



MontGuide

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Dying Without a Will in Montana

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This publication includes legal terms and detailed examples of possible scenarios for distribution of your property under Montana law should you pass away before writing a will.

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 fail to 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 disposition of their real and personal property. While the laws may make sense

for many people, your preferences for the distribution of your property may be different. If so, you should write a will. This MontGuide describes to whom and how your property will be distributed under Montana law if you die intestate (without a valid written will).

An interactive website illustrating how a deceased person's estate is distributed when a Montanan passes away without a will is at www.montana.edu/dyingwithoutawill. A CD containing the same information can be obtained by sending a request to the address on page 7.

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 decedent* and surviving spouse only	All to spouse
3. Spouse and decedent'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 decedent and surviving spouse; and surviving spouse has one or more surviving descendants who are not descendants of the decedent.	Spouse receives first \$225,000 plus $\frac{1}{2}$ of the balance. Decedent's children receive $\frac{1}{2}$ of the balance. Stepchild does not inherit.
5. Spouse and descendants of decedent who are not descendants of spouse.	Spouse receives \$150,000 plus $\frac{1}{2}$ of any balance. Decedent's children receive $\frac{1}{2}$ of balance.
6. Descendants of decedent (children and grandchildren)	Divided equally. (If a child predeceases parent, the grandchildren divide equally the share their parent would have taken).
7. Father and mother	Share equally if both alive. If one survives – entire estate.
8. Brothers and sisters	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. Other relatives	Varies according to degree of relationship
11. No relatives	Escheats to the State of Montana

*decedent: a deceased person

Montana Law of Intestate Succession

Because something must be done with your real and personal property after your death, the Montana Legislature has provided a method for dividing it among heirs if you fail to make other arrangements. The original statutes have been substantially revised to recognize the increasing portion of the population who have been married more than once and have stepchildren and children by previous marriages. Under certain conditions, Montana law also provides for the decedent's parents to receive some 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 property is titled. For example, property titled in joint tenancy with right of survivorship passes to the surviving joint tenants not by Montana's intestacy statutes.

Contractual law with beneficiary designations has priority over the intestacy statutes. (For further information on titling of property and beneficiary designations, ask for MSU Extension MontGuides, Property Ownership (MT198907HR), and NonProbate Transfers (MT199509HR). This publication is available through your local County Extension Agent or online at www.montana.edu/estateplanning).

The section that follows with numbers 1-11 summarize the intestate provisions and refer to Table 1 on page one. Examples are provided to clarify some of the more complicated statutes. The term decedent refers to the person who died. Descendants refer to children, grandchildren, great grandchildren, and so on, down the biological line. Children that were legally adopted by the decedent are also considered descendants. Stepchildren of the decedent are not considered descendants.

1. If the decedent leaves a spouse and has no surviving descendants or surviving parent(s), then the surviving spouse receives all of the decedent's estate (Table 1, line 1).
2. If all of the decedent'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 of the decedent'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 a previous 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 decedent's parent(s), then the surviving spouse receives \$300,000, plus three-fourths of any balance of the estate. The decedent's parent(s) receive the remaining one-fourth of the estate (Table 1, line 3).

Example: Tim has property 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. However, if Tim held all property in joint tenancy with right of survivorship with Sharon, then his parents 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 decedent'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 decedent, then the spouse receives \$225,000, plus half of any balance of the estate. The decedent's children receive the remaining balance of the estate (Table 1, line 4).

The surviving spouse's children from the previous marriage do not inherit. The purpose of the law is to assure the decedent's descendants a share of the estate, because likely they would otherwise not be the exclusive beneficiaries of the surviving spouse.

Example: Gail has an estate valued at \$600,000. 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 children receive half of the remaining balance of the estate (\$187,500). Fred's daughter does not receive any of the 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 the decedent's descendants 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 decedent's descendants (Table 1, line 5).

Example: Ron has two children from a previous marriage. His estate is valued at \$600,000. If Ron dies without a will, his present wife, Donna, receives first \$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 balance 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 a previous marriage would not inherit upon his death.

6. If the only surviving relatives are the decedent's descendants, then the entire estate passes to them by representation. This means, for example, grandchildren take only the share their deceased parent would have taken if he or she had been living, as long as there is one living child. If, however, there are no children living, then all 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 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 decedent's parents share equally if both survive. If only one survives, then he or she receives the entire estate (Table 1, line 7).

8. If there are no surviving spouse, descendants or parents, then the property passes to the brothers and sisters of the decedent 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 3 surviving sons. If Jeff dies without a will, his two sisters will receive one-third each. The other one-third passes by right of 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 (brothers and sisters of decedent), and the decedent is survived by one or more grandparents or descendants of grandparents (aunts and uncles of the decedent), then half passes to the:
 - a. Decedent's paternal grandparents equally if both survive;
 - b. Surviving paternal grandparent; or
 - c. Descendants of the decedent's paternal grandparents or either of them if both are deceased. The descendants take by representation.The other half passes to the decedent's maternal relatives in the same manner as the paternal grandparents (Table 1, line 9).
 - a. Decedent's maternal grandparents equally if both survive;
 - b. Surviving maternal grandparent; or
 - c. Descendants of the decedent's maternal grandparents or either of them if both are deceased. The descendants take by representation.

Example: Tom is survived by one paternal grandparent and five cousins – 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 will receive one-tenth of Tom's estate.

10. If there is no surviving descendant, grandparent, or descendant of grandparent, the property passes to the person of the closest degree of kinship with the decedent. This provision expands the class of potential intestate inheritors (Table 1, line 10).
11. If no relative survives the decedent then the property passes (escheats) to the State of Montana (Table 1, line 11).

Additional Rules

Other circumstances that influence 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 decedent for five days (120 hours) to inherit under intestate statutes. Otherwise, the heir is deemed to have predeceased the decedent, and the decedent's heirs are determined 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 as predeceasing John because she did not survive him five days (120 hours). Therefore, John's relatives (who do not need it) receive the property. Mary's incapacitated father, who had been living with them (and could benefit from the property), 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 fails to survive the other by 120 hours, the property is distributed equally between their heirs. 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 desire, they could hold their property as tenants-in-common and write a will so that property can be distributed according to their wishes, rather than by the Montana intestate statutes.

Contractual Arrangements

The Montana intestate statutes do not apply to payable on death (POD) designations or transfer on death (TOD) registrations, joint tenancy with right of survivorship transfers, or to insurance policies with a designated beneficiary other than the person's estate.

Example A: Jane has a certificate of deposit that she wants to pass to her nephew, Gary, so she named him as POD beneficiary. Gary has no rights to the account 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 as long as she has listed Gary as the POD beneficiary. The POD is a contractual agreement. If she wants the

CD to pass to another individual, she should change the POD beneficiary designation to the name of that individual.

If one joint tenant survives beyond 120 hours and dies without a will, then the intestate statute laws apply.

Example B: A married couple without children, Doug and Laura, have all their property in joint tenancy. If either dies, the survivor receives all. If both die within five days of one another and neither has a will, the property will be divided half among Laura's heirs and half among Doug's heirs. If Doug survives Laura by six days and dies, his parents receive all the property. Laura's mother receives nothing. If Laura survives Doug by six days and dies, then her mother receives all the property. Doug's parents receive nothing.

When "the estate" is named as beneficiary on a contractual agreement such as a life insurance policy Montana intestate statutes apply.

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. Suppose they are in a car accident; Lee dies first and Karen dies six days later. Without a will, the insurance proceeds in Karen's estate will be distributed according to Montana intestate statutes. Because she did not put her desires into a will, 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 written will, your real property in another state will be 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 will be distributed according to their laws if you die without a written will.

State laws relating to the distribution of real and personal property vary and may be quite different from the laws of Montana.

State laws regarding joint tenancy survivorship also vary. If you want to determine the distribution of your 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 located, is distributed according to the laws of the

state in which the decedent had established residency at the time of death.

Example: Suppose Montana residents, Jim and Lorna, who own real property in Montana and Oregon, are involved 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 located in Oregon savings institutions pass according to Montana law because Jim and Lorna are residents of Montana. Half of the value of the savings accounts passes to Jim's relatives and the other half to Lorna's relatives.

Additional Potential Problems of Dying Without A Will

The following illustrations show other problems that may arise as a result of dying without a written will in Montana.

Single Person

Ken was a 75-year-old widower. He had told several persons that he wished to leave his estate to his cousin and to an elderly neighbor with whom he enjoyed many hours of companionship, but he made no written 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. Now Mary's parents want custody of Tara. The case is in court.

Heir Surviving Beyond Five Days

Upon his marriage, Jim was deeded a farm as a wedding gift from his parents. 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's wife had survived less than 120 hours, under Montana law she would be considered as having predeceased Jim. In this case, Jim's 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 will receive the total estate. Helga has been diagnosed with Alzheimer's disease and is unable to manage her financial affairs. She could possibly waste the entire estate or be influenced to give it to a nephew who has lost thousands in the stock market. By the terms of a testamentary trust in a written will, Olaf can protect the estate for Helga's welfare.

Stepchildren

Stepchildren do not inherit under Montana law. Harold and Jolene were married after their previous spouses died. Both have two grown children from those marriages. Assume Harold dies without a written 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 assisted their mother in taking care of him, receive nothing under Montana intestate statutes (See Table 1 #5 on page 1).

Second Families

Some families have grown children when another one 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 assistance some may have received. By the terms of their written wills, the parents can, if they so desire, provide for the younger children's education or other assistance. 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 state when heirs shall receive their inheritance. For example, Nathan, 18, fell heir to a large sum of money and "blew it" within a year. With a will, his father could have provided in a testamentary trust that a percentage of his estate pass to Nathan, perhaps at age 21, an additional percentage at 25, and the remainder at 30. This would have allowed time for Nathan to mature and gain wiser financial judgement.

Charities and Friends

Marian has a favorite charity and close personal friend that she wishes to share in her estate. She must make a written will. 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 a previous marriage. Had he made a written 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 written will, his wife received \$375,000; with the remaining \$225,000 passing to the children because of Montana 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 of the children’s money. The inconvenience and additional expense will continue until the last child is 18 or otherwise attains the rights of majority.

Surviving Spouse’s Right to an Elective Share

This statute is effective for the surviving spouse of a decedent domiciled in Montana. He or she has the right to take an elective share that is a percentage of the augmented estate (See below) of the decedent and the surviving spouse. The elective share increases in percentage from three to 100 percent, based on the length of the marriage (See Table 2). To protect spouses against creditors’ claims in small estates, there is a minimum elective share amount of up to \$75,000.

The surviving spouse’s right to an elective share of the marital portion of the estate and to the homestead allowance of \$22,500, exempt property of \$15,000, and family allowance of \$27,000 (or any of them) may be waived wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse. The waiver is not enforceable if the surviving spouse proves that:

1. The waiver was not executed voluntarily or was executed under duress.
2. The waiver was unconscionable when it was executed and, before execution of the waiver the surviving spouse:
 - a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent,
 - b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligation of the decedent beyond the disclosure provided, and
 - c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligation of the decedent.

3. The surviving spouse did not have access to independent legal representation.
4. The surviving spouse did not have independent legal representation and the agreement did not include an explanation in plain language of the rights being affirmed, modified, or waived.
5. Prior to signing the agreement the surviving spouse did not receive adequate financial disclosure of the decedent’s property in one of the following forms:
 - a. Surviving spouse received a reasonably accurate description and good-faith estimate of the value of the property, liabilities, and income of the other spouse;
 - b. Surviving spouse expressly waived, in a separate signed record, the right to financial disclosure beyond the disclosure provided, or
 - c. Surviving spouse had adequate knowledge or reasonable basis for having adequate knowledge of the decedent’s property, liabilities, and income.

The surviving spouse’s right to an elective share is in addition to other benefits provided under the Uniform Probate Code, including the homestead allowance of \$22,500, exempt property of \$15,000, and family allowance of a maximum of \$27,000.

TABLE 2. Surviving Spouse’s Right to an Elective Share of the Estate Percentage

If the decedent and the spouse were married to one another		Percentage of augmented estate
AT LEAST	LESS THAN	
	1 year	3%
1 year	2 years	6%
2 years	3 years	12%
3 years	4 years	18%
4 years	5 years	24%
5 years	6 years	30%
6 years	7 years	36%
7 years	8 years	42%
8 years	9 years	48%
9 years	10 years	54%
10 years	11 years	60%
11 years	12 years	68%
12 years	13 years	76%
13 years	14 years	84%
14 years	15 years	92%
15 years or more		100%

The Montana Uniform Probate Code provides an extensive definition of augmented estate. The definition is not provided here because of its substantial length. A copy can be obtained from an attorney, from the Montana Codes Annotated, from the State Law Library, or at a local library.

In general, the augmented estate includes:

1. Assets owned at the date of death, as well as transfers by both the decedent and surviving spouse.
2. Assets over which the decedent exercised control or enjoyment.
3. Transfers made without consideration within two years prior to death.

The elective share provision is designed to make it difficult for a decedent to disinherit a surviving spouse intentionally by giving away all of his property or placing it in a trust shortly before death. A petition for the elective share must be made within nine months after the decedent's death or within 6 months after the probate of the decedent's will, whichever limitation expires the later.

You Have a Choice

The way Montana law provides for the distribution of property in the absence of a written will may be satisfactory in some instances. However, it does not take into account individual needs and abilities, not the requirements of various family members. Neither will the law take steps to conserve and protect estates. Furthermore, even though the Montana intestate statutes may seem to provide exactly the distributional scheme you now desire, laws can be changed.

Would the Montana intestate statutes distribute property according to your wishes and your situation? If it does not, then you should have a written will drafted 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. Printed copies are also available through your Montana State University Extension county office or reservation.

Dying Without a Will in Montana Website

www.montana.edu/dyingwithoutawill

Who receives your property if you pass away without a written will? Use the MSU Extension website to discover how your property will be distributed under Montana law if you are a Montana resident and if you pass away without a written will (as do 7 out of 10 Americans). The site provides 39 family situations. A CD containing the same information can be obtained by writing:

Extension Economics

P.O. Box 172800

Bozeman, MT 59717

Email: goetting@montana.edu

Or order online:

www.montana.edu/dyingwithoutawill/ordercd.html

Acknowledgements

The Business, Estates, Trusts, Tax, and Real Property Law Section, State Bar of Montana has approved this MontGuide and recommends its reading by all Montanans.

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 written will after becoming acquainted with where property passes when a person dies without a written 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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