

What Are Your Rights Over Your Remains?

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The Montana Right of Disposition Act allows persons to provide instructions for disposing of their remains or to designate an agent with authority to make such decisions.

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 a 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 to be 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 he would be cremated, and 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 situations have occurred because of uncertainty under prior law about who has the right to decide 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 18 years or older and of sound mind to arrange for funeral goods and services and indicate what they wish to be done with their bodies or remains after death. Any one of the four methods in the Act provides legal authority for the deceased's wishes to have priority over the preferences of survivors.

1. **Prepaid Funeral Contract:** Before 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 specified in the contract.

Example A: Carl visited his local mortuary and arranged 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 qualify as a written instrument if signed by the deceased and two witnesses.

Example B: Robin wrote a letter of last instructions indicating that she wanted to be buried in the local cemetery in a coffin made of white pine harvested from the family's forest land. Robin wrote her preference for having her good friends, Jane and Katelyn, share a couple of funny incidents about their years of growing up together during the service. Robin asked two of her neighbors both of whom were over 18 years old to witness Robin signing the letter and to sign it themselves as witnesses.

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 their remains in an affidavit signed before a notary public.

Example C: Jeff wants his wife to decide how to dispose of his remains. He feels 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. He 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 on the ranch or have his body buried in the local cemetery.

Figure 1 is a sample affidavit provided in the Montana statute for granting authority to another person to decide on the disposition of a deceased's remains. The sample affidavit can be downloaded at: montana.edu/estateplanning/documents/sampleaffidavit.pdf.

4. **Video Disposition Direction:** A fourth method of providing a disposition direction under Montana law is a video. This video must be in a replayable format. A person can record a video describing their disposition preferences. A written confirmation of the video's accuracy must be signed by two witnesses who are at least 18 years of age and of sound mind.

Example D: John made a "selfie" video of himself with his cell phone explaining that he wanted to be cremated after death. He requested that his family have a "Celebration of Life Service." John requested that his ashes be scattered along his favorite riding trail. John's two buddies were present during the recording. Each friend signed and dated a written confirmation that the video was an accurate distribution direction they witnessed John give. The video was then safely stored in case further inspection was necessary by family members who objected to John's direction.

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____

Figure 1: Sample Affidavit for granting authority to another person to make decisions about the disposition of a deceased remains.

Who has priority for decisions about the disposition of remains?

If a Montanan dies without providing disposition directions in a method authorized by the Act, then the authority, or "right of disposition," passes to individuals (at least 18 years old and of sound mind), in the following priority:

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 dispose of the remains if those children have used reasonable efforts to notify all other children of their disposition instructions and they are not aware of more than one-half of all children opposing those instructions.

3. Surviving parent or parents of the deceased. If one of the surviving parents is absent, the remaining parent may dispose of the remains assuming 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 of their disposition instructions and are unaware of more than one-half of all siblings opposing those instructions.
 5. Surviving grandparent of the deceased, or if there is more than one surviving grandparent, the majority of the grandparents. However, less than one-half of the surviving grandparents may dispose of the remains if those grandparents have used reasonable efforts to notify all other grandparents of their disposition instructions and are unaware of more than one-half of all grandparents opposing their instructions.
 6. The guardian of the deceased at the time of the deceased's death, if one had been appointed.
 7. The personal representative of the estate of the deceased.
 8. More distant relatives according to their degree of kinship to the deceased.
 9. Any other person, including the mortician in the custody of the deceased's remains, who is willing to assume responsibility for disposition of the remains after attesting in writing that a good faith effort has been made to contact those individuals having higher priority.
2. A surviving spouse loses "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 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 before 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 the right of disposition is forfeited unless the charges are dismissed or if the person is acquitted before 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;

However, 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 them a greater "right of disposition" than they would otherwise have.

Arrangements provided by survivors

The survivors can choose at their own expense, arrangements for funeral services if the arrangement does not conflict with the prepaid funeral contract, written instrument, video, or affidavit of "disposition directions" of the deceased.

Loss of "right of disposition"

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

1. If the person does not exercise "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.

Responsibilities of morticians if there is a dispute

If a dispute arises among family members about who has the “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 if the district court issues an order for disposition. If the mortician retains the deceased’s remains while the parties disagree, the mortician may preserve the body pending resolution of the dispute and add the expense to the final disposition bill.

A mortician may act according to the instructions of the first person with priority to make contact unless and until others (such as children who share priority) notify the mortician of any objections in writing. A person who represents they have priority as to “rights of disposition” is considered to be giving a warranty on the truthfulness of their 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
- Video Disposition Direction.

The Montana statute ranks the 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 decides 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: 406-841-2300
Email: DLIBSDWEBHELP@mt.gov
<https://boards.bsd.dli.mt.gov/funeral/>

Montana Funerals Directors Association (MFDA)

15 South Idaho Street
Dillon, MT 59725
Phone: 406-449-7244
<https://montanafda.org>

AARP Fulfillment

601 E Street, NW
Washington, DC 20049
Phone: 1-888-687-2277
www.aarp.org/home-family/friends-family/info-2020/paying-for-cost-of-funeral.html

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 the 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 also gratefully acknowledged.

Disclaimer

This publication is not intended to be a substitute for legal advice. Rather, it is designed to help families become better acquainted with some of the devices used in estate planning and to create an awareness of the need for such planning. Future changes in laws cannot be predicted, and statements in this MontGuide are based solely upon those laws in force on the date of publication.

Reference

Montana Codes Annotated Section § 37-19-901 – § 37-19-709
[https://leg.mt.gov/bills/mca/title_0370/chapter_0190/
part_0090/section_0010/0370-0190-0090-0010.html](https://leg.mt.gov/bills/mca/title_0370/chapter_0190/part_0090/section_0010/0370-0190-0090-0010.html)



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