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SMALL ESTATE AFFIDAVIT SUMMARY

PLEASE NOTE: The following conditions must be met in order for the Court to approve a Small Estates Affidavit:

No Will. The Small Estates Affidavit cannot be used where Decedent left a Will. Applicants must swear that the Decedent died without a Will.

Total Assets of less than \$50,000. The SEA must show that the total assets of the estate are \$50,000 or less, not including the homestead and exempt property.

No missing Distributees. If you do not know where to find a Distributee, you cannot use the Small Estate Affidavit to probate the estate.

If there is no Will and the estate does not meet the above conditions for filing a Small Estates Affidavit, then an Application to Determine Heirship is the appropriate probate procedure. An Applicant seeking a determination of heirship must be represented by an attorney.

DETERMINATION OF HEIRSHIP APPLICATION:

<http://www.estatelawtexas.com/index.php/checklists>

REQUEST LEGAL SERVICES FEE SCHEDULE:

<http://www.estatelawtexas.com/index.php/request-fee-schedule>

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SMALL ESTATE AFFIDAVIT CHECKLIST

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 Texas Estates Code as well as the rules for descent and distribution in Chapter 201. To prepare an SEA that the Court can approve, you will need to understand all of the rules and requirements. **The complexity of the 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.**

The following Checklist explains the basics, but the list does not cover everything included in Chapter 205 and does not address any of the rules in Chapter 201.

- 1. The SEA must be completed by persons who have actual knowledge of the stated facts.**
- 2. Cover Sheet.** Since 2010, 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.** Many Texas Courts 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 LESS than 30 days of the Decedent's death.**
- 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. Granting an SEA is in the Court's discretion and it is unusual for the Court to approve an SEA for a Decedent who did not have a fixed place of residence in that County.
- 6. No Will.** **By statute, a Small Estates Affidavit (SEA) cannot be used where Decedent left a Will. Applicants must swear that the Decedent died without a Will.**
- 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.
 - **Limited estate.** **The SEA must show that the total assets of the estate are \$50,000 or less, not including the homestead (see below) and exempt property.**
 - **Provide sufficient detail.** Indicate the value of each asset as precisely as possible, describing the property with sufficient detail so that it is 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.
 - **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.
 - **Exempt property.** If you are claiming that an asset is exempt property, you must allege the exempt status in the Small Estate Affidavit.
 - **Real property: homestead.** If decedent's homestead *is the only real property* in the decedent's estate, title to the homestead may be transferred under an SEA; however, the SEA must be recorded in the deed records of a county in which the homestead is located (except as provided by Section 205.006, title to real property cannot be transferred with a SEA).

9. Liabilities.

- **List everything.** The SEA must list all of Decedent's debts and other liabilities, including all credit card balances, doctor bills, utility bills, etc. – *anything* owed by Decedent and not paid off. As one of the liabilities, the SEA must list any attorney's fees paid or to be paid for preparation of the Affidavit.
- **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.

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 and the shares of those heirs under Texas law. For rules regarding descent and distribution, see Texas Estate Code Chapter 201.

13. Correct inheritance shares. You must list the name and address of every Distributee (heir) of Decedent's estate, along with the shares of each Distributee. Non-lawyers often do not understand who inherits under Texas law or what shares each Distributee inherits, so you may need to consult with a lawyer. Note the following:

- **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.)
- **If Decedent was single at the date of death,** the SEA must state the shares of each Distributee in both types of property: separate personal property and separate real property. If single, Distributee would have no community property.

14. Signed and sworn to by all Distributees. Every Distributee who has legal capacity must sign and swear to the Affidavit before a notary. Use as many signature pages as needed.

- **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 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.*

15. 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.

16. Possible hearing. 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.

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