# The Revision of the

*"In the natural order of things, property must, in a generation, pass through the chute symbolized by our probate courts."*

*—W. S. Simkins,*
*Professor of Law*
*University of Texas, 1908*

## Introduction

The 66th Legislature has adopted H.B. 329, by Grant, a revision of the Texas Probate Code, effective as of Aug. 27, 1979. Except for a number of changes in 1971, H.B. 329 represents the only comprehensive revision of probate law since the 1955 codification.

In recent years attention has been focused on probate law revision throughout the country, with emphasis on simplification of language and protection of parties. The latest Texas revision is based upon an interim study by the House Judiciary Committee, under the charge to review the probate laws and to study the advantages and disadvantages of enacting the Uniform Probate Code in whole or in part. The Committee held public hearings in four Texas cities, with the probate section of the State Bar assisting in the formulation of recommended legislation.

During the course of the study, the Committee found that for the most part, the Texas Probate Code is superior to the Uniform Probate Code. Of the Committee's 36 recommendations, only five called for adoption of Uniform Probate Code Sections. The Committee concluded that the Texas Code was sound, but that a number of proposed changes would make a good document better.

One example of comparison between the Uniform Probate Code and the Texas Probate Code is that the Uniform Code offers only *two* methods of administration: supervised and unsupervised. The Texas Code, on the other hand, in combination with common law, offers *17* different possibilities, depending on the individual needs of the estate. Texas pioneered independent administration years before other states adopted it.

# Texas Probate Code

## By Ben Z. Grant and Robert Whitehill

The five areas that do reflect the Uniform Probate Code have been adopted with care to fit into the Texas system. They include "Simultaneous Death" (Section 47, Texas Probate Code), "Contracts Concerning Secession" (Section 59A), "Voidness Resulting From Divorce") Subsection (b) of Section 69), "Removal of Independent Executor" (Section 149C), and "Nontestamentary Transfers" (Chapter XI.)

The bill repeals all of Section 66, "Posthumous Children" and Subsections (b-g) of Section 341, "Application For Sale of Real Estate." It adds five new sections and an entire new chapter, Chapter XI, consisting of Sections 436-450, "Nontestamentary Transfers." The bill introduces major and minor changes to 24 existing sections of the Code and amends Articles 1994 and 2327 of the Revised Civil Statutes.

The Judiciary Committee has strived to improve a complex document affecting people in life and death — a set of laws deserving of the Legislature's serious consideration.

### Probate Court Jurisdiction

A 1975 amendment to Section 5(b) of the Probate Code assured the availability of a legally trained judge in contested probate matters. Contested matters could be transferred from the constitutional county court to the district court, and then returned to the county court for further proceedings. Helpful as it was, the amendment was silent on counties having statutory probate courts or county courts at law. H.B. 329 fills in the gap, so that contested matters can now be transferred from the constitutional county court to "the statutory probate court, the county court at law or other statutory court exercising the jurisdiction of the probate court."

The bill answers an often asked question of what a "statutory probate court" actually is. Under a new Subsection (ii) of Section 3, a "statutory probate court" is a court (1) whose jurisdiction is limited by statute to the general jurisdiction of a probate court, or (2) whose statutory name contains the word "probate."

A new Section 5A defines two terms that have caused confusion: "appertaining to estates" and "incident to an estate." The first term comes from Section 4: "The county court shall have the general jurisdiction of a probate court. It shall probate wills . . . and transact all business *appertaining to estates* . . . ." The second term comes from Section 5(d): "All courts exercising original probate jurisdiction shall have the power to hear all matters *incident to an estate*, including but not limited to . . . ." As Schwartzel and Wilhusen have pointed out in their 1976 *Texas Law Review* article:

> Because probate courts now have nearly unlimited authority to resolve any problem concerning an estate, courts must redefine "probate jurisdiction" in terms of the "incident to an estate" phrase and the function of probate courts — that is, they must determine which types of matters probate courts should handle in the settlement partition, and distribution of estates. 54 Texas L. Rev. 373,383.

Section 5A defines the terms as they apply (a) in constitutional county courts and statutory county courts at law, and (b) in statutory probate courts and district courts. *Only statutory probate courts and district courts* may interpret and administer testamentary trusts and apply constructive trusts. Statutory probate courts may hear suits, actions and applications filed against or on behalf of a guardianship, heirship proceedings or decedent's estate, including independently administered estates. These powers are to be construed in harmony with sections dealing with independent executors, but not so as to increase permissible judicial control. Statutory probate court jurisdiction over independent executors is to be identical

with that exercised by the district courts.

Both sets of courts may engage in the following activities: the probate of wills; the issuance of letters testamentary and of administration; the determination of heirship; all claims by or against an estate: actions to construe wills; and all matters relating to the settlement, partition and distribution of estates of wards and deceased persons. In the constitutional county courts and county courts at law, the following matters must be incident to an estate; all actions for trial of title to and for the enforcement of liens on land, and all actions for the trial of the right of property.

### Certified Shorthand Reporters

Certiorari and direct appeal of probate proceedings to the district court have not been available since 1975. A case can be appealed directly to the court of civil appeals, or a bill of review can be filed in the district court. Schwartzel and Wilhusen note:

> In the past parties often used certiorari to perfect the record for appeal, but now the bill of review has replaced certiorari, parties anticipating appeal or bill of reviews should either transfer the case to the district court where court reporters are available or hire a court reporter to preserve a record of the evidence presented at the initial county court hearing. Otherwise, the record to be transmitted on appeal to the court of civil appeals may be deficient. The legislature should repair their shortcoming by legislation requiring the appointment of court reporters in contested probate matters. 54 Texas L. Rev. 372,379 (1976).

H.B. 329 amends Article 2327 of the Revised Civil Statutes by providing a certified shorthand reporter in any *contested* probate matter heard in a county court. In a county in which no certified shorthand reporter is a resident, a noncertified reporter or stenographer will be appointed.

### Disclaimers

Under Section 2518 of the Internal Revenue Code, a written disclaimer must be delivered not later than *nine months* after the date on which the transfer of property is made. Until the passage of H.B. 329, Section 37A(b) of the Probate Code lacked the nine-month delivery requirement for a copy of the written memorandum of disclaimer to the legal representative of the transferor of the interest. With the amendment, the Section now conforms fully with federal law.

Section 37A has also been amended to include insurance as disclaimable property. This conforms with Treasury Regulation 20.2056(d)-1(a), which states that insurance passing to one party can be disclaimed so as to pass to an alternated beneficiary, with the proceeds deemed to have passed from the decedent to the alternate beneficiary.

### Family Relations

H.B. 329 amends sections of the Code dealing with the relationship between spouses and between parent and child.

Section 3 has been amended by a new Subsection (jj), defining "next of kin" to include an adopted child or his descendants and the adopted child's adoptive parent. Section 77, "Order of Persons Qualified to Serve" as holders of letters testamentary of administration, now states that "next of kin" [under Subsection (e)] includes a person and his descendants who have adopted, or who have been adopted by, the deceased.

Section 66 "Posthumous Children," has been repealed since its intentions are already met by Section 67, "Afterborn or Afteradopted Children."

Section 42 has been amended to provide for one class of legitimated children and their fathers. For the purposes of inheritance and homestead, a child is legitimate if conceived or born within marriage, if legitimated by court decree under Chapter 13 of the Family Code or is acknowledged by his father under Section 13.22 of the Family Code or in a like manner in another jurisdiction. The amendment eliminates inheritance disabilities of some legitimated children, their fathers and their kindred.

Section 42, as it was previously worded, might have violated the Texas Equal Rights Amendment and the Equal Protection clause of the U.S. Constitution, as set out in recent U.S. Supreme Court decisions such as *Trimble v. Gordon*, 430 U.S. 762 (1977).

### Simultaneous Death

H.B. 329 amends simultaneous death procedure under Section 47. Previously, where title to property depended upon relative times of death and proving the order of death by *direct evidence* was impossible, the property of each decedent passed as if he were presumed to have survived persons dying in the same disaster who would have taken only by reasons of survival. These provisions did not eliminate fact determinations that were often gory and painful, sometimes resulting in double administration. *White v. Taylor*, 286 S.W.2d 925 (Tex. 1956). The Uniform Probate Code (Sections 2-104 and 2-601) approach to this problem is simpler: an heir or devisee must survive the deceased for 120 hours in order to succeed to or receive a decedent's property. H.B. 329 has adopted this approach.

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Under the amended Section 47, heirs must survive the decedent by 120 hours. Similar changes are found in Subsection (b) for disposal of community property; in Subsection (c) for devisees or beneficiaries; in Subsection (d) for joint owners; and in Subsection (e) for insureds and beneficiaries. Instruments may still provide for disposition different from the methods layed out in Subsections (a) through (e). Texas has now joined the dozen or so other states that have adopted this portion of the Uniform Probate Code.

### Improvement of Forms

A number of amendments enhance probate efficiency through the improvement of forms.

Section 49,"Who May Institute Proceedings to Declare Heirship," requiring an application to be filed by persons claiming ownership of the estate, has been rewritten. Prior to H.B. 329 the section did not guarantee that some heirs might be overlooked. The rewritten section has four new requirements for an application to declare heirship: the relationship of each heir to the decedent; a statement that *all* the decedent's children have been listed; a statement about each marriage of the decedent; a statement whether the decedent died testate and if so, what dispositions have been made.

Section 82, "Contents of Application for Letters of Administration," has also been broadened to require a statement of whether the decedent owned real or personal property, with a statement of its probable value; data on each heir of the decedent; whether the decedent had children and if so, data on them; whether the decedent had ever been divorced and if so, data on the former marriage; and a statement that a necessity exists for administration, with an allegation of facts.

### Notice of Citation

The bill improves Section 50, "Notice to Parties in Proceedings to Determine Heirship." Referring, as it once did, to parties as "defendants" was inaccurate; it now calls them "distributees." To insure public notice in all situations, the section now says that except when there is service by publication, citation shall also be posted in the county in which proceedings are commenced and in the county of the decedent's last residence.

The bill makes three important changes in Section 407, "Citation upon Presentation of Account for Final Settlement" of estates of decedents and the persons and estates of wards. First, personal service of a ward is not required if he is less than 14 years old; if he is 14 or older, he in person or by attorney may waive service. This revision conforms to Section 130, "Notice and Citation, Estates of Minors and Incompetents." When a ward has died, the executor need not be served personally if he is the ward's guardian. The third change in the section rewords Subsection 4 to permit notice of citation by posting if the court so directs under certain circumstances. Unless the court orders citation by posting, citation shall be by publication.

### Contracts Concerning Succession

A new Section 59A, "Contracts Concerning Succession,"[1] is based upon the Uniform Probate Code Section 2-701. Under the new Texas law, a contract to make a will or devise or not to revoke a will or devise, can be established *only* by provisions *of a will* stating that a contract does not exist and setting out the material provisions of the contract. The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract.

This new section should reduce litigation.

### Small Estates

The bill amends Section 137, "Collection of Small Estates by Affidavit," by raising the maximum gross value of the decedent's property from $10,000 to $50,000. The new figure reflects what by today's standards is a small estate. Distributees must include, along with their affidavit, a list of the assets and liabilities of the estate.

### Minors and Other Persons Ordinarily Requiring Guardianship

The bill amends Section 144 by raising the maximum amounts payable through the court to a person who would otherwise require a guardianship. Formerly the maximum amounts were as follows: (1) for resident payees, $5,000; (2) for nonresidents, $3,000; and (3) for a resident who is an inmate in a state eleemosynary institution, $1,000. They are now $10,000 for each category.

In a similar vein, the bill amends Article 1994 of the Revised Civil Statutes, "Suit and Representation by Next Friend," by striking entirely the maximum amount that the court may place under the supervision of a payee's next friend.

Article 1994 has a new Section 6, relating to court-ordered investment of money-judgment funds awarded to a minor without the necessary appointment of a guardianship. The court, upon application by the minor's next friend and/or guardian, and after a hearing, may direct the funds to be delivered to a financial institution as a trustee, under trust provisions provided by the court. The amendment requires: (1) that the minor be the beneficiary; (2) that the trustee be authorized to distribute the corpus and income for the health, education, support, and maintenance of the beneficiary; (3) that the trust terminate upon the beneficiary's death or upon his reaching a stated age, not to exceed 25; (4) that the trustee be compensated and serve without bond; (5) that the court may provide for distribution of a stated percentage of the corpus prior to termination; (6) that the court may provide for distribution without a guardian; (7) that the court may provide for payment directly to the beneficiary or his guardian; (8) that the trust is not subject to revocation by the beneficiary or his guardian; (9) that the trust may be amended, modified or revoked by the court; (10) that if it revokes the trust before the beneficiary reaches 18, the court may make further orders concerning corpus and income; and (11) that if the court revokes the trust after the beneficiary reaches 18, the corpus and income will be delivered to him after expenses are paid.

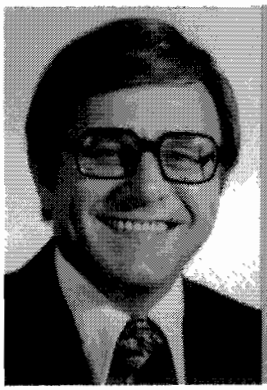
A new Section 339A permits the parent of a minor who is not a ward to sell *real or personal property* of a minor received *in an estate,* without being appointed guardian, when the value of the property does not exceed $10,000. The section encompasses provisions of the now repealed Subsections (b) through (g) of Section 341. The parent will apply to the court, supplying a description of the property, the name of the minor, the name of the purchaser, and a statement that the sale of the minor's interest is for cash, to be used for the benefit of the minor. The court sets a hearing and upon the hearing issues an order. The court may order an independent appraisal of the property. The purchaser shall pay the money belonging to the minor into the court registry.

### Bonds

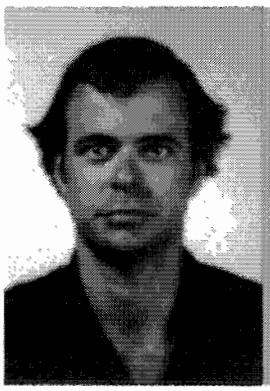
The bill revises the setting and computation of bonds, for personal representatives and guardians.

Section 145(p) has been amended, so that an independent executor, in order to receive a waiver of bond, must *apply* to the court for a waiver. The judge will set the bond at a sum "adequate under all circumstances," payable to the judge or guaranteed by one authorized corporate surety. These changes replace former requirements that the bond be "conditioned as required by law in the same manner as other personal representatives" — since Subsection 4 of Section 194, setting the penalty of bonds, requires that a bond cover the value of the entire estate. The judge may now set full bond, partial bond, or no bond at all.

The bill makes an identical change in Section 154A(h), "Bonds for Successor Independent Executors."



Rep. Ben Z. Grant has served in the Texas Legislature for the past 10 years and is chairman of the Judiciary Committee. He authored the legislation revising the Texas Probate Code. He also serves as president of the Texas Judicial Council and practices with the Marshall law firm of Kirkpatrick & Grant.



Robert Whitehill, a writer living in Austin, is counsel to the House Judiciary Committee. He is a graduate of the University of Texas Law School. Whitehill is married and has one son.

Section 148, "Requiring Heirs to Give Bond," is also amended. Formerly, bond was to be set at an amount equal to the full value of the estate. *With the amendment,* bond *is to be* set for an amount equal to the creditor's claim or the full value of the estate, whichever is smaller.

Section 193, "Bond of Guardian of Person," has been amended by the removal of the $1,000 upper limit of the bond. The judge is now authorized to approve the bond at an amount adequate under all circumstances. As with independent executors, the bond for guardians of the person may be payable to the judge or guaranteed by one authorized corporate surety. The new judicial discretion will be helpful when a guardian is authorized to spend a sum in excess of the income for the ward's education and maintenance.

Finally, the bill amends Section 194, Subdivision 4, by excluding from bond computation funds derived from Social Security payments. The federal government does not require that Social Security payments to an incompetent or minor be made through an officially designated guardian. Direct payment is preferred, unless a clear need is shown for the appointment of a representative payee, who need not be the payee's official guardian.[2] The amendment should save guardians much time and paperwork.

### Independent Administration

H.B. 329 introduces a number of changes in independent administration.

Section 145(a) has been amended to delete the requirement that certain estates be under $200,000 in order to qualify for independent administration. During the Judiciary Committee's hearings on the Probate Code, many witnesses criticized the ceiling as arbitrary and outside the spirit of independent administration. Also deleted is the Sept. 1, 1977, cutoff date, for the same reasons.

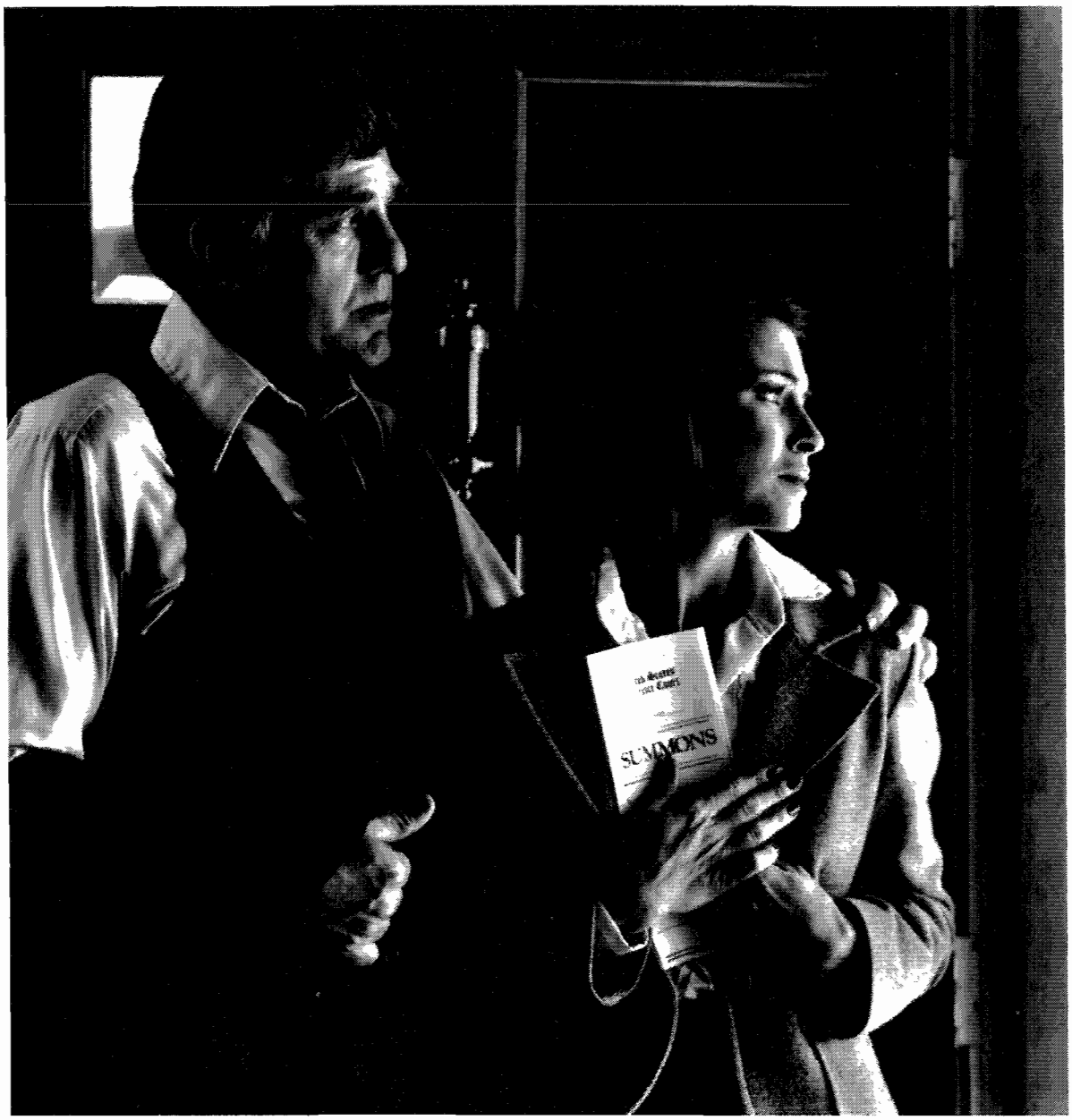
The bill introduces two new sections aimed at protecting the estate and interested parties from a capricious or dishonest independent executor. The drafters were careful, however, to ensure the continued strength of independent administration. The new *Section 149B* provides for court-ordered accounting and distribution. Although *Section 149A* already allows court-ordered accounting by the independent executor upon demand by an interested person, it does not license the court to compel distribution if an independent executor refuses to act. Under the new Section, an interested person may petition the court for accounting and distribution. This may be done after the end of 12 months after the payment of all estate and inheritance taxes, or three years from the date that the independent administration was created and the order appointing the independent executor entered, whichever is later. The proceeding may be brought in the county court if the judge is licensed to practice law, or in the county court at law, the statutory probate court or district court. After having issued its order and received an accounting, the court, upon notice to the independent executor and a hearing, may order distribution unless it finds a continued necessity for administration. If all the property of the estate is ordered distributed and the estate is fully administered, the court may order the executor to file a final account and then order closing of the administration and termination of the executor's powers.

Under another new section, 149C, an independent executor can be removed under certain circumstances, according to a fixed procedure. As under 149B, the procedure must be initiated by an interested person in the county court, if the judge is licensed to practice law, or in the county court at law, statutory probate court or district court. The independent executor is cited by personal service. There are five circumstances under which a court may remove the independent executor: (1) he fails to return an inventory and list of claims within ninety days after qualification, unless the court has extended the time; (2) he has misapplied or embezzled or is about to misapply or embezzle any of the property; (3) he fails to make an accounting required by law; (4) he has been proved guilty of gross misconduct or gross mismanagement in the performance of his duties; or (5) he becomes incompetent, or is sentenced to prison or becomes otherwise legally incapacitated from performing his duties.

The court shall state the cause for removal and shall order the disposition of the remaining assets and cancellation of letters issued to the removed executor. Upon application, the court may appoint a successor independent executor under Section 154A.

The independent executor, if he has defended himself in good faith, shall be paid expenses and attorney's fees out of the estate, even if he has lost his case.

Until passage of H.B. 329, the Probate Code was silent about property *in an independent administration* that cannot be partitioned or divided under Section 150. In court-supervised administrations, such a contingency is treated in Section 381, "Partition and Distribution when Property of an Estate Is Incapable of Division." Under the amended Section 150, the procedure is now available for independent administrations. The court may order sale of the part of the estate found by the court to be incapable of fair and equal partition and distribution. The court may partition some of the property and order the sale of the indivisible portion.

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Sections 151 and 152 have been amended to provide authority for the transfer of property after independent administration has been officially closed. (Section 151 deals with the closing of an independent administration upon affidavit filed by the independent executor; Section 152 deals with closing upon application by a distributee.) Before the passage of H.B. 329, both sections were silent on the disposal of newly discovered assets. Witnesses noted that holders of estate property have been reluctant to allow distribution without further administration. Under the new law, an independent executor's closing affidavit (or, under Section 152, a court order closing the administration) will give holders and agents additional authority to distribute the assets without additional administration. Distributees may enforce by suit their right to transfer or payment.

The bill also amends Section 154A on court-appointed *successor* independent executors. The section previously did not provide for appointment if the successor named in the will could not or would not serve, or if the will failed to appoint a successor. Such contingencies have now been taken care of: the distributees may apply for the appointment of a qualified person, firm or corporation to serve as successor independent executor. The amended Section 154A is also available when an independent executor has been removed under the new Section 149C.

### Nontestamentary Transfers

The bill adds Chapter XI to the Texas Probate Code, "Nontestamentary Transfers." It is merely a codification of existing Texas case law, organized according to the format of Article 6 of the Uniform Probate Code.

The chapter is divided into two parts: (1) Multiple-Party Accounts and (2) Provisions Relating to Effect of Death. The first part, Sections 436 through 449 of the Probate Code, sets out laws of ownership, survivorship, written notice to financial institution, rights of creditors, protection of financial institution, payment on signature of one party, payment of joint account after death or disability, payment of P.O.D. (payable on death) accounts, trust accounts (Totten trusts), discharge from claims and set-off to financial institution. The second part consists of Section 450, "Provision for Payment or Transfer at Death."

Although modeled after the Uniform Probate Code, the chapter has been written to comply with Texas community property law. This point is especially crucial in Section 437, "Ownership as Between Parties and Others": "A multiple-party account created with community property funds is subject to Article XVI, Section 15, of the Texas Constitution, and will not in any way alter community property rights." A person using this section as a legal guide for a nontestamentary transfer should, of course, be aware of Texas community property case law.

The nontestamentary transfer chapter mentions three types of accounts:

(1) Joint account. This is payable on request to one or more of two or more parties whether or not there is a right of survivorship.

(2) P.O.D. account. This is payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

(3) Trust account. This is in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution, and there is no subject of the trust other than the sums on deposit in the account. Payment to the beneficiary need not be mentioned in the deposit agreement. Witnesses from law schools and financial institutions pointed out that a trust account, or "Totten trust," is permissible in Texas under the ruling in *Westerfeld v. Huckaby*, 474 S.W.2d 189 (Tex. 1971). Trust accounts using community property would, of course, be subject to the provisions of Article XVI, Section 15 of the Texas Constitution. A caveat: the term "trust account" does *not* refer to a "trust" in the ordinary sense of the word as set up by a testamentary trust, a trust agreement with significance apart from the account, or one arising from fiduciary relationship; it is used in the chapter *only* for the limited purpose as defined in Subsection 14 of Section 436 of the definitions.

### Conclusion

These are the major changes in the Probate Code made by H.B. 329. The result of months of research by the House Judiciary Committee members and staff, the new legislation should be of service to millions of citizens affected by the Probate Code.[3]

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1. The term *succession* frequently appears in Louisiana law, but a computer search by the Legislative Council reveals that the term is found in only one other section of the Texas Probate Code, Section 377(c).
2. See Section 205(j) of the Social Security Act; I *Social Security Reporter*, paragraph 12,625; and *Social Security Handbook* 73-10135, 1974, Section 1602.
3. The House Judiciary Committee members and staff wish to thank Mrs. Nancy Sutton, of the Texas Legislative Council, for her assistance in drafting the revision of the Probate Code.