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DYING WITHOUT A WRITTEN WILL IN SOUTH DAKOTA: WHO RECEIVES YOUR PROPERTY?

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ALTHOUGH MOST SOUTH DAKOTANS are quite conscientious about their property while they are alive, nearly 60% 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, South Dakota 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 property may be different. If so, you should make a written will. This fact sheet describes to whom and how your property will be distributed if you die intestate (without a valid written will).

SOUTH DAKOTA LAW OF INTESTATE SUCCESSION

Since something must be done with your real and personal property after your death, the South Dakota Legislature has provided a method for dividing it among heirs if you fail to make other arrangements.

The property of a South Dakota 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. Contractual law has priority over the intestacy statutes. For further information on titling of property, ask for SDSU Extension fact sheet, Estate Planning: Property Ownership.

The sections that follow summarize the intestate provisions. 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.

1. If the decedent leaves a spouse and has no surviving descendants 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, 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, 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.



Table 1. Property division when decedent dies without a valid will

Survivors	Division of Property
1. Spouse only.	1. All to spouse.
2. Spouse and only descendants of both decedent and surviving spouse.	2. All to spouse.
3. Spouse and decedent's parents.	3. All to spouse.
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.	4. All to spouse.
5. Spouse and descendants of decedent who are not descendants of spouse.	5. Spouse receives \$100,000 plus 1/2 of any balance. Decedent's descendants by representation receive 1/2 of balance.
6. Descendants of decedent (children & grandchildren)	6. Divided equally. (If a child predeceases parent, the grandchildren divide equally the share their parent would have taken).
7. Father and mother.	7. Share equally, if both alive. If one survives, entire estate.
8. Brothers and sisters.	8. Equally divided. (Sibling's descendants take by representation).
9. Grandparents or descendants of grandparents.	9. 1/2 to paternal grandparents. 1/2 to maternal grandparents. (If not living, to their descendants by representation).
10. No relatives that are descendants of decedent's grandparents.	10. Escheats to the State of South Dakota.

3. If the only surviving relatives are the spouse and the decedent's parent(s), then the surviving spouse receives everything (Table 1, line 3).

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 everything.

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 \$100,000, 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, his present wife, Donna, receives first the \$100,000 and half of the balance of \$500,000 (\$250,000) for a total of \$350,000. Ron's two children split the remaining half of the balance of the estate (\$250,000). Each child receives \$125,000. If Ron and Donna had held the property in joint tenancy with right of survivorship, then Ron's children from a previous marriage would have received nothing 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.

Example: 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 and the surviving relatives are the three daughters and grandchildren, then the daughters share equally one-third each. None of the sons-in-law or grandchildren inherit any of Sara's property.

Example: 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: 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: If the surviving relatives are the six grandchildren, (all three daughters predeceased their mother), then Marsha's child receives $1/3$, Debbie's children receive $1/6$ each, and Donna's three children receive $1/9$ each.

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 is 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 parent to survive him. He has two living sisters. One brother with three sons predeceased Jeff. If Jeff dies, his two sisters will receive one-third each. The other 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 (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:

- decedent's paternal grandparents equally if both survive;
- surviving paternal grandparent;
- 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).

Example: Thomas has one paternal grandparent and five cousins – three from his deceased maternal aunt and two from his deceased maternal uncle. If Thomas dies, his paternal grandparent receives half of the property. The other half is divided among his five cousins. Each will receive one-tenth of Thomas' estate.

10. If there is no surviving descendant, grandparent, or descendant of a grandparent, the property escheats to the State of South Dakota for the support of the common schools (Table 1, line 10).

HEIR MUST SURVIVE 5 DAYS

South Dakota law requires that an heir must survive the decedent for five days (120 hours) to inherit under intestate statutes. Otherwise, the heir is considered 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 South Dakota law, she is considered as predeceasing John because she did not survive him five days. Therefore, John's relatives (who do not need it) receive the prop-



erty. 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 South Dakota 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 South Dakota intestate statutes.

Joint tenancy and life insurance proceeds
The South Dakota intestate statutes do not apply to joint tenancy with right of survivorship transfers or to insurance policies with a designated beneficiary other than the person's estate. If one joint tenant survives beyond 120 hours and dies without a will, then the intestate statute laws apply.

Example: 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.

Assume Doug survives Laura by six days and then dies. His parents receive all the property. Laura's mother receives nothing.

Assume Laura survives Doug by six days and dies. Her mother receives all the property. Doug's parents receive nothing.

Example: 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 South Dakota State University. 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 South Dakota intestate statutes. Since she did not put her desires into a will, South Dakota law requires that the proceeds pass to the relatives, not to SDSU.

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 South Dakota and own real property in Wyoming and Colorado, the real property in the other 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 South Dakota.

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 South Dakota residents, Vic and Kate, who own real property in South Dakota and Illinois, are involved in an automobile accident. Neither has a will. Vic dies first; Kate two days later. By South Dakota law, their real property held in joint tenancy in South Dakota is equally divided: half to Vic's relatives, half to Kate's relatives. However, their real property, held in joint tenancy in Illinois, passes to Kate's heirs because she survived Vic by two days. Their personal property located in Illinois savings institutions pass according to South Dakota law because Vic and Kate are residents

of South Dakota. One-half of the value of the savings accounts passes to Vic's relatives and the other half to Kate's relatives.

DYING WITHOUT A WILL

The following illustrations show other problems that may arise as a result of dying without a written will in South Dakota:

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 South Dakota 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 the South Dakota 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 \$350,000 and the other \$250,000 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 the intestate statutes.

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 that a percentage of his estate pass to him, 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 judgment.

Charities and Friends: Marian has a favorite charity and a close personal friend whom she wishes to share in her estate. She must make a written will. The South Dakota 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 25, 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 (\$200,000) to his wife, trusting her to use it to provide for herself and the children. Without a written will, his wife received \$150,000; with the remaining \$50,000 passed to the children.

Because the children were minors, the widow 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.

Taxes: Today's tax laws call for careful planning, even for moderate-sized estates. In most cases, some degree of tax saving, otherwise unavailable, is possible with a carefully planned distribution by a written will.

YOU HAVE A CHOICE

The way South Dakota 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, or the requirements of various family members. Neither will the law take steps to conserve and protect estates. Furthermore, even though the South Dakota intestate statutes may seem to provide exactly the distributional scheme you now desire, laws can be changed.

Would the South Dakota intestate statutes distribute property according to your wishes and your situation? If they do not, then you should

have a written will drafted or make other provisions for transferring property after your death.

OTHER ESTATE PLANNING RESOURCES

See a list of other estate planning fact sheets available online. Copies are also available through your local county Extension office.

DISCLAIMER

This publication is not intended to be a substitute for legal advice. Rather, it is designed to help families become better acquainted with some of the devices used in estate planning and to create an awareness of the need for such planning. Future changes in laws cannot be predicted, and statements in the fact sheet are based solely upon those laws in force on the date of publication.

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This publication is suggested for the reading of all South Dakotans. It has been reviewed and approved by the South Dakota Bar Association and South Dakota State University faculty in the Human Development, Consumer and Family Sciences Department, College of Family and Consumer Sciences, March 2005.

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