No. 21896 - PATRICIA L. PETERS V. NANETTE PETERS, EXECUTRIX OF THE ESTATE OF JOHN LEWIS PETERS, DECEASED, AS SUCH EXECUTRIX, AND NANETTE PETERS, IN HER INDIVIDUAL RIGHT, DON RANDALL PETERS, JOHN MICHAEL PETERS, AND THE WHITESVILLE STATE BANK, A CORPORATION

Miller, Justice, dissenting:

The majority expresses regret at the plight of Mrs. Patricia L. Peters who found out before her husband's death that he had taken all the funds from their joint account and given them to his children from his first marriage. Rather than obtain the majority's condolences, I am sure that Mrs. Peters wished it was more attentive to the law.

With regard to the joint passbook savings account,[1] the majority recognizes that the Whitesville State Bank (Bank), by its own regulations, had language that required presentation of a passbook before savings account money could be withdrawn.[2] The

[1]The majority appears to consider the certificates of deposit as being in the same category as the passbook savings account. The certificates are not the same as the passbook savings account because there was no language requiring the presentment of the certificates in order for a joint owner to cash them in.

[2]Immediately above its Rules and Regulations Governing Savings

majority brushes aside these promises by holding that W. Va. Code, 31A-4-33(c) (1993), allows payment to any joint depositor to be sufficient to release the bank. It cites DeLong v. Farmers Building & Loan Association, 148 W. Va. 625, 137 S.E.2d 11 (1964), for this premise. However, it is clear that DeLong dealt with the savings and loan statute found in W. Va. Code, 31-6-8 (1945), and not our banking statute. Contrary to the majority's view, DeLong made this critical distinction: "It is evident from the foregoing provision [W. Va. Code, 31-6-8] that the building and loan association statute,

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Deposits, the passbook contains this language which is emphasized by capital letters: "NO PAYMENTS WILL BE MADE EXCEPT UPON PRESENTMENT OF THIS BOOK." Article 5 of its Rules and Regulations states: "Deposits and the interest thereon may be withdrawn by the depositor in person or by written order; but, in either case, the passbook must be presented, so that such payments may be entered therein." Also, Article 7 states: "In all cases, a payment upon presentation of a deposit book shall be a discharge to the bank for the amount so paid."

Although this action arose prior to the 1993 amendment to W. Va. Code, 33A-4-33, the language in the prior version is substantially similar to that in the 1993 amendment. W. Va. Code, 31A-4-33(c) (1993), states:

> "Payment to any joint depositor and the receipt or the acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge for all payments made on account of such deposit, prior to the receipt by the banking institution of notice in writing, signed by any one of such joint tenants not to pay such deposit in accordance with the terms thereof. Prior to the receipt of such notice no banking institution shall be liable for the payment of

unlike the banking statute, was enacted primarily for the purpose of protecting such associations with respect to any payment made by them upon any such accounts." 148 W. Va. at 632, 137 S.E.2d at 16. Even if we assume that the release language in W. Va. Code, 31A-4-33(c), is designed to absolve the bank for payment to a joint owner, this language does not affect or control the passbook language requiring its presentation.

The critical issue is whether the Bank by its own regulations created an obligation with its savings account depositors that supersedes the exculpatory language of W. Va. Code, 31A-4-33(c). The majority rejects the Indiana court's holding in Badders v. Peoples Trust Co., 236 Ind. 357, 140 N.E.2d 235 (1957), which held that such passbook language does create a contractual duty superseding statutory language:

> "As to appellee bank's contention that the bank was relieved from liability under the statute as to joint accounts previously set out herein providing:
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> '. . . such deposit . . . may be paid [by the bank] to either of such persons . . . , and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to such bank

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such sums."

> or trust company for any payment so paid.'
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> [T]he statute does not prevent the bank by contract from enlarging its liability if it sees fit to do so. The rules of the bank voluntarily adopted by it become a valid agreement or contract between the bank and its depositors when an account is opened and the passbook is issued pursuant thereto with the printed rules set forth in the passbook." 236 Ind. at 365, 140 N.E.2d at 240. (Footnote and paragraph numbers omitted).

Indiana is not alone in this view. The Missouri court in Welch v. North Hills Bank, 442 S.W.2d 98 (Mo. Ct. App. 1969), dealt with a similar situation where one owner of a joint account withdrew funds without the passbook. Missouri had a statute similar to W. Va. Code, 31A-4-33(c), allowing payment to one joint depositor to release the bank. The bank asserted that the statute exonerated it, but the court rejected this view:

> "As heretofore indicated, this statute does not purport to govern the contract which the bank can make with its depositors. It does not by its terms or by implication prohibit the bank from making a contract with provisions different from the statute. We must therefore decide this case on the basis of the contract

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The court in Welch quoted its statute, Mo. Ann. Stat. § 362.470 (Vernon 1959), which contained, in part, this language: "'[S]uch payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit[.]'" 442 S.W.2d at 102.

> entered into by the parties." 442 S.W.2d at 102.

The court in Welch found that the bank's regulations formed a contract between it and the two depositors on the joint savings account which could not be waived by two of the three parties:

> "Each one of the three parties had a right to rely thereon and a right to hold the other parties to compliance therewith. Two of the parties to a three-party contract cannot waive the rights of the third party under the contract. It is clear from the evidence that plaintiff did not waive any rights that she had. In this instance, the bank patently failed to comply with the provisions of its rules and regulations which required the presentation of the pass book in order for a depositor to be entitled to make a withdrawal from the savings deposits in question." 442 S.W.2d at 103.

See also Keokuk Savings Bank & Trust Co. v. Desvaux, 259 Iowa 387, 143 N.W.2d 296 (1966); Graves v. Red River Valley Bank, 445 So. 2d 122 (La. Ct. App.), cert. denied, 446 So. 2d 320 (1984); LaValley v. Pere Marquette Employes' Credit Union, 342 Mich. 639, 70 N.W.2d 798 (1955); Stillings v. Citizens Bank of Ava, 637 S.W.2d 401 (Mo. Ct. App. 1982); Griffin v. Centreville Sav. Bank, 93 R.I. 47, 171 A.2d 207 (1961); Davis v. Chittenden County Trust Co., 115 Vt. 349, 61 A.2d 553 (1948). See generally Annot., 35 A.L.R.4th 1094 (1985).

While the majority cites Beizer v. Financial Savings & Loan Association, 172 Cal. App. 3d 133, 218 Cal. Rptr. 143 (1985), I do not find that it supports the majority's position. First, Beizer recognized:

> "[A] statute which specifies that payment to one of the coowners of a joint account discharges a bank's obligation 'does not prevent the bank by contract from enlarging its liability if it sees fit to do so. The rules of the bank voluntarily adopted by it become a valid agreement or contract between the bank and its depositors when an account is opened and the passbook is issued pursuant thereto with the printed rules set forth in the passbook. . . .' (Badders v. Peoples Trust Company, supra, [236 Ind. 357, 365, 140 N.E.2d 235, 240 (1957)]." 172 Cal. App. 3d at 139, 218 Cal. Rptr. at 146. (Other citations omitted).

The key point in Beizer was that the language relating to presentment of a T-bill certificate in order to withdraw from it was found not to be a part of the contractual language. Consequently, there was no contract requiring presentation of the certificate in order to obtain a withdrawal:

> "As heretofore noted, the contractual provisions of the subject account are set forth on the signature card and in sections numbered one to five of the T-bill certificate. None of these provisions, either expressly or implicitly, required presentation of the certificate in order to effect a withdrawal." 172 Cal. App. 3d at 139, 218 Cal. Rptr. at 147. (Emphasis in original).

However, Beizer closed with this admonition: "This conclusion, however, does not mean that in other cases certificates or passbooks containing different language or differently positioned terms, could not, with equal facility, sustain a contrary determination." 172 Cal. App. 3d at 139, 218 Cal. Rptr. at 147. (Footnote omitted).

Much the same result was reached in Coristo v. Twin City Bank, 257 Ark. 554, 520 S.W.2d 218 (1975), which the majority cites. There, the court found that "there is no requirement in these 'terms' that the passbook must be presented when a withdrawal was made[.]" 257 Ark. at 559, 520 S.W.2d at 221. Another case cited by the majority, Pulliam v. Pulliam, 738 S.W.2d 846 (Ky. Ct. App. 1987), came to a similar conclusion. The court found there was no language that required a presentation before a withdrawal of funds.

In this case, however, it is clear from the language of Articles 5 and 7 of the Bank's Rules and Regulations that presentment of the passbook was required. Obviously, a bank could avoid this problem by not adopting a rule requiring presentment of the passbook. However, one reason behind the presentment of the passbook is to

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See note 2, supra.

ensure the joint owner is authorized to withdraw. Many older persons will place a younger relative's name on a joint savings account and keep the passbook in their exclusive possession. By doing so, the older person is able to determine when the relative should have the passbook for a permitted withdrawal.

The majority either ignores or misreads the foregoing cases. It astounds me how the majority can establish the law that it has in Syllabus Points 2, 3, and 4. While the writer of the majority laments in note 2 the demise of local banks, it is apparent to me that he now creates law which exonerates a bank from a written promise it has made to its depositors.

Note 2 of the majority concludes with: "Sic transit gloria mundi." I would respond with: Si a jure discedas, vagus eris, et erunt omnia omnibus incerta. ("If you depart from the law, you will go astray, and all things will be uncertain to everybody.") Black's Law Dictionary 1380 (6th ed. 1990).