

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY

UNITED STATES OF AMERICA

v.

Criminal No.: 5:06-00025

ROBERT E. GRAHAM

**MOTION OF THE STATE OF WEST VIRGINIA TO TAKE POSSESSION OF
FUNDS SEIZED FROM GRAHAM'S INDIVIDUAL RETIREMENT ACCOUNT**

Now comes the State of West Virginia (hereafter "the State"), by its counsel, Silas B. Taylor, Senior Deputy Attorney General, seeking to protect its interests in funds seized by the United States to satisfy the fine and forfeiture previously ordered herein, opposing any motion already or hereafter made to return such funds to Robert E. Graham, and seeking an order transferring such funds to the Clerk of the Circuit Court of Kanawha County:

FACTS

A. The Pending State Court Action Against Robert E. Graham.

The undersigned counsel represents the State in a civil action against Robert E. Graham (Defendant herein) and the two non-profit corporations described in the superceding indictment – Council on Aging, Inc., and All Care Home and Community Services, Inc. (A copy of the Complaint filed by the State is attached as Appendix 1.) Both of said corporations were formed as nonprofit corporations to perform services in fulfillment of the State's policy objectives of providing social services, healthcare services, nutrition services, and employment services to the State's aged and disabled population (hereafter collectively called "Program Services").

As alleged in said Complaint, the Program Services are funded by grants administered by the State Bureau of Senior Services (“BoSS”) and Medicaid contracts administered by the State Bureau of Medical Services. Nearly all funds available to said Corporations come from these two sources, which in turn are funded by both State and Federal revenues.

Said Complaint seeks injunctive and monetary relief against Robert E. Graham predicated on allegations that he became unjustly enriched via excessive and unlawful compensation obtained through breaches of his fiduciary duties to said Corporations, and breaches by the Corporations of the laws applicable to charitable corporations, particularly the West Virginia Nonprofit Corporation Act. The relief sought, in large part, is oriented towards recovering funds from Robert E. Graham that should have been expended on the public services for which said corporations were formed. In particular, the Prayer for Relief seeks, in part, that the State court:

(6) Declare that the assets of defendant Graham are encumbered by a constructive trust to the extent that he was unjustly enriched, and issue judgment against Graham requiring him to disgorge any excess compensation or other moneys unjustly obtained and to recompensate the State and/or the corporate defendants;

(7) Require that any moneys thus collected from Graham pursuant to said judgment be expended on the charitable purposes for which the defendant corporations were formed.

The State proceedings have not yet come to final judgment. However, several preliminary injunctions have issued to preserve the State court’s jurisdiction to award monetary relief against Graham. Most pertinent are an *ex parte* restraining order issued August 4, 2006 (Appendix 2) and a preliminary injunction issued March 14, 2007 (Appendix 3), which restrained (and continue to restrain) Robert E. Graham from accessing the funds in his Individual Retirement Account (hereafter “IRA”).

The State of West Virginia has, this day, also moved the State court for an order which would, if entered, direct the Kanawha Circuit Clerk to accept any funds directed to her by this Court, to be held by her pending further order of that Court. (Appendix 4.) Said Motion is scheduled for hearing on Thursday, March 20, 2008, at 10:30 a.m.

B. Pertinent Proceedings in This Court.

When Mr. Graham was originally indicted, this Court entered an *ex parte* restraining order freezing Graham's IRA, then worth about \$300,000.00, as property subject to forfeiture upon conviction (Doc. No. 12; Order of January 26, 2006). This Court's assertion of jurisdiction over said account precluded the State from thereafter attaching or executing against it. ("Property in *custodia legis*, in the custody of the law, is not subject to attachment, as a general rule." *Meadows v. Holliday*, 164 W. Va. 397, 398, 264 S.E.2d 461, 462 (1980).)¹

Between the entry of the two State court orders that precluded Graham from accessing his IRA, this Court entered a verdict and Judgment on August 30, 2006, which, among other things, ordered that Graham forfeit to the United States the sum of \$31,129.00. In addition, at sentencing, the Court imposed a fine of \$10,000.00 and an assessment of \$100.00 (Doc. No. 120; Order of January 5, 2007). Before sentencing, the State filed its "Statement Regarding the Forfeiture of Funds from Graham's IRA," requesting "that this Court give due consideration to its interests in formulating any orders regarding restitution or forfeiture." (Appendix 3.) Shortly after sentencing,

¹See also, 18 U.S.C.A. § 981(c) (Civil Forfeiture), which provides:

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof.

on January 10, 2007, this Court modified its restraining order so as to release all but \$50,000.00 of said IRA, that being the amount necessary to satisfy Graham's obligations to this Court (Doc. No. 122). Importantly, said order recited that the release of the remaining funds in the account was "subject to any other restraint, such as orders of the Kanawha County Circuit Court, which may apply." Thus, this Court retained jurisdiction of only the \$50,000 necessary to effect its Judgment, and effectively relinquished jurisdiction of the remaining amount to the Circuit Court of Kanawha County.

The State court then issued its second order precluding any withdrawals from the IRA, but the order contained language specifically acknowledging this Court's exclusive jurisdiction over \$50,000.00, and permitting such withdrawals as might be ordered by this Court. (*Id.*) Eight days later, on March 22, 2007, this Court held that the forfeited sums could be obtained from the IRA (Doc. No. 155). To facilitate the release of Graham's income tax refund, this Court also granted Graham's request to execute on the account to pay his \$10,000.00 fine (Doc. No. 171; Order of August 25, 2007). Pursuant to said orders, \$41,229.00 was withdrawn from the IRA and deposited with the Clerk of this Court, with the following direction: "It is further ORDERED that this money be held by the Clerk pending further order of this Court." (*Id.*)

In the meantime, this Court granted *in forma pauperis* status to Defendant Graham so that he could pursue his successful appeal of the conviction (Doc. No. 145; Order of March 5, 2007). That Order noted that Graham's IRA was not available for paying his attorneys due to the restraining order imposed thereon by the State, but admonished as follows:

Provided, that should defendant's financial situation improve during the course of his appeal - for example, should defendant gain access to his frozen IRA account - then defendant must notify this court so that it may consider modifying this order to

require that defendant repay the fees and costs associated with the appeal. See *Holsey v. Bass*, 519 F. Supp. 395, 405 n. 24 (D. Md. 1981) (citing *Carter v. Telectrom, Inc.*, 452 F. Supp. 939, 943 (S.D. Tex. 1976)).

LEGAL DISCUSSION

Mr. Graham's financial circumstances have changed by reason of the Fourth Circuit's reversal of his conviction. The funds on deposit with the Court could now be made available to Graham to meet his financial obligations other than the now-defunct forfeiture and fine. But, "until further order," it appears that this Court still retains *exclusive* jurisdiction of the disposition of said funds. "Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized." 18 U.S.C.A. § 981(b)(3) (Civil Forfeiture).²

The obvious intent of the orders of the Circuit Court of Kanawha County, appended hereto, were to assert jurisdiction over Graham's IRA to the fullest extent possible without interfering with this Court's prior assertion of jurisdiction.³ As a practical matter, these orders constitute a lien

²Although the forfeiture in this case was pursuant to 28 U.S.C. § 2461(c), the provisions of the civil forfeiture statute are incorporated therein via a long string of incorporation by reference among several forfeiture provisions. (Section 2461(c) incorporates 21 U.S.C. § 853, subsection (j) of which incorporates 21 U.S.C. § 881(d) which, in turn, incorporates "other laws" "relating to the seizure, summary and judicial forfeiture, . . .")

³Those orders were based on the theory that the Bank held such funds in constructive trust for the benefit of the corporations, and that the State had a sufficient interest in their utilization for charitable purposes that the Court could assert jurisdiction over them on the State's behalf. (Appendix items 2 and 3.) If the funds are returned to Graham's IRA, they would be returned to the equitable trust from which they came, under the supervision of the State court.

However, it may be impractical to return them to the IRA, since that would result in the commingling of money on which taxes are not yet due (pre-tax) with the funds held by this Court, upon which taxes have already become due (post-tax). The State is making inquiry into the solution to this problem, and will supplement this Memorandum upon ascertaining whether there is a reasonable solution.

against the funds held by the Clerk to the extent that they are no longer needed to fulfill a judicial purpose within this Court's jurisdiction in this case.

While a writ of attachment, or lien, is not ordinarily effective against funds held in the registry of the Court for judicial disposition, funds so held in which the Court or the United States has no interest *may* be attached. *U.S. v. Van Cauwenberghe*, 934 F.2d 1048, 1062 -1063 (9th Cir. 1991).⁴ As may be seen from the language in the footnote, the cited decision was predicated, at least

⁴"It has long been asserted that property and funds in the registries of federal courts are not, as a general rule, subject to writs of attachment or garnishment. [Citations omitted.] The justification put forth for this doctrine of *custodia legis* is 'the desirability of avoiding a clash between judicial jurisdictions which would result from any attempt to use the process of one to seize assets in the control of another judicial authority.' *In re Quakertown Shopping Center, Inc.*, 366 F.2d 95, 97 (3d Cir.1966). More specifically, the common law doctrine of *custodia legis* prohibits any attachment of property in a court's registry that would prevent the court from allocating the property in accord with the purpose for which it was deposited. The doctrine applies where a court issues an order that interferes with the jurisdiction of another court, generally that of another sovereign, and impedes the latter's ability to dispose of property in its registry. See *Landau v. Vallen*, 895 F.2d 888, 894-96 (2d Cir.1990). Thus, under the doctrine of *custodia legis*, funds deposited in the registries of federal courts may not be attached 'except by the order of the judge or judges of said courts.' 1063 Lottawanna, 87 U.S. (20 Wall.) at 225.

"Here, the writ of attachment was issued out of the district where the funds were located. The writ was issued in the civil case to attach property placed in the registry of the district court in the criminal case. Both cases were pending in the same district court. Thus, the court that ordered the attachment did not run the risk of 'produc[ing] a collision in the jurisdiction of the courts that would extremely embarrass the administration of justice.' *Thomas v. Wooldridge*, 23 F.Cas. 986, 987 (C.C.S.D.Mo.1875) (No. 13,918). See also *Landau*, 895 F.2d at 897 n. 6.

"Further, attachment of property in the registry of the court under the circumstances of this case does not implicate sovereign immunity. Although funds held in the registry of a federal district court are held by the United States Treasury under 28 U.S.C. § 2041, the attachment of funds in which the government has absolutely no interest cannot be barred by the doctrine of sovereign immunity. Here the government requested that the court accept the certificates and the proceeds into its registry. The government has never attempted to claim an interest in the property. The court itself has no interest in the property. Therefore, '[n]o funds in which the United States has an interest will be expended from the Treasury; nor will the relief interfere with the public administration.' See *Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012-13, 91 L.Ed. 1209 (1947). The United States' involvement is only ancillary, and the sovereign immunity doctrine does not apply."

in part, on the fact that the attachment was issued by the same district court which held the seized property, but the policy rationale of the case was the absence of any conflict between the jurisdiction of the court issuing the attachment and the court holding the property, a situation that obtains here as well.

The State of West Virginia, by virtue of the orders appended hereto, has at least an “equitable lien” on the funds held by this Court.⁵ While the removal of funds from the IRA for the purpose of paying fines and forfeitures was in furtherance of this Court’s jurisdiction, that purpose no longer exists. Clearly, the removal of funds from the IRA and their subsequent return to Mr. Graham was *not* the intent of this Court and would manifestly circumvent the orders of the Circuit Court of Kanawha County, which are calculated to prevent Mr. Graham from withdrawing funds from said IRA.

As a matter of comity to the Circuit Court of Kanawha County, the State of West Virginia prays that this Court relinquish custody of the funds held in its registry to the State of West Virginia subject to disposition by the Circuit Court of Kanawha County.

U.S. v. Van Cauwenberghe, 934 F.2d 1048, 1062 -1063 (9th Cir. 1991).

⁵The Ninth Circuit has recognized that a district court may recognize an “equitable lien” on property seized from a defendant in a criminal case. In that case, the defendant’s motion to return the seized property was denied because the United States had an “equitable lien” thereon to the extent of the costs of providing court-appointed counsel. *U.S. v. Palmer*, 588 F.2d 732 (9th Cir., 1978).

Respectfully submitted,

THE STATE OF WEST VIRGINIA, by its Executive Department, consisting of THE HONORABLE JOE MANCHIN, GOVERNOR; THE HONORABLE BETTY IRELAND, SECRETARY OF STATE; THE HONORABLE GLEN B. GAINER III, AUDITOR; THE HONORABLE JOHN D. PERDUE, TREASURER; THE HONORABLE GUS R. DOUGLASS, COMMISSIONER OF AGRICULTURE; and THE HONORABLE DARRELL V. MCGRAW, JR., ATTORNEY GENERAL,

By counsel,

/s/ *Silas B. Taylor*

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2008, I electronically filed the foregoing "Motion of the State of West Virginia to Take Possession of Funds Seized from Graham's Individual Retirement Account" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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