



The relief described hereinbelow is SO ORDERED.

Signed November 01, 2007.

A handwritten signature in cursive script that reads "Robert D. Berger".

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ROBERT D. BERGER  
United States Bankruptcy Judge

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**CYNTHIA MARLEEN GARDNER,  
Debtor.**

**Case No. 06-21081  
Chapter 7**

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**ORDER REGARDING TRUSTEE'S OBJECTION TO  
DEBTOR'S CLAIM OF EXEMPTION IN WRONGFUL GARNISHMENT OF SUPPORT**

Chapter 7 Trustee Eric Rajala objects to Debtor's claimed exemption of property identified as wrongful garnishment of maintenance and child support. Debtor listed \$14,000.00 as exempt based on the alleged wrongful prepetition garnishment of child support and maintenance by a creditor. The Trustee demanded the funds from the creditor as an avoidable preferential transfer. The creditor turned over the funds to the Estate. The Trustee objects to the claimed exemption, arguing maintenance and support already paid to a debtor are not exempt under K.S.A. § 60-2312(b) and 11 U.S.C. § 522(d)(10). The parties submitted the issues based on the pleadings. This matter constitutes a core proceeding over which this Court has

jurisdiction.<sup>1</sup> The Court finds alimony, support, or separate maintenance is not exempt if it has already been paid to the debtor and deposited into her personal banking account. The Court further finds child support is not property of the Estate and thus does not need to be claimed as exempt. An evidentiary hearing is required to determine the allocation of the \$14,000.00 between alimony and child support.

### **Findings of Fact**

Debtor filed her Chapter 7 petition on July 25, 2006. On Schedule B, she listed a cause of action for the wrongful garnishment of a bank account containing \$14,000.00 in child support and maintenance payments received from her ex-spouse prepetition. On Schedule C, she listed the \$14,000.00 as exempt. The Trustee recovered the funds and holds the funds in his trustee account. The Debtor now argues the money is child support and is not property of the Estate. The Trustee concedes Debtor should be permitted to retain the portion of the \$14,000.00 garnished to the extent it is her ex-spouse's child support payment; however, the Trustee maintains he may administer any maintenance included in the \$14,000.00. The parties do not indicate how much of the \$14,000.00 is child support and how much is maintenance.

### **Discussion**

The Trustee bears the burden of proving the exemption is not properly claimed.<sup>2</sup> However, the Debtor bears the burden of establishing property is not part of the Estate.<sup>3</sup> The Trustee does not challenge Kansas law recognizing child support and the right to collect child

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<sup>1</sup> 28 U.S.C. § 157(b)(2)(B); 28 U.S.C. § 1334.

<sup>2</sup> Fed. R. Bankr. P. 4003.

<sup>3</sup> *In re Foster*, 275 F.3d 924, 926 (10th Cir. 2001).

support belong to the child, not the custodial parent.<sup>4</sup> The Trustee questions what amount of the \$14,000.00 is child support because the Debtor has consistently referred to the funds as both child support and maintenance in her pleadings. Debtor claims, for the first time in her response brief, that the entire \$14,000.00 is child support; however, Debtor offers no evidence to support her claim. Accordingly, Debtor has failed to meet her burden regarding the amount of child support which is not property of her bankruptcy Estate.

As for alimony and maintenance, the Debtor does not respond to the Trustee's argument that only the future right to receive maintenance is exempt under K.S.A. § 60-2312(b) and 11 U.S.C. § 522(d)(10)(D). The majority of case law interpreting §522(d)(10) exemptions holds the exemption of a right to receive property does not necessarily include the property itself after the debtor takes possession.<sup>5</sup> Accordingly, the Trustee's position is supported by case law and, absent a challenge from the Debtor, the Trustee's position prevails. However, like the Debtor, the Trustee offers no evidence to support his claim that a portion of the \$14,000.00 is indeed maintenance and, hence, not exempt under § 522(d)(10).

### **Conclusion**

The record is insufficient to establish the purpose behind the \$14,000.00, whether it be child support or maintenance or an allocation between the two. An evidentiary hearing shall be scheduled by separate order.

IT IS SO ORDERED.

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<sup>4</sup> *In re Welch*, 31 B.R. 537, 539 (Bankr. D. Kan. 1983), quoting *Myers v. Anderson*, 67 P.2d 542 (Kan. 1937); *Wheeler v. Wheeler*, 414 P.2d 1 (Kan. 1966).

<sup>5</sup> See, e.g., *In re Williams*, 181 B.R. 298 (Bankr. W.D. Mich. 1995); *In re Moore*, 214 B.R. 628 (Bankr. D. Kan. 1997); *In re Panza*, 219 B.R. 95 (Bankr. W.D. Penn. 1998); *In re Sanchez*, 362 B.R. 342 (Bankr. W.D. Mich. 2007).

ROBERT D. BERGER  
U.S. BANKRUPTCY JUDGE  
DISTRICT OF KANSAS