Small Estate Affidavits

Travis County Probate Court No. 1

Texas Estates Code Chapter 205 dealing with Small Estate Affidavits often generates confusion. Banks, insurance companies, title companies, and others often tell people to file a Small Estate Affidavit (SEA) without thinking about the limited situations in which an SEA can be approved. People then fill out a form without reading the statute and or understanding Texas intestacy law. They pay a $321 filing fee and expect approval. But many SEAs are denied for problems that can't be fixed, and the applicants lose their filing fees. Many other SEAs can't be approved as filed.

Small Estate Affidavits are <u>not</u> easy! To prepare an SEA the Court can approve, you'll need to meet all of the statutory requirements. The complexity of the Code poses many pitfalls for non-lawyers and lawyers alike. *So . . . .*

1. Before filing an SEA, definitely look at the quick lists below.
2. We also strongly recommend that you review the detailed checklist on pages 2-4 as well as the charts on pages 5-7 regarding Texas rules for who takes what property when the decedent didn't have a will (rules for descent and distribution). We know this material is dense. A completed SEA can't be approved unless it meets all of the requirements in Chapter 205 of the Texas Estates Code and follows all the rules for descent and distribution in Chapter 201. These requirements and rules are complex, and the checklist is designed to answer the questions people have when trying to fill out an SEA that can be approved.
3. Heirs may fill out an SEA without the assistance of an attorney, but an attorney's advice may prevent wasted time and money if a small estate affidavit is not appropriate or may prevent having an SEA denied that could have been approved if prepared correctly.

<u>When CAN'T you do a Small Estate Affidavit?</u>

- **An SEA can't be approved if decedent had a will.**
- **An SEA can't be approved if decedent's total assets were more than $75,000, not including homestead and exempt property.** See checklist #8 on pages 2-3.
- **An SEA can't be approved unless the assets are worth more than the debts.** See checklist #8-10 on pages 2-3. When comparing values, do not consider homestead and exempt property as assets, and do not consider as debts any mortgages or debts secured by exempt property.
- **An SEA can't be approved if the decedent owned real property *unless <u>both</u> of the following are true*:**
  - ✓ The real property was decedent's homestead property, ***<u>and</u>***
  - ✓ ***Everyone*** who will inherit ***any*** interest in the real property ***was homesteading with decedent*** on the date of decedent's death. See checklist page 3, second bullet.

  Note that the Court will always check the real property records before approving an SEA.
- **An SEA can't be approved if you can't locate an heir or if heirs refuse to sign the SEA (or have someone who has legal authority sign for them).**
- **An SEA can't be approved in Travis County unless decedent was residing in Travis County on the date of death or other facts indicate Travis County is the appropriate place to file.** See checklist page 2, #5.
- **An SEA can't be approved in Travis County if <u>any</u> of the heirs are minors (under the age of 18).**

<u>What are the most common mistakes people make when filling out an SEA?</u>

- **Mistake: not using the required form.** See checklist page 2, #1.
- **Mistake: leaving blanks when the form requires an answer.** The Court can't approve an SEA if needed information is missing. Before getting signatures, carefully check all pages to make sure you've answered **<u>all</u>** necessary questions.
- **Mistakes in filling out the chart in Section "I" of the form** (see checklist #8 on pages 2-3):
  - ✓ **Not listing assets with enough detail to identify them.**
  - ✓ **Listing assets with "unknown" value.**
  - ✓ **Not including <u>facts</u> to show <u>why</u> each asset of a married decedent is "separate" or "community" property.**
- **Mistakes in filling out the chart in Section "L" of the form** (see checklist #15 on page 4 and charts on pages 5-7):
  - ✓ **Not listing all heirs and not getting the shares right in the heirship chart.**
  - ✓ **Not filling out <u>all required columns</u> in the heirship chart.** ***Always*** fill out ***both*** "separate property" columns and ***also*** fill out the "community property" column if decedent was married.

Travis County Small Estate Affidavit (SEA) Checklist

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

1. **Use the most recent Small Estate Affidavit (SEA) form on the Travis County Probate Court's website.** The Court requires that applicants use the SEA form that is available on the Court's website because having applicants use that form helps ensure an SEA will include all necessary information,. If needed, include extra pages to provide additional information. *The SEA must be completed by persons who have actual knowledge of all stated facts.*

2. **Death Certificate.** The Travis County Probate Court requires a death certificate to be filed with all probate applications, including SEAs. An easily readable copy is fine. Cross out the social security number.

3. **Can't be filed within 30 days of decedent's death.** Wait long enough to be sure you have *all* bills.

4. **County where decedent resided.** An SEA should be filed in the county where decedent resided if decedent had a domicile or fixed place of residence in Texas. If that's not Travis County, add facts to support venue in Travis County. 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 Travis County.

5. **No Will.** By statute, an SEA can't be used when decedent left a will. All distributees must swear that the decedent died without a will. If decedent had a will, you will need to use a different probate procedure.

6. **No Administration.** An SEA can't be approved if a petition for appointment of a personal representative is pending or has been granted or if it appears that an administration is needed. If there's *any* question about whether you need an administration, consult with an attorney.

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, real estate, vehicles, and household furnishings.
   - **Indicate value.** Indicate the value of each asset as precisely as possible, using values at the time the affidavit is signed. An SEA ***can't*** be approved with any asset of "unknown value" because it is impossible to know if total assets are $75,000 or less, and it might be impossible to know if the estate is solvent. With paperless accounts, finding some values can be challenging. If a financial institution will not provide a precise value, you might be able to get the institution to provide an approximate amount or a range that would be sufficient to allow an SEA to be approved. Estates Code Chapter 153 also provides a method by which you can request a Court order to get access to account information in appropriate situations.
   - **Limited estate.** The SEA must show that the total estate assets are $75,000 or less, not including the homestead (see next page) and exempt property (see next page).
   - **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 numbers for cars and give the last four digits of any account numbers, along with the name of bank or other entity holding the funds.
   - **If decedent was married at the date of death,** you must also add the following in the "additional information" column on the SEA form:
     - ✓ State whether *each* asset was decedent's community property or decedent's separate property. See definitions on the form.
     - ✓ For each asset, give the *facts* that explain *why* the asset was community or separate property. ***For real property, indicate the <u>date</u> the real property was acquired, in addition to other facts.***
     - ✓ For each asset that was community property, indicate in the "additional information" column the total value of the asset; you will list the value of decedent's interest in the "value" column.
   - **Exempt property.** If decedent is survived by a spouse, minor children, or unmarried adult children who lived with decedent, you should consider which assets are "exempt." *If you claim any assets are exempt, you **must** indicate which assets you claim as exempt in the "additional information" column in the chart in Section "I" of the SEA form.* "Exempt property" is not the easiest concept, and defining

which assets are "exempt" is beyond the scope of this limited checklist. 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 Estates Code Section 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 need to do some research or 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 can't be transferred by an SEA unless the real property ***will be inherited only by person(s) homesteading with the decedent at the time decedent died*** – decedent's surviving spouse and/or minor child(ren) who resided on property with decedent. If this is the case, the SEA must include sufficient facts to support the homestead exemption ***and*** must also include the street address of the property and, if possible, the legal description.

8. **Decedent's Debts / Liabilities.**
   - **List everything.** The SEA must list all of decedent's existing debts and other liabilities, including all credit card balances, doctor or hospital bills, utility bills, etc. – *anything* owed by decedent or decedent's estate and not paid off *as of the date the SEA will be signed*. The SEA must list any attorney's fees paid or to be paid for preparation of the SEA. 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." ***This section can't be left blank!***
   - **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 estate assets – *not including homestead and exempt property* – must exceed the total of known liabilities (not including debts secured by homestead and exempt property). If they do not, the SEA must be denied. Distributees can pay off enough debts so that the assets exceed the remaining liabilities.

10. **Medicaid.** The SEA must indicate whether decedent applied for and received Medicaid benefits on or after 3/1/2005. If so, you 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 https://hhs.texas.gov/laws-regulations/legal-information/your-guide-medicaid-estate-recovery-program.

11. **Family history.** The SEA must state the facts about decedent's marital and family history in sufficient detail to show both who inherits decedent's property under Texas law as well as the shares of those heirs under Texas law. As long as you fill out the form carefully and *completely*, Section "K" of the form will lead you through the appropriate questions, except for relatively unusual situations.

12. **List all heirs/distributees.** After you have filled out Section "K" of the form completely, figure out who the heirs are under Texas law and list all of the heirs in Section "L" of the form.
    - To figure out who the heirs are, look at the charts on pages 5-7of this handout, which summarize Texas rules regarding descent and distribution based on Texas Estate Code Chapter 201. Decide which of the following four charts applies to decedent, and then look at *everything* included in that chart:
      1. Married Person with Child[ren] or Other Descendants
      2. Married Person with No Child or Descendant
      3. Unmarried Person with Child[ren] or Other Descendants
      4. Unmarried Person with No Child or Descendant
    - If any heir died ***after*** the decedent, contact the Court.
    - In Section "L" of the form, list the name, address, phone number, and email address of every heir/distributee of decedent's estate. ***You must list heirs for <u>every</u> type of property, even if you don't think decedent owned property of a particular type.***

13. **Minor heirs.** The Travis County Probate Court will not approve an SEA if any of the heirs is a minor.

14. **List correct inheritance shares.** In Section "L" of the Court's approved SEA form, you must list the shares of each distributee **in every possible type of property**. In every SEA, fill out ***both*** "separate

property" columns, *even if you did not list any real property*. If decedent was married when he or she died, you must also fill out the "community property" column. To figure out shares, see the appropriate chart on pages 5-7 of this handout.

- **If decedent was married at the date of death**, the SEA must state the shares of each distributee in all three types of property: separate personal property, separate real property, and decedent's share of the community property. (The surviving spouse will retain his or her own share of the community property.) *It is never sufficient to say that there was no separate property or no separate real property*.
- **If decedent was single at the date of death**, there is no community property. Put "NA" in the community property column – *but always fill out **both** separate property columns*.

15. Signed and sworn to by <u>all</u> distributees.

- **If you need more than one signature page**, use as many signature pages as needed, but *note that every signature page **<u>must</u>** include all the italicized, boxed statements regarding what the distributees are swearing or affirming, what the distributees are requesting, and what those who sign the affidavit could be liable for*. See the italicized paragraphs in the box above the distributees' signature lines on the Court's SEA form (at the top of page 7 of the pdf version of the form).
- **Every distributee who has legal capacity** must sign and swear to the affidavit before a notary.
- **Is there an incapacitated distributee (not the result of being a minor)?** If warranted by the facts, the guardian of any incapacitated distributee may sign and swear to the affidavit on behalf of the incapacitated distributee. *The fact that someone is signing and swearing on behalf of someone else must be clear from the signature*. For an incapacitated distributee, provide letters of guardianship as proof that the person signing has authority to do so.
- **Is there a distributee who survived decedent, but who is now deceased?** If no personal representative has been appointed for a now-deceased heir, you can't use the Small Estate Affidavit probate procedure and must file an Application to Determine Heirship. If a personal representative has been appointed, the personal representative can sign on behalf of the now-deceased heir's estate. In that case, the fact that the personal representative is signing on behalf of the estate must be clear from the signature. In addition, you must provide Letters Testamentary or Letters of Administration as proof that the person signing has authority to do so.
- **Is there a missing heir?** If you do not know where to find an heir, you can't use the Small Estate Affidavit probate procedure and must file an Application to Determine Heirship. Note that an applicant 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 do not inherit from decedent under the laws of descent and distribution of the State of Texas. As noted in the boxed, italicized statement on the SEA form above each disinterest witness's signature, these witnesses – along with the distributees/heirs – are liable for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit.

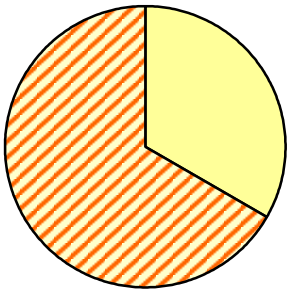
17. Possible hearing. The Court usually does not require a hearing on SEA applications, but in some circumstances the Court may require a hearing before an SEA will be approved. If a hearing is needed, the Court will contact you to set a hearing. Do not set a hearing unless the Court has asked you to do so.

Texas Descent and Distribution[1]

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

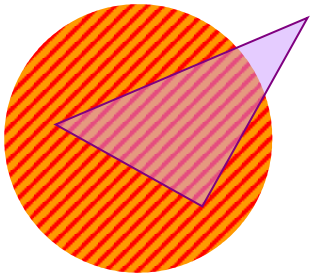
1. Married Person with Child[ren] or Other Descendants

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



- 1/3 to surviving spouse
- Children take 2/3 equally

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

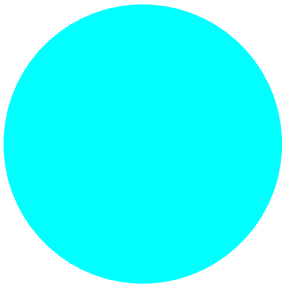


- Surviving spouse gets 1/3 life estate
- Children take all equally, subject to surviving spouse's 1/3 life estate

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

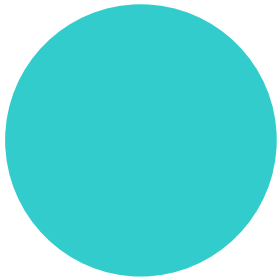
C. Decedent's share of community property when all surviving children and descendants of deceased are also children or descendants of surviving spouse.

(EC § 201.003(b)(2))



- 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))



- All to children, who take equally
- 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).

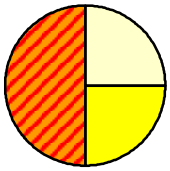
2. Married Person with No Child or Descendant

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

All to surviving spouse

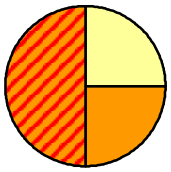
B. Decedent's separate real property (EC § 201.002)

If decedent is survived by **both** mother and father. EC §§ 201.001(c) & 201.002(c)(2) & (3).



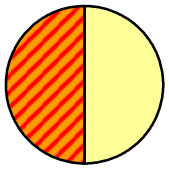
- 1/4 to father
- 1/4 to mother
- 1/2 to surviving spouse

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).



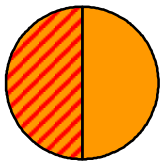
- 1/4 to surviving parent
- 1/4 to siblings, etc.
- 1/2 to surviving spouse

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).



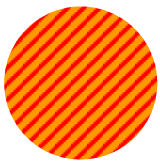
- 1/2 to surviving parent
- 1/2 to surviving spouse

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).



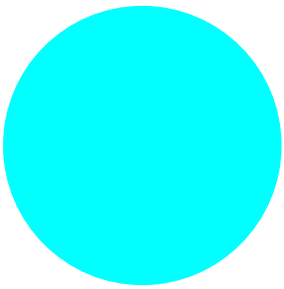
- 1/2 to siblings, etc.
- 1/2 to surviving spouse

If decedent is survived by no parent, no sibling, and no descendant of a sibling. EC § 201.002(d).



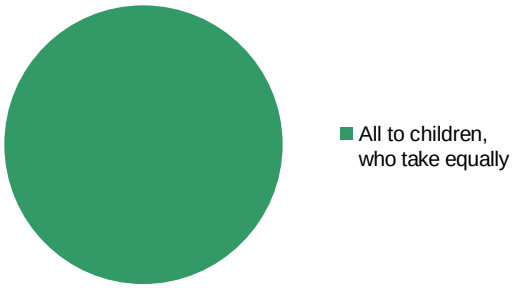
All to surviving spouse

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



All to surviving spouse

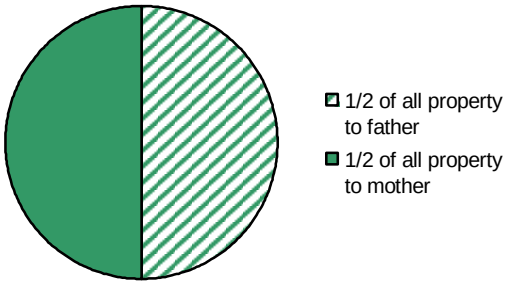
3. Unmarried Person with Child[ren] or Other Descendants (EC § 201.001(b))



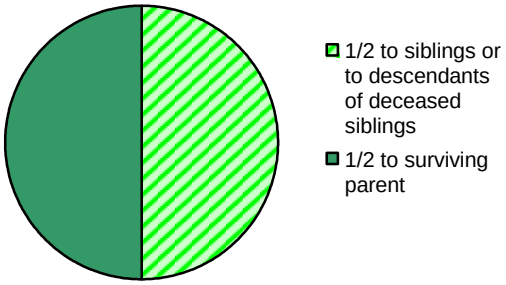
4. Unmarried Person with No Child or Descendant

All property passes depending on who survived the decedent:[1]

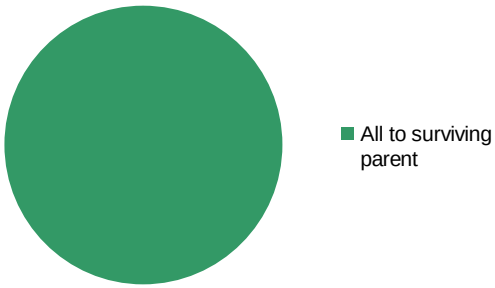
If decedent is survived by **both** mother and father. EC § 201.001(c).



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

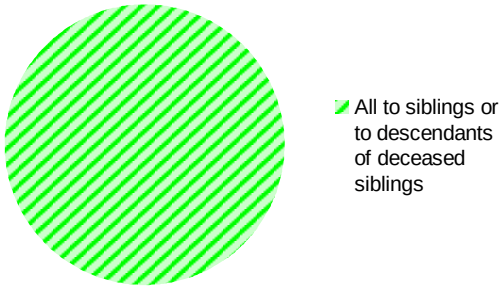


If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC § 201.001(d)(2).



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

EC § 201.001(e).



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