Jan Hamilton #08163
Chapter 13 Trustee
PO Box 3527
Topeka, Kansas 66601-3527
(785) 234-1551

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:
WILLIAM LEROY MCDONALD Case No.: 14-40529-13
BONNIE KAYE MCDONALD,
Debtors.

CHAPTER 13 TRUSTEE'S BRIEF ON ISSUE OF TRIBAL GAMING PER CAPITA PAYMENTS

Before the Court for consideration are the Debtors' Plan, the Trustee's Objection to Confirmation / Motion to Dismiss, and the Trustee's Objection to Debtors' Schedule C. Jan Hamilton, Chapter 13 Trustee has objected, asserting that the Debtors' tribal gaming per capita payments are property of the estate and cannot be claimed as exempt under Tribal law. In support of his objections, the Trustee asserts as follows:

I. ISSUES PRESENTED

This case, along with the issues being briefed simultaneously in *In re Scott* (Case No. 14-40543), presents an opportunity to revisit "property of the estate" and exemption issues which surround the interplay between the tribal law and the Bankruptcy Code relative to tribal gaming "per capita" payments.

These matters were previously visited by Kansas bankruptcy courts, in *In re McDonald* (Chapter 7), [1] *In re Hutchinson* (Chapter 13) [2] and *In re Howley* (Chapter 7). [3] The former two cases were decided by this Court. All three cases were decided adversely to the debtors.

After the decision in *In re Howley*, and perhaps queued by that decision, the Prairie Band Potawatomi Nation Indian Tribe[4] (hereafter "PBPN" or "Tribe"), amended the Potawatomi Law and Order Code (hereafter "Tribal Code"). At first glance, the amendment might suggest that the per capita payments to tribal members are either not assets of the estate or are exempt. However, The Trustee will show that the Tribal Code changes have no impact upon whether per capita payments are an asset of the Chapter 13 estate, and that the Bankruptcy Code does not permit the Debtors to claim the per capita payments as exempt under tribal law. Further, even if the changes in the Tribal Code are valid in bankruptcy, they are favorable to the debtor only in the context of a Chapter 7, because of 11 U.S.C. 1306, which expands the definition of §541 property of the estate in a Chapter 13. Two specific Chapter 13 issues are suggested:

---

[1] *In re McDonald*, 353 B.R. 287 (Bankr.D.Kan. 2006)(Karlin, J.).
[2] *In re Hutchinson*, 354 B.R. 523 (Bankr.D.Kan. 2006)(Karlin, J.).
[3] *In re Howley*, 446 B.R. 506 (Bankr.D.Kan. 2010)(Somers, J.)
[4] The Trustee refers to the Tribe as "Prairie Band Potawatomi Nation," as that is the way the Tribe currently refers to itself. See http://www.pbpindiantribe.com. The Per Capita Ordinance refers to the tribe as "Prairie Band of Potawatomi Indians of Kansas," as do prior rulings of the Kansas bankruptcy courts in *McDonald*, *Hutchinson*, and *Howley*, supra. These references are all to the same Tribe of which Debtor Bonnie McDonald is an enrolled member. In fact, the Debtors in the current case are the very same debtors as were in the former McDonald case referenced in FN1.

1. Do 11 U.S.C. §§ 541 and 1306 require findings that post-petition per capita payments received by the Debtor, an enrolled member of the Tribe are assets of the bankruptcy estate?

2. Are post-petition per capita payments received by the debtor exempt under Kansas law or the Bankruptcy Code?

II. STATEMENT OF THE FACTS

The Parties have submitted stipulations of fact, which are incorporated herein in their entirety. In brief summary, Debtor Bonnie McDonald is a member of the PBPN, and as such receives quarterly per capita payments, estimated at $361.00 per month from the Tribe's gaming revenue.[5] Debtors are below-median income, and do not reside on the PBPN reservation. Debtors claim the per capita payments as exempt under the Tribal Code, and do not propose to pay in any amount to satisfy a best interest of creditor's test analysis with regard to the per capita payments. Under the Debtors' plan as filed currently, approximately $495.00 would go to unsecured claims. Mrs. McDonald is disabled, and aside from the per capita payments, the Debtors' only other source of income is social security (hers being Social Security Disability).

This case involves the interpretation of the PBPN Tribal Code and recent changes to it, as relates to per capita distributions to enrolled Tribal members who are debtors in Kansas bankruptcy proceedings. See Chapter 4-14 of the Tribal Code, attached to the Stipulations as Exhibit A, Doc. 33. Per capita distributions are made to all enrolled tribal members in accordance with the PBPN Per Capita

[5] Debtors' Schedule I, Line 8h, Doc. 1, 29.

Ordinance, and that Ordinance has not been amended in any relevant manner since this Court's prior rulings on the issue.[6] The current version of the Per Capita Ordinance has been provided to the Court as a supplement to the Stipulations. Doc. 40, Exhibit B.

III. Arguments and Authorities

A. Relevant Statutes

Pursuant to the Indian Gaming Regulatory Act (hereafter "IGRA") of 1988, federally-recognized Indian tribes are authorized to negotiate compacts with the states in which they are located to provide casino gambling (Class III gaming) on Tribal lands.[7] The IGRA requires the Tribe to adopt a revenue allocation plan (RAP) outlining how the Tribe will dispose of casino revenues.[8] The IGRA permits, but does not require, the Tribe to disburse such revenue in the form of per capita payments to Tribal members.[9] In order to disburse such per capita payments, the Tribe must adopt a per capita ordinance and obtain the approval of the Secretary of the Interior.[10]

Per 11 U.S.C. 541, the bankruptcy estate, for purposes of this discussion, is comprised of, "all legal or equitable interests of the debtor in property as of the

---

[6] "The Prairie Band of Potawatomi Indians of Kansas Tribe (the "Tribe") owns a casino on its reservation located approximately 15 miles north of Topeka, Kansas. A portion of the net quarterly revenue realized by this casino is divided among the enrolled members of the tribe on a per capita basis. Whether to make distributions to members of the Tribe, as well as the exact amount of any distributions, is in the discretion of the governing body of the Tribe. Once the Tribe makes a determination that a distribution will be made and decides the amount of the total distribution, each member of the Tribe is entitled to receive an equal distribution, as fixed by tribal ordinance. Members of the Tribe are not required to provide any services, or to exchange any property of value, to receive their per capita distributions." *In re McDonald,* 353 B.R. at 289.

[7] 25 U.S.C. § 2701 et. seq.

[8] 25 U.S.C. §2710(b)(2)(B).

[9] 25 U.S.C. §2710(b)(3).

[10] Id.

commencement of the case," except for property which is excluded under §541(c)(2).[11] That section excludes from the estate property upon which there is a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law" by providing that the restrictive provision "is enforceable in a case under this title."[12] Therefore, an *enforceable spendthrift clause in a valid trust* under nonbankruptcy law does exclude from the bankruptcy estate the trust property protected by the provision. The bankruptcy estate includes all other property rights of the debtor, even those that are contingent in nature.[13] To determine the property rights of the Debtor, one must look to the applicable state law.[14] In Chapter 13, 11 U.S.C. 1306 expands the §541 definition of estate property to include all such property rights that the Debtor "acquires after the commencement of the case but before the case is closed, dismissed or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first" thereby capturing property that the debtor acquires post-petition.[15]

11 U.S.C. 1325(a)(4) provides that the Court shall confirm a plan only if the plan provides that: "the value, as of the effective date of the plan, of property to be

---

[11] 11 U.S.C. 541 cited in pertinent part only.
[12] 11 U.S.C. 541(c)(2).
[13] *In re Palmer*, 167 B.R. 579 (Bankr.D.Ariz. 1994), cited by *In re Kedrowski*, 284 B.R. 439, 445 (Bankr.W.D.Wisc. 2002).
[14] *In re Miner*, 185 B.R. 362 (N.D.Fla. 1995), cited by *In re Kedrowski*, 284 B.R. at 445.
[15] 11 U.S.C. 1306 provides:
"(a) Property of the estate includes, in addition to the property specified in section 541 of this title—
(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and
(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.
(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."

distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date." This is known as the "best interest of creditors" test – unsecured creditors must get what they would have received if the case was a Chapter 7. The burden to prove that the plan meets all of the requirements of confirmation, including the "best interest of creditors" test, lies with the Debtor.[16]

To determine what exemptions can be claimed by a debtor, one must look to state and bankruptcy law. " Section 522(b) of the Bankruptcy Code specifies that a debtor can take the exemptions enumerated in § 522(d) unless applicable state law specifically provides otherwise, in which case debtors are restricted to the exemptions found in state and local law, as well as exemptions found in federal law other than the Bankruptcy Code."[17] Which state's law is applicable to a debtor is determined by where the debtor has been domiciled during the 2 ½ years prior to the bankruptcy filing.[18] 11 U.S.C. 522(b)(3)(A) provides:

> "(3) Property listed in this paragraph is—
> (A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition to 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 or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place".

[16] In re Hutchinson, 354 B.R. 523 (Bankr. D. Kan. 2006).
[17] Hutchinson, 354 at 528, citing In re Lampe, 331 F.3d 750, 754 (10th Cir. 2003). See also K.S.A. 60-2312.
[18] 11 U.S.C. 522(b)(3)(A).

Therefore, if the debtor has been domiciled in a single state for the 730 days prior to the bankruptcy filing, then one must look to the laws of that state to determine what exemptions the debtor can claim.

"Kansas has opted out of the federal exemptions, and has enacted its own set of exemptions."[19] There is no reference in the Kansas exemption statutes to the PBPN Tribal Code or any other tribal law.[20] Kansas exemptions do specifically permit an individual debtor in bankruptcy to claim those exemptions listed in 11 U.S.C. 522(d)(10).[21]

The PBPN has elected to distribute gaming revenue to enrolled Tribal members. In accordance with the IGRA as referenced supra, the PBPN adopted a Per Capita Ordinance, which was approved by the Secretary of the Interior, most recently on August 25, 2008. See PBPN Per Capita Ordinance, pg. 7. The Per Capita Ordinance has not been amended in a manner relevant to the current issue since the Court's prior rulings interpreting the Per Capita Ordinance.[22] Under the Ordinance, the PBPN's net gaming revenues are divided equally among all enrolled members of the tribe on a per capita basis.[23] The Per Capita Ordinance provides that a certain percentage[24] of net gaming revenues "Shall be used for Per-Capita distributions to all eligible enrolled tribal members."[25] By a majority vote of the

[19] *In re Hutchinson*, 354 B.R. at 528. See also K.S.A. 60-2312.
[20] See K.S.A. 60-2301 et seq.
[21] K.S.A. 60-2312(b).
[22] *In re McDonald, supra.*
[23] PBPN Per capita Ordinance, Article V, Calculation and Disbursement of Per Capita Payments, Section 1. See also, *In re McDonald*, supra.
[24] The percentages were redacted by PBPN's counsel prior to the document being provided to the Trustee.
[25] PBPN Per Capita Ordinance, Article III, Allocation Plan, Section 1(b).

General Council, or in some instances by the Tribal Council, the Tribe may adjust the percentages of funding outlined in the Per Capita Ordinance under certain circumstances.[26] "Members of the tribe are not required to provide any services, or to exchange any property of value, to receive their per capita distributions."[27]

In July of 2013, the Tribal Code was amended. First, the exemption section was expanded to include actions of other courts of competent jurisdiction. See Tribal Code, Section 4-10-16. Also, subsection "H" was stricken, which was the exemption related to gaming revenue. A full list of the exemptions can be found on page 4-33 of Exhibit A of the stipulations.

Lastly, Section 4-14-1 "Claims Against Per Capita" was added. That section is reproduced here in its entirety, to assist the Court:

"Section 4-14-1. Claims Against Per Capita.
(A) Authority. Pursuant to the PBPN Constitution, Article V, Section 1, the Tribal Council has the responsibility for lawmaking.
(B) Jurisdiction. As required by the Nation's Constitution and amendments thereto, the authority and jurisdiction of the Nation shall extend to the fullest extent possible, including, without limitation to all Tribal Members, wherever located, exercising any tribal rights pursuant to federal, tribal or state law.
(C) Purpose. This Section establishes policy and rules for permitted claims against a Tribal member's per capita. For over two hundred years, federal Indian policies, which included forced Assimilation and forced Allotment resulted in the deaths of hundreds of thousands of Indian peoples, the taking of millions of acres of tribal homelands, the suppression of tribal religion and culture, and the destruction of tribal economies. The aftermath of these insidious policies continue to plague Indian country to this day. In 1987 the U.S. Supreme Court upheld Indian gaming as a crucial means by which tribal governments could exercise tribal self-determination and self-governance and begin to generate governmental revenue for essential tribal services and functions. Revenue from the Prairie Band Potawatomi Nation Casino has begun to change life for tribal members both on and off the Reservation and per capita payments help to assuage and redress the multiple wrongs that the federal policies created.

[26] Id, Section 2.
[27] *In re McDonald*, supra.

(D) Definitions. For purposes of this Section and pursuant to Article II, Section 1 of the Prairie Band Potawatomi Nation Per Capita Ordinance as last amended, the following definitions shall apply:
(1) Tribal Member: means any individual who is currently enrolled on the Prairie Band Potawatomi Tribal roll.
(2) Tribal Council: means the seven member elected governing body of the Prairie Band Potawatomi Nation. This seven member body consists of the Tribal Chairperson, Tribal Vice Chairperson, Treasurer, Secretary, and three Tribal Council Members, who exercise the executive and legislative powers enumerated in the Prairie Band Potawatomi Nation Constitution.
(3) Prairie Band Potawatomi Nation ("Nation"): also known as the Prairie Band of Potawatomi Indians means the federally recognized Indian tribe exercising jurisdiction over the Prairie Band Potawatomi reservation and other Indian lands, which are held in trust by the Federal Government for the tribes use and benefit.
(4) Per-Capita: means the payment provided to all enrolled members of the Prairie Band Potawatomi Nation, which are paid directly from the Prairie Band Potawatomi Nation Casino Net Gaming Revenues pursuant to the Prairie Band Potawatomi Nation Per Capita Ordinance then in effect, and in accordance with the Indian Gaming Regulatory Act, as defined herein.
(5) Per-Capita Pay Period: means the quarterly period of time established by the Tribal Council that is used to calculate Net-Gaming Revenues actual and projected available for the Per-Capita Payment in the period. The four quarterly periods end on March 31st, June 30th, September 30th and December 31st of each **year.**
(6) Per Capita Share: means a Tribal Member's equal share of a Per Capita payment prior to a reduction for any withholding, garnishment, or levy permitted by this Section, but after withholding at the source required by federal income tax law.
(7) Eligible Tribal Member: means any living member of the Prairie Band Potawatomi Nation, who has not relinquished or waived rights to be on the tribal roll.
(8) IGRA: means the Indian Gaming Regulatory Act of 1988 (public law 100-497) 102 stat. 2467 dated October 17, 1988 (codified at 25 U.S.L.. 2701-21 1988) and any amendments.
(9) Prairie Band Potawatomi Nation Per Capita Ordinance: The Tribal law approved by the United States Secretary of Interior in compliance with the Indian Gaming Regulatory Act (IGRA (25 U.S.C. Section 2701)) which governs and describes the Nation's Revenue Allocation Plan including Per Capita distributions.
(10) Distribution Date/s: means those dates set by the Tribal Council for the distribution of a Per-Capita Payment. Those dates set by the Tribal Council are March 15th, June 15th, September 15th and December 15th, of each year.
(11) Eligibility Date: means the day a person's application is approved for Tribal Membership by the Enrollment Committee. The eligibility determination dates for distributions are February 15th, May 15th, August 15th and November 15th of each year.

(E) Character of Per Capita.
(1) A Per Capita payment is a personal benefit to a Tribal member.
(2) A Per Capita payment is a periodic payment not a property right.
(3) A Per Capita Share is property of the Nation until such time as a distribution is duly made.
(F) Distribution of a Per Capita Payment. A distribution of a Per Capita payment occurs when the Per Capita payments are placed in the U.S. Mail or otherwise transferred to a Tribal Member.
(G) Permitted Claims against a Per Capita Share.
(1) A Per Capita Share shall not be subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, seizure, attachment or other legal or equitable process except that a Per Capita Share may be subject to the following claims:
(a) A debt or monetary obligation owed by a Tribal Member to the Nation and that is evidenced by (1) a judgment of the PBPN District Court permitting recovery from such Tribal members' Per Capita Share; or (2) a writing signed by a Tribal Member stating their consent to allow payment from their Per Capita Share for a debt that is owed to the Nation.
(b) An order of garnishment issued by the PBPN District Court for child support pursuant to the Potawatomi Law and Order Code Child Support Code, the Juvenile Code or the Juvenile Offender Code or any other applicable tribal law;
(c) A federal income tax levy issued against the income or property of a Tribal Member;
(2) Priority of Claims. If there is more than one claim against the same Per Capita payment, the claims shall be paid in the following priority:
(a) Federal tax levy, to the extent that child support is allowable and payable
(b) Child support
(c) Debts owed to the Nation
(3) Other Remedies for Debts Owed to the Nation. Nothing in this Section shall restrict the Nation from obtaining security for and enforcing the payment of a debt that is owed by a Tribal Member to the Nation through mortgages, liens, foreclosures, attachments, and other remedies.
(H) Prohibited Claims. Except those claims that are permitted in Section (G) above, a Per Capita Share shall not be subject to anticipation, alienation, sale, transfer, assignment pledge, encumbrance or charge, seizure, attachment or other legal or equitable process; and any proceeding for those purposes shall not be recognized nor enforceable.
(Amended by PBP TC No. 2013-142, July 15, 2013)"

B. Relevant Case Law

One of the most frequently cited cases on the issue is *In re Kedrowski*, from the Western District of Wisconsin.[28] Debtor Nyree Kedrowski, a member of the Wisconsin Indian tribe Ho-Chunk Nation, received quarterly per capita distributions of tribal gaming revenue.[29] Debtor initially claimed the per capita distributions were not property of the estate (claiming them only as "income" on Schedule I), but later amended Schedule C to claim the payments as exempt under the §522(d)(5) "wildcard" exemption.[30]

As with most per capita allocation plans, pursuant to the Ho-Chunk Nation Per Capita Ordinance, the tribal legislature decides what amount, if any, shall be disbursed as per capita payments.[31] The Ordinance further requires that all tribal members share equally in the allocation.[32] The Court held that as a member of the Ho-Chunk Nation, that "if the tribe does decide to make a distribution, the debtor has a 'right' to receive her share."[33] Under Wisconsin law, this right to payment is a "general intangible" property right, much like a partner's right to a distribution under a partnership.[34]

---

[28] *In re Kedrowski*, 284 B.R. 439 (Bankr.W.D.Wisc. 2002).
[29] Id.
[30] 11 U.S.C. 522(d) provides, in pertinent part: "**(d)** The following property may be exempted under subsection (b)(2) of this section: **(1)** The debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor. **. . . (5)** The debtor's aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection."
[31] *In re Kedrowski*, 284 B.R. at 443.
[32] Id. at 441.
[33] Id. at 446.
[34] Id. at 445.

Debtor next argued that even if the per capita payments were "property," that the payments were excluded from the estate pursuant to 11 U.S.C. 541(c)(2). Debtor asserted that the Ho-Chunk Nation's "Claims Against Per Capita Ordinance" acted as a spendthrift trust of the type referenced in §541(c)(2). Section 102 of the Ordinance provides that "No tribal member, nor any person claiming any right derived from a Tribal Member, ... shall have any right, title, interest or entitlement in any Per Capita Share unless and until Payment of the Per Capita Distribution to which it relates occurs.[35] The Ordinance further provides, in Section 104, that: "[T]he Nation shall not recognize or enforce any claim, garnishment, levy, attachment, assignment or other right or interest in a Per Capita Share. The Nation shall pay the full amount of the Per Capita Share, less any claim recognized under Section 103, to the Tribal Member whose interest in the Per Capita Distribution is represented thereby at the time of Payment."[36] As the Court noted, the Ordinance does not state that the "per capita distributions 'shall not be liable' for the tribal members' debts" and therefore is not exempt.[37] The Court also easily disposed of the Debtor's claim that the tribe's sovereign immunity was relevant, as there was no action against the tribe itself, and a tribal member does not enjoy such immunity unless acting as a representative of the tribe.[38] The Court found that the future per capita payments were nonexempt property of the

[35] Id. at 450.
[36] Id. at 450-51.
[37] Id. at 451.
[38] Id. at 451 .

bankruptcy estate, and Debtor was ordered to turn over future per capita payments in excess of the claimed exemption amount under the wildcard exemption.

Kansas bankruptcy courts have had numerous opportunities to rule on the per capita issue. The first of the Kansas cases is *In re McDonald*.[39] Debtors filed a Chapter 13, and then converted to Chapter 7. Debtor Bonnie McDonald, as an enrolled member of the Prairie Band of Potawatomi Indians of Kansas Tribe, received quarterly per capita gaming disbursements. The Chapter 7 Trustee sought turnover of post conversion per capita payments.

Debtors did not challenge the issue of whether or not the per capita payments were property of the estate. Rather, they claimed the property as exempt under 11 U.S.C. 522(b) and (b)(2)(B), §541(c)(2), and also under the Potawatomi Tribal code §4-10-16. The Court summarily disposed of the §522 arguments as inapplicable to the facts.[40]

With regard to the tribal code exemption, the Court found that not only did the wording of the tribal code indicate it applied *only* as to tribal court judgments, but that the Debtors were not entitled to rely in bankruptcy upon any exemption contained within the tribal code.[41] The Court reasoned that §522(b) permitted debtors to claim either the federal exemptions found in §522(d) or the exemptions available to the debtors in the state in which the debtor was domiciled for the 730 days prior to filing, unless that state has "opted out" of the federal exemptions.[42]

---

[39] *In re McDonald*, 353 B.R. 287 (Bankr.D.Kan. 2006).
[40] Id. at 291.
[41] Id. at 292.
[42] Id.

Kansas is an "opt-out" state, although it does permit debtors to claim certain federal exemptions under §522(d)(10).[43] The Code does not permit debtors to claim the exemptions of another governmental entity or territory.[44] The *McDonald* Court further indicated that even if §522 permitted use of tribal exemptions, such exemptions would not be available to the Debtors, who did not reside on the Potawatomi Reservation.[45] As a result, Kansas exemptions were the only exemptions available to the Debtors.[46]

The Court further held that the per capita distributions were not exempt under §541(c)(2), as nothing in the tribal ordinance created a "trust" upon per capita payments made to competent, adult members of the tribe.[47] In fact, the Tribe evidenced its understanding of how to create such a trust by providing that per capita distributions to minors would be held in an express trust.[48] The Court succinctly stated, "Property is not subject to a trust simply because a governmental entity has declared that property exempt from execution to satisfy a judgment." The Court ordered Debtors to turn over all future per capita distributions until all claims and expenses of the estate are paid.[49]

The same Kansas bankruptcy court similarly ruled in *In re Hutchinson*.[50] The facts were nearly indistinguishable from *McDonald*, except that Debtors had converted to Chapter 13. Debtors claimed the per capita payments as exempt under

[43] K.S.A. 60-2312.
[44] In re McDonald, 353 B.R. at 292.
[45] Id.
[46] Id.
[47] Id. at 294.
[48] Id.
[49] Id. at 295.
[50] In re Hutchinson, 354 B.R. 523 (Bankr.D.Kan. 2006).

§522(d)(10)(A) and 25 U.S.C. § 410. The Trustee asserted that the per capita payments were not exempt, and that Debtors had failed to meet the "best interest of creditors" test of 11 U.S.C. 1325(a)(4).

The *Hutchinson* court found that the per capita distributions, including the right to receive them in the future, do constitute property of the estate, referencing *In re McDonald* and concurring with *In re Kedrowski*. The Court further found that the per capita distributions were not exempt. The Court was not persuaded by the Debtors' argument that per capita distributions are public assistance benefits entitled to exemption under §522(d)(10(A), finding that per capita payments "are not based upon the need of individual tribal members but, rather, are distributed on a per capita basis, regardless of the financial circumstances of individual recipients."[51]

Debtors argued that even if the per capita payments were not exempt, Debtors have satisfied the requirements of confirmation because Debtors' plan proposes to devote all of their projected disposable income to plan payments during the life of the plan. The Court properly noted that Debtors were mixing apples and oranges. "Debtors' commitment to pay all of their disposable income to the plan payments during the life of the plan satisfies the requirements of § 1325(b)(1)(B), otherwise known as the best effort requirement, but it has no bearing on the "best interest of the creditors" test. The requirements of § 1325(b)(1) and § 1325(a)(4) must both be met to secure confirmation of a plan, and the fulfillment of one has no

[51] Id. at 530.

bearing on the other."[52] The Court sustained the Trustee's objections to exemption and confirmation.[53]

Seven years after *Kedrowski*, the bankruptcy court in *In re Fess*, held the opposite of the *Kedrowski* court, creating a split in the Western District of Wisconsin.[54] The *Fess* court opined that prior courts had mistakenly applied state law to determine the debtor's interest in the tribal per capita payments.[55] Citing to *In re Decora*[56] and *In re Airadigm*[57], the court held that because of the federal interest involved, the issue falls outside of state law.[58] However, the facts of *Decora* were distinguishable, as that case involved determining who had a superior interest – the Chapter 7 trustee as a judgment lien creditor or a bank asserting a security interest held under Tribal law. The court also expanded the *Airadigm* decision to make it applicable, holding, "Although federal law does not itself create the property right (as it did in *Airadigm*), it specifically authorizes tribes to create a certain type of property: per capita distributions."[59] Therefore, the court found that pursuant to the Ho-Chunk Nation's Per Capita Ordinance, the Debtor had only an expectancy of payment, not a property right sufficient to fall within the net of 541(a)(1).[60]

---

[52] Id. at 531(internal citations omitted.)
[53] Id. at 534.
[54] *In re Fess*, 408 B.R. 793 (Bankr.W.D.Wisc. 2009).
[55] Id. at 798.
[56] *In re Decora*, 396 B.R. 222 (Bankr.W.D.Wisc. 2008), holding that the Chapter 7 Trustee, as a hypothetical judgment lien creditor, would not have rights in debtor's per capita payments superior to those of the bank's security interest, under tribal law.
[57] *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008).
[58] *In re Fess*, 408 B.R. at 798.
[59] Id.
[60] Id at 799.

In a 2010 Kansas bankruptcy court decision, *In re Howley*, Chapter 7 debtor Jeannie Howley, a member of the Prairie Band of Potawatomi Indians of Kansas Tribe, claimed that her post-petition quarterly per capita payments were exempt under §4-10-16(H) of the Potawatomi Law and Order Code.[61] Debtors argued that the *McDonald* court erred when it held that the tribal exemption was not available to tribal members that reside outside of the reservation boundaries.[62] Debtors further claimed that the tribal ordinance is "applicable law" as referenced in §522(b)(3).[63]

The Debtors did not assert that the per capita payments were not property of the estate. In fact, as the Court noted: "Indeed, by taking the position that the payments are exempt, Debtor is conceding that they are property of the estate, since it is only property of the estate which can be exempted from the estate."[64]

The Court held that regardless of whether Tribal exemption laws could be considered "local law" under §522(b)(3)(A), Tribal exemptions were not available to the Debtors because they did not reside on the reservation.[65] §522(b)(3)(A) requires the debtor to use the exemptions of the state or local law applicable "at the place in which the debtor's domicile has been located." The Debtors lived in the State of Kansas; they did not live on the Tribal reservation, and therefore, the Tribal

[61] *In re Howley*, 439 B.R. 535 (Bankr.D.Kan. 2010).
[62] Id. at 538.
[63] Id at 539.
[64] Id at FN13.
[65] Id at 541-2.

exemptions were not "applicable" at the place in which the debtors were domiciled.[66] The Court sustained the Trustee's objection to the exemptions.

The Debtors later sought to have the Court's decision amended, to assert that the per capita payments were not property of the estate.[67] Despite the procedural issues, the Court took up the matter.[68] The *Howley* Court indicated that although the debtor's interest in future per capita payments was contingent upon the Tribe's decision to make a per capita disbursement, Kansas law recognized it as a property interest nonetheless.[69] This decision was consistent with the prior decisions from the same district (*McDonald* and *Hutchinson*, supra,) as well as *Johnson v. Cottonport Bank*, 259 B.R. 125(D.W.D.La. 2000) and *Kedrowski*, supra.[70]

More recently, in a consolidated case decision, the Bankruptcy Court for the District of Minnesota (O'Brien, J.) ruled in favor of the debtors in *In re Barth*.[71] In the three adversary cases, the Chapter 7 trustees sought turnover of post-petition per capita payments from the debtors, also naming as a defendant the Lower Sioux Indian Community in the State of Minnesota.[72] Although under Minnesota law the future per capita payments would be considered a property interest that constitutes property of the estate, the Court held that Tribal law, not Minnesota law, controlled.[73] The bankruptcy court granted the defendant debtor and tribe's motion for summary judgment, holding that the anti-alienation provision contained within

[66] Id at 542.
[67] In re Howley, 446 B.R. 506 (Bankr.D.Kan. 2011).
[68] Id. at 508-9.
[69] Id at 510.
[70] Id at 511.
[71] In re Barth, 485 B.R. 919 (Bankr.D.Minn. 2013).
[72] Id.
[73] Id at 921.

the Tribe's revenue allocation ordinance excluded the future per capita disbursements from the estate.[74] The decision, however, is devoid of any discussion of bankruptcy law whatsoever – the court merely finds that because the Tribe, a defendant in the matter, declared that per capita payments are not a property right, that it is so. Interestingly, the decision suggests that such treatment of per capita payments is the result of the sordid history between the Sioux and the United States, as well as early traders involved in predatory practices.[75] In a related adversary case of the same name, the 8th Circuit BAP affirmed Judge O'Brien's grant of summary judgment to the Tribe and Dakota Finance Corporation (an agency of the Tribe), finding that Defendants are protected by sovereign immunity and therefore could not be ordered to turnover the per capita payments.[76] Here, no order is sought against the Tribe, so no issues of sovereignty arise.

In another 2013 case, *In re Meier*, from the Eastern District of North Carolina, the bankruptcy court, although recognizing that it is a "hotly debated issue," refrained from deciding whether or not per capita payments from the Pokagon Band of Potawatomi Indians were property of the Chapter 7 bankruptcy estate.[77] Instead, the Court found that the nature of the debtor's interest in future per capita distributions was such that it was "of inconsequential value to the estate under §542(a)," and therefore denied the trustee's motion for turnover.[78]

---

[74] Id at 921, 22.
[75] Id at FN2. ("The traders got rich and the Sioux got screwed.")
[76] *In re Barth*, et al, 474 B.R. 687 (8th Cir. BAP 2012).
[77] *In re Meier*, Slip Copy, 2013 WL 6135085, No. 13-02323-8-SWH (November 21, 2013).
[78] Id. At 4.

C. DISCUSSION

Debtors would have the Court believe that the amendments to the Tribal Code change the landscape – that the *McDonald*, *Hutchinson*, and *Howley* decisions are no longer applicable. And, at first glance, and without reference to the Bankruptcy Code and other federal law, it is easy to see why one would initially have that impression. But here, as is often the case, first impressions are misleading.

(1) Debtor's Post-Petition Per Capita Payments Are Property of the Chapter 13 Estate.

It is not clear if Debtors intend to argue that the per capita payments are not property of the estate. Because Debtors have asserted that the per capita payments are exempt under the Tribal Code, as the Hon. Dale Somers stated in *Howley*, the Debtors have conceded the issue.[79] Property must actually **be** property of the estate before it can be exempted from the estate. However, in the interest of judicial economy, the Trustee will address the issue.

Debtors bear the burden of proving that property can be excluded from the bankruptcy estate.[80] Per 11 U.S.C. 541, property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case," except for property which is excluded under §541(b) and (c)(2). The analysis of per capita issues for Chapter 13 and Chapter 7 is not the same. In a Chapter 7 context, 11 U.S.C. 541 requires a snap shot as of the date of the filing of the bankruptcy

[79] *In re Howley*, 446 at 508 ("Indeed, by taking the position that the payments are exempt, Debtor is conceding that they are property of the estate, since it is only property of the estate which can be exempted from the estate.")
[80] *In re Adams*, 302 B.R. 535 (6th Cir. BAP 2003).

petition to determine whether an asset is of the estate. §1306 extends the application of §541 to all property acquired post confirmation, of the same kind of property as is listed in §541.[81] So here, there is no one time date of filing snap shot, as the picture may be taken at any time in a Chapter 13. All post-petition per capita payments are a part of the estate regardless of when received. This distinction becomes more obvious when one considers the application of §1329, which provides for the modification of the plan post confirmation and the specific incorporation of §1325(a) in §1329(b)(1).[82]

With regard to the enumerated exclusions from the definition of property under §541, those outlined in (b) are wholly unrelated to the matter in controversy. The only property excluded under §541(c)(2) is property that is protected by a valid spendthrift provision in a trust that is enforceable under nonbankruptcy law. The §541(c)(2) exception does not apply in the context of Debtor's per capita payments. As was outlined by this Court in *McDonald*, the § 541(c)(2) exclusion does not apply first and foremost because *there is no trust*.[83] The same provisions of the Per Capita Ordinance that the Court analyzed in *McDonald* apply to this case. The Ordinance establishes a trust only in the context of a minor Tribal member, which this Debtor is not. The Ordinance still provides that a percentage of quarterly net

[81] See the 10th Circuit BAP decision (affirming this Court), in *In re Vannordstrand*, 356 B.R. 788, 2007 WL 283076 (10th Cir. BAP, January 31, 2007) (NO. KS-05-091, 02-40431-13).

[82] In the present case, no vesting has occurred, so discussions regarding the effect of early versus delayed vesting are not necessary. While this issue was key to the *Vannordstrand* determination, many cases have held that even if the assets of the estate vest at confirmation, this vesting does not cause later obtained assets to vest in the debtor, as opposed to the estate. Section 1327(b) and (c) provide that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor" and that this property so vesting "is free and clear of any claim or interest of any creditor provided for by the plan."

[83] *In re McDonald*, 353 B.R. at 294.

gaming revenues received by the Tribe are to be divided equally among the members of the Tribe.[84] The Ordinance still "places no such restriction, or 'trust,' upon the per capita payments to be made to competent, adult members of the tribe, such as Debtor, Bonnie McDonald."[85] Although Debtors attempts to exempt the property under Section 4-14-1 of the Tribal Code, the same still rings as true now as it did in the prior *McDonald* case – "Property is not subject to a trust simply because a governmental entity has declared that property exempt from execution to satisfy a judgment."[86]

The changes to the Tribal Code do not and cannot affect the right of the debtor to receive a payment. Particularly in a Chapter 13 context, the Tribal Code amendment is not helpful to the Debtors.[87] Neither the Ordinance nor the IGRA permit the Tribe to restrict or prohibit the distribution to a competent, adult Tribal member.[88] The Per Capita Ordinance was (and must be) approved by the Secretary of the Interior.[89] Tribal Code provisions are not, generally, approved by the Secretary of the Interior. The Per Capita Ordinance provides that any

---

[84] *In re McDonald*, 353 B.R. at 294.
[85] Id.
[86] Id.
[87] "FN13: See *In re Kedrowski*, 284 B.R. at 446 (noting that "if the tribe does decide to make a distribution, the debtor has a 'right' to receive her share. Nothing in the IGRA, the federal regulations, or the Ho-Chunk per capita distribution ordinance would permit the tribe to exclude her from the distribution process."). See also *United States v. Whiting Pools, Inc*., 462 U.S. 198, 204-05 (1983) (discussing the very broad scope of § 541(a)(1)) and *In re Moses*, 256 B.R. 641, 645 (10th Cir. BAP 2000) (holding that the term "property of the estate" under § 541(a)(1) is defined, in relevant part, as "all legal or equitable interests of the debtor in property as of the commencement of the case."). FN14: *In re Kedrowski*, 284 B.R. at 451-52 (holding that per capita distributions made to members of the Ho-Chunk Nation tribe that are derived from net gaming revenues of the tribal-owned casino are property of the bankruptcy estate) and *Johnson v. Cottonport Bank*, 259 B.R. 125, 131 (W.D. La. 2000) (holding that per capita distributions made to members of the Tunica Biloxi Tribe of Louisiana that are derived from net gaming revenues of the tribal-owned casino are property of the bankruptcy estate)." *In re McDonald*, 353 B.R. at FN13 and FN14 (Internal citations omitted.)(Emphasis added.)
[88] *In re McDonald*, 353 B.R. at 443 and FN30.
[89] 25 U.S..C. 2710.

amendment to the Ordinance is effective only "when approved by the Secretary of the Interior or his representative."[90] There is nothing in the record to suggest that the Tribal Code changes at issue here were approved by the Secretary. By amending the Tribal Code with regard to claims against per capita payments, the Tribe has attempted to modify the Tribal members' interest in per capita payments without amending the Per Capita Ordinance and without obtaining approval of the Secretary of the Interior.[91]

In Section 4-14-1(D), the definitional section of the Tribal Code amendment, the Tribe defines "Per Capita Share" as "a Tribal Member's equal share of a Per Capita payment prior to a reduction for any withholding, garnishment, or levy permitted by this Section, but after withholding at the source required by federal income tax law." "Per Capita" is defined as "the payment provided to all enrolled members of the Prairie Band Potawatomi Nation, which are paid directly from the Prairie Band Potawatomi Nation Casino net Gaming Revenues pursuant to the Prairie Band Potawatomi Nation Per Capita Ordinance then in effect, and in accordance with the Indian Gaming Regulatory Act, as defined herein." In subsection (E), the Tribe describes the "Character of Per Capita" as "(1) A Per Capita payment is a personal benefit to a Tribal member. (2) A Per Capita Payment is a periodic payment not a property right. (3) A Per Capita Share is property of the Nation until such time as the distribution is duly made."[92] A

[90] Per Capita Ordinance, Article VI, Section 2.
[91] Tribal Code, Section 4-14-1(C) ("This Section establishes policy and rules for permitted claims against a Tribal member's per capita.")
[92] Tribal Code 4-14-1(E).

distribution occurs "when the Per Capita payments are placed in the U.S. mail or otherwise transferred to a Tribal Member."[93]

The Per Capita Ordinance does not include the distinctions between "per capita," "per capita payment," or "per capita share" referenced in the Tribal Code amendment.[94] The Per Capita Ordinance also does not include any exemption or anti-alienation language or any reference to "claims against per capita" at all.[95]

The Tribal Code amendment is internally inconsistent. The Tribal Code claims that the "per capita share" is property of the PBPN until the payment is transferred. However, within the PBPN's own definition of "per capita share" the Tribe recognizes that the "share" *is* the "***Tribal member's equal share.***"[96] In fact, the "share" is determined only ***after*** withholding federal income tax.[97] If the Tribal member had no interest in the funds, no income tax would be withheld from the "share" because none would be owed. And, since the "equal share" must be determined on a "per capita" basis per both the Per Capita Ordinance and the Tribal Code – the Tribal member's interest must be determined and identifiable prior to the date the share is actually distributed. The argument is therefore circular – a per capita payment is not property of the Tribal member until the Tribe gives it to her/him, but once the Tribe decides to make a per capita distribution at all, it must, by federal statute and Tribal law, give each eligible Tribal member his or her equal share. Therefore, the Tribal member's interest in a per capita payment

[93] Id at subsection (F).
[94] Per Capita Ordinance generally.
[95] Id.
[96] Tribal Code, Section 4-14-1(D)(6).
[97] Id.

exists as of the date the Tribe determines how much will be allocated to each Tribal member. Per the Per Capita Ordinance, the Tribal member's interest in the per capita payment is determined quarterly on the eligibility determination date / per capita pay period ending date for the distribution of a per capita payment.[98] Those dates are March 31, June 30, September 30, and December 31 of each year.[99]

Even if the Tribal Code amendment is valid, the anti-alienation provisions apply only **prior to** disbursement to the Tribal member. Section (G) of the Tribal Code amendment applies only to "Per Capita Shares." "Per Capita Shares" become "Per Capita" payments upon disbursement to the Tribal member.[100] Once disbursed by the Tribe, the per capita payments are not subject to any anti-alienation provision under Tribal or any other law.

Presumably, Debtors will argue that they are protected by the "Character of Per Capita" provision stating that "A Per Capita payment is not a property right."[101] However, Debtors are on weak footing. First, the Bankruptcy Code defines property of the bankruptcy estate, and as discussed supra, the per capita payments fit squarely within that definition. Second, although the Tribal Code states the per capita payment is not a property right, it also specifically states it is a "personal benefit to the Tribal member".[102] Debtors can't have it both ways. The Debtors either have an interest in the per capita payments, or they do not. Debtors have an expectation of payment. Whether or not a per capita payment will actually be

[98] See Per Capita Ordinance, Article II(s).
[99] Per Capita Ordinance, Article II(h). See also Tribal Code, Section 4-14-1(D)(5).
[100] Tribal Code, Section 4-14-1(D)(4) and (6)
[101] Tribal Code, Section 4-14-1(E).
[102] Tribal Code, Section 4-14-1(E)(1).

received may be contingent upon a per capita distribution being made by the Tribe, but that is of no consequence -- Kansas law recognizes contingent interests as property interests.[103] "Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of 11 U.S.C. § 541."[104]

Debtors may also argue that because they have treated the per capita payments as "income," they do not also have to treat the per capita payments as an "asset." §1306 recognizes only two types of assets: "Earnings" (which a per capita distribution is obviously not) and all other interests in property. Per capita payments constitute a §1306(a) asset, even though they may also be "income" for other purposes, such as in a tax context. If the quarterly per capita payments are not considered as an asset of the bankruptcy estate or are exempt, then the payments may be used to pay debtor's living expenses and fund the plan without any accountability to unsecured creditors via the best interest of creditors test in §1325(a)(4). But, Debtors must satisfy **all** of §1325 – both §1325(b)(1) **and** §1325(b)(4).[105] Moreover, treating the per capita payments as income on the 22C calculation in the context of a below-median income case is of no consequence – it makes no impact upon how much the Debtors must pay to their creditors. By treating the per capita payments only as income, the Debtors have failed to meet the best interest of creditors test requirement for confirmation contained in §1325(a)(4), and therefore, confirmation must be denied. Debtors have the burden

[103] *In re Howley*, 446 B.R. at 510.
[104] *In re Montgomery,* 224 F.3d 1199, 1205 (10th Cir. 2010), cited by *In re Howley*, 446 B.R. at FN15.
[105] *In re Hutchinson*, 354 B.R. at 531.

of proof in establishing all requisites to confirmation, including § 1325(a)(4). As Judge Somers noted in *Howley*, it may be difficult to determine a present value, but it can be done. However, as the Court may be aware, Trustee frequently makes arrangements to arrive at a fair number to avoid expensive litigation in per capita cases.

(2) The Debtors' Post-Petition Per Capita Payments Are Not Exempt.

Debtors have claimed the post-petition per capita payments as exempt under the Tribal Code. This exemption is improperly claimed by Debtors. §522(b) permits the Debtors to claim either the federal exemptions found in §522(d) or the exemptions available to the debtor in the state in which the debtor was domiciled for the 730 days prior to filing, unless that state has "opted out" of the federal exemptions.[106] Debtors currently domicile in the State of Kansas and have done so for the entire 730 days prior to the bankruptcy filing. At no time relevant to this bankruptcy proceeding have the Debtors lived on the PBPN Reservation. Since Kansas is an opt-out state, Debtors cannot claim Federal exemptions, aside from those outlined in §522(d)(10). The Code does not permit debtors to claim the exemptions of another governmental entity or territory.[107] Debtors apparently recognize that they must use Kansas exemptions, as the remainder of the exemptions claimed on their Schedule C are those claimed under Kansas law.[108]

The limited exceptions identified in §522(d)(10), as referenced in K.S.A. 60-2312, do not apply to per capita Tribal gaming distributions nor permit Debtors to

[106] In re McDonald, 353 B.R. at 292.
[107] Id.
[108] K.S.A. 2301, et seq. See Debtors' Amended Schedule C, Doc. 34.

claim such property as exempt under Tribal law. The per capita payments are also not exempt as a "local public assistance benefit" under §522(d)(10(A). As this Court noted in *Hutchinson*, per capita payments "are not based upon the need of individual tribal members but, rather, are distributed on a per capita basis, regardless of the financial circumstances of individual recipients."[109] Although Bonnie McDonald receives Social Security Disability benefits, her per capita payments are distributed to her by the PBPN without regard to any disability.

In Debtors' Amended Schedule C, Debtors reference the following exemptions under the Tribal Code, Section 4-10-16:

"(H) Any pension, annuity, retirement, disability, death other benefit exempt from process. . . .

(L) Any interest in any policy of insurance or beneficiary certificates upon a person's life.

(M) Any fraternal benefit society benefit, charity, relief or aid."

None of these exemptions under Tribal law list per capita payments. In fact, the reference to an exemption of per capita payments that previously existed at the time of the Court's prior *McDonald* ruling have been removed by the PBPN upon the revision to the Tribal Code. Per capita payments are not identified anywhere in the Per Capita Ordinance or Tribal Code as a "pension," "annuity," "retirement," "disability," or "death other benefit exempt from process." Per capita payments are not identified anywhere in the Per Capita Ordinance or Tribal Code as "any policy of insurance or beneficiary certificates upon a person's life." Per capita payments are not identified anywhere in the Per Capita Ordinance or Tribal Code as "Any

[109] In re Hutchinson, 354 B.R. at 530.

fraternal benefit society benefit," or "charity," or "relief," or "aid." There is simply no exemption under Tribal law as to per capita payments distributed to a Tribal member at all. There is nothing of record to suggest that any of the above provisions apply to these Debtors or per capita payments in general.

D. CONCLUSION

The attempted changes to the Tribal Code do not alter the rulings of the Kansas bankruptcy courts on exemptions. Any claim of exemption of the per capita payments by the Debtors fails because Debtors may claim only those found under Kansas law, which does not incorporate the Tribal Code. The Trustee's Objection to Schedule C must be sustained. Any claim that the per capita payments are not a part of the bankruptcy estate fails as the payments clearly fall within the definition of estate property pursuant to §541 and §1306. The requirements of §541(c)(2), necessary to defeat the general inclusionary language of §541, are not met, as no "trust" exists relative to the Debtors' per capita payments. The Tribe cannot unilaterally exclude property from the bankruptcy estate by virtue of a Tribal Code amendment, particularly one that attempts to amend the PBPN Per Capita Ordinance without approval by the Secretary of the Interior as required by the IGRA. Moreover, even if the Tribal Code amendment is valid as to per capita shares, it does not extend to protect per capita payments that are transferred to Tribal members. As Debtors have failed to propose a plan that pays in any amount to satisfy the best interest of creditors test as it relates to the per capita payments,

the Debtors' Plan does not comply with §1325(a)(4) and therefore confirmation must be denied.

Respectfully submitted,

s/ Jan Hamilton
Teresa L. Rhodd #21586
Jan Hamilton #08163
Chapter 13 Trustee
PO Box 3527
Topeka, Kansas 66601-3527
(785) 234-1551
(785) 234-0537 Fax
jan.hamilton@topeka13trustee.com
teresa.rhodd@topeka13trustee.com

CERTIFICATE OF SERVICE

I certify that I electronically filed the Chapter 13 Trustee's Brief with the Court via the CM/ECF system, which notices all interested parties using the CM/ECF system on this date: **September 3, 2014.**

s/ Teresa L. Rhodd
Teresa L. Rhodd