

Small Estate Affidavits

Texas Estates Code Chapter 205 dealing with Small Estate Affidavits (SEA) often generates confusion. Banks, insurance companies, title companies, and other 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 understanding Texas intestacy law. They pay a 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 not easy! To prepare an SEA the Court can approve, you will need to meet all of the statutory requirements. The complexity of the Texas Estates 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 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.

When CAN'T you do a Small Estate Affidavit?

- 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 if the total value of the debts and liabilities is more than the total value of the assets (not including homestead and exempt property). See checklist #8-10 on pages 2-3.
- An SEA can't be approved if the decedent owned real property *unless both of the following are true:*
 - ✓ The real property was decedent's homestead property, **AND**
 - ✓ **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: 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 to sign for them).
- An SEA can't be approved in Wise County unless decedent was residing in Wise County on the date of death or other facts indicate Wise County is the appropriate place to file. See checklist #5 on page 2.

What are the most common mistakes people make when filling out an SEA?

- **Mistake: not using the required form.** See Checklist #1 on page 2.
- **Mistake: leaving blanks when the form requires an answer.** There are some "or" parts of the form, but the Court can't approve an SEA if necessary information is missing. Please double-check before filing.
- **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" values.**
 - ✓ **Not including facts to show why 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 all required columns in the heirship chart. *Always* fill out *both* "separate property" columns and also fill out the "community property" column if decedent was married.**

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Wise 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 Wise County Court at Law No. 2'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 the stated facts.**
2. **Civil Case Information Sheet.** Texas Rule of Civil Procedure 78a has required that a Civil Case Information Sheet, including contact information, be filed with all original applications. This "cover sheet" is to be filed at the time an SEA is first filed. The Court will not consider an SEA unless the cover sheet is submitted with the Application.
3. **Death Certificate.** County Court at Law No. 2 requires a death certificate to be submitted with the Small Estate Affidavit. An easily readable copy is fine. **The social security number must be crossed out.**
4. **The SEA cannot be filed within 30 days of Decedent's death.** (Wait long enough to be sure you have ALL bills.)
5. **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 Wise County, add facts to support venue in Wise County. Remember that 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 Wise County.
6. **No Will.** By statute, an SEA cannot be used where Decedent left a will. Applicants must swear that the Decedent died without a will. If Decedent had a will, you will need to use a different probate procedure.
7. **No Administration.** 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.
8. **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 value.** Indicate the value of each asset as precisely as possible, using values at the time the affidavit is signed. An SEA **cannot** 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 assets of the estate 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, include VIN numbers for cars and include 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 date 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

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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 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 a distributee who was homesteading with the Decedent at the time Decedent died*** – a surviving spouse or unmarried child of Decedent 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.

9. Decedent’s Debts / Liabilities.

- **List everything.** The SEA must list all of Decedent’s debts and other liabilities, including all credit card balances, doctor and/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.

10. Solvent. The total of the assets (*not including the homestead and exempt property*) must exceed the total known liabilities, not including liabilities secured by homestead and exempt property. If they do not, the SEA must be denied. (Distributees can pay off enough debts that the assets exceed the remaining liabilities.)

11. Medicaid. The SEA must indicate whether the 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://hhs.texas.gov/laws-regulations/legal-information/your-guide-medicaid-estate-recovery-program>.

12. Family history. The SEA must state the *facts* about Decedent’s marital history and family history in sufficient detail that it is clear 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.

13. 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 5-7 of 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, list the name, address, phone number, and email address of **every** heir/distributee of Decedent’s estate. **You must list heirs for every type of property, even if you don’t think there was any property of a particular type.**

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14. Minor Heirs. County Court at Law No. 2 will not approve an 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.

15. 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.*

16. Signed and sworn to by all distributees.

- **If you need more than one signature page**, use as many signature pages as needed, but *note that every signature page must 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 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. *The fact that someone is signing and swearing on behalf of someone else must be clear from the signature.*
 - ✓ For a minor, if SEA Section “K” does not show why the person has the authority to sign on the minor’s behalf, provide proof the person signing for the minor is the minor’s natural guardian or next of kin.
 - ✓ For an otherwise 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 distributee, you cannot 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 distributee’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 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 that an Applicant seeking a determination of heirship must be represented by an attorney.*

17. 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. As noted in the boxed, italicized statement on the SEA form above each disinterested witness’ signature, these witnesses, along with the distributees, 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.

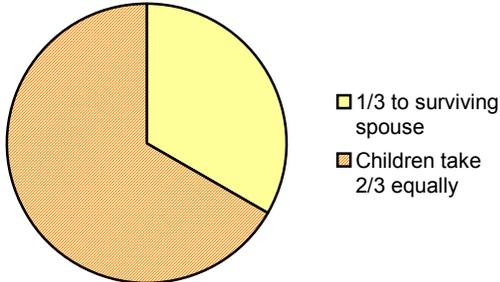
18. Possible hearing. County Court at Law No. 2 usually does not require a hearing on SEA applications, but in some circumstances the Court may require a hearing before an SEA will be approved. If a hearing is needed, the Court will contact you to set a hearing. Do not set a hearing unless the Court has asked you to do so.

Texas Descent and Distribution¹

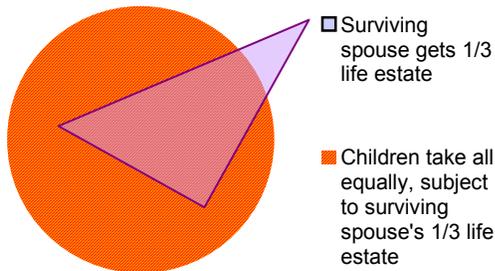
The Legal Effect of Not Having a Will (for decedents dying after 9/1/1993)

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

A. Decedent's separate personal property (all that is not real property) (TPC § 38(b)(1))

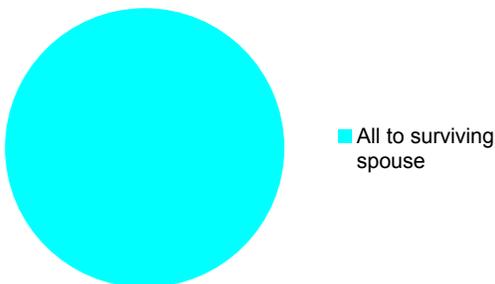


B. Decedent's separate real property (TPC § 38(b)(1))

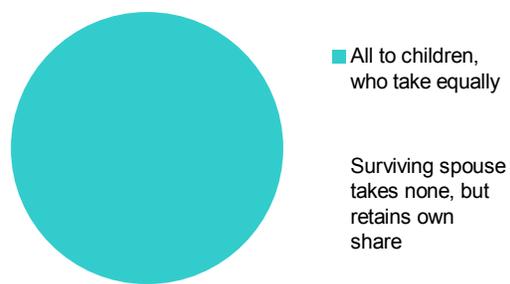


All separate real property will be owned outright by decedent's child[ren] or other descendants when surviving spouse dies.

C. Decedent's share of community property when all surviving children and descendants of deceased are also children or descendants of surviving spouse. (TPC § 45(a)(2))



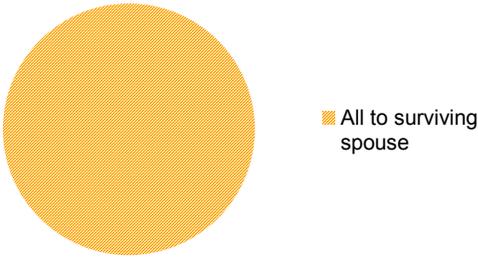
C. Decedent's share of community property when there are children or other descendants from outside of the existing marriage on the date of decedent's death (or if decedent died before September 1, 1993) (TPC § 45(b))



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 § 43 of the Texas Probate Code, Determination of Per Capita and Per Stirpes Distribution, as well as the following sections: § 40, Inheritance By and From an Adopted Child; § 41, Matters Affecting and Not Affecting the Right to Inherit; § 42, Inheritance Rights of Children; § 44, Advancements; and § 47, Requirement of Survival by 120 Hours.

2. Married Person with No Child or Descendant

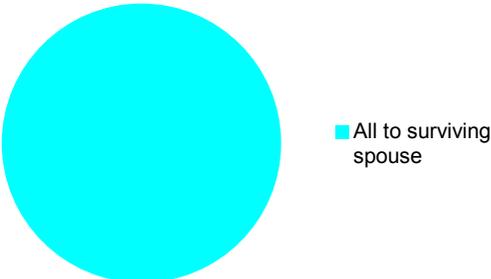
A. Decedent's separate personal property (all that is not real property) (TPC § 38(b)(1))



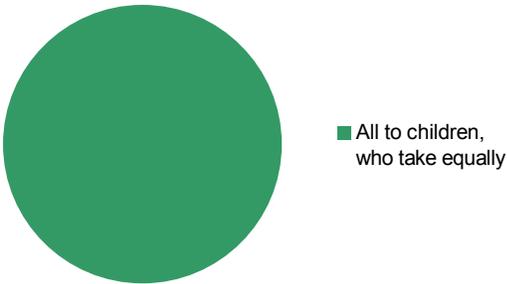
B. Decedent's separate real property (TPC § 38(b)(2))

<p>If decedent is survived by both mother and father. TPC § 38(b)(2) & (a)(2).</p> <ul style="list-style-type: none"> □ 1/4 to father ■ 1/4 to mother ■ 1/2 to surviving spouse 	<p>If decedent is survived (1) by mother or father and (2) by sibling(s) or their descendants. TPC § 38(b)(2) & (a)(2).</p> <ul style="list-style-type: none"> □ 1/4 to surviving parent ■ 1/4 to siblings, etc. ■ 1/2 to surviving spouse 	<p>If decedent is survived by mother or father, but is not survived by any sibling(s) or their descendants. TPC § 38(b)(2) & (a)(2).</p> <ul style="list-style-type: none"> □ 1/2 to surviving parent ■ 1/2 to surviving spouse
<p>If decedent is survived by neither parent, but is survived by sibling(s) or their descendants. TPC § 38(b)(2) & (a)(3).</p> <ul style="list-style-type: none"> ■ 1/2 to siblings, etc. ■ 1/2 to surviving spouse 	<p>If decedent is survived by no parent, no sibling, and no descendant of a sibling. TPC § 38(b)(2).</p> <ul style="list-style-type: none"> ■ All to surviving spouse 	

C. Decedent's share of community property (TPC § 45(a)(1))



3. Unmarried Person with Child[ren] or Other Descendants (TPC § 38(a)(1))



4. Unmarried Person with No Child or Descendant

All property passes depending on who survived the decedent:¹

<p>TPC § 38(a)(2). If decedent is survived by both mother and father.</p> <p>■ 1/2 of all property to father ■ 1/2 of all property to mother</p>	<p>TPC § 38(a)(2). If decedent is survived (1) by mother or father and (2) by sibling(s) or their descendants.</p> <p>■ 1/2 to siblings or to descendants of deceased siblings ■ 1/2 to surviving parent</p>
<p>TPC § 38(a)(2). If decedent is survived by mother or father, but is not survived by any sibling(s) or their descendants.</p> <p>■ All to surviving parent</p>	<p>TPC § 38(a)(3). If decedent is survived by neither parent, but is survived by sibling(s) or their descendants.</p> <p>■ All to siblings or to descendants of deceased siblings</p>

¹ If none of the four situations above applies, see TPC § 38(a)(4).