

Election Results, November 2, 1999

Texas voters approved 13 of the 17 proposed constitutional amendments on the November 2, 1999, ballot, according to the final, official results released by the Texas Secretary of State's Office, shown below. The four rejected amendments are marked with an (*). Including the 13 amendments adopted in 1999, voters have approved a total of 390 amendments to the Texas Constitution since its adoption in 1876. The House Research Organization Focus Report that follows analyzes all 17 amendments proposed in 1999.

Proposition 1: Specifying succession for the governor and lieutenant governor

FOR	692,455	74.1%
AGAINST	241,831	25.9%

Proposition 2: Revising provisions authorizing reverse mortgages

FOR	583,884	64.2%
AGAINST	325,162	35.8%

Proposition 3: Eliminating duplicative and obsolete provisions from the Constitution

FOR	720,085	76.8%
AGAINST	217,856	23.2%

Proposition 4: Defining charitable organizations and uses exempt from property taxes

FOR	483,674	51.8%
AGAINST	450,357	48.2%

* **Proposition 5:** Allowing state employees to be paid for service on local government boards

FOR	427,043	45.4%
AGAINST	513,295	54.6%

Proposition 6: Increasing the maximum size of an urban homestead to 10 acres

FOR	635,020	67.5%
AGAINST	306,390	32.5%

Proposition 7: Authorizing garnishment of wages to enforce spousal maintenance

FOR	644,742	67.4%
AGAINST	311,561	32.6%

* **Proposition 8:** Providing that the adjutant general serves at the pleasure of the governor

FOR	430,356	47.3%
AGAINST	478,706	52.7%

* **Proposition 9:** Creating a judicial compensation commission

FOR	369,235	40.9%
AGAINST	533,061	59.1%

* **Proposition 10:** Providing that the health and human services commissioner serves at the pleasure of the governor

FOR	439,505	47.9%
AGAINST	478,875	52.1%

Proposition 11: Allowing political subdivisions to buy nonassessable property and casualty insurance

FOR	566,408	62.2%
AGAINST	343,980	37.8%

Proposition 12: Exempting from ad valorem taxation vehicles leased for personal use

FOR	530,181	57.1%
AGAINST	398,705	42.9%

Proposition 13: Authorizing \$400 million in general-obligation bonds for student loans

FOR	674,249	71.0%
AGAINST	275,392	29.0%

Proposition 14: Allowing state boards to have an odd number of three or more members

FOR	664,727	73.2%
AGAINST	243,307	26.8%

Proposition 15: Authorizing agreements to convert separate property to community property

FOR	637,087	67.4%
AGAINST	308,342	32.6%

Proposition 16: Changing county population limits for JP and constable precincts

FOR	579,777	64.1%
AGAINST	325,183	35.9%

Proposition 17: Revising Permanent University Fund distribution and investment

FOR	553,859	61.2%
AGAINST	350,718	38.8%

Source: Secretary of State's Office.

HOUSE RESEARCH ORGANIZATION

focus report

Texas House of Representatives

August 9, 1999

AL

Amendments Proposed for November 1999 Ballot

CONSTITUTIONAL

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A

Amending the Constitution

Texas voters have approved 377 amendments to the state Constitution since its adoption in 1876. Seventeen more amendments will be proposed at the general election on Tuesday, November 2, 1999.

Joint resolutions

The Legislature proposes constitutional amendments in joint resolutions that originate in either the House or the Senate. For example, Proposition 1 on the November ballot was proposed by House Joint Resolution (HJR) 44, introduced by Rep. Tom Ramsay and sponsored in the Senate by Sen. Carlos Truan. Art. 17, sec. 1 of the Constitution requires that a joint resolution be adopted by two-thirds vote of the membership of each house of the Legislature (100 votes in the House of Representatives, 21 votes in the Senate) to be presented to voters. The governor cannot veto a joint resolution. Amendments may be proposed in either regular or special sessions.

A joint resolution includes the text of the proposed constitutional amendment and specifies an election date. While a joint resolution may include more than one proposed amendment, each proposition on the November 1999 ballot was proposed by a separate resolution. The secretary of state conducts a random drawing to assign each proposition a ballot number if more than one proposition is being considered.

If voters reject an amendment proposal, the Legislature may resubmit it. For example, a proposition authorizing \$300 million in general-obligation bonds for college student loans was rejected at an August 10, 1991, election, then was approved November 5, 1991, after being readopted by the Legislature and resubmitted in essentially the same form. Proposition 3 on the November 2, 1999, ballot, eliminating duplicative and obsolete provisions of the Constitution, also would repeal requirements for disclosing Texas Growth Fund investments in South Africa or Namibia, which has the same intent as proposals rejected by the voters in 1995 and 1997.

Ballot wording

The ballot wording of a proposition is specified in the joint resolution adopted by the Legislature, which has broad discretion concerning the wording. In rejecting challenges to the ballot language for proposed amendments, the courts generally have ruled that ballot language is sufficient if it describes the proposed amendment with such definiteness and certainty that voters will not be misled. The courts have assumed that voters become familiar with the proposed amendments before reaching the polls and that they do not decide how to vote solely on the basis of the ballot language.

Election date

The Legislature may call an election for voter consideration of proposed constitutional amendments on any date, as long as election authorities have sufficient time to provide notice to the voters and print the ballots. Most proposals are submitted at the November general elections held in odd-numbered years. In 1997, however, the Legislature submitted, and voters approved, HJR 4, a proposal to raise the homestead exemption for school property taxes and to allow transfer of the 65-and-over tax freeze to a new homestead, at an election held on August 9, 1997.

Publication

Constitution Art. 17, sec. 1 requires that a brief explanatory statement of the nature of each proposed amendment, along with the ballot wording for each, be published twice in each newspaper in the state that prints official notices. The first notice must be published 50 to 60 days before the election. The second notice must be published on the same day of the subsequent week. Also, the secretary of state must send a complete copy of each amendment to each county clerk, who must post it in the courthouse at least 30 days prior to the election.

The secretary of state prepares the explanatory statement, which must be approved by the attorney general, and arranges for the required newspaper publication. The average estimated total cost of publication twice in newspapers across the state is \$76,352, according to the Legislative Budget Board.

Implementing legislation

Some constitutional amendments are self-enacting and require no additional legislation to implement their provisions. Other amendments grant general authority to the Legislature to enact legislation in a particular area or within certain guidelines. These amendments require implementing legislation to fill in the details of how the amendment will operate. The Legislature sometimes adopts implementing legislation in advance, making the effective date of the legislation contingent on voter approval of a particular amendment. If the amendment is rejected by the voters, the legislation dependent on the constitutional change does not take effect.

Effective date

Constitutional amendments take effect when the official vote canvass confirms statewide majority approval, unless a later date is specified. Statewide election results are tabulated by the secretary of state and must be canvassed by the governor 15 to 30 days following the election.

P

revious Election Results

Analyses of the November 1997 ballot proposals appear in House Research Organization Report No. 75-18, *Fourteen amendments on November ballot*, September 5, 1997. The August 1997 proposition was analyzed in HRO Report No. 75-15, *Proposition 1: Raising homestead exemption, portability of senior tax freeze*, June 19, 1997.)

November 4, 1997

- * **Proposition 1:** Permitting municipal judges to hold office in more than one city
- | | | |
|---------|---------|-------|
| FOR | 423,793 | 36.7% |
| AGAINST | 731,044 | 63.3% |

- Proposition 2:** Limiting increases in homestead appraised values; allowing retroactive portability of 65-plus tax freeze
- | | | |
|---------|---------|-------|
| FOR | 852,031 | 75.7% |
| AGAINST | 273,957 | 24.3% |

- Proposition 3:** Property tax exemptions for water conservation initiatives
- | | | |
|---------|---------|-------|
| FOR | 681,060 | 61.8% |
| AGAINST | 420,923 | 38.2% |

- Proposition 4:** Eliminating duplicate and obsolete provisions
- | | | |
|---------|---------|-------|
| FOR | 865,397 | 78.8% |
| AGAINST | 232,350 | 21.2% |

- Proposition 5:** Allowing Texas Supreme Court to meet outside Austin
- | | | |
|---------|---------|-------|
| FOR | 665,617 | 59.2% |
| AGAINST | 458,791 | 40.8% |

- * **Proposition 6:** Eliminating Texas Growth Fund South Africa/Namibia investment disclosures
- | | | |
|---------|---------|-------|
| FOR | 562,535 | 49.9% |
| AGAINST | 564,070 | 50.1% |

- Proposition 7:** Bond consolidation within Texas Water Development Fund II
- | | | |
|---------|---------|-------|
| FOR | 707,498 | 64.0% |
| AGAINST | 398,795 | 36.0% |

- Proposition 8:** Allowing home equity loans
- | | | |
|---------|---------|-------|
| FOR | 698,870 | 59.6% |
| AGAINST | 474,443 | 40.4% |

- Proposition 9:** Permitting Harris County rural fire districts to increase tax rate
- | | | |
|---------|---------|-------|
| FOR | 558,400 | 53.1% |
| AGAINST | 492,666 | 46.9% |

- Proposition 10:** Constitutional dedication of crime victims' compensation funds
- | | | |
|---------|---------|-------|
| FOR | 763,646 | 68.8% |
| AGAINST | 345,563 | 31.2% |

- Proposition 11:** Limiting state debt
- | | | |
|---------|---------|-------|
| FOR | 742,798 | 68.0% |
| AGAINST | 350,317 | 32.0% |

- Proposition 12:** Deadline for Supreme Court action on motions for rehearing
- | | | |
|---------|---------|-------|
| FOR | 858,513 | 77.2% |
| AGAINST | 253,254 | 22.8% |

- Proposition 13:** Full faith and credit backing for Texas Tomorrow Fund
- | | | |
|---------|---------|-------|
| FOR | 811,873 | 72.1% |
| AGAINST | 314,516 | 27.9% |

- Proposition 14:** Authorizing the Legislature to establish constable qualifications
- | | | |
|---------|---------|-------|
| FOR | 869,156 | 78.0% |
| AGAINST | 244,472 | 22.0% |

August 9, 1997

- Proposition 1:** Increasing homestead exemption; allowing transfer of 65-plus school tax freeze
- | | | |
|---------|---------|-------|
| FOR | 693,522 | 93.8% |
| AGAINST | 45,619 | 6.2% |

* *Failed*

Source: Secretary of State's Office.

Specifying succession for the governor and lieutenant governor

(HJR 44 by Ramsay/Truan)

1

Proposition

The Texas Constitution contains several provisions for the succession of the governor and lieutenant governor. Under Art. 4, sec. 16, if the governor cannot fulfill the duties of the office because of death, resignation, removal, or refusal to serve, the lieutenant governor “exercises the powers and authority” of the governor until another person fills the office at the next general election or until the disability from performing the role of governor is removed. Art. 4, sec. 3a provides for the situation when the person elected governor dies before assuming the office. In that case, the lieutenant governor must act as governor until after the next general election.

Generally, the succession to the office of lieutenant governor is specified in Art. 3, sec. 9. If this office becomes vacant, the president pro tempore of the Senate must convene the Committee of the Whole Senate within 30 days to elect one of its members to perform the duties of lieutenant governor, in addition to that member’s duties as senator, until the next general election. Before 1984, when a constitutional amendment established this procedure, the president pro tempore of the Senate performed the duties of the lieutenant governor in case of absence or vacancy. An exception to the succession of the lieutenant governor occurs when the lieutenant governor is acting as governor. In that case, if the lieutenant governor becomes permanently or temporarily unable to serve, Art. 4, sec. 17 provides that “the President of the Senate [shall] administer the government” until superseded by a governor or lieutenant governor.

Digest

Proposition 1 would require the lieutenant governor to forfeit that office when filling a permanent vacancy in the office of governor. The office of lieutenant governor then would be filled, as under current law, by election of a member of the Senate to that office. A lieutenant governor who became governor would serve the governor’s entire remaining term regardless of any intervening general election. When the governor was temporarily absent from the state, unable to serve, or disqualified, the lieutenant governor would exercise the powers of governor until the governor resumed the duties of the office or became qualified for office. As under current law, if the lieutenant governor were exercising the powers of the governor during a temporary absence and became temporarily unable to serve, the president pro tempore of the Senate would exercise the powers of governor until the governor or lieutenant governor reassumed those powers.

HJR 44 would make other corrective and clarifying changes in the four constitutional provisions dealing with succession to the offices of governor and lieutenant governor, including making the succession language gender-neutral.

The ballot proposal reads: “The constitutional amendment to revise the provisions for the filling of a vacancy in the office of governor or lieutenant governor.”

Supporters say

Proposition 1 would clarify beyond question that the lieutenant governor cannot hold both offices when filling a permanent vacancy in the governorship. While the generally understood practice of succession has been that the lieutenant governor would resign that office to fill a permanent vacancy in the office of governor, the Constitution does not delineate that procedure clearly. Under the Constitution as it now reads, the lieutenant governor could “exercise the powers and authority” of the office of governor until the next general election without relinquishing the office of lieutenant governor. Other general constitutional provisions banning dual office-holding would not necessarily apply, since the existing succession provision could be construed as making a specific exception.

If a lieutenant governor attempted to eliminate any ambiguity about dual office-holding by resigning, it might create additional problems. Because the Constitution says that the lieutenant governor, not the *former* lieutenant governor, shall act as governor, there could be a question about whether a lieutenant governor who resigned the office still would be entitled to serve as governor. Proposition 1 would clear up the ambiguities surrounding all these issues.

This amendment would ensure the certainty of succession that should be established in the Constitution. Despite historical precedent that the lieutenant governor surrenders that office when assuming the office of the governor, such a precedent could be overturned by a court examining the constitutional language if such succession ever were challenged. Also, there is precedent for concluding that the lieutenant governor could serve in both capacities. In 1914, after Lt. Gov. William H. Mays resigned, the attorney general was asked to clarify the status of the succession of the president pro tempore of the Senate to the office of lieutenant governor, as Art. 3, sec. 9 provided at that time. While not directly related to the question presented, the attorney general’s opinion concerning succession touched on the question of gubernatorial succession and stated that the lieutenant governor inherited only the responsibilities of governor, not the office itself. (Attorney General’s Opinion to Robert L. Warren, Aug. 25, 1914, 1914-16 Tex. Atty. Gen. Biennial Rep. 533)

While all four successions to the office of governor that have occurred under the current Constitution have allowed the lieutenant governor to assume the office — not merely the responsibilities — contrary to the attorney general’s opinion, questions have arisen in each instance about the lieutenant governor’s assumption of the office of governor.

In 1876, upon the election of Gov. Richard Coke to the U.S. Senate, Lt. Gov. Richard Hubbard took over the office of governor, and questions linger about whether Hubbard actually took an oath of office or acted as lieutenant governor. The next succession in 1917 involved the impeachment of Gov. James Ferguson. Upon Ferguson’s removal, Lt. Gov. William P. Hobby assumed the governorship. However, the swearing-in ceremony for Hobby never was held because of questions raised concerning the 1914 attorney general’s opinion and whether taking the oath of office for governor would remove him from the office of lieutenant governor, and, possibly, any rights to exercise the office of governor under the Constitution.

In 1941, Gov. W. Lee O'Daniel was elected to the U.S. Senate and resigned the office of governor, whereupon Lt. Gov. Coke Stevenson became governor. There was a public swearing-in ceremony, but questions arose about the oath taken, since it refers to *election* of the governor. Upon the death of Gov. Beauford Jester in 1949, Lt. Gov. Allan Shivers took the oath of office as governor. While there was little controversy about that succession, a challenge was brought to an extradition warrant signed by Sen. Wardlow Lane, president pro tempore of the Senate, while acting as lieutenant governor. While the ruling in *Ex parte Raulie*, 237 S.W.2d 998 (Tex. Crim. App. 1951) took “judicial knowledge” of the fact that Lt. Gov. Shivers had succeeded to the office of governor and had vacated the office of lieutenant governor, this has been the only judicial comment on gubernatorial succession thus far and did not deal directly with the constitutional issues involved.

With the prospect of Gov. George W. Bush resigning from office in the middle of his term should his quest for the presidency prove successful, this is an appropriate time to clear up any ambiguities in the gubernatorial succession and align the pertinent provisions of the Constitution with actual practice over the past 123 years. The mere possibility of a question being raised that could prevent the orderly succession of government and allow legal challenges to official actions taken by a lieutenant governor who assumed the office of governor should be sufficient justification for making this revision.

The succession of a senator to the office of lieutenant governor would remain exactly as prescribed under the current Constitution, allowing a member of the Senate to be elected by his or her fellow senators. There is no conflict of interest in having a senator represent one district and hold a state office simultaneously, as the speaker of the House currently acts in those two roles. The current process allowing the president pro tempore of the Senate to act as governor during the temporary absence of the governor and the lieutenant governor also would remain as it is now, except that the constitutional provisions addressing this issue would be made clearer.

Opponents say

This amendment is unnecessary. When past vacancies in the governor's office have occurred, there has been no question that the lieutenant governor fills the vacancy and the Senate chooses one of its members to act as lieutenant governor until another one is elected. In all four successions to the governorship under the current Constitution, the lieutenant governor has assumed the *office* of the governor, not merely the powers and responsibilities of the office. While questions may have been raised at the various successions, the current precedent is clear that the lieutenant governor would give up that office and become governor.

An ambiguous 1914 attorney general's opinion concerning succession provides no serious ground for questioning of the ability of the lieutenant governor to succeed to the office of governor. That opinion went against historical precedent and was superseded by the 1951 opinion of the Court of Criminal Appeals, which recognized the succession of the lieutenant governor to the office of governor. In case of any further doubt, Art. 16, sec. 40 of the Constitution prohibits a person from holding or

exercising more than one office, which should prevent dual office-holding by the lieutenant governor.

While there may be no harm in specifying the succession of the governor, the manner set forth in Proposition 1 is confusing, requiring revision of four separate sections of the Constitution in two different articles. In contrast, the proposed constitutional revision introduced during the 76th Legislature as HJR 1 by Junell and SJR 1 by Ratliff would have consolidated and clarified these confusing provisions of the Constitution in a single succinct section.

Additional clarification is needed to resolve when the office for governor would become vacant. For example, if the governor and a majority of the Senate were of the same political party, the governor who was elected to another office or who otherwise chose to resign could time his or her resignation for when that party still retained a majority of seats to allow that party to elect the acting lieutenant governor. Such a situation would allow the “lame duck” Senate to elect the lieutenant governor who would preside over the incoming Senate, which might be controlled by a different party. Rather than leave the opportunity for a politically motivated decision to affect succession, the Constitution should specify when a vacancy occurs in the office of governor.

Other opponents say

As originally introduced, HJR 44 would have required the senator elected by the Senate to fill a vacancy for lieutenant governor to resign his or her seat in the Senate. That requirement should be included in the final version of this amendment. The lieutenant governor is elected statewide to ensure that the person holding that office considers the interests of the whole state when performing the duties of that office.

Revising provisions authorizing reverse mortgages

(SJR 12 by Carona/Hochberg)

2

Proposition

In 1997, the voters of Texas approved an amendment to Art. 16, sec. 50 of the Texas Constitution allowing homeowners to obtain loans and other extensions of credit using as collateral the equity in their residence homestead. Equity is the difference between a home's market value and what is owed on the home. Most home equity loans are paid in a lump sum, and loan repayments begin immediately. If a homeowner fails to make a monthly installment, the lender may foreclose, under conditions specified in the Constitution.

Reverse mortgages, another type of equity loan authorized by the Constitution, are fundamentally different from other home mortgages or home equity loans. The payments are reversed — the borrower receives advances from the lender at regular intervals, such as monthly or yearly, for a term of years or as long as the borrower continues to occupy the property. Repayments do not begin until the homeowner no longer occupies the property or transfers it to another owner. Only homeowners who are or whose spouses are 55 years or older may obtain reverse mortgages under the Constitution.

Reverse mortgages — also known as reverse annuity mortgages or home equity conversion mortgages — are secured by a voluntary lien on the homestead property created by a written agreement with the consent of each owner and each owner's spouse. The homestead owner must attest in writing that the owner received counseling regarding the advisability and availability of reverse mortgages and other financial alternatives. Reverse mortgages have priority over other liens placed on the property.

If more than one advance is paid to the borrower, the advances must be made at regular intervals set by the original loan agreement. The amount of the advances is calculated through a formula developed by the U.S. Department of Housing and Urban Development (HUD). Under the Constitution, the interest rate may be fixed or adjustable and may accrue and compound during the term of the loan. Lenders may not decrease the number or amount of advances because of fluctuations in interest rates. A lender who fails to make a loan advance and fails to remedy the default as required forfeits all principal and interest of the loan.

The loan balance, consisting of advances made by the lender and any interest, comes due once the homeowner and spouse transfer or no longer occupy the property. Under Art. 16, sec. 50(k)(6), no payment of principal or interest is due until the homestead property securing the loan is sold or otherwise transferred *or* all borrowers cease occupying the homestead property as a principal residence for more than 180 consecutive days *and* the location of the homestead property owner is unknown to the lender. When the loan becomes due, the home usually is sold and the proceeds used to pay off the loan. If the loan balance exceeds the value of the house, the borrower or the borrower's estate is not responsible for debt beyond the value of the home.

While reverse mortgages have been authorized by the Constitution since 1997, none have been issued in Texas.

Digest

Proposition 2 would amend provisions of Art. 16, sec. 50 of the Texas Constitution authorizing reverse mortgage loans. It would increase the minimum age of a borrower or borrower's spouse to 62 from 55 years.

The amendment would establish three methods by which advances could be paid to the borrower, according to the terms of the loan document:

- equal payments at regular intervals;
- unequal payments at regular intervals, if the borrower requested that the amount of the advance be reduced for one or more specific payments; or
- direct payments by the lender at any time of taxes, insurance, repairs or maintenance, assessments levied against the property, and any lien with priority over the reverse mortgage, if the borrower failed to pay them as obligated under the loan agreement to protect the lender's interest in the property.

The lender could use any combination of these three payment methods, so long as the loan agreement established the terms of the advances. With respect to paying for maintenance or repairs, the lender could not pay an employee of the lender or a person or company affiliated with or controlled by the lender.

The amendment would specify that the borrower would have to notify the lender before the lender would have to forfeit all principal and interest for failing to make loan advances as required and for failing to cure the default. If a governmental agency had taken assignment of the loan from the lender to cure the lender's default, the agency or its instrumentality would not forfeit the principal or interest because of the lender's failure to make a loan advance.

Proposition 2 would stipulate that no repayment of principal or interest could be required until:

- all borrowers had died;
- the homestead property was sold or otherwise transferred;
- all borrowers had ceased occupying the property for at least 12 months without prior written consent of the lender; or
- the borrower defaulted on obligations required by the loan agreement, committed actual fraud in connection with the loan, or failed to maintain the priority of the reverse mortgage lien.

Defaulted obligations could include failure to repair and maintain the property, to pay taxes and assessments, or to insure the property. If the borrower failed to maintain the priority of the reverse mortgage lien, the lender would have to give the borrower 10 days to restore the priority of the reverse mortgage lien. Borrowers who failed to maintain the priority of the lender's lien could:

- discharge any other lien that had priority or otherwise agree in writing to discharge the other lien in a manner acceptable to the reverse mortgage lender;

- secure an agreement, with approval of the reverse mortgage lender, from the other lender subordinating the other lender's lien to the reverse mortgage; or
- initiate in good faith legal proceedings to contest and prevent enforcement of the other lien.

A lender would have to disclose the provisions for repayment and default by written notice to the borrower at the time the loan was made.

Proposition 2 would prohibit lenders from commencing foreclosure before notifying the borrower by mail of the grounds for foreclosure. The lender would have to give the borrower 30 days to remedy the condition creating the grounds for foreclosure, to pay any debts from proceeds of the sale of the property, or to convey the property to the lender by deed in lieu of foreclosure. Only 20 days' notice would be required if the borrower had failed to maintain the priority of the reverse mortgage lien, as the borrower already would have had 10 days to restore the reverse mortgage's priority.

A court order would be required for any foreclosure for a ground other than the death of the borrowers or the sale or transfer of the homestead property. The Texas Supreme Court would have to promulgate rules of civil procedure for expedited foreclosure of a reverse mortgage lien requiring a court order.

The ballot proposal reads: "The constitutional amendment relating to the making of advances under a reverse mortgage and payment of a reverse mortgage."

Supporters say

Proposition 2 would give elderly homeowners in Texas the opportunity to supplement their monthly income with the equity they have built up in their homesteads and would reinforce strong constitutional protections against foreclosure. Many older persons are house-rich but cash-poor and have no way to benefit from their most valuable asset without selling their home. Voters strongly supported the 1997 constitutional amendment allowing reverse mortgages, but that amendment did not provide sufficient legal certainties to allow a market for reverse mortgages to develop in Texas. Proposition 2 would establish a more complete framework to develop reverse mortgages, harmonize state laws with federal rules and guidelines, and balance successfully the needs of senior citizens and the interests of lenders.

The Constitution now stipulates that the loan repayment cannot begin until all borrowers cease occupying the homestead for more than 180 consecutive days *and* the location of the owner is unknown to the lender. As a result, reverse mortgages have been impossible to obtain in Texas. No lender would make a loan knowing that the borrower could avoid repayment simply by notifying the lender of the borrower's new address. Also, several provisions of the Constitution conflict with federal rules and the policies of Fannie Mae, the congressionally chartered home-mortgage lending corporation. For example, federal rules require homeowners to be 62 years old, not 55 as in the Texas Constitution, to qualify for a reverse mortgage. The secondary market for reverse mortgages never formed as it has for other equity loans because Fannie Mae will not buy Texas loans. Other conflicts with federal law prevent FHA from insuring

Texas reverse mortgages. Proposition 2 would eliminate these conflicts and make reverse mortgages viable for homeowners, lenders, insurers, and secondary market purchasers. Fannie Mae has given its assurance that the changes made by Proposition 2 would allow it to purchase reverse mortgages made in Texas.

Proposition 2 would add substantial consumer protections to help prevent foreclosure against those continuing to reside in their homesteads. It would specify explicitly the causes of default and ways of rectifying those causes before a foreclosure proceeding could begin. A court order would be required to foreclose for all causes except the death of all borrowers or the sale or other transfer of the property. The amendment would protect elderly Texans from being forced to sell or vacate their homes because of technicalities, unforeseen circumstances, sudden expenses, or oversights. These protections would be similar to those afforded other home equity borrowers in Texas.

The amendment would clarify the conditions that trigger repayment of the loan. It expressly would include the death of all borrowers — now only implied — as a condition that would allow lenders to recover principal and interest. It would extend from the current 180 days to 12 months, or longer with prior written approval of the lender, the period when the borrowers could cease occupying the property before triggering repayment. It also would delete the provision allowing repayments to begin once the location of the homeowner was unknown to the lender. Doing so would enable homeowners who travel or summer elsewhere to retain their homes and to continue receiving payments while temporarily away from home.

Proposition 2 would allow lenders to step in when needed to protect their security interests. They could pay taxes, insurance, maintenance and repairs, assessments, and any other liens on the property in addition to regular installment payments. This would be a protection against default, allowing these bills to be paid even when the homeowner's resources were stretched thin by medical or other unexpected expenses. Homeowners would be protected from unscrupulous lenders who paid affiliated persons or companies for repairs, then added those payments to the loan principal.

Proposition 2 would not allow homeowners to use their equity as a line of credit because the potential for abuse is too great. A smooth-talking home-improvement salesperson more easily could dupe elderly customers into agreeing to an extravagant project if the customer could tap into an open-ended line of credit rather than a specific loan with definite terms. Lines of credit, such as credit cards, are inconsistent with the consumer protections embodied in the Constitution for home equity loans, which recognize that loans secured by the homestead should be subject to tighter restrictions than other types of debt.

The amendment would give borrowers the flexibility to reduce installment payments for particular months if they so chose. Some seniors would obtain reverse mortgages to help pay for medical care costs that were not the same amount every month. This flexibility would allow homeowners to reduce the total amount of principal and interest over the life of the mortgage while still allowing them enough of an installment to cover these costs as they occurred. Consistent with other equity loans, the borrower could not increase the installment amount above the figure agreed to in the loan contract and the HUD formula.

Proposition 2 would harmonize state laws with federal rules and guidelines, thus encouraging reverse mortgage lenders to provide the product to Texas' 2.2 million senior citizens. As the number of elderly Texans increases over the next few decades, reverse mortgage loans would enable more Texans to supplement their retirement and social security incomes.

The protections and restrictions on reverse mortgages should be specified in the Constitution, as for other types of home equity loans. Home ownership is a fundamental interest that should be protected in the Constitution, where any proposed change would require two-thirds approval by both houses of the Legislature and approval by Texas voters.

Opponents say

Proposition 2 would allow reverse mortgages that would be unnecessarily restrictive. Texas ought to allow homeowners to establish lines of credit in addition to or in lieu of lump-sum or periodic advances. Borrowers in other states can do this, and it makes reverse mortgages more attractive to borrowers and lenders alike.

Secured lines of credit offer borrowers a lower interest rate than most unsecured lines of credit, such as credit cards, and they allow borrowers to get money when they need it rather than locking them into receiving advances at regular intervals. Securing lines of credit with home equity would be a natural extension of the existing policy of allowing homeowners the freedom to use their home equity for whatever purpose they choose. Lines of credit for reverse mortgages would be particularly appropriate because the protections are so strong, the borrowers cannot lose their homes while they live there, and unexpected expenses often occur in amounts that could exceed a traditional reverse mortgage monthly advance.

Short of accessing a line of credit secured by home equity, borrowers should have the flexibility to adjust their installments up or down as needed and should be able to request a lump-sum payment of the remaining amount at any time. This flexibility is available in other states. Proposition 2 would allow borrowers only to reduce, not increase, their regular installments.

Other opponents say

The fact that voters are being asked to revise constitutional provisions for reverse mortgages that were adopted only two years ago shows that such detailed provisions belong in statute, not in the Constitution. Specifying in the Constitution in great detail how to implement reverse mortgages would mean that voters would be asked repeatedly to make revisions that more appropriately should be handled by the Legislature.

Eliminating duplicative and obsolete provisions from the Constitution

(HJR 62 by Mowery/Shapiro)

Since its adoption in 1876, the Texas Constitution has been amended 377 times. Various provisions have been rendered obsolete by federal judicial decisions or enactments, repeat the same or similar implementing language each time new bond financing is authorized for a particular program, or refer to programs or entities no longer in effect.

Digest

Proposition 3 would remove or reword many provisions of the Texas Constitution, including:

- consolidating provisions relating to the Veterans' Land Board and the Texas Water Development Board;
- removing language authorizing the execution of bonds that already have been executed;
- changing "electors" to "voters";
- removing requirements that voters own property;
- removing the requirement that voters be 18 years of age;
- removing provisions that an officer hold office until a successor is qualified;
- removing a provision for aid to indigent or disabled Confederate soldiers and sailors;
- removing the authority of the governor to protect the frontier from hostile incursions by Indians and other predatory bands;
- removing the provision for a poll tax;
- removing provisions relating to the creation of certain hospital districts;
- removing provisions relating to the 1990 deadline for local government taxation of "freeport" property;
- removing provisions relating to county education districts;
- removing provisions relating to the creation of counties in territories where no counties exist;
- removing references to county poor houses;
- consolidating abolished county treasurer and county surveyor provisions;
- removing provisions for the original staggering of county offices when the terms of such offices were extended in 1954;
- removing dates that already have passed;
- dividing long sections into subsections and longer sentences into shorter ones; and
- repealing provisions relating to:
 - restricting the number of state representatives per county;
 - providing for already executed student loans;
 - prohibiting the Legislature from releasing liens of railroads;
 - allowing the taxation of railroad property;
 - abolishing the Lamar County Hospital District;
 - allowing the creation of county and city sinking funds;
 - property rights before the adoption of the Constitution;
 - compelling people to bear arms;

- process of writs at the execution of the Constitution;
- providing pensions for Texas Rangers not eligible to be in the Employees Retirement System;
- requiring disclosure of Texas Growth Fund investments in South Africa or Namibia; and
- providing for the 1974 constitutional convention.

Temporary provisions of HJR 62 would:

- ensure that the amendment would not impair the issuance of bonds or existing indebtedness;
- allow the issuance of unissued bond authority from the Veterans' Land Board, the Texas Water Development Board, and the Texas Higher Education Coordinating Board;
- ensure that the amendment would not affect the property tax exemptions effective January 1, 1979, or the taxation of "freeport" personal property before April 1, 1990;
- not affect the authority of a municipality to impose or collect taxes on railroad property;
- not affect the disposition of assets of the Lamar County Hospital District;
- not affect the power of a county to abolish the office of county treasurer or surveyor;
- not affect current pensions payable to Texas Rangers; and
- not affect vested rights.

The ballot proposal reads: "The constitutional amendment to eliminate duplicative, executed, obsolete, archaic, and ineffective provisions of the Texas Constitution."

Supporters say

Proposition 3 would help streamline the Texas Constitution by deleting obsolete provisions and those inconsistent with federal law, removing moot provisions no longer needed, and renumbering provisions with duplicate numbering. It would make no substantive change but merely would update the fundamental law of Texas. The changes made by this amendment have been examined thoroughly to ensure that no change would be substantive.

While a complete overhaul of the Constitution may result in an improved document, such a rewrite was not completed during the most recent legislative session. Rather than wait for a complete revision, Proposition 3 would update the current Constitution and remove many unnecessary provisions that make it difficult to use.

The current constitutional provision requiring disclosure of Texas Growth Fund investments in South Africa or Namibia is obsolete and should be removed. Its original purpose — to monitor investments in two countries with apartheid racial segregation policies — no longer applies since those countries have abandoned those policies. Confusing ballot language may have caused voters in 1995 and 1997 to reject attempts to make this change, which Proposition 3 also includes.

Opponents say

Rather than amend and repeal sections of the outdated Texas Constitution, it would make more sense to overhaul the document completely to make it a leaner, more responsive document that would serve the state as a blueprint for government for years to come. The sheer volume of unnecessary provisions proposed for removal by Proposition 3 shows the need for a complete rewrite of the Constitution. This amendment should provide for a constitutional convention to examine and overhaul the current Constitution.

Because of the volume of changes involved in Proposition 3, some of the proposed changes may not have been examined fully to determine if they are indeed nonsubstantive.

Defining charitable organizations and uses exempt from property taxes

(HJR 4 by Kuempel/Wentworth)

4

Proposition

Art. 8, sec 2(a) of the Texas Constitution authorizes the Legislature to exempt from ad valorem (property) taxes all buildings owned and used exclusively by institutions of purely public charity.

Tax Code, sec. 11.18 exempts from taxation buildings and tangible personal property owned by charitable organizations and used exclusively by charitable organizations that meet specific criteria. Under sec. 11.18(b), the use of property by persons who are not charitable organizations does not result in the loss of a tax exemption if the use is incidental to use by a qualified charitable organization and is limited to activities that benefit the beneficiaries of the charitable organizations that own or use the property.

To qualify for the tax exemption, a charitable organization must engage exclusively in performing one or more of the charitable functions listed in sec. 11.18 and must meet other requirements. Providing support to elderly persons without regard to the beneficiaries' ability to pay is one of functions that qualify an organization as charitable.

Art. 16, sec. 71(b) of the Constitution authorizes the Legislature to establish a Texas small business incubator program to foster and stimulate the development of small businesses in the state. A small business incubator operating under the program is exempt from ad valorem taxation in the same manner as an institution of purely public charity under Art. 8, sec. 2(a).

Digest

Proposition 4 would amend Art. 8, sec. 2(a) of the Texas Constitution to replace the current exemption from ad valorem taxes for institutions of "purely public charity" with an exemption for institutions "engaged primarily in public charitable functions." These institutions could conduct auxiliary activities to support those charitable functions. The Legislature could authorize the exemption by general law.

It also would amend Art. 16, sec. 71(b), concerning small business incubators, to eliminate "purely" in referring to the charitable institution tax exemption that incubators also receive.

The tax exemption would take effect January 1, 2000, and would apply only to taxes imposed on or after that date.

The ballot language reads: "The constitutional amendment to authorize the legislature to exempt property owned by institutions engaged primarily in public charitable functions from ad valorem taxation."

Supporters say

Proposition 4 would clear up questions about whether legitimate charities that now receive property tax exemptions may engage in auxiliary activities without jeopardizing their tax-exempt status. For example, while the Tax Code allows senior citizen centers to receive tax exemptions as charitable organizations, questions have arisen about whether activities at some of these centers meet the “purely” charity and exclusive-use tests in the Constitution. Some centers rent out their facilities for wedding receptions or business meetings or provide meals at a small cost. Some appraisal districts could interpret this as violating the Constitution’s requirement that the organization be “purely” charitable and that the property be owned and used “exclusively” by the charitable organization, even though profits are used to support the centers. The Tax Code’s allowance of the “incidental” use of a charity’s property may not be broad enough to cover these circumstances.

Proposition 4 would clear up this confusion by specifically allowing charitable institutions to conduct auxiliary activities to support their charitable functions. In addition, HB 1978 by Kuempel, which would take effect only if Proposition 4 is approved, would authorize senior citizen centers to provide recreational or social activities and facilities for elderly persons and would require that charitable organizations fitting this description engage primarily in performing these charitable functions but would allow them to engage in other activities that support or are related to their charitable functions. These restrictions would ensure that only legitimate, charitable senior centers receive a tax exemption.

Proposition 4 would not allow an unreasonable expansion of the property tax exemption because charities still would have to meet the test imposed by the amendment to receive an exemption. Proposition 4 would require that an institution engage *primarily* in charitable functions and would limit any auxiliary functions to those that support their charitable functions. This would ensure that noncharitable institutions do not receive tax breaks and that any other uses of the property support the charity. As with all requests for tax exemptions, organizations with dubious claims as a charity or with for-profit ventures would have their requests carefully scrutinized by appraisal districts, taxpayers, and the courts.

Proposition 4 would have little, if any, fiscal impact on the state or on local taxing entities such as cities, counties, and school districts, since most taxing units already exempt senior centers and other charities from property taxes. In addition, many senior centers are owned by political subdivisions, which are exempt from paying property taxes.

While Proposition 4 could result in some cases ending up in courts for interpretation, this is true of many other constitutional or statutory changes made by the Legislature. Appraisal districts are well prepared to handle disputes over tax exemptions. If a property tax exemption were disputed, any undisputed part of the tax would have to be paid, and an institution that lost a case would have to pay the tax.

Opponents say

The framers of the Constitution were right to allow the Legislature to authorize property tax exemptions only for property owned and used exclusively by “purely” charitable institutions. Exemptions for organizations that are not purely charitable are inappropriate. If a senior center or any other organization is not purely charitable or allows the property it owns to be used by others for noncharitable purposes, it should have to pay taxes like other enterprises. The Tax Code appropriately limits the use of a charity’s property by others to incidental uses that benefit the charity. This gives pure charities enough flexibility to allow other uses of their property but does not allow exemptions for profit-making ventures.

Proposition 4 could open the door to tax exemptions for enterprises that do not meet the current tests of a “purely” charitable organization because it would substitute the broader standard of “engaged primarily in charitable functions.” In addition, Proposition 4 could result in the removal from tax rolls of for-profit offshoots of charities that now are taxed because the Constitution requires that the charity-owned property be used “exclusively” by the charity to qualify for an exemption. For example, if a charity owned an office building that it used for its corporate offices and also leased offices to others, the leased property could be taxed under current law. Under Proposition 4, this property might qualify for a tax exemption because engaging in “auxiliary activities” that generate income for the charity would be allowable. Proposition 4 also presents the danger that persons could organize “charities” that meet the letter but not the spirit of the constitutional requirement as a way to gain a tax exemption.

If Proposition 4 resulted in tax exemptions for organizations that do not receive them now, lost tax revenue would have to be made up from other sources. This would be unfair to other property owners. Property tax exemptions merely shift the tax burden to other taxpayers or inhibit the ability of local taxing units to raise the tax revenue they need to provide services. Public schools could suffer from this potential erosion of the tax base. Schools could lose revenue, and the state ultimately would be forced to bear the burden of a property tax base eroded by exemptions.

Years of case law have established an accepted set of interpretations of “purely” public charities. Amending the Constitution to replace that phrase with another would render years of case law moot, introducing instability into the property tax system. Courts would have to define this new constitutional test for charities, leading to delays in taxing entities receiving needed revenue.

Notes

If voters approve Proposition 4, the implementing legislation, HB 1978 by Kuempel, also will take effect, specifying that tax-exempt organizations that provide support to elderly persons could provide recreational or social activities and facilities designed to address the special needs of elderly persons. HB 1978 would require that charitable organizations fitting this description engage primarily in performing these charitable functions but would allow them to engage in other activities that support or are related to their charitable functions.

Allowing state employees to be paid for service on local government boards

(SJR 26 by Ratliff/Krusee)

Art. 16, sec. 40 of the Texas Constitution prohibits a person from holding more than one civil office for compensation. There are numerous exceptions for certain offices, such as justice of the peace, county commissioner, or notary public, as well as for members of the military, the reserves, and military retirees. Under a 1972 amendment, the Constitution specifically provides that state employees or others who receive all or part of their compensation, directly or indirectly, from state funds may serve as members of the governing bodies of school districts, cities, towns, or other local government districts, provided that the employee receives no salary for such service.

Digest

Proposition 5 would allow state employees or other persons who receive direct or indirect compensation from the state to receive salaries for service as members of the governing bodies of local government entities — specifically, school districts, cities, towns, or other local governmental districts.

The ballot proposal reads: “The constitutional amendment allowing state employees to receive compensation for serving as a member of a governing body of a school district, city, town or other local governmental district.”

Supporters say

Proposition 5 would remove an unnecessary prohibition that makes it very difficult for state employees, employees of public higher education institutions, and public school employees to serve their communities as members of local governing boards. Those who wish to serve must give up any salary or other compensation normally provided for long hours of public service. Many individuals who have run for these offices have been unaware of this prohibition and later have been forced to repay their salaries.

This prohibition should be repealed to increase the pool of qualified candidates for local government offices and to allow more state employees, university professors, and school teachers and administrators to serve their local communities. There is no reason to prohibit these people from receiving two paychecks when they actually are performing two jobs. Many state employees are well-educated and active in their communities. They also understand the workings of government and can bring special skills to the table in serving on local boards and councils.

Serving in a regular state government job and serving on a local government board are complementary activities, just as serving in a private-sector job and serving on a government board are complementary. In many cases, state employees already serve voluntarily on local governing boards. There is no reason to believe that they would not work as hard once they also could receive compensation for serving. If local government officials were paid on par with private-sector employees, the public might have

more reason to expect an official to give up the other position, regardless of whether it was a public or private-sector job. However, since these local boards rarely pay a living wage but usually cover only expenses and some other costs, people serving on these boards need other employment to earn a living.

While there may be potential conflicts of interest in certain decisions that local boards must make, those conflicts can arise whether or not a board member is a state employee and whether or not the member is paid for service on that board. Local boards already have specific provisions to prevent members from voting on or influencing discussion of any matter in which they may have a conflict of interest. It is just as likely, if not more so, that a person working at a private business could have a conflict of interest while serving on a local board, but that potential for conflict does not prevent private-sector employees from serving or being paid, and the same should be true for state employees. Proposition 5 also would keep state employees under Art. 16, sec. 40, prohibiting them from holding a state office, where the potential for conflict of interest is greater.

Opponents say

Good reasons exist for the constitutional prohibition against a person being paid for holding two government offices. Proposition 5 would undermine that policy by removing the prohibition against payment of salaries to state-funded employees for service on local governing boards. When taxpayers are paying an individual's salary, they expect total commitment from that individual to the job. When a person serves in two government offices, a conflict will arise at some point regarding the amount of time required to do each job well. Some city council and school board offices in major population centers are, in reality, full-time positions.

Small, local governing boards may not always require a full-time effort, but even these offices require a significant investment of time. Retaining the prohibition against state employees receiving compensation for such service would prevent those employees from holding two positions at taxpayer expense and would ensure that those serving on local governing boards are true volunteers for the community.

This amendment could lead to certain instances in which service on a board by a particular employee could create a conflict of interest. Many local boards do not have policies dealing with potential conflicts of interest arising from paying state employees for serving on boards because the Constitution has prohibited such compensation.

Other opponents say

This proposal should eliminate all restrictions on state employees who wish to hold government office. The current provision allows them only to serve as members of the governing bodies of school districts, cities, towns, and other local governmental districts, but not in state offices such as the Legislature. State employees hold a position, not an office requiring election or appointment, so the dual office-holding restrictions should not apply to them at all.

Notes

A related proposal considered by the Legislature during the 1999 session, SJR 41 by Madla, would have allowed a public school teacher or a faculty member of a public higher education institution to serve as a member of the Legislature. SJR 41 passed the Senate on April 26 by 30-0 but died in the House State Affairs Committee.

Increasing the maximum size of an urban homestead to 10 acres

(SJR 22 by Harris/Brimer)

6

Proposition

Art. 16, sec. 50 of the Texas Constitution protects a homestead from forced sale for payment of debts, except for the purchase or improvement of the homestead, taxes, certain partitions such as in a divorce, refinancing of a lien against the homestead, and, as of 1997, home equity loans and reverse mortgages.

Art. 16, sec. 51 limits an urban homestead to a lot or lots totaling not more than one acre, together with any improvements. An urban homestead may be claimed by the head of a family or by a single adult as a residence, as a business, or as both a residence and a business, at the same or separate locations, in contiguous or noncontiguous lots totaling no more than one acre located within the same urban area. A rural homestead, available for residences only, consists of up to 200 acres in one or more parcels.

A homestead is protected from foreclosure, with the exceptions specified in the Constitution, and from seizure or attachment for debt. The state definition of a homestead is used under federal bankruptcy law to determine what property of a debtor may be shielded from creditors.

When a borrower wishes to refinance a loan secured by homestead property, the courts have prohibited using a smaller portion of the property to secure the refinanced loan because it would “overburden” the smaller portion.

Digest

Proposition 6 would increase the maximum size of an urban homestead to 10 acres from one acre and would limit such a homestead to a single lot or contiguous lots. It would allow an urban homestead to be used either as a home or as both an urban home and a place of business.

A release or refinancing of an existing lien against part of a homestead would not create an additional burden on the part of the homestead property that was not released or subject to the refinancing, and a new lien would not be invalid solely for that reason.

The ballot proposal reads: “The constitutional amendment increasing the maximum size of an urban homestead to 10 acres, prescribing permissible uses of urban homesteads, and preventing the overburdening of a homestead.”

Supporters say

Proposition 6 would extend to more Texans the right and freedom to use their own property as security for a loan. Thousands of families live within cities on tracts of land larger than one acre. Under current law, these families generally cannot obtain

home equity loans, which are available to nearly all other homeowners in Texas, because their legal homestead may represent only a portion of their home property. The Constitution prohibits use of collateral other than the homestead as security for a home equity loan. Selling part of the excess land may not be desirable or even possible due to subdivision restrictions or restrictive covenants on minimum lot size. Because of these potential restrictions, lenders' security in the one-acre homestead portions of these properties may not be sufficient for them to offer home equity loans to such potential borrowers.

Most families who would benefit from Proposition 6 are not wealthy. The typical beneficiaries of this amendment would be families who own slightly more than an acre or two and who have the same need to use their homestead equity for loan collateral as families that own an acre or less. This is especially true in outlying areas, where lots tend to be larger, that technically may fit the definition of "urban" but are located far from the central part of a city or town.

If the proposed amendment were adopted, urban homeowners could obtain home equity loans on homesteads of up to 10 contiguous acres. This would leave only a tiny percentage of homeowners in Texas unable to obtain home equity loans. However, people owning larger acreage or multiple, noncontiguous properties usually have alternatives other than home equity loans to meet their financial needs.

Proposition 6 also would strengthen the long-standing Texas tradition of protecting the family homestead against creditors. One acre is an arbitrary limit that leaves too many Texans at the mercy of creditors who may seize or attach part of an urban homestead when a family runs into financial difficulties or must declare bankruptcy. Texas families should have the assurance that no matter what their financial circumstances, their entire homestead will be protected. The benefit to lenders from expanding the amount of a homestead available for home equity lending would far outweigh any detriment from expanding the homestead protection against creditors.

The proposal also would ensure that property owners with both an urban home and a business interest on the same property qualify for home equity loans. An urban homestead would not lose its homestead status because part of it was used for business purposes. Also, property owners could not obtain a home equity loan on noncontiguous property, such as a home on one side of town and a business on the other.

Proposition 6 would eliminate use of a homestead solely for business purposes, which few now claim. Separate business homesteads generally can be claimed only by sole proprietors, not by partnerships or corporations. The separate business homestead actually has become a hindrance for many, as lenders will not allow business property that possibly could be claimed as a homestead to be used as loan collateral because they could not foreclose on the property in the event of default. The amendment still would protect business homesteads on property that also is claimed as a residential homestead, ensuring that home businesses would remain protected.

Proposition 6 also would remove ambiguities that have arisen over so-called "overburdening" of loans secured by a homestead. Texas courts have ruled that refinancing of an existing loan cannot be applied to a smaller portion of homestead property than that

covered by the original lien, an action that would “overburden” the smaller portion. With the increase in the maximum size of the urban homestead to 10 acres, more borrowers may wish to refinance and secure a loan using a smaller part of the homestead, and this provision of Proposition 6 would give them that flexibility.

Lenders in other states routinely approve new loans and refinancing of existing loans that courts in Texas would view as overburdening. Proposition 6 would stipulate that refinancing an existing loan secured by a portion of the homestead would not constitute overburdening and would not invalidate a lien.

Opponents say

By expanding the size of the urban homestead, Proposition 6 would benefit mostly the wealthy who build expensive homes on large tracts within urban areas. The homestead protection was intended to apply to those who need their home as the basis to start again should they run into financial difficulty, subject to reasonable limits. The urban homestead protection originally was based on value and was limited to property, excluding improvements, valued at no more than \$10,000. In 1983, this provision was amended to define the urban homestead as including no more than one acre. Extending the homestead to 10 acres in an urban area would go too far.

Texas already has the most liberal homestead protection of any state. Along with Florida, Texas has gained a reputation as a haven for those who can buy an expensive house and then file for bankruptcy, safe in the knowledge that their homestead will be protected from all creditors except those few allowed to foreclose under the Constitution. Because of such abuses, Congress has been considering whether to limit the amount of the Texas homestead that may be protected under the federal bankruptcy laws, yet Proposition 6 would expand it even further.

The one-acre limit on urban homesteads has served as a check on some of the worst abusers while ensuring that lower- and middle-income homeowners receive the protection they need and deserve. Yet Proposition 6 would expand the Texas homestead protection to shield larger, more valuable, homesteads of up to 10 acres in urban areas, offering even more opportunities for the wealthy to escape their financial responsibilities.

Expanding the size of the urban homestead also would expand the potential for more homeowners to use their homes as collateral for home equity loans, thereby increasing the risk that they could lose their homes through foreclosure in case of default. The Legislature and the voters approved the home equity loan exception to the homestead protection only two years ago, yet now efforts already are being made to expand its scope to allow financial institutions more opportunities to use homes as collateral for loans unrelated to their purchase or improvement.

Proposition 6 also would eliminate a long-standing Texas tradition — protection of the separate business homestead. The proposed amendment would limit the business homestead protection to those who have a homestead with both a residence and a business, but it would eliminate the business homestead that is separate from the residence. In-

dividuals and families who are business owners but do not own their own residences or who have businesses located separately from their residence should continue to have the option of using the homestead protection to protect their basic livelihood against creditors.

Other opponents say

A specific limit on the size of an urban homestead is not needed, whether one acre or 10. Instead of being subject to an arbitrary cutoff of 10 acres or any other size, urban homeowners ought to be able to secure a home equity loan, reverse mortgage, or other extension of credit with the entire parcel of land they own and use as a homestead.

Notes

The implementing legislation, SB 496 by Harris, would place the new definition of an urban homestead in Chapter 41 of the Property Code if voters approve Proposition 6.

Two provisions of SB 496 take effect September 1, 1999, regardless of whether voters approve Proposition 6. Any judicial doctrine prohibiting “spreading” of loans secured by a homestead will not apply in Texas. Previously, Texas courts have ruled that a loan secured by a lien on one part of a homestead cannot be refinanced by using as security additional parts of the homestead beyond the part securing the original loan.

Sec. 41.002 of the Property Code had defined a homestead as urban if, at the time the homestead designation was made, the property was served by municipal utilities and by fire and police protection. SB 496 now will define a homestead as urban if, at the time of designation, the property is located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision *and* is served by police protection, paid or volunteer fire protection, and at least three of the following services by or under contract to a municipality: electric, natural gas, sewer, storm sewer, or water.

Authorizing garnishment of wages to enforce spousal maintenance

(HJR 16 by Thompson/Hill)

7

Proposition

Art. 16, sec. 28 of the Texas Constitution prohibits the garnishment of wages except to enforce court-ordered child support payments. Garnishment of wages involves directly deducting a debt or other obligation from a wage earner's paycheck.

Spousal maintenance is court-ordered support paid to one spouse by another after a divorce. Family Code, sec. 8.002 allows courts to order spousal maintenance only in cases in which:

- the spouse who is to pay the maintenance was convicted of or received deferred adjudication for a criminal offense of family violence within two years before the date a divorce is filed or while a divorce is pending; or
- the marriage lasted 10 years or more and the spouse seeking support lacks sufficient property to provide for minimum reasonable needs and:
 - cannot provide for his or her needs by working because of a physical or mental disability;
 - cannot be employed outside of the home because he or she is custodian of a child who requires substantial care and supervision due to a physical or mental disability; or
 - clearly lacks earning ability to provide for his or her minimum needs.

Family Code, sec. 8.003 lists many factors that courts must consider when determining the amount of maintenance awarded. These factors include the spouses' financial resources, including community and separate assets and liabilities; the ability of the spouse seeking maintenance to meet his or her needs independently; the spouses' education and employment skills; the time necessary for the spouse seeking maintenance to acquire education or training; the duration of the marriage; the ability of the spouse who would be paying maintenance to meet his or her own needs and make child support payments while supporting the other spouse; contributions of a spouse as a homemaker; and marital misconduct.

Digest

Proposition 7 would amend the Texas Constitution to allow the garnishment of wages to enforce court-ordered spousal maintenance.

The ballot proposal reads: "The constitutional amendment authorizing garnishment of wages for the enforcement for court-ordered spousal maintenance."

Supporters say

Proposition 7 would address a growing problem: the deadbeat ex-spouse who refuses to pay court-ordered spousal maintenance. The Legislature authorized spousal main-

tenance with the intent of providing temporary financial assistance for ex-spouses who have no or limited job skills and no financial resources so that they would not need to rely on government assistance. Without means to enforce maintenance payments, these spouses and their families could become dependent on government assistance.

Proposition 7 would give Texas the most effective tool to enforce court-ordered spousal maintenance. Under current law, persons who do not pay spousal maintenance can be thrown in jail or a judgment can be rendered against them for past-due amounts. To enforce the judgment debt requires filing a lien against the property of the delinquent ex-spouse or taking other measures that can be thwarted or delayed. Wage garnishment would be a more effective enforcement tool because it would get money into the hands of the spouse who needed it while allowing the payor to continue working.

Proposition 7 would not open the door to widespread wage garnishment because it would be limited to the narrow, well-defined situations in which a spouse has been awarded maintenance by a court. Garnishment would be used only in cases in which payors do not meet their obligations. Like garnishment for child support obligations, garnishment for spousal maintenance would be sufficiently beneficial to all concerned to justify amending the Constitution.

Wage garnishment can benefit both the person who pays the support and the spouse who receives it. Persons ordered to pay maintenance need not be concerned about making payments because they are deducted from wages automatically. Spouses receiving the maintenance get the support they are due and are assured that the support payments will arrive regularly each month. Also, the state and federal governments save on benefits that otherwise might have to be paid to spouses left without resources.

Garnishment of wages for spousal maintenance would not create a significant burden for employers. The number of spousal maintenance cases is small, and employers already have systems set up to garnish wages for child support enforcement. Like orders to garnish wages to enforce child support payments, orders to garnish wages to enforce spousal maintenance could be issued on a standard form to simplify the process for courts and employers.

Proposition 7 would not cause disputes between employers and employees because employers simply would follow court orders to garnish workers' wages and send them to another person. Such an order would not infringe on a worker's privacy because it would have to contain only minimal information about the amount to be withheld and where to send it.

Opponents say

Proposition 7 would weaken Texas' long-standing protection of a wage earner's paycheck from garnishment. It could set a precedent for creditors to seek additional exceptions to the ban on garnishment. The current exception for child support enforcement recognizes the inability of children to support themselves and the unique rights of children to be supported by their parents. This extraordinary measure should be reserved for child support enforcement alone. Court-ordered spousal maintenance is rela-

tively new in Texas, a community property state where divorcing spouses divide most assets acquired during the marriage, and does not rise to a high enough level of importance to justify such a drastic change in long-standing state policy.

Since spousal maintenance was enacted only in 1995, there is little evidence that traditional methods of enforcing court orders have proved inadequate. Courts, not employers, should be responsible for enforcing spousal maintenance.

Wage assignment would carry a cost for employers, who most likely would pass it along to consumers or other employees. Garnishing wages could involve employer record-keeping, computer reprogramming, or other costs. Neither Proposition 7 nor HB 145, the implementing legislation, would protect businesses from liability for making mistakes when garnishing wages. For example, an employer could be sued by an employee or a spouse who did not receive garnished wages, even though the employer could be blameless for the mistake. Because of these concerns, employers could hesitate to hire or retain workers under assignment orders.

Wage assignments could create an adversarial relationship between the employee and the employer who must withhold the wages and could involve employers in financial disputes between ex-spouses. In addition, wage assignments are an intrusion into the workers' privacy that should be avoided. As the result of an assignment for maintenance, employers would learn, for example, that an employee is divorced. Employers could discriminate against workers because of this knowledge. All this adds up to a threat to a person's livelihood — and thus to the ability to pay spousal maintenance.

There are practical limitations on wage assignments. Employees may quit work or change jobs frequently to avoid the assignment. Also, wage assignments are ineffective against debtors who are self-employed or paid in cash.

Although the circumstances for granting spousal maintenance now are relatively limited, Proposition 7 would place broad language in the Constitution generally allowing wage garnishment for "spousal maintenance." Nothing would prevent the Legislature from broadening the circumstances under which spousal maintenance is allowed, leading to more widespread garnishment and bringing Texas closer to an alimony system such as used in California. Spousal maintenance in Texas has been evolving toward outright alimony, and by equating it with child support, Proposition 7 could accelerate that trend. Combined child support and spousal maintenance payments easily could approach 50 percent or more of a person's income and could make it hard for that person to support his or her current family.

Notes

HB 145 by Thompson, the implementing legislation, would allow courts to enforce orders for spousal maintenance by ordering garnishment of wages or by other means listed in Family Code, sec. 8.009 for the enforcement of a court maintenance order. These methods include contempt of court and rendering a judgment that can be enforced by any means available to enforce judgments for debts. HB 145 would take effect only if voters approve Proposition 7.

Providing that the adjutant general serves at the pleasure of the governor

(HJR 95 by Gray/Brown)

The Adjutant General's Department gives military support to state civil authorities to provide for the safety and welfare of Texas and its citizens. It also stays prepared to furnish trained and equipped forces to the nation in case of war or other national emergency. The Adjutant General's Office, located at the department headquarters at Camp Mabry in Austin, controls and administers the state's military forces, including the Texas Army National Guard, the Texas Air National Guard, and the Texas State Guard.

Most funding for the National Guard comes from the federal government. Nonfederal funds appropriated to the Adjutant General's Department for fiscal 2000-01 total about \$23 million.

The governor serves as commander-in-chief of the state military forces and appoints the adjutant general, subject to Senate confirmation, for a two-year term ending February 1 of each odd-numbered year. The adjutant general controls the state's military department and is subordinate only to the governor in these matters.

Under Art. 16, sec. 30 of the Texas Constitution, the duration of all offices not otherwise fixed by the Constitution may not exceed two years. Government Code, sec. 431.022 sets the adjutant general's two-year term. Also, Art. 15, sec. 9 of the Constitution requires that the Senate consent to the removal of a public officer appointed by the governor by a two-thirds vote of the senators present.

Digest

Proposition 8 would amend Art. 16, sec. 30 to provide that the adjutant general serves at the pleasure of the governor. This provision would override any other constitutional or statutory limitation on the term for this office. The amendment would be effective only so long as the Legislature established an office of the adjutant general that was appointed by the governor and was the single governing office, subordinate only to the governor, for the state military forces.

Proposition 8 would apply to the person holding the office of adjutant general at the time the voters approved the amendment.

The ballot proposal reads: "The constitutional amendment to provide that the adjutant general serves at the pleasure of the governor."

Supporters say

The adjutant general is responsible for managing an important service to the state's citizens and is subordinate to the governor, who is commander-in-chief of the state's military forces. To allow additional oversight of this important office, the adjutant general should be held directly accountable to the governor. Also, to give a new adjutant

general adequate time to assess the state's military system, implement needed changes, and establish continuity in programs, the term of office should not be limited to two years. By combining the potential for a longer term with additional oversight by the governor, this amendment would help promote better leadership of the state's military forces.

Providing that the adjutant general serves at the pleasure of the governor would allow additional accountability for the office and a closer working relationship between the state's chief executive and the adjutant general. This provision would allow a system more closely resembling a cabinet form of executive government that makes the governor, a statewide elected official, ultimately accountable. Because the Adjutant General's Office receives orders directly from the governor, greater coordination between the Governor's Office and the adjutant general is essential. Proposition 8 would help prevent disruptive shifts in the leadership of the military forces upon the transition to a new adjutant general because the governor would be held directly accountable for any such disruptions.

While this amendment would allow an adjutant general to serve longer than two years, nothing prohibits that now. The same person may be reappointed as adjutant general every two years, even when the office of governor changes hands. The only difference under this amendment would be that the adjutant general need not worry about making politically unpopular decisions and being threatened with the possibility of failing to receive reconfirmation by a two-thirds vote of the Senate each legislative session.

Under Proposition 8, the adjutant general would be accountable to the governor exclusively, allowing the adjutant general to make necessary decisions so long as those decisions had the support of the state's chief executive, who in turn is accountable to voters statewide. This change also would provide better accountability than a Senate confirmation hearing. Rather than undergoing a formulaic confirmation every two years, the adjutant general would be accountable to the governor on a daily basis and could be removed at any time. The Legislature would retain its broad oversight authority to review the performance of the adjutant general and to determine spending priorities through the appropriations process. Also, like any state official, the adjutant general could be impeached and removed from office.

A constitutional amendment is necessary to authorize the adjutant general to serve more than two years. Art. 16, sec. 30 fixes the maximum term of all state offices at no longer than two years unless the Constitution provides otherwise.

Opponents say

Proposition 8 would severely limit legislative oversight of the adjutant general, who is responsible for the readiness of state military forces that may be needed in emergencies. This amendment would allow the adjutant general to serve indefinitely, never having to be reappointed, even when a new governor took office, and never having to be reconfirmed by the Senate. In practical terms, this amendment would require the governor — even an incoming governor — either to fire the then-serving adjutant general or to pressure that person to resign in order to appoint a new person to that post.

Politically, this would be much more difficult than simply waiting for that person's term to expire and appointing a new adjutant general.

An incoming governor could make a change in the office but would not be required to do so, and the same person could hold this office for many years. While continuity in office is not necessarily bad, the person holding this office at least should have to be reconfirmed periodically by the Senate. The confirmation process ensures that the person holding this important office serves the people of Texas and not merely the desires of the governor. No other appointive office confirmed by the Senate has an indefinite term.

This amendment could give the governor too much direct control over an important segment of state services. Given the broad powers of the adjutant general, allowing the governor to replace that officer at any time without the consent of the Senate could lead to disruptive shifts in the status of the state's military forces. A major leadership shift for those forces could delay access to needed services in an emergency.

Under Government Code, sec. 431.0255, the adjutant general may be removed from office only for failing to meet statutory qualifications, for violating laws relating to conflicts of interest, or for being unable to discharge the duties of the office. This amendment would allow the adjutant general to be removed from office for any reason at any time.

Other opponents say

The term of the adjutant general or of any other appointed office should not be set in the Texas Constitution, which already is bloated with overly specific and constraining provisions. Placing this provision in the Constitution would limit the flexibility of the Legislature if it later wished to reorganize the state's military services.

Instead of establishing specific constitutional provisions for every office, the Legislature should propose deleting the two-year term limitation in Art. 16, sec. 30. That provision was appropriate when the term of office for statewide elected executive officials, including the governor, was set at two years, but it is now obsolete. If that provision were deleted, the Legislature could establish reasonable terms of office for all appointed officials, balancing the need for continuity of office with reconfirmation of the person holding that office.

Notes

Proposition 10 (HJR 74) would provide that the health and human services commissioner serves at the pleasure of the governor. Both HJR 95 and HJR 74 would add a new subsection (e) to Art. 16, sec. 30 of the Constitution.

Creating a judicial compensation commission

(SJR 10 by Brown/Thompson)

9

Proposition

The Legislature establishes salaries for members of the Texas Supreme Court, the Court of Criminal Appeals, the 14 courts of appeals, and the 418 district courts. Salaries of all state officers, including state judges, are set in the general appropriations act. Government Code, sec. 659.012 establishes a formula for determining judicial salaries based on the salary set by the Legislature for a Supreme Court justice.

Under sec. 659.012, a Supreme Court justice is entitled to an annual salary of at least \$102,463, but the Legislature may establish a higher salary. HB 1 by Junell, the general appropriations act for fiscal 2000-01, sets the salary for a Supreme Court justice at \$113,000. Judges of the Court of Criminal Appeals are entitled to the same salary as Supreme Court justices. Justices of courts of appeals are entitled to a salary 5 percent less than that of a Supreme Court justice, or \$107,350 for fiscal 2000-01. A district court judge is entitled to a salary 10 percent less than that of a Supreme Court justice, or \$101,700 for fiscal 2000-01. The chief justices of the Supreme Court and the courts of appeals and the chief judge of the Court of Criminal Appeals receive additional compensation by appropriation.

Digest

Proposition 9 would add a new sec. 32 to Article 5 of the Texas Constitution to allow the Legislature to create a nine-member commission on judicial compensation to submit recommendations to the Legislature on salaries for members of the judiciary. The commission's recommendations would become law if neither the Senate nor the House of Representatives rejected them by majority vote. The commission could recommend salaries only for members of the Texas Supreme Court, the Court of Criminal Appeals, courts of appeals, and district courts.

The ballot proposal reads: "The constitutional amendment authorizing the legislature to create a judicial compensation commission."

Supporters say

Approval by Texas voters of Proposition 9 would create an independent panel that would determine judicial salaries on the basis of clear criteria, delineated in the implementing legislation, SB 71 by Brown.

Judicial salaries in Texas now lag behind those in other states. In setting salaries for Texas judges, the proposed independent commission could consider judicial salaries in other states as well as the compensation packages for private-sector attorneys and public officials. Setting appropriate salary levels would ensure that the Texas judiciary could continue to attract and retain the high-quality judges that Texans expect and deserve. Nine other states have similar judicial compensation commissions. In five of those states, the commission's recommendations are merely advisory, and in three, they

become law unless modified or vetoed by the state legislature. In Washington state, the commission's recommendations become law regardless of legislative action.

The Texas Commission on Judicial Efficiency, established in 1995 to review different aspects of the Texas judicial system, recommended creating a commission that would be responsible for making recommendations on judicial salaries.

Under this plan, the elected Legislature would retain a large role in determining judicial salaries because either the House or the Senate could veto the commission's recommendations. Nothing would prevent the Legislature from overriding these recommendations and setting different salaries in the general appropriations act. The plan also would allow the governor to retain some control over the process by empowering the governor to appoint the members of the compensation commission. If the Legislature chose to set a different salary schedule from the schedule the commission recommended, the governor could veto that provision of the general appropriations act.

The one-house veto provision in Proposition 9 is no different from the current legislative process. Both chambers of the Legislature must agree on legislative actions or appropriations. If either house objects, a proposal cannot become law. Allowing either chamber to override the recommendations of the judicial compensation commission would be the best way to ensure that, like any other appropriation, both chambers would have to concur in an action before it became law. As a practical matter, the commission's recommendations would not become law unless also included in the general appropriations act. The implementing legislation would require either chamber to override the commission's recommendations before enactment of the appropriations bill. The Legislature would not allow the commission's recommendations to become law unless they were funded in the general appropriations act.

In the past, the Legislature's determination of judicial salaries has been a political "hot potato," in part because the legislative retirement plan is linked to judicial salaries. Any increase in judicial salaries can be viewed as a backdoor increase to legislators' pensions. An impartial review of judicial salaries would allow this issue to be examined independently of the legislative retirement debate.

Opponents say

Proposition 9 would grant the proposed judicial compensation commission authority best reserved to the Legislature. The Legislature is elected to make difficult decisions that often may involve political considerations. Elected officials, not appointed commission members, should determine judicial salaries, which are paid from taxpayer dollars.

Granting an appointed commission even limited lawmaking authority would set a bad precedent and would blur the separation of powers. It would stand the lawmaking process on its head, allowing a governor-appointed commission to make law subject to veto by the Legislature. Also, a commission recommendation that was not vetoed by either chamber of the Legislature would become law without allowing the governor

an opportunity to review and possibly veto it, unlike any other law. While the governor would have the authority to appoint the members of the commission, the governor would not have the authority to disapprove the commission's actions.

The commission's recommendations could create confusion if they were not rejected by either the House or the Senate but the Legislature then made no appropriation to cover the increased salaries. Even if the salary amount were not included in the general appropriations act, it would become law under Proposition 9 and still would have to be paid. This requirement could cause difficulties in tracking spending for various agencies and, depending on the amount, even could force the state over constitutional spending limits.

The proposed procedure would allow one house to veto the recommendations of the commission. This would go against the bicameral nature of the Legislature and would disrupt the legislative process that results from having both chambers work out their differences on proposed legislation. The U.S. Supreme Court has held that a federal one-house veto violates the U.S. Constitution by contravening the procedural requirements for legislative action, *I.N.S. v. Chadha*, 462 U.S. 919 (1983). While an amendment to the Texas Constitution would allow such a procedure at the state level, the same constitutional and public policy objections to undermining the legislative process and the separation of powers raised in the *Chadha* case apply to this proposal as well.

Rather than allowing an appointed commission to set judicial salaries, the Legislature instead should be required to consider the factors outlined in SB 71 by Brown, the enabling legislation, that should be examined when determining compensation for members of the judiciary.

Notes

SB 71 by Brown, contingent on approval of Proposition 9, would establish the structure, membership, and powers of the nine-member judicial compensation commission, the time line for presenting the commission's recommendations to the Legislature, and the criteria the commission would have to use in developing its recommendations. In recommending judicial salaries, the commission would have to consider:

- the level of overall compensation adequate to attract the most highly qualified individuals in the state, from a diversity of life and professional experiences, to serve in the judiciary without unreasonable economic hardship and with judicial independence unaffected by financial concerns;
- the skill, experience, and time required of the particular judgeship;
- comparable compensation paid to judges in other states, federal judges, private attorneys, arbitrators, and mediators, state officeholders, university officials, district attorneys, and police chiefs, county attorneys, and city attorneys in larger cities; and
- the cost of living and inflation.

Providing that the health and human services commissioner serves at the pleasure of the governor

(HJR 74 by Gray/Brown)

The Legislature established the Health and Human Services Commission (HHSC) in 1991 to oversee and coordinate health and human services (HHS) programs in Texas. Headed by a commissioner appointed by the governor with Senate approval for a two-year term, HHSC is charged with developing and submitting to the governor, the lieutenant governor, and the House speaker a continuing strategic plan for HHS. The commissioner also submits a consolidated HHS budget recommendation to the Legislature for the agencies under its purview. In addition to its duties of coordinating service delivery and maximizing federal funding, HHSC is the federally required single state agency for Medicaid, the federal-state health program for low-income and elderly people, and has final approval of all Medicaid policies, rules, and programs, but it does not deliver directly any Medicaid services.

The following agencies are under HHSC's purview:

- Interagency Council on Early Childhood Intervention;
- Texas Department on Aging;
- Texas Commission on Alcohol and Drug Abuse;
- Texas Commission for the Blind;
- Texas Commission for the Deaf and Hard of Hearing;
- Texas Department of Health;
- Texas Department of Human Services;
- Texas Juvenile Probation Commission;
- Texas Department of Mental Health and Mental Retardation;
- Texas Rehabilitation Commission; and
- Texas Department of Protective and Regulatory Services.

HHSC operates with a budget of almost \$35 million for fiscal 2000-01 and is capped at about 182 full-time employees. Its enabling statute is Government Code, chapter 531. The commission oversees agencies with combined budgets of more than \$20 billion for fiscal 2000-01.

Under Art. 16, sec. 30 of the Texas Constitution, the duration of all offices not otherwise fixed by the Constitution may not exceed two years. Government Code, sec. 531.007 sets a two-year term for the HHS commissioner, expiring February 1 of each odd-numbered year. Also, Art. 15, sec. 9 of the Constitution requires that the Senate consent to the removal of a public officer appointed by the governor by a two-thirds vote of the senators present.

Digest

Proposition 10 would amend Art. 16, sec. 30 to provide that the HHS commissioner serves at the pleasure of the governor. This provision would override any other con-

stitutional or statutory limitation on the term for this office. The amendment would be effective only so long as the Legislature established an office of the HHS commissioner that was appointed by the governor and was the single governing office for coordinating and planning the delivery of HHS programs.

A temporary provision would specify that the proposed amendment would apply to the person holding office when the amendment was approved.

The ballot proposal reads: “The constitutional amendment to provide that the commissioner of health and human services serves at the pleasure of the governor.”

Supporters say

The HHS commissioner is responsible for managing and planning a large portion of the state’s services to citizens. The 76th Legislature increased the powers and duties of the commission and the commissioner through HB 2641 by Gray, which also continued HHSC until 2007. Among the new powers is the ability of the commissioner to hire and fire the executive directors of many agencies under the commission’s purview. To allow additional oversight of this important office, the commissioner should be held directly accountable to the governor. Also, to give a new commissioner adequate time to assess the state’s HHS system, implement needed changes, and establish continuity in service delivery, the term of office should not be limited to two years. By combining the potential for a longer term with additional oversight by governor, this amendment would help to promote better leadership of the Texas HHS system.

Providing for the commissioner to serve at the pleasure of the governor would allow additional accountability for the office and a closer working relationship between the state’s chief executive and the commissioner. This provision would establish a system more closely resembling a cabinet form of executive government that makes the governor, a statewide elected official, ultimately accountable. Because the HHS budget comprises more than one-quarter of all state spending and HHS agencies employ more than 60,000 employees, greater coordination between the Governor’s Office and the commissioner is essential. Proposition 10 would help prevent disruptive shifts in the delivery of services upon the transition to a new commissioner, because the governor would be held accountable for any such disruptions.

While this amendment could allow a commissioner to serve longer than two years, nothing prohibits that now. The same person may be reappointed as commissioner every two years, even when the office of governor changes hands. The only difference under this amendment would be that the commissioner need not worry about making politically unpopular decisions and being threatened with the possibility of failing to receive reconfirmation by a two-thirds vote of the Senate each legislative session.

Under Proposition 10, the commissioner would be accountable to the governor exclusively, allowing the commissioner to make necessary decisions so long as those decisions had the support of the state’s chief executive, who in turn is accountable to voters statewide. This change also would provide better accountability than a Senate confirmation hearing. Rather than undergoing a formulaic confirmation every two years, the

commissioner would be accountable to the governor on a daily basis and could be removed at any time. The Legislature would retain its broad oversight authority to review the performance of the HHS commissioner and to determine spending priorities through the appropriations process. Also, like any state official, the HHS commissioner could be impeached and removed from office.

A constitutional amendment is necessary to allow the HHS commissioner to serve longer than two years. Art. 16, sec. 30 fixes the maximum term of all state offices at no longer than two years unless the Constitution provides otherwise.

Opponents say

Proposition 10 would severely limit legislative oversight of the HHS commissioner, who supervises agencies with combined budgets of \$20 billion. This amendment would allow the commissioner to serve indefinitely, never having to be reappointed, even when a new governor took office, and never having to be reconfirmed by the Senate. In practical terms, this amendment would require the governor — even an incoming governor — either to fire the then-serving commissioner or to pressure that person to resign in order to appoint a new person to that post. Politically, this would be much more difficult than simply waiting for that person's term to expire and appointing a new commissioner.

An incoming governor could appoint a new person to the office but would not be required to do so, so the same person could hold this office for many years. While continuity in office is not necessarily bad, the person holding this office at least should have to be reconfirmed periodically by the Senate. The confirmation process ensures that the person holding this important office serves the people of Texas and not merely the desires of the governor. No other appointive office confirmed by the Senate has an indefinite term.

This amendment also could give the governor too much direct control over a significant segment of state services. Given the broad powers of the commissioner, allowing the governor to replace the commissioner at any time without the consent of the Senate could lead to disruptive shifts in the delivery of services. A major policy shift in the delivery of HHS programs could reduce access to needed services and further complicate the already confusing HHS systems.

Other opponents say

The term of the HHS commissioner or of any other appointed office should not be set in the Texas Constitution, which already is bloated with overly specific and constraining provisions. Placing this provision in the Constitution would limit the flexibility of the Legislature if it later wished to reorganize the delivery of HHS programs.

Instead of establishing specific constitutional provisions for every office, the Legislature should propose deleting the two-year term limitation in Art. 16, sec. 30. That provision was appropriate when the term of office for statewide elected executive of-

ficials, including the governor, was set at two years, but it is now obsolete. If that provision were deleted, the Legislature could establish reasonable terms of office for all appointed officials, balancing the need for continuity of office with reconfirmation of the person holding that office.

Notes

Proposition 8 (HJR 95) would provide that the adjutant general serves at the pleasure of the governor. Both HJR 74 and HJR 95 would add a new subsection (e) to Art. 16, sec. 30 of the Constitution.

Allowing political subdivisions to buy nonassessable property and casualty insurance (HJR 69 by G. Lewis/Harris)

Art. 3, sec. 52(a) of the Texas Constitution prohibits political subdivisions, such as cities or school districts, from lending their credit to or becoming stockholders in any corporation, association, or company. This prohibition primarily arose from state and local government investments in railroad companies, used to develop the Texas frontier, that failed shortly after the Civil War.

The Texas Commission of Appeals in 1926 (*City of Tyler v. Texas Employers' Ins. Ass'n*, 288 S.W. 409) and the Texas Supreme Court in 1942 (*Lewis v. Independent School Dist. of City of Austin*, 161 S.W.2d 450) ruled that Art. 3, sec. 52 prohibits political subdivisions from buying insurance from mutual insurance companies. In a mutual insurance policy, the policyholders act as stockholders in that they are entitled to share in any company surpluses and also are responsible for meeting, within limits, any obligations or losses of the company through additional payments or assessments. The courts determined that this combined status as policyholder and stockholder barred political subdivisions from buying such insurance from mutuals. These rulings have been cited repeatedly in attorney general opinions that found that political subdivisions are constitutionally prohibited from participating in various kinds of insurance funds. By contrast, political subdivisions may purchase policies issued by stock insurance companies because the policyholders only pay the premiums and hold no ownership interest in the company.

Most mutual companies issue “nonassessable” policies, in which assessments on policyholders are avoided because the companies set sufficiently high premium rates and accrue surpluses. In nonassessable mutual insurance policies, the policyholder has no further obligation to the mutual company for the duration of the policy other than paying the premium.

HJR 73, approved by Texas voters in 1986, amended the Constitution to allow political subdivisions to use public funds or credit to pay premiums on nonassessable life, health, or accident insurance policies and on annuity contracts issued by authorized mutual insurance companies.

Digest

Proposition 11 would amend Art. 3, sec. 52(a) to add property and casualty lines to the types of nonassessable insurance policies offered by mutual insurance companies for which a political subdivision could pay premiums using public funds or credit.

The ballot proposal reads: “The constitutional amendment permitting a political subdivision to purchase nonassessable property and casualty insurance from an authorized mutual insurance company in the same manner that the political subdivision purchases life, health, and accident insurance.”

Supporters say

Because Texas has allowed political subdivisions to hold nonassessable mutual policies for life, health, or accident insurance since 1986, there is no reason to maintain the prohibition against paying premiums for nonassessable property or casualty mutual insurance policies. With these nonassessable policies, a political subdivision would not risk its credit or become responsible for covering company losses. It would be responsible only for making premium payments, just as it would be if purchasing a property or casualty policy issued by a stock company.

This amendment would maintain the state's fundamental policy against local government investment in private ventures by allowing only the purchase of *nonassessable* mutual insurance policies. Nonassessable policies are just as safe as policies issued by stock companies. While in theory it may be true that mutual insurance companies are "owned" by the policyholders, only small, often rural, mutual companies continue to offer assessable policies. Most mutuals, especially those large enough to compete for political subdivision business, are more like stock companies and offer nonassessable policies. These mutuals must conform to additional security requirements of the Texas Department of Insurance (TDI) in order to offer nonassessable policies to avoid putting policyholders at risk due to adverse business decisions.

Allowing nonassessable mutuals to vie with stock companies for property and casualty insurance contracts could increase competition and thereby reduce the insurance expenditures of political subdivisions. According to TDI records, about 90 mutual property and casualty companies and about 880 stock property and casualty companies now are doing business in Texas. Although not all property and casualty companies market their coverage to political subdivisions, competition between companies with adequate resources to cover political subdivisions would be enhanced if even one more company got a chance to compete. Some of the largest property and casualty companies in Texas are mutuals, and they could provide insurance coverage for political subdivisions with competitive rates and services.

This amendment is worded narrowly to allow political subdivisions to purchase only nonassessable property and casualty mutual insurance policies. Such a limited change would be better than completely rewriting Art. 3, sec. 52 to remove the specific provisions concerning insurance purchases, which could raise other issues and cause unanticipated problems for the state and political subdivisions.

Opponents say

Creating a special exception in the Constitution just to allow local governments to purchase nonassessable property and casualty insurance from mutual insurance companies is not necessary. There is no obvious lack of competition or widespread demand by political subdivisions to obtain property and casualty insurance coverage from mutual insurance companies. The amendment probably would increase competition in this market by only a few more companies and would not result in much of a price break for political subdivisions.

Mutual insurance companies are “owned” by their policyholders. Assessable policyholders could be put at greater risk from large nonassessable policy claims by political subdivisions that may exceed premium payments.

The original reason for the constitutional provision in response to the failed railroad deals of the 1800s is still valid. It is potentially risky for the state’s political subdivisions to become stockholders in any type of private entity.

Other opponents say

Rather than ask the voters to approve piecemeal constitutional changes every few years for every specific type of insurance or other business lines used by political subdivisions, the Legislature either should allow political subdivisions to pay premiums for *all* types of insurance or should limit the use of public funds and public credit solely to public purposes without exception.

Exempting from ad valorem taxation vehicles leased for personal use

(SJR 21 by Carona/Hamric)

12
Proposition

Under authority of Art. 8, sec. 1(d) of the Texas Constitution, the Legislature has exempted from ad valorem (property) taxes tangible personal property not held or used to produce income. However, the Constitution also gives local taxing units the option of overriding the exemption and levying ad valorem taxes on most exempt personal property, although few do so. According to the standard practice of appraisal districts, the exemption applies to motor vehicles owned by a person and not used for income-creating purposes, but leased vehicles are not exempt.

Digest

Proposition 12 would amend Art. 8, sec. 1 of the Texas Constitution to authorize the Legislature to exempt from ad valorem taxation motor vehicles leased for personal use that are not held primarily for the production of income by the lessee and that otherwise would qualify for exemption under general law. The Legislature could limit the ability of political subdivisions to tax leased motor vehicles that were exempted.

The amendment also would delete references in this section of the Constitution to county education districts, which no longer exist.

The ballot proposal reads: “The constitutional amendment to authorize the legislature to exempt from ad valorem taxation leased motor vehicles not held by the lessee primarily to produce income.”

Supporters say

Proposition 12 would allow the Legislature to exempt from property taxation leased vehicles not held primarily for the production of income, treating them like vehicles owned by a person. The proposed amendment would eliminate this annual tax on citizens who lease cars for personal use, but vehicles leased for business use or for the production of income by the lessee would remain subject to taxation.

According to the Texas chapter of the National Vehicle Leasing Association (NVLA), about 344,000 vehicles in Texas were under lease in 1998. About 65 percent of those vehicles were leased for personal use. A survey conducted for the leasing industry concluded that leaseholders paid an average tax bill of \$564 in 1997, the latest year for which figures were available.

Current law relating to taxation of leased vehicles harkens back to a time when leased vehicles were used almost exclusively by businesses. People who lease cars for personal use are being “double-taxed,” because they pay a sales tax up front on the lease and then are liable to pay a business personal property tax on the vehicle. As a result, Texas has one of the lowest rates of leased vehicles in the nation, according to the NVLA, with about 16 percent of new vehicles in Texas leased annually compared

with a national average of about 30 percent. Businesses can offset the property taxes they pay on leased vehicles with a federal income-tax deduction, but those leasing vehicles for their personal use receive no such deduction.

Proposition 12 would end the inconsistencies in how vehicles are taxed depending on the political subdivision where the lessor resides by treating vehicles leased for personal use the same way as cars owned for personal use. Currently, many counties do not tax leased vehicles at all, others tax vehicles at their original price, and still others reduce the tax as the car depreciates. A few local governments, such as Dallas County, have opted to tax all vehicles, leased or owned, as allowed by the Constitution. Some dealers roll any tax assessed into monthly lease installment payments, others charge the lessors the tax in a yearly statement, and still others do not collect the tax for the lessor at all, creating additional confusion on the part of consumers. Many consumers are surprised to learn that they owe property taxes on the cars they lease, while the cars they own have no taxes levied against them. Many dealers have begun to use retail installment contracts that operate like leases, but are not taxed like leases, creating further inconsistencies and more confusion.

Although it would reduce revenues marginally for some local governments, the exemption likely would encourage more people to lease cars and would produce an offsetting increase in sale tax collections on the leases. On average, a leased vehicle is replaced every 38 months, whereas an owned vehicle is replaced every 53 months, according to the NVLA.

Opponents say

Proposition 12 would create a special class of personal property exempt from ad valorem taxes for the benefit of the vehicle-leasing industry. Under this amendment, the Legislature not only could exempt leased vehicles from taxation but also could prevent local governments from overriding the exemption and taxing leased vehicles if they chose. Such a special benefit is not extended to most other types of exempt personal property, including vehicles that are owned for personal use. Individual taxing units ought to be able to decide whether leased vehicles should be taxed or not.

Rather than ask the voters to amend the Constitution to create a special new exemption for leased vehicles, the Legislature simply should require local appraisers to inform consumers of their policies for taxing leased vehicles. More information would allow consumers to weigh the advantages and disadvantages of leasing versus purchasing a vehicle.

Eliminating the tax on leased vehicles would reduce local revenues, particularly in larger counties where more vehicles are being leased. State funds may compensate for revenue shortfalls in school districts, but cities, counties, and other local districts could lose needed revenues.

The proposed exemption could open up opportunities for evasion. People who are in business for themselves or who use their leased vehicles almost exclusively for business purposes more easily could avoid paying property taxes if a broad exemption

existed for personal use. At the very least, lessees should have to demonstrate to the appraiser that they did not claim business expenses for the leased vehicle for federal income tax purposes.

This special tax break for leased vehicles is not needed. For those who prefer not to purchase a vehicle, auto dealers in Texas already provide an alternative that accomplishes the same purpose as a lease while avoiding local property taxes. Retail installment contracts with balloon payments mimic leases in that the purchaser makes smaller monthly payments and at the end of the contract term has the option of buying the vehicle outright. With a balloon contract, the buyer either returns the car to the dealer or pays the full outstanding balance owed on the car in a single lump sum. Balloon contracts currently are not subject to the property tax. These types of contracts are used commonly for vehicles purchased for personal use, while leases are used more often for business. This arrangement simplifies the jobs of tax appraisers, relieves consumers from paying property taxes on personal vehicles, and reduces opportunities for fraud.

Notes

This amendment would require implementing legislation to make the proposed change effective in local taxing jurisdictions. No such legislation was filed during the 1999 legislative session.

Authorizing \$400 million in general-obligation bonds for student loans

(SJR 16 by Barrientos/Hunter)

Texas voters have approved \$960 million in general-obligation bonds since 1965 for the Hinson-Hazlewood College Student Loan Program, which offers federally guaranteed student loans backed by the U.S. Department of Education, health education loans, and college access loans made primarily to students from low- and middle-income families. The program has provided loans to more than 265,000 Texas students totaling nearly \$1.2 billion. Nearly 16,000 students received these loans in 1998.

Student borrowers must be Texas residents or eligible to pay in-state tuition and must demonstrate financial need. The program uses money from student loan repayments, federal interest subsidies, lender's allowances, and depositor interest to offset state borrowing costs.

Voters approved amendments authorizing \$85 million in student loan bonds in 1965, \$200 million in 1969, \$75 million in 1989, and \$300 million in 1991. In 1995, voters authorized some \$300 million of these bonds, of which all but \$150 million has been issued. The Texas Higher Education Coordinating Board plans to issue the remainder of these bonds by 2000. State law prohibits the coordinating board from issuing more than \$100 million in bonds in a year.

Art. 3, sec. 49 of the Texas Constitution prohibits state debt, but voters have amended the Constitution many times to authorize debt in the form of general-obligation bonds. The state guarantees repayment of the money borrowed by issuing such bonds. The state guarantees that payments will be made from the first money coming into the treasury each year that is not earmarked otherwise by the Constitution.

Digest

Proposition 13 would amend the Texas Constitution by adding Art. 3, sec. 50b-5, which would allow the Legislature to authorize the Texas Higher Education Coordinating Board to issue up to \$400 million in new general-obligation bonds to finance student loans. The bonds would be issued in installments as prescribed by the coordinating board.

The ballot proposal reads: "The constitutional amendment providing for the issuance of \$400 million in general obligation bonds to finance educational loans to students."

Supporters say

Roughly 40 percent of Texas students receive financial aid based on need, usually in the form of loans. Still, money is one of the main reasons why nearly half of all students enrolling in Texas colleges and universities do not graduate within six years. Tuition and fees at state-supported institutions of higher learning have tripled over the past decade.

Proposition 13 would ensure that the Texas Higher Education Coordinating Board could meet the growing need for financial assistance for Texas students. Without this measure, the amount of money available through the Hinson-Hazlewood loan program would drop from about \$77 million to \$23 million. If that occurred, an estimated 11,000 college students who otherwise could not attend college would be unable to receive such loans for the fall semester of 2001. The \$400 million in general-obligation bonds authorized by Proposition 13 would fund Hinson-Hazlewood for up to five years.

This program has a demonstrated record of success and is self-supporting, depending not on tax dollars but on money from student loan repayments, federal interest subsidies, and other sources. Using state-issued general-obligation bonds as the funding source for the program allows a lower interest rate. While Hinson-Hazlewood bonds represent state debt, the borrowed funds are repaid by students, not by taxpayers, and the loan interest is recycled to help future students. The bonds do not affect the state's constitutional debt limit for taxpayer-funded bonds, such as those used to finance prison construction, because the Bond Review Board classifies college student loan bonds as self-supporting.

The student loan fund currently is not being replenished fast enough with loan repayments because many loans made in recent years are not yet due. The bonds authorized by this amendment would help fund the program until payments from more recent loans begin to roll in.

The default rate on Hinson-Hazlewood loans is below 7 percent, compared to default rates as high as 15 percent to 20 percent for other student loan programs. The federal government insures and subsidizes the interest on about one-fourth of the coordinating board's student loans. That means that the loans will be repaid even if students default. Loans not guaranteed by the federal government or by the state guarantee fund have a co-signer who is responsible if the student does not pay. In addition, an origination fee of 3.5 percent to 6 percent is deducted from the loan proceeds to help defray the cost of administration and defaults. Texas taxpayers never have had to fund a shortfall in the program's 34 years of existence.

This loan program makes higher education more affordable for students by giving them a reliable source of funds, often at more favorable rates than they could obtain otherwise. Hinson-Hazlewood loans offer a good repayment rebate of up to 1 percent that is applied to the principal of the loan, a benefit not offered by all commercial lenders.

Higher education always has been a partnership among students, their families, private donors, and local, state, and federal government agencies. Lack of funding for student loans impedes recruiting and retaining students so they may complete their degrees in a reasonable period of time. Also, students must bear an increasing portion of the cost of education. In 1986, student tuition and fees accounted for 14 percent of all university revenue in Texas, with state general revenue comprising 55 percent. A decade later, the portion paid by students had risen to 21 percent, with the state share falling to 44 percent.

If Texas is to prosper, it must do more to ensure that Texas students complete their college degrees. While college debt may burden students early in their careers, statistics clearly link higher educational levels to significantly better lifetime earnings. National studies indicate that a bachelor's degree, on average, results in earnings over a lifetime of \$1 million more than lifetime earnings for the holder of a high school diploma.

It is in the best interest of Texas to provide financial aid to help produce the kind of educated workforce the state needs to attract industry and to make sure that jobs created in Texas go to Texans. Texas has college graduation rates below the national average. The state also lags behind the national average in per-capita income. Meanwhile, new jobs being created in areas like high technology require higher levels of education.

Opponents say

The state should not add to its considerable debt by issuing \$400 million in additional bonds, the largest authorization for this program thus far, to continue a student loan program that competes with private lenders. As of August 31, 1998, state bonded debt totaled \$11.7 billion, of which \$5.2 billion was in general-obligation bonds.

Even though student loan bonds are supposed to be repaid by the students, the state backs the bonds with its credit and takes ultimate responsibility for repayment. Borrowing money by issuing bonds is expensive due to the interest costs, and repaying the money borrowed by issuing bonds eventually will cost almost twice as much as the face amount of the bond issue.

Notes

On the assumption that \$75 million in bonds would be sold per year, the Legislative Budget Board estimates that debt service on \$400 million in bonds would cost \$5.9 million in fiscal 2001, \$11.3 million in fiscal 2002, \$16.9 million in fiscal 2003, and \$22.6 million in fiscal 2004.

Allowing state boards to have an odd number of three or more members

(HJR 29 by Gallego/Shapiro)

14
Proposition

Art. 16, sec. 30a of the Texas Constitution authorizes the Legislature to establish six-year terms for the members of state boards. This provision is an exception to Art. 16, sec. 30, which generally limits the term of all offices to two years unless the Constitution specifies otherwise. Sec. 30a also requires that one-third of a board's membership be appointed every two years. This provision has been interpreted to mean that the number of members on such boards, excluding *ex officio* members who serve on a board solely because they hold a particular office, must be divisible by three.

Digest

Proposition 14 would amend Art. 16, sec. 30a to authorize the Legislature to provide that a state board with members serving six-year terms have an odd number of three or more members, with one-third, or as near to one-third as possible, being appointed or elected every two years.

The amendment would create an exception for boards required by the Constitution. The Legislature could provide by law that such boards be composed of members of any number divisible by three who served six-year terms staggered so that one-third of the members were elected or appointed every two years.

A temporary provision would require the Legislature to reconstitute, no later than September 1, 2003, any board that did not conform with the requirements of Art. 16, sec. 30a, as amended by Proposition 14. A board that did not meet the requirements of the amended sec. 30a could continue to act as a governing body until there was a quorum of members who had qualified for office under the new provision. The temporary provision would expire September 1, 2005.

The ballot proposal reads: "The constitutional amendment authorizing the legislature to provide that a state board, commission, or other agency shall be governed by a board composed of an odd number of three or more members."

Supporters say

Proposition 14 would clear up confusion that now exists about the Legislature's authority to compose a board or commission that is not divisible by three. To have an odd number of members — to prevent ties when voting — that still is divisible by three, a board now can have only three, nine, 15, or 21 members. Reasonably sized boards of five, seven, or 11 members are prohibited because the number of members is not divisible by three. This inflexible "rule of three" has no real justification.

If the Legislature wishes to expand or reduce the number of members on a board, it must either add or subtract three, six, or nine members. This requirement can inhibit the Legislature's discretion without good reason if lawmakers would like to add or

remove a different number of members to represent a certain group on a board or to reapportion the representation on a board.

The Legislature still could provide for a board that was composed of an even number of members so long as that number was divisible by three and the terms of those members were staggered so that one-third were elected or appointed every two years. This exception would apply only to boards established by the Constitution, such as the 18-member Board of Pardons and Paroles. All other even-numbered boards would be reapportioned to provide an odd number of members during a four-year transition period to avoid disruption of board operations. Most state boards are composed of three or nine members, so relatively few would be affected during the transition.

Opponents say

If the purpose of Proposition 14 is to give the Legislature greater flexibility to decide the size and term of state boards, it would make more sense simply to repeal the outmoded two-year limit on terms of office and the special exception for six-year terms for state boards. The Constitution is bloated with similar provisions that define in detail matters best left to statute, yet Proposition 14 would complicate further an outdated provision that already is needlessly complex.

The two-year term limit on appointive offices was established in the 19th century to limit the authority of the government, but it soon became apparent that longer terms often were necessary to promote stability on boards and provide experienced leadership. Proposition 14 would further complicate the current exception by requiring odd-numbered boards, yet still allow even-numbered boards divisible by three if the board was required by the Constitution. The only board to which this provision currently would apply is the Board of Pardons and Paroles. However, another board wishing to retain its even number of members could do so if that board were added to the Constitution, further cluttering and complicating that document.

Proposition 14 would require the Legislature to add or subtract members of state boards in order to conform to this amendment. This unnecessary reapportionment of state boards could disrupt their operations or upset the balance of interests represented on a particular board.

Authorizing agreements to convert separate property to community property

(HJR 36 by Goodman/Harris)

15
Proposition

Texas law recognizes separate property — property held individually — and community property — property held by both spouses jointly — in marriage. Generally, all property acquired during the marriage is considered community property unless proved to be separate property. Separate property includes property owned by a spouse before the marriage or acquired by the spouse by gift, inheritance, or as money damages recovered from a personal injury case. Property purchased during the marriage with funds coming from separate property is separate property. However, income earned from separate property during the marriage generally is considered community property, unless an agreement between spouses makes it separate property. Under Art. 16, sec. 15 of the Texas Constitution, community property may be converted to separate property if both spouses agree.

Texas law allows prenuptial and postnuptial agreements that are made in writing and signed by both spouses. Such agreements may address property rights, including the conversion of community property to separate property, so long as the agreement is not intended to defraud pre-existing creditors. Such agreements are enforceable so long as they are made voluntarily by both spouses, each party received a fair and reasonable disclosure of the property or financial obligations of the other party, and the agreement is not unconscionable under contract law.

Digest

Proposition 15 would amend Art. 16, sec. 15 of the Texas Constitution to allow spouses to agree in writing that all or part of the separate property owned by either or both spouses would become the spouses' community property.

The ballot proposal reads: "The constitutional amendment permitting spouses to agree to convert separate property to community property."

Supporters say

Proposition 15 would allow spouses to agree in writing on whether and how to convert separate property to community property, a process called transmutation. HB 734 by Goodman, which would take effect if voters approve Proposition 15, prescribes the procedures for this conversion.

This amendment would permit the conversion of separate property to community property just as community property may be converted to separate property. Texas spouses would have more freedom in disposing of their separate property and greater flexibility in managing their finances. Texas already allows prenuptial and postnuptial agreements that provide for converting community property to separate property. Proposition 15 would accommodate the desires of some spouses to go the other way and convert separate property to community property.

Under HB 734, the agreement to convert separate property to community property would have to be in writing and signed by both spouses, identify the property being converted, and specify that conversion is occurring. The agreement would have to be enforceable without consideration, meaning that neither spouse would have to receive a benefit in return for the contract to be deemed valid. Simply transferring the separate property to the name of the other spouse would not be sufficient to convert the property without a separate written agreement.

To be enforceable under HB 734, a conversion agreement would have to be made voluntarily and both spouses would have to receive a fair and reasonable disclosure of the legal effect of converting the separate property to community property. The implementing legislation contains standardized “boilerplate” language, which, if included in the agreement, would create a rebuttable presumption that the potential effects of the conversion had been disclosed. That language addresses the possibility of exposure to creditors, the loss of management rights, and the loss of property ownership. An agreement to convert separate property to community property could specify which party had the right to manage the property. Otherwise, the implementing legislation would establish the circumstances leading to sole management or joint management of converted property.

Conversion from separate property to community property would allow spouses to own their property in equal undivided shares. Upon death or divorce, the parties or their estates would be entitled to half of all community property. Allowing this conversion would provide greater flexibility in estate planning. For example, current law allows a \$650,000 deduction from estate taxes upon death. The first \$650,000 of property passed to heirs is not taxed, but money above that amount is taxed. If a couple has a wide disparity in wealth with one spouse owning separately more than \$1 million in property, the spouse could convert all or part of the separate property to community property so that the other spouse owned half of it, thus reducing the size of the estate subject to taxation.

Another potential tax benefit involves the “step up in basis” of property for capital gains purposes. For example, a spouse who bought property originally at \$100 an acre and who sells it for \$1,000 an acre must pay taxes on the \$900-per-acre gain beyond the \$100 “basis” of the property. When the heirs to an estate inherit the property, the basis of the property for tax purposes increases to its value at the time it is transferred, so if the property is sold later at a higher price, the taxable gain is less. Transmutation of the property from separate to community property would provide this same step up in basis.

Current marital property law, including prenuptial agreements, often is concerned with protecting the interests of the wealthier spouse. Allowing the conversion of separate property to community property would provide some benefit to the less wealthy spouse in the event of a divorce. While that could prove detrimental to the spouse who originally owned the property separately, that spouse would have had to enter into a written agreement to convert the property with an understanding of the consequences of the conversion in the event of a divorce.

While property may be passed between spouses by gift without any tax implications, conversion of property from separate to community property would give the separate propertied spouse the right to retain control over the property after it is transferred to the community and to retain ownership in half of the property in the event of death or divorce. The transmutation of property provides the same benefits as a gift by allowing the spouse to obtain a larger financial stake in the marriage, but without completely giving up any rights to the property. In addition, if property was converted from separate to community property and the transferring spouse retained sole managing control over the property, that property would not be available to all creditors of the other spouse, but only to creditors of tort claims.

It is very unlikely that the transmutation of separate to community property would be used to reduce the inheritance of the children of a previous marriage. Those heirs would have their inheritance reduced only if the spouse died without a will. While that may occur in rare cases, transmutation of property most likely would be done as part of an overall estate planning package that would include specific provisions for inheritance to children of a previous marriage.

Texas law generally is moving away from paternalistic restrictions on how individuals handle their own property while retaining necessary safeguards. The 1997 decision by the Legislature and Texas voters to allow home equity lending is a prime example. Existing law allowing conversion of community to separate property, which has been available since 1980, shows that married couples can be trusted to make decisions regarding the division of their property. There is no reason to treat this transaction between spouses differently by requiring separate counsel to advise each spouse. Also, spelling out all the detailed procedures of the conversion process in the Constitution rather than in statute is unnecessary and would require voter approval for every minor modification.

Conversion of separate property to community property is available in every other community property state. Texas should join the ranks of the other community property states in allowing these transactions.

Opponents say

The conversion of separate property to community property could lead to unintended consequences. While in a happy marriage, a spouse may convert separate property to community property, only to regret that decision later when the marriage turns sour. Upon divorce, what formerly belonged to that spouse separately could be divided in half.

Under Proposition 15, a spouse could convert his or her property without full knowledge of the legal effects of such a conversion. Prenuptial agreements that provide for property conversion are required to provide full disclosure of the legal effects to both spouses. While HB 734, the implementing legislation for Proposition 15, does prescribe a legal-effects disclosure clause that could be included in a written agreement to convert property, that clause would be optional. Also, even if included, that clause may not sufficiently cover all potential ramifications of the conversion of property because

of the uniqueness of the particular situation of the married couple. To ensure a complete disclosure, the law should require that each party be represented separately by counsel. Moreover, Proposition 15 would grant broad authority to convert separate property to community property but would include in the Constitution none of the safeguards, which the Legislature could repeal without voter approval.

The principle that underlies community property — part of a long-standing tradition in the Texas Constitution — is that this property be “built up” by both spouses during the marriage. A spouse should be able to share only what is earned during marriage and should be protected from having his or her separate property taken away upon divorce or death, regardless of how that property was used during the marriage. Even though these agreements must be entered into freely, the pressure to convert property may tilt the balance of interests and impel a person who normally would not sign over rights to property to do so in order to please his or her spouse.

There are many other options for transferring separate property to community property, including the gift or sale of the property. While some of those transactions may have tax implications, they could accomplish the final result of equal ownership by the couple. For example, spouses may transfer freely any amount of property by gift to each other, without gift taxes. A spouse wishing to share property with another spouse could give half of the property to the other spouse as a gift. While both would own an equal share separately, that transaction could be just as beneficial for estate planning as community property transmutation would be.

Conversion of property could result in additional liability against the spouse converting the property. A spouse’s separate property generally cannot be touched by creditors to satisfy debts of the other spouse, but if that property were converted to community property, it could be used to satisfy such debts. At the time a conversion was entered into, it might be difficult to predict the possibility of future debts of one’s spouse.

Converting separate property to community property also could be used to reduce the inheritance of children of the transferring spouse’s previous marriage. If a spouse dies without a will, separate property is divided among the children from a previous marriage and the surviving spouse, with only one-third going to the surviving spouse. However, if that separate property were converted to community property, only one-half would be divided, the other half already being owned by the surviving spouse.

Changing county population limits for JP and constable precincts

(HJR 71 by Homer/Ratliff)

Under Art. 5, sec. 18(a) of the Texas Constitution, counties must be divided into precincts from which justices of the peace (JPs) and constables are elected. Each county with a population of 30,000 or more, according to the most recent federal census, must be divided into not less than four and not more than eight precincts. Each county with a population of at least 18,000 but less than 30,000 must be divided into not less than two and not more than five precincts. Each county with a population below 18,000 is designated as a single precinct, but the county commissioners court may divide the county into as many as four precincts. The Constitution provides an exception from these population brackets for Chambers County, which must be divided into not less than two and not more than six precincts.

Generally, one JP and one constable may be elected in each precinct for four-year terms, except in counties where the constable office has been abolished. In counties with a population below 150,000, two JPs must be elected in a precinct that contains a city of 18,000 or more. In a county with a population of 150,000 or more, each precinct may contain more than one JP court, allowing these counties to have as many as 16 JP courts. The U.S. Department of Justice must determine whether any new precinct boundaries meet federal Voting Rights Act requirements.

JP courts handle misdemeanor offenses for which only fines or other sanctions are imposed and that do not involve jail time or imprisonment. They have exclusive jurisdiction over civil cases involving an amount in controversy of \$200 or less and concurrent jurisdiction with county and district courts over most civil cases involving up to \$5,000. In addition to acting as small claims courts, JPs may issue search and arrest warrants, conduct preliminary hearings, serve as *ex officio* notaries, and perform marriages. They act as coroners in counties without a medical examiner. Each county sets the salary for its JPs.

Constables serve as bailiffs for the JP courts, serve court papers, and must attend each justice court held in their precinct. They are local peace officers with general jurisdiction in their home counties over criminal and civil law enforcement matters. Constables can perform any act or service — including serving citations, notices, warrants, subpoenas, or writs — anywhere in the county in which their precinct is located.

In fiscal 1998, Texas had 843 JP courts in operation, and the reporting courts collected revenue totaling \$173.2 million, according to the Texas Judicial Council. Criminal misdemeanor cases, primarily involving traffic offenses, accounted for 90 percent of cases filed in JP courts, and civil cases made up the remaining 10 percent of cases filed.

Digest

Proposition 16 would amend Art. 5, sec. 18(a) of the Texas Constitution to revise county population brackets that determine the number of precincts that counties must

provide for JPs and constables. Counties with at least 18,000 but fewer than 50,000 (rather than 30,000) residents would be required to have not less than two and not more than eight (rather than five) precincts. Counties with a population of 50,000 (rather than 30,000) or more would have to be divided into not less than four and not more than eight precincts.

Proposition 16 also would include Randall County in the current exception provided for Chambers County, requiring Randall County to be divided into not less than two and not more than six precincts.

The amendment also would stipulate that counties divided into four or more JP precincts on November 2, 1999, would remain divided into not less than four precincts.

The ballot proposal reads: “The constitutional amendment to provide that certain counties shall be divided into a specific number of precincts.”

Supporters say

Proposition 16 would give counties with populations between 30,000 and 50,000 flexibility in deciding whether or not to increase the minimum number of JP and constable precincts. Some counties might choose to continue with only two precincts, while others could choose to have as many as eight, if that number were deemed appropriate under local circumstances.

The Constitution now provides that any county with a population exceeding 30,000 must have at least four JP and constable precincts. Without the change proposed by Proposition 16, the results of the upcoming census will require some counties with populations that newly exceed 30,000 to increase the number of JP courts they now support. There is no need to increase the number of JPs and constables in a county unless their services are needed. Some counties now are served well by two JPs and constables who easily can provide services to several thousand additional residents, but those counties will have no choice but to create two more JP precincts that could elect two more JPs and constables, unless Proposition 16 is approved.

Creating two new JP courts would impose a substantial and unnecessary financial burden on some counties. Some county officials have estimated that increasing the number of JP precincts from two to four would cost about \$250,000 a year, a substantial burden for a small county. In cases where the current JP courts can absorb the additional duties with no loss of service, creating new precincts would be a poor investment of tax dollars. The cost of redrawing precinct lines and submitting them to the U.S. Department of Justice for clearance under the federal Voting Rights Act adds to the cost.

According to population projections from the Texas Association of Counties, 11 Texas counties that had fewer than 30,000 residents in the 1990 census may come close to or exceed 30,000 after the 2000 census. Of those counties, Erath, Hood, Hopkins, and Rockwall now have only two JP courts, according to the Texas Judicial Council, and

all would benefit from being able to decide for themselves whether their local needs justified adding two JP courts.

Proposition 16 would give counties greater local control by allowing county commissioners to tailor the number of JP courts to the needs of county residents. County commissioners, who are locally elected and sensitive to local demands, would not keep the number of precincts low in order to save money if a growing population clearly warranted the creation of more precincts.

Counties should not be forced to increase the number of JP courts automatically without considering local circumstances. In some counties, for example, recently acquired computer and communications technology allows JPs and constables to increase their productivity and handle more cases. Counties should have the option of increasing JP court staffs or acquiring technology that could allow courts to handle greater caseloads more efficiently rather than being forced to create additional courts regardless of local conditions or the cost to county taxpayers. Some counties, if required to increase the number of JP and constable precincts, would have to cut compensation or replace full-time positions with part-time ones for existing judges and constables, since there would not be enough work to justify full-time positions for every official required by the Constitution.

Proposition 16 would not require the abolition of any JP courts that now exist, as it would ensure that counties that already had four or more precincts as of the November 2, 1999, date of the constitutional amendments election could not reduce the number of precincts in the county below four. In fact, the amendment would allow counties to increase their number of JP precincts if they chose, because the maximum number of precincts allowed for counties with a population between 18,000 and 30,000 would increase from five to eight. This change also would ensure that five counties that have a population of between 30,000 and 50,000 and, according to the Texas Judicial Council, currently have more than five JPs would not have to reduce that number.

Opponents say

Proposition 16 would allow certain counties to avoid increasing the number of JPs and constables even though population growth justified the need for the services of additional JP courts. If Proposition 16 were approved, certain counties might be tempted to limit the number of JP and constable precincts because of budgetary constraints or local political considerations. The current population requirements for these offices should remain in place until the potential impact of the proposed changes has been studied thoroughly.

The 77th Legislature in 2001 would be much better positioned to make an informed decision on this issue, as the new census data would clarify which counties actually would be affected by population changes. There is no evidence that JPs and constables could take on additional workloads and increased responsibilities without affecting the quality of their services to the public. Currently, many JPs and constables in rural counties must hold other jobs to support themselves and their families, and they often are

on call around the clock and on weekends to serve as coroners and jail magistrates. Population growth clearly increases the demand for these services, which is why the Legislature and the voters in 1983 added to the Constitution this method of increasing the minimum number of JP and constable precincts when county population exceeds a specified level.

Under Proposition 16, counties would not have to pay for additional JP courts until their population reached 50,000, rather than 30,000. This is too large a population for only two JPs and constables to handle, especially since there is no guarantee that counties would add the staff, computers, or salary increases needed to deal with these increased responsibilities.

The Constitution should not be amended simply because officials in a few counties may fear that creating more precincts would be too expensive. JP courts and constable offices exist to serve the public, and their creation should not hinge on how much revenue they can produce or on other budgetary concerns.

Locally elected JPs and constables are often the first officials to whom citizens bring their problems, and they must have a thorough knowledge of local issues. County court judges, JPs, and municipal court judges spend a large amount of time counseling people in their communities, which averts the filing of many cases. It is important that each county have enough JPs to handle this important function. The essence of local control is allowing citizens to exercise their right to choose local elected officials and to have easy access to the lower courts. Approval of Proposition 16 could result in citizens having less access to JP courts and fewer opportunities to elect JPs and constables.

Rather than encouraging local control, this amendment would allow voters in large and populous counties that would not be affected by the proposed changes to decide matters affecting more sparsely populated counties without any consideration or understanding of local needs and issues. The proposal at least should have to be approved separately by voters in the counties it would affect, once census data become available to clarify which counties would be affected.

Other opponents say

Proposition 16 is another example of the type of detail best left to statute rather than being specified in the Constitution. It makes little sense to set in the Constitution arbitrary population brackets for the number of JP precincts in each of the state's 254 counties rather than leaving such matters to local discretion. When there is some legitimate reason for using population brackets, the Legislature should be able to adjust the brackets to reflect population changes after each census rather than asking voters throughout the state to decide on constitutional changes affecting only a few counties.

Revising Permanent University Fund distribution and investment

(HJR 58 by Junell/Ratliff)

17
Proposition

The \$7 billion Permanent University Fund (PUF) was established by Art. 7, sec. 10 of the Texas Constitution to provide perpetual support for the University of Texas (UT) and Texas A&M University systems from the state's land and mineral wealth. The PUF was established with an initial endowment of 2.1 million acres of land, mostly in West Texas. After oil was discovered on the land in 1923, mineral income became the cornerstone of PUF funding. Today, however, investment income is the biggest factor in the fund's continuing growth.

The PUF is used to back bonds for capital improvement projects. The UT System may issue bonds totaling up to 20 percent of the book value of the PUF to finance capital improvements at the UT schools supported by the PUF. The A&M System may issue bonds for up to 10 percent for its schools supported by the PUF.

Art. 7, sec. 18 requires that the dividends, interest, and other income from the PUF, minus administrative expenses, be distributed to the Available University Fund (AUF). The principal of the PUF, including unrealized and realized capital gains, may not be distributed. Capital gains are the appreciation in the value of fund assets, such as an increase in the share price of stock, while dividends, interest, and other income are the earnings received by the fund.

The AUF is used to pay the bond debt for capital improvement bonds backed by the PUF. The Constitution dedicates two-thirds of the AUF to support UT System schools and one-third to support A&M System schools. Any funds remaining after paying debt service on PUF bonds is used for system administration and for excellence programs for UT-Austin, Texas A&M-College Station, and Prairie View A&M University.

The PUF, along with the Higher Education Fund (HEF), created in 1984, and some \$1 billion in tuition revenue bonds approved during the past decade represent the basic resources for capital spending used by Texas' public general academic and health-related institutions of higher education. Some schools in the UT and A&M systems are supported by the HEF rather than the PUF. The institutions supported by the PUF include:

- UT system institutions at Arlington, Austin, Dallas, El Paso, Permian Basin, San Antonio, and Tyler;
- UT health science centers in Houston, San Antonio, and Tyler;
- the UT Southwestern Medical Center at Dallas;
- the UT Medical Branch at Galveston;
- the UT M.D. Anderson Cancer Center;
- Texas A&M University, including its medical college and agencies, including the Texas Forest Service, Texas Agricultural Experiment Stations, Texas Agricultural Extension Service, Texas Engineering Experiment Stations, Texas Transportation Institute, and Texas Engineering Extension Service;
- Prairie View A&M, including its nursing school in Houston;

- Tarleton State University; and
- Texas A&M-Galveston.

Under Art. 7, sec. 11b of the Constitution, the UT System board of regents invests PUF assets using the standard of how “persons of ordinary prudence, discretion, and intelligence,” exercising the judgment and care under then-existing circumstances, would acquire and retain assets for their own account, not for speculation but for permanent disposition of their funds and considering probable income as well as the probable safety of their capital.

Digest

Proposition 17 would amend the Texas Constitution to allow the UT System board of regents to determine annual PUF distributions to the AUF based on the total return on all PUF investments, including a limited portion of capital gains. Proposition 17 would require the board to make distributions from the PUF to the AUF in a manner that would:

- cover no less than the amount needed to pay the amount due on bonds and notes pledged against the PUF’s earnings;
- preserve the purchasing power of the PUF for any 10-year period;
- provide the AUF with a stable and predictable stream of annual payments; and
- provide that annual distributions not exceed 7 percent of the average net fair market value of PUF investment assets, except as needed to pay the amount due on existing bonds and notes.

A temporary provision, expiring January 1, 2030, would require that distributions from the PUF to the AUF not impair any obligation created by the issuance of bonds and notes before January 1, 2000. It would require an annual distribution from the income, investment returns, or other assets of the PUF to the AUF in an amount sufficient to pay at least the principal and interest due on those bonds.

Proposition 17 also would allow the UT System board of regents in managing PUF assets to invest under a broadened “prudent investor” standard. It would allow investments that a prudent investor exercising reasonable care, skill, and caution would acquire or retain, taking into consideration the investment of all assets of the fund rather than a single investment.

The ballot proposal reads: “The constitutional amendment relating to the investment of the permanent university fund and the distribution from the permanent university fund to the available university fund.”

Supporters say

Proposition 17 would update the distribution and investment policies under which the PUF and the AUF operate. The Texas Constitution now mandates the distribution of all interest and dividend income to the AUF and prohibits the distribution of realized

and unrealized gains, all of which must be retained in the PUF. The amendment would allow distribution to the AUF of a portion of PUF capital gains but would restrict such distributions to preserve the PUF corpus. It also would provide more flexibility for fund managers by granting broader investment authority to enhance PUF assets.

PUF income has failed to maintain its purchasing power during a period when demands on the PUF have been increasing. Interest rates, along with oil and gas royalties, have declined over the years. PUF earnings have not increased enough to support the level of new bond issues required to support capital needs.

Since 1992, the UT System has restricted the issuance of new PUF bonds to finance construction at UT institutions, except for critical repairs and equipment. UT System general academic institutions are at a serious economic disadvantage, estimated at \$24 million to \$25 million per year, in their ability to meet their capital needs. Also, the system will face a serious problem of deferred maintenance in coming years, estimated at \$29 million for health-related institutions and \$30 million for UT-Austin alone.

Endowment policies generally recognized across the nation allow distributions to equal average total investment return after inflation. Proposition 17 would provide the framework for a similar policy for the PUF. According to the Legislative Budget Board, voter approval of the amendment would allow distributions to the AUF to increase by \$33.6 million in fiscal 2000 and by up to \$49.8 million annually by fiscal 2004.

The constitutional limitations were established at a time when mineral income was the major source of income growth for the fund and the only eligible investment was in fixed-rate bonds. The Constitution now ties the hands of the fund managers, preventing them from taking advantage of total-return investment strategies used by other fund managers. For example, PUF purchasing power could have been preserved more effectively and efficiently if some income from the PUF had been reinvested during the 1980s and if some capital gains had been expended during the 1990s.

Management professionals and Texas' public universities endorse the investment strategies that Proposition 17 would authorize. Financial strategists say most higher education institutions nationwide, including Harvard, Yale, the Massachusetts Institute of Technology, Baylor University, and the University of California, use the total-return strategy for endowment fund investments.

The Office of the State Auditor in a 1996 report warned that constitutional restrictions on the use of capital gains and ordinary investment income could impair fund management. The auditor suggested that "a constitutional amendment eliminating those restrictions would provide more flexibility in attempting to maximize long-term growth in both the corpus and the distributions from those funds."

Additional revenue from increased distributions could be used to help eliminate capital funding inequities between institutions in the PUF and those in the HEF. When the HEF was created in 1984 as an endowment funded by general revenue appropriations, the intent was to make sure that all public universities in Texas received equal support for capital funding. However, several additional institutions were made dependent on the PUF for their capital funding when the Constitution was changed in 1984, put-

ting a strain on PUF resources. Today, the institutions in the HEF have an advantage over PUF institutions when it comes to capital spending.

Although some interest has been expressed in a more complex overhaul of the PUF by transferring some institutions into the HEF, this is not necessary. The changes made by Proposition 17 allowing larger distributions to the AUF and modernized investment standards for the PUF would go far toward expanding support for all the institutions that now depend on the PUF.

Opponents say

Any capital gains from PUF investments should be reinvested in the PUF rather than distributed to the AUF. A conservative investor should err on the side of preserving the corpus of the endowment, and the only way to ensure that practice absolutely is to retain all capital gains. Proposition 17 could make the PUF schools overly dependent on a continuing flow of capital gains that could be disrupted or greatly diminished by an extended downturn in the stock market and could allow speculative investment that could threaten PUF assets.

Seven more institutions were added to the PUF in 1984. These institutions account for only one-fourth of the total size of physical plant dependent on PUF funding, but they have received almost half of the PUF bond proceeds distributed since 1986. Moving some of these institutions out of the PUF into the HEF would help eliminate the dilution of AUF funding, which now is spread among too many schools, and avoid having to distribute capital gains that should be retained as part of the corpus of the PUF.

Other opponents say

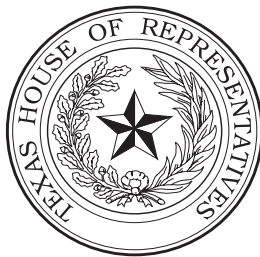
Proposition 17 would be only a partial fix, not a long-term solution to the inequities in higher education funding. Not all Texas schools benefit from the PUF. Even within the PUF, most institutions receive support only for capital improvements, while UT-Austin and the Texas A&M campuses at College Station and Prairie View receive additional funding to improve educational excellence, such as by enhancing faculty salaries. If PUF distributions to the AUF are to be increased, then all public higher education institutions in Texas, or at least all the institutions now under the PUF, should benefit from educational excellence programs.

Notes

Sections 1.01, 1.06, and 4.01(1) of HB 3211 by McCall would revise the Education Code to implement the provisions of Proposition 17, contingent on its approval by the voters.

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