

“JOINT TENANCY WITH RIGHT OF SURVIVORSHIP ISSUES”

Presented by:

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"Guardianships from Start to Finish," Wills and Probate Institute, University of Houston, 2004

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"JTWROS Accounts," Wills and Probate Institute, South Texas College of Law, 2003

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"How to Initiate and Administer Guardianships," Wills and Probate Institute Attorney and Guardian Ad Litem Certification Course, South Texas College of Law, 2001

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"The Two UPIAs – How They Will Change the World," State Bar of Texas Advanced Estate Planning and Probate Law Course (2003).

"Modifying and Terminating Irrevocable Trusts," State Bar of Texas Advanced Estate Planning and Probate Law Course (1999).

"Protecting the Surviving Spouse," Southwestern Legal Foundation Wills and Probate Institute (1999).

"Legal Research on the Internet," (with Joseph G. Hodges, Jr., Denver, Colorado), American College of Trust and Estate Counsel 1999 Annual Meeting.

"Court-Created Trusts in Texas," State Bar of Texas Advanced Drafting: Estate Planning and Probate Law Course (1995), updated to reflect legislative changes through 2005, The Texas Probate Web Site, www.texasprobate.com.

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1. Introduction.

Multi-party accounts are the estate planner's nemesis and the litigator's friend. Estate planners hate them because they can be the undoing of a well-conceived plan. How frustrating can it be to see a perfectly good credit shelter trust plan go up in smoke because 75% of the marital assets are held with right of survivorship? On the other hand, litigators love them because, despite the efforts of the legislature and the courts alike, there appears to be no end to litigation over the rightful owner of money and property in these accounts.

Of course, it is myopic to view multi-party accounts just from the perspective of lawyers, whether the lawyers are "writers" or "fighters." The real key, the thing that makes this a topic we still write about and discuss, is that clients love 'em. Despite all our preaching and despite all the litigation and problems they cause, lay people create multi-party accounts all the time with little or no thought (or, at least, little or no understanding) of the consequences.

It is just and right, then, for us to take a closer look at multi-party accounts. This paper begins with an historical perspective. Next, it covers the current statutory framework in Texas regarding multi-party accounts. Next, it discusses recent case law developments, beginning with the leading case on survivorship issues, *Stauffer v. Henderson*, 801 S. W. 2d 858 (Tex. 1990). Finally, it examines the signature cards and account agreements used in the summer of 2000 by the five largest banks in Texas for quirks which might affect the creation of survivorship accounts.

The author wishes to thank Professor Thomas M. Featherston, Jr., of the Baylor University School of Law for his help on this paper, as well as Barbara J. Lipscomb of Austin, who did most of the work on the 2007 update to this paper.

2. An Historical Perspective.¹

If two or more persons jointly own a piece of property and one of the joint owners dies,

¹ Professor Stanley Johanson, in *Johanson's Texas Probate Code Annotated*, gives an excellent historical perspective about joint tenancies in Texas and other jurisdictions in his commentaries to Tex. Prob. Code Ann. §§46, 439 and 451, and this section largely is derived from that.

does the property pass according to the deceased owner's will (or by intestacy if he or she has no will) or does the deceased owner's interest in the property pass to the other co-owners? The form of ownership and applicable state law provides the answer to this question. In general, if title passes to the other co-owners, the property is subject to a "right of survivorship," and title passes by "nontestamentary transfer" – free of the probate process.

At common law, a conveyance of land to two or more persons presumptively created a joint tenancy – with right of survivorship -- rather than a tenancy in common – with no right of survivorship. Many states, including Texas, passed statutes either reversing the presumption or abolishing joint tenancies with right of survivorship entirely. Texas's first statute on the subject – the forerunner to Section 46 of the Texas Probate Code – was enacted in 1848, and it opted for abolishing joint tenancy with right of survivorship rather than merely reversing the presumption. The Texas Supreme Court in 1889 announced: "The distinction which existed at common law between estates held by joint tenants, coparceners, and tenants in common, do not obtain in this state. The holders of such estates are tenants in common without regard to the manner in which such estates are acquired." *Peterson v. Fowler*, 73 Tex. 524, 11 S. W. 534 (1889).

Then came *Chandler v. Kountze*, 130 S. W. 2d 327 (Tex. Civ App. – Galveston 1939, writ ref'd), in 1939, which permitted the creation of a joint tenancy with right of survivorship where the conveyance was expressly made to two persons "as joint tenants with right of survivorship." The rationale of the *Chandler* case was that, while the legislature abolished joint tenancies with rights of survivorship that were created by operation of law, it did not prohibit parties to a contract from agreeing to create that form of ownership.

This result was codified into Section 46 of the new Texas Probate Code in 1955, which prohibited creation of joint tenancies with rights of survivorship by operation of law but permitted joint owners to agree in writing to create such estates.

Section 46 of the Probate Code proved to be inadequate in dealing with the explosive demand for multi-party survivorship accounts. There was much litigation over whether the parties to joint accounts intended to create survivorship rights and in fact did create survivorship rights. Finally, in 1979 the Texas Legislature enacted Chapter XI of the Texas Probate Code, entitled "Nontestamentary Transfers." These statutes, which have been amended several times since 1979, established ownership rules for such accounts and provided "safe harbor" language for persons wishing to create survivorship accounts.

Meanwhile, another quirk of Texas law was having a dramatic effect on the development of the law in this state regarding rights of survivorship. The most common type of joint ownership with right of survivorship in other states was between spouses. Joint tenancy with right of survivorship between spouses is called "tenancy by the entirety" in many states. Obviously, many spouses would like the property they hold jointly with their spouses to pass to the surviving spouse free of probate, so this form of ownership is quite attractive. For most of the 20th century, however, this type of ownership between spouses was effectively blocked in Texas because of our community property system. In the leading case of *Hilley v. Hilley*, 161 Tex. 569, 342 S. W. 2d 565 (1961), the Texas Supreme Court held that a husband and wife could

not create a valid survivorship estate with community property unless they first partitioned the community property into separate property by written partition agreement.

The *Hilley* result did not sit well with the Texas legislature. There were increasing demands for effective right of survivorship ownership between spouses in Texas – especially with respect to bank and brokerage accounts – and constituents put pressure on their legislators to fix *Hilley*. In 1987, Section 15 of Article XVI of the Texas Constitution was amended to provide that “spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse.” In 1989, Sections 451 – 462 of the Texas Probate Code were enacted (Part 3 of Chapter XI) to provide a statutory framework for survivorship agreements involving community property. Note, however, that agreements between spouses that their community property be held subject to a right of survivorship technically does not create “joint tenancy with right of survivorship” property; rather, it creates a Texas-only hybrid called “community property with right of survivorship.”

As will be discussed below, the statutory framework – Section 46 and Sections 436 – 462 of the Texas Probate Code – has made the law regarding multi-party accounts clearer in Texas, but it has not stopped the flood of litigation over such accounts.

3. Current Statutory Framework.

a. **Section 46.** Texas’s original statute regarding joint tenancies and rights of survivorship is still on the books. Section 46 of the Texas Probate Code is short and sweet and makes three basic points:

a. **Presumption: No Survivorship Right is Established.** The first sentence of Section 46 reads:

If two or more persons hold an interest in property jointly, and one joint owner dies before severance, the interest of the decedent in the joint estate shall not survive to the remaining joint owner or owners but shall pass by will or intestacy from the decedent as if the decedent’s interest had been severed.

This is straightforward. If property is conveyed to two persons and the conveyance is silent as to the form of ownership, title is taken not as joint tenants with right of survivorship but as tenants in common. It is important to remember this default rule – it takes something specific in the conveyance or agreement to create a right of survivorship, and if the specific language is not there, then there’s no right of survivorship.

b. **Survivorship May Be Created By Written Agreement.** The second sentence of Section 46 reads:

The joint owners may agree in writing, however, that the interest of any joint owner who dies shall survive to the surviving joint owner or owners, but no such agreement shall be inferred from the mere fact that the property is held in joint

ownership.

To overcome the presumption of no right of survivorship found in Section 46(a), the joint owners must agree *in writing* that the interest of a deceased joint owner will pass to the other joint owners by survivorship. Note that, while the agreement regarding survivorship must be in writing, the statute does not say whether or not all – or any – of the joint owners must sign the written instrument creating the survivorship right. In *Chandler v. Kountze*, 130 S. W. 2d 327 (Tex. Civ. App. 1939, writ ref'd), the acceptance of a deed by the co-owners as joint tenants with right of survivorship was held to create a survivorship right. In that case, the court does not make clear whether or not the grantees on the deeds (who accepted title as joint tenants with right of survivorship) signed the deeds; common practice at the time was that grantees did not sign deeds. Thus, *Chandler* may be some authority for the proposition that joint tenants need not sign the written instrument creating the right of survivorship, as long as a written instrument exists. However, the *Chandler* case was decided in 1939, before the adoption of Section 46 of the Probate Code and at a time when the predecessor statute made no provision for overriding the presumption against survivorship.

c. Section 46 Does Not Apply to Community Property. Section 46(b) reads:

Subsection (a) does not apply to agreements between spouses regarding their community property. Agreement between spouses regarding rights of survivorship in community property are governed by Part 3 of Chapter XI of this code [§§451 – 462].

Thus, while Section 46 continues to offer an alternative – if antiquated and ambiguous – way to create survivorship rights between nonspouses and between spouses as to separate property, it is not available as an alternative to Sections 451 – 462 to create survivorship rights in community property.

b. Sections 436 – 449 (Chapter XI, Part 1). Originally enacted in 1979 and amended several times since then, Chapter XI, Part 1 of the Texas Probate Code provides a much more detailed and thorough treatment of the subject of multi-party accounts at financial institutions.

a. Applicability: “Accounts” at “Financial Institutions.” Part 1 of Chapter XI applies to accounts at financial institutions. An “account” is “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.” Tex. Prob. Code Ann. §436(1). A “financial institution” is:

[A]n 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.

Tex. Prob. Code Ann. §436(3).

While brokerage firms are considered "financial institutions," the only accounts which are governed by Part 1 of Chapter XI are "contracts of deposit of funds." Does this mean that these statutes apply to securities held in street name at a brokerage firm? The correct answer is probably not, because these are not "contracts of deposit of funds." Rather, securities and accounts containing securities probably should be governed by Texas Probate Code §450, discussed below. However, one Texas case on the subject casts doubt on that outcome. The court in *In re Estate of Dillard*, 98 S. W. 3d 386 (Tex. App. – Amarillo 2003, writ denied) applied these bank account rules to a Merrill Lynch account without stating in the opinion whether or not this was a brokerage account and without discussing the issue of whether or not these rules apply to brokerage accounts. The opinion states that the decedent placed "more than a million dollars of *property*" in the account, 98 S. W. 3d at 398 (footnote 4), which is some indication that it was not a demand deposit account of the type described in Section 436(1). The author spoke to one of the attorneys who handled the *Dillard* case and was told that no one raised the issue that Part 1 of Chapter XI may not apply; rather, everyone assumed that the rules applied since "brokerage firms" are specifically mentioned in the definition of "financial institution" in Section 436(3).² In 1997, the legislature enacted the "Uniform Transfer on Death Security Registration Act" that would have specifically addressed survivorship rights in securities. Despite the efforts of probate lawyers' groups, the Governor signed the bill into law. After the bill became law but before the end of the 1997 legislative session, Governor Bush's staff had a change of heart and, with the Governor's backing, the uniform act was repealed before its effective date and "securities" and "accounts at financial institutions" were added to the list of permitted nontestamentary transfers in Section 450 of the Probate Code (discussed in more detail below). Therefore, conventional wisdom is that Part 1 of Chapter XI (Sections 436 – 449) does *not* govern securities held in brokerage accounts; rather, those arrangements are governed by Section 46 and/or Section 450. Nevertheless, the increasing popularity of brokerage investments among Texans and the tendency of the litigants and the courts to ignore the "contracts of deposit of funds" provision in Section 436(1) of the Texas Probate Code mean there probably are going to be more lawsuits filed under Part 1 of Chapter XI involving brokerage accounts. One of these days either the Legislature or the Texas Supreme Court will clarify this issue.

b. Rules Govern Ownership, Not Withdrawal Rights. Largely as a salve for financial institutions, and admittedly as a recognition of the reality of the situation, the provisions of Sections 438 – 440 of the Probate Code concerning beneficial ownership between parties to accounts, pay-on-death (P.O.D.) beneficiaries and their creditors "are relevant only to

² The United States Tax Court has also applied Part 1 to a brokerage account holding stock of a company called eConnect, citing Section 436 specifically for the proposition that the term "multi-party account" as defined in that section covered the account at issue in the case. Apparently here, as in *Dillard*, neither party argued that Part 1 did not apply. *Estate of Freedman v. Commissioner*, T.C. Memo 2007-61, 93, TCM (CCH) 1007.

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." Tex. Prob. Code Ann. §437. Sections 437 – 449 are full of protections of financial institutions. For example, in *MBank Corpus Christi, N. A. v. Shiner*, 840 S. W. 2d 724 (Tex. App. – Corpus Christi 1992, no writ), the bank was held to be not liable to the estate for paying money on deposit in a non-survivorship account to a joint account holder after the death of the depositor.

As a result, conflicts regarding whether an account is a survivorship account or not almost always involve the surviving account holder and the estate of the deceased account holder and not financial institutions. This makes collectability of a judgment against a surviving account holder an issue, since the money at issue usually has been withdrawn from the financial institution before the litigation is commenced.

c. Right of Survivorship. Section 439 is faithful to the presumption created in Section 46 that joint ownership of an account does not mean that the account is a survivorship account unless the parties otherwise expressly agree. Section 439 goes much further than Section 46, however, by setting forth the requirements for a survivorship agreement regarding multi-party accounts, by listing magic words or phrases which can be used to create such accounts and by providing for the nontestamentary transfer of funds held in pay-on-death (P. O. D.) and trust accounts.

(1) Requirements for Survivorship Agreement. Under Section 439(a), an agreement to make an account a survivorship account must be:

- (a) In writing (same as Section 46); and
- (b) Signed by the party who dies (more specific than Section 46).

This means that an agreement signed by just one of the account holders can create a right of survivorship if the person who signs the agreement is the person who dies. In most cases, the written agreement which meets this requirement will be the signature card, the depository agreement with the bank, or some combination of the two. However, according to a 1995 court of appeals decision, any written agreement regarding the accounts may suffice, even if it is not in the bank's custody. *Cweren v. Danziger*, 923 S. W. 2d 641 (Tex. App. – Houston [1st Dist.] 1995, no writ).

(2) Magic Words. Section 439(a) provides the ultimate guidepost for financial institutions and their customers who wish to create survivorship accounts – it says exactly what language is sufficient to create such an account:

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."

[Emphasis added] One would think that this provision, enacted in 1987, would effectively end all disputes regarding survivorship of multi-party accounts, since financial institutions obviously would use this safe-harbor language in their account agreements. One would be wrong, however, as explained below.

d. Pay-on-Death (P. O. D.) Accounts. Often a depositor does not wish to list someone as a co-owner, or joint tenant, of an account during the depositor's lifetime, but nevertheless wants the funds remaining in the account to be paid to someone else as a nontestamentary transfer at his or her death. Section 439(b) expressly provides for this type of "pay-on-death," or P. O. D., account. In order to be a valid P. O. D. account, the "original payee or payees" must sign a written agreement creating the P. O. D. status. Some Texas courts have applied the construction rules established in *Stauffer v. Henderson*, 801 S. W. 2d 858 (Tex. 1990), for joint accounts to P. O. D. account cases (see, e.g., *Parker v. JP Morgan Chase Bank*, 95 S. W. 3d 428 (Tex. App. – Houston [1st Dist.] 2002, no writ), but another court was more lenient in allowing extrinsic evidence in a P. O. D. case (see *Cummings v. Cummings*, 923 S. W. 2d 132 (Tex. App. – San Antonio 1996, writ denied).

e. Trust Accounts. Another way a depositor can provide for the non-testamentary transfer of amounts on deposit at the depositor's death is by creating a "trust account." These are really a sort of "poor-man's" trust (often called "Totten trusts") in which the depositor is the only one with signature authority on the account, but on the depositor's death the assets in the account belong to a person listed as the beneficiary of the trust. Section 439(c) expressly provides for this type of account. To be a "trust account" under the definition found in Texas Probate Code §436(14), these four requirements must be met: (1) the account must be in the name of one or more parties as trustee for one or more beneficiaries; (2) the trust must be established by the form of the account and the deposit agreement with the financial institution; (3) there must be no subject of the trust other than the sums on deposit on account; and (4) the account must not be a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account. See *Cweren v. Danziger*, 923 S.W.2d 641, 644 (Tex.App.-Houston [1st Dist.] 1995, no writ); *Isbell v. Williams*, 705 S.W.2d 252, 255 (Tex.App.-Texarkana 1986, writ ref'd n.r.e.); *Otto v. Klement*, 656 S.W.2d 678, 682 (Tex.App.-Amarillo 1983, writ ref'd n.r.e.); and *Stogner v. Richeson*, 52 S. W. 3d 903, 906 (Tex. App. – Fort Worth 2001, writ denied).

f. Convenience Accounts. In 1993, the legislature added Section 439A to the Probate Code. This section permits a depositor to name a co-signer on his or her account without giving the co-signer ownership rights before or after the depositor's death. In theory, this form of account could fill a much-needed void – a way for elderly persons to allow a loved one to help them pay bills and handle other bank transactions without intentionally or unintentionally giving the loved one any ownership interest. In practice, this type of account is unavailable at many banks.

In 2003, the Legislature amended the law regarding convenience accounts to make them even more attractive. First, the statute was amended to make clear that a depositor can name more than one convenience signer on the account and that a multi-party account (for example, an account in the name of a husband and wife) can name one or more convenience signers. Apparently, some banks to the requirement of Section 438A that "the" party could name "a" convenience signer literally and did not permit multiple account-holders and multiple convenience signers. The 2003 change makes it clear that depositors do not have to single out one convenience signer but may name more than one.

A second change in 2003 permits other types of persons with signing authority on multi-party accounts to pledge the account to secure their debts. However, convenience signers cannot pledge the account. Thus, an elderly person who makes his daughter a joint tenant with right of survivorship on his bank account could wake up to discover that the amounts on deposit in the account are pledged to secure the daughter's debts to the bank, while the same person who makes his daughter a convenience signer faces no such fear.

g. The Uniform Single-Party or Multiple-Party Account Form. The legislature promulgated a "uniform single-party or multiple-party account form" when it enacted Section 439A in 1993. This form, as amended in 2003, is set forth below. It gives easy-to-understand descriptions of each type of account:

<p>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.</p> <p>Select one of the following accounts by placing your initials next to the account selected:</p> <p>___ (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.</p> <p>Enter the name of the party:</p> <p>_____</p> <p>___ (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.</p> <p>Enter the name of the party:</p> <p>_____</p> <p>Enter the name or names of the P.O.D. beneficiaries:</p> <p>_____</p> <p>_____</p> <p>_____</p>
--

____ (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:

____ (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:

____ (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:

Note that the account titles and descriptions used in the statutory form in Section 439A are neutral as to community property or separate property. Rather than calling an account with two or more persons with survivorship rights a "joint tenancy with right of survivorship," which spouses still theoretically cannot create because of the rule in *Hilley v. Hilley*, 161 Tex. 569, 342 S. W. 2d 565 (1961), or having a separate account for spouses with community property called "community property with right of survivorship" (see the discussion of Sections 451 – 462 below), the legislature wisely and simply sidestepped the issue by providing for the creation of a "multiple-party account with right of survivorship." Thus, if the statutory form is used properly, a right of survivorship can be created between spouses with community property or between others with non-community property without any dispute over the "joint tenancy" nomenclature.

Section 439A(a) provides that deposit agreements containing provisions substantially the same as in the statutory form "establishes the type of account selected by a party." Thus, if a bank uses the statutory form, the form and Section 439A establish the type of account, not Section 439(a). A deposit agreement that does not contain provisions substantially the same as the statutory form "is governed by the provisions of this chapter [Chapter XI of the Probate Code] applicable to the account that most nearly conforms to the depositor's intent." Tex. Prob. Code Ann. §439A(a).

Again, it is clear that the legislature is just begging financial institutions and their customers to use this form to assure that the customers' intentions are clear regarding survivorship rights. To its credit, the Texas Bankers Association apparently recommends the use of this form for its member institutions. Unfortunately, as will be seen below, bank use of this

form is far from universal, and multi-party account cases continue to end up in the courts.

h. Account Ownership While All Account Holders Are Alive. Most disputes over ownership of funds in multi-party accounts arise after the death of one of the account holders. Section 438 addresses another important issue: who owns the money in multi-party accounts while all account holders are alive? Under this section:

(1) Joint Accounts. Money in joint accounts belongs to the parties (account holders) in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. Thus, in the typical case, if Aunt Suzy has contributed 100% of the money to an account on which niece Kate is also an account holder, during Aunt Suzy's lifetime all of the money in the account belongs to her, regardless of whether or not the account is a survivorship account.

(2) P. O. D. Accounts. Money in a pay-on-death (P. O. D.) account belongs to the original payee (depositor) during the payee's lifetime and not to the P. O. D. payee or payees. If there are two or more original payees (depositors), ownership rights during their lifetimes are governed by the rules applicable to joint accounts (described above).

(3) Trust Accounts. Money in a "trust account" belongs beneficially to the trustee during the trustee's lifetime, unless a contrary intent is manifested by the terms of the account or deposit agreement or there is clear and convincing evidence of an irrevocable trust. If there is an irrevocable trust, the account belongs beneficially to the beneficiary. If there is no irrevocable trust but more than one "trustee," then ownership rights during the "trustees'" lifetimes are governed by the rules applicable to joint accounts. This rule is a recognition that most depositors creating "Totten trust"-type accounts intend for themselves to be owners of the funds while they are alive even though the account is called a trust account.

What happens if there are multiple trustees of a trust account and only one of the trustees dies? That fact situation was presented in *Stegall v. Oadra*, 868 S. W. 2d 290 (Tex. 1993). There, a son put money in a "revocable trust" account with himself and his mother listed as trustees and various other persons listed as beneficiaries. The son died. The court of appeals applied Section 438 to say that the money in the account belonged solely to the surviving trustee – the son's mother – rather than to the son's estate or the beneficiaries. The Supreme Court, however, held that the money did not survive to the mother (as surviving trustee) *or* to the beneficiaries (since one trustee remained alive); rather, the money passed as part of the son's estate.

i. Effect of Creditors' Claims on Multi-Party Accounts. Are funds in a multi-party account subject to the claims of the parties' creditors? Section 442 of the Texas Probate Code addresses the possible exposure of the funds in two situations -- while all parties are living and after the death of a party.

(1) While All Parties to the Account are Living. Since Section 438 gives the rules for ownership of account funds while all parties to the account are alive, one

would think that the liability of the account for each party's debts would be determined the same way. In other words, if Aunt Suzy put all of the funds in the account, Aunt Suzy would own the account (Section 438), only Aunt Suzy's creditors could reach the account, signatory Kate would own none of the account, Kate's creditors could not reach the account.

That's not necessarily the case. In fact, the banking industry in 2003 pushed through an amendment to Section 442 to permit any party to a multi-party account (*other than a convenience account*) to pledge the account to secure a loan. In the above example, if Kate can pledge the account to secure her loan, then the lender (the financial institution where the account is held) can take the account proceeds to satisfy Kate's debt, even though Kate owns none of the money in the account. The probate bar was able to get one concession to the 2003 amendment to Section 442: If a signatory pledges the account to secure his or her debt, the financial institution must send written notice of the pledge to the other account signatories by certified mail, return receipt requested, within 30 days of the pledge. Hopefully Aunt Suzie will be alert enough to realize that a certified mail letter from the bank is serious and she takes steps to protect herself. Then again, if Kate is her caregiver and opens all of her mail. . . .

If a non-owner signatory can pledge the multi-party account, then perhaps the account is vulnerable to other creditors' claims. For example, if the financial institution in which the account is located is the creditor of a signatory who is in default, can it offset the account balance against the debt? The offset case is one of the toughest, since it is an extra-judicial remedy. If a third party creditor attempts to seize the account, Aunt Suzie is likely to get wind of it and can assert her ownership rights.

Problems with creditors is yet another reason that Texans should insist on a convenience account when allowing a caregiver to make withdrawals from the account.

(2) Account Funds Available to Pay Claims Against Decedent's Estate. Just because funds in an account may pass from the decedent to a joint account holder or P. O. D. beneficiary does not mean that the funds are not subject to the creditors of the decedent. Section 442 of the Probate Code provides that the survivorship rights are not effective against the estate of a deceased account holder "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." Note that the survivorship account assets are liable only if the other assets of the estate (presumably this means the probate estate) are insufficient. Thus, funds in survivorship accounts enjoy a privileged status with respect to creditors' claims.

Section 442 provides that the joint account holder or P. O. D. beneficiary who receives payment from a multi-party account after the death of the deceased account holder is "liable to account" to the personal representative "for amounts the decedent owned beneficially immediately before his death" to the extent necessary to discharge the claims and allowances. As a protection to the joint account holder or P. O. D. beneficiary who has withdrawn funds, the personal representative is not permitted to institute a suit to assert this liability unless a creditor, the surviving spouse or a person acting for a minor child has made a "written demand" on the

personal representative, and the personal representative must commence the suit no later than two years following the death of the decedent. It is unclear whether the "written demand" required by Section 442 must be a demand specifically to pursue the funds which passed by survivorship or merely a demand to be paid from the estate. There are no reported cases on this subject. Professor Thomas M. Featherston, Jr., of the Baylor University School of Law believes that the statute means a specific demand for survivorship funds, not just a claim or demand for allowance against the estate. Thus, one can imagine a personal representative telling a creditor that there are insufficient assets in the probate estate to pay all creditors' claims, but there may be funds in survivorship accounts. The creditor presumably then would make a written demand that the personal representative pursue survivorship account assets, enabling the personal representative to bring the suit described in Section 442. The two-year deadline for suits of this type could present a problem in a complex estate, since the personal representative and creditors may not know if the probate estate will be insufficient to satisfy all claims until after the two-year period expires. Also, Section 442 fails to make clear what happens to any funds taken from a survivorship account which are in excess of creditors' claims and allowances. Surely any excess funds should be returned to the joint account holder or P. O. D. beneficiary, but Section 442 does not make this clear.

The liability of nonprobate assets for claims against a decedent's estate is a thorny issue. Section 442 provides some clarity with respect to multi-party accounts, but there is no comprehensive treatment of the issue in Texas statutes, especially as to the liability of assets in revocable trusts for estate claims and allowances. Of course, if the same person or group of persons is the recipient of all probate and nonprobate assets in the same proportions, then the issue does not arise. On the other hand, if a decedent had a valid multi-party account with right of survivorship with one person, a revocable trust leaving trust property to a second person, a will leaving property to another person, and debts which may exceed the value of probate assets, the personal representative of the decedent's estate may be faced with this prospect:

- First, all probate estate assets must be exhausted (since Section 442 permits resorting to survivorship assets only if "other assets of the estate are insufficient").
- Second, assets in multi-party accounts which can be recovered under Section 442 must be exhausted (since there is no statute similar to Section 442 applicable to revocable trusts which gives the personal representative a right to go against trust assets, although clearly they are subject to the decedent's debts).
- Third, creditors must be advised to pursue claims against the revocable trust or its beneficiaries directly since there is no statutory basis for the personal representative of a decedent's estate to pursue revocable trust assets to satisfy claims.

Probate lawyer groups involved in the legislative process have considered a fix to this problem for some time, but none seems likely to be proposed in the 2001 legislative session.

For a further discussion of the liability of nonprobate assets such as survivorship property for a decedent's debts, see Thomas M. Featherston, Jr., and Lynda S. Still, "Marital Liability in Texas . . . Till Death, Divorce, or Bankruptcy Do They Part," 44 *Baylor Law Review* 1 (1992).

While the probate estate may have to be exhausted before creditors' claims can affect funds in a survivorship account, those funds are liable for payment of the share of estate taxes apportioned to them under Tex. Prob. Code Ann. §322A, unless the deceased account holder overrides the statutory apportionment scheme by including a contrary provision in his or her will.

c. Section 450 (Chapter XI, Part 2). Section 450 of the Probate Code was enacted in 1979 at the same time as Sections 436 – 449, and it seems clear that Section 450 was intended to cover nontestamentary transfers *other than* multi-party accounts at financial institutions. Later amendments (discussed below) muddy the waters a bit.

a. Provisions Covered. Section 450 contains a laundry list of contract types (discussed below) and provides that any of the following nontestamentary disposition provisions are valid in those contract types:

- Provisions that money or other benefits shall be paid after a decedent's death to a person designated by the decedent in either the contract itself or a separate writing, including a will, executed at the same time as the contract or subsequently.
- Provisions that money due under the contract ceases to be payable in the event of the death of the promisor or promisee.
- Provisions that property shall pass to a person designated by the decedent in either the contract itself or a separate writing, including a will, executed at the same time as the contract or subsequently.

The first and third of these types of provisions are classic survivorship and beneficiary designation situations. The second applies to forgiveness (gift?) of debt upon the death of the maker or payee of a note.

b. Types of Contracts. Section 450 applies to the following types of contracts:

[A]n insurance contract, 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 1 of this chapter, or any other written instrument effective as a contract, gift, conveyance, or trust

Tex. Prob. Code Ann. §450(a). "Securities" and "accounts with financial institutions as defined in Part 1 of this chapter" (Sections 436 – 449, discussed above) were added to the list in 1997.³ In 1990, the Texas Supreme Court held that Section 439 was the exclusive means for creating a right of survivorship in joint accounts. *Stauffer v. Henderson*, 801 S. W. 2d 858, 862 (Tex. 1990). The inclusion of "accounts with financial institutions" in Section 450 means that funds in those accounts are potentially subject to that section as well as Section 439. Community property accounts held with right of survivorship are subject to Sections 451 – 462 (discussed below), so there is some confusion about which statutes apply.

If Section 450 applies to accounts in financial institutions, does it override some of the requirements of Section 439? For example, what about the requirement that the agreement be in writing and signed by the decedent – a requirement imposed by Section 439 but is missing in Section 450? Also, Section 450 does not use the magic words set forth in Section 439 and 439A – provisions that money "paid" (not "belong to" or "vest in") to a person designated by the decedent after his death are valid under Section 450 but would seem to fall short of the statutory and case law standards otherwise applicable to such accounts.

While nontestamentary transfers by contract are permitted by Section 450, this section has been held to prohibit the nontestamentary transfer of a decedent's entire estate. *Hibbler v. Knight*, 735 S. W. 2d 924 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.).⁴

d. Sections 451 – 462 (Chapter XI, Part 3). Because of the rule stated in *Hilley v. Hilley*, 161 Tex. 569, 342 S. W. 2d 565 (1961), spouses were unable to create survivorship accounts with community property until the constitution was amended in 1987 to permit community property with right of survivorship.⁵ In 1989, the legislature enacted Part 3 of

³ In 1997 the legislature passed, and Governor Bush signed into law, the "Uniform Transfer on Death Security Registration Act." The uniform act presented a number of problems regarding survivorship rights in securities and brokerage accounts. For example, some of the forms of ownership (such as tenancies by the entireties) were not recognized in Texas. Opposition from the probate bar (and in particular from Professor Stanley Johanson of the University of Texas School of Law) came too late to result in a veto of the uniform act, but the Governor's staff was so moved by the opposition that the legislature, at the Governor's urging, passed another bill repealing the uniform act before its effective date. The bill repealing the uniform act added "securities" and "accounts with financial institutions" to Section 450 as a quick fix to the problem which the proponents of the uniform act said needed fixing.

⁴ *Hibbler* was an attempt by a husband and wife to provide for nontestamentary transfer of their entire marital estate. The subsequent enactment of Sections 451 – 462 and the related constitutional amendment regarding community property with right of survivorship may alter the result of this case.

⁵ Because of *Hilley*, banks sometimes had their customers do the Texas two-step – the signature card contained a partition agreement to make the amounts deposited separate property and then created a joint tenancy with right of survivorship. If effective, the Texas two-step may have created a survivorship account between spouses, but it had some side effects, some of which were undesirable, depending upon one's point of view. For example, in a divorce proceeding the court could not order an unequal division of amounts in these accounts, since the court could not award one spouse's separate property to the other. Occasionally one still runs into accounts purporting to use the Texas two-step. This type of account arrangement should be avoided, if possible.

Chapter XI (Sections 451 – 462) to provide a statutory framework for agreements by spouses to create survivorship rights with their community property.

a. Right of Survivorship in Community Property. The 1987 constitutional amendment read (in pertinent part): “[S]pouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of the spouse.” Tex. Constitution, Art. XVI, Sec. 15. When the legislature enacted Section 451 in 1989 to further enable the constitutional amendment, it addressed the potential problem of after-acquired property:

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.

Tex. Prob. Code Ann. §451. Thus, under Section 451, if both spouses sign an account agreement at a financial institution for creation of a community property with right of survivorship account, then funds deposited in the account after its creation will be subject to the right of survivorship.

b. Agreement Formalities. Unfortunately, the legislature has given us yet another statute setting forth the requirements for creating a survivorship right with more and different requirements. Fortunately, Section 452 – which sets forth the requirements for spousal agreements to create rights of survivorship in community property (and not just in accounts at financial institutions) – gives Texans more magic words that supposedly assure creation of the right of survivorship, even if the magic words are not the same as the magic words in Sections 439 and 439A. Section 452 reads:

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.*”

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

[Emphasis added].

Note that agreements to create a right of survivorship in community property must be signed by *both spouses*, not just the account holder who dies, as is the case with respect to non-community property multi-party accounts with rights of survivorship under Section 439.

c. Ownership and Management Rights. Section 453 provides that the ownership and management of community property with right of survivorship during the lifetime of both spouses remains the same as it would have been had the right of survivorship not existed. Thus, the funds in a community property with right of survivorship account are subject to the rules applicable to all community property and are available to the court for equitable division upon divorce. Similarly, if the property in a particular account is the sole management community property of one spouse, that spouse's sole management community property management rights are not affected simply because the account is held with right of survivorship.

d. Revocation of Agreement. If the agreement creating the right of survivorship in community property contains provisions which set forth the manner in which the agreement may be revoked, then those revocation provisions control. If the agreement creating the right of survivorship is silent, Section 455 provides that the agreement may be revoked *either*:

- (1) By a written instrument signed by *both spouses; or*
- (2) By a written instrument signed by *one spouse and delivered to the other spouse.*

In *Haas v. Voight*, 940 S. W. 2d 198 (Tex. App. – San Antonio 1996, no writ), the husband and wife had three accounts which were community property with right of survivorship accounts. The husband and his son signed new account agreements with respect to these accounts, naming themselves as joint tenants with right of survivorship. The court held that the community property with right of survivorship agreements for the accounts were not properly revoked because the wife had not signed the new account agreements (the revocation instrument).

Section 455 also provides that the agreement may be revoked with respect to specific property by disposition of that property by one or both of the spouses, if the disposition is not inconsistent with the specific terms of the agreement and applicable law. Thus, if the agreement between the spouses is silent on this subject and a spouse disposes of his sole management community property in a manner which is permitted by Texas law (presumably this means not in violation of the fraud on the community principle), then the disposition of the property terminates the right of survivorship as to the disposed property. Similarly, if both spouses dispose of joint management community property, the disposition terminates the right of survivorship with respect to the disposed property.

e. Proof of Survivorship Agreement. Because Sections 451 – 462 deal with agreements creating community property with right of survivorship in all types of property

and not just multi-party bank accounts, the statutes contain a procedure to prove the existence of the survivorship agreement for purpose of establishing title to survivorship property. These procedures are set forth in Sections 456 – 459 of the Probate Code. This usually is not a factor with respect to multi-party accounts, since the surviving spouse usually gains possession of the funds without the need to resort to the courts. Section 456 provides that agreements creating community property with right of survivorship arrangements are effective without an adjudication, so rarely will such issue need to be adjudicated with respect to bank accounts.

f. Rights of Creditors. Section 461 makes an ambitious attempt to explain the rights of creditors in community property with right of survivorship property. First, it attempts to differentiate property in multi-party accounts in financial institutions from other property, saying that Part 1 of Chapter XI (Sections 436 – 449, and principally Section 442) governs property in multiple-party accounts.

Second, with respect to other community property held subject to a right of survivorship (in other words, non-multiple-party account property), property subject to the sole or joint management of the deceased spouse continues to be subject to that spouse's liabilities upon death without regard to the survivorship status. The statute does not address the liability of the surviving spouse's sole management community property with right of survivorship for the deceased spouse's debts, but presumably the rules expressed in Tex. Fam. Code §3.202 apply, so that it is liable for the tortious liability of the deceased spouse but not liable for his or her nontortious liability.

Third, like Section 442 (with respect to multiple-party accounts), Section 461 provides that a personal representative cannot pursue community property with right of survivorship in the hands of the surviving spouse to pay the decedent's liabilities "unless the personal representative has received a written demand by a creditor," but unlike Section 442, Section 461 does not appear to require the exhaustion of the decedent's probate estate before any survivorship property can be touched.⁶ Suits to recover community property which passed by right of survivorship must be commenced within two years.

g. Protection of Third Parties. Section 460 contains provisions intended to protect third parties who buy, sell or otherwise deal with community property subject to a right of survivorship without knowledge of the right of survivorship. These provisions generally affect non-multi-party account property more than multi-party account property.

⁶ Section 442, governing multiple-party accounts (presumably including community property with right of survivorship accounts) provides in pertinent part: "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 . . . *if other assets of the estate are insufficient.*" [Emphasis added; see fuller discussion of Section 442, above] Section 461, governing community property with right of survivorship which is not held in multiple-party accounts, on the other hand, provides in pertinent 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.*" [Emphasis added]

4. *Stauffer v. Henderson* and Its Offspring.

In 1990, the Texas Supreme Court set out to issue the definitive decision on right of survivorship accounts which, together with Chapter XI of the Probate Code, would settle the right of survivorship issue once and for all. In *Stauffer v. Henderson*, 801 S. W. 2d 858 (Tex. 1990), Justice Hecht carefully recited the history of right of survivorship in Texas and stated what seemed to be simple straightforward rules.

Unfortunately, the Supreme Court's attempt to inoculate Texans from the litigation bug regarding survivorship accounts didn't take. Since the *Stauffer* case, there have been at least a dozen more reported cases on the subject.

In this section, this paper examines the *Stauffer* decision and the cases which have been decided since then on this narrow issue: did the depositors successfully create a multiple-party account with right of survivorship (meaning that the property in the account passed to the survivor), or not (meaning that the property in the account passed to the estate of the deceased account holder).

a. *Stauffer v. Henderson*. The *Stauffer* case followed these legislative developments:

- The 1979 enactment of Chapter XI of the Probate Code (Sections 436 – 450), including Section 439 dealing specifically with rights of survivorship in joint accounts.
- The 1987 amendments to Section 439, adding the “magic words” to create a right of survivorship in a joint account.

Writing for the majority, Justice Hecht clearly believed that the time had come to bring some certainty to the frequent disputes over survivorship rights in multi-party accounts. After tracing the history of joint accounts in Texas, Justice Hecht announced these simple rules:

a. **Section 439 Is Exclusive.** Section 439 is the exclusive means for creating a right of survivorship in joint accounts. The *Stauffer* court concluded that “the Legislature has replaced the various legal theories which have been used to determine the existence of a right of survivorship in a joint account with section 439.” 801 S. W. 2d at 863.⁷ Thus, even though Section 46 may otherwise seem to apply to multi-party accounts, *Stauffer* says it doesn't.

b. **There Must Be a Written Agreement Signed by the Decedent.** Justice Hecht stated that Section 439 of the Texas Probate Code was derived from Section 6-104(a) of

⁷ *Stauffer* preceded the 1997 amendment to Section 450, which added “accounts at financial institutions” to the laundry list of contract rights subject to that section's rules about nontestamentary transfers. This may affect *Stauffer*'s exclusivity ruling.

the Uniform Probate Code, which reads:

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 *unless there is clear and convincing evidence of a different intention at the time the account is created.*

[Emphasis added] Justice Hecht noted that, in adopting Section 439, the Texas legislature dropped the italicized UPC language quoted above in favor of *"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."* He concludes that, for proving survivorship, the Texas legislature "has determined that clear and convincing evidence is not enough, and that a written agreement signed by the decedent is required." 801 S. W. 2d at 863.

c. Extrinsic Evidence is Not Admissible. Prior to *Stauffer*, many Texas courts permitted the introduction of extrinsic evidence regarding the depositor's intent with respect to a joint account in order to prove survivorship status. These courts sometimes said that there was a rebuttable presumption that the depositor intended to create a right of survivorship.

Stauffer unequivocally holds that Section 439 allows neither extrinsic evidence nor a rebuttable presumption to create a right of survivorship which is not established by a written agreement signed by the deceased joint account party. 801 S. W. 2d at 865. If a right of survivorship is established, it must be established within the four corners of the written agreement itself – outside testimony about what the depositor intended is not admissible.

Based on these standards, the Supreme Court concluded that the account in *Stauffer* did not create a right of survivorship, since the account agreement said the property was "payable to" or "may be withdrawn by" the surviving party, rather than the "vest in" or "belong to" language of Section 439. Authorizing payment of funds to the survivor at the other party's death does not create a right of survivorship. 801 S. W. 2d at 865-6.

b. Cases Since *Stauffer*. Attached as Appendix A is a chart summarizing most of the survivorship cases in Texas since 1990, starting with *Stauffer v. Henderson*.⁸ It is easier to digest these cases in tabular format since there are so many of them and they are decided on such similar issues. A quick study of this chart will give the reader a good idea where the courts are on this frequently litigated subject.

While it is somewhat dangerous to assume that one can glean trends and general rules from a dozen or so cases such as those on Appendix A, it nevertheless is fun to try. Here are

⁸ Some cases decided the survivorship issue with respect to more than one account. Where the court's decision hinged on different facts associated with the various accounts, the various accounts are listed on Appendix A separately, meaning that there are multiple entries on Appendix A for some cases. Note that Appendix A does not include "trust account and P. O. D. cases.

some of the author's conclusions about these cases:

- The trend is toward finding that a right of survivorship exists. Prior to 1994, the majority of cases mentioned in Appendix A founding *no* right of survivorship. From 1994 forward, the majority of cases found a right of survivorship to exist. The author believes that this is an indication that banks are increasingly getting it right (so that their signature cards and account agreements are working better), rather than a change in the courts' attitude toward these accounts.
- The cases pretty universally hold that extrinsic evidence is not admissible, so weird facts surrounding the execution of the agreement generally do not help or hurt either party. There is some slippage on this point, however, as it seems the courts simply cannot refrain from looking beyond the four corners of the instrument in some cases. A couple of the cases⁹ *did* permit evidence that the card was changed after the decedent signed it, and in those cases the right of survivorship was found *not* to exist. Two cases¹⁰ permitted extrinsic evidence as to which accounts were subject to a survivorship agreement contained on a signature card, even though extrinsic evidence was not admissible to establish whether the depositor intended for the signature card to create a survivorship account. Also, a P. O. D. case (which is not included in Appendix A because it was not a right of survivorship case) left the door open for extrinsic evidence to prove the depositor's intent where both the "individual account" and "P. O. D" boxes were checked. *Cummings v. Cummings*, 923 S. W. 2d 132 (Tex. App. – San Antonio 1996, writ denied). At the time of this update (July 2007), there is a case before the Texas Supreme Court that presents the question of whether extrinsic evidence proving that decedent signed a survivorship agreement is admissible, not for the purpose of proving survivorship rights, but to prove claims against a financial institution for breach of contract (to create a JWROS account) and for various torts. *AG Edwards & Sons, Inc. v. Beyer*; 170 SW3d 684 (Tex. App. - El Paso 2005, pet. granted under No. 05-0580, in the Texas Supreme Court. The decedent had created a joint account with right of survivorship to his daughter; however, after his death the financial institution could not locate the agreement in its records. As a result, the daughter was unable to withdraw the funds from the joint account and thereafter sued the financial institution based on its "losing" the agreement. Her argument is that *Stauffer* does not apply as an evidentiary bar here because she is not attempting to recover the account pursuant to a survivorship agreement, but is instead seeking damages from the financial institution.

⁹ *Rogers v. Shelton*, 832 S. W. 2d 709 (Tex. App. – Eastland 1992, writ denied), and *Pressler v. Lytle State Bank*, 982 S. W. 2d 561 (Tex. App. – San Antonio 1998, no writ).

¹⁰ *Evans v. First National Bank of Bellville*, 946 S. W. 2d 367 (Tex. App. – Houston [14th Dist.] 1997, writ denied), and *In re Estate of Dillard*, 98 S. W. 3d 386 (Tex. App. – Amarillo 2003, writ denied).

- Most of the cases since *Stauffer* permit the language creating the survivorship right to be included on the signature card itself or elsewhere in the bank's account agreement without a detailed analysis of the "incorporation by reference" issue. An exception is *McNeme v. Hart*, 860 S. W. 2d 536 (Tex. App. – Waco 1993, no writ), which was first decided in the estate's favor (in other words, that no right of survivorship existed) based solely on the signature card but then was decided in favor of survivorship on rehearing when the bank raised the incorporation by reference issue in an amicus brief. More recently, the Tyler Court of Appeals stated that "[w]hen the signature card incorporates a deposit agreement, that agreement is also a part of the deposit contract between the parties.", citing Section 34.301(a), Tex. Fin. Code. *Estate of Wilson*; 213 SW3d 491 (Tex. App. - Tyler 2006, no pet.) Right now, the question is directly presented in a petition for review pending in the Texas Supreme Court. *Malone v. Malone*, No. 10-04-00011-CV, ____ SW3d _____. 2005 Tex. App. LEXIS 4254 (Tex. App. Waco, 2005, petition for review pending). Decedent Vivian Malone had an account at Bank of America for which she had signed and initialed a "signature card" which did not itself contain the "magic language", but which stated, in pertinent part "...The depositor...by signing, hereby agrees: ...(iii) that this account shall continue to be governed by the terms and conditions governing this type of account associated with this card, as they may from time to time be amended..." *Petitioner's Brief of Law*, p. 6-7. The court of appeals affirmed summary judgment in favor of the executor of Vivian's estate, finding that no rights of survivorship were created by the signature card, which only contained the language "joint with right of survivorship". Under the version of Section 439(a) in effect at the time the card was signed, said the Court of Appeals, that language without more was insufficient. The issue presented is whether the bank signature card can incorporate the terms of the bank depository agreement to create a survivorship interest in an account. Incorporation by reference was not an issue in *Stauffer* nor in any of the survivorship cases on which the Supreme Court has denied writ since *Stauffer*. The Supreme Court may not permit incorporation by reference for Section 439 purposes.¹¹ The safe way for banks to assure that their agreements create valid rights of survivorship are (1) to include the Section 439 "magic words" on the signature card itself or (2) use the statutory account form of

¹¹ The argument against incorporation by reference is as follows: *Stauffer* says that, under Tex. Prob. Code § 439, "the necessity of a written agreement signed by the decedent . . . is emphatic." 801 S. W. 2d at 863. *Shaw v. Shaw*, 835 S. W. 2d 232 (Tex. App. – Waco 1992, writ denied), interprets *Stauffer* to mean that Section 439 has "abrogated all basic contract principles such that only the statute controls the interpretation of a survivorship agreement relating to a multi-party account." 835 S. W. 2d at 234. Thus, while incorporation by reference may work under general contract principles, it may not work for Section 439 purposes. In addition, many signature cards attempt to incorporate by reference future versions of account rules and regulations. If the account agreement in effect at the time the account holder signed the agreement was insufficient to create a survivorship right, does a subsequent unsigned amendment to the account agreement rescue the right of survivorship? Probably not. Just because a depositor's signature on a signature card may bind him or her to a future version of a bank's account brochure does not mean that the future version is incorporated by reference for purposes of Section 439's requirement of a written agreement signed by the decedent.

Section 439A.

- In general, “Joint – With Survivorship” is not sufficient on its own to create a survivorship right, but “Joint tenants with the right of survivorship” is.
- The burden of establishing the survivorship right falls on the party seeking survivorship, not on the party asserting that no survivorship right exists.
- Failure to check any box on a signature card is almost certain to result in a determination that *no* right of survivorship exists. Similarly, checking more than one conflicting box on a signature card is almost certain to result in a determination that *no* right of survivorship exists.¹²
- Most of the cases involve financial institutions which did not use the magic words provided in Section 439(a) or the legislatively-approved account form provided in Section 439A. If banks would simply follow the statutory language, most of these cases would go away (except cases where there are errors or questions related to which boxes on the card are checked, if any).
- While the failure of certain banks to have adequate signature cards and account agreements caused much of the litigation in this area since 1990, in only four cases¹³ was the bank a named party, and the bank faced possible liability in only three of those cases. If banks were held liable because of the insufficiency of their account documents, perhaps more banks would have adequate documents, reducing the amount of this litigation.¹⁴

¹² But see *Cummings v. Cummings*, 923 S. W. 2d 132 (Tex. App. – San Antonio 1996, writ denied), where the court appeared to leave the door open for extrinsic evidence in a P. O. D. case where conflicting boxes were checked. This is not a right of survivorship case, however.

¹³ *Arlene v. Omnibank, N. A.*, 894 S. W. 2d 76 (Tex. App. – Houston [14th Dist.] 1995, no writ) (bank issued cashier’s check to administrator’s estate and then dishonored the check); *Evans v. First National Bank of Bellville*, 946 S. W. 2d 367 (Tex. App. – Houston [14th Dist.] 1997, writ denied) (bank had depositor sign a signature card with survivorship language, but the signature card did not expressly refer to certificates of deposit in question); *Pressler v. Lytle State Bank*, 982 S. W. 2d 561 (Tex. App. – San Antonio 1998, no writ) (bank filed a declaratory judgment action regarding disputed account); and *Parker v. JP Morgan Chase Bank*, 95 S. W. 3d 428 (Tex. App. – Houston [1st Dist.] 2002, no writ) (bank told P. O. D. beneficiary that it would pay when she brought a death certificate, then paid to the depositor’s independent executor before P. O. D. beneficiary returned with death certificate, then sued independent executor to get the money back, and then realized that the depositor had not signed the P. O. D. account agreement).

¹⁴ Section 439A(c) provides: “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 [the Uniform Single-Party or Multiple-Party Account Form].” However, Section 439A appears to provide no adverse consequence for bank which has not “adequately disclosed” the information, and there are no cases under Section 439A for failure to meet its requirements.

5. Selected Practical Problems with Multi-Party Accounts.

There are more problems with multiple-party bank accounts than simply trying to determine if the account meets the survivorship standard under Texas law. Here are a few:

a. Bank Signature Cards and Account Agreements are Confusing. Signature cards and account agreements vary from bank to bank. Savvy estate planning lawyers like the author have trouble making sense of these agreements (as will be demonstrated below), so it is unlikely that most lay persons fully understand the importance of the account terms. It is likely, therefore, that many account agreements fail to reflect the true, informed intent of the account holders with respect to the survivorship issue. Even the banks recognize this, and some go so far as to make the account holders indemnify them from liability for failing to get it right. *See, e. g., Chase Bank of Texas, N. A.'s signature card on Appendix E, page 1 (discussed below).*

b. The Underfunded Credit Shelter Trust. Until Congress repeals the federal estate and gift tax, the bread-and-butter estate tax planning technique for married couples with estates worth more than the applicable exclusion amount will be the credit shelter trust, or "bypass trust." The trick is to put a portion of the property of the first spouse to die (usually by means of a formula gift clause, which makes the amount of the gift equal the unused applicable exclusion amount) into a trust so that it will not be included in the surviving spouse's estate. In the typical case, the estate planning attorney will put one of these trusts in each spouse's will so that when the first spouse dies the trust will be created.

Assets which pass by right of survivorship pass immediately upon death to the survivor and are not subject to the decedent's will. This means that survivorship assets generally are unavailable to place in a bypass trust.¹⁵ If the couple holds a significant amount of their marital property as community property with right of survivorship or as joint tenants with right of survivorship, there may be insufficient assets to fully fund the bypass trust. Even if there are sufficient other assets, the existence of the survivorship accounts may make it necessary to place undesirable assets into the bypass trust, since the cash in the survivorship accounts is unavailable.

Clients with bypass trusts in their wills should be told to avoid survivorship property, except for relatively minor or insignificant accounts. These clients are not going to be able to avoid probate anyway, so there is no reason for them to have the bulk of their investment assets in survivorship form.

The unfunded credit shelter trust can cause a myriad of difficulties for the personal representative of the estate. What if the bank pays out funds pursuant to a purported survivorship agreement, but the document itself is legally insufficient to create the right of

¹⁵ Sometimes it is possible to salvage the situation by using a disclaimer. If the husband and wife are the only joint tenants, if the will provides that disclaimed property passes into the bypass trust, and if a favorable ruling can be obtained from the IRS to permit the disclaimer of the survivorship property (the IRS often issues private letter rulings to this effect), then the survivorship property may be maneuvered into the bypass trust.

survivorship? The executor, or the trustee of the bypass trust, may have a duty to discover and investigate purported survivorship accounts to determine whether to challenge the agreements. If an account holds *community property* subject to a survivorship agreement, the surviving spouse and the executor (often the same person) might be well advised to avail themselves of the procedures in Section 456 for obtaining a court order affirming the validity of the agreement for the purpose of heading off litigation by disgruntled bypass trust or estate beneficiaries.

c. The Caregiver Problem. Single elderly persons often wish for a caregiver to be able to write checks, make deposits and otherwise deal with their bank accounts. These caregivers usually are relatives – a son or nephew who lives close by, for example – and usually are beneficiaries under the elderly persons' wills (or heirs under the intestacy laws). Occasionally they are unrelated to the elderly person.

In the vast majority of cases, the caregiver is given access to the account so that he or she may act as an agent for the elderly person. Only occasionally does the elderly person wish to make a gift of the money in the account to the caregiver. Unfortunately, in the typical case the only documentation of this agency arrangement is the signature card and account agreement at the bank, and these documents usually are silent as to the nature of the relationship between the elderly person and the caregiver. The signature card and account agreement is completed by an officer at a bank, who becomes the *de facto* estate planner when he or she fills out the card: If the signature card creates a valid right of survivorship, the caregiver is entitled to the money in the account when the elderly person dies. If, on the other hand, he or she fills out the card so that a survivorship account is not created, the elderly person's will (or the intestacy laws) determines who gets the money in the account at death. Does the way in which the card is filled out accurately reflect the elderly person's intentions? One can only hope so, since extrinsic evidence of intent is inadmissible in a dispute over the money left in the account at death.

Accepting the benefit of being named a party to a survivorship account can create a fiduciary relationship, meaning that the conduct of the party will be judged by the high equitable standards imposed on fiduciaries. *Texas Bank and Trust Co. v. Moore*, 595 S. W. 2d 502, 508-9 (Tex. 1980). Therefore, even if the account agreement properly creates a survivorship right favoring the caregiver, the actions of the caregiver, including his or her actions related to the creation of the survivorship right, is subject to greater scrutiny. Unfortunately, fiduciary litigation tends to be messy and expensive, and in many cases the amount in controversy does not warrant the cost of litigation. Caregiver abuse of survivorship accounts and powers of attorney can lead to criminal liability as well. *See, e. g., Porter v. State of Texas*, 2000 Westlaw 863092 (Tex. App. – San Antonio 2000, unpublished opinion).

Texas law provides a simple solution to this problem: the elderly person can set up a "convenience account" under Section 438A of the Texas Probate Code. This means that the caregiver's name is on the account just "for the convenience" of the elderly person, and no ownership interest or survivorship right is created. Unfortunately, many banks do not offer convenience accounts. At most banks, the next best thing is a "tenants in common" account. This type of account connotes ownership rights (although, under Texas law, while both account holders are alive, ownership of funds on deposit is based on the account holders' relative

contributions to the account, so if the caregiver puts none of his or her money in the account, then he or she should own none of the account) and can create a problem for the elderly person if the caregiver has creditor problems and the creditor attempts to seize assets in the account. (If the caregiver owes money to the bank which issued the account, the bank may have the right to offset money from the tenants in common account.)

With very few exceptions, survivorship accounts for caregivers should be avoided, and convenience accounts (or, if a convenience account is unavailable, a tenants in common account) should be used. From the elderly person's perspective, it is better to include a provision benefitting the caregiver in a will than to rely on the survivorship account. If a survivorship account is used, the account balance will fluctuate, varying the size of the gift. If a survivorship account is used, the caregiver has a disincentive to use the money in the account to take care of the elderly person. Including a gift in a will (if one is intended) fixes the amount of the gift and takes away the caregiver's self-interest in avoiding use of the money in the account. From the caregiver's perspective, being a party on a survivorship account can cause others to question his or her actions and intentions. Often the caregiver will say that he or she plans to give the other estate beneficiaries their proportionate share of the money which passes by survivorship. This can result in gift tax liability for the caregiver, however. From the perspective of other persons interested in the elderly person's estate (the daughter that lives in another state, for example), discouraging the use of survivorship accounts can make it possible to avoid ill will and suspicions with the caregiver at a time when everyone's focus should be on celebrating the life of the elderly loved one.

d. The Guardianship/Power of Attorney Problem. The person appointed guardian of the estate for an incapacitated person or the agent on a power of attorney of a clearly incapacitated person can face very difficult choices if the incapacitated person holds funds in one or more survivorship accounts.

Assume, for example, that the guardian discovers upon his or her appointment that the incapacitated person has a joint tenancy with right of survivorship account naming someone as joint tenant:

- Assume that there are suspicious facts surrounding the creation of the survivorship account. Should the guardian challenge the survivorship status? Does the guardian have a *duty* to challenge the survivorship status? Or should the guardian leave the fight over the validity of the survivorship account to be fought after the death of the incapacitated person?
- Does the court supervising the guardianship have the power to undo a survivorship designation?
- Does the guardian have a duty to take control of and manage the funds in the survivorship account? If so, how does he or she do that? Surely the other joint tenant cannot be allowed to retain withdrawal rights on the survivorship account while the guardianship is pending.

- If the incapacitated person has funds in both survivorship and nonsurvivorship accounts, which funds should the guardian expend for the care of the ward? If the guardian spends survivorship funds, this reduces the property passing to the joint tenant by survivorship. If the guardian spends nonsurvivorship funds, this increases the property passing to the joint tenant by survivorship.

All of these issues affect the decisions of an agent under a power of attorney as well as a guardian. If a statutory durable power of attorney was used, and if the principal authorized "banking and other financial institution transactions" on the power of attorney, then Tex. Prob. Code Ann. §496 gives the agent the power to "continue, modify, or terminate an account or other banking arrangement" and to "establish, modify, or terminate an account or other banking arrangement." This appears to authorize the agent to terminate, modify or initiate accounts with rights of survivorship or pay-on-death (P. O. D.) designations. However, one court has ruled that, while the agent on a power of attorney had the authority to open CD accounts in the principal's name, the agent could not make them P.O.D. accounts because Section 439 requires the signature of the person who died. *Armstrong v. Roberts*; 211 SW3d 867 (Tex. App. - El Paso 2006, pet. den.) Any such action may expose the agent to breach of fiduciary duty claims (especially if the agent personally benefits from the change at the expense of another party), but remember that the fiduciary duties the agent owes are to the principal and not to third parties. For this reason, the agent may face little or no exposure for terminating survivorship arrangements (since this means that the assets will be solely in the principal's name and pass as part of the principal's estate) while facing greater exposure for initiating new survivorship arrangements, if the persons benefitting from the survivorship arrangement are not also heirs or estate beneficiaries.

The author found no reported appellate cases on this subject. In *Pressler v. Lytle State Bank*, 982 S. W. 2d 561 (Tex. App. – San Antonio 1998, no writ), a guardian (after qualifying as guardian) placed another person's name on an account holding guardianship property as a "beneficiary" (presumably as a pay-on-death beneficiary), but no dispute over the account arose until after both the ward and the guardian died and the propriety of naming a party with survivorship or P. O. D. rights in a guardianship account was not discussed. In *Terrill v. Davis*, 418 S. W. 2d 333 (Tex. Civ. App. – Eastland 1967, writ ref. n. r. e.), a guardian unsuccessfully attempted to repudiate a contractual right of survivorship in real property, but that should be irrelevant in determining if a guardian may terminate a right of survivorship where the ward is under no contractual obligation not to terminate the survivorship right.

Here are the author's thoughts about this problem:

- If a guardian discovers the existence of survivorship accounts, he or she can ask the court for instructions. Asking the judge for instructions may effectively protect the guardian from claims that he should have done something, or should have refrained from doing something, about survivorship accounts. On the other hand, if the guardian files a motion for instructions and gives the joint tenant notice of the motion, the joint tenant may withdraw funds from the joint account prior to the hearing on the motion, jeopardizing the ward's estate. To prevent

this, the guardian may couple his or her motion for instructions with a request for a temporary restraining order to protect the funds in the joint account pending the hearing. This is a lot of trouble to go to, however, so the guardian may wish to withdraw the funds from the joint account without notice and then ask the court for instructions. If the court determines that the right of survivorship should still exist, it can order that the funds be returned to a survivorship account or to a pay-on-death (P. O. D.) account naming the former joint tenant as beneficiary.

- As a practical matter, it is more difficult for agents acting under powers of attorney to ask a court for instructions. They can file a declaratory judgment action on this subject, but that is an expensive and burdensome process.
- Unless the court otherwise orders, the guardian probably has a duty to get all funds belonging to the ward, including funds in survivorship accounts, into the guardian's name and subject to the guardian's control. Tex. Prob. Code Ann. §771. This probably means that the guardian must remove the ability of other persons (such as joint tenants) to access guardianship funds, which in turn probably means that the guardian must terminate joint tenancy and tenancy in common accounts. This action probably will destroy the right of survivorship unless something is done to preserve it.
- The guardian may be able to preserve survivorship rights by using a safekeeping agreement (*see* Tex. Prob. Code Ann. § 703(d)). Under the agreement, the joint tenant and the financial institution would have to agree to prohibit withdrawals by anyone other than the guardian absent a written court order authorizing such withdrawals. Any such arrangement would work only if approved by the court, however.
- The guardian of an estate should have standing to challenge a suspicious survivorship designation. The guardian of an estate is entitled to possession and management of all property belonging to the ward, to collect claims due to the ward, to enforce all obligations in favor of the ward and to bring suits by the ward. Tex. Prob. Code Ann. § 768; *see also* Tex. Prob. Code Ann. §§ 772 and 773. Whether or not the guardian has an affirmative duty to challenge a suspicious survivorship designation is a question for the court.
- The court supervising a guardianship should have the power to terminate survivorship accounts or authorize the guardian to terminate survivorship accounts. *See* Tex. Prob. Code Ann. §§ 606, 607, 768, 771, 772, 773 and 774.
- Conversion of survivorship accounts to P. O. D. accounts in the guardian's name may be an effective workaround in cases where there is no reason to doubt the appropriateness of the survivorship arrangement. Such arrangements must be approved by the court, however. The author is aware of one guardianship where there were multiple survivorship accounts with different joint tenants. The

various survivorship accounts were closed and all of the money was transferred to a common guardianship account under the guardian's control with P. O. D. designations favoring the former joint tenants in proportion to the size of the various survivorship accounts. This enabled the guardian to use funds for the ward's care while maintaining the proportional benefits to be paid to the former joint tenants on the ward's death.

e. Self-Help Estate Planning. There are times when a survivorship account or P. O. D. account makes sense. If a person has very little property, use of survivorship and P. O. D. accounts may avoid the need for any type of probate proceeding.

Unfortunately, many people are infected with "probatitis." The prospect of any probate proceeding is so unpleasant that they will do whatever it takes to avoid it. The living trust mills largely are responsible for this condition, and it is not uncommon for someone to buy a defective and inadequate living trust from a nonlawyer for three or four times as much as a lawyer would charge for a complete, customized estate plan.

Many probatitus victims see survivorship accounts as a panacea. Many are under the mistaken impression that property in survivorship accounts is not subject to the federal estate tax. For whatever reasons, many people have large amounts of cash and securities in survivorship accounts. As noted above, these accounts can frustrate effective estate tax planning. If there is more than one "beneficiary" of a survivorship account, there can be a number of problems when one party dies. Here are some examples:

- Assume Mom has a survivorship account with Son and Daughter. If Daughter dies before Mom, leaving two children, and Mom fails to change the account, Son gets all of the funds when Mom dies, disinheriting Daughter's children.
- Assume Mom has a survivorship account with Son and Daughter. Mom dies, and before the account is divided Daughter dies, leaving two children. The money in the survivorship account goes to Son, and Daughter's children are disinherited.
- Assume Mom has a survivorship account with Son, and Mom, Son and Daughter have an unwritten agreement that Son will give Daughter half of the money in the account when Mom dies. Mom dies and Son refuses to give Daughter her share. Daughter has no recourse, other than perhaps a fraud claim against Brother.
- Assume Mom has a survivorship account with Son, and Mom, Son and Daughter have an unwritten agreement that Son will give Daughter half of the money in the account when Mom dies. Mom dies, and Son gives daughter half of the money in the account. Son's transfer to Daughter probably is a taxable gift. To the extent it exceeds \$10,000, a gift tax return must be filed and a portion of the Son's applicable exclusion amount must be allocated to the gift. If the property so paid

to Daughter exceeds the applicable exclusion amount, gift tax may be due.¹⁶

Estate planning attorneys constantly engage in "what if" thinking. A well-drafted will carries the "what ifs" out further than most lay persons are likely to think. Survivorship agreements occasionally work well, but all too often they stop two or three "what ifs" short of what is needed.

f. Fiduciary Liability. If the survivor who withdraws the account funds pursuant to a valid "POD" designation also is the executor of decedent's estate, one Texas court has found that he or she may take possession of the account individually, and doing so will not constitute a breach of fiduciary duties to estate beneficiaries. *Punts v. Wilson*, 137 SW3d 889 (Tex. App. - Texarkana 2004, no pet.) Would the result be the same if the account was joint with right of survivorship? The Supreme Court has not considered this issue, and no reported case extends this holding to trustees. Would a trustee be in trouble if, for instance, he withdrew account funds and retained them individually rather than treating them as trust assets? The argument goes like this: If a valid right of survivorship is created in favor of a person who is also named trustee of a trust, *as between the bank and the survivor*, he is entitled to take the funds. However, a Texas trustee can hold trust assets in the trustee's own name. Would the trustee have the burden to prove that accepting the benefit of the survivorship agreement is fair to the beneficiaries? In some circumstances, the trust beneficiaries might be able to prove that the trustee did, in fact, treat the funds as trust assets. This would presumably be a matter of fact, provable by such evidence as tax returns. For example, a surviving spouse who is also the trustee of the bypass trust might have simply maintained the survivorship account after the death of the first spouse. If those accounts are still on hand at the time of the survivor's death, are they arguably in the bypass trust?

g. Choice of Law. Ownership of property is, in general, determined by state law. Most account agreements contain a statement regarding "governing law" or "choice of law" provisions. For instance, Bank of America's agreement in effect in July 2007 states under "governing law" that "[y]our and our rights and obligations under this Agreement are governed by and interpreted according to federal law and the laws of the state where we open your account...." Is it possible that a Texas depositor or executor could get stuck with the rules of another state as to ownership of the account? The account agreement online for E*TRADE Financial in July 2007 purports to subject the agreement to the laws of Virginia. HSBC Direct chooses Delaware law for personal accounts opened by telephone or on the internet.¹⁷ Texas law

¹⁶ If this scenario happens, Son may be able to claim that he held Daughter's money in trust and, therefore, his delivery of the money to daughter was not a gift. Depending upon the size of the estate and the "gift" involved, this may or may not satisfy the Internal Revenue Service. Under *Stauffer v. Henderson*, 801 S. W. 2d 858 (Tex. 1990), outside evidence of what the parties intended is inadmissible, so it would be difficult or impossible for Daughter to enforce an oral trust. If Daughter could not enforce an oral trust, the IRS is likely to argue that it ought to be ignored for gift tax purposes.

¹⁷ HSBC Direct's agreement states that (1) all funds deposited in a joint account become the property of all joint tenants, even if only one depositor puts in all the money; and (2) creates a presumption that a depositor who opens a joint account intends to create a right of survivorship. Both are contrary to Texas law. See Section 438(a) and 439(a), Texas Probate Code.

may prohibit a bank from enforcing a choice of law provision with respect to Texas depositors. *See* Section 4.102(c), Tex. Bus. & Com. Code. Also, depending on the interpretation of a law provision, it might apply only to disputes between the depositor and the bank and not to disputes between a surviving depositor and a deceased depositor's estate. Nevertheless, especially with the advent of internet banking, choice of law provisions could create problems, and a prudent executor should, at least, obtain the agreements and review them.

6. Conclusion.

While the area of multi-party accounts remains thorny, the law in the area becomes clearer and clearer. Now if only the banks will take advantage of this clarity in the law, Texans may have fewer reasons to sue each other.

APPENDIX A – SURVIVORSHIP CASES SINCE 1990

<i>Case Name</i>	<i>Bank / Account</i>	<i>Wording of Signature Card</i>	<i>Wording of Related Account Agreement</i>	<i>Unique Facts Regarding Signature Card Completion</i>	<i>Key Factors in Determining Survivorship Issue</i>	<i>Right of Survivorship?</i>
<i>Stauffer v. Henderson</i> , 801 S. W. 2d 858 (Tex. 1990)	(Institution unknown)	<p>“JOINT ACCOUNT – PAYABLE TO EITHER OR SURVIVOR”</p> <p>“We agree and declare that all funds ... are and shall be our joint property, ...and that upon the death of either of us any balance in said account or any part thereof may be withdrawn by, or upon the order of the survivor.”</p>	N/A	Both depositors signed the signature card.	Section 439(a) is the exclusive means of establishing survivorship bank account. Extrinsic evidence is not allowed. Signature card authorizes <i>payment</i> to survivor but does not create a right of survivorship.	No
<i>Martinez v. Martinez</i> , 805 S. W. 2d 873 (Tex. App. – San Antonio 1991, no writ)	Alamo Savings	<p>“The undersigned ... agree ... that with respect to all sums ... we are joint depositors, that the moneys in such account may be paid to or on the order of any one of us, either before or after the death of the other account holder ... and payment ... shall be valid and discharge Association from liability regardless of original ownership of the money so deposited.”</p>	N/A	Both decedent and other party signed signature card.	The signature card was not a written agreement meeting the requirements of Section 439(a).	No

<i>Case Name</i>	<i>Bank / Account</i>	<i>Wording of Signature Card</i>	<i>Wording of Related Account Agreement</i>	<i>Unique Facts Regarding Signature Card Completion</i>	<i>Key Factors in Determining Survivorship Issue</i>	<i>Right of Survivorship?</i>
<i>Kitchen v. Sawyer</i> , 814 S. W. 2d 798 (Tex. App. – Dallas 1991, writ denied)	Gibraltar Savings	Account was set up as "Mrs. R. M. Park or Mrs. Joy Kitchen." No box was checked. One (unchecked) box read: "Joint Tenancy With Right of Survivorship. The undersigned agree that all funds ... are and shall be our joint property with the right of survivorship and that such funds may be paid to ... any of us, either before or after the death of any of us."	N/A	Decedent signed signature card; other party later signed it as well. Card had boxes to check which account type was desired, but no box was checked.	No box was checked to indicate account type desired. The signature card "is not an unambiguous written contract establishing a joint account with right of survivorship, as required by section 439(a)." Extrinsic evidence to the contrary was not admissible.	No
<i>Rogers v. Shelton</i> , 832 S. W. 2d 709 (Tex. App. – Eastland 1992, writ denied)	Royall National Bank of Palestine	N/A (Court just says account agreement established a joint account with right of survivorship with community funds.)	N/A	Husband and Wife signed card when joint account was established with community funds. Six years later, son's name was typed onto card, but husband and wife did not re-sign the card. Later, wife died and will left everything to her husband. Later, husband died.	The account agreement created a right of survivorship between original parties. However, typing an additional name on the signature card at a later date and having the added party sign the card did not create a right of survivorship in the added party, since the depositors did not make a "new written agreement" meeting the requirements of Section 439(a).	No [Note: Depositors were husband and wife, but court does not discuss community property survivorship issue.]
<i>Shaw v. Shaw</i> , 835 S. W. 2d 232 (Tex. App. – Waco 1992, writ denied)	Mbank (2 accounts)	"Type of Customer – Joint with Survivorship."	N/A	Accounts belonged to husband before marriage; husband added wife to accounts after marriage.	"Joint with Survivorship" does not substantially fulfill the requirements of Section 439(a) and <i>Stauffer</i> .	No

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<i>Ephran v. Frazier</i> , 840 S. W. 2d 81 (Tex. App. – Corpus Christi 1992, no writ)	Wharton Bank and Trust (2 accounts)	Boxes for “Joint – With Survivorship” and “Joint – No Survivorship.” No box was marked.	<u>Savings Account</u> : “JOINT ACCOUNT – WITH SURVIVORSHIP. Each joint tenant intends and agrees that the account balance upon his death shall be the property of the survivor ...” <u>Checking Account</u> : “JOINT ACCOUNT – WITH SURVIVORSHIP. Such an account is issued in the name of two or more persons each of you intend that upon your death the balance of the account ... will belong to the survivor(s)”	Account was made payable to “Elward Ephran or Mary L. Hayes.” Signatures were on printed signature card form provided by the bank, which listed several types of accounts. Boxes appeared opposite each type of account and depositors could mark the type desired, but none of the boxes were marked.	By failing to mark a box to select an account type, the signature cards and depository agreements are insufficient to establish joint tenancy with right of survivorship because they do not satisfy the statutory requirements of Section 439(a).	No
<i>McNeme v. Hart</i> , 860 S. W. 2d 536 (Tex. App. – El Paso 1993, on rehearing)	First National Bank of Monahans	“The undersigned, joint depositors, hereby agree ... that all sums ... are and shall be owned by them jointly, with right of survivorship”	N/A	Both depositors signed signature card.	Although §439 “magic words” are not used, “shall be owned by them jointly, with right of survivorship” is sufficient to create survivorship right.	Yes
<i>McNeme v. Hart</i> , 860 S. W. 2d 536 (Tex. App. – El Paso 1993, on rehearing)	NCNB	Box opposite “or with right of survivorship” marked with an “X” and initialed by all joint depositors.	“If survivorship is designated, on the death of one party to a joint account, all sums ... vest in and belong to the surviving party as his or her separate property and estate.”	Decedent signed the signature card as depositor; the decedent and the other depositors initialed the “survivorship” box	Initials written next to a statement reading “with right of survivorship” was enough to create a right of survivorship, because the account agreement was incorporated by reference	Yes
<i>Ivey v. Steele</i> , 857 S. W. 2d 749 (Tex. App. – Houston [14th Dist.] 1993, no writ)	Home Savings (3 accounts)	“Joint Tenancy with Right of Survivorship: Accountholders own this account as joint tenants with right of survivorship. Upon the death of one of us the survivor(s) shall own the entire account.”	N/A	Decedent signed signature cards; cards had boxes checked designating the type of account chosen.	Accounts had signature cards signed by decedent which “specified in clear language that upon the death of one of the parties, the account was owned by the survivor(s).”	Yes

<i>Case Name</i>	<i>Bank / Account</i>	<i>Wording of Signature Card</i>	<i>Wording of Related Account Agreement</i>	<i>Unique Facts Regarding Signature Card Completion</i>	<i>Key Factors in Determining Survivorship Issue</i>	<i>Right of Survivorship?</i>
<i>Ivey v. Steele</i> , 857 S. W. 2d 749 (Tex. App. – Houston [14th Dist.] 1993, no writ)	San Jacinto Savings (3 accounts)	"Joint Tenancy with Right of Survivorship. The undersigned agree that all funds now or hereafter deposited in the account(s) ... are and shall be our joint property with right of survivorship"	N/A	Decedent signed signature cards; cards had boxes checked designating the type of account chosen.	Accounts had signature cards signed by decedent which "specified in clear language that upon the death of one of the parties, the account was owned by the survivor(s).	Yes
<i>Ivey v. Steele</i> , 857 S. W. 2d 749 (Tex. App. – Houston [14th Dist.] 1993, no writ)	Heights Savings	"Joint Tenancy with Right of Survivorship: Accountholders agree that they own this account as joint tenants with right of survivorship and that upon the death of one of us the survivor(s) shall own the entire account."	N/A	Decedent signed signature cards; cards had boxes checked designating the type of account chosen.	Account had signature card signed by decedent which "specified in clear language that upon the death of one of the parties, the account was owned by the survivor(s).	Yes
<i>Ivey v. Steele</i> , 857 S. W. 2d 749 (Tex. App. – Houston [14th Dist.] 1993, no writ)	Guardian Savings	"Joint Account – With Survivorship – Such an account is issued in the name of two or more persons. Each of you intend that upon your death the balance in the account ... will belong to the survivor(s)"	N/A	Decedent signed signature cards; cards had boxes checked designating the type of account chosen.	Account had signature card signed by decedent which "specified in clear language that upon the death of one of the parties, the account was owned by the survivor(s).	Yes
<i>Ivey v. Steele</i> , 857 S. W. 2d 749 (Tex. App. – Houston [14th Dist.] 1993, no writ)	San Jacinto Savings	"Tenants in Common" and not "Joint Tenancy with Right of Survivorship"	N/A	Decedent signed signature cards; cards had boxes checked designating the type of account chosen.	Account "contained language insufficient to confer a right of survivorship upon the surviving party."	No
<i>Ivey v. Steele</i> , 857 S. W. 2d 749 (Tex. App. – Houston [14th Dist.] 1993, no writ)	Home Savings	N/A	N/A	Failed to have a box checked off designating the type of account chosen.	Accounts had signature cards signed by decedent which "specified in clear language that upon the death of one of the parties, the account was owned by the survivor(s).	No

<i>Case Name</i>	<i>Bank / Account</i>	<i>Wording of Signature Card</i>	<i>Wording of Related Account Agreement</i>	<i>Unique Facts Regarding Signature Card Completion</i>	<i>Key Factors in Determining Survivorship Issue</i>	<i>Right of Survivorship?</i>
<i>Ivey v. Steele</i> , 857 S. W. 2d 749 (Tex. App. – Houston [14th Dist.] 1993, no writ)	Citizens Savings (2 accounts)	"Joint Accounts – With Survivorship" with no other designating language	N/A	Decedent signed signature cards; cards had boxes checked designating the type of account chosen.	Account "contained language insufficient to confer a right of survivorship upon the surviving party."	No
<i>Ivey v. Steele</i> , 857 S. W. 2d 749 (Tex. App. – Houston [14th Dist.] 1993, no writ)	University Savings	N/A	N/A	Account contained no language indicating the type account opened.	Account "contained language insufficient to confer a right of survivorship upon the surviving party."	No
<i>Banks v. Browning</i> , 873 S. W. 2d 763 (Tex. App. – Fort Worth 1994, writ denied)	Sunbelt Savings	"Joint account with right of survivorship." [Court does not say if there is additional language.]	N/A	"X" in box by "joint account with right of survivorship." Estate argued that the decedent did not place "X" there, but a clerk at the bank did.	Account card is "clear and unambiguous regarding the parties' intent to create joint accounts with the right of survivorship." No extrinsic evidence to the contrary is admissible. Language of signature card is sufficient to create right of survivorship.	Yes [Note: Depositors were husband and wife, but court does not discuss community property survivorship issue.]
<i>Banks v. Browning</i> , 873 S. W. 2d 763 (Tex. App. – Fort Worth 1994, writ denied)	AmWest Savings	"Right of survivorship." [Court does not say if there is additional language.]	N/A	"XX" in box by "right of survivorship." Estate argued that the decedent did not place "XX" there, but a clerk at the bank did.	Account card is "clear and unambiguous regarding the parties' intent to create joint accounts with the right of survivorship." No extrinsic evidence to the contrary is admissible. Language of signature card is sufficient to create right of survivorship.	Yes [Note: Depositors were husband and wife, but court does not discuss community property survivorship issue.]

<i>Case Name</i>	<i>Bank / Account</i>	<i>Wording of Signature Card</i>	<i>Wording of Related Account Agreement</i>	<i>Unique Facts Regarding Signature Card Completion</i>	<i>Key Factors in Determining Survivorship Issue</i>	<i>Right of Survivorship?</i>
<i>In re Gibson</i> , 893 S. W. 2d 749 (Tex. App. – Texarkana 1995, no writ)	Nine savings accounts (institution unknown)	Account parties “as joint tenants with right of survivorship and not as tenants in common and not as tenants by the entirety” agree that “any funds placed in or added to the account by any one of us is and shall be conclusively intended to be a gift and delivery at that time of such funds to the other tenant signer or signers to the extent of his or their pro rata interest in the account.”	N/A	N/A	“The language on the signature card clearly meets the requirements of <i>Chopin</i> .” (<i>Chopin v. Interfirst Bank Dallas</i> , 694 S. W. 2d 79 [Tex. App. – Dallas 1985, writ ref’d, n.r.e., holding that words such as “held as joint tenants with the right of survivorship” create a right of survivorship.]	Yes
<i>Arline v. Omnibank, N. A.</i> , 894 S. W. 2d 76 (Tex. App. – Houston [14th Dist.] 1995, no writ)	Omnibank, N. A.	The funds in the account should be paid to “either of the undersigned regardless of the original ownership of the funds so deposited,” and that “[i]n the event of the death of either person, the funds shall be payable to the survivor, and in the event of the death of the survivor, the funds shall be payable to the administrator, executor, heirs, assigns or legal successors of such survivor....”	N/A	Signature card was signed by decedent. After decedent’s death, joint account holder continued to make deposits and withdrawals and designated another person as joint account holder. Bank delivered cashier’s check for account balance to administrator of decedent’s estate, then decided it was mistaken and dishonored check.	Account was not a survivorship account. The signature card does not purport to alter ownership of the funds at the death of an account holder. While the bank was authorized to pay the joint account holder after decedent’s death, the signature card did not create a right of survivorship.	No

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<i>Evans v. First National Bank of Bellville</i> , 946 S. W. 2d 367 (Tex. App. – Houston [14 th Dist.] 1997, writ denied)	First National Bank of Bellville	The "time deposit signature card" read: The signator(s) of this account hereby acknowledge that the depositor or depositors, both as to the original deposit and any subsequent deposits, intend that such funds as may constitute any account balance upon the death of any party to this account, shall be the property of the surviving party or parties who shall take as a surviving joint tenant.	N/A	Individual certificates of deposit were only in the name of decedent. There was no reference to "time deposit signature card" on the certificate, and there were no references to CD's account numbers on the card.	Language of "time deposit signature card" was sufficient to create right of survivorship. Extrinsic evidence <i>not</i> admissible to prove the existence of a survivorship agreement, but in this case extrinsic evidence <i>is</i> admissible to establish which accounts, if any, are subject to the survivorship language in the "time deposit signature card." Case remanded for factual determination.	Maybe
<i>Allen v. Wachtendorf</i> , 962 S.W. 2d 279 (Tex. App. – Corpus Christi 1998, no writ)	Cuero Federal S&L	"Multiple Party Account – With Survivorship"	"OWNERSHIP OF ACCOUNT AND BENEFICIARY DESIGNATION – These rules apply to this account depending upon the form of ownership ... specified on page 1 ... Multiple-Party Account With Right of Survivorship (joint, and not as tenants in common) – At death of party, ownership passes to surviving parties. If two or more of you survive the deceased party, you will own the balance in the account as joint tenants with the right of survivorship and not as tenants in common."	Bank officer prepared signature card. Both depositors signed card. Decedent initialed the account-type selection box. The box also is marked with two Xs. Page 2 of signature card was specifically referred to on Page 1 but not attached. Bank officer testified that it was maintained on computer media. Court said that Pages 1 and 2 constitute a single document.	Combined language of pages 1 and 2 substantially complies with the requirements of Section 439A(b)(4) & (c) [the legislative form adopted in 1997].	Yes

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<i>Pressler v. Lytle State Bank</i> , 982 S. W. 2d 561 (Tex. App. – San Antonio 1998, no writ)	Lytle State Bank	Box opposite "Individual" account type had "XX" typed in it; box opposite "Joint – With Survivorship" account type had "X" handwritten in blue ink. (Other language of signature card unavailable.)	N/A	Jury found that handwritten, blue ink "X" in box opposite "Joint – With Survivorship" was not placed on the signature card either by the decedent or with his consent.	Trial court properly placed burden of proof on disputed fact issue on party claiming survivorship. "[A] party who claims to own an account as the survivor of a joint account bears the burden of proving her claim."	No
<i>In re Estate of Dillard</i> , 98 S. W. 3d 386 (Tex. App. – Amarillo 2003, writ denied)	Merrill Lynch (court applies §439 to what appears to be a brokerage account and not a bank account, without explanation)	Court says no one disputes that there appears of record an agreement containing survivorship language, but the language is not reproduced in the opinion.	N/A	Signed account agreement references Merrill Lynch Account No. 51D-11699. Property at death was in ML Acct. No. 552-17M38.	Broker testimony allowed to explain that account is the same, but the number changed when the account was moved from Fort Worth ML office to Austin office. Court says <i>Stauffer</i> permits extrinsic evidence of which document governs which account (it prevents extrinsic evidence of the intent to make it survivorship or not survivorship).	Yes
<i>Herring v. Estate of Huffman</i> , ___ SW3d ___ (Tex. App. - Houston, 14 th Dist., 2004, pet. den.)	Bank of America	Adequacy of survivorship language was not at issue.	N/A	The box adjacent to the ROS language is checked; however, there is no signature next to the box. The parties' signatures appear on the card, but further down under a section relating to interest on the account.		No

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<i>Estate of Wilson</i> , 213 SW3d 491 (Tex. App. - Tyler 2006, no pet.)	Bank of America	The card had a place for an "X" next to "Joint with Right of Survivorship", which was marked by Husband and Wife and they both signed the card	"All joint accounts are presumed to be joint accounts with the right of survivorship unless the applicable state law does not permit this presumption or we have otherwise agreed with you in writing...Right of survivorship means that when a co-owner dies, the balance in the account belongs to the surviving co-owner...."	The husband and wife checked the box for joint with right of survivorship, and also crossed through the boxes showing "Individual", "POD" and "Totten Trust".	Court specifically stated that when the signature card incorporates a deposit agreement, that agreement is also a part of the deposit contract between the parties. Section 34.301(a), Tex. Fin. Code	Yes
<i>Malone v. Malone</i> , ___ SW3d ___, No. 10-04-00011 CV (Tex. App. - Waco 2005, pet. pending No. 05-0741)	Bank of America	Decedent initialed the line next to "w/ Right of Survivorship" and signed signature card.	Substantially same as above	Card specifically stated that the account was governed by the terms and conditions of the deposit agreement as it may be amended from time to time.	Court found that case governed by pre-1993 version of Section 439, and that signature on card was insufficient.	NO
<i>Dellinger v. Dellinger</i> , 224 SW3d 434 (Tex. App. - Dallas 2007, no. pet.)	Advanced Federal Credit Union	Decedent signed the "Membership and Account Application," which designated the account as a joint account.	"Unless otherwise stated on the Account Application, a multiple party account includes rights of survivorship. This means when one owner dies, all sums in the account on the date of death vest in and belong to the surviving party(ies) as his or her separate property and estate."		Court applied general principles of contract law to affirm probate court's finding that the "Membership Account Application" incorporated the terms of the Account Agreement by reference, including the presumption that a multi party account includes rights of survivorship.	YES

☐ New ☐ Replacement Card ☐ Change Name
☐ Change Account Styling ☐ Add Owner ☐ Change Certification
☐ Other _____

ACCOUNT NAME (NAME OF DEPOSITOR(S)) **INDIVIDUAL/JOINT**

FOR ALL ACCOUNTS

TYPE OF ACCOUNT (See Form FDBP-012000 for details)

ACCOUNT NUMBER

FDBP-page 2 of 2

3. Plan Beneficiary Designation (Your beneficiaries will share equally in your accounts covered under the Plan unless you specify different percentages below.) If you need more space, list the additional information on a separate sheet and attach it to this form. If percentages are not indicated, the assets will be divided equally among the beneficiaries.

A. Primary Beneficiaries. If a primary beneficiary dies before you or the last surviving joint owner, his or her share of your plan accounts covered under the Plan will be divided proportionately among the surviving primary beneficiaries. General instructions, such as "All my children," "Per Stirpes," or "Lineal Descendants," are not acceptable. Any changes will replace any previous designations.

Name	(Spouse) (y/n)	Social Security Number	Date of Birth (month, day, year)	Percentage Allocated*

*Minimum of 10% per beneficiary and total must equal 100%.

B. Contingent Beneficiaries. Vanguard will transfer ownership of accounts covered under the Plan to your contingent beneficiaries only if there are no surviving primary beneficiaries at the time of your death (or the last surviving joint owner).

Name	(Spouse) (y/n)	Social Security Number	Date of Birth (month, day, year)	Percentage Allocated*

*Minimum of 10% per beneficiary and total must equal 100%.

4. Custodian Designation for Minors (optional)

If you have named a minor (child) as any beneficiary, you can designate a custodian under the Uniform Transfers to Minors Act (UTMA) of your state. This option is not available if all designated parties (owners, custodians, and minors) reside in South Carolina or Vermont, where UTMA has not been adopted.

Name of Minor (first, middle initial, last)	Name of Custodian (first, middle initial, last)
Name of Minor (first, middle initial, last)	Name of Custodian (first, middle initial, last)

5. Shareholder Signatures—YOU MUST SIGN BELOW (All owners must sign exactly as their Vanguard accounts are registered.)

The undersigned Plan Account owners hereby acknowledge having received and read the Vanguard Directed Beneficiary Plan Agreement and agree to all terms and conditions set forth therein as supplemented by this application. I understand and agree that any service options previously established for my Plan Accounts will remain the same until otherwise changed by me.

Name of Account Owner (Please print.)	Name of Joint Account Owner (if applicable) (Please print.)
Signature of Account Owner	Signature of Joint Account Owner
Date (month, day, year)	Date (month, day, year)