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UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS
KANSAS CITY DIVISION

Alen Ray Howley
Jeannie Marie Howley

Case no. 10-20713-7 DLS

Debtor's Brief Regarding Trustee's Objection To Exemption Of Per Capita Payments To Joint
Debtor Jeannie Marie Howley

Debtor files the following brief in response to and in opposition to the trustee's objection to exemption of per capita payments from the Prairie Band Pottawatomie Nation per capita payments from tribal gaming revenue to Joint Debtor Jeannie Marie Howley.

Debtor shows the Court:

1. Joint Debtor Jeannie Marie Howley is a member of the Pottawatomie Tribe and receives per capita income as determined by the tribe on a quarterly basis.
2. The Pottawatomie nation is a sovereign entity with the right to enact statutes and a code for use in its Courts. The power of the Pottawatomie Nation is that of a limited sovereign under the plenary power of Congress, per a line of case law developed over the last century by the United States Supreme Court. Indian tribes' power has been defined as the "inherent powers of a limited sovereignty which have never been extinguished". *United States v. Wheeler*, 435 U.S. 313 (1978). There is no indication in the record or reference by the trustee to any authority indicating Congress restricted the Pottawatomie Nation in Kansas from developing its own legal

code, including the regulation and distribution of gaming revenue. There is every indication contrary. A joint stipulation of facts submitted to the Court recites that Pottawatomí Nation's gaming activities have been approved by Congress.

3. The Pottawatomí Nation has a complex and lengthy tribal code. Section 4-10-16(H) provides:

The following property shall be exempt from garnishment, attachment, execution, sale, and any other process for the payment of principal and interest, costs, and attorney's fees upon any judgment of the Tribal Court:

(H) Gaming revenue per capita payments to Prairie Band Pottawatomí Nation tribal members, provided that this exemption shall not apply to Pottawatomí Nation Tribal Actions to enforce or satisfy one or both of the following:

(1) [child support] [full code section omitted]

(2) [the creditor is the Prairie Band Pottawatomí Nation or its entities] [full code section paraphrased]

4. Joint Debtor sees little difference in form in the Tribal Law And Order Code exemption provisions than the Kansas exemption statutes relating to personal property, namely K.S.A. §60-2304, K.S.A. §60-2308, and K.S.A. §60-2310. The latter two statutes include references to streams of income. The Tribal Law And Order Code refers to exemption from legal process under court order of attachment and sale of the Tribal Court. Like Kansas exemption law, 4-10-16 limits a creditor's access to certain assets of a judgment debtor upon execution on a judgment from the Tribal Court. Section 4-10-16 (H) precludes attachment, execution, sale and other process against a debtor's interest in gaming revenue per capita payments. Per capita payments are limited to eligible tribal members defined as enrolled members who have not waived or relinquished the right to be on the member roll. Per Capita Ordinance, Article 1, Section 2 j and Per Capita Ordinance, Article IV, Section 1. The

exemption rule of Section 4-10-16 is limited, precise, and purposeful-to protect for eligible tribal members the income stream from gaming revenues generated on Reservation land at a casino near Mayetta, Kansas, which the tribe refers to as per capita payments.

5. Trustee has not attacked the Pottawatomi Nation's legal authority to legislate, called into question its jurisdiction over the gaming revenue per capita payments, nor asserted that the statute is not entitled to full faith and credit by other concurrent jurisdictions. In fact concurrent jurisdiction over matters of Indian Reservation affairs is the hallmark of the jurisprudence of the United States Supreme Court. *Williams v. Lee*, 358 U.S. 217 (1959). That the Pottawatomi Nation has jurisdiction and power over its affairs on the Reservation, where the gaming revenue generated then paid to Joint Debtor and other tribal members, is also not called in to issue by the trustee. Only Congress, it appears, could restrict the tribe's powers. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Trustee relies on the physical residence of Joint Debtor Jeannie Marie Howley outside the geographical boundaries of Prairie Band Pottawatomi Nation Reservation near Mayetta, Kansas, asserting Joint Debtor must reside there to have the protection of its Law And Order Code. Debtor asserts this position subverts the purpose of the exemption statute which speaks of membership in the Pottawatomi Nation, not of residence on a Reservation. That the Law And Order Code intends to protect the per capita payments for its members is clear.

6. Analyzing what requirements Joint Debtor must meet to have protection of the tribe's Law And Order Code of which she is an enrolled member requires reference to 11 U.S.C. §522 (b) (3). Joint Debtor asserts by her membership in the Pottawatomi Nation that the exemption provision now in question, 4-10-16 (H) is applicable law under the Bankruptcy Code. Two points: first, Pottawatomi Nation Law And Order Code does not limit Joint Debtor's protection under its exemption rules which bases the right to per capita payments on membership. Second,

no creditor could attach per capita payments without obtaining a judgment in Tribal Court as the tribe is not subject to foreign judgments unless registered. By legislating a right of exemption for its members' per capita payments from Tribal Court judgments, Pottawatomi Nation is exercising one of its inherent powers not extinguished. *United States v. Wheeler*, above. Joint Debtor is an enrolled member of the Pottawatomi Nation which is the tribe's condition for paying her per capita payments. The revenue paid is generated on the Reservation where the tribal government is located that enacted the exemption of Section 4-10-16(H). The same governing body enacted a Tribal Ordinance governing distribution of gaming revenue per capita payments. Relations between Indian Nations and States and between the Nations and the federal government are regulated by Congress. *Worcester v. Georgia*, 6 Pet. 515 (1832). Prairie Band Pottawatomi Nation has enacted measures concerning matters uniquely arising inside the Reservation, the generation of gaming revenue and protecting the payment stream to its eligible members. It can not be gainsaid that the purpose, intent, and goal of the Pottawatomi Nation in enacting Section 4-10-16(H) is to protect per capita payments for its members from ordinary judgment creditors by exempting the payments from attachment or garnishment at their source, the stream of income from gaming revenue for Pottawatomi Nation members. Joint Debtor argues that jurisdiction of the Tribal Law And Order Code to exempt per capita payments is based on the geographical location of the gaming revenues and is thus "applicable law", as provided in §522 (b) (3).

7. Joint Debtor suggests that the ruling in *In re: McDonald*, 353 B.R. 287 (Bankr.D.Kan.2006) on which trustee's objection to exemption in this case relies, has the effect of overriding and interfering with the Pottawatomi Nation's Tribal Law And Order Code over matters peculiarly within its control as held by the Supreme Court. *United States v. Wheeler*.

For example, if Joint Debtor physically appeared at the Tribe's office on the Reservation to receive a per capita payment, then negotiated the check and used it up, such funds would conclusively be protected from ordinary judgement creditors' effort to attach same. The same procedure must be followed by an employee in Kansas whose paycheck is garnished the maximum 25%. The employee must not deposit the check and convert it to cash or that amount can be attached; in effect the employee converts exempt wages into non exempt cash equivalent funds (a depository institution credit balance) by depositing those funds in a depository institution. Joint Debtor's interest in per capita payments is protected in the same manner, at their source. As with Kansas law exempting 75% of the net wages payable to employees, K.S.A. §60-2310, the Tribal Code protects an income stream generated on its Reservation for its members, at the source of those payments. The Bankruptcy Court should determine that outside of Bankruptcy Court jurisdiction, Joint Debtor has a near absolute right to exempt her right to per capita benefits that are payable under the Tribal Law And Order Code, and that similar to wages, per capita payments can not be attached until received, negotiated, and deposited into a deposit account in another jurisdiction.

8. The relevant provision in the Bankruptcy Code defining a debtor's right to exempt property from the estate is 11 U.S.C. §522:

Bankruptcy Code §522 (b) (1) provides:

"...an individual debtor may exempt from property of the estate property listed in paragraph (2) [so-called Federal exemptions] or in the alternative paragraph (3) of this subsection...

Bankruptcy Code §522 (b) (3) provides:
Property listed in this paragraph is-

(A) subject to subsections (o) and (p) of this section any property that is exempt under Federal law ...or State or local law that is applicable on the

date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition..."

9. In everyday terms, a debtor who files for bankruptcy relief in Kansas and meets the 730 day residency requirement can not claim the federal bankruptcy exemptions. Conversely, a debtor who resides in a State, such as Kansas where state law restricts access to federal bankruptcy exemptions, may utilize all other applicable exemption laws, state and local. §522 (b) (3). The phrase "local law" in Code §522 (b) (3) can be read to refer to law other than the State law in which debtor has a domicile but which is applicable to debtor. Included in applicable law, for example, is a wide array of federal law exempting property. Those non-bankruptcy exemption laws include income streams payable, and in some cases paid, to a recipient Social Security benefits and Veterans benefits. Joint Debtor applauds the trustee in his brief for getting to the heart of the dispute in this case, which dispute is the meaning of the term "applicable law". Joint Debtor disagrees with the trustee's point and therefore with the Court's ruling in *McDonald*, however, that an Indian tribe member loses protection of a tribe's laws regarding matters arising inside the Reservation by living outside the Reservations' physical borders.

10. In this instance, Joint Debtor has protection of an entity with limited sovereignty, the Prairie Band Pottawatomie Nation, of which she is an enrolled member, as to Indian matters on the reservation. The source of the funds she receives in per capita payments is from the Nation of which she is a member, and the activities that generate the funds she receives as per capita payments from her tribe, are uniquely situated and entirely located on the Prairie Band Pottawatomie Nation Reservation near Mayetta, Kansas. The Bankruptcy Code's reference to "local" law that is applicable to debtor on the date of petition can easily be construed to be

Indian tribal law where the nexus between a debtor and a tribe exists. Joint Debtor is a member of the tribe and she can only be subjected to the Tribal Court's powers as to the income stream she receives as per capita payments. §522 (b) (3) use an expression that is non exclusive by its reference to "...applicable..." "...State or local law...". The phrase "State or local law" should mean all exempt property law other than Federal bankruptcy exemptions that applies to Joint Debtor. Joint Debtor has not gleaned from either the *McDonald* opinion, 353 B.R. 287 (Bankr.D.Kan.2006) cited in trustee's brief, nor from trustee's other legal authority basis for holding that an Indian tribe member by living outside the Reservations' physical boundaries, loses protection of her own tribal laws as to matters solely within the tribe's physical Reservation boundaries. And, Joint Debtor resides in Kansas, the State within which Pottawatomi Nation is located. Again, neither the *McDonald* case holding nor trustee's brief indicate why debtor does not receive the benefit of another concurrent jurisdiction's exemption protection scheme when that jurisdiction lies within the boundaries of the State where Joint Debtor has a domicile when the Code's term is applicable State *or local law* [emphasis supplied].

11. The Bankruptcy Court can uphold Joint Debtor's right to exempt funds paid her as a member of a sovereign entity, the Prairie Band Pottawatomi Nation. Two basic rules of statutory construction: the intent of the legislature governs if that intent can be ascertained. *In re Marriage Of Killman*, 264 Kan. 33 955 P.2d 1228; and statutes are construed to avoid unreasonable results. The legislature does not intend to enact useless or meaningless legislation. *KPERS v. Reimer & Koger Assocs, Inc.* 229 Kan. 635. The Tribal Law And Order Code clearly intends to protect any enrolled member who is eligible to receive per capita payments from any attempt to attach those funds. Trustee proposes to place another restriction on debtor's right to

claim an exemption-that a debtor must physically reside on a Reservation, that Congress has not expressly imposed, and by implication declines to impose. By limiting the reach of the Pottawatomi Nation's Tribal Law And Order to tribe members who live on the Reservation, the Bankruptcy Court burdens persons who are the object of the intended protection of Section 4-10-16 without a convincing showing Congress intended same. The result of the trustee's argument is that the only instance in which a Pottawatomi tribe member such as Joint Debtor could be subjected to an ordinary judgment creditor's action against her income stream of per capita payments is if she files a bankruptcy court petition. If she did not file under Title 11, she would have the clear and unequivocal protection of the rules and protection of the Nation of which she is a member regardless of where she lives, inside or outside the geographic boundaries of the Reservation. Trustee's brief asserts that Pottawatomi Nation Tribal Code is not applicable law, in essence asking the Court to nullify the statute's intended protection for members who happen to reside outside the Reservation.

12. In closing, Joint Debtor wishes to address a reference to a phrase in 4-10-16 (H), that being the list of personal property protected from execution on a "...judgment of the Tribal Court..." Both trustee and the *McDonald* ruling imply that phrase in the exemption rule limits its scope to actions in Tribal Court. To compare, most Kansas exemption laws refer to protection from execution on a judgment. See K.S.A. §60-2301 (homestead), 60-2304 (personal property), §60-2308 (pension/retirement payments), §60-2310 (wages). Were the trustee's logic to follow, Kansas exemptions fail because a bankruptcy debtor could only assert exemptions before a Kansas court in a judgment execution proceeding, not in bankruptcy court.

13. In fact, for any judgment creditor to attach Joint Debtor's per capita payments, a creditor would need to obtain judgment in Tribal Court or in a foreign court and register the

foreign judgment. Then, the exemption of Section 4-10-16(H) would preclude attachment of the per capita payments, and she would be paid those monies without interference of a judgment creditor. Pottawatomie Nation has by 4-10-16 (H) limited the reach of creditor to actions brought in Tribal Courts, and then exempted per capita payments. Only by a hyper technical interpretation of 11 U.S.C. §522 (b) (3), which is to say, by ignoring the term “local law” as “applicable law” that can be construed to include Indian tribal codes, could Joint Debtor be subject of the reach of a creditor. Local law which should include the Prairie Band Pottawatomie Nation Tribal Law And Order Code, protects its members’ right to per capita payments were debtor not to file a petition for relief under Title 11 of the United States Code. The Tribal Law And Order Code provision should not fall or be reduced by the Bankruptcy Court without a clear indication from Congress that Indian nations may not enact such protections. If the Bankruptcy Court interprets exempt property law of a State or other jurisdiction, those exempt property rights should be gleaned and interpreted according to the jurisdiction enacting those exemption rights.

14. As a corollary matter, such interpretation of a Tribal Code, limiting its ability to protect by exempt property rules, income paid to members from the tribe’s activities located solely within Reservation boundaries, serves to limit tribe members’ freedom to move to communities outside the Reservation in order to seek economic or other benefits for the member’s spouse or dependents. As in the instant case, Joint Debtor is married to a non tribe member, who may have reasons not to want to reside on a Reservation.

In conclusion, Joint Debtor suggests and argues the Bankruptcy Court has adequate basis to find the Prairie Band Pottawatomie Nation Law And Order Code’s protection for per capita payments is based on the generation of the revenue on Reservation land where the Pottawatomie

Nation has exclusive jurisdiction for governance over tribal affairs and matters; that the Pottawatomie Nation's laws protect per capita payments at their source from Tribal Court judgments per Tribal Law And Order Code Section 4-10-16 (H), which is the sole court Joint Debtor's interest in per capita payments could be subject of an execution by a judgment creditor; and that Prairie Band Pottawatomie Nation Law And Order Code is both local law and applicable law to debtor as a resident of the State Of Kansas and an eligible member of the Prairie Band Pottawatomie Nation.

Respectfully submitted by:

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Certificate Of Service By U.S. Mail By Debtor's Counsel

I certify that on this 9th day of August, 2010, a true and correct copy of the foregoing:

“Debtor's Brief Regarding Trustee's Objection To Exemption Of Per Capita Payments To Joint Debtor Jeannie Marie Howley ”

was electronically filed with the court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system, and was forwarded first class postage prepaid to the following parties and/or counsel who do not receive notices electronically through the CM/ECF system:

Alen Ray Howley and Jeannie Howley, 98 US Highway 40, Lecompton KS 66050.

Dated: 08/09/2010.

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