

Small Estate Affidavit Checklist

Section 137 of the Texas Probate Code governs probate by Small Estate Affidavit. The Small Estate Affidavit is a probate method of transferring a decedent's property under certain limited circumstances. The complexity of the Probate Code poses many pitfalls for non-lawyers attempting to comply with the Small Estate Affidavit requirements. An attorney's assistance in drafting a Small Estate Affidavit may prevent the denial of an Affidavit where it would have been an appropriate probate procedure if the Affidavit had been prepared correctly.

Before filing a Small Estate Affidavit, please review carefully all of the requirements of Section 137 of the Texas Probate Code. The list below highlights a few common errors made by Applicants on such Affidavits, but **this list does not cover every statutory requirement that must be included in the Affidavit**. The Court does not distribute Small Estate Affidavit forms to the public because of the complexity of the requirements of Section 137 and the need for extensive modifications to fit the facts in each case.

Some Small Estate Affidavit traps for the unwary:

1. **Intestacy:** A Small Estate Affidavit cannot be used where decedent left a will. The Affidavit must state that the decedent died intestate (without a will).
2. **Homestead to homestead:** A Small Estate Affidavit cannot transfer title to any real property unless (1) the property was decedent's homestead and (2) the property will be inherited by an heir who was homesteading with the decedent at the date of decedent's death (for example, a surviving spouse or an unmarried child of the decedent who resided on the property with decedent).
3. **Property & liabilities:** The Affidavit must list all of decedent's property (not just some of it), correctly describing the property so that it is clear what property is being transferred by Affidavit. If decedent was married at the time of death, you must state what property was decedent's community property and what was decedent's separate property. The Affidavit also must list all of decedent's debts and other liabilities, including all credit card balances.
4. **Limited estate:** The Affidavit must show that the entire assets of the estate do not exceed \$50,000, not including the homestead and exempt property.
5. **Solvency:** These assets (not including the homestead and exempt property) must exceed the known liabilities, not including liabilities secured by homestead and exempt property.
6. **Family history & inheritance:** The Affidavit must clearly state the 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. If decedent was married at the time of death, the Affidavit must state the shares of each heir in both the separate and the community property. Non-lawyers often do not understand who inherits under Texas law or do not understand what is separate and community property—and therefore often do not provide enough information or the correct information in the Affidavit.
7. **Sworn by all heirs:** Each heir must sign and swear to the Affidavit before a notary. If you do not know where to find an heir, you cannot use the Small Estate Affidavit probate procedure and must file an Application to Determine Heirship.
8. **Sworn by two disinterested witnesses:** Two disinterested witnesses must each sign and swear to the Affidavit before a notary.
9. **Filed in proper county:** The Affidavit must be filed in the county where decedent resided at the time of death or in another appropriate county under Section 6 of the Texas Probate Code.