

HOUSE BILL NO. 386

INTRODUCED BY O'HARA, MCCHESENEY, SQUIRES, REINHART, STEINBEISSER

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING THE MONTANA RIGHT OF DISPOSITION ACT PERTAINING TO FUNERAL OR OTHER DISPOSITION ARRANGEMENTS; ESTABLISHING A PRIORITY OF PERSONS WHO MAY ARRANGE FOR THE FUNERAL OR DISPOSITION OF OTHERS; PROVIDING FOR THE LOSS OF THE RIGHT OF DISPOSITION; PROVIDING FOR THE RESOLUTION OF DISPUTES AS TO THE RIGHT OF DISPOSITION; ESTABLISHING RIGHTS AND IMMUNITY FOR A MORTICIAN WHO RELIES ON INSTRUCTIONS OF A PERSON WHO THE MORTICIAN REASONABLY BELIEVES HAS THE RIGHT OF DISPOSITION; CLARIFYING THE RIGHT TO CONTROL THE DISPOSITION OF HUMAN REMAINS WITH RESPECT TO MAUSOLEUM AND COLUMBARIUM AUTHORITIES; REVISING THE DEFINITION OF "AUTHORIZING AGENT"; AND AMENDING SECTIONS 35-21-810 AND 37-19-101, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 9] may be cited as the "Montana Right of Disposition Act".

NEW SECTION. **Section 2. Purpose.** The legislature declares that it is the public policy of this state to provide an orderly and uniform system to determine which individuals hold the right to direct and carry out funeral and disposition arrangements for the remains of deceased individuals.

NEW SECTION. **Section 3. Prepaid funeral arrangements -- DISPOSITION DIRECTIONS -- DEFINITION.**
(1) A person who is 18 years of age or older and of sound mind, by entering into a prepaid funeral contract with any mortuary licensed under Title 37, chapter 19, part 4, OR BY PROVIDING DISPOSITION DIRECTIONS may direct the location, manner, and conditions of disposition of the person's remains and the arrangements for funeral goods and services to be provided upon the person's death.

(2) The ~~disposition directions~~ and funeral prearrangements that are prepaid and contracted for with a licensed mortuary OR THE DISPOSITION DIRECTIONS may not be canceled or substantially revised unless the cancellation or substantial revision has been ordered by a person appointed by the decedent in the prepaid funeral contract OR THE DISPOSITION DIRECTIONS as the person authorized to cancel or revise the terms of the

prepaid funeral contract OR THE DISPOSITION DIRECTIONS.

(3) AS USED IN THIS SECTION, THE TERM "DISPOSITION DIRECTIONS" MEANS:

(A) A VIDEO PROVIDED IN A REPLAYABLE FORMAT OF THE PERSON WHO IS THE SUBJECT OF THE DISPOSITION DIRECTIONS IN WHICH THE PERSON DESCRIBES THE WISHES FOR DISPOSITION AND THAT IS ACCOMPANIED BY A WRITTEN ATTESTATION OF THE VIDEO ACCURACY BY TWO WITNESSES WHO ARE AT LEAST 18 YEARS OF AGE; OR

(B) A LEGIBLE WRITTEN INSTRUMENT SIGNED BY THE PERSON WHO IS THE SUBJECT OF THE DISPOSITION DIRECTIONS AND BY TWO PEOPLE WHO ARE AT LEAST 18 YEARS OF AGE WHO HAVE WITNESSED THE SIGNING BY THE PERSON. THE WRITTEN INSTRUMENT MAY BE BUT IS NOT LIMITED TO A LETTER OF INSTRUCTIONS, A WILL, A TRUST DOCUMENT, OR ADVANCE DIRECTIVES. A WRITTEN INSTRUMENT THAT DOES NOT NAME A PERSON WITH THE RIGHT TO CONTROL THE DECEDENT'S DISPOSITION MUST FOLLOW THE PRIORITY OF RIGHTS OF DISPOSITION PROVIDED IN [SECTION 4].

NEW SECTION. Section 4. Priority of rights of disposition. (1) A PERSON WHO IS 18 YEARS OF AGE OR OLDER AND OF SOUND MIND WISHING TO AUTHORIZE ANOTHER PERSON TO CONTROL THE DISPOSITION OF THE PERSON'S REMAINS MAY EXECUTE AN AFFIDAVIT BEFORE A NOTARY PUBLIC IN SUBSTANTIALLY THE FOLLOWING FORM:

"STATE OF MONTANA]SS
COUNTY OF]

I,.....[PERSON DESIGNATING ANOTHER PERSON TO CONTROL THE DISPOSITION OF THE PERSON'S REMAINS] DO HEREBY DESIGNATE [PERSON WHO IS PROVIDED WITH THE RIGHT TO CONTROL THE DISPOSITION] WITH THE RIGHT TO CONTROL THE DISPOSITION OF MY REMAINS UPON MY DEATH. I HAVE OR HAVE NOT ATTACHED SPECIFIC DIRECTIONS CONCERNING THE DISPOSITION OF MY REMAINS WITH WHICH THE DESIGNEE SHALL SUBSTANTIALLY COMPLY, PROVIDED THE DIRECTIONS ARE LAWFUL AND THERE ARE SUFFICIENT RESOURCES IN MY ESTATE TO CARRY OUT THE DIRECTIONS.

SUBSCRIBED AND SWORN TO BEFORE ME THIS DAY OF THE MONTH OF OF THE YEAR
....."

(2) Except as provided in [sections 3 and 7] AND SUBSECTION (1) OF THIS SECTION, the right to control the disposition of the remains of a deceased person, including the location, manner, and conditions of the disposition and arrangements for funeral goods and services, vests in the following persons in the order named if the named person is 18 years of age or older and is of sound mind:

(A) A PERSON DESIGNATED BY THE DECEDENT AS THE PERSON WITH THE RIGHT TO CONTROL THE DECEDENT'S DISPOSITION IN AN AFFIDAVIT EXECUTED IN ACCORDANCE WITH SUBSECTION (1);

~~(1)~~(B) the surviving spouse;

~~(2)~~(C) the sole surviving child of the decedent or, if there is more than one child of the decedent, the majority of the surviving children. However, less than one-half of the surviving children may be vested with the rights and duties provided in this section if those surviving children have used reasonable efforts to notify all other surviving children of their instructions and they are not aware of opposition to their instructions on the part of more than one-half of all surviving children.

~~(3)~~(D) the surviving parent or parents of the decedent. If one of the surviving parents is absent, the remaining parent may be vested with the rights and duties provided in this section if that parent's reasonable efforts have been unsuccessful in locating the absent surviving parent.

~~(4)~~(E) the surviving sibling of the decedent or, if there is more than one sibling of the decedent, the majority of the surviving siblings. However, less than one-half of the surviving siblings may be vested with the rights and duties provided in this section if those siblings have used reasonable efforts to notify all other surviving siblings of their instructions and they are not aware of any opposition to their instructions on the part of more than one-half of all surviving siblings.

~~(5)~~(F) the surviving grandparent of the decedent or, if there is more than one surviving grandparent, the majority of the grandparents. However, less than one-half of the surviving grandparents may be vested with the rights and duties provided in this section if those grandparents have used reasonable efforts to notify all other surviving grandparents of their instructions and are not aware of any opposition to their instructions on the part of more than one-half of all surviving grandparents.

~~(6)~~(G) the guardian of the decedent at the time of the decedent's death, if a guardian had been appointed;

~~(7)~~(H) the personal representative of the estate of the decedent;

~~(8)~~(I) the person in classes of the next degree of kinship, in descending order, under the laws of descent and distribution to inherit the estate of the decedent. If there is more than one person of the same degree, any person of that degree may exercise the right of disposition.

~~(9)~~(J) if the disposition of the remains of the decedent is the responsibility of the state or a local government, the public officer, administrator, or employee responsible for arranging the disposition of the decedent's remains; and

~~(10)~~(K) in the absence of any person provided for in subsections ~~(1) through (9)~~ (2)(A) THROUGH (2)(J), any other person, including the mortician with custody of the remains, who is willing to assume the responsibility to act and arrange the disposition of the decedent's remains after attesting in writing that a good faith effort has

been made to contact the individuals provided for in subsections ~~(1) through (9)~~ (2)(A) THROUGH (2)(J).

NEW SECTION. Section 5. Arrangements provided by survivors. The provisions of [section 3 AND SECTION 4(1)] do not prevent the decedent's survivors, in the order listed in [section 4], from pursuing, at their own expense, meaningful services and making arrangements for funeral services that do not conflict with the decedent's instructions for disposition made in accordance with [section 3 AND SECTION 4(1)].

NEW SECTION. Section 6. Loss of right of disposition. A person entitled to the right of disposition under [section 4] forfeits that right and the right is passed on to the next qualifying person listed in [section 4] under the following circumstances:

(1) the person is charged with deliberate or negligent homicide in connection with the decedent's death. However, if the charges against the person are dismissed or if the person is acquitted of the charges, the right of disposition is returned to the person.

(2) the person does not exercise the person's right of disposition within 2 days after notification of the death of the decedent or within 3 days of the decedent's death, whichever is earlier;

(3) the person and the decedent are spouses and a petition to dissolve the marriage was pending at the time of the decedent's death; or

(4) the district court, pursuant to [section 7], determines that the person entitled to the right of disposition and the decedent were estranged at the time of death. For purposes of this subsection, "estranged" means a physical and emotional separation from the decedent existing at the time of death and that existed for a period of time prior to death that clearly demonstrates an absence of affection, trust, and regard for the decedent.

NEW SECTION. Section 7. Disputes. (1) The district court for the county where the decedent resided may award the right of disposition to the person determined by the court to be the most fit and appropriate to carry out the right of disposition and make decisions regarding the decedent's remains if those sharing the right of disposition under [section 4] cannot agree.

(2) The following provisions apply to the court's determination under subsection (1):

(a) If the persons holding the right of disposition are two or more persons with the same relationship to the decedent and they cannot, by majority vote, make a decision regarding the disposition of the decedent's remains, any of the persons or a mortician with custody of the remains may file a petition asking the district court to make a determination in the matter.

(b) In making a determination, the district court shall consider the following:

(i) the reasonableness and practicality of any proposed funeral arrangements and disposition;

(ii) the degree of the personal relationship between the decedent and each of the persons claiming the right of disposition;

(iii) the desires of the person or persons who are able and willing to pay the cost of the funeral arrangements and disposition;

(iv) the convenience and needs of other family and friends wishing to pay respects;

(v) the desires of the decedent;

(vi) the degree to which the funeral arrangements would allow maximum participation by all those wishing to pay their respects.

(3) (a) In the event of a dispute regarding the right of disposition, a mortician may not be held liable for refusing to accept the remains or to inter or otherwise dispose of the remains of the decedent or complete the arrangements for final disposition of the remains until the mortician receives a court order or a written agreement signed by the parties to the disagreement that decides the final disposition of the remains.

(b) If the mortician retains the remains for final disposition while the parties are in disagreement, the mortician may embalm or refrigerate and shelter the body, or both, in order to preserve the body while awaiting the final decision of the district court and may add the cost of embalming or refrigeration and sheltering, or both, to the final disposition costs.

(c) If a mortician files a petition under this section for an order of disposition from the district court, the mortician may add the legal fees and court costs associated with the petition to the final disposition costs.

(d) This section may not be construed to require or to impose a duty upon a mortician to bring an action under this section. A mortician may not be held criminally or civilly liable for choosing not to bring an action under this section.

(4) Except to the extent that it may be considered by the district court under subsection (2)(b)(iii), the fact that a person has paid or agreed to pay for all or part of the funeral arrangements and disposition does not give that person a greater right of disposition than the person would otherwise have.

(5) The personal representative of the estate of the decedent does not have, by virtue of being the personal representative, a greater claim to the right of disposition than the person would otherwise have under the provisions of [sections 1 through 9].

NEW SECTION. Section 8. Right to rely. (1) A person who signs a funeral agreement, cremation

authorization form, or other authorization for disposition must be considered as warranting the truthfulness of any facts set forth in the agreement, form, or authorization, including:

- (a) the identity of the decedent whose remains are subject to the disposition; and
- (b) the person's authority to order the disposition.

(2) A mortician may rely on the funeral service agreement, cremation authorization form, or other authorization and may carry out the instructions of the person or persons who the mortician reasonably believes hold the right of disposition.

(3) A mortician is not responsible to contact or to independently investigate the existence of any next of kin or relatives of the decedent.

(4) If a class includes two or more persons who are equal in priority, a mortician may rely on and act according to the instructions of the first person in the class to make funeral and disposition arrangements if another person in the class has not provided to the mortician written notice of the person's objections to the arrangements and the mortician does not have knowledge of any objections to the arrangements by other members of the class.

NEW SECTION. Section 9. Immunity. A mortuary or mortician who relies in good faith on the instructions of an individual claiming the right of disposition is not subject to criminal or civil liability or subject to disciplinary action for carrying out the disposition of the remains in accordance with the instructions.

Section 10. Section 35-21-810, MCA, is amended to read:

"35-21-810. Disposition of remains -- liability. (1) The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, ~~vests in, and the duty of interment and the liability for the reasonable cost of interment of the remains devolves upon, the following in the order named:~~

- ~~_____ (a) a spouse;~~
- ~~_____ (b) a majority of adult children;~~
- ~~_____ (c) a parent;~~
- ~~_____ (d) a close relative of the decedent; or~~
- ~~_____ (e) in the absence of a person listed in subsections (3)(a) through (3)(d), a personal representative, a public administrator, the deceased through a preneed authorization, or others as designated by the board of funeral service by rule is as provided in [section 4].~~

(2) The liability for the reasonable cost of interment devolves jointly and severally upon all kin of the decedent listed in ~~subsection (1)~~ [section 4] in the same degree of kindred and upon the estate of the decedent.

(3) A person signing an authorization for the interment of any remains warrants the truthfulness of any fact set forth in the authorization, the identity of the person whose remains are sought to be interred, and the person's authority to order the interment. The person signing the authorization is personally liable for all damage occasioned by or resulting from breach of the warranty.

(4) The mausoleum-columbarium authority may inter any remains upon the receipt of a written authorization of a person representing to be a person who has acquired the right to control the disposition of the remains. A mausoleum-columbarium authority is not liable for interring pursuant to the authorization unless it has actual notice that presentation is untrue."

Section 11. Section 37-19-101, MCA, is amended to read:

"37-19-101. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Arrangements" includes:

(a) planning the details of funeral service, including time of service, type of service, and, if requested, acquiring the services of clergy;

(b) obtaining the necessary information for filing death certificates;

(c) comparing or discussing prices, including merchandise prices and financial arrangements; and

(d) providing for onsite direction and coordination of participants and onsite direction, coordination, and facilitation at funeral, graveside, or memorial services or rites.

(2) "At-need" arrangements means arrangements made by an authorized person on behalf of a deceased.

(3) "Authorizing agent" means a person legally entitled to order the final disposition of human remains, including burial, cremation, entombment, donation to medical science, or other means; ~~of human remains. An authorizing agent is, in~~ The order of preference: for an authorizing agent is subject to the priority of rights of disposition established in [section 4].

~~(a) a spouse;~~

~~_____ (b) a majority of adult children;~~

~~_____ (c) a parent;~~

~~_____ (d) a close relative of the deceased; or~~

~~— (e) in the absence of a person or persons listed in subsections (1)(a) through (1)(d), a personal representative, a public administrator, the deceased through a preneed authorization, or others as designated by board rule.~~

(4) "Board" means the board of funeral service provided for in 2-15-1743.

(5) "Branch establishment" means a separate facility that may or may not have a suitable visitation room or preparation room and that is owned by, a subsidiary of, or otherwise financially connected to or controlled by a licensed mortuary.

(6) "Cemetery" means any land or structure in this state dedicated to and used or intended to be used for interment of cremated remains or human remains. It may be any one or a combination of a burial park for earth interments, a mausoleum for crypt or niche interments, or a columbarium.

(7) "Cemetery company" means an individual, partnership, corporation, or association that:

(a) owns or controls cemetery lands or property and conducts the business of a cemetery; or
(b) applies to the board to own or control cemetery lands or property and conduct the business of a cemetery.

(8) "Closed container" means a container in which cremated remains can be placed and enclosed in a manner that prevents leakage or spillage of cremated remains or entrance of foreign material.

(9) "Columbarium" means a room or space in a building or structure used or intended to be used for the interment of cremated remains.

(10) "Cremated remains" means all human remains recovered after the completion of the cremation, including pulverization that leaves only bone fragments reduced to unidentifiable dimensions.

(11) "Cremation" means the technical process, using heat, that reduces human remains to bone fragments. The reduction takes place through heat and evaporation.

(12) "Cremation chamber" means the enclosed space within which the cremation process takes place. Cremation chambers of crematoriums licensed by this chapter must be used exclusively for the cremation of human remains.

(13) "Cremation container" means the container in which the human remains are placed in the cremation chamber for a cremation. A cremation container must meet substantially all of the following standards:

- (a) be composed of readily combustible materials suitable for cremation;
- (b) be able to be closed in order to provide a complete covering for the human remains;
- (c) be resistant to leakage and spillage;
- (d) be rigid enough for handling with ease; and

(e) be able to provide protection for the health, safety, and integrity of crematory personnel.

(14) "Crematory" means the building or portion of a building that houses the cremation chamber and the holding facility.

(15) "Crematory operator" means the person in charge of the licensed crematory facility.

(16) "Crematory technician" means an employee of a crematory facility who is trained to perform cremations and is licensed by the board.

(17) "Crypt" means a chamber of sufficient size to inter the remains of a deceased person.

(18) "Department" means the department of labor and industry provided for in Title 2, chapter 15, part 17.

(19) "Embalming" means:

(a) obtaining burial or removal permits or assuming other duties incidental to the practice of embalming;

(b) disinfecting and preserving or attempting to preserve dead human bodies in their entirety or in parts by the use of chemical substances, fluids, or gases ordinarily intended for that use by introducing the chemical substances, fluids, or gases into the body by vascular or hypodermic injection or by direct introduction into the organs or cavities; and

(c) restorative art.

(20) "Funeral directing" includes:

(a) supervising funerals;

(b) the making of preneed or at-need contractual arrangements for funerals;

(c) preparing dead bodies for burial, other than by embalming;

(d) maintaining a mortuary for the preparation, disposition, or care of dead human bodies; and

(e) representing to the public that one is a funeral director.

(21) "Holding facility" means an area within or adjacent to the crematory facility designated for the retention of human remains prior to cremation that must:

(a) comply with any applicable public health law;

(b) preserve the dignity of the human remains;

(c) recognize the health, safety, and integrity of the crematory operator and crematory personnel; and

(d) be secure from access by anyone other than authorized personnel.

(22) "Human remains" means the body of a deceased person or part of a body or limb that has been removed from a living person, including the body, part of a body, or limb in any stage of decomposition.

(23) "Interment" means any lawful disposition of cremated remains or human remains.

(24) (a) "Intern" means a person who has met the educational and testing requirements for a license to practice mortuary science in Montana, has been licensed by the board as an intern, and is engaged in the practice of mortuary science under the supervision of a licensed mortician.

(b) For the purposes of this subsection (24), "supervision" means the extent of oversight that a mortician believes an intern requires based upon the training, experience, judgment, and professional development of the intern.

(25) "Lot" or "grave space" means a space in a cemetery used or intended to be used for interment.

(26) "Mausoleum" means a community-type room or space in a building or structure used or intended to be used for the interment of human remains in crypts or niches.

(27) "Mortician" means a person licensed under this chapter to practice mortuary science.

(28) (a) "Mortuary" means a place of business licensed by the board, located in a building or portion of a building having a specific street address or location, containing but not limited to a suitable room for viewing or visitation and a preparation room, and devoted exclusively to activities that are related to the preparation and arrangements for funerals, transportation, burial, or other disposition of dead human bodies.

(b) The term includes conducting activities from the place of business referred to in subsection (28)(a) that are incidental, convenient, or related to the preparation of funeral or memorial services or rites or the transportation, burial, cremation, or other disposition of dead human bodies in any area where those activities may be conducted.

(29) "Mortuary science" means the profession or practice of funeral directing and embalming.

(30) "Niche" means a space in a columbarium or mausoleum used or intended to be used for the interment of the cremated remains or human remains of one or more deceased persons.

(31) "Perpetual care and maintenance" means continual and proper maintenance of cemetery buildings, grounds, and lots or grave spaces.

(32) "Preneed arrangements" means arrangements made with a licensed funeral director or licensed mortician by a person on the person's own behalf or by an authorized individual on the person's behalf prior to the death of the person.

(33) "Temporary container" means a receptacle for cremated remains that is usually made of cardboard, plastic film, or similar material designed to hold the cremated remains until an urn or other permanent container is acquired.

(34) "Urn" means a receptacle designed to permanently encase the cremated remains."

NEW SECTION. **Section 12. Codification instruction.** [Sections 1 through 9] are intended to be codified as an integral part of Title 37, chapter 19, and the provisions of Title 37, chapter 19, apply to [sections 1 through 9].

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