

1970

W. Smoot Brimhall, Commissioner Of Financial Institutions of the State of Utah v. D. Spencer Grow; Arta L. Grow; Steven L. Grow; First Fidelity Thrift And Low Association; Western Land Corporation; Grow Investment And Mortgage Company, Town And Country Real Estate Company : Appellant's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Strong, Poelman & Fox; Attorneys for Appellant

Recommended Citation

Brief of Appellant, *Brimhall v. Grow*, No. 12103 (1970).
https://digitalcommons.law.byu.edu/uofu_sc2/5261

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

W. SMOOT BRIMHALL, Commissioner
of Financial Institutions of the State of
Utah, *Plaintiff and Respondent,*

vs.

D. SPENCER GROW; ARTA L.
GROW; STEVEN L. GROW; FIRST
FIDELITY THRIFT AND LOAN AS-
SOCIATION; WESTERN LAND COR-
PORATION; GROW INVESTMENT
AND MORTGAGE COMPANY, and
TOWN AND COUNTRY REAL ES-
TATE COMPANY,

Defendants and Appellants.

APPELLANTS' BRIEF

Appeal from Order of the District Court,
Judicial District in and for Utah County,
Utah, Honorable Ferdinand Erickson.

STRONG, POELAND &
B. Lloyd Poelman,
Attorneys for Appellants
700 El Paso Gas Bldg.
315 East Second South
Salt Lake City, Utah 84111

Dallas H. Young, Jr., Esq.
Attorney for Respondent
48 No. University Avenue
Provo, Utah 84601

FILED

JUL 30 1970

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
DISPOSITION IN THE LOWER COURT	3
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF POINTS	4
ARGUMENT	
I. THE COURT ERRED IN FAILING TO GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO MEET THE REQUIRED BURDEN OF PROOF	4
A. PLAINTIFF OFFERED NO EVIDENCE TO SUPPORT MANY ALLEGATIONS OF PLAINTIFF'S COMPLAINT	5
B. PLAINTIFF OFFERED NO PROOF THE PROPERTIES CONVEYED HAD VALUE AT THE TIMES OF SUCH CONVEYANCES	7
C. PLAINTIFF FAILED TO MEET THE BURDEN OF PROOF REQUIRED BY THE UNIFORM FRAUDULENT CONVEYANCES ACT	8
1. PLAINTIFF OFFERED NO PROOF OF INSOLVENCY OF THE INDIVIDUAL GRANTORS.....	11
2. THE SOLE EVIDENCE INTENDED TO PROVE INSOLVENCY OF THE CORPORATE DEFENDANTS WAS IMPROPERLY ADMITTED IN EVIDENCE AND LEGALLY INEFFECTIVE FOR ITS INTENDED PURPOSE	11
3. NO PRESUMPTION OF FRAUDULENT CONVEYANCE AROSE FROM RELATIONSHIP OF THE PARTIES	17
II. DEFENDANTS' EVIDENCE SHOWED THE CONVEYANCES WERE MADE FOR FAIR CONSIDERATION.....	19
III. THE RELIEF GRANTED EXCEEDS THAT PRAYED IN THE COMPLAINT AND AUTHORIZED BY LAW.....	20
CONCLUSION	23
EXHIBITS	25

AUTHORITIES CITED

Page

Utah Cases

Ned J. Bowman Co. v. White, 13 Utah 2d 173, 369 P.2d 962 (1962)	18
Givan v. Lambert, 10 Utah 2d 287, 351 P.2d 959 (1960)	17
Zuniga v. Evans, 87 Utah 198, 48 P.2d 513 (1935)	7
Denver & R.G.R. Co. v. Ashton-White-Skillicorn Co., 49 Utah 82, 162 P. 83 (1916)	19
Gustin v. Mathews, 25 Utah 168, 70 P. 402 (1902)	18
Ogden State Bank v. Barker, 12 Utah 13, 40 P. 765 (1895)	13, 14, 15
United States v. Late Corporation of Church of Jesus Christ of Latter-day Saints, 5 Utah 538, 18 P. 35 (1888)	11
Enright v. Grant, 5 Utah 334, 15 P. 268 (1887)	13

Other Decisions

T. W. Homes, Inc. v. Atherwood Realty & Investment Co., 29 Cal. 887, 214 Cal. App. 2d 826	12
Nevers v. Hack, 138 Ind. 260, 37 N.E. 791 (1894)	12
Neubauer v. Cloutier, 265 Minn. 539, 122 N.W. 2d 623 (1963).....	13
Palestroni v. Jacobs, 18 N.J. Super 438, 87 A. 2d 356 (1952).....	13
Washington Nat. Bank v. Beatty, 77 N.J. Eq. 252, 76 A. 442 (1910)	22
In re Liquidmatic Systems, Inc. 194 F. Supp. 625 (D.S.D. Cal. 1961)	13

Statutes Cited

Utah Code Annotated (1953 Rplmt. Vol.)

Sections 25-1-1	8
25-1-2	8
25-1-4	9, 11
25-1-5	10
25-1-6	10
25-1-7	10
25-1-8	10, 11
25-1-16	9

Secondary Material

Evidence §166, 29 Am. Jur. 2d 204	19
Annotation: "Right of tort claimant, prior to judgment, to attack conveyance or transfer as fraudulent." 73 A.L.R. 2d 749 (1960)	21

IN THE SUPREME COURT OF THE STATE OF UTAH

W. SMOOT BRIMHALL, Commissioner
of Financial Institutions of the State of
Utah, *Plaintiff and Respondent,*

vs.

D. SPENCER GROW; ARTA L.
GROW; STEVEN L. GROW; FIRST
FIDELITY THRIFT AND LOAN AS-
SOCIATION; WESTERN LAND COR-
PORATION; GROW INVESTMENT
AND MORTGAGE COMPANY, and
TOWN AND COUNTRY REAL ES-
TATE COMPANY,

Defendants and Appellants.

} Case No.
12103

APPELLANTS' BRIEF

STATEMENT OF FACTS

This is an action to set aside conveyances of real property. In March of 1967 D. Spencer Grow and Arta L. Grow, his wife, conveyed one parcel of real property to their son Steven L. Grow and conveyed two parcels of real property to their son Steven and their daughter Gina M. Grow. Gina is not a party to this action. During the period September, 1966, through March, 1967, the three defendant corporations conveyed five parcels of real property to Steven L. Grow.

At no time, either prior or subsequent to said conveyances, have any of the grantors, individual or corporate, been adjudicated a bankrupt or entered into an assignment or composition for the benefit of creditors. Nevertheless, this action is brought by plaintiff alleging unmatured tort claims against the individual grantors and unsatisfied deficiency judgments against the corporate grantors. The deficiency judgments were entered after the dates of the conveyances sought to be set aside.

The present action is best understood in context with two other cases now pending in lower courts. One of the lower court actions, entitled "In the Matter of the Liquidation and Suspension of Utah Savings & Loan Association" (herein designated "liquidation proceedings") was filed by plaintiff in November, 1966 in the District Court in and for Utah County, State of Utah, Civil No. 30,309. In this action liquidation of the said Utah Savings & Loan Association is currently in process and losses, if any, to be sustained by depositors or shareholders have not yet been ascertained.

The other lower court action (herein designated "officer and director liability proceeding") was filed by plaintiff in the District Court in and for Utah County, State of Utah, Civil No. 32,027, in May, 1968 against numerous defendants including, among others, all of the grantor defendants in the present action. This second action seeks to impose liability upon the personal and corporate defendants for certain losses, not yet ascertained or determined, allegedly sustained or to be sustained by Utah Savings & Loan Association. The lower court, contem-

plating trial of the matter would be held in the summer of 1968, entered a preliminary injunction in this second action preventing disposition by the defendants of their properties and assets. Thereafter the case was removed to the District Court in and for Salt Lake County, and assigned Civil No. 181,123, where the case is still awaiting trial.

DISPOSITION IN THE LOWER COURT

The present action was tried at Provo, Utah in June, 1969 before Hon. Ferdinand Erickson who was invited specially from the Sixth Judicial District to try the case due to the disqualification of all other judges in the Fourth District from hearing the matter. Upon trial the court found in favor of plaintiff, ordered the conveyances set aside, and directed that the reconveyed properties be sold in satisfaction of certain deficiency judgments in favor of plaintiff resulting from mortgage foreclosure proceedings in other actions. Defendants appeal from the judgment of the lower court.

RELIEF ON APPEAL

Appellants seek a reversal of the judgment entered by the lower court and an order remanding the case with direction that appellants' Motion for Summary Judgment be granted. In the alternative, the case should be remanded to the lower court for further hearing to determine the equitable interest of Steven L. Grow in the subject properties.

STATEMENT OF POINTS RELIED UPON

- I. Defendants' Motion for Summary Judgment should have been granted because plaintiff failed to meet the required burden of proof.
 - A. Plaintiff offered no evidence to support many allegations of plaintiff's complaint.
 - B. Plaintiff offered no proof the properties conveyed had value at the time of such conveyances.
 - C. Plaintiff failed to meet the burden of proof required by the Uniform Fraudulent Conveyances Act.
 1. Plaintiff offered no proof of insolvency of the individual grantors.
 2. The sole evidence intended to prove insolvency of the corporate defendants was improperly admitted in evidence and legally ineffective for its intended purpose.
 3. No presumption of fraudulent conveyance arose.
- II. Defendants' evidence showed the conveyances were made for fair consideration.
- III. The relief granted exceeds that prayed in the complaint and authorized by law.

ARGUMENT

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE PLAINTIFF FAILED TO MEET THE REQUIRED BURDEN OF PROOF.

Defendants' motion for summary judgment, made when plaintiff rested its case, (See Transcript, page 40,

line 28 *et seq.*), was taken under advisement but was subsequently denied by the court. Only the first 40 pages of the trial transcript representing the plaintiff's case need be considered in determining the merits of defendants' motion.

A. *Plaintiff offered no evidence to support many allegations of the complaint before resting its case.*

In addition to alleging the fact of the conveyances, which fact is not disputed, plaintiff's complaint alleges:

1. That ". . . D. Spencer Grow was president controlling managing agent of . . . [the corporate defendants]." (Complaint, paragraph 2)

COMMENT: Prior to resting its case, no evidence was offered by plaintiff showing any relationship whatsoever between the personal defendants and the corporate defendants.

2. That the grantors ". . . do not have sufficient property with which to satisfy the debts which they owe to the plaintiff in his control of the business and assets of Utah Savings & Loan Association." (Complaint, paragraph 10)

COMMENT: This fails to allege insolvency of the grantors *at the time of the subject conveyances* or by reason thereof. Further, before resting its case plaintiff offered no direct evidence showing the financial condition of the grantors at any time. To prove insolvency of the corporate

defendants, plaintiff relied solely upon a presumption of insolvency claimed to arise from return of executions unsatisfied, as discussed hereafter. Any presumption of insolvency raised by return of executions unsatisfied is limited to the corporate defendants only, since no judgments have been entered against the personal defendants. Plaintiff *did* provide evidence that defendants have substantial property holdings, however, as indicated by the legal descriptions of 561 separate parcels of real property attached as an exhibit to the amended complaint filed in the officer and director liability proceeding, a copy of which was admitted in evidence herein as Exhibit P-11.

3. "The property affected by the deeds was acquired by the defendants under the direction and control of the defendant D. Spencer Grow with monies borrowed from Utah Savings & Loan Association while Utah Savings & Loan Association was under the management and control of the defendant D. Spencer Grow." (Complaint, paragraph 11).

COMMENT: No evidence was offered by plaintiff showing the circumstances under which the subject property was acquired by the defendants.

4. "The aforesaid conveyances were wholly voluntary and made without a valuable consideration." (Complaint, paragraph 12).

COMMENT: No evidence was submitted in support of this allegation.

5. "At the time of the execution of the aforesaid deeds, said Steven L. Grow, grantee therein, had full knowledge of the fraudulent intent and purpose of the defendant, D. Spencer Grow." (Complaint, paragraph 13).

COMMENT: When plaintiff rested its case, no evidence had been offered by plaintiff in support of the allegation that actual fraudulent intent was involved, nor was evidence offered by plaintiff showing the knowledge of Steven L. Grow with respect to any matter whatsoever covered by this action.

B. Plaintiff offered no proof the properties conveyed had value at the time of such conveyances.

Counsel for plaintiff acknowledged at trial plaintiff's obligation to furnish evidence that the property conveyed had a net value, and cited the case of *Zuniga v. Evans*, 87 Utah 198, 48 P.2d 513 (1935) in support thereof. (See Transcript, page 19, lines 8-10). The grantors' net equity in the subject properties could not be proved without evidence of and adjustments from the gross value for the amount of mortgages, tax delinquencies or other encumbrances against such properties. Plaintiff then produced an abstractor, Mr. Madsen, and it was stipulated that he had searched title of the properties *as of June 6, 1969 at 8:00 a.m.* and that his proffered testimony

concerning recorded encumbrances would not include evidence of any search with respect to delinquent taxes, special improvements or other levies. (See Transcript, pages 21-24).

The proffered and stipulated testimony of gross values of the conveyed properties and partial testimony concerning some encumbrances against the properties constituted incomplete evidence which failed to provide proper proof that the properties had any net value attributable to the grantors—even as of the time of trial. Even more important, however, is that all of the conveyances took place at least 21 months prior to the time of trial and not a scintilla of evidence was presented with respect to the net values of such properties in the hands of defendants *as of the dates of the respective conveyances*, nor of the value of improvements made between the dates of conveyance and time of trial.

Accordingly, plaintiff failed to meet an essential element of its required proof which constitutes a fatal defect in plaintiff's effort to establish a *prima facie* case.

C. Plaintiff failed to meet the burden of proof required by the Uniform Fraudulent Conveyances Act.

Plaintiff has not been specific in citing the provisions of the Uniform Fraudulent Conveyances Act (Utah Code Annotated, Sections 25-1-1 *et. seq.*, 1953 *Rplmt. Vol.*, herein designated "UFCA") which it believes to be con-

trolling in this action, and instead quoted at trial from general encyclopedic works on the topic and cited primarily cases decided before Utah enacted the UFCA. A difference of proof is required, depending upon the section regarded as controlling.

At trial (See Transcript, page 4, lines 7-9) plaintiff asserted its case against the individual defendants, D. Spencer Grow and Arta L. Grow to be premised upon Section 25-1-16 (there exists no Section 25-1-17 cited by plaintiff's counsel and the context indicates that Section 25-1-16 was intended). This section does not define the elements of a fraudulent conveyance but merely sets forth alternative remedies. Prerequisite to application of any one remedy is a finding by the court that the conveyance is "fraudulent," which in turn requires that the evidence satisfy the essential elements of proof defined in various other sections of the UFCA. In attempting to discern the foundation upon which plaintiff premises its claim herein, it becomes necessary to survey the possibilities presented under the UFCA.

(a) Under Section 25-1-4 the required proof consists of (a) a conveyance, (b) insolvency at time of or by reason of the conveyance, and (c) absence of fair consideration. A person is insolvent within the meaning of the UFCA: ". . . when the present fair salable value of his assets is less than the amount that will be required to satisfy his probable liability on his existing debts as they become absolute and matured." (Section 25-1-2) Because no evidence was presented by plaintiff at trial showing insolvency of

the individual defendants and because the only evidence of insolvency of the corporate defendants related to plaintiff's reliance upon return of execution unsatisfied, this section is applicable to the plaintiff's case only with respect to conveyances by the corporate grantors and subject to the validity of the arguments concerning nulla bona executions, as discussed hereafter.

(b) No allegations of the complaint or proof offered at trial include the evidentiary provisions required under Sections 25-1-5, 25-1-6, and 25-1-7, pertaining to under capitalization of a business concern or scientor of a grantor about to incur obligations beyond his ability to pay.

(c) Under Section 25-1-8 (cited in plaintiff's post-trial memorandum) the required proof consists of (a) a conveyance and (b) intent to delay, hinder or defraud the creditors. Since plaintiff presented no evidence at trial of actual intent, application of this statute is dependent upon the plaintiff's reliance upon presumed fraudulent intent and a shift in the burden of proof discussed hereafter. This section requires proof that the conveyance substantially prejudices attempts by creditors to receive satisfaction of their claims. It should be noted that this section is unique to Utah law, it is not part of the UFCA as proposed by the National Conference of Commissioners on Uniform State Laws, and has been declared by the Utah Supreme Court as merely declaratory of the principles of the common law. *United States v. Late*

Corporation of the Church of Jesus Christ of Latter-day Saints, 5 Utah 538, 18 P. 35 (1888).

(d) Other sections of the UFCA defining fraudulent conveyances relate to facts and circumstances not falling within those presented by the case presently under consideration by the courts.

1. *Plaintiff offered no proof of insolvency of the individual grantors.*

When plaintiff rested its case there was no evidence whatsoever relating to the assets or liabilities of the defendants at the time of the subject conveyances. The comment set forth under paragraph I.A.2. at page 4, *supra.*, is restated and incorporated by this reference. Hence, conveyances by the personal defendants evidenced by Exhibits P1, P2, P6, and P7, are not subject to plaintiff's argument that return of execution unsatisfied is presumptive of insolvency, and the only possible reliance by plaintiff on Sections 25-1-4 or 25-1-8 would be with respect to conveyances by the corporate defendants.

2. *The sole evidence intended to prove insolvency of the corporate defendants was improperly admitted in evidence and legally ineffective for its intended purpose.*

As proof of insolvency of the corporate defendants, plaintiff's sole evidence consisted of certain court files (Exhibit P13) showing deficiency judgments against the said corporate defendants and unsatisfied return of exe-

cution thereon. The records of deficiency judgments as evidence of the insolvency of the corporate defendants were admitted in evidence over the objection of the defendants. (See Transcript, page 11, lines 21-24). Their admission by the court apparently was intended solely to permit their consideration in connection with other proof as to the financial condition of the corporate defendants. (See Transcript, page 11, lines 17-20). No such other proof was presented by plaintiff before resting its case.

At the time of trial defendants pointed out to the court that in each case the judgments represented by the fourteen separate files were all entered and executions thereon issued *after* the dates of the conveyances challenged herein. (See Transcript, page 10, lines 8-20). A table showing the essential data with respect to such executions in relation to the dates of subject conveyances is shown herein as Exhibit "A" to this brief.

Cases construing the UFCA consistently hold that circumstances relative to the grantor's financial condition subsequent to the conveyance are immaterial in determining *prior* solvency. In the case of *T.W.M. Homes, Inc. v. Atherwood Realty & Investment Co.*, 29 Cal. Rptr. 887, 214 Cal. App. 2d 826 (1963), the court held that since insolvency must exist at the time of the conveyance or must result therefrom, subsequent insolvency is not of itself a sufficient foundation for an inference of insolvency at the time of the allegedly fraudulent conveyance. In the case of *Nevers v. Hack*, 138 Ind. 260, 37 N.E. 791 (1894) the court held that insolvency of the debtor at the

time when suit is brought to set aside his conveyance as fraudulent does not raise a presumption that insolvency existed prior to that time. See also *Neubauer v. Cloutier*, 265 Minn. 539, 122 N.W. 2d 623 (1963); *Palestroni v. Jacobs*, 18 N.J. Super 438, 87 A.2d 356 (1952); *In re Liquidmatic Systems, Inc.* 194 F. Supp. 625 (D.S.D. Cal. 1961).

Plaintiff further asserts that return of an unsatisfied execution is evidence of insolvency which is not subject to rebuttal or refutation, and cites as authority for this position the cases of *Enright v. Grant*, 5 Utah 334, 15 P. 268 (1887) and *Ogden State Bank v. Barker*, 12 Utah 13, 40 P. 765 (1895). The *Enright* decision, by a divided court, held that while return of an execution *nulla bona* may (in support of allegations not present in the instant case) constitute evidence of the debtor's insolvency during a period *subsequent* to that return, it does not hold such return to be either inference or proper evidence of insolvency *prior* to the unsatisfied return of execution.

In *Enright* the court considered a judgment entered upon default and failure of the defendant to file an answer. The court clearly indicated that a return of an execution *nulla bona* constituted evidence of the debtor's insolvency only when in substantiation of the "allegation that the plaintiffs know of no property upon which an execution can be levied, and that the judgments must remain wholly unsatisfied, unless they can resort to equity." (15 P. at 271, 272). Observing that it was considering only the sufficiency of the pleading as the basis for a default judgment, the court observed "When it comes to the proof

[of the debtor's insolvency], it may be difficult to establish, but we are dealing with it now as a pleading, and not as to what would constitute sufficient proof. . . " (15 P. at 272). Plaintiff's complaint lacks any allegation that plaintiff knows of no other property belonging to the judgment debtors from which the deficiency judgments can be satisfied; consequently, the *Enright* decision is not proper precedent in the present case where plaintiff not only knew of substantial other property owned by the judgment debtors, but had already caused the court to enjoin the judgment debtors from disposing of such other property.

In deciding the *Barker* case the court apparently believed it was merely following the *Enright* decision, but if the *Barker* case stands for the proposition relied upon by plaintiff, it goes beyond the holding in *Enright* with respect to permitting use of an execution returned unsatisfied as evidence of insolvency *preceding* the return on execution. This ruling is at variance with the strong weight of authority in other jurisdictions as cited above, the consequences thereof seem not to have been fully explored by the court, and such interpretation of the case should not be followed. If the *Barker* case supports the position relied upon by plaintiff, it should be overruled for the reason that a return of service unsatisfied in one county should not conclusively bar the judgment debtor from proving his solvency and showing the existence of other assets in adjoining counties or nearby areas where the judgment creditor can conveniently obtain jurisdiction, nor should a judgment debtor be conclusively prevented from showing the existence of other assets which

the Sheriff may have overlooked or disregarded in returning the execution unsatisfied.

The *Barker* ruling should further be distinguished on the grounds that (1) it was decided prior to adoption of the UFCA in Utah, (2) the prime effect of showing return of execution unsatisfied at that time was *procedural* in order to establish that a judgment creditor had exhausted his legal remedies and was now entitled to equitable relief, whereas setting aside a fraudulent conveyance under the UFCA is now a statutory legal proceeding for which proof of exhaustion of legal remedies is no longer prerequisite, and (3) the legislative intent underlying enactment of the UFCA requires that proof be furnished of the elements of action set forth in its various provisions, while the former procedural presumption of insolvency arising upon merely showing return of execution unsatisfied does not create a presumption of substantive insolvency as required under the UFCA.

The ruling in the *Barker* case is further inapplicable in the present action because plaintiff is estopped from asserting a presumption of insolvency based upon return of execution *nulla bona* because of (a) its failure to plead and prove that it had no knowledge of other properties from which the deficiency judgments could be satisfied, (b) its own evidence of the existence of such other properties, and (c) its prior conduct in thwarting the success of the executions upon which it relies for such presumption. Plaintiff entered into evidence a copy of its complaint in the officer and director liability action (Exhibit

P11) together with a copy of the preliminary injunction entered by the court in that action on July 11, 1968 (Exhibit P12) restraining defendants from conveying their properties. Attached to that complaint as Exhibit "A" is a 12-page, single-spaced, legal size, typewritten description of 561 separate parcels of real property acknowledged by plaintiff to be owned by these and other defendants and on which plaintiff had also filed *lis pendens* notices. Filing the complaint in the officer and director liability action, recording the *lis pendens* notices, and obtaining entry of the temporary injunction with respect to the numerous properties all preceded return of service unsatisfied herein. (See Exhibit "A" to this brief).

Plaintiff failed to plead the lack of properties from which the deficiency judgments could be satisfied because it well knew that defendants herein owned extensive properties having substantial value, and the only reason the executions were returned unsatisfied was because plaintiff's own *lis pendens* and injunction shielded all assets of these defendants from such subsequent execution. Under these circumstances it would be an utmost incongruity and injustice to permit the plaintiff to assert these unsatisfied executions as any level of evidence of insolvency of the defendants. Rather, plaintiff's own evidence before the court showing that defendants have substantial assets which are already secured to plaintiff's purposes under injunction has only strengthened the presumption of defendants' solvency.

3. *No presumption of fraudulent conveyance arose from relationship of the parties to shift the burden of proof to defendants.*

Plaintiff asserts that by showing the individual grantors were close relatives of the grantees, plaintiff was relieved of its burden of proving fraud and there was thereby imposed upon defendants a burden of proving that no fraud existed. It should first be observed that when plaintiff rested its case no evidence had been introduced showing any relationship between the personal defendants and the corporate defendants, and no family relationship can exist between the personal grantees and the corporate grantors; hence, if the position had any merit it would be confined in application only to conveyances by the individual grantors. More important, however, is that no such presumption arises even with respect to the personal defendants without the existence of other factors not before the court in this action when the plaintiff rested its case.

While a close family relationship is just cause for special scrutiny, such relationship alone is insufficient to create a legal presumption of fraud which shifts the burden of proof. In *Givan v. Lambert*, 10 Utah 2d 287, 351 P.2d 959 (1960) the Utah Supreme Court upheld the conveyances by a father to his children against attack by judgment creditors, stating:

It is elementary that the love and affection a father has for his children is sufficient consideration to support a conveyance, absent fraud. (351 P.2d at 963).

After discussing the early English rule that intra-family transactions be subjected to careful examination for evidences of fraud, the court further stated:

Human nature doesn't seem to have changed very much and we still take for granted that transactions between close relatives under circumstances of this kind are to be closely scrutinized when attacked by creditors of the grantor. However, *the mere fact that the transaction is among close relatives does not necessarily mean that it is invalid*, but the true facts are subject to proof. (351 P.2d at 962, emphasis added).

In *Ned J. Bowman Co. v. White*, 13 Utah 2d 173, 369 P.2d 962 (1962), the court rejected an attack by judgment creditors and upheld the validity of a mortgage given by a father to his son, stating:

“While conveyances between close relatives are subject to rigid scrutiny, that fact alone does not render the conveyance fraudulent. Whether a conveyance is fraudulent as to creditors must be determined from the facts of each case and from the circumstances surrounding the transaction, . . .” (369 P.2d at 963.)

Although some Utah cases decided prior to enactment of the UFCA are not founded upon proof of particular elements now required under the statute (see e.g. *Gustin v. Mathews*, 25 Utah 168, 70 P. 402 (1902), even the earlier cases upon which plaintiff primarily relies refused to shift the burden of proof in the absence of additional factors evidencing fraud.

The UFCA sets forth the elements of proof required of plaintiff as the price of the remedy sought. This stat-

ute specifically requires either proof of actual fraud (which has not been presented in this case) or a presumption of fraud. While elements in addition to proof of the grantor's insolvency may be essential to proving fraud, *no presumption of fraud can arise without proof of the grantor's insolvency at the time of or by reason of the conveyance.* If plaintiff relies upon return of execution *nulla bona* for a presumption of insolvency as a necessary element in creating a presumption of fraud between relatives or closely connected parties, plaintiff has failed to establish a *prima facie* case because the law will not permit a presumption to be based upon a presumption. (See 29 Am. Jur. 2d 204, *Evidence*, § 166. Also *Denver & R.G.R. Co. v. Ashton-White-Skillicorn*, 49 Utah 82, 162 P. 82 (1916).)

Further, no presumption of fraud can arise from the circumstances of a conveyance between close relatives unless direct evidence of other factors indicating fraud is furnished as supporting evidence. No such evidence had been presented when plaintiff rested its case.

II. DEFENDANTS' EVIDENCE SHOWED THE CONVEYANCES WERE MADE FOR FAIR CONSIDERATION.

The evidence adduced by defendants at trial with respect to each of the conveyed properties successfully controverted and disproved each and every allegation by plaintiff that the conveyances were made without fair consideration. A summary of defendants' evidence on this point is tabulated in Exhibit "B" attached to this brief and incorporated by reference.

III. THE RELIEF GRANTED EXCEEDS THAT PRAYED IN THE COMPLAINT AND AUTHORIZED BY LAW.

The entire prayer of plaintiff's complaint reads: "Wherefore, plaintiff prays that the aforesaid deeds be set aside as fraudulent." It does not contain the customary request for "further relief." Notwithstanding, the lower court not only set the conveyances aside but directed that the subject properties be sold in satisfaction of certain deficiency judgments.

Plaintiff has made an election of remedies making it improper to receive the benefit of a court order requiring sale of the subject properties prior to termination of the preliminary injunction in the officer and director liability action. By seeking and obtaining entry of the preliminary injunction plaintiff has rendered the grantor defendants helpless to apply any part of their property or assets in satisfaction of the deficiency judgments. If the subject properties were sold at Sheriff's sale, the defendants would be effectively limited by the preliminary injunction from exercising any rights of redemption which would otherwise be reserved to them as protection against a sale at distress prices.

If plaintiff had joined its claims in the present case as a separate cause of action in the officer and director liability proceeding and had obtained a judgment setting aside the conveyances, the subject property would have been held without sale until the extent of plaintiff's claims against the defendants, if any, were ascertained and de-

terminated. In bringing the present action separately, plaintiff has been gratuitously awarded a remedy in excess of what it requested of the court, and is seeking to obtain indirectly, through fragmentation of actions, a remedy which would not have been granted if brought in consolidated form and which should not be granted in this proceeding.

Plaintiff also elected a remedy precluding present sale of the subject property by founding its action to set aside the conveyances upon the theory of an unmatured tort claim. (See Transcript, page 4, lines 9-14, as corrected; page 28, lines 20-27.)

On page 18 of plaintiff's post-trial memorandum the annotation at 73 ALR 2d 749 is cited for the position that "Under our statute and in most jurisdictions . . . the right is afforded a tort claimant whose claim has not matured to judgment to attack conveyances as being fraudulent." What the plaintiff fails to point out is that those jurisdictions referred to as "most jurisdictions" and as set forth in the citation consist of fourteen states, eight of which do not have the UFCA. Even among those having the UFCA at least two states have recognized the need for affirmative enactment of statutes specifically authorizing extraordinary relief prior to final adjudication of the claims.

Several cases decided under the UFCA have followed the clear and well reasoned holding of the New Jersey court which says:

The rule, both in England and in this state, is that the statute extends its protection to all persons having a valid cause of action arising from torts as well as from contracts. . . . Nevertheless, a tort claimant, to place himself in the position of a lawful creditor or person competent under the statute to set aside a fraudulent conveyance, must reduce his claim to judgment, and thus establish a legal debt against the fraudulent grantor. When his claim has thus been liquidated and established as a lawful debt, he may attack a voluntary conveyance made, after the liability arose and before suit was brought, to defeat his debt, on the theory that such judgment, when once obtained, relates back and establishes a debt as of the time when the original cause of action accrued. *Washington Nat. Bank v. Beatty*, 77 N.J. Eq. 252, 76 A. 442, 444 (1910). (Citations omitted)

Sound reasons exist for refusing to set aside conveyances on mere allegation, and remedies based upon unproved allegations merit carefully supervised procedures and the posting of security for wrongful interference with property, as typified by the safeguards provided with respect to restraining orders and injunctions. (See Rule 65A, Utah Rules of Civil Procedure.) None of these safeguards is embodied in the statute whereunder the plaintiff asks the court to set aside conveyances of two or three years ago and restrain the grantors from dealing effectively with the property for an indeterminate time, possibly many years, until plaintiff has completed discovery, trial, possible appeals and other unforeseen delays — all without securing defendants in the event plaintiff is wrong (even in good faith) about the merits of his claims against defendants in a separate action.

Moreover, evidence presented at trial indicates that subsequent to the conveyances of subject properties to Steven L. Grow, he expended considerable time, effort and money in proving, repairing, and preserving the properties, and that he assumed and paid various mortgage payments, instalment contract payments, and taxes. (See Transcript, page 53, lines 4-23; page 54, lines 3-23; page 58, lines 23-26; page 60, lines 2-13; page 62, lines 4-14; page 64, lines 15-30; page 65, lines 1-7; page 140, lines 10-21; page 142, lines 16-30.)

Such expenditures vest in defendant Steven L. Grow an equitable interest in the subject properties, the precise monetary value of which interest has not been determined by the court. After entry of the lower court's decision but before judgment was reinstated, defendants moved the court for further hearings to determine the value of Steven L. Grow's equitable interest in the subject properties as a necessary prerequisite to their sale or other disposition (Designation of Record on Appeal, Item No. 8). Such further hearing is still required to define the interest in the properties being made the subject of Sheriff's sale.

CONCLUSION

At trial plaintiff failed to establish a prima facie case in chief before resting, and defendants' motion for summary judgment should have been granted. The case should be remanded to the lower court with instructions to enter the summary judgment. In the alternative, the decree of the lower court should be amended by eliminat-

ing that portion requiring sale of the subject premises, deferring any sale thereof until plaintiff's tort claims are matured and reduced to judgment or until the preliminary injunction is terminated in the officer and director liability action. If summary judgment for defendants is not entered, then the case should be remanded to the lower court for further hearings to determine the value of Steven L. Grow's equitable interest in the subject properties.

Respectfully submitted,

STRONG, POELMAN & FOX

By

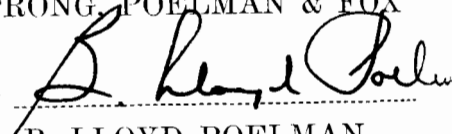

B. LLOYD POELMAN

EXHIBIT "A"

SCHEDULE OF DEFICIENCY JUDGMENTS AGAINST CORPORATE GRANTORS

Lower Court File No.	Defendant	Date of Original Judgment	Date of Deficiency Judgment	Date of Return of Execution Unsatisfied	Dates of Conveyances of Subject Properties by this Defendant	
25	31,209	Grow Investment & Mortgage and Property Investment Company	2/29/68	4/ 1/68	5/23/69	9/21/66
	31,342	"	2/29/68	4/ 1/68	5/23/69	
	31,213	"	4/11/68	5/15/68	5/23/69	
	31,226	"	4/11/68	5/15/68	5/23/69	
	31,212	"	4/11/68	5/15/68	5/23/69	
	31,301	"	5/28/68	7/ 8/68	5/23/69	
	32,800	"		2/28/69		
31,284	Allied Developpment (First Fidelity)	2/29/68	4/ 1/68	5/23/69	3/20/67	
31,225	"	2/29/68	4/ 1/68	5/23/69		
31,264	"	6/ 4/68	7/ 8/68	5/23/69		
31,224	"	6/21/68	7/19/68	5/23/69		
31,210	Town & Country Real Estate Co.	2/29/68	4/ 1/68	5/23/69	12/28/66 1/ 6/68 10/25/66	
31,208	Western Land, et al.	2/29/68	4/ 1/68	5/23/69	10/30/67	
31,429	"	5/17/68	6/18/68	5/23/69	1/26/68	

EXHIBIT "B"
SUMMARY OF DEFENDANTS' EVIDENCE AT
TRIAL THAT THE CONVEYANCES WERE
FAIRLY TRANSACTED

<i>Plaintiff's Exhibit Number</i>	<i>Common Name Description</i>	<i>Defendants' Evidence at Trial Indicated</i>
1	Oak Dell	(a) These properties were accumulated under an express family agreement that they constituted an inheritance and repayment for services performed in lieu of cash or bonds. (Transcript, page 69, Lines 6-11)
2	Oak Dell	(b) The motive for conveyance of these properties was the natural love and affection of the Grows for their children, and was devoid of any intent to hinder any creditors. (Transcript, page 73, Lines 14-19)
6	Kaleel	
7	Kaleel	(c) These conveyances were made by grantors who were then, and who are now, solvent, holding considerable assets, and no deficiency judgments were outstanding against them at the time of these conveyances or time of trial. (Transcript page 28, lines 101-109, 152-153)

- 5 Lot 17, Block 3
 (vacant lot with
 pressure water
 easement)
- (a) This lot was a deficit to corporate grantors because non-developable. It was granted to Steven as Trustee to find amicable use for the property. (Transcript, page 64, Lines 15-30; page 65, Lines 1-7).
- (b) Constituted a nuisance and created ill-will because the corporation could not reasonably expend funds for its development. (Transcript, page 65, Lines 26-29).
- 4 Stricken
- 8 Geneva Heights
 Martinez home
- (a) Purchaser under a uniform real estate contract had an equity in the home. (Transcript, page 50, Lines 13-17)
- (b) At the time of conveyance, the home was in bad repair, was encumbered by multiple delinquent mortgages, and the investment possibilities for the grantor corporation were unfavorable. (Transcript, page 53, Lines 4-23)

- (c) The grantor corporation had made repeated efforts to sell the property, but to no avail. (Transcript, page 54, Lines 3-23)
- (d) Grantee's condition for acceptance of the property was premised on his removing the present undesirable tenants. (Transcript, page 57, Lines 1-3)
- (e) The conveyance resulted in a financial benefit to the corporation upon assumption of existing mortgages by the grantee. (Transcript, page 58, Lines 23-26)
- (f) Grantee expended substantial time and money in an effort to bring the uniform real estate contract current. (Transcript, page 140, Lines 10-20)
- (g) Grantee relieved corporate grantor of burdensome liability by assuming a \$7,000 mortgage. (Transcript, page 140, Lines 17-21)

- (a) Grantor conveyed only an assignment of right it had acquired under a real estate contract which included an assumed obligation for monthly payment. (Transcript page 61, Lines 15-20)
- (b) When conveyance was made, the home was in a state of great disrepair, making continued possession and financing by the corporate grantor imprudent. (Transcript, page 62, Lines 4-14)
- (c) During the six years immediately preceding the conveyance the corporate grantor had operated the property at a net loss in excess of \$1,500. (Transcript, page 63, Lines 23-30; page 64, Lines 1-4)
- (d) Grantee relieved the corporated grantor of unprofitable investment by assuming the \$5,050 mortgage. (Transcript, page 146, Lines 19-22)
- (e) Grantee actually exercised dominion and control over all these premises. (Transcript, page 147; Lines 21-27)

3
 (Same as
 No. 10)

Lot 3, Block 5 —
 Linford Home

- (a) The home at time of conveyance was in a state of great disrepair. (Transcript, page 60, Lines 2-13)
- (b) The grantee relieved the corporate grantor of liabilities accruing from delinquent mortgage. (Transcript, page 60.)
- (c) Grantee expended substantial funds to pay debts which the corporate grantor had accumulated in the form of delinquent taxes and mortgage payments. (Transcript, page 142, Lines 16-30)

Generally:

- (a) Although services rendered by child for his parents cannot constitute valuable consideration prior to the child's majority:
 - (1) The grantee performed valuable services subsequent to his majority. (Transcript, page 73, Lines 6-14)

- (2) The grantee performed valuable but otherwise uncompensated services for the benefit of the corporate grantors, which have no claim upon the grantee's services prior to grantee's majority. (Transcript, page 111)