

What Are Your Rights Over Your Remains?

By Marsha A. Goetting, Ph.D., CFP®, CFCS, Professor and Family Economics Specialist, and Jane Wolery, MSU Teton County Extension Agent

The Montana Right of Disposition Act allows a person to provide instructions for disposing of his or her remains or to designate an agent with authority to make such decisions.



MontGuide

MT200918HR Revised 1/17

During a family get-together, Margaret announced to her four children that she wanted to be cremated after she died. Two years later, Margaret passed away. While her daughter wanted to follow her mom's wishes, Margaret's three sons disagreed. Because the local mortician was faced with following the direction of the majority of the children, Margaret was buried in the local cemetery. Years later Margaret's daughter still refuses to communicate with her three brothers because they didn't honor their mother's wishes about what she wanted done with her body after she died.

Jack told his two children from his first marriage that he wanted to be buried in the small cemetery that bordered his ranch land. After Jack's death his present wife decided that he would be cremated and that she would keep the urn containing the remains. While Jack's children strongly objected, the surviving spouse's preferences prevailed over the wishes of his children.

These are examples of situations that have occurred because of uncertainty under prior law about who has the right to make decisions about a deceased's remains. With the enactment of the Montana Right of Disposition Act, Montanans can now provide "disposition directions" and know that their choice has legal priority over any of their survivors' wishes.

Methods of providing "disposition directions"

The act allows Montanans who are 18 years of age or older and of sound mind to arrange for funeral goods and services as well as to indicate what they wish to be done with their bodies or remains after death. Any one of the four methods below provides legal authority for the deceased's wishes to have priority over the preferences of survivors:

1. Prepaid funeral contract: Prior to death, a person can make a prepaid funeral contract with a licensed mortuary. There are two types of prepaid funeral contracts recognized under Montana law – a funeral trust and a funeral insurance

policy. On either document the licensed mortuary is listed as the beneficiary. In return, the mortuary promises to provide the prepaid funeral goods or services that were specified in the contract.

Example A: Carl visited his local mortuary and made arrangements for his funeral and burial. He signed a prepaid funeral contract and placed a copy with his letter of last instructions. He also briefly explained his wishes to his wife and children and told them these documents were in his file drawer in a folder labeled "Letter of Last Instruction." For further information, see the MSU Extension MontGuide, *Letter of Last Instructions*, [MT198904HR](#).

2. Written Disposition Direction: A second method for making a disposition direction under Montana law is a written instrument that can be typed, handwritten, or computer generated. The person and two witnesses (all must be at least 18 years of age and of sound mind) must sign the written instrument. Letters of last instructions, a will, a trust document, a power of attorney, or a health care directive that contains specific instructions about the disposition of the deceased's remains, will qualify as a written instrument if signed by the deceased and two witnesses.

Example B: Robin wrote a letter of last instructions in which she indicated that she wanted to be buried in Highwood Cemetery in a coffin made of white pine harvested from the family's forest land. Robin requested that during the funeral service her good friends, Jane and Katelyn, share a couple of funny incidents about their years of growing up together. Robin signed the letter, and asked two of her neighbors, both of whom were over 18 years old, to witness and sign it.

3. Signed Affidavit: The third method of making a disposition direction under Montana law is an affidavit. A person can authorize another person to control the disposition of his or her remains in an affidavit that is signed before a notary public.

Example C: Jeff wants his wife to decide how to dispose of his remains. He feels that his wife would reach a decision that would comfort her, their five children and other family members. Jeff prepared a written affidavit designating his wife as his agent to dispose of his remains and signed it before a notary public. If Jeff wanted to limit his wife's decisions, he could attach specific instructions to the affidavit. For example, he could direct her to choose whether to have his remains cremated and scattered among the wildflowers or have his body buried in the local cemetery.

Figure 1 is a sample affidavit that is provided in the Montana statute for granting authority to another person to make decisions about the disposition of a deceased's remains. The sample affidavit can be downloaded at: <https://www.montana.edu/estateplanning/documents/sampleaffidavit.pdf>.

4. Videotaped Disposition Direction: A fourth method of providing a disposition direction under Montana law is a video. A person can record a video in which his or her disposition preferences are described. A written confirmation of the video's existence and accuracy must be signed by two witnesses who are at least 18 years of age and of sound mind.

Example D: John asked a friend to videotape him explaining that he wanted to be cremated after his death. John requested that his family have a "Celebration of Life" service. He asked his wife and two children to scatter his ashes along his favorite riding trail. John's two close friends, who were over age 18, were present at the videotaping. John's friends each signed and dated a written confirmation of the existence of the videotape.

FIGURE 1.

STATE OF MONTANA

County of _____
Name of County

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 _____.
Date Month, Year

(SEAL) _____
Signature Line for Notary

Name of Notary (printed or typed)

Notary of Public of State of Montana

Residing at _____, Montana

My Commission Expires: 20_____

Who has priority for decisions about the disposition of remains?

If a Montanan dies without providing disposition directions in one of the four methods listed previously, then the authority passes to individuals in the following priority, provided that they are 18 years or older and of sound mind:

- 1) Surviving spouse of the deceased;
- 2) Sole surviving child of the deceased or, if there is more than one child of the deceased, the majority of the surviving children. However, less than one-half of the surviving children may assume “right of disposition,” if those children have used reasonable efforts to notify all other children and they are not aware of opposition of more than one-half of all children.
- 3) Surviving parent or parents of the deceased. If one of the surviving parents is absent, the remaining parent may dispose of the remains if that parent’s reasonable efforts have been unsuccessful in locating the absent surviving parent.
- 4) Surviving sibling of the deceased or, if there is more than one sibling of the deceased, the majority of the surviving siblings. However, less than one-half of the surviving siblings may dispose of remains, if those siblings have used reasonable efforts to notify all other siblings and they are not aware of any opposition of more than one-half of all siblings.
- 5) If the deceased is not survived by a spouse, children, or siblings, the statute provides priority to others, including grandparents, a legal guardian, a personal representative, or more distant relatives.

Arrangements provided by survivors

The survivors can choose at their own expense, arrangements for funeral services that do not conflict with the prepaid funeral contract, written instrument, video, or affidavit “disposition directions” of the deceased.

Loss of “right of disposition”

Under certain circumstances (as outlined below) a person can lose his or her right to make disposition decisions. If a person loses “right of disposition,” it is passed to the next qualifying individual.

- 1) If the person does not exercise his or her “right of disposition” within two days after notification of the death of the deceased or within three days after the deceased's death, whichever is earlier, then the right is forfeited.
- 2) A surviving spouse loses his or her “right of disposition” if a petition to dissolve the marriage was pending at the time of the deceased's death.
- 3) If the district court determines that the person entitled to the “right of disposition” was estranged from the deceased at the time of death, then the right is forfeited. Estranged is defined in the statute as meaning that the person had a physical and emotional separation from the deceased. The

estrangement must have existed for a period of time prior to death and clearly demonstrates an absence of the person’s affection, trust, and regard for the deceased.

- 4) If the person is charged with deliberate or negligent homicide in connection with the deceased's death, then he or she must forfeit his or her “right of disposition” unless the charges are dismissed, or if the person is acquitted prior to the exercise of a “right of disposition” by others with priority.

Disputes among those sharing “right of disposition”

If there is a dispute as to who has priority, or if a majority of those having priority (such as siblings or children) cannot reach a decision about what should be done with the deceased’s remains, they may file a petition for an *order of disposition* with the district court. A mortician with custody of the remains may also file a petition for an order of disposition.

In making a determination about who has “right of disposition,” the district court considers several factors including:

- Reasonableness and practicality of any proposed funeral arrangements and disposition;
- Degree of the personal relationship between the deceased and each of the persons who are claiming “right of disposition;”
- Desires of the person(s) willing to pay the costs of the funeral arrangements and disposition.
- Convenience and needs of other family and friends wishing to pay respects to the deceased;
- Desires of the deceased; and
- Degree to which the funeral arrangements would allow maximum participation by all those wishing to pay their respects to the deceased.
- The fact that a person has paid or agreed to pay for all or part of the funeral arrangements or disposition of a deceased’s remains does not give him or her a greater “right of disposition” than he or she would otherwise have.

Responsibilities of morticians, if there is a dispute

If a dispute arises among family members about who has “right of disposition,” a mortician may not be held liable for refusing to accept the remains of the deceased. A mortician may also not be liable for refusing to complete the arrangements for final disposition until the parties come to an agreement or the district court issues an order for disposition. If the mortician retains the deceased’s remains while the parties are in disagreement, the mortician may preserve the body pending resolution of the dispute and add such expenses to the final disposition bill.

A mortician may act according to the instructions of the first person with priority to contact him or her unless and until others (such as children who share priority) notify the mortician of any objections in writing. A person who represents that he or she has priority as to "rights of disposition" is considered to be giving a warranty as to the truthfulness of his or her identity and authority. The Act protects morticians who rely in good faith on the instructions of an individual claiming a "right of disposition."

Summary

The Montana Right of Disposition Act allows Montanans who are 18 years of age or older and of sound mind to direct the disposition of their remains and to arrange for funeral goods and services by any of the following methods:

- Prepaid funeral contract;
- Written disposition direction; that is signed by the deceased and two witnesses
- Signed affidavit before a notary that authorizes another person to make disposition decisions for the deceased; or
- Videotaped disposition direction

The Montana statute lists a ranking order of individuals who can assume the "right of disposition" if a Montanan does not make prior arrangements. If a majority of the people with the right to make decisions cannot agree, they can file a petition for an *order of disposition*. The district judge then makes a decision about disposing of the deceased's remains or determines who has priority to make the decision.

For further information

Montana Board of Funeral Service

301 South Park, 4th Floor
PO Box 200513
Helena, MT 59620-0513
Phone: 406-841-2394 Fax: 406-841-2305
e-mail: dlibsdfnr@mt.gov
www.funeral.mt.gov

Montana Funeral Directors Association (MFDA)
PO Box 4267
Helena, MT 59604-4267
Phone: 406-449-7244 Fax: 406-443-0979
www.montanafuneraldirectors.org

AARP Fulfillment

601 E Street, NW
Washington, DC 20049
Phone: 1-888-687-2277
www.aarp.org Search on "Preneed Funeral"

Federal Trade Commission

Consumer Response Center
600 Pennsylvania Avenue, NW
Washington, DC 20580
Phone: 202-326-2222
www.consumer.ftc.gov, search "Funeral" in the search engine.

Acknowledgment

This MontGuide has been reviewed by representatives from the following who recommend its reading by Montanans who want to prepare for final disposition of their remains.

- Montana Board of Funeral Service
- Montana Funeral Directors Association
- Business, Estates, Tax, Trusts, and Real Property Section; State Bar of Montana
- The suggestions of reviewers from Teton, Gallatin, Liberty and Missoula counties are gratefully acknowledged as well.

Reference

Montana Codes Annotated Section § 37-19-701 - § 37-19-708. <http://leg.mt.gov/bills/mca/37/19/37-19-701.htm>



To order additional publications, please contact your county or reservation MSU Extension office, visit our online catalog at <http://store.msuextension.org> or e-mail orderpubs@montana.edu

Copyright © 2017 MSU Extension

We encourage the use of this document for nonprofit educational purposes. This document may be reprinted for nonprofit educational purposes if no endorsement of a commercial product, service or company is stated or implied, and if appropriate credit is given to the author and MSU Extension. To use these documents in electronic formats, permission must be sought from the Extension Communications Coordinator, 115 Culbertson Hall, Montana State University, Bozeman MT 59717; E-mail: publications@montana.edu

The U.S. Department of Agriculture (USDA), Montana State University and Montana State University Extension prohibit discrimination in all of their programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital and family status. Issued in furtherance of cooperative extension work in agriculture and home economics, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture, Jeff Bader, Director, Montana State University Extension, Bozeman, MT 59717.