

1990

Lynda C. Baldwin v. Willard D. Wood, Tonya
Glazier Wood, Max D. Burton Sr., Emily A. Burton,
Max D. Burton Jr., N.D. "Pete" Hayward, and Keith
L. Buckner : Petition for Rehearing

Utah Supreme Court

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Paul H. Richins; Pro Se.

David H. Schwobe; Perkins, Schwobe, and McLachlan; Attorney for Appellants.

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900339

PERKINS, SCHWOBE & McLACHLAN
 David H. Schwobe (#2893)
 Attorney for Defendants/Appellants Burton
 343 South 400 East
 Salt Lake City, Utah 84111
 Telephone (801) 521-0177

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

LYNDA C. BALDWIN, :

Plaintiff/Appellee, :

vs. :

WILLARD D. WOOD; TONYA GLAZIER :

WOOD; MAX D. BURTON SR.; EMILY :

A. BURTON; MAX D. BURTON, JR.; :

N.D. "PETE" HAYWARD, Sheriff :

of Salt Lake County, Utah; and :

KEITH L. BUCKNER, Deputy Sher- :

iff of Salt Lake County, Utah :

Defendants/Appellants. :

Docket No. 900339

* * * * *

APPELLANTS' PETITION FOR REHEARING

Petition for Rehearing from the Decision of the
 Utah Supreme Court, dated February 19, 1993

Paul H. Richins, Pro Se
 Substitute Appellee
 68 South Main, 8th Floor
 Salt Lake City, Utah 84101
 Telephone: (801) 531-9510

David H. Schwobe
 PERKINS, SCHWOBE & McLACHLAN
 Attorney for Appellants Burton
 343 South 400 East
 Salt Lake City, Utah 84101
 Telephone: (801) 521-0177

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 UTAH

PERKINS, SCHWOBE & McLACHLAN
David H. Schwobe (#2893)
Attorney for Defendants/Appellants Burton
343 South 400 East
Salt Lake City, Utah 84111
Telephone (801) 521-0177

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N.D. "PETE" HAYWARD, Sheriff of Salt Lake County, Utah; and :

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PERKINS, SCHWOBE & McLACHLAN
Attorney for Appellants Burton
343 South 400 East
Salt Lake City, Utah 84101
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343 South 400 East
Salt Lake City, Utah 84111
Telephone (801) 521-0177

IN THE SUPREME COURT OF THE STATE OF UTAH

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LYNDA C. BALDWIN,	:	
Plaintiff/Appellee,	:	PETITION FOR REHEARING
vs.	:	
WILLARD D. WOOD; TONYA GLAZIER	:	
WOOD; MAX D. BURTON SR.; EMILY	:	
A. BURTON; MAX D. BURTON, JR.;	:	
N.D. "PETE" HAYWARD, Sheriff	:	Docket No. 900339
of Salt Lake County, Utah; and	:	
KEITH L. BUCKNER, Deputy Sher-	:	
iff of Salt Lake County, Utah	:	
Defendants/Appellants.	:	

* * * * *

ARGUMENT

The prior decision of the Supreme Court in this matter appears to be based primarily upon its holding that, under Utah law as it existed at the time of Burtons' execution upon the property, a creditor was not allowed to disregard an alleged fraudulent conveyance and execute directly upon property in the hands of an alleged fraudulent transferee, but must first bring

an action to set aside the alleged fraudulent conveyance prior to conducting an execution upon the property.¹

Burtons respectfully submit that this holding is directly contrary to the language of the controlling provision of the Utah Fraudulent Conveyances Act, UCA Section 25-1-15 (1953) (repealed 1988) which stated:

UCA 25-1-15 Rights of creditors with matured claims. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser:

(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claims; or

(2) Disregard the conveyance, and attach, or levy execution upon, the property conveyed.

A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation may retain the property or obligation as security for repayment. (Emphasis added.)

Under this statute, creditors were expressly given the option of either bringing an action to set aside the fraudulent conveyance, or of disregarding the conveyance and executing directly upon the property. The Court's decision in this case renders Section 25-1-15(2) a nullity.

¹A true and correct copy of the Court's Decision, dated February 19, 1993, is attached as an addendum hereto.

The Court addressed Section 25-1-15(2) on page 9 of its decision, wherein the Court held, in essence, that the remedy provided by Section 25-1-15(2) is not available until after the creditor has brought an action to set aside the conveyance. However, this argument overlooks the relationship between Section 25-1-15(1) and 25-1-15(2). Moreover, requiring a creditor to first bring an action to set aside the conveyance overlooks the express language of Section 25-1-15(2) which allows a creditor to "disregard the conveyance."

Burton's construction of Section 25-1-15(2) is supported by the Supreme Court's decision in Jensen v. Eames, 519 P.2d 236 (Utah 1974). In Jensen, a judgment creditor served a post-judgment writ of garnishment upon a third party, to whom the judgment debtor had allegedly fraudulently conveyed certain shares of stock. Within the garnishment proceeding, the creditor moved to have the sale of stock set aside as a fraudulent conveyance. The trial court denied the motion on the grounds that such action could not be taken in a garnishment proceeding and that the creditor must file a separate action. The Supreme Court reversed the decision of the trial court on this issue, holding at page 428:

A judgment creditor may litigate the question of a fraudulent conveyance in a garnishment proceedings, in a creditor's bill in equity, or in an execution proceeding, provided that once contested the burden is upon the one alleging the fraudulent conveyance to prove by clear and convincing evidence that the transfer was in fact fraudulent. (Emphasis added.)

Although Jensen is factually distinguishable from the present case, Jensen is consistent with Burtons' position that, under Section 25-1-15(2), a creditor may seek a post-judgment remedy against alleged fraudulently conveyed property in the hands of a transferee without first bringing an action to set aside the conveyance.

The only authority cited in support of the Court's holding that a creditor must first bring an action to set aside a fraudulent conveyance is Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987), which states at page 1262: "The remedy provided by the Act for a fraudulent conveyance is the voiding of the conveyance." However, there is nothing within Butler which suggests that the voiding of a fraudulent conveyance can only be achieved through a specific action to set aside the conveyance. That issue was not before the Court in Butler.

Burtons' construction of Section 25-1-15(2) is further supported by UCA Section 25-1-8, which declared that all conveyances made with intent to defraud conveyances "shall be void," and by all of the prior Utah fraudulent conveyances decisions, which uniformly held that fraudulent conveyance are "void." Some of these cases went so far as to describe such conveyances as "void in toto," W.P. Noble Mercantile Co. v. Mt. Pleasant Equitable Co-op Inst., 42 P. 869 (Utah 1894) and "as if the transaction never took place at all." Meyer v. General American Corporation, 569 P.2d 1094, 1098 (Utah 1977);

Cardon v. Harper, 151 P.2d 99, 102 (Utah 1944). Prior to the present case, no Utah Supreme Court decision suggested that such conveyances are merely "voidable" rather than "void," notwithstanding the express language of Section 25-1-8. Even if this is a reasonable construction of Section 25-1-8, Section 25-1-15(2) expressly allows creditors to "disregard the conveyance" and execute upon property which is in the hands of an alleged fraudulent transferee.

The Court further states on page 9 of its decision that, even if Section 25-1-15(2) allows a creditor to execute directly upon property in the hands of a fraudulent transferee, such a remedy was not available against Baldwin because Baldwin was not Willard Woods' immediate successors in interest. However, Section 25-1-15 addresses situations in which allegedly fraudulently conveyed property has passed through the hands of multiple transferees, and exempts only bona fide purchasers and those who purchase "immediately or mediately" from bona fide purchasers. Although Baldwin may have been exempt from execution if she was a bona fide purchaser, the statute clearly applies to remote transferees who are not bona fide purchasers. The Court's decision erroneously limits Section 25-1-15(2) to immediate transferees in all instances.

The most important point which Burtons wish to make in this Petition is that, even if they were ultimately incorrect in their interpretation of Section 25-1-15(2), Section 25-1-8 and the Utah

cases which uniformly described fraudulent conveyances as "void," Burtons' actions were based upon a good faith interpretation of these authorities. A literal reading of Section 25-1-15(2) certainly appears to allow Burtons to act as they did. Burtons should not be subjected to an award of attorneys fees for having acted in bad faith where their conduct was consistent with a reasonable interpretation of the relevant legal authorities.

The Court held on pages 13-17 of its opinion that Burtons are liable for attorney's fees under UCA Section 78-27-56(1). Section 78-27-56(1) provides that attorney's fees may be awarded against a party which asserts an action or defense which is "without merit" and which is "lacking in good faith." The "without merit" element of Section 78-27-56(1) requires that the subject action or defense be "frivolous" or "having no basis in law or fact." Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). The "lacking in good faith" element of Section 78-27-56(1) requires the absence of one or more of the following: "(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay or defraud others." Id. at 151. The existence of bad faith is a subjective question of state of mind. Canyon Country Store v. Bracey, 781 P.2d 414, 416 (Utah 1989).

Burtons submit that their conduct in this case does not fall within either elements of Section 78-27-56(1). As previously stated, Burtons acted in accordance with their apparent rights under UCA Section 25-1-15(2), 25-1-8 and relevant Utah case law. In holding that void in fact means "voidable," the Court relied wholly upon authorities from outside the State of Utah, which Burtons could not have foreseen. Moreover, the Court's holding that a creditor must bring a separate action to set aside a fraudulent conveyance before executing upon alleged fraudulently conveyed property overlooks the relationship between UCA Section 25-1-15(1) and (2).

Even if Burtons are ultimately incorrect in their interpretation of Section 25-1-15, this does not mean in itself that Burtons' legal position was "without merit." As this Court stated in regard to URCP 11 in Barnard v. Sutliff, 202 Utah Adv. Rep. 17, 20 (Utah 1992):

Nor does rule 11 require the attorney to reach the correct legal position from the research. It is enough that the attorney's reading of the law is a reasonable one. Thus, once an attorney forms a reasonable opinion after conducting appropriate research, the mere fact that the attorney's view of the law was wrong cannot support a finding of a rule 11 violation.

Burtons' interpretation of Section 25-1-15 is at least tenable, and was not directly contrary to any controlling Utah authority. Therefore, Burtons' position should not be declared to be "without merit."

Regarding the "lack of good faith" element, there is absolutely no evidence in the record that Burtons did not honestly believe in their legal position, or that they acted out of any improper motive. The Court's decision of this point, which appears upon page 17 of the decision, was based solely upon the fact that Burtons issued a praecipe directing the Sheriff to levy upon the "right, title and interest" of Baldwins as "successors in interest to Willard D. Wood." The Court held that "Baldwins were not successors of Willard Wood" and "[H]ad Burtons proceeded with an honest belief in the propriety of their activities, they would have sought first to have the Wood-to-Wood conveyance set aside as fraudulent before attempting to wrongfully execute on Baldwin's interest in the property."

This analysis subsumes the previous issue regarding the reasonableness of Burtons' legal position. If Burtons honestly believed that they were entitled to execute upon the property under UCA Section 25-1-15, then none of the conduct cited in the Court's analysis constitutes a lack of good faith. There is absolutely no evidence in the record which suggests that Baldwins did not honestly believe in their asserted legal position or acted out of improper motives.

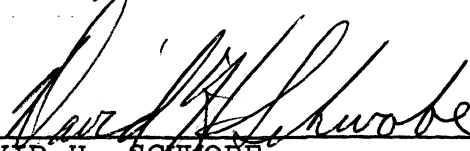
CONCLUSION

For these reasons, Burtons request in the alternative: (1) for a reversal of the Court's prior decision and entry of judgment in favor of Burtons; (2) for a remand of this case to

the trial court for trial upon the issue of whether Baldwin was a bona fide purchaser; and (3) for a reversal of the trial court's award of attorney's fees against Burtons, due to Burtons' reasonable and good faith belief that their execution upon the property was in accordance with Utah law.

DATED this 5 day of March, 1993.

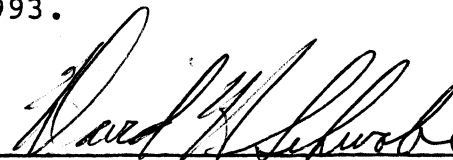
PERKINS, SCHWOBE & McLACHLAN



DAVID H. SCHWOBE
Attorney for Defendants/
Appellants Burton

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing PETITION FOR REHEARING was mailed, postage prepaid, to Paul H. Richins, 68 South Main, 8th Floor, Salt Lake City, Utah 84101 this 5 day of March, 1993.



David H. Schwobe

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Lynda C. Baldwin,
Plaintiff and Appellee,

and

Paul H. Richins,
Substitute Appellee,

v.

No. 900339

F I L E D

February 19, 1993

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Max D. Burton, Sr.; Emily A.
Burton; Max D. Burton, Jr.;
Willard D. Wood; Tonya Glazier
Wood; N. D. "Pete" Hayward,
Sheriff of Salt Lake County,
Utah; and Keith L. Buckner,
Deputy Sheriff of Salt
Lake County, Utah,
Defendants and Appellants.

Geoffrey J. Butler, Clerk

Third District, Salt Lake County
The Honorable Leonard H. Russon

Attorneys: David H. Schwobe, Salt Lake City, for the Burtons
Paul H. Richins, pro se

HALL, Chief Justice:

Defendants Max D. Burton, Sr., Emily A. Burton, and
Max D. Burton, Jr., appeal from a summary judgment entered in
favor of plaintiff Lynda C. Baldwin. We affirm.

In considering an appeal from summary judgment, we view
the facts in a light most favorable to the nonmoving party.¹ We
recite the facts accordingly.

On December 19, 1979, Ralph L. and Elaine L. Kofoed
executed a warranty deed in favor of Willard D. Wood and Tonya

¹ Blue Cross & Blue Shield of Utah v. State, 779 P.2d 634,
636 (Utah 1989).

Glazier Wood, thereby conveying the Kofoeds' interest in the property in question. The deed was recorded on December 19, 1979. On May 1, 1980, Willard Wood executed a warranty deed to the same property in favor of Tonya Wood. That deed was recorded on May 28, 1980.

On June 9, 1981, Max D. Burton, Sr., and Emily A. Burton obtained a judgment against Willard Wood and another person in an action brought to recover money due from a prior transaction.²

On September 30, 1981, Tonya Wood executed a trust deed in favor of the Kofoeds as trustor and beneficiary in consideration of the Kofoeds' remaining equity in the property. That deed was signed by both Tonya and Willard Wood and was recorded on October 2, 1981. On that same date, Tonya Wood conveyed the property by warranty deed to Gregory and Lynda Baldwin. That deed, signed by both Tonya and Willard Wood, was also recorded on October 2, 1981. The Baldwins therefore took the property subject to the underlying mortgage, the Kofoeds' trust deed, and any liens of record. At the time of the conveyance to the Baldwins, Tonya Wood was the only record owner of the property in question, and there were no liens of record against her.

On December 21, 1982, Gregory Baldwin quitclaimed his interest in the property to Lynda Baldwin. That deed was recorded on December 31, 1982.

On April 21, 1983, the Woods filed a petition for voluntary bankruptcy. The Burtons were listed as creditors of Willard Wood in the bankruptcy proceeding. The Woods' debts were discharged in bankruptcy in December 1983.

The property in question was scheduled for foreclosure in September 1986 under the Kofoeds' trust deed. The foreclosure report prepared by Surety Title Company indicated that the Burton judgment lien against Willard Wood had attached to the property, owned by Lynda Baldwin at the time, behind the first mortgage of

² Prior to 1980, Max Burton, Sr., Willard Wood, and Clealon B. Mann were partners in Woodcove Subdivision. In 1980, Wood and Mann agreed to purchase Burton's interest in the project. Wood and Mann executed a promissory note in favor of Max Burton, Sr., and Emily Burton in the amount of \$35,000. On February 25, 1981, the Burtons brought suit against Wood and Mann to recover the balance due under the promissory note. Summary judgment was entered in favor of the Burtons in the amount of \$38,500. Sometime during September 1986, Max Burton, Sr., assigned his interest in the judgment against Wood to Max Burton, Jr.

Equitable Life Assurance Company and ahead of the September 30, 1981 trust deed from Tonya Wood to the Kofoeds.

On August 6, 1986, the Burtons obtained a writ of execution authorizing the Salt Lake County Sheriff to levy upon and sell enough of Willard Wood's unexempt property to satisfy the Burtons' judgment against him. About the same time, the Burtons delivered a praecipe directing the sheriff to "levy on the right, title and interest of Gregory Baldwin and Lynda Baldwin, successors in interest to Willard D. Wood."³

On August 11, 1986, the sheriff's office issued a notice of real estate levy. Under that notice, the sheriff levied upon all the "right, title, claim and interest of Gregory Baldwin and Lynda Baldwin, successors in interest to Willard D. Wood." The notice of real estate levy was recorded on August 12, 1986. The sheriff's office also issued a notice of real estate sale, indicating that all "right, title and interest of Gregory Baldwin and Lynda Baldwin, successors in interest to Willard D. Wood," were to be sold on September 9, 1986. On August 15, 1986, the sheriff published notice of the real estate sale of the Baldwins' interest in the property.

On September 9, 1986, the sheriff conducted an execution sale whereby the property was sold to the Burtons for \$8,760. A certificate of sale-execution was subsequently issued indicating that all "right, title and interest of Gregory Baldwin and Lynda Baldwin, successors in interest of Willard D. Wood," had been sold to satisfy the judgment the Burtons had against Willard Wood. On May 7, 1987, the sheriff's office conveyed the Baldwins' interest in the property to the Burtons.

On June 10, 1987, at the foreclosure under the Kofoed trust deed, the property was sold at a trustee's sale to Robert L. Rice. Rice received a trustee's deed, which was recorded on June 18, 1987. On that same date, Rice executed a warranty deed for the property in favor of Derald A. Twilley. The warranty deed was also recorded on June 18, 1987. Twilley then conveyed the property by quitclaim deed to Lynda Baldwin. The quitclaim deed was recorded on October 8, 1987. Lynda Baldwin subsequently conveyed the property by quitclaim deed to the Lynda C. Baldwin Trust. That deed was recorded on June 23, 1988.

On behalf of the Lynda C. Baldwin Trust, Lynda Baldwin commenced this action against the Burtons to set aside the

³ While the original writ of execution directed the sheriff to levy upon and sell unexempt real property of Willard Wood only, in every subsequent document, the Burtons also included "Gregory Baldwin and Lynda Baldwin, as successors in interest of Willard D. Wood."

sheriff's deed on the basis that execution on the property was improper because Willard Wood, the Burtons' judgment debtor, had no interest in the property at the time the Burtons' judgment was docketed. Additionally, Baldwin sought to quiet title in the property and to have the trial court declare that the conveyance from Willard Wood to his wife was valid as to the Baldwins and that the Baldwins took the property from Tonya Wood as bona fide purchasers.

Both parties moved for summary judgment. The trial court granted Baldwin's motion, denied the Burtons' motion, and declared void both the sheriff's sale at which the property was sold to the Burtons and the sheriff's deed conveying the property. The trial court also found that when Max Burton, Sr., obtained his judgment against Willard Wood, Wood had no interest in the property to which a judgment lien could attach. The trial court held that it was necessary for the Burtons to bring a separate action to set aside the allegedly fraudulent conveyance and that the statute of limitations for that action had run. In a subsequent order, the trial court awarded Baldwin \$7,872.66 for attorney fees and related damages. The Burtons appeal from these rulings.

The primary issues presented on appeal are whether (1) a separate, prior action must be filed to set aside a fraudulent conveyance in a suit to foreclose and execute on a lien; (2) the statute of limitations bars an action by the Burtons to set aside the fraudulent conveyance; (3) the Baldwins were bona fide purchasers when they took the property from Tonya Wood; and (4) the trial court's award of attorney fees was reasonable.

We begin by noting the applicable standard of review. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁴ When reviewing an order granting summary judgment, we view the facts and all reasonable inferences that can be drawn therefrom in a light most favorable to the party opposing the motion.⁵ The legal conclusions of the trial court

⁴ Utah R. Civ. P. 56(c); see Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1039 (Utah 1991); Utah State Coalition of Senior Citizens v. Utah Power & Light Co., 776 P.2d 632, 634 (Utah 1989).

⁵ Culp Constr. Co. v. Buildmart Mall, 795 P.2d 650, 651 (Utah 1990).

are not accorded deference, but are reviewed instead for correctness.⁶

SEPARATE ACTION FOR FRAUDULENT CONVEYANCE

The Burtons contend that before foreclosing and executing on a lien, it is not necessary to file a separate action to set aside a fraudulent conveyance. They base their argument on two points: First, they contend that the conveyance from Willard Wood to his wife was fraudulent because he was attempting to protect the property from creditors. The Burtons claim that because the conveyance was fraudulent, it was therefore void and Willard Wood still maintained an interest in the property. Because Wood maintained an interest in the property, the lien could attach, and it was therefore proper to execute on the property without having the conveyance set aside as fraudulent. In the alternative, the Burtons argue that because the conveyance was fraudulent, the Burtons could entirely disregard it and execute upon the property.

The Burtons maintain that according to Utah Code Ann. § 78-22-1,⁷ the judgment obtained against Willard Wood in 1981 attached as a lien to the property. At issue is whether Willard Wood, the judgment debtor, had an interest in the property in question at the time the Burtons obtained their judgment against him. In order to make this determination, we must address the question of whether the 1980 conveyance from Willard Wood to his wife was void or simply voidable.

The Burtons assert that the Utah Fraudulent Conveyances Act ("the Act") explicitly states that a fraudulent conveyance is void. To support this position, they rely on section 25-1-8 of the Act,⁸ which provides:

Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in

⁶ Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169, 1171 (Utah 1991); Landes v. Capital City Bank, 795 P.2d 1127, 1129 (Utah 1990).

⁷ Utah Code Ann. § 78-22-1 states, "From the time the judgment of the district court or circuit court is docketed . . . it becomes a lien upon all the real property of the judgment debtor"

⁸ Compare Utah Code Ann. §§ 25-1-1 to -16 (1953) (repealed 1988) with Uniform Fraudulent Transfer Act, Utah Code Ann. §§ 25-6-1 to -13 (1988). Because the conveyance in question took place in 1980, the Utah Fraudulent Conveyance Act was still in effect and therefore governs this case.

action, or of rents or profits issuing therefrom, and every charge upon lands, goods or things in action or upon the rents or profits thereof, made with the intent to delay, hinder or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suits commenced, or decree or judgment suffered, with the like intent, as against the person hindered, delayed or defrauded shall be void.⁹

Section 25-1-8 does invalidate conveyances made with intent to defraud. However, such conveyances are not automatically void. Under well-established law, a number of cases have held "void" to mean "voidable" only.¹⁰ Professor Williston, in his work on contracts, stated:

[A] statute may and sometimes does make a bargain absolutely void, but even though a statute states it in terms, "void" has been held to mean "voidable." . . .

. . . .

Unless no other conclusion is possible from the words of a statute it should not be held to make agreements contravening it totally void.¹¹

In Wagner v. United States,¹² the United States Court of Appeals for the Seventh Circuit held that an assignment under Indiana law, although not in compliance with a statute, was voidable, not void. The Wagner court stated, "[E]ven when [an assignment] is statutorily described as being 'void,' the proper construction is that the action is 'voidable at the option of one

⁹ Utah Code Ann. § 25-1-8 (1953) (repealed 1988) (emphasis added).

¹⁰ See Harris v. Runnels, 53 U.S. (12 How.) 79, 84-85 (1851) (qualifications of general rule); Ewell v. Daggs, 108 U.S. 143, 149 (1882); Fisher v. Thumlert, 76 P.2d 1018, 1020 (Wash. 1938).

¹¹ 14 Samuel Williston, A Treatise on the Law of Contracts § 1630A (3d ed. 1972) (citations omitted).

¹² 573 F.2d 447 (7th Cir. 1978).

of the parties or some one [sic] legally interested therein.'"¹³ Wagner stated the general rule of construction that when an act is void as to persons who have an interest in impeaching it, the act is not utterly void, but merely voidable.¹⁴

Utah cases adhere to the general rule expressed above. This court has stated that "a contract induced by fraud, false representations, mistake, etc., is not void but only voidable, and it is entirely within the right of the injured party to affirm it or treat it as valid and subsisting."¹⁵ This court has also specifically addressed section 25-1-8 of the Act.¹⁶ With regard to that section, we stated, "The remedy provided by the Act for a fraudulent conveyance is the voiding of the conveyance."¹⁷ These cases clearly show that some action must be taken by the complaining party to render a conveyance void. ✓

Two cases from other jurisdictions with facts similar to this appeal specifically address the issue of "void" versus "voidable." In Becker v. Becker,¹⁸ a creditor brought suit to set aside a transfer made by the debtor to himself and his wife. The creditor claimed that the transfer was made fraudulently to hinder the plaintiff's ability to recover on the defendant's debt owed to her. While the threshold issue in Becker was whether the transfer itself was fraudulent, the Becker court also stated:

"A voluntary or a fraudulent conveyance is valid between the parties, and in fact as to the whole world, except those within the protection of the statute; thus the words 'null' and 'void' are construed to mean voidable only. Therefore such conveyances vest the legal title in the grantee, subject

¹³ Wagner, 573 F.2d at 451-52 (quoting Doney v. Laughlin, 94 N.E. 1027, 1028 (Ind. 1911)).

¹⁴ Wagner, 573 F.2d at 452 (citing Mutual Benefit Life Ins. Co. v. Winne, 49 P. 446, 449 (Mont. 1897) (discussing general rule of construction for "void" and "voidable")).

¹⁵ Frailey v. McGarry, 211 P.2d 840, 845 (Utah 1949).

¹⁶ See Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987).

¹⁷ Id. at 1262.

¹⁸ 416 A.2d 156 (Vt. 1980).

only to be divested by the creditors of the grantor if they choose to impeach it."¹⁹

In Gurley v. Blue Rents, Inc.,²⁰ a creditor brought suit to set aside an allegedly fraudulent conveyance wherein a debtor husband conveyed to his wife his interest in real estate held by the two as joint tenants. Pertinent to the issue now before this court, Gurley concluded that as to the grantor's creditors, "the conveyance is voidable [as opposed to void] and may be set aside at their option."²¹

The Burtons rely on a line of cases from this court to support their claim that the conveyance at issue is void.²² These cases are easily distinguishable because they involved either a prior proceeding where a conveyance was adjudged fraudulent and void or a situation where a motion to declare a conveyance fraudulent had been denied.²³ Therefore, in all of those cases, one of the issues was whether the conveyance was actually fraudulent. In the instant case, the conveyance has not been declared fraudulent or void. Furthermore, whether the conveyance was fraudulent is not an issue before this court.

Hence, although section 25-1-8 of the Act uses the language "void," as opposed to voidable, we do not believe that such a strict interpretation is warranted by the applicable case law. The conveyance is not the type of act that is routinely null, but rather, it must be challenged or set aside to render it void. Moreover, the conveyance is not something of which all the world may take advantage, but only the Burtons, who claim that

¹⁹ Id. at 162 (quoting Jones v. Williams, 109 A. 803, 807 (Vt. 1920)).

²⁰ 383 So. 2d 531 (Ala. 1980).

²¹ Id. at 536 (citing Brown v. Andrews, 257 So. 2d 356, 359 (Ala. 1972)); see also First Nat'l Bank of Birmingham v. Love, 167 So. 703 (Ala. 1936).

²² See Meyer v. General American Corp., 569 P.2d 1094 (Utah 1977); Jensen v. Eames, 519 P.2d 236 (Utah 1974); Cardon v. Harper, 151 P.2d 99 (Utah 1944); W.P. Noble Mercantile Co. v. Mt. Pleasant Equitable Co-Operative Inst., 42 P. 869 (Utah 1894).

²³ Meyer, 569 P.2d at 1095 (trial court held sale void for failure of fair consideration and lack of good faith); Jensen, 519 P.2d at 237 (plaintiff urged trial court to find transfer of stock fraudulent conveyance under Utah Code Ann. §§ 25-1-1 to -16); Cardon, 151 P.2d at 100 (appeal from decree adjudging conveyance of land fraudulent); W.P. Noble Mercantile Co., 42 P. at 870 (plaintiff sought to declare assignment of real estate null and void).

they were injured by the transfer. Because the conveyance from Willard Wood to his wife has not been adjudged void as a fraudulent conveyance, we conclude that it is voidable but not void.

We next address the Burtons' argument that because the conveyance was fraudulent, the Burtons could, pursuant to Utah Code Ann. § 25-1-15, entirely disregard it and execute upon the property.²⁴ Again, the Burtons claim that the conveyance was fraudulent because Willard Wood was attempting to shield the property from his creditors. While there is some record evidence suggesting that Willard Wood conveyed the property to his wife to protect it from creditors, we find little merit in this argument. A transfer must first be held void as fraudulent before section 25-1-15 becomes operative.²⁵ Although it remains in dispute, even if Willard Wood did admit fraud, the conveyance has not yet been adjudged fraudulent, and therefore, the remedy under section 25-1-15 is not available.

Furthermore, the Burtons cannot execute under section 25-1-15(2) because the property is not in the hands of the allegedly fraudulent transferee.²⁶ When the Burtons executed on the property, the land was no longer in the hands of Tonya Wood, the allegedly fraudulent transferee, but was owned by Baldwin. Because the conveyance has not been declared fraudulent and is not in the hands of the fraudulent transferee, section 25-1-15 does not apply.

In sum, since the conveyance is not void, but merely voidable, the Burtons could not simply disregard it and execute

²⁴ Section 25-1-15 (1953) (repealed 1988) states in relevant part:

Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser:

. . . ;
(2) Disregard the conveyance, and attach, or levy execution upon, the property conveyed.

²⁵ See Butler, 740 P.2d at 1262 n.13.

²⁶ See id. at 1262 ("[T]he remedy [of disregarding a conveyance] is not available . . . when the property has been transferred from a fraudulent transferee to a third-party purchaser").

on the property. Contrary to the Burtons' position, Willard Wood held no interest in the property at the time the Burtons obtained their judgment against him; hence, a lien did not attach and the Burtons could not execute on the property.²⁷ We therefore conclude, as did the trial court, that it was necessary for the Burtons to bring a prior, separate action to set aside and declare void the allegedly fraudulent conveyance before foreclosing and executing on Baldwin's interest in the property.²⁸

STATUTE OF LIMITATIONS

The trial court concluded that the Burtons did not bring a separate action to set the conveyance aside or assert fraud anywhere in their pleadings. As a result, it held that the statute of limitations had run on bringing an action for a fraudulent conveyance and, therefore, as a matter of law, Willard Wood had no ownership interest in the property in question. The Burtons challenge the trial court's conclusion,

The applicable period of limitations is found in Utah Code Ann. § 78-12-26(3), which states in relevant part:

Within three years:

. . . .

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

We first determine when the three-year period of limitations began to accrue. In cases such as this, equity requires that the statute of limitations for fraud does not begin

²⁷ See Lach v. Deseret Bank, 746 P.2d 802 (Utah Ct. App. 1987) (judgment creditor cannot place lien against property of judgment debtor's grantee).

²⁸ See, e.g., Dahnken, Inc. of Salt Lake City v. Wilmarth, 726 P.2d 420 (Utah 1986) (judgment creditors brought action to have assignment of real estate contract declared a fraudulent conveyance and therefore void); Furniture Mfrs. Sales, Inc. v. Deamer, 680 P.2d 398 (Utah 1984) (creditor brought action to set aside allegedly fraudulent conveyance from debtor to debtor's wife).

to run until the fraud is discovered by the injured party.²⁹ Baldwin argues that the Burtons were on constructive notice of the allegedly fraudulent conveyance and that the three-year period began to run on any one of three different dates: in May 1980, when the deed from Willard Wood to his wife was recorded; in June 1981, when Max Burton, Sr., obtained the judgment against Willard Wood; or in September 1981, when the deed from Tonya Wood to the Baldwins was recorded. The Burtons contend that constructive knowledge of a transfer or the recording of a deed itself is not enough to constitute notice of fraud. They rely on Smith v. Edwards,³⁰ where this court stated, "'Mere constructive notice of the deed by reason of its being filed for record is not notice of the facts constituting the fraud.'"³¹ Recording a deed or entering judgment alone is not enough in some instances to apprise a party of the fraudulent nature of a conveyance. However, the Burtons fail to reveal that Smith also provides direction for determining what constitutes discovery of fraud:

To ascertain what constitutes "a discovery of the facts constituting the fraud," reference must be had to the principles of equity. Hence, in actions in equity, the rule was that the means of knowledge were equivalent to actual knowledge; that is, that a knowledge of facts which would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of the fraud, was equivalent to actual discovery.³²

The words "until the discovery [of fraud]" are generally interpreted as meaning from the time the fraud was actually known or could have been discovered through the exercise of reasonable diligence.³³ Specifically addressing section 78-12-26(3), this court stated that the three-year statute of

²⁹ Esponda v. Ogden State Bank, 283 P. 729, 731 (Utah 1929); see also Richardson v. MacArthur, 451 F.2d 35, 39 (10th Cir. 1971) (applying Utah law).

³⁰ 17 P.2d 264 (Utah 1932).

³¹ Id. at 270 (quoting Duxbury v. Boice, 72 N.W. 838, 839 (Minn. 1897)).

³² Id. (citing Duxbury, 72 N.W. at 839).

³³ See, e.g., Transamerica Ins. Co. v. Trout, 701 P.2d 851, 854 (Ariz. Ct. App. 1985); Coronado Dev. Corp. v. Superior Court, 678 P.2d 535, 537 (Ariz. Ct. App. 1984); Mason v. Laramie Rivers Co., 490 P.2d 1062, 1064 (Wyo. 1971).

limitations for fraud "begins to run from the time the person entitled to the property knows, or by reasonable diligence and inquiry should know, the relevant facts"³⁴ of the fraud perpetrated against him. Furthermore, we have previously observed: "The means of knowledge is equivalent to knowledge. A party who has opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowledge that arose by reason of his own laches and negligence."³⁵

In Mason v. Laramie Rivers Co., shareholders sought to challenge the issuance of stock on the ground that it was fraudulent. The stock was issued in February 1963, and the plaintiffs filed their action in July 1969. The Mason court found that the plaintiffs as stockholders had voted either personally or by proxy for the issuance of the stock at the February 1963 meeting. The stockholders had failed to examine the corporate records and had "been negligent and careless of their own interests."³⁶ The means of knowledge were open to the plaintiffs, and in the exercise of reasonable diligence, they would have discovered the alleged fraud.³⁷ Mason held that the plaintiffs' action was therefore time barred by the four-year statute of limitations for fraud actions.³⁸

The Burtons argue that the alleged fraud took place when Willard Wood conveyed his interest in the property to his wife. It is conceivable that the Burtons could have discovered the fraud as early as May 1980, when the Wood-to-Wood deed was recorded. It is, however, more likely that the Burtons could have, or at least through the exercise of reasonable diligence should have, discovered the alleged fraud when the judgment against Willard Wood was obtained in June 1981.

In Greco v. Pullara,³⁹ a creditor brought an action to set aside a deed of trust as a fraudulent conveyance. Greco

³⁴ Auerbach v. Samuels, 349 P.2d 1112, 1116 (Utah 1960).

³⁵ Taylor v. Moore, 51 P.2d 222, 229 (Utah 1935) (citation omitted).

³⁶ Mason, 490 P.2d at 1064-65 (quoting Davis v. Harrison, 167 P.2d 1015, 1024 (Wash. 1946)).

³⁷ Id. at 1065.

³⁸ Id.

³⁹ 444 P.2d 383 (Colo. 1968).

dealt with a statute similar to section 78-12-26(3)⁴⁰ and reasoned that the limitations period "begins to run when the defrauded person has knowledge of facts which in the exercise of proper prudence and diligence would enable him to discover the fraud."⁴¹ The court held that the creditor was chargeable with constructive notice of the allegedly fraudulent conveyance at the time she became a judgment creditor and the statute of limitations began to run from the date of the judgment.⁴²

Inasmuch as the Burtons were attempting to execute on a judgment lien and the purpose of a judgment lien is to provide a judgment creditor a way to obtain satisfaction of a judgment, it logically follows that after obtaining the judgment against Willard Wood, the Burtons should have searched for property upon which to levy. Nothing in the record suggests that a search was performed in 1981 when the Burtons obtained their judgment against Willard Wood. Had a search been made, exercising reasonable diligence and proper prudence, it surely would have uncovered the transfer from Wood to his wife. Discovery of the transfer would then have sparked further inquiry on the part of the Burtons.⁴³ If such inquiry had been pursued, the Burtons would have discovered facts surrounding the allegedly fraudulent conveyance. At the very least, discovery of the transfer should have incited suspicion of fraud. The Burtons may not have learned every detail of the alleged fraud or even discovered that actual fraud did in fact occur. However, it is not necessary for a claimant to know every fact about his fraud claim before the statute begins to run.⁴⁴ The means of knowledge were available to the Burtons, and upon obtaining the judgment against Willard Wood, they should have discovered facts surrounding the alleged fraud. Accordingly, the three-year limitation period imposed by section 78-12-26(3) began to run when the Burtons' judgment against Willard Wood was docketed. Consequently, the Burtons' claim to set aside the conveyance is time-barred.

⁴⁰ Colo. Rev. Stat. § 87-1-10 (1963) provides, "Bills for relief on the ground of fraud, shall be filed within three years after the discovery by the aggrieved party, of the facts constituting such fraud, and not afterwards."

⁴¹ Greco, 444 P.2d at 384 (citations omitted).

⁴² Id.

⁴³ A party is required to make inquiry if his findings would prompt further investigation. See Diversified Equities v. American Sav. & Loan, 739 P.2d 1133, 1137 n.5 (Utah Ct. App. 1987), cert. dismissed, 779 P.2d 634 (Utah 1989).

⁴⁴ See Bedolla v. Logan & Frazer, 125 Cal. Rptr. 59, 68 (1975).

BONA FIDE PURCHASER

Implicit in the trial court's findings is that when the Baldwins purchased the property from Tonya Wood, they took the property as bona fide purchasers. A bona fide purchaser is one who pays valuable consideration for a conveyance, acts in good faith, and takes without notice of an adverse claim or others' outstanding rights to the seller's title.⁴⁵ Therefore, under the Act, even if the conveyance from Wood to his wife was fraudulent, Baldwin's interest as a bona fide purchaser is not affected by the Burtons' execution on the property.⁴⁶

The Burtons argue that the Baldwins were not bona fide purchasers when they purchased the property from Tonya Wood because the Baldwins had notice of the judgment lien against Willard Wood. The judgment lien therefore created an adverse interest in the property. The Burtons assert that the Baldwins had actual notice of the judgment lien by virtue of a title report issued by the Baldwins' title agent. There is no evidence in the title report that would give the Baldwins notice of the judgment lien against Willard Wood. More importantly, we have already determined that the conveyance was voidable, and at the time the Burtons obtained their judgment against Willard Wood, Wood held no interest in the property. Thus, the lien could not attach. When the Baldwins purchased the property from Tonya Wood, she was the only owner of record. While there was a judgment against Willard Wood, no liens of record existed against the Baldwins' immediate grantor, Tonya Wood. As a result, the Baldwins did not discover any judgment liens on the property and therefore had no notice of any adverse interest in the property.

In the alternative, the Burtons contend that the Baldwins had constructive notice of the fraudulent nature of the conveyance from Tonya Wood to the Baldwins. The Burtons base their contention on the fact that the 1980 conveyance was of record and Willard Wood later signed the warranty deed that conveyed the property to the Baldwins. According to the Burtons,

⁴⁵ See Pender v. Dowse, 265 P.2d 644, 648 (Utah 1954); Peterson v. Peterson, 190 P.2d 135, 138 (Utah 1948); J.C. Equip., Inc. v. Sky Aviation, Inc., 498 S.W.2d 73, 76 (Mo. Ct. App. 1973); Glaser v. Holdorf, 352 P.2d 212, 215 (Wash. 1960).

⁴⁶ Utah Code Ann. § 25-1-13 states:

Bona fide purchasers not affected. The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

this was enough to extend notice to the Baldwins of the possibility of fraud in the conveyance and to cause the Baldwins to question Tonya Wood's ability to reconvey the property.

We disagree. In accordance with the above discussion, the conveyance has not been determined to be fraudulent and was therefore valid. Upon purchasing the property, the Baldwins had no reason to believe otherwise. Accordingly, at the time of the purchase, Tonya Wood was the only owner of record. The fact that Willard Wood signed the warranty deed conveying the property to the Baldwins does not affect Tonya Wood's title to the property, nor does it put the Baldwins on notice to inquire further into Willard Wood's interest in the property.⁴⁷

In conclusion, we hold, in accordance with the requirements of section 25-1-13, that the Baldwins took the property without "notice of the fraudulent intent of [their] immediate grantor, or of the fraud rendering void the title of such grantor," and were therefore bona fide purchasers. Because the Baldwins were bona fide purchasers, the Burtons were further precluded from executing on the Baldwins' interest in the property.

ATTORNEY FEES

Subsequent to the entry of summary judgment, Baldwin submitted an affidavit of attorney fees, setting forth a detailed summary of costs. She requested \$12,715.25 in attorney fees and costs,⁴⁸ and the Burtons objected. Following a hearing, the trial court entered judgment in favor of Baldwin, requiring the Burtons to pay \$7,872.66 in attorney fees and related damages. The Burtons appeal, arguing that the award of attorney fees was improper because the trial court did not indicate a legal basis for its conclusion.

⁴⁷ A duty of inquiry requires a party to investigate and diligently do what his or her findings would reasonably prompt. The title search performed by the Baldwins showed Tonya Wood as the only titled owner of record. It is not reasonable to think that such a finding would prompt them to inquire further. See Diversified Equities, 739 P.2d at 1137 & n.5 (purchasers who reasonable relied on title search did not need to make further inquiry).

⁴⁸ Baldwin requested \$3,192 in attorney fees, \$328.06 in secretarial fees, and \$9,195.19 in paralegal costs.

When reviewing an award of attorney fees, we will affirm the trial court's ruling absent an abuse of discretion.⁴⁹ The general rule is that an award of attorney fees is appropriate only if authorized by statute or contract.⁵⁰ We note a statutory basis for the award of attorney fees under Utah Code Ann. § 78-27-56. Section 78-27-56(1) provides in part that "the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." We begin our analysis by addressing whether an award of attorney fees under section 78-27-56 was appropriate in this case and continue by addressing whether the amount of attorney fees awarded by the trial court was reasonable.

For a party to be entitled to attorney fees under section 78-27-56, the trial court must determine that a claim is "without merit" and that the party's conduct in bringing the suit "was lacking in good faith."⁵¹ In Cady, we defined both of these elements, stating that "without merit" means "frivolous" or "having no basis in law or fact."⁵² For purposes of section 78-27-56, we found the terms "lack of good faith" and "bad faith" to be synonymous.⁵³ To establish bad faith, one or more of the following must be lacking: "(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay or defraud others."⁵⁴

The Burtons' 1986 execution on Baldwin's property compelled her to bring this action. The Burtons claim that their execution on Baldwin's property was neither without merit nor brought in bad faith. They contend that after learning of the scheduled foreclosure on the property, they proceeded to execute on the property as would any reasonable creditor under the

⁴⁹ Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) (citing Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 671 (Utah 1982)).

⁵⁰ Dixie State Bank, 764 P.2d at 988; Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 734 (Utah 1985); Turtle Management, Inc., 645 P.2d at 671.

⁵¹ Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983).

⁵² Id.

⁵³ Id. at 151-52.

⁵⁴ Id. at 151 (quoting Tacoma Assoc. of Credit Men v. Lester, 433 P.2d 901, 904 (Wash. 1967)).

circumstances. However, the record supports the trial court's findings that there was no factual or legal justification for the Burtons' actions. At the time the Burtons obtained their judgment, Willard Wood held no interest in the property. The Burtons' only lien rights in this matter were against the judgment debtor, Wood. Furthermore, contrary to the Burtons' assertion, when the Baldwins took the property from Tonya Wood, they were in no way successors in interest to Willard Wood and they were not subject to liability on the Burtons' judgment against Willard Wood. The Burtons were in error both factually and legally when they executed on the interest of Baldwin, the owner of the property.

Additionally, the Burtons exhibited a lack of good faith. The writ of execution appeared to be correct on its face in that it directed the sheriff to levy upon and sell Willard Wood's unexempt real property to satisfy the Burtons' judgment. However, the Burtons then issued a praecipe directing the sheriff to levy on the "right, title, and interest of Gregory Baldwin and Lynda Baldwin, successors in interest of Willard D. Wood." From that point forward, all subsequent documents leading up to the sale of the property were in error. The Baldwins were not successors in interest of Willard Wood and should never have been included in the execution proceedings. Had the Burtons proceeded with an honest belief in the propriety of their activities, they would have sought first to have the Wood-to-Wood conveyance set aside as fraudulent before attempting to wrongfully execute on Baldwin's interest in the property. Accordingly, we hold that Baldwin is entitled to an award of attorney fees under section 78-27-56.

In regard to the reasonableness of the amount of attorney fees awarded by the trial court, calculation of such fees is within the sound discretion of the trial court.⁵⁵ However, the trial court's award of attorney fees must be based on and supported by evidence in the record.⁵⁶ This court has developed factors for trial courts to consider when evaluating evidence to determine what constitutes a reasonable fee.⁵⁷ Those factors include but are not limited to the extent of services rendered, the difficulty of issues involved, the reasonableness of time spent on the case, fees charged in the locality for similar services, and the necessity of bringing an

⁵⁵ Jenkins v. Bailey, 676 P.2d 391, 393 (Utah 1984).

⁵⁶ Dixie State Bank, 764 P.2d at 988; Jenkins, 676 P.2d at 393.

⁵⁷ See Dixie State Bank, 764 P.2d at 989; Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984); Jenkins, 676 P.2d at 393; Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1983); Wallace v. Build, Inc., 402 P.2d 699, 701 (Utah 1965).

action to vindicate rights.⁵⁸ In light of these factors, the attorney fee award appears to be reasonable. The evidence in the record supports the award, as does the fact that the trial court, in its discretion, substantially reduced the amount requested by Baldwin.

The Burtons also argue that even if we find that the trial court's award of attorney fees was proper, Baldwin is not entitled to recover paralegal costs. While the trial court did not specifically delineate any portion of the \$7,872.66 as paralegal costs, the Burtons concluded that because only \$3,192 of the total amount requested by Baldwin was for attorney fees, the remaining \$4,680.66 must have been for paralegal costs. The Burtons contend that paralegal costs are not recoverable under Utah law and that cases which have found the award of paralegal fees to be appropriate involve instances where the paralegal performed under the direction and supervision of an attorney.⁵⁹ According to the Burtons, Paul Richins, an independent paralegal used by Baldwin's attorney, operated outside the attorney's control when he prepared a billing statement separate from the attorney's.

Simple arithmetic shows that at least some portion of the \$7,872.66 awarded by the trial court was for paralegal costs. This court has never specifically addressed the issue of whether paralegal fees are recoverable as part of an award of attorney fees. We do so now with regard to the facts of this case.

In Continental Townhouses East Unit One Ass'n v. Brockbank,⁶⁰ the Arizona Court of Appeals considered the issue of whether the value of legal work performed by legal assistants⁶¹ could be considered as an element of attorney fees.⁶² The plaintiffs' request for attorney fees included an itemization of hourly rates and time spent for both attorneys and legal assistants. Recognizing that the use of legal assistants has become an increasingly essential element of legal services provided by many law offices, the court ultimately held that services provided by legal assistants "may properly be included

⁵⁸ See Trayner, 688 P.2d at 858; Cabrera, 694 P.2d at 625; Wallace, 402 P.2d at 701.

⁵⁹ See, e.g., Multi-moto v. ITT Commercial Fin. Corp., 806 S.W.2d 560, 570 (Tex. Ct. App. 1991).

⁶⁰ 733 P.2d 1120 (Ariz. Ct. App. 1986).

⁶¹ The Brockbank court used the terms legal assistant, paralegal, and law clerk interchangeably in its opinion. Id. at 1128 n.9.

⁶² Id. at 1126.

as elements in attorney fees applications and awards."⁶³ The rationale of the court was that allowing recovery for legal assistant fees promotes lawyer efficiency and decreases client litigation costs because a lawyer's time is free from tasks a legal assistant can perform at a lower rate.⁶⁴ The Brockbank court further noted that services performed by legal assistants are properly considered a component of attorney fees and are not automatically included in a lawyer's hourly billing rate as part of standard law office operating expenses but are often itemized and billed separately.⁶⁵

Applying the reasoning of Brockbank to the facts of this case, it is clear that had Baldwin's attorney not retained Richins to perform services traditionally performed by legal assistants, the attorney would have had to perform these services himself at a presumably higher billing rate. Taking into account the trial court's substantial reduction in the amount requested, especially in the area of paralegal costs, and having concluded that the total award of attorney fees was reasonable, we find that it was proper for the trial court to include services provided by the paralegal in its award of attorney fees.

In short, this court finds that the trial court did not abuse its discretion in awarding Baldwin reasonable attorney fees. We therefore do not disturb the trial court's ruling.

UNAUTHORIZED PRACTICE OF LAW

While not an issue raised on appeal, we deem it appropriate to address a peripheral matter brought to our attention during oral argument. As noted above, Paul Richins assisted Baldwin's attorney as a paralegal. After judgment was entered in favor of Baldwin, Richins took assignment of the judgment. Richins then appeared pro se before this court, arguing in favor of Baldwin's position to uphold the trial court's rulings. While Richins is free to take assignment of the judgment and appear on his own behalf to represent his interests in the matter, such a practice gives rise to at least the appearance of practicing law without a license.

Rule 5.5 of the Utah Rules of Professional Conduct prohibits lawyers from engaging in or assisting others in activities that constitute the unauthorized practice of law. While this might very well be an isolated incident, we are concerned that it might have the far-reaching effect of inspiring other members of the bar to similarly assign judgments to lay

⁶³ Id. at 1127.

⁶⁴ Id.

⁶⁵ Id. at 1127-28.

persons. In light of what is easily avoidable, we exhort all members of the bar to refrain from entering into such arrangements.

WE CONCUR:

Richard C. Howe, Associate
Chief Justice

I. Daniel Stewart, Justice

Christine M. Durham, Justice

Michael D. Zimmerman, Justice