

Wisconsin Transfer by Affidavit Guide for Banks

This guide is provided for informational purposes only. It is not intended to provide, nor should it be construed as legal advice. Additionally, it is not intended to, nor should it be construed as instruction as to whether and how a transfer by affidavit should be completed.

Introduction to the Transfer by Affidavit Form

When an individual dies and leaves property subject to administration in the State of Wisconsin, there are several types of estate procedures which can be followed. Often, estate administration is supervised by the probate court. However, there is a method to transfer a decedent's assets without court supervised administration called transfer by affidavit (sometimes referred to as a small estate affidavit). This option is only available for estates having a value of \$50,000 or less, and due to its nature of avoiding probate, is a popular option when available.

A transfer by affidavit may be used by affiants to transfer property which would otherwise be subject to probate administration. This includes real property and personal property such as a bank account, promissory note, or the contents of a safe deposit box. Because of this scope, and ease of use, banks are likely to encounter affiants seeking to transfer property by this method and should have appropriate policies, procedures, and training in place. This guide is designed to assist banks in understanding what a transfer by affidavit is, when and how it can be used, as well as provide some recommended best practices and address some common issues.

The Law

Wisconsin statute section 867.03 provides for the procedure for an affiant to use a transfer by affidavit to receive a decedent's property. That section provides generally that when a decedent leaves property subject to administration in Wisconsin that does not exceed \$50,000 in gross value, any heir of the decedent, trustee of a revocable trust created by the decedent, a person named in the will to act as personal representative, or person who was guardian of the decedent at the time of the decedent's death may collect any money due the decedent, receive the property of the decedent, and have any evidence of interest, obligation to, or right of the decedent transferred to the affiant if the heir, trustee, person named in the will to act as personal representative, or guardian provides to the person owing the money, having custody of the property, or acting as registrar or transfer agent of the evidences of interest, obligation to, or right proof of prior mailed notice if applicable and an affidavit showing all of the following:

- (a) A description of and the value of the property to be transferred.
- (b) The total value of the decedent's property subject to administration in this state at the date of decedent's death.
- (c) Whether the decedent or the decedent's spouse ever received services provided as:



- A benefit under a long-term care program, such as a Family Care benefit or family care partnership program offered through a Managed Care Organization, the self-directed services option offered through the federal department of health and human services, the program for all-inclusive care for the elderly, and the program for all-inclusive care for the elderly (see 49.496 (1)(bk)),
- Medical assistance through long-term community support services funded by the department of health services in coordination with local counties (see subch. IV of ch. 49, and 46.27(7)), or,
- Public assistance aid provided for the treatment of kidney disease, cystic fibrosis, hemophilia treatment services, or funeral expenses (see 49.68, 49.683, 49.685, and 49.785 respectively).

The statute also provides for release of liability of the transferor of the property. Meaning, liability protections for the bank. This protection is contingent on certain notifications which bank must confirm through proof of mail delivery, which will be discussed in more detail below.

By signing the Affidavit, the affiant certifies that the contents of the Affidavit are true and correct, that the affiant will pay the debts of the decedent according to Wisconsin law, and that the affiant will distribute any balance to those persons designated in the appropriate governing instrument (such as a will), or if none, to the decedent's heirs.

Considerations for Banks

Bank's procedures upon a depositor's death should address the possibility of a transfer by affidavit being presented. Staff should be familiar with the form, how to review it, and know what needs to be considered before releasing property to the affiant. This section of the guide is designed to help with those considerations.

Who can use the transfer by affidavit?

As discussed above, the transfer by affidavit can only be used for estates which do not exceed \$50,000 in gross value. It is the affiant's duty to make that determination, but if bank has actual knowledge that the estate exceeds \$50,000, it should not release property to the affiant. The four categories of affiants who may use a transfer by affidavit are an:

1. Heir,
2. Trustee,
3. Person who was guardian of the decedent at the time of the decedent's death, or
4. Person named in the will to act as personal representative.

The affiant must determine their capacity and represent that capacity on the transfer by affidavit form.

Notice to the State of Wisconsin

If the decedent (or the decedent's spouse) ever received certain services (such as medical assistance or other care programs), then the affiant must send a copy of the affidavit by certified mail, return receipt requested, to the Estate Recovery Program for the State of Wisconsin, Department of Health Services, along with additional information.

The affiant is required to send this notice even if they are unsure whether the decedent or the decedent's spouse received such services. The transfer by affidavit form includes a section where the affiant must make certifications as to their knowledge of those services. Bank must review this section, as if it indicates that the decedent did receive the service, or the affiant is unsure, bank must confirm, through return receipt, that the required notice was sent. If bank does not do this, then it will not receive its liability protections discussed above.

When and how is the property to be released?

After reviewing the transfer by affidavit for completion and confirming the notice to State of Wisconsin requirements discussed above, the property may be released directly to the affiant. The timing for release of that property depends upon the type of affiant. For an heir, trustee, and person who was guardian of the decedent at the time of the decedent's death, the property may be released immediately. However, for a person named in the will to act as personal representative, there is a waiting period. Meaning, if the affiant has indicated that they are a person named in the decedent's will identified to act as personal representative, then bank may not transfer any money to the affiant until 30 days after the day on which bank received the affidavit. If bank does not observe this waiting period, then it will not receive its liability protections discussed above.

The Transfer by Affidavit Form

Until recently, the transfer by affidavit form was maintained by the Wisconsin Court System's Records Management Committee. It is now maintained by the State Bar of Wisconsin's Real Property, Probate and Trust Section. Thus, the transfer by affidavit form, and corresponding instructions, can be found on the State Bar's website at wisbar.org. The following pages present a blank version of that form, along with notes to assist in understanding how to review it, followed by instructions as provided by the State Bar.

TRANSFER BY AFFIDAVIT

Amended (if Transfer by Affidavit form previously recorded, amending recorded Document No. _____)
§867.03, Wis. Stats. – Estates with property worth \$50,000 or less (gross value)

Estate of _____ (the "Decedent").

UNDER OATH, I STATE:

- The Decedent was born on _____ and died on _____ domiciled in the County of _____ State of _____ and with a mailing address of _____.
- I am signing this Transfer by Affidavit in the following capacity:
 - an heir having the following relationship with the Decedent: _____
 - trustee of a revocable trust created by the Decedent.
 - a person who was the guardian of the Decedent at the time of the Decedent's death.
 - the person identified in the Decedent's Will to act as personal representative.
NOTE: Per §867.03(1h), Wis. Stats., if you are signing as nominated personal representative in the Decedent's Will, then this Affidavit may not be used to transfer the Decedent's interest in real estate.
- The total gross value of the Decedent's property subject to administration in Wisconsin on the date of the Decedent's death was \$_____.
NOTE: All property of the Decedent subject to administration must be included in the total gross value and on this Affidavit, which may not exceed \$50,000 gross value.

Confirm that the decedent listed is the decedent which matches bank's records.

This recording area relates to real property and will not be relevant for bank's purposes. Whether this section is completed or not should not affect bank's decision to accept the form.

Check the affiant's capacity. If the affiant is a person named in the decedent's will to act as personal representative, bank must wait 30 days before releasing the property.

Register of Deeds recording area

Name and return address

Parcel No(s): _____

- If the Transfer by Affidavit is being used to transfer the Decedent's interest in real estate, the heirs of the Decedent are identified on the Affidavit of Heirship attached.
- I ask that the following property of the Decedent be transferred to me pursuant to §867.03(1g), Wis. Stats:

Confirm that the property requested to be released matches bank's records.

DESCRIPTION OF ALL PROPERTY TO BE TRANSFERRED

If real estate, list legal description and tax parcel number. If personal property (including digital property as defined under §711.03(10), Wis. Stats.), specifically describe property including name of financial institutions and account type.

See attached for additional property

The affiant must determine which property is to be received, and determine which property to list. Bankers are reminded that they should not assist the affiant in completion of this section, or any section of this form.

This notice requirement relates to real property and thus, will not be relevant for bank's purposes. Whether this section is completed or not should not affect bank's decision to accept the form.

6. **Real Estate – Requirement to notify heirs - 30 days:** If this Affidavit proposes to transfer the Decedent’s interest in real estate, then pursuant to §867.03(1p), Wis. Stats., I understand that I must provide a copy of this Affidavit, along with notice of my intention to record this Affidavit with the register of deeds office for each county in which the Decedent had an interest in real estate, to the Decedent’s heirs at least 30 days before recording.

I hereby confirm that I provided a copy of this Affidavit to the Decedent’s heirs at least 30 days prior to recording *or* have obtained waivers from the heirs. The required Affidavit of Service OR Waiver of Notice form is attached hereto.

7. **Decedent’s Spouse(s):** If the Decedent was ever married, complete the following (if more than one spouse, check here and provide same information for additional spouses(s) see attached):

Name of Spouse(s): _____ (living or deceased)

Married to Decedent Divorced from Decedent at time of Decedent’s death

The affiant lacks information to complete this section.

8. **Government Services – requirement to notify State of Wisconsin:** I understand that §867.03(1m), Wis. Stats. states that if the Decedent or the Decedent’s spouse(s) ever received the following services, then I must notify the Estate Recovery Program for the State of Wisconsin prior to transferring the Decedent’s property. I hereby certify that the Decedent and/or the Decedent’s spouse(s) (either alive or deceased) received the following services:

Service	Decedent Received the Service	Decedent’s Spouse Received the Service	I Don’t Know
Medical Assistance/Medicaid			
Family Care and/or Partnership benefits (through Managed Care Organization)			
Community Options Program benefits			
Wisconsin Chronic Disease Program			
Patient or inmate of a State of Wisconsin or Wisconsin County hospital or institution or responsible for any person owing an obligation to the State of Wisconsin or County in the State of Wisconsin			

If the Decedent or the Decedent’s spouse(s) received any of the services identified above, I hereby confirm that I provided a copy of this Affidavit to the Department of Health Services Estate Recovery Program and have attached the required proof of certified mail delivery showing the delivery date.

9. I understand that by accepting the Decedent’s property under this Affidavit, I assume a duty to apply the property transferred for the payment of obligations according to priorities established under §859.25, Wis. Stats., and to distribute any balance to those persons designated in the appropriate governing instrument, as defined in §854.01, Wis. Stats., or if there is no governing instrument, according to the rules of intestate succession under Chapter 852, Wis. Stats.

DECLARATION: To the best of my knowledge and belief, I declare that this document is true, accurate, complete, and in conformity with the provisions and limitations of the Wisconsin Statutes.

STATE OF _____

Signature

COUNTY OF _____

Name printed or typed

Subscribed and sworn to before me on _____

Notary Public/Court

Address

Name printed or typed

My commission/term expires: _____

This document was drafted by: _____

Review this section. If the affiant indicates that the decedent, or the decedent's spouse received any of the following services, or that the affiant "does not know," then bank must confirm that the affiant provided notice to the State of Wisconsin by obtaining the required proof of certified mail receipt.

INSTRUCTIONS FOR COMPLETING WISCONSIN'S TRANSFER BY AFFIDAVIT (\$50,000 gross and under)

WHEN YOU MAY USE THE TRANSFER BY AFFIDAVIT ("Affidavit"):

Pursuant to §867.03, Wis. Stats., when a deceased person ("decedent") dies with Wisconsin property subject to probate administration which does not exceed \$50,000 in gross value, a person entitled to sign the Affidavit (as set forth below) (the "Affiant") may collect, receive, and have the decedent's interest in property transferred to the Affiant. **By accepting the decedent's property, the Affiant assumes a duty to pay the decedent's debts and distribute any balance to the decedent's beneficiaries designated in the appropriate governing instrument (such as a will) or, if the decedent did not have a will or other governing instrument, to the decedent's heirs (as set forth below).**

WHAT PROPERTY MAY BE TRANSFERRED USING THE TRANSFER BY AFFIDAVIT:

All property which would otherwise be subject to a probate administration. This includes real property (an interest in real estate) and non-real property. Examples of non-real property which may be transferred using the Affidavit include, but are not limited to, interests in the following: a bank account, a certificated or uncertificated security, promissory note, digital property as defined in §711.03(10), Wis. Stats., and property that would otherwise be distributed to the decedent's estate via beneficiary designation.

WHO MAY BE AN AFFIANT AND SIGN THE AFFIDAVIT:

If the Affidavit is being used to transfer the decedent's interest in real estate or evidence of interest, obligation to, or right of the decedent in real estate (i.e. a mortgagee's interest or lien), then the Affiant must be: (i) an heir of the decedent (as set forth below), (ii) a trustee of a revocable trust created by the decedent, or (iii) a person who was guardian of the decedent at the time of the decedent's death.

If the Affidavit is being used to transfer the decedent's interest in only non-real property, then the Affiant must be: (i) an heir of the decedent (as set forth below), (ii) a trustee of a revocable trust created by the decedent, (iii) a person who was guardian of the decedent at the time of the decedent's death, or (iv) a person named in the decedent's will to act as personal representative.

WHO IS AN HEIR:

Section 852.01, Wis. Stats. defines who is an heir. See the Affidavit of Heirship form included as an addendum to the Affidavit form for additional help in determining a decedent's heir(s).

NOTICE TO THE STATE OF WISCONSIN:

If the decedent and/or the decedent's spouse ever received any of the services specified below, then the Affiant must send a copy of the Affidavit by certified mail, return receipt requested, to the Estate Recovery Program for the State of Wisconsin, Department of Health Services, along with proof of the certified mail delivery showing the delivery date, prior to furnishing the Affidavit to any party holding property of the decedent included in the Affidavit or recording the Affidavit with the Register of Deeds Office in any county in which an interest in real estate or a lien on real estate included in the Affidavit is located. The services are:

- Medical Assistance/Medicaid
- Family Care and/or Partnership benefits (through a Managed Care Organization)
- Community Options Program
- Wisconsin Chronic Disease Program
- Patient or inmate of a state or county hospital or institution, or responsible for any person owing an obligation to the state or county

Address for Estate Recovery Program:

Wisconsin Department of Health Services
Estate Recovery Program
P.O. Box 309
Madison, WI 53701-0309

NOTICE TO DECEDENT'S HEIRS (30-DAY NOTICE FOR REAL ESTATE):

If the Affiant is transferring the decedent's interest in real estate, or a lien on real estate, then the Affiant must first provide the following to the decedent's heirs at least 30 days before recording the Affidavit with the Register of Deeds Office in each county in which the subject real estate is located: (i) a copy of the Affidavit (including the Affidavit of Heirship and Affidavit of Service or Waiver of Notice forms), and (ii) notice that the Affiant intends to record the Affidavit with the Register of Deeds Office in each county in which the subject real estate is located. Notice to the decedent's heirs must be given by either: (i) certified mail, return receipt requested or (ii) personal service (see §867.03(1p), Wis. Stats.).

WHAT TO DO WITH THE AFFIDAVIT:

If the Affiant is not transferring the decedent's interest in real estate, or a lien on real estate, then, after complying with any required notice to the State of Wisconsin, Department of Health Services Estate Recovery Program, the Affiant may furnish the Affidavit to any party holding property of the decedent included in the Affidavit to implement the transfer(s) to the Affiant. NOTE: if the Affiant is a person named in the decedent's will to act as personal representative, the holder of the decedent's property may not transfer the property included in the Affidavit until 30 days after the day on which the Affidavit is received. If, within such 30-day period, the holder of the decedent's property receives an Affidavit for the same decedent from another person, then the holder is prohibited from transferring the decedent's property unless ordered to do so by a court (see §867.03(1j), Wis. Stats.).

If the Affiant is transferring the decedent's interest in real estate, or a lien on real estate, then 30 days after the Affiant provides the required notice to the decedent's heirs (or earlier if all of the heirs waive notice), and after complying with any required notice to the State of Wisconsin, Department of Health Services Estate Recovery Program, the Affiant may record the Affidavit with the Register of Deeds Office in each county in which the subject real estate is located. The recording of the Affidavit transfers the decedent's interest in the real estate (including lien rights) to the Affiant. NOTE: the Register of Deeds may require additional documentation, including a completed Wisconsin Electronic Real Estate Transfer Receipt (see §867.03(1p), Wis. Stats.).

OBLIGATIONS OF AFFIANT:

By signing the Affidavit, the Affiant is certifying that the contents of the Affidavit are true and correct, that the Affiant will pay the debts of the decedent according to Wisconsin law, and that the Affiant will distribute any balance to those persons designated in the appropriate governing instrument (such as a will), or if none, to the decedent's heirs.

MORE QUESTIONS?

The transfer by affidavit form and related instructions are not a substitute for legal advice. Please contact your attorney if you have any questions about how to complete this form.

REMINDER: If transferring an interest in real estate, do you have all attachments to submit to the Register of Deeds?

- Affidavit of Heirship
- Affidavit of Service OR Waiver of Notice
- If required, proof of Certified Mail Delivery to Estate Recovery Program showing the delivery date
- Legal Description of the real estate to be transferred
- Completed Wisconsin Electronic Real Estate Transfer Receipt

This form is maintained by the Real Property, Probate, and Trust Section of the State Bar of Wisconsin.

A Note on the Wisconsin Estate Recovery Program

The Wisconsin Estate Recovery Program (recovery program) seeks repayment for the cost of certain long-term care services paid for on behalf of members by Medicaid, BadgerCare Plus, the Community Options Program (COP), or non-Medicaid Family Care or for any services provided by the Wisconsin Chronic Disease Program (WCDP). Recovery is made from the estates of members, from the estates of their surviving spouses, from certain non-probate property, and from liens filed on their real property. Recovery is made after the assets of the member have been accounted for and higher priority expenses have been paid.

The Wisconsin Department of Health Services (DHS) can seek to recover assets of the decedent through this program. DHS may become aware of funds owned by the decedent, such as those on deposit at a bank, through the State data matching program. As discussed above, the affiant must also give notice.

DHS may send a letter to bank, the affiant, or other parties, seeking recovery of those funds. If bank receives such a letter, it should comply with the request as appropriate. If the funds are not on deposit, for example because they have been released to an affiant, bank should respond with that fact.

Sometimes situations can occur where banks are unsure how to proceed with regard to treatment of DHS and an affiant seeking to receive funds under a transfer by affidavit. As a general matter, all such situations can be solved by following these priorities:

1. Has bank received notice from DHS?
 - a. If yes, comply with the notice.
 - i. If bank has the property listed in its possession, it should be sent through the recovery program.
 - ii. If bank does not have the property listed, such as because it has already released the property to an affiant, this fact should be disclosed to DHS.
 - b. If no, proceed to 2.
2. Has an affiant presented a transfer by affidavit?
 - a. If yes, review the transfer by affidavit for completion and release the property as appropriate.
 - b. If no, no action is required.

Note that there is no requirement to wait for DHS to send notice.¹ Further, there is no requirement to act with respect to the recovery program if bank has not received notice. This includes if the affiant has received notice. If DHS has sent notice to the affiant, then the affiant

¹ At one point, there was a requirement to wait 10 days after the transfer by affidavit was sent by the affiant to DHS. While the affiant is still required to send the transfer by affidavit to DHS, and bank must still confirm this fact, there is no longer a requirement to wait any period of time.

must respond to that notice. For example, it might be that the affiant receives notice, receives the property via transfer by affidavit, and then remits that property to DHS.

Frequently asked Questions

Question: What situations should a transfer by affidavit be used in?

Answer: The parties surviving the decedent must decide whether to use a transfer by affidavit. When an individual dies and leaves property subject to administration in Wisconsin, there are several possible methods to receive that property. The appropriate method must be decided by those seeking to administer that property. If they do not know, they should consult an attorney.

However, a transfer by affidavit cannot be used if the value of the estate is greater than \$50,000.

Question: What if the customer has questions regarding whether and how they should complete a transfer by affidavit?

Answer: The customer should be directed to their attorney for assistance with such questions. Questions as to whether and how a transfer by affidavit is completed require legal advice. A bank should not be instructing its customer as to whether and how they should complete a transfer by affidavit.

Question: Must the bank confirm the affiant's status or identity?

Answer: Bank is not required to verify the affiant's status or otherwise confirm their identity. For example, bank is not required to independently verify whether the affiant is an heir. It is the duty of the affiant to select the appropriate category.

The only situation which should cause reconsideration, is where bank has actual knowledge that the affiant is not who they say they are. For example, if bank has actual knowledge that the affiant is not an heir of the decedent, then the transfer by affidavit should not be accepted.

Question: Which account types can a transfer by affidavit be used for?

Answer: A transfer by affidavit could be used to close out any individually owned account, including HSAs, IRAs, and other accounts owned individually in the decedent's name. A transfer by affidavit cannot be used to close out a joint account, account owned by an entity such as an LLC or trust, or an account affected by a POD beneficiary designation.

Question: Can a transfer by affidavit be used to receive property held in a safe deposit box?

Answer: Yes. A transfer by affidavit may list the contents of a safe deposit box, and the affiant may receive that property and terminate the lease. In doing so, the affiant should list the

contents of the box. It is not appropriate for the affiant to list the lease itself, refer to the box alone, or make a vague reference to the contents (ex: contents of Box 123 would not be an appropriate designation). If the affiant does not know the contents of the box to determine whether a transfer by affidavit is appropriate, they may need to perform an inventory first. This can be permitted through a process commonly referred to as a "will search and inventory," the process for which should be outlined in bank's safe deposit box operation policies and procedures.

Question: What if a dispute exists over the decedent's funds?

Answer: This situation is no different than other estate scenarios where a dispute, such as a family disagreement, exists over the decedent's property. It is a matter which must be addressed on a case-by-case basis. The fact that a transfer by affidavit is involved does not have any specific bearing on the analysis. If a transfer by affidavit is presented, consider what bank knows of the situation, and whether it is able to avail itself of the protections from liability discussed above.

Question: Can a check be negotiated using a transfer by affidavit?

Answer: WBA's position has been that a transfer by affidavit cannot be used to negotiate a check. Because bank is not the "holder" of the property being transferred, bank is not able to rely on the affidavit to make the transfer. In addition, the maker of the check is not able to inspect the transfer by affidavit for endorsement verification purposes.

This question typically arises involving checks made payable to a decedent's estate. To negotiate a check payable to the decedent's estate, the person presenting the check must be authorized to act on behalf of the decedent's estate. Without authority to act on behalf of the estate, the person cannot provide a proper endorsement on the check. So, the question becomes whether the transfer by affidavit bestows that authority.

However, as an exception to this general position, in circumstances where the affiant presents a check drawn on the bank itself, the bank might be more comfortable negotiating the item. Reason being, bank likely has additional resources in this context, such as knowledge of the holder of the property, and is better suited to make a determination as to whether it is appropriate to transfer that property to the affiant.

WBA is aware of differing opinions on this matter and recommends bank consult with its own legal counsel before deciding to negotiate checks via transfer by affidavit.