

1979

Road Runner Inn, Inc. and Harold M. Smithson v. Douglas C. Merrill and Colleen B. Merrill : Appellants' Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROAD RUNNER INN, INC. and HAROLD)
M. SMITHSON,)

Plaintiffs and
Appellants,)

Case No. 16374

v.)

DOUGLAS C. MERRILL and COLLEEN)
B. MERRILL,)

Defendants and
Respondents.)

APPELLANTS' BRIEF

Appeal from Third Judicial District Court
of Salt Lake County, The
Honorable James S. Sawaya, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROAD RUNNER INN, INC. and HAROLD)	
M. SMITHSON,)
Plaintiffs and)
Appellants,) Case No. 16374
v.)
DOUGLAS C. MERRILL and COLLEEN)	
B. MERRILL,)
Defendants and)
Respondents.)

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action pursuant to the Utah Fraudulent Conveyances Act to set aside a conveyance by quit-claim deed of real property located in Salt Lake County, State of Utah, from Defendant Douglas C. Merrill to Defendant Colleen B. Merrill on the grounds that the conveyance lacked a fair consideration and was made with actual intent to hinder, delay and defraud Plaintiffs Road Runner Inn, Inc. and Harold M. Smithson who were creditors with matured claims against the Defendant Douglas C. Merrill at the time of the conveyance.

DISPOSITION IN THE LOWER COURT

On August 16, 1978, following a trial before the Honorable James S. Sawaya, Judge, the Court held that Defendant Douglas C. Merrill had breached a contract with Plaintiff Road Runner Inn, Inc., thereby damaging Plaintiff Road Runner Inn, Inc. in the sum of \$28,300.00. The Court entered judgment on behalf

of Plaintiffs against Defendant Douglas C. Merrill in the amount of \$28,300.00, plus costs and interest thereon. The Court further held that the conveyance of real property by Defendant Douglas C. Merrill to Defendant Colleen B. Merrill on April 12, 1976, being part of a stipulated settlement in a divorce action between the Defendants, was for a fair consideration and was not a fraudulent conveyance. The Court dismissed, no cause of action, Plaintiffs' claim to set aside the conveyance of real property. (R.44) Plaintiffs do not appeal from that portion of the Court's order granting judgment against Defendant Douglas C. Merrill nor have Defendants-Respondents taken any action to perfect a cross appeal on that issue.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek to have the district court's judgment concerning the transfer of property between the Defendants reversed and remanded with the instruction that the district court enter judgment holding the transfer of the home and real property between Defendants to be a fraudulent conveyance and therefore null and void.

STATEMENT OF FACTS

On March 17, 1975, Defendant Douglas C. Merrill contracted with Plaintiff Road Runner Inn, Inc. to construct a building designed for commercial use on certain of Plaintiffs' property located within Salt Lake County. (Amended Finding of Fact No. 1: R.61) Defendant Douglas C. Merrill was to act as a general contractor. Pursuant to this contract, Defendant Douglas C. Merrill requested several materialmen and subcontractors to

to provide building supplies and construction services on the building.

After the services were performed and building materials were supplied as requested by Defendant Douglas C. Merrill, the materialmen and subcontractors were not paid by him. The subcontractors and materialmen then asserted various liens and claims against Plaintiff Road Runner Inn, Inc. and Defendant Douglas C. Merrill. (Amended Finding of Fact No. 3; R.62) The liens and claims asserted by these unpaid materialmen and subcontractors amounted to \$28,300.00. (Amended Finding of Fact No. 3; R.62)

Under the terms of his contract with Plaintiff Road Runner Inn, Inc., Defendant Douglas C. Merrill was obligated to satisfy these unpaid claims. (Amended Finding of Fact No. 4; R.62) Plaintiff Road Runner Inn, Inc. requested that Defendant Douglas C. Merrill pay these claims and liens, which he failed to do. Plaintiff Road Runner Inn, Inc. thereafter paid a total of \$28,300.00 to the unpaid materialmen and subcontractors in order to satisfy their claims. This amount was in excess of its contract price with Defendant Douglas C. Merrill. (Amended Finding of Fact No. 4; R.62)

On February 27, 1976, Defendant Colleen B. Merrill began divorce proceedings against Defendant Douglas C. Merrill in the Third Judicial District Court of Salt Lake County, State of Utah. (Amended Finding of Fact No. 5; R.62) Subsequently, on April 12, 1976, the Defendants owned and possessed the following real and personal property:

1. Real property located at 2341 Neffs Lane, Salt Lake City, Utah, valued at \$38,000.00. (Amended Finding of Fact No. 4; R.63; R.44)

2. A 1972 Ford Thunderbird automobile. (Merrill v. Merrill, R.3)

3. A 1969 Ford pickup truck. (Merrill v. Merrill, R.3)

4. A 1973 Starfire boat. (Merrill v. Merrill, R.3)

5. Furniture, fixtures and other personal belongings.

On April 12, 1976, Defendant Douglas C. Merrill had liabilities in excess of \$28,300.00. (Amended Finding of Fact No. 7; R.62) His total liabilities exceeded his total assets, leaving him without the ability to pay his debts as they matured.

(Amended Finding of Fact No. 12; R.63) Defendant Douglas C. Merrill was aware of this fact on April 12, 1976. Both Douglas and Colleen Merrill were aware that any claims or judgments against either or both of them could be satisfied by execution or levy against the real property. (Amended Finding of Fact Nos. 15-16; R.62) Furthermore, both Douglas and Colleen Merrill were aware on April 12, 1978, that the creditors of Defendant Douglas C. Merrill could not satisfy their claims against him by execution or levy on their real property if the title thereto was solely in the name of Defendant Colleen B. Merrill. (Amended Finding of Fact No. 17; R.62) Nevertheless, on April 12, 1976, Defendant Douglas C. Merrill executed a Stipulation and Property Settlement Agreement (Merrill v. Merrill, R.16,17) wherein he agreed that Defendant Colleen B. Merrill would be awarded (i) custody of the couple's minor children; (ii) the real property

located at 2341 Neffs Lane, Salt Lake City, Utah; (iii) the Ford automobile; and (iv) \$1,150.00 per month as alimony and child support. (Merrill v. Merrill, R.16,17) Pursuant to the stipulation, Defendant Douglas C. Merrill was (i) entitled to the old pick-up truck and a few personal belongings; (ii) required to assume and pay all debts and obligations incurred by the parties during their marriage; (iii) required to hold Defendant Colleen B. Merrill harmless on all debts and obligations; (iv) required to pay all attorneys fees and costs associated with the divorce action; and (v) required to continue in force all existing life insurance policies benefiting the couple's minor children. (Merrill v. Merrill, R.16,17)

In accordance with the above-mentioned Stipulation, Defendant Douglas C. Merrill executed on the same day (April 12, 1976) a quit-claim deed quit-claiming any and all interest he had in the real property located at 2341 Neffs Lane, Salt Lake City, Utah, to Defendant Colleen B. Merrill. (Amended Finding of Fact No. 9; R.63) After Defendant Douglas C. Merrill had quit-claimed his interest in the real property to Defendant Colleen B. Merrill, his sole assets consisted of a 1969 Ford pick-up truck and personal items and clothing with a total value of approximately \$1,000.00 to \$1,200.00. (Amended Finding of Fact No. 10; R.63)

The Interlocutory Decree of Divorce in the action between the Defendants was entered June 21, 1976. By its terms it approved the Stipulation signed by Defendant Douglas C. Merrill on April 12, 1976. (Amended Finding of Fact No. 19; R.62)

On June 30, 1976, Plaintiffs filed the instant action against Defendants, alleging that the transfer of the home and real property from Defendant Douglas C. Merrill to Defendant Colleen B. Merrill lacked fair consideration and was fraudulent as to Plaintiffs. (R.2-4)

On October 6, 1976, Plaintiff Road Runner Inn, Inc. made a motion to intervene in the divorce action between the Defendants. (Merrill v. Merrill, R.80) Following this motion, a written stipulation was entered into between Plaintiff Road Runner Inn, Inc. and Defendants upon which the district court ordered that the Judgment and Decree (Merrill v. Merrill, R.74-76) in the divorce action between the Defendants would not be conclusive on Plaintiff Road Runner Inn, Inc. as to the fairness of the consideration for the transfer of property approved or ordered by said Judgment and Decree from Defendant Douglas C. Merrill to Defendant Colleen B. Merrill. (Amended Finding of Fact No. 20; R.64; Merrill v. Merrill, R.80)

A trial to the Court was held on Plaintiffs' Complaint on August 15, 1978. Thereafter, the Court held that (i) Defendant Douglas C. Merrill had breached his contract with Plaintiff Road Runner Inn, Inc. by failing to pay certain subcontractors and materialmen; (ii) as a result of Defendant Douglas C. Merrill's breach, Plaintiff Road Runner Inn, Inc. had been damaged in the amount of \$28,300.00; (iii) Plaintiff Road Runner Inn, Inc. was entitled to judgment against Defendant Douglas C. Merrill in the amount of \$28,300.00, together with interest and costs; and (iv) the transfer of the real property by Defendant Douglas C. Merrill

to Defendant Colleen B. Merrill on April 12, 1976, being part of the settlement of the divorce action between the Defendants, was for a fair consideration. (Amended Conclusions of Law Nos. 1-5; R.65)

In this appeal Plaintiff Road Runner Inn, Inc. objects to the conclusion of the trial court that the stipulated property settlement in the divorce proceeding was a fair consideration for the transfer of the real property between Defendants at a time when Defendant Douglas C. Merrill's liabilities exceeded his assets and he was not able to pay his debts as they matured.

ARGUMENT

POINT I. THE CONVEYANCE BY DEFENDANT DOUGLAS C. MERRILL OF HIS HOME AND REAL PROPERTY TO DEFENDANT COLLEEN B. MERRILL AS PART OF A STIPULATED PROPERTY SETTLEMENT IN A DEFAULT DIVORCE ACTION WAS IN FRAUD OF CREDITOR-PLAINTIFF ROAD RUNNER INN, INC.

Pursuant to a Property Settlement Agreement in a divorce action, Defendant Douglas C. Merrill conveyed his interest in real property and his automobile to Defendant Colleen B. Merrill while assuming all debts and obligations of the parties and promising to pay \$1,150.00 per month in alimony and child support. (Merrill v. Merrill, R.16-18) In return, Defendant Douglas C. Merrill received a pick-up truck and a few personal belongings. (Merrill v. Merrill, R.16,17)

After Defendant Douglas C. Merrill conveyed his home and all his real property to Defendant Colleen B. Merrill, Plaintiff Road Runner Inn, Inc. was unable to collect its debt against Defendant Douglas C. Merrill because of the worthlessness of his remaining property. Douglas C. Merrill received nothing of

equivalent value from Defendant Colleen B. Merrill in return for his conveyance. Therefore, Plaintiff-Appellant Road Runner Inn, Inc. asserts that the transfer was void for lack of fair consideration.

A. A conveyance made without "fair consideration" by a debtor while insolvent is in fraud of his creditors.

The Uniform Fraudulent Conveyance Act, adopted by the Utah State Legislature in 1925, provides in part as follows:

"Every conveyance made, and every obligation incurred, by a person who is, or will be thereby rendered, insolvent is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration." U.C.A. §25-1-4 (1953).

Under the Act, and in particular as set forth in this section, a creditor with a matured claim against a debtor may have a conveyance by that debtor set aside, in order to satisfy the creditor's claim against the debtor, if the debtor's conveyance was made without adequate consideration and at the time of the conveyance, the debtor was thereby rendered insolvent. By statute such a conveyance constitutes statutory fraud and is void and of no effect.

The statute cited above, as applicable to the present action, sets forth the specific factors which will result in its application:

1. There must be a conveyance.
2. The actual intent of the person making the conveyance is irrelevant.
3. The person making the conveyance must already be insolvent or rendered insolvent by the conveyance.

4. The conveyance must lack an adequate or fair consideration passing from the grantee to the grantor.

The record in this case clearly shows that all of these factors were present when Douglas C. Merrill conveyed his interest in the real property located at 2341 Neffs Lane to the Defendant Colleen B. Merrill.

By statute a conveyance occurs when any tangible property is transferred between two parties. U.C.A. §25-1-1 (1953). The Quit-Claim Deed executed by Douglas C. Merrill on April 12, 1976, which transferred his entire interest in the real property to Defendant Colleen B. Merrill clearly constituted a "conveyance" within the meaning of Utah Code Annotated, Sections 25-1-1 and 25-1-4. A determination of the existence of a subjective intent on the part of Douglas C. Merrill to defraud the Plaintiff Road Runner Inn, Inc. is not necessary. Cardon v. Harper, 106 Utah 560, 151 P.2d 99, 154 A.L.R. 906 (1944).

A person is insolvent within the meaning of Utah Code Annotated, Section 25-1-4, when:

"The present fair saleable value of his assets is less than the amount that will be required to satisfy his probable liability on existing debts as they become absolute and matured." U.C.A. §25-1-2 (1953).

Insolvency under the statute "is not insolvency in the bankruptcy sense but merely a showing that the parties' assets are not sufficient to meet liabilities as they become due." Meyer v. General American Corp., 569 P.2d 1094, 1096 (Utah, 1977). In its Amended Findings of Fact the court below found that on April 12, 1976, the date "Douglas C. Merrill conveyed away his interest in the real property, his total liabilities exceeded his total

assets and he was unable to pay his debts as they matured."
(Amended Finding of Fact No. 12; R.63) This finding demonstrates conclusively that Douglas C. Merrill was "insolvent," as that term is defined in the Utah Uniform Fraudulent Conveyance Act, when he conveyed the real property to Defendant Colleen B. Merrill on April 12, 1976.

"Fair Consideration" under the Utah statutes is given for property conveyed between parties:

"(1) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied; or,

"(2) When such property, or obligation, is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small when compared with the value of the property or obligation obtained." U.C.A. §25-1-3 (1953).

The concept of "Fair Consideration" has received substantial attention from the courts. As a result, certain basic concepts about "Fair Consideration" have evolved which courts apply when reviewing a challenged conveyance.

"Fair Consideration" must be determined from the standpoint of the creditor--that is, whether the diminution in the debtor's estate unfairly impairs the creditor's prospect of recovery or payment. United States v. West, 299 F. Supp. 661 (1969); Larrimer v. Feeney, 411 Pa. 604, 192 A.2d 351 (1963); Ned J. Bowman Co. v. White, *supra*; Bailey v. Leeper, 142 Cal.App.2d 460, 298 P.2d 684 (1956); Hansen v. Cramer, 39 Cal.2d 321, 245 P.2d 1059 (1952). A debtor may be satisfied to give his property away or exchange it for some worthless chattel, but the statute will not permit him to do so "if he thereby renders himself

uncollectable to the detriment of his creditors." Hansen v. Cramer, supra, at 1061.

"Fair Consideration" means that a conveyance must be made for both a "fair equivalent" and in "good faith." Meyer v. General American Corp., supra, at 1096. "Fair equivalent" has been held to mean "such a price as a capable and diligent businessman could presently obtain for the property after conferring with those accustomed to buying such property." Utah Assets Corporation v. Dooley Bros., 92 Utah 577, 70 P.2d 738, 742 (1937). Thus, a fair consideration exists when a transferee gives in return substantially the full equivalent value of the property in light of the prevailing circumstances. Lucas v. Coker, 189 Okla. 95, 113 P.2d 589 (1941). The value of the transferred property must be determined as of the date of the conveyance. Hansen v. Cramer, supra.

Turning again to Utah Code Annotated, Section 25-1-3 (1953), it is apparent that Subsection (2) thereof is inapplicable to the case at bar. That subsection concerns itself solely with property given by a debtor as security for a present advance or antecedent debt. There is no indication in any of the lower court's findings that Douglas C. Merrill transferred his property interests as security.

Utah Code Annotated, Section 25-1-3(1) (1953), provides that "Fair Consideration" is given when (i) property is exchanged for equivalent property, or (ii) an antecedent debt of equivalent value is satisfied. An antecedent debt is any

pre-existing, legally enforceable liability. Vinlis Construction Co. v. Roreck, 67 Misc.2d 942, 325 N.Y.S.2d 457 (1971); Hansen v. Cramer, supra. Nowhere in the trial court's findings is there any indication that the transfers of property made by the Defendant Douglas C. Merrill to the Defendant Colleen B. Merrill were in satisfaction of an antecedent debt owed by Douglas C. Merrill to Colleen B. Merrill. The only remaining basis upon which "Fair Consideration" can be found in the law, as defined by Utah Code Annotated, Section 25-1-4(1) (1953), is that the Defendant Colleen E. Merrill conveyed or transferred to the Defendant Douglas C. Merrill, at the time she was given his entire interest in the real property at 2341 Neffs Lane, property having a fair equivalent value.

Referring to the agreement reached between the Defendants for the distribution of the property held by them and the assumption of the parties' outstanding liabilities as of April 12, 1976, we note that they agreed as follows: Defendant Colleen B. Merrill was given custody of the parties' three minor children. She was given Douglas C. Merrill's interest in the real property. She received a 1972 Thunderbird automobile. Defendant Douglas C. Merrill agreed to assume and pay all outstanding obligations and debts of the parties and to hold Defendant Colleen B. Merrill harmless thereon. He agreed to pay \$1,150.00 per month to Defendant Colleen B. Merrill as alimony and child support. He also agreed to maintain any existing life insurance policies for the benefit of his three minor children.

The divorce action, of which the property agreement was a

part, was brought and prosecuted by Defendant Colleen B. Merrill. The Defendant Douglas C. Merrill agreed to withdraw his answer filed in the divorce action so that a default judgment could be entered against him. These facts undeniably reveal that not only did Defendant Douglas C. Merrill fail to receive from Defendant Colleen B. Merrill something of equivalent value in consideration for the transfer of his real property to her, he failed to receive anything at all. In addition, he agreed to personally assume all of the debts of the parties (including all obligations on the real property) and he released Defendant Colleen B. Merrill from any obligation on those debts. He kept only a 1969 pick-up truck and minimal personal belongings but agreed to assume all the parties' debts and to pay substantial alimony, child support and insurance obligations. All this was agreed upon by the Defendants at a time when Douglas C. Merrill was insolvent and owed Plaintiff Road Runner Inn, Inc. \$28,300.00. Such circumstances clearly establish that "Fair Consideration," as traditionally defined and understood under Utah Code Annotated, Section 25-1-3(1) (1953), was not given by Defendant Colleen B. Merrill in return for the property she received from Defendant Douglas C. Merrill.

Notwithstanding these facts, the trial court concluded that the challenged transfer "being part of the settlement of the divorce action between the grantor and grantee, was for a fair consideration." (Amended Conclusion of Law No. 5; R.65) This conclusion is clearly in contravention to the law and other well-reasoned authority.

B. A stipulated property settlement agreement in a divorce action is not "Fair Consideration" for the transfer of a debtor's property within the meaning of Utah Code Annotated, Section 25-1-1 (1953).

The lower court's holding that settlement of a divorce action alone can constitute adequate consideration for a conveyance between husband and wife is, when viewed in the light of other court decisions, clearly erroneous. While no case has been found by Plaintiffs which specifically holds a conveyance to be fraudulent under facts identical to those in the case at bar, a number of courts have reviewed the question of validity of conveyances between spouses when marriage or divorce is raised as consideration for the transfer. In each instance, however, the courts have insisted on something more than the marriage relationship or a divorce to sustain a finding of "Fair Consideration."

Before reviewing those cases dealing with transfers between spouses, the Court must keep in mind that any conveyance between relatives is subject to rigid scrutiny. Smith v. Popham, 513 P.2d 1172 (Ore., 1973); Ned J. Bowman Co. v. White, 13 Utah 2d 173, 369 P.2d 962 (1962); Givan v. Lambeth, 10 Utah 2d 287, 351 P.2d 959 (1960); Peterson v. Peterson, 112 Utah 554, 190 P.2d 135 (1948). This is especially true where a transfer of property is between husband and wife. McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv. L. Rev. 404, 428 (1933). This rule has been adopted in almost every jurisdiction because the state courts have recognized "the notorious tendency

of spouses to aid each other in enjoying secretly reserved property interests and to be generous to each other before they are just to creditors." McLaughlin, supra, at 428.

Under principles long developed through the Statute of Elizabeth, a transfer for which the consideration is support of the grantor is invalid, not only because it is an executory promise (Crain v. Gould, 46 Ill. 293 (1867)), but also because the consideration is of no value to creditors. McLaughlin, supra, at 418. Transfers which claim as their consideration the performance by a wife of her ordinary marital or household duties or even the performance of past services other than usual household duties lack sufficient consideration so as to avoid the claims of creditors. 37 Am. Jur. 2d, Fraudulent Conveyances, §77 at 759.

It has been held that the promise of future support and the waiver of all claims for future support do not constitute "Fair Consideration" for transfers of property. Both types of consideration are of no value to creditors, for a creditor cannot levy or execute on a promise or a waiver of a right. In the case of Detroit Security Trust Co. v. Gitre, 254 Mich. 66, 235 N.W. 884 (1931), the defendant transferred his property to his son in trust for the support of his wife. The defendant's wife executed a consent to the instrument whereby she waived all of her claims for dower, alimony and support. After the plaintiff-creditor challenged the conveyance, the Supreme Court of Michigan found that the agreement of the son to support his mother did not furnish a consideration for the transfer which would defeat a

creditor's claim. In Auburgh v. Lydston, 117 Ill. App. 574 (1905), the husband transferred all his property to his wife when he and his wife separated in return for her waiver of all claims for support. As to creditors, it was held that the transfer was without a fair consideration.

In the case at bar, not only did Defendant Douglas C. Merrill transfer all of his property to Defendant Colleen B. Merrill, but he also agreed to pay her alimony and child support and pay all of her outstanding obligations and debts as well. If a waiver by the wife of claims for support is inadequate consideration, an agreement by Defendant Douglas C. Merrill to pay support, alimony and outstanding debts can hardly be termed adequate or "Fair Consideration." In National Surety Co. v. Wittich, 184 Minn. 44, 237 N.W. 690 (1931), the defendant conveyed his property to his wife in an attempt to appease her ire aroused by his indiscretions with a younger woman. In return for the property, the wife agreed to continue to live with the defendant. The Minnesota court determined that the transfer lacked consideration and was void as to creditors.

In First National Bank of Fairbanks v. Enzler, 537 P.2d 517 (Alaska, 1975), the defendant husband engaged in numerous unsuccessful business ventures which substantially depleted the family savings. As a result of the defendant's financial ineptitude, his wife threatened divorce if the defendant did not sign over all his interest in their assets to her so that she would have complete control of the family's remaining property. Following the transfer, the defendant continued to live with the

family and operate the family business as before. Several months later the defendant filed a petition in bankruptcy which resulted in a challenge by the trustee in bankruptcy to the validity of the transfers from the defendant to his wife. On appeal the Enzlers argued that the conveyance was supported by consideration in the form of the wife's forbearance in a divorce action against the defendant husband. However, the Supreme Court of Alaska disagreed with the Enzlers and found that "Fair Consideration" was lacking. The Alaskan court based its decision on an earlier Wisconsin opinion, Oppenheimer v. Collins, 115 Wis. 283, 91 N.W. 690 (1902). In that case creditors attacked a conveyance from Mr. Collins to Mrs. Collins of the former's interest in an inheritance for the sole consideration of the withdrawal by Mrs. Collins of a divorce action and her consent to continue the marriage. While recognizing that the wife had valid grounds for a divorce, the Wisconsin Supreme Court ruled that the transfer was without sufficient consideration. The Court reasoned as follows:

"The first of these reasons is that neither the law nor public policy can favor or approve bargaining between husband and wife as to continuance or severance of the marital status, in the existence of which the public, as a third party, is interested, as well as the two spouses. . . . Another most cogent reason is the utter inability to protect the rights of creditors in the property of a husband if such contracts can be deemed a valid consideration. Apparently the present case presents as nearly a meritorious situation for pecuniary arrangement between husband and wife as any likely to arise; but, if the principle be established that merely continuing the marital relation is a sufficient consideration to support conveyance from husband to wife against creditors, there will be no difficulty in supporting such conveyances even in most flagrant cases. It would but be necessary to establish any reasonable degree of exasperating circumstances or of conjugal infelicity to enable an insolvent husband to place his property within the shelter of his wife's

name, because, forsooth, she condones his alleged misconduct; which, for the purpose of effectuating a fraudulent scheme, he may well be willing to admit." 91 N.W. at 691, 692.

The reasoning of these cases is clear--a transfer between spouses, the consideration for which is the settlement of an action for divorce, cannot be "Fair Consideration" with regard to creditors' claims.

When a debtor places his property beyond the reach of a creditor, the debtor must receive a valuable and fair consideration in return for the transfer in order that the creditor's claims remain meaningful. U.C.A. §25-1-4 (1953). If a promise to forebear in or settle a divorce action is to be viewed as fair consideration, a creditor's claim becomes meaningless because a creditor cannot levy or execute on such consideration. Keeping in mind that the purpose of the Uniform Fraudulent Conveyance Act is not to prevent a creditor from collecting his honest accounts, Ned J. Bowman Co. v. White, *supra*, at 964, the courts have found this lack of consideration to be vulnerable to a creditor's attack.

Appellants note that there are several cases indicating that, as between spouses, one spouse's forbearance in pursuing a meritorious divorce action will be valid consideration for a transfer of property from the other spouse. However, these cases are distinguished by the fact that only the spouses were involved and the transfers were not challenged by creditors. Holsomback v. Caldwell, 218 Ga. 393, 128 S.E.2d 47 (1962); Campbell v. Prater, 64 Wyo. 293, 191 P.2d 160 (1948); Mack v. Mack, 87 Neb. 819, 128 N.W. 527 (1960); Duffy v. White, 115 Mich. 264, 73 N.W. 363 (1897). An agreement, particularly a potentially collusive one, may be binding intra parietes without binding third parties.

Notwithstanding the above authority, the trial court erroneously concluded that a settlement of a divorce action is, in fact, "Fair Consideration" as against third party creditors, a conclusion which clearly contravenes the principles of law expounded above.

That the settlement of a divorce action alone will not act as consideration for a transfer is evident from the Florida case of Lieberman v. Kelso, 354 So.2d 137 (Fla. App., 1978). In Lieberman the defendant Kelso's husband had transferred to the defendant his entire interest in the parties' marital home. This transfer was made pursuant to a property settlement agreement in a divorce action brought by the defendant which was later approved by the court and incorporated into the final judgment of dissolution. This conveyance was challenged by the husband's creditors.

On appeal to the District Court of Appeal of Florida, the Court found that fair consideration had accompanied the transfer of the home not because the conveyance was part of a divorce settlement, but because "the settlement agreement required (Kelso) to convey her interest in certain other property to the husband." 354 So.2d at 139.

Lieberman illustrates that when one party transfers property and receives property of a fair equivalent from the transferee, a creditor cannot complain about the transfer. This rule applies equally to transfers between strangers, as well as to transfers between a husband and wife in the settlement of a divorce action. In Lieberman the wife gave up valuable property in exchange for

the conveyance of property from the husband. The fairness of the consideration rested on the equivalent exchange of property between husband and wife and not on the fact that the transfer was made pursuant to a property settlement in a divorce suit. Neither the Florida court nor any other court Plaintiff-Appellant Road Runner Inn, Inc. has been able to discover has found fairness of consideration flowing solely from a property settlement agreement itself.

A property settlement agreement establishes only the manner in which the assets and liabilities of the married couple are to be divided upon divorce. Where it provides for an equal division of property among the parties, the actual and equal splitting of property, the exchange of property for its fair equivalent, constitutes a fair consideration which validates the transfer. This is the clear rule of Liberman. However, if the settlement agreement does not provide for an exchange of property for its fair equivalent, neither the settlement agreement itself nor the actual division of property between the parties can amount to a fair consideration sufficient to defeat a creditor's challenge. In that situation the rights of the creditor are unprotected and become worthless because of the inadequacy or total lack of consideration, a result contrary both to sound public policy and the statutory law of this state. Such a transfer is fraudulent and cannot be upheld as to creditors. This is precisely the case before this Court.

Defendant Colleen B. Merrill brought a divorce action against Defendant Douglas C. Merrill. He agreed to a property settlement

wherein he gave the Defendant Colleen B. Merrill his interest in the couple's real property, an automobile, custody of the couple's children, \$1,150.00 per month in child support and alimony, the continued protection of life insurance and a release from any and all obligations and debts accrued by the couple during their marriage. In return for his generosity, Defendant Douglas C. Merrill took an almost worthless nine-year-old pick-up truck and a few personal belongings. The lack of "Fair Consideration" accompanying Douglas C. Merrill's conveyance, as defined by Utah Code Annotated, Section 25-1-3 (1953), and as illustrated above, is obvious. Nothing of a value equivalent to the real property, automobile, release from debts and obligations and rights to payment of child support and alimony was given by Defendant Colleen B. Merrill to Defendant Douglas C. Merrill in return. Because this transfer lacked "Fair Consideration" and because Defendant Douglas C. Merrill was insolvent at the time it occurred, the conveyance was in fraud of Plaintiff Road Runner Inn, Inc. and the decision of the trial court to the contrary must be reversed.

POINT II. THE CONVEYANCE BY DEFENDANT-RESPONDENT DOUGLAS C. MERRILL OF HIS REAL PROPERTY TO DEFENDANT-RESPONDENT COLLEEN B. MERRILL WAS MADE WITH THE ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD PLAINTIFF-APPELLANT ROAD RUNNER INN, INC.

Chapter 1, Title 25, of the Utah Code Annotated (1953) provides that a transfer made with the actual intent to defraud creditors is void, regardless of whether adequate or fair consideration is received. Specifically, Utah Code Annotated, Section 25-1-7 (1953), states:

"Every conveyance made, and every obligation incurred, with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors."

This section makes a conveyance void not only if it is made with an intent to defraud the creditors of the grantor, but also if made with an intent to hinder or delay them. Ned J. Bowman Co. v. White, *supra*. Any conveyance will violate Section 25-1-7 if the actual intent of the transferor, at the time the conveyance is made, is to hinder, delay or defraud his creditors. Neubauer v. Cloritier, 265 Minn. 539, 122 N.W.2d 623 (1963).

The courts have held that actual intent to hinder, delay or defraud creditors may be shown in any one of three ways. Actual fraudulent intent is established (i) where a debtor transfers property in a manner that will necessarily result in hindering, delaying or defrauding creditors; (ii) where an insolvent debtor transfers property for a nominal consideration; or (iii) where the transfer is surrounded by numerous "badges of fraud." The findings of the lower court clearly indicate that the Defendant Douglas C. Merrill intended to hinder, delay and defraud the Plaintiff Road Runner Inn, Inc. when he conveyed all of his property to Defendant Colleen B. Merrill.

A. Actual intent to hinder, delay or defraud creditors is proven if a debtor transfers property under circumstances which must necessarily result in hindering or defrauding creditors.

The courts have long held that an individual is deemed to intend the probable and reasonable consequences of his own actions. This rule applies equally in determining the intent of a grantor

when transferring his own property. Smith v. Clark, 242 Mass. 1, 136 N.E. 66 (1922). Thus, if a conveyance of property "is made under such circumstances that the result must necessarily be to hinder and delay creditors, it will be presumed that this was the intent of the transferor in making it." 37 Am. Jur. 2d, Fraudulent Conveyances, §8, p.698.

The Arkansas Supreme Court stated in Evans v. Cheatham, 183 Ark. 82, 34 S.W.2d 1076 (1931):

"[I]t is well settled that fraud may arise as an inference of law, and that, when a conveyance is made under such circumstances that the result must necessarily be to hinder and delay creditors, it will be presumed that such was the intent of the transferor in making it." 34 S.W.2d at 1077.

See, also, Rice v. Columbia, 143 S.C. 516, 141 S.E. 705 (1928); Fahey v. Fahey, 43 Colo. 354, 96 P. 251 (1908); Hoppe Hardware Co. v. Bain, 21 Okla. 177, 95 P. 765 (1908). If a person conveys away property in a manner that will cause his creditors to be hindered, delayed or defrauded in the collection of their honest debts, it must be presumed that the transferor's intent in making the conveyance was to cause such hindrance or defrauding. Such is the case in the appeal before this Court.

As part of its Amended Findings of Fact, the trial court found that the Defendants were aware that any judgment against either or both of them could be satisfied by execution or levy against the real property they owned. (Amended Finding of Fact No. 15; R.64) That to forestall execution or levy on previous occasions, the Defendants had arranged loans from financial institutions and relatives in order to satisfy judgments and obligations outstanding against them. (Amended Finding of Fact

No. 13; R.63) Furthermore, the trial court specifically found that on April 12, 1976, the date of the challenged transfer, the Defendants knew that the creditors of Defendant Douglas C. Merrill could not satisfy their claims against him by execution or levy on the real property owned by him if title thereto was only in the name of Defendant Colleen B. Merrill. (Amended Finding of Fact No. 17; R.64) The Amended Findings of Fact clearly reveal that the Defendants knew Plaintiff Road Runner Inn, Inc. could not collect the obligation Defendant Douglas C. Merrill owed it if he transferred his entire interest in his real property to Defendant Colleen B. Merrill. Nonetheless, in the glaring light of this realization, Defendants engaged in a transfer of property which had the unquestionable consequence of hindering, delaying and defrauding Plaintiff Road Runner Inn, Inc. These facts unerringly establish the actual intent of Defendants to hinder, delay or defraud Plaintiff Road Runner Inn, Inc.

B. Actual intent to hinder, delay or defraud creditors is established where an insolvent transferor conveys away his property without receiving a fair consideration in return.

In Brimhall v. Grow, 25 Utah 2d 298, 480 P.2d 731 (1971), the plaintiff State Commissioner of Financial Institutions brought suit challenging certain transfers of property by the defendants therein as fraudulent conveyances. One defendant, Spencer Grow, had borrowed substantial amounts of money from a savings and loan business and secured those loans with liens on real property. When Grow defaulted on the loans, plaintiff foreclosed on the real property, only to discover that the amount of the loans

exceeded the fair market value of the property. In order to collect the deficiency, plaintiff brought action challenging certain transfers by Grow to his son, Steven Grow.

At trial the plaintiff alleged that the transfers from the father to his son were invalid under Utah Code Annotated, Section 25-1-8 (1953), which by its terms voids "Every conveyance . . . of any estate or interest in lands . . . made with the intent to delay, hinder or defraud creditors. . . ." After the trial court found that the conveyances from Spencer Grow to his son, Steven, were accompanied only by nominal consideration and that he was insolvent at the time of the execution of the conveyances, this Court held that "under Section 25-1-8, U.C.A., 1953, proof of these facts constituted a prima facie case." 480 P.2d at 734.

Under Utah Code Annotated, Section 25-1-8 (1953), intent can be established by showing that an insolvent debtor transferred away his property without receiving a fair consideration from the transferee. Sections 25-1-8 and 25-1-7 are similar in that both require proof of an intent to hinder, delay or defraud creditors in order to invalidate a conveyance of property. Plaintiff-Appellant Road Runner Inn, Inc. contends that the method for establishing intent under Section 25-1-8 should apply equally to cases arising under Section 25-1-7. Therefore, by proving that the conveyance from Defendant Douglas C. Merrill to Defendant Colleen B. Merrill lacked fair consideration and was made at a time when Defendant Douglas C. Merrill was insolvent, Plaintiff Road Runner Inn, Inc. also established Defendants' actual intent to hinder, delay or defraud Plaintiff Road Runner Inn, Inc. in

the collection of its lawful accounts in violation of Section 25-1-7.

C. Actual intent to hinder, delay or defraud creditors is proven if a conveyance is surrounded by a substantial number of recognized "badges of fraud."

The actual fraudulent intent of a transferor in making a conveyance may be determined by an examination of the circumstances surrounding the conveyance. Matter of Estate of Reed, 566 P.2d 587 (Wyo. 1977); Continental Bank v. Marcus, ___ Penn. ___, 363 A.2d 1318 (1976); Brydges v. Emmendorfer, 311 Mich. 274, 18 N.W.2d 822 (1945); Farrell v. Paulus, 309 Mich. 441, 15 N.W.2d 700 (1944); Cardon v. Harper, supra. Specifically, "actual intent" to hinder, dealy or defraud creditors, within the meaning of Utah Code Annotated, Section 25-1-7 (1953), may be established by exposing a number of "badges of fraud" which accompany a fraudulent conveyance. As was stated by the Wyoming court in Matter of Estate of Reed, supra:

"The issue of actual fraud is commonly determined by recognized indicia, demonstrated badges of fraud, which are circumstances so frequently attending fraud; a concurrence of several will make out a strong case and be the circumstantial evidence sufficient to sustain a court's finding." 566 P.2d at 591.

See, also, United States v. Bertie, 529 F.2d 506 (9th Cir., 1976); Mohar v. McLelland Lumber Co., 95 Idaho 38, 501 P.2d 722 (1972); Gafco, Inc. v. H.D.S. Mercantile Corp., 47 Misc.2d 661, 263 N.Y.S.2d 109 (1965). While a single "badge of fraud" may stamp a transaction as fraudulent (Payne v. Gilmore, ___ Okla. ___, 382 P.2d 140 (1963)), when several "badges of fraud" are found in combination, the transferor must bring forth strong and clear

evidence to repel the conclusion of fraud. Springfield Ins. Co. v. Fry, 267 F. Supp. 693 (D.C. Okla., 1967); Burns v. Radoicich, 77 C.A.2d 697, 176 P.2d 77 (1947).

The leading case of Evans v. Trude, 193 Ore. 648, 240 P.2d 940 (1952), sets forth in some detail the long recognized "badges of fraud:"

1. Inadequate consideration in return for the transfer of property.
2. Transfer of property in anticipation of pending litigation.
3. Insolvency of the transferor.
4. Failure to record the instrument signifying the transfer within a reasonable length of time after execution without explanation for the delay.
5. The conveyance covers all or substantially all of the debtor's property.
6. Retention of possession of the property by the grantor after the date of the conveyance.
7. The conveyance so depletes the assets of the transferor as to thereby hinder and delay creditors.
8. The close relationship of the parties to the conveyance.

These long recognized badges of fraud are as clearly apparent in this case as they are multitudinous. A review of the trial court's findings indicates the following:

1. The transfer of the home and real property from Defendant Douglas C. Merrill to Defendant Colleen B. Merrill was made without a fair consideration as defined by Utah Code Annotated,

Section 25-1-4 (1953).

2. The transfer of the real property was in anticipation of a pending suit. Other lawsuits by creditors were imminent or had already been filed.

3. The Defendant Douglas C. Merrill was insolvent at the time of the conveyance.

4. The conveyance was a transfer of all of Defendant Douglas C. Merrill's assets of any pecuniary value.

5. The transfer completely stripped Defendant Douglas C. Merrill of all valuable assets so as to necessarily hinder and delay Plaintiff Road Runner Inn, Inc. in the recovery of any part of its judgment.

6. The relationship of the transferee and transferor was that of husband and wife.

7. The Defendants both knew that creditors would be hindered and delayed in the collection of their accounts when Douglas C. Merrill executed the conveyance.

In addition to the above factors, a hurried transaction, not in the usual mode of doing business, is also considered a badge of fraud. United States v. Leggett, 292 F.2d 423 (6th Cir., 1961), cert. den. 368 U.S. 914, 82 S.Ct. 194, 7 L.Ed.2d 131, reh. den. 368 U.S. 979, 82 S.Ct. 476, 7 L.Ed.2d 441. The Defendants in this cause signed the Property Settlement Agreement in the divorce action on April 12, 1976. On that same day Douglas C. Merrill quit-claimed his entire interest in the real property to Defendant Colleen B. Merrill rather than waiting until the Decree of Divorce was entered on June 21, 1976.

Plaintiff Road Runner Inn, Inc. has previously shown that only two of the "badges of fraud," (i) insolvency of the transferor and (ii) lack of a fair consideration, lead to a determination by statute of actual intent to hinder, delay or defraud creditors. However, when coupled with the additional badges of fraud set forth above, the undeniable conclusion is that Defendant Douglas C. Merrill transferred his real property to Defendant Colleen B. Merrill with the actual intent to hinder, delay and defraud Plaintiff Road Runner Inn, Inc. in the collection of its honest and lawful accounts.

By any one of the three methods of examination outlined above, this Court can and must determine that the transfer of the real property from Defendant Douglas C. Merrill to Defendant Colleen B. Merrill was made with the actual intent to hinder, delay and ultimately defraud Defendant Douglas C. Merrill's creditors. Having concluded that Douglas C. Merrill's actual intent was to defraud his creditors, the elements of Section 25-1-7 are established and the transfer of the Defendant Douglas C. Merrill's real property must be held null and void as to the creditors of Douglas C. Merrill.

CONCLUSION

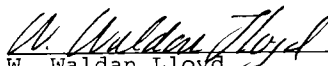
On October 6, 1976, an Order of the Court in the divorce proceeding between the Defendants affirmed the stipulation of Defendant Colleen B. Merrill that the Judgment and Decree in the divorce proceeding was not conclusive on Plaintiff Road Runner Inn, Inc. as to the fairness of consideration for the challenged transfer. By way of this action, Plaintiff challenges the fairness

of consideration for the transfer of Defendant Douglas C. Merrill's home and real property to Defendant Colleen B. Merrill. Plaintiffs have clearly and explicitly established that fair consideration was not given by Defendant Colleen B. Merrill for the Defendants' home and real property. U.C.A. §25-1-3 (1953). Because Defendant Douglas C. Merrill made this transfer at a time when he was insolvent and received no fair consideration in return, the conveyance was void as to Defendants' creditors. U.C.A. §25-1-4 (1953).

In addition to the lack of consideration and insolvency of the transferor, the Defendants' actual intent in making the conveyance was to hinder, delay or defraud Plaintiff Road Runner Inn, Inc. With such a fraudulent intent, the transfer must also be avoided as being in violation of Utah Code Annotated, Section 25-1-7 (1953).

Because the challenged transfer is invalid under at least two statutory provisions, the decision of the lower court must be reversed and the lower court must be directed and ordered to hold the transfer of the Defendants' home and real property null and void as to Plaintiff Road Runner Inn, Inc.

Respectfully submitted this 7th day of June, 1979.


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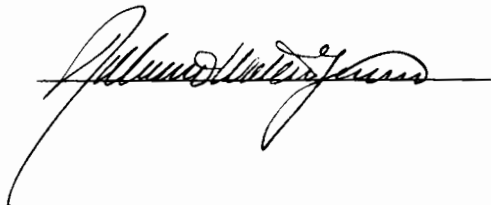
CERTIFICATE OF SERVICE

SERVED the foregoing Appellants' Brief by hand delivering
two copies to the following:

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this 7th day of June, 1979.

A handwritten signature in cursive script, appearing to read "Donald W. Morgan", is written over a horizontal line.