

Montana Common Law Marriages & Estate Planning



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Why session on Common Law Marriages?



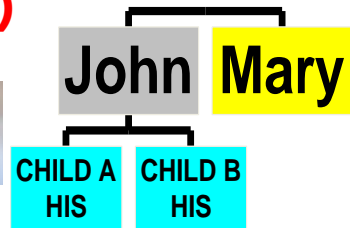
- Questions arose during & after estate planning meetings across the state

Introducing John & Mary

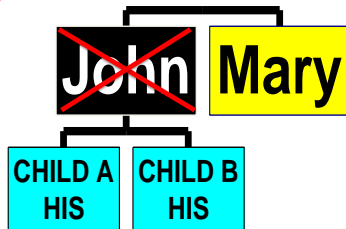
- Lived together 15 years
- John has 2 children from prior marriage
- Mary had no children



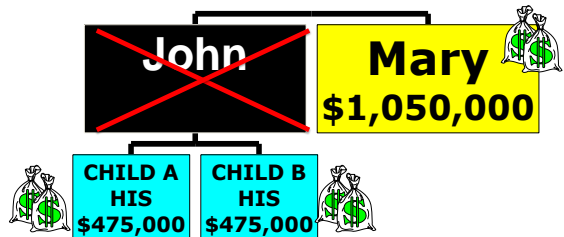
All property in John's Name (\$2 M)



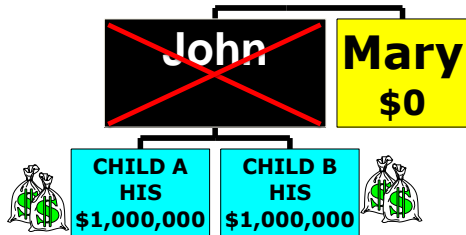
John dies with (\$2 M)



Mary asserts common law marriage existed



John's children say a common law marriage **did not** exist!



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When does issue of common law arise?



- Typically, at death of one member of the couple.

8

District Court must decide?

- Did John & Mary have a common law marriage?



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Purposes of webinar



- Define a Montana common law marriage
- Explore what establishes a common law marriage in Montana

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Purposes of webinar



- Provide illustrations of the \$\$\$\$ amount surviving spouse of Montana common law marriage inherits

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Authorization: Montana Code Annotated

- MCA § 40-1-403
- Common-law marriages are not invalidated by this chapter



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Definition: Montana Common Law Marriage

- One formed without a license & solemnization by:
 - minister
 - priest
 - judge of a court record
 - public official



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What establishes a common law marriage?



- Montana Supreme Court has established **3 elements** for creating a common law marriage

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Surviving "spouse"

- Party asserting existence of common law marriage must prove **3 elements** to district court



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Montana Supreme Court

- **First**, the parties were competent to enter into a marriage



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Competency requirements



- Same as "traditional" marriage

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Competency requirements



- Parties.....
 - Can't be already married to someone else

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Competency requirements



- **Can't be related**
 - **Marriage between first cousins prohibited in Montana**

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Competency requirements



- **Parties.....**
 - **Must have mental capacity to enter into a marital relationship**

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Montana Supreme Court



- ***Second***, the parties assumed a marital relationship by mutual consent & agreement

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Expressing Mutual Consent

- **Can be implied from the conduct of the parties**
- **Varies from couple to couple**



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Mutual Consent

- **May occur privately**
- **Witnessed by many**



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Mutual Consent Requirement

- **In Montana two people cannot create an unintended common law marriage**



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Montana Supreme Court

- **Third**, the parties confirmed their marriage by cohabitation & public repute



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Misperception

- Living together for a certain number of year creates a common law marriage
 - **WRONG**



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Indicators/Actions of Public Repute

- **Exchanging rings**



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Indicators/Actions

- Taking the partner's last name
 - Susan Jones and Clay Jones
- Referring to one another as husband & wife or spouse



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Indicators/Actions

- Filing joint tax returns
 - Montana
 - Federal



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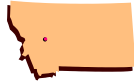
Indicators/Actions

- Filling out documents or forms with a signature line indicating *spouse*



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What documentation provides proof of Montana common law marriage.... while both parties are living?



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Montana Form



- **Affidavit of Common Law Marriage form**
 - Montana State Law Library
 - Solid Finances Resources on website

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Affidavit



- **Notice:** Your signature on this document may be considered proof of a common law marriage.

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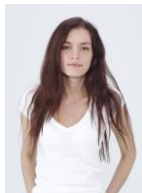
Affidavit



- During this period we have professed to be husband and wife and we have held ourselves out to the community as being married.

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Affidavit



- That we are 18 years of age or older.
- There is no legal impediment to our marriage.

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Affidavit



- Signed by couple
- Sworn before Notary Public for State of Montana

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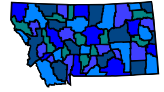
Affidavit



- Recorded at County Clerk and Recorder's Office
 - Fee--\$53

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Montana Form



- Declaration of Marriage without Solemnization
 - Filed with Clerk of District court

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Declaration



- Serves as official record of marriage
- Date they agreed they were married

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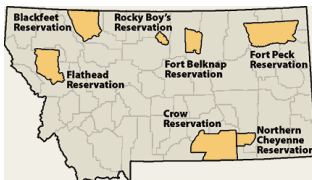
Declaration



- Yellowstone Clerk of Court has fact sheet
 - Lists information to include

40

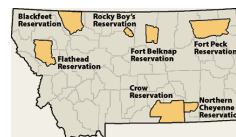
Is a common law marriage recognized on reservations in Montana?



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7 Tribal Codes

- Review most current version of the tribal code on specific reservation



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Is a Montana Common Law Marriage legal in other states?



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YES

- **If recognized in Montana**
- **Accepted by every state in the nation**



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How is a Montana common law marriage terminated?



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Montana Requirements

Requires a legal Dissolution of Marriage to terminate a common law marriage



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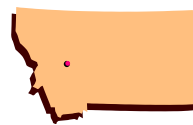
State Law Library

- **Provides forms for ending a marriage in Montana**
- **Attorney consulted to assure legal rights of each party protected**



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What amount does a surviving spouse in a Montana common law marriage inherit?



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It depends...

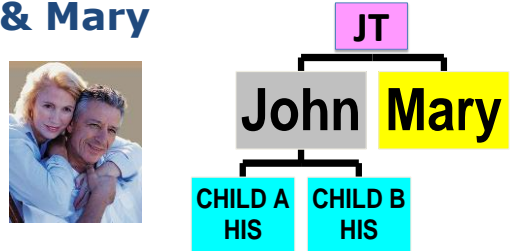


- How is property titled between the parties?
- Is there a beneficiary designation on the property/asset?
- Is there a will?

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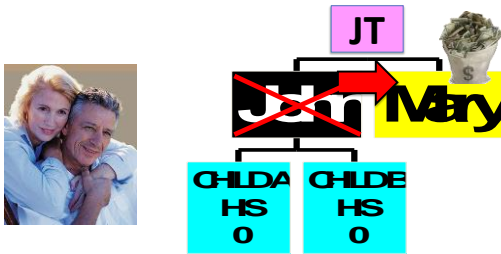
\$2 M Property in **joint tenancy** between John & Mary



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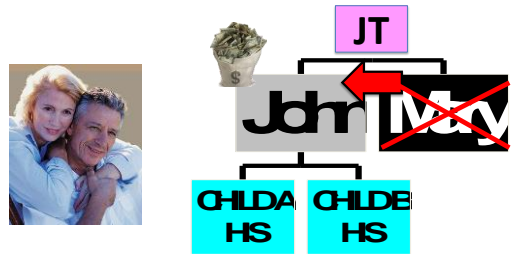
John dies, Mary receives all



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Mary dies, John receives all

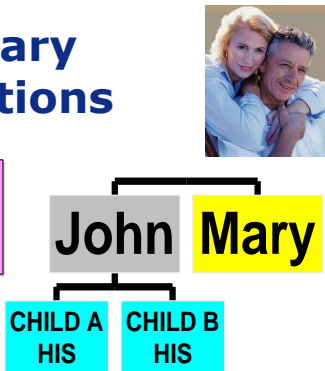


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Beneficiary designations

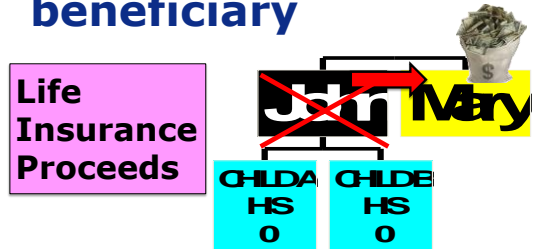
Each has Life Insurance



53



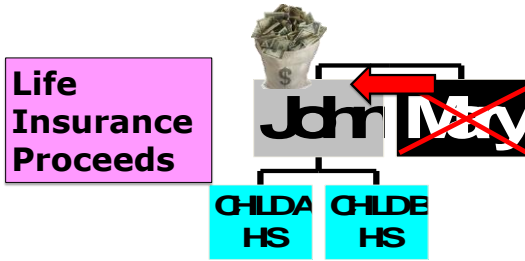
John dies, Mary is listed as beneficiary



54

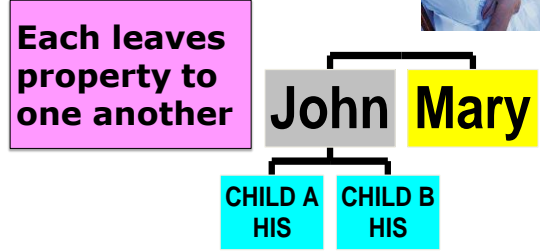


Mary dies, John is listed as beneficiary



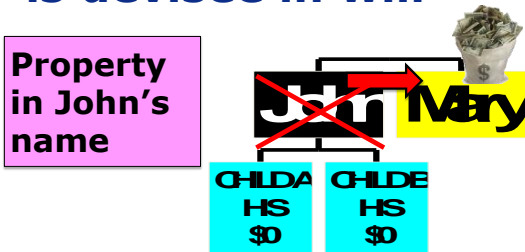
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Written Will



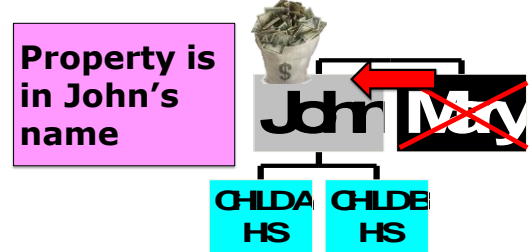
56

John dies, Mary is devisee in will



57

Mary dies, John is devisee in will



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Montana Uniform Probate Code

- Legalizes the distribution of property when a Montanan dies with or without a will



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Definitions

- **Decedent**—person who died
- **Descendants**—are those who are the issue of an individual:
 - Children
 - Grandchildren
 - Great grandchildren
 - Great great grandchildren

definition n. 1. The teacher gave de of the new words of an image (pics)

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Definitions



- **Personal Representative**
 - Person named in your will to carry out your plan for the settlement of your estate

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Priority Appointment

- Surviving spouse of a common law marriage has priority over all other relatives to be appointed as a personal representative



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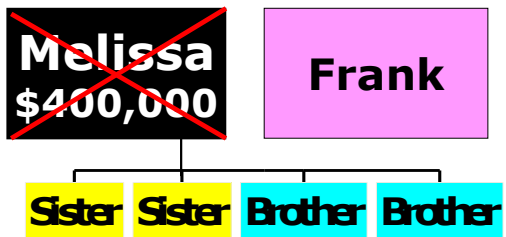


- **Scenario 1:**
- If decedent has no surviving descendants or surviving parents,
 - Common law surviving spouse receives all

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Scenario 1:

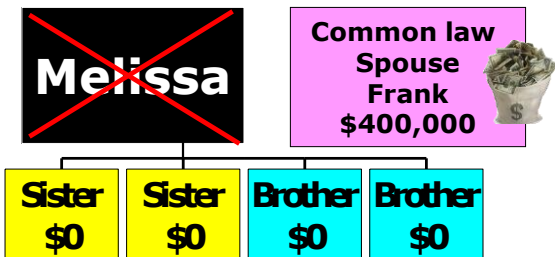
Couple: Frank & Melissa



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Scenario 1a: Common Law Marriage, Frank inherits

Melissa dies with \$400,000 Assets



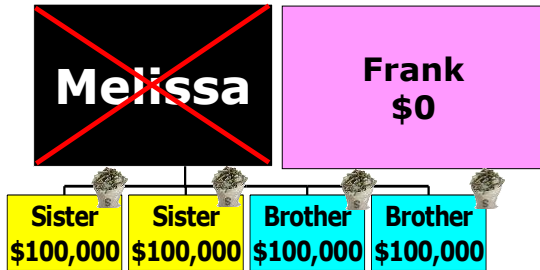
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- **Scenario 1b: Not a common law marriage**
- If decedent has no
 - surviving spouse,
 - surviving descendants, or
 - surviving parents,
- **Siblings inherit**

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Scenario 1b: Not a Common Law Marriage, Melissa's Siblings split \$400,000 equally



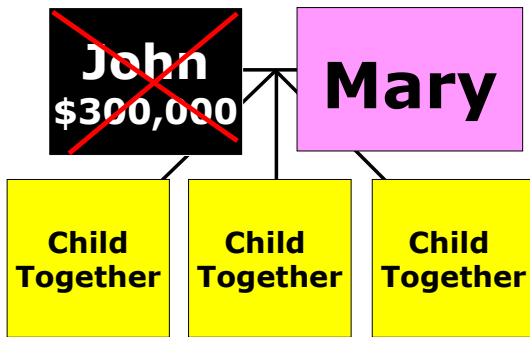
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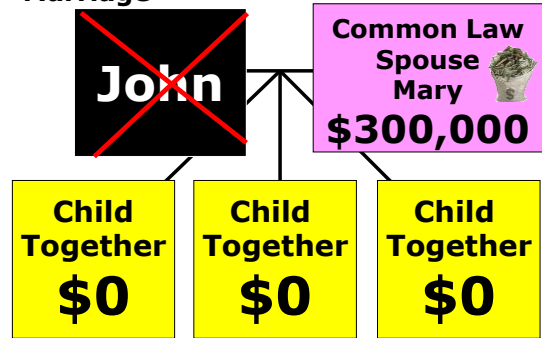
- **Scenario 2:**
- **Survivors.....**
 - Common law spouse
 - Descendants of both the decedent & surviving common law spouse

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Scenario 2: John & Mary, John dies



Scenario 2a: Common Law Marriage

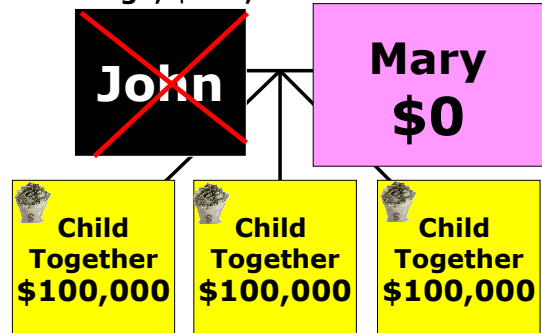


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- **Scenario 2b:** Not a common law marriage
- **Survivors.....**
 - Descendants of the decedent
 - ❖ Inherit equally

Scenario 2b: Not a Common Law Marriage, \$300,000 Assets



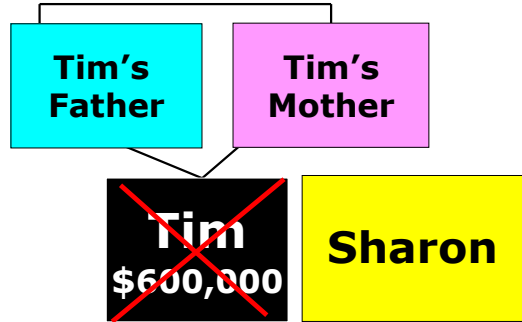
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- **Scenario 3:**
- **Survivors**
 - Common law spouse
 - Decedent's parents



Scenario 3: Tim and Sharon, Tim dies with living parents



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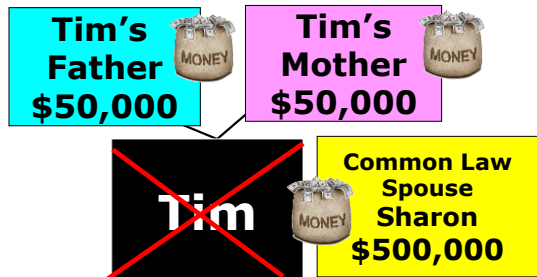
Distribution

- **Scenario 3a**
- First \$200,000 & $\frac{3}{4}$ of balance passes to common law spouse
- Decedent's parents share the remaining $\frac{1}{4}$



Scenario 3a: Common Law Marriage
\$600,000 Assets

Tim's Parents: Remaining $\frac{1}{4}$



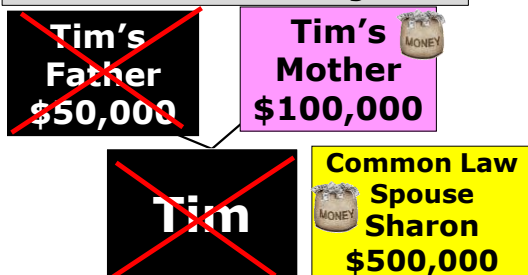
Sharon: \$200,000 plus $\frac{3}{4}$ balance

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Scenario 3a: Survivors, Tim's Mother & Sharon

Tim's Mother: Remaining $\frac{1}{4}$



Sharon: \$200,000 plus $\frac{3}{4}$ balance

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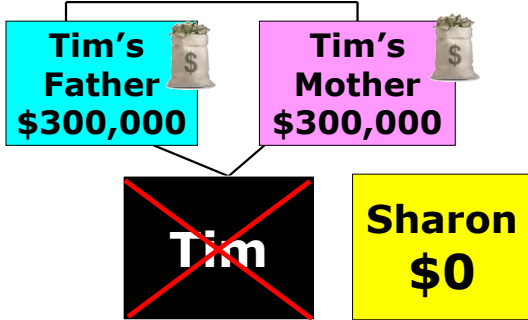
- **Scenario 3b:** Not a common law marriage
- **Survivors....**
 - Decedent's parents



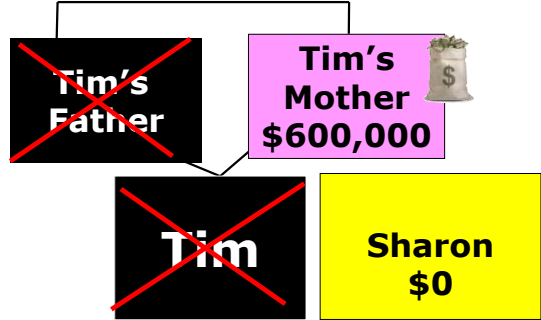
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Scenario 3b: Not a Common Law Marriage, \$600,000 in assets



Scenario 3b: Tim's Mother is survivor



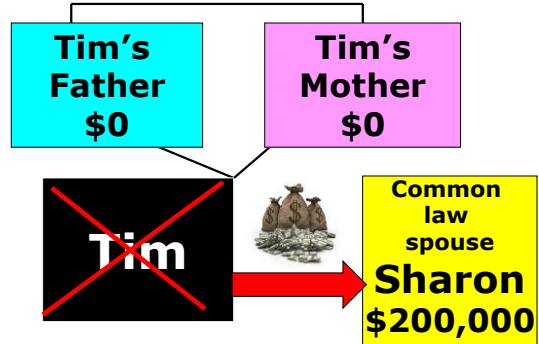
Distribution



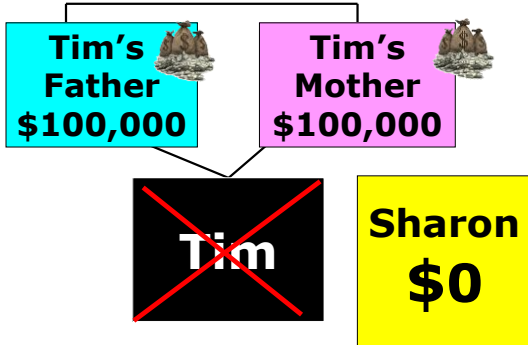
- **Scenario 3c:**
- If the estate is valued at \$200,000 or less,
 - Common law spouse receives all
- Decedent's parents receive nothing

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Scenario 3c: Common Law Marriage, \$200,000 in assets



Scenario 3d: Not a Common Law Marriage, \$200,000 in assets



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- **Scenario 4a:**
- **Survivors**
 - Common law spouse
 - Descendants of both the decedent & surviving spouse....

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- **Scenario 4a:**
- **AND, if the surviving spouse has one or more surviving descendants who are not descendants of the decedent...**

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Distribution



- **Scenario 4a:**
- **The common law marriage surviving spouse receives the first \$150,000 plus 1/2 of the balance**

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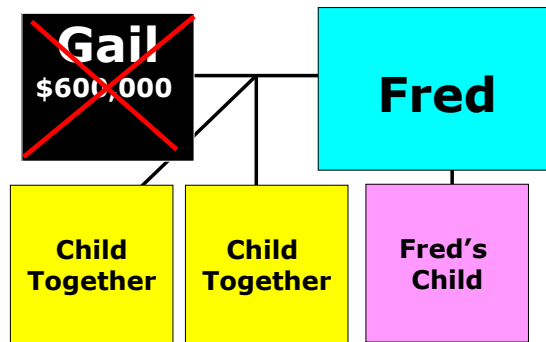
Distribution



- **Scenario 4a: (con'd)**
- **The decedent's children share the remaining 1/2**
- **Stepchildren do not inherit**

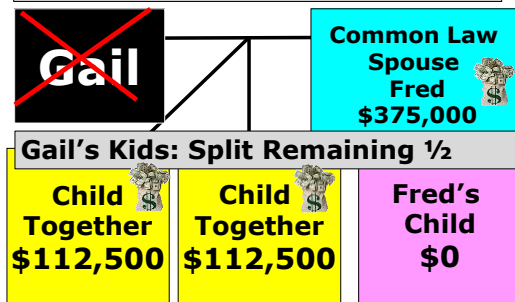
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Scenario 4: Gail & Fred, Gail dies



Scenario 4a: \$600,000 Common Law Marriage

Fred: \$150,000 plus 1/2 balance



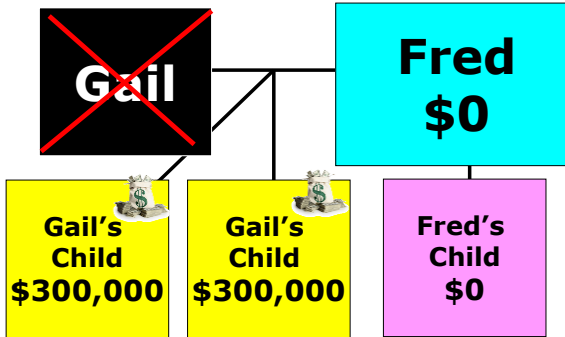
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- **Scenario 4b: Not a common law marriage**
- **Survivors.....**
 - **Descendants of the decedent**
 - **Inherit equally**



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Scenario 4b: Not a Common Law Marriage \$600,000



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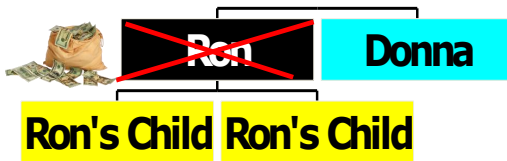
- **Scenario 5a:**
- **Survivors....**
 - **Common law spouse**
 - **Descendants of the decedent who are not descendants of the spouse**



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Scenario 5: Ron & Donna

Ron dies with \$600,000 Assets



Distribution

- **Scenario 5a:**
- **Spouse of the common law marriage receives:**
- **First \$100,000 plus 1/2 of the balance....**



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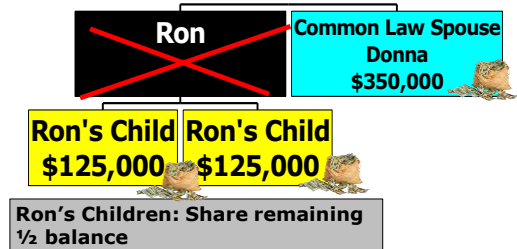
Distribution



- **Scenario 5a: (con'd)**
- **Decedent's children share the remaining 1/2**

Scenario 5a: Common Law Marriage Ron estate \$600,000

Donna: First \$100,000 plus 1/2 balance



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- **Scenario 5b:** Not a common law marriage
- **Survivors.....**
 - Descendants of the decedent
 - ❖ Inherit equally



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Scenario 5b: Not a Common Law Marriage: \$600,000 divided equally amount Ron's children



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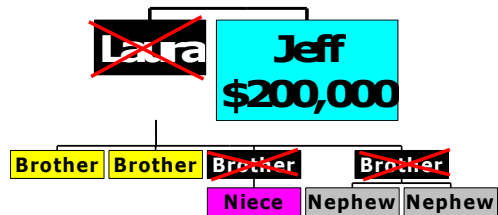
Distribution...

- **Scenario 6a:** Common law marriage
- **Survivors.....**
 - Common law spouse
 - Siblings of decedent



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Scenario 6a: Laura dies with \$200,000 Assets, Jeff is a common law spouse



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Distribution...

- **Scenario 6b:** Not a common law marriage
- Property passes to his/her brother & sister, & to their descendants *by representation.*



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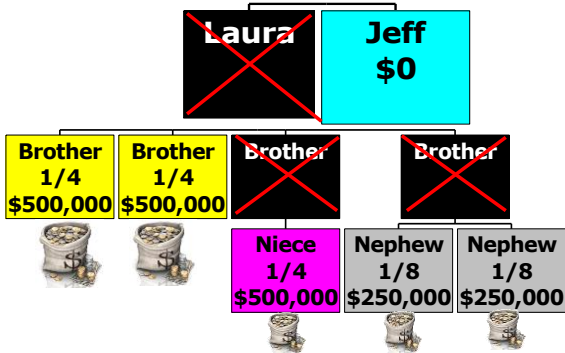
By representation...

- Means the descendants take the share the parent would have received had the parent lived

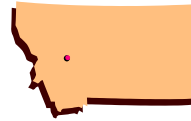


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Scenario 6b: Not a Common Law Marriage, \$2 million in assets



The amount a surviving spouse in a Montana common law marriage inherits...



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Depends on...



- How is property titled between the parties?
- Whether there is a beneficiary designation on the property/asset?

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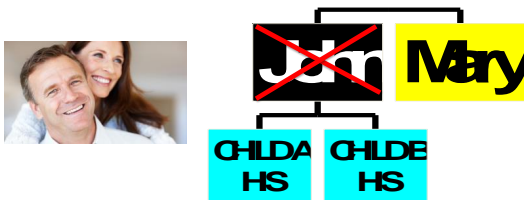
Depends on...



- Whether the decedent wrote a will?
- Was there a premarital agreement?"

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Revisit example (\$2 M)



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Court Decision



- John and Mary had a common law marriage



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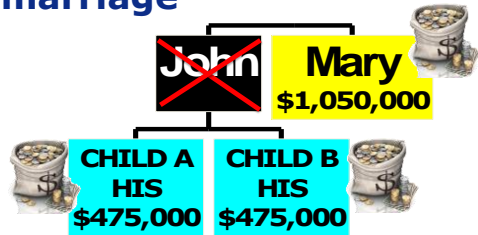
Distribution



- Spouse of the common law marriage receives:
 - First \$100,000 plus $\frac{1}{2}$ of the balance....
- Decedent's children share the remaining $\frac{1}{2}$

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Court decided: John & Mary had a common law marriage



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Common law marriages have consequences

- Not only for couple
- But also family members



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Estate Planning Goal

- Protect inheritance rights of a *surviving spouse*
 - Affidavit of Common Law Marriage
 - Declaration of Marriage without Solemnization



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Estate Planning Goal

- Protect inheritance rights of children, grandchildren or other heirs for real & personal property
 - Will/Trust
 - separate listing of tangible personal property



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Wise course of action

- Obtain legal advice while both parties are alive
 - To clarify their legal status!!



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Acknowledgement to Reviewers

- University of Montana School of law
- State Bar of Montana
 - Business, Estates, Trusts, Tax and Real Property Section
 - Family Law

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Montana Common Law Marriages & Estate Planning

Thank you for your participation in this webinar

Marsha



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