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DIVISION II
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STATE OF WASHINGTON
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No. 43451-2-II, CONS with 43751-1-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

FIRST-CITIZENS BANK & TRUST COMPANY
Respondent/Cross Appellant,

v.

ROBERT R. HARRISON AND TIFFANY J HARRISON,
Appellants/Cross Respondents.

REPLY BRIEF OF APPELLANTS/CROSS RESPONDANTS ROBERT R. HARRISON AND TIFFANY J HARRISON

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I. ISSUE ON APPEAL

Whether the trial court erred by ruling 25 USC §410 exempts Indian trust income located in the Banner Bank and Fife Commercial Bank accounts from garnishment.

II. STATEMENT OF THE CASE

Appellants and cross-respondents, TIFFANY JANE HARRISON, and RANDALL HARRISON (Harrisons) had a judgment entered against them and in favor of First Citizens Bank (Bank). In an attempt to collect on the judgment, the Bank garnished bank accounts at Banner Bank and Fife Commercial Bank. The Bank has stipulated that the money in those bank accounts is income derived from rents of Indian lands placed in trust for the benefit of Tiffany Harrison. RP (June 22, 2012) at 8, 14. The trial court ruled that the funds in those accounts are protected under 25 USC §410 and were not subjected to garnishment. This appeal followed.

III. ARGUMENT

A. FIRST CITIZENS BANK HAS STIPULATED THAT THE FUNDS AT ISSUE IS INCOME DERIVED FROM INDIAN TRUST LAND.

The Bank argues that the Harrisons' claimed exemption must be stricken because the Harrisons did not provide adequate proof that the money at issues was income derived from Indian trust land. At the trial

court level, however, the Harrisons were prepared to present testimony and documents to support their contention that these funds were from rents of Indian trust land. Instead of proceeding with a proper *evidentiary* hearing under RCW 6.27.160(2), the Bank stipulated that the funds were derived from Indian trust land. At the trial court hearing, Brian King, attorney for the Bank stated:

> "We are not disputing that the funds derived from Indian trust land. We're absolutely not disputing that." RP (June 22, 2012) at Pg 8.
>
> "These funds come directly from Indian trust land, from rents derived from lands held in trust for Tiffany Harrison. I'm conceding it." RP (June 22, 2012) at Pg. 14.

The Bank cannot argue on appeal that the Harrisons have not met their burden of showing these funds derived from Indian trust lands when they stipulated to that fact at the trial court level. The only issue before this Court is whether or not 25 USC §410 exempts the garnishment of these funds.

B. THE PLAIN LANGUAGE OF 25 USC §410 EXCEMPTS THE GARNISHMENT OF THE BANNER BANK AND FIFE COMMERICAL BANK ACCOUNTS.

The United States has exempted from garnishment *all money* accruing from leases of Trust land owned by Indians. The language of 25 USC §410 is simple:

> No ***money*** accruing from any lease or sale of lands held in Trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

The statute applies to all money accruing for any lease of land so long as that land is held in trust by the United States for any Indian. The statute does not distinguish between money that has been deposited into a regular bank account, an Individual Indian Money account, or held in cash by the Indian. The statute simply states "*No money . . .*" which applies to all money accruing from such leases regardless of where that money is located.

In *Taylor v Grant*, 220 Or 114, 349 P.2d 282 (1960) the plaintiffs sought recover a portion of their purchase price paid to two Native American Indians for the purchase of trust land that failed due to fraud. The trust land was later sold to another party and the Taylors sued the former land owners and the bank where the proceeds of the sale had been deposited. The Oregon Supreme Court ruled:

> In this action, of course, plaintiffs hope to gain a judgment against the defendant bank and thus be afforded access to the funds the bank holds. Plaintiffs have overlooked an insurmountable defect in their plans. 25 U.S.C.A. § 410 provides:

> 'No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.'
>
> Although this statute has been on the books for more than 50 years, we can find no case in which it has been construed. However, its provisions are so clear in their application to this case that we have no hesitancy in holding that the statute precludes the recovery of any judgment against the defendant bank for any of the money it held at the time this case was filed. The money held by the defendant bank accrued from the 'sale of lands held in trust by the United States for any Indian' (in this case the defendants Grant and Thornton) and the present action seeks payment of a 'debt of, or claim against, such Indians contracted or arising during such trust period, * * *' The facts of this case bring it within the terms just quoted. No further consideration is necessary of the action against the defendant bank.
>
> *Taylor v Grant*, at 285.

The Alaska Supreme Court has ruled that proceeds of a condemnation case were protected by 25 USC §410. *Law Offices of Vencent Vitale v Tabbytite*, 942 P.2d 1141 (Alaska 1997). In that case, the Indian's former attorney filed a lien seeking security for the payment of his fees from litigation proceeds. After the condemnation award was affirmed, the money from the sale was interplead by the municipality. The trial court ruled that the money from condemnation sale was money accruing from the sale of Indian trust land and was protected by 25 USC §410. The Alaska Supreme Court affirmed,

holding that 25 USC §410 is designed to exempt certain Indian property from liability for payment of certain debts and noted that the statute must be construed broadly: "ambiguities must be resolved in favor of the Indians." *Tabbytite*, 942 P.2d 1141 (1997), quoting *Matter of City of Nome*, 780 P.2d 363, 367 (Alaska 1989).

In a California Court of Appeals case, the court ruled that a trial court order allowing deductions from rents on Indian trust land to pay for the leasing agent's commissions ran afoul of 25 USC §410. In re Guardianship of Prieto, 52 Cal.Rptr, 80, 243 Cal.App.2d 79 (1966). In that case the real estate agents who leased the defendant's property were not being paid the commission they allegedly were owed. They sought and obtained an order from the trial court authorizing payment of their commissions by deducting it from the rents received. The California Court of Appeals ruled:

> That part of the order appealed from authorizing deduction of the commission from rental, under the circumstances of this case, is contrary to controlling federal law in the premises. * * * The proceeds of such land are subject to the same trusteeship provisions as the land. (citation ommitted) In this regard, § 410, Title 25, of the United States Code specifically provides: 'No money accruing from any lease * * * of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian * * * except with the approval and consent of the Secretary of the Interior.' As a consequence,

> any charge upon rentals due under the lease may not be effected without approval of the Secretary of the Interior.

The Bank argues that 25 USC §410 only applies to money held in Individual Indian Money (IMM) accounts. The Bank appears to misread 25 USC §410 by arguing that it only exempts funds "held in trust by the United States." The plain language of the statute exempts money accruing from leases or sale of *lands* held in trust. The land must be held in trust by the United States to trigger the protection of the funds derived therefrom.

The statue does not require the money to be held in trust as the Bank suggest. The statute does not mention IIM accounts. If Congress wanted to limited the application of 25 USC §410 to IIM accounts it could have simply stated so. Instead Congress drafted the protection in 25 USC §410 to apply to *all money* accruing from any lease of land held in Trust by the United States for an Indian. In fact, in none of the three cases cited above was the money at issue in an IIM account yet the court ruled that the funds were protected by 25 USC §410.

If the Bank's position were adopted and the funds had to be in an IIM account to be protected, then 25 USC §410 would be rendered meaningless. If the statute only protected money while it was in an IIM

account and allowed the money to be garnished once it reached the Indian's hands, then the money is not really protected.

A similar issue was decided by the Supreme Court in *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883, (1956). In that case, an Indian had received property under the General Allotment Act of 1887. The property was held in trust by the United States and protected by Section 6 of the General Allotment Act which provides:

> That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent.
> 25 U.S.C. §349.

The Indian in the *Squire* case sold the timber on his land and the IRS attempted to force him to pay income tax on the proceeds of sale. The court, by quoting Indian Law Expert Felix S. Cohen stated "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." *Squire*, 351 U.S. at 9 (1956). The court ruled that the protections in 25 USC §349 would be meaningless if the IRS could tax the income derived from the land:

> The wisdom of the congressional exemption from tax embodied in Section 6 of the General Allotment Act is manifested by the facts of the instant case. Respondent's timber constitutes the major value of his allotted land. The Government determines the conditions under which the cutting is made. Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent. It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondent under these circumstances would, in the words of the court below, be 'at the least, a sorry breach of faith with these Indians.
> *Squire*, 351 U.S. at 10 (1956).

Likewise in this case, the protections in 25 USC §410 would be meaningless if the money accruing from the lease of Indian lands were no longer protected once the money reaches the Indian's hands as the Bank here is arguing.

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C. ALLOWING GARNISHMENT OF MONEY ACCRUED FROM LEASES OF INDIAN TRUST LAND ONCE THAT MONEY REACHES THE INDIAN WOULD BE INCONSISTENT WITH OTHER GARNISHMENT EXEMPTIONS.

RCW 6.15.010 specifies exempt property that is protected from garnishments. Included in that list are two exemptions that apply to money. Section 3(d) exempts "Any past due, current, or future child support paid or owed to the debtor, which can be traced" and section 3(f) protects the ". . . proceeds of a payment no to exceed sixteen thousand one hundred fifty dollars on account of personal bodily injury . . ." These exemptions apply to the money paid or owed to the debtor. The money does not lose its exempt status once it is paid to debtor. As long as the money is traceable, it is protected from garnishment. Likewise, there is nothing is 25 USC §410 that indicates the money accruing from leases of Indian trust property loses its exempt status once it reaches the hands of the Indian.

The same is true of Social Security benefits even after they are paid to the beneficiary. Social Security benefits are exempt from execution, levy, attachment, garnishment, or other legal process, or from the operation of any bankruptcy or insolvency law. The exceptions are that benefits are subject: (1) to the authority of the Secretary of the Treasury to make levies for the collection of delinquent

Federal taxes and under certain circumstances delinquent child support payments; and (2) to garnishment or similar legal process brought by an individual to enforce a child support or alimony obligation. Section 207 of the Social Security Act provides:

> The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
> 42 USC §407(a)

Except for the two exemptions, Social Security benefits are protected from garnishment even after the money has been received by the beneficiary.

Veterans benefits are exempt from garnishment even after they are paid to the veteran. Subpart (a)(1) of 38 USC §5301 provides in relevant part:

> **(a)(1)**Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

The protections provided to veterans and beneficiaries of Social Security income were analyzed along with the protections provided to Indians in 25 USC §410 by the Honorable Frank Burgess in *Wright v Riveland* (1997). That case involved money paid to inmates that was being taken by taken by the State of Washington pursuant to RCW 79.09.111. The State was taking a percentage of monies paid to inmates from Social Security, Veterans Benefits, leases or sales of land held in trust for Indians, proceeds from civil rights actions, and benefits distributed under ERISA. *Wright v Riveland*, 219 F.3d 905, 910 (9th Cir 2000) (discussing trial's court distinction of exemptions for Veteran's, Social Security benefits, proceeds from Section 1983 actions and *certain funds distributed to Native Americans under 25 U.S.C. SS 410* with benefits distributed under an ERISA plan). Judge Burgess declared RCW 79.09.111 void to the extent that it authorized funds to be taken from benefits received from Social Security benefits, Veteran's benefits, proceeds from civil rights action, and money accrued from leases or sale of Indian trust property. *Id.* This ruling was not disturbed on appeal. *Id.*

Other statutes only protect the funds before they are distributed to the payee but no limitation exist in 25 USC §410. For example, RCW 41.26 lays out the LEOFF retirement system which was recently at issue in *Anthis v. Copland*, 270 P.3d 574, 173 Wn.2d 752 (2012). That statute provides:

> Subject to subsections (2) and (3) of this section, the right of a person to a retirement allowance, disability allowance, or death benefit, to the return of accumulated contributions, the retirement, disability or death allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this chapter, and ***the moneys in the fund created under this chapter***, are hereby exempt from any state, county, municipal, or other local tax and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or any other process of law whatsoever, and shall be unassignable.
> (emphasis added)

That statue explicitly protects the *money in the fund* and is designed to protect the fund from being attached or garnished. Once the money leaves the fund it is no longer protected.

The limitation in the LEOFF statute and statutes like it is explicit and not present in 25 USC §410. The plain langue in 25 USC §410 protects *ALL* the money accruing from any lease of lands held in trust. It makes no mention of accounts or plans

or other location where the money might be temporarily placed before it makes its way to the Indian.

D. THE BANK'S RELIANCE UPON *PURNEL* AND IBIA DECISIONS IS MISPLACED.

The Bank relies upon dicta in *Purnel v Purnel*, 52 Cal. App. 4th 527, 60 Cal.Rptr.2d 667 (1997) to funds must be maintained in a trust account to be protected. That case involved child support obligations of an Indian who received income from leases of property on land held in trust. The wife was ordered to pay child support by the trial court. The trial court found ". . . an order for [child] support . . . does not violate 25 USC §410, in that [the] court is merely making a determination as to [wife's] ability to pay child support . . . and rendering an Order pursuant to such a finding, but is not designating, nor ordering it to be paid from any particular source." The court went on to state ". . . there is no interference by the Court with any [Indian] tribal interest in that Order of the Court . . . is not against [wife's] Indian Trust Allocations." The Court of Appeals noted that language of the trial court represented a considered resolve by that court not to infringe upon any federally protected rights of a Native American. *Purnel*, 52 Cal. App. 4th at 529, 60 Cal.Rptr.2d at 669 (1997). The

wife appealed the Trial Court's order on jurisdictional grounds. Id at 553.

The Court of Appeals ruled that California did in fact have jurisdiction and affirmed the trial court's order. In dicta, the Court stated that if the wife still refused to pay her support obligations, the husband could move for an issuance of a writ and levy execution upon the wife's assets. The Court went on to state "One such asset could well be wife's personal bank account." Despite the fact that garnishment of the wife's accounts (including money accruing from rental income of trust lands) was not litigated, the Court stated that such rental income lost its "Indian" character once it was deposited into a personal account.

Dicta from a California child support case is not controlling authority. The issue as to whether money accruing from leases on Indian trust property is exempt from garnishment was not litigated in *Purnel*. The Court's comments regarding income from trust lands losing its "Indian character" once received conflict with the plain language of 25 USC §410. Moreover, the Court went to great lengths to explain that the child support order did not require her to pay support from any particular source of funds:

> The trial court's support order stands entirely independent of and unrelated to any particular source of funds which may be used to discharge the order. No order to pay money nor a money judgment in our system of jurisprudence implies from whence the money to pay or satisfy it shall come. There are occasional orders which do create charges or liens on particular funds: however, that was expressly disclaimed here. It is for this reason that wife has been unable to cite us to any authority which supports her illogical premise that the order that she pay child support amounted to a charge on income derived from the lease of Indian Trust Allotment lands.

Purnel, 52 Cal. App. 4th at 540 (1997).

The Bank also cites and relies upon several decisions from the Department of Interior Board of Indian Appeals (IBIA). The parties in those cases seeking funds from protected by 25 USC §410 followed the law and sought "approval and consent of the Secretary of the Interior". The Bank in this case could have followed the law and sought similar approval and consent from the Secretary of the Interior but they chose to instead garnish the bank accounts which runs afoul of federal law.

VI. CONCLUSION

The Harrisons has properly filed an exemption to the garnishment of the Banner Bank and Fife Commercial Bank Accounts. The exemption is based upon 25 USC §410. That statute clearly does not limited the protection to money that has not yet reached the Indian

(the person the statute is designed to protect). If there were any ambiguities in the statute, they must be resolved in favor of the Harrisons. Protecting the funds after they have been paid to the Indian is consistent with other garnishment exemptions such as Social Security benefits, Veteran's benefits, and child support payments. To hold otherwise and allow the Bank to garnish funds derived from the leases of Indian trust land would render 25 USC §410 meaningless.

DATED this 8th day of May 2013.

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DIVISION II

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STATE OF WASHINGTON

BY_____
DEPUTY

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

FIRST CITIZENS BANK & TRUST COMPANY, Appellants, v. ROBERT RANDALL HARRISON and TIFFANY JANE HARRISON, husband and wife and the marital community comprised thereof, Respondent	No. 43751-1-II Cons w/ 43451-2-II AFFIDAVIT OF SERVICE

43451-2-II, CONS with 43751-1-II

I, Erik F. Ladenburg, declare the following:

1. I am one of the attorneys representing the Respondents in this appeal.

2. On May 8, 2013, I caused the following documents to be electronically delivered and personally served on:

1. Respondents' Reply Brief

2. Respondents' Motion to Withdraw Appeal

To the following parties:

Brian King
DAVIES PEARSON, P.C.
920 Fawcett
Tacoma WA 98401.

I Declare under the penalty of perjury under the laws of the State of Washington the above statement is true.

Signed in Tacoma, WA, this 8th day of May 2013.

ERIK F. LADENBURG