

UNPUBLISHED OPINION
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

241

In re)	
)	
JACK FREDRICK NELL,)	Bankruptcy Case No. 85A-00808
)	
Debtor.)	
)	
KENNETH A. RUSHTON, Trustee,)	
)	
Plaintiff.)	
)	
vs.)	
)	
NELL INVESTMENT COMPANY, a)	
Utah limited partnership,)	
JACK FREDRICK NELL, MARION A.)	Civil Proceeding No. 86PA-0026
NELL, JAMES I. NELL, SCOTT)	
NELL, JACK CORY NELL,)	
RICHARD A. NELL, SHARRON)	
SHIPP, DAVID F. NELL,)	
DANIEL NELL, MICHELLE NELL,)	
SASHA NELL, KRISTINE SHIPP,)	
AMY SHIPP, PENNY SHIPP,)	
KASEY SHIPP, RYAN NELL,)	
JAMES NELL, and WINDI NELL,)	
individuals,)	
)	
Defendants.)	FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appearances: James M. Dunn and Michael N. Zundel, Jardine, Linebaugh, Brown & Dunn, Salt Lake City, Utah, for Kenneth A. Rushton, plaintiff-trustee; Paul N. Cotro-Manes, Salt Lake City, Utah, for defendants Nell Investment Company, Jack Fredrick Nell, Marion A. Nell, James I. Nell, Scott Nell, Jack Cory Nell, Richard A. Nell, Sharron Shipp, David F. Nell, Daniel Nell, Michelle Nell, Sasha Nell, Kristine Shipp, Amy Shipp, Penny Shipp, Kasey Shipp, Ryan Nell, James Nell, and Windi Nell.

BACKGROUND

The matter came before the Court on a complaint filed by the plaintiff, the trustee of the estate of Jack Nell, seeking a determination that certain transfers of assets to the defendants may be set aside and recovered for the benefit of the creditors of Jack Nell under §§ 544, 547, 548, and 550 of Title 11 United States Code and the Utah Uniform Fraudulent Conveyance Act § 25-1-1 et seq. Utah Code Annotated 1953, as amended. Testimony was presented on September 15 through September 19, and on October 14, 1986. The Court, having heard the testimony, examined all exhibits received into evidence, observed the candor and demeanor of the witnesses, considered the representations, arguments, and briefs of counsel, and upon its own review of the applicable statutes, rules, and case authorities, does hereby make the following Findings of Fact and Conclusions of Law as required by Bankruptcy Rule 7052. The Findings of Fact made herein may be considered conclusions of law to the extent appropriate, and the Conclusions of Law may be considered findings of fact to the extent appropriate.

FINDINGS OF FACT

1. On March 14, 1985, Jack Nell ("Nell") filed a petition for relief under chapter 7 of the United States Bankruptcy Code.

2. In the early part of 1982, Paul Cotro-Manes, Nell's attorney at that time, wrote a letter to Nell suggesting the implementation of a plan to limit federal estate tax liability. Exhibit 59(b). As part of the plan, Mr. Cotro-Manes advised Nell to do the following: First, to transfer one-half of his partnership interests in Old Ranch Place Association and in Parley's Lane Ltd. to his wife; second, to transfer his interest in any insurance policies to his wife; third, to form a limited partnership and transfer his assets into this partnership and then, to make gifts of interest in the partnership to his children. Nell and his wife would be both general and limited partners while the children would be limited partners. This arrangement was suggested in order to allow Nell to maintain control over his assets and to avoid federal estate tax liability.

3. On March 3, 1982, Nell transferred one-half of his 42 percent interest in Old Ranch Place Association fka Old Ranch Associates and one-half of his 40 percent interest in Parley's Lane Ltd. to his wife, Marion Nell.

4. On July 1, 1983, Jack and Marion Nell entered into an agreement whereby Nell agreed to transfer to his wife the proceeds from the sale of a home to Earl Townsend and cash in consideration for the interest she gave up in the The Pointe property in 1980.

5. On January 2, 1984, a limited partnership known as Nell Investment was formed. The Limited Partnership Agreement was filed with the Salt Lake County Clerk on August 10, 1984.

6. Jack Nell and Marion Nell are general partners as well as limited partners in Nell Investment.

7. The children and grandchildren of Jack and Marion Nell are limited partners in Nell Investment.

8. The children of Jack and Marion Nell are James I. Nell, Scott Nell, Jack Cory Nell, Richard A. Nell, Sharron Shipp, and David F. Nell. The grandchildren are Daniel Nell, Michelle Nell, Sasha Nell, Kristine Shipp, Amy Shipp, Penny Shipp, Kasey Shipp, Ryan Nell, James Nell, and Windi Nell.

9. All of the grandchildren are minors and were represented by their parents who appeared as their general guardians.

10. On January 3, 1984, Nell transferred the following assets to Nell Investment.

a. Residential home, 2405 Lilly Langtree, Park City (Lot 129, Prospector Park Phase III) valued at \$175,000.00. This property was encumbered by a lien valued at \$130,000.00 held by Lomas & Nettleton.

b. Building lots 236 and 239 valued at \$10,000.00.

c. Southwestern Realty Partnership valued at \$43,187.00.

d. 468,750 shares of Future Products Company valued at \$1,250.00 represented by a Future Products Stock Certificate, No. 7.

e. Twenty-one percent interest in Parley's Lane Ltd. valued at \$88,453.00.

11. On January 15, 1984, Jack and Marion Nell transferred their interest in the Faber Note and Trust Deed valued at \$38,889.00 to Nell Investment. This note arose from the sale of Jack and Marion Nell's home to Walter and Lorraine Faber on August 6, 1982. The note requires monthly payments of \$1,206.38. Between the bankruptcy filing and May 1986, the Nells received fourteen payments from Walter Faber.

12. On January 15, 1984, Nell also transferred his remaining interest in Old Ranch Place valued at \$202,000.00 and his interest in Parley's Park Ltd. valued at \$18,887.00 to Nell Investment.

13. On January 15, 1984, Nell also transferred his interest in the J&L Plastics Note and Mortgage valued at \$159,321.83 to Nell Investment. On March 31, 1986, Nell on behalf of Nell Investment compromised the note by accepting the following as complete satisfaction:

a. Lot 11, Sweetwater Park Golf Course Subdivision No. 6, as shown by the official plat of said subdivision filed April 27, 1976, as File No. F16,497 in Book Q2 at Page 798 in the Office of the Recorder of Rich County, Utah.

b. Lot 33, Sweetwater Park Omega Subdivision No. 6, as shown by the official plat of said subdivision filed January 12, 1979, as File No. F19,815 in Book D3 at Page 338 in the Office of the Recorder of Rich County, Utah.

c. Lot 48, Sweetwater Park Omega Subdivision No. 6, as shown by the official plat of said subdivision filed January 12, 1979, as File No. F19,815 in Book D3 at Page 338 in the Office of the Recorder of Rich County, Utah.

d. A commercial building lot in Davis County described as: Beginning at point 815 feet west along the section line and 383 feet north of the southeast corner of Section 4, Township 4 North, Range 1 West, Salt Lake Meridian and running north 200 feet, thence west 205 feet, thence south 200 feet, thence east 205 feet, to the point of beginning.

Together with and subject to a right of way over: beginning at a point 785.0 feet west along the section line and 583.0 feet north of the southeast corner of said Section 4, and running thence west 60.0 feet; thence south 768.6 feet, more or less, to the north line of a highway; thence south 79°58' east 60.93 feet along said highway; thence north 779.2 feet, more or less, to the point of beginning.

e. A promissory note in favor of Nell Investment Co. executed by Kenneth W. Hicks in the amount of \$17,638.59 dated March 4, 1986.

14. After Jack Nell made the January 3 and 15 transfers, he owned 5,250 and 1/100th units of interest and Marion Nell owned 1/100th unit of interest in Nell Investment.

15. On February 15, 1984, Jack Nell transferred to his children and grandchildren 5,250 units of interest in Nell Investment.

16. In April 1984, Jack Nell transferred his interest in the Townsend Real Estate Contract to Marion Nell valued at \$32,383.00. The contract called for monthly payments in the amount of \$306.44 and between the time of filing this bankruptcy and May 1986, Earl Townsend has made twelve payments to the Nells.

17. On May 15, 1984, Jack Nell transferred 500 shares of International Metals to Nell Investment having no value.

18. On August 8, 1984, Nell transferred \$50,000.00 from a Capital City Bank checking account to an E.F. Hutton account for Nell Investment. The Capital City account was originally opened in Marion Nell's name on April 10, 1978. This account was revised on November 28, 1984 to include her husband's name. Although Jack Nell was not a signator on the account until November 1984, Capital City issued checks in his name and he wrote checks against this account.

19. Marion Nell has withdrawn approximately \$700.00 to \$800.00 a month from Nell Investment's E.F. Hutton account for monthly household expenses.

20. On September 12, 1984, Jack Nell transferred to Marion Nell a New York Life Insurance Policy, No. 34274696, valued at \$9,346.00.

21. In October 1984, Nell Investment sold the home located at 2405 Lilly Langtree, Park City, Utah to John Phelps.

22. On December 18, 1984, Jack Nell transferred to Marion Nell a second New York Life Insurance Policy, No. 37853126, valued at \$33,809.00.

23. On April 8, 1985, Jack Nell transferred title to a 1981 280Z Datsun to Richard and Jana Nell without consideration.

24. The transfers of Nell's interest in Old Ranch Place to Marion Nell and Nell Investment came to the attention of the other partners sometime in March 1985. On May 22, 1985, the partnership agreement of Old Ranch Place was amended to reflect these transfers.

25. The transfers of Nell's interest in Parley's Lane to Marion Nell and Nell Investment came to the attention of the partners sometime in March 1985. Thereafter, the partners consented to these transfers and on May 22, 1985 the partnership agreement was amended to reflect the transfers.

26. The financial statement of Jack Nell dated January 30, 1984 included as assets his 42 percent interest in Old Ranch Place, his 40 percent interest in Parley's Lane, and a 1981 280Z Datsun.

27. The transfer of Nell's interest in Parley's Park to Nell Investment has been consented to by the partners. However, the consent document is undated. The partnership agreement has yet to be amended to reflect this transfer and the 1985 tax returns indicate that Jack Nell is still the owner.

28. Consent to the transfer of Nell's interest in Southwestern Realty was obtained from the partnership in May 1984.

29. The 1985 K-1 schedules for Parley's Lane Ltd. did not reflect any interest held by Marion in the partnership.

30. The deed transferring Nell's home to Nell Investment was recorded on November 16, 1984.

31. The deeds transferring building lots 236 and 239 were recorded on November 16, 1984.

32. The January 15, 1984 transfer of Jack and Marion Nell's interest in the Faber Trust Deed Note to Nell Investment was evidenced only by a document entitled Assignment of Trust Deed Note, which was never recorded.

33. The January 15, 1984 transfer of Nell's interest in the J&L Plastics Note and Mortgage to Nell Investment was recorded on March 31, 1986.

34. The April 1984 transfer of the Townsend Real Estate Contract has not been recorded.

35. Jack Nell transferred to Nell Investment those assets that had substantial value and kept those assets with little or no value.

36. Maintaining control over the assets that Jack Nell transferred to Nell Investment was the purpose for creating the partnership.

37. Since the creation of Nell Investment, Jack Nell has exercised exclusive control over the assets.

38. The children knew nothing about Nell Investment until sometime in December 1985 or January 1986 when Nell held a family meeting to discuss the partnership. Even following the meeting, the children knew very little about Nell Investment.

39. The children did not expect to receive anything from the partnership and would return the units of participation to Nell at no charge if asked to do so. They gave no consideration for their partnership interests.

40. Jack Nell received no consideration from Nell Investment for the transferred assets.

41. Marion Nell knew of no gift given to her over \$10,000.00, except for a piano.

42. Marion Nell knew of no interest she has in any life insurance policies.

43. In 1981, the following parties had filed lawsuits against Jack Nell, claiming damages in the indicated amounts:

- a. Quality Oil & Tire Corp. (\$9,350.04)
- b. Eagle Motor Lines (\$657,442.00)

44. In 1982, the following parties had filed lawsuits against Jack Nell, claiming damages in the indicated amounts:

- a. Citizens Bank (\$1,015.97)
- b. Mountain States Telephone (\$2,928.94)
- c. American KL (\$3,845.63)
- d. First National Bank of Denver (\$1,400,000.00)

e. Commercial Union Insurance Co. (\$72,796.49)

f. Financial Collection Agency (\$23,198.60)

45. In 1983, the following parties had filed lawsuits against Jack Nell, claiming damages in the indicated amounts:

a. Diners Club (\$6,942.24)

b. First Security Financial (\$10,959.38)

c. Utah First Bank (\$48,003.92)

d. FB Trucking (\$26,883.15)

e. Edwin A. Mickel/F-B Trucking (\$1,007,500.00)

46. In his bankruptcy schedules, Nell has claimed a New York Insurance Policy, No. 37853126, valued at \$33,809.00 as exempt under § 78-73-1 et seq. Utah Code Annotated.

DISCUSSION

Fraudulent Conveyances

The Bankruptcy Code gives the trustee in bankruptcy the power to avoid transfers of interest or obligations incurred by the debtor who has filed for bankruptcy. The purpose of this power of avoidance is to rehabilitate the bankruptcy estate, ensure an equal distribution of assets, and ensure equal treatment for creditors.

The fraudulent conveyance may be defined "as an infringement of the creditor's rights to realize upon the available assets of his debtor." G. Glenn, The Law of Fraudulent Conveyance, § 1 (1931).

Two types of fraudulent transfers exist. First, those which are actually fraudulent, made with the actual intent to hinder, delay, or defraud creditors. Second, those which are constructively fraudulent, made without actual intent, but deemed by other factors to be unfair to creditors.

In bankruptcy, the trustee has two different mechanisms for avoiding fraudulent transfers under the Bankruptcy Code, section 548(a) and section 544(b).

I. 11 U.S.C. § 548(a)

11 U.S.C. § 548(a) provides:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

Under this section, for a fraudulent conveyance to be subject to the trustee's avoiding power, the transfer must have been made within one year of the bankruptcy filing.

"Transfer" is broadly defined by the Code for purposes of section 548(a) to mean "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." See section 101(50).

The one year requirement of this section must also be read together with section 548(a)(1), which specifies when a transfer will be deemed to have been made. This section provides:

For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not

so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

The purpose behind section 548(d)(1) is to prevent fraudulent transfers from becoming impregnable to attack by keeping them secret until the limitation period has lapsed. 4 Collier on Bankruptcy ¶ 548.08, 548-92 (15th ed. 1986). This provision embraces every method of making a transaction good against a bona fide purchaser under applicable state law. Id.

Under section 548, a transfer is vulnerable to attack when the actual date is within one year of the bankruptcy filing; the actual date is outside the one year period, but perfection occurs within one year of the filing; or the actual date is outside the one year period, and perfection never occurs. Such transfers are deemed made immediately before the bankruptcy filing. Section 548(d).

In the present case, the actual dates of the transfers that occurred within one year of Jack Nell's bankruptcy filing consist of the Townsend Real Estate Contract, 500 shares of International Metals stock, \$50,000.00, and two New York insurance policies.

The actual dates of the remainder of transfers sought to be avoided in this case fall outside the one year reach back period, but are deemed under § 548(d)(1) to have been made within one year of the filing because they were either perfected within one year or unperfected at the time of the bankruptcy filing.

Transfers of Partnership Interests

Every partner is an agent of the partnership for the purposes of its business, and the act of every partner for apparently carrying on the partnership business, binds the partnership unless the partner so acting has no authority to act for the partnership. An unauthorized act, however, can be ratified so that it is treated as though it had been authorized from the outset. All rights and liabilities will be considered to relate back to the date of the original unauthorized act. R.S.2d Agency § 100 (1958). Ratification will not relate back where this would prejudice innocent third parties who have acquired rights in the transaction in the interim. Id.

In this case, the partnership agreements of Old Ranch Place and Parley's Lane required the consent of the partners before a partnership interest could be transferred. Nell did not obtain consent to his transfer of his partnership interests to Marion Nell and Nell Investment until April or May of 1985. Therefore, these transfers will be deemed to have been made immediately before the bankruptcy filing.

Concerning the transfer of the Southwestern Realty partnership interest, the partnership consented to the transfer to Nell Investment in May 1984. Therefore, perfection occurred within one year of the filing.

With respect to the Parley's Park transfer, Nell obtained the proper consent, although the consent document is undated. Nevertheless, the fact that the 1985 partnership tax returns indicate that Jack Nell (not Nell Investment) is the owner supports the conclusion that consent must have occurred sometime after 1985. Therefore, the Court concludes that this transfer is also avoidable under section 548(a).

Transfers of Notes and Mortgage

Perfection of the assignment of a note and mortgage given as security is accomplished in one of two ways according to commentators and case law.

On the one hand, several courts have required possession of the note only to perfect, it being unnecessary either to record the assignment of mortgage in the local real estate records or to file a financing statement under the Uniform Commercial Code. United States v. Goldberg, 362 F.2d 575 (3rd Cir. 1966), cert denied, 386 U.S. 919 (1967); In re Kennedy Mortgage Co., 17 B.R. 957 (Bkrtcy. D.N.Y. 1982). On the other hand, other courts have required both possession of the note and recording of the mortgage assignment in the real estate records. Rucker v. State Exchange Bank, 355 So.2d 171 (Fla. App. 1978); Second National Bank of New Haven v. Dyer, 121 Conn. 1268, 184 A. 386 (1936).

Although the transfers of Nell's interest in the Faber Note and Trust Deed and the J&L Plastics Note and Mortgage to Nell Investment were not given as security, the Court believes that under the circumstances of this case, recording in the real estate records would have been necessary to perfect against good faith purchasers. These transfers to Nell Investment were to an entity over which Nell maintained exclusive control. For practical purposes, possession of the J&L Plastics Note and Faber Note never changed. Notice to bona fide purchasers could only have been accomplished by recording in the real estate records. As of the date of this bankruptcy filing, nothing had been recorded. Therefore, these transfers are deemed to have been made immediately before the filing.

Transfers of Real Property

Section 57-3-9, Utah Code Ann. (1953), provides that a transfer of real property is perfected against a bona fide purchaser upon the recording of the transfer in the local real estate records. The transfers of Nell's home and lots 236 and 239 to Nell Investment were not recorded until November 16, 1984.

Transfer of Stock

Perfection of a transfer of a security against a bona fide purchaser is accomplished by placing subsequent purchasers on notice of any adverse claims against the security. Section 70A-8-304, Utah Code Ann. (1953) provides:

(1) A purchaser (including a broker for the seller or buyer but excluding an intermediary bank) of a security is charged with notice of adverse claims if

(a) the security whether in bearer or registered form has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or

(b) the security is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor. The mere writing of a name on a security is not such a statement.

(2) The fact that the purchaser (including a broker for the seller or buyer) has notice that the security is held for a third person or is registered in the name of or indorsed by a fiduciary does not create a duty of inquiry into the rightfulness of the transfer or constitute notice of adverse claims. If, however, the purchaser (excluding an intermediary bank) has knowledge that the proceeds are being used or that the transaction is for the individual benefit of the fiduciary or otherwise in breach of duty, the purchaser is charged with notice of adverse claims.

There is no dispute that the Future Products Stock Certificate of 468,750 shares transferred to Nell Investment is a security in registered form. Furthermore, the security has not been indorsed in accordance with section 70A-8-304(1)(a). Although Nell executed a document transferring his interest in

these shares, this document was not attached to the Stock Certificate. The Court therefore concludes that this transfer is deemed to have been made immediately before the bankruptcy filing.

II. 11 U.S.C. § 548(a)(1)

Once it has been established that the transfers that the trustee seeks to avoid fall within the one year limitation period of section 548(a), as defined by section 548(d), the next step is to examine the substantive grounds for avoiding transfers as fraudulent conveyances under section 548(a).

Subsection (1) of this section deals with transfers that are actually fraudulent, made with the intent to hinder, delay, or defraud creditors. The elements of this subsection are disjunctive.

The trustee has the burden of proving by clear and convincing evidence the actual fraud. The existence of actual intent is a question of fact. Rarely will a debtor accused of a fraudulent transfer disclose his fraudulent intent in a way capable of direct proof. However, direct evidence of fraudulent intent is not required since parties will be deemed to have intended the natural consequences of their acts. United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3rd Cir. 1986).

The finding of the requisite intent may be based on the occurrence of facts which, while not direct evidence of actual intent, lead to the conclusion that the purpose of the transfer was fraudulent. Although there can be no definitive formulation of the circumstances under which the transfer may be attacked under Section 548(a)(1), circumstances that courts have been willing to infer fraud, commonly referred to as the badges of fraud, include: (1) the debtor conveys all of his property; (2) the debtor continues in possession of the property and deals with it as his own; (3) the debtor transfers his property during the pendency of an action against him; (4) the transfer is kept secret; (5) the transferee takes the property in trust for the debtor; (6) the instrument of conveyance contains suspicious recitals of good faith; (7) the transfer is made to a closely-held entity; or (8) the transfer is made to a family member without receiving fair consideration.

Although the burden of proof never shifts, the burden of going forward with the evidence to rebut a prima facie case may shift. The proof of a badge of fraud establishes the trustee's prima facie case under section 548(a)(1) and shifts the burden of persuasion to the debtor to establish the absence of fraudulent intent. In re Butcher, 51 B.R. 61 (Bkrtcy. E.D. Tenn. 1985).

In the present case, a number of badges of fraud are present. First, Nell transferred nearly all of his assets to either his wife or Nell Investment. Second, Nell was a general partner of Nell Investment, which was created so that Nell, although no longer the owner, could maintain control over his assets. Nell's children were unaware of the activities of Nell Investment and considered the assets of the partnership to be their father's and would have returned their units of participation in Nell Investment, if asked by their father to do so. Third, numerous lawsuits had been filed against Jack Nell during the period in which he transferred his assets to his wife and Nell Investment. Fourth, Nell did not consider his transfers to his wife significant because, as he testified: "What's hers is mine and what's mine is hers." Finally, Nell did not follow the customary methods of making public his transfers to Marion Nell and Nell Investment. Even after he transferred one-half of his interest in Old Ranch Place and Parley's Lane to his wife and the other half to Nell Investment, Nell's financial statement as of January 30, 1984 indicated that he owned a 42 percent interest in Old Ranch Place and a 40 percent interest in Parley's Lane.

III. 11 U.S.C. § 548(c)

Section 548(c) provides an exception to the avoidance of fraudulent transfers in favor of a transferee or obligee that takes for value in good faith.

Concerning the transfers by Nell to Nell Investment, good faith could not have possibly been present. Nell transferred his assets to an entity he exclusively controlled. For practical purposes, Nell was the transferee of his fraudulent scheme.

Concerning the transfers to Marion Nell, the Court accepts her testimony that she had no knowledge of her husband's business dealings nor his financial affairs. However, she gave no consideration. The transfer of the Townsend Contract was not in satisfaction of an antecedent debt because the agreement entered into by Nell to transfer this asset to Marion Nell was not supported by consideration. Although Marion Nell did relinquish her interest in the The Pointe property, Nell did not promise her anything in exchange. Only sometime later, did Nell enter into an agreement to offset his wife's loss.

Accordingly, Nell Investment and Marion Nell are unable to avail themselves of the protection of section 548(c).

IV. 11 U.S.C. § 544(b)

Section 544(b) provides the trustee with a second mechanism in which to avoid fraudulent transfers. This section authorizes a trustee to avoid any transfer made or obligation incurred by a debtor that could be avoided under applicable nonbankruptcy law by a creditor (1) existing on the date of bankruptcy and (2) holding an allowed unsecured claim under section 502. The trustee has no independent power of avoidance, but may act only

upon the rights of at least one unsecured creditor holding an allowable claim against whom the transfer or obligation was invalid under nonbankruptcy law. However, the trustee is not limited to the amount of the creditor's claim. If the transaction is subject to avoidance by an actual creditor, the entire transaction is avoided and the recovery is for the benefit of all unsecured creditors.

Section 25-1-7, Utah Code Ann. (1953), of the Utah Fraudulent Conveyance Act provides:

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

A similar provision is found in section 548(a)(1) of the Bankruptcy Code.

Reliance by the trustee upon nonbankruptcy law, instead of ~~section 548(a)(1), is because there is generally a longer~~ reachback period.

In Utah, the statute of limitations in fraud actions is commenced at any time within three years after the discovery by an aggrieved party of the facts constituting the fraud. Utah Code Ann. § 78-12-26(3) (1953). "[D]iscovery occurs when the facts arise which would put a reasonable prudent person on notice to inquire into the matter. Additionally, if no inquiry is made,

one is held to have discovered all that would have been revealed if reasonable inquiry had been made." Haslem v. Ottosen, 689 P.2d 27, 30 (Utah 1984).

In contrast to section 548, the actual date of the transfer is determinative under the Utah Fraudulent Conveyance Act.

In the present case, no question exists that Utah Firstbank has an allowable claim under section 502. The critical question is whether Utah Firstbank could have assailed the transfers by Nell were it not for the intervention of bankruptcy. This action to set aside the transfers made by Nell was commenced on January 21, 1986. The transfers occurring after January 21, 1983 clearly fall within the three year limitation period of section 78-12-26(3). As to the March 1982 transfers, the facts associated with these transfers would have made discovery impossible at least until Nell had informed the partners in May of 1985 of his transfers to Marion Nell. Therefore, the Court finds that the March 1982 transfers also fall within the three year limitation period.

As with section 548(a)(1) of the Code, the badges of fraud are equally applicable to a finding of actual fraud under section 25-1-7. Consequently, based upon the finding of fraud under section 548(a)(1), the Court also finds that the transfers sought to be avoided by the trustee are avoidable under section 25-1-7.

Furthermore, like section 548(c), section 25-1-13 Utah Code Ann. (1953), protects a bona fide purchaser from the fraudulent activities of the seller. However, as noted previously, neither Nell Investment nor Marion Nell bear the status of a bona fide purchaser.

V. 11 U.S.C. § 550(a)

Section 550(a) authorizes the trustee to recover property or if the Court so orders, its value, that is the subject of a voidable transfer under sections 544, 547, 548, 549 and 553(b), among others.

Recovery may be from the initial transferee or the entity for whose benefit the transfer was made. Alternatively, recovery may be from any subsequent transferee. However, no recovery can be made from a subsequent transferee that took for value in good faith and without knowledge of the voidability of the initial transfer.

In any event, the trustee is entitled to only a single satisfaction. The value to be recovered is the market value of the property at the time of the avoided transfer, less valid liens senior to the estate's interest. See Still v. Hudson (In re Hudson), 28 B.R. 876 (Bkrtcy. E.D. Tenn. 1983); Reiber v. Baker (In re Baker), 17 B.R. 392, 395 (Bkrtcy. W.D. N.Y. 1982).

In this case, the trustee seeks to recover the transfers made by Jack Nell to his wife, Marion Nell, and to Nell Investment, both initial transferees. As previously discussed, these transferees cannot avail themselves of any of the defenses under section 550 nor under sections 544 and 548.

VI. 11 U.S.C. § 522(g)

Section 522(g) provides that the debtor is not entitled to claim as exempt property which he knowingly concealed and failed to disclose even though it would normally have been exempt had it been properly scheduled and claimed.

In this case, the only asset transferred by Jack Nell in which he claims as exempt is a New York Life Policy, No. 3785316. No doubt exists that Nell voluntarily transferred this policy to his wife. However, Nell also listed this asset on his schedules and therefore, the second element of section 522(g) is not satisfied.

Rule 4003(b), Rules of Practice and Procedure in Bankruptcy, requires the trustee or any creditor to file objections to the property claimed exempt by the debtor within thirty days of the first meeting of creditors. To the extent that the trustee did not comply with this rule, he is prevented from objecting to the property claimed exempt by Jack Nell and the exempt property is deemed exempted.

Therefore, the dividend and loan value claimed by Jack Nell as to the New York Policy, No. 3785316, is exempt because of the trustee's failure to timely object to the exemption. As to the validity of the other exemptions claimed by Jack Nell, the Court makes no ruling.

CONCLUSIONS OF LAW

1. The March 3, 1982 transfer of one-half of Jack Nell's 42 percent interest in Old Ranch Place Association and of one-half of Jack Nell's 40 percent interest in Parley's Lane Ltd. to Marion Nell were fraudulent transfers within the meaning of sections 548 and 544. The trustee shall have a judgment against Marion Nell for the recovery of these assets.

2. The January 3, 1984 transfers of the residential home, 2405 Lilly Langtree, Park City, Utah; of building lots 236 and 239; of the Southwestern Realty Partnership; of 468,750 shares of Future Products Company stock; and of Nell's remaining interest in Parley's Lane Ltd. to Nell Investments were fraudulent transfers within the meaning of sections 548 and 544. The trustee shall have a judgment against Nell Investment making the transfers null and void.

3. The trustee shall have a judgment against Nell Investment in the amount of \$36,831.35, which represents the equity in the Park City property.

4. As to the transfer of Southwestern Realty Partnership to Nell Investment and subsequent sale to Westco Realty, the trustee shall also have a judgment against Nell Investment in the amount of \$7,985.88, which represents the fourteen cash payments received from the sale to Westco.

5. The January 15, 1984 transfers of the Faber Note and Trust Deed, of Nell's remaining interest in Old Ranch Place, of Nell's interest in Parley's Park Ltd., and of the J&L Plastics Note and Mortgage are fraudulent conveyances within the meaning of sections 544 and 548. The trustee shall have a judgment against Nell Investment making the transfers null and void.

6. As to the transfer of the Faber Note and Trust Deed, the trustee shall also receive a judgment against Nell Investment in the amount of \$8,444.66, which represents the value of Nell's interest in the fourteen payments received by Nell Investment since the transfer.

7. As to the transfer of the J&L Plastics Note and Mortgage to Nell Investment, the trustee will also receive a judgment against Nell Investment in the amount of \$55,683.24, which represents the value lost in the compromise of the Note and Mortgage.

8. The April 1984 transfer of the Townsend Real Estate Contract to Marion Nell is a fraudulent transfer within the meaning of sections 548 and 544. The trustee shall have a

judgment against Marion Nell making the transfer null and void. The trustee shall also have a judgment against Marion Nell in the amount of \$4,290.16, which represents the number of payments received by Marion Nell since the transfer.

9. The May 15, 1984 transfer of 500 shares of International Metals stock to Nell Investment was fraudulent within the meaning of sections 544 and 548. The trustee shall receive a judgment against Nell Investment making the transfer null and void.

10. The August 8, 1984 transfer of \$50,000.00 to Nell Investment was a fraudulent transfer within the meaning of sections 548 and 544. The trustee shall receive a judgment against Nell Investment and Marion Nell in the amount of \$50,000.00.

11. The September 12, 1984 transfer of New York Policy, No. 3765370, to Marion Nell was fraudulent within the meaning of sections 544 and 548. The trustee shall receive a judgment against Marion Nell making the transfer null and void.

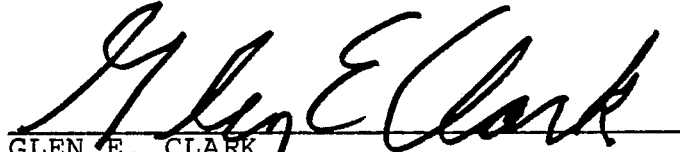
12. The December 18, 1984 transfer of New York Policy, No. 3785316, to Marion Nell was fraudulent within the meaning of sections 548 and 544. The trustee shall receive a judgment against Marion Nell making the transfer null and void. However, Jack Nell is entitled to the value in the policy he claimed exempt.

13. To the extent that payments are being withheld under the Faber Note and Trust Deed, the Townsend Real Estate Contract, and the Hick's Note, they should be turned over to the trustee.

14. The rate of interest on the money judgment entered herein shall be the rate of interest under 28 U.S.C. § 1961.

DATED this 16 day of November, 1987.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Glen E. Clark", is written over a horizontal line.

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE