

2004

Mary Dagmar Fenley, John Fenley v. Jeanne Tolle : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

JEANNE TOLLE,

Plaintiff/Appellee,

vs.

MARY DAGMAR FENLEY, JOHN
FENLEY, RALPH EUGENE TOLLE,
JUAN H. HERNANDEZ, and SHERRY
A. HERNANDEZ

Defendants/Appellants.

Case No. 20041045

APPELLEE'S RESPONSIVE BRIEF

APPEAL FROM THE FINDINGS OF FACT AND CONCLUSIONS OF LAW
ENTERED BY THE FOURTH DISTRICT COURT, MILLARD COUNTY

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UTAH APPELLATE COURTS

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Annotated § 78-2a-2(j) (2004).

ISSUES PRESENTED & STANDARDS OF REVIEW

1. Whether the trial court erred in concluding (i) that Jeanne Tolle was a creditor of Robert Tolle, and (ii) that Robert Tolle was insolvent at the time of the transfers.

Resolution of these questions involves “both questions of law and of fact.” Bradford v. Bradford, 1999 UT App 373, ¶10, 993 P.2d 887. The court’s findings of fact are reviewed for clear error, while the trial court’s “conclusions as to the legal effect of a given set of found facts” are reviewed for correctness. Id.

2. Whether the trial court erred in finding that Robert Tolle had actual intent to defraud Jeanne Tolle.

The question of whether a transferor had fraudulent intent is “ordinarily considered a question of fact.” Id. at ¶18; see also Territorial Savings & Loan Assoc. v. Baird, 781 P.2d 452, 462 (Utah Ct. App. 1989). Questions of fact are reviewed for clear error. Bradford, 1999 UT App 373 at ¶10.

STATEMENT OF THE CASE

1. Jeanne Tolle was born in 1958, and is the natural daughter of Robert Tolle. Findings of Fact at ¶1. From 1958 until 1970, Jeanne Tolle lived with Robert Tolle in Florida. Findings of Fact at ¶¶1-3.¹

¹Though the Fenleys have challenged several factual findings that were entered by the trial court, they have not in any way complied with—or even attempted to comply with—the

2. After Jeanne Tolle entered the second grade, Robert Tolle physically and emotionally abused Jeanne Tolle. Findings of Fact at ¶2. This abuse included Robert Tolle repeatedly rape Jeanne Tolle over a period of several years. Findings of Fact at ¶2.
3. Robert Tolle eventually separated from Jeanne Tolle's mother and moved from Florida to Ohio in 1970. Findings of Fact at ¶3. In 1973, Jeanne Tolle was sent to live with her father in Ohio. Robert Tolle began raping Jeanne Tolle again upon her arrival in Ohio. Findings of Fact at ¶4.
4. In 1973, Jeanne Tolle finally told her mother about the abuse. Findings of Fact at ¶5. At that point, Jeanne returned to Florida to again live with her mother, and finally reported the rapes to Florida authorities. Findings of Fact at ¶6. Robert Tolle then fled from Ohio, however, and Florida officials were unable to arrest Robert Tolle at that time. Findings of Fact at ¶7.
5. Jeanne Tolle lost track of her father in 1973 and did not know where he lived until 2001. Findings of Fact at ¶9.
6. In October 2001, Jeanne Tolle was called by a cousin of hers who was in Florida on

marshaling requirement set forth in Utah Rules of Appellate Procedure 24(a)(9). It is well established in Utah that an appellate court is required to assume that the factual findings of the trial court are correct in the absence of a valid, marshaling-supported challenge. In Houghton v. Miller, 2005 UT App 303, – P.3d –, for example, this Court expressly “adopted the trial court’s findings because Defendant has failed to marshal the evidence in support of those findings.” *Id.* at ¶1 n.2; see also Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998); Johnson v. Higley, 1999 UT App 278, ¶37, 989 P.2d 61.

Given the failure to marshal in this case, this Court is therefore required to accept those Findings of Fact as true. As such, all references in this brief will therefore be to the trial court’s Findings of Facts, located in the appellate record at R. 165.

- business. Findings of Fact at ¶10. Through that conversation, Jeanne learned that Robert Tolle had been living in Utah for the past 14 years. Findings of Fact at ¶10.
7. Subsequent to that conversation, Jeanne contacted Ralph Tolle, Robert's brother. Findings of Fact at ¶11. In that conversation, Jeanne Tolle told Ralph Tolle that Robert Tolle had raped her as a child. Findings of Fact at ¶11. Jeanne also told Ralph that she intended to "take away Robert's possessions" for what he had done to her. Findings of Fact at ¶11.
 8. Jeanne Tolle also contacted Mary Dagmar Fenley, Robert Tolle's ex-wife. Findings of Fact at ¶12. During that conversation, Jeanne Tolle told Fenley about the rapes, and also told Fenley that she intended to take Robert Tolle's possessions away from him for what he had done to her. Findings of Fact at ¶13.
 9. In October 2001, Jeanne Tolle made telephone contact with Robert Tolle. Findings of Fact at ¶15. In a taped call, Robert Tolle acknowledged having repeatedly raped Jeanne Tolle while she was a child. Findings of Fact at ¶15. Robert Tolle blamed his behavior on the fact that Jeanne Tolle's mother had not been "taking care of him." Findings of Fact at ¶15.
 10. During that phone call, Robert Tolle expressed remorse for having raped Jeanne while she was a child, and then requested that Jeanne Tolle come visit him in Utah. Findings of Fact at ¶15.
 11. Jeanne Tolle visited Robert Tolle in Utah in the fall of 2001. Findings of Fact at ¶18.

While there, Robert Tolle placed Jeanne's name on some joint bank accounts.

Findings of Fact at ¶18.

12. On November 30, 2001, Robert Tolle was arrested for the rapes of Jeanne Tolle. Findings of Fact at ¶22. As he was being arrested, he phoned Jeanne Tolle and told her that he knew that "she was responsible" for the arrest. Findings of Fact at ¶22.
13. On December 1, 2001, Jeanne Tolle informed Juan and Sherry Hernandez² that she intended to take Robert Tolle's possessions away for what he did to her. Findings of Fact at ¶23.
14. "In the days and weeks following Robert's incarceration, the defendants, Fenley, Hernandez, and [Ralph] Tolle, wrote letters to Robert indicating an interest in protecting Robert's property from Jeanne." Findings of Fact at ¶25.
15. On December 5, 2001, Ralph Tolle traveled to Utah. Findings of Fact at ¶30. On his way, he picked up a set of deeds for the properties that Robert Tolle owned and took them to Robert Tolle in the Millard County Jail. Findings of Fact at ¶30. These properties included a 200 acre ranch and a five bedroom house in Hinckley, as well as a two bedroom home in Delta. Findings of Fact at ¶16.
16. While at the Millard County jail, Robert Tolle deeded over all of these properties to Ralph Tolle and Mary Dagmar Fenley. Findings of Fact at ¶30. These transactions

²Juan and Sherry Hernandez are confidants of Robert Tolle's who at one time also claimed an interest in some of the properties in dispute in this case. They have not appealed the verdicts.

- occurred only five days after his arrest, and constituted “all the property known to be held in Robert Tolle’s name.” Findings of Fact at ¶30.
17. As the result of these transfers, Robert Tolle was rendered insolvent. Findings of Fact at ¶31.
 18. Robert Tolle was extradited to Florida. He died awaiting trial on June 11, 2002. Findings of Fact at ¶39.
 19. Jeanne Tolle filed a civil suit against Robert Tolle in Florida in February 2002. Findings of Fact at ¶38. On September 24, 2004, Jeanne Tolle received a judgment in the amount of \$1, 704,610.75. Findings of Fact at ¶38. That judgment has been domesticated in Utah. Findings of Fact at ¶38.
 20. On March 26, 2003, Jeanne Tolle filed suit in Utah asking that Robert Tolle’s transfers of property be voided under the Uniform Fraudulent Transfer Act. R. at 1.
 21. On October 7, 2004, a trial was held regarding Jeanne Tolle’s Uniform Fraudulent Transfer Act claims. R. at 109.
 22. On November 8, 2004, the trial court entered its ruling, wherein it determined that the December 2001 transfers were fraudulent. As such, the court voided the transfers and returned the properties to Robert Tolle’s estate. R. at 165.
 23. Mary Dagmar Fenley and John Fenley now appeal.

SUMMARY OF THE ARGUMENT

The Fenleys argue that the trial court erred by determining that Jeanne Tolle was a

creditor of Robert Tolle at the time of the transfers. The trial court's ruling on this point was correct, however, because (i) the Florida judgment does constitute a debt under Utah law, and (ii) settled Utah law establishes that a threat of suit is sufficient to invoke the protections of the Uniform Fraudulent Transfers Act.

The Fenleys next argue that the trial court erred in finding that Robert Tolle was insolvent at the time of the transfers. The Fenleys ignore the fact that Robert Tolle had a claim against him stemming from the Florida rapes, however, thus constituting a valid debt for purposes of the Uniform Fraudulent Transfer Act. Contrary to the Fenleys' assertions, the fact that Robert Tolle was in prison at the time of the transfers does not change this result.

Finally, the Fenleys argue that the evidence does not support the finding that Robert Tolle had actual intent to defraud Jeanne Tolle. The Fenleys have conceded that Robert Tolle transferred all of his properties for no consideration, however, thus supporting the trial court's conclusion on this point.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT JEANNE TOLLE WAS A CREDITOR OF ROBERT TOLLE.

Under the Uniform Fraudulent Transfer Act, a "creditor" is defined as "a person who has a claim." Utah Code Annotated § 25-6-2(4) (2004). Under §25-6-2(3), a "claim" "means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured" The trial court below concluded that Jeanne Tolle was a creditor of Robert Tolle at the time that he transferred his properties

based on the fact that she had threatened him with suit for repeatedly raping her as a child. As noted by the trial court, Jeanne Tolle did eventually file civil suit against him in Florida, and ultimately obtained a judgment against him for over one million dollars.

The Fenleys argue that this conclusion was in error. According to the Fenleys, the Florida lawsuit could not be considered as a “debt” of Robert Tolle for purposes of the Uniform Fraudulent Transfers Act because (1) the statute of limitations on the Florida action had allegedly run before the Florida complaint was filed, and (2) the Florida judgment was obtained after the properties had already been transferred. Both arguments should be rejected.

1. This Court should reject the Fenleys’ attempt to collaterally attack the Florida judgment in this appeal.

First, the Fenleys’ attempt to collaterally attack the Florida civil judgment in this appeal is not properly raised and should be rejected. The Fenleys have failed to identify any place where this argument was preserved or ruled on in the Utah court below, and they have also failed to provide any citations to the Florida litigation that would shed light on the statute of limitations issue as it was advanced there. As a result, it is difficult to fully address or even understand this argument, insofar as it is unclear whether this Court is: (1) being asked to collaterally review a statute of limitations ruling from Florida; (2) review the Utah trial court’s decision on whether an actual ruling on this issue by a Florida court has any bearing on the fraudulent transfer action here; (3) review the Utah trial court’s ruling regarding what a Florida court would have done if the statute of limitations argument had

been properly raised there; or (4) review the potential Florida statute of limitations issue for the first time in this proceeding. “Issues that are not raised at trial are usually deemed waived.” DLB Collection Trust v. Harris, 893 P.2d 593, 595 (Utah Ct. App. 1995). Here, the Fenleys have failed to identify whether a ruling has been issued on this question below or even where in the record this issue was raised. For this reason alone, this attempt to raise this issue now should be rejected.³

Even if this Court indulges the Fenleys’ request to review the Florida statute of limitations issue, the record actually indicates that there would have been no statute of limitations problem at all. While the Fenleys do set up and defeat the straw man argument relating to the tolling of statutes of limitations for minors, the Fenleys then neglect to point out that there are other, more applicable statute of limitations defenses that would have also

³ Assuming for a moment that there is a ruling from a Florida court on this issue, the Fenleys’ attempt to have this Court review that ruling now would be improper.

It is well accepted in Utah that collateral attacks on prior judgments from prior courts are disfavored. “With rare exception, when a court with proper jurisdiction enters a final judgment, including a default judgment, that judgment can only be attacked on direct appeal.” State v. Hamilton, 2003 UT 22, ¶25, 70 P.3d 111 (quoting Olsen v. Bd. of Ed., 571 P.2d 1336, 1338 (Utah 1997)). In Collins v. Sandy City Bd. of Adjustment, 2002 UT 77, 52 P.3d 1267, the Supreme Court noted that “the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy.” Id. at ¶19. The Court thus held that “an erroneous conclusion reached by the court in the first suit does not deprive the defendants in the second action of their right to rely upon the plea of res judicata. A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected by a direct review and not by bringing another action upon the same cause of action.” Id. at ¶18; see also Commercial Investment Corp. v. Siggard, 936 P.2d 1105, 1110 (Utah Ct. App. 1997); Morgan v. Morgan, 875 P.2d 563, 565-66 (Utah Ct. App. 1994).

Here, the proper place for an assault on the Florida judgment would be on direct review in Florida, not in a corollary attack filed in an appeal from a Utah probate action.

applied to this case. The most obvious of these would be Florida Statutes Annotated §95.051(1)(a) (2005), which would have tolled the statute of limitations during the entire time that Robert Tolle was in Ohio and Utah. According to the trial court's factual findings below, Robert Tolle left Florida in 1970 and presumably didn't return until his extradition in 2001. Under Florida Statutes Annotated §95.051(1)(a) (2005), the statute of limitations would therefore have been tolled until 2001. Given that Jeanne Tolle filed suit within four years of his extradition, there would have been no statute of limitations problem at all.⁴

Regardless, the Fenleys have failed to even point to a place where any of these arguments have been ruled on. As such, any discussion of these potential defenses is grounded in speculation on what a lower court *may* have determined, not on what a lower court *did* determine, and is therefore simply not subject to appellate review. Because the Fenleys have not cited this Court to any court that addressed the Florida statute of limitations below, this Court should simply reject this argument.

2. Jeanne Tolle was a creditor for purposes of the Uniform Fraudulent Transfers Act because she had threatened suit against Robert Tolle.

Second, the fact that the Florida judgment was entered after the transfers had occurred is irrelevant for purposes of the fraudulent transfer act. As noted above, § 25-6-2(3) defines a claim as "a right to payment." In Bradford v. Bradford, 1999 UT App 373, 993 P.2d 887, this Court considered a case where the transferee was similarly arguing that the challenged

⁴Other limitations would also have been potentially applicable, including the common law discovery rule, and Florida Statutes Ann. §95.10, which would have tolled the statute of limitations in Florida based on any Ohio or Utah-based defenses.

transfer was not voidable because it had occurred prior to the actual filing of the suit. Id. at ¶¶13-16. This Court rejected that argument, therein holding that “a person in the position of plaintiff” is protected under the act, id. at ¶15, even if the person has merely “*threatened*” suit at the time that the transfers actually occur. Id. at ¶16 (emphasis added). This result is consistent with the opinions of other courts and commentators that have examined this issue. See, e.g., United States v. Green, 201 F.3d 251, 257 (3d Cir. 2000) (holding that mere “awareness of a probable legal action against a debtor amounts to a debt” for purposes of the fraudulent transfer act); 37 Am.Jur.2d Fraudulent Conveyances and Transfers §3 (2005) (“The existence of a debt is a requirement for bringing a fraudulent conveyance action and generally speaking, the awareness of probable legal action against a debtor amounts to a debt.”).

In their brief, the Fenleys appear to acknowledge this authority, but still argue that there must be “some limit” on the reaches of the fraudulent transfer act. This concern is misplaced. As indicated by this Court in Bradford, the statute must be liberally construed in order “to reach all artifices and evasions designed to rob the Act of its full force and effect.” 1999 UT App 373 at ¶16 (quoting Butler v. Wilkinson, 740 P.2d 1244, 1260 (Utah 1987)). This Court further noted that “all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud.” Id. (quoting Givan v. Lambeth, 351 P.2d 959 (Utah 1960)). If there is to be a limitation on the applicability of the fraudulent transfers act, that limitation is the practical one that is imposed by the burden of proof that the plaintiff

bears in any particular case. The simple fact that a plaintiff's claim has not had time to work its way through the system, however, should not act as a loophole that would allow an erstwhile defendant to make himself insolvent by transferring away all of his or her assets.

Here, the court's finding that Robert Tolle admitted to having repeatedly raped Jeanne Tolle while she was a young child has not been challenged. It has also not been challenged that, after locating Robert Tolle several decades later, Jeanne Tolle then told his brother, ex-wife, and confidants of her plans to take all of his property. Finally, it has also not been challenged that, shortly after being arrested, Robert Tolle's brother, ex-wife, and confidants all wrote to Robert Tolle and asked him to transfer his properties out of his name in order to keep them from Jeanne Tolle, and that Robert Tolle then complied with those requests by deeding over those properties within a week of his arrest. By responding so clearly, so quickly after the arrest, Robert Tolle implicitly acknowledged that Jeanne was a potential plaintiff against him and that she would potentially be filing suit. Transferring properties as a means of avoiding actual debts is prohibited by the act, and transferring properties as a means of avoiding potential debts is also prohibited by the act. As such, Jeanne Tolle was properly deemed to have been Robert Tolle's creditor.⁵

⁵Because the relevant inquiry is whether the transfers occurred as a means of avoiding the effects of the "threatened" lawsuit, it is therefore arguable that the statute does not even require the suit to ultimately be successful. This would make sense on a statutory and public policy level. After all, the conduct that the act seeks to prohibit is the transferring of properties as a means of avoiding debt. The fact that a potential tortfeasor ultimately prevailed at trial doesn't change the fact that the tortfeasor had still been motivated by an unlawful intent to hide the assets when effecting the transfers

As such, the discussion above regarding the Florida statute of limitations issue becomes

II. THE TRIAL COURT CORRECTLY RULED THAT ROBERT TOLLE WAS INSOLVENT AT THE TIME OF THE TRANSFERS.

The Fenleys next argue that the trial court erred in concluding that Robert Tolle was insolvent at the time that the transfers occurred. As noted by the Fenleys, Utah Code Annotated §25-6-5(2)(i) and §25-6-6(1)(b) both allow a court to find that a transfer was fraudulent based, in part, on the insolvency of the transferor. The trial court below determined that Robert Tolle was insolvent at the time of the transfers, and then used that conclusion as partial support for its decision to void the transfers.

In arguing that Robert Tolle was not insolvent at the time of the transfers, the Fenleys first assert that, “at the time of the transfer at issue, Robert Tolle was essentially debt free.” Appellant’s Brief at 17. In addition to failing to support this assertion with any evidence from the record, this argument also wholly fails to account for the fact that Jeanne Tolle had already threatened suit against Robert Tolle for repeatedly raping her at the time that the transfers were made. “Insolvency may be measured not merely at the time of transfer, but also at the time plaintiff seeks to collect the amount due.” 37 Am.Jur.2d Fraudulent Conveyances and Transfers §19 (2005). As was discussed above, threats of suit are deemed

superfluous as well. Suppose, for example, that the Florida court in 2004 had finally considered the statute of limitations issue raised above and had then ruled that the suit was barred on those grounds. That conclusion still wouldn’t change the fact that, in 2001, Robert Tolle transferred the properties in anticipation of a lawsuit that he had reason to believe was coming. This intent to hide properties from an expected tortfeasor is clearly the basis for deeming the transfers to be fraudulent acts. As such, even if this Court were to determine that the Florida statute of limitations argument has some merit, this Court can and still should conclude that it does not have any bearing on this case. Again, there was a threat of suit, and Robert Tolle responded to the threat of suit by hiding assets. The ultimate success of that suit is simply not at issue.

to be “debts” for purposes of the fraudulent transfer act. See Utah Code Annotated § 25-6-2(3), (5) (defining a debt as a “liability on a claim” and a claim as “a right to payment, whether or not the right is reduced to judgment...[or is] unliquidated”). Thus, insofar as Jeanne Tolle’s suit against Robert Tolle ultimately resulted in a judgment of over one million dollars, Robert Tolle actually had “debts” of over one million dollars at the time that the transfers were made. The conclusion that Robert Tolle was insolvent was therefore correct.

The Fenleys next argue that Robert Tolle could not be deemed insolvent at the time of the transfers by virtue of the fact that he was in prison. According to the Fenleys, the fact that his “physical needs were being met, if meagerly, by the facility in which he was incarcerated” is enough to render him solvent for purposes of the Uniform Fraudulent Transfer Act. In addition to being unsupported by any reference to any authority, this argument can and should be rejected on two additional levels. First, the prison-based argument advanced by the Fenleys has little to do with the test for insolvency that is set forth in Utah Code Annotated §25-6-3(1). Under that statute, “insolvency” for purposes of the Uniform Fraudulent Transfers Act is defined by a person’s debt-ratio, not whether they have access to food and water. Thus, the fact that Robert Tolle was being cared for while in prison has little direct relevance at all to the particular question of whether he was insolvent for purposes of the Uniform Fraudulent Transfers Act.

On a more fundamental level, however, this particular argument can and should be rejected because it is flagrantly violative of the scope and purposes for which the Uniform

Fraudulent Transfers Act has been enacted. “Although one can generally dispose of his property as he sees fit, one cannot frustrate his creditor’s rights and avoid his obligations by changing title to his assets. That is the point of fraudulent conveyance law.” 37 Am.Jur. 2d Fraudulent Conveyances and Transfers §1 (2005). Taken on its literal terms, the Fenleys’ argument is that while law-abiding citizens are not allowed to fraudulently transfer their properties, an exception should be created giving criminals that very right. If this Court were to accept this argument, this Court would create the perverse scenario in which being sent to prison would *aid* a debtor’s efforts to hide assets from his or her lawful creditors.

Imprisonment should not be an asset for the tortfeasor, and the walls of the prison should not act as a shelter from the reaches of the fraudulent transfer act. Robert Tolle was in jail because he had admitted to raping Jeanne Tolle while she was a young girl. The criminality of his conduct simply should not be converted into a tool that would allow the Fenleys to retain properties that should instead be used to satisfy Robert Tolle’s civil debts to Jeanne Tolle. This argument should be rejected.

III. THE TRIAL COURT CORRECTLY RULED THAT ROBERT TOLLE HAD ACTUAL INTENT TO DEFRAUD JEANNE TOLLE.

Finally, the Fenleys argue that the trial court erred in finding that Robert Tolle had “actual intent” to defraud Jeanne Tolle when he transferred the properties. This argument should be rejected.⁶

⁶In point I of their brief, the Fenleys also argue that the trial court erred by (i) ruling that they had “conceded” that the transfer of the Hinckley property was fraudulent, and (ii) by then failing to enter any conclusions of law regarding that particular transfer.

The question of whether a transferor had fraudulent intent is “ordinarily considered a question of fact.” Bradford, 1999 UT App 373 at ¶18; see also Territorial Savings & Loan Assoc. v. Baird, 781 P.2d 452, 462 (Utah Ct. App. 1989). When challenging a ruling on a question of fact, an appellant must first marshal the evidence in support of that ruling. Utah R. App. P. 24(a)(9). “Where a party fails to . . . marshal the evidence, we need not consider the challenge to the sufficiency of the findings.” Houghton v. Miller, 2005 UT App 303, ¶1 n.2, – P.3d –. For this reason alone, these findings should be accepted by this Court.

Even if this Court chooses to address the merits of the challenge, it is still clear that the Fenleys have not carried their burden on appeal. Under Utah Code Annotated § 25-6-5(2)(a)-(k), a trial court is empowered to determine that the debtor had “actual intent” to defraud the creditor by relying on any of eleven separately numbered factors. These factors have been referred to in the Utah cases as the “indicia” or “badges of fraud.” Territorial Savings & Loan Assoc., 781 P.2d at 462; accord Dahnken, Inc. v. Wilmarth, 726 P.2d 420, 423 (Utah 1086). “Badges of fraud are said to be facts which throw suspicion on a transaction, and which call for an explanation. More simply stated, they are signs or marks

On page 10 of its Ruling, however, the trial court did enter specific conclusions of law regarding the transfer of the Hinckley properties. In that Ruling, the Court determined that Robert Tolle transferred the Hinckley property “with actual intent to hinder, delay, or defraud” Jeanne Tolle, and then went on to conclude that the specific statutory requirements for the Uniform Fraudulent Transfers Act had been met with respect to that particular transfer. Id. The Fenleys’ challenge to the substance of these particular conclusions is in fact the basis for point IV of their brief. As such, the argument that the trial court erred by failing to enter appropriate findings is simply incorrect and should be rejected.

of fraud. They do not of themselves or per se constitute fraud, but they are facts having a tendency to show the existence of fraud.” Territorial Savings & Loan Assoc., 781 P.2d at 462. Thus, by relying on these indicia of fraud, a trial court is able to determine that a party had actual fraudulent intent “by way of inference or presumption.” 37 Am.Jur.2d Fraudulent Conveyances and Transfers §10.

The Fenleys correctly note that the trial court relied on five separate indicia of fraud in concluding that Robert Tolle had actual intent to defraud Jeannie Tolle. Specifically, the trial court concluded that (i) the transfers were to insiders, pursuant to Utah Code Annotated § 25-6-5(2)(a); (ii) Robert Tolle “retained control over the property after the transfer,” pursuant to Utah Code Annotated § 25-6-5(2)(b); (iii) Robert Tolle had been threatened with suit prior to the transfer, pursuant to Utah Code Annotated § 25-6-5(2)(d); (iv) the transfer consisted of “all or substantially all of the debtor’s assets,” pursuant to Utah Code Annotated § 25-6-5(2)(e); and (v) “there was no consideration for the transfer,” pursuant to Utah Code Annotated § 25-6-5(2)(h).

While the Fenleys have mounted individual challenges to the first three of these indicia, the Fenleys also concede that the findings regarding the fourth indicium (ie that Robert Tolle transferred all or substantially all of his assets) and fifth indicium (that Robert Tolle received no consideration) are substantively correct. See Appellant’s Brief at 20.⁷ In

⁷Even if the Fenleys hadn’t conceded the substantive truth of these conclusions, this Court would be bound to reject any challenge based on their failure to offer any contrary evidence. The Fenleys have failed, for example, to establish that Robert Tolle kept any property in his name, and they have also failed to identify any consideration, let alone adequate consideration, that he

Territorial Savings & Loan Assoc., this Court noted that “a single one” of the indicia of fraud can be sufficient to support a court’s finding of fraudulent intent. 781 P.2d at 462. Thus, on a clear-error review, the Fenleys’ failure to challenge the substance of either the fourth or fifth indicia of fraud cited above is fatal to their claim that the trial court lacked support for its fraudulent intent finding.⁸

received in return for these transfers.

⁸While conceding that the transfers included substantially all of Robert Tolle’s property and were effected for no consideration, the Fenleys also argue that this should not matter because the transfers were allegedly made as part of a will. This argument fails on multiple levels.

First, the Fenleys cite to no provision in the fraudulent transfers act which makes any exception for wills. Though the act does specifically address its applicability to transfers to trusts, for example, see Utah Code Annotated § 25-6-14 (2005), there is no similar provision relating to wills. Given the absence of any authority for this argument, this Court should not accept the Fenleys’ invitation to now create such an exception in the absence of any statutory or precedential authority.

Second, allowing debtors to avoid their creditors by transferring all of their assets in a will violates the entire purpose of the fraudulent transfer act. As noted above, this act is construed “broadly” in order “to reach all artifices and evasions designed to rob the Act of its full force and effect.” Bradford, 1999 UT App 373 at ¶16. There is simply no coherent reason why debtors should be able to use their own terminal illness as a justification for cheating their creditors out of their assets. As with the prison-based argument discussed above, the Fenleys’ attempt to now allow terminal ill persons to fraudulently convey their properties is offensive to the spirit, scope, and purpose of the fraudulent transfer act, and should not be countenanced.

Third, the probate hearing that the Fenleys cite to as “proof” that the transfers occurred as part of a will was held in January 2003—over three months prior to Jeanne Tolle filing her civil claim in Florida, and over a year and half prior to the trial that was held regarding Jeanne Tolle’s fraudulent conveyance claim. The transcript of this hearing doesn’t even appear in the appellate record for this proceeding, but is attached to this Brief as Attachment A. There are a number of points that are significant. First, this hearing was held in the absence of any representation by anyone on behalf of Jeanne Tolle. Attachment A at 2. Second, at this hearing, the trial court expressly noted that the “will” that the Fenleys are now relying on was prepared by Robert Tolle while he was in the Millard County Jail awaiting extradition to Florida on charges of having raped Jeanne Tolle. Attachment A at 8. Under the terms of the fraudulent transfer act, this will would also properly be deemed to be a fraudulent conveyance. Third, the Fenleys conveniently neglect to point out that this same Court then issued another ruling on the probate matter on December 9, 2004, after the fraudulent conveyances had been set aside. See Attachment B. In

In addition to the concessions on the fourth and fifth indicia, the Fenleys' recitation of the facts surrounding the third indicium of fraud (that Robert Tolle had been threatened with suit prior to the transfers) are simply incorrect. According to the Fenleys, there was "nothing in the record that Robert Tolle knew of any" threat of suit at the time of the transfers, and "the events leading to the charges" "were so remote" from the transfers that there was little probative value.

As indicated above, however, at the time that the transfers were made, Jeanne Tolle had already told Robert Tolle's brother, ex-wife, and live-in confidants that she intended to take all of his property. Shortly after telling them this, Robert Tolle was arrested. "As he was being arrested, he called Jeanne, told her that he was being arrested and that he knew she was responsible." Findings of Fact at ¶22. Then, within one week of the arrest, Robert Tolle asked his brother to travel to Utah, pick up the deeds to the properties, and bring them to him in the Millard County Jail. Findings of Fact at ¶¶29-30. It was at this subsequent meeting that Robert Tolle transferred the properties out of his name.

Given these circumstances, the Fenleys' assertions that the trial court did not have a basis on which to conclude that Robert Fenley knew about Jeanne's potential suit at the time of the transfers are simply untenable. Instead, the evidence clearly supports the trial court's

that hearing, the trial court expressly acknowledged that the fraudulent transfers had in fact been set aside and that Jeanne Tolle was now the personal representative of the estate, Attachment B at 10-13, thus nullifying any probative effect that the January 2003 hearing might have otherwise had.


conclusion that the transfers were made in response to threats of suit.

When challenging a finding of fact, an appellant must show that the trial court committed "clear error." The Fenleys have not shown that the trial court was clearly erroneous in concluding that Robert Tolle had been threatened with suit prior to the transfers, that he transferred all or substantially all of his assets, or that he did not receive any consideration in return for the transfers. As such, the findings are properly supported and should be upheld.

CONCLUSION

In spite of the fact that transfers in this case occurred within a week of Robert Tolle's arrest for raping Jeanne Tolle, the Fenleys now want this Court to conclude that the transfers were not fraudulent and were not designed to hide assets from Jeanne Tolle's lawful claims. As support for this request, the Fenleys rely on unsupported factual challenges and unsupported legal assertions. They also rely on the argument that criminals and terminally ill debtors should be given rights under the Uniformed Transfers Act that healthy, law-abiding persons don't currently enjoy. These arguments are untenable and should be rejected by this Court.

DATED this 18th day of July, 2005.



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Attorneys for Appellee

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 19 day of July, 2005.

Jared G. Coleman
2150 South 1300 East, Suite 500
Salt Lake City, UT 84106



1 IN THE FOURTH JUDICIAL DISTRICT - MILLARD COURT

2 MILLARD COUNTY, STATE OF UTAH

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4 =====
5 IN THE MATTER OF THE ESTATE,) PROBATE HEARING
6)
7 OF ROBERT L. TOLLE.)
8)
9)
10) CASE 023700025
11) APPEAL 20041045-CA
12)
13 Defendant.) JUDGE DONALD J. EYRE
14)
15

16 BE IT REMEMBERED that this matter came on for hearing
17 before the above-named court on January 9, 2003.

18 WHEREUPON, the parties appearing and represented by
19 counsel, the following proceedings were held:

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A-P-P-E-A-R-A-N-C-E-S

FOR PETITIONER:

MARY DAGMAR FENLEY
1985 NORTH 360 EAST
PROVO UT 84604

OTHER PARTIES:

PRISCILLA YORK PLUFF, ESQ.
CHRISTINA AQUINO-GARCIA
SHERRY HERNANDEZ
JUAN HERNANDEZ
(NO ADDRESS INFORMATION GIVEN)

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DISCUSSION. 3

1 P-R-O-C-E-E-D-I-N-G-S

2 (January 9, 2003)

3 THE JUDGE: Okay. We'll call the case of the
4 matter of the estate of Robert L. Tolle. Anyone appearing
5 on that matter?

6 MS. FENLEY: Yes.

7 THE JUDGE: This is before the Court on the
8 petition of Mary Dagmar Fenley to be appointed as personal
9 representative over the estate of Robert L. Tolle.

10 MS. FENLEY: Yes.

11 THE JUDGE: Ms. Fenley is here.

12 MS. FENLEY: Right here.

13 THE JUDGE: Okay. You are?

14 MS. PLUFF: Priscilla Pluff.

15 THE JUDGE: And remind me what your interest in
16 the estate.

17 MS. PLUFF: I'm one of Robert's daughters.

18 THE JUDGE: Okay. And you're objecting to the
19 appointment of Ms. Fenley as the personal representative. Is
20 that correct?

21 MS. PLUFF: Yes.

22 THE JUDGE: And what's the basis for that? Why
23 are you objecting?

24 MS. PLUFF: She don't think it's right. It's not
25 right.

1 THE JUDGE: Again you are Priscilla. Is that
2 Priscilla York?

3 MS. PLUFF: Pluff.

4 THE JUDGE: How do you spell your last name?

5 MS. PLUFF: P-L-U-F as in Frank, F as in Frank.

6 THE JUDGE: Okay. And you live in a--

7 MS. PLUFF: Georgia.

8 THE JUDGE: Georgia. Okay.

9 Well, Ms. Fenley, my recollection is you're an
10 ex-wife of Mr. Tolle. Is that correct?

11 MS. FENLEY: Yes.

12 THE JUDGE: Normally children would have priority
13 with respect to the a, to be appointed as a personal
14 representative over, over a person's estate unless that
15 person, unless an ex, in your case ex-wife was designated as
16 the personal representative in a Will.

17 Why do you think that you have, would, should have
18 priority over Ms., Ms. Pluff?

19 MS. FENLEY: Well, it was this last sister that
20 put Bob in jail and cleared out his bank account and took as
21 much as she could before she had him put in jail.

22 THE JUDGE: Well--

23 MS. FENLEY: And when he wrote that Will out, do
24 you have a copy of the Will?

25 THE JUDGE: I do.

1 MS. FENLEY: Yes. When he wrote out that Will he
2 had not been in touch with his two younger daughters. We had
3 tried to find them. And the older daughter, the one that put
4 him in jail told him that they had gone to Chicago and were
5 married to some black men and didn't know the last names and
6 so we never could find them. So the Will states only for
7 his personal property and--

8 THE JUDGE: Do you know, well--

9 MS. FENLEY: -- there's maybe--

10 THE JUDGE: How much property are we talking
11 about?

12 MS. FENLEY: If you sold everything and got good
13 prices maybe 15,000. There's a '92 Lincoln, an '88 Chevy
14 S-10, a house full of furniture, two swamp coolers and a, two
15 flat bed trailers. That's it. Oh, and a coin collection
16 which his brother is holding until--

17 THE JUDGE: Where is all this property located?

18 MS. FENLEY: At Hinkley.

19 THE JUDGE: It's my, my understanding that
20 Mr. Tolle died in Florida. Is that correct?

21 MS. FENLEY: Yes, June 11th they pulled the
22 plug. He had emphysema and was in the prison hospital.

23 THE JUDGE: He didn't have any personal, any real
24 property left that he owned?

25 MS. FENLEY: No.

1 THE JUDGE: All the property that was in Utah
2 County that he'd owned previously had been sold or
3 transferred to you or--

4 MS. FENLEY: Yes. I mortgaged my house and a, we
5 figured up our equities and paid him off and he gave me the,
6 the, the deeds to the properties. I had to refinance
7 everything in order to get him paid off and get his name off
8 of all of the properties.

9 Now his older daughter put an article in the paper
10 in Florida when he first got there that was just scandalous
11 and she also--

12 THE JUDGE: Well I don't, I don't want to deal
13 with those things, that--

14 MS. FENLEY: Yes. But she also is under the
15 impression that he had over 70 properties in Utah County and
16 he certainly didn't.

17 THE JUDGE: Well, I know that you had some
18 properties because--

19 MS. FENLEY: Yes.

20 THE JUDGE: -- I dealt with you and Mr. Tolle on
21 some landlord tenant disputes and other things up in Utah
22 County. But it's your representation that all of those
23 properties have been sold?

24 MS. FENLEY: No. They have been refinanced and
25 they're in my name.

1 THE JUDGE: Refinanced and they're, and they're in
2 your name only?

3 MS. FENLEY: No. Mine and my son's.

4 THE JUDGE: Okay.

5 MS. FENLEY: Who is no relation to Robert Tolle.

6 THE JUDGE: Right. Ms. Pluff, what do you want
7 the Court to do?

8 MS. PLUFF: Well, I'm not the only one. This is
9 another one of his daughters, my sister.

10 THE JUDGE: Okay. And your name is?

11 MS. GARCIA: Christina Aquino-Garcia.

12 THE JUDGE: Okay. And where do you live?

13 MS. GARCIA: Richmond, Indiana.

14 THE JUDGE: So you live in Indiana and you live in
15 Georgia.

16 Ms. Fenley?

17 MS. FENLEY: Your Honor, I have never met the
18 girls. Bob was in jail in Florida when we finally got
19 contact. And they had found his name on the internet and
20 called me so I've talked to them I think maybe five times,
21 six times on the phone.

22 THE JUDGE: Well, since there's just the three of
23 you that a, are here contesting, it doesn't seem to me that
24 we're talking about too much value, have the three of you, do
25 you think it would help if the three of you went in the

1 conference room and discussed how you might want to resolve
2 this? Ms. Garcia?

3 MS. GARCIA: From my understanding his original
4 Will is that his brother Eugene had half and Mary had half.

5 THE JUDGE: Well I don't, the only Will I have is,
6 and there's a copy in the file, that he made out a, it's a
7 handwritten what we call an alographic (phonetic) Will which
8 he made out while he was in jail here at the Millard County
9 Jail awaiting extradition back to Florida wherein he, and
10 it's dated December 12 of 2001, and he in it says he gives
11 all of his personal property to a, Mary Dagmar Fenley. If
12 you have another Will that you want to present--

13 MS. GARCIA?: At that time we didn't even know
14 where he was. Jeanne's lawyer that was here last had a copy
15 of that Will but I never received one.

16 THE JUDGE: Well, she's not, her attorney is not
17 here now?

18 MS. GARCIA?: I think she fired him.

19 THE JUDGE: Okay. And she's not, doesn't have
20 any interest now?

21 MS. GARCIA?: No.

22 THE JUDGE: Okay. Well, do you think, and what my
23 suggestion is is do you think it would be helpful if the
24 three of you just went and met and talked and see if you can
25 resolve any issues? Okay. Why don't the, why don't the

1 three of you go, there's conference rooms back out here, sit
2 and talk. And, and it looks like Ms. Fenley is aware of what
3 the, what the assets are that remain.

4 One thing I would require you normally is that
5 since there's a contest that we, that there be an inventory
6 made of what's included in that property and that then there
7 would be a determination as to who has the right to receive
8 the proceeds of the estate and, and how, how that was to
9 occur. Okay?

10 **MALE SPEAKER:** It's my understanding that the
11 executor is supposed to a, see that what's stated in the Will
12 is done correctly. Correct?

13 **THE JUDGE:** Yes. I think they're also maybe
14 contesting that this is not a last Will and Testament.

15 **MALE SPEAKER:** Those would be two separate issues
16 then. Okay.

17 **THE JUDGE:** There are two issues. One is who is
18 to, who is to be his personal representative. Whether it's
19 going to be, I assume it would be one of the three of you.
20 And a, and how, what the, what the value of the estate is,
21 what the, what the property in the estate should be and how
22 that, how that property is to be distributed.

23 Okay. Do you want to, the three of you want to
24 meet and see if you can come to some resolution? Is there
25 someone else who has an interest?

1 FEMALE SPEAKER: Yes. This lady and gentleman
2 right here have a Will also.

3 THE JUDGE: Okay. Why don't all of you get
4 together then. Do you have, do you have another Will?

5 MALE SPEAKER: Just a second, I'm looking at it.

6 THE JUDGE: Okay. Anybody else got a Will?
7 Okay. Well, I don't know if this is a Will but it looks
8 like it's a more of giving them permission during his
9 lifetime to use certain items of property. He does refer to
10 another document.

11 Are you John and Sherry Hernandez? Is that--

12 FEMALE SPEAKER: (Short inaudible, no mic).

13 THE JUDGE: Okay. Did he have, did he have real
14 property in Delta? Did he own a house in Delta?

15 MS. HERNANDEZ?: Yes. We're living in it.

16 THE JUDGE: You're living in it? And did he give
17 you a deed to it?

18 MS. HERNANDEZ?: We're on the deed with Mary.

19 THE JUDGE: He owned the deed with Mary? Okay.
20 So that really isn't part of his estate. Is that correct,
21 Ms. Fenley?

22 MS. FENLEY: Correct.

23 THE JUDGE: Okay.

24 MS. PLUFF?: The Will I claim is only about his
25 pseronal possessions.

1 THE JUDGE: Okay.

2 MALE SPEAKER: Is that the will Dated December 11th

3 or--

4 THE JUDGE: Yes, December 11th.

5 MALE SPEAKER: Okay.

6 THE JUDGE: Well, what I'm going to suggest the

7 three of you meet and see if you can agree that somebody be

8 appointed, if someone can, who should be appointed as

9 personal representative. If you can't then I'll make a

10 determination and then we'll, we might discuss a possible

11 distribution of his estate too. Because they, the daughters

12 would clearly be heirs to, to his estate. Okay? Go in the,

13 go in the conference room and a, then we'll just pass your

14 case for a while.

15 (Discussion of other cases).

16 THE JUDGE: Going back to the a, the Tolle

17 estate. I asked that the parties involved go and, and try

18 to see if they could work out an agreement. Have you had any

19 success?

20 MS. PLUFF?: Yes.

21 THE JUDGE: Okay.

22 MS. PLUFF?: We decided that Christina is going to

23 be the executor.

24 THE JUDGE: Okay. So Christina Garcia.

25 MS. PLUFF?: She had to go to the bathroom.

1 THE JUDGE: Okay. Will be appointed as personal
2 representative over the estate of Mr. Tolle. And was there
3 any further agreement as to the division of the estate?

4 MS. PLUFF?: She said that once she got everything
5 situated and found out how much it was worth to sell it and
6 split it between the three of us.

7 THE JUDGE: That is your agreement, Ms. Fenley?

8 MS. FENLEY: Yes, that would be fine.

9 THE JUDGE: And that's your agreement,
10 Ms. Pluff?

11 MS. PLUFF: Yes.

12 THE JUDGE: Okay. Ms. Garcia, and it is agreed
13 indicated that you will take upon yourself the responsibility
14 of being the personal representative over your father's
15 estate. Is that correct?

16 MS. GARCIA: Yes.

17 THE JUDGE: And do you understand that includes
18 preparing an inventory of the assets of the estate and then
19 selling those assets and, and the agreement is is that you
20 divide the proceeds equally among the three of you. Is that
21 correct?

22 MS. GARCIA: Yes.

23 THE JUDGE: Okay. Thank you.

24 MS. FENLEY: Thank you.

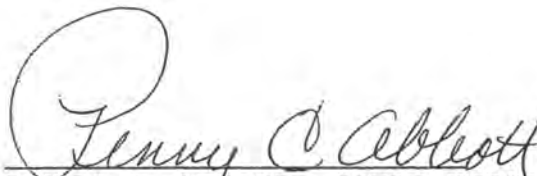
25 WHEREUPON, the hearing was concluded.

1 REPORTER'S CERTIFICATION

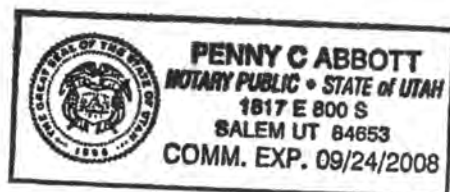
2 STATE OF UTAH)
3) SS.
4 COUNTY OF UTAH)
5

6 I, Penny C. Abbott, a Certified Shorthand Reporter and
7 Notary Public in and for the State of Utah, do hereby certify
8 that I received the electronically recorded audiotapes #1 and
9 #2 in the matter of Estate of Robert L. Tolle, hearing date
10 January 9, 2003, and that I transcribed them into typewriting
11 and that a full, true and correct transcription of said
12 hearing so recorded and transcribed is set forth in the
13 foregoing pages numbered 1 through 13, inclusive except where
14 it is indicated that the tape recording was inaudible.

15 WITNESS my hand and official seal this 1st day of April,
16 2005.

17
18 

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COPY

1 IN THE FOURTH JUDICIAL DISTRICT - MILLARD COURT
2 MILLARD COUNTY, STATE OF UTAH
3

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4 IN THE MATTER OF THE ESTATE,) PROBATE HEARING
)
5 OF ROBERT L. TOLLE.)
)
6) CASE 023700025
) FOR USE IN APPEAL 20041045-CA
7)
Defendant.) JUDGE DONALD J. EYRE
)

8

9

10 BE IT REMEMBERED that this matter came on for hearing
11 before the above-named court on December 9, 2004.

12 WHEREUPON, the parties appearing and represented by
13 counsel, the following proceedings were held:
14

15

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17 (From Electronic Recording)
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PENNY C. ABBOTT, REPORTER-TRANSCRIBER

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A-P-P-E-A-R-A-N-C-E-S

FOR FENLEY:

MARY DAGMAR FENLEY
JOHN FENLEY
1985 NORTH 360 EAST
PROVO UT 84604

FOR JEANNE TOLLE:

KENNETH PARKINSON, ESQ.
HOWARD LEWIS & PETERSEN
120 EAST 300 NORTH
PROVO UT 84603

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PAGE REF

DISCUSSION. 3

1 P-R-O-C-E-E-D-I-N-G-S

2 (December 9, 2004)

3 THE JUDGE: Okay. You may be seated. Okay.

4 We'll call the matter In the Matter of the Estate of Robert
5 L. Tolle. This is before the court on a petition for the
6 removal of personal representative for cause and for the
7 appointment of a successor personal representative. This is
8 on the petition of Jeanne Tolle. And Mr. Parkinson is here
9 representing the petitioner and the petitioner is present.

10 Is there anyone appearing, objecting to the
11 petition? Ms. Fenley?

12 MS. FENLEY: Yes.

13 THE JUDGE: And what's your basis for objection?

14 MS. FENLEY: I do not believe that Jeanne Tolle
15 should be a personal representative. She pulled out of the
16 probate at the first and because she said she couldn't sue
17 the estate and be an heir also. And as soon as Christina was
18 appointed personal representative then she sued her in
19 Florida and Christina was afraid to do anything. She hasn't
20 had a chance to really do anything on the probate because
21 that case in Florida was not settled until September 24th.
22 And I don't believe that the probate should be, have anything
23 done to it at this point. I don't believe it--

24 THE JUDGE: Well, Mr. Parkinson, I, since Jeanne
25 Tolle is the major creditor of the estate how can she serve

1 as the personal representative?

2 MR. PARKINSON: The priority for appointments
3 includes allowing any person or including a creditor.

4 THE JUDGE: It does, it does include a creditor.

5 MR. PARKINSON: It assumes that, our probate
6 system assumes that a creditor can be the personal
7 representative. She's both a creditor and has a higher
8 priority as an heir--

9 THE JUDGE: Uh-huh (affirmative).

10 MR. PARKINSON: -- in this case. And in this
11 case nothing has occurred. There isn't been a notice to
12 creditors, that's something that could have occurred with or
13 without that. We made our claim, Jeanne Tolle made her
14 claim on the estate. There's been no response to that.
15 There's been no inventory. All that's happened is that
16 Ms. Garcia came out and took some things out of his home..
17 And there has been, there's nothing in the court records that
18 shows her doing anything in this. And we understand she may
19 have been limited as to what she could do with this pending
20 problem. But she has done nothing and she's filed nothing
21 with the court objecting to this today.

22 THE JUDGE: Well, she's filed this, if you want to
23 review...

24 MR. PARKINSON: Oh, all right.

25 MS. FENLEY: Would you read it out loud, please?

1 THE JUDGE: It would be... Why don't you read it
2 out loud so that Ms. Fenley can--

3 MR. PARKINSON: All right.

4 THE JUDGE: This is a, you know I, I assume that
5 she only received this notice of probate proceedings that was
6 sent out. It doesn't really say what this is, the notice
7 doesn't really say. So I assume you've had some
8 communications with her, Ms. Fenley, because--

9 MS. FENLEY: No, I haven't for some time.

10 THE JUDGE: It appears that what she's objecting
11 to is your appointment as personal representative rather
12 than, so I don't know if she assumes that...

13 Why don't you read it out loud.

14 MR. PARKINSON: Okay.

15 Attention Honorable Judge Donald J.
16 Eyre,

17 I, Christina Aquino-Garcia, do not
18 think Mary Fenley should be able to be
19 the power of attorney for a counsel of
20 reasons.

21 Reason one, she told me that somebody
22 had stole must of his stuff from house.
23 She also took possession of everything
24 she wanted like his big Craftsman
25 toolbox, his truck and his oxygen tanks

1 and stuff, I don't remember.

2 Reason two, she told me that the houses
3 and the land is not included what is to
4 be in, in what is to be sold because she
5 put them in her name.

6 I thought you said all Wills were
7 thrown out and they were included.
8 Without the houses and the land he
9 doesn't own anything of value besides
10 three vehicles.

11 Reason three, I was recently sued for
12 his estate in the amount of \$1,700,000 in
13 Florida by his other daughter Jeanne
14 Tolle and Mary Fenley knows because I
15 told her. I also told her that nothing
16 could be touched because of it.

17 I called as soon as I found out we had
18 court but it was too late to change the
19 date because I just found out the 5th of
20 this month.

21 At the last court date I was under the
22 impression the houses and the land were
23 part of the estate that I was supposed to
24 sell. Could you straighten that out for
25 me to understand. If they are not part

1 of the estate there is nothing left from
2 what Mary Fenley told me to be power of
3 attorney over.

4 Thank you.

5 So my answer is no she should not be
6 power of attorney.

7 And then there was a page apparently before that
8 that said,

9 I, Priscilla Pluff, do not agree with
10 Mary Fenley becoming power of attorney of
11 Robert L. Tolle's estate. I want
12 Christina Aquino-Garcia to stay power of
13 attorney. I do not trust Mary. Also
14 Christina has a \$1,000,000 lawsuit
15 against her over our father's estate.

16 Thank you. Priscilla Pluff.

17 **THE JUDGE:** Well, it appears that that, just from
18 my reading of that it appears that she doesn't, didn't
19 understand that it was Jeanne Tolle that was requesting to be
20 the substitute. I guess maybe they thought it was
21 Ms. Fenley who was making that request.

22 **MS. FENLEY:** Your Honor, is it possible to
23 schedule a hearing when Christina could be advised, Priscilla
24 could be advised. And I would like a copy of those
25 letters.

1 THE JUDGE: You can get copies today.

2 MR. PARKINSON: Your Honor, if I may respond to
3 that. That's what this was and, and there was a notice under
4 the statute. She acknowledges in the letter that she hasn't
5 done anything. And we have someone with a, with priority
6 here who's willing to serve and will do the duties of the
7 personal representative, and she should be appointed.

8 MS. FENLEY: Your Honor, the only Will in
9 existence was given to me. And when we had the last hearing
10 when Christina was appointed we mediated that. And Christina
11 really hasn't had time to do anything. And as far as the
12 properties, that was discussed at that time too, the last
13 time. I don't think the probate should go ahead, anything
14 be done until my appeal goes through.

15 THE JUDGE: Well, what I'm going to do, I'm going
16 to make, I'm going to, this has been an informal probate as I
17 recall. I'm going to make this a formal probate. I'm going
18 to appoint... Clearly at this point in time Jeanne Tolle has
19 two priorities, she is a substantial creditor of the estate
20 and also she's an heir. What that means, Ms. Fenley, is
21 that Ms. Tolle, Jeanne Tolle cannot do anything without,
22 cannot sell any property or dispose of anything without
23 formal approval of the court. So a--

24 MS. FENLEY: Your Honor, what about all the things
25 that Jeanne took from the house?

1 THE JUDGE: Well, you can a file a, file any
2 pleadings that you think would be appropriate if you think
3 that she has. You a... And I'm going to direct Jeanne
4 Tolle to do those things, I'm going to direct her
5 specifically to do two things immediately, one is to give
6 notice to creditors and one is to make an inventory of the
7 estate. And, and once that inventory is, is filed,
8 Ms. Fenley, you may determine if there's things that you are
9 aware of that should be included in the estate that are not
10 there then you may a, make objection to the inventory.

11 Also, since we have you here, Ms. Fenley, I do have
12 the other case, the case of Jeanne Tolle versus you and, and
13 those other parties. Mr. Parkinson had prepared an order
14 pursuant to the Court's ruling in this case. I note that you
15 filed a one sentence objection which says "We are sorry we
16 cannot approve your order as written".

17 Is there anything specifically in that order that
18 does not conform with the, the ruling of the Court that you
19 want to make objection to?

20 MS. FENLEY: There wasn't anything in there that I
21 could not object to. If you will read it to me I will tell
22 you item by item.

23 THE JUDGE: Well that was your, that was your
24 responsibility. In my reading of it it appears to comport
25 with the decision of the Court wherein I overturned the

1 transfers that were made by a, by Mr. Tolle prior to his,
2 prior to his death which the Court found to be in violation
3 of the interest of, of her, of his creditors.

4 Is there anything specifically that you can recall
5 that Mr. Parkinson's proposed order is in opposition to the
6 ruling of the Court? I understand that you do not agree
7 with the ruling of the Court and you've filed a notice of
8 appeal. But is there anything in, in the proposed order
9 that does not comport with the, with the decision the Court
10 made?

11 MS. FENLEY: I don't remember the wording of
12 that order. But I, I don't believe anything should be done
13 with the properties until my appeal has been heard by--

14 THE JUDGE: Well all, all--

15 MS. FENLEY: -- by the other court.

16 THE JUDGE: All Mr. Parkinson's order does is that
17 it reverses the, the transfers that, the deeds that Mr. Tolle
18 made to, to you and to his brother and puts the, puts the
19 property back in the estate's name. And so it doesn't put
20 it in Ms., in Jeanne Tolle's name, it puts it in the name of
21 the estate. And I've, and I've just ordered that, that that
22 property is not to be disposed of unless there's prior court
23 order.

24 MR. FENLEY: Well, we're appealing the reversal of
25 the transfers and--

1 THE JUDGE: I understand that. But until that
2 appeal, until the court rules upon it, the Court's decision
3 stands.

4 Okay. Well, I'm going to sign the proposed
5 order—

6 MS. FENLEY: Your Honor, Your Honor.

7 THE JUDGE: Did you have something, Ms. Fenley?

8 MS. FENLEY: Okay. I just had a question.

9 THE JUDGE: Go ahead.

10 MS. FENLEY: Why was the transfer illegal when the
11 taking of the money out of the bank was not? What was the
12 difference there?

13 THE JUDGE: Well, you didn't file a counterclaim
14 or anything. That wasn't before me. It might be that it
15 was illegal but that wasn't, that wasn't the decision that
16 was before me. That wasn't what... You hadn't filed any,
17 any action against Ms. Jeanne Tolle to try to bring that back
18 into the estate.

19 MS. FENLEY: Can I do that now?

20 THE JUDGE: Well, I'm not here to give you legal
21 advice. I suggest that you consult with an attorney.

22 I'm going to sign the proposed order.

23 MS. FENLEY: Your Honor, one more question,
24 please.

25 THE JUDGE: Uh-huh (affirmative).

1 MS. FENLEY: Does that mean since it's back in
2 the estate, does that mean that she is going to be paying
3 the taxes and do the roofing and all of the stuff and
4 determine--

5 THE JUDGE: Whoever is the personal representative
6 of the estate, and I've just appointed her to be that, has
7 those obligations. Okay?

8 MR. PARKINSON: Your Honor, I have here an order
9 for removal of personal representative and appointment of
10 successor personal representative. There are a couple of
11 additional matters that you added to that, specifically
12 requiring that this is a formal probate which I agree with,
13 we need to do this at formal probate at this time. We can
14 either add that in by interlineation or I can submit a
15 supplemental order.

16 THE JUDGE: Why don't you submit a supplemental
17 one.

18 MR. PARKINSON: Okay. I'm willing to do that.

19 THE JUDGE: Okay. Anything else that needs to be
20 taken up at this time?

21 MR. PARKINSON: Nothing further.

22 THE JUDGE: Did you have anything else,
23 Ms. Fenley?

24 MS. FENLEY: If Jeanne is the personal
25 representative does that mean everything gets split five

1 ways, or she pays herself 1.7-million and then whatever is
2 left over is split among the other heirs?

3 THE JUDGE: Well, again I'm not here to give legal
4 advice and that's a matter that's not before me. Okay?
5 Okay.

6 MR. PARKINSON: Thank you, Your Honor.

7 THE JUDGE: If you want copies of those things
8 filed by the a, Ms. Garcia, you can take that file and the
9 clerk can make copies for you, Ms. Fenley.

10 MR. PARKINSON: I would like a copy as well, Your
11 Honor.

12 THE JUDGE: Okay.

13 WHEREUPON, the hearing was concluded.

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REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded tape #2 in the matter of Estate of Robert L. Tolle, hearing date December 9, 2004, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 14, inclusive except where it is indicated that the tape recording was inaudible.

WITNESS my hand and official seal this 9th day of April, 2005.

Penny C Abbott

PENNY C. ABBOTT, COURT REPORTER/NOTARY
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