UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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| IN RE: | ) | |
| | ) | |
| TAMECA D MARVE, | ) | CASE NO. 12-20611 JPK |
| | ) | Chapter 7 |
| Debtor. | ) | |

MEMORANDUM OF DECISION PARTIALLY DETERMINING
TRUSTEE'S MOTION FOR TURNOVER

This Chapter 7 case was initiated by voluntary petition filed by the debtor Temeca D. Marve ("Marve") on March 1, 2012. On June 26, 2012, Stacia L. Yoon, as Trustee of the Chapter 7 bankruptcy estate of Temeca D. Marve ("Trustee") filed a motion for turnover [record #17]. On July 12, 2012, as record #25, Marve, by counsel, filed an objection to the motion for turnover. On July 13, 2012, as record #26, Marve filed an amended Schedule C. The motion for turnover filed by the Trustee requested turnover of $3,819.44 of funds in the debtor's two bank accounts. Marve's objection to the motion for turnover in part asserted that a portion of the funds in her joint checking account at Chase Bank ending with the numbers 985 was derived from a federal income tax refund of $8,236.46, $5,291.00 of which constituted an earned income credit. The amended Schedule C claimed an exemption of $5,291.00 in the earned income credit[1].

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[1] Based upon the Trustee's motion for turnover, Marve's objection, and the parties' stipulation of facts filed on November 9. 2012 – a portion of the funds subject to the Trustee's motion do not appear to be in dispute. Paragraph 10 of the debtor's objection states that on the date of filing of her bankruptcy petition, there was a balance of $613.91 in a Chase Bank account ending with the numbers 580. Paragraph 10 of the objection asserts the debtor "is claiming $330.00 of that amount as exempt". However, the original Schedule C filed shortly after the inception of the case asserted only an exemption of $100.00 for a joint checking account at Chase Bank; this exemption assertion was mirrored in the amended Schedule C. Paragraph 10 of the of the stipulation of facts establishes that the "580" account is the <u>debtor's savings account</u>. The court determines that the $100.00 exemption claim relates to the Chase Bank account ending with numbers 985, and that no exemption has been claimed with respect the "580" account. Thus, no sustainable objection has been lodged to the turnover request for $613.91 in the debtor's Chase Bank account ending with the numbers 580. The Trustee's motion for turnover will therefore be sustained for $613.91 with respect to this account.

The matter before the court primarily relates to the Trustee's motion for turnover with respect to funds in the Chase Bank account ending with the number 985. The matter before the court is a contested matter pursuant to Fed.R.Bankr.P. 9014. The court determines that it has full jurisdiction and authority to render a final decision with respect to this contested matter.

At conferences held with the court, the court and the parties discussed that the primary issue was determining whether an earned income credit retained its exempt nature provided by Indiana law after its receipt by the taxpayer/debtor and deposit into a bank account. The court entered an order (record #32) reflecting this approach to the case. The parties did not timely file the stipulation of facts required by that order, and as a result, on November 9, 2012, a hearing was held to determine the course of further proceedings in the case, attended both by Trustee Yoon and by attorney Rosalind Parr, as counsel for Marve. The parties had filed a stipulation of facts on November 9, 2012, which the court addressed at that hearing. As a result of that hearing, the court entered an order which determined that there were now two issues necessary for decision: First, whether the Indiana exemption statute concerning the earned income credit continues to protect the amount of the credit <u>after</u> it is received by the debtor/taxpayer; second, if the foregoing issue were determined in the affirmative, the principles to be employed to determine the amount actually subject to exemption when the earned income credit amount is co-mingled in a bank account with non-exempt funds.

The first issue – whether an earned income credit retains its exempt character after it is received by a debtor/taxpayer/recipient of the earned income credit – is very easily resolved. The earned income credit exemption is provided by I.C. 34-55-10-2(c)(11) as follows:

> (c) the following property of a debtor domiciled in Indiana is exempt:
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> (11) The debtor's interest in a refund or a credit received or to be received under the following:
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> (A) Section 32 of the Internal Revenue Code of 1986 (the federal

earned income tax credit),

(B) IC 6–3.1–21–6 (the Indiana earned income tax credit)

This court has issued a number of decisions, some of which have been published by bankruptcy decision publication services, and some of which have not been so published. It is difficult sometimes to keep track of the issues which the court has previously determined. This is one of them. As record #30 in the case of Shashunte Jameca Norwood, Case No. 08-20259, the court determined that the exemption provided by the foregoing statute extends to the earned income credit after it is received by the debtor/recipient, and after it is deposited into a bank account. A copy of that memorandum of decision is attached to this document and is incorporated herein as the court's determination concerning the foregoing issue. Due to the manner in which the record was made in Norwood, the court did not determine the second issue, i.e., the manner in which the exempt amount would be determined with respect to earned income credit funds deposited in a bank account which were co-mingled with non-exempt funds. It is the second issue which will be determined by this Memorandum of Decision.

The court's research has disclosed three mechanisms for determining the amount of exempt funds existing on the date of the filing of a bankruptcy petition when prior to that date exempt funds have been co-mingled with non-exempt funds.

The first of these is the "Lowest Intermediate Balance Test", explained as follows in *In re Ross*, 2012 WL 3817792 (Bankr. S.D.Ind. 2012):

> The Debtors next urge the Court to trace the Disputed Funds by using the "Lowest Intermediate Balance Test" ("LIBT") which they assert will result in all of the Disputed Funds being traced to the EIC Funds, and thus, exempt. The LIBT has been applied most frequently where a debtor commingles his own funds with funds he is holding in trust for another. For example, if the account balance is equal to or exceeds the amount of funds held in trust, then the full amount of the trust funds remain intact. If the account balance drops to zero, the trust funds are lost and subsequent deposits into the account are considered non-trust funds and do not replenish the trust fund portion. If the account drops to a

> balance less than the amount of trust funds, but not to zero, the trust funds are limited to the lowest intermediate balance in the account. Thus, the LIBT is based on the fiction that the debtor would withdraw the non-trust funds first, retaining as much as possible of the trust funds in the account. See, *Connecticut Genera Life Ins. Co. v. Universal Ins. Co.,* 838 F.2d 612, 619 (1st Cir.1988); *In re MJK Clearing, Inc.,* 371 F.3d 397, 401–402 (8th Cir.2004); *In re Appalachian Oil Co., Inc.,* 471 B.R. 199 (Bankr.E.D.Tenn.2012). Courts use the LIBT to separate out funds held in trust for another from the debtor's funds which are property of the debtor's bankruptcy estate or where a creditor attempts to impress a constructive trust upon proceeds in the account. See, *U.S. v. McConnell,* 258 B.R. 869 (N. D.Tex.2001) (chapter 7 debtor had commingled immigration inspection fees which it held in trust for the Immigration and Naturalization Service); *In re Stoler & Co.,* 144 B.R. 385 (N. D.Ill.1992) (broker sought constructive trust over funds held by bankruptcy trustee for unpaid commissions); *In re LGI Energy Solutions, Inc.,* 460 B.R. 720 (8th Cir.B.A.P.2011) and *In re Appalachian Oil Co., Inc.,* 471 B.R. 199 (Bankr.E.D.Tenn.2012) (in both cases, defendant in preference action asserted constructive trust as defense and argued that transfer was of property held in trust and not of property of the estate).

The second approach is that actually adopted in *In re Ross*, stated as follows in that decision:

> This Court is of the opinion that the LIBT appropriately may be applied to determine *what is property of the bankruptcy estate* in two circumstances: (1) where the debtor has commingled his own funds with funds he holds for another in trust, or (2) where, in a case that converts from a chapter 13 to a chapter 7, the debtor has commingled funds acquired pre petition with funds acquired post petition but pre conversion. Neither of those circumstances is present here. Furthermore, the funds in the PNC Account were fungible ... certainly the EIC Funds within that account were not specially "marked" to physically distinguish them from the non exempt funds. Thus, this Court sees no logic in assuming that the Debtors first spent the non exempt funds in the PNC Account such that only the EIC Funds were deposited into the Huntington Account, or vice versa. Furthermore, unlike *Maine,* there is not one, but two bank accounts involved here and the balances in both dropped below the amount of the EIC Funds. Rather than using the LIBT, the fairer way to determine the exempt portion of the Disputed Funds is determine the percentage of the EIC Funds to the PNC Account total and to apply that percentage to the Disputed Funds. The parties stipulated that, as of March 16, 2012 and prior to the withdrawal of $9,300, the PNC Account balance

> was $10,575.88, of which $6104, or 57.72%, was made up of the EIC Funds. Applying this percentage to the Disputed Funds results in $1,296.68 (57.72% of $2,246.50) in exempt EIC Funds and $949.82 in non-exempt funds.

*Ross*, *supra.* [2]

The third approach is the "first-in, first-out method", explained in *In re Patterson*, 2010 WL 3606893 (Bankr. N.D. Ohio 2010) as follows:

> In determining the nature of the funds on deposit in Debtors' checking account at the time their bankruptcy petition was filed, the court finds use of the first-in, first out method of accounting appropriate to trace the source of the funds in the account. *See In re Lichtenberger,* 337 B.R. 322, 326 (Bankr.C.D.Ill.2006) ("[g]uided by the principle that exemptions are to be construed liberally in favor of debtors," the court applied the first-in, first-out method to determine the source of funds in the debtor's bank account); *Shumate,* 829 F.Supp. at 181 (using the first-in, first-out method in determining whether funds could be traced to social security benefits); *United States v. Griffith,* 584 F.3d 1004, 1021 (10th Cir.2009) (finding VA funds commingled in account with other funds will retain their VA character as long as they are readily traceable and may be accounted for with a standard accounting method, such as first-in, first-out tracing). Immediately before the deposit, the balance in Debtors' checking account was $362.23. After the income tax refund was deposited the balance was $5,267.23. However, before the date of filing, withdrawals were made from the account in the total amount of $1,512.13, leaving a balance of $3,755.10 at the time of filing. Applying the first-in, first-out method, this entire balance consists of payments received under the provisions of the Internal Revenue Code for the earned income credit and additional child tax credit. Debtors are, therefore, entitled to exempt the entire balance of funds in their checking account on the date of filing.

None of the foregoing methods is, or can be, a precise analytical model for the manner in which all people utilize bank accounts and intend the use of those accounts to reflect either

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[2] The court has been unable to locate any case decided by an Indiana appellate court with respect to the tracing rules to be applied in this matter, i.e., in relation to deposits into a bank account derived from exempt funds co-mingled with non-exempt funds. However, several cases which applied in essence the LIBT approach arose in situations in which a person had co-mingled his/her own funds with funds held in trust for another, as addressed by Judge Metz. The court agrees with Judge Metz that the LIBT approach is not appropriate, given Indiana law which implicitly limits its application to the foregoing circumstance.

extension of, or evisceration of, protections afforded by exemption laws with respect to exempt funds deposited in accounts which are co-mingled with non-exempt funds. If one were to implement sound pre-bankruptcy planning in relation to the issue of utilization of exempt funds, or deposit of exempt funds into a bank account, it would be a relatively easy matter to segregate the exempt funds into a separate account so that they could be entirely traced to that account and their use totally accounted for. That would be a perfect world of pre-bankruptcy planning, a world which – let's face it – does not exist. What we usually end up with is a circumstance in which a tax refund, including an earned income credit, is viewed as a source of payment/use for ordinary and extraordinary expenses made by the debtor/taxpayer/EIC recipient, without any thought being given as to identification of the source of any payment made from a bank account to a particular source of deposit. In this scenario, Judge Metz's approach really doesn't mirror a debtor's actual use of co-mingled funds: there is no provable intent by an account owner to use co-mingled funds proportionately. But ... while the earn income credit is treated by the Internal Revenue Code essentially as a tax refund, and many reported decisions designate the earned income credit as a "tax refund", it is actually not usually a tax refund in the real sense of that term. A true tax refund reflects a return of taxes paid by the tax refund recipient in excess of the amount of tax actually owed by that recipient. The earned income credit has little, or no, originating base in the payment of taxes. It is essentially a form of social welfare payment designed to provide a minimal amount of support to persons entitled to it so that those persons can be assisted in providing for very base necessities of life for them, their dependents, or other household members. The earned income credit, at least to some extent, alleviates the need for other social welfare payments to be made by the federal government, state and local governments, or charitable organizations. In other words, at its recipient level, it is the ultimate "trickle down" social welfare disbursement. It is based upon an assumption that without its disbursement, truly needy people would be even more truly needy; truly destitute people would be more truly destitute; and people who have difficulty making ends meet would have a further gap between the ends to be met. The earned income credit is entirely exempt, and but for its deposit into a “co-mingled” bank account, no creditor could reach it, and no bankruptcy Trustee could reach it to disburse it as property of the bankruptcy estate. Given the foregoing, perhaps the underlying premise of the earned income credit argues in favor of the LIBT approach, so that the maximum amount of the credit is preserved for the debtor.

Be the foregoing as may be, in this court’s view legal theories should not be the result of gerrymandering to carve out islands of preferential treatment which do not mirror actual circumstances. The LIBT approach does not reflect actual practices concerning deposited funds and their disbursement. The LIBT method, applied in the context of exempt funds as contrasted to the context of fiduciary-held funds, gives the debtor “credit” for planning fund uses which did not in fact exist. The LIBT method was derived to provide as much protection as possible for funds held in trust for another, to protect the actual owner of those funds – not to protect funds owned by the owner of the account into which those funds had been deposited. In actuality – as Judge Metz noted – deposits into an account are fungible, i.e., they are not deposited with an encapsulation as to the source of deposit. Ordinarily, depositor-owned funds are deposited into a bank account without thought as to their origin – to provide a convenient reservoir for funds, or to immediately provide a source of funds for immediate disbursement needs. They are deposited in the same manner that coal is loaded into a tipple for withdrawal to load coal cars: the first lump in, is the first lump out. In the court’s view, the “first in, first out” mechanism mirrors reality. Depending upon the circumstances of deposit and withdrawal, at times this approach will preserve EIC funds, while at times it won’t. However that may be, the court does not deem it appropriate to adopt a theory which results in the settling of exempt funds at the bottom of the tipple, or the proportionate mixing of exempt funds before funds reach the point of delivery. There is always a tension in cases involving co-mingled funds in any context – a tension between who is ultimately entitled to portions of the fund at issue. In the context of this case, the tension is between the debtor claiming exemption, and creditors of the debtor who stand to benefit if funds are not determined to be exempt. While it is true that exemptions are to be literally construed in favor of the debtor, in this court's view that principle ceases to be operative when exempt funds are co-mingled with non-exempt funds. At that point the actual use of co-mingled funds – i.e., the manner in which people use fungible deposits into a bank account – controls. The LIBT method and the proportional use method tend to create an encapsulation of exempt funds which does not in fact exist as the account owner's intent, and continue the preference for exemption construction beyond its boundary. Additionally, while those methods are relatively easy to apply in a circumstance in which the account is solely owned by the debtor, and relatively few deposits or withdrawals are made after the deposit of EIC funds up to the date of the bankruptcy petition – they become more difficult to conceptualize and apply in the context of a jointly owned account into which deposits are made by the non-debtor co-owner, or in the context of an account which is actively and regularly used after the deposit of the EIC funds. Whatever the ownership of the account, or the source of deposit, the "first in, first out" method provides an easily applied mechanism for determining the residual amount of potentially exempt funds. The use of this method does not necessarily favor the debtor's exemption – a factor mentioned in the citation stated above from *In re Patterson* – in the context of a jointly owned account or of an account from which frequent withdrawals/payments are made after the deposit of exempt funds, and thus in some circumstances better balances the interests of the debtor in exempt funds with the interests of creditors in bankruptcy estate property.

The court adopts the "first in, first out" approach.

In order to apply the "first-in, first-out" method, the <u>initial fact</u> which must be established is the balance in the account in question <u>immediately preceding</u> the deposit of the earned income credit into that account. That fact is missing from the Stipulation of Facts filed by the Trustee and Marve as record #38. The calculation is also complicated by the fact that the account at issue was a joint account with the debtor's non-debtor husband whose interest in the account is severable from the bankruptcy estate's interest in the account, and by the fact that deposit(s) of the husband's sole property was/were made into the account after deposit of the debtor's earned income credit into that account. Absent additional facts, a final determination as to the amount subject to turnover to the Trustee cannot be made.

The Trustee is entitled to turnover of $613.91 with respect to the Chase Bank account ending with numbers 580. The amount of the account ending with numbers 985 subject to turnover remains to be determined.

Because of missing facts, this memorandum of decision does not finally determine the contested matter arising from the Trustee's motion for turnover and Marve's objection to that motion. However, as to the legal issues before the court, the court determines as follows:

A. As determined by its decision in *In re Norwood* (attached), the Indiana exemption statute continues to provide exemption for the earned income credit after that credit amount has been received by a debtor/taxpayer/recipient, including with respect to deposit of the earned income credit into a bank account with non-exempt funds.

B. The "first-in, first-out" method is the method which the court will employ to determine the extent to which funds in a co-mingled bank account constitute funds subject to exemption with respect to the earned income credit.

IT IS ORDERED that a hearing will be held on **January 18, 2013, at 9:00 A.M.** to determine the extent of the evidentiary record necessary to finally determine the issues in this contested matter.

Dated at Hammond, Indiana on January 4, 2013.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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| IN RE: | ) | |
| | ) | |
| SHASHUNTE JAMECA NORWOOD, | ) | CASE NO. 08-20259 JPK |
| | ) | Chapter 7 |
| Debtor. | ) | |

MEMORANDUM OF DECISION CONCERNING CONTESTED MATTER

On February 9, 2009, David R. Dubois, as Trustee of the Chapter 7 estate of Shashunte Jameca Norwood ("Trustee"), filed a Motion for Turnover Order, directed to "the balance in the Chase Bank account no. 730651478 on the date of the bankruptcy filing, namely $2,290.87 and the 2007 Indiana income tax refund in the amount of $452.00". The debtor, by counsel, filed a timely objection to the motion for turnover on February 11, 2009. A preliminary pre-trial conference was held with respect to the resulting contested matter on April 17, 2009. As a result of that hearing, the court entered its Order Concerning Determination of Contested Matter on April 29, 2009. At that hearing, the parties stipulated in open court to the factual record with respect to the contested matter, stated in the April 29, 2009 order as follows:

> The parties stipulate that the amount of the account at issue is $2,900.00; that the amount of the account attributable to funds derived from the earned income credit is $2,424.75; and that the amount of the account attributable to a refund of withheld income tax is $475.25. These stipulated facts constitute the entire factual record before the court for determination of this contested matter; no further evidence will be considered.[1]

The issue presented to the court was stated in the April 29, 2009 order as follows:

> The issue before the court is the extent of the debtor's ability to

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[1] In the second paragraph of her Memorandum in Support of Debtor's Objection to Turnover filed on April 30, 2009, the debtor Shashunte Jameca Norwood ("Norwood") states facts which deviate from those comprising the stipulated record, as stated in the court's April 29, 2009 order. The factual record as stated in the April 29, 2009 order is the factual record applicable to this case, and the second paragraph of the foregoing Memorandum will be ignored. If either of the parties deemed the recitation of the stipulated record in the April 29, 2009 order to be incorrect, it was incumbent upon them to file a motion bringing that inaccuracy to the court's attention, which neither did.

> claim the exemption provided by I.C. 34-55-10-2(c)(11) with respect to the $2,424.75 amount in the bank account, which the parties have stipulated is directly derived from a deposit of the earned income credit received by the debtor.[2]

The contested matter, subject to Fed.R.Bankr.P. 9014, is now before the court for determination. The court has jurisdiction of this contested matter pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and (b)(1), and N.D.Ind.L.R. 200.1(a)(1) and (2). This contested matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

Norwood filed a timely memorandum pursuant to the April 29, 2009 order. The Trustee has not filed a memorandum. It would of course have been preferable if the Trustee had filed a memorandum in support of his motion for turnover. Despite the lack of a memorandum opposing the position taken by Norwood, because of the importance of the issue involved in the administration of bankruptcy cases, the court will take into account the contentions and authorities advanced by Norwood in her memorandum, but will still decide this contested matter *de novo*.

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[2] The parties presented one case to the court at the preliminary pre-trial conference held on April 17, 2009. The issue relating to the Trustee's motion for turnover, as the court understood it, was presented by the parties to the court as one involving deposit of an earned income credit into a bank account prior to the petition date, and the consequent issue of whether an exempt asset so deposited into a bank account retains its characteristic as an exempt asset, or whether, once deposited, whatever the asset was is subject solely to the intangible exemption for a bank account provided by Indiana law by I.C. 34-55-10-2(c)(3). However, the record itself appears to disclose an entirely different case.

In Schedule B which Norwood filed at the inception of her case on January 31, 2008, she designated the following property subject to administration in this case:

1. In paragraph 2 of Schedule B, $50.00 held in "Checking at Chase Bank (see SOFA)";
2. In paragraph 21, an asset designated as "Earned Income Credit", designated to have a current value of "Unknown".

According to the schedules, on the date of filing of this case on January 31, 2008, Norwood had not yet deposited the earned income credit into a bank account, and she was anticipating receipt of some form of earned income credit with respect to a tax return for calendar year 2007. Thus, on January 31, 2008, Norwood's bankruptcy estate did not include a bank account into which had been deposited any payment received by Norwood from the Internal Revenue Service with respect to her calendar year 2007 federal income tax return.

The Motion for Turnover Order to which Norwood has objected requests turnover with respect to “the balance in the Chase Bank account no. 730651478 on the date of the bankruptcy filing, namely $2,290.87 and the 2007 Indiana income tax refund in the amount of $452.00". There is a tremendous discrepancy between the record created by the debtor’s schedules filed on January 31, 2008 and the court’s understanding of the parties’ stipulation in open court at a preliminary pre-trial conference held on April 17, 2009. Rather than determine the motion for turnover on the basis of Schedule B as filed by the debtor, the court will hold the parties to their stipulation. Thus, for the purposes of this decision, as established by the parties’ stipulation, the facts are that on the date of the filing of the petition (January 31, 2008), Norwood had received a payment from the Internal Revenue Service with respect to her 2007 federal income tax return, and had deposited that payment into a bank account maintained at Chase Bank. That bank account – as established by the court’s order entered on April 29, 2009 – had a balance on the date of the filing of the petition of $2,900.00. That balance was comprised of proceeds received from the Internal Revenue Service with respect to Norwood’s 2007 federal income tax return: $2,424.75 with respect to an earned income credit, and $475.25 with respect to withheld income tax.

The subject of the Trustee’s Motion for Turnover Order is two-fold: first, the balance in the Chase Bank account, and secondly, an Indiana income tax refund in the amount of $452.00. Norwood’s objection to the Trustee’s motion, filed on February 11, 2009, states in entirety the following:

> Debtor Shashunte Norwood, hereby objects to the Trustee’s Motion for Turnover in that it calls for funds that are exempt under Indiana State exemptions. Namely, the debtor’s earned income credit. The Trustee’s actions are unnecessary and unfairly delay the debtor’s case and deny her a fresh start.

Norwood did not object to turnover of the Indiana income tax refund in the amount of $452.00, and the Trustee’s motion is therefor granted as to this item of property.

With respect to the issue framed by the parties, it must first be noted that the record presently before the court does not support any claim of exemption by Norwood as to the earned income credit. In her Schedule C, filed on January 31, 2008, Norwood claimed the following exemptions which are in any manner relevant to this contested matter:

| Property | Exemption Basis | Value of Exemption | Value of Property |
|---|---|---|---|
| 1, Checking, Savings, or Certificates of Deposit | Other Financial Accounts, | | |
| Checking at Chase Bank (see SOFA) | Ind. Code § 34-55-10-2(c)(3) | $50.00 | $50.00 |
| 2. Other Contingent and Unliquidated Claims of Every Nature | | | |
| Earned Income Credit | Ind. Code § 34-55-10-2(c)(10) | 0.00 | Unknown |

Resultantly, Norwood claimed an exemption of $50.00 with respect to a checking account held at Chase Bank; claimed an exemption of "0.00" with respect to the earned income credit; and claimed no exemption as to any other federal or state tax refund. Schedule C has not been amended. The simple fact is that Norwood did not effectively claim any exempt amount in Schedule C with respect to the earned income credit arising from her 2007 federal income tax return.

The consequence of failing to effectively claim an exemption with respect to property of a bankruptcy estate was stated in *Payne v. Wood*, 775 F.2d 202, 204 (7th Cir. 1985) as follows:

> Under the Bankruptcy Act all property of the debtor becomes part of the estate available to satisfy the creditors' claims. 11 U.S.C. § 541(a). The debtor then may remove some of the property by claiming exemptions under 11 U.S.C. § 522(b). Anything properly exempted passes through bankruptcy; the rest goes to the creditors. The debtor must file "a list of property that the debtor claims as exempt", and "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. § 522( *l* ). If the debtor does not claim an exemption with respect to particular property, the rule of inclusion stated in § 541 controls,

> and the property goes to the creditors. *In re Friedrich,* 100 F. 284 (7th Cir.1900); *Gardner v. Johnson,* 195 F.2d 717 (9th Cir.1952); *In re Guerrero,* 30 B.R. 463 (N.D.Ind.1983); *In re Elliott,* 31 B.R. 33 (Bankr.S.D.Ohio 1983).[FN1] (emphasis supplied).
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> > FN1. *Friedrich* and *Gardner* interpret the 1898 act rather than the current version, but the mechanics of exemption, as opposed to the substance of what may be exempted, were not changed in the 1978 revisions.

To effectively claim an exemption, the third column in Schedule C with respect to each designated exempt item must state a value. and the amount of the exemption is determined by that statement. As explained in *In re Bell*, 179 B.R. 129, 130 (Bankr. E.D.Wis. 1995):

> The question raised by the trustee's objection is whether the debtor has properly claimed his exemptions by declaring "entirely exempt," rather than a numerical amount, in the third column of Schedule C. The third column of Schedule C requires the debtor to set forth the "value of claimed exemption."
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> The debtor argues that he has fully complied with the requirements under the Bankruptcy Code and Rules. He maintains that he alerted the trustee to his estimate of the actual value of the property being claimed as exempt in the first and fourth columns of Schedule C. The first column of Schedule C requires the debtor to describe the property and Column 4 requires the debtor to list the current market value. Column 3 of Schedule C requires a debtor to declare the value of the claimed exemption. "Value," as used in the official exemption forms, generally means an approximate dollar amount. *In re Wenande,* 107 B.R. 770, 772 (Bankr.D.Wyo.1989). The generic term "entirely exempt" does not meet that requirement. Federal Rule of Bankruptcy Procedure 9009 requires that the Official Forms "shall be observed and used with alterations as may be appropriate." What the debtor is proposing is not an appropriate alteration.
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> . . .
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> Furthermore, where the debtor becomes aware that he underestimated the value of the exemption, if that value is below the maximum allowed exemption, and the case is still open, the exemption schedules can be amended. *See* F.R.Bankr.P. 1009(a). Although this does not necessarily assure a debtor that there will be no challenge to the amended exemptions, the prospect of a challenge is slight where the debtor's estimates of values were made in good faith and there is an absence of prejudice to the creditors. (footnote omitted)

Norwood's Schedule C states the claimed value of her exemption in the earned income credit to be "0.00", and thus she has effectively claimed no value for that exemption and the entirety of the earned income credit is not exempt. However, both the Trustee and Norwood have proceeded as if Norwood had effectively claimed an exemption for the entire amount of the earned income credit derived from the 2007 tax year and the court will proceed with this decision as if she had. Again, the parties are stuck with the case as they have presented it to the court. Fed.R.Bankr.P. 1009(a) provides the debtor with a general right to amend any schedule "as a matter of course at any time before the case is closed". The right to amend is not absolute, and there are certain circumstances which would preclude protection of property by amendment of Schedule C: For example, the circumstances in this case with respect to the portion of the bank account not comprised of the earned income credit, and with respect to the Indiana state tax refund. The contested matter before the court is a turnover motion by the Trustee. Norwood did not object to turnover of the Indiana tax refund, and at the time of submission of the contested matter to the court had not claimed any exemption with respect to that property. Similarly, no objection was made to turnover of the portion of the bank account comprised of the portion of the federal tax refund derived from withholding, and the exemption claimed with respect to the bank account into which that refund had been deposited was $50. The court's order with respect to the turnover motion will determine the property to be turned over pursuant to that motion, and will result in both a collateral estoppel and a res judicata effect as to matters subject to that motion. Any subsequent amendment of Schedule C will not alter the final effect of the order on the turnover motion, except as otherwise allowed by this order.

The circumstances with respect to a claimed exemption for the earned income credit are different. Both parties have submitted a case, and record, to the court which presumes a claimed exemption for this item of property. While Norwood failed to specifically designate a value with respect to her interest in the earned income credit, solely because of the manner of presentation of the case by the parties, she will be provided with an opportunity to file an amended Schedule C with respect to the exempt value she asserts for the earned income credit; *see*, *In re Doyle*, 209 B.R. 897, 902 (Bankr. N.D.Ill. 1997).

We thus proceed to the issue as it has been presented to the court:[3] Does an exempt item of property in which the debtor has an interest retain its exempt character when that property interest is deposited in a bank account prior to the date of the filing of the petition by the debtor and the proceeds of deposit of the exempt amount are traceable[4] into that bank account. The exemption at issue arises under Indiana law. The scope of a statutory exemption is to be interpreted liberally in favor of the debtor; *Union Nat. Bank of Muncie v. Finley*, Ind., 103 N.E. 110, 114 (1913); *see, In the Matter of Zumbrun*, Ind., 626 N.E.2d 452, 455 (1993). In this context, the manner of construction of exemptions under both state and federal law is parallel. As stated by this court in *In re Kuhn*, 322 B.R. 377, 385-386 (Bankr. N.D.Ind. 2005):

> The Seventh Circuit Court of Appeals, in addressing Illinois' ambiguous *statutory exemptions* of personal property in *In re Barker,* 768 F.2d 191, 196 (7th Cir.1985), stated that "this circuit and the courts of Illinois have consistently held that *personal property exemption statutes* should be liberally construed in order to carry out the legislature's purpose in enacting them-to protect

[3] Clearly, if at the time of the filing of her petition on January 31, 2008, Norwood had not received the earned income payment, that payment retained its characteristic as an item of property exempted by I.C. 34-55-10-1(c)(11), and the portion of any payment made by the Internal Revenue Service to Norwood subsequent to the petition date with respect to the 2007 tax year would be completely exempt from administration in this case. Similarly, had Norwood received the Treasury check with respect to payment of the earned income credit concerning the 2007 tax year as of January 31, 2008, and had retained that check in her possession as of the date of filing of her petition, the portion of the payment represented by that draft attributable to the earned income credit would also be exempt from administration in the case. Of course, both of the foregoing scenarios assume a properly claimed exemption with respect to the earned income credit.

[4] In this case, the parties have stipulated as to the amount of the earned income credit traceable into the bank account. Had the parties not done so, very complicated issues as to tracing of an exempt asset into a common co-mingled fund would have been presented, especially in the context of the deposit of an exempt asset into a bank account in which there existed funds which were not exempt prior to their deposit into the account, and subsequent utilization of the account prior to the petition date. This issue remains for determination for another day in view of the parties' stipulation regarding traceable funds.

debtors." (emphasis supplied). In more pertinent part, the court wrote:

> This clear legislative intent to grant protections to debtors and the court's liberal construction of exemption statutes convince us that a case such as this one, where an exemption statute might be interpreted either favorably or unfavorably vis-a-vis a debtor, we should interpret the statute in a manner that favors the debtor.

*Id. See also, In re Owen,* 2002 WL 531570 at *5 (S.D.Ill.) ["Generally, ambiguous bankruptcy exemption provisions should be construed in favor of the debtor"]; *In re De Vries Jr.,* 76 B.R. 917 (Bankr.N.D.N.Y.1987) ["Code § 522(b), and those state exemption statutes adopted pursuant thereto, are to be liberally construed in order to effectuate the debtor's 'fresh start' "]; *In re Vale,* 110 B.R. 396, 400 (Bankr.N.D.Ind.1989) ["Indiana exemption laws are liberally construed to affect their intent and purpose"]; *In the Matter of South Bend Community School Corp.,* 215 B.R. 1012, 1015 (N.D.Ind.1997) ["... if it is possible, to construe an exemption statute in ways that are both favorable and unfavorable to the debtor, then favorable method should be chosen"].

Indiana has "opted out" of the federal bankruptcy exemptions provided by 11 U.S.C. § 522(d), pursuant to 11 U.S.C. § 522(b)(2); I.C. 34-55-10-1. The exemption with respect to the earned income credit is stated in I.C. 34-55-10-2(c)(11) as follows:

> (c) The following property of a debtor domiciled in Indiana is exempt:
>
> . . .
>
> (11) The debtor's interest in a refund or a credit <u>received or to be received</u> under section 32 of the Internal Revenue Code of 1986. (emphasis supplied)

The issue in this case has been phrased in terms of whether an exempt asset deposited into a bank account retains its character as an exempt asset upon deposit. This is a sub-issue of a more expansive issue, which is whether an item of property, exempt from creditor process with respect to the debtor's interest in that asset when in the hands of a third person, retains its character as exempt when payment of the item is made to the debtor.

The issue before the court is the scope of a state exemption, and thus state law – not federal law – applies to determination of the issue before the court. That being the case, it is still instructive to consider similar exemption issues in the context of the scope of federal exemption statutes. The court has recently issued a decision in the case of *In re Stephanie S. Spolarich* (case number 08-23438 in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division) in which the scope of the exemption provided for Social Security payments by 42 U.S.C. § 407 was determined to allow an exemption for Social Security benefits despite the benefits having been paid to the debtor by the Internal Revenue Service as a sort of "tax refund" under 26 U.S.C. § 3402(p). 42 U.S.C. § 407 states the following:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and <u>none of the moneys paid or payable</u> or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.
>
> (c) Nothing in this section shall be construed to prohibit withholding taxes from any benefit under this subchapter, if such withholding is done pursuant to a request made in accordance with section 3402(p)(1) of the Internal Revenue Code of 1986 26 U.S.C.A. § 3402] by the person entitled to such benefit or such person's representative payee. (emphasis supplied)

Based upon the breadth of the foregoing statute, Indiana courts have held that Social Security benefits are totally exempt, even if deposited into a bank account; *Perkins v. Kocher*, Ind. App., 531 N.E.2d 231 (1988); *Brosamer v. Mark*, Ind., 561 N.E.2d 767 (1990) [*affirming Brosamer v. Mark*, Ind. App., 540 N.E.2d 652 (1989)]. The court held in *Spolarich* that the "refund" was exempt under 11 U.S.C. §407, due in part to the "paid or payable" language of that statute.

Indiana courts have had occasion to construe other exemption provisions in the context in which property, exempt in the hands of a third person, has then come in to the hands of the debtor. In *Sohl v. Wainwright Trust Co.*, Ind. App., 130 N.E. 282 (1921), the court determined that a government pension, although exempt from creditor process in the hands of the government, did not retain its exempt status when pension benefits had been paid to the pensioner [the specific wording of the exemption statute at issue is not provided in the decision]. *See also, Faurote v. Carr*, 108 Ind. 123, 9 N.E. 350 (1886). In *Brosamer v. Mark*, Ind., 561 N.E.2d 767 (1990), the Indiana Supreme Court determined that ERISA's anti-garnishment provision did not protect pension benefits, paid from an ERISA-qualified plan, in the hands of the pensioner, based upon an anti-alienation provision in ERISA which states: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated" [29 U.S.C. § 1056(d)(1)].[5]

Thus, from the foregoing, Indiana courts' determination of the scope of an exemption with respect to property upon a recipient's receipt of exempt property is determined, perhaps obviously, by the language of the exemption statute itself.[6]

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[5] In *Brosamer v. Mark*, Ind. App. 540 N.E.2d 652, the Indiana Court of Appeals contrasted the ERISA anti-garnishment provision to a similar provision in the Railroad Retirement Act, which states:

> "[N]o annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment or other legal process <u>under any circumstances whatsoever</u>...." (emphasis supplied)

45 U.S.C. § 231m(a). The implicit holding of the court is that the breadth of the phrase "under any circumstances whatsoever" was to be contrasted to ERISA's anti-garnishment provision in the context of exemption from execution once benefits were received by the person entitled to receive them.

[6] In *In re Weaver*, 93 B.R. 172 (N.D.Ind. 1988), the United States District Court for the Northern District of Indiana reversed a bankruptcy court decision with respect to exemption of Indiana Workmen's Compensation benefits upon payment of those benefits to the worker. In distinguishing workmen's compensation benefits from other forms of exempt benefits, the court stated:

> The trustee's first argument is that the exemption, which he concedes is afforded workmen's compensation payments, does not apply to cash in the hands of a debtor. Under Indiana law, money in the hands of a debtor stands on the same footing as any other money held by the debtor, even if the money is derived from exempt payments. *See Sohl v. Wainwright Trust Co.,* 76 Ind.App. 198, 130 N.E. 282 (1921); *Faurote v. Carr,* 108 Ind. 123, 9 N.E. 350 (1886). Under this case law, the legislature can only grant exemptions in proceeds <u>by explicitly stating that the proceeds are</u>

The focus must be on the scope of the exemption provided by I.C. 34-55-10-2(c)(11). Unlike the language of the federal statute stating the ERISA anti-garnishment exemption and the language of the Indiana Workmen's Compensation Act concerning workmen's compensation benefits, the earned income credit exemption is <u>clearly</u> intended to provide an exemption for an earned income credit payment even after its receipt by the taxpayer/recipient. This intent is clearly stated by the use of the word "received" in the foregoing exemption statute.

Thus, the court determines that when an earned income credit has been received by a debtor prior to the date of filing of a bankruptcy petition; has been deposited in a bank account prior to the date of filing of a bankruptcy petition; and can be encapsulated and traced as a separate component of the bank account as of the date of filing of a bankruptcy petition – the amount of the credit so deposited and traceable retains its exempt status under I.C. 34-55-10-2(c)(11).

Thus, the following rules apply:

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> <u>exempt.</u> Exemptions afforded to aged, blind and disabled persons, for example, provide that "none of the money <u>paid or payable</u> under the provisions of this chapter shall be subject to execution, levy, attachment,...." *See* I.C. § 12-1-5-12 (1981); I.C. § 12-1-6-12 (1981); I.C. § 12-1-7.1-14 (1981). <u>The life insurance statute is just as explicit.</u> *See* I.C. § 27-1-12-14 (1985). Money paid by a fraternal benefits society is exempted <u>"either before or after payment by the society."</u> I.C. 27-11-6-3 (1985). Where the legislature of Indiana has given exemptions it has chosen statutory language which is clear and unequivocal.
>
> The workmen's compensation statute at issue in this case, I.C. § 22-3-2-17 (1929), uses the term compensation as a term of art. The statute provides: "No claims for compensation under this act shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors." I.C. § 22-3-2-17 (1929). An obligation to compensate is discharged upon payment. (Emphasis supplied).

93 B.R. 172, 174. Again, this decision focuses upon the breadth of the exemption statute in relation to exempt property in the hands of a recipient/debtor.

1. If on the date of the filing of a bankruptcy petition, a bankruptcy debtor has not yet received any payment with respect to an earned income credit potentially subject to administration in a bankruptcy case, whatever amount the debtor ultimately receives as the earned income credit is completely exempt if an exemption is properly claimed.

2. If on the date of the filing of a bankruptcy petition, the debtor has received a Treasury check which includes an earned income credit otherwise potentially subject to administration in a bankruptcy case, but has not yet negotiated the check, then the amount of the earned income credit included within the payment represented by that check is exempt, if the debtor has properly claimed an exemption with respect to the earned income credit.

3. If on the date of the filing of a bankruptcy petition, the debtor has received an earned income credit payment and has negotiated the check in which that payment is included and has deposited the payment in a bank account, or has caused the "refund" to be deposited into a bank account by electronic means, the amount of the earned income credit represented by that payment is subject to exemption if the credit can be traced into the bank account, and the amount of the credit still existing in the account as of the date of the filing of the bankruptcy petition can be definitively determined.[7]

As stated above, the parties have stipulated that the amount in the bank account subject to the Trustee's motion for turnover attributable to the earned income credit is $2,424.75. If the debtor amends Schedule C to claim this amount as exempt under I.C. 34-55-10-2(c)(11) within 30 days of the date of entry of this order, then the motion for turnover with respect to the $2,424.75 constituting the proceeds of the earned income credit deposited into the bank account which is the subject of the Trustee's motion for turnover is denied. If the debtor does not so timely amend Schedule C, then the motion for turnover with respect to the $2,424.75

[7] Again, the court makes no statement as to rules applicable to tracing, or the amount in a "co-mingled" account which can be traced to any particular deposit.

constituting the proceeds of the earned income credit deposited into the bank account which is the subject of the Trustee's motion for turnover is granted.

The court has determined that amendment of Schedule C will not save Norwood from the Trustee's request for turnover of withheld income tax in the amount of $475.25, save to the extent of the $50.00 exemption claimed by Norwood within respect to the bank account on presently filed Schedule C. Thus, the Trustee's motion is sustained unequivocally as to the amount of $425.25 with respect to the Chase Bank account.

Finally, Norwood has claimed no exemption, nor stated any objection, with respect to the 2007 Indiana income tax refund demanded by the Trustee in his turnover motion in the amount of $452.00. No further claim of exemption will be allowed with respect to that property, and the Trustee's motion with respect to that item of property will be sustained.

Based upon the foregoing, IT IS ORDERED, ADJUDGED AND DECREED as follows:

A. The Trustee's Motion for Turnover Order is granted with respect to the amount of $425.25 in Chase Bank account no. 730651478.

B. The Trustee's Motion for Turnover Order with respect to $452.00 representing Norwood's 2007 Indiana income tax refund is granted.

C. The Trustee's Motion for Turnover Order with respect to the amount of $2,424.75, constituting the stipulated amount of the earned income credit deposited in the Chase Bank account, is denied if the debtor files an amended Schedule C which properly exempts this amount pursuant to I.C. 34-55-10-2(c)(11) within 30 days of the date of entry of this order; the motion is granted if the debtor fails to file a timely amendment in proper form and amount.

Dated at Hammond, Indiana on October 5, 2009.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor, Trustee, US Trustee