non-profit).

Cemeteries without clear title face both legal and non-legal, **management** related issues. This is why issue of ownership is paramount. What can you do when the cemetery is privately owned, and the owner denies access, not just to caretakers, but to visitors? That situation exists for a cemetery in Cumberland County, where access is essentially a matter of grace from the owner, a farmer. The law is fairly clear that individual grave “owners” of a burial plot have a legally enforceable easement (a right to enter or use for limited purposes), but proof of ownership of your plot may not exist.

There can be vexatious problems of management, even where ownership is not disputed. What happens when the entity responsible for maintenance fails to do its job, or worse, interferes with volunteers who are helping. There, one must examine the charter of the corporation or association in charge. Is it following its own bylaws and mission? If not, you have two choices: (i) try to influence the existing Board of the error of its ways; or (ii) seek legal help with a view of getting a county court in Pennsylvania to force compliance. Charters, (Articles of Incorporation) are public records and can be searched for free, in Pennsylvania at least, at the website of the Pennsylvania Department of State, <https://www.dos.pa.gov>. If you cannot locate an entity responsible for care and maintenance of your cemetery, then look to either the government, for example, the state Attorney General, or the courts, for relief.

To avoid the cost and uncertainty of litigation, it is always best to try to resolve disagreements through negotiation, or if necessary, by locating a government agency responsible for enforcing the delinquent cemetery association's legal obligations. In Midland's case, the PA Attorney General's office was cooperative and sympathetic, but would not on its own file the Petition which ultimately resulted in the transfer of legal authority from the defunct non-profit, MCA, to the active FOM.

ATTACHMENTS & REFERENCES

1. Copy of Complaint filed in Dauphin Co., PA, “In re Midland Cemetery” (Redacted to omit attorney address and telephone number, and to omit Exhibits referenced in the Complaint, and for clarity) & ORDER (pdf)

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

In re: Midland Cemetery : CIVIL ACTION – LAW
: NO. 2020-CV-7786 (FILED 08/10/2020)
: ACTION FOR DECLARATORY JUDGMENT

COMPLAINT

1. This action is brought under the Declaratory Judgments Act, 42 Pa.C.S. SS7531 to 7541, on behalf of a Pennsylvania Nonprofit Corporation known as the Friends of Midland, ("FOM") with offices at 503 S. 2nd St., Steelton, PA 171 13, acting by and through its incorporator and President. Barbara Barksdale. There is no party in opposition to the relief requested herein, and accordingly no entity is named as a Defendant, nor is a Notice to Defend attached hereto.

2. FOM filed articles of incorporation with the Pennsylvania Department of State on June 17, 1993, under the Nonprofit Corporation Law of 1988, for the purpose of rehabilitating and maintaining the historical cemetery known as Midland Cemetery ("Midland"). In 1995, the IRS recognized FOM as tax-exempt under IRC 5501 (c) (3). A copy of FOM's Articles of Incorporation is attached hereto and marked as Exhibit I .

3. Midland was established circa 1795 as the segregated cemetery for the "colored" in Dauphin County. The cemetery holds the remains of Ministers, enslaved persons, educators, businessmen, women and children and those who served in the United States Colored Troops, Buffalo Soldiers and all branches of the United States Armed Forces. The last burial at Midland occurred in or about 1986.

4. In 1934, under the then existing Nonprofit Corporation Law, the Midland Cemetery Association ("MCA") registered its name with the Secretary of the Commonwealth for the purposes of "properly maintaining, improving, keeping in repair and enlarging the original cemetery as well as the purchasing of additional land... ." (Application for Registration of a Name, filed November 1, 1934). MCA obtained ownership over Midland Cemetery by virtue of a deed dated March 30, 1935 and recorded in Dauphin Co. Book R-23-222 et seq., wherein Ruth E. Alleman, unmarried grantor, granted and conveyed the premises known as Midland Cemetery to MCA. A copy of the deed is attached hereto and marked as Exhibit 2.

5. Since the mid-1980s, or earlier, the MCA ceased to function and the cemetery fell into serious disrepair. To address the need to restore, rehabilitate and maintain it, the FOM was incorporated as stated above. Since on and before the date of incorporation, Ms. Barksdale, and subsequently the FOM board, and community volunteers, aided by local and state officials, have rehabilitated and maintained the cemetery on a volunteer basis, and they continue to do so. The work of the FOM has been recognized by, among others, the Pennsylvania Historical and Museum Commission (see nomination letter for "stewardship award" date January 10, 1996, attached hereto as Exhibit 3) and representatives of state and county government, as well as various dignitaries who attend an annual Memorial Day celebration to pay respect to the veterans and others

buried there. In short, the FOM perform, and have been performing for more than 25 years, the duties and responsibilities that technically remain the duty of the non-functioning MCA.

6. On information and belief, there are no remaining officers, board members, or individuals of any kind available to discharge the duties of the MCA, nor is there an office, telephone number, registered agent, or any entity to speak or act on its behalf, nor are there any judgments, liens or encumbrances against MCA. MCA filed an Application for Registration of Name for a Nonprofit Corporation on November 1, 1934. As of June 16, 2016, when counsel for FOM examined the records, that is the only document on file with the Commonwealth's Department of State. Attached hereto as Exhibit 4 is a certified copy of the index and docket report for MCA. As set forth below in 118, since at least 1995 Barbara Barksdale and the FOM have been recognized by Swatara Township as the sole caretakers of Midland, because, in the words of former Swatara Tp. Commissioner Bruce Eshenaur in an interview with the Harrisburg Patriot in the 1990's, "The township tried to trace ownership and went back as far as 1960 to the Midland Association. But they were mostly elderly people who have since passed on." See, copy of article from the Patriot [last digit of date in the 1990s illegible], attached hereto as Exhibit 5.

7. The office of the Attorney General of Pennsylvania, as *parens patriae* has standing in matters involving fundamental change transactions affecting charitable nonprofit entities such as those named herein. The Attorney General has reviewed the proposed transaction and the relief requested herein and does not object. Attached to this Complaint as Exhibit 6 is a letter from the office of the Attorney General indicating its lack of objection to the requested declaratory judgment.

8. The only other governmental body with standing to address this matter is Swatara Township (the township) in which Midland is situated. On June 14th, 1995, the township through its then president issued a Proclamation publicly recognizing and commending Barbara Barksdale, "for her efforts to restore the Midland Cemetery" a "neglected, but historic, site." A copy of the Proclamation is attached as Exhibit 7.

Attached hereto as Exhibit 8 is a copy of a letter dated July 6, 2010, from the Director of Codes Enforcement for the township to FOM notifying it that the township assigned the street address of 206 Kelker St. to Midland Cemetery, at the request of FOM.

Attached hereto as Exhibit 9 is a copy of the township's resolution, R-2020-14, adopted March 11, 2020, in support of the declaratory relief requested herein.

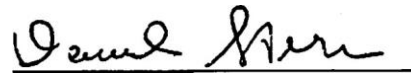
9. The Dauphin County Office of Veteran's Affairs has recognized Barbara Barksdale as the party responsible for the continued maintenance of Midland. See letter dated December 8, 2016 addressed to her [albeit containing the name of MCA in the caption], a copy of which is attached as Exhibit 10, explaining that office's inability to provide funds for maintenance of the veterans' graves contained in the cemetery.

10. The relief requested is needed to allow the FOM to continue to maintain, rehabilitate and expand (if appropriate) the cemetery, in accordance with the stated purposes of the original incorporators and the FOM. Without such express legal authority, notwithstanding more than a quarter century of volunteer effort, the FOM have been unable to, among other things, apply for grants which would help defray the costs of maintenance; to enter into binding agreements with neighboring property holders; and to protect the historic boundaries from encroachments.

Wherefore, Plaintiff prays:

- 1 . For a judgment declaring and adjudicating the FOM to be the legal successor to the MCA, with all of the legal rights, privileges and duties attendant thereto, including, without limitation, all rights of ownership, possession and control previously vested in the MCA by virtue of the deed dated March 30, 1935, and recorded in Dauphin Co. Book R-23-222 et seq., wherein Ruth E. Alleman, unmarried grantor, granted and conveyed the premises known as Midland Cemetery to MCA; as well as all other rights and privileges that may have been conveyed, transferred or assigned to or accepted by MCA from any person or entity, whether public or private.
2. Providing that such judgment be recorded in the office in and for the recording of deeds for Dauphin County, Pennsylvania, in addition to the civil judgment index and such other places where official actions of the courts of Dauphin County may be recorded.
3. For such further relief as to the Court may seem proper.

Respectfully submitted,



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Order signed by J.
John Joseph McNally

2. Pennsylvania Laws Regarding Burial Practices and Cemeteries: (the following document in the link was created in August, 2015, and has not been updated)

<http://www.phmc.state.pa.us/portal/communities/cemetery-preservation/laws/pennsylvania-laws.html>.

See also Act 64 of 2017, Burial Grounds, which provides specifically for reasonable access for visitation to burial grounds, including those in private cemeteries (section 703):

<https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2017&sessInd=0&act=64>

3. Rights of Owners of Cemetery Lots

Source: **14 Am. Jur. 2d Cemeteries § 28, 38-39**

The purchase of a lot in a cemetery, although under a deed absolute in form and containing words of inheritance, is regarded as conveying only a privilege, easement, or license to make interments in the lot purchased, exclusively of others, so long as the lot remains a cemetery, the fee remaining in the grantor subject to the grantee's right to the exclusive use of the lot for burial purposes. *Pitcairn v. Homewood Cemetery*, 229 Pa. 18, 77 A. 1105 (1910); *Craig v. First Presbyterian Church of Pittsburgh*, 88 Pa. 42 (1878); *Kincaid's Appeal*, 66 Pa. 411 (1870); *Walter v. Baldwin*, 126 Pa.Super. 589, 193 A. 146 (1937); *Cedar Hill Cemetery Company v. Lees*, 22 Pa.Super. 405 (1903); 14 C.J.S. *Cemeteries* s 25, and is subject to the police powers of the state.

Petition of First Trinity Evangelical Lutheran Church in City of Pittsburgh, 214 Pa. Super. 185, 192–93, 251 A.2d 685, 689 (1969)

The universality and intensity of the feeling which requires of the living, some effort to assuage the pangs caused by final separation from loved ones, by visiting their last resting places and attempting to keep them free from the ravages of time, were beautifully portrayed by an eminent jurist many years ago in the following language: “Among all tribes and nations, savages and civilized, the resting places

of the dead are regarded as sacred. There memory loves to linger and plant the choicest flowers; there the sorrowing heart renews the past, rekindles into life the viewless forms of the dead, revives the scenes where once they moved and recalls the happy hours of love and friendship. There parent and child, husband and wife, relatives and friends, with broken spirits and crushed hopes, revisit often the spot where they deposited their dead. Who does not feel the fountains of his heart broken up and the warm gushings of emotion when standing over the green sod which covers the departed?"

Benson v. Laurel Hill Cemetery Co., 68 Pa. Super. 242, 246 (1917)

Alleged owners of gravesites acquired an easement, license, or privilege to use gravesites in a family plot where the owners followed many years of custom and usage by creating the family plot by placing markers around the plot area.¹⁰ Even though the purchaser of a cemetery lot may not acquire the fee simple title to the property, the purchaser has a property right in the lot which the law recognizes and protects by appropriate remedies from invasion, whether it is by a mere trespasser or by the corporation itself.¹¹ The purchaser acquires an exclusive right to make interments in the lot,¹² and a right to the use of public areas of the cemetery for the purpose of obtaining access to the lot.¹³ One who is permitted to bury the dead in a public cemetery by the express or implied consent of those in control of it acquires such a possession in the spot of ground in which the bodies are buried as will entitle such person to an action against the owners of the fee or strangers who without the person's consent negligently or wantonly disturb it, and this right of possession will continue as long as the cemetery continues to be used.¹⁴ Individuals who have ancestors buried in a cemetery have a property right in the parcel of land that the cemetery occupies within a farm and, while this right is only in the form of an easement, it is a protectable right.¹⁵

A formal deed is not necessary to confer an exclusive right to use a cemetery lot, and an easement can be acquired by adverse possession, provided that the prescriptive holders use the cemetery lot exclusively, continuously, and uninterruptedly, with the actual or presumptive knowledge of the owner.¹⁶

Frequently, when a lot is purchased from a cemetery association or corporation, the rights of the purchaser are expressed or deemed to be subject to the charter and the

rules and regulations or bylaws of the company.¹⁷ The rules and regulations adopted, however, by the cemetery proprietor must be uniform and reasonable,¹⁸ and a person's agreement to be bound by the rules and regulations is ineffectual if such regulations are unreasonable.¹⁹

A statute limiting cemetery lots to use of sepulture is a valid exercise of police power.²⁰

14 Am. Jur. 2d Cemeteries § 28

Footnotes omitted

§ 38. Right to visit graves, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Cemeteries🔑

When one has acquired an exclusive right of sepulture in a cemetery lot, that right includes the right to visit, keep, and attend the graves of those interred therein, under such reasonable rules as to the character of the work and the manner in which it must be done as may be prescribed by the cemetery company or proprietor.¹ A cemetery is a place not only for the burial of the dead but also for an expression of love and respect by the living for the dead; hence, a purchaser of a burial lot and those who succeed to the purchaser's rights must be accorded the right to visit, maintain, and decorate the graves of persons interred therein,² though the regulations of a cemetery may limit the right to decorate graves.³ Moreover, the right to visit and decorate a grave is not confined to the owner of the cemetery lot but extends to other relatives of the deceased as well.⁴ After burial, the relatives of the deceased acquire certain rights that permit them to go to the grave of the deceased and give it attention, care for it, and beautify it.⁵ Whether the right of an heir to visit a cemetery is considered an easement, a license, or a privilege, it cannot be extinguished by a subservient fee owner through a conveyance to another;⁶ this right is a real right, not a servitude or usufruct, but an implied contractual relationship that binds the owner irrevocably.⁷ An easement or other right of access for ingress or egress to a private cemetery where a relative is buried is governed by the common-law principles of easements.⁸ However, a statute granting relatives and descendants of any person buried in a cemetery an easement for ingress and egress for purposes of visiting and maintaining a cemetery has been held not to create an interest in real property; it creates nothing more than a

personal privilege, exercisable in the future if (1) a relative or descendant of a person buried in the cemetery comes forward, and (2) such person seeks to visit the cemetery.⁹

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14 Am. Jur. 2d Cemeteries § 38

§ 39. Access to cemetery and lots

Topic Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Cemeteries🔑
15
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17

Persons entitled to visit, protect, and beautify graves must be accorded ingress and egress from the public highway next or nearest to the cemetery, at seasonable times and in a reasonable manner.

¹ Some state statutes provide for access to another's private property for purposes of discovering, restoring, maintaining, or visiting a grave.² Moreover, avenues and alleyways within a cemetery which have been dedicated for use by persons interested in the lots and by the public generally, must be kept open.³ A lot owner, at least, has the right to the free and unobstructed use of the alleys and driveways of the cemetery for the purpose of obtaining access to the lot,⁴ and the cemetery association may not grant easements in such alleys and driveways or subject the lot owners to the preferred rights of others; however, in some jurisdictions, statutes permit cemetery associations, under certain prescribed conditions, to vacate thoroughfares and convert their areas into cemetery lots.⁵

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14 Am. Jur. 2d Cemeteries § 39

Footnotes [Omitted]