IN THE FLORIDA SUPREME COURT

Case No. 93,384
L.T. Case No.: 97-944

On Discretionary Review Of The Decision
Of The Fifth District Court Of Appeal

BEAL BANK, SSB, a
Texas Savings Bank,

Petitioner,
v.

ALMAND & ASSOCIATES, AMOS F. ALMAND, JR., AMOS F. ALMAND, III, ALMAND CONSTRUCTION COMPANY, INC., DJMS, INC., NIHOUL DEVELOPMENT CO., INC., DON BELL INDUSTRIES, INC., and SOUTHPARK AT ST. AUGUSTINE MASTER ASSOCIATION, INC.,

Respondents.

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Although the law of tenancy by the entireties is well-established and developed as to *real property*, Florida courts -- including this Court -- have struggled with the application of the doctrine to *personal property*, particularly as to *joint spousal bank accounts*. Courts and commentators alike have described this area of Florida law as a "legal quagmire"[1] that is "confusing and contradictory"[2] and in a "state of morass."[3] In fact, Florida's adoption of the doctrine of tenancy by the entireties, and the extension of the doctrine to personal property, has been sharply criticized over the past forty-five years.[4] As one commentator presciently noted over thirty-five years ago, the "greatest area of difficulty has been in determining whether the estate was created in bank accounts."[5]

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[1] Jerry R. Parker, *Garnishment of the Married Couple's Bank Account: A Call for Revised Signature Cards*, 54 FLA. B.J. 500, 502 (Oct. 1979) (noting that the then-current state of Florida law creates "an open invitation to perjury" by spouses who want to protect their joint accounts from the creditors of one spouse).

[2] Sitomer v. Orlan, 660 So. 2d 1111, 1117 (Fla. 4th DCA 1995).

[3] Id.; (citing Wiggins v. Parson, 446 So. 2d 169, 171 (Fla. 5th DCA 1984)); Carlos A. Rodriguez, *Joint Ownership of Bank Accounts in Florida By Husband and Wife: When Does a Spouse's Interest in Account Funds Survive Their Withdrawal by the Other Spouse?*, 71 FLA. B.J. 24, 31 (Jan. 1997) ("the state of morass in this area of the law is not likely to be improved in the near future.")

[4] *See* Paul Ritter, *A Criticism Of The Estate By The Entireties*, 5 U. FLA. L. REV. 153, 153 & 162 (1952) (noting that Florida was one of only ten states that recognizes the doctrine in personal property); *see also* John M. Starling, *The Tenancy By The Entireties*, 14 U. FLA. L. REV. 111, 111 (1961) (entireties doctrine, which is deeply rooted in feudal concepts of the marital relationship," is a "trap for the unwary, a blessing for the surviving spouse, a curse to heirs and creditors, and source of endless litigation.") (hereafter *Tenancy By The Entireties*); William C. Brooker, *Survivorship In Joint Bank Accounts*, 31 FLA. B.J. 183 (April 1957) (critique of then-current Florida Supreme Court cases by trial judge).

[5] *Tenancy By The Entireties*, *supra* note 4 at 116.

In light of this disarray, the certified questions present this Court with the opportunity to clarify the standard of proof that applies when spouses attempt to shield their joint bank accounts from creditors of one spouse by invoking the entireties doctrine. At issue are a total of six bank accounts: three accounts held by a father and his wife, two accounts held by a son and his wife, and one account held by the son and his wife jointly with another couple for business purposes. The trial court dissolved writs of garnishment as to all six accounts.

On appeal, a sharply divided panel of the Fifth District reversed, in part, and permitted garnishment of two accounts held by the father and his wife (the Barnett Bank and Southtrust accounts). Beal Bank, SSB v. Almand & Associates, 710 So. 2d 608 (Fla. 5th DCA 1998). Two panel members agreed that the father and his wife did not prove their intent to establish these accounts as tenancies by the entireties. Two panel members, however, affirmed and disallowed garnishment as to the remaining four bank accounts (all of which are Compass Bank accounts) including the three held by the son and his wife. All three judges wrote their own free-standing decisions, which failed to reach a consensus on the applicable legal standards and the weight to be accorded to the record evidence.

In this appeal, Beal Bank, SSB ("Beal Bank") requests that this Court answer the certified questions to require the application of the "clear and convincing" standard that Justice Dekle announced in his concurrence in First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So. 2d 777 (Fla. 1971), which the Second District adopted in Terrace Bank of Florida v. Brady, 598 So. 2d 225 (Fla. 2d DCA

1992). This higher evidentiary standard is necessary in cases involving joint spousal bank accounts because the entireties doctrine is so easily abused in garnishment and other types of collection proceedings. Even if this Court adopts a lesser standard (such as a preponderance of the evidence), the record below fails to establish that the four disputed Compass Bank accounts were established and held as tenancies by the entireties. As such, Beal Bank requests that the Fifth District's holding as to these four accounts be reversed.

STATEMENT OF THE CASE AND FACTS

The primary issue in this appeal is whether bank accounts that a son, Amos F. Almand, III ("Almand III), and a father, Amos F. Almand, Jr. ("Almand, Jr."), held jointly with their respective wives are subject to garnishment to satisfy judgments against Almand III and Almand, Jr. (the "Almands"). The key legal question is whether the Almands and their spouses proved that at the time the accounts were opened they were intended to be, and were established as, tenancies by the entireties and thereby exempt from garnishment for the individual debts of the father or son.

After judgments were entered against the Almands, Beal Bank had writs of garnishment issued to the financial institutions where the Almands maintained the accounts at issue. The Almands and their wives moved to dissolve the writs. After an evidentiary hearing, the trial court issued an order dissolving the writs as to all accounts. The statement of the case below sets forth the procedural background of the action; the statement of the facts sets forth the evidence and testimony that the

parties presented in support of, and opposition to, the Almands' motions to dissolve the writs of garnishment.

Statement of the Case

This case involves the efforts of Beal Bank to collect on judgments against the Almands. On March 26, 1996, Beal Bank filed a lawsuit against various defendants, including the son, Almand, III, individually, and Almand Construction Company. [R 1-281] The action sought various remedies for breaches of, and defaults on, mortgage and note obligations. [R 1-281]

On July 26, 1996, Beal Bank served a motion for summary final judgment, which sought judgment against various defendants including Almand III, Almand Construction Company, as well as the father, Almand Jr., for obligations due on two buildings (the "Bank Building" and the "Medical Building"). [R 345] The liability of Almand Jr. arose from a default under the terms of a Consolidated Real Estate Note, Credit Note and Bank Building Mortgage.

On September 25, 1996, the trial court entered two orders pursuant to Beal Bank's motion for summary final judgment. [R 576, 578] First, the court entered a summary final judgment as to the Bank Building jointly and severally against Almand & Associates, Almand Jr., and Almand III in the total amount of $416,142.65. [R 576] This amount represented the principal sum of $361,956.91, interest of $52,685.74, and attorneys' fees of $1,500.00. [R 577] Second, the trial court entered a summary final judgment as to the Medical Building jointly and severally against Almand & Associates, Almand Jr., and Almand III in the total

amount of $141,879.81. [R 578] This amount represented the principal sum of $126,083.37, interest of $14,296.44, and attorneys' fees of $1,500.00. [R 579]

Writs of Garnishment Are Issued

On January 23-24, 1997, Beal Bank filed motions for garnishment as to the father, Amos F. Almand, Jr., and writs of garnishment were issued to the following: Barnett Bank, N.A.; Compass Bank, N.A.; and, Southtrust Bank, N.A. [R 648, 652, 654, 659, 665, 668] Beal Bank also filed motions for garnishment as to Amos F. Almand III and writs of garnishment were issued as to the following institutions: Barnett Bank, N.A.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; Compass Bank, N.A.; and Southtrust Bank, N.A. [R 646, 650, 656, 662]

Each of the institutions answered the writs as to the accounts at issue. Compass Bank provided a series of answers and amended answers that reflected four joint accounts held by the Almands and their respective spouses (one with another couple). [R 673, 729, 731, 795][6] The four accounts were:

- An account (#40022866) held by "Amos F. Almand, III and Sue C. Almand";
- An account (#40022646) held by "Amos F. Almand, III and Sue C. Almand";
- An account (#100200355) held by "Jane D. Freeman, Sandra N. Freedman, Amos F. Almand, III and Sue C. Almand"; and
- An account (#0020001887) was held in the name of "Amos F. Almand and Doris J. Almand."

Barnett Bank answered and stated that an account was held in the names of the father, Almand, Jr., and his wife, Doris. [R 671] The style of the account was

[6] Its answer also listed an account (#20015208) held by "Amos F. Almand, III (Salary Acct.)." [R 795] This "salary" account is not at issue in this appeal.

indicated as a "Jt. Tenants with Right of Survivorship." [R 671] Southtrust Bank's answer stated that a checking account was jointly held in the names of the father, Almand Jr., and his wife. [R 692] In its February 4, 1997 amended answer, Southtrust stated that an account was held by Almand Jr. and his wife. The account was titled "Amos F. Almand, Jr. or Doris J. Almand JT TEN." [R 720]

The Almands Move To Dissolve The Writs
And An Evidentiary Hearing Is Held

Almand Jr. moved to dissolve the writs of garnishment against Barnett Bank, Southtrust Bank, N.A., and Compass Bank. [R 733, 797, 800] Likewise, Almand III moved to dissolve the writs of garnishment against Compass Bank and Merrill Lynch. [R 818, 822] Sue Almand and Doris Almand, as non-parties, moved to dissolve the writs of garnishment and adopted the motions of their respective spouses. [R 826]

An evidentiary hearing on the Almands' motions was held on March 7, 1997, at which Almand III and Almand Jr. testified. [R 1280] Neither of their spouses appeared or provided testimony or evidence. [R 1280] After the hearing, the parties submitted legal memoranda in support of their respective positions. [R 828, 846, 1040, 1113]

The Trial Court Dissolves
All The Writs of Garnishment

On April 2, 1997, the trial court entered an Order on the Almands' motions to dissolve writs of garnishment. [R 1113] The court dissolved all of the writs of

garnishment as to each account. The court's order set forth no findings of fact or legal analysis. [R 1113-14]

The Fifth District's Divided Decision

On appeal, the Fifth District, in a sharply divided decision, reversed the trial court's order as to some, but not all, of the accounts (the "Decision"). Beal Bank, 710 So. 2d 608 (Fla. 5th DCA 1988). [A1] All three judges agreed that the trial court erred in dissolving the writ of garnishment on the Merrill Lynch account, which lacked the unity of time to be an entireties account.[7] They also agreed that the "salary" account at Compass Bank held only by the son, Almand III, was not subject to garnishment under a head of household claim.

The Fifth District panel, however, failed to reach a consensus on the principles of law that apply to the remaining six accounts. Instead, each judge wrote a separate opinion that analyzed the issues in significantly different ways. One judge (Judge Cobb) -- whose opinion fully reflects Beal Bank's position -- would reverse as to all six accounts and permit garnishment. Id. at 608-12. One judge (Judge Harris) would affirm as to all accounts and disallow garnishment. Id. at 616-17. The third judge (Judge Sharp) would reverse in part and affirm in part by permitting garnishment only as to two accounts, the Barnett Bank account and the Southtrust account, both held by the father, Almand Jr., and his wife. Id. at 612-

[7] Because Almand III owned the account in his name, and later added his wife's name, the account was not established at the same time thereby failing the unity of time. See discussion *infra* Section I.B.

15. A short per curiam opinion was necessary to explain the outcome of the case because of the lack of a common legal rationale or holding. Id. at 608.

The Certified Questions

Beal Bank moved for certification on the basis of conflict among this Court's and the district courts' decisions, and because the divided panel's opinions presented issues of great public importance. [R-5 29-57] Specifically, Beal Bank asked the Fifth District to certify the following separate and distinct questions:

1. WHETHER SPOUSES MUST PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THEY INTENDED THEIR JOINT BANK ACCOUNTS TO BE ESTABLISHED AS TENANCIES BY THE ENTIRETIES?

2. WHETHER SPOUSES MUST UNDERSTAND THE SIGNIFICANCE OF TENANCY BY ENTIRETIES IN ORDER TO HAVE THE INTENT TO ESTABLISH SUCH A TENANCY IN THEIR BANK ACCOUNTS?

3. WHETHER THE MERE CONCLUSORY TESTIMONY OF ONE SPOUSE THAT BANK ACCOUNTS WERE INTENDED TO BE OWNED EQUALLY OR AS A WHOLE IS SUFFICIENT TO ESTABLISH ENTIRETIES ACCOUNTS, WHERE EITHER SPOUSE COULD ACCESS AND DISBURSE ANY AND ALL FUNDS FROM SUCH ACCOUNTS WITHOUT THE OTHER SPOUSE'S CONSENT AND NO DOCUMENTARY EVIDENCE OF SUCH INTENT EXISTS?

4. DID THE TRIAL COURT ERR IN DISSOLVING THE WRITS OF GARNISHMENT BASED UPON THE EVIDENCE PRESENTED BELOW?

[R-5 33] In response, the Fifth District granted Beal Bank's motion, but certified somewhat different questions for this Court's consideration. Specifically, the two certified as framed by Judge Harris are:

> 1. IN A CASE IN WHICH THE CREDITOR OF ONE SPOUSE SEEKS TO GARNISH A BANK ACCOUNT HELD BY THAT SPOUSE JOINTLY WITH HIS OR HER SPOUSE, AND THE DOCUMENTS ESTABLISHING THE JOINT ACCOUNT (WITH THE RIGHT OF SURVIVORSHIP AND RIGHT OF ONE PARTY TO THE ACCOUNT TO WITHDRAW FUNDS) DISCLAIM IT IS HELD AS A TENANCY BY THE ENTIRETIES, MAY THE SPOUSE CLAIMING IT IS HELD AS A TENANCY BY THE ENTIRETIES RESORT TO EXTRINSIC EVIDENCE TO PROVE IT WAS INTENDED TO BE HELD AS TENANCY BY THE ENTIRETIES, AND WHAT IS THE PROPER BURDEN OF PROOF WHICH THE SPOUSE MUST CARRY TO PROVE THE ACCOUNT IS HELD AS TENANCY BY THE ENTIRETIES?
>
> 2. WOULD THE ANSWER TO THE ABOVE QUESTION BE THE SAME IF THE DOCUMENTS ESTABLISHING THE ACCOUNT MERELY SHOWED IT IS A JOINT ACCOUNT WITH RIGHT OF SURVIVORSHIP AND RIGHT OF ONE PARTY TO THE ACCOUNT TO WITHDRAW FUNDS?

710 So. 2d at 617-18. [A1] Beal Bank timely invoked this Court's discretionary jurisdiction, and this Court postponed its decision on jurisdiction and set a briefing schedule. [R-5 61]

Statement of the Facts

The pertinent facts relate to the evidence presented in support of, and in opposition to, the Almands' motions to dissolve the writs of garnishment as to the joint accounts at Barnett Bank, Compass Bank, and Southtrust Bank. This evidence

consisted of: (1) the testimony of Almand III and Almand Jr. at the March 7, 1997 hearing; (2) the deposition of Almand Jr.; and, (3) the parties' trial exhibits (which were primarily the bank records reflecting the nature of the accounts).

Records Of The Bank Accounts
Of The Father, Almand Jr.

Bank records for the Compass Bank account at issue indicate that Almand Jr. and his wife opened an account (#20001887) on January 26, 1988 at Enterprise National Bank (a Compass Bank predecessor). [R 962 Ex. 9]. The "Ownership" of the account was designated as "JOINT" and reflected ownership in "Amos F. Almand, Jr. and Doris J. Almand." [R 962] This account is not subject to garnishment under the Fifth District's Decision.

The Barnett Bank account records for Almand Jr.'s joint account (#1946450029) with his wife, Doris J. Almand, reflect that it was held as "JT TENANTS WITH RIGHTS OF SURVIVORSHIP." [R 954 Ex. 7]. The brochure containing the rules and regulations governing the account had the following provision:

> 16. **Ownership of Account and Transfer of Ownership.** If the account is designated a JOINT account, or if the names of two or more owners are joined by the word "or" or "and" on the signature card or in the title of the account, the Customer agrees that all sums now or hereafter deposited in the account are and shall be joint property and owned by the Customer and any co-owners of the account as joint tenants with the right of survivorship *and not as tenants in common or as tenants by the entireties.* . . . Even if the Bank at the Customer's request titles the Customer's account as "Tenants by the Entireties" or receives oral or written notice that the Customer intends to treat the funds as being held as such, the Customer agrees that as between the Customer and the Bank, the Bank may treat the account like any other joint account and subject to all the terms and provisions set forth above.

[R 954] (italics added). This account is subject to garnishment under the Fifth District's Decision.

The Southtrust Bank account records reflect that Almand Jr. and his wife opened an account (#47927588) on May 22, 1995. [R 966 Ex. 11]. The terms of the Deposit Agreement provided that "the depositors own this account as joint tenants with right of survivorship, unless another manner of ownership is specifically set forth in connection with the account legal title on this card." [R 966] The account's "legal title" is stated as "Amos F. Almand, Jr. or Doris J. Almand JT TEN." [R 966] This account is subject to garnishment under the Fifth District's Decision.

Almand Jr.'s Testimony

Almand Jr. testified as to accounts held jointly with his spouse at Barnett Bank, Southtrust Bank, and Compass Bank.

As to the Compass Bank accounts, he testified that he opened each account with his wife at the same time. [R1280 at 55-56] He stated that both he and his wife could draw money out of the accounts. [R1280 at 56] ("Q: Can either of you draw money out of the account? A: Yes, sir."). He also testified as to a Compass Bank trust account in which he had no ownership interest. [R1280 at 57]

As to the Barnett Bank account, he testified that the account was opened in 1994 and was owned with his wife. [R1280 at 48] He testified that he had not had any accounts in his own name in the past five years and that all accounts created during that time were opened with his spouse at the same time. [R1280 at 51]

As to the SouthTrust Bank account, he testified that it was opened in 1995 with his wife at the same time. [R1280 at 59] He stated that in the past six years he owned no property in his own name, and that all property was jointly owned with his wife. [R1280 at 58] He stated that his interest in the SouthTrust account was no different from that of his wife's interest. [R1280 at 59]

On cross-examination, Almand Jr. stated that all of his and his wife's funds are for his wife's "personal use as she wants them." [R1280 at 61] Nonetheless, he testified that he writes monthly periodic checks to his wife, for her own separate account, in the amount of $2,500 and had done so from three to seven years. [R1280 at 61, 69-70] He also stated that each of the joint accounts had been used, in part, for business purposes. [R1280 at 63]

When asked about his understanding of joint ownership in entireties accounts, the following exchange took place:

Q: Do you know what an estate by the entireties is?
A: I've never heard of it.
Q: Is it true that when you opened your Barnett Account you never heard of it?
A: When I -- when we opened the Barnett Bank account, we opened it with joint tenants with rights of survivorship.
Q: And your intent when you opened all of these accounts was the same; is that correct?
A: My intent was that everything that we put into the bank was ours.
Q: And your intent on each of these accounts is the same?
A: That is correct.

[R1280 at 61-62]

As to all of his bank accounts, Almand Jr. stated that he never received any information about the accounts. [R1280 at 64] ("I've never received any

information from any bank that I opened an account at."). He read information from a document regarding his Barnett Bank account that, he testified, had not been provided to him at the time he opened the account. [R1280 at 64-65] This exchange followed:

> Q: Do you understand that those are the terms and conditions of that account?
> A: I don't understand why they didn't tell me at the time I opened the account. I might not have opened it.
> Q: That's probably true, and you would not have opened it had they told you that, isn't it?
> A: Probably.

[R1280 at 67] On re-direct, Almand Jr. testified that all funds deposited into the Barnett Bank account were jointly owned with his wife. [R1280 at 67-68]

Records Of The Bank Accounts
Of The Son, Almand III

The Compass Bank account records for Almand III's two joint accounts with his wife reflect that each account -- one opened on July 16, 1996 and the other on May 31, 1996 -- was a "Multiple Party Account." [R 934, 935; Ex. 1 & 2]. A box had been checked on each "Ownership of Account" form to that effect. [R 934, 935] A "multiple party account" is defined as follows: "Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent." [R 934] Each account was also designated (via a checked-box) as a "Multiple Party Account With Right of Survivorship" meaning that "[a]t death of a party, ownership passes to the surviving party or parties." [R 934, 935] These accounts are not subject to garnishment under the Fifth District's Decision.

The Compass Bank account that Almand III held jointly with his wife and two former business partners -- opened on August 3, 1995 -- was designated similarly. [R 936 Ex. 3]. This account is not subject to garnishment under the Fifth District's Decision.

Almand III's Testimony

Almand III testified as to the three accounts held jointly with his spouse at Compass Bank (formerly "Enterprise Bank" accounts). First, as to one Compass Bank account (#40022866) he stated that he and his wife opened the account at the same time and that they were listed as joint owners. When asked whether he and his wife had the same interest in the account he stated: "The account belongs to both of us as a whole and either one of us can, you know, write checks on the account, have access and privileges to any and all, either of us." [R1280 at 10] When asked whether he and his wife "possess the money or the entitlement to the money in the account equally" he stated: "Yes." [R1280 at 10-11]

Second, as to another Compass Bank account (#40022646) he stated that he and his wife opened the account at the same time and were both owners. [R1280 at 11] When asked whether "the funds in his account, the interest and the funds in this account, equal as between you and your wife" he stated: "Yes." [R1280 at 11] He explained that "all the monies are available to either of us. We own it jointly and we both have equal access to it." [R1280 at 11-12]

Third, as to the next Compass Bank account (#100200355) he stated that he and his wife were co-owners along with the Jane and Sandra Freedman, their

former business partners. [R1280 at 13] He stated that none of the funds in the business account were his personal funds, but that any of the four co-owners could withdraw funds. [R1280 at 13-14]

On cross-examination, he testified that he had not read any of the written conditions and terms set forth on the back of the Compass Bank account statements. [R1280 at 22-24] He claimed that he requested that the accounts be established as entireties accounts, but admitted that no written designation was made to that effect on the account documents. [R1280 at 27-28] In addition, he testified regarding the accounts as follows:

> Once again, I don't have a clear understanding of the law as it relates to joint tenants or tenants by the entireties. Obviously, since this case has come up, I've been, you know, schooled on it and briefed on it and I now have a better understanding. My understanding was, from what the bank had told me, was joint tenants with the rights of survivorship was, basically, the same thing as tenants by the entireties.

[R1280 at 28] As to his intent in opening the account, he stated:

> My intent was to open this account where the monies would belong to the two of us and that either party sign for any or all of the monies. . . . my intent was to have the monies belong to both parties and have equal access to that money.

[R1280 at 28] When asked whether "at the time you opened this account, you did not even know what an estate by the entireties was?" he responded: "No. I had heard the term estate by the entireties, but I'm not -- the answer is yes, I did not fully understand what that meant." [R1280 at 29]

Almand III testified that he had drawn checks payable to himself and that, in doing so, his understanding was that he could make withdrawals at any time he wanted. [R1280 at 39-40]

> Q: So your understanding is that you could withdraw the entirety of that account out any time you wanted it?
> A: Yes.
> Q: Without discussing it with Sue?
> A: Yes. I think I've done that before in previous joint accounts.

[R1280 at 39-40]

On redirect-examination, Almand III emphasized that he and his wife could take any or all of the funds from the three Compass Bank accounts. Almand III's attorney asked the following:

> Q: All right. What right, if any, did your wife have with regard to taking the money out of the account?
> A: The same as I have. Her signature is on the account. She can write a check and take it all out.

[R1280 at 42-43]

Based upon this evidence and testimony, the trial court dissolved the writs of garnishment as to all accounts. On appeal, the three judge panel reached vastly differing conclusions. Judge Cobb stated that the Almands' testimony was insufficient proof under the "clear and convincing" standard to establish that the Almands intended the accounts to be established as tenancies by the entireties. 710 So. 2d at 611. He concluded, as Beal Bank had argued, that "there was no evidence, much less clear and convincing evidence, that the various accounts were created with the intent of the parties that they were to be held as tenancies by the entireties." Id.

In stark contrast, Judge Harris stated that the husband's and son's testimony -- unsupported by any documentary evidence -- was sufficient proof of the intent of the Almands (and their spouses) to establish entireties accounts. Id. at 616-17. He disagreed that the wives' intent was necessary and concluded that the husbands' testimony that "the intent of the parties to each own the entire account" was sufficient to establish entireties accounts. Id.

Finally, Judge Sharp -- who noted that this area of the law is "relatively confusing and conflicting" -- generally agreed with Judge Harris, except as to the Barnett Bank and Southtrust accounts held by Almand Jr. and his wife. Id. at 612. She noted that the Barnett Bank account records specifically stated it was not a tenancy by entireties and that the Southtrust account stated it was a "joint account and *not* anything else unless expressly specified[.]" Id. at 614. She also noted that because it appears to be "fairly simple to have a spouse state the few words necessary" to establish the necessary intent, it may be "an open invitation to perjury" to shield funds in garnishment cases. Id. Nonetheless, she concurred with Judge Harris that the Almands presented sufficient testimony to establish that all of the Compass Bank accounts were intended to be entireties accounts. Id. at 614-15.

SUMMARY OF THE ARGUMENT

This appeal presents questions of great public importance regarding the legal requirements for proving that joint spousal bank accounts were intended to be established as tenancies by the entireties (rather than some other joint tenancy) and thereby shielded from creditors. These questions are of immense importance because they affect every joint spousal bank account in Florida. Clarification is necessary because courts and legal commentators have described this area of Florida law as "confusing and contradictory" and in a "state of morass." Florida's state and federal courts are increasingly confronting situations where spouses attempt to shield their joint bank accounts from creditors by testifying that they intended to establish them as entireties accounts -- without any corroborating documentary evidence. The need for definitive guidance from this Court is most evident in the Decision itself in which each judge wrote a separate opinion that applied sharply contrasting legal principles.

As to the first certified question, the clear and convincing evidence standard should apply because of the substantial and real potential for the entireties doctrine to be abused in frequently recurring garnishment and collection proceedings. As noted by Justice Dekle in his concurrence in First Nat'l Bank of Leesburg v. Hector Supply Co., and by the Second District in Terrace Bank of Florida v. Brady, this standard of proof ensures that the spouses' intention to establish a tenancy by the entireties in a bank account existed at the time it was opened and was not a "hurried, after-the-fact creation" to thwart "the legitimate claims of creditors of one

of the spouses." Because entireties accounts are not subject to garnishment for the debts of one spouse, a tremendous incentive exists to portray joint accounts as entireties accounts in collection and garnishment proceedings. Courts have imposed a substantial evidentiary standard because tenancy by the entireties is so similar to joint tenancy with the right of survivorship. The clear and convincing evidence standard is appropriate because of the potential for abuse and fabrication that occurs in the face of creditors' demands for payment or garnishment.

As to the certified questions regarding extrinsic evidence, a trial court has discretion to consider relevant extrinsic evidence (including testimony) to determine the intent of spouses in establishing bank accounts where documentary evidence is lacking or deemed ambiguous. Under a clear and convincing standard or some other lesser standard (such as a preponderance of the evidence), however, the writs of garnishment on the six joint bank accounts should not have been dissolved. The Almands failed to present any evidence that these accounts were intended to be and were established as tenancies by the entireties other than their vague and conclusory testimony.

At most, the Almands' testimony merely confirmed that the accounts were jointly held and that each spouse had the "equal" right to access and use the accounts' funds without the consent of the other's respective spouse. This testimony does not establish that the joint accounts were intended to be or established as entireties accounts. Instead, the only objective and tangible evidence -- the bank records -- indicated to the contrary. All six accounts were joint accounts with

survivorship rights, and two had explicit written language that they were other than entireties accounts. Under these circumstances, a debtor should be required to provide some quantum of documentary proof beyond mere self-serving testimony to establish a tenancy by the entireties in a joint spousal bank account.

Further, the fact that either of the Almands or their spouses could access and disburse funds from the joint accounts without the other respective spouse's consent demonstrated that the accounts were not entireties account. A distinguishing characteristic of an entireties account is that one spouse cannot alienate funds without the other's consent. The Almands' testimony demonstrated precisely the opposite: any spouse was free to access and disburse funds without spousal consent.

Finally, the specific intent of the Almands and their spouses in establishing the accounts as entireties accounts is lacking. Neither Almand III nor Almand Jr. even understood the concept of tenancy by the entireties; Almand Jr. had never heard of it. As the Second District has recognized, spouses can not intend to create entireties accounts if they do not even know the significance of such accounts. Moreover, neither of the Almands' spouses appeared or testified at the evidentiary hearing thereby creating an evidentiary void as to their intent as to the accounts at issue. Even if the father and son intended the accounts to be entireties accounts, no evidence was presented that their respective spouses had such an intent.

In summary, Beal Bank requests that this Court quash the Fifth District's Decision as to the four Compass Bank accounts at issue with instructions to

reinstate the writs of garnishment as to these accounts. The Fifth District's Decision should be affirmed as to all other accounts.

ARGUMENT

I. THE ALMANDS' UNSUPPORTED TESTIMONY FAILS TO PROVE, BY CLEAR AND CONVINCING EVIDENCE OR SOME LESSER STANDARD, THAT THEIR JOINT SPOUSAL BANK ACCOUNTS WERE INTENDED TO BE AND WERE ESTABLISHED AS TENANCIES BY THE ENTIRETIES.

Beal Bank respectfully suggests that the certified questions raise two basic issues: (a) what standard of proof applies, and (b) what quantum of proof is necessary to establish that a joint spousal bank account was intended to be established as a tenancy by the entireties that is exempt from the claims of one spouse's creditors. As discussed below, the standard of proof is stringent in garnishment actions involving joint spousal accounts purportedly held as tenancies by the entireties. As such, Beal Bank requests that the Court apply the "clear and convincing" evidence standard, which the Almands clearly did not meet. Even under a lesser standard (such as a preponderance of the evidence), however, the Almands failed to provide that quantum of proof necessary to establish entireties accounts. It requires more than just the unsupported testimony of one spouse to insulate joint bank accounts from garnishment. Instead, such testimony is insufficient, particularly where bank records contradict or fail to substantiate such testimony.

A. The Clear and Convincing Evidence Standard Applies.

In garnishment actions, spouses who claim ownership of a joint bank account as a tenancy by the entireties must meet the stringent burden of establishing an intent to create such ownership by "clear and convincing" evidence. A compelling

reason for this stricter degree of proof is the close similarities between joint accounts with right of survivorship and joint accounts held as tenancies by the entireties. Although both types of accounts are jointly held, funds held in the latter cannot be garnished for the debts of one spouse. For this reason, spouses have a tremendous incentive to characterize their joint accounts as entireties accounts to avoid collection and garnishment actions. As Judge Sharp noted in her opinion below, these situations are "an open invitation to perjury." 710 So. 2d at 614.

Because these types of accounts have dramatically different legal ramifications as to creditors, Florida courts have elevated the standard of proof necessary to establish tenancies by the entireties. This point is evident in this Court's decision in First Nat'l Bank of Leesburg. In discussing tenancy by the entireties, this Court stated:

> since the form will be similar to that of a joint tenancy, and since the spouses may or may not intend that a tenancy by the entireties should result, *the intention of the parties must be proven unless the instrument creating the tenancy clearly bears an express designation that the tenancy is one held by the entireties*.

Id. 254 So. 2d at 781 (italics in original; footnote omitted). The rationale for the Court's holding is to prevent misuse of the tenancy by the entireties doctrine. As Justice Dekle noted:

> **We are dealing with a type of transaction which is easily abused; in order to prevent an abuse of the entireties doctrine, it should be shown by clear and convincing proof that the parties' intention to create a tenancy by the entireties existed at the time of acquisition of the assets in questions, and that the tenancy by the entireties was not a hurried, after-the-fact creation used for the purpose of insulating funds from legitimate claims of creditors of one of the spouses.**

Id. at 782 (Dekle, J., concurring) (emphasis added); see Terrace Bank, 598 So. 2d at 228. As the highlighted language indicates, a heightened evidentiary standard is necessary to prevent spouses from using the tenancy by the entireties doctrine for improper or questionable purposes -- such as avoiding creditors through after-the-fact artifices or stratagems.

This Court in First Nat'l Bank of Leesburg also noted that specific proof of intent was necessary because of the differences between the doctrine's application to realty and personalty. The doctrine was initially recognized in real property, which by rule of construction is considered entireties property that is recorded in public records. In essence, a presumption of entireties applies to real property, but not personal property. As this Court stated:

> But in personalty matters, a different standard obtains; not only must the form of the estate be consistent with the entirety requirements, the intention of the parties must be proven. The reason for this double standard is easily understood. Realty matters are matters of record which occur infrequently, and which generally involve formal transactions necessarily requiring consent of both spouses. Personalty, on the other hand, is generally not under mandate of record; it may easily be passed by either spouse without mutual consent or without knowledge of the other spouse; finally, it may change hands with great frequency, as in the case of checking accounts.

254 So. 2d at 780. This Court also noted that "application of entireties concepts to personalty becomes exceedingly complex as the nature of the personalty increases in sophistication, and *the judicial mind seeks to require greater safeguards lest the tenancy by abused. Thus in our bank account cases, we have required the demonstration of intention.* " Id. (emphasis added) (citing Hagerty v. Hagerty, 52 So.

2d 432 (Fla. 1951); In re: Estate of Lyons, 90 So. 2d 39 (Fla. 1956), and Winters v. Park, 91 So. 2d 649 (Fla. 1956)).

Notably, the Second District has held that the clear and convincing evidence standard applies. Terrace Bank, 598 So. 2d at 288. As the Second District emphatically stated:

> We are convinced that the standard of clear and convincing evidence is the burden of proof which the supreme court intended to place upon a married couple who attempt to exempt their bank account from the claim of a creditor of one spouse.

Id. The reason for this standard is the incentive of spouses to blur the distinction between the concepts of joint spousal accounts and entireties accounts in garnishment and collection actions.

This heightened standard of proof is also important for policy reasons because of the misconception that an entireties account is merely an account that happens to be jointly owned by married people. All joint spousal accounts would be entireties accounts under such a definition. Instead, because joint spousal accounts share many of the same characteristics of entireties accounts, they can be easily mischaracterized as entireties accounts to avoid creditors' claims. For this reason, the clear and convincing evidence standard requires significant proof -- beyond merely unsupported, after-the-fact, or self-serving testimony -- that spouses intended their joint spousal accounts to be entireties accounts at the time of their creation.

In this regard, the concept of "clear and convincing" evidence is an intermediate level of proof between the "preponderance of the evidence" and

"beyond a reasonable doubt" standards. This Court has described the standard as follows: "The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." Inquiry Concerning A Judge, 645 So. 2d 398, 404 (Fla. 1994). As the court noted:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. (citation omitted); see State v. Mischler, 488 So. 2d 523 (Fla. 1986). As discussed below, this heightened evidentiary standard was not met below and the writs of garnishment should not have been dissolved.

B. The Almands' Self-Serving and Unsupported Testimony Is Insufficient To Establish That The Joint Bank Accounts Were Intended To Be Established As Tenancies by the Entireties.

Both certified questions address whether "extrinsic evidence" is permissible where the documents establishing a joint bank account indicate that the account is not an entireties account or is a joint account with right of survivorship. Beal Bank respectfully suggests that a trial court has discretion to consider relevant extrinsic evidence where the signature card or bank records are unclear,[8] but that such

[8] As this Court emphasized over forty years ago, the proper inquiry is "to investigate the facts and circumstances leading up to and surrounding the creation of the bank account in order to determine the intention of the original depositors." Winters, 91 So. 2d at 652. Proof of intent is required "unless the instrument creating the tenancy clearly bears an express designation that the tenancy is one held by the entireties." First Nat'l Bank of Leesburg, 254 So. 2d at 781. As commentators have recognized, much of the confusion in this area of the law can be avoided with

evidence in the form of unsupported testimony of intent bears little weight and does not constitute sufficient evidence to establish entireties accounts without some quantum of supporting documentary proof. Instead, the Almands failed to establish their intent under either a "clear and convincing" standard or some other lesser standard such as a preponderance of the evidence.

Under Florida law, spouses are required to prove the five unities of possession, interest, title, time, and marriage to establish that they intended their bank accounts to be entireties accounts. First Nat'l Bank of Leesburg, 254 So. 2d at 781. For each purported "entireties" account at issue, the Almands were required to prove that: (1) the account was jointly owned and controlled, (2) their joint interests in the account were identical, (3) their interests in the account originated in the same instrument or document, (4) their interest in the account commenced simultaneously, and (5) neither spouse could, acting alone and without the acquiescence and approval of the other spouse, sever or convey his or her interest in the account. Bailey v. Smith, 103 So. 833, 834 (Fla. 1925). Proof that spouses had joint ownership of accounts does not establish a tenancy by the entireties. A jointly-owned account with right of survivorship is not transformed into an entireties account simply because its owners are married and claim (without tangible proof) that they intended entireties accounts. Importantly, the Almands had to prove that they and their spouses opened each account with the specific intent that it be an entireties account.

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signature cards that include a designation for entireties accounts. *See Garnishment of the Married Couple's Bank Account: A Call for Revised Signature Cards*, *supra* note 1.

The unsupported testimony of the father and son, however, is insufficient to prove that they and their spouses intended to establish entireties accounts at the time the accounts were opened. Instead, their testimony was fragmentary and inconclusive on this point (as summarized in the statement of facts and discussed below). Further, none of the documentary evidence in the record supports a finding that the bank accounts were intended to be entireties accounts. Instead, two accounts specifically were designated other than entireties accounts, three were designated as joint "multiple owner" accounts with right of survivorship, and one was jointly held with another couple.

Testimony of intent -- without some quantum of documentary proof -- is inherently unreliable and an "open invitation to perjury." For this reason, Beal Bank urges this Court to hold that such unsupported testimony, by itself, falls short of what is necessary to establish a tenancy by the entireties in joint spousal bank accounts. This is an important issue to Florida courts as well as to bankruptcy courts in Florida, which have issued a number of published opinions on the topic. Florida's bankruptcy courts have interpreted Florida law to require that a debtor provide some quantum of documentary proof (beyond mere self-serving testimony) to establish a tenancy by the entireties in a joint spousal bank account.[9] The

[9] *See*, *e.g.*, In re: Campbell, 214 B.R. 411, 414 (Bankr. M.D. Fla. 1997) ("The burden of proof is not met solely by the debtor's, or the non-filing spouse's, testimony . . . Rather the debtor must provide a quantum of documentary proof establishing that an entireties estate was intended when the personalty was acquired."); In re: Shaland, 133 B.R. 166, 168 (Bankr. S.D. Fla. 1991) ("self-serving declarations of the Debtor and his wife" that "they had the requisite intent to create an entireties estate because they believe the property to be 'theirs'" is insufficient to prove intent because application of tenancy by the entireties to personal property "requires some quantum of proof of intent.").

rationale for this quantum of proof is that joint ownership of bank accounts creates the potential for abuse, particularly where distinctions between joint tenancies with the right of survivorship (the most common form of ownership) and tenancy by the entireties must be made in collection and garnishment actions.

Also, because any type of personal property can potentially be shielded from one spouse's creditors under the entireties doctrine, it is important that some tangible evidentiary basis exist before insulating these assets from creditors. For instance, spouses might claim that they intended that their boat or motor vehicle be held as entireties property. It would be inequitable for their testimony to defeat a creditor's claim without some quantum of documentary proof of their intent. Absent a legal requirement of some documentary proof of intent, spouses can easily defeat creditors' claims: they can simply fabricate or falsely state that they had intended to establish entireties accounts (i.e., the "open invitation to perjury" that judges and commentators have recognized). In light of the substantial protections from creditors that the entireties doctrine affords, it is evident why courts reject self-serving and unsupported testimony of intent without some tangible supporting evidence.

In this regard, the bank records do not support a finding that the accounts were intended to be entireties accounts. Notably, none of the bank records reflect ownership as tenancies by the entireties, and two explicitly state they are other than entireties accounts. The Southtrust Bank account indicated that owners who desired accounts other than joint ownership with the right of survivorship had to

specifically designate them as such; the account bears no such designation. [R 966 Ex. 11]. The Barnett Bank account records for Almand Jr.'s joint account indicate that it was not an entireties account, and, instead, was held as joint tenants with rights of survivorship. [R 954 Ex. 7] The four Compass Bank accounts were joint "multiple party" accounts with right of survivorship, where "multiple party" means that each party owns the account "in proportion to net contribution unless there is clear and convincing evidence of a different intent." [R 934] As such, the only objective evidence of the Almands' intent -- the documents establishing the accounts -- supports the conclusion that the accounts were not intended to be entireties accounts.

Despite the clear language of these records, the Almands nonetheless claimed that they had intended that the joint accounts be established as entireties accounts. The Almands' conclusory testimony, however, was ambiguous and unsupported by any documentary evidence. Notably, neither Almand III nor Almand Jr. understood the concept of tenancy by the entireties, and Almand Jr. had never heard of it. At most, the Almands' testimony merely established that the accounts were jointly held with their respective spouses and that each spouse had the "equal" right to access and use the accounts' funds without the consent of the other's respective spouse.

A dispositive point is that neither Almand Jr. nor Almand III testified nor provided proof that, at the time each account was established, each spouse intended to establish an entireties account. This evidentiary void is fatal because the intent to establish an entireties account must exist at the time the account is created.

Winters v. Parks, 91 So. 2d 649, 652 (Fla. 1956); First Nat'l Bank of Leesburg, 254 So. 2d at 781. The record below, however, has no evidence -- clear and convincing or otherwise -- that the Almands and their spouses intended an entireties account when each account at issue was first established.

At best, the Almands provided generalized testimony without any specific timeframes and without reference to which particular account was at issue. For example, no testimony or proof exists as to Almand III's intent (or his wife's intent) on or about May 31, 1996 when one of the Compass Bank accounts was opened. [R 935] Likewise, no testimony or proof exists as to Almand III's intent (or his wife's intent) on or about August 3, 1995 when another Compass Bank account was opened. [R 936] The generalized testimony that Almand III and his wife "own" these accounts proves nothing about the Almands' specific intent at the time each account was opened. This testimony might establish the unity of possession, i.e., that the account was jointly owned and controlled. It does not prove the intent to establish an entireties account.

Notably, the bank accounts at issue were opened many months, if not years, apart, thereby making it critical for the Almands to provide proof of their (and their spouses') specific intent to open each account as an entireties account. The Almands failed to present such proof.

Another dispositive point is that neither of the Almands' spouses testified as to their intent in opening the accounts at issue. As this Court in First Nat'l Bank of Leesburg held, it is the intention of the *parties* (i.e., both spouses) that determines

the creation of a tenancy by the entireties. Because no evidence exists to support a finding that the Almands' spouses each intended to create a tenancy by the entireties, the requisite proof of intent is wholly lacking. Because the record is silent on the intent of the wives, the trial court -- and this Court on appeal -- can only speculate as what each intended. Neither wife testified and neither husband specifically testified as his wife's intent. Instead, no meaningful evidentiary basis exists for factual findings as to the intent of the wives. Speculation as to such intent is not appropriate where the standard of proof is "clear and convincing evidence."[10] Nor is it appropriate generally. As such, it is pure speculation -- on the record below -- what the intent of the Almands' spouses was when the joint accounts at issue were first established many years ago.

Most telling is that neither Almand III nor Almand Jr. testified that they intended to create a tenancy by the entireties. Nor could they have. Both did not know, and were unable to explain (even in general terms), what constitutes a tenancy by the entireties. The specific intent to form a tenancy by the entireties cannot exist if the purported tenants did not even know the legal significance of this

[10] See Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994) ("[s]peculation, surmise and suspicion" improper where clear and convincing evidence standard applies). Speculation and surmise is particularly improper under the clear and convincing evidence standard where a person's subjective intent is at issue. In Re Estate of Combee, 583 So. 2d 708 (Fla. 2d DCA 1991). In Combee, the appellate court held that purported beneficiaries failed to prove by clear and convincing evidence that the deceased did not intend her nieces to obtain the two bank accounts upon her death. Notably, the court stated that the "fact that [the deceased] lived a frugal life and did not give large sums of money to people during her life *provides little more than speculation as to her intent* to give money, at the time of her death, to two nieces who had provided substantial care to her in her final years." Id. at 712 (italics added).

type of ownership when the accounts are established. As the Second District stated in Terrace Bank:

> It is hard to conceive how the Bradys could have intended to create an entireties account if Dr. Brady did not understand the significance of an entireties account.

598 So. 2d at 228. Likewise, it is difficult to comprehend how the Almands could have intended to create a type of ownership that they neither knew nor understood. The Almands undoubtedly intended to establish joint ownership with right of survivorship, and their testimony is entirely consistent with this form of ownership. Their vague and unsupported testimony, however, does not prove the intent to establish a tenancy by the entireties in the accounts at issue.

The historical development of the entireties doctrine also plays a role in this appeal. At common law, husband and wife were considered one person such that each spouse was deemed to own and control the entire estate; each owned the entirety of the property at issue and not a share or divisible part. Bailey v. Smith, 103 So. 833, 834 (Fla. 1925) (recognizing tenancies by the entireties in personal property). Thus, in order to create a tenancy by the entireties, it must be shown that neither spouse could, acting alone and without the acquiescence and approval of the other spouse, sever or convey his or her interest in the property. Id. In other words, one spouse could not have the unilateral right to transfer or disburse the funds in entirety property without the other spouse's approval.

Both Almand Jr. and Almand III, however, testified that they and their spouses had the unrestricted ability and unilateral right to access and disburse any

of the funds in each of their accounts without the other respective spouse's consent or acquiescence. This testimony established that the accounts were not entireties accounts. The right to alienate or disburse the property without spousal consent is an essential distinction between tenants by the entireties and joint tenants with a right of survivorship. As the court in Sitomer v. Orlan, 660 So. 2d 1111 (Fla. 4th DCA 1995) stated:

> A unique aspect of a tenancy by the entirety, is that each spouse is "seized of the whole or the entirety, and not of a share, moiety, or divisible part" . . . The important attribute separating a joint tenancy from an tenancy by the entirety is that in a tenancy by the entirety neither spouse may sever or forfeit any part of the estate without the assent of the other so as to defeat the right of the survivor.

Id. at 1113; see Bailey, 103 So. at 834. Because the evidence establishes that the Almands and their spouses each had the right to disburse funds from the accounts -- even the entire balance -- without the consent of other account owners, it is evident that a tenancy by the entireties was neither intended nor established.

This Court's decision in First Nat'l Bank of Leesburg is consistent with this conclusion. In reexamining the application of the entireties doctrine to bank accounts, this Court held that accounts that provide for individual withdrawal of funds can be tenancies by the entireties under certain limited circumstances. 254 So. 2d at 779. In this regard, the Court's analysis focused on the unique facts of that case. Specifically, the joint account at issue was unusual because the spouses had "exchanged mutual powers of attorney, recognizing in each the power to make deposits and drafts on behalf of both." Id. at 778. In other words, the fact that the spouses had made specific provision to make deposits and withdrawals (pursuant

to the mutual powers of attorney) in a manner that *preserved* the unity of person would not, by itself, defeat their claim that the account was a tenancy by the entireties. Of course, they bore the substantial burden of proving this intention on remand. Id. at 781.

Notably, the signature card in First Nat'l Bank of Leesburg explicitly provided for withdrawals by each spouse on behalf of the other via the powers of attorney. In light of this express authorization, this Court stated:

> So long as a bank contract or signature card is drafted in a manner consistent with the essential unities of the entireties estate, and so long as it contains a statement of permission for one spouse to act for the other, the requirements of form of the estate will have been met.

Id. This holding stands merely for the limited proposition that joint accounts with individual withdrawal rights can be entireties accounts -- provided that the essential unities are proven and preserved through specific written "permission for one spouse to act for the other."[11]

The point is simply that because the Almands failed to prove that they intended to establish entireties accounts, the question of whether the signature cards properly preserved the unity of person is irrelevant. The mutual exchange of powers of attorney on signature cards does not by itself establish an entireties

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[11] See Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951). In Hagerty, the joint account at issue included the following language: "Either one or both or the survivor of either are authorized to sign checks. Signature of either one or the survivor to be sufficient for withdrawals of all or any part of the funds standing to the credit of the account." Id. at 433. Because of this "language of the signature cards" that provides authorization for withdrawals, the court held that a tenancy by the entireties in such account was not precluded. Id. at 434. Cf. Marine Midland Bank-New York v. Arms, 409 So. 2d 215, 215 (Fla. 1982) (holding that language "either one or both of the survivor" may withdraw funds was sufficient, coupled with testimony and evidence, to establish tenancy by the entireties).

account. Instead, if the requisite intent to establish entireties accounts is clearly demonstrated, the existence of properly drafted mutual powers of attorney can *preserve* this intent.

In fact, the Almands' testimony is contrary to the concept of an entireties account. Each testified that they (or their spouses) could unilaterally access and disburse funds. [R 1280 at 10-11, 39-40, 43, 56] For example, Almand III testified as follows:

> Q: So your understanding is that you could withdraw the entirety of that account out any time you wanted it?
>
> A: Yes.
>
> Q: Without ever discussing it with Sue?
>
> A: Yes, I think I've done that before in previous joint accounts.

[R 1280 at 39-40] Likewise, Almand III verified that his wife could freely access and disburse any or all funds:

> Q: . . . What right, if any, did your wife have with regard to taking the money out of the account?
>
> A: The same right I have. Her signature is on the account. She can write a check and take it all out.

[R 1280 at 43] Almand Jr. testified that he and his wife opened their accounts as "joint tenants with rights of survivorship" -- not as entireties accounts. [R 1280 at 62] Of course, he had never even heard of an estate by the entireties. [R 1280 at

61] Further, he specifically made a clear distinction between his funds and his wife's funds, thereby undermining the purported unity of interest in the accounts.[12]

The credibility of the Almands is not an issue. In assessing the record evidence, this Court need not place significant weight on the trial court's ruling (which included no findings of fact). In this type of case, the trial court's ruling is entitled to little deference and its presumption of correctness is slight.[13] Instead, this Court can conduct a de novo review of the pleadings and evidence to make its own judgment as to whether the spouses clearly intended to establish accounts held as tenancies by the entireties and thereby avoid garnishment by creditors.[14] This close inspection of the record is particularly important because the transactions at issue are so "easily abused" that additional scrutiny is warranted.[15]

Finally, it bears emphasis why compelling proof of contemporaneous prior intent is required as to each account. The reason is to avoid the type of "hurried," "after-the-fact" and opportunistic characterizations that are contrived to "insulat[e] funds from legitimate claims of creditors of one of the spouses." First Nat'l Bank of Leesburg, 254 So. 2d at 782 (Fla. 1971) (Dekle, J., concurring); see Terrace

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[12] When asked the question "Who's in charge of the financial matters in your household?" Almand Jr. stated, "Her money or my money?" [R 973 at 56] Because Almand Jr. had no funds other than those held jointly with his wife, his testimony supports the conclusion that no unity of interest existed in the accounts.

[13] Terrace Bank, 598 So. 2d at 227 ("Because this court can review the exact evidence (pleadings, exhibits, and depositions) which the trial court utilized in entering its order, the presumption of correctness which the appellate court normally gives to the trial court's ruling is slight.").

[14] Id.

[15] Id. (citing First Nat'l Bank of Leesburg, 254 So. 2d at 782 (Dekle, J., concurring)).

Bank, 598 So. 2d at 228. Because bank accounts are subject to manipulation and abuse (and intent so easily fabricated), courts must require stringent proof of the intent to establish entireties accounts. Here, such proof is absent as to each account under the clear and convincing standard or some lesser standard such as a preponderance of the evidence.

In summary, the Almands' testimony merely established that the accounts at issue were jointly owned. Their testimony was not supported by any documents showing that the accounts were intended to be entireties accounts. Instead, the documents demonstrated that the accounts were other than entireties accounts. As such, the bank accounts are subject to creditors' claims and may be garnished.

CONCLUSION

The Almands failed to establish that the six bank accounts at issue in this appeal were intended to be established as tenancies by the entireties. As such, Beal Bank requests that this Court quash the Fifth District's Decision as to the four Compass Bank accounts at issue with instructions to reinstate the writs of garnishment as to these accounts. The Fifth District's Decision should be affirmed as to all remaining accounts. Further, Beal Bank respectfully requests that this Court answer the certified questions to require a clear and convincing evidence standard. Even if the Court concludes that a lesser standard applies (such as a preponderance of the evidence), the Almands still failed to meet their burden of proof and the relief that Beal Bank seeks in this appeal should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to William G. Cooper, Esquire, Post Office Box 551069, Jacksonville, FL 32255-1069, Sue Almand, 51 Ocean Breeze Drive, Atlantic Beach, Florida 32233, and Doris Almand, 2802 Park Sq. Pl. E., Fernandina Beach, Florida 32034 by U.S. Mail this _____ day of September, 1998.

_____

Attorney

JAX1-313330.2

A1 Beal Bank, SSB, v. Almand et. al., 710 So. 2d 608 (Fla. 5th DCA 1998)

A2 Trial Court's Order