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### Administrative Directive

#### Section 1

<b>Transmittal:</b>	09-ADM-07
<b>To:</b>	Local District Commissioners
<b>Issuing Division/Office:</b>	Center for Child Well-Being/ Division of Child Support Enforcement
<b>Date:</b>	May 4, 2009
<b>Subject:</b>	Property Execution Procedures for Mistake of Fact and/or Exempt Money Claims
<b>Suggested Distribution:</b>	CSEU Coordinators SCU Supervisors IV-D Attorneys
<b>Contact Person(s):</b>	Division of Child Support Enforcement at 1-800-343-8859 Office of Legal Affairs – Brian S. Wootan at 1-518-473-6188
<b>Attachments:</b>	Attachment 1 – Mistake of Fact and/or Exempt Money Claim Form Attachment 2 – Notice to Judgment Debtor/Obligor of Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 (d) and (e) of Child Support Debt Attachment 3 – Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 for Child Support Debt Attachment 4 – Child Support Enforcement Execution and Notice Attachment 5 – Order to Show Cause and Affirmation Attachment 6 – Notice to Vacate Restraining Notice or Execution Attachment 7 – Notice of Determination of Your Mistake of Fact and/or Exempt Money Claim
<b>Attachment Available On – Line:</b>	<input checked="" type="checkbox"/>

#### Filing References

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
		18 NYCRR 346.11	CPLR 5205, 5222, 5230, 5231, and 5232		

## Section 2

### I. Summary

This Administrative Directive (ADM) refines the child support enforcement program's Property Execution (PEX) process, restraining notice, and execution forms. It provides a new form and additional instructions for determining the merits of mistake of fact and/or exempt money claims. The ADM also provides information and forms regarding turn over proceedings and joint accounts.

### II. Purpose

Recent legislative activity prompted a review of the PEX process and forms. This ADM introduces revised PEX documents designed to provide notices specifically tailored to child support judgment debtors/obligors. It provides a simplified and uniform process for asserting claims of mistake of fact or that money is exempt from restraint, levy, or execution. The ADM provides information about joint accounts and instructions regarding turn over proceedings.

### III. Background

On September 25, 2008, the Governor signed Chapter 575 of the Laws of 2008. This bill, called the "Exempt Income Protection Act" (ACT), amended the Civil Practice Law and Rules (CPLR) in relation to restraint, execution, income execution, and levy procedures under Article 52 of CPLR. These amendments, effective January 1, 2009, afford low income judgment debtors additional protections and place additional requirements on judgment creditors. As a result of the ACT, effective December 31, 2008, the Division of Child Support Enforcement (DCSE) temporarily disabled the automated PEX process.

This ADM is being issued in advance of an anticipated amendment to Chapter 575 of the Laws of 2008 which will exempt certain debtors and creditors from the requirements of the ACT. We anticipate the amendment will be effective immediately upon its signature into law. If the amendments to the ACT are signed into law as anticipated, New York State, municipal corporations and their agencies, as well as child support creditors, including Support Collection Units (SCUs), will **not** need to comply with the Chapter 575 requirements. Until such amendments are enacted, the requirements of the ACT continue to apply to child support creditors, including SCUs.

As a result of the review of the PEX process, DCSE has amended the PEX forms and refined the process for making mistake of fact and/or exempt money claims. **The automated PEX process will resume as soon as the Chapter law is amended.**

### IV. Program Implications

#### A. Mistake of Fact

The process for determining whether a mistake of fact or error in issuing a PEX has occurred has not changed. However, child support obligors will receive a new claim form to use in challenging the PEX [*Mistake of Fact and/or Exempt Money Claim Form*

(Attachment 1)]. The claim form will be included with the *Notice to Judgment Debtor/Obligor of Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 (d) and (e) of Child Support Debt* (Attachment 2), and a copy of the *Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 for Child Support Debt* (Attachment 3).

## B. **Exempt Money**

Upon the date the *Notice to Judgment Debtor/Obligor of Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 (d) and (e) of Child Support Debt* (Attachment 2) is received, the noncustodial parent is afforded fifteen (15) days to claim that the money is exempt from restraint, levy, or execution.

1. Money that **is exempt** from restraint, execution, or levy for child support enforcement:
  - Supplemental Security Income (SSI);
  - public assistance, including employment earnings considered in calculating the public assistance grant; and
  - child support, spousal support, maintenance or, alimony payments.
2. Money that is **not exempt** from restraint, execution, or levy for child support enforcement:
  - Social Security Disability (SSD) benefits - SSD is not exempt from collection made through the child support enforcement program. Social Services Law §111-t and 42 U.S.C. 659(h).
  - Unemployment Insurance benefits and Workers' Compensation benefits – Social Services Law §111-j, §111-t; Labor Law §596(2); 42 U.S.C. 654(19) and 42 U.S.C. 666 (c)(1)(G);
  - Veterans' benefits - 42 U.S.C. 659(h) and Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987);
  - Federal Civil Service retirement benefits, and Federal Railroad retirement benefits - 42 U.S.C. 659;
  - Payments from pensions and retirement accounts - Social Services Law §111-t; 42 U.S.C. 659(h) and 666[c][1][G]; and
  - Black lung benefits - 42 U.S.C. 659(h).

## V. **Required Action**

### A. **Determination of Mistake of Fact and/or Exempt Money Claims**

The Child Support Management System (CSMS) issues the *Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 for Child Support Debt* (Attachment 3) to a financial institution identified through the PEX process. CSMS

issues the noncustodial parent a copy of the restraining notice in addition to the *Notice to Judgment Debtor/Obligor of Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 (d) and (e) of Child Support Debt* and the *Mistake of Fact and/or Exempt Money Claim Form*. Upon receipt of these documents, the noncustodial parent may claim a Mistake of Fact and/or that the money in the account is exempt.

1. Making a Mistake of Fact and/or Exempt Money Claim: The noncustodial parent must make a claim of mistake of fact and/or exempt money **in writing** within fifteen (15) days of the date of the *Notice to Judgment Debtor/Obligor of Restraining Notice Pursuant to New York Civil Practice Law and Rules Section 5222 (d) and (e) of Child Support Debt* (Attachment 2). The noncustodial parent **may** make a claim by completing and signing a *Mistake of Fact and/or Exempt Money Claim Form* (Attachment 1) or otherwise in writing.
2. Update the system: The SCU must update the PROP EXE CODE on IVDRPA from “02” (Restraining Notice Sent) to “15” (Mistake of Fact Claimed).
3. Responding to a Claim: The SCU must make a determination as to the validity of the claim, and notify the noncustodial parent, within forty-five days (45) of the date the *Notice to Judgment Debtor/Obligor of Restraining Notice Pursuant to New York Civil Practice Law and Rules Section 5222 (d) and (e) of Child Support Debt* (Attachment 2) was sent to the noncustodial parent. When the SCU denies a claim, the SCU must update IVDJRR – Respondent Remarks Screen – with the reason or reasons the claim was denied. The SCU is responsible for all matters pertaining to claims by the judgment debtor/obligor or other party (i.e., non-obligated joint account holder) as specified in this ADM.
4. Reviewing Documentary Proof: Upon receiving the written assertion or claim form, the SCU must review the documentary proof submitted by the noncustodial parent.
  - a) If the noncustodial parent claims that the money is from SSI, the SCU must review any documentation submitted to support the claim. The SCU may also check WMS to determine whether the noncustodial parent is receiving MA-SSI. If so, the SCU can then obtain the documentation from WMS. Please note that all recipients of SSI are typically MA eligible and, therefore, receipt of SSI can be validated through WMS. Because SSI is exempt from execution, the restraining notice or execution must be vacated if the financial account contains only funds from SSI. If the noncustodial parent is not a resident of New York State, he or she must submit documentation from the state in which the noncustodial parent resides and/or other appropriate proof of receipt of SSI.
  - b) If the noncustodial parent claims that the money is from public assistance, including employment earnings considered in calculating the public assistance grant, the SCU must review any documentation submitted to support the claim and must verify the claim using WMS. Public assistance is exempt from execution. The restraining notice and/or execution must be vacated if the financial account contains only public assistance or employment earnings considered in calculating the public assistance grant. If the noncustodial parent is not a resident of New York State, he or she must submit documentation from

the state that issued the public assistance and/or other appropriate proof of receipt of public assistance.

- c) If the noncustodial parent claims the money is from child support, the SCU must verify the claim by reviewing CSMS or, if a non-IV-D order, by reviewing documentation provided by the noncustodial parent that they receive child support (e.g., a copy of the court order of support and proof of payment; a statement from the financial institution that money deposited is child support paid). The restraining notice and/or execution must be vacated if the financial account contains only child support, spousal support, or maintenance (alimony) payments. If the noncustodial parent is not a resident of New York State, he or she must submit documentation from the state that issued the child support.
- d) If the noncustodial parent claims that the money is commingled (i.e., non-exempt money is deposited with exempt money or money belonging to a non-obligated spouse or party), the exempt money generally does not lose its exempt status. The judgment debtor/obligor must provide proof that the deposit is from a source that is exempt, as set forth above. To determine the part of the balance in the account that is exempt, find the lowest balance that existed between the date of deposit of the money in question and the date of the Restraining Notice. The lesser of the total amount of exempt funds deposited or the lowest balance is the amount that is deemed exempt.
- e) If the person is claiming a case of mistaken identity, the party should provide information that proves his or her identity. Acceptable proof includes: driver license, passport, Social Security card, or other government-issued documents.
- f) If the noncustodial parent claims that the court order has been modified, terminated, or vacated, the noncustodial parent must provide a copy of the court order or other documentation from the court.
- g) If the noncustodial parent is claiming an error in the computation of arrears or past-due support, the SCU must review the documents provided by the noncustodial parent and the CSMS records to verify the information and correct the account, if appropriate.

## 5. Notification of Determination

- a) **If the claim is upheld**, the SCU must:
  - i. change the PROP EXE CODE from “15” to “86” (Release Restraint – Mistake of Fact Valid). With the proper use of property execution code “86,” CSMS will issue the *Notice to Vacate Restraining Notice or Execution* (Attachment 6) to the financial institution and a copy to the noncustodial parent.
  - ii. Print and complete the *Notice of Determination of Your Mistake of Fact and/or Exempt Money Claim* (Attachment 7) and mail it to the noncustodial parent.

b) **If the claim is denied**, the SCU must:

- i. change the PROP EXE CODE from “15” back to “02,” and reset the PROP EXE CODE DATE to the date the *Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 for Child Support Debt* (Attachment 3) was issued. CSMS will issue a *Child Support Enforcement Execution and Notice* (Attachment 4) to the financial institution and a copy to the noncustodial parent.
- ii. Print and complete the *Notice of Determination of Your Mistake of Fact and/or Exempt Money Claim* (Attachment 7) and mail it to the noncustodial parent.

The PROP EXE CODES of “2,” “15,” and “86” will be used by CSMS regardless of whether the noncustodial parent files the claim for exempt money or for a claim of mistake of fact. Mistake of fact, unlike a claim of exempt money, means that the individual served with the *Notice to Judgment Debtor/Obligor of Restraining Notice Pursuant to New York Civil Practice Law and Rules, Section 5222 (d) and (e) of Child Support Debt* (Attachment 2) is asserting a case of mistaken identity, or the calculated arrears are erroneous, or the court order does not exist or has been vacated.

## **B. Joint Accounts and Special Proceedings for a “Turn Over” Order**

1. Joint Accounts: New York law provides that each joint account owner is presumed the owner of one-half of the account (Banking Law §675). The presumption of one-half ownership is not conclusive but may be rebutted by competent evidence. The burden of proof is on the party trying to rebut the presumption. This means that the party who is challenging whether the account contains more or less than one-half belonging to the Judgment Debtor/Obligor has the burden of proving it in court.

Generally, the deposit of money into a joint account constitutes prima facie evidence of intent to create a joint tenancy. The presumption created by the Banking Law can be rebutted "by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only." (See Wacikowski v. Wacikowski, 93 AD2d 885, 461 NYS2d 888)

Facts that would demonstrate that all or a portion of the money in the account belongs to the non-obligated joint account holder include: the joint account was opened for the convenience of the non-obligated joint account holder; the money is traceable to money available only to him or her (death benefits, paychecks); or, the non-obligated joint account holder retains sole possession of the bank book and pays all taxes on interest accruing on the account and the obligor makes no deposits or withdrawals.

2. Turn Over Proceedings: If the financial institution refuses to honor an execution, the SCU must bring a special proceeding under (CPLR §5225 and §5227) to obtain a “turn over order” directing the financial institution to turn over the money contained

in the account. The proceeding must be commenced within 90 days of service of the Execution [CPLR §5232(a)].

3. Determining Whether to Initiate a Turn Over Proceeding: In all cases where the financial institution refuses to turn over money, the SCU should consider bringing a proceeding to compel surrender of the funds. If the financial institution mistakenly claims that the money is exempt or subject to the Exempt Income Protection Act, the SCU may contact the financial institution and provide information regarding the statutory exemption for child support obligations. If the money is exempt (i.e., SSI, public assistance, or child support), the SCU must release that portion of the account that is exempt.

If the financial institution refuses to turn over the money because there is a joint account, the SCU should first determine whether all or a portion of the money is subject to collection for the child support debt. If the SCU believes that the child support obligor owns more than one-half of the account, it will have the burden to prove what portion of the account is owned by the obligor.

If possible, the SCU should contact the obligor before bringing a turn over proceeding. The obligor or the non-obligated joint account holder should be given the opportunity to show the SCU that the joint account consists **entirely** of money belonging to the non-obligated joint account holder. If the obligor or the non-obligated joint account holder provides such satisfactory proof, the SCU cannot take the non-obligated joint account holder's money to apply to the obligor's child support debt. Satisfactory proof includes proof of direct deposit or other electronic deposit or transfer. In that case, the SCU must immediately issue to the financial institution the *Notice to Vacate Restraining Notice or Execution* (Attachment 6) and a copy to the noncustodial parent. If a portion of the account belongs to the obligor, the SCU may obtain a signed statement from both parties authorizing the release of that portion of the account to the SCU.

Each challenge should be reviewed independently based on the circumstances of that particular case and the documentation presented by the obligor or the non-obligated joint account holder, and in consultation with legal counsel for the local district. The SCU may utilize an Information Subpoena, a Child Support Subpoena (SSL §111-p), or other discovery methods (CPLR §§3106-3120, §§3122-a-3123, §§3130-3133) to gain the information necessary to determine the source and ownership of the money.

4. Bringing a Turn Over Proceeding: The SCU should consult with its counsel to prepare the necessary documents to bring a turnover proceeding. A sample pleading, *Order to Show Cause and Affirmation* (Attachment 5), is provided. The documents must be served on the financial institution, the obligor and the non-obligated joint account holder and filed with either the supreme or county court.

## **VI. Systems Implications**

Once the automated PEX process is restarted, local districts can anticipate a higher volume of restraining notices and executions being issued because of the time the process was suspended.

For example, documents normally issued during January and February, 2009 will be added to the volume generated during March, 2009, provided the accounts remain PEX eligible.

**VII. Additional Information**

Word versions of the *Mistake of Fact and/or Exempt Money Claim Form* (Attachment 1), the *Order to Show Cause and Affirmation* (Attachment 5), and the *Notice of Determination of Your Mistake of Fact and/or Exempt Money Claim* (Attachment 7) are available on ERS under Resources, Property Execution.

**VIII. Effective Date**

This Administrative Directive is effective with the start-up of the automated process. Districts will be notified under separate cover.

**Issued By** \_\_\_\_\_  
**Name:** Scott E. Cade  
**Title:** Deputy Commissioner and Director  
**Division/Office:** Center for Child Well-Being/  
Division of Child Support Enforcement