POD, TR, ITF, JT TEN, JTWROS, AND CPWROS:

WHAT YOU DON'T KNOW CAN BE HAZARDOUS TO YOUR CLIENT'S ESTATE PLAN

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by

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I. INTRODUCTION

A. Scope of Outline. This outline begins with an overview of the rules applicable to multiple-party accounts in financial institutions found in Part 1, Multiple-Party Accounts, of Chapter XI, Nontestamentary Transfers, Texas Probate Code, as well as the rules applicable to community property with right of survivorship agreements found in Part 3, Community Property With Right of Survivorship, Chapter XI, Texas Probate Code. Also included are discussions of relevant FDIC deposit insurance rules applicable to various types of accounts. Then follows a discussion of the advantages and disadvantages of using multiple-party accounts for estate planning purposes, as well as selected issues arising in the estate planning and estate administration context.

B. Definitions. Before discussing the rules applicable to specific types of accounts, it may be helpful to review the definitions of a few terms used in Part 1 of Chapter XI of the Texas Probate Code. (Definitions of more terms are included in the text as they become relevant.)

1. Financial Institution. A "financial institution" is an organization authorized to do business under state or federal laws relating to financial institutions, including banks, trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions. Since September 1, 1993, the term has also included brokerage firms that deal in the sales and purchases of stocks, bonds, and other types of securities. [Prob C §436(3).]

2. Account. An "account" is a contract of deposit of funds between a depositor and a financial institution. The term includes checking accounts, savings accounts, certificates of deposit, share accounts, and other similar arrangements. [Prob C § 436(1)[1].]

This definition clearly includes all deposit accounts with financial institutions. Is it not clear whether this definition would include other types of arrangements, such as a brokerage account which holds securities held in street name, since they do not involve deposits of funds. [See Reis, Dianne, *Texas Estate Planning*, §2:61 (James Publishing 2011), citing Karisch, Multiple Party Accounts in Texas, 2002, pages 4-5 (prepared for the Elder Law Institute sponsored by Texas Bar CLE on March 22, 2002.]

3. Party. A "party" is a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. The term may also include a guardian, personal representative, or assignee, including an attaching creditor, of a party. The term also includes a person identified as a trustee of an account for another, whether or not a beneficiary is named. The term does not

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[1]Unless otherwise noted, all references are to the specified section of the Texas Probate Code as amended as of September 1, 2011.

include a P.O.D. payee or beneficiary of a trust account until he survives the original payee or trustee. [Prob C §436(7).]

Please note that the term "party" is not synonymous with the term "owner." As discussed below, a person may be a "party" to a joint account but have no ownership interest in the funds on deposit in the account.

4. Multiple-Party Account. A "multiple-party account" is a joint account (with or without a right of survivorship), convenience account, P.O.D. account, or a trust account. [Prob C §436(5).]

The term "multiple-party account" can be confusing. The term clearly includes a "joint account," which actually has more than one "party." However, the term also includes a "P.O.D. account" which often has only one party (the original payee), since a P.O.D. payee (the beneficiary) is not considered to be a party. Similarly, a "trust account" is a multiple-party account, even though a "trust account" with only one trustee has only one party, since the beneficiary is not a party to the account..

II. JOINT ACCOUNTS

A. Introduction. The definition of "joint account" under the Probate Code is "an account payable on request to one or more of two or more parties whether or not there is a right of survivorship." [Prob C § 436(4).] This definition is broad enough to include several distinct types of joint accounts:

- An account owned jointly ***without*** right of survivorship. This is referred to under the Texas statute and on most Texas bank deposit agreements as a "multiple-party account without right of survivorship." [Prob C § 439A(b)(3).] In other states this would often be referred to as a "tenants in common" account. In other states, the term "tenants in common" is commonly abbreviated as "TEN COM" in the style of bank accounts, brokerage accounts, and on securities.

- This category of account would include those accounts consisting of the community property of a husband and wife, which historically could not be owned with right of survivorship. Technically there may be a distinction between an account which is community property and an account owned by non-spouses as tenants in common. Some brokerage and mutual fund companies offer an ownership category of "community property," which may be intended to be distinguishable from "tenants in common."

- An account owned as joint tenants ***with*** right of survivorship. This referred to under the Texas statute and on most Texas bank deposit agreements as a "multiple-party account with right of survivorship." [Prob C § 439A(b)(4).] In other states this account could be referred to as being owned as "joint tenants," as "joint tenants with right of survivorship," or even owned as "joint tenants with right of survivorship and not as tenants in common." In other states, joint tenants with right of survivorship is commonly abbreviated as "JT," "JT TEN," or as "JTWRS" or "JTWROS" in the style of bank accounts, brokerage accounts, and on securities.

- This category would include those accounts consisting of the community property of a husband and wife subject to a survivorship agreement pursuant to Probate Code §§ 451 through 462.[2]

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[2] In some states (of which Florida is a notable example), there is another category of ownership for married persons known as "tenants by the entirety." This type of ownership includes a right of survivorship, but it may have additional characteristics, including protection of one spouse's interest in the property from creditors of the other spouse.

Aside from any marital property issues, the key distinguishing feature among these accounts is the *right of survivorship*. If a right of survivorship exists, at the death of a party to the account, the party's ownership interest in the account will pass automatically to the surviving party or parties. The interest will pass outside of the probate process, and notwithstanding any provision to the contrary in the decedent's Will. If no right of survivorship is present, then at the death of a party, the party's ownership interest in the account will pass to the party's heirs by will or intestacy.

In Texas, the presumption has long been that property owned jointly by two or more persons is ***not*** owned with a right of survivorship, but that the interest of an owner will pass from the owner at death by will or intestacy as though the interest has been severed. Although joint owners may agree in writing to create a right of survivorship, no right of survivorship is inferred from the mere fact of joint ownership. [Prob C § 46(a).] The courts have historically given the presumption against a right of survivorship a tremendous amount of weight. In the case of community property, the presumption that there is no right of survivorship has been especially strong. Despite legislative attempts to authorize a right of survivorship for community property, it took a constitutional amendment to authorize a new class of property, so-called "community property with right of survivorship." [Texas Constitution of 1876, Article XVI, § 15 (amended Nov. 3, 1987). (For a helpful discussion of the history of the presumption against survivorship and the history of attempts to enable right of survivorship for community property, see Reis, Dianne, Texas Estate Planning, §§ 2:10, 2:30-33 (James Publishing 2011).)]

B. Joint Account With No Right of Survivorship (Multiple-Party Account Without Right of Survivorship).

1. In General. These are accounts in the names of two or more parties where the parties have ***not*** agreed that the funds in the account will belong to the surviving party. This type of account includes an accounts consisting of the community property of married parties, as well as a joint account in the names of parties who are not married to each other.

The terminology used to describe these accounts on bank signature cards and deposit agreements includes references such as "joint with no survivorship" or "multiple-party account without right of survivorship." Historically, some banks used the term "tenants in common" to designate this type of account, and the term may be found on some signature cards or deposit agreements, especially if the account was opened a number of years ago. The term is much more common in other states. In some cases, particularly in other states, and particularly with respect to securities, the acronym "TEN COM" is intended as an abbreviation for "tenants in common."

2. Rules During Lifetime.

a. Ownership. During the lifetime of all parties, the account belongs to the parties in proportion to the "net contribution" by each to the sums on deposit, unless there is a clear and convincing evidence of a different intent. [Prob C § 438(a).] The "net contribution" of a party to a joint account is defined as the sum of all deposits made to the account by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a *pro rata* share of any interest or dividends included in the current balance, as well as any proceeds of deposit life insurance added to the account by reason of the death of the party. [Prob C § 436(6).] Of course, if the funds in the account are the community property of the parties, then each party owns an undivided one-half of the funds on deposit.

Because a party to an account may not have any ownership interest in the account, it is preferable to refer to the persons in whose name the account is styled as the "parties" rather than as the "owners" of the

account. In some cases and in dealing with certain issues, referring to the "parties" as the "owners" can create a great deal of confusion.

Because ownership is based on contributions to the account, adding another party as an owner of a joint account does not cause a gift to be made at the time the account is established or when subsequent deposits are made to the account. [*Edwards v. Pena,* 38 S.W.3d 191 (Tex. App. -- Corpus Christi 2001, no writ).]

Please note that the financial institution may not have any idea as to the ownership of the sums on deposit as between the parties to the account. The ownership of the original and subsequent deposits to the account may not be apparent on the face of items deposited to the account. Whether withdrawals from an account are made "for" a party may not be obvious. Even in the case of an account between married parties, deposits to an account could be either community property of both spouses, the separate property of one spouse, or even the separate property of both spouses Issues as to the ownership of funds on deposit as between the parties must be resolved by the parties,

b. Payment to Party. As far as the financial institution is concerned, a joint account may be paid, on request, to any one or more of the parties. A financial institution is not required to inquire as to the source of funds received for deposit, or to inquire as to the proposed application of any sum withdrawn from an account for the purposes of establishing net contributions. [Prob C § 444.] This provision is for the protection of the financial institution, since the financial institution cannot determine ownership of funds deposited into an account.

The parties may be able to enter into an agreement with the financial institution that signatures of more than one party would be required for payment, especially if the account is a regular savings account or a certificate of deposit. Because of the automated check clearing process, the trend is for financial institutions to have policies against allowing customers to require multiple signatures on a checking account.

c. Payment After Disability. As far as the financial institution is concerned, any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated at the time payment is demanded. [Prob C § 445.]

d. One Party Cannot Remove Another Party. The Texas Attorney General has opined that one party to a joint account cannot unilaterally terminate the interest of another joint interest. [Op. Tex. Att'y Gen. No. DM-0010 (1991).] Therefore, one party to a joint account cannot direct the financial institution to remove another party to the account. However, one party to the account can exercise the party's right to withdraw all funds in the account and then deposit the funds into a new, single-party account.

e. Notice Not to Permit Withdrawals. Section 448 of the Probate Code indicates that any party able to request present payment of the account may give written notice to the financial institution that withdrawals pursuant to the terms of the account are to be no longer permitted. This essentially gives any party to the joint account the right to direct the financial institution to "freeze" the account. Unless the party withdraws the notice, the successor in interest to the deceased party must consent to any subsequent withdrawal. The author believes that *most financial institutions are not fully cognizant of a party's ability to exercise this right,* although some may have forms to be used for this purpose.

f. Set-Off to Financial Institution. If a party is indebted to a financial institution, the financial institution has a right to set-off the debt against the funds in the account. Under the Texas statute, the amount of the account subject to set-off is the proportion to which the debtor is, or was immediately

before his death, beneficially entitled. In absence of proof of net contributions, the amount is an equal share with all parties having present right of set-off. [Prob C § 449.]

Please note that a financial institution's well-drafted signature card or deposit agreement will modify the statutory rule by providing that each party to a joint account agrees that the financial institution's right of set-off against any party extends to the entire balance in the account, even if owned by another party. Therefore, adding a new party to an account will expose the funds in the account to set-off to the financial institution to the extent of the new party's current or future liability to the financial institution. This is important to remember when a parent is considering whether to add a child as a party to a joint account.

3. Disposition at Death.

a. Ownership. Since there is no survivorship agreement, the death of a party to a joint account has no effect on beneficial ownership of the account *as between the parties*. The decedent's rights to the account are part of the decedent's estate, and the surviving owner has the same ownership interest in the account as before the decedent's death. [Prob C § 439(d).] So after a party's death, the party's estate (and ultimately, the party's heirs) would own an interest in the account equal to the party's "net contribution" to the account during the party's lifetime. The decedent's estate may have absolutely no ownership interest in the account, depending on the decedent's net contributions to the account. Similar, the surviving party may have no ownership in the account. If the funds in the account are the community property of married parties, then the estate and the surviving spouse will each own 50% of the account.

b. Payment After Death. As far as the financial institution is concerned, any sums on deposit may be paid, on request, to any other party without regard to whether any other party is deceased at the time payment is demanded. [Prob C § 445.] Therefore, even though the deceased party's interest is owned by the beneficiaries or heirs of the party's estate, a financial institution is protected in paying out sums on deposit to any surviving party to the account. However, because the term "party" is defined to include a personal representative of a party, a financial institution would also be protected in paying out sums on deposit to the executor or administrator of the deceased party's estate upon request.

At one time, it was common for financial institutions to "freeze" a joint account without right of survivorship after the death of a party, until ownership of the funds on deposit could be determined. Unfortunately, this may still be the practice in some banks and in some communities. In the author's opinion, there is no longer a justifiable reason for a financial institution to do so in most cases. As a practical matter, the financial institution is protected in paying the funds to the first party who requests the funds, whether the party is a surviving party on the account or the personal representative of the deceased party. A bank's failure to pay out upon request of a party would arguably violate the terms of some deposit agreements.

4. Special Considerations.

a. Discharge from Claims. A financial institution making payment on the signature of one party pursuant to Prob C § 444, or to a party after the death or incapacity of another party pursuant to Prob C § 445, is discharged from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership as between parties or their successors. (That is, unless the institution has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be made . See II.B.2.d. above). However, the fact that the institution is discharged has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, the account. [Prob C § 448.]

b. Pledge of Account. A party to a joint account may pledge the account or otherwise create a security interest in the account without the joinder of any other party to the account. However, if one party to a joint account pledges or gives a security interest in the account to a financial institution insured by the FDIC, the financial institution must give notice to any other party to the account who did not create the security interest by certified mail at the party's last address provided to the financial institution. [Prob C § 442.] Credit unions are not insured by the FDIC, but by the NCUA. So the protection afforded by requiring notice to the other party(ies) does not apply to credit union deposits.

5. Example Illustrating Various Rules. Assume that John has a certificate of deposit account with a balance of $100,000. When the certificate renews, John adds Mary as a party to the account. The deposit agreement provides that the account is a "multiple-party account without right of survivorship." Application of the foregoing rules to the account is illustrated by the following examples:

a. Assume that John and Mary are not married to each other.

(1) Even though Mary is listed as a party to the account, John owns the entire balance in the account during his lifetime, since he contributed all of the money in the account. When John added Mary to the account, he did not make a gift to Mary.

(2) When John dies, the beneficiaries of his estate will own the entire balance in the account, and the funds in the account will pass under his Will, or if he has no Will, to his heirs as determined under the Texas laws of descent and distribution. Death of party to a joint account without right of survivorship does not change ownership of the account as between the parties.

(3) Even though the beneficiaries of John's estate own all of the funds in the account after John's death, if Mary comes in first and requests payment after John's death, the financial institution can safely pay the entire balance in the account to Mary at her request (and in fact, would likely be violating the deposit agreement if it failed to do so). John's estate would have no recourse against the financial institution, but would have to pursue a claim against Mary.

(4) If after John's death, the executor or administrator of John's estate requests payment of the balance in the account, then the financial institution can safely pay the executor or administrator of John's estate.

(5) Even though Mary owns none of the funds in the account, if Mary dies and the executor or administrator of Mary's estate requests payment of the balance in the account, then the financial institution can safely pay the balance in the account to the executor or administrator of Mary's estate. John would have no recourse against the financial institution, but would have to pursue a claim against Mary's estate.

b. Assume that the funds in the account are the community property of John and Mary.

(1) Since the funds in the account are community property, each party owns an undivided one-half of the funds on deposit.

(2) When John dies, the beneficiaries of his estate will own an undivided one-half of the funds on deposit. His interest in the account will pass under his Will, or if he has no Will, to his heirs as determined under the Texas laws of descent and distribution. Death of party to a joint account without right of survivorship does not change ownership of the account as between the parties.

(3) If after John's death, the executor or administrator of John's estate requests payment of the balance in the account, then the financial institution can pay all of the funds in the account to the executor or administrator. Mary's recourse would not be against the financial institution, but against John's estate.

(4) Even though John's estate owns half of the funds in the account after John's death, if Mary comes in and requests payment after John's death (and before John's personal representative does so), the financial institution can pay the entire balance in the account to Mary at her request. John's estate would have no recourse against the financial institution, but would have to pursue a claim against Mary.

C. Joint Accounts With Right of Survivorship (Multiple-Party Accounts With Right of Survivorship). Following are the general rules which apply to joint accounts with rights of survivorship. Special rules applicable to community property with right of survivorship accounts are discussed in II.D. below.

1. In General. In order to create a right of survivorship, there must be a written agreement signed by the party who dies. An agreement is sufficient to establish a right of survivorship if it is substantially similar to the following: "On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate." [Prob C § 439(a).] Note that only the signature of the party who dies first is necessary to make the account a valid survivorship account. (However, both or all parties may be required to sign the deposit agreement in order to obtain additional deposit insurance coverage as a joint account. See II.E.1. below.) Note that if the account consists of the community property of the parties, then signatures of both parties are required. See II.D.1.a. below. An agreement has been found to exist where one of the parties initialed (but did not sign) the survivorship agreement. *McNeme v. Estate of Hart*, 860 S.W.2d 536 (Tex. App.-El Paso 1993)

While the language of the agreement need only be substantially similar to that in § 439(a), reasonable persons can certainly disagree as to what is substantially similar. For an interesting summary of the language in various cases holding an agreement to be substantially similar or not substantially similar, see Reis, Dianne, *Texas Estate Planning,* § 2:82 (James Publishing 2011).

When the legislature added the Uniform Single-Party or Multiple-Party Account Selection Form Notice in Probate Code § 439A(b) effective September 1, 1993, the legislature arguably enacted additional safe harbor language. The approved disclosure applicable to right of survivorship accounts is as follows:

"On the death of a party, the party's ownership of the account passes to the surviving parties."

[Prob C § 439A(b)(4).] This language should be acceptable as the agreement among the parties. Many of the bank deposit agreements available from forms providers who design Texas-specific forms include this language in their forms.

If one or more parties are subsequently added to an account, then it is important that a new signature card or deposit agreement be signed at that time. If the signature card or deposit agreement for an existing account is "updated" by merely adding the signature of an additional party, then the "written agreement" requirement of Probate Code § 439(a) will not be satisfied, as there was no contemporaneous agreement among the parties. [*Rogers v. Shelton,* 832 S.W.2d 709 (Tex. App. -- Eastland 1992, writ denied).]

Please note that § 439(a) may be interpreted to require each of the parties to sign the deposit agreement *personally*. See the discussion in II.C.4.e. below.

2. Rules During Lifetime.

a. Ownership. During the lifetime of all parties, the account belongs to the parties in proportion to the "net contribution" by each to the sums on deposit, unless there is a clear and convincing evidence of a different intent. [Prob C § 438(a).] The "net contribution" of a party to a joint account is defined as the sum of all deposits made to the account by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a *pro rata* share of any interest or dividends included in the current balance (and after the death of a party, would include any proceeds of deposit life insurance added to the account by reason of the death of the party). [Prob C § 436(6).] As a consequence, adding another party to a joint account does not cause a gift to be made at the time the account is established or when subsequent deposits are made to the account. [*Edwards v. Pena,* 38 S.W.3d 191 (Tex. App. -- Corpus Christi 2001, no writ).]

b. Payment to Party. As far as the financial institution is concerned, a joint account with a right of survivorship may be paid, on request, to any one or more of the parties. A financial institution is not required to inquire as to the source of funds received for deposit, or to inquire as to the proposed application of any sum withdrawn from an account for the purposes of establishing net contributions. [Prob C § 444.] This provision is for the protection of the financial institution. The parties may be able to enter into an agreement with the financial institution that signatures of more than one party would be required for payment, especially if the account is a regular savings account or a certificate of deposit. Because of the automated check clearing process, financial institutions tend to have policies against a multiple signature requirement on a checking account.

c. Payment After Disability. As far as a financial institution is concerned, any sums in a joint account with a right of survivorship may be paid, on request, to any party without regard to whether any other party is incapacitated at the time payment is demanded. [Prob C § 445.]

d. One Party Cannot Remove Another Party. The Texas Attorney General has opined that one party to a joint account cannot unilaterally terminate the interest of another party. [Op. Tex. Att'y Gen. No. DM-0010 (1991).] Therefore, one party to a joint account cannot direct the financial institution to remove another party to the account. However, one party to the account can exercise the party's right to withdraw all funds in the account and then deposit the funds into a new, single-party account.

e. Notice Not to Permit Withdrawals. Section 448 of the Probate Code indicates that any party able to request present payment of the account may give written notice to the financial institution that withdrawals pursuant to the terms of the account are to be no longer permitted. This essentially gives any party to the joint account the right to direct the financial institution to "freeze" the account. Unless the party withdraws the notice, the successor in interest to the deceased party must consent to any subsequent withdrawal. The author believes that *most financial institutions are not fully cognizant of a party's ability to exercise this right,* although some may have forms to be used for this purpose.

f. Set-Off to Financial Institution. If a party is indebted to a financial institution, the financial institution has a right to set-off against the right of survivorship account. The amount of the account subject to set-off is the proportion to which the debtor is, or was immediately before his death, beneficially entitled. In absence of proof of net contributions, the amount is an equal share with all parties having present right of set-off. [Prob C § 449.] A financial institution's well-drafted signature card or deposit agreement will modify the statutory rule by providing that each party to a joint account agrees that the financial institution's right of set-off against any party extends to the entire balance in the account, even if owned by another party.

Therefore, adding a new party to an account will expose the funds in the account to set-off to the financial institution to the extent of the new party's current and future liability to the financial institution. This is important to remember when a parent is considering whether to a child as a party to a joint account. Note that adding a child as a party may also prevent equality of treatment of children, as well, since the funds in the account will belong to the surviving parties, rather than to beneficiaries under the decedent's will.

3. Disposition at Death.

a. Ownership. Sums remaining on deposit at the death of a party to a multiple-party account with right of survivorship belong to the surviving party or parties. If there are two or more surviving parties, their respective ownership during their lifetime is in proportion to their previous ownership interests (based on their net contributions), plus an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death. The right of survivorship continues between the surviving parties if a written agreement signed by the party who dies so provides. Prob [C § 439(a).]

> Example: Mom and Dad establish a multiple-party account with right of survivorship and add daughter Susie as an additional party. During their lifetimes, Mom and Dad each have a 50% ownership interest in the account, but Susie's ownership interest is zero. After Dad's death, Dad's 50% ownership interest passes equally to Mom and Susie, so Mom thereafter owns 75% and Susie owns 25% of the account.

b. Payment After Death. As far as the financial institution is concerned, any sums on deposit in a survivorship account may be paid, on request, to any other party without regard to whether any other party is deceased at the time payment is demanded. *However, the institution may not pay any sums on deposit to the personal representative or heirs of a deceased party unless the institution is provided with proofs of death showing that the decedent was the last surviving party.* [Prob C § 445.] A proof of death would generally be a certified copy of a death certificate. Thus, the executor or administrator of a deceased party generally has no access to the funds in a right of survivorship account.

c. Rights of Creditors. Even though the decedent's ownership interest in the account passes to the surviving parties at death, a multiple-party with right of survivorship account will not be effective against the claim of a secured creditor who has a lien on the account. Further, if the assets of the probate estate of the deceased party are not sufficient to pay debts, taxes, and expenses of administration (including statutory allowances to the surviving spouse and minor children), then the surviving parties are liable to account to the deceased party's personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the taxes, debts, and expenses. The financial institution will not have liability for payment in accordance with the terms of the account before receiving notice from the personal representative of the decedent's estate. [Prob C § 442.]

4. Special Considerations.

a. Cancellation of Right of Survivorship. Whether or not there is a right of survivorship is determined by the form of the account *at the death of a party*. A party to a survivorship account may unilaterally alter the status of the account as a survivorship account by giving a written order to the financial institution to change the form of the account. The order must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by another written order of the same party during his lifetime. [Prob C § 440.]

Note: The author believes that many financial institutions are apparently not familiar with this

provision and therefore may not have procedures for documenting or responding to such an order.

Probate Code § 440 does not allow a party to unilaterally terminate the interest of another party to the joint account by removing the other party from the account. The order will not in any way affect the relative ownership interests of the parties while all are living. However, the written notice permits a change in the disposition of the funds in the account *at the death* of the party. Tex Atty. Gen. Op. DM-10 (1991). Please note that if the deposit agreement allows any party to withdraw the funds in the account, the party may accomplish the removal of the other party from the account by withdrawing all funds in the account and opening a new single party account.

b. 120 Hour Rule. There is a special survivorship rule which applies when joint owners of real or personal property die within 120 hours of each other. Instead of belonging to the surviving joint owner, the assets are distributed one-half as though one joint owner had survived and one-half as though the other joint owner had survived. Therefore, one-half would be paid under the will of one owner (or if an owner has no will, to the owner's heirs determined under the laws of descent and distribution). If there are more than two joint owners and all have died within a period of less than 120 hours, the account balance should be divided into as many equal portions as there are joint owners, and the equal portions should be distributed to the persons who would have taken if each such joint owner had survived. [Prob C § 47(d).]

This provision would presumably apply in the case of a multiple-party account with right of survivorship. Although it is not entirely clear how this statute would be applied in the case where not all "parties" to the account are "owners" of the funds on deposit (based on net contributions to the account), use of the term "owner" makes it possible to argue that the beneficiaries or heirs of a party with no lifetime ownership interest in the account should not inherit.

c. Pledge of Account. A party to a joint account may pledge the account or otherwise create a security interest in the account without the joinder of any other party to the account. However, if one party to a joint account pledges or gives a security interest in the account to a financial institution insured by the Federal Deposit Insurance Corporation ("FDIC"), the financial institution must give notice to any other party to the account who did not create the security interest by certified mail at the party's last address provided to the financial institution. [Prob C § 442.] Credit unions are not insured by the FDIC, but by the National Credit Union Administration. So the protection afforded by requiring notice to the other party(ies) is not available in the case of credit union deposits.

d. Certificates of Deposit. In the past (and especially prior to September 1, 1993), many commercial banks (as opposed to savings and loan associations and savings banks) did not use signature cards or other deposit agreements in connection with certificate of deposit accounts. In absence of a signature card or other deposit agreement signed by the parties, there is no valid survivorship account. Today, most financial institutions use a written deposit agreement in addition to the certificate of deposit, but there may be some exceptions, especially in the case of banks which have not updated their forms.

e. Survivorship Account Opened with Power of Attorney. Is it possible for a right of survivorship account to be established by an agent under a durable power of attorney?

(1) Neither Chapter XI (Nontestamentary Transfers) nor Chapter XII (the new Durable Power of Attorney Act) of the Probate Code specifically addresses this issue. Under Probate Code § 439(a), the written survivorship agreement must be signed by the party who dies. "Party" means a person who has a present right, subject to request, to payment from an account. While the term is specifically defined to include a guardian, personal representative, or assignee of a party, there is no reference to an agent or

attorney in fact. [Prob C § 436(7).] In a recent Texas opinion, the court held that similar language in Probate Code § 439(b) (applicable to P.O.D. accounts) requires a party to *personally* sign the agreement, and held that a valid P.O.D. account could not be created by an agent under a power of attorney. Similar reasoning would deny an agent the power to create a valid right of survivorship account. [*See Armstrong v. Roberts,* 211 S.W.3d 867 (Tex App–El Paso, 2006).] Please note that the FDIC deposit insurance rules (see II.E.1. below) similarly require that each party personally sign in order to obtain deposit insurance coverage as a joint account.

(2) The powers granted under a Statutory Durable Power of Attorney related to banking and other financial institutions transactions include the power to "continue, modify, or terminate an account or other banking arrangement made by or on behalf of the principal," as well as the authority to "establish, modify, or terminate an account or other banking arrangement with a . . . financial institution selected by the attorney in fact or agent." It is not clear that these powers include the authority to enter into a survivorship agreement. It may be possible to do so if the power of attorney is a general power of attorney, unless the reasoning of the *Armstrong* case applies to survivorship accounts, as well.

(3) Specifically giving an agent authority to open right of survivorship accounts may not be desirable. If an agent can sign the survivorship agreement on behalf of a party, with the agent as another party to the account, then the agent may possess a power of appointment which would cause inclusion of the principal's property in the estate of the agent if the agent predeceases the principal. [Internal Revenue Code § 2041.] So a well-drafted power of attorney often restricts the power of the agent to do so.

D. Special Rules for Community Property with Right of Survivorship Accounts. Part 3, Community Property with Right of Survivorship, of Chapter XI, Nontestamentary Transfers, Texas Probate Code, contains special rules adopted by the Texas legislature in 1989 to implement the 1987 constitutional amendment authorizing community property with right of survivorship. Section 462 provides that "the provisions of Part 1 of this chapter apply to multiple-party accounts held by spouses with a right of survivorship to the extent that such provisions are not inconsistent with the provisions of this part." Presumably, the intent of this section is that the multiple-party account rules in Part 1 apply to community property with right of survivorship accounts, unless the rules in Part 3 are different. However, this section could also be interpreted to apply the community property with right of survivorship ("CPWROS") rules to joint tenancy with right of survivorship ("JTWROS") accounts consisting of the separate property of the spouses. This result likely was not intended.

Following is a discussion of some of the CPWROS rules as they apply to accounts in financial institutions.

1. Creation of CPWROS Account. A CPWROS agreement must be in writing and signed by both spouses. An agreement in writing and signed by both spouses is sufficient to create a right of survivorship if it includes any of the following phrases: "with right of survivorship"; "will become the property of the survivor"; "will vest in and belong to the surviving spouse"; or "shall pass to the surviving spouse." The preceding language is not exclusive; an agreement that otherwise satisfies Part 3 will be effective without including any of those phrases. [Prob C § 452.] However, "a survivorship agreement will not be inferred from the mere fact that the account is a joint account." [Prob C § 452(c).]

a. Both Spouses Must Sign. While Probate Code § 439 requires only a signature by the party who dies first in the case of a JTWROS account, signatures of both spouses are required in order to create the right of survivorship for a CPWROS account.

b. Safe Harbor Language. While any of the phrases mentioned in Probate Code § 452 will be conclusive, none of them is required. A deposit agreement which provides for a "joint tenancy with right of survivorship" should result in a valid CPWROS account, since the phrase "right of survivorship" is included. One case held that JTWROS accounts established with community property were, retroactively, CPWROS accounts. *Haynes v. Stripling*, 812 S.W.2d 397 (Tex. App. -- Eastland 1991).

c. Specifically Insufficient Language. A survivorship agreement will not be inferred from the fact that an account is designated as "JT TEN," "joint tenancy," "joint," or other similar language. [Prob C § 452(c).] This provision was added to legislatively overrule the Texas Supreme Court decision in *Holmes v. Beatty*, 290 S.W.3d 852 (Tex. 2009).

d. Financial Institution Need Not Be A Party. Under Probate Code § 436, an "account" is a contract between a depositor and a financial institution, and the institution will always be a party to any agreement creating the JTWROS account. While a CPWROS account in a financial institution would normally be created with a signature card or deposit agreement which meets the requirements of Part 3, the CPWROS relationship could also be created by a separate agreement of which the financial institution is not even aware. However, a financial institution which pays out to a decedent's personal representative (or to the heirs, legatees, or devisee of the decedent's estate if no administration is pending) is protected from liability, provided the financial institution has no actual knowledge of a CPWROS agreement. [Prob C § 460(d).] Actual knowledge means receipt of a written notice or the original or a certified copy of the agreement.

2. Ownership and Management During Marriage. A CPWROS account remains the community property of the spouses during the marriage of the spouses. The CPWROS agreement does not affect the rights of the spouses concerning management, control, and disposition of the property subject to the agreement unless the agreement provides otherwise. [Prob C § 453.] Query: Would a deposit contract that allowed both spouses to transact business on the account convert sole management community property to joint management community property?

3. Revocation of Survivorship Agreement. While revocation of JTWROS status pursuant to Probate Code § 440 requires notice to the financial institution, revocation of a CPWROS agreement may be accomplished by the written agreement of the spouses, or by written notice from one spouse to the other spouse, without notice to the financial institution. [Prob C § 455.] The institution's records will therefore not necessarily be determinative of CPWROS status. However, a financial institution without actual knowledge of the revocation of a CPWROS agreement may make payment to the surviving spouse. [Prob C § 460(e).] Actual knowledge is defined as receipt of the original or a certified copy of the revoking instrument.

4. Proof of CPWROS Agreements. Detailed rules are provided for a probate proceeding in which an order adjudging the CPWROS agreement may be obtained. [Prob C §§ 456 through 459.] However, an agreement between spouses that satisfies the requirements of Part 3 is effective and enforceable without an adjudication. [Prob C §§ 456(a) and 458.] If the agreement creating CPWROS is contained in the signature card or deposit agreement, it is unlikely that an institution would require an adjudication except in the event of a dispute with respect to the funds.

5. Rights of Creditors. The rights of creditors with respect to CPWROS bank accounts are governed by the rules applicable to multiple-party accounts under Part 1. See II.C.3.c. above.

6. 120 Hour Rule. A special rule will apparently apply in the case where both spouses die within

120 hours of each other. Instead of belonging to the surviving spouse, the assets are distributed one-half as though one spouse had survived and one-half as though the other spouse had survived. Therefore, one-half would be paid under the will of each spouse (or if a spouse has no will, to the spouse's heirs). [Prob C § 47(d).]

E. FDIC Deposit Insurance Coverage for Joint Accounts. The following rules apply to determining the Federal Deposit Insurance Corporation ("FDIC") deposit insurance coverage of all joint accounts.

1. General Rule. Each co-owner's interests in all "qualifying joint accounts" are entitled in the aggregate to deposit insurance coverage up to the "standard maximum deposit insurance amount" (currently $250,000)[3] separate from and in addition to any single ownership accounts maintained by the co-owners. As far as the FDIC is concerned, it doesn't make any difference whether the account is a tenancy in common, joint tenancy with right of survivorship, tenancy by the entirety, or community property account. [FDIC Reg. 12 CFR § 330.9(a).}

A joint deposit account is a "qualifying joint account" only if (a) all co-owners of the funds in the account are natural persons (i.e., human beings); (b) each co-owner has *personally* signed a deposit account signature card; and (c) each co-owner possesses withdrawal rights on the same basis. The requirement that each co-owner sign a signature card does not apply to certificates of deposit, to any deposit obligation evidenced by a negotiable instrument, or to any account maintained by an agent, nominee, guardian, custodian, or conservator on behalf of two or more persons. [FDIC Reg. 12 CFR § 330.9(c).] *Note: The requirement that each co-owner sign personally sign a deposit account signature card generally precludes separate coverage for an account bearing a signature made by an agent under a power of attorney.*

2. Determining Coverage. The interests of each co-owner in funds in all qualifying joint accounts in the same financial institution are added together, and the total is insured for up to $250,000. [FDIC Reg. 12 CFR § 330.9(b).]

Note: The foregoing rule, effective April 1, 1999, is simpler than the prior rule which provided for a two-step calculation. Under the prior rule, all joint accounts with the same combination of co-owners would have been aggregated and insured up to the maximum amount (currently $250,000). Then each co-owner's interests in all qualifying joint accounts was insured up to $250,000. Under the prior rule, a joint account of a husband and wife could be insured only to $250,000. Under the new rule, and account of a husband and wife could be insured up to $500,000.

Example: A owns an interest in three joint accounts in the same institution, each of which has a balance of $250,000. Account No. 1 is owned by A and B as a CPWROS account. Account No. 2 is owned by A and C as a JTWROS account (A and C each contributed $125,000 to this account). Account No. 3 is owned by A and D as tenants in common (A contributed $75,000 and D contributed $175,000 and their relative interests are shown on the account signature card). How much deposit insurance coverage is available? The following chart shows how deposit insurance would be calculated:

[3] For all purposes of this outline, the standard maximum deposit insurance amount will be assumed to be $250,000, and each time the deposit insurance limit is specified to be $250,000, it should be understood to be actually be the current standard maximum deposit insurance amount.

Account	A	B	C	D
1	$125,000	$125,000	-0-	-0-
2	$125,000	-0-	$125,000	-0-
3	$ 75,000	-0-	-0-	$175,000
Interest	$325,000	$125,000	$125,000	$175,000
Insured	$250,000	$125,000	$125,000	$175,000

Although A's total interest in the three accounts is $325,000, it is insured only to $250,000, leaving $75,000 uninsured.

3. Ownership Interests. For insurance purposes, the holders of any joint account are deemed to have equal interests in the account unless the institution's records show the form of joint ownership as a tenancy in common account (which would likely correspond to a multiple party account without right of survivorship). With a tenancy in common account, equal interests are presumed unless otherwise specifically stated on the records of the institution. It makes no difference whether the title of the accounts uses "and," "or," or "and/or." [FDIC Reg. 12 CFR § 330.9(e).]

4. Non-Qualifying Accounts. A deposit account held in two or more names that is not a qualifying joint account is treated as being owned by each of the named owners as an individual, corporation, partnership, or unincorporated association, as the case may be, and the actual ownership interest of each individual or entity shall be added to any other single ownership accounts of such individual or other accounts of such entity and insured accordingly. [FDIC Reg. 12 CFR § 330.9(d).]

5. Certain Accounts Treated as Joint. Accounts held jointly by individuals but established at an insured institution through an agent, nominee, guardian, custodian, conservator, or loan servicer are insured as joint accounts under the same conditions as if the accounts had been established directly by those holding the funds jointly if the details of the relationship and interests of the parties are adequately disclosed. [FDIC Reg. 12 CFR § 330.8(a).]

III. CONVENIENCE ACCOUNTS AND CONVENIENCE SIGNERS

A. Historical Background. Many individual depositors wish to give a second person authority to transact business on their bank account. For example, an elderly customer might request the bank to add another person to an account as an additional signer, so that person could sign checks or conduct transactions in the event of the customer's illness or incapacity.

Historically, rather than adding the additional signer by using a special power of attorney for the account, the bank would often suggest changing to a joint account. Unfortunately, the joint account agreement was often one which provided for a right of survivorship. Instead of becoming only an authorized signer on the account, the additional signer was often added as party to the account, so that when the original customer died, the intended authorized signer became the owner of all of the funds in the account by virtue of the right of survivorship. This often resulted in unequal inheritance by family members, since the right of survivorship account superceded the provisions in the customer's Will.

The only recourse of family members who felt that a bank customer's intentions had been thwarted by the right of survivorship account often was a lawsuit against the surviving party to the account to obtain a determination that the right of survivorship agreement was not intended by the customer. The sometimes

successful argument was that a joint account was not intended, but that the additional signer had been added to the account solely for the ***convenience*** of the customer.

1. "Convenience Account" Created. In order to reduce the incidence of family disputes about the intention of customers, effective September 1, 1993, the legislature created a new account with special rules and called it a "convenience account." [Prob C § 438A.] The convenience account provision was added at the request of the estate planning and probate bar to provide a solution to a problem with certain bank accounts. While well intended, the convenience account statute was drafted without input from bank lawyers and therefore had some shortcomings (at least as far as bank lawyers were concerned):

- The statute used the confusing term "cosigner" to describe the convenience signer on the account. "Cosigner" is a lending term, and implies that both the party and the additional signer would need to sign.

- The convenience account statute was generally interpreted as applying only to single-party accounts. The parties to a joint account or a P.O.D. account could not use the convenience account feature to add additional signers. Further, the statute apparently allowed only one "cosigner" on an account. The customer had to pick only one person to add as a "cosigner."

2. "Convenience Account" Expanded. In the 2003 legislative session, at the behest of the banking industry, the legislature made some changes in the convenience account statute. First of all, the term "cosigner" was replaced with the more descriptive term "convenience signer." Second, the statute allowed multiple convenience signers to be added to an account. Finally, the statute provided that one or more convenience signers could be added to a joint account, as well as to a single-party account. While the changes improved the statute, the statute was subject to the following criticism:

- A convenience signer could be added only to a joint account only if the account was ***opened*** on or after September 1, 2003. So if the parties to a joint account opened prior to September 1, 2003 wished to add a convenience signer, they would have to close the account and open a new account. (This was especially problematic if direct deposits were being made to the account, if payments were made by ACH transactions from the account, or if the customer did not want to order new checks.)

- Similarly, multiple convenience signers could be added only to an account ***opened*** on or after September 1, 2003. See the discussion in the preceding paragraph.

- A convenience signer could be added to single party without P.O.D. account or a multiple-party account with right of survivorship, but ***not*** to a single-party account with P.O.D., a multiple-party account without right of survivorship, or a multiple-party account with right of survivorship and P.O.D.

From the standpoint of those in the banking industry, the concept of the convenience account was flawed from the beginning. The mistake was trying to design a "convenience account," when what was needed was rules governing someone designated as a "convenience signer." Then a convenience signer could be added to many of the different types of accounts, including single-party, multiple-party with and without right of survivorship, and single-party and multiple-party P.O.D. accounts - without interfering with the account itself.

3. "Convenience Signer" for Any Type of Account Authorized. In the 2009 legislative session, the banking industry convinced the legislature to add a new statute specifically providing for "convenience signers" on accounts which were not denominated as "convenience accounts." [Prob C § 438B.] This new

provision seems to fix several of the perceived problems with the convenience account statute:

- With a properly designed signature card, one or more convenience signers can now be added to any type of personal account, including a single party account, a single party account with P.O.D. designation, a multiple-party account with right of survivorship, a multiple-party account without right of survivorship, a multiple-party account with right of survivorship and P.O.D. designation, and an informal revocable trust account.
- The new provision was specifically made to apply to any account for which a convenience signer is designated, regardless of whether the account was established before, on, or after June 19, 2009.
- The statute should work to make effective prior designations of convenience signers on accounts which were not denominated as convenience accounts and for which convenience signers were not previously authorized.

B. Rules for *Convenience Accounts* under Probate Code Section 438A.

1. Rules During Lifetime of Party.

a. Ownership. Although § 438A does not clearly so specify, all sums on deposit in a convenience account apparently belong to the party or parties. (See the text of the description of a convenience account in paragraph (6) of the Uniform Single-Party or Multiple-Party Account Selection Form Notice in Probate Code § 439A(b).) There is no provision comparable to § 438(a) providing for ownership among multiple parties based on net contributions to the account. The statute does provide that the making of a deposit in a convenience account does not affect the title to the deposit. [Prob C § 438A(b).] The party or parties to a convenience account are not considered to have made a gift of one-half of the deposit or of any additions or accruals of the deposit to the convenience signer(s). [Prob C § 438A(c).] If an addition is made to the account by anyone other than a party, the addition and accruals to the addition are considered to have been made by the party.]Prob C § 438A(e).]

b. Payment from Account. All deposits to a convenience account and additions and accruals to the deposits may be paid to the party or to an authorized signer. The financial institution is completely released from liability for a payment made from the account before the financial institution receives notice in writing signed by a party not to make the payment in accordance with the terms of the account. After receipt of the notice from a party, the financial institution may require a party to approve any further payments from the account. [Prob C § 438A(f).]

2. Rules after Death of the Party or Parties.

a. Ownership. On the death of the last surviving party, the authorized signer has no right of survivorship in the account and ownership of the account remains in the estate of the last surviving party. [Prob C § 438A(d).] Note: The statute does not clearly address ownership of the account after the death of one of multiple parties, although the presumption appears to be that the surviving party or parties own the funds, since ownership is in the estate of the last surviving party.

Assume that an account has two parties, Bill and Mary, who are married to each other. They open a convenience account and name their daughter Susie as the "convenience signer." The description on the deposit agreement is the statutory language from paragraph (6) of § 439A(b) as follows:

"The parties to the account own the account. One or more convenience signers to the account may make account transactions for a party. A convenience signer does not own the account. On the death of the last surviving party, ownership of the account passes as a part of the last surviving party's estate under the last surviving party's will or by intestacy. The financial institution may pay funds in the account to a convenience signer before the financial institution receives notice of the death of the last surviving party. The payment to a convenience signer does not affect the parties' ownership of the account."

Query: If Bill dies, does Mary own the funds in the account? Is there a right of survivorship? Does the language create a valid right of survivorship? It is not clear to the author that it does.

b. Payment to Authorized Signer after Death. If the financial institution makes a payment of the sums of on deposit in a convenience account to the authorized signer after the death of the last surviving party and before the institution has received written notice of the last surviving party's death, the financial institution is completely released from liability for the payment. [Prob C §438A(g).]

c. Payment to Personal Representative. If a financial institution makes payment to the personal representative of the last surviving party's estate after the death of the last surviving party and before service on the financial institution of a court order prohibiting payment, the financial institution is released to the extent of the payment from liability to any person claiming a right to the funds. The receipt by the representative to whom payment is made is a complete release and discharge of the financial institution. [Prob C § 438A(g).]

C. Rules for *Convenience Signers* under Probate Code Section 438AB.

1. Convenience Signers Authorized for Any Personal Account Type. An account which is not designated as a "convenience account," but which is designate as a single-party account or another type of multiple-party account, may provide for convenience signers. [Prob C § 438B(a).]

2. Ownership and Rights of the Convenience Signer. The same general rules applicable to ownership during lifetime and after the death of a party described in § 438A with respect to a convenience signer on a convenience account will apply to a convenience signer on another type of single-party or multiple-party account.

D. Special Considerations.

1. Authority of Convenience Signer Not Clear. While §§ 438A and 438B of the Probate Code apparently contemplates that the convenience signer will have authority to receive payment from the account, the statute does not specifically grant the convenience signer any additional powers. (Compare the powers specifically granted to an agent with respect to "banking and financial institution transactions" under § 496 of the Texas Durable Power of Attorney Act.) Section 442 of the Probate Code does specifically *deny* a convenience signer the authority to pledge or otherwise create a security interest in an account.

Unless the deposit agreement specifically addresses the authority of the convenience signer, then it is not clear that the convenience signer has authority to close the account, cancel ACH payments, receive bank statements, change the address to which statements will be made, or take any other type of action which might be contemplated in connection with the account. For that reason, using a statutory durable power of attorney to designate an authorized signer may have significant advantages over a convenience account.

2. FDIC Deposit Insurance Coverage. If the account clearly indicates to the satisfaction of the FDIC that the account is an individual or single ownership account and that any other persons who are signatories on the account are merely authorized to withdraw funds on behalf of the true owner, then the account will be treated as a single ownership account, rather than a joint ownership account, for deposit insurance coverage. [FDIC Reg. 12 CFR § 330.5(a).]

3. Convenience Account Not Universally Available. As Karisch pointed out in the article cited at I.B.2 above, even though convenience accounts have been authorized since September 1, 1993, they are not universally available at Texas banks. Since the convenience account is apparently unique to Texas, the larger, multi-state financial institution, because of a desire to standard products and forms through out the institution, are much less likely to offer convenience accounts. On the other hand, it is very common for regional banks and community banks to offer convenience accounts, and some regional and community banks are well aware of the distinctions between convenience accounts and regular accounts with convenience signers and can readily add convenience signers.

IV. P.O.D. (PAYABLE ON DEATH) ACCOUNTS

A. In General. A P.O.D. account is an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees. An account payable to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees is also a P.O.D. account. [Prob C §436(10).] The person or persons to whom payment may be made during lifetime is/are known as the "original payee" or "original payees". A person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons is known as the "P.O.D. payee." [Prob C §436(11).] (The P.O.D. payee is frequently referred to by financial institutions as the "beneficiary" of the account.) Since the "P.O.D. payee" has no present right of withdrawal, the P.O.D. payee is not a party to the account. [Prob C § 436(7).] Effective September 1, 1993, the original payee must have signed a written agreement to that effect in order to establish a P.O.D. account. [Prob C § 439(b).] A P.O.D. account is not created where the original payee does not sign the account agreement. [*Parker v. JPMorgan Chase Bank*, 95 S.W.3d 428 (Tex. App. -- Houston [1st Dist.] 2002).]

P.O.D. accounts are very popular for two primary reasons. First of all, they can serve the function of a "poor man's will," with which ownership of funds on deposit may be transferred to another person at death, without the necessity of the probate process (and its inherent costs in time and money). Second, P.O.D. accounts can be used to create additional deposit insurance coverage when the payees are qualified beneficiaries under the FDIC rules.

In many financial institutions, the title (or "style") of the account will clearly indicate that the account is a P.O.D. account. The following are common:

John Smith P.O.D. Bill Smith

John Smith P.O.D. [where the signature card shows that Bill Smith is the P.O.D. payee or beneficiary, but Bill's name is not in the title of the account]

John Smith [where the signature card shows that account is a P.O.D. account and that Bill Smith is the P.O.D. payee or beneficiary, but neither "P.O.D." nor Bill's name is in the title of the account]

B. Rules During Lifetime. The following rules apply during the lifetime of the original payee(s):

1. Ownership. A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees. If two or more parties are named as original payees, their lifetime ownership rights as between them are determined by their respective net contributions to the sums on deposit. [Prob C § 438(b).]

2. Payment to Original Party. As far as a financial institution is concerned, a P.O.D. account may be paid, on request, to any one or more of the original parties. [Prob C § 446.] This means the original payees -- a P.O.D. payee is a party only after the account becomes payable to him by reason of surviving the original payee(s). [Prob C §436(7).] A financial institution is not required to inquire as to the source of funds received for deposit, or to inquire as to the proposed application of any sum withdrawn from an account for the purposes of establishing net contributions. [Prob C § 444.]

3. Pledge of Account. A party to a P.O.D. account may pledge the account or otherwise create a security interest in the account without the joinder of any P.O.D. payee. [Prob C § 442.] Since a P.O.D. payee is not a party until the account becomes payable to him, a P.O.D. payee cannot pledge an account or create a security interest in the account.

C. Disposition at Death.

1. Ownership. On the death of the original payee or the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee. In other words, a P.O.D. payee must outlive the original payee(s) in order to obtain an ownership interest in the account. If two or more P.O.D. payees survive, there is no right of survivorship in event of the death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them. [Prob C §439(b).] (The author has not seen a deposit agreement which provides for such a right of survivorship.) Although the statute does not specifically state that multiple surviving P.O.D. payees own equal interests in the funds on deposit, this seems to be the logical result and is commonly assumed in the banking industry.

What is not clear from the statute is the effect of the death of one of the parties - the original payees - when there are multiple original payees. Nothing in § 439(b) specifically provides for a right of survivorship between the original payees, and nothing in the statute provides guidance as to disposition of the ownership interest of a deceased original payee. In order to have a right of survivorship, the original payees would apparently have to have signed a valid written survivorship agreement. However, paragraph (5) of the Uniform Single-Party or Multiple-Party Account Selection Form Notice in Probate Code § 439A(b) indicates that it creates a right of survivorship, so use of this language in the deposit agreement may be enough to effectively create a right of survivorship. Many bank deposit agreements use the term "Multiple-Party Account with Right of Survivorship and P.O.D. (Payable on Death) Designation" to define the account, and the "right of survivorship" language in the account title should be determinative.

2. Payment to Personal Representative of Deceased P.O.D. Payee. Payment may be made to the personal representative or the heirs of a deceased P.O.D. payee upon proof that the P.O.D. payee survived all persons named as original payees. [Prob C § 446.[

3. Payment to Personal Representative of Deceased Original Payee. Payment may be made to the personal representative or heirs of a deceased original payee only upon proof that the decedent survived all other persons named on the account either as an original payee or as P.O.D. payee. [Prob C § 446.] So

the executor or administrator of the estate generally will not have access to the funds in a P.O.D. account.

4. Rights of Creditors. Even though the ownership interest in a P.O.D. account passes to the P.O.D. beneficiary at the death of the original payee, a P.O.D. account will not be effective against the claim of a secured creditor who has a lien on the account. Further, if the assets of the probate estate of the deceased original payee are not sufficient to pay debts, taxes, and expenses of administration (including statutory allowances to the surviving spouse and minor children), then the P.O.D. payees are liable to account to the deceased party's personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the taxes, debts, and expenses. The financial institution will not have liability for payment in accordance with the terms of the account before receiving notice from the personal representative of the decedent's estate. [Prob C § 442.]

D. Special Considerations.

1. Proper Taxpayer Identification Number. A P.O.D. account is owned by the original payee. The P.O.D. payee has no ownership interest in the account during the lifetime of the original payee. Therefore, the original payee's social security number should be used in connection with the account. [Instructions on IRS Form W-9.] It is never appropriate to use the P.O.D. payee's social security number on the account.

2. Certificates of Deposit. Historically, some commercial banks (as opposed to savings and loan associations and savings banks) did not use signature cards or other deposit agreements in connection with certificate of deposit accounts. In absence of a signature card or other deposit agreement signed by the original payee, the account may not be a P.O.D. account which would pass title to the P.O.D. payees at death of the original payee.

3. P.O.D. Account Opened with Power of Attorney. Is it possible for a P.O.D. account to be established by an agent under a durable power of attorney?

a. Neither Chapter XI (Nontestamentary Transfers) nor Chapter XII (the new Durable Power of Attorney Act) of the Probate Code specifically addresses this issue. Under Probate Code § 439(b), the P.O.D. agreement must be signed by the party who dies. "Party" means a person who has a present right, subject to request, to payment from an account. While the term is specifically defined to include a guardian, personal representative, or assignee of a party, there is no reference to an agent or attorney in fact. [Prob C § 436(7).] In a recent Texas case, the court held specifically that the language in Probate Code § 439(b) requires a party to ***personally*** sign the agreement, and held that a valid P.O.D. account could not be created by an agent under a power of attorney. [*See Armstrong v. Roberts,* 211 S.W.3d 867 (Tex App–El Paso 2006, pet. denied).] Please note that the FDIC deposit insurance rules applicable to joint accounts (see II.E.1. above) similarly require that each party personally sign in order to obtain deposit insurance coverage as a joint account.

b. The powers granted under a Statutory Durable Power of Attorney related to banking and other financial institutions transactions include the power to "continue, modify, or terminate an account or other banking arrangement made by or on behalf of the principal," as well as the authority to "establish, modify, or terminate an account or other banking arrangement with a . . . financial institution selected by the attorney in fact or agent." There is no indication that these powers were intended to include the authority to establish a P.O.D. account; in any case, the *Armstrong* case would preclude that possibility.

c. Specifically giving an agent authority to open a P.O.D. account may not be desirable. If an

agent can designate himself as the P.O.D. payee, then the agent may possess a power of appointment which would cause inclusion of the principal's property in the estate of the agent if the agent predeceases the principal. [Internal Revenue Code § 2041.] So a well-drafted power of attorney often restricts the power of the agent to do so.

d. 120 Hour Rule. Section 47 of the Probate Code requires a person to survive the decedent by at least 120 hours to inherit. Section 47(d) clearly applies to joint/multiple-party accounts with right of survivorship. Section 47(c) applies to beneficiaries under Wills. It is not entirely clear whether either of these provisions is intended to apply to P.O.D. accounts or is drafted broadly enough to apply to P.O.D. accounts, but it would make sense for P.O.D. accounts to be subject to similar rules.

E. FDIC Deposit Insurance Coverage.

1. General Rule. Funds in a P.O.D. account are insured to the owner (i.e., the original payee) for up to $250,000 as to each named P.O.D. payee, if the named payee is a natural person, charitable organization, or other non-profit entity under the Internal Revenue Code. [FDIC Reg. 12 CFR § 330.10(a).] (Prior to September 26, 2008, separate insurance coverage was available only with respect a payee who was the spouse, child, or grandchild of the owner.) An owner of more than one P.O.D. account for the same beneficiary in the same institution is limited to $250,000 in the aggregate for the same beneficiary. [FDIC Reg. 12 CFR § 330.10(a).]

2. Inappropriate Payee. If the P.O.D. payee of a P.O.D. account is not a natural person, charitable organization, or other non-profit entity under the Internal Revenue Code, there is no separate insurance. Funds in the account will be aggregated with any other single ownership accounts of the original payee and insured up to $250,000. [FDIC Reg. 12 CFR § 330.10(c).]

3. Testamentary Intent Must Be Manifested. The intention that funds in the account belong to the natural person, charitable organization, or other non-profit entity under the Internal Revenue Code at death of the owner must be manifested in the title of the account. For purposes of this requirement, "title" includes the electronic deposit account records of the institution (for example, as long as the institution's electronic deposit account records identify (through a code or otherwise) the account as a P.O.D. account). [FDIC Reg. 12 CFR § 330.10(b).]

4. P.O.D. Payees Specifically Named. The P.O.D. payees on the account must be specifically named in the deposit account records of the institution. References to classes or categories of P.O.D. beneficiaries, such as "my children" or my "lineal descendants" are not sufficient. [FDIC Advisory Opinion 90-43.]

5. *Pro Rata* Allocation to Payees. In the case of accounts established by one owner for one or more P.O.D. payees, one of whom is the owner, funds contributed by the owner must be allocated on a *pro rata* basis to all named P.O.D. payees, including the original payee, unless a different allocation is documented in good faith and in the ordinary course of business. Any funds allocated to the original payee would be insured to the original payee individually as a single ownership account.

6. Insurance Coverage Based on Contributions. If a P.O.D. account is established by two or more persons, then each co-owner will be separately insured to $250,000 for each P.O.D. payee which is a natural person, charitable organization, or other non-profit entity under the Internal Revenue Code. However, insurance will be available only in proportion to the amount contributed by each co-owner. The co-owner's respective interests will be deemed equal unless the deposit account records indicate otherwise. [FDIC Reg.

12 CFR § 330.10(f).]

7. Death Changes Coverage. When the owner of a P.O.D. account dies, the account will be eligible for separate insurance as a testamentary account for six months after the date of death (unless the account is restructured). It will then be insured to the P.O.D. payee as a single ownership account.

V. TRUST ACCOUNTS

A. In General. A "trust account" is an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. It is not essential that payment to the beneficiary be mentioned in the deposit agreement. [Prob C §436(14).] This definition is broad enough to include "Totten" trusts where the only reference to a trust is in the style of the account (for example, "Bill Jones as Trustee for Mike Jones") and accounts where the signature card or deposit agreement contains the brief terms of a rudimentary trust (as was common with deposit agreements used by savings and loan associations, especially prior to enactment of §§ 436 through 449 of the Probate Code).

> Note: This account is the twin of the P.O.D. account (and some might say :evil twin"). These accounts are much more common in savings associations and savings banks than in commercial banks. For reasons beyond the scope of this outline, the author would prefer that financial institutions exclusively offer P.O.D. accounts, rather than trust accounts.

The statute further provides that the term does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relationship, such as attorney-client. [Prob C § 436(14).]

Effective September 1, 1993, the trustee or trustees must have signed a written agreement in order to pass title to the beneficiary at the death of the trustee or trustees. [Prob C §439(c).]

The title (or "style") of the account will generally include an abbreviation or acronym setting out the relation ship between the owner/trustee and the beneficiary, such as the following:

BILL SMITH TR [or TR FOR] SUSIE SMITH

BILL SMITH ATF SUSIE SMITH [where "ATF" means "as trustee for"]

BILL SMITH ITF SUSIE SMITH [where "ITF" means "in trust for"]

Similar to P.O.D. accounts discussed above, the title of the account could be:

BILL SMITH TR [where the signature card shows that Susie is the beneficiary, but Susie's name is not in the title of the account]

BILL SMITH [where the signature card shows that account is a trust account and that Susie is the beneficiary, but neither "TR" nor Susie's name is in the title of the account]

B. Rules During Lifetime.

1. Ownership. The statute provides that beneficial ownership of a trust account belongs to the trustee during his lifetime, unless a contrary intent is manifested by the terms of the account or the deposit agreement, or there is other clear and convincing evidence of an irrevocable trust. If there are two or more parties named as trustee, then their beneficial rights during their lifetimes are based on their net contributions to the sums on deposit. If there is an irrevocable trust, then the account belongs beneficially to the beneficiary. [Prob C §439(c).]

2. Payment. A trust account may be paid, on request, to any trustee. [Prob C § 447.]

C. Disposition at Death.

1. Ownership. On the death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving. The sums on deposit belong to the survivor of the beneficiaries if one or more of the beneficiaries die before the trustee. *If two or more beneficiaries survive, there is no right of survivorship unless the terms of the account or deposit agreement expressly provide for survivorship between them*. [Prob C § 439(c).]

The statute does not address ownership of the funds in the account after the death of one trustee when there are multiple trustees. In particular, the statute does not specifically provide for a right of survivorship between the trustees. At the death of one of multiple trustees, the interest owned by the deceased trustee may pass as part of the deceased trustee's estate. [*Stegall v. Oadra,* 868 S.W.2d 232 (Tex. 1993), on remand, 871 S.W.2d 882 (Tex. App. --Houston [14th Dist.], no writ; *Jameson v. Bain,* 693 S.W.2d 676 (Tex. App. -- San Antonio 1985, no writ).]

These cases were decided before the description of a trust account was included in paragraph (7) of the Uniform Single-Party or Multiple-Party Account Selection Form Notice in Probate Code § 439A(b) effective September 1, 1993, which now includes the following statement:

> "The trust account is not a part of a trustee's estate and does not pass under the trustee's will or by intestacy, unless the trustee survives all of the beneficiaries and all other trustees."

It is not clear whether the same result would be obtained if the deposit agreement had contained the foregoing language.

2. Payment to Beneficiary. Payment of the account may be made, on request, to the beneficiary upon presentation of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees. [Prob C §447.]

3. Payment to Personal Representative of Deceased Trustee. Payment may be made to the personal representative or heirs of a deceased trustee only upon proof that the deceased trustee was the survivor of all other persons named on the account either as trustee or beneficiary (unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his surviving the trustee). [Prob C § 447.]

4. Rights of Creditors. A trust account will not be effective against the claim of a secured creditor who has a lien on the account. Further, if the assets of the probate estate of the deceased trustee are not sufficient to pay debts, taxes, and expenses of administration (including statutory allowances to the surviving

spouse and minor children), then the beneficiaries are liable to account to the deceased party's personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the taxes, debts, and expenses. The financial institution will not have liability for payment in accordance with the terms of the account before receiving notice from the personal representative of the decedent's estate. [Prob C § 442.]

D. Special Considerations.

1. Owner (Grantor) Should Be the Same Person as the Trustee. The statute clearly contemplates that the trustee is the actual owner of the account; in other words, that the owner of the funds is the "grantor" or "settlor" of the "trust" is the same person as the trustee. The statute does not provide guidance in other circumstances. Under the provisions of signature cards and deposit agreements used by some institutions in the past, it was possible for the owner/creator of the trust to designate another party to serve as trustee. In such case, the trust language on the signature card or agreement should be examined to make sure that it deals with all relevant issues. Use of a trust account where the owner/grantor is not the trustee is not contemplated by the statute and should be discouraged.

2. Taxpayer Identification Number. When the trust account is a Totten trust, then the social security number of the trustee should be used. [Instructions on IRS Form W-9.] The social security number of the beneficiary should never be used until after the death of the trustee. When the signature card creates a simple trust, then the social security number of the owner/grantor/trustee should be used. [Instructions on IRS Form W-9.] If the trustee is not the grantor, then the social security number of the owner/grantor should be used. The social security number of the beneficiary should never be used until after the death of the grantor/trustee.

3. Inappropriate Uses. Trust accounts are frequently established by depositors in an attempt to obtain results which the account can not deliver. In particular, depositors often expect trust accounts to result in income or estate tax savings. Depositors frequently attempt to use a trust account to achieve objectives which in reality require a carefully-drafted trust agreement, rather than just the title to a bank account..

4. Certificates of Deposit. Historically, some commercial banks (as opposed to savings and loan associations and savings banks) did not use signature cards or other deposit agreements in connection with certificate of deposit accounts. In absence of a signature card or other deposit agreement signed by the trustee, the account will not be a trust account which would pass title to the beneficiary at the trustee's death.

5. 120 Hour Rule. Section 47 of the Probate Code requires a person to survive the decedent by at least 120 hours to inherit. Section 47(d) clearly applies to joint/multiple-party accounts with right of survivorship. Section 47(c) applies to beneficiaries under Wills. It is not clear whether either of these provision is intended to apply to trust accounts or is written broadly enough to apply to trust accounts, it would make sense for them to do so.

E. FDIC Deposit Insurance Coverage.

1. General Rule. Funds in a trust account (referred to in the FDIC regulations as an "informal trust account") are insured to the owner (i.e., the trustee) for up to $250,000 as to each named beneficiary who is a natural person, charitable organization, or other non-profit entity under the Internal Revenue Code. [FDIC Reg. 12 CFR § 330.10(a).] (Prior to September 26, 2008, separate insurance coverage was available only with respect a beneficiary who was the spouse, child, or grandchild of the owner.) An owner of more than one informal trust account for the same beneficiary in the same institution is limited to $250,000 in the

aggregate for the same beneficiary. [FDIC Reg. 12 CFR § 330.10(a).] Under the FDIC rule, the term "informal trust account" includes both P.O.D. accounts and trust accounts. An owner of more than one informal trust account for the same beneficiary in the same institution is limited to $250,000 in the aggregate for the same beneficiary. [FDIC Reg. 12 CFR § 330.10(a).]

2. Improper Beneficiary. If the beneficiary of an informal trust account is not a natural person, charitable organization, or other non-profit entity under the Internal Revenue Code, there is no separate insurance. Funds in the account will be aggregated with any other single ownership accounts of the owner and insured up to $250,000. [FDIC Reg. 12 CFR § 330.10(c).]

3. Testamentary Intent Must Be Manifested. The intention that funds in the account belong to a natural person, charitable organization, or other non-profit entity under the Internal Revenue Code at death of the owner must be manifested in the title of the account using commonly accepted terms such as, but not limited to, "in trust for," or "as trustee for," or any acronym therefor, such as "ITF," or "ATF." For purposes of this requirement, "title" includes the electronic deposit account records of the institution (for example, as long as the institution's electronic deposit account records identify (through a code or otherwise) the account as a trust account).[FDIC Reg. 12 CFR § 330.10(b).]

4. Beneficiaries Specifically Named. The beneficiaries of the account must be specifically named in the deposit account records of the institution. References to classes or categories of beneficiaries, such as "my children" or my "lineal descendants" are not sufficient. [FDIC Advisory Opinion 90-43.]

5. *Pro Rata* Allocation. In the case of accounts established by one owner for one or more beneficiaries, one of whom is the owner, funds contributed by the owner must be allocated on a pro rata basis to all named beneficiaries, including the owner, unless a different allocation is documented in good faith and in the ordinary course of business. Any funds allocated to the owner would be insured to the owner individually as a single ownership account.

6. Insurance Coverage Based on Contributions. If an informal trust account is established by two or more persons, then (assuming proper relationships) each co-owner will be separately insured to $250,000 for each beneficiary. However, insurance will be available only in proportion to the amount contributed by each co-owner. The co-owner's respective interests will be deemed equal unless the deposit account records indicate otherwise. [FDIC Reg. 12 CFR § 330.10(f).]

7. Husband and Wife as Trustee for Husband and Wife. A trust account established by a husband and wife naming themselves as the sole beneficiaries will not be insured as an informal trust account, but will be insured as a joint ownership account. [FDIC Reg. 12 CFR § 330.10(f)(2).]

8. Death of Trustee Changes Coverage. When the owner of a trust account dies, the account will be eligible for separate insurance as a testamentary account for six months after the date of death (unless the account is restructured). It will then be insured to the beneficiary as a single ownership account.

VI. MERITS OF MULTIPLE-PARTY ACCOUNTS IN ESTATE PLANNING

A. Advantages to Bank Customer of Multiple-Party Account.

1. Avoids Probate. Sums on deposit in right of survivorship accounts, P.O.D. accounts, and trust accounts (that is, multiple-party accounts other than convenience accounts and multiple party accounts

without right of survivorship) will pass outside the probate process. As a consequence, administrative costs may be reduced, and time delays may be avoided.

2. Inexpensive. Generally there is no out-of-pocket cost to an individual establishing a multiple-party account. Assets may be disposed of by using a multiple-party account as a "poor man's will," without incurring associated attorney's fees.

3. Convenient. Simple estate planning can be accomplished by merely opening bank accounts and without paying a lawyer for a Will or a trust.

4. Increases FDIC Deposit Insurance Coverage. If properly established, multiple-party accounts can significantly increase deposit insurance coverage for the funds on deposit in one institution.

Note: As the standard maximum deposit insurance has increased, the "need" to use multiple-party accounts to obtain additional deposit insurance coverage has diminished.

5. Can be Used to Fine-Tune an Estate Plan. Multiple-party accounts can be used to make minor modifications in a client's estate plan without re-doing the clients estate planning documents. For example, the client may wish to add small gifts to certain persons or charities. By establishing P.O.D. accounts, the client can provide for the desired gifts (a) without re-doing estate planning documents, (b) while maintaining confidentiality about the amount and recipient of the gifts, and (c) without triggering § 128A notice requirements.

B. Disadvantages of Multiple-Party Accounts.

1. Avoids Probate. Because certain multiple-party accounts avoid probate, the funds on deposit in the accounts may not be available to fund testamentary gifts to credit-shelter trusts, marital deduction trusts, and charitable trusts, and funds on deposit may not be readily available to pay taxes, debts, and expenses of administration. Contingent trust provisions for minor children in wills may be ineffective. A married couple may create multiple-party accounts which avoid probate, without realizing that the accounts will wreak havoc with their estate plan. The accounts can also cause intended beneficiaries to be treated un equally.

2. Ease of Use Discourages Obtaining Proper Advice. Because multiple-party accounts may be used easily to accomplish certain estate planning objectives, persons often do not seek professional advice, and therefore do not plan for all contingencies. Reliance on multiple-party accounts may result in, among other consequences, increased taxes at the death of the survivor, failure to plan for disposition at the death of the survivor, unintentional unequal treatment of beneficiaries of the same class, failure to appoint guardians of the person for minor children, and failure to provide for grandchildren of a deceased child.

3. Cannot Provide Adequately for Various Contingencies. Right of survivorship accounts may work at the death of the first party, but if no changes are made in the account, then no provision is made for payment at the death of the survivor. P.O.D. accounts can work well if everyone dies in the right order, but if one or more P.O.D. payees predecease the original payee, then the ultimate disposition may not be as desired.

4. Not Suitable for Minor Payees and Beneficiaries. Multiple-party accounts are not appropriate when the P.O.D. payee or trust account beneficiary is a minor. The financial institution generally cannot safely pay out the funds to the minor, although the financial institution may pay the funds to a guardian of

the minor's estate. Other acceptable options may include retaining the funds until the minor attains majority, paying the funds to a custodian under the Texas Uniform Transfers to Minors Act (if the amount doesn't exceed $15,000), or payment of the funds to the county clerk under § 887 of the Probate Code (if the amount owed to minor does not exceed $100,000).

5. Consequences of Account May Not be Understood. In many cases, the depositor may not understand that establishing a multiple-party account has consequences at his death. This may be especially true when a P.O.D. or trust account is suggested as a means of obtaining additional deposit insurance coverage.

6. Divorce Does Not Change Account. With a will, divorce results in automatic voiding of testamentary provisions in favor of a former spouse. [Prob C § 69.] Similarly, divorce results in revocation of certain revocable dispositions of property by trust. [Prob C § 472.] There is no comparable provision for multiple-party accounts.

7. Exposes Funds to Creditors of Additional Parties to Multiple-Party Accounts. Adding an additional party to an account may expose the sums on deposit in the account to legal process of the creditors of the additional party, including the Internal Revenue Service, and set-off by the financial institution.

8. Actions Taken to Obtain Additional Deposit Insurance Coverage Can Destroy Estate Plan. Creating additional right of survivorship accounts, P.O.D. accounts, or trust accounts in order to obtain additional FDIC deposit insurance coverage can be penny wise and pound foolish. Such accounts can destroy marital deduction and bypass trust planning, as well as generation-skipping transfer tax planning. As noted above, if minors are the P.O.D. payees or trust account beneficiaries, flexibility can be lost and expenses can be increased.

VII. WHAT LAWYERS SHOULD KNOW ABOUT MULTIPLE-PARTY ACCOUNTS IN THE ESTATE PLANNING CONTEXT

Following is a summary of some of the important points made in the preceding pages concerning multiple-party accounts.

A. Multiple-party accounts can mess up a good estate plan (or make a bad estate plan worse). If the client implemented an estate planning strategy in a Will or revocable living trust, the funds in the multiple-party accounts will pass outside of that plan, which may result in increased estate taxes (now or at the death of a surviving spouse), unintended inequality among beneficiaries, or even unintended disinheritance of beneficiaries. Even if the disposition is generally as the client intended, flexibility may be lost when beneficiaries of multiple-party accounts are minors or are incapacitated.

When doing estate planning for your clients, it is important to educate them to the extent necessary as to the issues raised by multiple-party accounts and other non-probate assets. It may be very important to make written recommendations with respect to use or non-use of multiple-party accounts. When you implement a plan using testamentary trusts or providing for pecuniary cash bequests, it is a good idea to bring up the issue when you initially discuss the strategy, to mention it again in the transmittal letter with draft documents, to discuss it again when you meet to sign documents, and then to mention it again when you send out the originals or a closing letter.

Appendix B includes some sample communications about multiple party accounts.

B. You don't know what you've got unless you read the account documents. For planning purposes, you often cannot rely on your client to accurately advise you whether his accounts in financial institutions are right of survivorship, P.O.D. accounts, or trust accounts. And even if your client knows the types of accounts he has, you cannot advise that the multiple-party accounts will achieve their desired objectives without reviewing the underlying account agreements to make sure that the correct selections have been made on the documents and that all parties to the account have signed.

On the other hand, reviewing account documents can substantially increase the amount of time spent in providing the estate planning services. So you should agree with your client as to whether reviewing account documents will be part of the engagement. If reviewing account ownership will not be part of the engagement, then it might be a good idea to note in the engagement letter that the client has not requested that you undertake the review.

C. Adding a party to a single-party account to change it to a multiple-party account does not result in a gift or change in ownership. During the lifetime of all parties, a multiple party account generally belongs to the parties in proportion to the "net contribution" by each to the sums on deposit. The "net contribution" of a party to a joint account is generally defined as the sum of all deposits made to the account by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party. Because ownership is based on contributions to the account, adding another party as an "owner" of a joint account does not cause a gift to be made at the time the account is established or when subsequent deposits are made to the account.

On the other hand, when a party who does not have an ownership interest in the account makes withdrawals which are not repaid, a gift may be made at that time.

D. Adding a party to a single-party account to change it to a multiple-party account may subject the account to levy, garnishment or other legal process. Adding a second party with withdrawal rights to an account will make it necessary for the financial institution to identify that account with the second party upon receipt of an IRS levy, garnishment, child support levy, or other legal process.

E. If discovered during lifetime, inappropriate survivorship provisions under multiple-party accounts can be terminated unilaterally. If you discover that right of survivorship accounts will mess up the estate plan, then it may be possible to correct the problem quickly and unilaterally. If the account is not a community property with right of survivorship account, then any party can change the survivorship form of the account by written order to the financial institution. The written order must be received by the financial institution during the lifetime of the party. Notice to the other party is not required.

While it is not entirely clear from the statue, it seems that § 440 of the Probate Code should be interpreted to allow the original payee to revoke the P.O.D. feature in the same manner; i.e., by written notice to the financial institution received during the lifetime of the original payee.

On the other hand, if the account is a community property with right of survivorship account, the right of survivorship agreement can generally be revoked either by a written instrument signed by both spouses, or by a written instrument signed by one spouse and delivered to the other spouse. Notice to the financial institution is not required. Please note, however, that the terms of the original survivorship agreement may prevail. If the original agreement between the spouses prohibits revocation, then it may not be possible to do revoke the survivorship agreement.

F. Multiple-party accounts cannot be used to avoid creditors at the owner's death. A multiple

party account will not be effective against the claim of a secured creditor who has a lien on the account. If the assets of the probate estate of the deceased party are not sufficient to pay debts, taxes, and expenses of administration (including statutory allowances to the surviving spouse and minor children), then the beneficiaries of the account are liable to account to the deceased party's personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the taxes, debts, and expenses.

G. Watch out for choice of law provisions in investment contracts with out of state financial entities which might change the result. In a recent Texas case, the appellate court held that the choice of law provisions in an investment contract made Michigan law applicable in determining whether intangible personal property owned by Texas residents was owned with a right of survivorship. *McKeehan v. McKeehan*, 355 S.W.3d 282 (Tex. App.-Austin 2011, no pet.).

H. Using a funded revocable living trust as the primary dispositive document can reduce or eliminate conflicts involving multiple-party accounts. If the client creates a revocable living trust and transfers all bank accounts, brokerage accounts, and securities into the revocable living trust, then problems with multiple-party accounts which conflict with the general estate plan can be avoided.

VIII. WHAT LAWYERS SHOULD KNOW ABOUT MULTIPLE-PARTY ACCOUNTS IN THE PROBATE CONTEXT

A. The executor/administrator is generally not entitled to deal with the funds in multiple-party accounts. If there is a valid deposit agreement creating a right of survivorship account, P.O.D. account, or trust account, and if the decedent did not survive the other parties, then the funds will not be part of the probate estate, and the personal representative will have no right to collect those funds. Since the funds are not part of the probate estate, the funds should not be included on the probate inventory, appraisement, and list of claims. On the other hand, the personal representative of the estate is entitled to obtain information about the account. See the discussion in the VIII.B. below.

B. You don't know what you've got until you look at the account documents. You don't really know whether the decedent's accounts in financial institutions are included in the decedent's probate estate unless you review not only the periodic account statements, but also the underlying documents for the account, such as the signature card or deposit agreement. A personal representative of the estate may have a duty to examine the documents, particularly if the beneficiaries of the multiple-party accounts are not the same persons or in the same shares as the probate estate. The personal representative must determine whether a valid written agreement was signed to create the right of survivorship account, P.O.D. account, or trust account. If so, the funds will belong to the surviving parties, P.O.D. payees, or trust account beneficiaries. If not, then the personal representative must pursue collection of the amounts in the accounts.

Please note that some financial institutions may initially refuse to provide you with information about the account or a copy of the deposit agreement. Many financial institution employees have been correctly trained not to pay the executor or administrator of a multiple party account, and federal privacy laws make them extremely reluctant to provide customer information to anyone other than the customer. It may be necessary to patiently and politely educate the employee (or the employee's supervisor, or even the bank's legal counsel) about the duties, responsibilities, and powers of the personal representative of the estate.

Appendix C lists some steps which can be taken to evaluate multiple-party accounts to determine whether the funds are assets of the estate.

C. A party to an account is not necessarily an owner of the account. When administering the estate of a decedent or a ward for whom a guardianship of the estate has been taken out, it is important to remember that a party to the account is not necessarily an owner of the funds in the account. A party has a present right to withdraw the funds in the account, but may not have any ownership interest in the account. If the funds in the account do not consist of the community property of the parties to the account, then it is possible that the decedent (or the ward) did not, in fact, own any of the funds in the account. So even if the financial institution allows the executor (in the case of a multiple-part account with no survivorship) or the guardian to withdraw the funds, the estate of the decedent or ward may not be entitled to keep those funds. Further, the financial institution likely does not know who owns the funds in the account. The provisions in the multiple-party account statutes are designed so that financial institutions can safely administer multiple-party accounts without knowing who actually owns the funds in the account.

D. A disclaimer can sometimes be used after the fact to solve a problem created by multiple-party accounts. As noted in VII.A. above, multiple-party accounts can mess up a good estate plan. In some cases, a plan can be salvaged after death by using a qualified disclaimer under Internal Revenue Code § 2518 and Probate Code § 37A. Section 37A of the Probate Code allows a "beneficiary" to disclaim "property." The relevant definitions of "property" and "beneficiary" from § 37A(e) of the statute are as follows:

> "The term "property" as used in this section shall include all legal and equitable interests, powers, and property, whether present or future, whether vested or contingent, and whether beneficial or burdensome, in whole or in part. . . . . In this section "beneficiary" includes a person who would have been entitled, if the person had not made a disclaimer, to receive property as a result of the death of another person by inheritance, under a will, ***by an agreement between spouses for community property with a right of survivorship, by a joint tenancy with a right of survivorship, or by any other survivorship agreement, account, or interest in which the interest of the decedent passes to a surviving beneficiary***, by an insurance, annuity, endowment, employment, deferred compensation, or other contract or arrangement, or under a pension, profit sharing, thrift, stock bonus, life insurance, survivor income, incentive, or other plan or program providing retirement, welfare, or fringe benefits with respect to an employee or a self-employed individual." (Emphasis added)

The definitions are broad enough to encompass right of survivorship accounts, P.O.D. accounts, and trust accounts.

If the surviving parties and/or payees on the multiple-party account are also the primary beneficiaries under the decedent's estate plan, then disclaimers can be very effective. One advantage of disclaiming these types of assets is that there are no contingent beneficiaries who would prevent the disclaimed assets from becoming part of the decedent's estate.

E. If the estate is insolvent, then the executor has an obligation to pursue funds in multiple-party accounts. Even though the decedent's ownership interest in certain multiple-party passes to the surviving parties or to P.O.D. payees at death, if the assets of the probate estate of the deceased party are not sufficient to pay debts, taxes, and expenses of administration (including statutory allowances to the surviving spouse and minor children), then the surviving parties or P.O.D. payees are liable to account to the deceased party's personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the taxes, debts, and expenses. The financial institution will not have liability for payment in accordance with the terms of the account (i.e., to the surviving party or to the P.O.D. payee) before receiving notice from the personal representative of the decedent's estate. Therefore, as soon as the executor or administrator determined that the probate assets are insufficient to pay debts, taxes and expenses,

APPENDIX A

SELECTED PROVISIONS OF THE TEXAS PROBATE CODE

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§ 37A. Means of Evidencing Disclaimer or Renunciation of Property or Interest Receivable From a Decedent

(a) Persons Who May Disclaim. Any person, or the guardian of an incapacitated person, the personal representative of a deceased person, or the guardian ad litem of an unborn or unascertained person, with prior court approval of the court having, or which would have, jurisdiction over such guardian, personal representative, or guardian ad litem, or any independent executor of a deceased person, without prior court approval, or an attorney in fact or agent appointed under a durable power of attorney authorizing disclaimers that is executed by a principal, who may be entitled to receive any property as a beneficiary and who intends to effect disclaimer irrevocably on or after September 1, 1977, of the whole or any part of such property shall evidence same as herein provided.

(b) Effective Date of Disclaimer. A disclaimer evidenced as provided by this section shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent and is not subject to the claims of any creditor of the disclaimant.

(c) Effect of Disclaimer. Unless the decedent's will provides otherwise, the property subject to the disclaimer shall pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent and a future interest that would otherwise take effect in possession or enjoyment after the termination of the estate or interest that is disclaimed takes effect as if the disclaiming beneficiary had predeceased the decedent.

(d) Ineffective Disclaimer. Failure to comply with the provisions of this section shall render such disclaimer ineffective except as an assignment of such property to those who would have received same had the person attempting the disclaimer died prior to the decedent.

(e) Definitions. The term "property" as used in this section shall include all legal and equitable interests, powers, and property, whether present or future, whether vested or contingent, and whether beneficial or burdensome, in whole or in part. The term "disclaimer" as used in this section shall include "renunciation." In this section "beneficiary" includes a person who would have been entitled, if the person had not made a disclaimer, to receive property as a result of the death of another person by inheritance, under a will, by an agreement between spouses for community property with a right of survivorship, by a joint tenancy with a right of survivorship, or by any other survivorship agreement, account, or interest in which the interest of the decedent passes to a surviving beneficiary, by an insurance, annuity, endowment, employment, deferred compensation, or other contract or arrangement, or under a pension, profit sharing, thrift, stock bonus, life insurance, survivor income, incentive, or other plan or program providing retirement, welfare, or fringe benefits with respect to an employee or a self-employed individual.

(f) Subsequent Disclaimers. Nothing in this section shall be construed to preclude a subsequent disclaimer by any person who shall be entitled to property as a result of a disclaimer.

(g) Form of Disclaimer. In the case of property receivable by a beneficiary, the disclaimer shall be evidenced by a written memorandum, acknowledged before a notary public or other person authorized to take acknowledgments of conveyances of real estate.

(h) Filing of Disclaimer. Unless the beneficiary is a charitable organization or governmental agency of the state, a written memorandum of disclaimer disclaiming a present interest shall be filed not later than nine months after the death of the decedent and a written memorandum of disclaimer disclaiming a future interest

may be filed not later than nine months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested. If the beneficiary is a charitable organization or a governmental agency of the state, a written memorandum of disclaimer disclaiming a present or future interest shall be filed not later than the first anniversary of the date the beneficiary receives the notice required by Section 128A of this code, or the expiration of the six-month period following the date the personal representative files the inventory, appraisement, and list of claims due or owing to the estate, whichever occurs later. The written memorandum of disclaimer shall be filed in the probate court in which the decedent's will has been probated or in which proceedings have been commenced for the administration of the decedent's estate or which has before it an application for either of the same; provided, however, if the administration of the decedent's estate is closed, or after the expiration of one year following the date of the issuance of letters testamentary in an independent administration, or if there has been no will of the decedent probated or filed for probate, or if no administration of the decedent's estate has been commenced, or if no application for administration of the decedent's estate has been filed, the written memorandum of disclaimer shall be filed with the county clerk of the county of the decedent's residence, or, if the decedent is not a resident of this state but real property or an interest therein located in this state is disclaimed, a written memorandum of disclaimer shall be filed with the county clerk of the county in which such real property or interest therein is located, and recorded by such county clerk in the deed records of that county.

(i) Notice of Disclaimer. Unless the beneficiary is a charitable organization or governmental agency of the state, copies of any written memorandum of disclaimer shall be delivered in person to, or shall be mailed by registered or certified mail to and received by, the legal representative of the transferor of the interest or the holder of legal title to the property to which the disclaimer relates not later than nine months after the death of the decedent or, if the interest is a future interest, not later than nine months after the date the person who will receive the property or interest is finally ascertained and the person's interest is indefeasibly vested. If the beneficiary is a charitable organization or government agency of the state, the notices required by this section shall be filed not later than the first anniversary of the date the beneficiary receives the notice required by Section 128A of this code, or the expiration of the six-month period following the date the personal representative files the inventory, appraisement, and list of claims due or owing to the estate, whichever occurs later.

(j) Power to Provide for Disclaimer. Nothing herein shall prevent a person from providing in a will, insurance policy, employee benefit agreement, or other instrument for the making of disclaimers by a beneficiary of an interest receivable under that instrument and for the disposition of disclaimed property in a manner different from the provisions hereof.

(k) Irrevocability of Disclaimer. Any disclaimer filed and served under this section shall be irrevocable.

(l) Partial Disclaimer. Any person who may be entitled to receive any property as a beneficiary may disclaim such property in whole or in part, including but not limited to specific powers of invasion, powers of appointment, and fee estate in favor of life estates; and a partial disclaimer or renunciation, in accordance with the provisions of this section, shall be effective whether the property so renounced or disclaimed constitutes a portion of a single, aggregate gift or constitutes part or all of a separate, independent gift; provided, however, that a partial disclaimer shall be effective only with respect to property expressly described or referred to by category in such disclaimer; and provided further, that a partial disclaimer of property which is subject to a burdensome interest created by the decedent's will shall not be effective unless such property constitutes a gift which is separate and distinct from undisclaimed gifts.

(m) Partial Disclaimer by Spouse. Without limiting Subsection (l) of this section, a disclaimer by the decedent's surviving spouse of a transfer by the decedent is not a disclaimer by the surviving spouse of all or any part of any other transfer from the decedent to or for the benefit of the surviving spouse, regardless of whether the property or interest that would have passed under the disclaimed transfer passes because of the disclaimer to or for the benefit of the surviving spouse by the other transfer.

(n) Disclaimer After Acceptance. No disclaimer shall be effective after the acceptance of the property by the beneficiary. For the purpose of this subsection, acceptance shall occur only if the person making such disclaimer has previously taken possession or exercised dominion and control of such property in the capacity

of beneficiary.

(o) Interest in Trust Property. A beneficiary who accepts an interest in a trust is not considered to have a direct or indirect interest in trust property that relates to a licensed or permitted business and over which the beneficiary exercises no control. Direct or indirect beneficial ownership of not more than five percent of any class of equity securities that is registered under the Securities Exchange Act of 1934 shall not be deemed to be an ownership interest in the business of the issuer of such securities within the meaning of any statute, pursuant thereto.

Added by Acts 1971, 62nd Leg., p. 2954, ch. 979, § 1, eff. Aug. 30, 1971. Amended by Acts 1977, 65th Leg., p. 1918, ch. 769, § 1, eff. Aug. 29, 1977; Acts 1979, 66th Leg., p. 1741, ch. 713, § 4, eff. Aug. 27, 1979; Acts 2007, 80th Leg., R.S., Ch. 1170, § 3.01, eff. September 1, 2007.

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§ 47. Requirement of Survival by 120 Hours

(a) Survival of Heirs. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly, except as otherwise provided in this section. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This subsection does not apply where its application would result in the escheat of an intestate estate.

(b) Disposal of Community Property. When a husband and wife have died, leaving community property, and neither the husband nor wife survived the other by 120 hours, one-half of all community property shall be distributed as if the husband had survived, and the other one-half thereof shall be distributed as if the wife had survived. The provisions of this subsection apply to proceeds of life or accident insurance which are community property and become payable to the estate of either the husband or the wife, as well as to other kinds of community property.

(c) Survival of Devisees or Beneficiaries. A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will of the decedent contains some language dealing explicitly with simultaneous death or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will. If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, the beneficiary shall be deemed not to have survived unless he or she survives the person by 120 hours. However, if any interest in property is given alternatively to one of two or more beneficiaries, with the right of each to take being dependent upon his surviving the other or others, and all shall die within a period of less than 120 hours, the property shall be divided into as many equal portions as there are beneficiaries, and those portions shall be distributed respectively to those who would have taken in the event that each beneficiary had survived.

(d) Joint Owners. If any real or personal property, including community property with a right of survivorship, shall be so owned that one of two joint owners is entitled to the whole on the death of the other, and neither survives the other by 120 hours, these assets shall be distributed one-half as if one joint owner had survived and the other one-half as if the other joint owner had survived. If there are more than two joint owners and all have died within a period of less than 120 hours, these assets shall be divided into as many equal portions as there are joint owners and these portions shall be distributed respectively to those who would have taken in the event that each joint owner survived.

(e) Insured and Beneficiary. When the insured and a beneficiary in a policy of life or accident insurance have died within a period of less than 120 hours, the insured shall be deemed to have survived the beneficiary for the purpose of determining the rights under the policy of the beneficiary or beneficiaries as such. The

provisions of this subsection shall not prevent the application of subsection (b) above to the proceeds of life or accident insurance which are community property.

(f) Instruments Providing Different Disposition. When provision has been made in the case of wills, living trusts, deeds, or contracts of insurance, or any other situation, for disposition of property different from the provisions of this Section, this Section shall not apply.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1965, 59th Leg., p. 279, ch. 119, § 1, eff. Aug. 30, 1965; Acts 1979, 66th Leg., p. 1743, ch. 713, § 6, eff. Aug. 27, 1979. Subsec. (d) amended by Acts 1993, 73rd Leg., ch. 846, § 5, eff. Sept. 1, 1993.

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CHAPTER XI.
NONTESTAMENTARY TRANSFERS

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PART 1. MULTIPLE-PARTY ACCOUNTS

§ 436. Definitions

In this part:

(1) "Account" means a contract of deposit of funds between a depositor and a financial institution, and

includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

(2) “Beneficiary” means a person named in a trust account as one for whom a party to the account is named as trustee.

(3) “Financial institution” means an organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, credit unions, and brokerage firms that deal in the sales and purchases of stocks, bonds, and other types of securities.

(4) “Joint account” means an account payable on request to one or more of two or more parties whether or not there is a right of survivorship.

(5) “Multiple-party account” means a joint account, a convenience account, a P.O.D. account, or a trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or a regular fiduciary or trust account where the relationship is established other than by deposit agreement.

(6) “Net contribution” of a party to a joint account as of any given time is the sum of all deposits made to that account by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

(7) “Party” means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include a named beneficiary unless the beneficiary has a present right of withdrawal.

(8) “Payment” of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any set-off, or reduction or other disposition of all or part of an account pursuant to a pledge.

(9) “Proof of death” includes a certified copy of a death certificate or the judgment or order of a court in a proceeding where the death of a person is proved by circumstantial evidence to the satisfaction of the court as provided by Section 72 of this code.

(10) “P.O.D. account” means an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

(11) “P.O.D. payee” means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons.

(12) “Request” means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution, but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal.

(13) “Sums on deposit” means the balance payable on a multiple-party account including interest,

dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party.

(14) “Trust account” means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. It is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relationship such as attorney-client.

(15) “Withdrawal” includes payment to a third person pursuant to check or other directive of a party.

§ 437. Ownership as Between Parties and Others

The provisions of Sections 438 through 440 of this code that concern beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts.

§ 438. Ownership During Lifetime

(a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees. If two or more parties are named as original payees, during their lifetimes rights as between them are governed by Subsection (a) of this section.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by Subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

§ 438A. Convenience Account

(a) If an account is established at a financial institution by one or more parties in the names of the parties and one or more convenience signers and the terms of the account provide that the sums on deposit are paid or delivered to the parties or to the convenience signers “for the convenience” of the parties, the account is a convenience account.

(b) The making of a deposit in a convenience account does not affect the title to the deposit.

(c) A party to a convenience account is not considered to have made a gift of the deposit or of any additions or accruals to the deposit to a convenience signer.

(d) On the death of the last surviving party, a convenience signer shall have no right of survivorship in the account and ownership of the account remains in the estate of the last surviving party.

(e) If an addition is made to the account by anyone other than a party, the addition and accruals to the addition are considered to have been made by a party.

(f) All deposits to a convenience account and additions and accruals to the deposits may be paid to a party or to a convenience signer. The financial institution is completely released from liability for a payment made from the account before the financial institution receives notice in writing signed by a party not to make the

payment in accordance with the terms of the account. After receipt of the notice from a party, the financial institution may require a party to approve any further payments from the account.

(g) If the financial institution makes a payment of the sums on deposit in a convenience account to a convenience signer after the death of the last surviving party and before the financial institution has received written notice of the last surviving party's death, the financial institution is completely released from liability for the payment. If a financial institution makes payment to the personal representative of the deceased last surviving party's estate after the death of the last surviving party and before service on the financial institution of a court order prohibiting payment, the financial institution is released to the extent of the payment from liability to any person claiming a right to the funds. The receipt by the representative to whom payment is made is a complete release and discharge of the financial institution.

§. 438b. Convenience Signer on Other Accounts

(a) An account established by one or more parties at a financial institution that is not designated as a convenience account, but is instead designated as a single-party account or another type of multiple-party account, may provide that the sums on deposit may be paid or delivered to the parties or to one or more convenience signers "for the convenience of the parties."

(b) Except as provided by Subsection (c) of this section:

(1) the provisions of Section 438A of this chapter apply to an account described by Subsection (a) of this section, including provisions relating to the ownership of the account during the lifetimes and on the deaths of the parties and provisions relating to the powers and duties of the financial institution at which the account is established; and

(2) any other law relating to a convenience signer applies to a convenience signer designated as provided by this section to the extent the law applies to a convenience signer on a convenience account.

(c) On the death of the last surviving party to an account that has a convenience signer designated as provided by this section, the convenience signer does not have a right of survivorship in the account and the estate of the last surviving party owns the account unless the convenience signer is also designated as a P.O.D. payee or as a beneficiary.

§ 439. Right of Survivorship

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is made to survive to the surviving party or parties. Notwithstanding any other law, an agreement is sufficient to confer an absolute right of survivorship on parties to a joint account under this subsection if the agreement states in substantially the following form: "On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate." A survivorship agreement will not be inferred from the mere fact that the account is a joint account. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 438 of this code augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death, and the right of survivorship continues between the surviving parties if a written agreement signed by a party who dies so provides.

(b) If the account is a P.O.D. account and there is a written agreement signed by the original payee or payees, on the death of the original payee or on the death of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more P.O.D. payees die before the original payee. If two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a trust account and there is a written agreement signed by the trustee or trustees, on death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more beneficiaries die before the trustee dies. If two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

§ 439A. Uniform Single-Party or Multiple-Party Account Form

(a) A contract of deposit that contains provisions substantially the some as in the form provided by Subsection (b) of this section establishes the type of account selected by a party. The provisions of this part of Chapter XI of this code govern an account selected under the form, other than a single-party account without a P.O.D. designation. A contract of deposit that does not contain provisions substantially the same as in the form provided by Subsection (b) of this section is governed by the provisions of this chapter applicable to the account that most nearly conforms to the depositor's intent.

(b) A financial institution may use the following form to establish the type of account selected by a party:

UNIFORM SINGLE-PARTY OR MULTIPLE-PARTY ACCOUNT SELECTION FORM NOTICE: The type of account you select may determine how property passes on your death. Your will may not control the disposition of funds held in some of the following accounts.

Select one of the following accounts by placing your initials next to the account selected:

(1) SINGLE-PARTY ACCOUNT WITHOUT "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the name of the party:

____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____
____

(2) SINGLE-PARTY ACCOUNT WITH "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate.

Enter the name of the party:

____

Enter the name or names of the P.O.D. beneficiaries:

____
____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____
____

(3) MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay

any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the names of the parties:

____
____
____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____
____

(4) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes to the surviving parties.

Enter the names of the parties:

____
____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____
____

(5) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND P.O.D. (PAYABLE ON DEATH) DESIGNATION. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of the last surviving party, the ownership of the account passes to the P.O.D. beneficiaries.

Enter the names of the parties:

____
____

Enter the name or names of the P.O.D. beneficiaries:

____
____

(6) CONVENIENCE ACCOUNT. The parties to the account own the account. One or more convenience signers to the account may make account transactions for a party. A convenience signer does not own the account. On the death of the last surviving party, ownership of the account passes as a part of the last surviving party's estate under the last surviving party's will or by intestacy. The financial institution may pay funds in the account to a convenience signer before the financial institution receives notice of the death of the last surviving party. The payment to a convenience signer does not affect the parties' ownership of the account.

Enter the names of the parties:

____
____

Enter the names of the convenience signers:

____
____

(7) TRUST ACCOUNT. The parties named as trustees to the account own the account in proportion to the parties' net contributions to the account. A trustee may withdraw funds from the account. A beneficiary

may not withdraw funds from the account before all trustees are deceased. On the death of the last surviving trustee, the ownership of the account passes to the beneficiary. The trust account is not a part of a trustee's estate and does not pass under the trustee's will or by intestacy, unless the trustee survives all of the beneficiaries and all other trustees.

Enter the name or names of the trustees:

____

____

Enter the name or names of the beneficiaries:

____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____

____

(c) A financial institution shall be deemed to have adequately disclosed the information provided in this section if the financial institution uses the form set forth in Subsection (b) of this section. If a financial institution varies the format of the form set forth in Subsection (b) of this section, then such financial institution may make disclosures in the account agreement or in any other form which adequately discloses the information provided in this section.

(d) A financial institution may combine any of the provisions and vary the format of the selections form and notices described in Subsection (b) of this section provided that the customer receives adequate disclosure of the ownership rights and there is appropriate indication of the names of the parties. This may be accomplished in a universal account form with options listed for selection and additional disclosures provided in the account agreement, or in any other manner which adequately discloses the information provided in this section.

§ 440. Effect of Written Notice to Financial Institution

The provisions of Section 439 of this code as to rights of survivorship are determined by the form of the account at the death of a party. Notwithstanding any other provision of the law, this form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime.

§ 441. Accounts and Transfers Nontestamentary

Transfers resulting from the application of Section 439 of this code are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to the testamentary provisions of this code.

§ 442. Rights of Creditors

No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse and minor children, if other assets of the estate are insufficient. No multiple-party account will be effective against the claim of a secured creditor who has a lien on the account. A party to a multiple-party account may pledge the account or otherwise create a security interest in the account without the joinder of, as appropriate, a P.O.D. payee, a beneficiary, a convenience signer, or any other party to a joint account, regardless of whether there is a right of survivorship. A convenience signer may not pledge or otherwise create a security interest in an account. Not later than the 30th day after the date on which a security interest on a multiple-party account is perfected, a secured creditor that is a financial institution the accounts of which are insured by the Federal Deposit Insurance Corporation shall provide written notice of the pledge

of the account to any other party to the account who did not create the security interest. The notice must be sent by certified mail to any other party at the last address the party provided to the depository bank and is not required to be provided to a P.O.D. payee, a beneficiary, or a convenience signer. A party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to the deceased party's personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate, but is not liable in an amount greater than the amount that the party, P.O.D. payee, or beneficiary received from the multiple-party account. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor, or one acting for a minor child of the decedent, and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party unless before payment the institution received written notice from the personal representative stating the sums needed to pay debts, taxes, claims, and expenses of administration.

§ 443. Protection of Financial Institutions

Sections 444 through 449 of this code govern the liability of financial institutions that make payments as provided in this chapter and the set-off rights of the institutions.

§ 444. Payment on Signature of One Party

Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. A multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

§ 445. Payment of Joint Account After Death or Disability

Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded, but payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under Section 439 of this code. A financial institution that pays a sum from a joint account to a surviving party to that account pursuant to a written agreement under Section 439(a) of this code is not liable to an heir, devisee, or beneficiary of the decedent's estate.

§ 446. Payment of P.O.D. Account

A P.O.D. account may be paid, on request, to any original party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee.

§ 447. Payment of Trust Account

A trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account

either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

§ 448. Discharge from Claims

Payment made as provided by Section 444, 445, 446, or 447 of this code discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

§ 449. Set-Off to Financial Institution

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

PART 2. PROVISIONS RELATING TO EFFECT OF DEATH

§ 450. Provisions for Payment or Transfer at Death

(a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, employees' trust, retirement account, deferred compensation arrangement, custodial agreement, pension plan, trust agreement, conveyance of real or personal property, securities, accounts with financial institutions as defined in Part I of this chapter, or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled, or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promissor before payment or demand; or

(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this state.

(c) In this section:

(1) "Employees' trust" means:

(A) a trust that forms a part of a stock-bonus, pension, or profit-sharing plan under Section 401,

Internal Revenue Code of 1954 (26 U.S.C.A. Sec. 401 (1986));

(B) a pension trust under Chapter 111, Property Code; and

(C) an employer-sponsored benefit plan or program, or any other retirement savings arrangement, including a pension plan created under Section 3, Employee Retirement Income Security Act of 1974 (29 U.S.C.A. Sec. 1002 (1986)), regardless of whether the plan, program, or arrangement is funded through a trust.

(2) "Individual retirement account" means a trust, custodial arrangement, or annuity under Section 408(a) or (b), Internal Revenue Code, of 1954 (26 U.S.C.A. Sec. 408 (1986)).

(3) "Retirement account" means a retirement-annuity contract, an individual retirement account, a simplified employee pension, or any other retirement savings arrangement.

(4) "Retirement-annuity contract" means an annuity contract under Section 403, Internal Revenue Code of 1954 (26 U.S.C.A. Sec. 403 (1986)).

(5) "Simplified employee pension" means a trust, custodial arrangement, or annuity under Section 408, Internal Revenue Code of 1954 (26 U.S.C.A. Sec. 408 (1986)).

PART 3. COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP

§ 451. Right of Survivorship

At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse.

Note: Section 3 of Acts 1989, 71st Leg., ch. 655, § 2, eff. Aug. 28, 1989, provides as follows:
"(a) The amendments made by this Act apply:
"(1) to all agreements between spouses creating a right of survivorship in community property entered into on or after the effective date of the 1987 amendment to Article XVI, Section 15, of the Texas constitution; and
"(2) to all such agreements entered into prior to that date if both spouses were living on that date, the agreement complies with the provisions of Part 3 of chapter XI, Texas Probate Code, as added by Section 2 of this Act, and the property which was the subject of the agreement remained community property after the date of the agreement.
"(b) If an agreement between spouses which purported to create a right of survivorship in their community property was entered into prior to the effective date of the 1987 amendment to Article XVI, Section 15, of the Texas Constitution, and a spouse died prior to that date, the agreement is covered by the law as it existed prior to the constitutional amendment, and that law is continued in effect for that purpose."

§ 452. Formalities

An agreement between spouses creating a right of survivorship in community property must be in writing and signed by both spouses. If an agreement in writing is signed by both spouses, the agreement shall be sufficient to create a right of survivorship in the community property described in the agreement if it includes any of the following phrases:

(1) "with right of survivorship";

(2) "will become the property of the survivor";

(3) "will vest in and belong to the surviving spouse"; or

(4) “shall pass to the surviving spouse.”

(b) An agreement that otherwise meets the requirements of this part, however, shall be effective without including any of those phrases.

(c) A survivorship agreement will not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language.

§ 453. Ownership and Management During Marriage

Property subject to an agreement between spouses creating a right of survivorship in community property remains community property during the marriage of the spouses. Such an agreement does not affect the rights of the spouses concerning management, control, and disposition of the property subject to the agreement unless the agreement provides otherwise.

§ 454. Transfers Nontestamentary

Transfers at death resulting from agreements made in accordance with this part of this code are effective by reason of the agreement involved and are not testamentary transfers. Such transfers are not subject to the provisions of this code applicable to testamentary transfers except as expressly provided otherwise in this code.

§ 455. Revocation

An agreement between spouses made in accordance with this part of this code may be revoked in accordance with the terms of the agreement. If the agreement does not provide a method for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse. The agreement may be revoked with respect to specific property subject to the agreement by the disposition of such property by one or both of the spouses if such disposition is not inconsistent with specific terms of the agreement and applicable law.

§ 456. Proof of Agreement

(a) Application for Adjudication. An agreement between spouses creating a right of survivorship in community property that satisfies the requirements of this part is effective without an adjudication. After the death of a spouse, however, the surviving spouse or the personal representative of the surviving spouse may apply to the court for an order stating that the agreement satisfies the requirements of this code and is effective to create a right of survivorship in community property. The original agreement shall be filed with the application for an adjudication. An application for an adjudication under this section must include:

(1) the name and domicile of the surviving spouse;

(2) the name and former domicile of the decedent and the fact, time, and place of death;

(3) facts establishing venue in the court; and

(4) the social security number of the decedent, if known.

(b) Proof Required. An applicant for an adjudication under this section must prove to the satisfaction of the court:

(1) that the spouse whose community property interest is at issue is dead;

(2) that the court has jurisdiction and venue;

(3) that the agreement was executed with the formalities required by law;

(4) that the agreement was not revoked; and

(5) that citation has been served and returned in the manner and for the length of time required by this code.

(c) Method of Proof. The deceased spouse's signature to the agreement may be proved by the sworn testimony of one witness taken in open court, by the affidavit of one witness, or by the deposition of one witness, either written or oral, taken in the same manner and under the same rules as depositions in other civil actions. If the surviving spouse is competent to make an oath, the surviving spouse's signature to the agreement may be proved by the sworn testimony of the surviving spouse taken in open court, by the affidavit of the surviving spouse, or by the deposition of the surviving spouse either written or oral, taken in the same manner and under the same rules as depositions in other civil actions. If the surviving spouse is not competent to make an oath, the surviving spouse's signature to the agreement may be proved in the manner provided above for the proof of the deceased spouse's signature.

(d) Venue. An application for an adjudication under this section must be filed in the county of proper venue for administration of the deceased spouse's estate.

§ 457. Action of Court on Agreement

On completion of a hearing on an application under Section 456 of this code, if the court is satisfied that the requisite proof has been made, an order adjudging the agreement valid shall be entered. Certified copies of the agreement and order may be recorded in other counties and may be used in evidence, as the original might be, on the trial of the same matter in any other court, on appeal or otherwise.

§ 458. Effect of Order

An agreement between spouses creating a right of survivorship in community property that satisfies the requirements of this code is effective and enforceable without an adjudication. If an order adjudging such an agreement valid is obtained, however, the order shall constitute sufficient authority to all persons owing money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right, that is subject to the provisions of the agreement, and to persons purchasing from or otherwise dealing with the surviving spouse for payment or transfer to the surviving spouse, and the surviving spouse may enforce his or her right to such payment or transfer.

§ 459. Custody of Adjudicated Agreements

An original agreement creating a right of survivorship in community property that has been adjudicated together with the order adjudging it valid shall be deposited in the office of the county clerk of the county in which it was adjudicated and shall remain there, except during such time when it may be removed for inspection to another place on order of the court where adjudicated. If the court orders an original agreement to be removed to another place for inspection, the person removing the original agreement shall give a receipt therefor, and the clerk of the court shall make and retain a copy of the original agreement.

§ 460. Protection of Persons or Entities Acting Without Knowledge or Notice

(a) Personal Representatives. If the personal representative of a decedent's estate has no actual knowledge of the existence of an agreement creating a right of survivorship in community property in the decedent's surviving spouse, the personal representative shall not be liable to the surviving spouse or to any person claiming from the surviving spouse for selling, exchanging, distributing, or otherwise disposing of the property or an interest therein.

(b) Purchaser without Notice of Survivorship Agreement.

(1) If any person or entity purchases real or personal property from a person claiming from a decedent more than six months after the date of the decedent's death, for value, and without notice of the existence of

an agreement creating a right of survivorship in the property in the decedent's surviving spouse, the purchaser shall have good title to the interest which the person claiming from the decedent would have had in the absence of the agreement, as against the claims of the surviving spouse or any person claiming from the surviving spouse.

(2) If any person or entity purchases real or personal property from the personal representative of a decedent's estate, for value, and without notice of the existence of an agreement creating a right of survivorship in the property in the decedent's surviving spouse, the purchaser shall have good title to the interest which the personal representative would have had the power to convey in the absence of the agreement, as against the claims of the surviving spouse or any person claiming from the surviving spouse.

(c) Purchaser without Notice of Revocation of Survivorship Agreement. If any person or entity purchases real or personal property from a decedent's surviving spouse more than six months after the date of the decedent's death, for value, and

(1) with respect to real or personal property, the purchaser has received an original or certified copy of an agreement purporting to create a right of survivorship in such property in the decedent's surviving spouse, purportedly signed by the decedent and the surviving spouse; or

(2) with respect to real property, an agreement purporting to create a right of survivorship in such property in the decedent's surviving spouse, purportedly signed by the decedent and the surviving spouse, is properly recorded in a county in which a part of the property is located;

and the purchaser has no notice that the agreement was revoked, the purchaser shall have good title to the interest which the surviving spouse would have had in the absence of a revocation of the agreement, as against the claims of the personal representative of the decedent estate and all persons claiming from the decedent or the personal representative of the decedent's estate.

(d) Debtors, Transfer Agents, and Other Persons Acting without Notice of Survivorship Agreement. If any person or entity owing money to a decedent or having custody of any property or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right which was owned by a decedent prior to death has no actual knowledge of an agreement creating a right of survivorship in such property in the decedent's surviving spouse, that person or entity may pay or transfer such property to the personal representative of the decedent's estate or to the heirs, legatees, or devises of the decedent's estate if no administration is pending on the estate, and the person or entity shall be discharged from all claims for amounts or property so paid or transferred.

(e) Debtors, Transfer Agents, and Persons Acting without Notice of Revocation of Survivorship Agreement. If any person or entity owing money to a decedent or having custody of any property or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right which was owned by a decedent prior to death is presented with the original or a certified copy of an agreement creating a right of survivorship in such property in the decedent's surviving spouse, purportedly signed by the decedent and the decedent's surviving spouse and if such person or entity has no actual knowledge that the agreement was revoked, that person or entity may pay or transfer such property to the decedent's surviving spouse and shall be discharged from all claims for amounts or property so paid or transferred.

(f) Definitions. Under this section:

(1) a person or entity has "actual knowledge" of an agreement creating a right of survivorship in community property or of the revocation of such an agreement only if the person or entity has received written notice or has received the original or a certified copy of the agreement or revoking instrument:

(2) a person or entity has "notice" of an agreement creating a right of survivorship in community property or the revocation of such an agreement if the person or entity has actual knowledge of the agreement or revocation or, with respect to real property, if the agreement or revoking instrument is properly recorded in the county in which the real property is located; and

(3) a “certified copy” is a copy of an official record or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, certified as correct in accordance with the provisions of Rule 902 of the Texas Rules of Civil Evidence.

(g) Other Cases. Except as expressly provided in this section, the provisions of this section do not affect the rights of a surviving spouse or person claiming from the surviving spouse in disputes with persons claiming from a decedent or the successors of any of them concerning a beneficial interest in property or the proceeds therefrom, subject to a right of survivorship pursuant to an agreement that satisfies the requirements of this code.

§ 461. Rights of Creditors

The provisions of Part 1 of this chapter govern the rights of creditors in multiple-party accounts, as defined by Section 436 of Part 1. Except as expressly provided above in this section, the community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death without regard to a right of survivorship in the decedent’s surviving spouse under an agreement made in accordance with the provisions of this part. The surviving spouse shall be liable to account to the deceased spouse’s personal representative for the property received by the surviving spouse pursuant to a right of survivorship to the extent necessary to discharge such liabilities. No proceeding to assert such a liability shall be commenced unless the personal representative has received a written demand by a creditor, and no proceeding shall be commenced later than two years following the death of the decedent. Property recovered by the personal representative shall be administered as part of the decedent’s estate. This section does not affect the protection given to persons and entities under Section 460 of this code unless, before payment or transfer to the surviving spouse, the person or entity received a written notice from the decedent’s personal representative stating the amount needed to satisfy the decedent’s liabilities.

§ 462. Coordination With Part 1 of Chapter XI

The provisions of Part 1 of this chapter apply to multiple-party accounts held by spouses with a right of survivorship to the extent that such provisions are not inconsistent with the provisions of this part.

APPENDIX B

COMMUNICATIONS WITH CLIENTS

My goal is to tell my clients as many as four different times about the need for planning concerning non-probate assets:

- At our initial conference when we are discussing the nature of client's assets and how the estate planning strategy will work.
- In my transmittal letter when I send out drafts of the documents. In this letter, I provide specific instructions about beneficiary designations, if appropriate.
- Ideally, we will discuss this topic again when we sign the documents.
- Finally, the transmittal letter with the original, executed documents will repeat the instructions in the transmittal letter accompanying the draft documents.

EXCERPT FROM LETTER TRANSMITTING DRAFTS OF WILLS

Ownership of Assets and Beneficiary Designations

When you sign your Wills, they will dispose of all of your property which is in your probate estate. Your probate estate does not include "non-probate" assets -- property which is subject to a contractual arrangement which provides that the property will pass in another manner. Examples of "non-probate" assets include life insurance proceeds, annuity contracts, retirement benefits (including individual retirement accounts and 401(k) plans), and certain accounts in financial institutions and with brokerage companies owned either with right of survivorship, as P.O.D. ("payable on death") accounts, as T.O.D. ("transfer on death") accounts, or as "Totten" trust accounts.

In order to accomplish your estate planning objectives, it is very important to coordinate disposition of your non-probate assets with your Wills. Otherwise, it may not be possible to fully fund the bequests to the Family Trust (the "bypass" trust which provides for the potential federal estate tax savings). Coordination of disposition of your non-probate assets with your Wills may require the following action:

- **Bank and Brokerage Accounts.** Any bank accounts, brokerage accounts, mutual fund accounts, etc., which the two of you hold in accounts described as "multiple party with right of survivorship," "joint tenants with right of survivorship," or "community property with right of survivorship" should be changed to joint accounts which do not provide for survivorship (such as "multiple-party with no right of survivorship" accounts or accounts owned as tenants in common), so that the interest of the first to die will be available to pass under the Will and into the Family Trust. Similarly, P.O.D. accounts and T.O.D. accounts should be re-styled either as single-party accounts or as "multiple-party with no right of survivorship" accounts or accounts owned as "tenants in common."

- **Life Insurance.** The beneficiary designations on any life insurance policies of significant amounts should be changed so that the trusts under your Wills are permissible beneficiaries. There are two alternatives, as follows:

    - The primary beneficiary may be designated as "the Trustee under the Will of [Name of the

Insured].” Upon receipt of the proceeds, the trustee will distribute the survivor’s community property interest in the proceeds to the survivor, and allocate the remaining proceeds to either the Family Trust, Marital Trust, or other appropriate beneficiaries, depending on the size of the estate.

- In the alternative, the beneficiary designation may provide that one-half would go to the other uninsured spouse and one-half would go to “the Trustee under the Will of [Name of Insured].” The life insurance company would then pay one-half of the proceeds to the surviving spouse and one-half to the Trustee under your Will, to be allocated to the Family Trust, Marital Trust, or other appropriate beneficiaries.

- **Retirement Benefits.** The primary beneficiary of your IRAs, employee benefit plans, and annuity contracts should be the other spouse, with “the Trustee of the Family Trust under the Will of [Name of Participant]” as the alternate beneficiary (sometimes also referred to as the “secondary beneficiary” or the “contingent beneficiary”). This will give the survivor the option of “rolling over” a distribution to take advantage of favorable income tax treatment for employee benefits, or disclaiming the benefits so that they will be available to fund the bypass trust for estate tax savings.

If you have any questions about these recommendations, please let me know. I would be glad to assist you in completing change of beneficiary designation forms if that would be helpful, and you may wish to request copies of those forms now.

EXCERPT FROM LETTER TRANSMITTING DRAFT OF REVOCABLE LIVING TRUST

Beneficiary Designations and Non-Probate Assets

In order to accomplish your estate planning objectives, it is important to properly coordinate disposition of your other non-probate assets with your estate plan after you have signed your Will and your revocable living trust. If ownership of assets and beneficiary designations are not properly coordinated with your estate plan, then it may not be possible to achieve the desired objectives, because the trusts provided for in your plan may not be fully funded. Following are some recommendations in this regard:

- **Bank and Brokerage Accounts.** Any bank accounts, brokerage accounts, mutual fund accounts, etc., which the two of you hold as multiple party accounts with right of survivorship, as joint tenants with right of survivorship or as community property with right of survivorship should be restyled. Preferably, the accounts will be restyled in the name of your revocable living trust. (Please see our enclosed memo regarding funding your revocable living trust.) In the alternative, the accounts should be re-styled as accounts which do not provide for survivorship, such as “multiple party accounts with no right of survivorship” or as “tenants in common” accounts.

EXCERPT FROM LETTER TRANSMITTING DRAFTS OF SIMPLE WILLS

Ownership of Assets and Beneficiary Designations

Please note that your Wills dispose only of your “probate” property. Any of your “non-probate” property will not necessarily or automatically be covered by your Wills, but may pass entirely outside of the terms of your Wills. Non-probate property includes retirement plan benefits, individual retirement account benefits, annuity contracts, and life insurance proceeds, all of which are generally paid in accordance with

a beneficiary designation which you have signed.

In addition, certain accounts in financial institutions, certain mutual funds, certain accounts with brokerage companies, and certain stocks and bonds are non probate assets. These accounts and securities may be payable either to the surviving owner (as in the case of joint tenancy with right of survivorship and community property with right of survivorship accounts and securities) or to a beneficiary named by the owner(s), such as “P.O.D.” (“payable on death”) accounts, “T.O.D.” (“transfer on death”) accounts, and “Totten trust” accounts.

In order to coordinate the disposition of your non-probate assets with your Wills, you should review your account ownership, security ownership, and beneficiary designations (for annuity contracts, life insurance policies, individual retirement accounts, and employee benefit plans, including group life insurance policies) to make sure that they properly reflect your desires. Following are some general considerations.

- Holding accounts and securities in right of survivorship accounts and arrangements between the two of you are generally appropriate and should not interfere with your estate plan, since you are leaving all of your property outright to each other

- Care must be used in establishing P.O.D. accounts and T.O.D. accounts. If not properly structured and titled, then you may end up treating your beneficiaries unequally. For example, if you name only one child as beneficiary, or different children as beneficiaries of different accounts, then your children may be treated unequally. These accounts are generally not advisable if the beneficiaries are minors.

- Your beneficiary designations should generally be as follows:

  - The primary beneficiary under each policy or plan should be the other spouse. Your beneficiary designations probably already provide for this.

  - The secondary (or contingent) beneficiary should be your children. Care must be taken to determine whether a child’s descendants will benefit if a child predeceases you.

APPENDIX C

REVIEWING BANK ACCOUNT DOCUMENTATION

- Obtain copies of signature card/deposit agreement and accompanying pages. The terms of the ownership agreement are often in accompanying "terms and conditions" pages or even in a separate booklet or brochure.

- Review the documents to determine what type of account ownership is stated on the face of the document, which may include:

    - Single-party account with no P.O.D. designation
    - Single-party account with P.O.D. designation
    - Multiple-party account with no right of survivorship / tenants in common
    - Multiple-party account with right of survivorship
    - Multiple-party account with right of survivorship and P.O.D. designation
    - Trust account
    - Convenience account

- Review the document for special issues based on account type.

    - Single-party account with no P.O.D. designation

        - No real issues. Account included in decedent's probate estate.

    - Single-party account with P.O.D. designation

        - Did owner personally sign signature card and/or initial ownership selection?
        - Did P.O.D. payee survive the owner?
            - If so, funds in account belong to P.O.D. payee (unless estate insolvent).
        - If multiple P.O.D. payees, did all payees survive the owner?
            - Funds belong to those payees who survived the owner.
        - If all payees predeceased the owner, funds are included in owner's probate estate.

    - Multiple-party account with no right of survivorship / tenants in common

        - Must review account records to determine decedent's ownership interest in the account.
        - Interest owned by decedent will be included in decedent's probate estate.

    - Multiple-party account with right of survivorship / joint tenants with right of survivorship / community property with right of survivorship

        - If a married couple, did both parties sign signature card and/or initial ownership selection?
        - If not married couple, did the party who died sign signature card and/or initial ownership selection?
        - Did all parties sign the same signature card contemporaneously, or were some parties added at a subsequent date?
        - Did one party survive the other party by at least 120 hours?
        - Does the signature card include appropriate survivorship language?

- Trust account
  - Did owner/trustee personally sign signature card and/or initial ownership selection?
  - Did beneficiary survive the owner/trustee?
    - If so, funds in account belong to beneficiary (unless estate insolvent).
  - If multiple beneficiaries, did all beneficiaries survive the owner/trustee?
    - Funds belong to those beneficiaries who survived the owner/trustee.
  - If all beneficiaries predeceased the owner/trustee, funds are included in owner's probate estate.