



## Intestacy

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### Background

When a person dies (the decedent), a major concern for those surviving the decedent is how to distribute the decedent's property, or the estate. An age-old problem, this issue has mattered greatly in the past, and it still does. Accordingly, the law has developed to govern not only how the decedent's personal property and real property is distributed to heirs but also how important privileges as well as debts and other responsibilities are passed down to later generations.

Because this issue reaches into ancient times and the consequences of [INHERITANCE](#) can be so important, there is an enormous body of [STATUTORY](#) and [CASE LAW](#) relating to "who gets what" when someone dies. There are several key components to these laws. For example, there are laws about wills, trusts, and other methods of leaving property in addition to wills, jurisdiction of [PROBATE](#) courts, qualifications and duties of executors of wills, and estate and inheritance taxes. Tax consequences for the estate and heirs are important considerations when individuals plan their estates. Whether individuals die with a will or [INTESTATE](#), there are tax consequences for estates and potentially for those who would [INHERIT](#) property according to the laws of [INTESTACY](#). The negative tax consequences and other potentially unintended consequences that can flow from dying intestate are major reasons that prompt people to create wills.

### Intestacy

When a decedent does not leave a legally binding will, this state is called dying intestate. The estate of a decedent (an estate is the sum of the decedent's property), who dies intestate is distributed according to the intestacy laws where the decedent was domiciled and/or where the decedent owned real property. Federal law leaves the creation of intestacy laws largely up to the states. Consequently, intestacy laws and judicial decisions vary from state to state. Intestacy statutes basically "create" a will for the decedent if the individual died intestate.

The most common way for individuals to influence how their property gets distributed when they die is to create a will. Wills are legal documents that help heirs and courts; local, state and federal governments; and the decedent's creditors know how to distribute that person's property upon death. There is more information about wills in The Gale Encyclopedia of Everyday Law under the topic "Wills."

### ***Partial Intestacy***

If someone dies and has made a will, all state laws strongly favor the decedent's intentions as expressed in his will. However, even if the individual has made a will, it is possible for the person to die partially intestate. This situation occurs when a gift in the will is invalid for some reason, or if the terms of the will simply do not cover all of the property. For example, if the will only disposes of personal property (like jewelry, art, automobiles, and antiques), the [PERSONAL PROPERTY](#) will be distributed to those named in the will according to the terms of the will. However, if the individual had purchased a parcel of land after the person made the will and failed to later include that land in the will, then the real estate may pass to the heirs under the laws of intestacy. And in some states, if an otherwise valid will is not properly filed with the probate court within a specific time, the entire estate will be distributed according to the state intestacy scheme. Needless to say, these situations may not at all be what the decedent wanted to happen.

### ***Determining Who Will Receive a Share of an Intestate Estate***

If individuals die intestate, their state's intestacy laws will make assumptions about how they would want to leave their property. Some of these assumptions may be correct, and others may result in the distribution of property in a manner far different from their wishes. The law will determine who will inherit the property (heirs) and how the property will be divided among the heirs, but it cannot determine who will receive specific items of property. For example, the law may state that the two children, a daughter and a son, will each take one half of the estate, but it may not say that the daughter should receive the decedent's mother's wedding ring and the decedent's son should receive the decedent's antique desk. Leaving such issues for a judge or other official to determine can cause squabbles among heirs, expense to the estate, and long delays in disposing of the property.

For the most part, states assume that the closer individuals are related to someone, the more likely the decedent would want the property to go to those persons when the decedent dies. In this way, intestate laws generally favor blood relations over other types of relationships. It is also common for state laws to require that heirs survive the decedent by a certain amount of time. This time can be expressed in hours, days, or months, depending on the state. These rules become important when there is an event in which several members of a family are killed at or about the same time. They generally apply whether or not the decedent had a will.

### ***Intestacy Laws and Surviving Spouses***

Of course, there are also many laws that pertain to surviving spouses of decedents who die intestate. Like other aspects of intestacy, these laws vary considerably from state to state. While it seems safe to assume that the spouse will inherit the entire estate if the decedent dies without a will, this is not necessarily the case. It is true that spouses usually inherit the greatest portion of the decedent's estate; however, intestacy laws almost always divide the estate between the decedent's spouse, children, and sometimes even the decedent's parents. If there are no spouse or children, and if the decedent's parents are dead, then the estate usually is distributed among the decedent's siblings or other relatives according to specific rules delineated in the statutes.

It is crucial to keep in mind that state intestacy laws can differ significantly from one state to the next. For example, most states set aside an allowance for a surviving spouse and/or children. This can be true whether or not there is a will. This amount is usually modest, but it is free from any other claims against the estate or debts of the decedent. In these cases, the spouse and/or children take a specific dollar amount of the estate. Their doing so occurs before the creditors, heirs, and other beneficiaries receive their shares of what remains. There are great differences in these allowances among the states. For example, this amount is set at \$50,000 in California, but only \$2,000 in Delaware. If there is no will, many states also give the surviving spouse a definite financial interest in any real estate owned by the decedent, such as "one-half," or a "life estate."

## ***Intestacy and Marital Property***

The portion of an estate that is distributed to the spouse of a decedent who dies intestate depends to some extent on other laws governing marital property in the decedent's state. For example, in states which employ a [COMMUNITY PROPERTY](#) scheme, spouses generally own equal rights to all marital property, regardless of whose name is on the title of the property. But this general rule has some important exceptions. There are currently nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

In a typical situation involving community property for a decedent who dies intestate, the decedent's share of the community property owned at the time of death will pass automatically to the surviving spouse. Property that the decedent owned individually (e.g. certain property owned prior to the marriage) is usually divided between the surviving spouse and any children. The spouse usually takes one quarter of this individual property and surviving children take the remaining three-quarters of the property. For individuals living in a community property state, the complexity of the intestacy and other probate laws make it especially important to contact competent legal advice when planning their estates.

## **Typical Intestacy Distribution Methods**

What happens to their property if individuals die without a will? The answer to this question depends on many factors. Because of the variability of the response, it is perhaps best to explain through illustrations. Here are four examples of some of the most common distribution methods under typical intestacy laws.

- If the Intestate Decedent is Married but has no Children
- If the intestate decedent is married but has no children, most people would probably think that the decedent's surviving spouse would take everything in the estate. However, most states distribute between one-third to one-half of the estate to the surviving spouse. Anything remaining generally goes to the decedent's surviving parent or parents. If both of the decedent's parents are dead, many state intestate statutes [DECREE](#) that the remaining portion be distributed among the decedent's surviving brothers and sisters.
- If the Intestate Decedent is Married and has Children
- If the intestate decedent is married and has children, it seems reasonable to assume that the surviving spouse/parent would take all of the deceased spouse's property, especially if the children are minors at the time of the decedent's death. Yet, most intestacy statutes distribute just one-third to one-half of the decedent's property to the surviving spouse. The remainder is divided among the decedent's surviving children, regardless of their ages.
- If the Intestate Decedent is a Single Person with Children
- If the intestate decedent is a single person with children, state intestacy laws uniformly decree that the entire estate will be distributed equally among the children, regardless of their ages or circumstances. For example, an adult child will receive the same amount as a minor child, and a wealthy child will take the same share as a child in more modest circumstances. The only determining factor is the blood relation to the decedent. Most states also make no distinction between siblings of whole blood and siblings of half blood. Thus, in a case where a decedent has children from two marriages, each child from both marriages will take an equal share of the decedent's estate. Likewise, intestacy laws in all states treat legally adopted children the same as full-blooded relations of the decedent. The laws may differ significantly with respect to the decedent's step-children and illegitimate children.
- If the Intestate Decedent is a Single Person with no Children
- If the intestate decedent is a single person with no children, most state intestacy laws favor the decedent's parent(s) in the distribution of his/her property. If both parents predecease the decedent,

many states divide the property among the decedent's surviving brothers and sisters.

Intestacy laws that distribute property to surviving children and other relatives use various formulas to divide the property. In a state that employs a "per capita" method, the heirs receive equal shares. For example, if there are eleven heirs of a decedent who dies intestate, each will receive one-eleventh of the decedent's estate. Other states have more complicated schemes that determine the amount of an heir's share according to the degree of relationship to the decedent. For example, let us say that a decedent has two adult children. One of these children is dead, but has two surviving children (the decedent's grandchildren). So in the present case, the decedent's surviving adult child would take one half of the estate and the decedent's two grandchildren would share their deceased parent's half share, each taking one-quarter of the estate. These examples show that the methods of distributing property under intestacy law can range from fairly simple to quite complex.

### ***Escheat***

If the intestate decedent has no living spouse, children, parents, or siblings, intestacy laws provide mechanisms to determine other blood relatives qualified to take the estate. Overall, there is a strong statutory preference to distribute the decedent's property to heirs, regardless of how remote they may be to the decedent. Sometimes, the search for heirs can be time-consuming and expensive. The estate bears the expense of a search for heirs. However, in those rare cases where no living [HEIR](#) can be located, then the decedent's estate will escheat to the state, that is, the state takes ownership of the decedent's property. Escheat is rare and almost never what the decedent wanted or expected to happen with the estate.

## **Estate and Inheritance Tax Considerations**

When a person dies the federal and state governments may impose taxes on the transfer of the property. This is true whether the person dies with a will or intestate. These taxes are calculated according to the rules of estate tax law. In some cases, the property received by heirs may also be taxed according to inheritance tax laws. The inheritance tax is usually determined by the amount of property received by the [BENEFICIARY](#), as well as by the beneficiary's relationship to the decedent. Basically, it is a tax on the right to receive the property. Every state except Nevada imposes either an estate tax or an inheritance tax; some states employ both. Inheritance taxes are not levied in addition to federal estate taxes because the federal law allows an offset for the payment of state death taxes. The maximum taxes in states with inheritance taxes are:

- Delaware 16%
- Kansas 15%
- Kentucky 16%
- Indiana 15%
- Iowa 15%
- Maryland 10%
- Massachusetts 16%
- Michigan 17%
- Mississippi 16%
- Montana 32%
- Nebraska 18%
- New Hampshire 15%
- New Jersey 16%
- North Carolina 17%
- Ohio 7%
- Oklahoma 15%

## Encyclopedia of Everyday Law: Intestacy

- Pennsylvania 15%
- South Dakota 30%
- Tennessee 13%

Currently, the estate of a decedent is liable for a tax if the estate exceeds \$650,000. The United States has recently enacted new laws that will increase this amount in certain increments over the next several years. In calculating the value of an estate for tax purposes one starts with the premise that all property owned by the decedent at the time of death is potentially subject to tax. This amount can be modified by several factors:

- The decedent's debts
- Certain transfers to charity
- Certain transfers to the decedent's spouse
- Some [CASUALTY](#) and theft losses

An intestate estate is the most exposed to estate and inheritance tax liability. The greater the value of the estate, the greater the tax burden on the estate—and potentially on the beneficiaries of the estate. This fact is a powerful inducement for many people to seek estate-planning advice. There are several methods to shield the value of an estate from estate and inheritance tax laws. Along with the creation of a will, some of these methods may include the creation of a trust, purchasing life insurance policies, and making transfers of property prior to your death, known as inter vivos gifts. Attorneys and accountants provide for more specific information about estate and inheritance tax rules.

Individuals who do have wills and believe they would distribute their property differently than their state's intestacy distribution plan should consult their attorneys for advice on estate planning and wills. Likewise, if they believe they are the beneficiaries of an intestate decedent's estate, they should check with their own attorneys for information about the specific laws governing their particular situation and advice about how to proceed to claim their share of the estate. Intestacy laws differ in very significant ways from state to state; understanding their applicability to you may require the advice from an attorney.

### Additional Resources

*The American Bar Association Guide to Wills & Estates.* American Bar Association, Times Books, 1995.

"*Crash Course in Wills and Trusts.*" Palermo, Michael T., Attorney at Law, 2001. Available at: <http://www.mtpalermo.com>.

"*Estate Planning Resources.*" EstatePlanningLinks.com, 2001. Available at: <http://www.estateplanninglinks.com/ep.html#highlighted>

*The Estate Planning Sourcebook.* Berry, Dawn Bradley, Lowell House, 1999.

"*Inheritance and Estate Tax.*" Available at: <http://www.lawyers.com/lawyers-com/content/aboutlaw/taxatio...>, 2001.

*Restatement of the Law, Property Wills and Other Donative Transfers.* American Law Institute, West Publishing, 1999.

*The Wills and Estate Planning Guide: A State and Territorial Summary of Will and Intestacy Statutes.* American Bar Association, The Association, 1995.

*Wills and Trusts in a Nutshell*. Mennell, Robert L., West Publishing, 1994.

"*Wills, Trusts, Estates and Probate*." FindLaw, 2001. Available at:

<http://www.findlaw.com/01topics/31probate/index.html>.

## Organizations

### ***The American Academy of Estate Planning Attorneys***

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### ***General Practice, Solo and Small Firm Section***

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#### ***American Bar Association (ABA), Taxation Section***

740 15th Street NW, 10th Floor

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#### ***American College of Trust and Estate Counsel***

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#### ***Americans for Tax Reform (ATR)***

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#### ***National Network of Estate Planning Attorneys, Inc.***

## Encyclopedia of Everyday Law: Intestacy

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### *The National Academy of Elder Law Attorneys*

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