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Recent Texas Statutes Affecting Estate Planning

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I. INTRODUCTION

No less than nine statutes affecting estate planning were enacted by the Texas Legislature in its 1961 regular session. Of the nine, the two which overruled the decision of the supreme court in *Hilley v. Hilley* and provided for pour-overs of wills into revocable or amendable trusts, are the most important. The other seven, involving changes of lesser consequence, will be first considered.

II. LESSER STATUTORY CHANGES

A. Investments By Guardians

Chapter 28 added a new subsection to Section 389 of the Probate Code which permits a guardian to invest funds which exceed the amount necessary for maintenance and education of the ward, in interest-bearing time deposits which may be withdrawn within one year after demand. Such deposits may be made in any bank doing business in Texas if payment is insured by the Federal Deposit Insurance Corporation. This statute was certainly a desirable addition to the investments available to a guardian. Other permissible investments are: bonds of the United States, Texas, and local governmental subdivisions of Texas; shares and share accounts of state and federal building and loan associations in Texas, if insured by the Federal Savings and Loan Insurance Corporation; and certain bonds of Texas corporations having a paid-in capital of one million dollars or more.

B. Clarification Of Bond Requirements

Chapter 30 purports to clarify the provisions of the Texas Banking Code, Trust Act, and Probate Code regarding corporate fiduciaries acting without bond. Just how the statute clarifies these basic

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1 161 Tex. 569, 342 S.W.2d 565 (1961).
laws is unclear. The changes in each of the three statutes are miniscule, and yet it is possible that these changes may be significant.

In the Banking Code, for example, prior to amendment, one of the powers of a state bank was:

To act under the order or appointment of any court of record as guardian, receiver, trustee, executor or administrator, and, although without general depository powers, to act as depository for any moneys paid into court *without giving bond as such.*

The language "without giving bond as such" was added in 1957. As rewritten in 1961, the same statute now reads:

To act under the order or appointment of any court of record, *without giving bond,* as guardian, receiver, trustee, executor, administrator and, although without general depository powers, as depository for any moneys paid into the court.

Moving the phrase "without giving bond" from one point in the statute to another may constitute clarification, but it may be doubted whether this is sufficient justification for a new statute which may cause some to wonder whether there has been any change in the law.

Similarly, the clarification in the Texas Trust Act does not appear to have materially changed the law. Section 25L of the Act requires trustees to give bond, unless the trust instrument provides otherwise. However, since its enactment in 1943, a proviso has excepted from this requirement "corporate trustees who comply with the law concerning the deposit of securities with the State Treasurer or any one of his authorized deputies." The new statute excepts "corporate trustees which are authorized by law to act as trustees of any trust affected by this Act." The only additional fiduciaries affected by the new statute would appear to be foreign corporate fiduciaries who are not required to make deposits of securities, but who may be able to serve as fiduciaries in Texas under the new reciprocity statute.

The change in the Probate Code parallels that of the Texas Trust Act in defining "corporate fiduciary."
C. Nonresident Corporate Fiduciaries

Chapter 31 adds Section 105a to the Probate Code which permits out-of-state banks or trust companies to act as fiduciaries to the extent that Texas banks and trust companies are permitted to act as fiduciaries in the jurisdictions where the nonresident banks are organized. In addition, the statute provides for the service of notice or process on such entities, prohibits the establishment of branch offices by them, prohibits the solicitation of fiduciary business in Texas, and provides penalties for violation. 

The new statute thus liberalizes the rules regarding operation as a fiduciary in Texas by an out-of-state institution. Formerly, an out-of-state fiduciary could not qualify as an original fiduciary without first complying with Texas requirements regarding deposit of securities, and the like. On the other hand, the new statute is more restrictive in that nonresident corporate fiduciaries who seek to serve only in an ancillary capacity will now have to show that the jurisdictions in which they are organized allow Texas corporate fiduciaries to serve in an ancillary capacity.

D. Transfer Of Trust Business By Title Companies

Chapter 125 is an interesting footnote to the history of the development of the corporate fiduciary. In the past, trust business has been handled variously by trust companies, title companies, and banks. Since World War II, the pattern of business organization in Texas has been such that the title companies have largely confined themselves to title business, while the trust business has become the province of the trust departments of our major banking institutions. Instruments drafted some years ago may have named the Title and Trust Company as the fiduciary to serve as executor or trustee. Since these institutions are no longer in this business, it has become necessary for them to be relieved of their trust responsibilities and have other fiduciaries appointed to succeed to their responsibilities. Normally, this would require the intervention of a court of equity to supervise the resignation of the old trustee and the appointment of the new.

The new statute makes such intervention unnecessary. The act validates and authorizes the transfer and assignment of all the

11 Only one Texas title company (Guaranty Title and Trust Company, Corpus Christi) has ever developed any substantial trust business.
12 Even the Guaranty Title and Trust Company, Corpus Christi, is reported to have segregated its title and trust business into two new entities, viz., Guaranty Title Insurance Company and Guaranty Trust Company. These corporations are owned by the same persons.
fiduciary business of the title company to a state bank or trust company, without the necessity of judicial action by any court of this State or by the settlor or beneficiary of the trust, estate, or other fiduciary business assigned. The power to make this transfer expires on April 30, 1962. There is no apparent reason why the statute confines the potential assignee to a state bank or trust company, rather than a national bank. Perhaps the draftsman of the statute was contemplating a particular transaction in which a state bank was involved.

E. Shut-in Gas Wells

Chapter 215 amends Sections 367 and 369 of the Probate Code to allow personal representatives to execute oil, gas, and mineral leases which provide for the continuance of the lease beyond the primary term by provisions relating to shut-in gas wells either on the land covered by the lease or on land pooled or unitized therewith. The act further permits the personal representative to amend existing leases to extend the lease beyond the primary term by shut-in gas wells. Finally, leases containing shut-in gas well clauses executed prior to the amendment are validated, with the proviso that such validation does not extend to leases involved in any pending lawsuit in which the validity of the shut-in provision is at issue.

The obvious purpose of this amendment is to make it possible for personal representatives acting under judicial supervision to execute oil and gas leases with shut-in gas well provisions.

F. Self-proving Clause

One of the most interesting changes affecting the law of wills is

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15 Mr. L. H. Gross, President, Guaranty Trust Company, Corpus Christi, Texas, has confirmed this to be true in a letter to the writer. See Appendix.
16 Tex. Prob. Code § 367(c)7 (1957), as amended, Acts 1961, ch. 215, § 1. As amended, the proviso describing the permissible term for an oil and gas lease reads as follows: "provided the authorized primary term shall not exceed five (5) years, subject to terms and provisions of the lease extending it beyond the primary term by paying production ... or by the provisions of the lease relating to a shut-in gas well." (The italicized portion of the statute constitutes the recent amendment.)
17 Tex. Prob. Code § 369(a)(2) (1955), as amended, Acts 1961, ch. 215, § 4. This section is amended to permit extension of the primary term of a lease covering a pooled or unitized area by a shut-in gas well clause which reads: "or as long as there is a shut-in gas well on any part of the pooled or unitized area, if the presence of such shut-in gas well is a ground for continuation of the lease by the terms of said lease."
18 It has been held that independent executors are not subject to the jurisdiction of the probate or district court insofar as such courts empowering them to execute oil and gas leases is concerned. Marshall v. Hobert Estate, 315 S.W.2d 604 (Tex. Civ. App. 1958) error ref. In drafting the powers of independent executors in wills, counsel should include powers of the type authorized by the statutes affecting personal representatives.
the amendment of Section 59 of the Probate Code, having to do with self-proved wills. According to the emergency clause of the statute, "there is a difference of opinion in legal circles as to the necessity of having a married testatrix acknowledge, privily and apart from her husband, a self-proved will or testament." Article 6605 of the Revised Civil Statutes requires that an acknowledgment of any "instrument purported to be executed" by a married woman shall be explained to her and be taken "privily and apart from her husband."

The Legislature might have amended the statute by saying:

Provided that a married testatrix shall not be required to make her acknowledgment privily and apart from her husband.

Instead, it changed the terminology of the statute from "acknowledgment" to "affidavit" and added a proviso, as follows:

Provided that nothing shall require an affidavit, acknowledgment or certificate of any testator or testatrix as a prerequisite to self-proof of a will or testament other than the certificate set out below.

Many practitioners, when handling the execution of the wills of a man and his wife, will probably continue to ask the husband to leave the room when the wife executes her will and her "affidavit" is taken.

G. Probate Of Wills As Muniments Of Title

Texas law has long limited the time in which a will may be admitted to probate. For almost as long, the case law has provided that where the party applying for probate was not in default, a will might be admitted to probate after the period of limitation as a muniment of title. Where there were no debts to be paid and no provision in the will for an independent executorship, attorneys soon realized that they might cut administration costs by seeking probate of wills solely as muniments of title. This has long been done without specific statutory authority. The need for the statute arose when "transfer agents and other persons are sometimes unwilling to make delivery or transfer of property over to persons entitled under a will which has been admitted to probate as a Muniment of Title." Section 89 was therefore amended to provide for such probate and insure that the transfer agent would transfer
The following paragraphs have been added to the statute:

Probate of Wills as Muniments of Title. In each instance where the Court is satisfied that a will should be admitted to probate, and where the Court is further satisfied that there are no unpaid debts owing by the estate of the testator, excluding debts secured by liens on real estate, or for other reason finds that there is no necessity for administration upon such estate, the Court may admit such will to probate as a Muniment of Title.

The order admitting a will to probate as a Muniment of Title shall constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, and to persons purchasing from or otherwise dealing with the estate, for payment or transfer to the persons described in such will as entitled to receive the particular asset without administration. The person or persons entitled to property under the provisions of such wills shall be entitled to deal and treat with the properties to which they are so entitled in the same manner as if the record of title thereof were vested in their names.26

While the statute says nothing about the time limitations in which a will may be admitted to probate, it would seem that there would be the same time limitation for admission to probate as a muniment of title, as for admission generally. In other words, one applying for probate as a muniment of title after the period of limitation would have to show that he was not in default.

III. MAJOR STATUTORY CHANGES

A. Joint Tenancy Of Community Property

In 1848, Texas abolished all distinctions among the types of common ownership recognized at common law.27 What is now Section 46 of the Probate Code has ever since provided that whatever the form of common ownership—joint tenancy, tenancy in common, tenancy by the entirety, or coparcenary—all are treated as tenancies in common. This result was further confirmed by case law during the nineteenth century.28

In 1939, the Galveston Court of Civil Appeals ruled that it was

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possible to have a contract among joint owners to give a survivor a right to the property commonly owned. The precise nature of this contract has not been fully articulated, but in 1955, the Probate Code gave it recognition by providing that "by 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." In 1961, the supreme court ruled that such a contract was not possible as between husband and wife where community funds were used. The Legislature quickly overruled this result by adding 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." In so doing, the Legislature injected a property concept into an area previously approached from a contractual point of view, and altered some basic property law concepts. In common law jurisdictions, it is not uncommon to find many lay persons who believe that the necessity for probate may be eliminated by the use of joint tenancies in real estate, government bonds, securities, savings and loan association accounts, savings accounts, checking accounts, etc. Banks have generally encouraged this type of ownership on the theory that, at the death of the first joint tenant, the property would pass to the survivor, without the necessity of administration, thereby saving administration expenses and providing for efficient passing of the property. Additional savings would be achieved by eliminating the need for a will. Although this was the policy behind the Legislature's overruling of Hilley v. Hilley, such a fundamental change in Texas law deserves more careful consideration than hasty legislative action has provided.

1. Case Law Background of the Hilley Case

The first Texas case to uphold survivorship agreements was

33 As a practical matter, this is often untrue. In Oklahoma, for example, title companies often require a copy of letters testamentary, or of administration, before they will insure a title based on a deed from the surviving joint tenant. While the joint tenancy is not part of the probate estate, the requirement is said to be made in order to prove the death of the decedent. A death certificate is said to be insufficient. The survivor's inability to obtain funds from joint accounts after the death of a joint tenant, before tax clearances have first been obtained, is a familiar fact of business life.
There, the original owner of Blackacre conveyed to Charles and Luther, brothers, as joint tenants. Luther died, and Charles conveyed the fee to himself and Denman, another brother, as joint tenants. Charles and Denman conveyed to appellant. Appellant contended that he received an undivided one-half interest from Charles and Denman, since the other undivided one-half descended to Luther's heirs at his death. The court held that while the statute had abolished joint tenancy, "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," and, accordingly, appellant had obtained the entire fee by the conveyance of Charles and Denman.

In Edds v. Mitchell, a testator died in 1915, leaving a will in which he gave his one-half of the community to his wife for life, with a power of sale over the remainder. After the death of his wife, any portion of his estate remaining undisposed of was to pass to his heirs, subject to a monthly charge payable to a servant. The husband died and the wife sold some of the real estate of the community and used the proceeds to buy United States Savings Bonds, payable to herself, and at her death, to Retta B. Edds. She then died in 1941, leaving a will in which she gave her property to her nephew. The Texas Supreme Court held that proceeds from the sales of the husband's one-half of the community, apart from the bonds, passed to his remaindermen, and not to the nephew. But with regard to the bonds, it ruled that the "situation of the parties . . . is substantially the same as that of the parties to [an] insurance policy. Mrs. Edds is the third party for whose benefit the contract between Mrs. Rhode and the Government was made, the Government agreeing to pay the bonds to Mrs. Edds on the death of Mrs. Rhode. The latter could not change the beneficiary named in the bonds, but she could defeat the beneficiary's interest by collecting them. Under the rule of the life insurance cases, Mrs. Edds' interest, although defeasible, was a vested interest created by the issuance of the bonds." The cases established two substitutes for testamentary disposition. A party might contract with another for rights of survivorship in their jointly owned property, or contract with another to
pay over property to a third party beneficiary upon the death of the first party. In *Chandler v. Kountze*, Charles and Luther used their community funds to obtain Blackacre, originally. But in the absence of fraud, their respective spouses could not complain of their inter vivos acts as managers of their respective community estates. *Edds v. Mitchell* suggests the hypothetical problem of the use of community funds for contracts *in futuro* as distinct from a contract for joint ownership *in praesenti*. Suppose that husband, H, uses community funds to buy Government bonds, payable to himself, and on his death, to X. H dies. May W complain that she is entitled to one-half of the bonds?

*Pruett v. First Nat'l Bank* is illustrative of the protection given the bank that pays a survivor of a joint account. A mother and son had a joint savings account payable to “T. H. Pruett or Mrs. Nancy J. Dyess, or either of them.” The son died intestate, and the mother withdrew the funds in the account for the benefit of her daughter and niece. The mother died intestate, and her other sons contended that they had inherited one-half of the account from their brother, and that after his death the bank could not pay his one-half interest to anyone else. But the court held that since the bank had no notice of the son’s death prior to payment, it was free to pay the survivor.

*Shroff v. Deaton* involved a federal savings and loan association account of H and W, holding “as joint tenants with right of survivorship and not as tenants in common.” H died, leaving a will which did not dispose of the fund on deposit with the association. His children by a prior marriage contended that they were entitled to one-half of the fund, as heirs of his one-half of the community. The trial court concluded that H had made an inter vivos gift of his interest in the account to W by delivering the passbook to her shortly before his death. In affirming this holding, the court of civil appeals, by way of dictum, commented: “[W]here the contract is clear and explicit in creating a joint tenancy with right of survivorship, and there is no fraud, undue influence, mistake, or

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39 Tex. Rev. Civ. Stat. Ann. art. 881a-23 (1953) provides similar protection for joint shares of building and loan or savings and loan associations. Further, this statute specifically provides that the issuance of such shares “in the name of husband and wife may constitute a partition between them of any community funds invested in such shares or share accounts under the provisions of Tex. Const. art. XVI, § 15, 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.” Tex. Rev. Civ. Stat. Ann. art. 881a-23 (1953), as amended, Acts 1937, ch. § 1, at 1319.
other infirmity relied upon . . ., the courts are bound by the
agreement.'"41

In Olive v. Olive,42 decedent had a checking account with her
nephew, the account card of which provided that the bank was
authorized "to pay to either of the undersigned, or to the survivor
of them." The nephew contended that he was entitled to the fund
either on the theory of an inter vivos gift upon the establishment of
the account, or by way of survivorship upon the death of his aunt.
The court rejected both of these contentions, stating that "there was
no final act carrying to completion the intention of the donor," and
that "neither does the form and content of this joint deposit card
conclusively establish ownership of the account in appellant."43 This
case was later distinguished from one in which the decedent and his
niece executed an instrument stating that "all funds now, or here-
after, deposited in this account are, and shall be our joint property
and owned by us as joint tenants with right of survivorship, and
not as tenants in common; and upon the death of either of us any
balance in said account shall become the absolute property of the
survivor. . . . It is especially agreed that withdrawals of funds by
the survivor shall be binding upon us and upon our heirs, next of
kin, legatees, assigns and personal representatives."44

Upon death of the decedent intestate, this language was sufficient
to pass the balance in the account of the niece, as against the widow
of the decedent. Without stating why, the court noted that "we
prefer the view that [the decedent] . . . made gifts in praesenti to
[the niece] . . . of all deposits made by him subject to the terms of
the agreement."45

In Reed v. Reed,46 the Dallas Court of Civil Appeals was presented
with the same basic facts that later appeared in the Hilley case. The
deceased and his second wife placed community funds in shares of
savings and loan associations in their joint names with rights of
survivorship, and also placed equal amounts in their separate names
in the Postal Savings System. Upon the death of the decedent intes-
tate, his widow contended that she was entitled to the amounts
remaining on deposit as her separate property, but the court held
that these amounts were part of the community estate, and in the
absence of the satisfaction of the appropriate constitutional and

41 Id. at 492.
43 Id. at 493.
45 Id. at 403. The court did not state whether the deposits of decedent were from
community or separate funds. Query: Is this material?
statutory requirements regarding voluntary partition, the decedent's interest in these community assets descended to his heirs.

Finally, in two cases involving or bonds owned by persons other than husband and wife, it was held that such bonds pass outside of the probate estate, and that the survivor is entitled to claim the whole property in the bonds.47

In summary, prior to the decision of Smith v. Ricks48 the state of the law was as follows:

1. Joint tenancies were not recognized in Texas,49 but parties were free to contract so that persons having common ownership of property might have survivorship rights in the property upon the death of any common owner.50

2. Husbands and wives were free to so contract with respect to their separate property.51 If community property were involved, compliance with the constitutional and statutory requirements with regard to voluntary partition was necessary.52

3. Co-owner bonds53 or "p.o.d."54 bonds constituted contracts wherein the property vested absolutely in the named beneficiary upon the death of the decedent, and such bonds were not part of the decedent's probate estate.

4. Banks and savings and loan associations were free to pay the survivor of a joint account, upon the death of one of the parties without regard to who was entitled to the property, at least where the bank had no notice of the demise of one of the depositors.55

5. Under certain circumstances, it was possible for the decedent to have made a gift inter vivos which would vest the property in the co-owner prior to the demise of the decedent.56

In Smith v. Ricks, the supreme court was faced with the choice between Reed v. Reed, involving a survivorship agreement where

51 See Reed v. Reed, 283 S.W.2d 311, 314 (Tex. Civ. App. 1955), wherein the court quotes the rule of the Bruce cases, discussed infra at note 62.
community funds were used, and *Chandler v. Kountze*, where community funds of husband and wife were not involved. The supreme court chose the latter, finding that co-owner bonds purchased with community funds passed outside of the probate estate to the survivor of husband and wife.

In his dissent, Justice Walker noted the difference between *or* bonds and *p.o.d* bonds. If *or* bonds are used, (as between husband and wife) the analogy to life insurance contracts breaks down if the wife dies first. The husband's taking by right of survivorship would not fall into any one of the categories whereby Texas law permits a wife to pass community property to a husband.

2. The Hilley Case

*Hilley v. Hilley* involved securities purchased with community funds and issued to the husband and wife "as joint tenants with right of survivorship and not as tenants in common." Upon the death of the husband intestate, his son by a prior marriage contended that the property was community and his father's one-half interest descended to him. The widow contended she was entitled to the securities as her separate property. Despite the supreme court's decision in *Smith v. Ricks*, the Waco Court of Civil Appeals agreed with the son.

The supreme court affirmed, Justice Walker noting that any attempt to provide for rights of survivorship as between husband and wife using community funds, would be unconstitutional:

> In the first place, any such attempt could not be effectual in so far as the wife is concerned. Under the Constitution, property which she acquires during marriage in any manner other than by gift, devise, descent, purchase with separate funds, or partition as authorized by Articles 4624a and 881a-23, does not and cannot be made to constitute her separate property. *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799.

In the second place and while we do not attempt to decide the question here, it seems that our Constitution and statutes already provide a method whereby the spouses may arrange for property which once constituted part of their community estate to vest in the survivor if the necessary formalities are observed. Community property may be partitioned in the manner provided in Article 4624a, and the portion set apart to each spouse thereupon becomes his or her separate estate. Article 4614 provides that the wife, if she is at least twenty-one years of age and elects in the manner set out therein, shall have the sole management, control and disposition of her separate property, and in connection therewith may contract without the joinder of her husband. If the wife thus acquires power to contract with the husband regarding her separate estate, there apparently is no legal reason for saying

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57 161 Tex. 569, 342 S.W.2d 565 (1961).
that they cannot make an effective survivorship agreement covering property separately owned by either or both. Under such circumstances the survivorship right or interest acquired by each at the time of making the contract would be by gift or purchase for a consideration paid out of separate property.\(^5^\)

In short, where husband and wife use separate funds to purchase property with reference to which they execute a survivorship agreement, the agreement will pass the property to either upon the death of the other; but if community funds are used, there must be a voluntary partition of the property in accordance with the Constitution and statutes.

Within a week following Hilley, the supreme court decided Pollard v. Steffens.\(^6^\) There, husband and wife used community funds to obtain (1) building and loan shares "as joint tenants, with right of survivorship," (2) federal Credit Union deposits "with right of survivorship," and (3) United States Savings Bonds, payable to husband or wife. The husband died intestate, survived by his second wife and a son by a prior marriage. The probate court entered a consent decree awarding all of the properties to the wife by reason of the survivorship provisions. The son later brought a bill of review in the district court on the theory that there had been a mutual mistake of law with respect to the legal effect of the survivorship provisions. The district court held that the son was entitled to one-half of the building and loan stock and one-half of the credit union deposit, but that the wife was entitled to all of the or bonds. The court of civil appeals, relying on Smith v. Ricks, ruled that all of the properties belonged to the wife, and denied the son's bill of review. On appeal, the supreme court affirmed on the theory that the son, a practicing attorney, should have known that, as of the time he consented to the probate decree, the question of survivorship agreements affecting community property had not been fully resolved by the supreme court. He should have contested, rather than consented. Having permitted a judgment to go against him, he was bound by the decree in the absence of fraud.

Since Hilley v. Hilley, federal government bonds purchased with community funds and held in the name of husband and wife as joint tenants have been held to be governed by the rule of the case, but the United States Supreme Court has granted certiorari to consider whether Treasury regulations requiring the government to pay the

\(^5^\) Id. at 579, 342 S.W.2d at 571.

\(^6^\) 161 Tex. 594, 343 S.W.2d 234 (1961).
survivor should take precedence over local law. Shares of a savings and loan association held by husband and wife as joint tenants have also been held to pass as part of the husband's probate estate. But in the case so holding, the husband used his separate funds to purchase the particular shares involved. Accordingly, it is questionable whether the rule of the *Hilley* case was pertinent to the decision.

The perils of trying to predict the outcome of a highly contested point of law are obvious and equally present today. Justice Walker assumed that, for a joint tenancy to be good between husband and wife using community funds, there must be compliance with *both* the Constitution and the statutes.

Prior to 1948, a statute seeking to alter the basic scheme of community and separate property would probably have been held unconstitutional. In that year, the section of the Constitution defining separate and community property was amended by addition of the following:

> [P]rovided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme 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, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject. . . .

Though not required to do so, in 1949, the Legislature did prescribe the necessary forms for compliance with the 1948 Amendment. The partition or exchange had to be by written instrument subscribed and acknowledged by both spouses, and "if such instrument purports to exchange property or to partition property be-

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63 Tex. Const. art. XVI, § 11. A further sentence of the 1948 Amendment made constitutional any anticipatory legislation which the Legislature might pass.
between the husband and wife, otherwise than as equal undivided interest in the same property, or as equal shares or units of identical personal property," it had to be approved by the district court."

3. House Bill 670

The 1961 proviso requires only a "written agreement" to create a joint estate with rights of survivorship. It is thus far easier to create a "joint estate" than to partition the community. The following alternatives might be urged:

(1) The 1948 Constitutional amendment was self-operative; the Legislature was permitted, but not required, to enact legislation prescribing the forms for the partition of the community; the 1961 proviso prescribes the necessary formal requirements, viz., written agreements; these formal requirements are wholly independent of the 1949 statute which could require judicial approval; or (2) assuming that the 1961 proviso is governed by the 1949 statute's formal requirements, judicial approval is required only where there is an unequal partition; since the use of community funds to create a joint estate with rights of survivorship means that the parties will continue to own "equal undivided interest in the same property," or "equal shares or units of identical personal property," the parties are required only to execute "a written instrument subscribed and acknowledged by both spouses in a manner now required by law for the conveyance of realty."^65

Ironically, if the 1961 statute is valid, it would appear to allow a husband and wife to do more with their community funds than they are presently permitted to do with their separate funds. Similarly, they may do more with their community funds than other parties may do with either separate or community funds.

This is because the proviso injects a property law concept into an area previously dominated by contract. A valid partition, under the Constitution and statute, changes the community estate into separate property of the husband and wife. Presumably, if valid, the 1961 proviso would likewise change the community estate into the separate property of the husband and wife.

At common law, if a joint tenant transferred his interest to another, the right of survivorship disappeared and the joint tenancy


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 16, 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.
became a tenancy in common. Will such a theory apply to the "joint estate" created by the 1961 statute? Suppose, for example, that H and W buy Blackacre, taking title as "joint tenants with right of survivorship, and not tenants in common," thereby creating a "joint estate" under the new proviso. H then sells his interest to X. The joint tenancy would terminate and W and X would hold Blackacre as tenants in common. W's undivided one-half interest would be her separate property and the proceeds which H received from X would be his separate property. H might then invest these proceeds in other properties, which in turn would be his separate property. The net result would be that he would be able to convert his interest in the community estate into separate property without adherence to the formalities required by the 1949 statute. W, of course, would be free to do likewise. An alternative interpretation would be to require judicial approval of any later conversion of the joint estate, and in the absence thereof, the property would return to its community status. Still another interpretation is to say that the proviso made it possible for husbands and wives to contract that certain properties would pass to one another outside of their probate estates, on the theory of Edds v. Mitchell and Smith v. Ricks.

The 1961 proviso was a piece of fundamental legislation affecting our basic property law. When this statute ultimately comes before the supreme court, that body will be faced with some difficult choices.

1. The statute might be held unconstitutional as violating Art. 16, Sec. 15, of the Constitution, as amended. But to reach this result, the court would have to rule that the formalities required by the 1949 statute were equally applicable to the 1961 proviso.

2. The statute might be held constitutional on the theory (1) that the Amendment was self-operative, and the proviso was a law "prescribing requirements as to the form and manner of execution of such instruments," or (2) that the Constitution required that the 1961 proviso conform to the requirements of the 1949 statute, and that these requirements were somehow satisfied.

3. Assuming the statute was constitutional, it might be interpreted to mean either (1) that, upon the creation of a "joint estate," husband and wife would thenceforth hold their undivided one-half interests as separate property, which would remain separate property upon subsequent conversions of the property; (2) that such sepa-

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63 Mr. John N. Jackson of the Dallas Bar believes the courts will reach this result. In the meanwhile, "banks, corporations, transfer agents, executors and administrators should treat the law as being that declared by the Hilley case rather than . . . [the statute]." Joint Tenancies, 24 Tex. B.J. 710, 711 (1961).

67 Tex. Const. art. XVI, § 15, par. 2.
rate properties might be so created, but that if the joint estate were ever severed, the interests of the parties would revert to the community estate, unless there was a partition; or (3) that the statute allows certain rights to be created by contract, which arise only upon the death of either husband or wife.

The policy issue is the extent to which it is desirable to maintain the formalities that surround the execution of a will. A well drafted will, with the appointment of an independent executor, can accomplish more efficiently and cheaply all that could be achieved by any survivorship agreement or “payable on death” clause.

B. Pour-overs

The last change likewise raises questions with regard to the fundamental philosophy of the statute of wills. Since the deceased is unavailable to state his true intentions upon the later construction of a will, the law has traditionally surrounded the execution of a will with extensive formalities. By way of contrast, inter vivos trusts have required less formality either upon their creation or termination, and the court of equity has always been available to add greater flexibility where the trust instrument was deficient in so providing.

With the increasing use of inter vivos trusts during the past quarter century, many testators have thought it quite desirable to be able to pass their residuary estates to trusts in existence, usually created by themselves during their lifetimes. One way to accomplish this result would be to give the estate to the same trustee as the one holding the assets of the inter vivos trust, under precisely identical terms, with the further provision that the trust so created by will should be administered in solido with the inter vivos trust.

A much simpler method would be to provide that the assets should pass to “X, Trustee, under the Y Trust established by the transfer in trust of ________ date.” This is the concept of the “pour-over.” By such a clause in his will, the testator typically turns over certain assets of his estate (usually, the residuary estate) to X a certain trust to be administered by the trustee along with other assets passed to the trustee during the testator's lifetime. The advantages of the pour-over are extensive. But their validity at common law has sometimes been a question of doubt.

69 It is, of course, possible to pour-over estate assets into a trust created by someone other than the testator. The Texas statute clearly comprehends both of these possibilities. In the text, however, we assume the usual situation, viz., where the testator seeks to pour-over to an inter vivos trust that he has created. No case involving the incorporation of a trust established by another has been found.
70 However, only Louisiana would seem to prohibit pour-overs altogether.
Two case law doctrines have been used to support the legality of pour-overs, viz., incorporation by reference and acts of independent legal significance or the doctrine of non-testamentary act.

By the first of these, the testator must specifically refer to the document which he intends to incorporate into his will, and such document must be in existence at the time of the execution of the will.\(^7\) If the trust is neither amendable nor revocable, the ability to pour-over has rarely been questioned. But if the testator poured over the probate estate into an inter vivos trust in which he retained a power of revocation or modification, a few cases held that the ability to change the over-all plan later by an unattested instrument invalidated the entire plan.\(^7\) Subsequently, the majority of jurisdictions departed from this view by allowing a pour-over to a revocable or amendable trust, but permitting the incorporation by reference only of the terms of the trust as it existed as of the date of the execution of the will.\(^7\) If the trust was later amended, the testator's estate plan could be properly effectuated only by the later execution of a valid will or codicil.

By the second doctrine, i.e., non-testamentary act, it is immaterial whether the amendment precedes or follows the execution of the will. The will refers to the trust as an entity having a significance

\(^7\) It is not necessary that the trust be created prior to the execution of the will. Where the testatrix was planning to execute both a will and trust instrument on the same day, it was not necessary to prove that the instrument was executed before the will, since it was clear that the trust document was in existence at the time of the will's execution. Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51, 21 A.L.R.2d 212 (1950).

\(^8\) Atwood v. Rhode Island Hosp. Trust Co., 275 Fed. 513 (1st Cir. 1921), cert. den. 217 U.S. 661 (1922); Boal v. Metropolitan Museum of Art, 298 Fed. 894 (2d Cir. 1924); President & Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 21 N.Y.S.2d 232 (1940). Later federal rulings conformed the Atwood and Boal cases to contrary Rhode Island decisions. The Janowitz case may be distinguished from the In re Matter of Ivice's Will, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958), on the theory that, in the former case, substantial amendments were involved. But the basic philosophy of the two cases is at odds. See Trachtman, Pour-Overs, 97 Trusts & Estates 416 (1958).

\(^7\) This result was reached even though the trust was subsequently amended in Koeninger v. Toledo Trust Co., 49 Ohio App. 490, 197 N.E. 419 (1934). See also State ex rel. Citizens Nat'l Bank v. Superior Court, 138 N.E.2d 900 (Ind. 1956). Many cases have reached the same result where there was no later amendment. In re York's Estate, 95 N.H. 435, 65 A.2d 282, 8 A.L.R.2d 611 (1949); Bolles v. Toledo Trust Co., 114 Ohio St. 195, 58 N.E.2d 381, 157 A.L.R. 1164 (1944) (decision made with reference to Ohio statutes); Old Colony Trust Co. v. Cleveland, 291 Mass. 380, 196 N.E. 920 (1933); Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51, 21 A.L.R.2d 212 (1950); Swetland v. Swetland, 102 N.J. Eq. 294, 140 Atl. 279, aff'd, 100 N.J. Eq. 196, 134 Atl. 822 (1928) (incorporation of revocable trust permitted); Continental Ill. Nat'l Bank & Trust Co. v. Art Institute, 341 Ill. App. 624, 94 N.E.2d 602 (1950); First-Central Trust Co. v. Claffin, 49 Ohio L. Abs. 29, 73 N.E.2d 388 (Ohio 1947); Shawnee v. City Bank Farmers Trust Co., 6 Ohio Op. 309 (Ohio Prob. Ct. 1936); In re Willey's Estate, 128 Cal. 1, 60 Pac. 471 (1900); Glazefelter's Estate, 60 York Leg. Rec. 77 (Pa. 1946); In re Snyder's Will, 125 N.Y.S.2d 459 (N.Y. Surrogate 1953); Re Schintz Will Trusts, [1951] Ch. 870, 1 All Eng. 1091 (1971); but cf. [1942] Ch. 328, 1 All Eng. 642 (1942) (testamentary gift to trustees appointed or to be appointed).
independent of any testamentary intent. The testator is free to amend the trust subsequent to the execution of his will in much the same way as he would be free to change the contents of his home where his will provided "I give my home and all its contents to X."

In Matter of Rausch,4 Chief Judge Cardozo drew an analogy with a gift to a corporate entity: "A gift to a trust company as trustee of a trust created by a particular deed identifies the trust in describing the trustee, like a gift to a corporation for the use stated in its charter." Since the will does not "speak" until death, we look to the terms of the trust as of this time in order to determine the terms that will govern the gift to the trust. While Rausch involved a gift to a trust which was neither amendable nor revocable, the New York Court of Appeals recently indicated that it will hold valid a gift to an amendable trust, and will allow the post-execution amendments to govern, so long as they are not substantial.75

The Texas statute is a synthesis of the doctrines of incorporation by reference and non-testamentary act. The statute requires that the terms of the trust to which the assets are poured over must be "evidenced by a written instrument in existence before or concurrently with the execution of such will and which is identified in such will," but the terms are determined as of the date of the death of the testator, rather than as of the time of execution. A post-execution amendment need only be in writing. If the trust is revoked or terminated during the testator's lifetime, the gift to the trust lapses.

The advantages of the statute are obvious:

1. The draftsman is not required to repeat verbatim complex and lengthy trust terms.

2. There is no danger of the testamentary trust assets being treated separately from the inter vivos trust assets.76

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75 This would appear not to be a problem in Texas, in view of the tradition of naming one entity or individual both independent executor and trustee. Moreover, there is no reason to suppose that the "in solido" clause would not be effective in this jurisdiction. In some states (e.g., California), however, it is not possible to merge testamentary and inter vivos trusts. This is due to the fact that these jurisdictions impose a greater amount of court supervision over testamentary trusts. For this reason, some of the recent pour-over statutes specifically provide that the probate assets shall be administered as part of the existing trust, and shall not be subject to the judicial supervision that normally accompanies testamentary trusts. See, e.g., Conn. Gen. Stat. Ann. § 45-173 (1960), as amended by Conn. Pub. Acts 1959, No. 421; Miss. Code Ann. § 661.5; Neb. Rev. Stat. § 30-1806, as amended Neb. Sess. Laws 1959, ch. 127, at 462 (providing the trustee or one of the co-trustees is a corporate trustee authorized by law to exercise trust powers); Mont. Rev. Codes Ann. § 91-321 (Supp. 1961); Pa. Stat. Ann. tit. 20 § 180.14a.
3. Cost of administration of the estate may be minimized.  

4. Publicity of the testator's estate plan may be avoided, since only his will giving his estate to the "X Trust" becomes a matter of public record.

5. The testator is free to amend or revoke his gift at any time by an unattested instrument, so long as he has retained these powers in the inter vivos trust.  

On the other hand, in departing from the fundamental restrictions of the statute of wills, several dangers may be noted:

1. Amendments to the inter vivos trust need only be in writing. There is no requirement that they be in the handwriting of the settlor or that they be signed.

2. If the trust is revocable, the testator may effectively revoke his will without adherence to formal requirements. An oral communication to the trustee would be sufficient to cause a lapse, with resulting intestacy.

3. These weaknesses are intensified where the settlor names an individual, including himself, rather than a corporate entity, as trustee.

On balance, however, the advantages in promoting flexibility in the estate plan outweigh the possible disadvantages that accompany the necessary relaxation in the requirements of the statute of wills.

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77 In Texas, this is not so great because of the use of the independent executor. The effect of the statutes in many states however (supra note 76) is to make for a system of administration not unlike Texas' independent executorship.

78 In planning, the draftsman may feel that tax reasons require that a portion of the assets of the settlor-testator be placed in an irrevocable, unamendable trust. The balance of his estate would be placed in an amendable, revocable trust.


81 Cf. the Nebraska statute, supra note 76, requiring that at least one of the trustees be a corporate entity, presumably in order to give some form of institutional protection against potential fraud.
APPENDIX

Letter From Guaranty Trust Company, Corpus Christi, Texas

Mr. Harold G. Wren
Professor of Law
Southern Methodist University
Dallas, Texas

August 8, 1961

Dear Mr. Wren:

In order to answer your letter of July 21 more clearly, it is necessary that I give you some historical background of the legislation enacted by the 57th Legislature as H.B. 226 to which you made reference, presently appearing on page 243 of 1961 Vernon’s Texas Session Law Service.

First, please refer to Art. 1314a which appears in Title 32 in Vernon’s Civil Statutes, Vol. 3, Chap. 2, Private Corporations. That article, containing four sections, was enacted as H.B. 280 of the 56th Legislature, regular session, for the sole purpose of enabling San Antonio Loan and Trust Company to establish itself as a state banking institution instead of continuing to exist as a special corporation chartered under an 1879 statute with a charter issued by the Secretary of State. When Mr. Ben Glusing, our legislative representative from Kingsville, and I had a conference with Mr. Cap Richards, Assistant Attorney General, we were advised to pattern our bill as closely as practicable to the wording of the 1959 enactment above mentioned. At my appearance at the public hearing before the House Judiciary Committee, to which this bill was referred, one of the questions asked me was whether there was any precedent by which our bill was justified. Senator Bruce Reagan handled the bill in the Senate.

In answer to that question it gave me an opportunity to explain that Guaranty Title and Trust Company and two other corporations chartered originally under Art. 1302a enacted in 1929, with charter granted by the Board of Insurance Commissioners, are the only ones affected by enactment of legislation so that trust business of an insurance corporation could be legally and expeditiously placed in a corporation chartered under the State Department of Banking. At a previous hearing before the State Board of Insurance, as it is now called, it was suggested to me that Guaranty Title and Trust Company should get its trust operations out from under the Insurance Department. In our study and activity toward accomplishing that result we found ourselves faced with the problem of having to go into probate court in numerous guardianships, trusts and administrations with a tender of resignation and application for appointment of a substitute fiduciary, all of which would result in considerable delay and cost. Having become acquainted with the previous legislation, we hit on the idea that the Legislature would readily understand our need as paralleling the previous need of the San Antonio Loan and Trust Company which had found itself in almost the same identical dilemma.

In order to make a further explanation and showing before the House

Committee to justify our bill's being placed on the non-contested calendar, I personally obtained consent and approval from the Banking Commissioner, the three-man Board of the Department of Insurance, and with Mr. Glusing's cooperation, obtained the approval of the Attorney General's Department for the form, legality, and justification of our requested legislation. In addition, when I appeared before the House Committee, I had authority to state that the Presidents of the other two corporations chartered under the same law had approved the legislation also.

As you can readily see, none of the interested people had in mind any possibility of a national bank corporation being involved in the matter. None of the Texas officials were interested in expediting a merger other than between two Texas corporations, and certainly I did not want to inject some new idea which might call for delay and further hearings. Neither did we want to become involved with federal regulations or having to obtain the approval of the Federal Banking Department.

There was already ample authority in Art. 9, Chap. 3, of the Texas Banking Code for incorporation or reorganization for taking over the business of "any incorporated bank or banks, state or national, as a step in the reorganization of such bank or banks," etc. We felt that once we became legally chartered and operating as a trust company under the State Banking Department, we could, without additional legislation, reorganize as a national bank or merge with a national bank or another state bank; while as we were originally chartered, under the insurance laws we were unable to transfer our trust business to any other corporation.

Under charter duly issued by the State Banking Department of Texas, we opened for business under the name of Guaranty Trust Company on January 1, 1961, as successor to all the fiduciary powers and accounts and as holder of all properties previously managed and controlled by Guaranty Title and Trust Company.

As of April 4, 1960, Guaranty Title and Trust Company transferred all its title insurance business to a new corporation chartered under the Texas Insurance Code under the name of Guaranty Title Insurance Company. Presently Guaranty Title and Trust Company, the old corporation, is waiting for a public hearing on August 15 to obtain authority to merge its final assets with Guaranty Title Insurance Company and then surrender our old charter. As a result of the split of the old company, the same stockholders will receive an equivalent number of shares of stock in each of the two new companies.

Since I am the one primarily responsible for the introduction and passage of H.B. 226, I must, of course, take the blame for any mistakes made, and I am perhaps in better position than anyone else to explain the peculiar situation which you have discovered.

Having had considerable experience previously over a period of many years in trying to get legislation through both Houses of the Texas Legislature, I was very conscious of the necessity of avoiding any side issues or possible delaying action which might be caused by opposition. As it happened, both Houses unanimously approved our little bill without a contest.

Yours very truly,

L. H. Gross, President