

## Dying Without a Will in Montana

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*This publication includes legal terms and detailed examples of scenarios for the distribution of property under Montana law if a person should pass away before writing a Will. It also explores how the title of real and personal (in whose names) property affects the distribution.*

**ALTHOUGH MOST MONTANANS ARE QUITE CONSCIENTIOUS** about their property while they are alive, 70 percent of these same thoughtful people make no provisions for its management and distribution after their deaths. Despite concern for families, friends, and property during their lifetime, they do not provide guidance when it is most needed – when they are no longer present to make decisions.

Many do not realize that if they die without writing a Will, Montana law provides for the distribution of their real and personal property. While the laws may make sense for many Montanans, your preferences may be different. If so, a Will is an estate planning tool to use to name beneficiaries (called devisees in Montana). This MontGuide describes to whom and how property is distributed under Montana law if a person dies intestate (without a valid Will).

An interactive website illustrating how a deceased's estate is distributed when a Montanan passes away without a Will can be found online, [montana.edu/dyingwithoutawill](http://montana.edu/dyingwithoutawill).

The term **deceased** refers to the person who died. **Descendants** refer to children, grandchildren, great-grandchildren, and further down the biological line. Children who were legally adopted by the deceased are also considered descendants. Stepchildren and foster children of the deceased are not considered descendants.

### Montana Law of Intestate Succession

Because something must be done with real and personal property after death, the Montana Legislature has provided a method for dividing it among heirs if a person does not make other arrangements. The original statutes have been revised to

recognize the increasing number of Montanans who have been married more than once and have stepchildren and children of earlier marriages. Under certain conditions, Montana law also provides for the deceased's parents to receive property.

The property of a Montana resident who dies without a valid Will passes by the pattern outlined in **Table 1**. However, transfer is also affected by the way real and personal property are titled. For example, property titled in joint tenancy with right of survivorship passes to the surviving joint tenant, not by Montana's intestacy statutes.

Property with a beneficiary designation also has priority over the intestacy statutes. For example, a payable on death designation (POD) on a person's checking account, or a transfer on death (TOD) on stocks, bonds, and mutual funds, or a beneficiary designation on a life insurance policy has priority over the intestate succession statutes.

For further information on titling of property and beneficiary designations, ask for MSU Extension MontGuides, *Property Ownership: Estate Planning* (MT198907HR), *Nonprobate Transfers* (MT199509HR), and *Designating Beneficiaries through Contractual Arrangements* (MT199901HR). These publications are available through local MSU Extension or Reservation office or online, [montana.edu/estateplanning/eppublications.html](http://montana.edu/estateplanning/eppublications.html).

The following section (numbered 1-11) summarizes the intestate provisions and refers to **Table 1**. Examples are provided to clarify the more complicated statutes.

1. If the deceased leaves a spouse and has no surviving descendants or surviving parent(s), then the surviving spouse receives all the deceased's estate (Table 1, Line 1).
2. If all the deceased's surviving descendants are also descendants of the surviving spouse, and there are no other living descendants of the surviving spouse, then the surviving spouse receives all the deceased's estate (Table 1, Line 2).

*Example:* John and Mary have three children. John has an estate valued at \$300,000. Neither has children from an earlier marriage. If John dies without a Will, all \$300,000 passes to Mary. However, if John held certificates of deposits (CDs) in joint tenancy with right of survivorship with his three children, then those CDs pass directly to them, not to his wife, Mary.

3. If the only surviving relatives are the spouse and the deceased's parent(s), then the surviving spouse receives \$300,000, plus three-fourths of any balance of the estate. The deceased parent(s) receive the remaining one-fourth of the estate (Table 1, Line 3).

*Example:* Tim has property in his name only, valued at \$600,000. Tim is married to Sharon, and they do not have children. Tim's parents are still living. If Tim dies

without a Will, Sharon receives the first \$300,000, and three-fourths of the balance of \$300,000 (\$225,000) for a total of \$525,000. Tim's parents receive one-fourth of the balance or \$75,000. If Tim held all property in joint tenancy with right of survivorship with Sharon, then his parents would receive nothing upon his death, because the joint tenancy contract with his wife takes priority over the Montana intestate statutes.

4. If the surviving relatives include the deceased's surviving descendants who are also descendants of the surviving spouse, and if the surviving spouse has one or more surviving descendants who are not descendants of the deceased, then the spouse receives \$225,000, plus half of the balance of the estate. The deceased's children receive the remaining balance of the estate (Table 1, Line 4).

**Table 1.** Property division when a person dies without a Will.

Survivors	Division of Property
1. Spouse only	All to spouse
2. Spouse and descendants* of both deceased and surviving spouse only	All to spouse
3. Spouse and deceased's parents	Spouse receives first \$300,000, plus $\frac{3}{4}$ of balance. Parents receive $\frac{1}{4}$ of balance.
4. Spouse and descendants of both deceased and surviving spouse; and surviving spouse has one or more surviving descendants who are not descendants of the deceased.	Spouse receives first \$225,000 plus $\frac{1}{2}$ of the balance. Deceased's children receive $\frac{1}{2}$ of the balance. Stepchild does not inherit.
5. Spouse and descendants of deceased who are not descendants of spouse.	Spouse receives \$150,000 plus $\frac{1}{2}$ of any balance. Deceased's children receive $\frac{1}{2}$ of balance.
6. Descendants of deceased (children and grandchildren)	Divided by right of representation. (If a child predeceases parent, the grandchildren divide equally the share their parent would have taken).
7. Parents	Share equally if both are alive. If one survives – entire estate.
8. Siblings	Equally divided. (Sibling descendants take by representation).
9. Grandparents	$\frac{1}{2}$ to paternal grandparents. $\frac{1}{2}$ to maternal grandparents. (If not living, to their descendants by representation).
10. Descendants of grandparents/closest kin	Varies according to degree of relationship
11. No relatives	Escheats to the State of Montana

\* According to Black's Law Dictionary, a descendant is defined as "the natural and lawful issue of a person, including the issue of a lawful marriage between persons of the same or different sex." This means descendants are the children, grandchildren, great-grandchildren, etc., of a person. Adopted children are considered descendants, but step-children are not.

The surviving spouse's children from the earlier marriage do not inherit. The purpose of the law is to ensure the decedent's descendants receive a share of the estate, because they would likely not inherit from the surviving spouse.

*Example:* Gail has an estate valued at \$600,000 that is in her name only. Gail is married to Fred. They have two children from this marriage. Fred also has a daughter from a prior marriage. If Gail dies without a Will, Fred receives \$225,000 and half of the balance of \$375,000 (\$187,500) for a total of \$412,500. Gail's two children receive half of the remaining balance of the estate \$93,750 (\$187,500 divided by 2). Fred's daughter does not receive any of Gail's estate.

If Gail and Fred had titled all their property in joint tenancy with right of survivorship and Gail dies, then the property goes to the surviving joint tenant, Fred. Their children receive none of the estate because the joint tenancy contract takes priority over the Montana intestate statutes.

5. If the surviving relatives are a spouse and include any descendants of the deceased's who are not descendants of the surviving spouse, then the spouse receives \$150,000, plus half of any balance of the estate. The remaining half passes to the deceased's descendants (Table 1, Line 5).

*Example:* Ron has two children from an earlier marriage. His estate is valued at \$600,000. If Ron dies without a Will, his present wife, Donna, receives \$150,000 and half of the balance of \$450,000 (\$225,000) for a total of \$375,000. Ron's two children split the remaining half of the estate (\$225,000). Each child receives \$112,500. If Ron and Donna had held the property in joint tenancy with right of survivorship, then Ron's children from an earlier marriage would not inherit upon his death. All the property in joint tenancy with right of survivorship would pass to Donna.

6. If the only surviving relatives are the deceased's descendants, then the entire estate passes to them by **representation**. This means, for example, grandchildren receive only the share their deceased parents would have received if they had been living, as long as there is one living child. If, however, there are no children living, then the grandchildren inherit equal shares (Table 1, Line 6).

*Example A:* Sara, a widow, has three married daughters: Marsha, Donna, and Debbie. Marsha has one child, Debbie has two children, and Donna has three children. If Sara dies without a Will and the three daughters and

grandchildren survive, then the daughters share equally one-third each. None of the sons-in-law or grandchildren inherit any of Sara's property.

*Example B:* If the surviving relatives are Sara's two daughters, Marsha, and Donna, (Debbie predeceased her mother) and the two children of Debbie, then Marsha and Donna receive one-third each, and the two living children of Debbie split her one-third share (one-sixth to each). The other four grandchildren (children of Marsha and Donna) do not inherit property.

*Example C:* If the surviving relatives are Marsha and the children of Donna and Debbie, then Marsha receives one-third, and the children of Donna and Debbie inherit by representation. Donna's three children receive one-ninth each. Debbie's two children receive one-sixth each.

*Example D:* If the surviving relatives are the six grandchildren (all three daughters predeceased their mother), then all grandchildren share equally. Each receives one-sixth of Sara's estate.

7. If there is no surviving spouse or descendant, then the deceased's parents share equally if both survive. If only one survives, then they receive the entire estate (Table 1, Line 7).
8. If there are no surviving spouse, descendants, or parents, then the property passes to the siblings of the deceased and to their descendants by representation (Table 1, Line 8).

*Example:* Jeff does not have a spouse, children or parents who survive him. He has two surviving sisters and one brother who predeceased him with three surviving sons. If Jeff dies without a Will, his two sisters receive one-third each. The remaining one-third passes by representation to the three sons of Jeff's brother. Each nephew receives one-ninth of the estate.

9. If there are no surviving descendants (children, grandchildren, or great-grandchildren), parent or descendant of a parent (siblings of deceased), and the deceased is survived by one or more grandparents or descendants of grandparents (aunts and uncles of the deceased), then half passes to the:
  - a. Deceased's paternal grandparents equally if both survive,
  - b. Surviving paternal grandparents, or
  - c. Descendants of the deceased's paternal grandparents or either of them if both are deceased. The descendants take half by representation.

The other half passes to the deceased's maternal relatives in the same manner as the paternal grandparents (Table 1, Line 9).

- a. Deceased's maternal grandparents equally if both survive,
- b. Surviving maternal grandparent, or
- c. Descendants of the deceased's maternal grandparents or either of them if both are deceased. The descendants take half by representation.

*Example:* One paternal grandparent and five cousins survive Tom – three from his deceased maternal aunt and two from his deceased maternal uncle. If Tom dies without a Will, his paternal grandparent receives half of the property. The other half is divided among his five cousins. Each cousin would receive one-tenth of Tom's estate.

10. If there are no surviving descendants, grandparents, or descendants of grandparents, the property passes to the person of the closest degree of kinship with the deceased. This provision expands the class of potential intestate inheritors (Table 1, Line 10).
11. If no relative survives the deceased, then the property passes (escheats) to the State of Montana (Table 1, Line 11).

### Additional rules

Other factors influencing how property passes under Montana law include the 120-hour survival requirement, contractual arrangements and if property is owned out-of-state.

#### HEIR MUST SURVIVE 5 DAYS

Montana law requires that an heir must survive the deceased for five days (120 hours) to inherit under intestate statutes. Otherwise, the heir is considered to have predeceased the deceased, and the deceased's heirs are decided accordingly.

*Example:* John and Mary, who are married, had all their property in his name only. John was killed instantly in an automobile accident. Mary died three days later. Neither one had written a Will. Under Montana law, Mary is considered to have predeceased John because she did not survive him by five days (120 hours). Therefore, John's relatives receive the property. Mary's incapacitated father, who had been living with them and now will need to move to assisted living, receives nothing.

If John and Mary had titled property in joint tenancy with right of survivorship, then the distribution would have

been different. Another Montana law provides that, whenever the last joint tenant does not survive the other by 120 hours, the property is distributed to their heirs by representation. In this case, John's relatives would receive half, and Mary's relatives would receive half. Since this is not the arrangement Mary and John want, they could write a Will to say how they want the property to pass if neither one survives the other by 120 hours.

#### CONTRACTUAL ARRANGEMENTS AND OWNERSHIP

The Montana intestate statutes do not apply to **personal property** with payable on death (POD) designations or transfer on death (TOD) registrations, property held as joint tenancy with right of survivorship, property held in a trust, or to insurance policies with a designated beneficiary. When "my estate" is named as a beneficiary on a contractual arrangement such as a life insurance policy, the Montana intestate statutes apply if the owners of the property died without a Will.

The Montana intestate statutes further do not apply to **real property** held in joint tenancy with rights of survivorship, or property to which the owners have prepared and recorded a valid transfer on death deed. If one joint tenant survives beyond 120 hours and does not have a Will, that survivor receives all the jointly held property, and upon death, then the Montana intestate statutes apply. If both joint tenants die in a common event or within 120 hours of one another, and both die without a Will, each joint owner's interest passes to their heirs by the Montana intestate statutes.

*Example A:* Jane has a certificate of deposit that she wants to pass to her nephew, Gary, so she named him as the POD beneficiary. Gary has no rights to the CD during Jane's life. He receives the funds only upon the death of Jane. Jane can change the POD beneficiary anytime she wants. However, she cannot leave the certificate of deposit to someone else in a Will if she has listed Gary as the POD beneficiary. The POD is a contractual agreement with the financial institution. If she wants the CD to pass to another individual, she should change the POD beneficiary designation to the name of that individual.

*Example B:* A married couple, Doug and Laura, did not have any descendants. They hold all their property in joint tenancy with rights of survivorship. If either dies, the survivor receives all. If both die within five days of one another and neither one has a Will, the property is divided between Laura's heirs and Doug's heirs. If Doug survives Laura by at least 120 hours and then dies, Doug's parents receive all the property. Laura's mother receives nothing.



*Example C:* Karen has an insurance policy naming her husband, Lee, as primary beneficiary and her estate as secondary beneficiary. She had talked about wanting the funds to go to Montana State University Extension if Lee dies first. They are in a car accident; Lee dies first, and Karen dies six days later. Without a Will, the insurance proceeds pass to Karen's estate and are distributed to her heirs according to Montana intestate statutes. Why? Because she did not put her desires into a Will or use a beneficiary designation, and Montana law requires that the proceeds pass to her relatives, not to MSU Extension.

## **Property owned out-of-state**

### **REAL PROPERTY**

If you die without a Will, your real property in another state is distributed according to the laws of the state where the property is located. For example, if you live in Montana and own real property in Wyoming and Colorado, the real property in those two states is distributed according to their laws.

State laws relating to the distribution of real and personal property vary and may be quite different from the laws of Montana. State laws about joint tenancy and survivorship also vary. To control the distribution of real property in another state after your death, you must write a Will.

### **PERSONAL PROPERTY**

Personal property, such as checking and savings accounts, certificates of deposit, and stocks and bonds, no matter where it is found, is distributed according to the laws of the state in which the deceased had residency at the time of death.

*Example:* Montana residents, Jim and Lorna, who own real property in Montana and Oregon, are in an automobile accident. Neither has a Will. Jim dies first; Lorna two days later. By Montana law, their real property held in joint tenancy in Montana is equally divided: half to Jim's relatives, half to Lorna's relatives. However, their real property held in joint tenancy in Oregon passes to Lorna's heirs because she survived Jim by two days. Their personal property in Oregon savings institutions passes according to Montana law because Jim and Lorna are residents of Montana. Half of the value of the savings accounts pass to Jim's relatives and the other half to Lorna's.

## **Additional potential problems of dying without a will**

The following illustrations show other problems that could arise because of dying without a Will in Montana.

### **SINGLE PERSON**

Ken was a 75-year-old widower. He had told a friend that he wished to divide his estate between his cousin and an elderly neighbor with whom he enjoyed hours of companionship. However, he made no Will. Eventually, the cousin received one-third of his estate, and the balance went to relatives who lived far away and had never known Ken. His neighbor received nothing.

### **MINOR CHILDREN**

Tim Smith was killed in a snowmobile accident in January. His wife, Mary, was killed in a car accident the following April. They had verbally asked a brother and his wife to raise their two-year-old daughter, Tara. But they didn't write a Will to nominate a guardian (takes care of the child and makes medical decisions) and conservator (manages the money). Now Mary's parents want custody of Tara. The case is in court. The child may be raised by individuals whose parenting style or lifestyle differs from what Tim and Mary preferred.

### **HEIR SURVIVING BEYOND FIVE DAYS**

Upon his marriage, Jim's parents gave him a farm as a wedding gift. Before any children were born, Jim and his wife were in an automobile accident. Jim was killed instantly, and his widow died of injuries six days later. The farm passed to the widow and, upon her death, to her parents. If Jim had been the one to survive more than 120 hours (five days), under Montana law, his parents would have inherited the farm.

### **INCAPACITATED SPOUSE**

An elderly couple, Olaf, 83, and Helga, 80, have an estate valued at \$250,000. If Olaf dies without making a Will, and Helga survives, she receives the entire estate. Helga has been diagnosed with Alzheimer's disease and is unable to manage her financial affairs. She could be influenced to give it to a nephew who has lost thousands in the stock market. Olaf could protect the estate for Helga's welfare by preparing a Will creating a testamentary trust with a competent trustee for her benefit.

### **STEPCHILDREN**

Stepchildren do not inherit under Montana law. But half-blood relatives inherit the same as full-blood relatives.

*Example:* Harold and Jolene were married after their earlier spouses died. Both have two grown children from those marriages. Harold dies without a Will with an estate valued at \$600,000. Jolene receives \$375,000 [ $\$150,000 + \frac{1}{2}$  of the balance ( $\$450,000 \times .50 = \$225,000 + \$150,000 = \$375,000$ )]. The remaining balance of \$225,000 passes

to his two children who have not visited him in three years. Harold's two stepchildren, of whom he is very fond because they have helped their mother in taking care of him, receive nothing under Montana intestate statutes (See Table 1, Line 5).

## **SECOND FAMILIES**

Some families have adult children when another child, or more, are born. The parents may have educated the older children, set them up in business, or on a ranch or farm. Without a Will, all children inherit equally without regard to earlier help some may have received. By the terms of their Wills, the parents can, if they so desire, provide for the younger children's education or down payment on a home like they did with the older children. The remaining property may then be distributed equally among all their children.

## **DELAYED DISTRIBUTION**

A factor often overlooked is that without a Will, a person cannot say when heirs receive their inheritance. For example, Nathan, 18, was heir to a considerable sum of money and "blew it" within a year. With a Will, his father could have provided in a testamentary trust for a percentage of his estate pass to Nathan, at age 21, an added percentage at age 25, and the rest at age 30. This would have allowed time for Nathan to mature and gain wiser financial judgment.

## **CHARITIES AND FRIENDS**

Marian has a favorite charity and a close friend whom she wishes to share her estate with. She must make a Will to achieve her estate planning goal. The Montana intestacy law provides for the distribution of her estate only to her relatives. She hasn't seen her nieces and nephews in 15 years.

## **DISTRIBUTION TO MINORS**

A young man, age 30, died very suddenly, leaving a wife and two small children who were his from an earlier marriage. Had he made a Will, he would have left all property (\$600,000) to his wife, trusting her to use it to provide for herself and the children. Without a Will, his wife received \$375,000; with the remaining \$225,000 passing to the children because of Montana's intestacy statutes.

Because the children were minors, the stepmother had to be appointed the conservator of their estates. In this case, the surviving parent was limited to certain types of investments and had to provide an annual accounting for the children's money. The inconvenience and added expense continue until the last child is 18 or otherwise obtains the rights of majority.

## **You Have a Choice**

The way Montana law provides for the distribution of property in the absence of a Will may be satisfactory in some instances; however, it does not take into account individual needs and abilities, nor the requirements of various family members. Neither does the law take steps to conserve and protect assets for individuals with special circumstances. Furthermore, even though the Montana intestate statutes may seem to provide exactly the distribution desire, laws can be changed every time the Montana Legislature meets.

Would the Montana intestate statutes distribute property according to your wishes and your situation? If not, then you should draft a Will or make provisions for transferring property after your death.

## **Further estate planning resources**

### **PUBLICATIONS**

This MontGuide and other estate planning publications are available at [www.montana.edu/estateplanning](http://www.montana.edu/estateplanning). Printed copies are also available through Montana State University Extension county or reservation offices.

### **DYING WITHOUT A WILL IN MONTANA WEBSITE**

[montana.edu/dyingwithoutawill](http://montana.edu/dyingwithoutawill)

Who receives your property if you pass away without a Will? Use the MSU Extension website to discover how property is distributed under Montana law if you are a Montana resident and pass away without a Will (as do seven out of 10 Americans). The site provides 39 family situations.

## **Acknowledgements**

Representatives from the Business, Estates, Trusts, Tax, and Real Property Law Section, State Bar of Montana has reviewed this MontGuide and recommends its reading to those who want to know factors affecting who receives their property upon death.

## **Disclaimer**

This publication is not designed as a substitute for legal advice. Rather, it is designed to create an awareness of the need for a Will after becoming acquainted with where property passes when a person dies without a Will. Future changes in laws cannot be predicted and statements in this MontGuide are based solely on the laws in force on the date of publication.

## References

Montana Code Annotated: Part 4 Exempt Property and Allowances. §72-2-413 – §72-2-415, Part 11 – §72-3- 1101 and §72-3-1104 and §72-3-109.

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