

Course Goals

- ✚ Discuss what happens to a person's assets if they **do not have a Will** and have not done any estate planning
- ✚ Discuss the effects of the **estate tax** and the importance of estate planning to preserve the value of the estate of a person
- ✚ Discuss various **elder law issues** such as Medicaid planning, that are designed to prevent depletion of an estate before the person dies.
- ✚ Learn the requirements of a **Will**, when Wills are valid and invalid.
- ✚ Analyze the various **provisions within a Will** and the purposes that they serve
- ✚ Discuss the **probate proceeding** and how to going through it
- ✚ Analyze various forms of **trusts** and their purposes

Intestate Succession

- ✚ This occurs when the decedent has no valid mechanism that provides the decedent's intents about her estate.

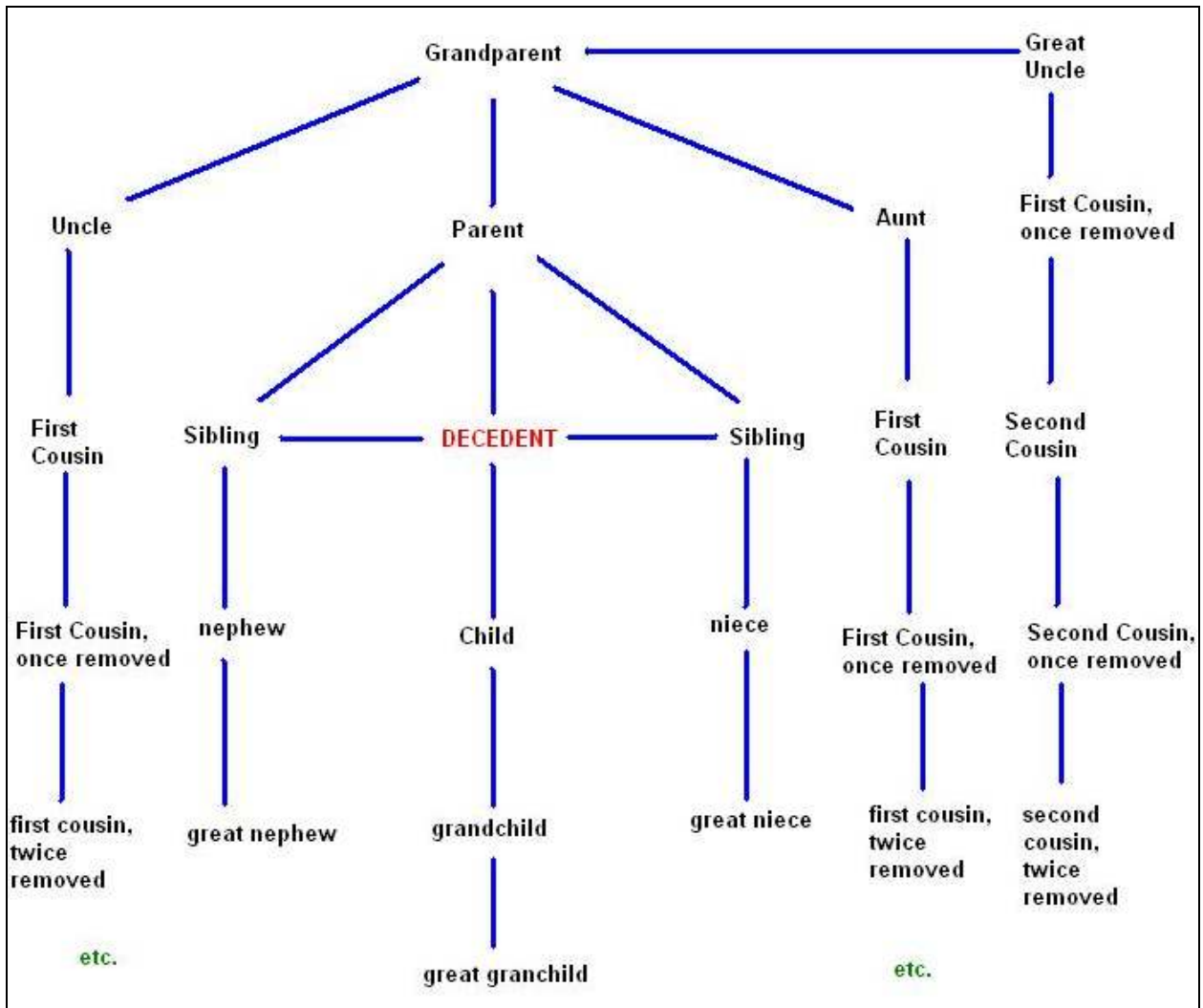
i.e. The decedent had ***no Will and no Trust that disposes of the estate's assets***

- ✚ Whose law governs?

- For personal property, the law of the state in which the decedent was domiciled controls
- For real property, the law of the state in which the real property sits governs

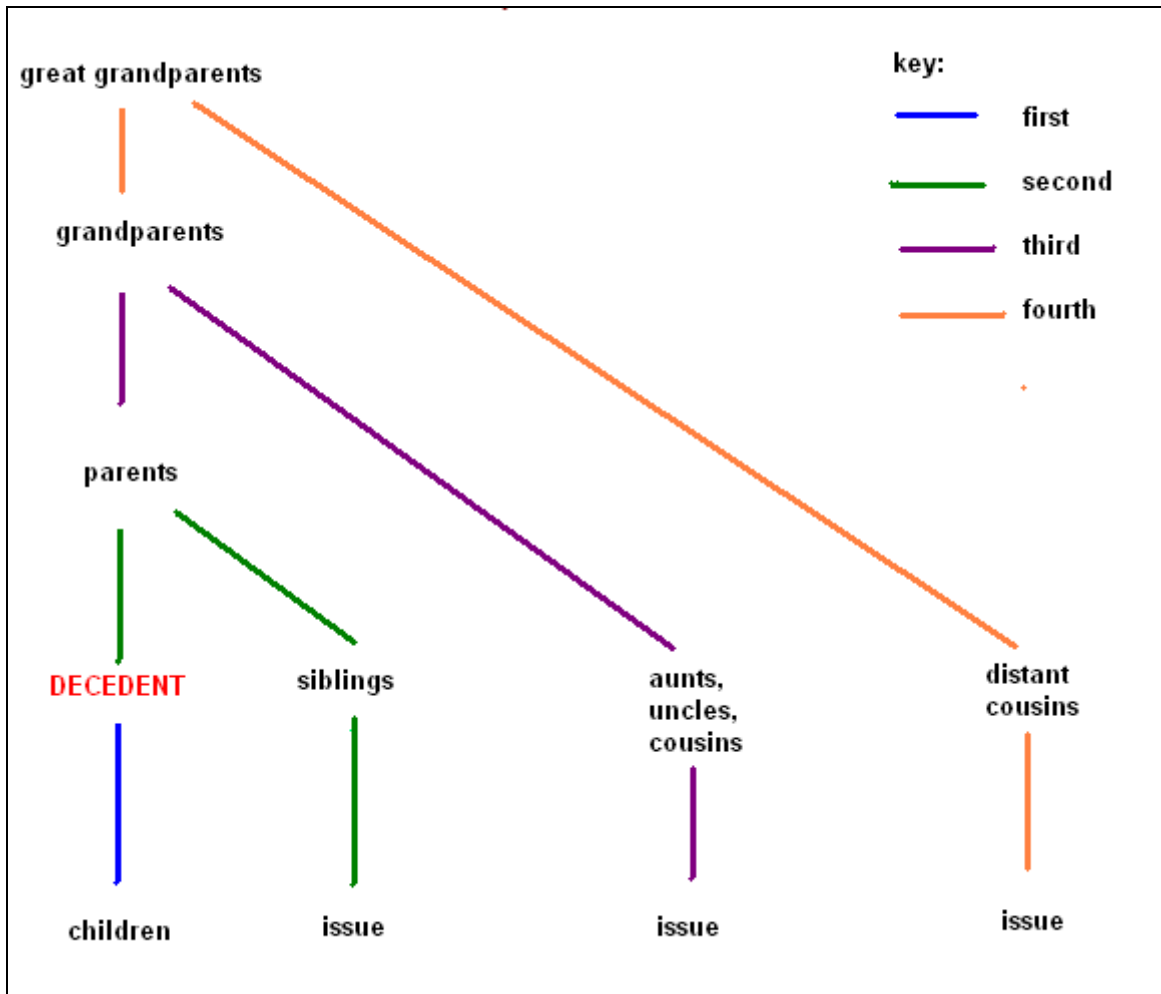
IMPORTANT: Intestate succession rules can apply even if there is a will or trust! If there is property in the estate that the decedent does not dispose of by will or trust, it will go to the heirs under intestacy law

Consanguinity Chart



Order of Intestacy Distribution

- ✚ Depends on the jurisdiction
- ✚ Surviving spouse takes some or all of the estate first
- ✚ After that,
 - Decedent's issue comes first
 - Then, parents and then their issue
 - Then grandparents and then their issue
 - Etc.



Typical Intestate Succession Provision - New York

Distribution shall then be as follows:

- (a) If a decedent is survived by:
 - (1) A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.
 - (2) A spouse and no issue, the whole to the spouse.
 - (3) Issue and no spouse, the whole to the issue, by representation.
 - (4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents.
 - (5) Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation.
 - (6) One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving paternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving maternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, *issue of grandparents shall not include issue more remote than grandchildren of such grandparents.*
 - (7) **Great-grandchildren of grandparents**, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the paternal grandparents, per capita, and the other one-half to the great-grandchildren of the maternal grandparents, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.
- (b) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.
- (c) Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime.
- (d) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.
- (e) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

Methods of Sharing among Heirs

Per Capita

→ All heirs in the class split the estate equally

Per Stirpes

→ All people in the first inheriting generation split the estate equally

→ If one of the inheriting parties is dead, his or her issue takes that share. If that party had multiple issue, they split the estate in the same manner.

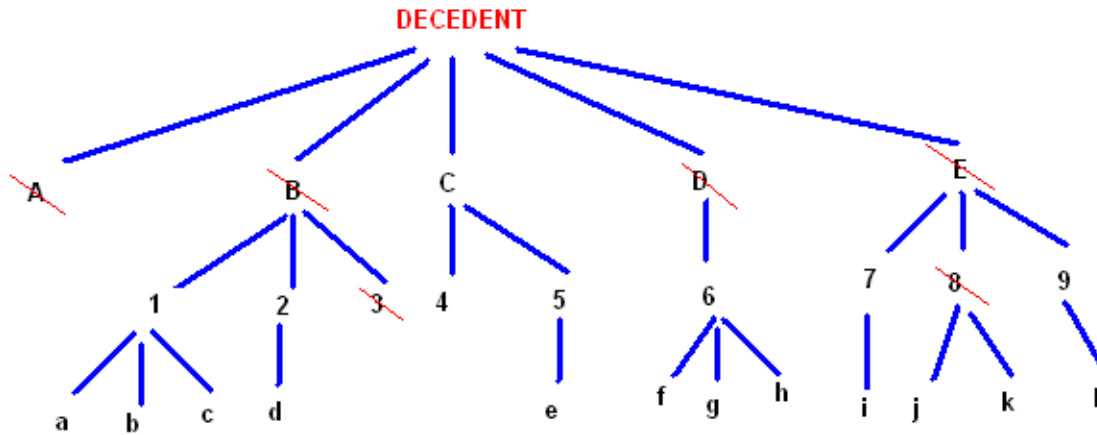
→ The heirs of the dead beneficiary take only what the dead beneficiary would have taken

→ If a beneficiary is dead and has no heirs, it is as if he never existed

Per representation

→ Same as per stirpes, except:
Each generation entitled to inherit splits the proceeds equally among that generation.

Distribution Hypothetical



Results:

Per capita:

Each of the alive heirs will get 1/21 of the estate

Per Representation:

C gets 1/4

1,2,6,7 and 9 each get 1/8

j and k each get 1/16

Per Stirpes:

C gets 1/4

1 and 2 each get 1/8

4 and 5 each get nothing!

7 and 9 each get 1/12

j and k each get 1/24

6 gets 1/4

Protection against Disinheritance - The Spouse

- Spouse gets a share of the estate under intestacy rules.
- In some community property states, the spouse receives all of the community property at the death of the first to die spouse.
- *Spouses are entitled to an “elective share” even if the decedent had a Will that didn’t provide for the surviving spouse.*

Elective share only applies if the marriage was still valid at the death and can be nullified by a pre-nuptial agreement.

Example of Elective Share Statute- Florida

The surviving spouse of a person who dies domiciled in Florida has the right to a share of the elective estate of the decedent as provided in this part, to be designated the elective share.

The elective share is an amount equal to 30 percent of the elective estate.

Valuation of the elective estate

1. For purposes of [s. 732.2035](#), "value" means:
 - In the case of any policy of insurance on the decedent's life includable under [s. 732.2035](#)(4), (5), or (6), the net cash *surrender value of the policy* immediately before the decedent's death.
2. In the case of any policy of insurance on the decedent's life includable under [s. 732.2035](#)(8), the *net cash surrender value of the policy* on the date of the termination or transfer.
3. In the case of amounts includable under [s. 732.2035](#)(7), the transfer tax value of the amounts on the date of the decedent's death.
4. In the case of other property included under [s. 732.2035](#)(8), the *fair market value of the property on the date of the termination or transfer*, computed after deducting any mortgages, liens, or security interests on the property as of that date.
5. In the case of all other property, *the fair market value of the property on the date of the decedent's death*, computed after **deducting** from the total value of the property:
 - (a) All claims paid or payable from the elective estate; and
 - (b) To the extent they are not deducted under paragraph (a), all mortgages, liens, or security interests on the property.

Other Protection against Disinheritance

Children

- ✚ Pretermitted child statutes protect against unintentional disinheritance by providing:
 - If a Will is made and the *testator later has children*, and there is no clear intent from the Will to disinherit the after-born children, the children get something:
 - If the testator had earlier children and gave them something in the Will, the pretermitted children get the same as the earlier children
 - If not, the pretermitted children take their intestacy share

- ✚ ***Protection against large deathbed charity gifts (Mortmain statutes):***
These usually provide that ***large gifts to charity close to death are invalid;***
Reason: to protect the families from influence by people soliciting donations and taking advantage of the testator's fear of mortality
 - **Constitutional issues? (Equal protection, due process etc.)**

- ✚ Protection against creditors
e.g. homestead exemption etc.