STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL L. WRIGHT, Petitioner, vs. DEPARTMENT OF REVENUE, CHILD SUPPORT ENFORCEMENT PROGRAM, Respondent.	)	Case No. 03-3684

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Jeff B. Clark, Administrative Law Judge, Division of Administrative Hearings, on December 11, 2003. The hearing was conducted in Tallahassee, Florida, and Tampa, Florida, via video teleconference.

APPEARANCES

For Petitioner: Michael L. Wright, pro se
Carolyn David Adult Family Home
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Tampa, Florida 33617-8316

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

Is it appropriate for Respondent, Department of Revenue, Child Support Enforcement Program, to garnish funds for past due child support reduced to judgment from a joint account pursuant to Section 409.25656, Florida Statutes (2001)?[1]

PRELIMINARY STATEMENT

On October 22, 2001, Respondent sent a Notice of Intent to Levy to Petitioner. In the Notice of Intent to Levy, Respondent advised Petitioner that it intended to levy on Petitioner's personal property, in the form of liquid assets, in the control of the Suncoast Schools Federal Credit Union ("Suncoast"). (Respondent had previously sent Suncoast a Notice of Freeze on October 15, 2001.) According to the Notice of Intent to Levy, Respondent's proposed action was being taken because of Petitioner's nonpayment of child support in the amount of $16,121.06. Petitioner challenged Respondent's intended action and requested an administrative hearing.

On May 1, 2002, Respondent initially referred the matter to the Division of Administrative Hearings to conduct the hearing; the Division of Administrative Hearings assigned Case No. 02-1714 to the case. At that time, Petitioner was a patient at the Florida State Hospital, Chattahoochee, Florida. Ultimately, Respondent filed a Motion to Relinquish Jurisdiction on March 10, 2003, primarily on the grounds that Petitioner was

a patient at Florida State Hospital, Chattahoochee, Florida, and that Respondent had requested that a guardian ad litem be appointed for Petitioner; Respondent's request was denied on the grounds that Administrative Law Judges did not have the authority to appoint a guardian ad litem. An Order Closing File was entered on March 12, 2003.

After Petitioner was released from the Florida State Hospital, Respondent filed a Motion to Reopen File on October 6, 2003; the case was reopened as Case No. 03-3684 pursuant to an Order Granting Motion to Re-Open File issued on October 6, 2003.

The final hearing in this case was set for December 11, 2003, at 2:00 p.m., in Tallahassee, Florida, and Tampa, Florida, via video teleconference pursuant to a notice of hearing issued on November 7, 2003.

The final hearing convened as noticed. Petitioner and a court reporter were present at the site in Tampa, Florida; Respondent's counsel, two witnesses for Respondent, and the undersigned were present at the site in Tallahassee, Florida. Respondent's Exhibits 1 and 2, appropriately certified records of the Circuit Court in and for Hillsborough County, Florida, were admitted into evidence prior to any testimony being presented. Petitioner testified but did not present a case and did not present the testimony of any other witnesses. Petitioner indicated that his sister, the joint account holder,

was not able to attend the hearing. Respondent presented the direct examination testimony of two witnesses, Denise Buchanan and Audrey Obinyan, and the cross-examination testimony of Petitioner. During the testimony of Respondent's witnesses, Respondent's remaining exhibits were admitted into evidence as Respondent's Exhibits 3, 4, and 5.

The final hearing on December 11, 2003, was recorded, but was not transcribed. At the conclusion of the hearing, the undersigned gave the parties until December 31, 2003, to file proposed recommended orders and written legal arguments. Petitioner timely filed a Proposed Recommended Order and a memorandum of law, which have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On December 20, 1985, an Order of Support was issued in Derrick v. Wright in the Hillsborough County Circuit Court; pursuant to this Order, Petitioner was ordered to pay $25.00 per week for the current support of his minor child, Mesheal Lee Wright, born on April 20, 1983, commencing December 16, 1985.

2. On February 10, 1995, a Recommendation of Hearing Officer and a Findings of Fact and Order on Motion for Contempt in Derrick v. Wright were filed in the Hillsborough County Circuit Court, which adjudicated Petitioner's child support arrearage in the case to be $10,639.02 as of October 7, 1994.

3. On May 11, 1995, a General Findings and Order of Arrest Instanter in Derrick v. Wright was filed in the Hillsborough County Circuit Court, which adjudicated Petitioner's child support arrearage in the case to be $9,463.02 as of December 31, 1994.

4. On or about May 13, 2002, a Recommendation of Hearing Officer and a Findings and Establishing Arrears in Derrick v. Wright were filed in the Hillsborough County Circuit Court, which adjudicated Petitioner's child support arrearage in the case to be $16,121.06 as of April 9, 2002, and ordered Petitioner to pay $167.00 per month in liquidation of his arrearage, commencing May 1, 2002.

5. All the arrearage was owed by Petitioner to the custodial parent of the minor child; none of the arrearage was owed to the state.

6. On October 15, 2001, Respondent mailed a Notice of Freeze in an amount up to $16,121.06 to Suncoast by certified mail, return receipt requested, regarding any accounts of Petitioner with the credit union; Suncoast received the Notice of Freeze on October 18, 2001.

7. Suncoast confirmed a freeze on Petitioner's joint account in the amount of $5,573.95 as of October 18, 2001.

8. The signature card, produced as an exhibit by the Respondent, stipulated that the account was owned as a joint

tenancy with right of survivorship by Petitioner and a non-obligor joint account holder, Petitioner's sister.

9. On October 22, 2001, Respondent mailed a Notice of Intent to Levy in an amount up to $16,121.06 to Petitioner by certified mail, return receipt requested; the Notice of Intent to Levy was received and signed for at the Florida State Hospital, Chattahoochee, Florida, on October 23, 2001.

10. The Notice of Intent to Levy 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 Respondent’s action. The non-obligor joint account holder did not file a petition to contest the levy nor did she appear at the final hearing.

11. On or about November 5, 2001, Petitioner filed a Petition-Disputed Issues of Material Fact with Respondent.

12. Respondent sent a Notice of Extension of Freeze in an amount up to $16,121.06 to Suncoast on November 9, 2001.

13. Pursuant to the official records of the Hillsborough County Circuit Court in Derrick v. Wright, Petitioner’s child support arrearage was $16,121.06 as of November 21, 2003.

14. Petitioner and his sister, Sandra W. Russaw, opened a joint account with survivorship rights at Suncoast on November 21, 1997. The Suncoast account had balances of less than $100.00 for 12 of the first 25 months it was open including

the five months immediately preceding January 20, 2000, when $3,900.00 was deposited in the account.

15. On December 27, 1999, Petitioner had $3,655.00 deposited in a Resident Trust Account he maintained at the Florida State Hospital, Chattahoochee, Florida. These funds, which were deposited by the U.S. Treasury, were followed by a deposit of $749.00 from the same source. These funds were initial payments to Petitioner for Veteran's Administration benefits.

16. On January 14, 2000, $4,200.00 was withdrawn in the form of a check from Petitioner's Resident Trust Account at the Florida State Hospital. On January 20, 2000, $3,900.00 was deposited in the Suncoast account.

17. Over the next 23 months, from January 20, 2000, to November 31, 2001, $20,538.00 directly attributable to Petitioner was deposited in the Suncoast account. The money was from Veteran's Administration benefits paid to Petitioner by direct deposit. Not surprisingly, upon notification of the Notice of Freeze the monthly checks from the Veteran's Administration stopped being deposited in Petitioner's Suncoast account.

18. On March 8, 2000, $5,000.00 was withdrawn from the Suncoast account, and on July 10 and 20, 2000, $4,990.00 was deposited in the same account. With the exception of the

July 2000 deposits, only $1,490.00 in deposits to the Suncoast account are not directly attributable to Petitioner.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57(1), Fla. Stat. (2003).

20. Respondent is the state agency responsible for the administration of the state's child support enforcement program. § 409.2557(1), Fla. Stat.

21. Subsection 409.2557(2), Florida Statutes, provides in pertinent part the following:

> (2) [Respondent] in its capacity as the state Title IV-D agency shall have the authority to take actions necessary to carry out the public policy of ensuring that children are maintained from resources of their parents to the extent possible. [Respondent's] authority shall include, but not be limited to, the establishment of paternity or support obligations, as well as the modification, enforcement, and collection of support obligations.

22. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, Respondent seeks to levy the past due child support owed by Petitioner from his

credit union accounts. Therefore, to prevail in this proceeding, Respondent must establish by a preponderance of evidence that the proposed levy is authorized by Section 409.25656, Florida Statutes.

23. Section 409.25656, Florida Statutes, provides in pertinent part the following:

> Garnishment.
>
> (1) If a person has a child support obligation which is subject to enforcement by [Respondent] 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 child support obligor, or owing any debts to the child 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 to the department or pay to [Respondent] the amount owed to the obligor.

* * *

(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 child 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.
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> * * *
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> (8) An obligor may contest the notice of intent to levy provided for under subsection (7) by filing an action in circuit court. 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.

24. The above-quoted provisions enumerate the prerequisites that must be met prior to Respondent's levying upon a person's credits, personal property, or debts. First, Respondent must determine that the person has a child support obligation that is subject to enforcement by Respondent. Second, when Respondent establishes that the person has a past due or overdue child support obligation that is subject to enforcement by Respondent, it must demonstrate further that

there has been compliance with the notice requirements enumerated in Section 409.25656, Florida Statutes.

25. Prior to levying upon the credits, personal property, or debts of any child support obligor, Respondent is required to give notice by registered mail to all persons known to have in their possession or under their control any credits or personal property belonging to the obligor or owing any debts to that obligor of its intent to levy. The notice should direct such person not to transfer or dispose of the credits, personal property, or debts until Respondent consents to a transfer or disposition or until 60 days after receipt of the notice. § 409.25656(1), Fla. Stat. Next, persons who receive the foregoing notice are required to advise Respondent of credits or other personal property owned by the obligor, or debts owed by them to the obligor, that are in their possession or under their control. § 409.25656(2), Fla. Stat. Finally, prior to Respondent's levying upon credits, other personal property, or debts of a child support obligor, it must provide notice to the obligor that comports with the requirements of Subsection 409.25656(7), Florida Statutes.

26. Petitioner had a past due child support obligation that was subject to enforcement by Respondent; the amount of past due child support owed by Petitioner was $16,121.06 as of November 21, 2003.

27. Respondent gave the statutorily-required notice to the financial institution, Suncoast, that held personal property owned by Petitioner in its possession and under its control.

28. Respondent issued to Petitioner a Notice of Intent to Levy which: (1) notified Petitioner that Respondent intended to levy upon his personal property, i.e., liquid assets, in the control of Suncoast; (2) stated that the action was being taken for Petitioner's nonpayment of child support; and (3) advised Petitioner of his due process rights. This Notice of Intent to Levy provided to Petitioner by Respondent fully complied with the requirements of Subsection 409.25656(7), Florida Statutes.

29. 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, 780 So. 2d 45, 53 (Fla. 2001).

30. A creditor of one of the joint tenants may attach the joint tenant's portion of the property owned as a joint tenancy with right of survivorship to recover that joint tenant's individual debt. Beal Bank, 780 So. 2d at 53.

31. It has been stated in Ginsberg v. Goldstein, 404 So. 2d 1098, 1099-1100 (Fla. 3rd DCA 1981),

> In accordance with the basic principle of garnishment that a plaintiff merely stands in the shoes of the judgment debtor, see Howe v. Hyer, 36 Fla. 12, 17 So. 925 (1895); Barsco, Inc. v. H.W.W., Inc., 346 So. 2d 134

> (Fla. 1st DCA 1977), it is universally held that property which is not actually and in "good conscience" deemed to be owned by the debtor may not be secured by the judgment creditor. 38 C.J.S. Garnishment s 71 (1943); 6 Am.Jur.2d Attachment and Garnishment s 92 (1963). This rule is directly applicable to the bank deposit situation before us. Even though, as here, the debtor holds a general account in his own name, thus creating a simple creditor-debtor relationship between him and the bank, Camp v. First National Bank of Ocala, 44 Fla. 497, 33 So. 241 (1902), and a concomitant obligation by the bank to pay out the funds at his direction, Aronson v. First Savings & Trust Co. of Tampa, 139 Fla. 240, 190 So. 524 (1939), the 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, at 38 C.J.S. Garnishment s 80 (1943):
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> 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.

32. Respondent has shown that virtually all the funds frozen in Petitioner's account at Suncoast belong to Petitioner; no evidence was presented that indicated that any of the funds not directly attributable to Petitioner were the funds of the joint account holder. Respondent was able to trace through deposit slips and the timing of withdrawals from Petitioner's Resident Trust Account at Florida State Hospital and

corresponding deposits into the joint account at Suncoast, subsequent direct deposits by the Veteran's Administration to Suncoast, the ownership of virtually all the funds in the Suncoast account back to Petitioner through the presentation of Petitioner’s account records and through testimony.

33. The joint account holder did not assert ownership of the funds, either independently or in conjunction with her brother.

34. In light of the foregoing, Respondent has met its burden of proof in this proceeding. Therefore, Respondent is authorized to levy on Petitioner’s credit union account with Suncoast up to either the full amount owed by Petitioner in past due child support as of November 21, 2003, i.e., $16,121.06, or to the full amount frozen, whichever is less, and to apply those funds to reduce his past due child support obligation.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that Respondent enter a final order that: (1) levies upon the funds in Petitioner’s credit union account with Suncoast Schools Federal Credit Union, Tampa, Florida, up to the amount of unpaid child support as of November 21, 2003, i.e., $16,121.06, or to the full amount frozen, whichever is less; (2) applies the funds levied to satisfy all or part of

Petitioner's past due child support obligation; and (3) credits Petitioner for the amount so applied.

DONE AND ENTERED this 22nd day of January, 2004, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of January, 2004.

ENDNOTE

1/ All references to Florida Statutes are to Florida Statutes (2001) unless otherwise indicated.

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.