



2022 South Dakota Legislature

House Bill 1152

Introduced by: **Representative Hoffman**

1 **An Act to establish rights regarding the disposition of a person's remains.**

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 **Section 1. That a NEW SECTION be added to title 55:**

4 A person, who is 18 years of age or older and of sound mind, by entering into a
 5 preneed contract as defined by § 55-11-1, may direct the location, manner and conditions
 6 of disposition of the person's remains, and the arrangements for funeral goods and
 7 services to be provided upon the person's death. The disposition directions and funeral
 8 prearrangements that are contained in a preneed contract are not subject to cancellation
 9 or substantial revision unless the cancellation or substantial revision has been ordered by
 10 a person who the decedent has appointed in the preneed contract as the person authorized
 11 to cancel or revise the terms of the preneed contract, or unless any resources set aside
 12 to fund the preneed contract are insufficient under the terms of the preneed contract to
 13 carry out the disposition directions and funeral prearrangements contained therein.

14 **Section 2. That a NEW SECTION be added to title 55:**

15 Except as provided in section 3 of this Act, the right to control the disposition of
 16 the remains of a deceased person, the location, manner and conditions of disposition, and
 17 arrangements for funeral goods and services to be provided vests in the following, in the
 18 order named, provided such person is 18 years or older and is of sound mind:

19 (1) A person designated by the decedent as the person with the right to control the
 20 disposition in an affidavit executed in accordance with section 4 of this Act;

21 (2) A person designated in the federal Record of Emergency Date Form DD 93, or its
 22 successor form, to have the right of disposition by a member of the military who
 23 dies while under active-duty orders, as described in 10 U.S.C. § 1481, in effect on
 24 January 1, 2022;

25 (3) The surviving spouse;

- 1 (4) The sole surviving child of the decedent, or if there is more than one child of the
2 decedent, the majority of the surviving children. However, less than one-half of
3 the surviving children are vested with the rights of this section if they have used
4 reasonable efforts to notify all other surviving children of their instructions and are
5 not aware of any opposition to those instructions on the part of more than one-half
6 of all surviving children;
- 7 (5) The surviving parent or parents of the decedent. If one of the surviving parents is
8 absent, the remaining parent is vested with the rights and duties of this section
9 after reasonable efforts have been unsuccessful in locating the absent surviving
10 parent;
- 11 (6) The surviving brother or sister of the decedent, or if there is more than one sibling
12 of the decedent, the majority of the surviving siblings. However, less than the
13 majority of surviving siblings are vested with the rights and duties of this section
14 if they have used reasonable efforts to notify all other surviving siblings of their
15 instructions and are not aware of any opposition to those instructions on the part
16 of more than one-half of all surviving siblings;
- 17 (7) The surviving grandparent of the decedent, or if there is more than one surviving
18 grandparent, the majority of the grandparents. However, less than the majority of
19 the surviving grandparents are vested with the rights and duties of this section if
20 they have used reasonable efforts to notify all other surviving grandparents of their
21 instructions and are not aware of any opposition to those instructions on the part
22 of more than one-half of all surviving grandparents;
- 23 (8) The guardian of the person of the decedent at the time of the decedent's death, if
24 one had been appointed;
- 25 (9) The personal representative of the estate of the decedent;
- 26 (10) The person in the classes of the next degree of kinship, in descending order, under
27 the laws of descent and distribution to inherit the estate of the decedent. If there
28 is more than one person of the same degree, any person of that degree may
29 exercise the right of disposition;
- 30 (11) If the disposition of the remains of the decedent is the responsibility of the state
31 or a political subdivision of the state, the public officer, administrator or employee
32 responsible for arranging the final disposition of decedent's remains; or
- 33 (12) In the absence of any person under subdivisions (1) to (11), inclusive, of this
34 section, any other person willing to assume the responsibilities to act and arrange
35 the final disposition of the decedent's remains, including the funeral director with

1 custody of the body, after attesting in writing that a good faith effort has been
 2 made to no avail to contact the individuals under subdivisions (1) to (11), inclusive,
 3 of this section.

4 **Section 3. That a NEW SECTION be added to title 55:**

5 A person entitled under law to the right of disposition forfeits that right, and the
 6 right is passed on to the next qualifying person as listed in section 2 of this Act, in the
 7 following circumstances:

8 (1) Any person charged with first- or second-degree murder or voluntary manslaughter
 9 in connection with the decedent's death, and whose charges are known to the
 10 funeral director; provided, however that if the charges against the person are
 11 dismissed, or if the person is acquitted of the charges, the right of disposition is
 12 returned to the person;

13 (2) Any person who does not exercise the person's right of disposition within two days
 14 of notification of the death of decedent or within three days of decedent's death,
 15 whichever is earlier;

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

18 (4) Where the court, pursuant to section 5 of this Act, determines that the person
 19 entitled to the right of disposition and the decedent were estranged at the time of
 20 death. For purposes of this subdivision, the term, estranged, means a physical and
 21 emotional separation from the decedent at the time of death that has existed for
 22 a period of time that clearly demonstrates an absence of due affection, trust, and
 23 regard for the decedent.

24 **Section 4. That a NEW SECTION be added to title 55:**

25 A person who is 18 years or older and of sound mind wishing to authorize another
 26 person to control the disposition of his or her remains as referenced in section 2 of this
 27 Act, may execute an affidavit before a notary public in substantially the following form:

28 State of _____ }

29 County of _____ }

30 I, _____, do hereby designate _____ with the
 31 right to control the disposition of my remains upon my death. I have/ have
 32 not attached specific directions concerning the disposition of my remains which the

1 designee shall substantially comply with, provided such directions are lawful and
2 there are sufficient resources in my estate to carry out the directions.
3 Subscribed and sworn to before me this _____ day of the month of _____ of the year
4 _____.
5 _____ (signature of notary public)

6 **Section 5. That a NEW SECTION be added to title 55:**

7 Notwithstanding sections 1 to 4, inclusive, of this Act, the court of the county where
8 the decedent resided may award the right of disposition to the person determined by the
9 court to be the most fit and appropriate to carry out the right of disposition, and may
10 make decisions regarding the decedent's remains if those sharing the right of disposition
11 cannot agree. The following provisions apply to the court's determination:

12 (1) If the persons holding the right of disposition are two or more persons with the
13 same relationship to the decedent, and they cannot, by majority vote, make a
14 decision regarding the disposition of the decedent's remains, any of the persons or
15 a funeral home with custody of the remains may file a petition asking the probate
16 court to make a determination in the matter;

17 (2) In making a determination under this section, the probate court shall consider the
18 following:

19 (a) The reasonableness and practicality of the proposed funeral arrangements
20 and disposition;

21 (b) The degree of the personal relationship between the decedent and each of
22 the persons claiming the right of disposition;

23 (c) The desires of the person or persons who are ready, able, and willing to pay
24 the cost of the funeral arrangements and disposition;

25 (d) The convenience and needs of other families and friends wishing to pay
26 respects;

27 (e) The desires of the decedent; and

28 (f) The degree to which the funeral arrangements would allow maximum
29 participation by all wishing to pay respect;

30 (3) In the event of a dispute regarding the right of disposition, a funeral home is not
31 liable for refusing to accept the remains or to inter or otherwise dispose of the
32 remains of the decedent or complete the arrangements for the final disposition of
33 the remains until the funeral home receives a court order or other written
34 agreement signed by the parties in the disagreement that decides the final

1 disposition of the remains. If the funeral home retains the remains for final
2 disposition while the parties are in disagreement, the funeral home may embalm
3 or refrigerate and shelter the body, or both, in order to preserve it while awaiting
4 the final decision of the court and may add the cost of embalming and refrigeration
5 and sheltering to the final disposition costs. If a funeral home brings an action
6 under this section, the funeral home may add the legal fees and court costs
7 associated with a petition under this section to the cost of final disposition. This
8 section may not be construed to require or to impose a duty upon a funeral home
9 to bring an action under this section. A funeral home and its employees may not
10 be held criminally or civilly liable for choosing not to bring an action under this
11 section; and

12 (4) Except to the degree it may be considered by the court under subsection (2)(c),
13 the fact that a person has paid or agreed to pay for all or part of the funeral
14 arrangements and final disposition does not give that person a greater right to the
15 right of disposition than the person would otherwise have. The personal
16 representative of the estate of the decedent does not, by virtue of being the
17 personal representative, have a greater claim to the right of disposition than the
18 person would otherwise have.

19 **Section 6. That a NEW SECTION be added to title 55:**

20 Any person signing a funeral service agreement, cremation authorization form, or
21 any other authorization for disposition is deemed to warrant the truthfulness of any facts
22 set forth therein, including the identity of the decedent whose remains are to be buried,
23 cremated, or otherwise disposed of, and the party's authority to order the disposition. A
24 funeral home shall have the right to rely on the funeral service contract or authorization
25 and shall have the authority to carry out the instructions of the person or persons whom
26 the funeral home reasonably believes holds the right of disposition. The funeral home shall
27 have no responsibility to contact or to independently investigate the existence of any next-
28 of-kin or relative of the decedent. If there is more than one person in a class who is equal
29 in priority and the funeral home has no knowledge of any objection by other members of
30 such class, the funeral home shall be entitled to rely on and act according to the
31 instructions of the first such person in the class to make funeral and disposition
32 arrangements; provided that no other person in such class objects in writing to the funeral
33 home.

1 **Section 7. That a NEW SECTION be added to title 55:**

2 No funeral home or funeral director who relies in good faith upon the instructions
3 of an individual claiming the right of disposition shall be subject to criminal or civil liability
4 or subject to disciplinary action for carrying out the disposition of the remains in
5 accordance with the instructions.