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## Williams v. McKnight: The Constitutionality of Section 46 of the Probate Code

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"ingenuity in calculation" and "form of words," is constitutional; it does not impose a tax on exempt interest because (1) the policy-holders' share goes to the reserve and is not taxed and (2) the company is allowed a deduction for its pro rata share.

*Michael M. Boone*

## Williams v. McKnight: The Constitutionality of Section 46 of The Probate Code

### I. COMMUNITY PROPERTY SURVIVORSHIP AGREEMENTS BEFORE HILLEY V. HILLEY

The legality of joint tenancies involving community property has long been a problem in Texas. Joint tenants constitute one tenant and have one estate in the land. In the ancient language of the common law, each joint tenant is said to hold "per my et per tout"; that is, each tenant is the tenant of the whole estate for purposes of tenure and survivorship, but for purposes of alienation he has only his undivided share.<sup>1</sup>

The distinctive characteristic of the joint tenancy is the right of survivorship; upon the death of one of the tenants, the remaining tenant has the whole estate.<sup>2</sup> The interest of the deceased tenant does not actually pass to the surviving tenants when the first tenant dies. Instead, because the joint tenants were owners of the whole, or owners "per tout," the title to the estate of the deceased owner simply ceases to exist.<sup>3</sup>

As a result of this survivorship characteristic, parties holding property under a joint tenancy receive several advantages. First, the surviving owner obtains the interest of the deceased owner without being required to pay a Texas inheritance tax.<sup>4</sup> Second, since the entire estate is automatically that of the survivor, the need for an administrator or a probate proceeding is eliminated.

At common law, when land was conveyed to two or more persons,

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<sup>1</sup> 2 Tiffany, *The Law of Real Property* § 418 (3rd ed. 1939).

<sup>2</sup> *Id.* § 419.

<sup>3</sup> Tex. Att'y Gen. Op., WW-262, Sept. 25, 1957.

This principle was announced by the Texas attorney general in an opinion involving a tract of land held by three daughters as joint tenants with right of survivorship. The first daughter died, and the remaining two became the sole owners of the land. The attorney general held that no inheritance tax was due upon the interest owned by the deceased tenant, because no taxable estate passed to the surviving sisters.

<sup>4</sup> See note 3 *supra*.

a presumption arose that the land was acquired in joint tenancy with right of survivorship. The Texas Legislature, in defining the law of succession in 1840, passed a statute<sup>5</sup> with the purpose of abolishing joint tenancies with right of survivorship. This statute was incorporated into article 2580 of the revised Texas statutes,<sup>6</sup> which later became section 46 of the Probate Code.<sup>7</sup> Article 2580 was interpreted in 1939 in *Chandler v. Kountze*<sup>8</sup> as abolishing joint tenancies where they would have been created by *law*, but permitting their creation by contract, will, or deed of conveyance. Consequently, section 46 of the Probate Code was amended in 1955<sup>9</sup> to allow *joint owners* to form, by written agreement, a joint tenancy with right of survivorship.

The question that now faced the courts was whether a husband and wife could hold community property under a joint tenancy without violating the Texas constitution and statutory enactments. Article XVI, section 15 of the Texas constitution<sup>10</sup> and articles 4614<sup>11</sup> and 4613<sup>12</sup> of the Revised Texas Statutes define separate property as that owned or claimed by each spouse before marriage and that acquired after marriage by gift, devise, or descent. All other property is defined by article 4619<sup>13</sup> as belonging to the community. The courts were confronted, therefore, with an important decision—was a joint tenancy agreement, which changed the community property of the two spouses into the separate property of the sur-

<sup>5</sup> Texas Acts 1840, ch. —, § 17, 2 Gammel, Laws of Texas 306, 309 (1898).

<sup>6</sup> Former art. 2580, Tex. Rev. Civ. Stat. (1925) provided:

Where two or more persons hold an estate, real, personal, or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained.

<sup>7</sup> Texas Prob. Code Ann., § 46 (1956).

<sup>8</sup> In *Chandler v. Kountze*, 130 S.W.2d 327, 329 (Tex. Civ. App. 1939) *error ref.*, the court decided that:

While the wording of Article 2580 indicates a legislative intent to abolish the relationship of joint tenancy where it would otherwise have been created by law, including the common law doctrine of survivorship, there is nothing in the subject matter of the act which would, in our opinion, justify the presumption that the legislature intended to thereby prevent the parties to a contract, a will, or a deed of conveyance, from providing among themselves that the property in question should pass to and vest in the survivor as at common law.

<sup>9</sup> Section 46 of the Probate Code had incorporated the language of former article 2580. To this was added: "Provided, however, that by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership." Texas Acts 1955, ch. 55, at 88.

<sup>10</sup> Tex. Const. art. 16, § 15 (1876).

<sup>11</sup> Tex. Rev. Civ. Stat. Ann. art. 4614 (1957).

<sup>12</sup> Tex. Rev. Civ. Stat. Ann. art. 4613 (1929).

<sup>13</sup> Tex. Rev. Civ. Stat. Ann. art. 4619 (1959).

vivor, violative of the above constitutional and statutory definitions?

This problem has been before the courts on several occasions.<sup>14</sup> In *Sbroff v. Deaton*,<sup>15</sup> a husband and wife purchased shares in a savings and loan association with community property and executed a written agreement providing for a joint tenancy with right of survivorship. The husband died and the court, relying on *Chandler v. Kountze*,<sup>16</sup> awarded the shares to the wife as her separate property. However, in reaching this decision, the court did not rely entirely on the survivorship agreement, but also upon the fact that the husband made a gift of his share to his wife shortly before his death.

Several years later, in *Reed v. Reed*,<sup>17</sup> a survivorship agreement between husband and wife was held invalid for two reasons. First, the agreement was not a "partition" of community property into separate property because the constitutional and statutory requirements were not met.<sup>18</sup> Secondly, the agreement violated article 4610,<sup>19</sup> which prohibits agreements between husband and wife that have the effect of altering the legal order of descent.

Three years after the *Reed* decision the Texas Supreme Court decided *Ricks v. Smith*,<sup>20</sup> which involved the purchase by the husband of United States Savings Bonds with community funds. The bonds were purchased under United States Treasury regulations, which provide that if either owner dies without having presented the bond for payment, the survivor will be the sole owner. The agreement

<sup>14</sup> *Adams v. Jones*, 258 S.W.2d 401 (Tex. Civ. App. 1953), is omitted from this discussion because it did not deal with community property.

<sup>15</sup> 220 S.W.2d 489 (Tex. Civ. App. 1949).

<sup>16</sup> 130 S.W.2d 327 (Tex. Civ. App. 1939) *error ref.* It should be pointed out that the *Chandler* case did not deal with community property.

<sup>17</sup> 283 S.W.2d 311 (Tex. Civ. App. 1955).

<sup>18</sup> Article XVI, section 15 of the Texas constitution defines the separate property of the wife as being that "owned or claimed by her before marriage and that acquired afterward by gift, devise, or descent." This section was amended in 1948 to permit the *partition* of community property. The amendment provided that:

[A] husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a femme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

This amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments and providing for their recordation. . . .

Article 4624a was passed to implement this constitutional amendment. It provides that the partition or exchange "shall be effectuated by written instrument subscribed and acknowledged by both spouses in the manner now required by law for the conveyance of realty. . . ."

<sup>19</sup> Tex. Rev. Civ. Stat. Ann. art. 4610 (1925).

<sup>20</sup> 159 Tex. 280, 318 S.W.2d 439 (1958).

was upheld on two theories: (1) the supremacy of the federal regulations and (2) a third party beneficiary contract between the government and the husband for the benefit of the surviving wife.

## II. HILLEY V. HILLEY AND SUBSEQUENT DEVELOPMENTS

*Hilley v. Hilley*<sup>21</sup> came before the Texas Supreme Court in 1961. In that case a husband and wife purchased stock with community funds, and the certificates were issued in the names of the husband and wife as "joint tenants with right of survivorship and not as tenants in common." The court held that a husband and wife cannot purchase property with community funds and have it transferred to them as joint tenants with right of survivorship. In reaching this result, the supreme court used four steps in its reasoning. First, the court distinguished the previous cases which had held survivorship agreements valid. *Adams v. Jones*<sup>22</sup> and *Chandler* were held inapplicable because they did not involve community property or a survivorship agreement between husband and wife. *Shroff v. Deaton* was discounted because of the finding that a short time before his death the husband made a gift of his interest to his wife.<sup>23</sup> After distinguishing those cases, the court also mentioned *Reed v. Reed*, in which the survivorship agreement was held invalid.<sup>24</sup>

The second part of the opinion dealt with the methods by which a person can acquire separate property in Texas. The court stated that under the Texas constitution and statutes, property can only be separate if acquired before marriage, or after marriage by gift, devise, or descent. However, two exceptions were pointed out.<sup>25</sup>

<sup>21</sup> 161 Tex. 569, 342 S.W.2d 565 (1961).

<sup>22</sup> 258 S.W.2d 401 (Tex. Civ. App. 1953).

<sup>23</sup> See text accompanying note 15 *supra*.

<sup>24</sup> See text accompanying note 17 *supra*.

<sup>25</sup> Additional cases present variations from the basic methods of acquiring separate property as set forth by the supreme court in *Hilley*. These include:

a. Mutation or changes in form, including:

(1) exchanges, which follow the rule as to purchases, *Love v. Robertson*, 7 Tex. 6 (1851);

(2) increase in value, *Stringfellow v. Sorrells*, 82 Tex. 277, 18 S.W. 689 (1890);

(3) sale of:

(a) royalties, *Texas Company v. Parks*, 247 S.W.2d 179 (Tex. Civ. App. 1952);

(b) bonuses, *Welder v. Commissioner*, 148 F.2d 583 (5th Cir. 1945). See also

*Jackson, Community Property and Federal Taxes*, 12 Sw. L.J. 1, 10 (1958), and notes 35 and 36 and accompanying text.

b. Declaration of stock dividends out of income of separate corporate ownership, *Scotfield v. Weiss*, 131 F.2d 631 (5th Cir. 1942).

c. Separation agreement pending divorce, *Rains v. Wheeler*, 76 Tex. 390, 13 S.W. 324 (1890).

d. Failure to trace community property into separate property, *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964).

(Continued on next page)

Property purchased with separate funds is separate property,<sup>26</sup> and community property becomes separate if partitioned in the manner provided in articles 4624a<sup>27</sup> and 881a-23.<sup>28</sup> Justice Walker, who wrote the court's opinion, analyzed the facts in *Hilley* to see if the stock became the wife's separate property by any of the above methods, and concluded that it did not. The stock certificates were not acquired by devise or descent; neither were they purchased with separate funds. The husband made no gift of his interest to his wife<sup>29</sup> because the spouses purported to form a contract.<sup>30</sup> The only remaining possibility was that the property became the wife's separate property as the result of a partition under article XVI, section 15 of the Texas constitution. Justice Walker ruled this out because the survivorship agreement was not subscribed and acknowledged by both spouses as required in article 4624a. Therefore, the court concluded that the marital partners had failed to use a method which would, under the Texas constitution and statutes, make the stock the separate property of the wife.<sup>31</sup>

The third step taken by the supreme court in deciding *Hilley* was to overrule the case of *Ricks v. Smith*.<sup>32</sup> The court said that the contract which the purchaser of a United States Savings Bond there

e. Purchase of land, and deed recital is in favor of wife, *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952).

f. Purchase of United States securities with right of survivorship, *Free v. Bland*, 369 U.S. 663 (1962).

g. Purchase of United States insurance, *Wisner v. Wisner*, 338 U.S. 655 (1950).

<sup>26</sup> *Love v. Robertson*, 7 Tex. 6 (1851).

<sup>27</sup> See note 18 *supra*.

<sup>28</sup> Tex. Rev. Civ. Stat. Ann. art. 881a-23 was repealed in 1963 and replaced by article 852a, § 6.09, which provides:

A husband and wife shall have full power to enter into a savings contract involving a savings account consisting of funds which are community property of their marriage so as to create a joint tenancy with right of survivorship as to such account and any future additions or dividends made or credited thereto and, to the extent necessary to accomplish such result in law, such contract shall constitute a partition of such community property or reciprocal gifts from the respective spouses, if the same is in writing and subscribed to by such husband and wife even though not acknowledged by either of them.

<sup>29</sup> If the wife had died first, a question might have been raised as to her donative capacity to deal with her interest in the community estate. See the observation on *Stratton v. Robinson* in *McKnight, Liability of Separate and Community Property for Obligations of Spouses to Strangers, Creditors' Rights in Texas* 353, n.127 (1963).

<sup>30</sup> Justice Walker reasoned that the husband and wife purported to enter into a contract, under the terms of which each surrendered a community interest in exchange for the right of a joint tenant. The right acquired by the husband is no less valuable than that received by the wife; neither is his detriment greater than that suffered by the wife. Thus, there could be no gift because the right or interest which each spouse expected to acquire was bought with a valuable consideration.

<sup>31</sup> As pointed out in *Kellet v. Trice*, 95 Tex. 160, 169, 66 S.W. 51, 54 (1902), "the question whether particular property is separate or community must depend upon the existence or non-existence of the facts, which, by the rules of law, give character to it, and not merely upon the stipulations of the parties that it shall belong to one class or the other."

<sup>32</sup> See text accompanying note 20 *supra*.

made with the government for the benefit of a third person is nothing more than a survivorship agreement<sup>33</sup> and, therefore, it must meet the requirements of section 46 of the Probate Code. Section 46, as it then read, provided that the interest of a joint owner could be made to survive only by agreement of the joint owners in writing. Since the contract in *Ricks* was made between the husband and the government, and not between the husband and wife, it was invalid. The court also pointed out that federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved.<sup>34</sup>

Finally, the court stated that the Texas constitution and statutes already provide a three-step method whereby a husband and wife may arrange for community property to vest in the survivor.<sup>35</sup> First, property may be partitioned in the manner provided in article 4624a, the portion set aside to each spouse becoming his or her separate property. Next, under article 4614, the wife can obtain management, control, and disposition of her separate estate.<sup>36</sup> The husband and wife can then enter into an effective survivorship agreement covering the property separately owned by either or both.

The decision in *Hilley* was interpreted as establishing the rule that a husband and wife in Texas cannot form a survivorship agreement with respect to community property. However, immediately following the *Hilley* case, the fifty-seventh legislature adopted House Bill 670,<sup>37</sup> which added to section 46 of the Probate Code the following sentence: "It is specifically provided that any husband and his wife may, by written agreement, create a joint estate out of their community property with rights of survivorship." This amendment took effect on May 15, 1961, and if constitutional, supersedes the holding in *Hilley*.

Recent cases have dealt with survivorship agreements, but none have directly ruled on the constitutionality of the new amendment. The first such case was *Free v. Bland*,<sup>38</sup> in which the United States

<sup>33</sup> *Hilley v. Hilley*, 342 S.W.2d at 570.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Id.* at 571.

<sup>36</sup> This second step is no longer necessary since the wife's power to control separate property is now the same as the husband's by operation of law.

<sup>37</sup> Texas Acts 1961, ch. 120.

<sup>38</sup> 369 U.S. 663 (1962). The facts in *Free v. Bland* were the same as those in the *Ricks* case—a husband in Texas purchased United States Savings Bonds with community property. The bonds were issued to "husband and wife," and according to the Treasury regulations, the survivor was to be recognized as the sole owner. The United States Supreme Court upheld the survivorship provision because it was based on a federal law, and under the supremacy clause of the United States Constitution, a federal law must prevail if it conflicts with a state law. See Comment, *Community Property—Force and Effect of Treasury Regulations Creating Right of Survivorship in United States Savings Bonds*, 37 Tul. L. Rev. 115 (1962).

Supreme Court decided that United States Savings Bonds, held by the purchaser under Treasury regulations creating a right of survivorship, pass to the survivor as his separate property. This decision reinstated the holding of *Ricks v. Smith*,<sup>39</sup> which had been overruled in *Hilley*. Section 46 of the Probate Code was not mentioned in the opinion.

Some time after the effective date of the amendment to section 46, the Texas Supreme Court decided *Davis v. East Texas Savings and Loan Association*.<sup>40</sup> In that case a husband and wife using community funds purchased a savings and loan certificate with a survivorship provision.<sup>41</sup> The court failed to uphold the agreement, basing its decision entirely on *Hilley*. Section 46 was not mentioned since the purchase of the certificate and the death of the husband both occurred prior to the effective date of the amendment.<sup>42</sup>

### III. WILLIAMS V. MCKNIGHT

The first and only case to rule directly upon the constitutionality of section 46 of the Probate Code, as amended in 1961, is the recent case of *Williams v. McKnight*.<sup>43</sup> In that case a husband and wife deposited \$10,000 in each of two banks and \$10,000 in a savings and loan association. Each of the three accounts was subject to a written survivorship agreement signed by both spouses. After the husband's death, the wife claimed the funds as her separate property, relying on the 1961 amendment to section 46. She was opposed by her husband's executor, who maintained that the funds were community property. Relying on the holding in *Hilley*, he contended that a survivorship agreement formed according to the Probate Code amendment violates article XVI, section 15 of the Texas constitution. The court relied on the Probate Code amendment<sup>44</sup> to uphold

<sup>39</sup> See text accompanying note 20 *supra*.

<sup>40</sup> 163 Tex. 361, 354 S.W.2d 926 (1962).

<sup>41</sup> In the *Davis* case, the husband also purchased a savings and loan certificate with his *separate* funds, and the certificate stated that it was held by husband and wife as joint tenants with right of survivorship. The court, in upholding this agreement, stated: "We know of no constitutional or statutory impediment to the making by a husband of such a contract affecting title to his separate funds." 354 S.W.2d at 931.

<sup>42</sup> The same situation existed in *Brunson v. Brunson*, 372 S.W.2d 761 (Tex. Civ. App. 1963), where the Amarillo Court of Civil Appeals also found it unnecessary to rule on the constitutionality of the 1961 amendment since the husband died two days before it went into effect.

<sup>43</sup> 391 S.W.2d 813 (Tex. 1965).

<sup>44</sup> It is puzzling why, throughout its opinion, the court regarded section 46 as the only statute applicable to the three accounts. One of the accounts was with a savings and loan association, and normally should be covered by former article 881a-23, Tex. Rev. Civ. Stat. (1929) (now art. 852a-6.09). Presumably the specific requirements of article 881a-23 were not met by the parties, and as a result, the court had to resort to the general provisions of section 46 of the Probate Code.



the survivorship agreement and awarded the funds to the wife as her separate property. It also expressly ruled that section 46 of the Probate Code, as amended in 1961, is constitutional.

The reasoning used by the court was quite simple. Article XVI, section 15 of the Texas constitution defines the separate property of the wife. It was amended in 1948 to permit a husband and wife to *partition* their community property into the separate property of each if done by a written instrument.<sup>45</sup> The second paragraph of the 1948 amendment states that the amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments. As a result of this language, the Legislature enacted article 4624a,<sup>46</sup> which requires that partitions be in writing, subscribed and acknowledged. Article 881a-23 was amended in 1957<sup>47</sup> to permit the partition of community property invested in savings and loan shares if done by written instrument. In 1961, the amendment to section 46 was also passed. The Eastland court, realizing that two statutes already provided partition requirements, simply held that the 1961 enactment is *another* law prescribing requirements as to the form and manner of written partition instruments as contemplated by the 1948 constitutional amendment.

#### IV. CONCLUSIONS

The holding by the Eastland court that section 46 of the Probate Code provides another method for executing partition instruments is logically correct. The language of the 1948 constitutional amendment indicates that the vital requirement of partition agreements is that they be in *writing*. Both articles 4624a and 881a-23 (now 852a-6.09) meet this requirement. The 1961 Probate Code amendment also meets this standard since it requires that the husband and wife enter into a written agreement. It is reasonable to assume that the Legislature intended section 46 to be another law providing a method by which marital partners can partition their community property.<sup>48</sup>

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<sup>45</sup> See note 18 *supra*.

<sup>46</sup> *Ibid.*

<sup>47</sup> The following provision was added to Tex. Rev. Civ. Stat. Ann. art. 881a-23 in 1957:  
Joint shares or share accounts issued in the name of a husband and wife may constitute a partition between them of any community funds invested in such shares or share accounts under the provisions of Article XVI, Section 15 of the Constitution of this State if the parties so provide by executing a written instrument and acknowledge the same in the manner now required by law for the conveyance of realty.

<sup>48</sup> The 1948 constitutional amendment allowing partition provided that "laws may be passed prescribing, requirements as to form and manner of execution of such instruments. . . ." Tex. Const. art. 16, § 15 (1876).

For other suggestions as to the Legislature's intent in passing the amendment to section

Of the two methods of partition which existed prior to the passage of the 1961 amendment one is restricted in application and the other is of general application but very strict in its requirements. Article 881a-23 ordinarily applied only to partitions of savings and loan accounts. The other method, partition under article 4624a, requires the written instrument to be subscribed and acknowledged, and the Supreme Court expressly stated in *Hilley* that any survivorship agreement that does not meet either of these requirements will be held invalid. Therefore, the immediate passage of the Probate Code amendment following the decision in *Hilley* indicates that the legislature wanted to provide a simpler method for partition than that allowed by article 4624a.

It should be noted here that the Legislature, in its haste<sup>49</sup> to respond to the *Hilley* decision, failed to word the amendment to section 46 in the terms of the 1948 constitutional amendment. Another sentence should have been added to section 46 to provide that any joint tenancy agreement formed under this amendment will constitute a *partition* under the Texas constitution. Such language would have prevented the confusion which has resulted from the passage of the amendment. However, the parties in *Williams* should not be penalized for the legislature's careless drafting.<sup>50</sup>

Once it is seen that the 1961 Probate Code amendment is another law prescribing a method for partitioning community property, the question arises as to whether such a survivorship agreement actually constitutes a *partition* as contemplated by the 1948 constitutional amendment. The executor of the deceased husband raised this question by contending that a partition under the constitution is a *present* division of property with a vesting of the separate interest immediately upon execution of the partition agreement, whereas property held under a joint tenancy agreement as allowed by the

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46 of the Probate Code, see: Jackson, *Community Property and Rights of Survivorship (After Hilley v. Hilley and H. B. 670)*, 13 Baylor L. Rev. 139, 146 (1961). See also Comment, *Hailey, Hilley, and House Bill 670—A Study in Partition and Survivorship in Texas Community Property*, 15 Sw. L.J. 613, 622 (1961).

<sup>49</sup> The haste with which the Legislature acted is apparent when one realizes that the *Hilley* decision appeared in the Texas Supreme Court Journal on Jan. 25, 1961, and the Probate Code amendment containing an effective emergency clause became law on May 15, 1961.

<sup>50</sup> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

Johnson v. United States, 163 Fed. 30, 32 (1st Cir. 1908).

Probate Code amendment does not vest in the wife as her separate estate until the death of the husband.

The executor's contention is incorrect and could have been answered by the Eastland court. As previously stated, for the purpose of survivorship each joint tenant is the tenant of the *whole* estate. When one of the joint owners dies, his interest does not actually pass to the survivor; the interest of the deceased merely ceases to exist.<sup>51</sup> Nothing passes to the survivor at that time because he was already an owner of the *whole* estate. From the foregoing it is apparent that when the husband and wife execute the written joint tenancy agreement, there results at that every instant a partition of the community property into the separate property of each and the conversion of those separate interests into a joint tenancy with right of survivorship in the surviving spouse. In other words, the separate property vests immediately upon making the written agreement, and each spouse obtains ownership of the whole estate. It does not vest, as the husband's executor contended, upon the death of one of the spouses.

Therefore, the constitutionality of section 46 of the Probate Code needs to be upheld for three reasons. First, section 46 is constitutional since it is merely another law providing for the execution of partition instruments as contemplated by the 1948 constitutional amendment. Secondly, it furnishes a husband and wife with a simple, easy method of partition and eliminates the necessity of meeting the strict requirements of article 4624a. Thirdly, the supreme court's interpretation of section 46 may affect the interpretation of other statutes. A recent statute<sup>52</sup> was passed by the legislature allowing a husband and wife to hold title to their automobile under a joint tenancy agreement. The court's decision as to section 46 may affect the constitutionality of this title statute as well as the current savings and loan statute.<sup>53</sup> Thus, the *Williams* case presents the supreme court with an opportunity to clear up the confusion which has long surrounded section 46 of the Probate Code.

Joseph J. McCain, Jr.

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<sup>51</sup> See text accompanying note 3 *supra*.

<sup>52</sup> Vernon's Tex. Sess. Law Serv. ch. 658, § 24, at 1514 (1965), provides that an automobile title certificate must now contain:

A statement indicating "rights of survivorship" when an agreement providing that the motor vehicle is to be held between a husband and his wife jointly with the interest of either spouse who dies to survive to the surviving spouse is surrendered with the application for certificate of title. This agreement is valid only if signed by both husband and wife and, if signed, the certificate shall be issued in the name of both.

<sup>53</sup> See note 28 *supra*.