

County and Municipal Cemeteries

Florida Association of County Attorneys¹

July 1, 2021

I. Cemetery Statutes

A. Chapter 497

1. Purpose.

a. The Legislature recognizes that purchasers of preneed burial rights, funeral or burial merchandise, or funeral or burial services may suffer serious economic harm if purchase money is not set aside for future use as intended by the purchaser and that the failure to maintain cemetery grounds properly may cause significant emotional stress. Therefore, it is necessary in the interest of the public welfare to regulate preneed sales and cemeteries in this state. However, restrictions shall be imposed only to the extent necessary to protect the public from significant or discernible harm or damage and not in a manner which will unreasonably affect the competitive market.

§ 497.002(1), Fla. Stat.

b. Subject to certain interests of society, the Legislature finds that every competent adult has the right to control the decisions relating to her or his own funeral arrangements.

§497.002(2), Fla. Stat.

2. The county and municipal cemetery exemption.

a. “The provisions of [Chapter 497] relating to cemeteries and all rules adopted pursuant thereto shall apply to all cemeteries except for...County and municipal cemeteries.”

§ 497.260(1)(b), Fla. Stat.

b. However, Florida Attorney General Robert A. Butterworth opined in 2000 that certain provisions of Chapter 497 are “...applicable to all cemeteries in Florida...”

Fla. Att’y Gen. Op. 2000-51 (2000).²

c. Codified exceptions to the public cemetery exemption: Section 497.276(1) as to burial records, and ss. 497.152(1)(d),

¹ Prepared by Thomas M. David, Assistant County Attorney, Charlotte County.

² Chapter 497 was amended in 2004 (effective October 1, 2005) to renumber the sections referenced in the AGO. This outline refers to the current numbering scheme.

497.164, 497.2765, 497.278, 497.280, and 497.284 apply to all cemeteries in this state.

§ 497.260(2), Fla. Stat.

3. Discrimination prohibited.

Refusing to sell or issue a contract or provide services to any person because of the person's race, color, creed, marital status, sex, or national origin..." (§ 497.152(1)(d), Fla. Stat.) constitutes "...conduct that is prohibited and that shall constitute grounds for denial of any application, imposition of discipline, or other enforcement action against the licensee **or other person committing such conduct.**"

§ 497.152, Fla. Stat. (emphasis added.)

NB: This statute could be interpreted to allow personal liability for a county or municipal employee.

4. Prohibition related to solicitation of goods or services.

a. The board³ is authorized to adopt rules regulating the solicitation of sales of burial rights, merchandise, or services by licensees.

§ 497.164(1), Fla. Stat.

b. The board shall regulate such solicitation to protect the public from solicitation which is intimidating, overreaching, fraudulent, or misleading; which utilizes undue influence; or which takes undue advantage of a person's ignorance or emotional vulnerability.

§ 497.164(2), Fla. Stat.

c. The board shall regulate any solicitation which comprises an uninvited invasion of personal privacy. It is the express finding of the Legislature that the public have a high expectation of privacy in their personal residences, and the department⁴ by rule shall restrict the hours or otherwise regulate such solicitation in the personal residence of a person unless the solicitation has been previously and expressly requested by the person solicited.

§ 497.164(3), Fla. Stat.

d. Nothing in this section shall be construed to restrict the right of a person to lawfully advertise, use direct mail, or otherwise

³ "Board" means the Board of Funeral, Cemetery, and Consumer Services. § 497.005(6), Fla. Stat.

⁴ "Department" means the Department of Financial Services. § 497.005(26), Fla. Stat.

communicate in a manner not within the definition of solicitation or to solicit the business of anyone responding to such communication or otherwise initiating discussion of goods and services being offered.

§ 497.164(4), Fla. Stat.

e. At-need solicitation of sales of burial rights, merchandise, or services is prohibited. No person may contact the family or next of kin of a deceased person to sell services or merchandise unless the person has been initially called or contacted by the family or next of kin of such person or persons and requested to provide services or merchandise.

§ 497.164(4), Fla. Stat.

5. Nondiscrimination provisions, unless excepted, apply to all cemeteries in Florida.

a. No cemetery company or other legal entity conducting or maintaining any public or private cemetery may deny burial space to any person because of race, creed, marital status, sex, national origin, or color.

§ 497.260(6)(a), Fla. Stat.

b. A cemetery company or other entity operating any cemetery may designate parts of cemeteries or burial grounds for the specific use of persons whose religious code requires isolation.

§ 497.260(6)(b), Fla. Stat.

c. Religious institution cemeteries may limit burials to members of the religious institution and their families.

§ 497.260(6)(c), Fla. Stat.

6. Restrictions on eminent domain with regard to cemeteries and on conditions for regulatory approval.

a. Except for road system, transportation corridor, or rights-of-way purposes, property dedicated for cemetery purposes and licensed under this part may not be taken by eminent domain if the area of property to be taken is 1 contiguous acre or greater in size, unless the taking entity determines in a public hearing that there are no reasonable alternatives except to use cemetery property for the project.

§ 497.270(6), Fla. Stat.

b. A governmental entity may not require the transfer of property dedicated for cemetery purposes and licensed pursuant to part II as a condition of obtaining regulatory approval under this chapter.

§ 497.270(7), Fla. Stat.

7. Cemetery records shall be kept.

A record shall be kept of every burial in the cemetery of a cemetery company, showing the date of burial and the name of the person buried, together with lot, plot, and space in which the burial was made. All financial records of the cemetery company shall be available at its principal place of business in this state and shall be readily available at all reasonable times for examination by the department.

§ 497.276(1), Fla. Stat.

8. Recording of purchase of burial rights applies to public cemeteries.

a. Any person purchasing a burial right, belowground crypt, grave space, mausoleum, columbarium, ossuary, or scattering garden for the interment, entombment, inurnment, or other disposition of human remains may, at the person's option, permanently record the purchase of the burial right, belowground crypt, grave space, mausoleum, columbarium, ossuary, or scattering garden with the clerk of the court in the county where the burial right, belowground crypt, grave space, mausoleum, columbarium, ossuary, or scattering garden is located. The recordation pursuant to this section is for the purpose of public notification and for the purpose of establishing a permanent record in the official records of the county; however, it does not create any priority of interest or ownership.

§ 497.2765(1), Fla. Stat.

b. The clerk of the court shall record the evidence of the purchase of a burial right, belowground crypt, grave space, mausoleum, columbarium, ossuary, or scattering garden presented to him or her for recording upon payment of the service charge as otherwise provided by law for the recording of the purchase documents in the official records.

§ 497.2765(2), Fla. Stat.

9. Regulations on monuments and installation fees in public cemeteries:

a. No cemetery company⁵ may charge a fee for the installation of a monument purchased or obtained from and to be installed by a person or firm other than the cemetery company or its agents.

§ 497.278(1), Fla. Stat.

b. To verify that a monument is installed on the proper grave in accordance with cemetery bylaws, rules, or regulations, the cemetery company shall mark the place on the grave where the marker or monument is to be installed and shall inspect the installation when completed. Nothing in this subsection is intended to imply or require that a cemetery company shall have to lay out or engineer a grave site or grave sites for the installation of a marker or monument.

§ 497.278(2), Fla. Stat.

c. A cemetery company may require any person or firm that delivers, installs, places, or sets a monument to show proof of liability insurance coverage and, if required by law, workers' compensation insurance coverage. However, a cemetery company may not set liability insurance coverage limits or require any person or firm to obtain any form of bond or surety, or make any form of pledge, deposit, or monetary guarantee, as a condition for entry on or access to cemetery property.

§ 497.278(3), Fla. Stat.

10. Tying arrangements prohibited.

a. Section 497.280, Fla. Stat. related to monuments and installation fees “prohibits tying arrangements, that is, the linking of the purchase of any grave space to the purchase of a monument.”

Fla. Att'y Gen. Op. 2000-51 (2000). Specifically, the section provides:

b. No person authorized to sell grave space may tie the purchase of any grave space to the purchase of a monument from or through the seller of any other designated person or corporation.

§ 497.280(1), Fla. Stat.

⁵ “Cemetery company” means any legal entity that owns or controls cemetery lands or property. § 497.005(14), Fla. Stat.

b. Noncemetery licensed persons and firms shall have the right to sell monuments and to perform or provide on cemetery property foundation, preparation, and installation services for monuments. However, a cemetery company or any other entity owning and operating a cemetery may establish reasonable rules regarding the style and size of a monument or its foundation, provided such rules are applicable to all monuments from whatever source obtained and are enforced uniformly as to all monuments. Such rules shall be conspicuously posted and readily accessible to inspection and copy by interested persons.

§ 497.280(2)(a), Fla. Stat.

c. No person who is authorized to sell grave space and no cemetery company or other entity owning and operating a cemetery may:

1. Require the payment of a setting or service charge, by whatever name known, from third party installers for the placement of a monument;
2. Refuse to provide care or maintenance for any portion of a gravesite on which a monument has been placed; or
3. Require waiver of liability with respect to damage caused by cemetery employees or agents to a monument after installation,

where the monument or installation service is not purchased from the person authorized to sell grave space or the cemetery company providing grave space or from or through any other person or corporation designated by the person authorized to sell grave space or the cemetery company providing grave space. No cemetery company may be held liable for the improper installation of a monument where the monument is not installed by the cemetery company or its agents.

§ 497.280(2)(b), Fla. Stat.

d. “No program offering free burial rights may be conditioned by any requirement to purchase additional burial rights, funeral merchandise, or services. Any program offering free burial rights shall comply with [section 817.415, Fla. Stat.⁶].”

⁶ A violation of the Florida Free Gift Advertising Law is a deceptive trade practice, is unlawful and may be enjoined by an action of the Commissioner of Agriculture or the Attorney General. § 817.415, Fla. Stat.

§ 497.280(3), Fla. Stat.

11. Abandoned cemeteries.

a. Notwithstanding any provision of law to the contrary, a county or municipality which has within its jurisdiction an abandoned cemetery or a cemetery that has not been reasonably maintained for a period in excess of 6 months may, upon notice to the department, take such action as is necessary and appropriate to provide for maintenance and security of the cemetery. The solicitation of private funds and the expenditure of public funds for the purposes enumerated in this subsection are hereby authorized, provided that no action taken by a county or municipality under this subsection shall establish an ongoing obligation or duty to provide continuous security or maintenance for any cemetery.

§ 497.284(1), Fla. Stat.

b. No county or municipality nor any person under the supervision or direction of the county or municipality, providing good faith assistance in securing or maintaining a cemetery under [§ 497.284(1), Fla. Stat.], may be subject to civil liabilities or penalties of any type for damages to property at the cemetery.

§ 497.284(2), Fla. Stat.

c. A county or municipality that has maintained or secured a cemetery pursuant to the provisions of [§ 497.284(1), Fla. Stat.] may maintain an action at law against the owner of the cemetery to recover an amount equal to the value of such maintenance or security.

§ 497.284(3), Fla. Stat.

12. Report of identification of exempt cemeteries.

a. All cemeteries in excess of 5 acres located in this state that are exempt from the provisions of this chapter shall be required to file a report of identification with the department and pay a \$25 fee. The department shall maintain such reports as public records. Such report of identification shall be refiled every 5 years pursuant to a schedule set by board rule. Solely for purposes of chapter 120, such report of identification shall be considered a license with the department.

§ 497.287(1), Fla. Stat.

b. The report shall be submitted on a form⁷ and pursuant to procedures specified by rule and shall list the name and address of the authorized agent who is responsible for conducting the business of the cemetery and to whom inquiries about the cemetery can be directed.

§ 497.287(2), Fla. Stat.

c. The department may institute proceedings in any appropriate court for injunctive relief to enforce this section. Upon issuance of an injunctive order, the court shall award the department its costs and attorney fees in the action.

§ 497.287(3), Fla. Stat.

B. Other Florida Statutes

1. Rule against perpetuities not applicable to dispositions of property for perpetual maintenance public cemeteries.

No disposition of property, or the income thereof, hereafter made for the maintenance or care of any public or private burying ground, churchyard, or other place for the burial of the dead, or any portion thereof, or grave therein, or monument or other erection in or about the same, shall fail by reason of such disposition having been made in perpetuity; but such disposition shall be held to be made for a charitable purpose or purposes.

§ 689.13, Fla. Stat.

NB: The [above statute exempts] funds or property set aside for the perpetual maintenance of cemeteries, cemetery lots, graves, and burial plots from invalidity under the rule against perpetuities.

Restatement (Second) of Property, Don. Trans. § 1.6 (1983)

2. Right of ingress and egress for visiting or maintenance.

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

⁷ Form DFS-EC-1 (<https://www.myfloridacfo.com/Division/funeralcemetery/Licensing/documents/DFS-EC-1.pdf>).

descendants shall have the right to maintain the cemetery.

§ 704.08, Fla. Stat.

3. Unlawful for any person to purchase any object used to commemorate a deceased person or placed in memory of a deceased person.

It shall be unlawful for any person to purchase any object used to commemorate a deceased person or placed in memory of a deceased person, or any part of such object, unless the same is sold by an authorized representative of the deceased person or of the cemetery in which such object was placed. Violation of this provision shall be a misdemeanor of the second degree, punishable as provided in [sections 775.082 or 775.083, Fla. Stat.].

§ 812.052, Fla. Stat.

4. Promises related to the sale of cemetery lots or mausoleum space.

a. It shall be unlawful for **any person**, firm or corporation, to sell, offer for sale, or advertise for sale, cemetery lots or mausoleum space, upon the guarantee, promise, representation or inducement to the purchaser that the same may be sold or repurchased at a financial profit.

§ 817.35(1), Fla. Stat.

b. Any violation of this section shall constitute a misdemeanor of the second degree, punishable as provided in [sections 775.082 or 775.083, Fla. Stat.].

§ 817.35(2), Fla. Stat. (emphasis added.)

NB: This statute could be interpreted to allow personal liability for a county or municipal employee.

5. Unlawful protests.

a. Terms defined:

(a) "Funeral or burial" means a service or ceremony offered or provided in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains or cremated human remains.

(b) "Funeral procession" has the same meaning as provided in section 316.1974, Fla. Stat.

(c) "Protest activities" means any action, including picketing, which is undertaken with the intent to interrupt or disturb a funeral or burial.

§ 871.015(1), Fla. Stat.

b. A person may not knowingly engage in protest activities or knowingly cause protest activities to occur within 500 feet of the property line of a residence, cemetery, funeral home, house of worship, or other location during or within 1 hour before or 1 hour after the conducting of a funeral or burial at that place. This subsection does not prohibit protest activities that occur adjacent to that portion of a funeral procession which extends beyond 500 feet of the property line of the location of the funeral or burial.

§ 871.015(2), Fla. Stat.

c. A person who violates this section commits a misdemeanor of the first degree, punishable as provided in [sections 775.082 or 775.083, Fla. Stat.].

§ 871.015(3), Fla. Stat.

6. Penalties and county commission procedures for injuring or removing a tomb or monument or disturbing the contents of grave or tomb.

a. A person commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if he or she:

(a) Willfully and knowingly destroys, mutilates, defaces, injures, or removes any tomb, monument, gravestone, burial mound, earthen or shell monument containing human skeletal remains or associated burial artifacts, or other structure or thing placed or designed for a memorial of the dead, or any fence, railing, curb, or other thing intended for the protection or ornamentation of any tomb, monument, gravestone, burial mound, earthen or shell monument containing human skeletal remains or associated burial artifacts, or other structure before mentioned, or for any enclosure for the burial of the dead; or

(b) Willfully destroys, mutilates, removes, cuts, breaks, or injures any tree, shrub, or plant placed or being within any such enclosure, except for a person performing routine maintenance and upkeep.

§ 872.02(1), Fla. Stat.

b. A person who willfully and knowingly excavates, exposes, moves, removes, or otherwise disturbs the contents of a grave or tomb commits a felony of the second degree, punishable as provided in [sections 775.082, 775.083, or 775.084, Fla. Stat.].⁸

§ 872.02(2), Fla. Stat.

c. For purposes of sentencing under chapter 921, a violation of this section, committed by a person in furtherance of a riot or an aggravated riot prohibited under s. 870.01 is ranked one level above the ranking under s. 921.0022 or s. 921.0023 for the offense committed.

§ 872.02(3), Fla. Stat.

d. This section does not apply to any person acting under the direction or authority of the Division of Historical Resources of the Department of State, **to cemeteries operating under chapter 497**, any cemeteries removing or relocating the contents of a grave or tomb as a response to a natural disaster, or to any person otherwise authorized by law to remove or disturb a tomb, monument, gravestone, burial mound, or similar structure, or its contents, as described in [section 872.02(1), Fla. Stat.].

§ 872.02(4), Fla. Stat. (emphasis added.)

e. For purposes of this section, the term “tomb” includes any mausoleum, columbarium, or belowground crypt.

§ 872.02(5), Fla. Stat.

f. Notwithstanding [sections 872.02(1) and 872.02(2), Fla. Stat.] **an owner, officer, employee, or agent of a cemetery exempt from regulation pursuant to s. 497.260** may relocate the contents of a grave or tomb:

(a) After receiving a written authorization from a legally authorized person as defined in s. 497.005(43); or

(b) After public notice is posted as required in this paragraph, if a legally authorized person cannot be located after conducting a reasonable search or after 75 years or more

⁸ Florida House Bill CS/HB 1 (2021) also known as the “anti-riot bill” amended section 872.02(2), Fla. Stat. by creating a new subsection (3): “For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a violation of this section, committed by a person in furtherance of a riot or an aggravated riot prohibited under s. 870.01 is ranked one level above the ranking under s. 921.0022 or s. 921.0023 for the offense committed.” See p. 35, CS/HB1. Governor Ron DeSantis signed the bill on April 19, 2021 and became law immediately.

have elapsed since the date of entombment, interment, or inurnment. The public notice must be published once a week for 4 consecutive weeks in a newspaper of general circulation in the county where the cemetery is located. The public notice must contain the name of the cemetery; the name, address, and telephone number of the cemetery representative with whom objections may be filed; the reason for relocation of the contents of the graves or tombs; the names of the human remains to be relocated; the approximate date of the initial entombment, interment, or inurnment; the proposed site of relocation; and the proposed date of relocation. The proposed date of relocation may not be less than 30 days from last date of publication. If no objection from a legally authorized person is received within 30 days from the last date of publication of the public notice, the cemetery may proceed with relocation.

§ 872.02(6), Fla. Stat. (emphasis added.)

g. If a legally authorized person refuses to sign a written authorization, as provided in [section 872.02(6)(a), Fla. Stat.], or if a legally authorized person objects, as provided in [section 872.02(6)(b), Fla. Stat.], ***a public hearing shall be held before the county commission of the county where the cemetery is located, or the city council, if the cemetery is located in a municipality, and the county commission or the city council shall have the authority to grant a request for relocation of the contents of such graves or tombs.***

§ 872.02(7), Fla. Stat. (emphasis added.)

7. Unmarked human burials.

a. Legislative intent. It is the intent of the Legislature that all human burials and human skeletal remains be accorded equal treatment and respect based upon common human dignity without reference to ethnic origin, cultural background, or religious affiliation. ***This section applies to all human burials, human skeletal remains, and associated burial artifacts not otherwise protected under chapter 497 or other state law and found upon or within any public or private land in the state, including submerged lands.***

§ 872.05(1), Fla. Stat. (emphasis added.)

b. Terms defined:

(a) "Archaeologist" means a person who is registered by the Society of Professional Archaeologists with an emphasis in field research or who, in the judgment of the State Archaeologist, meets the training and experience requirements necessary for such registration.

(b) "District medical examiner" means a person appointed under [sections. 406.06, 406.15, or 406.17, Fla. Stat.].

(c) "Division" means the Division of Historical Resources of the Department of State.

(d) "Human skeletal analyst" means a person who possesses a postgraduate degree in human skeletal biology, human forensic osteology, or other related area of physical anthropology and who has a minimum of 1 year of laboratory experience in human skeletal analysis and reconstruction.

(e) "State Archaeologist" means the person employed by the division pursuant to [section 267.031(7), Fla. Stat].

(f) "Unmarked human burial" means any human skeletal remains or associated burial artifacts or ***any location, including any burial mound or earthen or shell monument, where human skeletal remains or associated burial artifacts are discovered or believed to exist on the basis of archaeological or historical evidence, excluding any burial marked or previously marked by a tomb, monument, gravestone, or other structure or thing placed or designed as a memorial of the dead.***

§ 872.05(2), Fla. Stat. (emphasis added.)

c. Notification.

(a) ***Any person who knows or has reason to know*** that an unmarked human burial is being unlawfully disturbed, destroyed, defaced, mutilated, removed, excavated, or exposed shall immediately notify the local law enforcement agency with jurisdiction in the area where the unmarked human burial is located.

(b) Any law enforcement agency that finds evidence that an unmarked human burial has been unlawfully disturbed shall notify the district medical examiner pursuant to [section 872.05(4), Fla. Stat.].

§ 872.05(3), Fla. Stat. (emphasis added.)

d. Discovery of an unmarked human burial other than during an archaeological excavation. ***When an unmarked human burial is discovered other than during an archaeological excavation authorized by the state or an educational institution, all activity that may disturb the unmarked human burial shall cease immediately, and the district medical examiner shall be notified.*** Such activity shall not resume unless specifically authorized by the district medical examiner or the State Archaeologist.

(a) If the district medical examiner finds that the unmarked human burial may be involved in a legal investigation or represents the burial of an individual who has been dead less than 75 years, the district medical examiner shall assume jurisdiction over and responsibility for such unmarked human burial, and no other provisions of this section shall apply. The district medical examiner shall have 30 days after notification of the unmarked human burial to determine if he or she shall maintain jurisdiction or refer the matter to the State Archaeologist.

(b) If the district medical examiner finds that the unmarked human burial is not involved in a legal investigation and represents the burial of an individual who has been dead 75 years or more, he or she shall notify the State Archaeologist, and the division may assume jurisdiction over and responsibility for the unmarked human burial pursuant to [section 872.05(6), Fla. Stat.].

(c) When the division assumes jurisdiction over an unmarked human burial, the State Archaeologist shall consult a human skeletal analyst who shall report within 15 days as to the cultural and biological characteristics of the human skeletal remains and where such burial or remains should be held prior to a final disposition.

§ 872.05(4), Fla. Stat. (emphasis added.)

e. Discovery of an unmarked human burial during an archaeological excavation.

(a) When an unmarked human burial is discovered as a result of an archaeological excavation and the archaeologist finds that the unmarked human burial represents the burial of an individual who has been dead less than 75 years, the archaeologist shall notify the district medical examiner, and all activity that may disturb the unmarked human burial shall

cease until the district medical examiner authorizes work to resume.

(b) If such unmarked human burial represents the burial of an individual who has been dead 75 years or more, archaeological activities may not resume until the State Archaeologist has been notified of the unmarked human burial.

(c) Within 15 days after the discovery of an unmarked human burial, the archaeologist conducting the excavation shall report to the State Archaeologist his or her opinion regarding the cultural and biological characteristics of the unmarked human burial and where human skeletal remains and associated burial artifacts should be held prior to a final disposition. The division may assume jurisdiction over and responsibility for the unmarked human burial pursuant to [section 872.05(6), Fla. Stat.].

§ 872.05(5), Fla. Stat.

f. Jurisdiction; duties of the state archaeologist. The division may assume jurisdiction over and responsibility for an unmarked human burial in order to initiate efforts for the proper protection of the burial and the human skeletal remains and associated burial artifacts. Whenever the division assumes jurisdiction over and responsibility for an unmarked human burial, the State Archaeologist shall:

(a) Determine whether the unmarked human burial is historically, archaeologically, or scientifically significant. If the burial is deemed significant, reinterment may not occur until the remains have been examined by a human skeletal analyst designated by the State Archaeologist.

(b) Make reasonable efforts to identify and locate persons who can establish direct kinship, tribal, community, or ethnic relationships with the individual or individuals whose remains constitute the unmarked human burial. If possible, the State Archaeologist shall consult with the closest related family member or recognized community leaders, if a community or ethnic relationship is established, in determining the proper disposition of the remains found in the unmarked human burial.

(c) If he or she is unable to establish a kinship, tribal, community, or ethnic relationship with the unmarked human burial, determine the proper disposition of the burial and consult with persons with relevant experience, including:

1. A human skeletal analyst.
2. Two Native American members of current state tribes recommended by the Governor's Council on Indian Affairs, Inc., if the remains are those of a Native American.
3. Two representatives of related community or ethnic groups if the remains are not those of a Native American.
4. An individual who has special knowledge or experience regarding the particular type of the unmarked human burial.

If the State Archaeologist finds that an unmarked human burial is historically, archaeologically, or scientifically significant and if the parties with whom he or she is required under this subsection to consult agree, the human skeletal remains and the associated burial artifacts thereof shall belong to the state with title thereto vested in the division.

§ 872.05(6), Fla. Stat.

g. Report required. The archaeologist and human skeletal analyst involved in the archaeological excavation and scientific analysis of an unmarked human burial shall submit a written report of archaeological and scientific findings as well as a summary of such findings, in terms that may be understood by laypersons, to the State Archaeologist within 2 years after completion of an excavation. The division shall publish the summary within 1 year after its receipt and shall make such report available upon request.

§ 872.05(7), Fla. Stat.

h. Public display.

(a) Associated burial artifacts may be made available on loan by the division for educational purposes to institutions that have demonstrated an ability to provide safe, proper, and respectful care.

(b) The division shall develop guidelines and adopt rules regarding the public display of human remains. Such guidelines and rules shall not restrict legal, medical, or educational use of human skeletal remains, or the display of human skeletal remains in a manner not objectionable to groups with a kinship, tribal, community, or ethnic relationship to the individual whose remains are displayed.

§ 872.05(8), Fla. Stat.

i. Excavation not required. This section does not require excavation of an unmarked human burial unless circumstances require excavation to prevent destruction of the human skeletal remains.

§ 872.05(9), Fla. Stat.

j. Violation and penalties.

(a) Any person who willfully and knowingly disturbs, destroys, removes, vandalizes, or damages an unmarked human burial is guilty of a felony of the third degree, punishable as provided in [sections 775.082, 775.083, or 775.084, Fla. Stat.].

(b) Any person who has knowledge that an unmarked human burial is being disturbed, vandalized, or damaged and fails to notify the local law enforcement agency with jurisdiction in the area where the unmarked human burial is located is guilty of a misdemeanor of the second degree, punishable as provided in [sections 775.082 or 775.083, Fla. Stat.].

(c) *This subsection shall not apply to any person acting under the direction or authority of the division or to any person otherwise authorized by law to disturb, destroy, or remove an unmarked human burial.*

§ 872.05(10), Fla. Stat. (emphasis added.)

k. Rules. The Department of State may prescribe by rule procedures for reporting an unmarked human burial and for determining jurisdiction over the burial.

§ 872.05(11), Fla. Stat.

II. Selected Cases

A. Religious displays in public cemeteries.

1. American Legion v. American Humanist Association.

a. Background. Organization and individual residents brought § 1983 action against Maryland-National Capital Park and Planning Commission, alleging that the prominent display of a 32-foot tall Latin cross on public land, which was erected as a memorial to area soldiers who died serving in World War I, as well as the Commission's ownership and maintenance of the memorial, violated the First Amendment's Establishment Clause.

Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019)

b. Holding. The Supreme Court, Justice Alito, held that the cross did not violate the Establishment Clause. NB: American Legion is a complex case that “[insert quote from *Woodring v Jackson County*]” which contains an interesting analysis in both the opinion and the dissent.

Id.

2. Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999), aff'd, 420 F.3d 1308 (11th Cir. 2005)

a. [C]ertain Rules and Regulations (the “Regulations”) promulgated by the City of Boca Raton (the “City”) for the maintenance of its Municipal Cemetery (the “Cemetery”) violate the plaintiffs' federal and state guarantees of freedom of religious exercise, freedom of speech and due process of law.

Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1275 (S.D. Fla. 1999), aff'd, 420 F.3d 1308 (11th Cir. 2005)

b. The court adopted the following test: “...[t]o determine the place of a particular practice within a religious tradition [] a court should consider whether the practice: 1) is asserted or implied in relatively unambiguous terms by an authoritative sacred text; 2) is clearly and consistently affirmed in classic formulations of doctrine and practice; 3) has been observed continuously, or nearly so, throughout the history of the tradition; and 4) is consistently observed in the tradition as we meet it in recent times. If a practice meets all four of these criteria, it can be considered central to the religious tradition. If the practice meets one or more of these criteria, it can be considered a tenet, custom or practice of the religious tradition. If the practice meets none of these criteria, it can be considered a matter of purely personal preference regarding religious exercise.”

Id. at 1285.

c. The Court concluded “...that while marking graves and decorating them with religious symbols constitute customs or practices of the plaintiffs' religious traditions, the plaintiffs' desire to maintain vertical grave markers and religious symbols reflects their personal preference with regard to decorating graves.”

Id. at 1287.

d. The Regulations at issue in this case are clearly neutral laws of general applicability, which do not violate the Free Exercise Clause.

Id. at 1288.

e. City-owned “[c]emetery is a nonpublic forum for First Amendment analysis.”

Id. at 1289.

f. Viewpoint neutral regulations that prohibit all vertical decorations—religious or otherwise—in the newer sections of the cemetery cannot be considered an attempt to stifle religious expression.

Id. at 1291.

g. Under Florida law, “[n]o property interest arises from the unauthorized acts of municipal officers.”

Id. at 1294.

h. To the extent the Cemetery Manager permitted the plaintiffs to maintain permanent vertical grave decorations on their Cemetery plots, he did so in violation of the Regulations. Accordingly, the plaintiffs have no property interest in maintaining vertical grave decorations in the Cemetery, and the City is not estopped from enforcing the Regulations.

Id.

B. Proprietary vs. Regulatory Function

Family brought mandamus action to compel city to participate in a Florida Land Use and Environmental Dispute Resolution Act (FLUEDRA) informal dispute resolution process. Purpose was to allow family to construct one mausoleum on three adjacent burial plots in city-owned cemetery in violation purchase contract.

City of Tarpon Springs v. Planes, 30 So. 3d 693, 695 (Fla. 2d DCA 2010)

1. “[A]greeing to a modification of an agreement to build one mausoleum rather than the contractually approved three was not a ministerial duty of the City of Tarpon Springs; rather, it was purely a matter of discretion on the City's part as proprietor of the cemetery and party to the agreement. Nothing in the parties' agreement limited this discretion to modify the agreement in any way. The circuit court could not compel the execution of this discretionary act. Thus it was error to grant the Family's petition and issue the writ of mandamus.”

Id. (internal citations omitted.)

2. Family does not qualify as an “owner” under FLUEDRA.

Id. at 696.

3. “Even assuming that the Family has, at most, an equitable interest in the three cemetery plots by having interment rights therein, they did not file an application for a development permit or receive a development order. There is no merit to their argument that the City's denial of approval to amend the contract can be likened to a development order. None of the other provisions of this definition are remotely applicable to them. Because this dispute did not qualify as a land use or environmental dispute, it was not incumbent on the City to submit to the resolution procedures of [FLUEDRA].”

Id.

C. Negligence

1. Failure to maintain accurate records: misplacement of a body.

a. To begin with, it is clear under the facts that the injury here was foreseeable. The major reason to keep a record of burials is to ensure that it is known where bodies are interred. By failing to keep the records, it is obvious that the exact occurrence sought to be avoided herein has occurred, namely, that a body cannot be found. The City Manager and City Secretary, as reasonable people, should have anticipated the dangers that their lack of diligence threatened.

City of Gladewater v. Pike, 727 S.W.2d 514, 517–18 (Tex. 1987)

b. Had the City kept proper records, then common sense shows that no problem could have arisen here. Because the injury which has occurred is failure to find the body, and the omission of the City contributed in some ways to that failure, we hold there is evidence of proximate cause from which reasonable minds could draw an inference of negligence. Thus, the Pikes are entitled to actual damages from the City.

Id. at 518.

2. Open and obvious condition.

The plaintiff was injured during a burial service attended by approximately 50 mourners when she tripped over turf carpeting surrounding the grave site. The plaintiff testified that she saw the carpeting when she first arrived at the cemetery, that she had seen such carpeting at other funerals, that she understood its purpose was to cover the dirt, and that no one directed her to walk on a particular path.

Under the circumstances, the Supreme Court properly determined that the turf carpeting was an open and obvious condition that was readily observable by employing the reasonable use of one's senses

Keller v. Reginald H. Tuthill Funeral Home, Inc., 298 A.D.2d 364, 751 N.Y.S.2d 211, 212 (2002)