

## **Hays County Small Estate Affidavit Checklist**

Texas Estates Code Chapter 205 dealing with Small Estate Affidavits generates much confusion. Banks, insurance companies, and title companies often tell individuals to file a Small Estate Affidavit (SEA) without considering the limited circumstances in which an SEA can be granted. Individuals then fill out a form without reading the statute and without understanding Texas intestacy law. They pay a \$360 filing fee and expect approval. But many SEAs are denied for problems that cannot be corrected, and the denied applicants lose their filing fees. Many other SEAs cannot be approved without amendment.

Before filing an SEA, carefully review this checklist and the attached charts regarding Texas rules for who takes what property when the decedent didn't have a will (rules for descent and distribution). See also the requirements for SEAs in Chapter 205 of the Texas Estates Code and the rules for descent and distribution in Chapter 201. To prepare an SEA that the Court can approve, you need to understand *all* of the rules and requirements. The complexity of the Code poses many pitfalls for non-lawyers – and even some 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 Chapters 201 and 205.

- 1. Use the most recent SEA form on the Hays County Clerk's website.** To increase the chances that an SEA will include all necessary information, the Court requires that applicants use the SEA form that is available on the Court's website. If necessary, include extra pages to provide additional information. The SEA must be completed by persons who have actual knowledge of the stated facts.
- 2. Death Certificate.** The Hays County Court at Law 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. Cannot 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 Hays County, add facts to support venue in Hays 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 Hays County.
- 5. 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.
- 6. 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.
- 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. An SEA **cannot** be approved with any asset of "unknown value."
  - **Limited estate.** The SEA must show that the total estate assets are \$75,000 or less, 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 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.

- **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 are exempt. If you claim any assets are exempt, add this information in the “additional information” column on 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 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.
- **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.***
- **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 property with Decedent. If this is the case, the SEA must include sufficient facts to support the homestead exemption **and** must also include the legal description and street address of the property.

#### 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 or hospital bills, utility bills, etc. – *anything* owed by Decedent or Decedent’s estate and not paid off. The SEA must list any attorney’s 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.
- 10. 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 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://www.dads.state.tx.us/services/estate\\_recovery/index.html](http://www.dads.state.tx.us/services/estate_recovery/index.html).
- 12. 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. Section K of the Court’s 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*.
- 13. List all heirs.** After you have filled out section K of the form completely, figure out the heirs and list them in section L of the form.
- To figure out who the heirs are, look at the charts on pages 4-6 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.

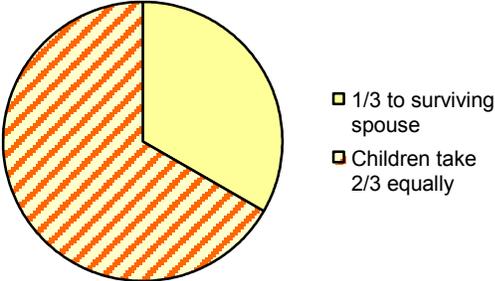
- In section L, list the name, address, phone number, and email address of every Distributee (heir) of Decedent’s estate. **If Decedent was married, you must list heirs for every type of property, even if you don’t think there was any property of a particular type.**
- 14. Minor heirs.** The Hays County Court at Law 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 “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. Always fill out the “community property” column if the Decedent was married when he or she died. To figure out shares, see the appropriate chart on pages 4-6 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 not 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.
- 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 for 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 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 – 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.** 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<sup>1</sup>

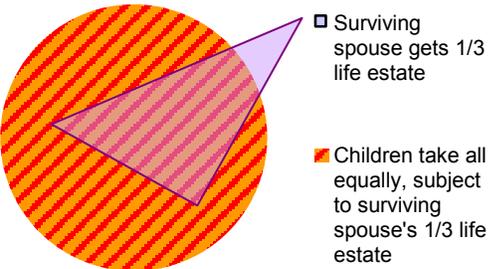
The Legal Effect of Not Having a Will (for decedents dying after 9/1/1993)

## 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))

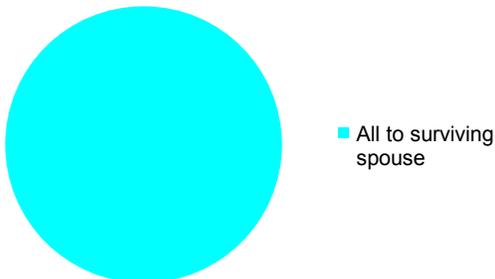


### B. Decedent's separate real property (EC § 201.002(b))

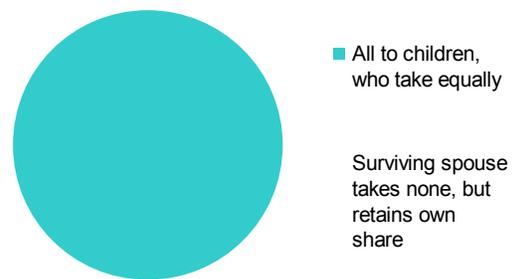


All separate real property will be owned outright by decedent's child[ren] or other descendants when surviving spouse dies.

**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))



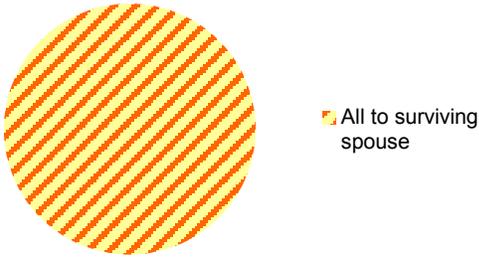
**C. Decedent's share of community property** when there are children or other descendants from outside of the existing marriage on the date of decedent's death (or if decedent died before September 1, 1993) (EC § 201.003(c))



<sup>1</sup> 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

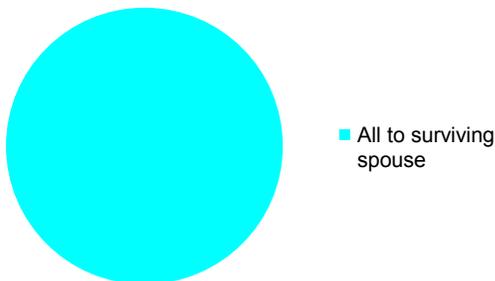
### A. Decedent's separate personal property (all that is not real property) (EC § 201.002(c)(1))



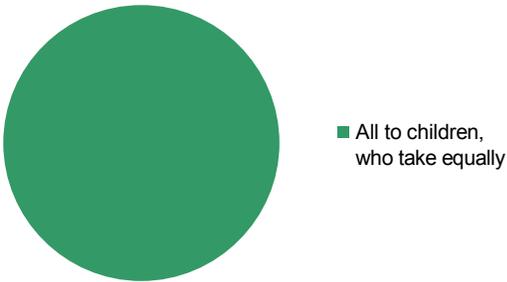
### B. Decedent's separate real property (EC § 201.002)

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

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



**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:<sup>1</sup>

<p>If decedent is survived by <b>both</b> mother and father. EC § 201.001(c).</p> <ul style="list-style-type: none"> <li>■ 1/2 of all property to father</li> <li>■ 1/2 of all property to mother</li> </ul>	<p>If decedent is survived (1) by mother <b>or</b> father <b>and</b> (2) by sibling(s) or their descendants. EC § 201.001(d)(1).</p> <ul style="list-style-type: none"> <li>■ 1/2 to siblings or to descendants of deceased siblings</li> <li>■ 1/2 to surviving parent</li> </ul>
<p>If decedent is survived by mother <b>or</b> father, <b>but is not</b> survived by any sibling(s) or their descendants. EC § 201.001(d)(2).</p> <ul style="list-style-type: none"> <li>■ All to surviving parent</li> </ul>	<p>If decedent is survived by <b>neither parent</b>, but <b>is</b> survived by sibling(s) or their descendants. EC § 201.001(e).</p> <ul style="list-style-type: none"> <li>■ All to siblings or to descendants of deceased siblings</li> </ul>

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