STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARGARET HARTIGAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-3656
	)	
DEPARTMENT OF REVENUE, CHILD SUPPORT ENFORCEMENT PROGRAM,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings, on October 26, 2001, in Ocala, Florida.

APPEARANCES

For Petitioner: Suzanne K. Edmunds, Esquire
Withlacoochee Area Legal Services, Inc.
222 Southwest Broadway Street
Ocala, Florida 34474

For Respondent: Robert Lehrer, Esquire
Department of Revenue
Child Support Enforcement Program
Post Office Box 8030
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STATEMENT OF THE ISSUE

Whether the Department of Revenue, Child Support Enforcement Program, may levy bank accounts held jointly by Petitioner and

Donald F. Ziesmer and apply the funds to reduce or satisfy Mr. Ziesmer's past due child support obligation.

PRELIMINARY STATEMENT

On or about November 16, 2000, Respondent Department of Insurance, Child Support Enforcement Program, sent a Notice of Intent to Levy to Donald F. Ziesmer, boyfriend of the Petitioner, Margaret Hartigan.

In the Notice, the Department advised Mr. Ziesmer that it intended to levy on his personal property in the form of liquid assets in the control of the Florida Credit Union. According to the Notice, the proposed action was being taken because of Mr. Ziesmer's failure to pay child support in the amount of $7,534.08. The Notice also advised that a non-obligor joint owner, who claimed to have an equal right to all of the money levied upon in a joint account, had a right to contest the Department's action. Petitioner, as a non-obligor joint owner, timely challenged the Department's action and requested an administrative hearing.

On or about September 18, 2001, the Department referred the matter to the Division of Administrative Hearings.

At the disputed-fact hearing on October 26, 2001, Petitioner testified on her own behalf and had Petitioner's Exhibits A, B, C, and D, admitted in evidence. Respondent presented the oral testimony of Pamela Ellingsworth and Donald F. Ziesmer.

Respondent had eight exhibits admitted in evidence (DOR1-8). The parties' Stipulation of Facts was admitted as Joint Exhibit 1.

No transcript was provided. Petitioner timely filed a Proposed Recommended Order on November 5, 2001. Respondent filed a letter critiquing Petitioner's Proposed Recommended Order, which critique was docketed one day late. Respondent filed another letter of correction and legal argument, which was docketed November 11, 2001.

Respondent's filings were late (first by one day, and secondly by eight days), and do not comply with the rules enunciated in the Post-Hearing Order entered October 26, 2001. For these reasons, it is within the discretion of the undersigned to strike both filings, but there having been no motion to do so, they have been considered simultaneously with Petitioner's Proposed Recommended Order.

FINDINGS OF FACT

1. On September 4, 1992, an Order and Judgment was filed in the case of Shirley Skubish v. Donald F. Ziesmer (Skubish v. Ziesmer), Case No. 85-1368-CA, in the Circuit Court of the 19th Judicial Circuit, in and for Martin County, Florida. Pursuant to this Order and Judgment, Donald F. Ziesmer was ordered to pay $48.00 per week in current child support for two minor children, and an additional $5.00 per week on a child support arrearage of

$4,571.00, which was established as being owed by Mr. Ziesmer as of August 19, 1992. (Joint Stipulation).

2. On May 19, 1994, an Order of Contempt was filed in Skubish v. Ziesmer, under which, inter alia, Mr. Ziesmer's child support obligations as set out in the September 4, 1992, Order and Judgment were continued, and a child support arrearage of $6,108.37, was established as being owed by Mr. Ziesmer as of May 5, 1994. (Joint Stipulation).

3. On May 14, 1998, an Enforcement of Child Support Agreement and Order on Stipulation was filed in Skubish v. Ziesmer, under which Mr. Ziesmer's child support obligation, as set out in the September 1992 Order and Judgment were continued, and a child support arrearage of $1,246.08, was established as being owed by Mr. Ziesmer as of May 6, 1998. (Joint Stipulation).

4. On January 29, 1999, a Recommended Order and Order on Motion for Enforcement, Contempt and Income Deduction was filed in Skubish v. Ziesmer, in which Mr. Ziesmer's child support obligation, as set out in the September 1992 Order and Judgment was continued, and a child support arrearage of $2,686.08, was established as being owed by Mr. Ziesmer as of December 2, 1998. (Joint Stipulation).

5. On December 28, 1999, a Recommended Order and Order on Motion for Enforcement, Civil Contempt and IBO was filed in

Skubish v. Ziesmer, under which, inter alia, Mr. Ziesmer's child support obligations as set out in the September 4, 1992 Order and Judgement were continued, and a child support arrearage of $5,182.08, was established as being owed by Mr. Ziesmer as of December 1, 1999. (Joint Stipulation).

6. The official payment records of the Martin County Clerk of Court established that Mr. Ziesmer owed past due child support in Skubish v. Ziesmer, in the amount of $7,534.08, as of November 9, 2000. (Joint Stipulation).

7. On or before November 9, 2000, Petitioner and her boyfriend, Donald Ziesmer, opened a joint checking account (account number: 262746-8), and a joint savings account (account number: 262746-0), (hereafter, "the FCU joint accounts") with the Florida Credit Union, Gainesville, Florida. (Joint Stipulation).

8. At the time that the accounts were opened and at all times material, Petitioner and Mr. Ziesmer were living together on Petitioner's Social Security disability income and gifts from her father, and Mr. Ziesmer's Veterans Administration disability income and gifts from his mother and other relatives. At no time material were either Petitioner or Mr. Ziesmer working for a living or earning any income.

9. Petitioner was receiving Social Security disability benefits of about $530.00, per month, during the period of

September 2000 through November 2000. Her benefits were deposited into an EBT account in her name, only, with Citicorp Electronic Financial Services, Inc., Tampa, Florida. (Joint Stipulation).

10. Petitioner made a one-time deposit in September 2000, of a lump sum disability payment of $659.00.

11. Her Social Security disability payments were made to Petitioner monthly by an EBT card in an uneven amount which was not a multiple of $20.00. An EBT card works like an ATM card for purposes of withdrawals. Most ATMs only permit withdrawals of cash in 20-dollar increments, with fees attaching to each withdrawal. Because Petitioner's EBT monthly credit was in an amount which was not a multiple of 20-dollars, she could not access the balance of approximately $13.00 each month unless she had a checking account. Also, she needed to write checks so she could prove she had paid certain domestic bills.

12. The accounts were opened primarily to allow Petitioner to access her last $13.00 each month.

13. The accounts were opened as joint accounts because Petitioner's bad credit kept her from being able to open a checking account in her name alone. Petitioner and Mr. Ziesmer both intended that the accounts be used only by Petitioner, and Petitioner is the only one who used the accounts.

14. Petitioner and Mr. Ziesmer have never been married to each other.

15. On November 9, 2000, Respondent mailed a Notice of Freeze to the Florida Credit Union, Gainesville, Florida, by certified mail, return receipt requested, regarding any accounts held by Mr. Ziesmer. The Notice was received by the credit union on November 13, 2000. (Joint Stipulation).

16. Pursuant to the Notice of Freeze, the Florida Credit Union froze the FCU joint accounts on November 13, 2000.

17. On November 16, 2000, Respondent mailed a Notice of Intent to Levy on Mr. Ziesmer, by certified mail, return receipt requested. Mr. Ziesmer received the Notice after November 16, 2000. (Joint Stipulation).

18. The Notice of Freeze and Notice of Intent to Levy satisfied Respondent's statutory notice requirement in Section 409.25656, Florida Statutes.

19. Petitioner filed a timely Petition for Administrative Hearing on November 29, 2000. (Joint Stipulation).

20. Respondent Department's agency representative, Pamela Ellingsworth, Revenue Specialist II, testified that it is the Department's standard procedure to give any joint account holders, who do not owe the back child support, the opportunity to show the source of accounts frozen by the Department. She further testified that the Department normally releases back to

the non-debtor/non-obligor joint account holder those funds which the non-debtor can establish are his or her own funds, separate and apart from those of the child support debtor/obligor. According to Ms. Ellingsworth, if a percentage of contributions to the account(s) can be determined, the Department's standard procedure is to release back that percentage of proven funds to the non-debtor/non-obligor.

21. Between October 1, 2000 and November 13, 2000, thirteen deposits were made into the FCU joint accounts. Twelve deposits were of cash only. One deposit, on October 6, 2000, was from a check for $150.00 ($130.00 "net" deposit) written to Petitioner by her father. (Joint Stipulation, modified by testimony as to "father").

22. Petitioner testified, without refutation, that the funds deposited came only from the two sources: Petitioner's Social Security benefits and gifts by cash or check from Petitioner's father. Petitioner and Mr. Ziesmer testified, without refutation, that no deposits to the accounts were made by Mr. Ziesmer. Although both witnesses have mental disabilities and take heavy medication, they were credible on this issue because credit union statements and other documents regarding the FCU accounts were admitted into evidence, which documents

materially mirror their testimony regarding amounts received, deposited, and disbursed. (Petitioner's Exhibits A, B, C, and D).

23. Mr. Ziesmer's income from disability payments at all times material was only $101.00 per month, with one slightly larger one-time lump sum payment. The amounts he received in gifts varied. He did not recall exact amounts. He gave Petitioner cash for food and no monies of his were deposited into the joint accounts.

24. The Department established that in September 2000, the couple signed a lease together on a house for $550.00 per month. However, their testimony shows they were evicted less than two months later for failure to pay, and they no longer live together.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1) and Chapter 400, Part III, Florida Statutes.

26. The Department is the State agency responsible for the administration of the Child Support Enforcement Program, pursuant to Subsection 409.2557(1), Florida Statutes.

27. Section 409.2557(2), Florida Statutes, charges the Department with the collection of child support obligations.

28. Because the Department seeks to levy upon the FCU joint accounts, it must prove by a preponderance of the evidence that the proposed levy is authorized by Section 409.25656, Florida Statutes. In the absence of specific statutory or case law to the contrary, the party asserting the affirmative of a factual issue, or seeking to change the status quo (in this case, to seize/garnish monies from citizens' accounts) has the ultimate duty to go forward and the burden of proof by a preponderance of the evidence. Moore v. State, Department of Health and Rehabilitative Services, 596 So. 2d 759 (Fla. 1st DCA 1992); Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

29. Section 409.25656, Florida Statutes, provides, in pertinent part,

> 409.25656 Garnishment.
>
> (1) If a person has a support obligation which is subject to enforcement by the department as the state Title IV-D program, the executive director or his or her designee may give notice of past due and/or overdue support by registered mail to all persons who have in their possession or under their control any credits or personal property, including wages, belonging to the support obligor, or owing any debts to the support obligor at the time of receipt by them of such notice. Thereafter, any person who has been notified may not transfer or make any other disposition, up to the amount provided for in the notice, of such credits, other

personal property, or debts until the executive director or his or her designee consents to a transfer or disposition, or until 60 days after the receipt of such notice. If the obligor contests the intended levy in the circuit court or under chapter 120, the notice under this section shall remain in effect until final disposition of that circuit court or chapter 120 action. Any financial institution receiving such notice will maintain a right of setoff for any transaction involving a debit card occurring on or before the date of receipt of such notice.

(2) Each person who is notified under this section must, within 5 days after receipt of the notice, advise the executive director or his or her designee of the credits, other personal property, or debts in their possession, under their control, or owed by them and must advise the executive director or designee within 5 days of coming into possession or control of any subsequent credits, personal property, or debts owed during the time prescribed by the notice. Any such person coming into possession or control of such subsequent credits, personal property, or debts shall not transfer or dispose of them during the time prescribed by the notice or until the department consents to a transfer.

(3) During the last 30 days of the 60-day period set forth in subsection (1), the executive director or his or her designee may levy upon such credits, personal property, or debts. The levy must be accomplished by delivery of a notice of levy by registered mail, upon receipt of which the person possessing the credits, other personal property, or debts shall transfer them o the department or pay to the department the amount owed to the obligor.

(4) A notice that is delivered under this section is effective at the time of delivery

against all credits, other personal property, or debts of the obligor which are not at the time of such notice subject to an attachment, garnishment, or execution issued through a judicial process.

(5) The department is authorized to bring an action in circuit court for an order compelling compliance with any notice issued under this section.

(6) Any person acting in accordance with the terms of the notice or levy issued by the executive director or his or her designee is expressly discharged from any obligation or liability to the obligor with respect to such credits, other personal property, or debts of the obligor affected by compliance with the notice of freeze or levy.

(7)(a) Levy may be made under subsection (3) upon credits, other personal property, or debt of any person with respect to any past due or overdue support obligation only after the executive director or his or her designee has notified such person in writing of the intention to make such levy.

(b) Not less than 30 days before the day of the levy, the notice of intent to levy required under paragraph (a) must be given in person or sent by certified or registered mail to the person's last known address.

(c) The notice required in paragraph (a) must include a brief statement that sets forth:

1. The provisions of this section relating to levy and sale of property;

2. The procedures applicable to the levy under this section;

3. The administrative and judicial appeals available to the obligor with respect to such

levy and sale, and the procedures relating to such appeals; and

4. The alternatives, if any, available to the obligor which could prevent levy on the property.

(d) The obligor may consent in writing to the levy at any time after receipt of a notice of intent to levy.

(8) An obligor may contest the notice of intent to levy provided for under subsection (7) by filing a petition in the existing circuit court case. Alternatively, the obligor may file a petition under the applicable provisions of chapter 120. After an action has been initiated under chapter 120 to contest the notice of intent to levy, an action relating to the same levy may not be filed by the obligor in circuit court, and judicial review is exclusively limited to appellate review pursuant to s. 120.68. Also, after an action has been initiated in circuit court, an action may not be brought under chapter 120.

(9) An action may not be brought to contest a notice of intent to levy under chapter 120 or in circuit court, later than 21 days after the date of receipt of the notice of intent to levy.

(10) The department shall provide notice to the Comptroller, in electronic or other form specified by the Comptroller, listing the obligors for whom warrants are outstanding. Pursuant to subsection (1), the Comptroller shall, upon notice from the department, withhold all payments to any obligor who provides commodities or services to the state, leases real property to the state, or constructs a public building or public work for the state. The department may levy upon the withheld payments in accordance with subsection (3). Section 215.422 does not apply from the date the notice is filed with

> the Comptroller until the date the department notifies the Comptroller of its consent to make payment to the person or 60 days after receipt of the department's notice in accordance with subsection (1), whichever occurs earlier.
>
> (11) The Department of Revenue has the authority to adopt rules to implement this section.

30. The Department has cited to no other statute or existing rule dealing with the rights of non-obligors/non-debtors.

31. The Department established that Donald F. Ziesmer had a past due child support obligation that was subject to enforcement by the Department, which totaled $7,534.08, as of December 1999.

32. The parties stipulated that the Department had given the notices required by Section 409.25656, Florida Statutes, to the financial institution and to the obligor. It was also clearly established that the non-obligor joint account holder, Petitioner, received adequate and appropriate notice.

33. Pursuant to Section 689.15, Florida Statutes, an instrument creating a joint tenancy must expressly provide for a right of survivorship. Otherwise, unless the joint tenants are husband and wife, the estate created is one of tenancy in common.[1] Herein, the signature card(s) for the joint accounts were not presented, the couple is not married, and the Joint Stipulation does not specify a right of survivorship. Therefore, there is no

proof of an express provision of a right of survivorship.[2] Petitioner and Mr. Ziesmer were living together without benefit of clergy, so without an express right of survivorship, there is no presumption at law that a joint estate was intended, let alone that the account holders intended to create a joint estate with right of survivorship.

34. Each share of a joint tenancy with right of survivorship is presumed to be equal for purposes of alienation (in this case, garnishment). Beal Bank, SSB v. Almand and Associates, et al, 780 So. 2d 45 (Fla. S. Ct. 2001). That is not necessarily the case where there is a joint tenancy with no right of survivorship, but Petitioner and the Department have proceeded as if the right of survivorship had been agreed-upon. Assuming that it has been, this case is still subject to the case law applicable to garnishment, not survivorship.

35. When a joint bank account is established with the funds of one person, there is a rebuttable presumption that a gift was made of these funds to the other person. DeSoto v. Guardianship of DeSoto, 664 So. 2d 66 (Fla. 1st DCA 1995); Hagopian v. Henry Zimmer, 653 So. 2d 474 (Fla. 3rd DCA 1995); Ginsberg v. Goldstein, 404 So. 2d 1098 (Fla. 3rd DCA 1981).

36. It has been stated in Ginsberg v. Goldstein, supra,

> In accordance with the basic principle of garnishment that a plaintiff merely stands in the shoes of a judgment debtor, see Howe v.

Hyer, 17 So. 925 (1895); Barsco, Inc. v. H.W.W., Inc., 346 So. 2d (Fla. 1st DCA 1977), it is universally held that property which is not actually in "good conscience" deemed to be owned by the debtor may not be secured by the judgment creditor, 38 C.J.S. Garnishment, Section 71 (1943); 6 Am. Jur. 2d. Attachment and Garnishment, Section 92 (1963) . . . [T]he depositor's creditor is not entitled to the money if it is actually owned by somebody else. Instead, the somebody else is. E.g., Susman v. Exchange National Bank of Colorado Springs, 117 Colo. 12, 183 P.2d 571, 573-74 (1947). As is accurately stated, based on the cases collected,

> Funds of defendant on deposit in a bank are subject to garnishment in the absence of special circumstances creating an exemption. However, the garnishing creditor can reach funds of the depositor only in cases where the depositor is the true owner thereof.
>
> For the purposes of garnishment a bank deposit prima facie belongs to the person in whose name it stands, the general test being whether, but for the garnishment, the deposit would be subject to defendant's check, or whether defendant could sue the bank therefor in debt or assumpsit. These considerations, however, are not conclusive, and the fact that the depositor can withdraw or maintain an action for the deposit does not in all cases render the deposit subject to garnishment at the instance of a creditor of the depositor.

37. Ginsberg is a case in which a husband deposited funds arguably belonging soley to his wife into an account in his name

alone, and upon proper proof, the wife was able to recover all of her discrete funds (in that case more than an equal share of the account) in preferance to the husband's judgment creditor.

38. It has been held that for purposes of an estate of joint tenancy with right of survivorship or of tenancy by the entirety, only clear and convincing evidence to the contrary will rebut the presumption of both spouses owning the whole of the res. Winterton v. Kaufman, 504 So. 2d 439 (Fla. 3rd DCA 1987) rev. den. 515 So. 2d 231 (Fla. 1987). The difference in a tenancy by the entirety situation is that because of the unities of the marital estate, each spouse is presumed to own an interest in the undivided whole, and one spouse's creditors cannot reach any part of the assets held jointly, unless a transfer to the account is proven fraudulent. Sitomar v. Orlan, 660 So. 2d 1111 (Fla. 4th DCA 1995).[3] See also Thomas J. Konrad & Assocs. v. McCoy, 705 So. 2d 948 (Fla. 1st DCA 1998).

39. The Department asserts Petitioner herein also bears such a "clear and convincing" burden to establish her independent entitlement to any part of the joint accounts in this case. I concur. DeSoto, supra, makes clear that same burden of proof is to be applied here, where a tenancy by the entirety is not involved. In DeSoto, joint accounts were opened in three names: a brother, a sister, and the brother's wife. The brother and sister contributed funds to the accounts. The brother's wife

contributed nothing to the accounts. The sister was apparently unable to prove entitlement to all of the deposits she claimed to have made, but the court ultimately held that the sister was entitled to one-third of the res of the accounts. Therein, the court said:

> Funds contributed to a joint bank account by one of the owners of the account are presumed to be a gift to the other owners of the account absent clear and convincing evidence to the contrary. Hagopian v. Henry Zimmer, 653 So. 2d 474 (Fla. 3rd DCA 1995) . . . Neither party presented evidence sufficient to overcome the presumption that each party owns an equal share of the funds. Thus (the sister) was entitled to a one-third share of the funds. . . .

40. Hagopian, supra, is in line with the foregoing reasoning. The fact that DeSoto, cites In re: Guardianship of Medley, 573 So. 2d 892 (Fla. 2nd DCA 1990) for a corollary premise and Beal Bank, SSB, supra, disapproves Medley, for yet a third and different corollary premise (see Footnote one) is not dispositive of the case at bar.

41. Since there is no proof of a right of survivorship in these accounts, Petitioner may not have had to bear any burden of proof. However, Petitioner has established, by clear and convincing evidence, that she never intended to give her income (account deposits) to Mr. Ziesmer. While Mr. Ziesmer benefited from some of the things on which Petitioner spent her money, i.e., electricity, telephone, and lodging, the deposits

themselves were not being presented to him as a gift. Furthermore, the cash was derived from Petitioner's independent funds, to which Mr. Ziesmer had no legal entitlement, and it was agreed between the account-holders that Mr. Ziesmer would not draw on the joint bank accounts.[4]

42. Petitioner, having borne her burden to prove by clear and convincing evidence that the joint accounts were established with her independent funds and were never intended as a gift to Mr. Ziesmer, shifted the burden of proof to the Department. The Department has not rebutted her direct evidence. Therefore, the Department has not met its ultimate burden by a preponderance of the evidence to establish the elements of Section 409.25656, Florida Statutes.

43. Even if the foregoing case law, applicable to independent funds within a joint bank account, were not applied, it appears from Ms. Ellingsworth's testimony that the Department has determined that Section 409.25656, Florida Statutes, only authorizes the Department to garnish that proportion of a joint account not independently attributable to the non-obligor joint account owner. On that basis alone, the Department has no entitlement to these joint accounts.

44. As explained by the court in Board of Medical Examiners v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984),

> An agency's construction of the statute it administers is entitled to great weight and is not to be overturned unless clearly erroneous. . . . [T]he agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations.

See also Koger v. Department of Business and Professional Regulation, Board of Clinical Social Work, Marriage, Family, Therapy and Mental Health Counselors, 647 So. 2d 312, (Fla. 5th DCA 1994).

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED

That the Department enter a Final Order which releases the frozen joint account balances to Petitioner alone.

DONE AND ENTERED this 3rd day of December, 2001, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of December, 2001.

ENDNOTES

1/ The presumption in favor of tenancy by the entirety when a married couple jointly owns personal property shifts the burden of proof to the creditor to prove by a preponderance of the evidence that a tenancy by the entireties was not created. Beal Bank, SSB v. Almand and Associates, et al. 780 So. 2d 45 (Fla. Supreme Court 2001), disapproving Terrace Bank v. Brady, 598 So. 2d 225 (Fla. 2nd DCA 1992).

2/ Use of the words "and" or "or" is not dispositive as between husband and wife. An express designation on the signature card that it is a tenancy by the entirety ends such inquiry. As between a debtor and a third party creditor, if the signature card of a bank account does not expressly disclaim tenancy by the entirety, a rebuttable presumption arises that the account titled in the name of both spouses is held as a tenancy by the entirety, provided the unities of the marital estate are in accord. Beal, Bank, SSB v. Almand and Associates, et al. 780 So. 2d 45 (Fla. S. Ct 2001), receding from First National Bank v. Hector Supply Company, 254 So. 2d 777; In re: Estate of Lyons, 90 So. 2d 39; Bailey v. Smith, 103 So. 833, Winters v. Parks, 91 So. 649. If a signature card expressly states that the bank account is not held as a tenancy by the entireties and another form of legal ownership is expressly designated, no presumption of tenancy by the entireties arises; disapproving In re: Guardianship of Medley, 573 So. 2d 892.

3/ Sitomar has been modified by the recent case of Beal Bank, SSB, supra, but its explanation of the basic distinctions between a tenancy by the entirety and other joint tenancies is still good law. Because the instant case involves persons who, by virtue of their failure to wed, can never form a tenancy by the entirety, and due to the confusing nature of some case law, it is worthwhile to explain the difference. In Sitomar, the court said:

> A unique aspect of a tenancy by the entirety is that each such spouse is "seized of the whole of the entirety, and not of a share, moiety, or divisible part . . . 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 . . . The 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. . .

4/ The tests applicable to determining independent funds, independent control of the accounts, and the intent of the parties as set forth in Sitomar v. Orland, supra, at page 1115, have been adapted to the circumstances of this case.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.