MICHIGAN OR BUST: THE DISASTROUS RESULT WHEN CONFLICTING CHOICE OF LAW PROVISIONS CONSTRAIN RIGHT OF SURVIVORSHIP AGREEMENTS

Comment

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I. INTRODUCTION

The purpose of estate planning is to provide an individual with a definite way of giving possessions to someone else when the individual in question dies.[1] Documents are prepared to give the individual a sense of peace and to assure that the decedent's possessions go exactly where the decedent intends. Now, imagine a world where you create a legally valid document with the full intention of passing your assets to someone close to you, but, instead of following your intentions, the court decides to distribute those assets to someone else. Traditionally, Texas follows the intentions of the testator; however, the recent Texas court decision in *McKeehan v. McKeehan* threatens to overturn the guarantee of all past and present estate plans.[2]

Dale McKeehan, a top executive at Ford Motor Company, retired after nearly four decades of service in the international development sector of the company.[3] As one can imagine, being an executive at Ford is not without perks.[4] Along with a generous salary, Ford offered a substantial money market program for purchasing Ford Credit debt securities.[5] Dale retired in 1998 and, as is the custom, moved to Texas to enjoy sunshine and cattle-country.[6] The money market account was left to accumulate funds for another ten years, and the newly remarried executive enjoyed the decade in relative solitude.[7]

Unfortunately, in 2008, cancer reared its ugly head and Mr. McKeehan embarked on an accelerated estate-planning mission.[8] At this point, he visited a local attorney to determine the distribution of his estate.[9] Logically, Dale McKeehan first decided what to do with the largest piece of his estate, which, surprisingly enough, was the money market account.[10] At the beginning of his illness, Dale arranged a meeting between his Texas banker and the manager of the Michigan bank where the money market account existed.[11] The purpose of this meeting was to add his current wife to the money market account.[12] Dale assumed that the account would pass by right of survivorship to his second wife, as is the law in Michigan.[13] Dale and his wife were domiciled in Texas at

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1. Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 385 (2011); *see also* Zechariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 COLUM L. REV. 381, 382 (1941) (citing UNIF. PROBATE CODE ART. 2, pt. I ("Intestate Succession").

2. McKeehan v. McKeehan, 355 S.W.3d 282, 284 (Tex. App.—Austin 2011, pet. filed).

3. *Id.*

4. *Ford Motor Company Credit*, FORD MOTOR COMPANY, (Sept. 20, 2012), http://credit.ford.com/investor-center/app-prospectus (last visited Oct. 3, 2012).

5. *McKeehan*, 355 S.W.3d at 284.

6. *Id.* at 284.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

the time of the signing.[14] Sadly, Dale passed away soon after the meeting at the bank, and his will proceeded to probate.[15]

At this point, two major issues arose. First, the testator's children from another marriage stood to inherit half of the testator's property by right of survivorship.[16] The children claimed that the non-testamentary property included the money market account, but the current wife disagreed.[17] Second, the money market account originated under Michigan Law; however, at the time of the addition of the wife to the account and testator's death, he and his wife were domiciled in Texas.[18]

As testator, Dale intended to pass the entire account to his second wife through right of survivorship.[19] Texas's policy is to use Texas law to govern agreements involving joint accounts when the owner of the account is a Texas domiciliary.[20] Instead of following Texas's public policy, the court distributed the jointly held assets to the second wife by right of survivorship, thus departing from fifty years of Texas case law precedent![21]

This comment delves into the issues presented by *McKeehan v. McKeehan*, and explores two non-Texas solutions to this type of issue.[22] The ultimate purpose of this comment is to use background information from *McKeehan* combined with current statutory language to forge a hybrid rule, effectively solving the issue.[23]

In order to clearly address this issue, this comment begins with an overview of Michigan and Texas law dealing with choice of law agreements.[24] Second, this comment explores the *McKeehan* decision, delving into the reasoning behind the court's decision, and explaining the ramifications of this decision.[25] Third, this comment exposes the broad reaching repercussions of *McKeehan*, including retroactive and impending issues arising out of this ruling.[26] Finally, this comment proposes a permanent solution—a new hybrid rule expanding on Texas's current proposed statute—that will prevent future estate planning nightmares for Texas residents.[27]

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14. *Id.* at 285.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See id.* at 291 (citing TEX. PROB. CODE ANN. § 46(a) (West 2003 & Supp.2012); *see* Holmes v. Beatty, 290 S.W.3d 852, 860–61 (Tex. 2009); *see, e.g.*, Patterson, 2003 WL 2251204, at *1–2.
21. *McKeehan*, 355 S.W.3d at 285.
22. *Infra* Part V.
23. *Infra* Part V.B.
24. *See infra* Part II.
25. *See infra* Part III.
26. *See infra* Part IV.
27. *See infra* Part VI.

II. MICHIGAN AND TEXAS CHOICE OF LAW PROVISIONS

Before delving directly into the decision and analysis of the *McKeehan* decision, some background information regarding Texas and Michigan choice of law provisions is needed. These next few sections provide an annotated summary of Michigan and Texas choice of law statutes with a focus on the relevant sections in *McKeehan v. McKeehan*. This background knowledge is necessary to fully comprehend the broad ramifications of *McKeehan* and its effects on Texas Estate Planning Law.

A. Michigan's Choice of Law: Implicit Right of Survivorship

Michigan's joint tenancy property law is fairly straightforward.[28] Michigan Compiled Laws Section 557.151 controls all agreements signed by spouses domiciled in Michigan at the time of execution.[29] Michigan adopted statutes governing all jointly owned property with a right of survivorship nearly a century ago.[30] The original purpose was to ensure that the wife was not "barred from a fair economic share . . . during the marriage and upon [the husband's] death."[31] At first glance, the plain language of the statute appears to govern Dale McKeehan's right of survivorship agreement.[32] In 1928, Michigan began treating all joint ownership of accounts as automatically having a right of survivorship.[33] Since then, all agreements between spouses, made under the authority of Michigan owned subsidiaries, carry with them the assumption that all property passes to the surviving spouse.[34] Michigan's legislature created this presumption to provide a guaranteed solution for spouses with the intention of leaving their accounts to a spouse by right of survivorship.[35] Unfortunately,

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28. *See* MICH. COMP. LAWS ANN. § 557.151 (West 2012).

29. *See* Schram v. Collins, 30 F. Supp. 783, 784 (D. Mich. 1939) (citing Michigan Comp. Laws Section 557.151 as authority for the decision that no Michigan law obstructed a spouse (married woman) from becoming the owner of stocks through right of survivorship, because the surviving spouse gains all benefits and liabilities stemming from the original stock acquisition.). *Id.*

30. *See, e.g.*, MICH. COMP. LAWS ANN. § 557.151 (West 2012) (stating that "All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with *full right of ownership by survivorship* in case of the death of either.") (emphasis added). *Id.*

31. *See* R. Bruce Townsend, *Creation of Joint Rights Between Husband and Wife in Personal Property*, 52 MICH. L. REV. 779, 787 (1954) (citing CO. Litt. *300a.); *see also* Marlborough v. Godolphin, 2 Ves. Sr. 61, 28 Eng. Rep. 41 (1750).

32. *See, e.g.*, MICH. COMP. LAWS ANN. § 557.151 (West 2012). The words "held jointly by husband and wife under the laws of this state" are an express indication of the law's intention to keep accounts between spouses, with rights of survivorship. *Id.*

33. *See* Forler et al. v. Williams, 242 Mich. 639 (Mich. 1928); *accord* MICH. COMP. LAWS ANN. § 557.151 (West 2012).

34. McKeehan v. McKeehan, 355 S.W.3d 282, 282 (Tex. App.—Austin 2011, pet. filed).

35. *See id.*

the statute's design only guarantees a right of survivorship to account owners domiciled in Michigan, creating turmoil when the account owners are domiciled elsewhere.[36] Michigan law fails to address the issue of out of state property owners, thus opening the door for situations like the problem in *McKeehan*.[37] By contrast, Texas choice of law provisions implement a polar opposite legal approach, creating complex dilemmas when they clash in the same courtroom.

B. Texas's Choice of Law: No Granting of Right of Survivorship

Understanding the right of survivorship in Texas requires some historical background regarding the enactment of Texas Probate Code Section 439.[38] Texas solved two problems with this enactment.[39] First, Section 439 presents Texas married couples with an absolute method of asset distribution other than through probate.[40] Second, Section 439 eliminates the inference of right of survivorship without express language indicating an intention to create a right of survivorship.[41] This enactment simplifies the establishment of a right of survivorship for Texas couples, allowing them to fulfill their intentions without filing multiple documents.[42]

Texas Probate Code Section 46 governs all joint accounts owned by two spouses domiciled in Texas.[43] Unlike Michigan's choice of law provision, Section 46 does not allow survivorship of property without the express language provided in the statute. [44] The primary reasoning behind this policy is to maintain uniformity with Texas' community property provisions.[45] This approach to joint tenancies ensures that the testator clearly intends for a right of survivorship to occur.[46] The only way to pass property under a right of survivorship in Texas is to use the specific language described in Texas Probate

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36. *See id.* (citing MICH. COMP. LAWS ANN. § 557.151 (West 2012) (Using the language "all bonds . . . shall be held by such husband and wife . . . unless otherwise therein expressly provided").

37. MICH. COMP. LAWS ANN. § 557.151.

38. Act of August 28, 1989, ch. 297, 1987 Tex. Laws 715 (stating that "spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes property of the surviving spouse on the death of a spouse"); Act became effective on August 31, 1987 and is codified as TEX. PROB. CODE ANN. § 439 (West 2012).

39. *See* TEX. PROB. CODE ANN. § 439 (West 2012).

40. *See id.*

41. *See id.*

42. *See id.*

43. *See, e.g.*, TEX. PROB. CODE ANN. § 46 (West 2012) (stating that "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. 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.") (emphasis added).

44. *See id.* ("The joint owners may agree in writing . . .").

45. Brief for Petitioner at 8, McKeehan v. McKeehan, 355 S.W.3d 282 (2012) (No. 12-0003).

46. Holmes v. Beatty, 290 S.W.3d 852, 856 (Tex. 2009).

Code Section 452.[47] Like all states without implied right of survivorship standards, failure to meet the Texas standard results in automatic vesting to the next beneficiary.[48] Texas enacted this statute in an attempt to aid testators wanting to ensure their assets passed under community property standards.[49] The theory being, if the provision does not use the four "magic phrases", then there is no way of creating a right of survivorship.[50] This precedent aids in understanding the true gravity of the *McKeehan* dilemma.[51] Not only did *McKeehan* overturn nearly fifty years of case law, it also directly conflicted with Texas statutory law.[52] The Texas legislature enacted the express language provision with the intention of streamlining choice of law provisions for those that want them.[53] The *McKeehan* decision directly conflicts with the purpose of Section 452 and casts a shroud on the Restatement (Second)'s language dictating choice of law between spouses.[54]

C. Restatement (Second)'s View on Conflict of Laws

Restatement (Second) Section 187 is the historically chosen path for choice of law provisions.[55] Although not legally binding, Section 187 is seen as the final authority on choice of law issues between different states.[56] The language of Section 187 provides explicit instructions for agreements both with

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47. *See* TEX. PROB. CODE ANN. § 452 (West) (2012).

48. *See id.*

49. *See Holmes*, 290 S.W.3d at 856; *see also* GERRY W. BEYER, TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 60.1 (3d ed. 2012).

50. *See, e.g.*, TEX. PROB. CODE ANN. § 452 (West) (2012) (the magic phrases in question are: "with right of survivorship"; "will become the property of the survivor"; "will vest in and belong to the surviving spouse"; or "shall pass to the surviving spouse.").

51. *Id.*

52. McKeehan v. McKeehan, 355 S.W.3d 282 (Tex. App.—Austin 2011, pet. filed).

53. *See Holmes*, 290 S.W.3d at 856; *see also* TEX. PROB. CODE ANN. § 452 (West) (2012).

54. *See McKeehan*, 355 S.W.3d at 285; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 187 (1990).

55. RESTATEMENT (SECOND) OF CONTRACTS § 187 (1990).

> 1. The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> 2. The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> a. the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or
>
> b. Application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> 3. In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.").

56. *See id.*

and without options to solve the question of choice of law.[57] Section 187 also provides a solution when there is simply a lack of indication about preference in choice of law.[58] In situations like this, the court applies the local law of the state.[59]

In cases involving choice of law provisions, the court must use a three-step test to decide how the issue should be resolved.[60] First, the court must look to see if the issue is solvable via outside agreement; if so, then the law of the state applies.[61] Second, if the agreement is not solvable through outside agreement, the law of the state still applies unless the application is directly against state policy.[62] If neither party disputes a choice of law, the law of the state applies.[63] Although somewhat tedious, this background is essential to set the stage for the explanation of *McKeehan v. McKeehan* and subsequent analysis that follows.

III. THE *MCKEEHAN* DECISION UNRAVELED

The Texas appellate decision of *McKeehan* illustrates a shift in policy and precedent when determining the choice of law of right of survivorship agreements.[64] The decision to validate the agreement according to Michigan law, while simultaneously overriding nearly fifty years of Texas precedent, is one of the most decisive estate planning decisions in recent history.[65]

A. Familiar Background Information

Before delving into the depths of the *McKeehan* decision, it is important to understand the underlying factors that caused this situation to arise.[66]

Dale McKeehan worked for Ford Motor Company for over thirty-six years, rising to the level of Vice President of Vehicle Operations.[67] During his tenure at Ford Motor Company, Mr. McKeehan received a considerable amount

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57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.* ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.").

62. *See id.* ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either . . . application of the law of the chosen state would be contrary to a fundamental policy of a state . . .").

63. McKeehan v. McKeehan, 355 S.W.3d 282 (Tex. App.—Austin 2011, pet. filed) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 187 (1990)).

64. *McKeehan*, 355 S.W.3d at 285.

65. *McKeehan*, 355 S.W.3d at 285; *see also* Holmes v. Beatty, 290 S.W.3d 852,855 (Tex. 2009); *see also* Hilley v. Hilley, 342 S.W.2d 565 (Tex. 1961).

66. *McKeehan*, 355 S.W.3d at 285.

67. *Id.* at 285.

of shares of Ford Motor Company.[68] These shares resided in a money market account, held by a Michigan bank, as part of a program designed by Ford Motor Company as compensation for high-level executives.[69] After several decades as Vice President of Vehicle Operations, Mr. McKeehan retired and moved to Texas becoming domiciled therein, while maintaining his money market account in Michigan.[70] In 2008, after being diagnosed with brain cancer, Mr. McKeehan put his final affairs in order.[71] Mr. McKeehan intended to pass the full content of his money market account to his second wife, Marcia.[72]

In an Austin, Texas bank, Mr. McKeehan and Marcia signed a right of survivorship agreement to ensure the Texas community property rule did not override his testamentary intent.[73] Mr. McKeehan passed away less than a month later and Marcia was appointed executor under his will.[74] Mr. McKeehan's will gave "[a]ll real property, all death benefits paid by Ford [Motor Company], all death and pension benefits paid as a result of his employment with Ford [Motor Company], and $2,500,000 to Marcia."[75] Marcia understood this particular provision of the will as passing the money market account to her right of survivorship agreement.[76] Mr. McKeehan's two children contested this interpretation of the will by arguing that the "Ford investment program should be included in Dale's probate assets because, under Texas law, Marcia did not have survivorship rights."[77] The probate court ruled in favor of Dale's children, citing Texas state policy as its deciding factor.[78]

B. Texas's Unprecedented Court Decision

The appellate court in *McKeehan* faced two corresponding issues: (1) should Michigan or Texas law apply to the agreement between spouses, and (2) if Michigan law applies, does it grant the surviving spouse possession of the remaining money market assets?[79]

The first step in determining these two issues is to ensure that the respective Michigan and Texas choice of law provisions actually disagree with one another.[80] This first step arises out of the court's decision in *Duncan v. Cessna Aircraft Company*, which created the precedent that a Texas court must

68. *Id.* at 282.
69. *Id.* at 282.
70. *Id.* at 283.
71. *Id.* at 283.
72. *Id.* at 284.
73. *Id.* at 284.
74. *Id.* at 284.
75. *Id.* (quoting the will's language to show the intent of Dale McKeehan).
76. *Id.* at 285.
77. *Id.*
78. *Id.*
79. *Id.* at 285–93.
80. *Id.* at 285; *see also* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984).

always determine the state law choice of law provision conflicts.[81] After this initial determination, the court must look at the actual choice of law provision to determine if the specific language is enforceable.[82]

Analyzing the first issue, the *McKeehan* court examined statutes from each state and interpreted the RESTATEMENT's view on choice of law provisions before making a final determination.[83] Michigan law governed the agreement if the court overruled Texas case law and public policy.[84] Texas law governed the agreement if the court followed Texas public policy and viewed the agreement as between Texas domiciliaries.[85] If the statute is legally viable, then the court must determine the proper choice of law according to the Restatement (Second).[86] In *McKeehan*, the court held that Michigan law must govern the agreement because the parties had the initial option to settle the issue by express provision.[87] Dale's children from his first marriage argued that Michigan law is in direct opposition with Texas public policy.[88] The RESTATEMENT holds that if the agreement is resolvable through an express provision, then the policy argument possesses no relevance.[89]

After the court ruled in favor of the appellants on the first issue, the court preceded to determine the legality of the right to take as a survivor.[90] The court used a three-step analysis in determining the validity of the right of survivorship.[91] First, the court determined Dale's investment in the Ford program to be an "interest" in the Ford investment program.[92] Second, any interest in the funds was payable to both spouses per their agreement.[93] Third, the court ruled that as long as both account holders were spouses at the time of the agreement, Michigan law should trump any Texas policy argument.[94] The court primarily relied upon the argument from *Holmes v. Beatty* in deciding to pass the property to the surviving spouse.[95] This 2009 Texas case experienced the first diversion from the decade-old Texas standard against recognizing out

81. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984).

82. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (citing Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 417 (Tex. 1984)).

83. McKeehan v. McKeehan, 355 S.W.3d 282, 285 (Tex. App.—Austin 2011, pet. filed); *see also* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 417 (Tex. 1984) (citing RESTATEMENT (SECOND) OF CONTRACTS § 187 (1990)).

84. McKeehan v. McKeehan, 355 S.W.3d 282, 293 (Tex. App.—Austin 2011, pet. filed).

85. *Id.* at 292.

86. *Id.* at 291.

87. *Id.* at 293.

88. *Id.* at 292.

89. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

90. McKeehan v. McKeehan, 355 S.W.3d 282, 293 (Tex. App.—Austin 2011, pet. filed).

91. *Id.* at 293–94.

92. *Id.* at 294.

93. *Id.*

94. *See id.* at 294 (citing Holmes v. Beatty, 290 S.W.3d 852, 857 (Tex. 2009)); *see also* U.S. v. Craft, 535 U.S. 274, 280 (2002) (establishing the principle of allowing spouses domiciled in community property states to pass property through right if survivorship).

95. McKeehan, 355 S.W.3d at 294; *see also* Holmes v. Beatty, 290 S.W.3d 852, 857 (Tex. 2009).

of state right of survivorship provisions.[96] The *McKeehan* court borrowed language from *Beatty*, allowing explicit language between the testator and the testator's spouse to overrule a presumed community property conveyance.[97] The problem is that the facts here were substantially different in *McKeehan.*[98] The court's decision in *McKeehan* represented a sharp departure from Texas legal policy, creating a potential for serious disruption of Texas estate planning in the near future.[99]

C. Extensive Aftermath Arising Out of McKeehan

The *McKeehan* decision caused ripples across the Texas estate planning community.[100] Apart from depriving the *McKeehan* children of hundreds of millions of dollars, the decision disrupted all past, present, and future Texas estate planning.[101]

For over fifty years, Texas law governed all multi-party accounts owned by parties domiciled in Texas.[102] *McKeehan* effectively severed that precedent, sending past and present estate planning into oblivion.[103] Now, instead of guaranteeing to follow the testator's intent when a choice of law question exists, ambiguity exists as to where the property goes.[104] This presents several dilemmas for estate planning attorneys and for testators themselves.[105] First, testators need to be cognizant of the laws of each state involved in the choice of law dispute.[106] Their current clients may have wills or trusts with conflicting choice of law provisions. Seeing as Texas and Michigan both have probate codes spanning well past 100 sections, it seems unrealistic to subject a layperson to this task.[107] Second, the *McKeehan* decision is completely retroactive.[108] Thus, all estates involving multi-party account from out-of-state financial institutions would fall prey to the possibility of the court circumventing the testator's intent and would allow a separate beneficiary to

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96. *Id.* at 854.

97. McKeehan v. McKeehan, 355 S.W.3d 282, 294 (Tex. App.—Austin 2011, pet. filed); *Holmes*, 290 S.W.3d at 858 (citing U.S. v. Craft, 535 U.S. 274, 280 (2002)). "Tenants in common may each unilaterally alienate their shares through sale or gift or place encumbrances upon these shares. They also have the power to pass these shares to their heirs upon death." *Id.*

98. *See generally*, *McKeehan*, 335 S.W.3d at 282 (discussing the facts in *McKeehan*).

99. *Id.*

100. *See generally*, Wills, Trusts & Estates ProfBlog, http://lawprofessors.typepad.com/trusts_estates_prof/2012/05/impact-of-choice-of-law-provision-in-non-probate-instrument.html (last visited Jan. 25, 2013).

101. *Id.*

102. Brief for Petitioner at 4, McKeehan v. McKeehan, 355 S.W.3d 282 (2012) (No.12-0003), 2012 WL 6044354 at *7.

103. *Id.*

104. *Id.*

105. *See id.* at 5.

106. *See id.*

107. *See id.*

108. *See id.* at 19.

inherit the funds in question.[109] Lastly, the court's decision places an unwieldy and otherwise unnecessary burden on estate planning lawyers who now have to spend considerably more time researching the probate laws of each state in order to ensure that the court's uphold the testator's intent and that no malpractice occurs.[110] This also means that probate attorneys would inherit the task of researching all past wills involving multi-party accounts from out-of-state institutions to maintain their client's intent.[111]

Practically speaking, the court's decision in *McKeehan* entails the potential ramifications of costing Texas testators and beneficiaries billions of dollars in legal fees, personal research, and improperly distributed estates.[112]

IV. RAMIFICATIONS IN TEXAS ESTATE PLANNING LAW STEMMING FROM THE *MCKEEHAN* DECISION

A. The Dilemma of Alex Accountholder—A Hypothetical Illustration Depicting the Worst Case Scenario Emanating from McKeehan

Alex and Andrea Accountholder live in Dallas, Texas.[113] The Accountholders recently migrated back home to Texas from Michigan after Alex had decided that he no longer desired four seasons a year. Alex's two children came from a prior marriage and currently live in Dallas. While working in Michigan, Alex compiled considerable resources in an Individual Retirement Account (IRA) account provided by his place of employment. Alex held the IRA account solely under his name. After nearly a decade of adding funds to this account, Alex and Andrea moved their domicile to Texas. Alex fully intends for this money market account to pass to his devisees through a revocable trust. This is Texas's approach to bank accounts of this type, and Texas public policy supports this result.[114] Alex Accountholder is operating under the assumption that Texas law must govern an account created in Michigan, regardless of where the money market account originates.[115] Additionally, Alex bases his assumption this assumption on the fact that Texas law expressly states its governance over all accounts of Texas residents and for the benefit of Texas domiciliaries per Texas public policy.[116] Michigan's

109. *See id.* at 3.

110. *See id.* at 3–4.

111. *See id.*

112. *See generally*, McKeehan v. McKeehan, 355 S.W.3d 282, 296 (Tex. App.—Austin 2011, pet. denied) (ruling on ownership status using Michigan law instead of Texas law).

113. This hypothetical is a work of fiction and was created by combining McKeehan v. McKeehan, 355 S.W.3d 282 (Tex. App.—Austin 2011, pet. filed) with my own reasoned analysis.

114. *See* TEX. EST. CODE ANN. § 439(a); McKeehan, 355 S.W.3d at 291; Holmes v. Beatty, 290 S.W.3d 852, 860–61 (Tex. 2009); *In re* Estate of Patterson, 2003 WL 22251204, at *1 (Tex. App.—Eastland Oct. 2, 2003, no pet.) (mem. op., not designated for publication).

115. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677–81 (Tex. 1990).

116. *See id.*; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971) (stating that the application of a state's law depends on the state's substantial relationship to the parties).

approach to this issue differs significantly from Texas Law.[117] Specifically, Michigan governs all accounts originating within its borders "under the laws of this state, with full right of ownership by survivorship in case of the death of either."[118] In other words, once Alex passes away, Andrea May legitimately claim the entire bank account regardless of any adverse Texas laws or public policy.[119]

Sadly, Alex passes away after a few years of enjoying the Texas retirement life. Under Texas law, the devisees now believe they stand to inherit nearly half of the $250,000,000 because Texas has no implied right of survivorship.[120] Prior to *McKeehan*, they would be correct.[121] Unfortunately, the decision in *McKeehan* now renders Texas law inapplicable to the money market account.[122] The $250,000,000 passes as it would under Michigan law, to Andrea, against both the intentions of Alex and the Texas Legislature.[123] This development in Texas case law is troubling as it pertains to future estate planners, but the real danger lies in a situation involving retroactive assets.[124] Suppose that Alex opened this account years before the *McKeehan* decision. He allows the account to gather interest and leaves it otherwise untouched on the advice of his estate planning lawyer. Prior to *McKeehan*, this would constitute sound legal advice; however, after *McKeehan*, this legal advice would lead to an entirely different result than intended by Alex Accountholder.[125] Alex Accountholder set up his estate with the full intentions of distributing half of his estate to his children from another marriage, and under Texas law prior to *McKeehan*, this would have been the case.[126] Due to the change in Texas's legal policy, Alex's assets will be fully distributed to Andrea, against his intentions.[127] Unless Alex Accountholder is extraordinarily diligent in keeping up with Texas estate planning legal news, he will most likely be unaware of such a major change in the distribution of his assets.[128] There is no guarantee that Alex's lawyer possesses the foresight to warn Alex of the impending change, and the

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117. *See* MICH. COMP. LAWS § 557.151 (2009).

118. *Id.*

119. *See* DeSantis, 793 S.W.2d at 681; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971) (stating that the application of a state's law depends on whether the contrary law would be against the fundamental policy of the state with a materially greater interest).

120. *See* TEX. PROB. CODE ANN. § 452 (West 2012).

121. *See DeSantis*, 793 S.W.2d at 681; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 187 (1982).

122. *See* McKeehan v. McKeehan, 355 S.W.3d 282, 291 (Tex. App.—Austin 2011, pet. filed).

123. *See* Michael G. Guajardo, Comment, *Texas' Adoption of The Restatement (Second) of Conflict of Laws: Public Policy Is The Trump Card, But When Can It Be Played?*, 22 TEX. TECH L. REV. 837, 867 (1991) (discussing the public policy argument regarding conflict of laws in Texas); *see also DeSantis*, 793 S.W.2d at 681 (Tex. 1990).

124. *See McKeehan*, 355 S.W.3d at 291.

125. *See id.*

126. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 681 (Tex. 1990); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 187 (1990).

127. *McKeehan*, 355 S.W.3d at 291.

128. *See* Brief for Petitioner at 33, *McKeehan*, 355 S.W.3d 282 (No. 12-0003).

$250,000,000 will pass against the testamentary intent of Alex.[129] Adding to the dilemma is the fact that this decision applies to all current and future estate planning conducted in Texas.[130] The court now has precedence to follow that directly coincides with Texas public policy and creates a legal quagmire for any future testators.[131] This is the worst-case scenario brought to life by *McKeehan*.[132] The next four sections delve deeper into the possible negative scenarios stemming from *McKeehan*, beginning with its effect on past estate planning provisions.[133]

B. Effect on Past Texas Estate Planning Provisions

Testamentary intent serves as the ultimate method of distributing property.[134] The formalities of the document serve to ensure that the testator's intent is fully represented.[135] As one commentator put it, "Intent is indisputably the heart of the will, ..."[136] Even after the execution ceremony, leading estate planners still recommend reviewing the document in the presence of the client to fully guarantee that the intent of the testator is met throughout the document.[137] The decision in *McKeehan* threatens to uproot the foundation of Texas estate planning.[138] Testators will be forced to return to their lawyers to ensure that their testamentary wishes are fulfilled.[139] This means added costs to the testators and added work to the lawyers.[140]

Estate planners face the added duty of researching multiple state laws in an attempt to fully satisfy a client's need.[141] This also presents the attorney with the issue of how much extra to charge for the new research.[142] Ideally the attorney can find the necessary information quickly to the benefit of the testator.[143] Unfortunately, the task of searching through complex laws of three or four states is not simple.[144] Along with the added costs, the attorneys will need to contact all clients who might be affected and relay to them the

129. *See McKeehan*, 355 S.W.3d at 296.
130. *See id.*
131. *See id.*
132. *See id.*
133. *See infra* PART IV.B–E.
134. *See* Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 309 (2011) (discussing the purposes and historical development of intent to distribute through testamentary methods).
135. *See id.*
136. *Id.* at 309.
137. *See* GERRY W. BEYER, TEXAS WILLS AND ESTATES: CASES AND MATERIALS 112 (6th ed. 2008).
138. *See infra* PART III.C.
139. *See infra* PART III.C.
140. *See infra* PART III.C.
141. *See* McKeehan v. McKeehan, 355 S.W.3d 282, 291 (Tex. App.—Austin 2011, pet. filed).
142. *See* BEYER, *supra* note 137, at 115–16.
143. *See* BEYER, *supra* note 137, at 116.
144. *See McKeehan*, 355 S.W.3d at 285.

unfortunate news that their wills may insufficient to carry out their wishes.[145] Odds are, these conversations will not be pleasant.

This situation pales in comparison to the possible effect on testators less well versed in the current law.[146] Those testators ignorant of *McKeehan* face the likely possibility of their out-of-state assets passing to someone other than the intended beneficiary.[147] These listed scenarios represent only a handful of the possible implications for past wills arising out of the *McKeehan* decision. Sadly, under this legal precedent, the future holds little more hope for testators with out of state jointly owned assets.

C. Effect on Future Texas Estate Planning Provisions

While the *McKeehan* decision does not present future problems of the same magnitude as problems arising retroactively, these issues are nonetheless troubling. First, in the future, estate planners face the distinct possibility of increased costs due to the necessity of researching multiple state property laws.[148] This planning adds both to the difficulty and the likelihood of error because very few lawyers around the state are likely to possess the knowledge to successfully circumvent the laws of multiple states.[149]

For example, a lawyer in Texas may need to be proficient in the laws of New Mexico, Colorado, Oklahoma, Louisiana, and Arkansas in order to properly plan for each client's out of state interests.[150] These states are provided as examples because they are the five states closest to Texas; thus, it is more likely that Texas domiciliaries own property here. Of these five states, three follow community property distribution schemes.[151] This fact pattern presents a perfect example of why the *McKeehan* decision is so far-reaching. If a Texas resident owns property in Oklahoma and Texas, the estate planning attorney assigned to their property must be proficient in the laws of both states.[152]

Another issue arising out of choice of law provisions revolves around the increased chance of botched distribution.[153] As is clear in *McKeehan*, when the laws of multiple states govern a single agreement, the probability of an error in

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145. *See* Brief for Petitioner at 33, *McKeehan*, 355 S.W.3d 282 (No. 12-0003).

146. *See McKeehan*, 355 S.W.3d at 285.

147. *See id.*

148. David Hricik, Infinite Combinations: *Whether the Duty of Competency Requires Lawyers to Include Choice of Law Clauses in Contracts They Draft for Their Clients*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 241, 256–59 (2004) (discussing the costs of including choice of law provisions).

149. *See id.*

150. *See id.*

151. *Publication555-IntroductoryMaterial*, IRS (Last visited on Oct.20, 2012) http://www.irs.gov/publications/p555/ar01.html.

152. *See* Hricik, *supra* note 148, at 255–56.

153. *See* Hricik, *supra* note 148, at 257 (discussing the increased risk of error in distribution because of complicated choice of law provisions).

distribution increases exponentially.[154] Finally, an argument exists that places a duty on lawyers to ensure that a choice of law provision is correctly created.[155] David Hricik uses the famous Learned Hand's balancing test as the basis for his argument that whenever an attorney drafts a choice of law provision, if the risk of loss outweighs the expected harm, a breach of duty may occur.[156] Estate planning of this magnitude usually involves substantial monetary assets, so the risk of breach of duty remains omnipresent.[157]

Similarly, the convoluted logic of the *McKeehan* decision causes ripples among future testators.[158] First, the cost of litigation is almost guaranteed to skyrocket.[159] Lawyers will spend twice the time and exert twice the effort attempting to abide by the testator's wishes.[160] As mentioned previously, future estate planners will spend countless hours researching the respective out of state laws necessary to create the choice of law provision.[161] These added costs assume that the entire process finishes smoothly, if any litigation arises, the parties will be subjected to increased court costs and wasted time and effort.[162]

Testators also face added opportunity costs in planning their estates.[163] For example, testators view the right to pass property without limitation by any state or the Federal Government as a natural right.[164] The *McKeehan* decision possesses the power to effectively limit a testator's power to distribute because of the sharp increase in the cost of will making.[165] The aftermath of *McKeehan* creates added difficulty in deciding the state in which to create wills and trusts.[166] For example, take the previously mentioned testator who owns property in Texas and Oklahoma.[167] Each state handles community property and choice of law differently.[168] The testator now has to do background research about material he or she may not comprehend simply to decide the best state for probating their estate.[169] Prior to *McKeehan*, a testator could abide by the knowledge that property left to beneficiaries in a state would pass exactly as

154. *See McKeehan*, 355 S.W.3d at 285.

155. *See* Hricik, *supra* note 148, at 258.

156. *Id.*

157. *See id.*

158. *See infra* PART III.C.

159. *See generally* Hricik, *supra* note 148, at 250–57 (discussing costs of omissions and inclusion of choice of law provision.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See* Hodel v. Irving, 481 U.S. 704, 716 (1987) (holding that a governmental restriction on distribution of property is unconstitutional); John Locke, *Two Treatises of Government* 88 (Gryphon eds., 1994) (1698) (asserting that the right of inheritance is a natural right).

165. *See McKeehan*, 355 S.W.3d at 285.

166. *See id.*

167. *See* TEX. PROB. CODE ANN. § 46(a) (West 2003 & Supp.2012); OKLA. STAT. tit. 15 § 162 (2012).

168. *See* Katherine D. Black, Mary K. Black, Julie M. Black, *Community Property for Non-Community Property Status*, 24 QUINNIPIAC PROB. L. J. 260, 264–69 (2011).

169. *See* Hricik, *supra* note 148, at 255–56.

the testator intended.[170] Now, with the change in Texas case law, individual testators face the terrible possibility that their assets may end up with another beneficiary![171]

Modern legal scholars argue that conflicting choice of law provisions harm the predictability of estate planning, directly circumventing the purpose of estate planning.[172] Less predictable estates cause more worry for testators and more work for the estate planners.[173]

These issues also present an added level of difficulty for those attempting to create a holographic will.[174] Usually, these individuals are laypeople with scarce legal knowledge to speak of.[175] If Texas substantially alters the distribution scheme, those wishing to create a holographic will are forced to either learn the new law or risk an erroneous distribution.[176] The *McKeehan* decision primarily affects Texas residents, but this does not mean that Texans are the only people with an interest.[177]

D. Collateral State Law Estate Planning Implications Arising Out of McKeehan

Out-of-state residents face the distinct possibility of losing rights if they own any property in Texas.[178] No cases have spoken to this issue yet, but the possibility exists.[179] If a California resident takes advantage of tax benefits allowed in California, would Texas allow this?[180] Under Texas community property law, a spouse does not have complete control over investments from other states.[181] The *McKeehan* decision threatens this arrangement.[182] Texas case law is now conflicted about this concept so there is no guarantee to the account owner.[183] As mentioned previously, the law of the domicile governs all agreements regardless of the intent of the testator, so Texas courts now have to decide which rule to give precedence to.[184]

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170. *See* TEX. PROB. CODE ANN. § 46(a) (West 2003 & Supp.2012); *see also* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 681 (Tex. 1990).

171. *See infra* PART IV.A.

172. *See* Hricik, *supra* note 148, at 256–59.

173. *See* Hricik, *supra* note 148, at 249–50.

174. *See id.*

175. *See id.*

176. *See id.*

177. Noel C. Ice, *IRAs (Including So-Called SEP-IRAs): Exempt or Not?*, TRUSTS AND ESTATES (Oct.20,2012), http://www.trustsandestates.net/Articles/2011_ALI_ABA_IRAs_Creditor_Claims_and_Conflict_of_Laws_Affecting_IRAs_and%20_SEPs.pdf.

178. *Id.*

179. *Id.*

180. *See id.*

181. TEX. PROB. CODE ANN. § 46 (West 2012) *repealed by* Acts 2009, 81st Leg., Ch. 680, §10(a), eff. Jan. 1, 2014 (*see* TEX. EST. CODE ANN. §§111.001–111.002 (West 2014) for corresponding sections).

182. McKeehan v. McKeehan, 355 S.W.3d 282, 285 (Tex.—App. Austin 2011, pet. denied).

183. *Id.* at 282; *see also* Holmes v. Beatty, 290 S.W.3d 852, 854 (Tex. 2009).

184. TEX. PROB. CODE ANN. § 46.

Louisiana law presents another potential victim of the new Texas stance on choice of law provisions between spouses. The unique nature of Louisiana law and the close proximity to Texas possess the potential to create a legal perfect storm. Louisiana Civil Code Article 3526 governs choice of law provisions between spouses.[185] This statute creates a hybrid method of deciding choice of law, taking into account the "relationship of all involved states to the parties and the dispute; and . . . the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow . . . ."[186] The Louisiana legislature is concerned primarily with the fairness to spouses in terms of distributing property from other states.[187] If Texas allows *McKeehan* to stand as valid law, Louisiana natives looking to circumvent Civil Code Article 3526 will travel to Texas, where they will be able to control both halves of the estate instead of just one.[188] Louisiana is already taking action to close this loophole, but the fact that a decision in Texas might adversely affect other state laws provides yet another valid reason to overturn *McKeehan*.[189] Under the amended statute, Louisiana plans to classify all property gathered inside or outside of Louisiana as community property in terms of choice of law provisions.[190] The Louisiana legislature believes this will alleviate some of the frustration with the current statute and provide a more "fair" method of spousal distribution.[191] Apart from affecting out of state residents, *McKeehan* is also likely to give rise to new difficulties in the financial sector of Texas as well.

E. McKeehan *Decision's Effect on the Financial Sector*

Despite all the negative estate planning consequences stemming from the *McKeehan* decision, financial institutions may actually benefit from the court's holding. Banks may develop the ability to implement marketing campaigns using *McKeehan* as an example of what can go wrong if a person doesn't keep assets in Texas.[192] The situation with the McKeehan's could have been easily solved, had they taken the time to move their assets to a Texas bank before trying to create a right of survivorship.[193] This gives Texas banks the ability to advertise the beneficial impact of keeping assets in Texas even if a person owns multiple residences in different states. Texas banks can inform customers of

185. Dian Tooley-Knoblett, *A Step By Step Guide to Louisiana's Choice of Law Provisions on Marital Property*, 52 LOY. L. REV. 759, 769 (2006) (citing LA. CIV. CODE. ART. 3526 (2012)).
186. *Id.* at 762.
187. *Id.*
188. *Id.* at 769.
189. *Id.*
190. *Id.*
191. *Id.* at 771.
192. *See* McKeehan v. McKeehan, 355 S.W.3d 282 (Tex. App—Austin 2011, pet. denied).
193. *See id.*

the potential consequences of keeping assets in states with varying ownership provisions, which will then give the banks logical reasons to push their own services on customers. Comerica Bank, the bank involved in the *McKeehan* case, possesses over 67 million dollars in assets in Texas alone.[194] Comerica also operates over 350 out-of-state branches in states like Florida, Arizona, California, and Michigan.[195] Comerica possesses ample incentive to recommend out-of-state customers move their assets to Texas banks to ensure that their estate planning wishes are carried out to the fullest extent possible.[196] Primarily, Financial Planners at large banks could face the need to adapt their policies in order to better inform their customers of conflicting state laws. These examples of collateral implications are just a handful of the possible out-of-state consequences arising from the *McKeehan* decision.[197] The *McKeehan* decision presents a plethora of difficulties for the estate planning community, luckily, all hope is not lost! Several states with similar community property laws possess statutory solutions to a situation like *McKeehan*, and Texas is in the process of developing it's own solution in 2013.[198]

V. PROPOSED SOLUTIONS TO MULTI-PARTY ACCOUNT CHOICE OF LAW ISSUES

The Texas legislature is already in the process of altering the Probate Code to remedy this type of situation.[199] This proposed change would effectively destroy a large percentage of the possibility of an out-of-state provision governing Texas based account.[200] This addition guarantees Texas law is used to determine the distribution of accounts owned by any Texas domiciliary.[201] The addition also specifically provides for a Texas judicial determination of the ownership of the account.[202] Legislation is not the only method of solving the issues arising from *McKeehan*. California and Louisiana contain effective legal solutions to right of survivorship designation and choice of law determinations.[203] By combining the statutory provisions of California and Louisiana with the proposed additions to the Texas Estates Code, the Texas legislature possess the ability to indefinitely solve all issues arising out of *McKeehan*.

194. Comerica Website, www.comerica.com/Pages/default.aspx (last visited Jan. 1, 2013).
195. *Id.*
196. *See id.*
197. McKeehan, 355 S.W.3d at 285.
198. *See id.*
199. TEX. ESTATES CODE §§ 111.051(d) and 111.054 (West 2014).
200. *Id.*
201. *Id.*
202. *See* Holmes v. Beatty, 290 S.W.3d 852 (Tex. 2009); *see also* TEX. ESTATES. CODE ANN. § 111.054 (West 2014) (the legislature's intent is to allow Texas Courts to examine the testator's intent and to choose the state law closest to that intent.).
203. LA. CIV. CODE ANN. art. 3524 (2013); *see also* CAL. CIV. CODE § 682.1 (West 2014).

A. State Specific Case Law & Statutory Solutions

1. California Civil Code Section 682.1 & Kircher v. Kircher

In July of 2001, California enacted Section 682.1 of the California Civil Code as a codified solution for creating a right of survivorship for community property.[204] In order to simplify the process of creating a right of survivorship between spouses, Section 682.1 requires an expressly stated, signed document in order to create a right of survivorship.[205] This language is nearly identical to the Texas method of creating a right of survivorship and the purposes of both legislatures involved simplifying the process.[206] Subsection (a) also provides the parties with a method of severing the right of survivorship, this provision is primarily a safeguard against situations mirroring the *McKeehan* case.[207]

Historically, California courts tend to follow the intent of the legislature instead of deciding right of survivorship issues on a case by case basis.[208] *Kircher v. Kircher* maintained the precedent of strictly enforcing the language of the California Probate Code in right of survivorship cases.[209] *Kircher* involved debts from a joint tenancy case involving community property.[210] The specific facts of this case are not as important in terms of a *McKeehan* like situation, instead California's strict adherence to the California Probate Code shows a dedication to maintaining a set guide for creating right of survivorships.[211]

California's Limitation on Community Property Rights gives spouses some flexibility in allocating their property, while maintaining rigidity in areas of policy.[212] This follows in line with Texas's policy of limiting Community

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204. CAL. CIV. CODE § 682.1 (West 2012).

205. Community Property with Right of Survivorship: Hearing on A.B. 2918 Before the California Assembly Comm. on Judiciary (Aug. 25, 2005); *see also* CAL. CIV. CODE § 682.1.

206. *Compare* CAL. CIV. CODE § 682.1 (stating that "Community property of a husband and wife, *when expressly declared in the transfer document to be community property with right of survivorship*, and which may be accepted in writing on the face of the document by a statement signed or initialed by the grantees, shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy.") (emphasis added) , *with* TEX. PROB. CODE ANN. § 46 (West 2012) *repealed by* Acts 2009, 81st Leg., Ch. 680, §10(a), eff. Jan. 1, 2014 (stating that "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. 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.") (emphasis added).

207. CAL. CIV. CODE § 682.1; *see also* McKeehan v. McKeehan, 355 S.W.3d 282, 285 (Tex.—App. Austin 2011, pet. denied).

208. *See* Kircher v. Kircher, 117 Cal. Rptr. 3d 254, 260–62 (Cal. Ct. App. 2010).

209. *Id.*

210. *Id.*

211. *Id.*; *see also* McKeehan v. McKeehan, 355 S.W.3d 282 (Tex. App.—Austin 2011 pet. denied).

212. *See* HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE 3D, 5 CAL. REAL EST. § 12.65 (3d ed.) (2006).

Property Rights.[213] California enacted this policy to give spouses certainty in allocating their assets and the courts' decision in *McKeehan* directly undermines this type of policy.[214] California's limitation on spousal designation of property serves as a safeguard against an unreliable court system, and while simultaneously soothing the nerves of future estate planners.[215] Implementing this spousal designation in Texas would solidify the rights of spouses in cases of joint accounts with right of survivorship, and serve as a check on the Texas court system. The California courts recognize the importance of precedent in situations that have the potential of retroactively changing estate planning in a substantial way.[216] In the future, if Texas wants to modify its stance on joint accounts with right of survivorship, necessitating a legislative action seems like the best method. A possible solution to the choice of law situation created by *McKeehan* is contained in Louisiana's unique balancing test for deciding choice of law decisions.[217]

2. Louisiana Civil Code Article 3524

Louisiana law addresses the issue of joint ownership with a right of survivorship in an effective, yet complicated test that balances interests of both the property owner and the state in an attempt to determine the best solution in the interest of justice.[218]

Article 3515 of the Louisiana Civil Code governs all choice of law issues arising in Louisiana with a few exceptions.[219] The basic idea of Article 3515 is for the Louisiana court to look to see which state's policies would be most seriously impaired if that state's law was not applied to that issue.[220] This involves a detailed analysis by the court and by the judge presiding over the case, even if they judge is not cognizant of the effect of the ruling on that specific area of law.[221] Louisiana goes on to provide more specialized applications of that rule to individual situations as the law evolves and the court can break the issues down.[222] For example, Article 3524 provides that immovable property located in a state is subject to the law of that particular state as long as a significant portion of the facts occurred in that state.[223] Apart from a few minor exceptions, the basic rules contain two sections: (1) what is the relationship of all involved states to the parties and the dispute, and (2) what

213. *See* TEX. PROB. CODE ANN. §§ 436–62 (West 2012).
214. Miller & Starr, *supra* note 212, § 12.65.
215. *See id.*
216. *Id.*
217. LA. CIV. CODE ANN. art. 3515 (WEST 2012).
218. Tooley-Knoblett, *supra* note 159, at 771; *see also* LA. CIV. CODE ANN. art. 3515 (1994).
219. *Id.*
220. Tooley-Knoblett, *supra* note 185, at 772.
221. *Id.* at 773.
222. *Id.*
223. *Id.*; *see also* LA. CIV. CODE ANN. art. 3524 (1994).

are the policies and needs of the interstate and international systems involved in the dispute.[224] Louisiana's decision to adhere to public policy serves dual purposes.[225] First, the statute ensures that the court bases its decision on a case by case basis, while at the same time, following precedent set by previous court decisions.[226] Second, by incorporating the policies of both states involved in the decision, the court increases the probability of applying the best choice of law for each individual situation.[227]

The first requirement allows the law to evolve within the court system without giving the judiciary branch complete control in all matters of choice of law decisions.[228] The truly innovative portion of this rule is the consideration of the relationship between the states and the parties involved.[229] The second requirement allows the court to incorporate history policy considerations into each case, creating a nearly seamless web of choice of law provisions across state lines.[230] Applying this to Texas law could help prevent situations like the one in *McKeehan* from arising in the future. Instead of basing the holding on arcane public policy or the judge's personal reasoning, Texas courts would have an express method of deciding choice of law provisions in the future.[231] The *McKeehan* decision impacts Texas exponentially more than it affects Michigan law. If the Texas court chose to implement Texas law in this case, Michigan law would have remained unaffected entirely.[232] Michigan requirements for joint account ownership for Michigan residents would remain entirely unaffected.[233] Conversely, the current court's decision threatens to upset both Texas public policy and Texas estate planning certainties. In 2013 Texas will attempt to pass legislation containing two additions to the Estates Code, specifically to avert the ramifications from *McKeehan*.[234]

3. Texas Estates Code Sections 111.051(d) and 111.054

With the effects of *McKeehan* still fresh on their minds, the Texas legislature proposed a legislative amendment to the Texas Estates Code to alleviate the problems set forth by *McKeehan*.[235] Acting in direct response to the transfer of assets in *McKeehan*, The Estate and Real Estate, Probate, and

224. Tooley-Knoblett, *supra* note 185, at 773.

225. Dian Tooley-Knoblett, *A Step By Step Guide to Louisiana's Choice of Law Provisions on Marital Property*, 52 LOY. L. REV. 759, 773 (2006); *see also* LA. CIV. CODE ANN. art. 3524 (1994).

226. LA. CIV. CODE ANN. art. 3524 (1994).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*; *see also* TEX. ESTATES. CODE ANN. § 113.151(a) (West 2014).

232. MICH. COMP. LAWS ANN. § 557.151 (West 2012).

233. *Id.*

234. TEX. ESTATES CODE §§ 111.051(d) and 111.054 (2013 Proposed Addition) (Proposed in the Summary of the 2013 Decedents' Estates Proposals of the Real Estate, Probate, and Trust Law Section).

235. *Id.*

Trust Section of the State Bar of Texas devised additions of Sections 111.051(d) and 111.054 of the Texas Estates Code, which guarantee the application of Texas law to joint accounts falling under conflicting state laws.[236] The proposed additions seek to modify the wording of the Estates Code by adding a requirement that if more than 50 percent of the funds in a financial account, insurance contract, retirement account, or other similar arrangement were contributed by a Texas resident, Texas law shall apply. . . .[237] This requirement fills in the gaps left by previous Texas statutes governing jointly held accounts, and also provides an express guideline for future estate planners to follow to guarantee that they achieve their intended results.[238] The proposed solution is not overreaching in its coverage, instead seeking merely to ensure that Texas public policy is upheld in future situations of this kind.[239] Sections 111.051(d) and 111.054 also provide guidance in the area of judicial matters that were previously left ambiguous by the Texas legislature.[240] The proposed additions provide that any person, or the personal representative of a person's estate, who asserts an ownership interest in the subject property shall have access to Texas courts for a judicial determination of whether a non-testamentary transfer has occurred and the ownership of property following such transfer.[241] This provision serves to assuage any fear of bias where a Texas resident owns property located in another state where the laws might not favor out of state parties.[242] The fact that Texas moved so quickly to amend the decision in *McKeehan* serves as validation for the idea that Texas public policy is best served by allowing non-Texas based jointly owned bank accounts to remain expressly under Texas law. These two additions to the Texas Estates Code address only a portion of the problems arising out of the *McKeehan* decision. Texas public policy is best served by combining relevant sections from California, Louisiana, and Texas's own proposed additions to the Estates Code in order to create a hybrid legal solution for choice of law provisions in joint tenancies with right of survivorship.[243]

B. Hybrid Statutory Solution for Right of Survivorship

After analyzing two other states' methods of dealing with choice of law in right of survivorship for joint accounts, Texas's interests seem best served by combining the most effective portions of multiple state statutes in an expressly stated hybrid solution to a choice of law provision in a right of survivorship case. This new statute would incorporate three major concepts, drawing a piece

236. *Id.*
237. TEX. ESTATES CODE § 111.034 (West 2014).
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *See infra* Section VI.

of three different state statutes in an attempt to create a custom-made solution to Texas joint account with right of survivorship.

First, Texas needs to implement a balancing test, taking into account "the relationship of each state to the parties and the dispute", as well as "the policies and needs of the interstate . . . the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state."[244] This portion of the hybrid statute seems to singlehandedly address the majority if the issues stemming from *McKeehan*. In a situation like *McKeehan*, the court would first look at Texas public policy and determine that the Texas case law and public policy precedent favors using Texas law in joint account with right of survivorship.[245] An estate planner in Texas would absolutely be justified in expecting Texas law to govern this type of transaction seeing as *McKeehan* is the first and only decision to take this line of reasoning.[246] Finally, a new hybrid statute that attempts to minimize adverse consequences from a choice of law dispute serves to assuage the fears of future estate planners, while simultaneously ensuring that Texas law benefits Texas residents.

Second, Texas needs to follow the example of California and implement a code section limiting the rights of community property owners, as well as strictly enforcing the language of the Texas Probate Code. California includes the phrase "expressly declared in the transfer document" in its section regarding community property with right of survivorship, and thus far, the California judiciary has not wavered in the implementation of that requirement.[247] The hybrid Texas statute needs to include language mirroring California, along with the understanding of the judiciary that this language is not subject to individual court's interpretations. Decisions like *McKeehan* that go against public policy and case law precedent invoke a fear that the legal system is malleable and cause worry in estate planners. Express language and strict adherence to public policy and precedents serve as a check to that type of problem.

Finally, a proposed hybrid Texas statute should include a system of percentages similar to the proposed additions of Texas Estates Code Sections 111.051(d) and 111.054, but with one minor change.[248] The current proposal calls says that "if more than fifty percent of the funds in a financial account . . . were contributed by a Texas resident, Texas law shall apply . . . ."[249] This language still does not completely address a situation like *McKeehan* because the proposed amendment does not specify if the contribution must be made

244. LA. CIV. CODE ANN. art. 3515 (1994).

245. Guajardo, *supra* note 123, at 867; *see also* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 681 (Tex. 1990).

246. McKeehan v. McKeehan, 355 S.W.3d 282, 282 (Tex. App.—Austin 2011, pet. filed).

247. *See* CAL. CIV. CODE § 682.1 (West 2012).

248. TEX. ESTATES CODE §§ 111.051(d) and 111.054 (2013 Proposed Addition) (Proposed in the Summary of the 2013 Decedents' Estates Proposals of the Real Estate, Probate, and Trust Law Section).

249. *See id.* (quoting the language from the proposed statute); *see also* TEX. ESTATES CODE § 111.054.

while the resident is a current Texas domiciliary.[250] In *McKeehan*, a Michigan resident "contributed" the funds, but the joint tenancy arose in Texas.[251] The proposed additions of Texas Estates Code sections 111.051(d) and 111.054 need more express language covering the outcome in a situation involving multi-state contributions.[252]

VII. CONCLUSION

Although the *McKeehan* decision greatly impacted the McKeehan family, the court's decision holds far greater consequences for Texas probate law. If the Texas Supreme Court upholds the appellate court's decision allowing Michigan law to govern the right of survivorship agreement, the ripple effect will be catastrophic.[253] If Texas disregards state policy in favor of an agreement under another state's law, all joint accounts that originate in other states carry the possibility of falling subject to the other state's law, regardless of the intent of the account holder.[254] In other words, if any portion of a Texas resident's joint account is subject to another state's law, this decision will force the account holder to do exhausting additional research about the governing state's joint account provisions. Apart from adding a substantial amount of difficulty to a large portion of Texas joint property owners, this decision will complicate past, present, and future distribution of jointly owned property.

Louisiana and California handle joint account with right of survivorship in distinct methods, but the end result appears to serve the needs of each state's citizens in the most favorable way.[255] California adopted a limiting approach to community property rights by creating strict statutory provisions and enforcing them.[256] California allows spouses some leniency in distributing assets, while simultaneously leaving any ambiguities up to the legislature.[257] This system of limitation helps to minimize the effect of any judicial diversion from state public policy, thus providing a firm foundation for estate planning in the future. Louisiana adopts a policy involving a two-part balancing test, ultimately allowing the judiciary to decide the choice of law that best represents Louisiana state policy, while at the same time incorporating the interests of the individual citizens.[258] This method appears to be the most rational method of deciding choice of law because the semantics of every individual case are highly scrutinized without disregarding the potential effects on state public policy.

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250. *McKeehan*, 355 S.W.3d at 285.

251. *Id.*

252. TEX. ESTATES CODE §§ 111.051(d) and 111.054 (2013 Proposed Addition) (Proposed in the Summary of the 2013 Decedents' Estates Proposals of the Real Estate, Probate, and Trust Law Section).

253. *McKeehan*, 355 S.W.3d at 285.

254. *Id.*

255. LA. CIV. CODE ANN. art. 3524 (1994); *see also* CAL. CIV. CODE § 682.1 (West 2012).

256. *See* Miller & Starr, *supra* note 212, § 12.65.

257. *See id.*

258. LA. CIV. CODE ANN. art. 3524 (1994).

Regardless of how the issue is decided in courts or the legislature, the outcome will have a monumental effect on all choice of law provisions for distribution of jointly held assets in Texas.