

When There is No Will

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Intestacy

An individual who passes away without a valid unrevoked Will is said to be “intestate.” An individual who passes away with a valid Will is said to be “testate.” An individual can also be considered “partially intestate” when his or her Will fails to dispose of the entire estate. The most common instance of this occurring is when a Will lacks a residuary clause which disposes of anything else not specifically devised.¹ In the case of partial intestacy, the intestacy provisions discussed below apply to the property not disposed of by the Will.

An example of partial intestacy: Decedent widow passes away leaving two adult children surviving her, a son and a daughter. Decedent’s Will devises her home and bank accounts to her daughter and lacks a “residuary” (or “everything else”) clause. The decedent’s estate includes a vehicle not devised in her Will. The Decedent’s vehicle pass according to intestacy laws to the son and daughter equally. The Decedent’s home and bank accounts pass to the daughter.

Wills do more than direct the proper distribution of property upon an individual’s death, although that is the primary function of a Will. Another important function of a Will is to nominate a personal representative (or “executor”) whose responsibility it is to carry out the instructions found in the Will and to perform other duties imposed by law. A Will can waive the bond requirement for a personal representative (representing a cost savings to the Estate), and impose other conditions and instructions for the personal representative.

The remainder of this article discusses the provisions of South Dakota intestacy law.

Intestacy for Married Persons

If an intestate decedent is survived by a spouse, then in most cases the surviving spouse’s share is the entire estate.² A different rule applies where all of the decedent’s surviving descendants are not also descendants of the surviving spouse. In that case, the surviving spouse inherits an intestate share of the first \$100,000 plus one-half of any balance of the intestate share.³

¹ A typical residuary provision in a Will reads: “I dispose the rest, residue and remainder of my estate to X.”

² SDCL 29A-2-102.

³ Id.

If, for example, a deceased husband was survived by his widow and two children who were not children of that widow (e.g., children born of a prior marriage), then this rule would apply. The widow would receive the first \$100,000 in estate value and one-half of any amount above this value, with the other half passing to the decedent's two children. The intestacy law "guesses" that this type of scheme is close to what most individuals would want in the absence of a Will.

Intestacy for Single Persons

If an intestate decedent is not survived by a spouse, then the following rules apply.

If the decedent is survived by any children, then the estate will be distributed to the decedent's children in equal shares. If any of the decedent's children also predeceased the decedent, then that deceased child's share will be distributed to that child's surviving children. (This is what is meant by the phrase "by right of representation"⁴ or "per stirpes"). For example, if an unmarried decedent is survived by a son, but his other child, a daughter, predeceased him leaving two children of her own, then the intestate estate would be distributed: one-half to the son and one-fourth to each of the daughter's children.

If the decedent is not survived by any children or more remote descendants, then the intestate estate is distributed to his or her parents. If only one of the parents survived the decedent, then the surviving parent inherits the entire estate.

If the decedent is not survived by his or her parents either, then the intestate estate is distributed to the descendants of the decedent's parents by right of representation. In other words, the intestate share is distributed to the decedent's siblings. If any of the siblings predeceased the decedent leaving children, that deceased sibling's children (nieces and nephews of the decedent) inherit the predeceased sibling's share.

If none of the decedent's siblings, or their descendants survive, then the intestate share falls to grandparents. If the grandparents predeceased the decedent, then the estate passes to the descendants of the grandparents.⁵

If no individual survives an intestate decedent who is identified in the foregoing paragraphs, then the estate "escheats" to the State of South Dakota.⁶ Escheats are rare occurrences.

⁴ SDCL 29A-2-106.

⁵ SDCL 29A-2-103.

⁶ SDCL 29A-2-105. See also Estate of Jetter, 570 N.W.2d 26 (SD 1997) (discussing the escheat provisions in connection with a Will which devised the estate to the decedent's brother -- who predeceased him without descendants -- where the Will provided: "I have

WHERE TO FIND THE LAW

The law is generally comprised of statutes, regulations and caselaw (reported opinions by a court to specific facts). The law cited within the above discussion can be found at the links provided in the “Law” section of the ThomasESimmons.com website. South Dakota statutes are abbreviated as “SDCL” for South Dakota Codified Laws. South Dakota administrative rules are abbreviated as “SDAR.” Federal statutes are abbreviated as “USC” for United States Code.

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intentionally omitted all of my heirs and all other persons whomsoever, who are not specifically mentioned herein, and I hereby generally and specifically disinherit each and all persons whomsoever claiming to be my heirs-at-law and each and all persons whomsoever who, if I died intestate, would be entitled to any part of my estate except those herein provided for.”).