IN THE SUPREME COURT OF FLORIDA

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,

Petitioners,

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.

ANSWER BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

Respondents disagree with much of the Preliminary Statement advanced by Petitioner as such is not a true preliminary statement but rather direct argument on Beal Bank's position in this matter. On the basis that this is an improper use of the preliminary statement, Respondents will address Petitioner's contentions at the appropriate places in this brief.

References to Respondent Amos F. Almand, Jr. will be "Almand Jr." References to Respondent Amos F. Almand, III will be "Almand III." No other respondents are involved in this appeal as it relates only to the garnishment of bank accounts of these two respondents and their non-party wives.

Citations to the Record on Appeal will be referenced as [R.__], with the blank space representing the page number of the citation to the Record. Citations to the transcript of the hearing held March 3, 1997 before the Circuit Court, St. Johns County will be to [R. 1280] with the page number where the citation appears immediately following.

STATEMENT OF CASE AND FACTS

Respondents Amos F. Almand, Jr. and Amos F. Almand, III essentially agree with the statement of the case and facts presented in Petitioner's Initial Brief, but have some clarifications and additions to bring to the Court's attention. Respondents will follow the same organization as did Petitioners, by first addressing the procedural background (Statement of the case) and secondly addressing the evidence and testimony at the hearing on the motions to dissolve the writs of garnishment (Statement of Facts).

Statement of the Case

This matter actually involves two actions that were consolidated into one case before the Circuit Court, St. Johns County. The action filed March 26, 1996 [R. 1-281] was not filed against Almand Jr., but was filed against Almand III, as well as other Defendants. The separate action that was filed against both Almand Jr. and Almand III was filed in approximately April, 1996. There does not appear to be a record reference to this second action. These two actions are referred to respectively as the Medical Building action and the Bank Building action. Almand Jr. had no liability and was not sued by Petitioner Beal Bank regarding the Medical Building.

After the cases were consolidated [R. 336], Beal Bank filed a consolidated "Motion for Summary Final Judgment Including an Adversary Evidentiary Hearing to

Tax Attorney's Fees and Re-establishment of Lost Instruments." [R. 345-396]. On September 25, 1996, the trial court entered two separate orders pursuant to this Motion [R. 576 - 579]. The summary final judgment on the Bank Building in the amount of $416,142.65 [R. 576] was entered against both Almand Jr. and Almand III, as well as Almand Construction Company. Contrary to Petitioner's assertion, the summary final judgment as to the Medical Building in the amount of $141,879.81 was not entered against Almand Jr., but only against Almand III and Almand Construction Company [R. 578-579].

The reason that the answers of Compass Bank to the writs of garnishment were amended was because Petitioner Beal Bank had initially served the writ of garnishment on Compass Bank only as to accounts of Almand Jr. [R. 654-55; R. 659-661]. Compass Bank then mistakenly disclosed accounts of Almand III in response to this January 1997 writ [R.731-732] when Beal Bank did not move for a writ of garnishment as to Almand III's accounts at Compass Bank until February 11, 1997 [R. 736-737]. The Compass Bank accounts at issue in this appeal as to Almand Jr. (formerly from First Performance Bank and Enterprise National Bank) are disclosed in the Second Amended Answer of Garnishee Compass Bank filed February 11, 1997 [R. 731 - 732]; account 6630036247, entitled "Almand, Doris W. or Almand, Amos" and account 0020001887, entitled "Amos F. Almand, Jr. and Doris J. Almand", as reflected on the

account agreements [R. 960, 962]. For some reason, Petitioner has not included these account agreements in their Appendix, choosing instead to include the nonrelevant account agreements of Southtrust Bank and Barnett Bank. These relevant Compass Bank account agreements are included in Respondents' Appendix, App. 1. The Compass Bank accounts at issue in this appeal as to Almand III are those set forth in the February 18, 1997 Answer of Garnishee Compass Bank [R.795-796], and revealed at the hearing, via the account agreements, to be (1) account 0040022866, entitled "Amos F. Almand, III, Sue C. Almand"[R. 934]; (2) account 004022646, entitled "Amos F. III or Sue C. Almand" [R. 935]; and (3) account 10020355, entitled "Jane D. Freedman or Sandra J. Freedman or Amos F. Almand, III or Sue C. Almand" [R. 936]. Account 20015208, entitled "Amos F. Almand, III, Salary Account". [R. 947] is not at issue in this appeal. Petitioner mistakenly identifies these accounts in different manners on p. 6 of their Initial Brief. The above identification of the accounts is taken directly from the account cards.

Respondents Almand Jr. and Almand III agree with the remainder of Petitioner's Statement of the Case, except that the hearing on the motions to dissolve was on March 3, 1997, not March 7, 1997 [R.1212-1213 , R. 1280-1352].

Respondents note to the Court that it appears from the discussion in Petitioner's Initial Brief that Petitioner does not dispute the dissolution of the writs of garnishment

as to the Almand III Salary Account but only as to four Compass accounts held by either Almand Jr. and Doris Almand, or Almand III and Sue Almand. Furthermore, Petitioner does not dispute the Fifth District's reversal as to the dissolution of the Almand, Jr. Southtrust and Barnett accounts. Thus, a discussion of these accounts is irrelevant and superfluous.

Statement of the Facts

Respondents agree that the pertinent facts in this appeal relate to the evidence presented at the March 3, 1997 hearing and would elaborate somewhat on Petitioner's recitation of the testimony presented at that hearing.

Almand Jr.'s Testimony

Since Petitioner is only seeking a reversal of the trial court and appellate court's decision as the Compass Bank accounts of Almand, Jr. and his wife, Respondents fail to see the relevancy of the exchanges related by Petitioner in its brief as to the Barnett and Southtrust accounts.

Amos F. Almand, Jr. and his wife Doris Almand have been continuously married for almost 52 years and they have resided in Florida since 1952. [R. 1280 at 47]. Almand Jr. verified that the signatures on the Barnett Bank account are those of he and his wife, and that he owns the account with his wife. [R. 1280 at 48; Ex. 7]. He also verified he and his wife's signatures for the Compass Bank accounts. [R. 1280 at 51 -

55]. The second bank account at Compass Bank, 0020001887, was opened by Almand Jr. and his wife on January 26, 1988, and was created by both Almand Jr. and his wife at the same time. [R. 1280 at 55].

Almand Jr. verified he and his wife's signatures for the Southtrust Bank account. [R. 1280 at 57]. Almand Jr. testified that he and his wife jointly own their property, and that everything they have is in both of their names - that it has been that way "forever". [R. 1280 at 58].

Almand Jr. also testified that no monies in any of the accounts have been derived from any property owned in his name, at least in the last two years prior to the hearing of March 3, 1997. [R. 1280 at 60].

On cross-examination, Almand Jr. testified that his intent when each of the accounts was opened was that "everything that we put into the bank was ours." [R. 1280 at 62]. He also testified that he and his wife both controlled their money. [R. 1280 at 63].

On re-direct, Almand Jr., as to the Barnett account, verified that "not one nickel has gone into that account" from property that was owned by him personally. [R. 1280 at 67]. The monies in the Barnett account have always come from properties owned by either his wife or both he and his wife. [R. 1280 at 67 - 68].

Almand III's Testimony

Almand III testified that he and his wife, Sue C. Almand, have been married continuously for 21 1/2 years [R. 1280 at 8]. Almand III and his wife's accounts at issue were all at either Compass Bank (which had recently acquired Enterprise National Bank), or at Merrill, Lynch, Fenner and Smith. [R. 1280 at 9]. The Almand III accounts at Compass Bank were all former Enterprise National Bank accounts and those account agreements were introduced into evidence at the hearing. [R. 934, 935, 936, 947] Almand III testified that account 0040022866 was opened by he and his wife, Sue, at the same time and that the two of them are joint owners of the account. [R. 1280 at 10]. Almand III further testified that "[t]he account belongs to both of us as a whole and either of us can, you know, write checks on the account, have access and privileges to any and all, either of us." [R. 1280 at 10].

Almand III testified that as to account 0040022646, he and his wife were the owners, they established the account at the same time, and that the monies in the account were available to either of them. [R. 1280 at 10 - 11]. Almand III also testified that although he did not have a clear understanding of the difference between tenants by the entireties and tenants with rights of survivorship, his intent in opening the accounts was to have the money belong to both he and his wife and have equal access to the money [R. 1280 at 27 - 28].

As to Compass account 100200355, Almand did not testify that the Freedmans were "their" former business partners, as recited in Petitioner's Brief. He testified that the Freedmans were the wives of two doctors that were business partners of his in some previous venture. [R. 1280 at 13]. Almand III testified that he personally had no interest in the funds in that account [R. 1280 at 13].

Regarding the fourth Compass Bank account 20015208, Almand III testified that this account was a head of household account that he established pursuant to advice he received. [R. 1280 at 15]. Almand III placed his salary in the account, and only his salary and car allowance, which he understood to be part of his compensation, was placed in the account in the six months prior to the hearing. [R. 1280 at 15-16].

Almand III testified that within the last six and one-half years, there had been no sales of any property owned by him alone that could have been turned into money that would have gone into any one of the above-listed accounts. [R. 1280 at 19]. The last time he owned any real property or personal property in his own name as opposed to that owned jointly he and by his wife was six-and-a-half years prior to the March 3, 1997 hearing. [R. 1280 at 19]

Discussion of the Fifth District Decision

Petitioner reiterates the "stark contrast" of the Fifth District decision, and the "vastly differing conclusions" of the appellate judges. Notably missing is the

substantial fact that the Fifth District had to analyze account cards from many different financial institutions, none of which were similar. As noted in Judge Harris and Judge Sharp's opinions, distinctions were made on the basis of what appeared in the account language, particularly in the Southtrust and Barnett accounts, as well as the fact that the Merrill Lynch account lacked the unity of time.

Furthermore, Judge Harris did not state that the testimony of Almand Jr. and Almand III was "unsupported by any documentary evidence." Judge Harris thoroughly analyzed the deposit cards and discussed the fact that these cards authorized either depositor to withdraw funds and that the Compass deposit cards gave authority by each spouse for individual withdrawals. In footnote 5 to his opinion, Judge Harris noted:

> Judge Cobb is overly impressed with the fact that the husband testified that the wife was free to withdraw the funds (as was he) at her discretion and without consultation with him. The purpose and that authority was conveyed in the signature card. The dissent sees this as authority for one spouse to "defeat the rights of the other spouse" and thus prevent the formation of a tenancy by the entireties account. But the reasoning is pre-*Hector* and ignores the holdings of the *Hector* majority. After *Hector*, even if the account authorized individual withdrawals, still it is a tenancy by the entireties account *if* the parties intend to each own all of the account. (emphasis in original)

Clearly, Judge Harris referenced to the documentary evidence as well as the testimony of the Almands, thus refuting Petitioner's contention that Judge Harris' conclusions were unsupported by any documentary evidence.

SUMMARY OF ARGUMENT

Although the District Court of Appeal was divided in its opinion, such an outcome can be attributed to the factual differences inherent in the documentary evidence, and not necessarily to the status of the law. However, Respondents agree that this Court should clarify the requirements of proving the establishment of a tenancy by the entireties.

While Respondents disagree with Petitioner's contention that courts are increasingly confronting cases in which spouses are attempting to shield their accounts without corroborating documentary evidence, they agree that guidance is necessary from this Court, particularly in light of the fact that financial institutions in which spouses are establishing their joint spousal accounts cannot be expected to look out for the legal interests of these customers and indeed, do not present married couples with any option to establish a tenancy by the entireties, so as to better protect that financial institution's collection status vis-a-vis the joint account holders.

As to the first certified question, Respondents disagree that the clear and convincing standard should apply because it places too heavy of a burden on an uneducated public to understand an area of law that is "confusing and contradictory" and in a "state of morass." The entireties doctrine as it presently exists guards against the type of abuse Petitioner claims are suffered by creditors. The banking system is set

up such that married couples have no opportunity to declare that they wish to establish an account by the entireties, if these people even know exactly how an account by the entireties is different from a joint account. Most consumers lack the sophistication or indeed, legal training, necessary to recognize that an account card entitled "joint tenants with right of survivorship" does not protect the account from creditors of only one spouse. Financial institutions protect their own interests, not those of their customers. Most institutions allow a set off of account balances against other debts owed by the customers to the financial institution in the event a default in these other relationships. A financial institution is not going to eradicate this collection tool by permitting customers to select an option on a depository account card that allows the customer to shield their assets from the bank.

Regarding the Fifth District's second certified question, it is necessary to go beyond what account cards and terms provide because banks seek to protect their own financial interests. In most cases, banks do not offer customers the ability to designate an account as a tenancy by the entireties and the term is generally absent on account agreement cards. The status of the law is that a spouse must demonstrate an intent to create a tenancy by the entireties. Such intent should be demonstrated by the customary preponderance standard, as such an element is ordinarily proved up when intent is at issue.

The trial court correctly dissolved the writs of garnishment against the Almand III and Sue Almand accounts and against the Almand Jr. and Doris Almand accounts. The accounts were established by each respective Almand and their spouse well in advance of the filing of the underlying lawsuits, and the actions of the debtors are not any type of abuse against Beal Bank. The evidence as to the establishment and intent behind the establishment of the Compass accounts was sufficient. Furthermore, proper notice was not provided to Doris Almand by Beal Bank of the garnishment action and Beal Bank should be precluded from asserting its garnishment actions against Doris Almand as to the Barnett and Southtrust accounts.

ARGUMENT

I. THE BANK ACCOUNTS OF ALMAND, JR. AND ALMAND, III WERE HELD BY THE ALMANDS AND THEIR RESPECTIVE SPOUSES AS TENANCIES BY THE ENTIRETIES AND THE TRIAL COURT WAS CORRECT IN DISSOLVING THE WRITS OF GARNISHMENT

The first certified question of the Fifth District relates only to accounts which disclaim the status of tenancy by the entireties on the face of the actual documents establishing the joint account, specifically here the Southtrust and Barnett accounts. Thus, this question has no application to the Compass Bank accounts at issue in this appeal. However, the second certified question relates directly to the Compass Bank accounts at issue because these account documents do not disclaim a tenancy by the entireties, but rather do not provide a check-box by which the Almands could have established such an account.

No matter what the status of the documentary evidence, Respondents respectfully suggest that the burden to be placed on any litigant seeking to establish a tenancy by the entireties as to a bank account should be by preponderance of the evidence, or greater weight and force of the evidence. Requiring the Almands to meet the burden of the "clear and convincing" standard particularly when the law on the subject flounders in a "legal quagmire" that is "confusing and contradictory," and in a "state of morass," as articulated to this Court in Petitioner's Brief, is fundamentally

unfair and runs contrary to standards of justice and equity. As to future litigants, a standard of preponderance of the evidence or greater weight and force of the evidence should apply in light of the public policy considerations in permitting spouses to protect jointly-owned property from creditors of only one spouse. Safeguards currently exist in the law as it stands, by requiring that certain nebulous factors such as intent be demonstrated by the party claiming protection, in addition to having to establish the five unities.

The testimony of the Almands referenced and touched on each of the particular factors which determine whether a tenancy by the entireties was intended to be created. No contradictory testimony was introduced and contrary to Beal Bank's contention, the bank records support the testimony of the Almands.

(A) The Preponderance of the Evidence Standard Applies

Property held as tenancy by the entirety cannot be reached to satisfy the individual judgment debt of either party under the law of this state. Meyer v. Faust, 83 So. 2d 847 (Fla. 1955). The bank accounts of Almand Jr. and his wife and Almand III and his wife are held as tenancies by the entireties and thus are not subject to garnishment by Almand Jr. and Almand III's creditor, Petitioner Beal Bank, because these accounts are protected.

Spouses who must establish a tenancy by the entireties already have a substantial burden to demonstrate the existence of entireties joint ownership of their account. First, in order to present the prima facie existence of an entireties account, a spouse or spouses must demonstrate the four unities of possession, interest, title and time, together with the unity of marriage. First Nat. Bank of Leesburg v. Hector Supply Co., 254 So.2d 777 (Fla. 1971). See also Sitomer v. Orlan, 660 So. 2d 1111, 1115 (Fla. 4th DCA 1995). The unity of marriage is what distinguishes a tenancy by the entireties from a joint tenancy with right of survivorship, as such relates to bank accounts. A tenancy by the entirety can only exist between a husband and wife. Quick v. Leatherman, 96 So. 2d 136, 138 (Fla. 1957). The essential characteristic of an estate by the entirety is that each spouse is seized of the whole as opposed to a devisable part. Ashwood v. Patterson, 49 So. 2d 848, 849 (Fla. 1951).

Beal Bank first argues that one reason for the establishment of a clear and convincing standard as to entireties accounts is because there are such close similarities between an account with a right of survivorship and a tenancy by the entireties, thus prompting spouses to claim joint accounts as entireties accounts so as to protect these accounts from collection and garnishment. However, this Court has addressed this “incentive” situation in First Nat. Bank of Leesburg by requiring that “the intention of the parties must be proven unless the instrument created the tenancy clearly bears an

express designation that the tenancy is one held by the entireties." Id. 254 So.2d at 781 (emphasis added).

Thus, a party seeking protection of the doctrine of a tenancy by the entireties has the burden of proving intent, itself a subjective, nebulous and ill-defined concept. Now, Petitioner seeks to heap onto account holders the burden of proving such intent by clear and convincing evidence, under the guise of claiming that such a burden would prevent misuse of the doctrine of tenancy by the entireties.

Such a burden is not warranted, particularly when considering the arsenal of weapons already aimed at spouses who own joint accounts at financial institutions. Customers of banks, particularly in this day and time where small, local banks are being gobbled up by megabanks from other states, have no real choices when entering into a depository relationship with a bank. The forms by which one opens an account with a bank are not negotiated by the customer, but rather are presented to the customer to fill out only in the manner permitted by the bank. This is a "take it or leave it" process. Customers do not take these forms to their attorneys for review, nor do they submit to any type of a negotiation process with the bank. Most importantly, these forms, as is evidenced by every single account card presented as evidence at the trial of this cause, have no option for a customer to designate their account as one to be held by the entireties.

The reason for this is simple. A bank these days seeks to be involved in every aspect of their customers' lives, from providing depository accounts, car loans, first and second home mortgages, to lines of credit, IRAs and securities brokerage services. In light of these multi-function cross-selling activities, banks have no incentive to assist a customer in protecting their assets, particularly those assets that a bank can access so easily as a depository account, by a simple transfer of funds collection process in the event the need arises. As may be seen by reference to the account cards at issue here, particularly the Compass accounts, banks customarily provide in their depository agreements for the right of set-off for other obligations owed by the customers to the bank. The Compass account cards provide as follows:

> "SET-OFF - by signing this form you each agree that we may at any time (without prior notice, except as prohibited by law) set-off the funds in this account against any debt owed to us now or in the future, by any of you having the right of withdrawal, subject to any limit on the right of withdrawal from this account by such person or legal entity.
>
> This right of set-off does not apply to this account if (a) it is an IRA or a tax deferred retirement account; or (b) the debt is created by a consumer credit transaction under a credit card plan; or (c) the debtor's right of withdrawal arises only in a representative capacity."

If a bank allows a customer to expressly designate their account to be a tenancy by the entireties, this right of set-off will be extinguished when only one spouse is responsible for the debt for which the bank would seek the right of set-off.

Financial institutions are quite capable of protecting themselves, as is evident in the account cards at issue, particularly the Barnett and Southtrust accounts. Under no circumstances can this Court expect a financial institution to gratuitously offer a tenancy by the entireties to their customer. Financial institutions are not what they were in 1971, when First Nat. Bank of Leesburg was decided by this Court. In light of the substantial changes in the nature of banks and the increasing myriad of relationships which banks enjoy with their customers, no additional protection in the form of a clear and convincing standard as to an entireties account establishment is necessary.

Of course, the relationship between a bank and its customer different than that between the same customer and one of his or her separate creditors. The designation on bank account cards and in account agreements only relate to the agreement between the depositor(s) and the bank, and are not determinative as to issues involving an outside credit. This point is explored in In re: Guardianship of Medley, 573 So. 2d 892 (Fla. 2d DCA 1990). In this case, a husband and wife had twelve joint savings and loan association accounts. Heirs of the wife, who was deceased at the time of the action, sought to surcharge the bank for withdrawals by the husband from the joint accounts. These withdrawals were made pursuant to signature cards which authorized either the husband or the wife to make withdrawals. The trial court ruled that the

petition of the heirs failed to state a cause of action because the signature cards permitted either the husband or the wife to withdraw funds, and the wife had no ownership interest traceable to the funds withdrawn by the husband. The appellate court reversed, holding that a joint account owner has a continued interest in funds in a joint account, whether the account is owned as a joint tenancy or by the entireties, notwithstanding the right of either owner to withdraw money from the account, when all of the funds are appropriated to the other owner's use without the agreement of both owners. Id. at 896-899. Obviously, this holding is not particularly useful here because this action does not involve any allegations of improper withdrawal. What is important about the Medley court's ruling is the holding that signature card provisions permitting withdrawal of account funds by either of two owners of an account are not determinative of the kind of ownership interest in the account. Id. at 900. The provisions of signature cards are ". . . only for the protection of the savings and loan associations and for the convenience of the parties" and do not affect the kind of ownership interests held in the account funds. Medley at 900. As noted in Medley, these signature card provisions establish the immunity of the bank but do not affect the rights of the husband and wife.

It is also important for the Court to note that a signature card designation as a "joint account with a right of survivorship" does not preclude the creation of an

entireties account. Sitomer, supra, at 1115, citing Winters v. Parks, 91 So. 2d 649, 652 (Fla. 1956). The mere fact that none of the accounts testified to by Almand Jr. or Almand III expressly indicated on their face that they were "tenancies by the entireties" does not preclude the Respondents from establishing with factual testimony that these accounts were tenancies by the entireties. As noted previously, it is to be expected that banks would not place such an option on an account card because it would be to their financial detriment. Indeed, as noted by Petitioners, Barnett Bank takes the matter one step further and protects itself by providing in the supplemental account agreements that tenancies by the entireties will not be recognized.

Respondents do not contend that the signature cards and account agreements of the Almands' accounts are not relevant in this matter, only that they are not determinative of the issue of how the funds in the accounts were owned by the Almands and their respective spouses. Of much greater importance is the intent of the owners. Sitomer at 1115; First Nat. Bank of Leesburg, at 780.

The case of Sitomer v. Orlan, 660 So. 2d 1111 (Fla. 4th DCA 1995) explores the issues of intent in detail. In this case, a woman sought to recover from her husband's brother money which the husband withdrew from their joint bank account without her consent. According to the account documents, the account was entitled "Irving Sitomer or Orbel Sitomer," and the signature card designated the account as a joint account with

a right of survivorship. The Fourth DCA discussed two forms of bank account ownership, joint tenancy with the right of survivorship and tenancy by the entirety, and noted that these two types of ownership have many of the same characteristics. These characteristics include the four central "unities," possession, interest, title, and time. As noted by the Fourth District, a tenancy by the entirety possesses one more -- the unity of marriage. The main difference between a joint tenancy and a 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. Sitomer at 1113, citing Bailey v. Smith, 103 So. 833, 834 (Fla. 1925). As noted by the Court in Sitomer, "[t]he non-severability aspect of a tenancy by the entirety precludes a bank account so held from being subject to execution to satisfy an individual debt of either spouse." Id. at 1114, citing First Nat. Bank of Leesburg, 254 So.2d 777 (Fla. 1971).

The Sitomer court noted that the issue of whether the parties created a tenancy by the entirety in a bank account is a question of fact. Sitomer, 660 So. 2d at 1115. Sitomer addresses the very situation we have in this matter, where a tenancy by the entirety is not specifically noted on the bank documents. In fact, Sitomer also involved bank accounts with signature cards that expressly designated the accounts of a husband and wife to be "joint tenants with rights of survivorship" just as in the instant case. A

review of the bank agreements submitted as evidence in this matter reveals none of the signature cards have a space for the account holders to indicate that they are seeking to establish an account labeled as "tenancy by the entirety." As noted by the Fourth District in Sitomer, banking practices generally do not require accounts holders to expressly delineate the form of ownership that they are creating in a jointly held account. Id. at 1113. It is for this reason that the Sitomer case holds that the intention of the parties regarding a tenancy by the entirety must be proven unless the instrument creating the tenancy clearly bears an express designation that the tenancy is by the entireties. This reasoning ties in with Respondents' discussion above of common banking practices today. As noted earlier, it is respectfully suggested to the Court that the reason that banks do not explicitly provide for a box for a tenancy by the entirety on the bank account cards is that should one of the joint account holders default on some other obligation owed to the bank, most banks would attempt to exercise a right of set off against funds being held in the bank. In fact, many of the account agreements that were submitted at the hearing along with the signature cards recognize the right of the respective banks to do this. If a bank account is designated as an account by the entireties, the bank would not be able to assert a set off unless both account holders were indebted to the bank on the underlying obligation. However, this factor as to designation on an account card only affects the relationship of the depositor and the

bank and does not have anything to do with rights of third parties vis-a-vis joint owners of a bank account.

Furthermore, the mere fact that a conjunction employed in an account card indicates that the parties are joined by the word "or" does not mean that the account was not held as tenants by the entireties. See Norman v. Bank of Hawthorne, 321 So. 2d 112 (Fla. 1st DCA 1975), referencing First Nat. Bank of Leesburg, supra, and Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951).

Despite this, creditors such as Beal Bank seek to make use of the account agreements between joint account holders and their banks as evidence that an entireties account was not created. Now, Petitioner wants this Court to place an additional bar in a joint account holder's path when already faced with having to prove intent to create a tenancy by the entireties, that such intent must be proved by clear and convincing evidence.

The ordinary evidentiary burden in most civil cases is the preponderance or greater weight of the evidence. See Seropian v. Forman, 652 So.2d 490, 494 (Fla. 4th DCA 1995). The "clear and convincing" standard is a higher, more demanding burden. Id. Preponderance of the evidence is the acceptable level of proof in nearly all civil cases. Visincardi v. Tirone, 193 So.2d 601, 604 (Fla. 1966); Schoenrock v. Schoenrock, 202 So.2d 574, 573 (Fla. 2d DCA 1967); Hill v. State, 358 So.2d 190,

201 (Fla. 1st DCA 1978); and In re Bryan, 531 So.2d 1062 (Fla. 4th DCA 1988).

There is no reason for this Court to depart from this ordinary level of proof and require the Almands or any other spousal account holder to demonstrate their intent to hold their accounts as entireties accounts by a clear and convincing standard, particularly in light of the hurdles such account holders already face in setting up their accounts at their financial institutions. As noted by Judge Harris in his opinion in this matter:

> "But the *Hector* court did not intend to set up an obstacle course for married couples to run in order to set up a tenancy by the entireties account. Such couples should not be required to be experts in or even knowledgeable of the law of estates in order to take advantage of the benefits of the tenancy by the entireties estate."

To require an account holder demonstrate their intent by clear and convincing evidence in essence prohibits said account holders from obtaining the benefits of such an estate.

All that this Court required in First Nat. Bank of Leesburg was proof of an intention to establish an entireties account. This requirement already protects creditors of a spouse and provides the safeguards necessary to insure against abuse of the tenancy by the entireties doctrine. These specific protective factors are addressed in the cases below in relation to the testimony by Almand Jr. and Almand III in this case.

Prior to discussing the specific showings made at the evidentiary hearing in this

matter, Respondents wish to address the Second District's opinion in Terrace Bank of Florida v. Brady, 598 So.2d 225 (Fla. 2d DCA 1992). This is the only Florida case which applies the clear and convincing standard. None of the other Florida cases discussed below apply this standard, even though they all address the same issue of the applicability of the entireties doctrine to joint spousal accounts. Terrace Bank involved a Barnett Bank account which expressly excluded the ability to create a tenancy in common. No live testimony was presented at the final hearing, but the testimony of three witnesses from Barnett Bank was admitted, which testimony established that Barnett did not offer or allow checking accounts by the entireties. The only evidence offered by the account holders was that they were husband and wife at the time the account was opened, and continued to be married. The wife testified that the parties had no discussion of an intent to protect their money or create a tenancy by the entireties. Additionally, the wife had written a letter claiming the account was owned as joint tenants with right of survivorship.

It is respectfully submitted that the same result in Terrace Bank would have been rendered by applying the preponderance of the evidence standard rather than the clear and convincing standard imposed by the Second District. No real showing was made by the husband and wife and obviously, not much of a showing could be made because the documentary evidence expressly disclaimed a tenancy by the entireties. However,

the evidence presented in this matter was much more comprehensive than that presented in Terrace Bank, as discussed below.

The clear and convincing standard is used in civil cases normally where something of extreme importance or value is at stake, such as the revocation or suspension of a professional license , as in Nair v. Dept. of Business & Professional Regulation, Bd. of Medicine, 654 So.2d 205 (Fla. 1st DCA 1995); or forfeiture of property, Fletcher v. Metro Dade Police Dept. Law Enforcement Trust Fund, 593 So.2d 266 (Fla. 3d DCA 1992). Even a fraud case, which has intent as one of its requirements, only requires evidence of fraud to be demonstrated by a preponderance or greater weight. Wieczoreck v. H & H Builders, Inc., 475 So.2d 227 (Fla. 1985). A miscarriage of justice can occur when an incorrect standard of proof is applied. Powerhouse, Inc. v. Walton, 557 So.2d 186, 187 (Fla. 1st DCA 1990).

Such a miscarriage of justice would occur if this Court requires spousal joint account holders in Florida to demonstrate their intent to hold their accounts as tenancies by the entireties by the standard of clear and convincing evidence. This is particularly so in light of the motivation and demonstrated ability of banking institutions to prevent customers from designating their spousal accounts as tenancies by the entireties, and in light of the fact that other creditors can protect themselves by requiring spouses to join in on obligations assumed by the respective husband or wife.

(B) The Testimony of the Almands Supports the Trial Court's Order.

Quite frankly, the Almands established, under either the clear and convincing or preponderance of the evidence standard, that the accounts at issue were intended to be and were held as tenancies by the entireties. The testimony by each of the Almands, together with the bank account documents, was uncontradicted and conclusive. It is axiomatic that uncontradicted testimony must be accepted as proof of a contested issue. Howell v. Blackburn, 100 Fla. 114, 129 So. 341(Fla. 1930); Levy v. Cox, 22 Fla. 552 (1886). When testimony on pivotal issues of fact is not contradicted or impeached in any respect, and no conflicting evidence is introduced, these statements of fact cannot be wholly disregarded or arbitrarily rejected. Duncanson v. Service First, Inc., 157 So.2d 696, 699 (Fla. 3d DCA 1963). Beal Bank wants this Court to ignore the testimony of Almand III and Almand Jr. and merely hold that the testimony is "self-serving" and "unsupported." What more support is necessary? The Almands testified as to the five entities, as a review of their testimony shows. The accounts were all created at the same time, the interest held by each of the Almands and their spouse were identical and undivided, the title was unified as evidenced by the account cards, and each spouse held possession of the accounts. Marriage is not disputed.

Sitomer v. Orland, supra., discusses some of the factors examined by courts as to whether an account is a tenancy by the entireties. These include (a) whether both

parties contributed to the account; (b) whether both parties made use of the account; (c) whether there is testimony that both parties "owned" the account; (d) whether funds from the account went to pay marital expenses; (e) whether the parties made statements indicating their intentions concerning the account such as to protect it from creditors of one of them; and (f) that the accounts were opened with the intention that each spouse . . . should have the use of all or part of the balance at any time and upon death of either, any remainder immediately becomes the property of the survivor. Sitomer, 660 So.2d at 1115. All of these factors, with the except of (e), were testified to by the Almands as specifically noted in both Petitioner's and Respondent's Statements of the Facts. The funds that went into the accounts was from property jointly owned by the spouses. There was testimony that the accounts were set up simultaneously by both the husband and wife, that both gentlemen and their respective wives made use of the accounts and that both spouses "owned" the accounts. There was also testimony that the funds in the accounts went to pay marital expenses. The testimony of Almand Jr. and Almand III was that there was an intention that each spouse should have the use of all or part of the balance in the account at any time and owned an undivided 100% of the whole. Indeed, the signature card agreements and supporting documents submitted as evidence demonstrate that either spouse has the right to use and withdraw the funds in each of the accounts, and that the banks are not liable for paying out the

entire sum to one or the other. The remainder was to go to the other spouse upon death.

Respondents disagree with Petitioner's use of the case of Bailey v. Smith, 103 So. 833 (Fla. 1925). Petitioner cites this case to stand for the proposition that one of the attributes of a tenancy by the entireties is that neither spouse can, acting alone and without the acquiescence and approval of the other spouse, sever or destroy an estate by the entirety. However, the holding of the case is clearly meant to apply only as to each spouse's rights to the account as it relates to the interest of the other spouse, not as to third parties such as a creditor. Notably, this Court stated in Bailey v. Smith:

> "Where property is acquired specifically in the name of both husband and wife, they become seized of the estate thus granted per tout et non per my, and not as joint tenants or tenants in common. The estate thus created is, however, essentially a joint tenancy, modified by the common-law doctrine that the husband and wife are one person. Upon the death of one spouse the entire estate goes to the survivor, but the survivor takes no new estate, since there is a mere change in the person holding, and not an alteration in the estate held. Neither spouse can alien or forfeit any part of the estate without the assent of the other so as to defeat the right of the survivor. There can be no severance of the estate by the act of either, and no partition of the lands during their joint lives." Bailey v. Smith, 103 So. at 834. (emphasis added)

The portion of Bailey v. Smith relating to the action taken by a spouse regarding severing or destroying an estate by the entireties relates to the interest of the other spouse as a survivor, not to third parties such as a creditor. The Bailey v. Smith case

does not mandate that the fact that each of the Almands and their wives could access their respective accounts destroys the tenancy by the entirety. In fact, it appears such a factor would have to exist in order to demonstrate unity of possession and interest.

In First Nat. Bank of Leesburg v. Hector Supply Co., supra, this Court explicitly rejected the argument that the fact that either a husband or wife could disburse funds by check and make deposits and drafts on behalf of an account meant that the account was not a tenancy by the entireties account. Id. at 779. An arrangement for individual withdrawal on a joint account does not defeat the form of an estate by the entireties as a matter of law. Id. This Court noted that one spouse can draft checks on behalf of both spouses in a tenancy by the entireties account, and that as long as an account contract is drafted in a manner consistent with the essential unities of the entireties estate (possession, interest, title, time and marriage) and as long as the account contract contains a grant of permission for one spouse to act for the other, the requirements of form of the estate will have been met. Id. at 781. Those form requirements have been demonstrated in the instant case. Petitioner seeks to advance some type of proposition that the fact that either Almand Jr. or his wife, or Almand III or his wife, respectively, could sign checks on their joint accounts means that an estate by the entireties is defeated and that only accounts of joint tenancy with rights of survivorship are created by these accounts. If this were the case, Florida courts would hold that in order for an

estate by the entireties to be created, both spouses must sign the checks. It is clear from the explicit holding of First Nat. Bank of Leesburg v. Hector Supply Co. that this is not the status of the law in Florida.

The Medley also case recognizes this apparent conflict between the signature card and nature of a tenancy by the entireties account and explicitly holds that pursuant to First Nat. Bank of Leesburg, the right of a spouse to withdraw funds does not destroy or preclude a tenancy by the entireties in a bank account. Medley at 903. In doing so, the Medley court noted that each spouse has a power of attorney to act for both in withdrawing funds, but as between each spouse, they continue to have a common interest in the funds. Medley at 904. Thus, Petitioner's argument that the fact that the Almands and their spouses could each withdraw money from the accounts destroys the tenancy by the entirety is fallacious. See Medley, at 903-906.

In referencing this power of attorney between spouses that Medley recognizes, Respondents must point out to this Court a misleading argument in Petitioner's Brief. In discussing First Nat. Bank of Leesburg, Petitioner represents that the spouses in that case had exchanged powers of attorney. This is false. The powers of attorney appeared in the account agreements of the bank in First Nat. Bank of Leesburg. A glance at the case confirms this -- "according to the card, the Petersons exchanged mutual powers of attorney recognizing in each the power to make deposits and drafts

on behalf of both." Id. at 778. Those same grants of powers of attorney appear in each of the Compass supplemental account agreements signed by the Almands and their wives. The Compass signature card provides: "Withdrawals, anyone of you who sign on the reverse side may withdraw or transfer all or any part of the account balance . . . Each of you . . . authorizes each other person signing this form to endorse any item payable to you or your order for deposit in this account or any other transaction with us." This language is indicative of powers of attorney, being granted to the other spouse.

Petitioner's argument that the Almand accounts do not provide the same powers of attorney as does the account in First Nat. Bank of Leesburg is factually incorrect. All of the accounts at issue meet the standard set forth in First Nat. Bank of Leesburg. See also Hagerty v. Hagerty, 52 So. 2d 432, 434 (Fla. 1951), where this Court noted that when an account is payable on the order of the husband or his wife, there was an immediate expression of authority or agency of either to action for both.

Respondents have produced ample evidence to establish that it was the intention of Almand Jr. and Almand III and their wives to create estates by the entirety and protect these accounts from creditors. The fact that Almand Jr. or Almand III did not know what the legal definition of an "estate by the entirety" was at the time does not establish that there was not an intention to protect these accounts from creditors. If the

attorneys and scholars of the State of Florida cannot agree what needs to be shown to establish a tenancy by the entireties, how can we expect common people to know the legal definition of an estate by the entirety except that they had an intent to own their proeprty in the same manner, and that each of them could access it? The clear and uncontradicted testimony reveals that all of these accounts are jointly owned by Almand Jr. and Almand III with their wives. The intent was that these accounts would be owned 100% by both spouses and are, therefore, protected from creditors of the singular spouse, as is the case here. As recognized in Medley, in determining the type of property interest intended to exist in a bank account, "courts are controlled by the substance of the transaction rather than the name given it." Medley, at 906, citations omitted. As also noted in Medley at 906-907, circumstances to look at include whether there had been or intended to be withdrawals by either or both of the joint owners; evidence of ownership of the funds prior to their deposit; evidence as to the creation of the account, and whether both were aware of the account; and evidence as to who retained possession of the passbook. All of these factors were testified to by each of the Almands, as noted in the statement of facts. Both men testified that neither had owned property except jointly with their wives in at least the previous two years as to Almand Jr., and six-and-one-half years as to Almand III. Obviously, the wives were aware of the accounts, as they signed the signature cards. Both Almand Jr. and Almand

III testified that the accounts were created by they and their wives at the same time. Thus, the fact that the Almands did not know the technical, legal name for what they had created is not a bar to establishing these accounts as entireties accounts. What was relevant and important was the intent, and this was clearly demonstrated by the Respondents. Another important factor is that these accounts were created, with the exception of one account, many years prior to the indebtedness at issue in this instant case. This fact alone demonstrates that the Almands were not out to deprive Beal Bank of any funds and were not participating in any "hurried, after-the-fact creation" designated to thwart creditors, which was the concern of Justice Dekle in his concurring opinion in First Nat. Bank of Leesburg and which is the basis upon which Petitioner rests its argument that a heightened evidentiary standard is required.

Petitioner presented no evidence to contradict the testimony of Almand Jr. and Almand III as to the elements of a tenancy by the entirety. Petitioner makes much of the fact that the accounts do not, by words on the account cards, reflect the ownership to be titled as an estate by the entireties, but a review of the accounts would indicate that in no case is there a box provided for a check-off to show that intention. As indicated by Sitomer, this is the very reason a factual inquiry must be conducted. The important factor is that the accounts were created under the five unities and were available to either spouse and that fact was clearly proven at the hearing. The

Respondents have satisfied the tests for the existence of the five "unities" required for the creation of tenancies by the entirety.

Petitioner advances the proposition that the fact that the wives of Almand, Jr. and Almand, III did not appear at the hearing is "fatal" to the Almands' claims that the accounts are tenancies by the entireties. No Florida case requires that both a husband and wife testify as to intent. In Marine Midland Bank - New York v. Arms, 409 So. 2d 215 (Fla. 4th DCA 1982), the court explored the issue of whether a bank account opened in the name of the husband or his wife could be a tenancy by the entirety and therefore exempt from garnishment proceedings brought against the husband alone. The Fourth District held that by itself, such an account would not be sufficient to establish the tenancy by the entireties, but in this case, the signature card had been checked in the appropriate box marked "joint account" (not tenancy by the entirety) and the language of the account cards provided that all funds could be withdrawn by either one or both or the survivor. A careful review of the account cards in this matter indicates that the Marine Midland Bank scenario is factually identical to the accounts in the instant matter. The deposit agreements clearly provide that, respectively, either Almand Jr. or his wife, or Almand III or his wife, could withdraw any amount of funds from the accounts, and that the remainder of the funds would go to the survivor should a death occur. In Marine Midland Bank, the Fourth DCA held that such a fact, plus

testimony <u>of the husband</u> to the effect that both he and his wife owned the account, and a further showing that the money to create the account came from the assets owned solely by the wife, was more than sufficient to sustain the trial judge's conclusion that the intention of the parties was to create a tenancy by the entirety. It is important to note that in the <u>Marine Midland Bank</u> case, the wife did not testify.

Defendants have produced much more evidence than that found sufficient to constitute a tenancy by the entirety in the <u>Marine Midland Bank</u> case. Almand Jr. and Almand III testified on each of the five unity requirements. Moreover, they both testified that, at least in the last two or six years, respectively, all monies that have gone into their respective accounts have been from jointly owned assets with the exception of the Freedman account, and the Almand Jr. trustee account.

Almand Jr. additionally indicated that any business that he does is accomplished on behalf of both he and his wife and thus the fact that he may have used these accounts for business purposes is also of no relevance. The fact that income of Almand Jr. and his wife is derived from the sale of real estate lots that were transferred from Almand Jr. <u>and</u> Doris Almand to Doris Almand individually is even more supportive of Appellee's position. If this income in the account comes from lots that were owned by Doris Almand individually, the funds cannot be garnished by Beal Bank. The fact that, for tax and estate planning purposes, a husband and wife transferred lots that were

in their names jointly to her name alone has nothing to do with this garnishment matter and in reality, that factual scenario is more supportive of the motions to dissolve garnishment. Respondents would only have to show that the funds in the accounts are from either jointly owned property or from solely owned property from the non-debtor spouse and Respondents have done so. Furthermore, if the money deposited into these accounts is proceeds from the sale of any jointly-owned real estate lots, it is protected, as proceeds from a tenancy by an entirety are also tenancy by the entirety property. See Miller v. Rosenthal, 510 So. 2d 1127, 1128 (Fla. 2d DCA 1987).

As noted in Judge Sharp's concerning opinion in this matter, courts appear to lean toward finding a tenancy by the entirety exist in cases dealing with levy or garnishment by a creditor of one spouse. Beal Bank, SSB v. Almand & Associates, et al., 710 So.2d 608, 612 (Fla. 5th DCA 1998) (concurring opinion). As also noted by Judge Harris, as to the Compass account, sufficient words were "said" to sustain the trial court's findings. Judge Harris noted that the deposit cards in the Compass accounts give authority for individual withdrawal and meet the requirement of First Nat. Bank of Leesburg as to account cards being drafted in a manner consistent with the essential unities. These findings are supported by the evidence in the case.

(C) Doris Almand Did Not Receive Proper Notice of the Writs of Garnishment and Thus Beal Bank's Claims to Her Joint Accounts with Almand Jr. Are Invalid.

Neither Doris Almand or Sue Almand are parties to these lawsuits. Moreover, as to Doris Almand, Petitioner Beal Bank failed to give her proper or timely notice of the writs of garnishment, and this fact is fatal to Petitioner's claims.

§77.055, Fla. Stat. (1996) provides as follows:

§77.055 Notice to defendant and other interested persons

> "Within 5 days after service of the garnishee's answer on the plaintiff or after the time period for the garnishee's answer has expired, the plaintiff shall serve, by mail, the following documents: a copy of the writ, a copy of the answer, a notice, and a certificate of service. The notice shall advise the recipient that he or she must move to dissolve the writ within the time period set forth in s. 77.07(2) or be defaulted and that he or she may have exemptions from the garnishment which must be asserted as a defense. The plaintiff shall serve these documents on the defendant at the defendant's last known address and any other address disclosed by the garnishee's answer and on any other person disclosed in the garnishee's answer to have any ownership interest in the deposit, account, or property controlled by the garnishee. The plaintiff shall file in the proceeding a certificate of such service."

Petitioner Beal Bank failed to give non-party Doris Almand (Almand Jr.'s wife) the statutorily required notice pursuant to §77.055, Fla. Stat. (1996). A time line showing the accounts to which this failure to give notice applies is set forth below:

Bank	Writ Served	Garnishee's Answer Served	Notice by Plaintiff to Almand Jr.
Barnett Bank	January 27	January 30	January 30
Southtrust Bank (amended response)	January 27	February 3	February 5
Compass Bank (amended response)	Unknown	February 5	February 7

As to each of the above accounts, notice as required by §77.055, Fla. Stat. was not provided by Plaintiff to non-party Doris Almand, who was disclosed as "any other person disclosed in garnishee's answer to have ownership interest" until a second amended notice was served by Plaintiff on February 11, 1997 [R. 738 - 743]. This was the first time that Doris Almand was provided notice of the garnishment actions. [S. R. 702, 708, 714, 722]. Plaintiff certifies in this second amended notice that the required pleadings were served within 5 days of the service of the garnishees' answers, but it is clear that in the case of the three banks above, as to Doris Almand, these required pleadings were not served in a timely fashion, i.e., within 5 days of the service of the garnishees' answers which identified Doris Almand as a potential owner of the garnished accounts. The required notice was not certified to Doris Almand until February 11, while the answers from the garnishees were served January 30, February 3 and February 5. The latest the five day period could have run was February 10.

As noted in Beardsley v. Admiral Ins. Co., 647 So. 2d 327 (Fla. 3rd DCA 1994), once Beal Bank received notice from the banks that Doris Almand's name appeared on the accounts, it should have provided the required notice within 5 days. Beal Bank failed to do so. This is a denial of Doris Almand's due process rights. Antuna v. Dawson, 459 So.2d 1114, 1117 (Fla. 4th DCA 1984), and Beal Bank is not entitled to garnish the accounts of Almand Jr. and Doris Almand for this reason.

CONCLUSION

Florida case law provides that in a situation where a bank account owned by a husband and wife is not designated on its face as an account held as tenancy by the entirety, a factual inquiry must be conducted by the court as to the ownership status of such an account. This factual inquiry should be based upon the preponderance of the evidence standard, not upon a clear and convincing start.

The trial court was correct in its ruling on the motions to dissolve the writs of garnishment. Both Almand Jr. and Almand III made the requisite showing at the hearing of the five unities so as to entitle them to claim the accounts owned jointly with their spouses as tenancies by the entireties. Petitioner Beal Bank submitted no evidence to rebut the factual testimony presented at the hearing. Furthermore Doris Almand was not given sufficient notice of the garnishment actions. For these reasons, Respondents request this Court uphold the Fifth District's decision as to the four Compass Bank accounts at issue. Respondent requests that the Fifth District's decision as to the Southtrust and Barnett Bank accounts be quashed on the grounds that Doris Almand was not given sufficient notice of the garnishment action. Finally, Respondents respectfully request that this Court answer the certified questions to require a standard of preponderance of the evidence or greater weight of the evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Raymond Ehrlich, Esq., Scott D. Makar, Esq., and Alan M. Weiss, Esq., Holland & Knight, LLP, 50 N. Laura Street, Suite 3900, Jacksonville, Florida 32202 on this 13th day of October, 1998.

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