FAMILY LAW BULLETIN

Number 19 August 2004 Cheryl Howell, Editor

"FREEZING AND SEIZING" JOINT BANK ACCOUNTS TO COLLECT PAST-DUE CHILD SUPPORT: DUE PROCESS AND LEGAL RIGHTS OF NONLIABLE DEPOSITORS

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G.S. 110-139.2(b1) authorizes North Carolina's child support enforcement agency (the state "IV-D" agency) to collect past-due child support by attaching and garnishing ("freezing and seizing") bank accounts held by individuals who are delinquent in paying court-ordered child support ("delinquent obligors"). In some instances, the bank accounts garnished under G.S. 110-139.2(b1) are accounts delinquent obligors hold jointly with other individuals ("nonliable depositors") who have a legal right to all or part of the funds in the accounts and who are not liable for the child support debts owed by the delinquent obligors. If, for example, John owes $1,500 in past-due child support to his ex-wife, the state IV-D agency may attempt to collect the past-due support on behalf of John's ex-wife by freezing and seizing a joint savings account held by John and his new wife (or by John and John's elderly mother), even though all or part of the funds in the account belong to John's new wife (or John's elderly mother) rather than John.

This *Family Law Bulletin* discusses:

1. whether, and to what extent, funds in a joint bank account held in the names of a delinquent obligor a nonliable depositor are subject to levy, attachment, or garnishment to collect past-due child support owed by the delinquent obligor; and

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2. whether the U.S. and North Carolina Constitutions require that a nonliable depositor be given notice and an opportunity to be heard when the state IV-D agency garnishes a joint bank account held by a nonliable depositor and a delinquent obligor to collect past-due child support owed by the delinquent obligor.[1]

Federal and State Law Allowing Garnishment of Bank Accounts to Collect Past-Due Child Support

Federal Law (Title IV-D)

Section 466(a)(17) of Title IV-D the Social Security Act requires North Carolina, as a condition of receiving federal funding for child support enforcement and assistance for needy families, to establish a financial institution data match (FIDM) program that matches, on a quarterly basis, the names and social security numbers of delinquent child support obligors against the names and social security numbers of individuals who maintain accounts with banks and other financial institutions doing business in the state.[2]

When a bank matches the name or social security number of an individual on the list of delinquent obligors provided by a state IV-D agency with the name or social security number of an individual who maintains an account with the bank, the bank must provide the child support agency with the delinquent obligor's address and date of birth, and the account number, type of account, and account balance of any account maintained by the delinquent obligor.[3] If a matched account is held jointly by a delinquent obligor and another person, the bank must provide the other individual's name and social security number to the state IV-D agency and indicate whether she is the "primary" or "secondary" owner of the account.[4]

A second provision of the Social Security Act, 42 U.S.C. 666(c)(1)(G)(ii), requires North Carolina to adopt and implement procedures allowing the state IV-D agency to collect past-due child support by freezing and seizing, without a court order, any assets that a delinquent child support obligor holds in a financial institution.[5] State procedures for freezing and seizing the bank accounts of delinquent obligors, however, must include "due process safeguards, including (as appropriate) requirements for notice, opportunity to contest the action, and opportunity for an appeal on the record to an independent administrative or judicial tribunal."[6]

State Law (G.S. 110-139.2)

G.S. 110-139.2 implements the federal IV-D requirements regarding the FIDM program and garnishment procedures for bank accounts of delinquent child support obligors.[7]

G.S. 110-139.2(b1) authorizes the state IV-D agency to garnish an identified bank account maintained by an individual who (a) is delinquent in paying child support under a court order being enforced by the IV-D agency, and (b) owes past-due child support in an amount equal to at least $1,000 or six times the obligor's monthly child support obligation, whichever is less.

Although neither federal nor state law limits the types of bank accounts that may be garnished to collect past-due child support, North Carolina's child support agency does not garnish checking accounts, trust accounts, or accounts with balances of less than $225.

In order to garnish a bank account, the state IV-D agency must serve a notice of intent to levy on the obligor and the bank in which the obligor maintains an account.[8] This notice must include the names of the obligor and the financial institution, the number of the account being garnished, the certified amount of child support arrearages owed by the obligor, and information advising the obligor how he may contest or remove the lien.[9]

Upon receipt of the notice of intent to levy, the bank is required to attach a lien on, or "freeze," the identified account in the amount of the account balance or the amount of the certified child support arrearage, whichever is less.[10]

A delinquent obligor may contest the lien against his account by requesting, within ten days after being served with the notice of intent to levy, a hearing before the district court that entered the child support order that is being enforced.[11] The lien may be contested only on the grounds that:

1. the obligor is not the person subject to the child support order; or
2. the child support arrearage that the obligor owes does not exceed $1,000 or six times the obligor's monthly child support obligation, whichever is less.[12]

If the obligor fails to contest the lien within ten days of being served with the notice of intent to levy or if the district court finds that the obligor does not have any basis for contesting the lien, the state IV-D agency sends a notice of levy to the bank directing it to remit to the state IV-D agency the balance in the "frozen" account up to the amount of the child support lien.[13] Payments received from financial institutions by the state IV-D agency under

G.S. 110-139.2(b1) are applied to the delinquent obligor's child support arrearage.[14]

Garnishing Joint Bank Accounts to Collect Past-Due Child Support

G.S. 110-139.2(b1) does not expressly mention garnishing joint bank accounts maintained by delinquent obligors and other individuals. Neither federal nor state law, however, exempts a bank account from garnishment to collect past-due child support simply because it is held jointly by a delinquent obligor and another individual who is not liable for the obligor's child support debt. As a result, there have been several instances in which the state IV-D agency has garnished joint bank accounts maintained by delinquent obligors and other individuals who were, or might have been, nonliable depositors who not liable for the past-due child support owed by the delinquent obligors.15

When the state IV-D agency garnishes a bank account to collect past-due child support, it may know whether the account is a joint bank account held by a delinquent obligor and another individual. But even when the agency is aware that it is garnishing a joint bank account, it will rarely, if ever, know whether, or to what extent, the funds in the account belong to the delinquent obligor or to a nonliable depositor. The agency, however, apparently assumes that all of the funds in the account belong to the delinquent obligor.[16]

In any event, the state IV-D agency follows essentially the same procedures in garnishing joint bank accounts as those for garnishing bank accounts held solely by delinquent obligors:

- The notice to garnish a joint bank account directs the bank to freeze the entire account balance (up to the amount of the lien), regardless of whether the garnished funds may belong to a nonliable depositor.
- While the agency notifies the delinquent obligor that it is garnishing a joint account that is held in his name, it does not provide any separate notice to other individuals whose names appear on the account and who may have a legal right to all or part of the funds in the account.
- The notice sent to the delinquent obligor does not include any information regarding the legal rights of nonliable depositors or the procedures through which they may claim that garnished funds in a joint bank account belong to them rather than a delinquent obligor.
- Although G.S. 110-139.2(b1) allows a delinquent obligor to contest garnishment of his bank account by requesting a hearing before a district court judge, the statute does not establish a judicial procedure through which a nonliable depositor may contest garnishment of her funds in a joint bank account held with a delinquent obligor.[17]
- State policy, however, allows a local IV-D agency to terminate the garnishment if it determines that the garnished funds belong to someone other than the obligor or the obligor's spouse.[18] If the local IV-D agency determines that a garnished account is held by a delinquent obligor and his spouse and that the obligor's spouse has contributed funds to the account, state policy requires the local agency to release the lien with respect to half of the account balance, regardless of the amount of the spouse's contributions to the account.[19]
- State policy, however, does not specify the procedures that a child support agency should follow to determine whether garnished funds in a joint bank account belong to a nonliable depositor and does not provide for administrative or judicial review of an agency's decision not to release a child support lien on a joint bank account.

Substantive Legal Rights of Nonliable Depositors Under North Carolina Law

Does garnishing a joint bank account to collect past-due child support owed by a delinquent obligor violate the legal rights of an individual who holds the account with the delinquent obligor?

The answer is "yes" *if* the individual who holds a joint bank account with a delinquent obligor is a nonliable depositor and the garnished funds belong to her rather than the delinquent obligor.

State Law Governing Ownership and Garnishment of Joint Bank Accounts

Who owns the money in a joint bank account?[20] Can a creditor attach or garnish a joint bank account held by a debtor and another individual who is not liable for the debt?

These two questions are related because, as a general rule, a creditor may not attach or seize property to collect a debt unless the debtor has some legal right or interest in the property. Conversely, property owned by an individual other than a debtor is not subject to attachment or garnishment by the debtor's creditors.

Thus, funds in a joint bank account maintained by a delinquent child support obligor and another individual are not subject to garnishment to collect child support owed by the delinquent obligor *if* the funds belong to the other individual rather than the delinquent obligor.

So, who owns the funds in a joint bank account? Under North Carolina law, the answer to this question is that, although each person in whose name a joint bank account is held generally may withdraw funds from that account without the express authorization of the other account holder, the funds in a joint account belong to the account holders in proportion to their respective contributions to the account. For example, if Mr. A and Mr. B maintain a joint savings account and all of the funds in the account were deposited by Mr. A, Mr. A owns all of the funds in the account even though Mr. B may have the right to withdraw funds from the account. If Mr. B had deposited 30 percent of the funds in the account, Mr. A would own 70 percent of the balance and Mr. B would own 30 percent.

Can a creditor attach or garnish a joint bank account held by a debtor and another individual who is not liable for the debt? Under North Carolina law, the answer this question is that a creditor may garnish a joint bank account to collect a debt only to the extent that funds in the account belong to the debtor.

Common Law

North Carolina's rules regarding the ownership and garnishment of joint bank accounts are based primarily on the State's common law.

The North Carolina Supreme Court has consistently held that, in the absence of evidence to the contrary, the individual who deposits funds into a joint bank account is the owner of those funds.[21] When an individual deposits his own funds into a joint bank account that he maintains with another individual, the deposit does not constitute a gift of all or part of the deposited funds by the depositor to the other person.[22] Nor does the fact that the other individual may have the right to withdraw the deposited funds from the account affect the depositor's ownership of the funds during the parties' lifetimes.[23] If, however, it cannot be determined who deposited funds into a joint account, the account may be deemed to be owned by both (or all) of the joint account holders in equal shares during their lifetimes.[24]

G.S. 41-2.1

G.S. 41-2.1, enacted in 1959, is one of several North Carolina statutes governing joint accounts in financial institutions.

The provisions of G.S. 41-2.1 are not exclusive.[25] Joint bank accounts that are not established pursuant to G.S. 41-2.1 are governed by the common law or other applicable statutory provisions. Today, most joint bank accounts in North Carolina are established under and governed by other applicable statutes.[26] These statutes, however, have not completely supplanted North Carolina's common law governing joint bank accounts. And since G.S. 41-2.1 constitutes, in part, a codification of North Carolina's common law regarding joint bank accounts,[27] its provisions may provide some guidance with respect to the ownership and garnishment of joint bank accounts established pursuant to other statutes or the common law.

G.S. 41-2.1 does not expressly address the *inter vivos* ownership of funds held in a joint bank account.[28] Two decisions by the North Carolina Court of Appeals, however, have held that funds held in a joint bank account established pursuant to G.S. 41-2.1 belong to the individual who deposited the funds into the account..[29]

In *Myers v. Myers*, the state court of appeals held that:

> When one spouse deposits funds into a joint account with the other, the other is designated the depositor's agent, with authority to withdraw the funds. … A principal[, however,] may maintain an action in conversion to recover funds converted by his agent. … The depositing spouse, as principal, thus may bring an action in conversion against the withdrawing spouse to recover funds which that spouse has converted as agent.[30]

G.S. 41-2.1(b1), the court noted, "does provide that either party to an agreement establishing a joint bank account with right of survivorship may deposit to or withdraw from the account, and that 'any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.'"[31] The statute, however, serves "only to discharge the bank from liability to its depositors … [and does] not release one depositor to a joint account from liability to another for withdrawal which constitutes wrongful conversion."[32] The court, therefore, affirmed a judgment against a husband for unlawfully converting funds that his wife deposited into the couple's joint bank account.

Similarly, in *Hutchins v. Dowell*, the court of appeals upheld a judgment for conversion against a defendant who withdrew almost $50,000 from two joint bank accounts held in the names of herself and her stepfather without her stepfather's permission.[33] The court rejected the stepdaughter's claim that she could not be liable for conversion because G.S 41-2.1 expressly authorizes either holder of a joint account to

withdraw funds from the account.[34] Because all of the funds in the joint bank accounts had been deposited by the defendant's stepfather, the court ruled that the entire account belonged to him and that his stepdaughter did not obtain any legal right to the funds.

G.S. 41-2.1 does expressly address the garnishment of bank accounts. It specifically provides that during the lifetimes of joint account holders, the balance in a joint account is "subject to [account holders'] respective debts to the extent that each has contributed to the unwithdrawn account." If the account holders' respective contributions to the account cannot be determined, G.S. 41-2.1 provides the balance in the joint account is "deemed owned by both or all equally."[35]

Jimenez v. Brown

Only one reported appellate case in North Carolina has addressed a creditor's right to garnish a joint account to satisfy a debt owed by one of the account holders.

In *Jimenez v. Brown*, the North Carolina Court of Appeals held that a joint bank account maintained in the names of a judgment debtor and his minor son was attachable by his judgment creditors.[36] Following the general rule in other jurisdictions that "joint bank accounts are vulnerable to seizure by the creditor of one depositor … [to the extent of] the amount of funds in the account equitably owned by the debtor depositor and do not extend to funds equitably owned by the innocent depositor," the court held that "equitable ownership should be the determining factor" and "that joint accounts are attachable to the extent of a debtor's contribution to the account."[37] "To hold otherwise," the court concluded, "would allow seizure of money belonging to an innocent third party."[38]

North Carolina law, therefore, allows a creditor to attach or garnish a joint bank account to the extent of a debtor's proportionate contributions to the account. North Carolina law, however, does not allow a creditor to collect a debt by garnishing funds that belong to a nonliable depositor. The fact that the debtor may have the ability to withdraw all of the funds from the account is not determinative of the debtor's ownership of the account or the extent of a creditor's right to garnish funds in the account.

And just as an individual may be held liable for conversion if she withdraws funds from a joint bank account without the permission of the individual who deposited the funds into the account, a creditor of an individual may be liable for conversion if the creditor garnishes a joint bank account held by the debtor and the funds in the account belong to a nonliable depositor rather than the debtor.

Remedies for Unlawful Garnishment

Does this mean that the State, the state IV-D agency, state IV-D officials or employees, or a bank may be held liable if they erroneously, inappropriately, or unlawfully garnish funds that belong to a nonliable depositor?

Statutory Immunity of Financial Institutions

With respect to the bank, the short answer is "no." A bank that freezes and seizes funds in a joint account pursuant to G.S. 110-139.2(b1) is not liable to a nonliable depositor as long as the bank acts in good faith in complying with the notice of lien and levy.[39]

Liability of the State and State Officials for Unlawful Conversion of Personal Property

It is clear that a nonliable depositor could sue a delinquent child support obligor for conversion if the delinquent obligor withdrew the nonliable depositor's funds from a joint account without permission and used the withdrawn funds to satisfy the obligor's child support debt.[40] Similarly, a nonliable depositor may have a cause of action for conversion against a creditor who garnishes a joint bank account to satisfy a debt owed by a debtor who holds the account with the nonliable depositor.

If so, a nonliable depositor may have a cause of action for conversion against the state IV-D officials or employees who are responsible for freezing or seizing her funds under G.S. 110-139.2(b1).[41] A nonliable depositor, however, may not bring a conversion action against the State or the state IV-D agency under the State Tort Claims Act.[42]

Liability of the State for Violating the Substantive Due Process Rights of Nonliable Depositors

A nonliable depositor also might argue that the State's seizure of her property to satisfy a debt owed by someone else violates her constitutional right to substantive due process.[43]

A nonliable depositor who claims that the State's garnishment of her funds violates her right to substantive due process under the North Carolina Constitution could bring a *Corum* lawsuit in state court against the State or state IV-D agency for any damages she suffers as a result of the unlawful garnishment of her funds.[44] A state official, however, may not be sued for damages in his or her individual capacity for violating an individual's rights under the North Carolina Constitution.[45]

A nonliable depositor who claims that the State's garnishment of her funds violates her right to substantive due process under the U.S. Constitution may file a lawsuit under 42 U.S.C. §1983 asking a court to hold a state official or employee personally liable for damages if the state official or employee knowingly violated her federal constitutional rights.[46] A nonliable depositor, however, may not sue the State, a state agency, or a state official in his or her official capacity under 42 U.S.C. §1983 for monetary damages for violating the nonliable depositor's federal constitutional rights.[47]

Procedural Due Process Rights of Nonliable Depositors

If the state IV-D agency garnishes a joint bank account held by a delinquent obligor and an individual who is, or may be, a nonliable depositor to collect past-due child support owed by the delinquent obligor, what rights, if any, does the nonliable depositor have to procedural due process when the State freezes or seizes her funds?

Procedural Due Process Rights Under the Federal and State Constitutions

The fourteenth amendment to the United States Constitution prohibits the State of North Carolina from "depriv[ing] any person of life, liberty, or property without due process of law."[48]

In order to prevail on a procedural due process claim, an individual must prove that

1. the State has deprived her of a constitutionally-protect interest in property (or liberty)
2. without due process of law (that is, without providing her with adequate notice and a fair opportunity to be heard).[49]

Property Interests Protected by Due Process

The "purpose of [procedural due process] is not only to ensure abstract fair play to an individual … [but] to protect his use and possession of property from arbitrary encroachment—to minimize substantive unfairness or mistaken deprivation of property."[50]

> So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free from government interference.[51]

The constitutional requirements of procedural due process "apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[52] The property interests protected by the due process clause, however, are not created by the due process clause itself. Instead, they are "created by existing rules and understandings that stem from independent sources, such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[53]

Although the property interests protected by the constitution's due process clause "may take many forms," it is clear that, at a minimum, procedural due process protects an individual's "actual ownership of real estate, chattels, or money" pursuant to a "legitimate claim of entitlement" arising under state law.[54]

The question, therefore, is whether, and to what extent, a nonliable depositor has a legitimate claim of ownership under state law with respect to funds in a joint bank account held in the names of the nonliable depositor and a delinquent child support obligor.

As discussed above, North Carolina law provides that funds held in a joint bank account are the property of the person who contributed the funds to the account. If both account holders have deposited funds into a joint account, the account balance is owned by both in proportion to their deposits. If the account holders' respective contributions cannot be determined, they are deemed to own the account equally.

A nonliable depositor therefore owns the funds in a joint bank account to the extent that the nonliable depositor has contributed funds to the account. And to that extent, the nonliable depositor has a "property" interest in the account that is protected from deprivation by state action without due process of law.

Property Deprivations That Trigger Due Process

What constitutes the "deprivation" of property under the Constitution's due process clause?

According to the U.S. Supreme Court, even a temporary, non-final deprivation of property may trigger constitutional due process requirements.[55] Indeed, the court has recognized on several occasions that the

> temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protections. Without a doubt, state procedures for creating and enforcing attachments, as with liens, are "subject to the strictures of due process."[56]

It seems clear, therefore, that the garnishment, or "freezing and seizing," of a nonliable depositor's funds in a joint bank account pursuant to G.S. 110-139.2(b1) constitutes a deprivation of the nonliable depositor's property for purposes of procedural due process.

The State Action Requirement

The Constitution's due process clause is directed only "against state laws and acts done under state authority."[57] Depriving an individual of liberty or property without due process of law does not violate the individual's constitutional rights unless the deprivation is the result of "state action" rather than private conduct. This means that

> … the conduct allegedly causing the deprivation of a [constitutional] right [must] be fairly attributable to the State.[58]

To determine whether action depriving an individual of property is "fairly attributable to the State," the Supreme Court employs a two-part test.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. … Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[59]

Applying this test, dozens of federal and state courts have found that a State's involvement in garnishment proceedings on behalf of private creditors and in state-initiated garnishment and set-off proceedings to collect debts owed to a State is sufficient to trigger the constitution's protections related to procedural due process.[60]

Does the garnishment of joint bank accounts to collect past-due child support constitute "state action" for purposes of the due process clause?

The answer is clearly "yes." First, the procedures for garnishing a bank account to collect child support are created and governed by state law (G.S. 110-139.2(b1)). Second, although the garnishment may be initiated by the state IV-D agency on behalf of a private person (the individual to whom child support is owed) and implemented in part by a private entity (the bank), a bank account may be garnished only at the direction of the state IV-D agency.

What Procedural Protections Does Due Process Require?

Because the garnishment of a nonliable depositor's interest in a joint bank account under G.S. 110-139.2(b1) constitutes state action that deprives the nonliable depositor of her property, a nonliable depositor is constitutionally entitled to "due process of the law."

The question, then, is: "What process is due?" And the answer is: "It depends."

> "Due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.[61]

Instead, "due process is flexible and calls for such particular protections as the particular situation demands."[62] Due process mandates those procedures that are deemed necessary to safeguard the constitutionally-protected liberty or property interest against mistaken, unfair, arbitrary, or wrongful deprivation.

Notice and Hearing

Although the contours of due process are not rigidly defined, procedural due process generally requires that an individual be given some sort of "notice and an opportunity to respond" when the government deprives her of a constitutionally-protected interest in life, liberty, or property.[63]

Due process requirements regarding notice and the opportunity to be heard are related. An individual's right to be heard with respect to the potential loss of her life, liberty, or property "has little reality or worth unless one is informed [of the government's action] and can choose for [her]self whether to appear or default, acquiesce or contest."[64]

> [Individuals] whose rights are to be affected [by government action] are entitled to be heard; and in order that they may enjoy that right they must first be notified.[65]

Procedural due process, therefore, generally requires that notice be given in a manner that is "reasonably calculated under all the circumstances" to inform an individual of the government's action and of her right to be heard in connection therewith.[66] Thus, due process generally requires that notice be provided to an individual in person, by mail, or through other means that are reasonably likely to ensure that she receives actual notice.

As a general rule, due process also requires that the notice provided to an individual whose liberty or property may be infringed by governmental action adequately apprise her of the nature of and basis for the government's action, afford her a reasonable time to present her objections thereto, and inform her of the procedures through which she may contest the government's action.[67]

Notice of governmental action depriving an individual of life, liberty, or property, however, is meaningless unless the individual has a right to contest the government's action. Due process, therefore, implies not only the right to receive notice but also the

opportunity to "*some form* of hearing … before an individual is … deprived of a property interest."[68]

Providing the opportunity for a fair hearing to contest governmental action protects individuals from arbitrary, unlawful, or mistaken deprivations of life, liberty, or property.

> For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.[69]

The hearing required by due process, however, does not always "need [to] take the form of a judicial or quasi-judicial trial."[70] In most instances, due process is satisfied if "'something less' than a full evidentiary hearing is [provided] prior to adverse administrative action" and an individual is given the opportunity for a more formal hearing thereafter.[71]

At a minimum, however, due process generally requires that an individual be given an opportunity to contest the government's action by presenting, in person or in writing, evidence and arguments on her behalf and that her case be heard by a fair and impartial decision maker who renders a decision based on the evidence and applicable law.[72]

Due process also requires that notice and an opportunity to be heard be provided "at a meaningful time and in a meaningful manner."[73] As a general rule, this means that an individual must be given notice and the opportunity for some sort of hearing *before* the government deprives her of her liberty or property.[74]

> If the right to notice and a hearing is to serve its full purpose, … it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded him for wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not … embraced the general proposition that a wrong may be done if it can be undone."[75]

The Supreme Court, however, has held that, in some instances, the government's seizure of property without prior notice and opportunity for hearing does not violate procedural due process.[76] In these instances, notice and opportunity for hearing may be "postponed" if "a full and immediate [post-deprivation] hearing is provided."[77] These cases, though, generally have involved situations in which (a) the seizure of property was necessary to secure an important government interest, (b) there was a special need for prompt action, *and* (c) a government official was responsible for determining that the particular seizure was necessary and justified.[78]

Due Process Rights of Nonliable Depositors Under G.S. 110-139.2(b1)

As noted above, when the state IV-D agency garnishes a joint bank account held by a delinquent obligor and another individual who is, or may be, a nonliable depositor, the State

- freezes the entire account balance (up to the amount of the lien) regardless of whether the garnished funds may belong to the delinquent obligor or a nonliable depositor;
- does not provide any notice to an individual (other than the delinquent obligor) whose name appears on the account and who may have a legal right to all or part of the funds in the account;
- does not notify the delinquent obligor or other account holders that a nonliable depositor may have a legal right to all or part of the garnished funds;
- does not notify the delinquent obligor or an individual who is, or may be, a nonliable depositor of the procedures through which a nonliable depositor may claim that garnished funds in a joint bank account belong to her rather than the delinquent obligor;
- does not provide a special judicial procedure through which a nonliable depositor may contest garnishment of her funds in a joint bank account held with a delinquent obligor;[79]
- allows a local IV-D agency to terminate the garnishment if it determines that the garnished funds belong to a nonliable depositor, but does not specify the procedures that the agency must follow to determine whether garnished funds in a joint bank account belong to a nonliable depositor and does not provide for administrative or judicial review of an agency's decision not to release a child support lien on a joint bank account;
- prohibits a local IV-D agency from releasing the lien with respect to more than half of the account balance if a nonliable depositor is the spouse of a delinquent obligor, regardless of the amount of the nonliable depositor's contributions to the account.

The question is whether these procedures provide nonliable depositors with adequate notice and an opportunity to be heard when the State freezes and seizes joint bank accounts to collect child support owed by a delinquent obligor.

Matthews v. Eldridge

Although due process requires "some sort" of notice and hearing, the Constitution does not specify the exact nature of the notice and opportunity for hearing that must be afforded. Instead, procedural due process requires that "notice and opportunity to be heard [be] appropriate to the nature of the case."[80]

In determining what sort of notice and hearing is required in connection with the government's deprivation of an individual's liberty or property, the Supreme Court has considered, and attempted to balance, three factors:

1. the private interest that will be affected by the government's action;
2. the government's interest, including the function involved and the fiscal and administrative burdens that any additional or substitute procedural requirement would entail; and
3. the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.[81]

The question, then, is whether, considering the factors set forth in *Matthews v. Eldridge*, the procedures through which a nonliable depositor may contest the state IV-D agency's garnishment of a joint bank account under G.S. 110-139.2(b1) meet the Constitution's requirements for procedural due process.

The Private Interest of Nonliable Depositors

A nonliable depositor whose account is garnished under G.S. 110-139.2(b1) has an undeniable interest in the continued possession, use, and ownership in the funds she has contributed to a joint bank account.[82]

Current state law and policy, however, do not include any procedural safeguards that would enable a nonliable depositor to prevent the State from freezing her share of a joint bank account. At a minimum, therefore, garnishing a nonliable depositor's share of a joint bank account adversely affects her interest by temporarily depriving her of access to her funds in the garnished account.[83]

As noted above, even a temporary deprivation of property may be sufficient to trigger due process requirements. The "length and consequent severity" of the deprivation, however, are relevant in determining how much due process is required.[84]

Under current state policy, checking accounts are excluded from the State's freeze and seize procedures under G.S. 110-139.2(b1). As a result, liens for past-due child support are asserted primarily with respect to savings and money market accounts and certificates of deposit. Because most people rarely use these types of accounts to pay day-to-day living expenses, the consequences of garnishing funds in a savings account will, more often than not, be less severe than those involved in garnishing an individual's wages or terminating an individual's public assistance benefits.[85]

But even if nonliable depositors are only minimally impacted by temporarily freezing their funds a joint savings account, they nonetheless have an interest in

1. obtaining a prompt and fair determination with respect to whether their funds may be frozen and seized; and
2. ensuring that their funds are not unlawfully seized and used to pay a child support debt for which they are not legally liable.

The interest of a nonliable depositor with respect to the freeze and seize provisions of G.S. 110-139.2(b1), therefore, is qualitatively different from that of a delinquent obligor.[86] The delinquent obligor is a post-judgment debtor who has already had his day in court. His liability has been adjudicated and he has been notified that his property may be subject to legal process to collect past-due support he owes. By contrast, a nonliable depositor, by definition, is not liable for the obligor's debt and has not had her day in court.

A nonliable depositor's interest in a joint bank account, therefore, is at least as substantial as that of a pre-judgment debtor whose property is attached or garnished through judicial process or a "nonobligated spouse" whose share of a joint federal income tax refund is withheld to satisfy a child support debt owed by her spouse.[87]

Adequate notice and procedures providing an opportunity for a fair and prompt post-garnishment hearing for nonliable depositors who claim that their funds have been unlawfully garnished, for example, might be sufficient to satisfy procedural due process requirements by minimizing the length and consequent severity of erroneous garnishments. But it is not at all clear that the State's current procedures sufficiently minimize the length and consequent severity of erroneous garnishments.

As noted above, state law and policy do not require that nonliable depositors (or individuals who may be nonliable depositors) be notified that the bank accounts they maintain with delinquent obligors will be, or have been, garnished. Nor do they inform nonliable depositors of the procedures through which they may claim that all or part of the garnished funds belong to them rather than a delinquent obligor. And while state policy allows a local IV-D agency to release a child support lien if it

determines that the garnished funds belong to a nonliable depositor, the State's procedures may not be sufficient to ensure the fair and *prompt* resolution of a nonliable depositor's claim.

The Government's Interest

The State has several significant interests with respect to garnishing bank accounts under G.S. 110-139.2(b1).

First, the State has a substantial interest in ensuring that custodial parents receive the court-ordered support that they need in order to provide adequate shelter, food, clothing, and care for the children in their care.

> [N]onpayment of child support … is a widespread problem which has significant deleterious effects on children, particularly those in low-income families.[88]

In 2001, fewer than 60 percent of custodial parents had court orders requiring an absent parent to pay child support and fewer than half of the custodial parents who were owed court-ordered child support received the full amount of support due.[89]

Federal and state lawmakers have recognized the government's interest in establishing and enforcing child support orders by establishing and funding state child support enforcement programs to "secure child support from absent, deserting, abandoning and nonsupporting parents."[90]

> There can be no doubt that the failure of parents to support their children is recognized by our society as a serious offense against morals and welfare. It "is in violation of important social duties [and is] subversive of good order. … It is the very kind of problem that the legislature can address.[91]

The government's interest in collecting child support on behalf of custodial parents and minor children is furthered by the adoption and implementation of effective child support enforcement remedies, including procedures allowing the garnishment of bank accounts to collect past-due child support owed by delinquent obligors.

The State also has a direct financial interest in the establishment and enforcement of child support orders. Children who do not receive child support from absent parents "often must look to the public fisc … for financial sustenance."[92] Effective child support enforcement programs allow states to avoid increased costs for public assistance for dependent children. The State also has a direct pecuniary interest in the collection of past-due child support owed for children who have received public assistance.[93] Garnishing bank accounts to collect past-due child support enables the State to collect assigned child support arrearages that otherwise might be uncollectible and to use these funds to recoup its costs for providing public assistance to needy families with dependent children.[94]

The government's interest in collecting past-due child support, however, involves more than the mere collection of past-due child support. State child support enforcement agencies and the custodial parents they serve are also interested in the *timely*, *effective*, and *efficient* collection of court-ordered child support. This interest is clearly furthered by an expeditious administrative procedure allowing the garnishment of bank accounts of delinquent obligors and, conversely, would be frustrated by procedures that significantly delay the collection of past-due child support from delinquent obligors or allow delinquent obligors to avoid paying the child support they owe.

Finally, the State has an interest in avoiding or minimizing the fiscal and administrative burdens that might be incurred in providing additional due process protections to nonliable depositors.[95] These burdens might include the cost of identifying nonliable depositors, providing notice to nonliable depositors, and providing them with an opportunity for a fair hearing.

> [T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the [government's] action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.[96]

"Financial cost alone," however, "is not a controlling weight in determining whether due process requires a particular procedural safeguard."[97]

The State's interest in garnishing bank accounts to collect past-due child support, therefore, is "undeniably significant."[98] But the government's goals with respect to effective child support enforcement, while clearly valid, desirable, and significant, "cannot, in and of [themselves], comprise the be-all and end-all" in determining the requirements of due process.[99]

Risk of Erroneous Deprivation vs. Value of Additional Protection

The third factor that must be considered in determining what due process must be provided to a nonliable depositor whose funds are garnished under G.S. 110-139.2(b1) is the risk of erroneous deprivation of the nonliable depositor's property resulting from the procedures employed by the state IV-D agency and the probable value, if any, of additional or substitute procedural safeguards.

To assess adequately the risk of erroneous deprivation of funds belonging to nonliable depositors, however, one would need to know:

1. what percentage of the bank accounts garnished under G.S. 110-139.2(b1) are joint bank accounts;
2. the number of incidents in which garnished funds in joint bank accounts belong to a nonliable depositor rather than the delinquent obligor;
3. the number of incidents in which a nonliable depositor whose funds were improperly garnished under G.S. 110-139.2(b1) has been able, under current state law and policy, to promptly recover her property; and
4. the number of incidents in which a nonliable depositor whose funds were improperly garnished under G.S. 110-139.2(b1) has been unable, under current state law and policy, to promptly recover her property.

Without this information, any assessment of the actual extent to which nonliable depositors are erroneously deprived of their property under G.S. 110-139.2(b1) must be tentative and speculative.

Current state law and policy, however, contain no procedures designed to prevent a nonliable depositor's funds from being erroneously garnished under G.S. 110-139.2(b1).

The quarterly report received by the state IV-D agency from financial institutions under the financial institution data match (FIDM) program includes the name and social security number (but not the address or phone number) of an individual who holds a bank account jointly with a delinquent obligor, indicates whether the delinquent obligor is the "primary owner" or "secondary owner" of a joint account, and includes the account number and current balance of a joint bank account held in the names of the delinquent owner and another person. But it does not, and cannot, indicate whether an individual who holds a bank account jointly with the delinquent obligor is a nonliable depositor, how much of the account balance belongs to a nonliable depositor, or how much of the account balance belongs to the delinquent obligor.

An individual's status as a nonliable depositor, therefore, cannot be determined before a joint bank account is garnished under G.S. 110-139.2(b1) solely on the basis of the FIDM report received by the state IV-D agency.

Current state law and policy, however, permit the state IV-D agency to freeze all of the funds in a joint bank account (up to the amount of the child support arrearage) without first determining whether any or all of the funds in the joint account belong to a nonliable depositor. Indeed, state IV-D policy states that garnishment of a joint bank account is appropriate if the delinquent obligor's name is on the account and that the agency may assume that the funds in a matched bank account belong to the delinquent obligor regardless of whether the account is held jointly with other individuals.[100]

There is, thus, at least some possibility that some or all of the funds in a joint bank account that is frozen under G.S. 110-139.2(b1) will belong to a nonliable depositor rather than to the delinquent obligor who is subject to garnishment. Indeed, in the absence of evidence regarding ownership of the funds in a joint bank account, there is at least a presumption that an individual who holds the account with a delinquent obligor may be erroneously deprived of his or her property whenever the bank freezes more than half of the account balance pursuant to a notice of lien under G.S. 110-139.2(b1).[101] Moreover, there is anecdotal evidence that, in at least a handful of cases, funds belonging to nonliable depositors have been improperly frozen under G.S. 110-139.2(b1).[102]

Furthermore, current state policy may result in the erroneous deprivation of funds that belong to nonliable depositors who are the spouses of delinquent obligors. When a joint bank account is held by a delinquent obligor and his spouse, state policy provides that a lien for child support arrearages may be released with respect to *half* of the account balance if the obligor's spouse contributed to the account. State policy, however, does not allow the lien to be released with respect to more than half of the account balance if the obligor's spouse contributed *more than half* of the balance.[103] In these cases, the State's IV-D policy is inconsistent with state law regarding ownership of joint bank accounts and results in the erroneous and unlawful deprivation of funds that belong to the spouses of delinquent obligors.[104]

Would additional procedural safeguards significantly reduce the risk that a nonliable depositor's funds will be erroneously garnished under G.S. 110-139.2(b1)?

Although the state IV-D agency generally knows whether a matched bank account is held jointly by a delinquent obligor and another individual, it would be difficult, if not impossible, for the agency to determine, *before* garnishing funds in a joint bank account, whether any of the funds belong to a nonliable depositor.

The State, however, could minimize the risk of erroneously garnishing the funds of a nonliable depositor by limiting the garnishment to no more than half of the account balance (based on the presumption

that, in the absence of contrary evidence, the balance is owned equally by the delinquent obligor and a second account holder).

The risk of erroneous seizure of funds belonging to nonliable depositors also might be reduced by requiring the state IV-D agency (or the bank) to notify individuals who may be nonliable depositors that (1) a matched joint account is being garnished to collect past-due child support owed by the delinquent obligor and (2) they have the right to request a hearing before an impartial decisionmaker if they claim that their funds are being improperly garnished.

And finally, the risk of erroneous deprivation of funds belonging to nonliable depositors could be reduced by ensuring that state policy and practice with respect to the garnishment of joint bank accounts under G.S. 110-139.2(b1) is consistent with state law governing the ownership of joint bank accounts.

The question, under *Matthews*, is whether any of these additional safeguards will, in fact, reduce the risk that a nonliable depositor will be erroneously deprived of her property and whether the fiscal and administrative costs of these additional protections, along with other governmental interests, outweigh the private interests of nonliable depositors. The court decisions discussed in the following sections may provide some guidance in answering this question.

Laubinger v. Department of Revenue

To date, only one reported appellate court decision has addressed the procedural due process rights of nonliable depositors in connection with the garnishment of joint bank accounts to collect past-due child support owed by a delinquent obligor.[105]

In *Laubinger v. Department of Revenue*, Mr. and Mrs. Laubinger sued an official with Massachusetts' state child support enforcement agency for violating their constitutional rights in connection with the agency's garnishing their joint bank account to collect past-due child support Mr. Laubinger owed to his ex-wife. Before garnishing the couple's account, the state IV-D agency sent a notice to Mr. Laubinger informing him that the account was being garnished to collect the past-due child support he owed and that he could request administrative review of the agency's action. The agency, however, did not send Mrs. Laubinger any separate notice of its action or advise her that she could assert a claim that all or the part of account balance belonged to her and was not subject to garnishment.

On appeal, the state IV-D agency conceded that (1) as a joint depositor, Mrs. Laubinger was entitled to challenge the State's garnishment of the couple's joint bank account, and (2) *a nonliable depositor has a right to procedural due process when a state IV-D agency garnishes a joint bank account to collect past-due child support owed by a delinquent obligor*.[106] The agency, however, contested Mrs. Laubinger's constitutional right to be given notice and an opportunity for hearing *before* the agency garnished the couple's joint bank account.

The Massachusetts Appeals Court declined to decide "what notice or hearing is constitutionally required" when a state IV-D agency garnishes a joint bank account that includes funds belonging to a nonliable depositor.[107] Noting the paucity of legal "authority on the issue of what notice and other procedural safeguards must be given a joint depositor or other joint owner of personal property to satisfy due process," the court held that Mrs. Laubinger's claim for monetary damages was properly dismissed because the constitutional right she asserted had not yet been "clearly established" and that, in the absence of a "clearly established" constitutional right, the state IV-D official who garnished the couple's account could not be held personally liable for monetary damages.[108]

The *Laubinger* court, however, went out of its way to "point out that serious constitutional issues are involved when a levy is imposed and joint property is seized without adequate notice."[109] The state IV-D agency, the court said, "would be well advised to consider putting in place a policy … requiring that written preseizure notice be given to nonobligor parties to joint accounts [since c]onsiderations of fairness suggest taking into account the obvious point … that there is even more reason to give notice to the nonobligor joint depositor than to the [delinquent] obligor."[110]

The *Laubinger* court, therefore, recognized that a nonliable depositor is entitled to procedural due process when a state IV-D agency garnishes a joint bank account to collect past-due child support, even though it declined to decide the exact nature and extent of due process that must be provided.

Jahn v. Regan

Although not directly on point, court decisions regarding the garnishment of joint federal income tax refunds to collect past-due child support provide additional support for the argument that a nonliable depositor is entitled to notice and the opportunity for a hearing when a state IV-D agency garnishes a joint bank account she holds with a delinquent child support obligor.

In *Jahn v. Regan*, Michigan's child support enforcement agency, with the assistance of the federal Internal Revenue Service (IRS) and under the authority of federal law, garnished Mr. and Mrs. Jahn's federal

income tax refund to collect past-due child support owed by Mr. Jahn.[111] The Jahns filed a claiming that the State's seizure of their federal income tax refund constituted an unconstitutional deprivation of private property without due process of law.

The *Jahn* court first noted that, under federal law, "husbands and wives who file joint [income tax] returns have separate interests in any refund based on the extent to which their respective income contributes to the refund."[112] Because Mrs. Jahn's wages constituted approximately one-third of the couple's gross income, the court concluded that Mrs. Jahn had a separate legal claim with respect to a proportionate share of the couple's income tax refund.

The court then recognized that "in assessing the due process rights of [Mr. and Mrs. Jahn], their [respective] position[s] in regard to a judicial determination that [Mr. Jahn] must pay child support is crucial."[113] Although Mr. Jahn's liability for the child support arrearage was not disputed, it was clear that Mrs. Jahn was not liable with respect to her husband's child support debt.

> The portion of the joint refund attributable to [Mrs. Jahn] was seized by the government not because of any debt or obligation on her part, but simply because she filed her tax form jointly with her husband.[114]

The *Jahn* court therefore concluded that Mr. and Mrs. Jahn "do not stand in the same position as far as procedural due process is concerned."[115] Thus, while the court dismissed Mr. Jahn's claims, it held that "due process [clearly] affords greater protection to [Mrs. Jahn] than [to] her husband."[116]

Mrs. Jahn, however, "actually received fewer procedural safeguards" than her husband.[117] The notice that the IRS sent to Mr. Jahn in 1982 did not inform Mrs. Jahn that she could claim part of the couple's tax refund free and clear of child support debt owed by her husband.[118]

The court therefore held that the State violated Mrs. Jahn's right to procedural due process by depriving her "of any knowledge that her property rights had been infringed until long after [her property] had been seized and transferred to the State."[119]

The *Jahn* court, however, subsequently determined that revised procedures adopted by Michigan's IV-D agency adequately protected the procedural due process rights of Mrs. Jahn and other nonliable spouses.[120] Under these procedures, the state IV-D agency was required to send a notice to delinquent child support obligors *before* garnishing their federal income tax refunds. This pre-garnishment notice advised delinquent obligors (and, indirectly, their nonliable spouses) that if they and their nonliable spouses filed a joint income tax return and their nonliable spouses had received taxable income, their nonliable spouses could object to having their share of a joint tax refund garnished to satisfy the obligor's child support debts.[121] The procedures also required the IRS to send a post-garnishment notice to delinquent obligors and their nonliable spouses informing them of a nonliable spouse's right to file an amended tax return (IRS Form 1040X) claiming her share of a joint tax return free and clear from the State's child support lien on a delinquent obligor's share of a joint tax refund.

The analogy between Mrs. Jahn and a nonliable depositor whose bank account is garnished under G.S. 110-139.2(b1) is clear:

1. Mrs. Jahn was not personally liable for her husband's child support debt. A nonliable depositor is not personally liable for a child support debt owed by the delinquent obligor who holds a joint bank account with the nonliable depositor.
2. Mrs. Jahn had a legally-recognized right to at least a portion of the couple's federal income tax refund based on her contribution to the couple's taxable income. A nonliable depositor has a legally-recognized right to all or part of the balance in a joint bank account held with a delinquent child support obligor based on the nonliable depositor's contribution to the account.
3. Mrs. Jahn's legal interest in the couple's income tax refund was separate and distinct from her husband's interest in the refund. A nonliable depositor's legal interest in a joint bank account is separate and distinct from the interest of a delinquent child support obligor whose name is on the account.
4. Due process required the state's IV-D agency to give Mrs. Jahn notice that it was seizing the couple's income tax refund to satisfy a child support debt owed by her husband and to give Mrs. Jahn an opportunity to establish her claim that all or part of the couple's tax refund belonged to her rather than her husband. When a state IV-D agency garnishes a joint bank account to collect past-due child support owed by a delinquent obligor who holds the account with another person, due process requires the agency to give the person who holds the account with the delinquent obligor notice that it is garnishing the account and give that person a fair opportunity to establish a claim that she is a nonliable depositor and that all or part of the funds in the account belong to her rather than to the delinquent obligor.

United States v. National Bank of Commerce and Douglas v. United States

Courts also have recognized that a nonliable depositor is entitled to due process when the government garnishes a joint bank account held by the nonliable depositor and a delinquent taxpayer to collect unpaid taxes owed by the delinquent taxpayer. Like *Jahn v. Regan*, these cases may provide some guidance in determining the due process rights of nonliable depositors whose bank accounts are garnished under G.S. 110-139.2(b1).

In *United States v. National Bank of Commerce*, the IRS filed a notice of levy against two bank accounts held jointly by Roy Reeves, who owed delinquent income taxes, and two other individuals, who were nonliable depositors.[122]

The IRS conceded that its tax levy attached only to that portion of the joint accounts owned by the delinquent taxpayer and that "co-depositors of the joint account are entitled to make known their respective ownership interests in the joint account in order to insure that only that portion of the account belonging to the taxpayer is seized by way of levy."[123] The IRS, however, contended that it was not required to notify the co-depositors of the levy or to name them as co-defendants in a lawsuit to enforce the tax levy, and that their rights to due process were adequately protected by allowing them to sue the IRS seeking the return of their proportionate interest in the garnished accounts.[124]

The federal district court disagreed. Recognizing the "interest of the co-depositor in not having his ownership interest in the account erroneously taken by the government," the court held that because due process requires "something more than [the right to bring a] post-seizure lawsuit," the nonliable depositors were entitled to "some notice … at the levy stage."[125] Applying the *Matthews v. Eldridge* factors to the government's procedures for imposing a tax levy on joint bank accounts, the court held that:

1. When the IRS imposes a tax levy on a joint bank account, the bank must immediately freeze the account (up to the amount of the levy) and notify the IRS of the names and addresses of all individuals who have, or may have, an ownership interest in the account.
2. Upon receipt of this notice from the bank, the IRS must notify co-depositors of the levy against their account and give them "a reasonable (even if brief) time period in which to respond to the government … by affidavit or other appropriate means, specifically setting out [their] ownership interest in the joint account … and the factual and legal basis for that claim."[126]
3. If a co-depositor responds within the required time, the IRS must determine what portion, if any, of the joint account belongs to the co-depositor and release the levy with respect to the co-depositor's share of the account.
4. If a co-depositor fails to respond within the required time, the bank must transfer the garnished funds to the IRS and the co-depositor's only remedy is a lawsuit against the IRS seeking recovery of her share of the garnished funds.

The court, therefore, held that due process did not require the government to give a nonliable depositor notice and an opportunity for hearing *before* the IRS garnished a joint bank account held by the nonliable depositor and a delinquent taxpayer, but did require that a nonliable depositor be given notice and an opportunity for hearing *after* the IRS placed a tax levy on a joint account but *before* the levied funds were transferred to the IRS. Noting that the government's interest in the effective and efficient collection of delinquent taxes was protected by allowing the IRS to freeze funds in a joint bank account until the extent of a delinquent taxpayer's apparent ownership of the account is determined, the court held that the required due process protections "put a minimal burden on the government while serving to increase the likelihood that only the portion of a joint account belonging to the taxpayer" is seized.[127]

United States v. National Bank of Commerce is in some respects analogous to cases involving the garnishment of joint bank accounts to collect past-due child support:

1. Both the federal tax levy process and the procedure for garnishing bank accounts under G.S. 110-139.2(b1) involve extra-judicial or administrative action by a government agency.
2. Both the federal tax levy process and the procedure for garnishing bank accounts under G.S. 110-139.2(b1) freeze funds in a bank account by placing a lien against or levying on those funds.
3. Both federal tax levies and liens for past-due child support may be asserted against a bank account held jointly by the individual who is liable for the tax or child support debt and a nonliable depositor who is not liable for the debt.
4. When a federal tax levy or child support lien is asserted against a joint bank account, the government and the bank generally do not

know whether all or part of the account belongs to a nonliable depositor.

5. Effective and efficient collection of delinquent taxes and child support through garnishment of joint bank accounts held by nonliable depositors and individuals who owe delinquent taxes or child support may require that the accounts be temporarily frozen until the ownership rights of the nonliable depositors and the delinquent taxpayers or obligors can be determined.[128]

National Bank of Commerce, therefore, suggests that a state's IV-D agency must give a nonliable depositor notice and a fair opportunity to assert a claim regarding ownership of a joint bank account when the agency garnishes the account to collect a child support debt owed by a delinquent obligor.

At least one court, however, has held that due process does not require the government to notify a nonliable depositor when the IRS imposes a tax levy on a joint bank account.[129] In *Douglas v. United States*, the court reasoned that the federal tax levy itself, and the nonliable depositor's consequent inability to withdraw funds from the frozen account, provided adequate notice of the government's action to the nonliable depositor.[130] According to the court, "reasonable supervision of the account would inform the depositor of the levy" and would be sufficient to notify the nonliable depositor of the garnishment proceeding.[131]

Douglas, therefore, may suggest that a nonliable depositor whose funds are erroneously garnished under G.S. 110-139.2(b1) is not entitled to notice or due process protections other than the right to file a post-seizure legal action. The holding in *Douglas*, however, may be inconsistent with decisions by the U.S. Supreme Court regarding due process requirements. In *Memphis Light, Gas & Water Division v. Craft,* for example, the Supreme Court held that due process may require that an individual be notified not only of the government's action depriving her of property but also of the procedures by which she may contest the government's action.[132]

Does Garnishing Joint Bank Accounts to Collect Past-Due Child Support Violate the Constitutional Rights of Nonliable Depositors?

Are North Carolina's procedures for garnishing joint bank accounts under G.S. 110-139.2(b1) unconstitutional as applied to nonliable depositors?

Considering the holdings in *Matthews*, *Laubinger*, *Jahn*, *National Bank of Commerce*, and other cases involving the garnishment of joint bank accounts, the short answer to this question has to be "maybe."

It is clear that a nonliable depositor's right to procedural due process is violated when the State freezes and seizes her funds in a joint bank account she maintains with a delinquent child support obligor without giving her adequate notice and an opportunity to be heard.

What is not clear is whether North Carolina's procedures provide nonliable depositors with adequate notice and a fair opportunity to be heard when their funds are garnished under G.S. 110-139.2(b1).

The information that the state IV-D agency receives through the FIDM process indicates whether an identified bank account is held solely by the delinquent obligor or is a joint account maintained by the delinquent obligor and another individual who may be a nonliable depositor, but does not indicate whether or to what extent the funds in a joint account belong to the delinquent obligor or a nonliable depositor. Garnishing joint bank accounts under G.S. 110-139.2(b1), therefore, always involves the potential risk of erroneously and unlawfully garnishing funds belonging to a nonliable depositor rather than a delinquent obligor.[133]

That being the case, the only way to ensure that the due process rights of nonliable depositors are not inadvertently violated is to

1. give any individual who may be a nonliable depositor notice that the State is garnishing her bank account to collect past-due child support owed by a delinquent obligor; and
2. afford her the opportunity for a fair hearing at which she may claim that the garnished funds belong to her rather than the delinquent obligor.

Current state law and practice, however, appear to fall short of these minimal constitutional requirements.

Under current state law and practice, the state IV-D agency serves delinquent obligors with notice that their bank accounts are being garnished to collect past-due child support but, in cases involving the garnishment of joint bank accounts, does not provide any notice directed to individuals who are or may be nonliable depositors.

It could be argued that notice to a delinquent obligor also serves as notice to a nonliable depositor that her bank account is being garnished to satisfy the child support debt owed by the delinquent obligor. This argument, however, is valid only to the extent that a delinquent obligor may be said to act as the agent for a nonliable depositor, so that providing notice to the delinquent obligor is reasonably certain to ensure that a nonliable depositor who maintains an account with the

delinquent obligor also receives actual notice of the pending garnishment action. This well may be the case for nonliable depositors such as Mrs. Laubinger who are married to and live with delinquent child support obligors. But it may not be so with respect to other nonliable depositors.

In any event, the notice of intent to levy that the State currently provides to delinquent obligors fails to advise delinquent obligors or nonliable depositors that a nonliable depositor may contest the garnishment if all or part of the garnished funds belong to her rather than to the delinquent obligor. Nor does it inform delinquent obligors or nonliable depositors of the procedures through which a nonliable depositor may contest the pending garnishment action.

To remedy these potential constitutional deficiencies, the State could adopt and implement procedures under which nonliable obligors, as well as delinquent obligors, would be provided timely and adequate notice that the state IV-D agency is garnishing their bank accounts. When the state IV-D agency determines that a bank account is maintained jointly by a delinquent obligor and another person, it could obtain the other person's address from the bank[134] and send her a notice

1. informing her that the agency is freezing and intends to seize funds from the account to collect past-due support owed by a delinquent obligor with whom she maintains the account, and
2. advising her of the procedures through which she may claim that all or part of the funds in the account belong to her rather than to the delinquent obligor.[135]

Providing such notice and an opportunity to assert a claim of ownership with respect to a joint bank account *before* the state IV-D agency garnishes the account under G.S. 110-139.2(b1) clearly would satisfy constitutional requirements for procedural due process. But such a procedure also might undermine the effectiveness of the garnishment procedure by allowing a nonliable depositor or delinquent obligor to withdraw fund from the account before it is frozen. Alternatively, the due process rights of nonliable depositors *and* the government's interest in collecting past-due child support might be adequately protected by providing notice to nonliable depositors concurrently with notice requiring the bank to freeze a joint bank account and giving nonliable depositors the opportunity for a prompt and fair hearing to resolve their claims regarding erroneous or unlawful garnishment *after* the account is frozen but before the garnished funds are finally seized.

As noted above, current state IV-D policy allows a local IV-D office to release a child support lien on a joint account when a delinquent obligor or nonliable depositor provides evidence that the garnished funds belong to a nonliable depositor rather than the delinquent obligor. State law and policy, however, do not expressly recognize the right of a nonliable depositor to request an administrative hearing contesting the agency's garnishment of a joint bank account, do not establish any timeframes within which a nonliable depositor's claim must be determined, do not identify the government employee or official who is responsible for determining a nonliable depositor's claim, and do not provide for any administrative or judicial review of the agency's determination.

To remedy these potential constitutional deficiencies, the State could amend state law to give nonliable depositors the right to request an administrative or judicial hearing to determine whether the state IV-D agency has improperly garnished their funds, to require that such claims be resolved in accordance with state law, and to establish procedures for the fair and expeditious resolution of such claims.

Conclusion

Garnishing the bank accounts of delinquent child support obligors is undoubtedly an effective means of collecting past-due child support. But when the State attempts to collect past-due child support by garnishing joint bank accounts, its actions may violate the legal rights of nonliable depositors who hold joint bank accounts with delinquent obligors.

The State's legitimate interest in collecting past-due child support, however, can be reconciled with protecting the property and due process rights of nonliable depositors by revising current state law and practice to require adequate notice to nonliable depositors and to provide them with an opportunity to be heard when the State garnishes joint bank accounts under G.S. 110-139.2(b1).

Notes

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[1] This bulletin does not discuss the procedural due process rights of delinquent obligors whose funds are garnished under G.S. 110-139.2(b1). G.S. 110-139.2(b1) appears to be more-than-adequate in protecting the due process rights of delinquent obligors, since due process generally does not require that a judgment debtor be given notice and an opportunity to be heard before a judgment creditor obtains the State's assistance in attaching or garnishing the judgment debtor's property. *See* Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924).

[2] 42 U.S.C. §666(a)(17). Federal requirements regarding FIDM and garnishing bank accounts to collect past-due child support were enacted in 1996 as part of the federal welfare reform law. The term "financial institution" includes, but is not limited to, national and state banks, credit unions, and savings and loan associations. 42 U.S.C. §§666(a)(17)(D)(i), 669A(d)(1). The term "account" means a demand deposit account, checking or negotiable withdrawal order account, savings account, time deposit account, or money-market mutual fund account. 42 U.S.C. §666(a)(17)(D)(ii).

[3] Office of Child Support Enforcement, *Financial Data Match Specifications Handbook* (U.S. Dept. of Health and Human Services) (http://www.acf.hhs.gov/programs/cse/fct/fidm/dataspecs.pdf).

[4] *Id*. An individual is considered to be the "primary" owner of the account if her social security number is used for tax reporting purposes.

[5] A third provision of the Social Security Act, 42 U.S.C. §666(a)(17)(A)(ii), requires state IV-D agencies to enter into agreements with financial institutions for encumbering and surrendering the assets of a delinquent child support obligor in response to a notice of lien or levy for past-due child support.

[6] 42 U.S.C. §666(c)(1).

[7] The FIDM provisions of G.S. 110-139.2 were enacted in 1997. The garnishment provisions of G.S. 110-139.2(b1) were enacted in 2003 and became effective October 2, 2003.

[8] The notice must be served on the delinquent obligor in the manner specified by G.S. 1A-1, Rule 4. The notice may be served on the bank pursuant to Rule 4 or in any other manner to which the bank has agreed in writing. G.S. 110-139.2(b1).

[9] G.S. 110-139.2(b1).

[10] The bank is also required to notify the state IV-D agency of the date the lien attached to the account, the balance in the account, and whether the account is not subject to levy. G.S. 110-139.2(b1).

[11] G.S. 110-139.2(b1). The obligor's request for hearing should be filed as a motion in the pending child support action and served on all parties pursuant to G.S. 1A-1, Rule 5. The obligor also must send a written notice, stating his basis for contesting the lien, to the state IV-D agency within ten days of being served with the notice of intent to levy. G.S. 110-139.2(b1).

[12] G.S. 110-139.2(b1).

[13] G.S. 110-139.2(b1). A financial institution that complies in good faith with the freeze and seize provisions of G.S. 110-139.2(b1) is not liable to the obligor or any other person. G.S. 110-139.2(b1).

[14] G.S. 110-139.2(b1).

[15] John Zebrowski, "Tool Helps Collect Child Support," *Raleigh News and Observer* (March 10, 2004).

[16] N.C. Division of Social Services, *Child Support Enforcement Policy Manual* (http://info.dhhs.state.nc.us/olm/manuals/dss/cse/man/CSEcP-11.htm#P624_63104).

[17] Nonliable depositors may be able to contest the unlawful garnishment of their funds through post-seizure legal remedies under other provisions of state law.

[18] N.C. Division of Social Services, *Child Support Enforcement Policy Manual* (http://info.dhhs.state.nc.us/olm/manuals/dss/cse/man/CSEcP-11.htm#P624_63104).

[19] *Id*.

[20] A joint bank account is a bank account held jointly in the names of two or more persons and payable to either of the account holders (for example, John Smith or Mary Smith). Individuals may hold a joint bank account with or without the right of survivorship. If a joint bank account is held with the right of survivorship, the funds in the account pass to the surviving account holder on the death of the other account holder regardless of whether the surviving account holder contributed all or part of the funds to the account.

[21] Nannie v. Pollard, 205 N.C. 362, 171 S.E. 341 (1933); Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940); Hall v. Hall, 235 N.C. 712, 71 S.E.2d 471 (1952); Smith v. Smith, 255 N.C. 152, 120 S.E.2d 575 (1961); Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793 (1979). Robert E. Lee, "Joint Bank Accounts With Rights of Survivorship," 10 [N.C. BAR ASSN.] BAR NOTES 2:3 (1959).

[22] Nannie v. Pollard, 205 N.C. 362, 171 S.E. 341 (1933); Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

[23] Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940); O'Brien v. Reece, 45 N.C. App. 610, 617,

263 S.E.2d 817, 821 (1980). William H. Lewis, Jr., "Note: Survivorship in Joint Bank Accounts," 46 N.C. LAW REV. 669, 671 (1968).

[24] Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956). Frederick B. McCall, "Some Problems in the Administration of Estates," 35 N.C. LAW REV. 341, 356 (1957); Lee, 10 [N.C. BAR ASSN.] BAR NOTES at 6; Lewis, 46 N.C. LAW REV. at 671.

[25] G.S. 41-2.1(d).

[26] *See also* G.S. 53-146, G.S. 53-146.1, G.S. 54-109.58, G.S. 54B-129, and G.S. 54C-165.

[27] Lewis, 46 N.C. LAW REV. at 671-72.

[28] Lewis, 46 N.C. LAW REV. at 672.

[29] Myers v. Myers, 68 N.C. App. 177, 314 S.E.2d 809 (1984); Hutchins v. Dowell, 138 N.C. App. 673, 531 S.E.2d 900 (2000).

[30] Myers v. Myers, 68 N.C. App. at 181, 314 S.E.2d at 813.

[31] *Id*. at 180, 314 S.E.2d at 812.

[32] *Id*. at 180, 314 S.E.2d at 812.

[33] Hutchins v. Dowell, 138 N.C. App. 673, 531 S.E.2d 900 (2000).

[34] While G.S. 41-2.1(b)(1) discharges a bank from liability in connection with the withdrawal of joint account funds by one account holder, its provisions are not dispositive, as between the account holders or between an account holder and a party other than the bank, with respect to ownership of the account. *See* O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

[35] G.S. 41-2.1(b)(2).

[36] Jimenez v. Brown, 131 N.C. App. 818, 509 S.E.2d 241 (1998). The court also held that a second account held by the debtor for the benefit of his minor son was subject to attachment by his judgment creditors. This account was established as a "Totten Trust" or "payable on death" account under G.S. 53-146.2. Although the account was established for the benefit of the debtor's son, it was held in the debtor's name only and therefore was not a *joint* account. *See* G.S. 53-146.1. A third bank account held by the judgment debtor as custodian for his minor son under the Uniform Transfers to Minors Act was determined *not* to be subject to attachment by the debtor's judgment creditors.

[37] Jimenez v. Brown, 131 N.C. App. at 825, 509 S.E.2d at 246.

[38] *Id*. The court upheld the trial court's order attaching the joint account on the assumption that the judgment debtor contributed the funds to the account even though the record was silent with respect to this fact.

[39] G.S. 110-139.2(b1).

[40] "The tort of conversion is well defined as 'an [individual's] unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to … the exclusion of [the] owner's rights.'" Peed v. Burleson's, Inc., 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956).

[41] A state official or employee who, acting in the course of her official duties, wrongfully converts property belonging to another person may not raise sovereign immunity, governmental immunity, or public official immunity as a defense. *See generally* Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties* (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 1999). A state IV-D official or employee who unlawfully garnishes a nonliable depositor's funds may be liable for conversion even if she acted in good faith and without knowledge that the funds were owned by a nonliable depositor. Wall v. Colvard, Inc., 268 N.C. 43, 149 S.E.2d 559 (1966). "'The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner ... and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from the act.'" Gallimore v. Sink, 27 N.C. App. 65, 67, 218 S.E.2d 181, 183 (1975).

[42] *See* G.S. 143-291; Frazier v. Murray, 135 N.C. App. 43, 519 S.E.2d 525 (1999).

[43] State action violates an individual's right to substantive due process under Art. I, sec. 19 of the North Carolina Constitution or the fourteenth amendment to the U.S. Constitution if it is so unreasonable, arbitrary, or capricious that it offends traditional notions of justice and fair play. *See* State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

[44] Sovereign immunity does not bar a lawsuit against the State seeking damages for the State's violation of an individual's constitutional rights. Corum v. University of North Carolina, 330 N.C. 261, 413 S.E.2d 276 (1992).

[45] *Id*.

[46] *See generally* Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties* (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 1999).

[47] Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); Hawkins v. State, 117 N.C. App. 615, 453 S.E.2d 233 (1995).

[48] The procedural due process protections afforded by Art. I, sec. 19 of the North Carolina Constitution (prohibiting the State from depriving an individual of property except by "law of the land") are equivalent to those afforded under the due process clause of the fourteenth amendment to the U.S. Constitution. *See* McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990). A violation of a nonliable depositor's due process rights under the U.S. Constitution, therefore, is also a violation of his or her due process rights under the North Carolina Constitution.

[49] Weinstein v. Albright, 261 F.3d 127, 134 (2nd Cir. 2001).

[50] Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

[51] *Id*. at 81.

[52] Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

[53] *Id*. at 577.

[54] *Id*. at 572, 576, 577. The fourteenth amendment's protection of property protects legitimate *claims* to entitlement of benefits as well as rights of *undisputed* ownership of property. Fuentes v. Shevin, 407 U.S. at 86-87.

[55] Fuentes v. Shevin, 407 U.S. 67, 85 (1972).

[56] Connecticut v. Doehr, 501 U.S. 1, 12 (1991) (quoting Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 85 (1988) and relying on Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974)).

[57] United States v. Stanley, 109 U.S. 3, 13 (1883).

[58] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

[59] *Id*. at 937. These two principles, although related, are not the same. They "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions" but "diverge when the constitutional claim is directed against a [private] party without such apparent authority." *Id*.

[60] *See* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), Fuentes v. Shevin, 407 U.S. 67 (1972), Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1974); Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 486 (1988).

[61] Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

[62] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[63] Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985).

[64] Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950).

[65] Baldwin v. Hale, 68 U.S. 223, 233 (1863).

[66] Mullane v. Central Hanover Bank & Trust, 339 U.S. at 315, 316.

[67] *See* Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14-15 (1978). *Cf.* City of West Covina v. Perkins, 525 U.S. 234 (1999).

[68] Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

[69] Fuentes v. Shevin, 407 U.S. at 81.

[70] Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

[71] Cleveland Board of Education v. Loudermill 470 U.S. at 545.

[72] *See* Goldberg v. Kelly, 397 U.S. at 267-271.

[73] Matthews v. Eldridge, 424 U.S. at 333.

[74] Cleveland Board of Education v. Loudermill, 470 U.S. at 545.

[75] Fuentes v. Shevin, 407 U.S. at 81-82 (quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972)).

[76] Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 594-595, 597 (1931); Gilbert v. Homar, 520 U.S. 924, 930 (1997).

[77] Mitchell v. W.T. Grant Co., 416 U.S. at 611.

[78] Fuentes v. Shevin, 407 U.S. at 91. *Cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

[79] Nonliable depositors may be able to contest the unlawful garnishment of their funds through post-seizure legal remedies under other provisions of state law.

[80] Mullane v. Central Hanover Bank & Trust, 339 U.S. at, 313.

[81] Matthews v. Eldridge, 424 U.S. at 335.

[82] United States v. National Bank of Commerce, 554 F.Supp. 110, 114 (E.D. Ark. 1982) (due process rights of nonliable depositor with respect to federal tax levy against joint bank account).

[83] Garnishing a joint bank account maintained by a delinquent obligor and another individual who is, or may be, a nonliable depositor does not necessarily affect that individual's interest or violate her legal rights. Garnishing a joint bank account does not affect an individual's interest unless she has a valid, legally-recognized and protected interest in the funds in the account (that is, unless she is, in fact, a nonliable depositor). And garnishing a joint bank account does not affect the interest of a nonliable depositor unless the amount garnished exceeds the delinquent obligor's share of the account balance.

[84] Fuentes v. Shevin, 407 U.S. at 86.

[85] *See* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970).

[86] Jahn v. Regan, 584 F.Supp. 399, 413-14, 416-17 (E.D. Mich. 1984).

[87] *Id*.

[88] Kansas v. United States, 214 F.3d 1196, 1199, n. 4 (9th Cir. 2002).

[89] Timothy S. Grail, "Custodial Mothers and Fathers and Their Child Support: 2001" (Current Population Reports P60-225), Washington, DC: U.S. Census Bureau, 2003.

[90] G.S. 110-141.

[91] Eunique v. Powell, 302 F.3d 971, 974 (9th Cir. 2002).

[92] *Id*. at 975.

[93] When a custodial parent receives public assistance on behalf of a dependent child, acceptance of public assistance constitutes an assignment to the State of the child's right to child support, up to the amount of public assistance paid on behalf of the child. G.S. 110-137. When the state IV-D agency collects past-due child support on behalf of a child who has received public assistance, the State generally retains the child support to reimburse itself for the public assistance it has paid on behalf of the child.

[94] *See* Jahn v. Regan, 584 F.Supp. 399 (E.D. Mich. 1984) (due process rights of delinquent obligors and nonliable spouses in connection with the garnishment of joint federal income tax refunds).

[95] Matthews v. Eldridge, 424 U.S. at, 335.

[96] *Id.* at 347.

[97] *Id*.

[98] Marcello v. Regan, 574 F.Supp. 586, 597 (D.R.I. 1983) (requiring due process protections in connection with the garnishment of federal income tax refunds to collect past-due child support).

[99] *Id*.

[100] N.C. Division of Social Services, *Child Support Enforcement Policy Manual* (http://info.dhhs.state.nc.us/olm/manuals/dss/cse/man/CSEcP-11.htm#P624_63104).

[101] *See* G.S. 41-2.1(b)(2).

[102] *See* John Zebrowski, "Tool Helps Collect Child Support," *Raleigh News and Observer* (March 10, 2004).

[103] *Id*.

[104] *See* notes 20 through 38 and accompanying text.

[105] Laubinger v. Department of Revenue, 672 N.E.2d 554 (Mass. App. Ct. 1996).

[106] *Id*. at 557.

[107] *Id*. at 558.

[108] *Id*. at 561. The Laubingers did not seek injunctive relief against the state IV-D agency.

[109] *Id*.

[110] *Id*.

[111] Jahn v. Regan, 584 F.Supp. 399 (E.D. Mich. 1984). The IRS had entered into an agreement with Michigan's Department of Social Services that required the IRS to transmit the tax refunds of overdue child support obligors to the State.

[112] *Id*. at 410.

[113] *Id*. at 413.

[114] *Id*. at 417.

[115] *Id*. at 413.

[116] *Id*. at 417.

[117] *Id*.

[118] Mrs. Jahn was informed of the procedures by which she could claim a portion of the couple's income tax refund *after* her husband received the IRS notice and contacted the state's IV-D office. The IRS notice sent to delinquent child support obligors in 1983 informed them that if they had filed a joint tax return and their spouses received taxable income, the nonliable spouses could object to having their share of the joint tax refund applied to the obligors' child support debts by filing an amended income tax return (IRS Form 1040X) showing each spouse's share of the couple's tax liability and refund.

[119] *Id*.

[120] Jahn v. Regan, 610 F.Supp. 1269 (E.D. Mich. 1985).

[121] The court noted that, ideally, a separate pre-garnishment notice should be sent to a nonliable spouse as well as to the delinquent obligor, but found that providing such notice would be impractical "because the existence of the non-obligated spouse who intends to file a joint tax return and who will be entitled to a separate portion of the refund cannot be known before the tax return is filed." Jahn v. Regan, 610 F.Supp. at 1280. This consideration is absent in situations involving the garnishment of joint bank accounts under G.S. 110-139.2(b1) because the FIDM process identifies accounts held by a delinquent obligor and an individual who may be a nonliable depositor and the state's IV-D agency can obtain from a bank the address of individuals who may be nonliable depositors before it freezes a joint bank account pursuant to G.S. 110-139.2(b1).

[122] United States v. National Bank of Commerce, 554 F.Supp. 110 (E.D. Ark. 1982), *aff'd. on other grounds* 726 F.2d.1292 (8th Cir. 1984), *rev'd. on other grounds* 472 U.S. 713, 729 n.12 (1985).

[123] *Id*. at 113.

[124] *Id*. at 114.

[125] *Id*.

[126] *Id*. at 115.

[127] *Id*.

[128] "Where … adequate opportunity is afforded for a later judicial determination of [one's] legal rights,

summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. … Property rights must yield *provisionally* to governmental need." Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 594-595, 597 (1931) (emphasis added). *See also* Gilbert v. Homar 540 U.S. 924, 930 (1997); United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993); Zinermon v. Burch, 494 U.S. 113, 128 (1990); Barry v. Barchi, 443 U.S. 55, 64-65 (1979); Dixon v. Love, 431 U.S. 105, 115 (1977); North American Cold Storage v. Chicago, 211 U.S. 306, 314-320 (1908).

[129] Douglas v. United States, 562 F.Supp. 593 (S.D. Ga. 1983).

[130] *Id*. at 596.

[131] *Id*. at 596-597.

[132] Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14 (1978). *Cf.* City of West Covina v. Perkins, 525 U.S. 234 (1999).

[133] The State could minimize, but not eliminate, this risk by garnishing only the delinquent obligor's per capita share of a joint account, applying the presumption that when the respective contributions to the account by the delinquent obligor and one or more other individuals cannot be determined the balance is owned in equal shares by all of the individuals whose names are on the account.

[134] G.S. 110-139(d) authorizes the state IV-D agency to obtain the address and other identifying information of any person who maintains an account with a financial institution when the information is necessary to enforce a child support order.

[135] Another option would be to amend G.S. 110-139.2(b1) to require the bank to notify nonliable depositors that their accounts are being garnished by the state IV-D agency.