

# 2021

## SHORT ANSWERS TO COMMON QUESTIONS

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## CEMETERIES AND PAUPER BURIAL

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The  symbol indicates sections that have been updated since the previous publication.

### INTRODUCTION

This publication attempts to answer frequently asked questions about the commissioners court's authority to establish, operate, and maintain cemeteries in the county and the county's responsibilities for burial of paupers. Because operation of a cemetery is not considered a governmental purpose, the county has limited authority related to cemeteries. However, the county has a longstanding responsibility to provide for the burial of paupers. Additionally, the county has limited authority related to burial grounds for indigent, honorably discharged veterans.

### CEMETERIES

#### **1. May a county own and operate a cemetery using public funds?**

Only under very limited circumstances may public funds be used to operate a cemetery. In fact, Health and Safety Code ("Code") §713.026(a) prohibits the commissioners court or any other elected county officer from paying or using public funds or county employees, equipment or property to maintain a neglected or unkept public or private cemetery except as specifically authorized. See also Question 4 below.

#### **2. Is the county required to provide a cemetery for burial of paupers who die in the county?**

No, but the commissioners court has discretion to do so. Under Code §694.002, which requires the county to dispose of the body of a deceased pauper, the commissioners

court has implied authority to purchase and maintain land for the exclusive interment of deceased paupers.<sup>1</sup> Under certain circumstances, the commissioners court may also purchase burial grounds to be used exclusively by veterans who may also be paupers.<sup>2</sup>

### **3. What if a county already owns a cemetery?**

A county that owned a cemetery from September 1, 1976 through January 1, 1979 or that used county funds, employees, equipment, or property to maintain a county-owned cemetery during 1976 may continue to use public funds, employees and property to maintain the cemetery.<sup>3</sup> However, the county must file a certified copy of the commissioners court's order certifying that it qualifies to own or maintain a cemetery with the secretary of state to maintain its ability to own or provide maintenance for the cemetery.<sup>4</sup>

### **4. Are there different rules for a small county?**

Yes. Health and Safety Code §713.027 permits a county with a population of 8,200 or less to own, operate, and maintain a cemetery and to sell the right of burial in the cemetery.<sup>5</sup> <sup>6</sup> The commissioners court serves as the county cemetery board and manages the cemetery property.

The commissioners court may use general revenue funds to maintain the cemetery and may dedicate not more than one-eighth of the maximum allowable tax levy for that purpose. Additionally, revenue from the sale of burial plots may be used to purchase additional land for cemetery purposes and for maintenance.

### **5. What about an historical cemetery in the county?**

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<sup>1</sup> Tex. Att'y Gen. Op. No. GA-0235 (2004)

<sup>2</sup> Tex. Health & Safety Code §713.029

<sup>3</sup> Tex. Health & Safety Code §713.026(b)

<sup>4</sup> Tex. Health & Safety Code §713.026(c). The Registry of County-owned and County-operated Cemeteries has records from six counties - Andrews County, Brazos County, Culberson County, Gillespie County, Travis County, and Wichita County.

<sup>5</sup> There are currently 75 Texas counties with a population of 8,200 or less, according to the U.S. Census Bureau.

<sup>6</sup> In 2019, the Legislature also added Section 713.0271 to the Health and Safety Code to specifically allow Fort Bend County to own, operate, and maintain a cemetery.

Under certain circumstances, for the purposes of historical preservation or public health, safety, or welfare, the commissioners court is authorized to use public funds, county employees, county inmate labor, and county equipment to maintain a cemetery that is at least 50 years old.<sup>7</sup> However, county property may not be used to maintain a perpetual care cemetery or one maintained by a religious or fraternal organization, even if the cemetery contains an historical grave marker.<sup>8</sup>

**6. What if the historical cemetery is managed by a nonprofit corporation authorized by the district court?**

If a nonprofit corporation has petitioned for the right to restore, operate, and maintain an historical cemetery, the county has discretion to assist with the maintenance of the cemetery, but is not required to. The county auditor acts as the trustee for the trust fund established by the nonprofit corporation and receives monthly reports verifying the funds deposited and income disbursed. If the county auditor resigns the position of trustee or fails to act, the district court must appoint a successor trustee.<sup>9</sup>

**7. May the county use public property to open and close graves in an historical cemetery?**

Yes. At the discretion of the commissioners court, public funds, labor, and equipment may be used to open and close a grave in an historical cemetery with a grave marker that is at least 50 years old.<sup>10</sup> This means that the commissioners court as a whole must authorize the use.

**8. What about opening and closing graves in other types of cemeteries?**

The commissioners court may not use county funds, labor, or equipment to open and close graves in privately owned cemeteries.<sup>11</sup>

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<sup>7</sup> Tex. Health & Safety Code §713.028

<sup>8</sup> Tex. Health & Safety Code §713.028(b)

<sup>9</sup> See Tex. Health & Safety Code Chap. 715

<sup>10</sup> Tex. Health & Safety Code §713.028

<sup>11</sup> Tex. Health & Safety Code §713.026(a); Tex. Att’y Gen. Op. No. JC-0329 (2001).

**9. Must the county maintain a road leading to a cemetery if the road is not in the county road system?**

The county is prohibited from abandoning a county road leading to a cemetery.<sup>12</sup> However, a county's decision as to the frequency of maintenance of any particular county road is a matter for the discretion of the commissioners court.<sup>13</sup>

**10. Does the public have a right to visit a cemetery located on private property?**

Yes. The relatives of a deceased person have the right to reasonable access to the deceased person's gravesite.<sup>14</sup> A court that considered this issue ruled that reasonable access is a once-a month-visit for a four-hour period.<sup>15</sup>

**11. May the county establish a fund for maintenance of a neglected or unkept cemetery?**

Yes. The commissioners court may adopt a resolution establishing a perpetual trust fund to provide maintenance for a neglected or unkept public or private cemetery.<sup>16</sup>

**12. Who is authorized to act as the trustee for the cemetery trust fund?**

The commissioners court must appoint the county judge as trustee for the fund. However, if the county judge vacates the position or renounces the trust, the district judge must appoint someone who is not a county commissioner as the successor trustee for the fund.<sup>17</sup> The trustee has the authority to establish reasonable rules for donations, accept gifts, and invest the fund in interest-bearing bonds or government-issued securities.

**13. May the commissioners court use county funds to fund the cemetery trust?**

No. The trustee may accept a gift or grant from any source, including one attached to a particular cemetery. If the trustee accepts a gift, he or she must instruct the county treasurer to issue a certificate to the donor stating the amount and purpose of the gift

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<sup>12</sup> Transportation Code §251.057

<sup>13</sup> Tex. Att'y Gen. Op. No. GA-0128 (2003)

<sup>14</sup> Tex. Health & Safety Code §711.041

<sup>15</sup> Davis v. May, 135 S.W.3d 747 (Tex.App. – San Antonio 2003, pet. denied)

<sup>16</sup> Tex. Health & Safety Code §713.021

<sup>17</sup> Tex. Health & Safety Code §713.024

and any other information determined by the trustee.<sup>18</sup> Only the income or revenue of the trust fund may be used for maintenance of a neglected or unkept public or private cemetery in the county.

**14. May the county require that a private cemetery be maintained by the property owner?**

The district attorney can file suit in district court against the owners of a cemetery that is maintained, located, or used in a way that constitutes a public nuisance, provided that the cemetery is not located within five miles from a city with a population of more than 25,000.<sup>19</sup> The court will then decide whether the cemetery nuisance must be abated by repair and restoration or whether the cemetery should be removed.

**15. What if someone wants to establish a family cemetery on their own property?**

Provided that a family complies with deed restrictions and other legal requirements, such as flood plain regulation, a family may establish a cemetery on its land. The cemetery plot must be surveyed and the survey, including a declaration of dedication, filed with the county clerk. However, there are restrictions on the location of a cemetery based on proximity to a city and the population of the city.<sup>20</sup> More information on the laws governing family cemeteries is available on the Texas Funeral Service Commission website at [www.tfsc.state.tx.us](http://www.tfsc.state.tx.us) under the Consumer Information menu.

**16. May the county prevent a person from establishing a cemetery on the person's property?**

Yes, under the following circumstances. The district attorney may file suit to prevent the establishment of a cemetery if its location would be a public nuisance or a threat to public health and safety or if its location would violate the restrictions on the location of a cemetery near a city, based on the city's population.<sup>21</sup>

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<sup>18</sup> Tex. Health & Safety Code §713.022(d)

<sup>19</sup> Tex. Health & Safety Code §711.007

<sup>20</sup> Tex. Health & Safety Code §711.008

<sup>21</sup> Tex. Health & Safety Code §711.007

## 17. What is an abandoned cemetery?

An abandoned cemetery is a cemetery, regardless of whether it appears on a map or in deed records, that is not owned or operated by a cemetery organization, does not have another person legally responsible for its care, and is not maintained by any person.<sup>22</sup>

## 18. What is an unknown cemetery?

An unknown cemetery is an abandoned cemetery evidenced by the presence of marked or unmarked graves that does not appear on a map or in deed records.<sup>23</sup>

## 19. What if someone finds an unknown or abandoned cemetery in the county?



The person who discovers the cemetery must file notice with the county clerk and concurrently mail notice to the landowner on record in the county appraisal district within 10 days after the date of the discovery.<sup>24</sup> The county clerk must file the notice in the deed records, indexed to the land the cemetery is located on, and send a copy to the Texas Historical Commission. The clerk may not charge a fee for filing this notice. The property owner may not construct improvements on the property that will disturb the cemetery until the human remains are removed.<sup>25</sup>

## 20. May the county close an abandoned cemetery?

A district court in a county of at least 525,000 may authorize the removal and re-internment of the bodies in an abandoned and neglected cemetery for which no perpetual care and endowment fund has been established if the cemetery has been abated as a nuisance.<sup>26</sup>

## 21. What is an unverified cemetery?

An unverified cemetery is a location having some evidence of internment including one or more unmarked graves that have not been verified by a cemetery keeper,

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<sup>22</sup> Tex. Health & Safety Code §711.001(1)

<sup>23</sup> Tex. Health & Safety Code §711.001(36)

<sup>24</sup> Tex. Health & Safety Code §711.011

<sup>25</sup> Tex. Health & Safety Code §711.010

<sup>26</sup> Tex. Health & Safety Code §714.004; *see also* Code §711.004.

licensed funeral director, medical examiner, coroner, professional archeologist or the Texas Historical Commission.<sup>27</sup>

## **22. What if someone finds an unverified cemetery?**

The person who finds an unverified cemetery must file notice and evidence of the discovery with the Texas Historical Commission on a form provided by the Commission and must concurrently provide a copy of the notice to the landowner on record in the county appraisal district on whose land the unverified cemetery is located. The landowner may send a response or comments to the Texas Historical Commission concerning the notice not later than the 30<sup>th</sup> day after receiving the notice. If the Texas Historical Commission determines that a cemetery exists the Commission must inform the landowner and may file notice with the county clerk. If the Texas Historical Commission determines that a cemetery does not exist, the Commission must inform the landowner and ensure any notice filed with the county clerk is corrected.<sup>28</sup>

## **23. Can anyone investigate unmarked graves in an abandoned, unknown or unverified cemetery?**

Yes. A justice of the peace acting as a coroner or medical examiner or a cemetery keeper, a licensed funeral director, a medical examiner, a coroner, or a professional archeologist may investigate or remove remains found in an unmarked grave without written order of the state registrar.<sup>29</sup>

## **24. Are there any other limits on closing a cemetery?**

Property dedicated as a cemetery must be used as a cemetery unless the dedication is removed in an action under an applicable Code provision.<sup>30</sup>

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<sup>27</sup> Tex. Health & Safety Code §711.001(38)

<sup>28</sup> Tex. Health & Safety Code §711.0111

<sup>29</sup> Tex. Health & Safety Code §711.004(f-1)

<sup>30</sup> Tex. Health & Safety Code §§711.010, 711.036 or 711.007. Tex. Att'y Gen. Op. No. JC-0355 (2001). *See also* Tex. Att'y Gen. Op. No. JC-0235 (2000).



## PAUPER'S BURIAL

### 1. What are a county's responsibilities related to the burial of a pauper?

The commissioners court is required to provide for the disposition of a "deceased pauper."<sup>31</sup> The commissioners court may adopt rules to implement the statute.

### 2. Is the county responsible for the burial of all paupers who die in the county, or only those who are also residents of the county?

The statute does not reference residency and there is no legal guidance on how to determine the appropriate county for disposition. Without further clarification, it appears that the county in which the pauper died is responsible for his or her burial.

### 3. Are there any special procedures that the county must follow?

Yes. The county should first determine if there is a person with a duty to bury the deceased pauper under Code §711.002 and if the deceased has left direction in writing for the disposition of his or her remains. However, the county is not required to follow the deceased's direction and need only incur the usual cost of burial if there is no relative or other person responsible who takes responsibility for cost of the burial.<sup>32</sup>

Additionally, the county must notify the Anatomical Board of the State of Texas that it has the remains of a deceased pauper and deliver the body to the board if it receives written notification from the board to do so.<sup>33</sup> A body that is not claimed for burial within 48 hours after a relative receives notification shall be delivered as soon as possible to the board.<sup>34</sup> If the board does not request delivery of the remains, the county is responsible for all costs of preparation for burial.

### 4. How does a county dispose of a deceased pauper?

The commissioners court has the discretion to determine how to dispose of the remains of a deceased pauper. The commissioners court may adopt rules related to

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<sup>31</sup> Tex. Health & Safety Code §694.002(a); Tex. Att'y Gen. Op. No. GA-0235 (2004).

<sup>32</sup> Tex. Att'y Gen. Op. No. JC-0228 (2000)

<sup>33</sup> Tex. Health & Safety Code §691.023

<sup>34</sup> Tex. Health & Safety Code §691.025

how the county disposes of the body. Disposition may be by donation to a medical facility, burial, or cremation.<sup>35</sup>

**5. Is the county responsible for the cost associated with transporting a body of someone who is not a deceased pauper from an autopsy ordered by a justice of the peace to its final destination?**

No. The commissioners court is authorized to pay the cost of transporting a body to its final destination following an autopsy ordered by a justice of the peace only if the body is not claimed for burial or is to be buried at public expense.<sup>36</sup>

**6. Even though the county is paying, can a deceased pauper's family dictate how the body is disposed of?**

No. However, in disposing of a deceased pauper, the commissioners court is required to consider any information provided by a person listed in Code §771.002, including the religious affiliation of the deceased.<sup>37</sup> The county need only incur the usual disposition costs and may adopt a policy requiring contributions if the deceased pauper's relatives object to the less expensive options.<sup>38</sup>

**7. Are there limits on how a county pays for a pauper's burial?**

The commissioners court must provide for the cost of pauper burial in the county's annual budget. The county may accept a donation toward the costs of pauper burial. Donations may be made either toward the expenses of disposing of a particular deceased pauper or to the county to be used as necessary.<sup>39</sup>

**8. May the county require a deceased pauper's family to pay for burial expenses?**

No. The county has the primary responsibility for the cost of burial of a pauper and may not require the relatives or other persons identified in Code §711.002 to contribute to the costs. Additionally, the assets of the deceased person may not be seized to cover the county's costs.<sup>40</sup> However, see also Question 9 below.

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<sup>35</sup> Tex. Health & Safety Code §694.002; Tex. Att'y Gen. Op. No. JC-0228 (2000); Tex. Att'y Gen. Op. No. GA-0301 (2005).

<sup>36</sup> Tex. Att'y Gen. Op. No. KP-0083 (2016)

<sup>37</sup> Tex. Health & Safety Code §694.002(b)

<sup>38</sup> Tex. Att'y Gen. Op. No. JC-0228 (2000)

<sup>39</sup> Tex. Att'y Gen. Op. No. JC-0228 (2000)

<sup>40</sup> Tex. Att'y Gen. Op. No. JC-0228 (2000)

**9. What if the pauper has some cash when they die?**

The county may use any cash found with a deceased pauper for the person's actual burial expenses and deposit any remaining funds in a trust account to be claimed within one year. If the funds are not claimed, they may be used to pay for the expense of other pauper burial in the county.<sup>41</sup>

**10. What if a local church or charity offers to pay for the burial of a deceased pauper?**

The county must comply with the Texas Department of State Health Services regulations adopted under Code §694.001 related to the disposal and transportation of dead bodies. The church or charity would need to obtain the proper authorization to transfer the body to a licensed funeral home or crematorium before it could take action toward burial. Otherwise, the county remains responsible for disposition of the deceased pauper.

**11. What if the county finds unidentified remains?**

The county may dispose of the unidentified remains in the same manner as pauper burial under Code §716.101.

**12. May the county acquire property to establish a cemetery for the burial of paupers?**

Yes. Under §694.002 of the Code, which requires the county to dispose of the body of a deceased pauper, the commissioners court has implied authority to purchase and maintain land for the exclusive interment of deceased paupers.<sup>42</sup> Under certain circumstances, the commissioners court may also purchase burial grounds to be used exclusively by veterans who may also be paupers.<sup>43</sup>

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<sup>41</sup> Tex. Health & Safety Code §694.002

<sup>42</sup> Tex. Att'y Gen. Op. No. GA-0235 (2004)

<sup>43</sup> Tex. Health & Safety Code §713.029

## VETERAN'S BURIAL

### **1. May the county establish a cemetery for veterans?**

Yes. The commissioners court is authorized to purchase burial grounds to be used exclusively for honorably discharged veterans who have served during a war and die without leaving sufficient means to pay funeral expenses, but only if there is not a national military cemetery or other military plot in the county where veterans may be buried free of charge.<sup>44</sup>

### **2. May the county assist with the costs of burial for an honorably discharged veteran?**

A veteran who dies without leaving sufficient means to pay funeral expenses may be buried by the county under the same circumstances as any other deceased pauper. There does not appear to be any authority, in Code §713.029 or elsewhere, for the commissioners court to provide additional services based on a deceased person's status as an honorably discharged veteran.

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<sup>44</sup> Tex. Health & Safety Code §713.029