

# Oh Bury Me (Not) On The Lone Prairie

## **Establishing Family Cemeteries on Texas Farms and Ranches**

BY DOUG JORDAN

n the cowboy folk song "The Dying Cowboy" (also known as "The Cowboy's Lament") sung by the likes of Roy Rogers, Tex Ritter, and Johnny Cash, the following verse appears:

Oh bury me not on the lone prairie, Where the coyotes howl and the wind blows free, In a narrow grave just six by three, Oh bury me not on the lone prairie.



However forlorn this kind of interment may seem to some, a spot on the family farm or ranch might be considered by some Texans as the perfect final resting place. But before Grandpa can be buried near his favorite fishing hole on the Home Place, several state and local regulations, as well as other factors, must be considered to avoid potential violations of law, including some that carry criminal penalties. The last thing anyone (especially Grandpa) wants is to be forced to have his remains exhumed and moved or for a well-intentioned surviving family member to be cited for a Class A misdemeanor over his dead body.

#### **Texas Statutes**

Chapters 711 through 715 of the Texas Health and Safety Code were enacted to provide direction for those concerned with the establishment and operation of cemeteries. The rules for family cemeteries, as opposed to cemeteries owned and operated by "cemetery organizations" (as defined in the statutes), are relatively easy to comply with, but are not to be ignored due to the potential penalties if violated. The following is a discussion of those sections of the Code that are related to establishing family cemeteries.

Section 711.001 — Definitions. This section of the Code provides the statutory meaning of 28 terms used throughout Chapter 711, General Provisions Relating to Cemeteries. These defined terms include:

- "Cemetery" is defined as "a place that is used or intended to be used for interment, and includes a graveyard, burial park, or mausoleum." (Emphasis added to other defined
- "Interment" is "the permanent disposition of remains by entombment, burial, or placement in a niche." The term "interment" is not to be confused with "inurnment," defined as "the placement of cremated remains in an urn."
- "Remains" means "either human remains or cremated remains," with those terms defined, respectively, as "the body of a decedent" and "the bone fragments remaining after the cremation process, which may include the residue of any foreign materials that were cremated with the human remains."

It is necessary to have a clear understanding of these somewhat morbid terms to correctly apply the regulations to the intention of the landowner. For instance, if Mr. and Mrs. Ewing want to set aside a few acres of South Fork for the family members and their pets to be buried under, or their cremated remains ceremonially spread or entombed upon (hopefully after their deaths due to natural causes), it is essential to have a working knowledge of the terminology and how to navigate the rules accordingly.

Sec. 711.003 — Records of Interment. This section establishes the requirement for a record to be maintained of all interments in a cemetery. The record must include:

- the date the remains are received;
- the date the remains are interred;
- the name and age of the person interred if those facts can be conveniently obtained; and
- the identity of the plot in which the remains are interred.

Sec. 711.008 — Location of Cemetery. This section sets minimum distance requirements outside municipal boundary lines for cemeteries to be established, based on the population of the nearest municipality. These distances range from 1 mile for small communities (populations of 5,000 to 25,000), to 5 miles for large cities (populations of at least 200,000). There are some interesting exceptions to the location rules that were undoubtedly granted for site-specific purposes and/or jurisdictions, but a general exception is allowed for cemeteries existing and operating prior to enactment of the rule (Sept. 1, 1989).

Sec. 711.012 — Rules. Here the Texas Funeral Service Commission is authorized to adopt rules, establish procedures, and proscribe forms to enforce and administer various sections of the chapter relating to non-perpetual care cemeteries as defined in Sec. 711.001. Family cemeteries are normally established as non-perpetual care cemeteries, thereby eliminating the need for establishing a trust fund for maintenance. The Texas Funeral



Service Commission's website (http://www.tfsc.state.tx.us) provides general information regarding family cemeteries with specific instructions on how to survey and record plats and certificates of declaration of dedication of the land with the local county clerk's office. (Note: It appears from a close reading of Sec. 711.034 that only cemetery organizations are required to dedicate land for cemetery purposes, but it is recommended that private family cemetery landowners follow suit and put the public on notice of the existence of a cemetery to prevent potentially unsuitable or prohibited development on adjacent property — see Sec. 714.002, Limitation on Location of Feed or Slaughter Pens Near Cemetery).

**Sec.** 711.041 — Access to Cemetery. The general public is granted ingress and egress rights to a family cemetery via routes designated by the landowner. Visits are to be allowed during reasonable hours and only for purposes usually associated with cemetery visits. These provisions logically exclude, but can't prevent, teenagers visiting at midnight on Halloween.

**Sec. 711.052** — **Criminal Penalties.** Failure or refusal to maintain the record of interments required by Sec. 711.003 is a Class A misdemeanor. Clearly, Texas is dead serious about cemetery recordkeeping.

Sec. 714.001 — Depth of Graves; Criminal Penalty. This section provides for minimum burial depths based on the type of container used to hold the decedent's body. If the container is made of impermeable material, the top surface must be at least 1.5 feet below the surface of the ground. If not made of impermeable material, the top surface of the container must be no less than 2 feet below ground level. These requirements may be relaxed by county ordinance or rule if subsurface soil conditions or other relevant conditions so dictate. This section does not apply to interment in a sealed surface reinforced concrete burial vault. A person commits a misdemeanor punishable by a fine of not less than \$100 or more than \$200 if the person buries the body of a decedent in violation of this section or in violation of an ordinance or rule adopted under this section.

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#### **Local Government Rules**

County governments and other quasi-governmental agencies (e.g., the Lower Colorado River Authority) have only limited authority to regulate land use and establish rules related to environmental or public safety matters. These may include flood plain management, drainage, or underground cabling. Before having a survey conducted, it would be prudent to contact the county environmental department, the county commissioner elected from the precinct where the proposed cemetery will be located, or the county judge to determine if any rules have been instituted with regard to family cemeteries. Likewise, contact the office of any other quasi-governmental agency with potential authority over use of the proposed property.

#### **Other Factors**

In addition to state and local laws, there are other factors that must be considered prior to the establishment of a cemetery on private land. These are related to real property and contract law specific to the land being considered.

First, an examination of the real property records of the subject land must be completed to determine if there are any deed restrictions prohibiting or limiting use of the land for cemetery purposes. A restriction of this type could have been included in a laundry list of restrictive covenants in a deed recorded decades ago and long forgotten, but still valid today. Restrictions may also be found in separately recorded instruments related to property located within rural subdivisions that exist throughout the state. These restrictions sometimes can be amended by a vote of the affected landowners or may terminate after a period of time under their own terms, but until such amendment or termination, they remain an encumbrance on the property.

In addition to deed restrictions, the real property records must also be examined to determine if there are public and private easements that may also affect the use of the subject land. Rural Texas is a spider's web of underground pipelines, overhead electric transmission lines, and buried telephone fiberoptic cables. These easement agreements normally restrict the use of the property within the easement area.

Another factor is whether the land to be converted to cemetery purposes is subject to a lien. If so, the deed of trust or other security agreement should be reviewed to determine if such a conversion would be in violation of the lien instrument. Lenders are wont to maintain certain loan-to-value ratios on their collateral and conversion of a significant portion of your property to cemetery use might well have a negative impact on its market value. Why? Unfortunately, not everyone may be as fond of your late relatives as you are.

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