

1998

George K. Bradford v. Andrea O. Bradford and James A. Demita : Response Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GEORGE K. BRADFORD,
Plaintiff/Appellee,

vs.

ANDREA O. BRADFORD and
JAMES A. DEMITA
Defendants/Appellants.

Case No. 981745-CA

RESPONSE BRIEF OF APPELLEE

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY,
PROVO DEPARTMENT, JUDGE GUY R. BURNINGHAM

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IN THE UTAH COURT OF APPEALS

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|------------------------|---|--------------------|
| GEORGE K. BRADFORD, | : | |
| | : | |
| Plaintiff/Appellee, | : | Case No. 981745-CA |
| | : | |
| vs. | : | |
| | : | |
| ANDREA O. BRADFORD and | : | |
| JAMES A. DEMITA | : | |
| | : | |
| Defendants/Appellants. | : | |

JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated Section 78-2a-3(2) (1) (1996).

ISSUES PRESENTED AND STANDARDS OF REVIEW

I. When deciding to partition property in a divorce action, did the trial Court misapply the law when it found that appellee husband was the creditor of appellant wife?

The standard of review for the trial court's interpretation of the Uniform Fraudulent Conveyance Act is correction of error. *State v. Morck*, 821 P.2d 1190, 1192 (Utah App. 1991). However, the standard of review for the trial court's finding of fact in this area is whether the trial court committed a clear and prejudicial abuse of

discretion. *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah 1988).

II. After entering a decree of divorce, did the trial court abuse its broad powers of discretion when it apportioned the marital property between the two parties?

The standard of review on this issue is the above-mentioned *Rasband* standard.

CONTROLLING STATUTORY PROVISIONS

Please see the attached addendum "A" - The Uniform Fraudulent Transfer Act, Utah Code Ann. §25-6-5 (1988).

STATEMENT OF THE CASE

Appellee ("Mr. Bradford") tried this action in the Fourth District Court, Honorable Steven L. Hansen presiding, on a complaint for divorce and a claim that appellant ("Mrs. Bradford") had fraudulently conveyed her portion of the marital home. Findings of Fact and a Decree of Divorce were filed on July 14, 1998. Appellant's Timely Motion to Alter and Amend Findings of Fact and Conclusions of Law and Decree were denied on September 4, 1998. Appellant then filed a timely appeal to which appellee now responds.

STATEMENT OF RELEVANT FACTS

1. Mr. and Mrs. Bradford were married in June 1985, in Provo, Utah (Findings of Fact No. 1, p.152, Record) (3/4/98 Tr. At 37).

2. During the three months before the commencement of their divorce proceedings, Mr. and Mrs. Bradford were legal residents of Utah County, Utah (Findings of Fact No. 2, p. 152, Record) (3/4/98 Tr. at 47).

3. Effective July 14, 1998, the lower court found that the existence of irreconcilable differences between Mr. and Mrs. Bradford made the continuation of their marriage no longer possible (Findings of Fact No. 3, p. 152, Record).

4. Prior to their marriage, Mr. and Mrs. Bradford had each been married once. Although no children were born of their marriage, each party has at least one adult child from their previous marriages (Findings of Fact Nos. 4 & 5, p. 152, Record).

5. Mr. and Mrs. Bradford are 63 and 65 years old, respectively (Findings of Fact, No. 6, p. 151, Record) (3/4/98 Tr. at 89).

6. While they were married, Mrs. Bradford possessed few

assets other than some personal property and land in Indianola, Utah. After paying the debt on this land with money given to her by her husband, Mrs. Bradford eventually sold this land. She kept all of the profits herself (Findings of Fact No. 7, p. 151, Record) (3/4/98 Tr. at 3-4).

7a. Before they were married, Mr. Bradford worked at Geneva Steel where he received special on-the-job training. He was also, and still is, a janitor with the Nebo School District (Findings of Fact No. 8, page 151, Record) (3/4/98 Tr. at 37, 39).

7b. When the divorce was granted, Mr. Bradford's monthly assets were thus: \$410 from the Nebo School District, \$769 from Social Security, \$324 from his pension, and \$50 from rent from his property. Said figures total \$1,553. However, because Mr. Bradford puts \$105 per month into a discretionary retirement account, his monthly income is actually \$1,658. (Findings of Fact No. 9, page 151, Record) (3/4/98 Tr. at 80-83).

8. During the marriage, Mrs. Bradford worked at temporary jobs. Because she has trouble focusing on her task and may have carpal tunnel syndrome, she is unable to work (Findings of Fact No. 10, page 151, Record) (3/4/98 Tr.

at 90-92).

9. Mrs. Bradford receives approximately \$150 per month in child care for taking care of her granddaughter and \$381 in Social Security, which amounts to \$531 in monthly income. (Findings of Fact No 11, p. 151, Record) (3/4/98 Tr. at 93).

10. Neither Mr. nor Mrs. Bradford can be retained or develop new skills in order to substantially increase their income. (Findings of Fact No. 12, p. 151, Record).

11. Mr. and Mrs. Bradford have lived in Mr. Bradford's home in Spanish Fork, Utah, since the beginning of their marriage. This home was paid for and then given to Mr. Bradford as an inheritance gift before he married Mrs. Bradford. Mr. Bradford was born and raised in this house, and it has been passed from generation to generation within his family. (Findings of Fact No. 13, p. 151, Record) (3/4/98 Tr. At 34-35).

12. Since the parties have been married, various improvements have been made to the home. This work includes a repaired roof and septic system, the addition of a new furnace, and plumbing work that connected the home to city water. Findings of Fact No. 14, p. 150, Record) (3/4/98 Tr. at 18-23).

13. Although Mrs. Bradford claims that she was an integral part of the home improvements, she actually made only phone calls and arrangements for the work to be done. (Findings of Fact No. 15, p. 150, Record) (3/4/98 Tr. at 18-23).

14. The repairs and improvements made to the home were paid for by funds which Mr. Bradford received from a settlement with Geneva Steel. This money was acquired before the marriage. (Findings of Fact No. 16, p. 150, Record). (3/4/98 Tr. at 48).

15. Neither party disputes that the value of the home is \$180,000. (Findings of Fact No. 17, p. 150, Record).

16. Mr. Bradford deeded the home by way of warranty deed to he and Mrs. Bradford as "joint tenants with full rights of survivorship and not as tenants in common" approximately four years after they had married. (Findings of Fact No. 18, p.150, Record) (3/4/98 Tr. at 44).

17. Mr. Bradford filed for divorce from Mrs. Bradford in 1992. At that time, Mr. Bradford requested that both the home and other real property be awarded to him. The divorce action was dismissed in 1993. (Findings of Fact No. 19, p. 150, Record) (3/4/98 Tr. at 55).

18. Since 1992, Mr. and Mrs. Bradford have had many arguments, and Mr. Bradford has threatened to divorce Mrs. Bradford on many occasions. (Findings of Fact No. 20, p. 150, Record) (3/4/98 Tr. at 55).

19. James DeMita, Mrs. Bradford's adult son, has been living with Mr. and Mrs. Bradford since 1995. Mr. Demita's son also stays at the home from time to time. In exchange for these living arrangements, Mr. Demita neither pays rent nor the utility bill and resides in the home rent-free. (Findings of Fact No. 21, p. 150, Record).

20. Mr. Demita attended one year of law school and has since worked at various jobs. At the time of the trial, Mr. Demita was employed on a part-time basis at a computer store. His 1996 gross income was approximately \$3,500 (Findings of Fact No. 22, p. 150, Record) (3/4/98 Tr. at 106-08).

21. In 1996, all three parties began work together to develop the land for re-zoning, division into lots and sale. They hired LSI, Inc. to survey the ground, prepare a subdivision plat and perform other pre-sales work. In exchange for his assistance with this project, Mr. Demita was to receive 25% of the profits from the sale. (Findings

of Fact No. 23, p. 149, Record) (3/4/98 Tr. at 42-43; 61-76).

22. In July 1996, Mr. Bradford discovered various engineers in his home when he entered his house. Although the reasons for the ensuing argument with Mrs. Bradford are in dispute, Mr. Bradford was upset with the project's development. This argument was more severe than the others, and divorce was again discussed. (Findings of Fact No. 24, p. 149, Record) (3/4/98 Tr. at 38-40).

23. On August 8, 1996, Mrs. Bradford deeded her share of the home by way of quit claim deed to her son James Demita. Mr. Demita gave his mother \$10 for the transaction. (Findings of Fact No. 25, p. 149, Record) (3/4/98 Tr. at 4-10).

24. \$10 is not the equivalent value of one-half of the house and property. (Findings of Fact No. 26, p. 149, Record).

25. Because Mr. Demita is Mrs. Bradford's son, the quit-claim transfer of her property to his name was made to an "insider," according to Utah Law. (Findings of Fact No. 27, p. 149, Record).

26. Although she deeded her portion of the property to

Mr. Demita rather than any of her other children, Mrs. Bradford claimed that the transfer was made for estate planning purposes. At trial, however, she acknowledged that she did not prepare a will nor did she prepare any instructions whatsoever regarding the disposition of the property. (Findings of Fact No. 28, p. 149, Record) (3/4/98 Tr. at 10-14).

27. After this transfer, Mrs. Bradford and Mr. Demita continued to live in the home as they had before. (Findings of Fact No. 29, p. 149, Record) (3/4/98 Tr. at 12-14).

28. Neither Mrs. Bradford nor Mr. Demita ever told Mr. Bradford about the quit-claim transfer. Mr. Bradford discovered the existence of the deed when his daughter went to the recorder's office to verify that the home and property has been re-zoned for development as Mr. Demita had mentioned. At this time, the daughter discovered the Quit-Claim Deed and that the property had actually never been re-zoned. (Findings of Fact No. 30, p. 148-49, Record) (3/4/98 Tr. at 14, 42, 45).

29. After discovering this information, Mr. Bradford commenced another divorce action against his wife. The time between the granting of the deed and the filing of divorce

was approximately 11 months. (Findings of Fact No. 31, p. 148, Record) (3/4/98 Tr. at 46).

30. The transfer of Mrs. Bradford's portion of the home to her son left her in possession of only her personal property, which has limited value. Thus, this transfer constituted substantially all of her assets. (Findings of Fact No. 32, p. 148, Record).

31. When asked on cross-examination whether she could afford to pay Mr. Bradford for one-half of the property's value, Mrs. Bradford indicated that she would not be able to do so, but that she would have to rely on family members if she were obligated to pay such a sum. (Findings of Fact No. 33, p. 148, Record) (3/4/98 Tr. at 101-02).

32. At the time of the transfer of the Quit-Claim Deed, Mrs. Bradford should have reasonably believed that Mr. Bradford might seek to divorce her, and that he would probably claim the home and property as his own as he had done so in the previous 1992 divorce action. (Findings of Fact No. 34, p. 148, Record).

33. The house and property are not partitionable, as they contain a residence, road, and river frontage. If an interest were conveyed, the house would have to be

refinanced or sold. (Findings of Fact No. 35, p. 148, Record).

34. Even though Mr. Bradford placed Mrs. Bradford's name on the deed to the house in 1992, the trial court found that the house and property belong to Mr. Bradford since he inherited this from his father before he married Mrs. Bradford. This finding is consistent with previous Utah Supreme Court decisions wherein the parties married later in life, and one of the parties had brought into the marriage an inheritance gift which was subsequently deeded to the other party. See *Georgedes v. Georgedes*, 627 P.2d 44 (Utah 1981); *Jespersion v. Jespersen*, 610 P.2d 326 (Utah 1980). (Findings of Fact No. 36, p. 148, Record).

35. Mr. Bradford earns \$1,926 per month, but his net income is approximately \$1,658. His monthly expenses are \$1,000 per month without rent or a mortgage payment. These expenses are reasonable and necessary. (Findings of Fact No. 37, p. 147-48, Record).

36.. Mr. Bradford has approximately \$600 per month after necessary expenses. Mr. Bradford also has at his disposal the house and property which do not have a mortgage and are worth approximately \$180,000. (Findings of Fact No.

38, p. 147, Record) (3/4/98 Tr. at 80-83).

37. Mrs. Bradford nets \$531 per month. She listed her expenses at \$1750 which includes \$600 for rent (which she is currently not paying). This leaves Mrs. Bradford with a shortfall of approximately 1,200 per month. However, she is 65 years old, not trained in an employable skill, and has health concerns. She receives \$150 per month for caring for one of her grandchildren. Although she may be able to earn more from child care, there is insufficient evidence that she would be able to find such a position, or that even if she were to increase her child care hours that it would meet her shortfall. Mrs. Bradford has a need for alimony.

(Findings of Fact No. 39, p. 147, Record).

38. Mrs. Bradford has expenses which exceed her income, but she cannot make up for this shortfall. Mr. Bradford has approximately \$600 per month after expenses. Therefore, Mr. Bradford is required to pay Mrs. Bradford \$600 per month in alimony for a term not to exceed the length of the marriage. This gives \$1,131.00 to Mrs. Bradford to meet her expenses and leaves 1,058.00 for Mr. Bradford's expenses. (Findings of Fact No. 40, p. 147, Record).

39. Mr. and Mrs. Bradford acquired the following

investments during their marriage:

| | |
|------------------------------|---------|
| First Security Bank Accounts | \$6,492 |
| Valic IRA | \$2,418 |
| Utah Retirement | \$1,583 |
| Insurance Policy Cash Value | \$3,990 |

(Findings of Fact No. 41, p. 147, Record).

40. Each party is awarded one-half of the total sum from the above investments. The remainder of the personal property has been divided between the parties and the same should be awarded as divided. (Findings of Fact No. 42, p. 146, Record).

SUMMARY OF ARGUMENT

In this response brief, Mr. Bradford will rebut each of Mrs. Bradford's arguments. Her arguments can be summarized as follows: 1) Mrs. Bradford did not fraudulently convey the home in question; 2) Mr. Bradford was not her "creditor;" 3) The portion of the home that she allegedly owned was "gifted" to her by her former husband; and 4) The lower court abused its broad powers of discretion when it apportioned the property in its divorce decree.

In rebuttal, Mr. Bradford will show that his ex-wife fraudulently conveyed her portion of the marital home to her

son in violation of the Uniform Fraudulent Transfer Act. To this end, Mr. Bradford will show that he was a "creditor" of Mrs. Bradford.

Mr. Bradford will also show that the home was not a legal gift, as Mrs. Bradford claims. Lastly, Mr. Bradford will explain why the lower court did not abuse its broad powers of discretion when it decided to apportion the marital property. To this end, Mr. Bradford will ask this Court to affirm the lower court's decision on all counts.

ARGUMENT

POINT I: FRAUDULENT CONVEYANCE

A. Mrs. Bradford Violated the Uniform Fraudulent Transfer Act.

The first issue to be resolved is whether Mrs. Bradford violated the Uniform Fraudulent Transfer Act, UTAH CODE ANN. sec. 25-6-5 (1988) (hereinafter "the Act") (**See Attached Addendum**) .¹

¹ Many jurisdictions have adopted the Uniform Fraudulent Transfer Act, recognizing that "[t]he law has long held that transfers of property designed to place a debtor's assets beyond the reach of the debtor's creditors are void as to the creditors." Indeed, the Act has a rich history in the common law. See, e.g., 13 Elizabeth 1 (1570) Ch. *Twyne's Case*, 3 Coke 80, 76 Eng. Rep. 809 (1601); *Clements v. Moore*, 73 U.S. (6 Wall.) 299, 312, 18 L.Ed. 786 (1867); *Smith v. Holland*, 298 Ky. 598, 603-604, 183 S.W.2d 647, 649 (Ky. Ct.

Mrs. Bradford's conduct falls squarely within the language of the Act. Mr. Bradford was a creditor with a claim before the conveyance, and Mrs. Bradford, acting with actual intent, sought to hinder, delay, or defraud him.² Specifically, Mrs. Bradford's conduct aligns itself with at least 7 of the 11 indicators of "actual intent" as found in 25-6-5(2):

subsection "a" - The conveyance was made to an insider.³

subsection "b" - Both Mrs. Bradford and her adult son, James Demita, along with Mr. Bradford, possessed and were in control of the home after the transfer. Indeed, Mrs. Bradford and Mr. Demita continued to live in the home.

subsection "c" - Neither Mrs. Bradford nor Mr. Demita informed Mr. Bradford about the transfer.

subsection "d" - The transfer was made only a month before she was sued for an action in divorce.

subsection "e" - The transfer, valued at approximately \$90,000, consisted of virtually all of Mrs. Bradford's assets (her assets were found by the trial court to amount to about \$5,000).

App. 1944); *Ranier National Bank v. McCracken*, 26 Wash Appl. 498, 505-506, 615 P.2d 469, 474 (1980).

² For a more detailed discussion regarding Mr. Bradford's status as Mrs. Bradford's creditor, see *infra* p. 16.

³ The Act states that an insider can include "a relative of the debtor or of a general partner of the debtor. . ." *Id.*, sec. 25-6-2(7)(a)(i).

subsection "i" - Mrs. Bradford became insolvent after she transferred the home.

subsection "j" - Mrs. Bradford transferred the home shortly before the action in divorce was to leave her in debt.

B. Mr. Bradford was Mrs. Bradford's Creditor within the Language of the Act.

The crux of Mrs. Bradford's argument regarding fraudulent conveyances, hinges upon her belief that Mr. Bradford was not her creditor.

First, it should be noted that the plain language of the Act proves otherwise. A creditor is "a person who has a claim," and a "[c]laim means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, *equitable*, secured, or unsecured." *Id.*, at 25-6-2(3)-(4) (emphasis added). At the time of the conveyance, and in the years before, Mr. Bradford had threatened Mrs. Bradford with a suit in divorce many times. In July 1996, the parties had a particularly severe argument, and the topic was again discussed. Only one month later, on August 8, 1996, Mrs. Bradford conveyed the property in question.⁴

⁴ Even if Mrs. Bradford acted *without* actual intent, her actions also comport with the "alternative language" of

Second, it should be noted that many courts have recognized a spouse as a "creditor" for purposes of a fraudulent conveyance action. Although Mr. Bradford has found no Utah cases directly on point, the Supreme Court of Oregon (citing an earlier decision) resolved this exact issue in *Adamson v. Adamson*, 541 P.2d 460 (Or. 1975).

In *Weber v. Rothchild*, 15 Or. 385, 388-89, 15 P. 650, 2 Am.St.Rep. 162 (1887), we held that a person in the position of plaintiff may maintain a suit to set aside a transaction which may defeat her recovery and rights in a contemplated suit for divorce. See also *Bosma v. Harder*, 94 Or. 219, 230-32, 185 P. 741 (1919); *Burnett et al. V. Hatch*, 200 Or. 291, 266 P.2d 414 (1954). This rule prevails in other jurisdictions that have considered the matter. See Bigelow, *The Law of Fraudulent Conveyances* 168, 173 (1911); Note, 14 Albany L. Rev. 102, 103-04 (1950); Annot., 49 A.L.R.2d 521 sec. 10 at 556-58 (1956); 37 Am. Jur. 2d, *Fraudulent Conveyances* sec. 133 (1968).

We conclude, as did the trial court, that the conveyance by deed of April 14, 1972, was obtained by fraud to hinder or prevent plaintiff's recovery of Brian's equitable interest in the fourplex, in the divorce suit, and is therefore set aside and held to be void.

Adamson at 466.

the Act -- sec. 25-6-5(1)(b)(i-ii). Specifically, the co-appellant, James Demita, paid Mrs. Bradford \$10 for half of a home valued at approximately \$180,000 (section (1)(b)).

In short, Mr. Bradford was clearly a "creditor" within the meaning of the Act, and this conclusion is supported by ample case authority.

II. DIVISION OF MARITAL PROPERTY

The bulk of Mrs. Bradford's argument concerns the issue of a fraudulent conveyance; however, Mrs. Bradford makes two equity arguments, which will now be discussed together.

A. Reverter of Home

Mrs. Bradford asserts that the trial court erroneously reverted the home to Mr. Bradford as well as inequitably distributed the marital property. The overriding rule that affects both issues is thus: "In divorce proceedings, the trial court has considerable discretion concerning property distribution. This court will not disturb the trial court's decision unless it is clearly unjust or a clear abuse of discretion[;]" *Walters v. Walters*, 812 P.2d 64, 66 (Utah App. 1991) (citing *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986)) and the trial court's ". . . actions enjoy a presumption of validity." *Schaumberg v. Schaumberg*, 240 Utah Adv. Rep. 11, 13 (Utah App. 1994) (citing *Watson v. Watson*, 837 P.2d 1, 5 (Utah App. 1992)).

As to the distribution of pre-marital property, the Utah

Court of Appeals has stated that "[a]s a general rule, however, premarital property is viewed as separate property, and equity usually requires that 'each party retain the separate property he or she brought into the marriage.'" *Walters v. Walters*, 812 P.2d 64, 67 (Utah App. 1991), cert denied, 836 P.2d 1383 (Utah 1992) ((quoting *Haumont v. Haumont*, 793 P.2d 421, 424 Utah App. 1990)).

Continuing with the concept that a trial court is afforded latitude when dividing marital property, the Utah Supreme Court has stated:

Although the home was held in joint tenancy, that is not conclusive that a gift has been made. . . The trial court found as follows: Although the mobile home in issue is [was] held in joint tenancy, there was no intention by Plaintiff to create a one-half property interest in Defendant, nor any expectation by Defendant that he had received a one-half property interest.

Jespersion v. Jespersen, 610 P.2d 326 (Utah 1980).⁵ In *Jespersion*, the parties were married for approximately six years; they were both older individuals (the husband was 73,

⁵ Mrs. Bradford also asserts that Mr. Bradford gave her portion of the home to her as a gift. The findings of fact and conclusions of law, however, prove otherwise. The trial judge took into consideration Mr. Bradford's request for reverter of Mrs. Bradford's interest when he filed for divorce against her in 1992.

and the wife was 68); no children were born of the marriage; and, lastly, although the home had been owned by the wife before their marriage, and although she had deeded a joint tenancy interest to her husband during their marriage, the Court reverted the property to her.⁶

Jespersion is very similar to the case at bar, in that Mr. and Mrs. Bradford were married later in life, and they had no children during their rather short marriage. Also, Mr. Bradford was born and raised in the home, which had been passed down in his family for many generations. See also *Cox v. Cox*, 877 P.2d 1262, 1270 (Utah App. 1994) (affirming a divorce decree between a husband and his second wife, wherein the marital home was reverted to the husband who had raised his nine children in it from a previous marriage but had Quit Claimed half of the property to the wife a few days before they were married.).

B. Apportionment of the Marital Property, Generally

As to the argument that the marital property was

⁶ See also *Georgedes v. Georgedes*, 627 P.2d 44, 45 (Utah 1981) (trial court, after entering decree of divorce for parties seeking to dissolve their second but short marriage, did not abuse its powers of discretion when it reverted pre-marital property to its original owners.).

inequitably divided, the overarching rule from *Walters* still applies: “[t]his court will not disturb the trial court’s decision [concerning property division] unless it is clearly unjust or a clear abuse of discretion.” *Walters v. Walters*, 812 P.2d at 66; accord *Smith v. Smith*, 751 P.2d 1149, 1151 (Utah App. 1988).⁷

When dividing the marital property, the trial court should consider:

the amount and kind of property to be divided, the source of the property, the parties’ health, the parties standard of living and respective financial conditions, their needs and earning capacities, the duration of the marriage, what the parties gave up by the marriage, and the relationship the property division has with the amount of alimony awarded.

Id., at 1147-48.

When applying these rules to the case at bar, it should

⁷ See also *Naranjo v. Naranjo*, 751 P.2d 1144 (Utah App. 1988), which states:

there is no fixed formula upon which to determine a division of properties in a divorce action[;] the trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity.

Id. at 1146.

first be mentioned that if the court's decision regarding the home is reversed, it will either need to be refinanced or sold – all costly procedures. As mentioned above, the home was inherited by Mr. Bradford and has been in his family for generations. Also, the marriage was rather short, neither party is in a state of health which renders them unable to earn an income, and the assets used to improve the home during the marriage came out of Mr. Bradford's pocket. To this end, this Court should find that the lower court did not abuse its broad powers of discretion when it reverted the home to Mr. Bradford and apportioned the marital property as it saw fit.

CONCLUSION AND PRECISE RELIEF SOUGHT

In conclusion, Mr. Bradford submits that his points are well taken and requests this Court to affirm the lower court's decision in respect to all issues.

DATED this 27 day of May, 1999.

ALDRICH, NELSON, WEIGHT & ESPLIN



THOMAS R. PATTON

Attorney for Appellee George Bradford

CERTIFICATE OF MAILING

I hereby certify that I mailed postage prepaid, two (2) true and correct copies of the foregoing Response of Appellee to Howard Chuntz, Esq., 1149 West Center Street, Orem, UT 84057 this 27 day of May, 1999.



ADDENDA

Utah Code Annotated §25-6-5

(a) a person who directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

- (i) as a fiduciary or agent without sole discretionary power to vote the securities; or
- (ii) solely to secure a debt, if the person has not exercised the power to vote;

(b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

- (i) as a fiduciary or agent without sole power to vote the securities; or
- (ii) solely to secure a debt, if the person has not exercised the power to vote;

(c) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(d) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but does not include:

- (a) property to the extent it is encumbered by a valid lien;
- (b) property to the extent it is generally exempt under nonbankruptcy law; or
- (c) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

- (a) if the debtor is an individual:
 - (i) a relative of the debtor or of a general partner of the debtor;
 - (ii) a partnership in which the debtor is a general partner;
 - (iii) a general partner in a partnership described in Subsection (7)(a)(ii);
 - (iv) a corporation of which the debtor is a *director, officer, or person in control*; or
 - (v) a limited liability company of which the debtor is a member or manager;
- (b) if the debtor is a corporation:
 - (i) a director of the debtor;
 - (ii) an officer of the debtor;
 - (iii) a person in control of the debtor;
 - (iv) a partnership in which the debtor is a general partner;
 - (v) a general partner in a partnership described in Subsection (7)(b)(iv);
 - (vi) a limited liability company of which the debtor is a member or manager; or
 - (vii) a relative of a general partner, director, officer, or person in control of the debtor;
- (c) if the debtor is a partnership:
 - (i) a general partner in the debtor;

CHAPTER 6

UNIFORM FRAUDULENT TRANSFER ACT

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25-6-1. Short title.

This chapter is known as the "Uniform Fraudulent Transfer Act."

1988

25-6-2. Definitions.

In this chapter:

- (1) "Affiliate" means:

- (ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;
- (iii) another partnership in which the debtor is a general partner;
- (iv) a general partner in a partnership described in Subsection (7)(c)(iii);
- (v) a limited liability company of which the debtor is a member or manager; or
- (vi) a person in control of the debtor;
- (d) if the debtor is a limited liability company:
 - (i) a member or manager of the debtor;
 - (ii) another limited liability company in which the debtor is a member or manager;
 - (iii) a partnership in which the debtor is a general partner;
 - (iv) a general partner in a partnership described in Subsection (7)(d)(iii);
 - (v) a person in control of the debtor; or
 - (vi) a relative of a general partner, member, manager, or person in control of the debtor;
- (e) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
- (f) a managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, limited liability company, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual or an individual related to a spouse, related by consanguinity within the third degree as determined by the common law, or a spouse, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings. 1992

25-6-3. Insolvency.

(1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(2) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.

(3) A partnership is insolvent under Subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset. 1988

25-6-4. Value — Transfer.

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred

or an antecedent debt is secured or satisfied. However, value does not include an unperformed promise made other than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) Under Subsection 25-6-5(1)(b) and Section 25-6-6, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous. 1988

25-6-5. Fraudulent transfer — Claim arising before or after transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(2) To determine "actual intent" under Subsection (1)(a), consideration may be given, among other factors, to whether:

(a) the transfer or obligation was to an insider;

(b) the debtor retained possession or control of the property transferred after the transfer;

(c) the transfer or obligation was disclosed or concealed;

(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) the transfer was of substantially all the debtor's assets;

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. 1988

25-6-6. Fraudulent transfer — Claim arising before transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:

(a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent. 1989

25-6-7. Transfer — When made.

In this chapter:

(1) A transfer is made:

(a) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(b) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien other than under this chapter that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in Subsection (1) and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in Subsection (1), the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

(a) if oral, when it becomes effective between the parties; or

(b) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee. 1988

25-6-8. Remedies of creditors.

(1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 25-6-9, may obtain:

(a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Utah Rules of Civil Procedure;

(c) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court orders, may levy execution on the asset transferred or its proceeds. 1988

25-6-9. Good faith transfer.

(1) A transfer or obligation is not voidable under Subsection 25-6-5(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Subsection 25-6-8(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) the first transferee of the asset or the person for whose benefit the transfer was made; or

(b) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under Subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to an adjustment as equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) a lien on or a right to retain any interest in the asset transferred;

(b) enforcement of any obligation incurred; or

(c) a reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under Subsection 25-6-5(1)(b) or Section 25-6-6 if the transfer results from:

(a) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) enforcement of a security interest in compliance with Title 70A, Chapter 9, the Uniform Commercial Code.

(6) A transfer is not voidable under Subsection 25-6-6(2):

(a) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(b) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor. 1988

25-6-10. Claim for relief — Time limits.

A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) under Subsection 25-6-5(1)(a), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under Subsection 25-6-5(1)(b) or 25-6-6(1), within four years after the transfer was made or the obligation was incurred; or

(3) under Subsection 25-6-6(2), within one year after the transfer was made or the obligation was incurred. 1988

25-6-11. Legal principles applicable to chapter.

Unless displaced by this chapter, the principles of law and equity, including merchant law and the law relating to principal and agent, equitable subordination, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement this chapter's provisions. 1988

25-6-12. Construction of chapter.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it. 1988