

Small Estate Affidavit Checklist – Williamson County Court at Law #4

Texas Estates Code Chapter 205 governs probate by Small Estate Affidavit (SEA), a method of transferring probate property under certain limited circumstances. Approval of an SEA is within the Court's discretion.

Before filing an SEA, carefully review both the requirements in Chapter 205 of the Estates Code as well as the rules for descent and distribution in Chapter 201. To prepare an SEA, you will need to understand *all* of the rules and requirements. The complexity of the Estates Code poses many pitfalls for non-lawyers attempting to comply with the requirements. An attorney's assistance in drafting an SEA may prevent the denial of an Affidavit that might have been approved if the Affidavit had been prepared correctly.

This checklist explains the basics, but the list does not cover everything included in Chapter 201 and Chapter 205.

1. To increase the chances that an SEA will include all necessary information, the Court prefers that applicants use the most recent SEA form that is available on the Court's website. If necessary, include extra pages to provide additional information. The Small Estate Affidavit must be completed by persons who have actual knowledge of the stated facts.
2. The Williamson County Probate Court requires a death certificate to be filed with all probate applications, including SEAs. An easily readable copy is fine. The social security number must be crossed out.
3. An SEA cannot be filed within 30 days of Decedent's death.
4. An SEA should be filed in the county where Decedent resided if Decedent had a domicile or fixed place of residence in Texas. Granting an SEA is in the Court's discretion; it is unusual for the Court to approve an SEA for a Decedent who did not have a fixed place of residence in Williamson County.
5. By statute, an SEA cannot be used where Decedent left a will. Applicants must swear that the Decedent died without a will.
6. An SEA cannot be approved if a petition for the appointment of a personal representative is pending or has been granted or if it appears that an administration is needed.
7. Decedent's Estate Assets.
 - * List everything. The SEA must list *all* of Decedent's known estate assets – not just some of them. Assets are any property owned that has monetary value, including cash or bank accounts, vehicles, household furnishings, and real property.
 - * Indicate the value of each asset as precisely as possible. An SEA cannot be approved with any asset of "unknown value."
 - * The SEA must show that the total estate assets are \$75,000 or less (effective 9/1/17), not including the homestead (see below) and exempt property (see below).

- * Provide sufficient detail. Describe each asset with enough detail to make it clear exactly what property is being transferred by Affidavit. For example, give VIN number, make and model of vehicles, name of bank or other entity holding funds, and last four digits of any account number(s).
- * Exempt property. If Decedent is survived by a spouse, minor children, or unmarried adult children who lived with Decedent, the list of known estate assets must indicate which assets you claim as “exempt.” If you claim any assets as exempt, add this information in the “additional information” column of the SEA form. Exempt assets are those that are exempt from forced execution under Chapter 42 of the Texas Property Code and that would be eligible to be set aside under Estate Code §353.051 if Decedent’s estate were being administered. Exempt assets include home furnishings, farm animals, and some other property, as well as Decedent’s pension benefits and IRAs. Insurance benefits are also exempt. You may want to consult with an attorney regarding which assets are exempt.
- * Real property: homestead to homestead. The only real property that can be transferred by an SEA is Decedent’s homestead property. Even then, real property cannot be transferred by an SEA unless the real property *will be inherited only by an heir who was homesteading with the decedent at the time Decedent died* – a surviving spouse or unmarried child of Decedent who resided on the property with Decedent. If this is the case, the SEA must include sufficient facts to support the homestead exemption *and* must include the legal description street address of the property.
- * If Decedent was married at the date of death:
 - ✓ State whether *each* asset was Decedent’s community property or Decedent’s separate property.
 - ✓ For each asset, give the *facts* that explain why the asset was community or separate property. For real property, indicate the date the real property was acquired, in addition to other facts.

8. Decedent’s Liabilities.

- * List everything. The SEA must list all of Decedent’s debts and other liabilities, including all credit card balances, doctor or hospital bills, utility bills, etc. – *anything* owed by Decedent and not paid off. The SEA must list any attorneys’ fees paid or to be paid for preparation of the Affidavit. If attorney’s fees are not listed as an estate liability, whoever paid the fees is responsible for those fees; the SEA will not have the estate reimburse that person for those fees. If there are no debts or liabilities, indicate “none.”
- * Provide sufficient detail. Indicate the amount of each liability as precisely as possible, describing the debt or other liability with sufficient detail so that it is clear who the creditor is. Also, indicate at least the last four digits of any known account numbers.

9. Solvent. The total of the assets - *not including the homestead and exempt property* – must exceed the total known liabilities. If they do not, the SEA must be denied. Prior to filing an SEA, distributees may choose to pay off enough of the debts so that the assets exceed the remaining liabilities, but it is recommended that you consult an attorney before do so.
10. Medicaid. The SEA must indicate whether Decedent applied for and received Medicaid benefits on or after March 1, 2005. If so, Applicant must either (1) list as a liability the amount owed to Medicaid or (2) file a Medicaid Estate Recovery Program (MERP) certification that Decedent's estate is not subject to a MERP claim or (3) include additional information proving that a MERP claim will not be filed. For more information, see http://www.dads.state.tx.us/services/estate_recovery/index.html.
11. Family history. The SEA must state the *facts* about Decedent's marital and family history in sufficient detail that it is clear who inherits Decedent's property and the shares of those heirs under Texas law. The Court's approved SEA form will lead you through the appropriate questions, except for relatively unusual situations, as long as you fill out the form carefully and *completely*.
12. List all heirs. To determine the heirs who must be listed in Section L of the SEA, look at the charts on pages 5 - 7 of this handout, which summarize the Texas rules regarding descent and distribution based on Chapter 201 of the Texas Estates Code. Decide which of the charts in the SEA applies to Decedent and then look at *everything* included in that chart.

When filling out the information requested in Section L, you must do so completely, even if you are the only heir. The Court will not consider SEAs with incomplete heirship information.

13. Minor heirs. Williamson County Court at Law #4 will not approve and SEA with a minor heir unless all estate assets the minor heir(s) will inherit can be placed in the registry of the Court until the heir turns 18.
14. Correct inheritance shares. In the Court's approved SEA form, in addition to naming each heir, you must list the share each Distributee is to receive of *each type of property*, per the charts on pages 5 -7 of this handout. In considering an SEA, the Court will not stray from the distribution allowed in Chapter 201 of the Texas Estates Code, even if it is agreed by all heirs.

Non-lawyers often do not understand who inherits under Texas law or what shares each Distributee inherits. If you do not understand the descent and distribution charts attached to this handout, or if Decedent's family history is complicated, you may want to consult an attorney to assist in listing in the heirs and their appropriate shares (of each type of property).

15. Signed and sworn to by all Distributees. Every Distributee who has legal capacity must sign and swear to the Affidavit before a notary. You may copy and attach as many signature pages as needed. ***IMPORTANT*** - Every distributee who has legal capacity must sign and swear to the Affidavit before a notary.

* Is there a minor or otherwise incapacitated Distributee? If warranted by the facts, the natural guardian or next of kin of any minor Distributee or the guardian of any other incapacitated Distributee may sign and swear to the Affidavit on behalf of the minor or otherwise incapacitated Distributee.

* Is there a distributee who survived Decedent, but is now deceased? If a personal representative has not been appointed for a now-deceased distributee, you **cannot** use the Small Estate Affidavit probate procedure and must file an Application to Determine Heirship.

* Is there a missing Distributee? If you do not know where to find a Distributee, you **cannot** use the Small Estate Affidavit probate procedure and must file an Application to Determine Heirship.

NOTE: An applicant in an application for determination of heirship must be represented by an attorney.

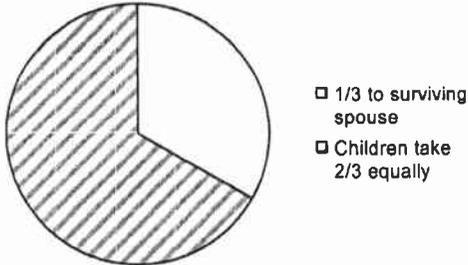
16. Sworn to by two disinterested witnesses: Two disinterested witnesses must each sign and swear to the Affidavit before a notary. These witnesses must be able to swear to *all* of the facts included in the SEA, not only the family history facts. Disinterested witnesses are witnesses who have no interest in Decedent's estate and who are not related to Decedent under the laws of descent and distribution of the State of Texas.
17. The Court usually does not require a hearing on SEA applications, but in some circumstances, the Court may require a hearing before an SEA will be approved. If a hearing is needed, the Court will contact you to set a hearing. **DO NOT** set a hearing unless the Court has asked you to do so.

Texas Descent and Distribution¹

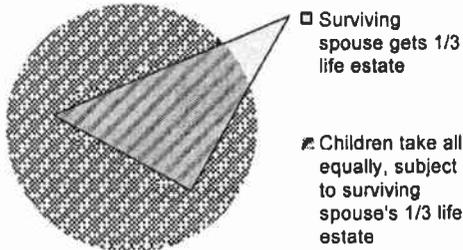
The Legal Effect of Not Having a Will (for decedents dying after 9/1/1993)

1. Married Person with Child[ren] or Other Descendants

A. Decedent's separate personal property (all that is not real property) (EC § 201.002(b))



B. Decedent's separate real property (EC § 201.002(b))



All separate real property will be owned outright by decedent's child[ren] or other descendants when surviving spouse dies.

C. Decedent's share of community property when all surviving children and descendants of deceased are also children or descendants of surviving spouse. (EC § 201.003(b)(2))

A pie chart that is entirely filled with a cross-hatch pattern. A legend to the right states: "All to surviving spouse".

C. Decedent's share of community property when there are children or other descendants from outside of the existing marriage on the date of decedent's death (or if decedent died before September 1, 1993) (EC § 201.003(c))

A pie chart that is entirely filled with a cross-hatch pattern. A legend to the right states: "All to children, who take equally" and "Surviving spouse takes none, but retains own share".

¹ The charts in this handout illustrate the general rules of descent and distribution under Texas law. In addition to the statutory references noted throughout, see the following Texas Estates Code (EC) provisions, among others: § 201.101, Determination of Per Capita with Representation Distribution (fka per stirpes); § 201.051 et seq., Matters Affecting Inheritance (including Adoption [§ 201.054] and Collateral Kindred of Whole and Half Blood [§ 201.057]); Advancements, §§ 201.151 & 201.152; and Requirement of Survival by 120 Hours, §§ 121.052 & 121.053 (see also §§ 121.151-121.153).

2. Married Person with No Child or Descendant

A. Decedent's separate personal property (all that is not real property) (EC § 201.002(c)(1))

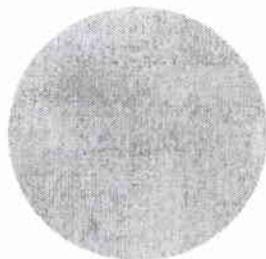


☑ All to surviving spouse

B. Decedent's separate real property (EC § 201.002)

<p>If decedent is survived by both mother and father. EC §§ 201.001(c) & 201.002(c)(2) & (3).</p> <div style="display: flex; align-items: center;"> <ul style="list-style-type: none"> <input type="checkbox"/> 1/4 to father <input type="checkbox"/> 1/4 to mother <input checked="" type="checkbox"/> 1/2 to surviving spouse </div>	<p>If decedent is survived (1) by mother or father and (2) by sibling(s) or their descendants. EC §§ 201.001(d)(1) & 201.002(c)(2) & (3).</p> <div style="display: flex; align-items: center;"> <ul style="list-style-type: none"> <input type="checkbox"/> 1/4 to surviving parent <input checked="" type="checkbox"/> 1/4 to siblings, etc. <input checked="" type="checkbox"/> 1/2 to surviving spouse </div>	<p>If decedent is survived by mother or father, but is not survived by any sibling(s) or their descendants. EC §§ 201.001(d)(2) & 201.002(c)(2) & (3).</p> <div style="display: flex; align-items: center;"> <ul style="list-style-type: none"> <input type="checkbox"/> 1/2 to surviving parent <input checked="" type="checkbox"/> 1/2 to surviving spouse </div>
<p>If decedent is survived by neither parent, but is survived by sibling(s) or their descendants. EC §§ 201.001(e) & 201.002(c)(2) & (3).</p> <div style="display: flex; align-items: center;"> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> 1/2 to siblings, etc. <input checked="" type="checkbox"/> 1/2 to surviving spouse </div>	<p>If decedent is survived by no parent, no sibling, and no descendant of a sibling. EC § 201.002(d).</p> <div style="display: flex; align-items: center;"> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> All to surviving spouse </div>	

C. Decedent's share of community property (EC § 201.003(b)(1))



☑ All to surviving spouse

3. Unmarried Person with Child[ren] or Other Descendants (EC § 201.001(b))

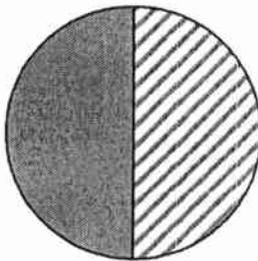


- All to children, who take equally

4. Unmarried Person with No Child or Descendant

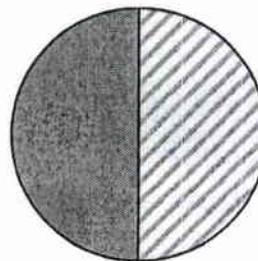
All property passes depending on who survived the decedent:¹

If decedent is survived by **both** mother and father. EC § 201.001(c).



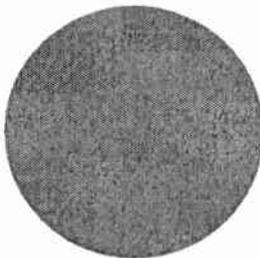
- 1/2 of all property to father
- 1/2 of all property to mother

If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants. EC § 201.001(d)(1).



- 1/2 to siblings or to descendants of deceased siblings
- 1/2 to surviving parent

If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC § 201.001(d)(2).



- All to surviving parent

If decedent is survived by **neither parent**, but **is** survived by sibling(s) or their descendants. EC § 201.001(e).



- All to siblings or to descendants of deceased siblings

¹ If none of the four situations above applies, see EC § 201.001(f)-(h).