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Supreme Court of Texas.
Harry Holmes, II, Independent Executor of the Estate of Thomas J.
Holmes, Sr.,
Deceased and as Trustee of any Trust named as a legatee in the Will of
Thomas
J. Holmes, Sr., Deceased Petitioner,
v.
Douglas G. Beatty, Independent Executor of the Estate of Kathryn V.
Holmes,
Deceased, Respondent.
Nos. 07-0784, 07-0785.

January 14, 2009.

Appearances:

Richard P. Hogan, Jr., Hogan & Hogan, L.L.P., Houston, TX, for
petitioner.

Jack W. Lawter, Jr., Lawter & Lawter, Houston, Texas, for
petitioner.

Joseph S. Horrigan, Horrigan & Goehrs, L. L. P., Houston, TX, for
respondent-appellant-plaintiff, Douglas G. Beatty.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet
O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Phil Johnson
and Don R. Willett, Justices.

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CHIEF JUSTICE JEFFERSON: The Court is ready now to hear argument
in 07- 0784 and 07-0785, Harry Holmes v. Douglas Beatty.

MARSHALL: May it please the Court, Mr. Hogan will present argument
for the Petitioners. Petitioners have reserved five minutes for
rebuttal.

ORAL ARGUMENT OF RICHARD P. HOGAN, JR. ON BEHALF OF THE PETITIONER

ATTORNEY RICHARD P. HOGAN: (unintelligible) Chief Justice and may
it please the Court. There are many interests that come together in
this Appeal. Married couples have an interest in seeing that their
written agreements are enforced. Securities industry has an interest in
uniformity of its forms and nomenclature. The legislature has an
interest in seeing that its statutory language is given effect and the
general public's will as reflected in the Constitution is also an
important interest. All those interests are aligned in getting effect
to written agreements from which a married couple decides that marital
property can be given to the surviving spouse when one of them dies

without going to court and without having to probate a will. The accounts and the securities at issue in this case are survivorship property. First, the written agreements signed by Mr. and Mrs. Holmes meet the requirements of Sections 451 and 452 of the Probate Code. Section 452, as enacted by the Legislature after a Constitutional Amendment allows spouses to create a right of survivorship without the use of any particular words or any magic language.

JUSTICE NATHAN L. HECHT: But it does make it awfully easy.

ATTORNEY RICHARD P. HOGAN: Yes it does.

JUSTICE NATHAN L. HECHT: Um, is it the bank's fault that they don't follow the statute or why is this so complicated?

ATTORNEY RICHARD P. HOGAN: Well, it's really not complicated, Justice Hecht.

JUSTICE NATHAN L. HECHT: I mean, why don't they just pick out one of these phrases and stick it in there and then there won't be any question about it?

ATTORNEY RICHARD P. HOGAN: Well that would be easier, Judge, but it's not as if Raymond James flips to the Texas Probate Code and decides that that's the way that they're going to write their forms. We believe that the depository institutions in this case have nonetheless reflected a clear intent that this should be survivorship property.

CHIEF JUSTICE WALLACE B. JEFFERSON: But these two could have made it very clear just by following the form. I mean, there is a way in which they could either strike out B or, you know, make it very clear they wanted a joint, uh, tenancy with right of survivorship and they didn't do that. Why shouldn't that decide the case?

ATTORNEY RICHARD P. HOGAN: Your Honor, you're referring to the Dane Roucher Agreement?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

ATTORNEY RICHARD P. HOGAN: That Agreement has two possible choices. It has either a survivorship choice or a percentage interest choice. Now both of those are survivorship choices. In the Dane Rauscher Account, the parties clearly signed on the form that said that it was, it had an interest in survivorship property included in the account. To, to choose the second option, which would have allowed them to give less than 100% of the property to one of the spouses or to someone else, that would be sur--a survivorship option, they would have had to have filled out the blanks on that form. They did not do so and under the handout, which we've given to the Court, that Agreement is contained under Tab 3. If you look at the second page of the Agreement in the Dane Rauscher Account, the very last sentence on that form says, "If Paragraph B is retained, fill in the names and percentages amounts of the interests." They did not retain Paragraph B because they didn't fill out the percentages. Now, it does violence to the parties' intent to take this Agreement under Tab 3, which is entitled, "Thomas J. Holmes and Kathryn V. Holmes, JT 10," and say it is not a survivorship interest. JT 10 is known throughout the industry, throughout all of the practicing people in the securities field as Joint Tenancy containing a right of survivorship.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you can have a Joint Tenancy without a right of survivorship.

ATTORNEY RICHARD P. HOGAN: No, Your Honor, you can't.

CHIEF JUSTICE WALLACE B. JEFFERSON: Cannot?

ATTORNEY RICHARD P. HOGAN: No. There is a, a type of property called Tenancy in Common, but JT 10 is defined in the Securities Association Handbook and the Securities Transfer Handbook as JT 10. Let's look it as an example of that, if you would, at Tab 4 of the

handout. Now this is a stock certificate that was one of the certificates or securities issued out of the Raymond James account and it's titled "Thomas J. Holmes and Kathryn V. Holmes JT 10." If you flip to the second page of that certificate, this is the reverse side, you'll see that the legend is contained on the back of the certificate consistent with the way it's used throughout the industry, indicate that JT 10 means as joint tenants with right of survivorship and not as tenants in common.

JUSTICE PHIL JOHNSON: Does the industry usage indicate anything about the intent of the parties?

ATTORNEY RICHARD P. HOGAN: Yes, Your Honor, it does. Throughout these agreements, the parties in signing the agreements agreed to bind themselves to the customs and usages in the industry. In the Raymond James account, they signed an agreement that said that they understand and agree to be bound by the customs and usages of the applicable exchange. In the Dane Rauscher accounts, again we see that the JT 10 language, which is consistent with the way the industry uses the language, is survivorship language. The First Southwest Account contains this agreement that all transactions shall be subject to the Constitution rules, regulations, customs and usages of the exchange and likewise the principal financial group agreement says that it should be subject the regulations and customs of exchanges, markets, clearing houses and the National Association of Securities dealers and that's typical. With a 50- state operation, uh, a company like Raymond James or First Southwest or any of these other companies don't want to have to have separate forms, one for Texas, one for Missouri, one for Kansas. What they expect is and consistently with the kinds of certificates issued as in this case that the industry nomenclature will be followed and that when people sign up for these accounts, they've agreed to do that.

CHIEF JUSTICE WALLACE B. JEFFERSON: 452, that section is part of the Uniform Probate Code correct? So is there a majority or minority trend on how to analyze or are have these facts been presented in other states?

ATTORNEY RICHARD P. HOGAN: No, Your Honor, not that we could tell. There are cases in other states and we cite a couple of them in the brief in which abbreviations are consistent with the intent of the industry. For example, the term JTWROS is a term in these, some of these agreements. JTWROS as, as this Court did in the A. G. Edwards case, stands for a phrase that's permissible under 452 to create a survivorship account. JTWROS stands for joint tenancy with right of survivorship and as in the Raymond James Account, we've included this form under Tab 2. That's the kind of phrase that 452 says you can use to create survivorship language. And what 452 says, and this is quite important, we think, in permissive language is that the agreement shall be effective without including any of these phrases. So it's not simply a matter of flipping to that section of the Probate Code, cutting and pasting the phrase into the agreement.

JUSTICE SCOTT A. BRISTER: Whose intent do we look to is it the brokers or the beneficiaries?

ATTORNEY RICHARD P. HOGAN: Your Honor, we submit they're the same intent. Obviously, you would look to the intent of the spouses.

JUSTICE SCOTT A. BRISTER: I mean, WROS, if we stop people on the street, what do you think JTWROS is, 99 out of 100 are going to have no idea. Um, now if it's in a right of survivorship lawsuit, it jumps out at us and, of course, of course, we all know what it means and probably in the brokerage industry everybody probably knows what it means, but

how could we be sure and I'm, it's interesting, the statute just says there has to be an agreement. It doesn't really say whose intent we have to have. Uh, could parties sign one of these not really having ever thought about whether it was right of survivorship or what would happen in case one of them died and not the other and have it still be binding because this language is in there?

ATTORNEY RICHARD P. HOGAN: Well, I suppose it's possible that somebody wouldn't know what those initials mean anymore than people wouldn't know what FOB means or COD means, but in a Uniform Commercial Code Contract, if it is says FOB, you don't have to spell out "freight on board" to know that the risk of loss passes at the time that the cargo's loaded or COD means, you know, "care of delivery" and it's, you pay for it when it gets there. We give effect to those terms because those terms are consistently used throughout the, the country and what we know that these people meant in this case, we have sophisticated investors and in the Raymond James Agreement, as you'll see behind Tab 2 of the handout, they've been investing in securities since 1940. Their occupation is listed as investments. We know that these people did both ways. They sometimes created accounts that had tenants in common effect and would have created community property accounts, but oftentimes as is reflected in this case, the dispute about this property is survivorship property. Because the clear intent of the parties says so, it says so consistent with the way that the securities industry says that it's created and in a permissive way, the legislature has said that's okay, that you can do it the way that Mr. and Mrs. Holmes wrote and signed these agreements. Well, obviously, they didn't write them, but they signed the agreements that the industry said that they should sign in creating survivorship accounts. The property went into these accounts as survivorship property because the account agreements governed the property when they were in the accounts. When those certificates were issued out of the accounts, they invariably said JT10.

CHIEF JUSTICE WALLACE B. JEFFERSON: But JT 10, okay, there, you can't have tenants in common and that's without the right of survivorship, right?

ATTORNEY RICHARD P. HOGAN: That's correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: And when you look at 452, all of these examples of, um, where, where the rights of survivorship are, arc, um, the parties agree to it, they have the term "survivorship" in them, 1 through 4, with right of survivorship become the property of the survivor, surviving spouse shall pass. So why shouldn't we read JT 10 as merely a tenants, a tenancy in common. I know the industry standard, but, uh, I, I wouldn't have done that, uh, before, if, if that's the case before this.

ATTORNEY RICHARD P. HOGAN: Because, Your Honor, we hold people bound to the agreements that they sign. We don't let people escape the effect of the agreement as the, as a term in the agreement, uh, is defined simply by saying well, I didn't know that that's what it meant. What if somebody came in and said well the initials JTWROS don't mean anything to me. It's an invitation to fraud for somebody to sign that agreement, not ask a question about what JTEN means, which could have been explained easily.

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm just trying to analyze though, compare it with the Probate Code itself and, and it seems like, you know, there might be a legislative intent that says at least you have to have some concept of survivorship in the, in the term or the agreements that you're signing.

ATTORNEY RICHARD P. HOGAN: Well, well you do, Your Honor, and what we say is and what we submit the Court ought to do is use ordinary contract interpretation principles to interpret what a term in the agreement means. If you had to go to Securities Association Transfer book and look up a definition of JT 10, which you can do in any legal dictionary in this country and find out that JT 10 means it has survivorship qualities. If you had to that to explain the term that's in the agreement, if you had to look up in the dictionary or in the securities industry and see what JT 10 means if it wasn't on the flipside of the certificate defined as it is in this Texaco certificate, if you had to do that, that should be permissible in this instance because the legislature said you don't have to use those magic words. It gave examples. It did not give as it did in Section 439 of the Probate Code for people who are not married, uh, a specific magic language way to do it. In this instance, the legislature in Section 452 said, "The agreement shall be effective without including any of those phrases."

JUSTICE NATHAN L. HECHT: It's not clear to me whether you think, uh, 452 and 439 should be applied consistently or differently.

ATTORNEY RICHARD P. HOGAN: Your Honor, we think that they can be applied consistently in one sense, but differently in another sense.

JUSTICE NATHAN L. HECHT: (unintelligible) clear.

ATTORNEY RICHARD P. HOGAN: It's probably not very well said and I apologize for the confusion, but it's consistent to say that the legislative intent is given effect in both sections, but it is a different legislative intent because the policy behind allowing spouses to do something is far different than in the example that Your Honor had in, in the, uh, in the Stauffer v. Henderson case in which there were two sisters involved, or where there are unmarried people involved, it's different and the legislature said say these magic words and that's all you can do to create a survivorship right when people aren't married, but when people are married, it's natural and it's normal for the wife, if the husband dies first, for the wife to get that property and not have to go to probate court and probate a will to get the assets that were community assets in the marriage to survive to the spouse. In Section 46 of the Probate Code, we know that the legislature has said that Part 3, uh, of the Probate Code Chapter 11 apply to spouses and that's for a very good reason for this exact kind of case in which the survivor ought to get survivorship assets and, and the legislature says do it differently if you're married and it does it in a permissive way, it's not required in specific terms as would be required in Section 439. Now all that you have to do to interpret these as ordinary terms in the industry is to look at ordinary contract interpretation principles, which this Court does all the time in wills, in statutes, in decds. If you look at the industry norms and you apply consistent contract interpretation principles, we submit that this Court ought to decide that this is survivorship property, that it should have passed to Mr. Holmes at the death of Kathryn and we would ask the Court on that basis to reverse in part the court of appeals.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counselor. The Court is ready to hear argument now from the Respondent.

MARSHALL: May it please the Court, Mr. Horrigan will present argument for the Respondent.

ORAL ARGUMENT OF JOSEPH S. HORRIGAN ON BEHALF OF THE RESPONDENT

ATTORNEY JOSEPH S. HERRIGAN: Good morning. May it please the Court, the key to this case, two keys, number one ownership in the survivor there has to be some indication here that the survivor takes an ownership interest in the property. That can be vest in, belong to, uh, passed to, he gets it and he owns it, but we have to show that what it is that we're talking about when we use the term "survivorship." The survivor obtains the property in an ownership right. The second key to this case in my mind is fraud. We have to be extremely careful when we are interpreting or tinkering with this legislation that resulted in 452, 451 and 452 in 450 and in 439A that we do not open the door to fraud by one spouse against another spouse bearing in mind that a husband and wife are in a fiduciary relationship. This is why in 451 and 2, we talk about a written agreement signed by both spouses. Now, let's take, since the one, the one account that the court of appeals did not agree with me on and I have my own petition for review before the Court, let's talk about Raymond James. Joint (WROS). The Court, that's the ke-that's the account where there were 14 different choices and the court of appeals said well, you checked joint WROS, therefore and there were other accounts, there were other, uh, uh, names there, one of which was Tenants by the Entirety, one of which was, uh, Tenants in Common, one of which was Joint Community Property, court of appeals says they didn't check any of those others, ergo it had to be Joint Tenants with Right of Survivorship, that's what Joint WROS meant. That assumes that laymen, people on the street know what those initials mean.

JUSTICE SCOTT A. BRISTER: What else, what else could they mean?

ATTORNEY JOSEPH S. HERRIGAN: They could mean Joint Tenants without Right of Survivorship. They could mean Joint Taxpayers withhold Registration of Securities.

JUSTICE DALE WAINWRIGHT: Mr. Hogan says that the first option doesn't exist in the law, joint tenancy without right of survivorship.

ATTORNEY JOSEPH S. HERRIGAN: Joint tenancy. My, my response to that is, I believe it does, in, at least in some jurisdictions. I think it means the same thing as tenants in common. My, my other response is how in the world are laymen supposed to know that.

JUSTICE DAVID M. MEDINA: Well, well, how in the world are laymen supposed to know that when they execute a contract and there's a little clause that says you're going to be bound by an arbitration agreement that some years later say well, I don't know what that means. The Court consistently holds that, well it's too bad. How is this any different?

ATTORNEY JOSEPH S. HERRIGAN: Well, I think the, I think when you have a statement that you're going to be bound by arbitration; I think the word "arbitration" means arbitration.

JUSTICE DAVID M. MEDINA: To who? Who reads those documents and if you want this car, you sign it. If you want this house, you sign it.

ATTORNEY JOSEPH S. HERRIGAN: I'm glad you raised it, Justice Medina. In the Raymond James client agreement, which the other side says we must look to, there is an arbitration provision saying any disputes are going to be decided by arbitration and they say that the, that the client agreement really was an agreement between the husband and the wife. We say it was agreement between the brokerage house on the one hand and the husband and wife as one entity on the other. Now, if, if arbitration governs, why are we here?

JUSTICE SCOTT A. BRISTER: Because both parties can waive arbitration.

ATTORNEY JOSEPH S. HERRIGAN: But no question, nothing was raised about arbitration. The arbitration provisions.

JUSTICE SCOTT A. BRISTER: Right, like any other, if both parties agree impliedly or expressly after the fact, they can skip it, but the question is what, what would, uh, I understand it could have been more clear, um, but you've got 14 options and you pick one for WROS, first you say joint tenant can be the same as tenant in common? Seems to me, just if I hadn't been to law school, tenant in common separates two people in on one thing. Joint tenancy sounds more like they do something like a joint venture together if I was just a business person. So they sound different. Uh, can you give us anything specific of where someplace joint tenancy exists that is without right of survivorship?

ATTORNEY JOSEPH S. HERRIGAN: I can't tell you.

JUSTICE SCOTT A. BRISTER: Case, statute, nothing?

ATTORNEY JOSEPH S. HERRIGAN: No, but I, I can tell you that JTEN is not what is contemplated by the legislature in 451 and 452 nor in 439A because JTEN does not tell a layman that we're talking about survivorship.

JUSTICE SCOTT A. BRISTER: But the back of the certificate defines JTEN.

ATTORNEY JOSEPH S. HERRIGAN: Right.

JUSTICE SCOTT A. BRISTER: As joint tenants with right of survivorship.

ATTORNEY JOSEPH S. HERRIGAN: But what about the back of the certificate? Is there a written agreement between the spouses? No. Did both sides, do both parties sign that agreement, sign that stock certificate if they didn't know?

JUSTICE SCOTT A. BRISTER: Why, if they both sign it, why isn't it an agreement between the spouses?

ATTORNEY JOSEPH S. HERRIGAN: I'm sorry.

JUSTICE SCOTT A. BRISTER: If they both sign it, why isn't it an agreement between the spouses?

ATTORNEY JOSEPH S. HERRIGAN: But they both didn't sign the stock certificate.

JUSTICE SCOTT A. BRISTER: Well they signed the, okay, we'll take, let's, first with the account agreements, once things they did, they both signed that and that's agreement between the spouses.

ATTORNEY JOSEPH S. HERRIGAN: Right.

JUSTICE SCOTT A. BRISTER: And if then the account officer purs--- from money in the account they buy the stock and they hand the stock to them, why isn't that governed by the account agreement?

ATTORNEY JOSEPH S. HERRIGAN: Why is it not?

JUSTICE SCOTT A. BRISTER: Yes.

ATTORNEY JOSEPH S. HERRIGAN: Because the certificates came out of the brokerage house. They were withdrawn from the brokerage house by Mr. and Mrs. Holmes. When they were in the brokerage house, I think it's arguable that they were bound by the agreement assuming the agreement was clear.

JUSTICE SCOTT A. BRISTER: So if me, if me and, what if me and my spouse have an agreement where we're going to buy something with right of survivorship and then I go out and buy it and take title myself. I mean, why does that make the agreement say and it's taken, what I'm going to do is with right of survivorship, why does that take it out of the agreement?

ATTORNEY JOSEPH S. HERRIGAN: This is the very reason that I talk about the danger of fraud. Think about it a minute. Husband and wife have a, have some certificate, have stock in street name at a brokerage house. They decide that they're going to withdraw that stock and do

whatever they want to do with it. So they agree that that's what they're, what's going to happen.

JUSTICE SCOTT A. BRISTER: What do you mean withdraw that stock?

ATTORNEY JOSEPH S. HERRIGAN: I mean tell the brokerage house folks we would like to have our stock certificates out of that agreement.

JUSTICE SCOTT A. BRISTER: So the stock certificate in a street name is handed to them. I don't see where that changes it. I agree with you if the stock brokerage calls up somebody and says cancel this shares and issue the shares to their names. That seems to me like that would take it out of the agreement, but if we got it in a street name or joint ten, whatever we've got it and the company's holding it and it was bought pursuant to this account agreement, when they hand it to them, why does that take it out of the agreement?

ATTORNEY JOSEPH S. HERRIGAN: First of all, it wasn't in the form of a certificate when it was in the brokerage house. It was in a street name. So they had to issue a stock certificate in a form that was different than what was contemplated under the or what was stated under the account agreement. Bear in mind in the Raymond James, it was joint (WROS) whereas when they issued the stock, on the face of the stock certificate, he was JTEN. Where the, some of those certificates had a legend on the back defining JTEN, in it, ETEN. Some of them did, didn't. If I may, I'd like to speak to Justice Brister's question about what else could you find in those 14 choices? I'd invite the Court to look up the term "tenants by the entirety" in Black's Law Dictionary. What it says is it's just exactly like joint tenants with right of survivorship except it is peculiar to a husband a wife. That's the way it's defined in Black's Law Dictionary. Now, are laypeople supposed to know that tenants by the entirety is a term that is not permissible under Texas law.

JUSTICE NATHAN L. HECHT: But it looks to me as if what really happens is that somebody goes to the banker or broker or whoever it is and says this is what I want to have happen and it's likely, isn't it, that the banker checks the box, uh, based on what he's been told.

ATTORNEY JOSEPH S. HERRIGAN: I don't think it's likely that the banker checks the box. I think it is extremely likely that even the banker doesn't know what it is that is being determined when that account agreement is signed. I, I went to a bank the other day, well not the other day, but several months ago, asked for an, asked for an account in the joint names of my wife and myself. I just wanted her to have signing privileges on my account. What I got by way of a form was a Survivorship Account Agreement. Now I had enough, uh, uh, legal knowledge to know that's not what I wanted.

JUSTICE SCOTT A. BRISTER: Isn't that what most people want?

ATTORNEY JOSEPH S. HERRIGAN: Oh, I don't think so.

JUSTICE SCOTT A. BRISTER: Most, most people, you're married to somebody short or long period of time. It's your joint account like a bank; it's where you keep all your money, all your community property. One of them dies; they expect the other one not to get any of it?

ATTORNEY JOSEPH S. HERRIGAN: Well when you.

JUSTICE SCOTT A. BRISTER: That's just the opposite. If, the whole idea of having both of you sign on is when you like die, you expect they can still use the account right?

ATTORNEY JOSEPH S. HERRIGAN: Well you may or may not because bear this in mind, Your Honor, number one, it wreaks havoc with estate planning.

JUSTICE SCOTT A. BRISTER: I know lawyers don't like it. Of course not.

ATTORNEY JOSEPH S. HERRIGAN: And, but the.

JUSTICE SCOTT A. BRISTER: But most people don't want to hire a lawyer when they open a bank account. They want this to be quick and cheap and not pay any lawyers' fees and isn't that, if that's what most of them want, isn't that why we passed this Amendment to the Constitution because that's what most people want.

ATTORNEY JOSEPH S. HERRIGAN: I think the Court is imposing its knowledge respectfully on what most, of what some folks want and some folks don't.

JUSTICE SCOTT A. BRISTER: Why would they have amended the Constitution? Before, the rule before the Constitutional Amendment was exactly what you say, it's got to be very, very clear. It's got to say this precisely, but they amended the Constitution for some reason and clearly they amended it, you'd agree, to make it easier for spouses to leave right of survivorship accounts.

ATTORNEY JOSEPH S. HERRIGAN: Agree with that.

JUSTICE SCOTT A. BRISTER: So that has to be because they thought most people wanted to do that didn't they?

ATTORNEY JOSEPH S. HERRIGAN: No, I think it's because they thought some people and maybe most people found this to be a convenient way to do things. Bear in mind that 50% of the marriages today end in divorce.

JUSTICE SCOTT A. BRISTER: Do you?

ATTORNEY JOSEPH S. HERRIGAN: And we got children by prior marriages here.

JUSTICE SCOTT A. BRISTER: That's not the.

ATTORNEY JOSEPH S. HERRIGAN: That's what Mrs. Holmes was trying to do in her will.

CHIEF JUSTICE WALLACE B. JEFFERSON: Do you agree that, that it is an industry standard to use JTWR0S?

ATTORNEY JOSEPH S. HERRIGAN: An industry standard?

CHIEF JUSTICE WALLACE B. JEFFERSON: That it's common in bank accounts and, and some of these brokerage accounts?

ATTORNEY JOSEPH S. HERRIGAN: No, I agree that that is one of the things that, that, that people, that companies in the financial industries use.

CHIEF JUSTICE WALLACE B. JEFFERSON: And, and the reason I asked that is if we were to say that doesn't establish a right of survivorship, I'm just thinking about all the contracts and agreements that are out there today where that was the intent where two lawyers go into a bank and they see JTWR0S and know exactly what it means and they sign thinking that if I die, it's going to go to my wife.

ATTORNEY JOSEPH S. HERRIGAN: Right.

CHIEF JUSTICE WALLACE B. JEFFERSON: And, uh, if we hold otherwise, that's going to upset, it seems to me, a lot of, uh, of intended, uh, survivorship contracts.

ATTORNEY JOSEPH S. HERRIGAN: Well I, respectfully, submit that that the Court needs to take into account that that is not what a lot, that does not comply with 452 and, respectfully, it is not what we can say a husband and a wife necessarily want. The burden of proof here and Justice Brister touched on it when he talked about amending the Constitution, the burden of proof here is not on the, us. It is on the folks that are trying to establish right of survivorship. That's the exception to the rule.

JUSTICE DALE WAINWRIGHT: Now precisely why does the JT 10 language not satisfy 452?

ATTORNEY JOSEPH S. HERRIGAN: Because it does not use, does not give the customer any hint of survivorship. It does not say anything

about the property vesting in, belonging to, going to, owner, owned by. It says nothing like that.

JUSTICE DALE WAINWRIGHT: And what about the example of a contract FOB?

ATTORNEY JOSEPH S. HARRIGAN: Well, I think, I think IRA is common knowledge. I think FOB, you ought to know it. You and I know.

JUSTICE DALE WAINWRIGHT: That's, that's a good point. We ought to know it.

JUSTICE PHIL JOHNSON: Why would you ought to know FOB and you ought not to know JTROS?

ATTORNEY JOSEPH S. HARRIGAN: Because I think it's a legal term that that is not common knowledge to a customer of a brokerage house.

JUSTICE PHIL JOHNSON: Well there's some.

ATTORNEY JOSEPH S. HARRIGAN: You and I know what.

JUSTICE PHIL JOHNSON: Well if someone signs a contract, he says we're just using ordinary contract principles on this and if ordinary contract principles, you incorporate the definit—you can incorporate definitions can you not? You use FOB and say see the definition. Say we have an insurance policies that everybody has. See and he says we just use ordinary contract principles. You're talking about everybody knows or everybody doesn't know. It seems to me like why don't we just look at the contract as Counsel says?

ATTORNEY JOSEPH S. HARRIGAN: Here's the problem, respectfully, with ordinary contract principles. If you use ordinary contract principles and if you have JTROS, for example, that in my mind raises an ambiguity and ordinary contract principles would say let's bring in extrinsic evidence of intent so that we can resolve this ambiguity.

JUSTICE DAVID M. MEDINA: It sounds like that's what you are more or less concerned, maybe I'm wrong.

ATTORNEY JOSEPH S. HARRIGAN: I'm sorry, Your Honor.

JUSTICE DAVID M. MEDINA: You said that that's what Ms. Holmes was trying to do in her will, but she had extra children and so you're asking us to look beyond the contract there.

ATTORNEY JOSEPH S. HARRIGAN: I'm looking at the Will. The Will passes her property to her children by her first marriage.

JUSTICE DAVID M. MEDINA: They have all these documents to consider.

ATTORNEY JOSEPH S. HARRIGAN: I'm sorry.

JUSTICE DAVID M. MEDINA: Are we considering her Will or these documents and the terms?

ATTORNEY JOSEPH S. HARRIGAN: Well we're considering her, I brought her Will up to show that it is not necessarily the way people want to pass their property, i.e., to their surviving spouse.

JUSTICE DALE WAINWRIGHT: Is there any ambiguity in the, in the law of what JTROS means?

ATTORNEY JOSEPH S. HARRIGAN: Well, I think, I think it's a, yes, I think there is ambiguity.

JUSTICE DALE WAINWRIGHT: Not, not what a non-lawyer might think it means, but under the law.

ATTORNEY JOSEPH S. HARRIGAN: Oh, under the law? What a non. I think lawyers know what JTROS means.

JUSTICE DALE WAINWRIGHT: It's not ambiguous under the law. Aren't we all bound by the law when we sign a contract? We're bound by the legal significance of what we signed? You said people may not understand exactly everything in the agreement. Um, a big part of my practice in the private world for 12 years was securities and brokers would sell mortgage-backed inverse IOETS(?). People didn't know what

that meant unless the broker explained it to them. If there's something in the arrangement that they're going to sign off on and agree to, don't they have a duty, since they're bound by what they sign to understand what it is? If there's something they don't understand to get that worked out before you sign?

ATTORNEY JOSEPH S. HERRIGAN: They would have that duty under ordinary contract principles, but when you have a specific statute that says that agreement has got to indicate survivorship.

JUSTICE DALE WAINWRIGHT: Careful, Counsel, it says, um, the agreement, an agreement that otherwise meets the requirement of this part, however, shall be effective without including any of those phrases.

ATTORNEY JOSEPH S. HERRIGAN: Right.

JUSTICE DALE WAINWRIGHT: Like survivorship.

ATTORNEY JOSEPH S. HERRIGAN: Right and that's where tho-and, of course, some of the.

JUSTICE DALE WAINWRIGHT: After you agree under the statute, the agreement in this case does not have to say survivorship or any derivative of that word for it to meet Section 452 necessarily.

ATTORNEY JOSEPH S. HERRIGAN: I do, Justice, Wainwright. I agree with that, but if, when I use the term, it has to show survivorship, what I'm really saying it has to show ownership in the surviving spouse. It has to show an ownership interest because 452 gives examples that don't use the term survivorship. It talks about vest in, belong to, owned by. It doesn't, they don't use the term survivorship either.

JUSTICE SCOTT A. BRISTER: And I agree with you in the blended family situation where you've got two spouses get married with different kids and have Wills that want to leave them to different kids, um, if that's what they wanted to do, why would you create a joint account in the first place? If the whole, whole idea was look I want my stuff to go my kids, your stuff to go to your kids and that's fine with everybody, why would put all your stuff in a joint account?

ATTORNEY JOSEPH S. HERRIGAN: Some folks want it and some folks don't.

JUSTICE SCOTT A. BRISTER: I know, but why, why would you do that if you want to keep things separate in the first place?

ATTORNEY JOSEPH S. HERRIGAN: Oh, I think, I, I think that it's community property and you can, if you've got a, a joint account, a convenience account, it's very common for a husband and wife to have joint community property in a convenience account in Mary or John Doe, but that's not getting down to what happens to the property upon the death of a spouse and if it's, if it's put in a convenience account, Mary or John, that leaves it open to pass by virtue of Mary's Will if she dies first.

JUSTICE DON R. WILLETT: What do you make of Mr. Hogan's point, pardon me, that the parties agreed to be bound by the customs and usage prevalent in the industry?

ATTORNEY JOSEPH S. HERRIGAN: Well, I think they agreed to be bound by the customs and uses in the industry vis-à-vis an agreement by them on the one hand with the brokerage house on the other, not an agreement between the two of them.

JUSTICE DON R. WILLETT: But not in terms of vernacular used or terminology or what those terms mean?

ATTORNEY JOSEPH S. HERRIGAN: Correct. Because first of all, the client agreement that we're that is, uh, an exhibit here that is in the Raymond James account, number one, you go from the account agreement which 452 speaks to and then they want us to leapfrog over to the

account agreement and then they want us to leapfrog into, uh, customer usages and when we do that, then we get into extrinsic evidence, affidavit from a, from a, uh, uh broker that had nothing to do with this case as an expert witness. We get into the securities handbook. We get into the securities rulebook. That is, that goes far beyond what is contemplated under 452.

JUSTICE DON R. WILLETT: Usage does not include usage of vocabulary or terminology.

ATTORNEY JOSEPH S. HERRIGAN: Not usage that is common to brokers, but not to a layman. You and I know what NRE means. We know WOJ means. I submit to you that, that, that the, that the folks on the street don't know what those terms mean and they have a right to under 452 if they're going to have a, an understanding of how their property is going to pass upon the death of one of them and let me, let me say this, think about this.

CHIEF JUSTICE WALLACE B. JEFFERSON: You'll close at this.

ATTORNEY JOSEPH S. HERRIGAN: All right, sir. If, if extrinsic evidence is supposed to come in about the intent of these parties and the one spouse dies, who is going to be left to testify about intent? The surviving spouse to whom the property goes. Now if that's not an invitation to fraud, respectfully, it is and bear in mind this, the stock certificates that came out here, there is nothing, please, I'd ask the Court to review Ms. Lisa Hyde's testimony before the Senate Jurisprudence Committee, which is set out at some length in our brief. What Ms. Hyde said to the Committee was, we've got these stock certificates that there's no written agreement by, about, but somebody's going to take the position that those stock certificates because they say JT 10 on the face ought to go to the surviving spouse and she says that's not what we want. That's not what is contemplated here and, in fact, that's how uh, uh, the statute was passed based on, uh, taking Ms. Hyde's testimony before the Jurisprudence Committee and going forward.

CHIEF JUSTICE WALLACE B. JEFFERSON: We will take that into account. Are there any further questions?

ATTORNEY JOSEPH S. HERRIGAN: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you very much.

MARSHALL: May it please the Court, Mr. Lawter will present rebuttal for the Petitioners.

REBUTTAL ARGUMENT OF JACK W. LAWTER, JR. ON BEHALF OF PETITIONER

ATTORNEY JACK W. LAWTER, JR.: May it please the Court. I'd like to just point out that, um, given the permissive nature of 452, how easy the legislature made it for spouses to agree that property is, uh, survivorship, it's hard to believe that a spouse in Texas is going to be required to hire a lawyer to interpret whether their brokerage firm has given them a document that, uh, that does the job and should they have to hire a lawyer to, uh, tell them that their survivorship agreement still applies when they take a stock certificate and put it in their lockbox.

JUSTICE DALE WAINWRIGHT: Well can't they just ask the broker. I mean, when they sign the joint account agreement and they see initials they may not recognize, so what does that mean and the broker has a duty to tell them truthfully and honestly what that means and if the broker says it sets up a joint account with right of survivorship, then it better well do that or down the road, we know who's going to be

liable. Right?

ATTORNEY JACK W. LAWTER, JR.: Yes, Your Honor, that is precisely.

JUSTICE DALE WAINWRIGHT: You don't have to hire a lawyer.

ATTORNEY JACK W. LAWTER, JR.: That is precisely what happens, but if this Court's.

JUSTICE SCOTT A. BRISTER: The brokerage has lawyers.

ATTORNEY JACK W. LAWTER, JR.: Yes, Your Honor.

JUSTICE SCOTT A. BRISTER: And they have lawyers that advise them filling out these forms.

ATTORNEY JACK W. LAWTER, JR.: We don't believe.

JUSTICE SCOTT A. BRISTER: Why don't they put this little language directly from the statute in these forms. Then there's no, this problem goes away.

ATTORNEY JACK W. LAWTER, JR.: They have 50 states to deal with. They should. There's no question they shouldn't get it right.

JUSTICE SCOTT A. BRISTER: Have lawyers looking to what the law is in all 50 of those states, surely.

ATTORNEY JACK W. LAWTER, JR.: But what I.

CHIEF JUSTICE WALLACE B. JEFFERSON: And survivorship is probably pretty common among all 50 states as well.

ATTORNEY JACK W. LAWTER, JR.: Yes, Your Honor, and but what they do is they use these abbreviations throughout the industry and they use it in every state. The associations that deal with transfer of securities all use the same abbreviation. There's one meaning for joint ten. Joint tenants with right of survivorship and not tenants in common and not tenants in common. So if a, if a customer, uh, an uninformed customer, which we don't have here, uh, an uninformed customer comes into a brokerage house, doesn't know what these strange initials are at the top, they ask their broker and they're told all the person has to do is look it up. It's every broker and it has the same rules. It means joint tenancy with right of survivorship and not tenants in common. That means they can tell them it goes to your spouse when you die.

JUSTICE NATHAN L. HECHT: And if it's separate property, is that, does that go on your 439A.

ATTORNEY JACK W. LAWTER, JR.: Yes, Your Honor, this only applies to community property.

JUSTICE DALE WAINWRIGHT: Now, um, you're not suggesting that custom and uses trump state statutes are you?

ATTORNEY JACK W. LAWTER, JR.: No, no, Your Honor. What, what we have in the state statute is a call for an agreement, which calls Texas Contract Law into play.

JUSTICE DALE WAINWRIGHT: Okay. Because, um, you can, uniformity is a certainly a, um, a good goal, efficiency's, um, um, very attractive and the industry should strive for it. The statute should strive for it, but in securities, it's not unusual for young lawyers like me, 20 years ago, to do a 50-state blue-sky survey to find out how the law differed in 32 of the states, the same in 15 and different in a third way in two or three others. So securities firms, brokerage firms are not, um, unused to having to do different things in different states if statutes require that. So uniformity is a goal, but uniformity doesn't answer the entire question does it?

ATTORNEY JACK W. LAWTER, JR.: No, Your Honor, um, but all that's required in Texas, it's easy. All that's required is an agreement between the spouses that in some way with any, with some words or abbreviations, it calls for survivorship and, and that's what we have here because we have abbreviations that only have one meaning and it's part of the contract. It's not, you don't have to go look at some other

document. It's in the contract. Joint ten is in the contract or JTWROS is in the contract. So we're not looking at extrinsic evidence. We're looking at what's in the contract and all we need to do is to look at a dictionary or look at the handbook to say what that word means.

JUSTICE DAVID M. MEDINA: Mr. Lawter, would you please respond to the second key of your adversary's argument that we don't want to open the door to fraud here.

ATTORNEY JACK W. LAWTER, JR.: Yes, Your Honor. I personally think the bigger risk of fraud is with, uh, a party signing a contract and then later claiming or actually her heirs later claiming that, um, she didn't know what that meant or, uh, and it's even worse than that, you sign a contract that says joint ten on it. You get statements for years that say joint ten on it. You get certificates that say joint ten on it with a definition on the back that says joint tenancy with right of survivorship, then later claim I didn't know what that meant. That is a bigger oppor--. We don't have fraud by either spouse in this case, but that's a bigger opportunity for fraud, uh, in the general scope, general scheme of things.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Lawter. The clause is submitted and the Court will take a brief recess.

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