CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF:

AMERICAN RESEARCH AND INVESTIGATIONS, INC., and CHOICE PLUS, LLC

_____/

CASE NO. 141350-13-CI
(DOAH NOS. 13-4953 c/w 13-4954)

FINAL ORDER

THIS CAUSE came on for consideration of and final agency action on the Recommended Order (RO) issued in this matter on April 18, 2013, attached hereto as Exhibit A.

PROCEEDINGS BELOW

A formal hearing was conducted pursuant to section 120.57(1), Florida Statutes, by Administrative Law Judge Jessica E. Varn (hereinafter "ALJ") on March 4, 2014, via video teleconference in Tallahassee and Lauderdale Lakes, Florida. Petitioner American Research and Investigations, Inc. (hereinafter, "ARI") was represented by Steven D. Fromang, Esq.; Petitioner Choice Plus, LLC (hereinafter, "CP") was represented by Michael Farrar, Esq.; and Respondent, Department of Financial Services (hereinafter, "Agency") was represented by Josephine Schultz, Esq.

After the formal hearing all parties filed proposed recommended orders. The ALJ issued her RO on April 18, 2014, allowing the parties 15 days to submit exceptions to the RO. Both Petitioners timely filed exceptions to the RO.

RULINGS ON EXCEPTIONS

ARI's Exceptions[1]

1st Exception – RO p. 5

ARI's first exception addresses the RO's Finding of Fact #9 and the first sentence of Finding of Fact #10 as regards the burden of proof. ARI contends that it met its burden of proof

[1] ARI filed a document captioned "ARI'S EXCEPTION TO RECOMMENDED ORDER." While the caption was framed in the singular, the document had five separate exceptions, each separately identified by reference to the specific page and paragraph of the Recommended Order in keeping with the requirements of rule 28-106.217, Florida Administrative Code. For ease of reference, the Final Order assigns a number to each exception raised by ARI.

and established by a preponderance of the evidence that the named beneficiary, Silja Sova, does not exist. ARI asserts that it was wrong for the RO to impose the burden of proof on the Petitioners, instead of requiring the Agency to produce evidence proving that Silja Sova does exist. The exception correctly notes that the RO did not conclude that the person Silja Sova does not exist. The ALJ merely noted that ARI's search found no person named Silja Sova, with the exception of one person born in Finland in 2009. However, the ALJ's challenged findings are an accurate statement of the evidence in the record. The testimony of ARI's president, Riley Welchance (Welchance) does not establish the non-existence of Silja Sova. A witness is only competent to testify as to matters about which he has personal knowledge. Welchance's statement that "we know for a fact there is no Silja Sova" [Tr.p.18; Line 22], together with other such statements to that effect, does not constitute competent substantial evidence. Welchance's testimony was not based upon his own personal knowledge. The same defect applies to Welchance's testimony as to the intent of the decedent, Anja Sova, in creating a purported "placeholder/fictitious name" for the Sterling Bank account. His testimony is merely a layman's opinion. Consequently, the predicate for the admission of such testimony was not met. *Fino v. Nodine,* 646 So.2d 746 (Fla. 4th DCA, 1994).

The nonexistence of a person, being a negative, is not easily susceptible of proof. No cases addressing this issue are directly on point. However, similar cases are typically proven based upon the presentation of circumstantial evidence from which reasonable inferences may be drawn. *In re: Alachua* 188 So.2d 203 (Fla. 2nd DCA 1966). Similar evidence would have been helpful in the present matter. ARI failed to present any probative testimony from witnesses having personal knowledge of the Sova family history, although it could have done so by various means, such as through interrogatories or depositions of family members or members of the community. The mere fact that certain relatives of the decedent have filed a claim to reopen the probate proceedings is insufficient to support an inference that the named beneficiary on the account, Silja Sova, is a fictitious person.

It is settled that the obligation to come forward with rebuttal evidence does not arise until the claimant has established his case by the preponderance of the evidence. 2 Am. Jur.2d *Administrative Law* §355; *Comprehensive Medical Access, Inc. v. Office of Insurance Regulation*, 983 So.2d 45 (Fla. 1st DCA 2008). ARI failed to establish a prima facie case; thus,

the Recommended Order does not impermissibly fail to shift the burden of proof to the agency. Accordingly, the exception is rejected.

2nd Exception - RO p. 5 #10

ARI's second exception disputes the last part of Finding of Fact #10 as regards ARI's Exhibit 5 – the Finnish Population Extract ("Extract"). The ALJ found there was no credible evidence as to whether the Extract includes both living persons and deceased persons, or only living persons. ARI contends that the statement in the Extract's "Further Information" provision, which reads: *"Silja Sova, born on 19 July 2009 is the only person with that name in the Population Registration System in Finland"* provides such credible evidence.

The Extract is a two-page document (the 2nd page is a signature page). The information provided by the Extract is limited: it does not provide the dates covered in the search period; it does not state the degree of kinship covered in regards to "Person and family relationship information"; and it does not state whether it includes living and deceased persons. The actual scope of the search would have to be proven by additional substantial competent evidence. Welchance had no personal knowledge of the Finnish population survey process, and thus, could not testify as to what went into its composition. In the absence of evidence as to the composition of the Extract, the testimony of Welchance "that there is nobody else except this now [sic] girl" is merely speculative. *McNorton v. McNorton,* 135 So.2d 482 (Fla. 2nd DCA 2014). In *McNorton*, an accountant testified regarding the value of certain retirement accounts, relying upon a Standard and Poor's index. The trial court accepted the accountant's valuation. However, the ruling was reversed on appeal, the reviewing court finding that *"[W]ithout evidence of the composition of the retirement investments* [stocks or bonds] *. . . the accountant's testimony in this regard was speculative."* The RO correctly states that the record lacks credible evidence as to the scope of the Extract. Therefore, this exception is rejected.

3rd Exception – RO p.5 #11

This exception takes issue with the ALJ's Finding of Fact #11 that the "scant evidence presented" fails to provide evidentiary support for ARI's opinion that Silja Sova "does not exist, and never existed, in Finland", particularly since it is not known if Anja Sova's husband had other brothers or uncles, who might well have had a descendant named Silja Sova.

ARI's case rests upon the premise that the named beneficiary, Silja Sova, is fictitious and that no such person, known to the decedent, was in existence at the relevant time period. However, the RO correctly states that the evidence produced by ARI in support of its assertion that Silja Sova's does not exist is "scant". As stated, ARI's evidence consists primarily of the ambiguous Extract and the non-probative testimony presented by Welchance.

In connection with ARI's Finnish investigation, Welchance was asked on cross-examination if the investigation included deceased individuals and if he knew if the decedent's late husband had brothers or uncles. He answered that he did not know if the investigation included deceased persons or if the decedent's late husband had brothers or uncles. This testimony is competent evidence, in that it rests upon his own personal knowledge of what he knows or does not know. Therefore, it was proper for the ALJ to consider this testimony. ARI's accusation that the ALJ considered *the question* posed by the agency as evidence is consequently without merit. The ALJ's finding is clearly based upon Welchance's response to the question, not upon the question itself.

ARI bears the burden of producing evidence that establishes that is it is more likely than not that the Silja Sova named as the pay-on-death beneficiary on the Certificate of Deposit is fictitious and that no such person existed at the relevant time period. For the reasons discussed above, ARI's reliance on the Extract is misplaced as the information presented in the Finnish Extract is inconclusive. The only other evidence presented by ARI on this issue consists of Welchance's non-expert, opinion testimony. As previously stated Welchance lacked personal knowledge as to whether or not a person named Silja Sova, known to the decedent, existed during the relevant time period. He has expressed an opinion, but the opinion of a layman is not competent, credible evidence, with limited exceptions that are not applicable here. Section 90.701, Fla. Stat. It is axiomatic that the burden of proof does not shift until the party with the initial burden of proof has established a prima facie case, which the Petitioners failed to do. Thus, this Agency was under no obligation to come forward with evidence establishing the existence of Silja Sova. The exception is accordingly rejected.

4th Exception – RO p. 6, #13

The ALJ, in addressing the Petition for Subsequent Administration filed with the Probate Court in the *Estate of Anja Sova,* finds that a court order was entered that establishes the residual beneficiaries of Anja Sova's estate, "*but it* [the Order] *does not include Silja Lappalainen, Anja Sova's grand-niece*". ARI correctly contends that Silja Lappalainen was not named in Anja Sova's Will and was never part of the estate. However, the ALJ's finding that the list of residual beneficiaries named in the Order does not include Silja Lappalainen is an accurate description of the contents of the Order. Accordingly, this exception is rejected.

5th Exception – RO p.8 #21

This exception takes issue with the ALJ's final Conclusion of Law, which states "*There is simply no evidence to support either of Petitioners' arguments as to their entitlement to the unclaimed property.*" ARI contends that it established by a preponderance of the evidence that the Silja Sova named on the bank account does not exist; and since no evidence was presented in opposition, the funds belong to the estate of the last surviving party in accordance with the provisions of section 655.82(3)(b), Florida Statutes.

However, ARI's repeated assertions (derived from the testimony of Welchance) that Silja Sova is a fictitious person, are not supported by competent substantial evidence. The testimony of Welchance does not constitute competent evidence. It is not based on personal knowledge; rather it is speculative opinion testimony from a lay witness. Therefore, and based upon the reasoning in response to the previous exceptions, above, the ALJ's legal conclusion that there was no competent evidence to support the Petitioner's entitlement to the unclaimed property at issue is correct. Accordingly, the exception is rejected.

CP's Exceptions

1st Exception – RO pp. 3-4 ¶ 1

CP's first exception to the RO takes issue with the ALJ's initial finding of fact which addresses the volume of unclaimed funds received and paid out by the agency, which it claims is irrelevant to the proceeding. The finding at issue appears to be provided merely as background information to put the Agency's process for resolving unclaimed property claims in context. However, to the extent, if any, that the inclusion of such information is irrelevant, it would

constitute harmless error. *See Gonzalez v. Department of Health,* 120 So.3d 234 (Fla. 1st DCA 2013). The exception is therefore rejected.

2nd Exception – RO pp. 5-6 ¶ 11

CP's second exception consists of two parts. The first part disputes the ALJ's conclusion that the *"scant evidence presented"* does not support a finding that Silja Sova *"does not exist, and never existed, in Finland"*, particularly since no evidence was produced establishing whether or not Anja Sova's husband had other brothers or uncles, who may indeed have had a descendant named Silja Sova. CP asserts that sufficient evidence was introduced to meet the Petitioners' burden of proof under section 717.126(1), Florida Statutes. The second part of the exception contends that the ALJ inappropriately placed the burden of proof on the Petitioners to establish the non-existence of Silja Sova.

In support of the first part of the exception, CP relies upon the evidence introduced by ARI, specifically, the testimony of ARI's president, Riley Welchance (Welchance) at Tr. p.18 line 22 to p.21 line 24 and ARI Exhibit 5 (the Extract). This Agency's ruling in response to ARI's similar exception on the same finding in the RO (that such evidence was, on its face, insufficient) is hereby incorporated as the ruling on CP's second exception. Further, as regards the second part of CP's second exception, that the burden of proof was inappropriately placed upon the Petitioners, for the same reasons stated in this Agency's response to ARI's first exception, above (which raised the same contention) the exception is rejected.

3rd Exception – RO pp. 6-7 ¶ 15

CP's third exception takes issue with the ALJ's ruling that the affidavit of Iina Sova (CP Exhibit #1), the now deceased sister-in-law of the late Anja Sova, is not credible or reliable because the affidavit was executed in English and Iina Sova lived in Finland. The RO states in pertinent part that the affidavit "... is written in a language that the affiant did not speak, there is no indication that a certified translator was present while the statement was being made." CP contends, to the contrary, there is no evidence in the record that the affiant did not speak English. The record on this issue consists of the following: in the course of making an objection to the admission of the affidavit as hearsay, the agency attorney made the following statement: "Ms. Ina [sic] Sova did not speak English and did not read English."

It is well-established that an agency may not reject an Administrative Law Judge's findings of fact if they are supported by competent, substantial evidence. *Fox v. Department of Health,* 994 So.2d 416 (Fla. 1st DCA, 2008). Here, the finding of fact to the effect that the Iina Sova did not speak English does not appear to be supported by competent, substantial evidence. The statement made by the Agency attorney is not evidence. While this portion of the exception is well-founded, the error is harmless. The affidavit itself does not constitute competent, substantial evidence sufficient to establish the donative intent of the decedent, Anja Sova -- the primary purpose for which it was introduced. While hearsay is admissible in an administrative proceeding, its purpose must supplement or explain other evidence. Rule 28-106.213(3), Florida Administrative Code. CP failed to introduce any competent, non-hearsay evidence as to Anja Sova's intentions, as regards the identity of the beneficiary of the pay-on-death account, to supplement or explain the affidavit. The ALJ properly found that the affidavit is "replete with hearsay" and is not credible or reliable. Therefore, this exception is rejected.

4th Exception – RO p. 7 ¶ 16

The 4th exception disputes the ALJ's finding that no credible evidence was introduced by CP to support its assertion that the designation of Silja Sova as the beneficiary of the pay-on-death account was a mistake.[2] The gist of CP's dispute is over the exclusion of an affidavit executed by Sirkka Tommola, the Personal Representative for Anja Sova's estate. The affidavit was part of the pre-hearing proposed package of exhibits submitted by ARI, which ARI ultimately chose not to use at the hearing. As part of its case in chief, CP sought to put the Tommolo affidavit into the record on its own behalf. ARI, joined by the Agency, objected on the grounds that the document was hearsay. The ALJ sustained the objection. CP does not cite any legal authority in support of its assertion that it should have been permitted to introduce ARI's proposed pre-hearing exhibit as part of its case-in-chief; nor does CP address the ALJ's hearsay ruling, denying admission of the affidavit. Indeed, it seems the sole purpose of the exception

[2] Even if CP had come forward with competent evidence, the administrative forum is not the appropriate forum to determine whether or not a donative instrument should be reformed to correct a mistake. The DFS has the power to determine if the proof provided by a claimant establishes to a reasonable certainty that the claimant is entitled to the property. In exercising this power the agency is vested with quasi-judicial power, not judicial power. *Canney v. Board of Public Instruction of Alachua County,* 278 So.2d 260 (Fla. 1973): "As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties, and the Legislature may not authorize officers or bodies to exercise powers which are essentially judicial in their nature." Reformation of a contract or a donative instrument is an equitable remedy and calls for the exercise of a power *which is essentially judicial in nature.* Administrative agencies are not vested with the power to grant equitable relief. *Bitmore Const. Co. v. Fla. Dept. of General Services,* 363 So.2d 851 (Fla. 1st DCA 1978).

(which includes a lengthy quote from the excluded affidavit regarding the purported intentions of Anja Sova) is an attempt to slip in through the backdoor what was not allowed in through the front door. The exception is thus meritless and is rejected.

ACCORDINGLY, after a complete review of the entire record, including all admitted exhibits, the official transcript of proceedings, the proposed recommended orders filed by all parties to the proceeding, the exceptions to the RO filed by ARI and CP, and after being fully apprised in all other material premises:

IT IS HEREBY ORDERED that the ALJ's Findings of Fact in the RO are adopted as the Department's Findings of Fact, except as modified below:

In paragraph ten of the Findings of Fact, in regards to the Finnish Extract, the ALJ found that the database was created in 1969. However, after review of the entire record, no credible evidence was introduced by any party to support this finding. The date "1969" came up in the context of a question on cross-examination of Welchance by the agency attorney. [Tr. p.31 lines 5-21] The agency attorney made a reference to a pamphlet Welchance had provided to her (the pamphlet had not been put into evidence) and asked him if the statement in the pamphlet stating the database was initiated in 1969 was accurate. No foundation was laid for Welchance's reply that the database was in existence before then, but was digitized in 1969. Further, the finding is an inaccurate description of the colloquy between the agency attorney and Welchance. Therefore, the portions of paragraph ten that reference the year 1969 are not supported by competent, substantial evidence and are rejected.

In paragraph fifteen of the Findings of Fact, the ALJ found that the affidavit of Iina Sova was written in a language she did not speak. However, after review of the entire record, no competent substantial evidence was introduced by any party to substantiate the assertion that the affiant did not speak English. Thus, the finding of fact to the effect that the Iina Sova did not speak English is not supported by competent, substantial evidence and this portion of paragraph fifteen of the RO is rejected.

IT IS HEREBY ORDERED that the ALJ's Conclusions of Law set forth in the Recommended Order are adopted in full as the Department's Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is adopted by the Department. Accordingly, the claims submitted by

Petitioners American Research and Investigations, Inc. and Choice Plus, LLC for Unclaimed Property Account Number 108502717 are hereby DENIED.

DONE and ORDERED on this 22nd day of July, 2014.

Robert C. Kneip
Chief of Staff

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Final Order is entitled to seek review of the Order pursuant to section 168.68, Florida Statutes, and rule 9.110, Florida Rules of Appellate Procedure. Appeal proceedings must be initiated by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, Room 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0390, and filing a copy of the petition or notice of appeal with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

Administrative Law Judge Jessica E. Varn
Michael Farrar, Esq.
Steven D. Fromang, Esq.
Josephine Schultz, Esq.