

SUBJECT: Release of Decedents' Accounts

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INTRODUCTION

This release applies to all Wisconsin credit unions. It discusses the procedures for releasing funds when a party to an account dies.

EXECUTIVE SUMMARY

There are three basic issues to be resolved before releasing a deceased member's funds. They are:

1. Does the credit union have proof of death?
2. Is the claimant legally entitled to the funds?
3. Are all credit union claims against the account satisfied?

The funds should not be released until all three questions can be answered “yes.”

A fourth issue, release from liability for inheritance tax, no longer applies. The Wisconsin inheritance tax was phased out and entirely repealed, effective January 1, 1992.

PROOF OF DEATH

The credit union needs proof of death in order to release funds and make insurance claims. Without proof of death, the credit union risks being the victim of fraudulent claims.

The ideal proof of death is a certified copy of the death certificate. A certified copy is identified by the original embossed or stamped seal of the registrar. A death certificate also provides helpful details, such as address and social security number, to verify the decedent's identity. Any lesser standard of proof should be accepted only with approval by credit union management, on a case-by-case basis. Keep in mind that Wisconsin now prohibits the unauthorized copying of death certificates.

However, a state or federal credit union may make a copy from a certified copy of a death certificate for its own use. The copy must be marked “FOR ADMINISTRATIVE USE.”

LEGAL ENTITLEMENT TO FUNDS

This section of the release rules for release of joint, POD, and marital accounts. However, the law releases the credit union from liability when making payment according to the terms of the account. Thus, in case of doubt, pay funds to the joint owner or POD beneficiary if called for by the account documentation, or hold the funds until any dispute is resolved.

Joint Accounts

Joint accounts usually feature the right of automatic survivorship. When one joint owner dies, the other(s), if living, automatically become(s) legally entitled to the funds. This is not affected by whether it is an “and” or “or” account.

Since survivorship is automatic, there is no remaining interest of the decedent in the account to be disposed of by probate. The personal representative has no right to claim funds from a joint account. An exception to this rule is if there is “clear and convincing evidence of a different intention at the time the account is created.” Wis. Stats. §705.04(1). And Wisconsin now has other complications described below.

Of course, if the deceased party was the last surviving joint owner of the account, the account would then be treated as solely-owned and may be claimed by the personal representative. See “Solely-Owned Accounts” in this release.

120 Hour Survivorship

For deaths on or after January 1, 1999, a new twist may be added. The surviving joint owner generally must live at least 120 hours after the decedent’s passing away in order to receive property as a survivor. If at least one joint owner does not survive for at least 120 hours, the property will be transferred to the co-owners in proportion to their ownership interests.

If the account is a husband’s and wife’s marital property and the deaths are less than 120 hours apart, half is treated as the husband’s individual property and half is treated as the wife’s.

The League’s Account Ownership Agreement Card #82024 (rev. 7/01) avoids the 120 hour survivorship rule, but not the automatic revocation rule described below.

Automatic Revocation

Also as of January 1, 1999, Wisconsin law generally provides that a divorce, annulment or termination of a registered domestic partnership automatically revokes the survivorship terms of a joint account that are in favor of the now former spouse, or relative of the former spouse. In such cases, the interests of the decedent are transformed into tenancies in common.

There are some exceptions, such as when the parties have remarried, or when the express terms of the account agreement or a court order provide otherwise.

Benefits Recovery by the State

The credit union may be required to pay out funds in the account to the state if it gets a special affidavit or lien notice from the Wisconsin Department of Health Services. The department is responsible for recovering funds if certain benefits, like medical assistance, were paid to the decedent or decedent’s spouse. Under §49.849 of the Statutes, it can collect from the property of a decedent, by affidavit or by lien, an amount equal to the medical assistance recoverable under the statute. Property means “all real and personal property to which the recipient held any legal title or in which the recipient had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint tenancy, tenancy in common, survivorship, life estate, revocable trust, or any other arrangement, excluding an irrevocable trust.”

The statutes require anyone in possession of the decedent’s property to transmit it to the department upon receipt of the affidavit, if certain conditions are met. A credit union that receives such an affidavit can contact Legal Affairs for additional information.

Payable on Death Accounts

Payable on Death (POD) Accounts, like joint accounts, have an automatic survivorship feature. The POD beneficiary is automatically legally entitled to the funds upon the death of the owner. As with joint accounts, POD funds cannot be claimed by the personal representative of the decedent’s estate.

For joint POD accounts, the POD feature is not activated until all joint owners die. Multiple POD beneficiaries share the funds equally, unless the decedent left other instructions with the credit union.

Sometimes, a POD beneficiary dies before the account owner(s). In legal terms, the POD beneficiary is said to have “predeceased” the account owner(s). When that happens, the Wisconsin Statutes say that predeceased beneficiary’s share of the account can go to his/her “issue” (meaning children, grandchildren, great-grandchildren, etc.). However, it could be complicated to determine who the predeceased POD beneficiary’s issue are and what portion of the money each one is entitled to. For that reason, the statutes include protections for financial institutions. Sec. 705.06 allows a credit union to pay out the funds in the account to the surviving POD beneficiary (or beneficiaries) “without regard to claims by the issue

of a predeceased beneficiary,” so long as they have proof that the other POD beneficiary has died. This enables credit unions to pay surviving POD beneficiaries. If another POD beneficiary “predeceased” the account owners, then his/her “issue” would need to collect their share from the other POD beneficiary(ies) that the credit union paid out to, not from the credit union directly.

120 Hour Survivorship

However, for deaths on or after January 1, 1999, a new twist may be added for POD accounts. The POD beneficiary generally must live at least 120 hours after the account owner’s passing away in order to receive property as a beneficiary. Otherwise, the beneficiary will be treated as having predeceased the account owner(s).

If the account is a husband’s and wife’s marital property and the deaths are less than 120 hours apart, half is treated as the husband’s individual property and half is treated as the wife’s.

The League’s Account Ownership Agreement Card #82024 (rev. 7/01) avoids the 120 hour survivorship rule, but not the automatic revocation rule described below.

Automatic Revocation

As of January 1, 1999, Wisconsin law generally provides that a divorce, annulment or the termination of a registered domestic partnership automatically revokes a POD designation made in favor of a now former spouse, or relative of the former spouse.

There are some exceptions, such as when the parties have remarried, or when the express terms of the account agreement or a court order provide otherwise.

Benefits Recovery by the State

The credit union may be required to pay out funds in the account to the state if it gets a special affidavit or lien notice from the Wisconsin Department of Health Services. The department is responsible for recovering funds if certain benefits, like medical assistance, were paid to the decedent or decedent’s spouse. Under §49.849 of the Statutes, it can collect from the property of a decedent, by affidavit or by lien, an amount equal to the medical assistance recoverable under the statute. Property means “all real and personal property to which the recipient held any legal title or in which the recipient had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint tenancy, tenancy in common, survivorship, life estate, revocable trust, or any other arrangement, excluding an irrevocable trust.”

The statutes require anyone in possession of the decedent’s property to transmit it to the department upon receipt of the affidavit, if certain conditions are met. A credit union that receives such an affidavit can contact Legal Affairs for additional information.

Minors as POD Beneficiaries

When a POD beneficiary is under age 18, the credit union cannot simply pay over the funds in the account to the minor, as it would with an adult POD beneficiary. The Wisconsin Statutes govern how the funds should be handled. See Wis. Stats. §705.04(2) and Chap. 54. How should this be done? It depends on several factors.

If a person has been appointed by the courts to act as the guardian of the minor’s property, (the word “conservator” is used in the statutes) then the credit union should transfer the funds to that person. The conservator may want to place the money into a custodial account under the Uniform Transfers to Minors Act (UTMA), but he/she does not necessarily have to. Wis. Stats. §54.864. The person appointed as conservator/guardian should provide the credit union with Letters of Guardianship from the courts.

If the courts have not appointed a conservator/guardian for the minor, then the following rules apply:

- If the account holder previously named a UTMA custodian for these funds, then the credit union must turn the money over to the named custodian, regardless how much is in the account. This would apply if, for example, the account owner had designated the POD beneficiary this way: “Tom Jones, as custodian for Junior Jones, under the Wisconsin UTMA.” This would also apply if the account holder’s Will named a custodian to hold the funds from this account for the minor. Wis. Stats. §54.866(2).
- If the account holder did not name a custodian for these funds, or if the named custodian has died or refuses to serve or cannot serve, then the credit union has two options:

1. If the account has less than \$10,000, the credit union may transfer the funds to an adult member of the minor's family as custodian for the minor under the UTMA. (An adult family member can be a parent, stepparent, spouse, grandparent, brother, sister, uncle or aunt.) Wis. Stats. §54.866(3). The credit union should exercise caution before turning the money over to a family member and should take care not to become caught up in family disputes. Due diligence is needed to confirm the identity of the family member. The credit union should consider obtaining an affidavit confirming, for example, the person's relationship to the minor, that the decedent did not designate a custodian for these funds in a will, and that the courts have not named a conservator/guardian for the minor. If in doubt, the credit union should decline to transfer the funds under this provision. The statute is clear that the credit union "may" make the transfer to an adult family member; it is not required to do so.
2. If the account has more than \$10,000, or if the credit union chooses not to transfer account funds to an adult family member, as described previously, then the credit union can require that the family have a conservator or a UTMA custodian appointed by the courts to receive the money. No matter how much money is in the account, the Wisconsin Statutes says that a court can order the transfer of the funds to a custodian designated by the court under the UTMA, as adopted in Wisconsin or another state. Wis. Stats. §54.12(3).

Note: The word "minor" is defined differently for different parts of the Wisconsin Statutes. The credit union may transfer account funds to a POD beneficiary who is age 18. On the other hand, money held in a UTMA account created after April 8, 1988, may not be released to a "minor" until that person is 21.

For details on UTMA accounts, see ii Release No. 0012.

Working with members who want to name minors as POD beneficiaries

Please note that League forms with areas to name POD beneficiaries were revised in 2025 to add this line: "Members should consult an attorney before naming minors as P.O.D. beneficiaries." We added this notice after credit unions relayed stories of members frustrated by the legalities described above.

Members may want to consult with an attorney or estate planning professional to discuss their options. Alternatively, they may want to consider this option: They can stipulate that the funds are to be paid to the minor in accordance with Wisconsin's Uniform Transfers to Minors Act (UTMA). In other words, account owners can designate an adult who will hold the funds for the child in a custodial account.

To accomplish this, account owners need to use certain language required by the Wisconsin Statutes. Since League forms do not offer enough space for that language, credit unions may need to create a short addendum page they can add to the forms for a particular account.

Consider using language like this on that addendum:

- For individual accounts

If [name of minor], a P.O.D. beneficiary named on account no. _____ at _____ Credit Union, is a minor on the date of my death, ownership passes to [name of adult] as custodian for [name of minor] under the Wisconsin Uniform Transfers to Minors Act.

Member/Owner's Signature

Date

- For joint accounts

If [name of minor], a P.O.D. beneficiary named on account no. _____ at _____ Credit Union, is a minor on the date of death of the last surviving depositor, ownership passes to [name of adult] as custodian for [name of minor] under the Wisconsin Uniform Transfers to Minors Act.

Member/Owner's Signature

Date

Joint Owner's Signature

Date

Credit unions should collect adequate information to properly identify the named custodian and to contact them.

After the death of the account owner(s), the custodian may open a new custodial account at the credit union to hold the funds, signing a Custodial Account Ownership Agreement (WCUL #81036) or similar account agreement form from another vendor. If the custodian chooses, instead, to withdraw the funds from the credit union, the check should be made payable to the custodian "as custodian" for the child under the Wisconsin UTMA, such as: "Pay to the order of *Amanda Adult, custodian for Mary Minor under Wis. UTMA.*" This helps ensure that the funds will be deposited into a custodial account elsewhere.

The League covers the UTMA in its *ii Release No. 0012*.

Marital Accounts

Accounts owned by two or more parties are joint accounts. Even if the owners are married, nearly all such accounts are joint; however, Wisconsin law provides for a special type of "marital account." That account type has seldom been used, and so The League no longer offers its Marital Account Ownership Agreement (#82081), which included special language needed to create a marital account.

If your credit union has existing accounts that used the Marital Account Ownership Agreement, be aware that it included this language: "This account is owned as a marital account by the parties named hereon. Upon the death of either of them, the survivor owns 50% of the sums on deposit." The result of this language is that one-half of the funds is released under the procedures for a joint account. The other half is released as described later for solely-owned accounts, unless a POD designation is on file. The League's 7/01 version of the agreement avoided application of the 120 hour survivorship rule, but not the automatic revocation described below.

Automatic Revocation

Wisconsin law generally provides that a divorce or annulment revokes the survivorship terms of a marital account made in favor of a now former spouse or relative of the former spouse.

Solely-Owned Accounts

Domiciliary Letters, for Formal or Informal Probate

Generally, an estate is probated by a personal representative. The Probate Court or Register in Probate appoints the personal representative with a document called "domiciliary letters."

The personal representative assumes responsibility for collection and distribution of probate assets as well as payment of various death taxes. The personal representative is legally entitled to collect all solely-owned funds. Release of solely-owned funds to the personal representative, acting in that capacity, releases the credit union from inheritance tax liability. Make the check payable to the estate. When releasing funds to the personal representative, retain a certified copy of the domiciliary letters for your files to document that you properly released the funds. The personal representative will have extra copies for that purpose.

For guidance on opening accounts for probate estates (including conducting CIP to verify the estate's and personal representative's identities, titling the account properly, and using the right account opening documents) see The League's *ii Release No. 0161 – "Organization Accounts."*

Summary Procedures

State statutes provide several procedures as alternatives to probate for solely-owned accounts. The credit union may encounter any of the following:

1. Summary Settlement; Summary Assignment

These are simplified procedures for probating qualified small estates without use of a personal representative. They each result in a court order naming who is entitled to the money.

The credit union is bound by the order on the back of either form, under the heading "Persons Entitled to Receive." Upon payment in accordance with the court order, the credit union is released from liability to the same extent as if it had made payment to the personal representative of the estate.

Summary settlement of small estates, under Wis. Stats. §867.01 is available:

- Whenever the estate, less the amount of the debts for which any property in the estate is security, does not exceed in value the costs, expenses, allowances and claims under § 859.25(1), or
- Whenever the estate, less the amount of the debts for which any property in the estate is security, does not exceed \$50,000 in value and the decedent is survived by a spouse or one or more minor children or both.

Summary assignment of small estates subject to claims of creditors, under Wis. Stats. § 867.02, is available if the estate, less the amount of the debts for which any property in the estate is security, does not exceed \$50,000 in value and the estate cannot be summarily settled under § 867.01.

2. Transfer by Affidavit (*Wis. Stats. §867.03*)

The most commonly used summary procedure is the Transfer by Affidavit. This form allows someone to claim a decedent's property without having to go through probate if the person who died left a relatively small estate.

A Transfer by Affidavit form can be used to claim personal property or to collect money owed to the decedent when the total gross value of decedent's property is \$50,000 or less. (Technically, the affidavit can be used if the gross value of the decedent's property that would be included in a probate estate, if one were started, is \$50,000 or less.)

The affidavit may be signed by:

- Any heir (which includes a spouse, registered domestic partner, children, parents, siblings and grandparents) of the deceased person;
- The trustee of a revocable trust created by the deceased person;
- A person who was guardian of the deceased person at the time of his/her death; or
- A person named in the deceased person's will to act as personal representative (as of Dec. 1, 2017).

Some special considerations apply if the affiant (the person who signs the affidavit) was named to be the personal representative in the deceased person's will. They do not apply if the affiant was an heir, trustee or guardian. Those considerations are:

- Ordinarily, credit unions have no reason to examine a will, since it's only enforceable by a probate court. In this situation, however, The League suggests that the credit union should examine the will to verify that the person who signed the affidavit is, indeed, named in the will to serve as the personal representative (although the statutes does not specifically require someone who receives an affidavit to examine the will).
- It may be a good practice for the credit union to insist on getting a certified copy of the will to show that it has been filed with the clerk of court's probate office. (Wisconsin law says that if the deceased person left a will, it must be filed with the clerk of court's probate office within 30 days of death – even if no probate proceeding is required. Wis. Stats. §856.05.) By getting a certified copy, the credit union ensures that the will was filed with the courts and it is not relying on a mere photocopy of a will (that may then disappear). Also, the courthouse filing may discourage fraud.
- The affiant does not actually have to be appointed as a personal representative by a probate court in order to sign the Transfer by Affidavit form. The statute says that being named as personal representative in the will is enough to enable someone to sign the affidavit. So, the credit union does not need to insist on getting certified copies of "Domiciliary Letters" in this situation.
- An extra waiting period may be imposed, depending on the facts:
 - If the affidavit was signed by someone acting solely in their capacity as "a person named in the will to act as personal representative," then the credit union must not transfer any funds to the person who signed the affidavit until at least 30 days after the day on which the affidavit is received. If, during the 30-day period, the credit union gets another affidavit for the same deceased member from someone else, then the credit union "may not transfer any money due the decedent, the property of the decedent, or any evidence of interest, obligation to, or right of the decedent under this section unless ordered to do so

- by a court." A credit union that fails to comply with this 30-day waiting period gets no protection from liability under the statute.
- However, the 30-day waiting period does not apply to an affidavit the credit union receives "from a person named in the will to act as personal representative if the person is also an heir of the decedent, a trustee of a revocable trust created by the decedent, or a person who was guardian of the decedent at the time of the decedent's death.
- A "person named in the will to act as personal representative" cannot use the affidavit to have any interest in real estate transferred to him/her. This limit does not apply if the person is also an heir of the decedent, a trustee of a revocable trust created by the decedent, or a person who was guardian of the decedent at the time of the decedent's death.

As explained later in this release, under the heading, "Checks Payable to Decedent," the heirs of a decedent generally lack the authority, even with a properly completed and signed Transfer by Affidavit form, to endorse or deposit checks payable to a decedent. The affidavit does not appear to protect the credit union if it allows an heir to cash a check that is payable to the decedent or to the estate. An eligible heir can present a proper Affidavit to the party who issued the check and ask that the check be re-issued to the heir.

The affidavit can be used to claim funds in solely owned accounts, not joint accounts or accounts with a payable-on-death (POD) beneficiaries. (When one owner of a joint account dies, the other(s), if living, automatically become(s) legally entitled to the funds. A POD beneficiary is automatically legally entitled to the funds upon the death of the account's owner(s).) The credit union needs proof of death in order to release funds. The ideal proof of death is a certified copy of the death certificate.

The Transfer by Affidavit form is available online at: www.wicourts.gov/forms/PR-1831.PDF

The affidavit form is filled out in duplicate, indicating the heirs' relationship to the decedent, a description and the value of the property to be transferred, the total value of all the decedent's solely-owned property in Wisconsin at the date of death, and the total gross value of all the decedent's interests in property at the time of death. It must be executed and sworn to under oath before a notary public. The credit union should refer heirs to their attorneys for help completing the affidavit. Credit unions should not attempt to give heirs legal advice, since that could result in liability. Instead, the attorney can help determine whether the heirs are permitted to use the affidavit and advise them on how to complete it properly. (The Register in Probate may be willing to offer guidance, as well.)

In sections 4 and 5 of the Affidavit by Transfer form, the person signing it must indicate whether the deceased person (or his/her spouse) "did" or "did not" receive certain government benefits. If the person signing the affidavit is not certain, he/she would check the box showing that "the affiant lacks information to complete this section." If that box is checked or if a box is checked to show that the decedent or spouse "did" receive certain government benefits, then the signer of the affidavit must send a copy of the affidavit to the Wisconsin Department of Health Services (DHS) "by certified mail, return receipt requested." (The address is provided on the back of the Transfer by Affidavit form.)

Wisconsin law used to say that the credit union could pay funds to the person who signed the affidavit only if 10 or more days had elapsed since the date the affidavit was delivered to DHS, as shown on the certified mail return receipt. References to that 10-day waiting period have been cut from the statute.

Instead, the affidavit instructions now say that if the affidavit states that if the deceased person (or his/her spouse) received certain government benefits, or if it is unknown whether they received such benefits, then the person signing the Transfer by Affidavit form "shall attach to the affidavit the proof of mail delivery of the notice required [to the DHS] showing the delivery date." The credit union can release the funds, and it is protected from liability so long as that proof of mail delivery to the DHS (if required) was attached to the affidavit. If the affidavit shows that the deceased person (or his/her spouse) received certain government benefits, or if it is unknown whether they received such benefits, but the affidavit does not have an attached proof of certified mail delivery to the DHS, the credit union should not release the funds to the person who signed the affidavit.

The 30-day waiting period described earlier in this release, which only applies when the credit union receives an affidavit from "a person named in the will to act as personal representative," must be honored regardless whether the affidavit shows that the deceased person (or his/her spouse) received certain government benefits.

The credit union should disburse funds by making a check payable to the individual who signed the Transfer by Affidavit form, not to the deceased member's "estate."

The person who signs the affidavit does not necessarily keep all the money, but instead has a duty to distribute the funds to creditors (according to priorities set out in the statutes) and to others (such as other heirs) who may be entitled to the funds. The affidavit form reminds the signer of this duty.

A credit union that follows the statutory procedures and releases funds to someone who presents a Transfer by Affidavit form (with an attached mail delivery receipt, if required) is released from liability just as if they had released the funds to a probate-court-appointed personal representative.

If the affidavit is used to transfer an interest in real estate, then the person signing it must record it with the appropriate register of deeds office. (Otherwise, recording is not necessary.)

If the affidavit is used improperly to transfer an interest in real property, Wisconsin law gives a level of protection for innocent lenders who subsequently acquire an interest in the property. A credit union is protected if it later acquires an interest in the property (e.g., via a mortgage), had no reason to know of the earlier improper transfer by affidavit, acted in good faith, and gave value for the interest it acquired. The statute says that the lender would have no duty to inquire whether a transfer by affidavit was proper.

CREDIT UNION CLAIMS

The credit union should check to be sure it does not have an enforceable claim against an account before releasing the funds in it. Have those particular funds been pledged on a loan? Is there a negative balance in a share draft account, or another obligation of the decedent owing to the credit union?

ii Release No. B013 summarizes when a credit union may have the right to setoff against an account balance due to the default of the same member's loan at the credit union. In reviewing it, keep in mind that the death of a borrower is not necessarily an automatic default on a loan. Look to the terms of the loan note or agreement to see what was agreed upon as the grounds for default.

- How delinquent does the agreement say the loan must be before default occurs? A single payment late once? Two delinquencies in a 12-month period? An amount one full payment that is more than 10 days delinquent? The details may vary significantly; you need to abide by your agreement with the member.
- Most loan agreements include some grounds for default other than an actual delinquency. Sometimes the death of a borrower is listed as the grounds for default on a note.

Again, read the agreement carefully as the particulars will vary. For example, Wisconsin Consumer Act loan documents may include grounds for default for failure to observe any provision of the agreement where the violation “materially impairs” the condition, value or protection of the credit union’s rights in the collateral or materially impairs the member’s ability to pay the amounts due under the loan or security agreement.

Your loan agreement might include death of a borrower as a trigger of default but if the Wisconsin Consumer Act applies you may only declare default if under the standard just described. Thus, under the particular facts of that situation, does the death of the borrower “materially impair” the condition, value or protection of the credit union’s rights in the collateral, or materially impair the member’s ability to pay the amounts due under the loan or security agreement? Maybe not. Despite a death, there may be a coborrower or a personal representative of the decedent's estate that is ready and willing to continue making the payments on the loan as they come due.

See *ii Release No. B031 - Right to Cure Default* for more details on what constitutes default and when a right to cure exists on a Wisconsin Consumer Act loan or line of credit.

- Most loan notes will provide that violation of any of the covenants in a security agreement or mortgage securing that loan will trigger default on the note itself. See the loan agreement signed by the borrower for the particulars.

In turn, many security agreements and mortgages include covenants by the mortgagor that the property will not be sold or conveyed without consent of the lienholder. Again, see the particular terms in your security instrument.

Often, the death of an owner results in a transfer of ownership that may violate the non-conveyance covenant, which may then trigger a default on the note. That could give the credit union grounds for a setoff claim against the decedent's account balance. However, before relying on the death as grounds for a violation of a non-conveyance covenant in a residential mortgage, please review *ii Release No. B050 - Federal Limitation on Exercise of Due-on-Sale Clauses*. There are many situations where the non-conveyance covenant cannot be enforced when it results from a death.

If the credit union faces losses on a defaulted loan which cannot be offset by funds on deposit, be sure to file a claim against the estate before the deadline set by the probate court. If the decedent was a maker or cosigner on a loan and there are no current grounds for default, consider filing a contingent claim against the estate. This may prompt the estate to seek a buyer for the property to pay off the loan. This may be dispensed with if you still have sufficient collateral and are willing to give up the opportunity to file a claim.

Dealing with successors in interest under the Mortgage Servicing Rules

See *ii Release No. B075 - Reg. X & Reg. Z: Mortgage Servicing Rule* to see if the loan is impacted by the Successor in interest rule. For covered loans, credit unions must generally treat confirmed successors in interest as defined in the Mortgage Servicing Rules as borrowers for the purposes of Regulation X's mortgage servicing rules and consumers for the purposes of Regulation Z's mortgage servicing rules.

- The successor in interest rules in Regulation X generally apply to federally related mortgage loans, but not including open-end lines of credit).
- The successor in interest rules in Regulation Z generally apply to closed-end consumer credit transactions secured by a dwelling.

Successors in interest are certain persons who inherit or otherwise receive an ownership interest in property, from a spouse, parent, or other relative, or upon the death of a joint tenant, when there is an outstanding mortgage loan on the property. Successors in interest can include persons who acquire their interest in the property upon death of a borrower or in a divorce, as well as transfers from a spouse or from a parent to a child.

There is no general exemption from the successor in interest requirements for credit unions classified as small servicers, but small servicers have the same exemptions with respect to confirmed successors in interest that they have with respect to other borrowers and consumers.

- For example, small servicers are required to respond to certain written requests from potential successors in interest (§ 1024.36(i)), as there is no small servicer exemption for information requests.
- However, small servicers are exempt from the requirement for servicers to adopt servicing policies, procedures, and requirements. (§ 1024.30(b)).

Unless an exemption applies, the rule requires you to maintain policies and procedures reasonably designed to ensure that you can:

1. Promptly facilitate communication with any potential or confirmed successors in interest regarding a property securing a mortgage loan upon receiving notice of the death of a borrower or of any transfer of the property;
2. Promptly determine what documents you reasonably require to confirm the person's identity and ownership interest in the property, and promptly provide the person with a description of those documents and how to submit a written request for information regarding the documents required for confirmation; and
3. Promptly notify the person, upon the receipt of such documents, that you have
 - confirmed the person's status as a successor in interest, or
 - determined that additional documents are required (and what those documents are), or
 - determined that the person is not a successor in interest.

The rule also requires you to respond to certain written requests indicating a person may be a successor in interest by providing that person with a written description of the documents that are required to confirm the person's identity and ownership interest in the property. This requirement includes responding to a written request from an agent of a successor in interest.

See *ii Release No. B075 - Reg. X & Reg. Z: Mortgage Servicing Rule* for details.

Transfers by Affidavit

If someone with a Transfer by Affidavit form claims the member's funds (as described earlier in this release), the credit union may want to point out paragraph 8 of the affidavit form. That paragraph makes it clear that the person signing the

affidavit does not necessarily keep all the money, but instead has a duty to distribute the funds to creditors (according to priorities set out in the statutes) and to others (such as other heirs) who may be entitled to the funds.

If the decedent owed a debt to the credit union, the affiant may be responsible for paying it from the decedent's funds, depending on the amount available and the priority given to other creditors. (Under the statutes, many other expenses have priority before the credit union's claims, such as funeral expenses, "provisions for the family," final medical costs and taxes.)

SPECIAL CONSIDERATIONS

Checks Written by Decedent

The credit union can accept checks *written by the decedent* for ten days after the date of death, unless ordered to stop payment by a person claiming an interest in an account. In any case, the credit union is no longer authorized to pay the check more than 10 days after the death, if it has knowledge of the death. The 10-day period does *not* protect the credit union from liability if an unauthorized party writes checks in the decedent's name.

Checks Payable to Decedent

Heirs of a decedent generally lack the authority, even with a Transfer by Affidavit form, to endorse or deposit checks *payable to a decedent*.

Checks payable to the order of the decedent may no longer be deposited without endorsement to the decedent's account as they could have been before death. That is because the decedent is technically no longer a party to the account. Of course, a check payable to the decedent "or" another payee may still be negotiated or deposited by the joint payee.

A personal representative, however, generally can deposit into the estate account a check payable to the decedent, but only if the estate is actually entitled to the proceeds.

Personal representatives should not be allowed to deposit a check into their own account if the check is made payable to the decedent, to the probate estate, or to the accountholder "as personal representative" for the decedent.

Federal Checks Payable to Decedent

Most government-issued checks payable to the decedent should not be accepted even from a personal representative. Generally, the personal representative should contact the issuing government agency for assistance. But, under federal regulations (31 C.F.R. §240.13), a personal representative can negotiate a few certain types of federal checks on the decedent's behalf:

- Tax refund checks;
- Federal payments for goods and services; and
- Federal payments for the redemption of currencies or for principal or interest on U.S. securities.

Under the regulations, these types of federal checks must be endorsed to show the personal representative's capacity, for example, "John Jones by Mary Jones, personal representative (or executor, administrator, etc.) of the estate of John Jones." The U.S. Treasury will pay the checks without requiring that you submit documentary proof of the personal representative's authority, though the government may later require evidence of authority if a dispute arises.

Other than the three categories listed above, *no other type of check drawn on the federal government and payable to a decedent should be accepted*.

For information on how the government can obtain refunds of certain benefits paid after a member's death, see the next section.

Federal ACH Payments to Decedent

The *Green Book* is an online guide for help in processing federal government ACH transfers and payments.

The federal government can recover payments that were automatically deposited to a recipient's account through the Automated Clearing House (ACH) after the recipient dies or becomes legally incapacitated. This process is called "reclamation."

Only government benefit payments for a federal entitlement program or annuity are subject to reclamations. These include:

- Social Security benefit payments or disability;
- Military and Coast Guard retirement;
- Civil service annuity;
- Veteran's benefits;
- Black Lung disability;
- Railroad Retirement Board annuity;
- Worker's Compensation (FECA);
- DC Pensions;
- Compensation Act (Department of Labor), or
- Any other federal retirement or annuity.

Limiting Credit Union Liability

When a credit union accepts a recurring payment from the federal government, the credit union agrees to the potential liability for post-death payments. As a general rule, a credit union is liable for all benefit payments received after the death or legal incapacity of a recipient or death of a beneficiary unless the credit union meets the qualifications for limiting its liability, as explained below.

A credit union may qualify to limit its liability by full compliance with the regulations if it:

- Had no actual or constructive knowledge of the recipient's death or legal incapacity at the time of the deposit of any post-death benefit payments;¹
- Returns all post-death benefit payments it receives after it learns of the recipient's death (but not post-death benefit payments it received before it learned of the death); and
- Responds to the *Notice of Reclamation* (FS Form 133) completely and adequately, so that it is received by the Government Disbursing Office within 60 days of the date on the reclamation.

The credit union has no right to limit its liability with respect to post-death benefit payments received after it knows of the death or incapacity of a recipient or the death of a beneficiary and has had a reasonable opportunity (i.e., one business day) to act on that knowledge.

Requirement to Return Post-Death Benefit Payments

The Federal Government can no longer require credit unions to return post-death benefit payments it has received prior to it having actual or constructive knowledge of death, due to the funds becoming property of the joint accountholder or the decedent's estate. Credit unions are only required to return post-death benefit payments it has received after it has constructive or actual knowledge of death.

So, upon learning of the death of a beneficiary or legal incapacity or death of a recipient (i.e. Representative Payee) who receives federal government benefits via ACH, the credit union should immediately take two steps:

- Step One - the credit union must immediately notify the paying agency(s) if it learns of the death or incapacity from a source other than notice from that agency (Death Notification Entry (DNE)), regardless of how the death was discovered. This could be done by simply returning the ACH deposit with a return reason code of R15 - (beneficiary or accountholder (other than a Representative Payee) is deceased), R14 - Representative Payee deceased or unable to

¹ "Constructive knowledge" of the death means that the credit union would have learned of the death if it had followed commercially reasonable business practices, e.g., receiving notice of a death in the mail demonstrates "constructive knowledge," even if the credit union fails to open the notice. Does this mean the credit union must routinely check the obituaries? No, but if the credit union did in fact check obituaries, and learned of a member's death it would have actual knowledge of that death and would have to act accordingly.

continue in that capacity (beneficiary is not deceased), or by contacting the agency directly. Use caution to use the correct return reason code.

- Step Two - check all accounts for the beneficiary at the credit union to discover any federal government benefits subject to reclamation and flag the account as deceased. The credit union should return any federal government benefit payments it receives from the date of notice of death going forward. Recipients may be receiving multiple benefit payments from the same or different federal agencies. Credit unions should ensure that they are returning all federal benefit payments subject to reclamation. If the account stays open and the federal benefit payments are not returned, those deposits could become part of the amount that has to be paid in response to the reclamation. Therefore, it is required to immediately return any post-death deposits to minimize liability.

If the credit union is asked by the survivor not to return post-death benefit payments, the credit union must still follow the requirements to return the payments and direct the survivor to the appropriate agency to determine if a survivor payment is due.

Note: If all or part of the post-death benefit payments have already been withdrawn from the account before the credit union learns of the death, the government does not authorize the credit union to try to recover the funds from the withdrawer. If the credit union does so, it acts under its own authority in terms of its contract with its depositor or under state law.

Calculation of Liability

If a credit union qualifies for limited liability, the amount for which it can be debited is the “45-day amount” – the dollar amount of the post-death benefit payments received within 45 calendar days following the death. The limited liability amount may not exceed the outstanding total. The outstanding total is the total of all the unreturned post-death payments.

Therefore, if the account balance amount is equal to or greater than the outstanding total listed on the reclamation notice, the credit union must return the full amount due to the government via ACH within 60 days of the date on the notice. If the account balance amount is less than the outstanding total, the credit union must return an amount equal to the account balance to the Government Disbursing Office (not the originating federal agency).

If the credit union does not immediately return post-death benefit payments, it could be liable for payments up to six years prior to the most recent payment. For that reason, when a credit union has knowledge of death, it should immediately return any post-death benefit payments it receives for that beneficiary. Under no circumstances should the credit union hold payments indefinitely in a segregated account, or any other means, to see if any disputes are resolved; holding payments may constitute a breach of the credit union's warranty for handling federal government ACH payments.

Reclamation Process

Once the paying agency receives notification of death, it has 120 calendar days to initiate reclamations. The agency will send a Death Notification Entry (DNE) to the credit union. If additional payments are automatically made into the account in error, the government will send a five-part Notice of Reclamation (FS-133) form to the credit union.

Once a reclamation is received, the credit union must provide a full and accurate response to the reclamation within 60 days. This means that the proper Government Disbursing Office (GDO) must *receive* the response within 60 days – not that the credit union mails its response in 60 days.

Completing the Notice of Reclamation Form

Responding to the reclamation requires that the credit union sign the certifications, if accurate, on the GDO's copy in black or dark blue ink only. The credit union must then return copies to the GDO, send a copy to the account owners, and retain its own copy. Three completed copies are returned to the government, the “Notice to Account Owners” part [5] must be sent to the accountholder's last known address, and one copy is retained by the credit union.

The Reclamation Notice includes two certifications that the credit union may need to complete in order to limit its liability.

- The first certification states that the notice to account owners has been sent, the account owners have been notified of any action the credit union has taken or plans to take against the account, and any error regarding date or fact of death has been corrected.
- The second certification states that the credit union had no knowledge of the recipient's death at the time of deposit or withdrawal of any the post-death payments. The credit union must also provide the names and addresses of all people

who have withdrawn funds from the account if the outstanding total listed in the reclamation notice has not been returned by the credit union.

For amounts owed, the credit union may complete an ACH Debit Authorization that permits the Treasury to process an ACH debit from the credit union's FRB or Correspondent account.

If the credit union can return a full payment in response to the reclamation, it should use the ACH return method. If subsequent withdrawals were made on the account, and a credit union is only able to return a partial payment, it may use a check and attach a copy of the relevant Notice of Reclamation listing only the partial payment total on the reverse of the notice.

Failure to Respond to Notice of Reclamation

The credit union must respond completely and accurately to a Notice of Reclamation by the due date. If not, the government disbursing office will debit the credit union's FRB/Correspondent account for the full outstanding total. There is no appeal to this action, it is final.

For More Information:

The procedures for responding to the Notice of Reclamation, along with the liability rules, are found in the "Green Book" published by the U.S. Department of the Treasury, Financial Management Service. The credit union should have a current copy in its offices. The "Green Book" also is available [online here](#). It includes examples of how reclamation liability is calculated.

A Payment Association such as MACHA or UMACHA also provides information on ACH issues to its members. Credit Unions may also call the Fiscal Service Payment Management Call Center at 1-855-868-0151.

Check Reclamation

The federal government has a process similar to ACH reclamation for obtaining a refund from a presenting financial institution for paid paper checks. The U.S. Treasury has information on check reclamation in its "Gold Book," which is available [online here](#).

Non-Resident Decedents

When a member dies while living out-of-state, the legal entitlement to the member's Wisconsin accounts is basically the same as it would be if the member had lived here. For example, a joint account owner or POD beneficiary would be entitled to the funds in the account regardless of where the decedent had lived. Someone could use a Transfer by Affidavit form to claim other personal property (not real estate) or to collect money owned by the non-resident decedent. Refer to the section on "Transfer by Affidavit" under "Summary Procedures" for details.

If a personal representative has been appointed by a court outside Wisconsin, but no personal representative has been appointed here, that person can claim account funds in this state by following some simple procedures. The person needs to file, with a Wisconsin circuit court, an original or certified copy of the court document from the other state that appointed him/her as personal representative there. Once that document is filed in Wisconsin, the foreign personal representative has all the powers that a Wisconsin personal representative would have. Wis. Stats. §877.16

A different procedure called "ancillary probate" must be followed to claim Wisconsin real estate owned by a non-resident decedent.

Share Certificates

Share certificates are released according to the rules already described. An additional consideration is whether to enforce an early withdrawal penalty against the estate (or survivor). This is an issue to be addressed by individual credit union policy, but it is not common to assess a penalty in such situations. Regulation D does not require an early withdrawal penalty when the withdrawal is due to the death of an owner.

Custodial Accounts

The treatment of Uniform Transfers to Minors Act accounts depends on whether it is the minor or the custodian that dies.

If the minor dies, the custodian must turn the funds over to the minor's estate. The Wisconsin Statutes say that this must be done "in an appropriate manner," which may require issuing a check payable to the minor's estate, if a probate estate is established, or to an heir of the minor who presents a Transfer by Affidavit form.

If the custodian dies, resigns or becomes incompetent, the designated successor custodian assumes authority over the account. The successor should provide proof of the custodian's death, resignation, or incompetence. Please see *The League's ii Release No. 0012* for more information, including material on options if no successor custodian was designated.

Termination of Agency & Power of Attorney

The authority of an agent or attorney-in-fact (under a power of attorney) terminates upon the death of the party granting the authority. This holds true even for a "durable" power of attorney. As a result, the agent or attorney-in-fact has no power to act on a deceased member's solely-owned account.

Fortunately, the credit union may honor a power of attorney until it becomes aware of the member's death.

1099 Reporting Requirement

The IRS requires that dividends accruing after the date of death of the decedent be reported on an IRS 1099-INT form, in the name of the new owner of the account. Thus, if the personal representative claims the funds, the earnings since the date of death are reported in the name of the estate and using the estate's Employer Identification Number. POD account earnings after the date of death are reported in the name and Social Security Number of the beneficiary.

In the case of joint accounts, the reporting might already have been taking place in the survivor's name (if the survivor is the member). If not, the same change must be made to report after-death earnings under the name and Social Security Number of the surviving joint owner. Let's look at an example:

Mary and David are joint owners of an account, with survivorship rights. Mary died on May 15 when the account had earned \$125 in dividends so far this year. David claims the funds one month later, when another \$25 has accrued in dividends. If the account listed Mary's name first and 1099 reporting was done in the past under her Social Security Number, this year the credit union will report \$125 in that manner. However, the \$25 must be reported in David's name and Social Security Number. If all earnings were reported in David's name all along, no change is needed.

The credit union may encounter problems when nobody claims the funds and furnishes a TIN, even though the credit union has learned of the death. To make sure the credit union obtains the payee name and TIN in time for 1099-INT reporting, the Milwaukee IRS office advises:

1. Send a W-9 form to the home address with a request that it be completed with the name and TIN of the person or estate now owning the account.
2. If there is no response, institute backup withholding.
3. If there is still no response, file an 1099-INT at year-end under the name of the estate or POD beneficiary or surviving joint owner as appropriate. The credit union would avoid any penalty for not reporting a TIN by claiming that the credit union has complied with due diligence requirements.

Safe Deposit Boxes

Procedures after the death of a safe deposit box lessee depend on the circumstances and terms of the lease. See *The League's ii Release No. 0146* for details on handling the death of a safe deposit box lessee.

Interest on Loans After Death

The Wisconsin Consumer Act does not address whether a lender can continue to accrue interest on a loan after the borrower dies. However, the Wisconsin Department of Financial Institutions, Consumer Affairs Division, takes the position that if the credit union has sold credit life insurance to that person, then interest has to stop on the date of death. If credit insurance does not pay the full amount owing, as of the date of death, then interest can be charged on the remaining debt from the date of death. If there is no credit life insurance that would pay off the loan, then the credit union can continue to charge interest on the loan.

Information on Credit Card Accounts

The Truth in Lending regulations (Reg. Z § 1026.11(c)) require credit card issuers to have written procedures so that when a cardholder passes away, the personal representative for the estate can find out what the balance is and pay it.

The credit union may get the personal representative's balance request in writing or by telephone, and it must give the information within 30 days (in writing or by phone). It can take steps to verify the personal representative's authority.

Reg. Z does not bar the credit union from giving information to other appropriate people, too, like a spouse or other family member, when appropriate.

Once the credit union gets a balance request from a personal representative, it cannot charge further fees (like late fees, annual fees or over-the-limit fees) even if there is another authorized user on the account. However, it can charge fees that apply to time periods before the request was made or if there is a joint accountholder. If the balance is paid in full within 30 days after the credit union gives the balance information to the personal representative, the credit union must waive or rebate interest charges for that payment.

Information on Mortgages

The League's *ii Release No. B075* explains a set of nine Reg. Z and Reg. X rules that affect how credit unions must service mortgage loans, effective Jan. 10, 2014. Among them, the release explains that Reg. X has certain policy requirements that apply to most real estate transactions involving 1- to 4-family residential structures. Credit unions that are "small servicers" are exempt from these rules. The rules require the credit union to establish policies and procedures reasonably designed to achieve certain objectives. Among them: The credit union's policies and procedures must be reasonably designed to ensure that upon notification of a consumer's death, the credit union promptly identifies and facilitates communication with the successor in interest of the deceased about the property secured by the deceased consumer's mortgage loan.

Under *a 2014 CFPB interpretive rule*, when a borrower dies, the borrower's heir may be allowed to assume the mortgage debt without triggering the ability-to-repay rules. See The League's *ii Release No. B074* for details.

CONCLUSION

It is very important that proper procedures be followed in releasing accounts of a deceased party. Review the three requirements listed at the beginning of this release as a checklist to insure that all points are covered. Do not hesitate to obtain legal advice as needed.

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League publications are designed to provide accurate information with regard to the subject matter covered, with the understanding that the League does not render legal services. If you have general questions regarding this release, please call The League at (608) 640-4050 if local; or (800) 242-0833. For specific legal advice, please consult your credit union's attorney.

Legal Affairs Department

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