

Critique of HB 323

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Below is the text of HB 323, with my commentary interspersed in [blue type in brackets].

2007 Montana Legislature

HOUSE BILL NO. 323

INTRODUCED BY B. THOMAS

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 THE INSTRUCTIONS OF A PERSON WHOM THE MORTICIAN REASONABLY BELIEVES HAS THE RIGHT OF DISPOSITION; REVISING DEFINITIONS; AND AMENDING SECTION 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.** (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, 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.

[Tying a citizen's right to control how his body is handled to prepayment at a mortuary is a terrible idea. Citizens do need this right, but they should not be forced to enter risky prepayment schemes to exercise it. AARP, Consumer Reports, and Funeral Consumers Alliance all warn against prepayment. Scandals involving hundreds of millions of missing prepaid dollars (sparking FBI investigations just this week in Oklahoma and Maryland) point to the danger of prepayment.]

(2) The disposition directions and funeral prearrangements that are prepaid and contracted for with a licensed mortuary 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 as the person authorized to cancel or revise the terms of the prepaid funeral contract.

[This prohibition on changing funeral plans neglects situations many families face. What if the customer dies out of state or out of the funeral home's service area? This bill makes no provision for these circumstances that hundreds of families face every year. It also directly conflicts with the sensible provisions already included in Montana's funeral regulations. Rule 24.147.1504 states:

"Every preneed funeral agreement executed in this state shall be reduced to writing, and must:

.....

(f) provide that, unless otherwise specified therein, a prepaid funeral agreement anticipates the provision of prepaid funeral goods and services in the area served by the provider. The agreement shall further provide that, if the intended funeral recipient's place of death is in a location other than that served by the provider, alternative funeral arrangements will be necessary unless otherwise provided for in the terms of the agreement."

But under HB 323, if the prepaid customer forgets or neglects to specifically authorize an agent to revise the contract, the family member or next-of-kin would be unable to move the contract to another funeral home if mom died two states away. Who will pay for the expensive transportation to get the body back to Montana?]

NEW SECTION. **Section 4. Priority of rights to disposition.** Except as provided in [sections 3 and 7], the right to control the disposition of the remains of a deceased person, including the location, manner, conditions of 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:

(1) the surviving spouse;

(2) 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 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) 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) 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 a majority of 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) the surviving grandparent of the decedent or, if there is more than one surviving grandparent, the majority of the grandparents. However, less than the majority 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) the guardian of the decedent at the time of the decedent's death, if a guardian had been appointed;

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

(8) the person in the 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) 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 final disposition of the decedent's remains; and

(10) in the absence of any person provided for in subsections (1) through (9), any other person, including the mortician with custody of the remains, who is willing to assume the responsibility to act and arrange the final 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).

[This devolution of power is unnecessarily complicated, and does little to adjudicate disputes among warring kin. It also neglects a citizen's presumptive right to direct the disposition of his own body, and to appoint anyone he wishes to have that power (unless he prepays). Squabbling families are a disaster for funeral directors, too, who rightly feel caught in a situation out of their control.

Even worse, HB 323 doesn't give any help to, for example, unmarried elderly couples who entrust each other with all important decisions in their life together. Example:

George and Mary live together in their retirement, but have decided not to marry for personal and financial reasons. They've lived together for 25 years. George appoints Mary as his attorney-in-fact in his Durable Healthcare Power of Attorney. George suffers a heart attack, and is left brain-dead. Mary exercises her right as his representative to decide how long to keep him on life support.

When George dies, however, Mary loses all rights. George's estranged son, Sam, who never approved

of Mary and refused to speak to his father, now comes in and orders funeral arrangements contrary to George's and Mary's wishes. Under HB 323, this unfair situation would be completely legal.

There is a better way, and 29 other states have taken it. Laws known as "personal preference" and "designated agent" allow citizens to make legally binding funeral arrangements (without prepaying) that survivors are obliged to carry out, provided the estate is sufficient or the survivors are willing to bear the expense. Designated agent laws are the best solution. They extend the rights of attorneys-in-fact under Durable Healthcare Powers of Attorney past death, so that the decedent's chosen representative — whether this person is kin or not — has the sole right to make funeral arrangements. This takes care of bitter family feuds over the dead, and gives funeral homes clear instructions and immunity from liability.

A list of the 29 states with such laws is available at:

www.funerals.org/pref.htm

Montana might consider Texas' law, which is simple, direct, and fair. It accomplishes the objective much more economically than HB 323, and provides an advance remedy to the problem of fighting out funeral arrangements in court:

" Texas Health and Safety Code

§ 711.002. DISPOSITION OF REMAINS; DUTY TO INTER. (a) Unless a decedent has left directions in writing for the disposition of the decedent's remains as provided in Subsection (g), the following persons, in the priority listed, have the right to control the disposition, including cremation, of the decedent's remains, shall inter the remains, and are liable for the reasonable cost of interment:

- (1) the person designated in a written instrument signed by the decedent;
- (2) the decedent's surviving spouse;
- (3) any one of the decedent's surviving adult children;
- (4) either one of the decedent's surviving parents;
- (5) any one of the decedent's surviving adult siblings; or
- (6) any adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent."

The following provision immunizes funeral directors:

"(i) A cemetery organization, a business operating a crematory or columbarium or both, a funeral director or an embalmer, or a funeral establishment shall not be liable for carrying out the written directions of a decedent or the directions of any person who represents that the person is entitled to control the disposition of the decedent's remains."

NEW SECTION. **Section 5. Arrangements provided by survivors.** The provisions of [section 3] 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].

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; and

(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 the 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 cost of final disposition.

(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 final 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, by virtue of being the personal representative, have 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 service 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 whom 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 there is more than one person in a class who are equal in priority, a mortician is entitled to 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 written notice of the person's objections to the arrangements to the mortician and the mortician does not have knowledge of any objection to the arrangements by other members of the class.

NEW SECTION. **Section 9. Immunity.** A mortuary or mortician who relies in good faith upon 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.

[The following section, which significantly expands the definitions of activities that only a licensed mortician can perform, is fraught with problems. NOTE — Insofar as private families care for their own dead without using a funeral home, these new definitions which restrict certain activities to funeral homes are *a priori* in conflict with existing Montana law. The Montana Board of Funeral Service is granted limited authority to regulate the **business and occupation** of commercial funeral directing. It has no statutory authority to govern the private activities of families, or the activities of their chosen clergy, when these parties perform funerals and memorial services without pay. Nor should it aspire to such authority. The state has a legitimate interest in regulating businesses that serve the public at a time of grief; it has no legitimate interest in "protecting" families from themselves by denying them their rights to care for their dead privately. The Board's authority is delineated in **37-1-131** of the Montana Code:

"A quorum of each board within the department shall:

(1) set and enforce standards and rules governing the licensing, certification, registration, and conduct of the members of the particular profession or occupation within the board's jurisdiction; "

and in **37-1-136** of the Montana Code:

"37-1-136. Disciplinary authority of boards -- injunctions. (1) Subject to 37-1-138, each licensing board allocated to the department has the authority, in addition to any other penalty or disciplinary action provided by law, to adopt rules specifying grounds for disciplinary action and rules providing for:

...

(3) Notwithstanding any other provision of law, a board may maintain an action to enjoin a person from engaging in the practice of the occupation or profession regulated by the board until a license to practice is procured."

These code sections fall under the heading "Professions and Occupations." The clear legislative intent is to give the state authority to regulate businesses, not private citizens. To the extent HB 323 seeks to expand the authority of the Board of Funeral Service to govern privately conducted funerals performed by families, these provisions are invalid and unenforceable on their face.

There are numerous, additional problems with HB 323's expansion of "mortician-only" activities, not the least of which is the way it effectively puts freestanding crematoria out of business by defining activities **necessary to that business**, such as transporting the dead and refrigerating bodies, as illegal if not performed "under the supervision" of a mortician.

This is a transparent attempt to kill competing businesses by a thousand paper cuts. The absurd prohibitions on anyone but morticians discussing "funeral arrangements," or conducting "memorial services" or "sheltering" the dead are beyond the pale. I doubt any court of law would sustain these provisions, which go a country mile beyond reason and the First Amendment to the United States Constitution. I'll detail these below.

The most favorable outcome would be for the Legislature to scrap all the provisions below. But, at the very least, the Legislature should insert the following language to clearly circumscribe the state's authority to interfere in the legitimate free market, and to protect the Constitutional and Common-Law rights of American citizens living in Montana. If it did, there'd be no need for the surfeit of convoluted language HB 323 contains anyway.

"No part of this legislation shall be construed to prevent any mortician, funeral home, crematory, crematory operator, or other duly licensed provider of death services from performing the duties necessary to conduct the business for which the provider is licensed."

Forty-three states recognize Americans' right to care for their own dead in accord with their conscience, religion, and pocketbooks. This is a fundamental right that must be preserved. Montana should adopt either of the following excellent provisions from the statutes of Tennessee and Mississippi, which articulate and protect this right better than any other state laws:

From the Code of Tennessee, **62-5-102**:

Nothing herein shall be constituted to prevent or interfere with the ceremonies, customs, religious rites, or religion of any people, denomination, or sect, or to prevent or interfere with any religious denomination, sect, any body composed of persons of a denomination, or to prevent or interfere with any church or synagogue from having its committee or committees prepare human bodies for burial or

to the families, friends or neighbors of deceased persons who prepare and bury their dead without charge.

From the Code of Mississippi, **73-11-63** (this language was added effective in 2002):
In addition, nothing in this chapter shall be construed to prevent or interfere with the ceremonies, customs, religious rites or religion of any people, denomination, or sect, or to prevent or interfere with any religious denomination, sect or anybody composed of persons of a denomination, or to prevent or interfere with any church or synagogue from having its committee or committees prepare human bodies for burial or the families, friends or neighbors of deceased persons who prepare and bury their dead without charge.

Section 10. 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) (a) "Arrangements" includes:

~~(a)(i) planning the details of funeral service, including time of service, type of service, and, if requested, acquiring the services of clergy and reviewing with the authorizing agent the details of a funeral or disposition of human remains, including but not limited to the manner and specifics of the funeral or disposition of the human remains;~~

[Under this definition, a crematorium operator would be barred from discussing with his client even the simple fact that the client wants cremation! In addition, any private citizen or clergyman would be barred from having conversations about how to dispose of the dead.]

~~(b)(ii) filing for and obtaining the necessary information for filing removal permits, burial permits, and death certificates; and~~

[This would outlaw private families (and legitimate cremation businesses) from filing for death certificates and burial permits necessary to lay their dead to rest either through cremation or burial. The state has no authority to prevent families from engaging in this traditional, time-honored act of caring for their own. What legitimate reason does the state have for preventing the rugged ranch family, for example, from following legal procedures and filing legal paperwork necessary to bury a son or bring him to the crematory?

There is absolutely no public purpose served by this; it would merely force unwilling families and individualists to pay a funeral home to do what they can do for themselves. Effectively, this makes our dead loved ones hostages of the funeral industry.

This provision squarely conflicts with existing Montana law, which clearly allows people other than

funeral directors to prepare and file death certificates:

"50-15-403. Preparation and filing of death or fetal death certificate.

(2) The **person in charge of disposition** of the dead body or fetus shall present the death certificate to the certifying physician, the certifying advanced practice registered nurse, or the coroner having jurisdiction for medical certification of the cause of death. The medical certification must be completed by the physician, the advanced practice registered nurse, or the coroner within the timeframe established by the department by rule. The **person in charge of disposition** shall obtain the completed certification of the cause of death from the physician, the advanced practice registered nurse, or the coroner and shall, within the time that the department may prescribe by rule, file the death or fetal death certificate with the local registrar in the registration area where the death occurred or, if the place of death is unknown, where the dead body was discovered. [emphasis added]."

For families who conduct private funerals, the "person in charge of disposition" is obviously a family member, not a funeral director. Since coroners, certifying physicians, nurses, or other competent medical professionals must certify the death in any circumstances, prohibiting anyone but a mortician from filing the certificates serves no practical or public safety purpose. In fact, the biographical data on the death certificate can **only come from the family** anyway, and families who complete these themselves have cut one step out of the process, which may increase the accuracy of the data.

Finally, there is no practical reason to prevent crematory operators from procuring and filing this paperwork necessary to conduct their business. This provision would effectively shut down such businesses for no rational reason.

~~(e) 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~~

(iii) communicating with others to arrange and carry out funeral and disposition services.

[So, a pastor who calls the family to ask when he should show up to deliver the eulogy is in violation of the law? Is a family committing a crime if it calls the crematorium to arrange a time to remove the dead body from the home? Has the crematorium operator committed a crime if he calls the family back and asks when it would be convenient to deliver the cremated remains? On what authority can the state of Montana abridge Constitutionally protected speech in this manner? I trust readers see the absurdity of this situation.]

(b) The term does not include filing obituary notices with newspapers, ordering flowers for funeral services, reporting prices to consumers from a mortuary's price list, and other clerical work.

(2) "At-need" arrangements means arrangements made with a licensed funeral director or licensed

mortician at or after the time of death by an ~~authorized person~~ authorizing agent ~~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 to 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 conducting or engaging in or representing or holding oneself out as being authorized to engage in or conduct any one or any combination of the following practices:

~~(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.~~

(a) using, in connection with a name or practice, the word mortician, funeral director, undertaker,

mortuary, funeral home, funeral parlor, funeral chapel, or any other title implying that the person is engaged in the practice of funeral directing;

(b) operating a place for preparing human remains for disposition or for caring for human remains prior to disposition;

[Defining "funeral directing" in this way would make it illegal for a freestanding crematorium to exist and do business. This is odd, considering that Montana statutes clearly provide for the licensure of crematories.]

(c) the removal of human remains from the place of death, except that:

(i) a mortician may employ persons who are not licensed morticians to perform the removal of human remains from the place of death if those persons have received any training that the board may prescribe for the safe handling and transportation of human remains; and

[This provision is supremely irrational. It would prevent families, crematory operators, or anyone else from transporting a body unless they were licensed morticians. However, a mortician can employ anyone to do so on his behalf if such a person received training the board **may** (note, **not must**) "prescribe for the safe handling and transportation of human remains." I can imagine what convoluted, unnecessary "training" the Board might implement to make it difficult for anyone but a mortician to perform such a mundane chore.

There is no such necessary training. Quite obviously, there is no way to transport the dead that is unsafe to a corpse. Secondly, any potential risk to the handler of bodies is easily taken care of by the use of "universal precautions," simple protocols from the Centers for Disease Control workers should use to protect themselves from contact with potentially infectious bodily fluids. The sum total of these precautions? The use of latex gloves, and bleach to disinfect surfaces that have come in contact with body fluids. Any person of ordinary intelligence can move a dead body from one place to another. It does not require two years of mortuary trade school. If it did, we'd have to explain why hospital orderlies with no mortician's training are somehow able to successfully and "safely" move bodies on gurneys to the morgue in the basement.]

(ii) the transportation of human remains that are embalmed or otherwise prepared and enclosed in an appropriate container to some place that is not the place of final disposition or the transportation of deceased human remains to a cemetery, crematory, or other place of final disposition may be performed by persons who are not licensed morticians as long as those persons are under the general supervision of a mortician. The supervision does not have to be immediate and direct.

[There is no public health purpose served by embalming (challenge those who claim there is to provide you data - they cannot) or by "otherwise preparing" bodies. And, just what is an "appropriate container?" One that's closed? One that's costly? One that a funeral director deems "dignified?" This language is loose enough to drive a fleet of Cadillac hearses through.

There is no purpose to this provision aside from making sure only morticians — not crematory operators — get paid for transporting bodies. How else can we explain that morticians are allowed to have others transport bodies under the "general supervision" of a mortician that "does not have to be immediate and direct?" So, it's OK for a crematorium operator to transport a body so long as a mortician asks him to, but it's not OK for him to do so because a customer requests it? What qualifications does such a transporter have to have? None, according to the statute, just the blessing of a mortician, and his indirect and non-immediate supervision.]

(d) carrying out, conducting, or assuming responsibility for carrying out or conducting at-need or preneed arrangements;

[This is getting tiresome. Shall families who take on the burden of caring for their own be prosecuted? Shall ministers who guide families through the unfamiliar waters of organizing a funeral be brought up on charges?]

(e) assuming custody of human remains, providing shelter or protection and care to human remains, or carrying out the disposition of human remains;

[This would clearly make it illegal for a crematorium operator to accept a body for cremation. How in the world can he cremate a body without having custody of it? How can he cremate a body without providing it "shelter" and "protection" by virtue of the fact that there's a roof on the crematorium where the body is held?

Montana law says bodies may not be cremated until 24 hours have passed after death:

"37-19-705. Cremation procedures -- cremation containers. (1) Human remains may not be cremated except in a licensed crematory.

(2) Human remains may not be cremated within 24 hours after the time of death."

HB 323 would make it illegal for crematories to pick up or hold bodies for the required time until cremation is performed. The alternative? Paying a mortician to collect and shelter the body. There is no rational purpose for this. Why is it that a crematorium is allowed to burn a body at 1,800 degrees Fahrenheit, rake the bones out of the crematorium, pulverize them in a metal grinder, but is **not** allowed to put the body in its refrigerator?

It should be clear the function of these provisions is to guarantee morticians business that a rational consumer might decide not to give.]

(f) embalming, sanitizing, dressing, restoring, applying cosmetics, or otherwise preparing human remains for burial, cremation, or disposition, except that directing and supervising the burial or disposition of human remains if those functions are normally performed by cemetery and crematory personnel in interring or cremating human remains may not be considered funeral directing; and

[Do we want to make it illegal for families or crematorium operators to dress or put lipstick on the dead?]

(g) supervising, conducting, or coordinating funeral, committal, or memorial services.

[This is the most outrageous and *per se* illegal and unenforceable provision in HB 323. The state has no right to say that families, pastors, or friends must have a mortician's license to perform funeral or memorial services. This ridiculous provision would make it a crime for a pastor to preside over a private service of remembrance held at church, unless he had a mortician's license. It would make it a crime for a family to set up a phone tree with relatives to coordinate the time and place of a memorial gathering, or to preside over that gathering in their own home or church. Perhaps we should make it illegal for parents to organize a birthday party? Perhaps they should be required to pay for the services of a Certified Birthday Consultant, whose skills in selecting noisemakers are duly vetted by the State Board of Birthdays?

More than any other provision of HB 323, this demonstrates the bill's clear intent: to establish a Divine Right of Undertakers in square conflict with Constitutional, Common-Law, and statutory rights all citizens enjoy. This is embarrassing.]

(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 11. 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].

- END -