NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. NC-06-1101-MaMeRy |
| GEORGE G. BROWN; LISA BROWN, Debtors. | Bk. No. 05-13909 |
| GEORGE G. BROWN; LISA BROWN, Appellants, | |
| v. | **M E M O R A N D U M**[1] |
| JEFFRY G. LOCKE, Trustee, Appellee. | |

Submitted Without Argument[2] on July 14, 2006

Filed - September 28, 2006

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding.

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Before: MARLAR, MEYERS[3] and RYAN,[4] Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] At the request of the parties, and with the panel's approval, this appeal was submitted without oral argument. See BAP Rule 8012-1.

[3] Hon. James W. Meyers, United States Bankruptcy Judge for the Southern District of California, sitting by designation.

[4] Hon. John E. Ryan, United States Bankruptcy Judge for the Central District of California, sitting by designation.

## INTRODUCTION

Debtor Lisa Brown ("Mrs. Brown") is a Native American who receives quarterly per capita distributions ("Payments") of a percentage of the net revenue from her tribe's casino gaming enterprise. She and her husband ("Debtors") filed a chapter 7[5] bankruptcy petition and sought an order of abandonment for Mrs. Brown's interest in the Payments, asserting that it was not property of the estate. The bankruptcy trustee ("Trustee") countered with a motion for turnover. The bankruptcy court, relying on case law from other circuits, determined that the Payments were property of the estate which could be transferred. It then denied abandonment and ordered turnover of the present and future Payments to Trustee.

In this appeal, Debtors have again raised the issue of whether the Payments are property of the estate. We hold that the bankruptcy court correctly determined that Mrs. Brown's interest in the Payments is property of the estate, and AFFIRM that ruling. However, we conclude that the bankruptcy court erred in determining that the terms of the tribal ordinance allowed Mrs. Brown's entitlement to be transferred or assigned. More importantly, the bankruptcy court did not make the necessary findings for abandonment as to whether future, contingent Payments would be of any value or benefit to the estate. We therefore

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[5] Unless otherwise indicated, all Code, chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (Oct. 17, 2005).

VACATE and REMAND, in part, for further proceedings consistent with this memorandum decision.

**FACTS**

Mrs. Brown is an enrolled "Tribal Member"[6] of the Pomo Indians of the Sherwood Valley Rancheria ("Tribe") in Willits, California. The Tribe owns and operates the "Sherwood Valley Rancheria Gaming Enterprise," also known as the "Black Bart Casino."

As a Tribal Member, Mrs. Brown is eligible to receive Payments consisting of quarterly per capita and other revenue-sharing distributions[7], provided for and distributed in accordance with a tribal ordinance entitled "Ordinance Governing the Allocation and Disbursement of Net Revenue from Tribal Gaming Sherwood Valley Rancheria" ("Ordinance").

Debtors filed a voluntary chapter 7 petition on October 13, 2005. By November, 2005, Mrs. Brown had received approximately $8,000 in Payments for that year. On their bankruptcy schedules, Debtors listed, as personal property, a Payment in the amount of $1,100, and also claimed it as exempt. Debtors did not include

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[6] "'Tribal member' means any living enrolled member of the Tribe who is in good standing, and has not forfeited or waived his or her right to receive Per Capita Payments from the Tribe's Net Gaming Revenues, and who is not excluded by this Tribal Ordinance from receiving such payments." Tribal Ordinance, art. II, sec. 1001(b).

[7] The parties have not presented any legal distinction between the "per capita" and "revenue-sharing" payments which Mrs. Brown receives. For purposes of this appeal, therefore, we will denominate and treat all as per capita payments.

the Payments as monthly "income," on their Schedule I.[8] However, on their Statement of Financial Affairs, they disclosed them as "income other than from employment or operation of business."

In bankruptcy, Debtors moved for an order to compel Trustee to abandon Mrs. Brown's interest in the Payments, arguing that Mrs. Brown was the beneficiary of a valid spendthrift trust provision in the Ordinance and, therefore, that the Payments were excluded from the bankruptcy estate. See 11 U.S.C. § 541(c)(2).

Trustee objected, arguing there was no spendthrift trust provision for Mrs. Brown in the Tribal Ordinance.[9] He contended that the asset was property of the estate and requested that the court order Debtors to turn over both present and future Payments.

Debtors then filed a supplemental brief, contending that the Ordinance neither designated such Payments as the Tribal Member's "property" nor conferred upon Tribal Members any "right" to receive them. In addition, Debtors argued that a characteristic of a property interest, e.g., the right to assign or transfer the asset, was missing from the Ordinance language.

Following a hearing, the bankruptcy court issued its memorandum decision, concluding that the Ordinance did not contain language creating a trust concerning Mrs. Brown's interest, nor did it contain any restrictions on transfer of the interest, which

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[8] We may take judicial notice of the papers which have not been provided in the excerpts of record. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989) (panel did not err by taking judicial notice of the underlying bankruptcy court records).

[9] The Tribal Ordinance contains trust language concerning payments for minors and legally incompetent adults, but Debtors did not maintain that Mrs. Brown fell into either category.

would be evidence of a spendthrift trust.[10] It then ruled that it would follow the holdings of two published opinions from other jurisdictions that tribal gaming distributions are property of the bankruptcy estate. See Johnson v. Cottonport Bank, 259 B.R. 125, 130 (W.D. La. 2000) and In re Kedrowski, 284 B.R. 439, 451-52 (Bankr. W.D. Wis. 2002). It denied Debtors' motion to compel abandonment and granted Trustee's motion for turnover. Debtors timely appealed.

**ISSUES**

1. Whether the bankruptcy court correctly determined that the Payments were property of the estate.

2. Whether the bankruptcy court erred in determining that Mrs. Brown's entitlement to any future Payments was a transferable property interest.

3. Whether the bankruptcy court abused its discretion in denying Debtors' motion to compel abandonment.

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[10] Debtors have not argued, in their Opening Brief, that the Tribal Ordinance contained a provision for a spendthrift trust or that the Payments were excluded from the estate under § 541(c)(2). Therefore, they have abandoned the "trust" theory, and we will not consider it. See Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998).

Compare the situation where a tribal member's funds are placed into an Individual Indian Money ("IIM") account, which is held in trust by the United States Department of Interior and is subject to anti-alienation regulations. See Warfield v. Frank-Hill (In re Frank-Hill), 300 B.R. 25, 30-31 (Bankr. D. Ariz. 2003) (IIM account was an interest within the scope of § 541(c)(2)).

## STANDARDS OF REVIEW

The question of whether property is included in a bankruptcy estate is one of law, subject to de novo review. Birdsell v. Coumbe (In re Coumbe), 304 B.R. 378, 381 (9th Cir. BAP 2003). Issues of statutory interpretation are reviewed de novo by the panel. United States v. Towers (In re Feiler), 230 B.R. 164, 167 (9th Cir. BAP 1999), aff'd sub nom. United States v. Sims (In re Feiler), 218 F.3d 948 (9th Cir. 2000).

A court's decision to authorize or deny abandonment is reviewed for an abuse of discretion. Johnston v. Webster (In re Johnston), 49 F.3d 538, 540 (9th Cir. 1995).

## DISCUSSION

### A. Policy Considerations

At the outset, we note that this panel is conflicted by issues in this case which have not been directly addressed by the parties, but which concern larger principles of both justice and the intentions behind the Indian gaming laws and the Bankruptcy Code.

Debtors in this case filed a chapter 7 liquidation case. In so doing, they have potentially subjected their major asset—the stream of income derived from future tribal gaming revenues—to total loss. But their schedules, the claims filed, and their income reflect that this need not be the outcome, either as a factual matter or possibly a legal one.

Debtors' combined income, including the gaming revenues, would support a 100% payout to unsecured creditors in a chapter 13 plan, without suffering the potential loss—at a chapter 7 trustee's sale—of future tribal payouts.

Debtors' ages are not set forth in the schedules, but they must be in their 30's or early 40's because their children are only three and ten. Their combined annual income, exclusive of the gaming revenue, is $47,400. The panel notes (from the record at tab F) that in the year the bankruptcy was filed, the tribe paid Mrs. Brown $8,220.13. Debtors scheduled their unsecured debts of only $10,198, but the unsecured claims now on file, according to the claims register, total $16,511.22.

This panel takes a larger view of the Tribe's intentions and the underlying purposes in the revenue-sharing aspects of gaming revenues, as they concern a Tribal Member's stream of future income. Theoretically, if Mrs. Brown is 40 years old, with a life expectancy of 80 years, that income (assuming it never increases or decreases from $8,220 per year), is potentially worth a gross, non-discounted value of $328,800. This panel must conclude, as a matter of tribal policy, that the Tribe did not intend for such valuable rights to be sold to an outside, non-tribal member, for satisfaction of only $16,511 of a Tribal Member's unsecured debts. Yet that may very well be the result in this case.

As a matter of bankruptcy policy, the payment to creditors, of a debtor's available assets, is equally as important as debtor's fresh start. In a chapter 13 proceeding, both of these objectives may be achieved without any surrender, loss, or sale of a debtor's assets. Here, for example, Debtors could propose a

chapter 13 plan which devotes regular future gaming revenues, as and when paid, toward payment of filed claims, and the income therefrom could pay off those creditors, in full, within a few short years.[11] In doing so, Debtors could thereby reserve to themselves the valuable future income stream beyond what is necessary to repay their relatively minor outstanding debts. In this way, the overarching policies of both the Indian Tribal Gaming Ordinance and the bankruptcy laws are achieved, for the mutual benefit of all concerned.

Alternatively, Debtors could simply stipulate with Trustee that they would turn over so much of the future income stream as would be necessary to repay all filed and valid claims, plus administrative expenses, in return for retaining the future rights to the tribal stream of income. Again, such a resolution would practically solve all of the policy concerns of the competing interests.

However, the parties may elect, instead, to further litigate the complex and unpredictable outcome of the current case. In that event, we must continue our analysis of the issues presented to us, and resolve them.

**B. Analysis of the Issues**

The underlying motion is Debtors' request for an order compelling Trustee to abandon property of the estate, viz, Mrs. Brown's interest in Payments from the Tribe's net gaming revenues.

[11] Chapter 13 plans may last from 36 to 60 months. 11 U.S.C. § 1322(d).

Section 554(b) provides:

> On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

11 U.S.C. § 554(b).

Trustee countered with a motion for turnover of estate property, pursuant to § 542(a). A bankruptcy trustee has the right to recover property of the subject bankruptcy estate, and any entity in possession, custody or control of such property must deliver it to the trustee "unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a); see also § 543(b); § 363(b)(1) (trustee may "use, sell, or lease, other than in the ordinary course of business, property of the estate").

In their bankruptcy schedules, Debtors listed the Payments as personal property and claimed an exemption therein. They therefore admitted that the asset was property of the estate. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 616 (9th Cir. 1988) (exempt property is initially regarded as property of the estate and the debtor may then remove it by claiming exemptions); Hon. Barry Russell, Bankr. Evid. Manual § 301.94 (2006 ed.) (bankruptcy schedules signed under oath constitute admissions). In addition, Debtors listed the Payments as "other income" in their Statement of Financial Affairs.

Nevertheless, the reason given by Debtors to support their motion to compel abandonment was that the Payments were not property of the estate. Debtors' apparent argument was that the Payments were of inconsequential value and benefit to the estate

because they were not "property of the estate." Thus, Debtors mixed their legal theory with a factual dispute.

Trustee objected and moved for turnover of the asset. The bankruptcy court focused on the turnover motion and the question of whether the Payments were property of the estate. To the extent that Debtors' inconsistent argument was a defense to Trustee's turnover demand as well as a threshold requirement for abandonment, we will therefore consider the merits. Then, we will examine whether the bankruptcy court took into account whether the Payments were of any value and benefit to the estate.

**1. Section 541(a): Property of the Estate**

**(a) Applicable Law**

"Bankruptcy courts have exclusive [in rem] jurisdiction over a debtor's property, wherever located, and over the estate." Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004). The Ninth Circuit Court of Appeals has held that § 106(a)'s abrogation of sovereign immunity of "governmental units" with respect to various Code provisions, including a turnover proceeding under § 542, applies to Indian tribes. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1060-61 (9th Cir. 2004), cert. denied, 543 U.S. 871 (2004). Moreover, a tribe's common law sovereign immunity does not impair jurisdiction over individual tribal members who are not acting as tribal representatives or in an official capacity. See Puyallup Tribe, Inc. v. Dept. of Game, 433 U.S. 165, 172 (1977); Stringer v. Chrysler (In re Stringer),

252 B.R. 900, 901 (Bankr. W.D. Pa. 2000) (defendant tribe member could be compelled to turn over estate property). See generally, COHEN'S HANDBOOK OF FED. INDIAN LAW § 7.05 (2005).

What comprises "property of the estate" is determined by federal law. Under the Bankruptcy Code, the commencement of a bankruptcy case creates an estate "comprised of all the following property, wherever located and by whomever held: . . . [A]ll legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a).

"Property" under § 541(a) "'has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.'" United States v. Sims (In re Feiler), 218 F.3d 948, 955 (9th Cir. 2000) (quoting Segal v. Rochelle, 382 U.S. 375, 379 (1966)). This definition is broad, and includes both tangible and intangible property. United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05 (1983).

Section 541(a), however, "'merely defines what interests of the debtor are transferred to the estate. It does not address the threshold questions of the existence and scope of the debtor's interest in a given asset. . . . [W]e resolve these questions by reference to nonbankruptcy law.'" Suncrest Healthcare Center LLC v. Omega Healthcare Invs., Inc. (In re Raintree Healthcare Corp.), 431 F.3d 685, 688 (9th Cir. 2005) (applying federal Medicare and state contract law) (alterations in original) (citation omitted). Even when a property interest is conceived in federal statutory law, whether or not such interest is alienable may be an issue determined by state law. See Segal, 382 U.S. at 381 n.6 (holding

that whether an NOL carryback refund claim could have been transferred was determined by state law, "save that on rare occasions overriding federal law may control this determination or bear upon it").

Here, the Payments were authorized by the tribe's Ordinance, which was promulgated under federal law, but which was also closely connected to a Tribal-State compact regarding the gaming operation. Therefore, questions as to the existence and scope of Mrs. Brown's interest in the Payments are to be resolved by federal, state, and tribal law. See Butner v. United States, 440 U.S. 48, 55 (1979) (unless a federal purpose requires a different result, property rights are determined by state law); Kedrowski, 284 B.R. at 441 (tribal gaming "features an uneasy mixture of federal, state, and tribal rights and responsibilities").[12]

In the absence of Ninth Circuit precedent, the bankruptcy court relied on two opinions from other circuits in reaching its conclusion that Mrs. Brown's right to receive the Payments was property of the estate and that future distributions should be turned over to Trustee.

In Kedrowski, the first case cited by the bankruptcy court, the chapter 7 trustee moved to compel turnover of future per

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[12] Courts generally recognize the imposition of traditional federal and state property concepts in lieu of any tribal property system. See Richard A. Monette, Governing Private Property in Indian Country; The Double Edged Sword of the Trust Relationship and Trust Responsibility Arising out of Early Supreme Court Opinions and the General Allotment Act, 25 N.M. L. REV. 35, 50 (Winter, 1995). For a study of the Bankruptcy Code applied to Indian tribes, see R. Spencer Clift, III, The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes under the Bankruptcy Code and Related Matters, 27 AM. INDIAN L. REV. 177, 208-212 (2002-03).

capita distributions to which the debtor was entitled as an enrolled member of an Indian tribe. After a comprehensive examination of tribal gaming, federal and Wisconsin law, the bankruptcy court held that the debtor's right to receive distributions from the tribe's gaming operations constituted a "property right" within the meaning of § 541(a). 284 B.R. at 449. It further held that the per capita payments were not immune Indian trust funds, nor did the tribal ordinance contain any anti-alienation language to prevent them from being made liable for the tribal member's debts. Id. at 450-51.

In Johnson, the bankruptcy court's second case, the debtor tribal member had given a security interest in his per capita distributions to a bank to secure a loan. In bankruptcy, the secured creditor sought to continue collecting its loan from the per capita payments and the trustee sought turnover of any surplus payments, and the bankruptcy court agreed with both.

On appeal to the district court, the debtor argued that the payments were not property of the estate because they were proceeds of postpetition "earnings." See § 541(a)(6). The district court held that the payments were "income," but not "earnings." Therefore it held that the right to the per capita payments was a "general intangible" property interest pursuant to Louisiana law, and thus was includable in the bankruptcy estate. 259 B.R. at 129-30.

The district court in Johnson further held that the tribal ordinance did not restrict the member's ability to assign the payments to another person, as long as he or she was living (no provision for devise), and that other recipients of such payments

had also used them to secure debts. Id. at 131. Because the debtor had granted a security interest in the stream of payments to the creditor up to the amount of the debt, the district court held that such security interest applied to future, postpetition payments "as they were made," and that the balance of payments belonged to the trustee. Id. at 130.

In this appeal, Debtors have attempted to distinguish these cases, and so do we.

**(b) Mrs. Brown's "Right" to Payments**

The chapter 7 trustee and the estate succeed only to the title and rights in property which the debtor had at the commencement of the case: "[T]he broad scope of the estate under the § 541(a)(1) definition does not enlarge a trustee's substantive property rights beyond those existing at the commencement of the case." Calvert v. Bongards Creameries (In re Schauer), 62 B.R. 526, 529-30 (Bankr. D. Minn. 1986), aff'd, 835 F.2d 1222 (8th Cir. 1987) (emphasis in original).

Debtors maintain that the Payments were not property of the estate because the Ordinance did not state that Tribal Members have a "right" to the Payments or that such Payments are the Tribal Member's "property."

The Ordinance defines per capita payments as "those payments made or distributed to Tribal Members, which are paid directly from the Tribe's Net Gaming Revenues of the Gaming Enterprise." Ordinance, art. II, sec. 1001(g). With some inapplicable exceptions, it further provides that "[e]very person who is an

enrolled member of the Sherwood Valley Rancheria on the date of the Per Capita Distribution and is living on said date is eligible to receive a full Per Capita Payment . . . ." Id., art. IV, sec. 1003(1).

Such per capita payments are ordinarily based on a constant "[s]ixty-five percent (65%) of Net Gaming Revenues . . . ." Id., art. III, sec. 1002(4). While this percentage rate could not decrease, it could be increased up to 75% if net revenues exceed the Tribe's annual operational budget. Id.. The "Payment Date" is the 15th day of the month following the last day of the preceding calendar quarter, and may precede the actual disbursement date. See id., art. II, sec. 1001(p) and art. IV, sec. 1003(2).

No services need be performed by individual Tribal Members in order to receive the Payments. The Payments cannot be inherited because they cease upon the Tribal Member's death. However, any Payment that has been determined, following a Payment Date, but not yet disbursed at the time of the Tribal Member's death, is an asset of the Tribal Member's probate estate. Id., art. IV, sec. 1003(2).

Debtors cite to the following provision, which states that a Tribal Member does not have a "vested" interest in the revenues:

> Nothing in this Ordinance is intended to vest or vests in any Tribal Member or any other person any right or interest in the Tribe's Gaming Enterprise, the revenues produced by or derived from said Enterprise, any other Tribal income or assets, or the income produced by such assets. The General Council reserves the right to amend or repeal this Ordinance at any time, and any such amendment or repeal shall not constitute or be construed to be the taking of any vested property right.

Ordinance, art. IV, sec. 1003(4).

They contrast this language to the ordinance in Kedrowski which specifically provided 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.'" Kedrowski, 284 B.R. at 450 (emphasis added). In addition, the Kedrowski court referred to a decision by the Ho-Chunk National Tribal Court, which had concluded that "'the right to per capita [payments] exists so long as a member is on the rolls of the Ho-Chunk Nation.'" Kedrowski, 284 B.R. at 448 (citation omitted) (emphasis and alteration added). In other words, they contend that the ordinance in Kedrowski expressly granted a "right" upon distribution.

This is a distinction without a difference. Here, the Ordinance also uses the word "right," when it provides that a Tribal Member who fails to either claim a per capita payment check or to request a replacement check shall forfeit his or her "right to receive that Per Capita Payment." Ordinance, art. V, sec. 1004(3).

It is helpful to briefly consider the statutory history, for the genesis of the two tribal ordinances is the same Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701-2721 and accompanying federal regulations, 25 CFR § 290.1-290.26 (regulations governing "Tribal Revenue Allocation Plans"). Enacted in 1988, the purpose of the IGRA is to promote "tribal economic development, self-sufficiency, and strong tribal government," shield the tribe's enterprise from organized crime and corruption, and protect tribal gaming as a means of generating tribal revenue. 25 U.S.C. § 2702.

Casino gaming is classified as Class III gaming under the IGRA. See 25 U.S.C. § 2703(8). A tribe engaging in casino gaming must negotiate a "compact" with its State, which must be approved by the Secretary of the Interior. 25 U.S.C. § 2703(7)(E) and (10); see also 25 U.S.C. § 2710(d) (1), (3); Cal. Const. Art. 4, § 19.[13] The tribal-state compact limits the state's jurisdiction "in matters concerning Indian gaming," to "the extent provided in the Compact." Campo Band of Mission Indians v. Super. Ct., 137 Cal. App. 4th 175, 182, 39 Cal. Rptr. 3d 875, 881 (2006).

The IGRA specifically addresses the matter of per capita payments which are made out of the Tribe's gaming revenues. Pursuant to the IGRA, a tribe is required to adopt an ordinance, which, among other things, allocates its gaming revenues, and it must obtain its approval by the Chairman of the National Indian Gaming Commission.[14] Here, the Ordinance complied with IGRA by authorizing the use of net gaming revenues:

> (i) to fund tribal government operations or programs;
> (ii) to provide for the general welfare of the Indian tribe and its members;
> (iii) to promote tribal economic development;
> (iv) to donate to charitable organizations; or
> (v) to help fund operations of local government agencies[.]

Ordinance, art. II, sec. 1000(2); 25 U.S.C. § 2710(b)(2); see also

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[13] In March 2000, California voters adopted Proposition 1A, which authorized the governor to negotiate tribal-state gaming compacts with federally recognized Indian tribes for the operation of slot machines and certain casino games on tribal lands in California in accordance with federal law. See Historical Notes, Cal. Const. Art. 4, § 19.

[14] The IGRA established the National Indian Gaming Commission, which approved the Sherwood Valley Rancheria's Class III tribal gaming Ordinance. See 67 Fed. Reg. 165, 54823-54825 (Aug. 26, 2002).

25 U.S.C. § 2710(d)(2) (providing that Class III gaming is subject to the provisions of § 2710(b) regarding the disposition of net gaming revenues). The IGRA and Ordinance further provide that the net gaming revenues may be used to make per capita payments to Tribal Members, if certain conditions are met. These conditions are:

> (A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);
>
> (B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);
>
> (C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and
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> (D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

25 U.S.C. § 2710 (b)(3); Ordinance, art. II, sec. 1000(3).

In Kedrowski, as in this case, the debtor argued that the ordinance did not denominate the per capita payment as a property "right." For all practical purposes, the language of the Ho-Chunk ordinance, in Kedrowski, and this Ordinance are identical in that they prohibited any vesting of ownership rights other than the Tribe's in the gaming revenues before they were either determined following a Payment Period (ours) or actually distributed (Kedrowski). The Kedrowski bankruptcy court rejected the debtor's argument, stating:

> It is undisputed that the debtor is an enrolled member of the Ho-Chunk Nation. Thus, 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.

Kedrowski, 284 B.R. at 446.

Similarly, in Johnson, the district court found that the debtor's right to receive monthly per capita payments was an intangible property interest under Louisiana law, similar to a right to receive an annuity, insurance proceeds, accounts receivable, or federal program entitlements. 259 B.R. at 128-30 (citing cases).

In our case, Debtors had already received and possessed some of the Payments for 2005. Using the petition date as a benchmark, Mrs. Brown's property rights were divisible into two kinds. The actual money received became Mrs. Brown's personal property and it lost its identity as tribal funds. See Jacobsen v. Jacobsen (In re Marriage of Jacobsen), 121 Cal. App. 4th 1187, 1192-93, 18 Cal. Rptr. 3d 162, 166-67 (2004) (per capita distribution that was deposited into bank account or securities account lost its identity as immune Indian property); see also Ordinance, art. IV, sec. 1003(2); 25 C.F.R. § 290.16 (providing that the Secretary of the Interior "will not accept any deposits of payments or funds derived from net gaming revenues to any account held by [the Bureau of Indian Affairs] or [the Office of Trust Funds Management]."). In the case at bar, it is clear that the Payments that Mrs. Brown had already received as of the petition date were property of the estate.

The second form of property right was Mrs. Brown's entitlement to future Payments, which was created under the

Ordinance. This was a contingent, intangible property interest to which Trustee succeeded. Feiler, 218 F.3d at 953 (a trustee succeeds to the debtor's interest in property).

Section 541(a)(7) provides that property of the estate includes "any interest in property that the estate acquires after the commencement of the case." The legislative history of this section states:

> The addition of this provision by the House amendment merely clarifies that section 541(a) is an all-embracing definition which includes charges on property, such as . . . beneficial rights and interests that the debtor may have in property of another.

124 Cong. Rec. H11096 (daily ed. Sept. 28, 1978); S17413 (daily ed. Oct. 6, 1978). Congress intended that "property of the estate" be broadly construed. "Under [§ 541(a)(1)], the estate is comprised of . . . tangible and intangible property, choses in action, causes of action, rights such as copyrights, trade-marks, patents, and processes, contingent interests and future interests, whether or not transferable by the debtor." H.R. Rep. No. 95-595, 175-176, reprinted in 1978 U.S.C.C.A.N. 5963, 6136.

California takes an expansive view of property, which is defined as follows:

> The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.

Cal. Civ. Code § 654.

"Property" is "'all-embracing so as to include every intangible benefit and prerogative susceptible of possession or disposition . . .'"; and signifying "'any valuable right or interest protected by law.'" People v. Kwok, 63 Cal. App. 4th

1236, 1251, 75 Cal. Rptr. 2d 40 (1998) (citations omitted). Every kind of property that is not "real" property is "personal" property. Cal. Civ. Code § 663. Personal property may be without tangible substance, and it may be intangible in the sense that it is a right rather than a physical object. Navistar Int'l Transp. Corp. v. State Bd. of Equalization, 8 Cal. 4th 868, 875, 35 Cal. Rptr. 2d 651, 653, 884 P.2d 108, 110 (1994).

California recognizes contingent property interests. See State ex rel. Harris v. PricewaterhouseCoopers LLP, 23 Cal. Rptr. 3d 529, 566 (2005), rev'd in part on other grounds, 48 Cal. Rptr. 3d 144, 141 P.3d 256 (2006); Cal. Civ. Code §§ 688, 690, 697.[15] Courts, in a variety of circumstances, consistently have concluded that contingent interests are included within the bankruptcy estate. See, e.g., DeNadai v. Preferred Capital Markets, Inc., 272 B.R. 21, 29 & n.5 (D. Mass. 2001) (right to exercise a stock option in the future was property of the estate); Rau v. Ryerson (In re Ryerson), 739 F.2d 1423, 1425 (9th Cir. 1984) (holding that postpetition termination payments were property of the estate); Booth v. Vaughan (In re Booth), 260 B.R. 281, 285-87 (6th Cir. BAP 2001) (collecting cases holding that various contingent interests are property of the estate).

[15] In California, "[p]ossession may be proved without proof of ownership, and although ownership implies the right to possess (Civ. Code, sec. 654), possession may exist entirely apart from ownership and ownership may be had of a thing not in the owner's possession." People v. McKinney, 9 Cal. App. 2d 523, 524, 50 P.2d 827, 828 (1935).

Mrs. Brown's interest is analogous to business or stock dividends.[16] She has a right to receive the distribution effective on the declared per capita Payment Date. See Ordinance, art. IV, sec. 1003(1) and (2). As long as she is an eligible Tribal Member, and the same Ordinance is in effect, her share in the net revenues cannot be excluded from the distribution process.

The interest in future Payments is contingent because the Ordinance provides: a) that the tribe may amend or repeal the Ordinance at any time at its discretion, see Ordinance, art. IV., sec. 1003(4); b) Mrs. Brown must be alive and eligible on the Payment Date, see id., art. IV, sec. 1003(1) and (2); and c) there must be net revenue available for distribution.

Thus, Debtors' contention that no "right" to further payments "vested" in Mrs. Brown, does not precisely frame the issue. While paragraph 4 prohibits the vesting in any Tribal Member, or other person, of any interest in the gaming enterprise and its revenues, the vesting of later, declared and individual Payments is separately authorized in specific provisions of the Ordinance.

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[16] The court in Kedrowski stated:

> [T]ribal per capita distributions are far more conceptually akin to an interest in a business enterprise than they are a gift, a license, or some form of public assistance. Someone who owns stock in a company, or holds a limited partnership interest in a business, may never receive a distribution on that interest. The business may encounter a poor economic climate, may find expenses outpacing revenues, and may even fail. But should the company ever issue a dividend, all stockholders receive an appropriate amount in relation to their interest. Clearly, those who hold a "right" to receive payment from the operation of a business hold some sort of intangible property right under Wisconsin law.

Kedrowski, 284 B.R. at 447.

See Fireman's Fund Mortg. Corp. v. Hobdy (In re Hobdy), 130 B.R. 318, 321 (9th Cir. BAP 1991) ("[a] general statutory rule usually does not govern unless there is no more specific rule.") (citing Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989)). Therefore, paragraph (4) generally reiterates the Tribe's sovereignty and ownership. See Kedrowski, 284 B.R. at 450-51 (explaining that similar provisions emphasized the tribe's sovereign status); see also 28 U.S.C. § 1360 (discussed below).

In addition, the IGRA treats per capita payments when made as personal income,[17] with the consequence that the Tribe must inform the members that their Payments are subject to federal taxation. See 25 U.S.C. § 2710(b)(3)(D); Campbell v. Comm'r of Internal Revenue, 164 F.3d 1140, 1142 (8th Cir. 1999) (per capita distribution of casino proceeds was a dividend taxable as ordinary income). As such, per capita payments have been used to calculate an individual's income for various purposes in state courts. See Kedrowski, 284 B.R. at 448 (citing case law).

In summary, Mrs. Brown's interest in the Payments was an intangible "right" to possess them whenever the shares of net revenues are calculated (the "Payment Date"). As Trustee contends, this was an "automatic" property interest. Appellee's Brief (May 17, 2006), at 2. Although the Tribe could elect to amend or revoke the Ordinance, which might affect the intrinsic or marketable value of Mrs. Brown's right (see discussion below), it did not alter her absolute right to a distribution, if any future

[17] However, this income is not "earned," as that term is used in the exception to property of the estate for "earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6).

distributions are made, pursuant to the extant Ordinance. See Kedrowski, 284 B.R. at 446.

Finally, Debtors contend that the Payments were not a property interest because they were not transferable. Debtors maintain that the Ordinance restricts and prohibits Mrs. Brown from transferring this asset because any Payment check may only be made payable to the Tribal Member.

Even intangible property must be capable of being transferred. "'[I]t is a fundamental principle of law that one of the chief incidents of ownership in property is the right to transfer it.' 'A common characteristic of a property right, is that it may be disposed of, transferred to another.'" McTiernan v. Dubrow (In re Marriage of McTiernan and Dubrow), 133 Cal. App. 4th 1090, 1100, 35 Cal. Rptr. 3d 287, 295 (2005) (citations omitted) (alteration in original). California recognizes the transferability of intangible property. See, e.g., Cal. Civ. Code § 1044 ("Property of any kind may be transferred . . . ."); Cal. Com. Code § 9102(2), (42) and (61) (definitions of "account," "general intangible," and "payment intangible" under Division 9—Secured Transactions); Cal. Com. Code § 9109 (noncollection-related secured transactions in accounts or payment intangibles); Cal. Com. Code § 9204 (security interest in after-acquired property and future advances); Cal. Civ. Code § 955.1 (requirements for assignment of payment intangibles). Thus, under California law, Mrs. Brown's property interest is transferable.

Whether or not the transferability of the Payments is restricted by virtue of the Ordinance, however, is irrelevant to the question of whether they are property of the estate. Section

541(c)(1) provides, that except in regards to a beneficial interest in a trust, "an interest of the debtor in property becomes property of the estate under subsection (a)(1) . . . of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law–(A) that restricts or conditions transfer of such interest by the debtor; . . . ." 11 U.S.C. § 541(c)(1)(A). Thus, "'[p]ersonal' property interests or 'personal' rights that may not be transferred under federal or state law will nevertheless become property of the estate." 5 COLLIER ON BANKRUPTCY ¶ 541.24, at 541-100 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005). Therefore, Debtors' contention that Mrs. Brown's interest in the Payments was not property of the estate because it was nontransferable must fail.

In summary, the bankruptcy court did not err in determining that Mrs. Brown had a property interest in both the present and future Payments which became property of Debtors' bankruptcy estate. On this point, then, we AFFIRM the bankruptcy court.

**2. Value or Benefit to the Estate**

The determination that Mrs. Brown's interest in the Payments was property of the estate was, however, only the first step in deciding the motions for abandonment and turnover. Section 554(a) also requires the bankruptcy court to determine whether the property was "burdensome" or "of inconsequential value or benefit to the estate." 11 U.S.C. § 554(a). An interest in future distributions is only of value to the estate if it can be

assigned,[18] sold or reached for the enforcement of judgments.

Per capita distributions of profits from tribal enterprises are a discretionary choice of the tribal government, and therefore, we look to the language of the Ordinance to determine whether Trustee may take control of future Payments for the estate's benefit, and whether there are any restrictions imposed upon that interest. See Cohen, supra, § 16.04[2] & n.225 (2005); § 541(a)(6). Furthermore, the Supreme Court has admonished courts to interpret Indian treaties and applicable federal statutes by resolving any doubtful expressions in favor of the Indians' sovereignty. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172-74 (1973).

In ruling on another issue (i.e., spendthrift trust), the bankruptcy court concluded that the Ordinance contained no restrictions on transfer and specifically permitted transfer, citing the provision for allowing a third party to receive a Tribal Member's check upon the Tribal Member's signed and notarized written instruction. See Memorandum Decision, supra, at 2. That provision reads:

> Each Per Capita Payment shall be made by Tribal check, made payable only to the Tribal Member, except in the case of minors or legal incompetents, in which case payment shall be made as provided in Section (4). If requested in writing by the Tribal Member, the Treasurer shall mail each Per Capita Payment check to said member at the member's current address on file with the Treasurer; otherwise, Per Capita Payment checks shall be available at the office of the Treasurer during normal business hours. Upon the signed and notarized instruction of the Tribal

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[18] In California, an "assignment" refers to "a class of acts by which the right or title to something of value is transferred to another before the object of the transfer has become property in possession." Cross v. Sacramento Savings Bank, 66 Cal. 462, 466, 6 P. 94 (1885).

> Member, Per Capita Payment checks may be released to another person, provided that said person provides valid picture identification and signs for the check. If a Tribal Member who has not requested that his/her check be mailed fails to claim his/her Per Capita Payment check within 90 days after issuance, the Treasurer shall cause the check to be voided . . . .

Ordinance, art. V, sec. 1004(3) (emphasis added).

The Ordinance does not provide that a Payment check may be made payable to a third party, nor that it would be subject to attachment or garnishment under state law. Nor does it clarify what the words "may be released to" mean. For example, the Ordinance may be contemplating a situation in which someone is authorized to pick up, then deposit, the distribution to an elderly or infirm person. Therefore, construing the Ordinance in favor of Mrs. Brown, we hold that the bankruptcy court erred in its interpretation.

Moreover, in denying Debtors' motion to compel abandonment, the bankruptcy court implicitly ruled that the Payments were of some value or benefit to the estate, presumably because they could be assigned or sold by Trustee. This ruling was premature, because the bankruptcy court had neglected to analyze the "value" element of 554(a) or to make separate findings and conclusions which justified that a value could indeed be placed upon future distributions.[19]

However, the interest in future Payments may not be transferable or subject to enforcement proceedings such as

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[19] We agree that the Payments that Mrs. Brown had already received, as of the petition date, were freely transferable. However, we disagree with the bankruptcy court's conclusion in regards to Mrs. Brown's interest in an ongoing and unaltered stream of future Payments. Too many unanswered questions affect that conclusion.

garnishment.[20] The Supreme Court has held that Indian Nations enjoy immunity from judicial attack absent consent to be sued or express abrogation of tribal immunity. See Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 757 (1998); Krystal Energy, 357 F.3d at 1056 (Congress abrogated tribal immunity in § 106(a) of the Bankruptcy Code). Federal Indian law can also preempt state law "if the balance of federal, state and tribal interests tips in favor of preemption." Hoopa Valley Tribe v. Hongkong and Shanghai Banking Corp., Ltd. (In re Blue Lake Forest Prods., Inc.), 30 F.3d 1138, 1142 (9th Cir. 1994). "The more the federal government and the tribe have taken control of an activity, the more likely is the state to be preempted." William C. Canby, Jr., American Indian Law in a Nutshell 292 (1998). "Indian law preemption . . . determines which government — federal, tribal, or state — has jurisdiction in Indian country." David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., Cases and Materials on Federal Indian Law 562 (5th ed. 2005).

Tribal gaming is an important tribal interest which provides the sole source of revenues for the operation of a tribe's government and the provision of tribal services. Cal. v. Cabazon Band of Mission Indians, 480 U.S. 202, 218-19 (1987). Garnishment and other state enforcement of judgment remedies of a tribal member's per capita payments could implicate the tribe's sovereign

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[20] See, e.g., Begay v. Roberts, 167 Ariz. 375, 382, 807 P. 2d 1111, 1118 (Ct. App. 1990) (quashing justice court writs of garnishment of wages earned by a reservation Indian as being an infringement on tribal sovereignty, and on the basis of tribal law preemption). See also McClanahan, 411 U.S. at 173 (holding that absent explicit congressional authorization, a state acts outside its authority if it infringes on the right of reservation Indians to make their own laws and be governed by them).

immunity or preemption. See North Sea Prods., Ltd. v. Clipper Seafoods Co., 92 Wash. 2d 236, 237, 595 P.2d 938, 939 (1979); People v. Superior Ct., 224 Cal. App. 3d 1405, 1410, 274 Cal. Rptr. 586, 589 (1990) (noting, and citing Tenth Circuit law, that "Native Americans residing on reservations enjoy protection from compulsion of the state courts in a variety of matters such as . . . garnishment . . . .").

In California, federal law grants the state limited jurisdiction over civil actions involving Indians to the same extent that it has jurisdiction over other civil causes of action, and its general laws apply in Indian country. See 28 U.S.C. § 1360(a) ("Public Law 280").[21] However, § 1360(b) limits the scope of such state power and jurisdiction: it provides that § 1360(a) does not authorize the "alienation, encumbrance or taxation of any real or personal property . . . belonging to any Indian, or any Indian tribes, bands or community," nor does it

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[21] Section 4 of Public Law 280, 67 Stat. 589 (1953), is codified in 28 U.S.C. § 1360. Subsection (a) provides, in relevant part:

> (a) Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> . . .
>
> California . . . . All Indian country within the State[.]

28 U.S.C. § 1360(a).

authorize the "regulation of the use" of Indian property "in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto."

Furthermore, § 1360(b) provides that the general grant of civil jurisdiction "does not confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [Indian] property or any interest therein." 28 U.S.C. § 1360(b).

Finally, § 1360(c) provides that a tribal ordinance or custom which is not inconsistent with applicable state civil law will "be given full force and effect in the determination of civil causes of action pursuant to this section." 28 U.S.C. § 1360(c).

Public Law 280 did not abrogate Indian sovereign immunity, nor does it deprive a tribe of concurrent subject matter jurisdiction in civil matters. See Bryan v. Itasca County, 426 U.S. 373, 389-91 (1976); Getches, supra, at 508 n.2. Moreover, § 1360(b) precludes states from asserting jurisdiction over disputes concerning Indian trust land, even if one party is non-Indian. Boisclair v. Super. Ct., 51 Cal. 3d 1140, 1152, 276 Cal. Rptr. 62, 69, 801 P.2d 305, 312 (1990).

> [F]or section 1360(b)'s jurisdictional preclusion to operate and its protective purpose to be fulfilled, the threshold question must be whether one possible outcome of the litigation is the determination that the disputed property is in fact Indian trust land. If that outcome is possible, then a state court is barred from assuming jurisdiction of the case.

Id. (emphasis added); see also Lamere v. Super. Ct., 131 Cal. App. 4th, 1059, 1064, 31 Cal. Rptr. 3d 880, 883-84 (2005), cert. denied sub nom. Salinas v. Lamere, 126 S.Ct. 2291, 164 L. Ed. 2d 813 (2006) (Public Law 280 does not provide jurisdiction over disputes

involving a tribe).

In addition, in a garnishment, the tribe is the real party in interest, and therefore, Indian sovereign immunity may be at issue. See Stephen Pevar, The Rights of Indian Tribes 355 (2002). Whether a judgment is obtained in a Public Law 280 state or not, Indian trust property will be protected from garnishment or execution. See Robert Laurence, Service of Process and Execution of Judgment on Indian Reservations, 10 AM. IND. L. REV. 257 (1982). A tribal code may govern such enforcement. Id. at 268-69. A leading authority on Indian law has stated: "[E]ven in Public Law 280 states, the better rule is that state court judgments should be presented to tribal courts for recognition, and not merely executed upon by state officers using state enforcement process on-reservation." Cohen, supra, § 7.07[2][c].

Here, the per capita shares did not become Mrs. Brown's personal property until each Payment date. Her contingent interest in future Payments, while intangible property of the estate, may or may not be protected against transfer to third parties.[22] This matter was neither addressed by the bankruptcy court nor satisfactorily analyzed in either Johnson or Kedrowski.

The facts in Johnson are distinguishable from our case. There, the debtor had granted a bank a consensual security interest in his stream of per capita payments in order to secure a loan, rather than absolutely assigning the payments to the bank.

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[22] In addition, under California law, a contingent debt owed by the garnishee which is uncertain in the sense that it may never become due and payable is not subject to garnishment. Javorek v. Super. Ct. of Monterey County, 17 Cal. 3d 629, 640, 131 Cal. Rptr. 768, 777, 552 P.2d 728, 737 (1976).

The debtor had remained current on the loan by using the per capita payments to pay the debt as they were distributed. See Johnson, 259 B.R. at 130 n.4. The district court saw this situation as "resembling" an assignment. Id. In fact, there was no assignment in Johnson and, therefore, that case cannot support a conclusion that per capita payments are always assignable. In our case there was neither an assignment of, nor an encumbrance or lien on Mrs. Brown's interest.

In addition, the Johnson court noted that "[o]ther Tribe members have granted security interests in the payments, and have had them garnished." Id. at 127. However, any conclusion regarding garnishment was dictum because there was no garnishment under the Johnson facts. The district court merely found that the ordinance contained no restrictions on the debtor's ability to encumber the per capita payments on behalf of a third party. Id. at 131.

Nor do we believe the Kedrowski opinion is persuasive on this point. There, the ordinance stated: "[T]he Nation shall not recognize or enforce any claim, garnishment, levy, attachment, assignment or other right or interest in a Per Capita Share." 284 B.R. at 450. Interestingly, the bankruptcy court concluded that the ordinance did not expressly forbid per capita distributions from being liable for the tribal member's debts. Id. at 451. In fact, this tribal rule could be read to treat the per capita shares as trust property, which is protected from encumbrance in Public Law 280 states, and Wisconsin is one of those states.

Moreover, we disagree with both Johnson and Kedrowski that a lack of an express prohibition as to the transferability of per

capita payments in an ordinance should be construed as allowing for such transfer. We hold, therefore, that to the extent the bankruptcy court so interpreted the Ordinance, its conclusion was erroneous. We further hold that the bankruptcy court's implicit finding that Mrs. Brown's interest in the stream of future Payments was of value or benefit to the estate was clearly erroneous. See Wall Street Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006) ("[W]e may regard a finding of fact as clearly erroneous not only if it is without adequate evidentiary support, but also if it was induced by an erroneous view of the law.") (citation omitted). Further evidence and support for this conclusion must be shown.

At the very least, the Ordinance is ambiguous, and more evidence is required in order for the bankruptcy court to determine whether Mrs. Brown's interest is transferable and, if so, what it is worth. There is no evidence in the record of whether any attempt had been made to value the stream of Payments, nor any determination made as to whether the contingencies affected its marketability. Such evidence may require the testimony of tribal officers or valuation experts, or facts judicially noticed concerning tribal law and financial affairs. The issue is not purely one of law which we may review de novo, and therefore a remand will preserve the trial court's role as factfinder. See Matter of MCI, Inc., 151 B.R. 103, 109 (E.D. Mich. 1992) (determining appeal of abandonment order de novo). Thus, we VACATE AND REMAND for further proceedings.

## CONCLUSION

The relevant legal authority to determine property of the estate for a Tribal Member requires a consideration of federal and state property law, as well as the tribal laws and the specific Ordinance. The bankruptcy court correctly concluded that Mrs. Brown's interest in the present and future Payments was property of the estate, and its reliance on Kedrowski and Johnson for such holding was proper. This part of the order is AFFIRMED.

However, the bankruptcy court ruled against Debtors' abandonment motion without analyzing and making findings and conclusions concerning whether there was any value or benefit to the estate in the stream of future Payments. Any implicit valuation determined against Mrs. Brown that was based on case law from other jurisdictions or on the absence of prohibitive language in the Ordinance was therefore an abuse of the court's discretion. Specifically, the Ordinance is ambiguous concerning the transferability of the future Payments, and more evidence is warranted. Similarly, any determination of actual value requires positive proof. We therefore VACATE AND REMAND for further proceedings on the abandonment request, including a determination of the asset's value to the estate.

**AFFIRMED IN PART; VACATED AND REMANDED IN PART.**