WILLS

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WILLS

I. INTESTATE SUCCESSION

A. IN GENERAL

Property may pass by intestate succession when:

1. A decedent dies ***without having made a will***;
2. A decedent's will is ***denied probate***;
3. A decedent's will ***does not dispose of all of his property***, either because a gift has failed or because the will contains no residuary clause; or
4. A decedent's will ***specifies*** that his property should pass according to laws of intestate succession.

B. INTESTATE SHARE OF SURVIVING SPOUSE

1. Descendants Also Survive

In most states, if the decedent leaves descendants as well as a surviving spouse, the spouse takes ***one-third or one-half of the estate***. Some states give the surviving spouse a specific dollar amount plus one-third or one-half of the estate. In states adopting the Uniform Probate Code ("UPC"), the surviving spouse takes the ***entire estate*** if the decedent is survived by descendants who are all descendants of the surviving spouse and the surviving spouse has no other surviving descendant.

2. No Descendants Survive

In most states, if the decedent is survived by a spouse but no descendants, the surviving spouse takes the ***entire estate***. In UPC states, however, the spouse takes the entire estate only if the decedent is not survived by descendants or parents.

C. INTESTATE SHARE OF CHILDREN AND OTHER DESCENDANTS

The portion of the estate that does not pass to the surviving spouse, or the entire estate if there is no surviving spouse, passes to the decedent's children and descendants of deceased children.

Exam Tip Remember that in most states parents and collateral kin (brothers, sisters, aunts, uncles) never inherit if the intestate is survived by children or more remote descendants.

1. Majority Rule—Per Capita with Representation

In most states, a decedent's issue take their shares per capita with representation, which means the property is divided into equal shares at the first generational level at which there are living takers. Each living person at that level takes a share, and the share of each deceased person at that level passes to his issue by right of representation.

2. Modern Trend—Per Capita at Each Generational Level

A growing number of states and the UPC make the initial division of shares at the first generational level at which there are living takers, but the shares of deceased persons at that level are combined and then divided equally among the takers at the next generational level. Persons in the same degree of kinship to the decedent always take equal shares.

CMR SUMMARY CHART

INTESTATE SUCCESSION UNDER TYPICAL STATUTE

INTESTATE DECEDENT'S ESTATE

passes to

Spouse	and/or	Descendants

if none to

Parents

if none to

Descendants of Parents (Siblings or Their Issue)

if none to

Maternal Grandparents or Descendants	and/or	Paternal Grandparents or Descendants

if none to

Nearest Maternal Kin	and/or	Nearest Paternal Kin

if none to

The State

D. SHARES OF OTHER HEIRS

If the decedent is not survived by a spouse or descendants, the estate is distributed to other heirs in the order below, proceeding down the list until takers are found:

(i) Parents or surviving parent;

(ii) Brothers and sisters and their issue;

(iii) One-half to paternal grandparents and one-half to maternal grandparents and their descendants (both halves to one side if there are no takers on the other side);

(iv) One-half to nearest kin on maternal side and one-half to nearest kin on paternal side (all to one side if there are no kin on the other side).

Failing all of the above, the estate escheats to the state.

E. SPECIAL CASES INVOLVING CHILDREN

1. Adopted Children

For purposes of intestate succession, adopted children are treated the same as the natural children of the adopting parents. There is no inheritance in either direction between adopted children and their natural parents, except where one of the natural parents marries an adopting parent, or the child is adopted by a close relative.

2. Stepchildren and Foster Children

Generally, stepchildren and foster children have no inheritance rights unless adopted by the stepparent or foster parent. The doctrine of ***adoption by estoppel***, however, permits a child to inherit from or through a stepparent or foster parent when legal custody of a child is gained under an (unfulfilled) agreement to adopt him.

3. Posthumous Children

Generally, one cannot claim as an heir of another unless he was alive at that person's death. An exception is made for the posthumous issue of the decedent (*i.e.,* a child in gestation at the decedent's death).

4. Nonmarital Children

A nonmarital child always inherits from the mother. The child will inherit from his father if: (i) the father married the mother after the child's birth; (ii) the man was adjudicated to be the father in a paternity suit; or (iii) after his death and during probate proceedings, the man is proved by clear and convincing evidence to be the father.

5. No Distinction Between Half Bloods and Whole Bloods

Half bloods are brothers and sisters who have only one common parent. The UPC and most states make no distinction between half bloods and whole bloods; they inherit equally.

II. SUBSIDIARY PROBLEMS COMMON TO INTESTACY AND WILLS

A. SIMULTANEOUS DEATH

A person cannot take as an heir or will beneficiary unless he survives the decedent. Because it is sometimes difficult to determine whether one person survived another (*e.g.*, both persons are