

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE
WILLIAM LEROY McDONALD AND
BONNIE KAYE McDONALD
Debtors

Case No. 14-40529

**DEBTORS' BRIEF IN SUPPORT OF THEIR OBJECTION
TO MOTION TO DISMISS AND OBJECTION TO CONFIRMATION**

COME NOW debtors and object to the motion to dismiss and to their plan and show that only Bonnie Kaye McDonald should be affected by the Motion to Dismiss and Objection to Confirmation, as the cases of debtors William LeRoy McDonald and Bonnie Kaye McDonald have not been consolidated for the purpose of administration, as is permitted by 11 U.S.C. 302(b), and debtor William has no claim to the per capita distribution.

STIPULATIONS Certain written stipulations, including Exhibits A and B, have been entered upon by the parties and filed with the Court. They will be referenced as need be.

ARGUMENT AND AUTHORITIES *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (U.S. 1991), held that:

Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. (Citation omitted.) Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. (Citation omitted.)

The Prairie Band Potawatomi is a recognized Indian tribe and entitled to and has enacted a constitution and laws governing per capita distributions from its gaming revenue, a share of which debtor Bonnie Kaye McDonald, but not debtor William LeRoy McDonald, is entitled.

See Exhibit A, Prairie Band Potawatomi Nation Constitution, generally; and Article V, Section 1, Rules of Civil Procedure, Chapter 4-14, Claims Against Per Capita and Paragraph (G) Permitted Claims against a Per Capita Share, in particular which states:

(I) 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: (None of which are applicable herein.) <http://www.pbpindiantribe.com>.

11 U.S.C. 522(b)(3)(A) permits exemption of property from the estate under, “Federal law . . . or State or local law . . . that is applicable . . . to the place in which the debtor’s domicile has been located for the 730 days immediately preceding the date of filing of the petition”

Potawatomi Prairie Band law is undeniably local law and applicable to debtor Bonnie Kaye McDonald, as an enrolled tribal member, and she has the right to choose it. See *Consumer Bankruptcy Law and Practice*, NCLC pub., 10th ed, Vol. One, §10.2.3: “The term ‘local law’ presumably includes Indian Tribal Law, and any other provisions applicable to a particular locality.”

The issue of “domicile” is complicated, given the well-known and undeniable history of forced removal of all Indian tribes by the federal government from their original homelands. The Trustee stipulates that Bonnie McDonald has “head rights” to land on the Potawatomi reservation assigned her tribe by the federal government. This is sufficient for this Court to find that as an enrolled member she is domiciled there or at a minimum to find “extra-territorial” jurisdiction over the per capita funds even in her hands, as Section 4-14-1(B) Claims against per capita states:

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.

Mayes v Cherokee Nation (In re Mayes), 294 B.R. 145, 149-150 (B.A.P. 10th Cir. 2003), held that: "Although the Supreme Court has distinguished between tribal and state sovereign immunity, it has long recognized that Indian tribal immunity is similar in scope to that enjoyed by the states." Thus, it is imminently logical to hold that the Potawatomi Tribe retains authority and jurisdiction over per capita payments and to its recipients living off the reservation.

In re Howley, 439 B.R. 535 (Bankr. D. Kan. 2010), declined to decide whether Potawatomi tribal law is "local law." There, debtor contended tribal law expressly exempted from execution per capita payments from gaming revenues; and the exemption was available to her as a tribal member even though she was domiciled outside the physical boundaries of the reservation. Judge Somers observed at 541, ". . . by analogy with the law applicable to territories, it is possible that for purposes of exemptions under § 522(b)(3)(A), tribal law could be considered 'local law.'" But, even assuming tribal law constituted local law, he did not allow that debtor the exemption, because: "Applying the exemption in this case would require the Tribal Code exemption to have extraterritorial effect, since Debtor does not reside on the Prairie Band reservation." *Ibid*. The present case is clearly distinguishable, as Bonnie McDonald is an owner of an undivided interest in reservation land, as noted in the stipulation of the parties, and tribal jurisdiction now extends to her, no matter where she resides. If this Court is to sustain the

Trustee's objections, it must deny to the Potawatomi Tribe what Congress permits it to do.

In re McDonald, 353 B.R. 287 (Bankr. D. Kan. 2006), (which this counsel just noticed also involved the present debtors, but was filed prior to passage of BAPCPA and converted from Chapter 13 to Chapter 7) this Court held that even if Kansas law allowed a claim of exemption under the Potawatomi Tribal Code, the exemption was inapplicable absent a judgment against debtors by the tribal court. Further, this Court held that the distributions, although they were rendered exempt by the Potawatomi Tribe Per Capita Ordinance from execution to satisfy a judgment, were not subject to a spendthrift or other trust for competent adult tribal members, such as the debtor, and, thus, not exempt under 11 U.S.C. 541(c)(2).

All that has changed and the present case is factually and legally distinguishable. First, as noted by stipulation nos. 6 and 7, Bonnie McDonald has been found disabled by the Social Security Administration. This satisfies concerns on an important point in the original McDonald decision. There, this Court noted that the Indian Gaming Regulatory Act requires the tribal allocation plan to protect and preserve the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments citing 25 U.S.C. 2710(b)(3)(c).

In re Hutchinson, 354 B.R. 523, 30 (Bankr. D. Kan. 2006), was a companion of sorts to the original *McDonald* and a decision in favor of the Trustee. *Ibid.* 527 There, this Court wrote:

Based upon the existing case law, and the general sense of the concept of "public assistance" as that term is used throughout Kansas statutes, the Court adopts the definition of "public assistance benefit" set forth in *Longstreet* as "government aid to needy, blind, aged, or disabled persons and to dependent children."

None can deny that Bonnie McDonald is disabled and that what she receives constitutes a *de facto* public assistance benefit from her tribe. The stipulation that Bonnie McDonald has been found disabled by the Social Security Administration allows this Court to now find present the “spend thrift” element discussed but absent from the earlier case. As this Court recently noted with *In re Robben*, 502 B.R. 572 (Bankr. D. Kan. 2013):

There are no magic words required to create a spendthrift trust under Kansas law; a spendthrift trust is created when the trustor clearly manifests the intention not only to create a trust, but to create it with the spendthrift effect. The intent need not be stated in express terms but may come from construction of the trust instrument as a whole. A court's inference of such intent need only be made with reasonable certainty.

Second, as revealed by Exhibit A to the stipulation, the Tribal Code has been amended since the original McDonald decision, resolving the concern by this Court that Section 4-10-16 applied only to Tribal Court judgments. It now reads:

Section 4-10-16. Exempt Property. The following property shall be exempt, from garnishment, attachment, execution, sale, and other process for the payment of principal and interest, costs, and attorney fees upon any judgment of the Tribal Court or other court of competent jurisdiction: (Emphasis supplied.)

In *Dietz v. Barth (In re Barth)*, 485 B.R. 919, 922 (Bankr. D. Minn. 2013), the bankruptcy court held that: “The . . . bankruptcy estates have no interest in post-petition per capita payments under the Lower Sioux Constitution and the Revenue Allocation Ordinance paid or payable to the defendants.” The Potawatomi Law and Order Code 4-14 Title 4: Civil Procedure contains an anti-alienation provision comparable to that of the Lower Sioux, to-wit:

(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.

In re Meier, 2013 Bankr. LEXIS 4928 (Bankr. E.D.N.C. Nov. 21, 2013), followed *Barth* and held that a Chapter 7 trustee was not entitled to an order under 11 U.S.C.S. 542(a) requiring debtor to turn over future payments received from an Indian tribe as her share of gaming revenue generated by the tribe's casinos. The court observed that even assuming the payments were property of the debtor's bankruptcy estate, the payments, which totaled \$3,671 for 2011, \$6,183 for 2012, and \$2,000 for 2013, were of inconsequential value or benefit to the estate and the permanent loss of this income stream would have dramatically impeded not only the debtor's ability to make the "fresh start" envisioned by the Bankruptcy Code, but also to maintain her standard of living for decades to come, and the trustee's efforts to administer the payments would have been a detriment to and a burden on the debtor's estate. Such is particularly true here, as Bonnie McDonald has been found permanently disabled by the Social Security Administration.

SUMMARY. The perceptive analysis of *In re Barth* should guide this Court to find in debtors' favor, as the anti-alienation provision of the Potawatomi Code is sufficiently similar to that of the Lower Sioux. The sound reasoning of *In re Meier* applies here, also, as the Trustee stipulates that Bonnie McDonald's only income aside from per capita distributions is monthly Social Security disability payments, which a peek at her Schedule I reveals is only \$1,071.44 per month. One purpose and effect of the modest per capita income is to keep her from becoming a

ward of the state of Kansas. This is a *de factor* public benefit fitting the definition adopted by this Court; and Potawatomi Tribe exemption law is both local law and extra-territorial in reach, providing Bonnie McDonald the right to exempt the per capita distribution as a public assistance benefit” or as a “fraternal benefit society benefit, charity, relief or aid,” referenced in Section 4-10-16 Exempt Property. Furthermore, the tribal exemption statute is not limited to the reservation: It runs, “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.” This is exercise of the “inherent sovereign authority over their members,” granted by federal common law discussed in *Citizen Band*, supra. There has been no abrogation by Congress of such authority over per capita proceeds.

The plan of the Trustee to pry these few dollars from her hands and divide them among her several creditors interferes with the well-conceived federal plan to help Potawatomi tribal members lift themselves out of poverty with casino earnings. This is expressed in Exhibit A, Section 4-14-1(C) Claims Against Per Capita: "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." The Trustee's plan is to ignore the wrongs of the past and continue to practice them against Potawatomi tribal members well into the 21st century. There is no honor in taking the few dollars of a disabled, Potawatomi tribal member in Kansas and dividing them among credit-

card issuing bankers living in Connecticut.

WHEREFORE debtors pray that the Objection to Confirmation and Motion to Dismiss be overruled and their plan confirmed. These debtors filed an amended Schedule C on August 21, 2014, to which the Trustee also objected. This brief is intended to address those objections, also.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2014, I electronically filed the foregoing Objection to Motion to Dismiss and to Confirmation with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all parties of interest participating in the CM/ECF system.

s/FRANK D. TAFF
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