

NO. A09-1221

State of Minnesota
In Supreme Court

Mona Savig and Robert Savig,

Plaintiffs,

v.

First National Bank of Omaha, and
Messerli & Kramer, P.A.,

Defendants.

ON QUESTION CERTIFIED BY UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA, HON. JOAN N. ERICKSEN

PLAINTIFFS' RESPONSE BRIEF AND APPENDIX

Nicholas Slade (#270787)
BARRY & SLADE, LLC
2021 East Hennepin Avenue
Suite 195
Minneapolis, MN 55413
(612) 379-8800

Sam Glover (#327852)
SAMUEL J. GLOVER &
ASSOCIATES, LLC
2021 East Hennepin Avenue
Suite 195
Minneapolis, MN 55413
(612) 424-3770

Attorneys for Plaintiffs

David F. Herr (#44441)
Haley N. Schaffer (#0313099)
MASLON EDELMAN BORMAN &
BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8200

Derrick N. Weber (#241623)
Truman W. Schabilion (#388018)
MESSERLI & KRAMER, P.A.
3033 Campus Drive, Suite 250
Plymouth, MN 55441
(763) 548-7942

Attorneys for Defendants

(additional counsel listed on following page)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

Charles F. Webber (#215247)
Aaron D. Van Oort (#315539)
Nathaniel J. Zylstra (#0314328)
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

*Attorneys for Amicus Curiae National
Association of Retail Collection Attorneys
and Capital One Bank (USA), N.A.*

Teresa E. Rice (#027209)
MINNESOTA BANKERS
ASSOCIATION
9521 West 78th Street
Eden Prairie, MN 55344
(952) 857-2613

*Attorneys for Amicus Curiae
Minnesota Bankers Association*

Michael A. Klutho (#0186302)
Charles E. Lundberg (#006502X)
BASSFORD REMELE, P.A.
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402
(612) 333-3000

*Attorneys for Amicus Curiae
ACA International*

Simone Suri (#324899)
MINNESOTA CREDIT UNION
NETWORK
555 Wabasha Street North, Suite 200
Saint Paul, MN 55102
(651) 288-5170

*Attorneys for Amicus Curiae
Minnesota Credit Union Network*

Heidi L. Staloch (#271445)
Michael Johnson (#31044X)
Bridget A. Sullivan (#265974)
GURSTEL STALOCH & CHARGO, P.A.
6681 Country Club Drive
Golden Valley, MN 55427
(763) 267-6700

*Attorneys for Amicus Curiae
Gurstel Staloch & Chargo, P.A.*

Table of Contents

Table of Contents	iii
Table of Authorities	iv
Statement of the Issues	1
Statement of the Case	3
Statement of Facts	5
Summary of the Argument	6
Argument	8
I. A creditor may not serve a garnishment summons for funds in a joint bank account unless it first provides clear and convincing evidence of ownership of the funds	8
a. This Court must interpret Minnesota law consistent with the U.S. Constitution, which prohibits taking a non-debtor's funds without notice and an opportunity to be heard	10
b. A creditor may serve a garnishment summons that does not reach funds in a joint bank account	13
II. As the party that initiated the garnishment proceeding, the judgment creditor bears the burden of establishing net contributions to a joint bank account	15
III. Because due process requires notice and opportunity to be heard before deprivation of property, it should be presumed that all parties to an account have an interest in the account	17
Conclusion	19

Table of Authorities

Cases

Minnesota

<i>City of Duluth v. Sarette</i> , 283 N.W.2d 533 (Minn. 1979)	12
<i>Enright v. Lehmann</i> , 735 N.W.2d 326 (Minn. 2007)	<i>passim</i>
<i>Miller Brewing Co. v. State</i> , 284 N.W.2d 353 (Minn. 1979).....	12
<i>Minn. 5th Dist. Indep. Republican Party v. State</i> , 295 N.W.2d 650 (Minn. 1980)	12
<i>Park Enterprises v. Trach</i> , 47 N.W.2d 194 (1951)	18

Federal

<i>Bell v. Burson</i> , 402 U.S. 535 (1971).....	11
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972).....	10, 11, 12
<i>Gallagher v. Gurstel, Staloch & Chargo, P.A.</i> , 08-cv-01189, Doc. 32 (D. Minn. July 29, 2009).....	15
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950).....	10
<i>Phillips v. Messerli & Kramer, P.A.</i> , 08-cv-04419, Doc. 43 (D. Minn. April 20, 2009).....	16
<i>Ramirez v. Como Law Firm</i> , 08-cv-04249, Doc. 65 (D. Minn. June 30, 2009).....	17
<i>Sniadach v. Family Fin. Corp. of Bay View</i> , 395 U.S. 337 (1969).....	10, 11
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972).....	12

Constitutional Provisions

Minnesota

Minn. Const., art. I, § 7.....	10
--------------------------------	----

Federal

U.S. Const. amend., XIV § 1	10
-----------------------------------	----

Statutory Provisions

Minnesota

Multiparty Accounts Act, Minn. Stat. § 524.6-203	<i>passim</i>
Minn. Stat. § 524.6-212	19
Minn. Stat. § 550.02.....	13
Minn. Stat. § 550.08.....	14
Minn. Stat. § 551.05, Subd. 1(a)	14
Minn. Stat. § 571.73, Subd. 1	13
Minn. Stat. § 571.83.....	16
Minn. Stat. § 571.90.....	8
Minn. Stat. § 645.17(3).....	12

Federal

Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-16920	8
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Other Authority

86 A.L.R. 5th 527 § 11.....	10
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Statement of Issues

- I. May a judgment creditor serve a garnishment summons on a joint account to satisfy the debt of an account holder when not all of the account holders are judgment debtors?

Most apposite authorities:

Enright v. Lehmann, 735 N.W.2d 326 (Minn. 2007)

Fuentes v. Shevin, 407 U.S. 67 (1972)

Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969)

Multiparty Accounts Act, Minn. Stat. § 524.6-203

- II. If so, is it the judgment creditor or the account holders who bear the burden of establishing net contributions to the account during the garnishment?

Most apposite authorities:

Enright v. Lehmann, 735 N.W.2d 326 (Minn. 2007)

Phillips v. Messerli & Kramer, P.A., 08-cv-04419, Doc. 43 (D. Minn. April 20, 2009)

Ramirez v. Como Law Firm, 08-cv-04249, Doc. 65 (D. Minn. June 30, 2009)

Multiparty Accounts Act, Minn. Stat. § 524.6-203

III. If so, what applicable presumptions regarding ownership, if any, apply in the absence of proof of net contributions?

Most apposite authorities:

Enright v. Lehmann, 735 N.W.2d 326 (Minn. 2007)

Multiparty Accounts Act, Minn. Stat. § 524.6-203

Minn. Stat. § 524.6-212

Statement of the Case

This case arises out of the Savigs' claims that Defendants wrongfully garnished Robert Savig's funds in attempting to satisfy a judgment against Mona Savig, and refused to return his funds when he asked for them.

In *Enright v. Lehmann*, 735 N.W.2d 326 (Minn. 2007), this Court recognized that, under the Minnesota Multiparty Accounts Act ("MPAA"), Minn. Stat. § 524.6-203 (2006), money in a joint account belongs to the owners of the account in proportion to their contributions. In *Enright*, this Court emphasized that, under the plain language of the MPAA, a creditor may not garnish a non-debtor's funds in a joint account unless the creditor first proves by clear and convincing evidence that the non-debtor intended to confer ownership of the funds on the debtor.

Defendants had a judgment against Mona Savig, and served a garnishment summons on the Savigs' joint Midwest Bank account. The garnishment froze \$842.37 of Robert Savig's funds. Robert Savig contacted Defendant Messerli & Kramer, P.A., which refused to return his funds.

The Savigs sued Defendants in federal court, alleging violations of the Fair Debt Collection Practices Act based on Defendants' failure to comply with the MPAA and *Enright* in garnishing Robert Savig's funds, and based on Defendants' conversion of Robert Savig's funds.

The Honorable Joan N. Erickson, judge of the United States District Court for the District of Minnesota, decided that the Savigs' case presented an important issue of Minnesota law, but she reformulated the questions proposed by Defendants to the following:

May a judgment creditor serve a garnishment summons on a joint account to satisfy the debt of an account holder when not all of the account holders are judgment debtors, and if so, (1) is it the judgment creditor or the account holders who bear the burden of establishing net contributions to the account during the garnishment proceeding and (2) what applicable presumptions regarding ownership, if any, apply in the absence of proof of net contributions?

(Add. 17.) This Court accepted the certified question in its order of July 13, 2009. (Add. 22.)

Statement of Facts

Defendant First National obtained a judgment against Mona Savig and her ex-husband, Lowell Bjerke, in 2004. (A. 2.) As part of the divorce decree, Lowell Bjerke assumed responsibility for the judgment. (A. 115.) In January 2009, Defendants served a garnishment summons on Midwest Bank. (A. 3.) In response to the garnishment summons, Midwest Bank attached \$1,438.10 in a joint checking account and \$565.68 in a joint savings account (*Id.*) Of the funds attached in the joint checking account, \$842.37 belonged to Robert Savig. (*Id.*) After discovering his funds had been attached, Robert Savig contacted Defendant Messerli & Kramer to discuss the seizure of his funds, and he requested that the funds be released immediately. (A. 4.) Messerli & Kramer refused to release his funds, claiming it could attach any funds held in any account for which Mona Savig was a signatory. (*Id.*)

Summary of the Argument

Minnesota's Multiparty Accounts Act (MPAA) prescribes the ownership of funds held in joint accounts. In *Enright v. Lehmann*, this Court interpreted the MPAA to prohibit a creditor from serving a garnishment summons for funds in a joint bank account unless it first provides clear and convincing evidence of ownership of the funds. If Minnesota law allowed a creditor to take first, and ask questions later—as Defendants did in this case—Minnesota law would conflict with the due process requirements of the U.S. and Minnesota constitutions. The doctrine of constitutional avoidance, Minn. Stat. § 645.17(3), compels this court to avoid such an interpretation of Minnesota law. This Court should therefore respond to the first part of Judge Erickson's question with a qualified "yes": a creditor may serve a garnishment summons on a joint account if, consistent with *Enright*, the creditor first provides clear and convincing evidence of ownership of the funds in the joint account.

The answer to the second part of Judge Erickson's question should be that the judgment creditor bears the burden of establishing net contributions. A non-debtor's funds in a joint account are not subject to garnishment, so she should not have the burden of establishing net contributions. As Judge Frank pointed out in *Phillips v. Messerli &*

Kramer, P.A., a non-debtor account holder has no obligation to establish his contributions to the account during a garnishment proceeding because he is not subject to the judgment; his funds may not be garnished in the first place.

Finally, due process prohibits the presumption requested by Defendants: that the debtor should be presumed to own all the funds in a joint account. Defendants' requested presumption would regularly operate to deprive non-debtors of their property without notice or any opportunity to be heard, and impose on them the burden and expense of recovering wrongfully-taken property. If there has been no notice to non-debtor joint account holders and an opportunity for them to be heard, there should be no presumptions regarding ownership of funds in the account. If the creditor has given notice to non-debtor joint account holders, and if they have had an opportunity to be heard but have provided no proof of their contributions, it should be presumed that all parties to a joint account have an equal interest in the account.

Argument

There are two components to the Savigs' claims in U.S. District Court. First, the Savigs claim that Defendants broke the rule set forth in *Enright v. Lehmann* that a creditor may not garnish a non-debtor's funds in a joint account without proving ownership of those funds by clear and convincing evidence. Defendants did exactly what *Enright* prohibits: they garnished a non-debtor's funds in a joint account without providing any evidence that Robert Savig intended to confer ownership of his funds on his wife, the debtor. As a result, Defendants converted Robert Savig's funds in violation of Minn. Stat. § 571.90 and the Fair Debt Collection Practices Act.

Second, the Savigs claim that Defendants ratified the unlawful garnishment by retaining the joint funds after they knew they had captured a non-debtor's funds. In doing so, Defendants converted Robert Savig's funds and violated the Fair Debt Collection Practices Act.

The composite question before this Court concerns only the first component of the Savigs' claims, not the second.

I. A creditor may not serve a garnishment summons for funds in a joint bank account unless it first provides clear and convincing evidence of ownership of the funds.

The Multiparty Accounts Act ("MPAA") simply defines ownership of funds in joint accounts, but in doing so, it also acts as an obstacle to

creditors who seek to garnish funds held in a joint account. Indeed, that is the whole point of the MPAA.

In *Enright v. Lehmann*, discussing the MPAA, this Court stated that “funds in a joint account may not be garnished to satisfy a judgment against a party who did not contribute the funds.” 735 N.W.2d 326, 336 (Minn. 2007). In other words, no funds in a joint account may be garnished until the ownership of funds in that joint account is established. This Court conceded that the MPAA “provides some measure of protection for assets in a joint bank account from creditors of *either* party.” *Id.* at 332 (emphasis added). This is, in fact, the point of the MPAA. As this Court also pointed out in *Enright*, the benefit of the MPAA—a simple and inexpensive way to transfer money from a decedent to a surviving joint owner—would be lost if creditors of either party could easily reach funds in a joint account. *Id.*

The policy underlying the MPAA as articulated by this Court rests on sound principles of due process: a non-debtor must receive notice and an opportunity to be heard before a creditor may deprive him or her of property. Robert Savig got neither. Defendants simply took his funds. After he discovered his loss and asked for his money back, Defendants refused, causing Robert Savig to waste time and incur expenses to recover it.

a. This Court must interpret Minnesota law consistent with the U.S. Constitution, which prohibits taking a non-debtor's funds without notice and an opportunity to be heard.

The due process clauses of the United States and Minnesota constitutions require notice and an opportunity to be heard before a person may be deprived of property. U.S. Const. amend., XIV § 1; Minn. Const., art. I, § 7. Non-debtors with funds in a joint account are entitled to notice and an opportunity to be heard before a creditor may garnish or levy their funds. *See Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) (invalidating a Wisconsin prejudgment garnishment statute where wages were frozen without opportunity for debtor to be heard), and *Fuentes v. Shevin*, 407 U.S. 67 (1972) (invalidating Florida and Pennsylvania replevin provisions for permitting seizure of property prior to opportunity to be heard); *see also* 86 A.L.R. 5th 527 § 11. As the United State Supreme Court observed over half a century ago, the right to be heard “has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

When a bank freezes funds pursuant to a creditor's garnishment summons, those funds have been taken from the account holder. *See Sniadach*, 395 U.S. at 339. It does not matter that the funds may be

returned through an exemption proceeding. It is “well settled that a temporary, nonfinal deprivation of property is nonetheless a ‘deprivation’ in the terms of the Fourteenth Amendment.” *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972) (citing *Sniadach*, 395 U.S. 337, and *Bell v. Burson*, 402 U.S. 535 (1971)).

While due process can be flexible when a situation demands it, in *Sniadach*, the U.S. Supreme Court rejected the premise that garnishment proceedings might merit a postponement of the judicial inquiry. 395 U.S. at 339. The process of freezing funds, then allowing the debtor to assert an exemption or defend on the merits, may be sufficient in “extraordinary situations,” but service of a garnishment summons is not, by itself, an extraordinary situation. *Id.* at 339.

In *Fuentes*, the U.S. Supreme Court emphasized that if the right to notice and a hearing is to serve its purpose of preventing unfair and mistaken deprivations of property, “it must be granted at a time when the deprivation can still be prevented” 407 U.S. at 81. The Court noted that while a person’s property can be returned and damages awarded for the wrongful deprivation, a later hearing and a damage award does not undo the taking. *Id.* at 81-2. “This Court has not . . . embraced the general

proposition that a wrong may be done if it can be undone.” *Id.* at 81 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)).

In construing a Minnesota statute, this Court must presume that the legislature did not intend to violate the United States or Minnesota constitutions. Minn. Stat. § 645.17(3); see *Minn. 5th Dist. Indep. Republican Party v. State*, 295 N.W.2d 650, 656 (Minn. 1980) (citing *Miller Brewing Co. v. State*, 284 N.W.2d 353 (Minn. 1979), and *City of Duluth v. Sarette*, 283 N.W.2d 533 (Minn. 1979)).

The Savigs are not challenging the constitutionality of Minnesota law. Quite the opposite, the Savigs believe Minnesota law is constitutional. This Court’s decision in *Enright* was carefully tailored to avoid the due process problems posed by garnishment of joint accounts in a state with the MPAA. Therefore, “funds in a joint account may not be garnished to satisfy a judgment against a party who did not contribute the funds.” *Enright*, 735 N.W.2d at 336. This Court decided that, in order to garnish a non-debtor’s funds in a joint account, a creditor must prove by clear and convincing evidence that the depositor intended the funds to belong to the debtor. *Id.*

The rule urged by Defendants would not pass constitutional muster. Defendants urge this Court to allow them to elevate a judgment creditor’s rights above a non-debtor’s right to due process, and allow them to garnish

Robert Savig's funds with impunity. Even though they have no judgment against him, even though they have not given him any notice, and even though he has not had any opportunity to be heard before his funds were frozen. If Minnesota law allowed this, it would violate the due process guarantees of the United States and Minnesota constitutions. Under the doctrine of constitutional avoidance, this Court should interpret Minnesota law as consistent with the federal due process clause and find that the MPAA requires notice and an opportunity to be heard before a creditor may garnish or levy a non-debtor's funds in a joint bank account.

b. A creditor may serve a garnishment summons that does not reach funds in a joint bank account.

Minnesota law provides that when a judgment requires the payment of money it, may be enforced by execution. Minn. Stat. § 550.02. In aid of execution, a creditor may serve a garnishment summons to begin the process of attaching the debtor's property, including funds in a bank account. The service of a garnishment summons obligates the garnishee to "retain possession and control of the disposable earnings, indebtedness, money, and property *of the debtor*." Minn. Stat. § 571.73, Subd. 1 (emphasis added). Nothing gives the creditor the ability to garnish funds beyond those due and owing to the debtor. Once funds of the debtor have been attached,

any order of execution is similarly limited to the “property of the judgment debtor.” Minn. Stat. § 550.08; Minn. Stat. § 551.05, Subd. 1(a).

Defendants have miscast Plaintiffs claims in an attempt to create a conflict between Minnesota’s garnishment and levy statutes and the MPAA. Defendants are correct that nothing in the MPAA prohibits the issuance of a garnishment summons, but that is not the issue. The issue is whether a garnishment summons may be used to attach the funds of a non-debtor in a joint account. This Court already determined, in *Enright*, that the provisions of the garnishment and levy statutes do not permit a garnishment summons to be used to attach or levy a non-debtor’s funds.

735 N.W.2d at 336

The language of the MPAA is unambiguous. In a controversy between parties to a multi-party account and their creditors, funds in a joint account belong to the parties in proportion to their net contributions. *Id.* at 331. “Funds deposited by [the non-debtor] do not ‘belong’ to [the debtor].” *Id.* at 335. This Court noted that if it were to construe all funds in a joint account as “due” to any party to the account and therefore attachable by garnishment to satisfy a debt, the garnishment statute would negate the MPAA. *Id.* In order to avoid such a conflict, this Court specifically held that

funds in a joint account are not “attachable by garnishment to satisfy the debt of a party who did not contribute the funds.” *Id.* at 335-336.

Creditors who serve garnishment summons on joint accounts run the very real risk that they will attach funds of the non-debtor. And creditors who blindly send out garnishment summonses face more liability than just reaching a non-debtor’s funds in a joint account. If a creditor’s garnishment summonses end up freezing more than 110% of the debtor’s assets, for example, the creditor may be liable under the Fair Debt Collection Practices Act. *See Gallagher v. Gurstel, Staloch & Chargo, P.A.*, 08-cv-01189, Doc. 32 at 11-12 (D. Minn. July 29, 2009).

This case illustrates the problem of garnishing joint accounts without clear and convincing evidence of ownership of the funds. Where a creditor’s garnishment summons captures a non-debtor’s funds, the creditor has converted those funds.

II. As the party that initiated the garnishment proceeding, the judgment creditor bears the burden of establishing net contributions to a joint bank account.

In order to impose this burden on the non-debtor, this Court would have to decide that the non-debtor’s funds may be garnished. But since a non-debtor’s funds in a joint bank account are not subject to garnishment in the first place, the non-debtor joint account holder should not have the burden

of establishing net contributions. That burden is the creditor's, as this Court stated in *Enright*.

In *Phillips v. Messerli & Kramer, P.A.*, U.S. District Judge Donovan Frank pointed out that

Marshall Phillips [the non-debtor] is not a creditor of Alisha Phillips with an interest in her funds upon which he wishes to execute. Rather, Marshall Phillips alleges that he had an interest in his own funds, funds which Defendants would not have been authorized to take pursuant to the judgment against Alisha Phillips.

08-cv-04419, Doc. 43 at 9 (D. Minn. April 20, 2009). Judge Frank was directly addressing Defendants' argument that Minn. Stat. § 571.83 provides a way for a non-debtor to intervene in a garnishment proceeding when his funds are wrongfully frozen. But Minn. Stat. § 571.83 does not give non-debtor joint account holders notice or an opportunity to respond to the garnishment. Their funds should not be frozen in the first place. Additionally, if they are, and the amount seized is small, the non-debtor could be faced with the dilemma of incurring more in expenses than the amount frozen by the garnishment. The law could encourage the taking of a non-debtor's funds.

Further, Defendants' argument on this point is irrelevant. By the time of an exemption hearing, the funds will have been frozen, and the damage will have been done. The non-debtor will have been wrongfully deprived of his

funds. Non-debtor joint account holders must be given notice *before* a judgment creditor freezes their funds through garnishment or levy.

In order to avoid this problem, this Court placed the burden on the creditor to prove ownership of the funds in a joint account. *Enright*, 735 N.W.2d at 328, 331 & 336. U.S. District Judge Paul Magnuson agreed, finding that “the collectors bear the burden of establishing relative ownership of funds in a joint account.” *Ramirez v. Como Law Firm*, 08-cv-04249, Doc. 65 at 13 (D. Minn. June 30, 2009).

In a garnishment proceeding, the judgment creditor should bear the burden of establishing net contributions to a joint account the judgment creditor wishes to garnish. And the judgment creditor must do so *before* initiating garnishment of a joint bank account.

III. Because due process requires notice and opportunity to be heard before deprivation of property, it should be presumed that all parties to an account have an interest in the account.

Defendants ask this Court to presume that a debtor owns all the funds in a joint account. This Court rejected this argument in *Enright*, stating that “funds in a joint account are not, simply by virtue of the power of withdrawal provided in the account contract, attachable by garnishment to satisfy the debt of a party who did not contribute the funds.” 735 N.W.2d at 335-36. Just like the creditor in *Enright*, Defendants would prefer to be

able to garnish all the funds in a joint account without giving non-debtors notice and an opportunity to be heard beforehand.

Defendants argue that prior to the enactment of the MPAA, the common-law presumption was that the debtor owns all of the fund in a joint account. *Park Enterprises v. Trach*, 47 N.W.2d 194 (1951). While Defendant acknowledges that the MPAA abrogated *Park's* presumption that the debtor owned all the funds, Defendants argue that in *Enright*, the MPAA only abrogated the rule to the extent the presumption of ownership was conclusive. (Defs' Br. 28.) Defendants' position ignores this Court's clear statement: "[a]s the rule articulated in *Park Enterprises* is incompatible with Minn. Stat. § 524.6-203, we hold that *Park Enterprises* has been abrogated." *Enright*, 735 N.W.2d at 334.

While it appears that some other jurisdictions have adopted a presumption that debtor is presumed to own all the funds in a joint account until a judgment debtor makes an offer of proof, this Court noted that if it were to construe all funds in a joint account as "due" to any party to the account and therefore attachable by garnishment to satisfy a debt, the garnishment statute would negate the MPAA. *Id.* at 335.

Robert Savig's funds are his, whether or not they are initially presumed to be. When Defendants wrongfully garnished his funds, they deprived him

of those funds, which was conversion. It is just such a wrongful deprivation without notice or a hearing that the U.S. Supreme Court wished to abolish in *Sniadach* and *Fuentes*.

While it is unclear how under the circumstances, this Court could impose a presumption that a person's property is not theirs without violating due process, if this Court were to impose a presumption regarding a debtor's ownership of funds, the presumption should be ownership in equal shares. This would be in keeping with the presumption provided to banks exercising their right of setoff under the MPAA: "The amount of the account subject to setoff is that proportion to which the debtor is, or was immediately before death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal." Minn. Stat. § 524.6-212.

Conclusion

This Court should respond to the first part of Judge Erickson's question with a qualified "yes": a creditor may serve a garnishment summons on a joint account only if, consistent with *Enright*, the creditor first provides clear and convincing evidence of ownership of the funds in the joint account.

To the second part of Judge Erickson's question, this Court should respond that the judgment creditor bears the burden of establishing net contributions before attaching any funds in a joint account, since a non-debtor account holder has no obligation to establish his contributions to the account during a garnishment proceeding.

Finally, the debtor should never be presumed to own all the funds in a joint account without proof of ownership. Instead, if the creditor has given notice to non-debtor joint account holders, and if they have had an opportunity to be heard but have provided no proof of their contributions, it should be presumed that all parties to a joint account have an equal interest in the account.

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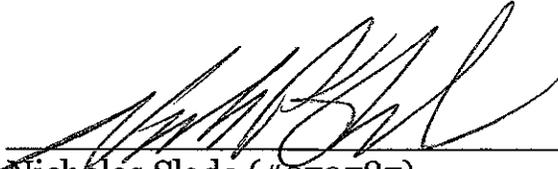
I certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3, for a brief produced with a proportional-width font. The length of this brief, from the statement of issues through the conclusion, is 3,895 words. This brief was prepared using Microsoft Word 2007 for Microsoft Windows and Microsoft Word 2008 for Mac.

Respectfully submitted,

Barry & Slade, LLC

Dated:

9/11/09



Nicholas Slade (#270787)
2021 East Hennepin Avenue, Suite 195
Minneapolis, MN 55413
(612) 379-8800

Sam Glover (#327852)
Samuel J. Glover & Associates, LLC
2021 East Hennepin Avenue
Suite 195
Minneapolis, MN 5413
(612) 424.3770

Attorneys for Plaintiffs