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.

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

Petitioner, Beal Bank, SSB, submits this Reply to the Answer Brief of the Respondents, Amos F. Almand, Jr. ("Almand Jr.") and Amos F. Almand, III ("Almand III") (collectively the "Almands"). The Answer Brief has two central themes. First, the Almands claim the "banking industry" is responsible for the Almands' failure to establish their bank accounts as joint tenancies by the entireties. Second, they claim it is unjustified to impose a heightened standard of proof on spouses who claim their bank accounts are shielded from creditors under the entireties doctrine. These arguments, however, are inconsistent with Florida law and ignore the lack of record evidence to support the Almands' generalized assertions regarding their intent to open entireties accounts. The Almands also raise an issue for the first time on appeal that should be stricken.

A. The "Banking Industry" Is Not Responsible For The Almands' Failure To Establish Entireties Accounts

A strident theme throughout the Almands' Answer Brief is that the "banking system" is to blame for their own failure to establish that the bank accounts at issue were intended to be entireties accounts. The Almands assert that the "banking system" has been "set up such that married couples have no opportunity to declare that they wish to establish" an entireties account. [AB 10-11] Specifically, they claim that the Compass Bank accounts at issue "do not provide a check-box by which the Almands could have established such an account." [AB 13] They go so far as to assert that none of the account cards have an "option for a customer to designate their [sic] account as one to be held by the entireties." [AB 16]

The Almands, however, overstate their position and misstate the documentary evidence below. First, the Almands overlook that the account records at issue have either a check-box or blank line for entry of the type of account desired. For example, if the Almands had truly desired to open an entireties account, they could have checked the optional box on the account cards and stated an intent to open an "entireties" account, a "tenancy by the entireties", or simply a "TBE." Three of the four Compass Bank accounts have this type of feature and the fourth has a space for this purpose. [A3] The Almands were not presented with a "take it or leave it" situation as they claim [AB 16], and their attempt to blame their own failure to establish entireties accounts on the "banking industry" rings hollow.

If married couples intend to take advantage of the unique asset-sheltering aspects of entireties accounts, they must understand what they are doing and take the necessary steps to effectuate their intent. It is apparent that persons cannot intend to open entireties accounts when -- like the Almands -- they either never heard of them or did not understand them. Terrace Bank of Florida v. Brady, 598 So. 2d 225, 288 (Fla. 2d DCA 1992). The Almands downplay this point by feigning that the current confusion in the law regarding the proper legal standard for proving entireties accounts somehow alleviates their basic burden of proving what type of bank account they opened. As discussed in Beal Bank's Initial Brief, the law clearly places the responsibility for establishing entireties accounts on the married couple, not the "banking industry."

Further, the Almands' position that the "banking industry" should foster the use of entireties accounts to prevent debt collection overlooks that banks have no duty to

make such accounts available to their customers as debt avoidance mechanisms. In fact, many significant asset-protection methods for spouses are already available in Florida including homestead property, certain trust and estate planning instruments, as well as annuities and life insurance policies. Even one spouse's individually owned bank accounts and assets are generally shielded from the other spouse's debts. Given these existing protections and the ability to designate a tenancy by the entireties on account cards, no legitimate reason exists to blame the "banking industry" when spouses fail to take appropriate steps to shield their joint bank accounts from the claims of one another's creditors.

Notably, the Almands presented no evidence that joint marital bank accounts are legally required to be, or are traditionally presumed to be held as, tenancies by the entireties. To the contrary, this Court and the District Courts have consistently viewed the entireties form of ownership as the exception to the norm that requires a heightened evidentiary burden to distinguish it from other types of joint ownership. *See* First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So. 2d 777 (Fla. 1971); Terrace Bank, 598 So. 2d 225 (Fla. 2d DCA 1992). Because they are a unique form of ownership and have significant asset-protection qualities, entireties accounts should not be presumed and should require a stringent standard of proof in the face of creditors' claims.

Next, the Almands surmise that banks disallow entireties accounts because such accounts would "extinguish" the banks' contractual rights to set-off against the customers' accounts for other bank-related debts. This argument is speculative and a red herring. First, the contractual right of set-off is not relevant to the certified

questions nor to the issue of whether the Almands proved their intent. Second, financial institutions can easily preserve by contract their set-off rights vis-a-vis their customers while recognizing bank accounts as entireties accounts vis-a-vis third parties.[1] For these reasons, the question of set-off is irrelevant.

Finally, the Almands overlook a common sense reason why banks might be disinclined to promote the entireties form of ownership. A bank may be averse to offering (or at least promoting the availability of) entireties accounts to avoid the types of potentially difficult situations that arise when one spouse (or the spouse's beneficiary) claims that a bank wrongfully permitted the other spouse to make withdrawals from an entireties account without obtaining consent. These types of scenarios are not uncommon and have arisen in a number of reported cases on entireties accounts, two of which the Almands have cited.[2] Banks cannot be faulted for attempting to avoid situations that pose problems for themselves and their customers. In sum, the Almands' attempt to shift their burdens to the "banking industry" is misguided and their conjectures about purported "common banking practices today" are unsupported by record evidence or the law.

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[1] The Almands acknowledge this point by recognizing that the relationship between a bank and its customers is governed, to a great degree, by the account agreements. [AB 18] As an example, the Barnett Bank account included language that preserved its set-off rights even if its customers designated their account as a tenancy by the entireties. [A4]

[2] See In re Guardianship of Medley, 573 So. 2d 892 (Fla. 2d DCA 1990) (beneficiaries seeking to surcharge bank for withdrawals from purported entireties account by deceased's husband); Sitomer v. Orlan, 660 So. 2d 1111, 1117 (Fla. 4th DCA 1995) (suit by wife's guardian to recover money that husband withdrew from purported entireties account and gave to siblings without wife's consent).

B. The Clear and Convincing Evidence Standard Should Apply

The Almands make a number of unavailing arguments that a heightened evidentiary burden is either unjustified or unfair. First, they make the misleading claim that Beal Bank is attempting to "heap onto account holders the burden of proving . . . intent by clear and convincing evidence" without justification. [AB 16] The Almands act as if Beal Bank's arguments for the clear and convincing standard are novel and unsupported by law.

Beal Bank is not proposing a new standard or an unwarranted extension of the law, however. To the contrary, the Second District in Terrace Bank of Florida v. Brady, 598 So. 2d 225 (Fla. 2d DCA 1992) has adopted the clear and convincing evidence standard based upon this Court's decision in First Nat'l Bank of Leesburg, 254 So. 2d 777 (Fla. 1971). The Almands scarcely recognize this fact. In addition, this Court has referred to a heightened evidentiary standard in other cases involving entireties accounts.

For example, in In re: Estate of Lyons, 90 So. 2d 39 (Fla. 1956) this Court initially held that an entireties account was proven. On rehearing, the Court held that the evidence was insufficient "to make it *clearly* appear that it was the intention of the parties to create an estate by the entireties in either of the two bank accounts." Id. at 43 (emphasis added). In Lyons, this Court cited and followed Doing v. Riley, 176 F.2d 449 (5th Cir. 1949), which applied Florida law in stating that the "intent to create a tenancy by the entireties . . . ought to be made *clearly* to appear since upon the decease of one spouse the survivor would become the sole and complete owner of the property

to the exclusion of the children and creditors." Id. at 454 (emphasis added). The Fifth Circuit ruled that a tenancy by the entireties was not established in personal property (hotel furniture) simply because the spouses purchased the property with joint funds. As such, the evidence failed to establish the "specific intent" to set up an estate by the entireties. Id.

In this regard, the Almands drastically misconstrue the "intent" requirement. They claim that because they opened their bank accounts "well in advance of the underlying lawsuits" they could not have intended to thwart Beal Bank's garnishment claims many years later. [AB 34] The Almands entirely miss the point. It is the incentive to fabricate "intent" in the face of creditors' claims that justifies a heightened standard of proof. The "open invitation to perjury" does not occur when an account is opened; instead, it arises in a subsequent garnishment or collection action where proof of prior intent becomes critical. The clear and convincing standard was adopted to prevent after-the-fact fabrications of intent that thwart "the legitimate claims of creditors of one of the spouses" in these later garnishment and collection proceedings. First Nat'l Bank of Leesburg, 254 So. 2d at 782 (Dekle, J., concurring); Terrace Bank, 598 So. 2d at 228.

Beal Bank need not restate the numerous valid reasons that Florida courts, including this Court, have articulated to justify a heightened evidentiary standard in these situations. A higher standard is justified based solely upon the tremendous incentive to fabricate testimony of intent in the face of creditors' claims. As such, the clear and convincing standard is appropriate to eliminate the "open invitation to

perjury" that exists in these situations. In short, the clear and convincing evidence standard should apply because of the substantial and real potential for the entireties doctrine to be abused in these types of proceedings.

C. The Almands' Self-Serving and Unsupported Testimony Is Insufficient To Establish Entireties Accounts Under Either A Clear And Convincing Or Preponderance Of The Evidence Standard.

The Almands make the claim that their testimony was "uncontradicted and conclusive" and so "comprehensive" that it was sufficient to establish by clear and convincing evidence that they intended to establish entireties accounts. Their claim cannot be taken seriously. The Almands overlook that no documentary evidence supported their testimony, that their direct testimony was fragmentary and incomplete, and that they made numerous admissions on cross-examination that defeated their claim to entireties accounts. As such, the Almands failed to meet their burden to present evidence that clearly demonstrated that -- at the time each account was opened -- they intended to establish entireties accounts.

Beal Bank suggests that a review of the record below will quickly belie the Almands' assertion that their evidence was "comprehensive" and "unrebutted." Instead, it is superficial, sketchy and conclusory. In the appendix to its Initial Brief, Beal Bank has provided the account records and the hearing transcript for the Court's review. [A3, A4, A5 & A6] None of the account records support the Almands' claim of entireties account status and the Almands' testimony is so vague that it is ineffectual as to their intent.

Notably, the Almands provide only generalized assertions about their testimony but fail to provide any specific record citations. The Almands make page after page of statements about how their "testimony" supports the trial court's order (which contained no facts or analysis). [AB 27-37] But, not a single record citation appears on these pages. Instead, the Almands merely paraphrase their testimony in a manner that obscures the lack of record evidence of their intent.

It bears emphasis that the Almands cite no specific evidence of their (or their wive's) intent to establish tenancies by the entireties *at the time each account was opened*. The record contains no evidence of their specific intent to establish the four Compass Bank accounts as entireties accounts when they were each opened on July 26, 1988; August 3, 1995; May 31, 1996; and July 16, 1998, respectively. Instead, the only objective record evidence is the account cards, which reflect no intent to establish entireties accounts. In short, the Almands fail to pinpoint any record evidence that demonstrates -- under a clear and convincing standard or a preponderance of the evidence standard -- that they and their wives intended to establish entireties accounts.

D. Caselaw Upon Which The Almands Rely Has Been Rejected Or Misapplies The Law Regarding Entireties Accounts

Notably, two cases upon which the Almands rely are of dubious precedential value. First, the Almands rely on In re Guardianship of Medley, 573 So. 2d 892 (Fla. 2d DCA 1990), which has been soundly criticized and effectively discredited in

Sitomer v. Orlan, 660 So. 2d 1111 (Fla. 4th DCA 1995),[3] a case the Almands cite in their brief.

The confusion spawned by Medley regards the proper distinction between joint tenancy accounts and entireties accounts. It is a misconception that joint spousal ownership transforms a bank account into an entireties account. The Almands continue to perpetuate this misconception by inferring that the fifth unity, the unity of marriage, is sufficient to distinguish a tenancy by the entireties from other types of joint ownership. [AB 27] The court in Medley made this same fundamental mistake. The Fourth District recognized this error in stating that:

> Medley equated a joint tenancy with the right of survivorship with a tenancy by the entireties by holding that even a joint tenant's interest in funds would continue after they were unilaterally withdrawn and appropriated by the other owner. *Such a position is contrary to the holding of the supreme court in Lyons and blurs the distinction between joint accounts and entireties accounts that is well established in Florida.*

Sitomer, 660 So. 2d at 1114-15 (emphasis added) (citation and footnote omitted). Because the trial court had failed to make the proper distinction between these types of accounts, the jury had been misled and a reversal was required. Id. at 1115-16. Notably, the court in Sitomer found direct conflict between Medley and this Court's precedent in Lyons, such that the Almands' reliance on the holding in Medley is misplaced.

Second, the Almands place substantial weight on Marine Midland Bank - New York v. Arms, 409 So. 2d 215 (Fla. 4th DCA 1982), a one-page, three-paragraph

[3] See also Katz v. Katz, 666 So. 2d 1025 (Fla. 4th DCA 1996) (noting Sitomer's rejection of Medley).

decision with little analysis or factual discussion. In fact, the limited analysis in Marine Midland -- much like that in Medley -- conflicts with established Florida law as to proof of entireties accounts. The sparse facts discussed in Marine Midland indicate that a husband and wife opened a joint account and marked the "Joint Account" box on the signature card. Id. at 215. The account permitted funds to be withdrawn by "either one or both of the survivors." Id. The husband testified that he and his wife "owned" the account and a showing was made "that the money to create the account came from assets owned solely by the wife[.]" Id. The Fourth District, in a terse opinion void of meaningful analysis, held that this evidence was sufficient to support the trial court's conclusion that the parties intended to establish an entireties account. Id.

The panel decision in Marine Midland, however, is inconsistent with principles of Florida law that apply to entireties accounts. Of course, the fact that the parties opened a joint account, and designated it as such, is clearly insufficient to establish an entireties account. The Fourth District clearly erred, however, in placing relevance on the joint "ownership" of the account and the fact that the account consisted solely of funds the wife had contributed. These factors, alone or together, are insufficient to prove the intent to establish an entireties account.

First, the husband's testimony that he and his wife "owned" the account proves nothing because spouses can "own" joint accounts, whether the accounts are entireties or simply joint with rights of survivorship. Second, the wife's contribution of funds to create the account undermines the conclusion that the account is an entireties account. If the account had been created solely with funds from an entireties accounts, this fact

would merely be supportive of (but not dispositive of) an assertion that the account was intended to be an entireties account. Sitomer, 660 So. 2d 1111, 1115 (Fla. 4th DCA 1995) (courts may consider whether "both parties contributed to the account").

Moreover, the Marine Midland decision contrasts sharply with this Court's opinion in Winters v. Parks, 91 So. 2d 649 (Fla. 1956). In Winters, this Court emphasized the importance of the spouses' joint intent to establish an entireties account at the time it is opened. This Court noted that litigation often arises when one spouse dies and "courts are confronted with the problem of trying to determine *whether the parties at the outset intended to create an estate of this nature*." Id. at 652 (emphasis added). Further, this Court indicated that although the parties may clearly intend that an account to be a "joint account" whose remaining funds go to the survivor, "such intention does not lead necessarily to the conclusion that an estate by the entireties was created." Id. Of note, this Court placed emphasis on the wife's testimony in concluding that the bank account at issue was not an entireties account. Here, neither of the Almands' wives testified as to their intent. As such, it is highly doubtful that this Court intended the type of superficial analysis reflected in Marine Midland, which is of highly dubious precedential value.

E. The Almands Have Raised An Issue That Should Be Stricken Or Ignored Because It Was Not Preserved And Is Improperly Raised For The First Time On Appeal

Finally, the Almands have raised an issue that was not preserved below and is improper in this appeal. [AB 38-41] As such, the issue should be stricken or disregarded under Florida Rules of Appellate Procedure 9.110(g) and 9.210(c).

The issue regards whether Doris Almand received adequate notice of the garnishment proceeding. As Beal Bank pointed out below, the Almands waived this issue because they did not file a notice of cross-appeal and raised the issue for the first time in their answer brief.[4] The issue is also improper because Doris Almand is not a party to this appeal, and neither of the Almands have standing to assert her alleged interest. Notably, the Fifth District did not address the issue in its per curiam opinion[5] and the issue is not a part of, or relevant to, the certified questions.

In any event, the claim that Doris Almand was denied due process is frivolous.[6] Contrary to the Almands' claim, the record reflects that Doris Almand received notice of the proceedings no later than February 11, 1997 (i.e., almost a month prior to the hearing) [R 738-743], filed a motion to dissolve the writs [R 826], and -- like her husband who testified -- had an opportunity to present evidence at the March 3, 1997 hearing. For these reasons, the claim that Doris Almand was denied due process is wholly meritless.

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[4] A-1 Racing Specialties, Inc. v. K & S Imports of Broward County, Inc., 576 So. 2d 421, 422 (Fla. 4th DCA 1991) (striking portion of answer brief where "appellee did not file a notice of cross appeal" and "answer brief went well beyond the scope of the appellant's initial brief"); State Dep't of HRS v. Craft, 596 So. 2d 503 (Fla. 2d DCA 1992) (striking "two additional issues not raised or addressed in the initial brief").

[5] Judge Sharp mentioned the issue in her separate opinion, but neither of the other two judges joined her concurrence nor discussed the issue. 710 So. 2d at 615.

[6] The Almands rely upon Beardsley v. Admiral Ins. Co., 647 So. 2d 327 (Fla. 3d DCA 1994), but fail to mention that *no notice* was given to the purported account holder in Beardsley. The Almands also cite Altuna v. Dawson, 459 So. 2d 1114 (Fla. 4th DCA 1984), which is easily distinguishable. In Altuna, notice was provided to a non-resident seven days prior to a hearing as he was leaving the country for an extended time. Here, Doris Almand had almost a month's advance notice of the hearing and a full opportunity to testify and present evidence.

CONCLUSION

Based upon the foregoing, Petitioner, Beal Bank, SSB, requests that this Court quash the Fifth District's Decision as to the Compass Bank accounts and reinstate the writs of garnishment below. The Fifth District's Decision should be affirmed as to all remaining accounts.

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 November, 1998.

_____

Attorney