

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**Transmittal Sheet for Opinions**

**Will this opinion be published? No**

**Bankruptcy Caption: In re Charles F. Chevie**

Bankruptcy No. 99 B 06542

**Adversary Caption: RICHARD M. FOGEL v. RHODA CHEVRIE**

Adversary No. 00 A 00038

**Date of Issuance: February 13, 2001**

**Judge: Susan Pierson Sonderby**

**Appearance of Counsel:**

Attorney for Movant or Plaintiff: Fred R. Harbecke and Bruce M. Bozich

Attorney for Respondent or Defendant: Joseph Korn

Trustee or Other Attorneys:

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)
	) Chapter 7
CHARLES F. CHEVRIE,	)
	) Case No. 99 B 6542
Debtor.	)
_____	)
	)
RICHARD M. FOGEL, Trustee,	) Honorable Susan Pierson Sonderby
	)
Plaintiff,	) Adv. No. 00 A 38
	)
v.	)
	)
RHODA CHEVRIE,	)
	)
Defendant.	)
_____	)

**CERTIFICATE OF MAILING**

I hereby certify that I caused to be mailed copies of the attached **FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER** to the persons listed on the attached service list this 13<sup>th</sup> day of February, 2001.

\_\_\_\_\_  
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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
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In re:	)	
	)	Chapter 7
CHARLES F. CHEVRIE,	)	
	)	No. 99 B 6542
Debtor.	)	
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RICHARD M. FOGEL, Trustee,	)	Honorable Susan Pierson Sonderby
	)	
Plaintiff,	)	Adv. No. 00 A 38
	)	
v.	)	
	)	
RHODA CHEVRIE,	)	
	)	
Defendant.	)	
_____	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On October 4, 2000, this Court held a trial on Trustee Richard M. Fogel’s complaint to avoid fraudulent transfers. After taking evidence and hearing oral arguments on December 14, 2000, the Court enters its findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. In this adversary proceeding, the Trustee seeks to recover a number of alleged fraudulent transfers made by Debtor Charles F. Chevrie (the “Debtor”) to his former wife, Defendant Rhoda Chevrie (“Rhoda”).
2. During the course of their marriage, the Debtor and Rhoda (collectively, the “Chevries”) constructed a marital residence, and Rhoda purchased two residential properties which were used as rental properties. All three residences were awarded to Rhoda under the terms of the Chevries’ marital settlement agreement.

3. The principal question for resolution is whether title to the real estate was placed in Rhoda's name, so as to hinder, delay or defraud the Debtor's creditors.
4. The Chevries were married in August 1993 and divorced in February 1999. There were no children born of the marriage.

Evidence Regarding the Chevries' Financial Resources

5. Rhoda has worked as a hair stylist for the last six years. Before that, she worked as a cashier in a hotel and as a nanny. According to her tax returns and testimony, Rhoda earned wages of \$20,000 or less per year at all times relevant to this dispute.
6. The Debtor is a mortgage loan officer who earned wages or commissions of approximately \$140,000 in 1998. The Debtor earned a comparable amount in 1999, although no tax return for that year was entered into evidence at trial.
7. The Chevries' joint income tax returns indicate that the Debtor earned considerably less in years 1995 through 1997. Returns show that the Chevries earned combined wages of \$9,218.00, \$14,720.00 and \$48,229.00 in those years.
8. For three years before working as a mortgage loan officer, the Debtor was engaged in the construction of residential homes. Around the time of his marriage, the Debtor was sole shareholder of a real estate development corporation that purchased real property in Union Pier, Michigan. In addition, the Debtor owned an interest in a commercial property in San Diego, California.
9. Rhoda testified at trial that she had \$70,000.00 in a bank account at the time of the marriage, and that in the years that followed, that amount grew to \$100,000.00. According to Rhoda, the funds in the account came from earnings from employment, and from cash delivered to her as gifts and loans by friends and relatives from the

Philippine Islands. Rhoda stated that when cash was given to her, it was always in amounts less than \$10,000.00. Rhoda has no bank statements or loan documents to support her allegations concerning the existence of loans or the balance in her bank account at the time of her marriage to the Debtor.

10. When asked how he negotiated his paychecks in 1997 and 1998, the Debtor stated that normally he cashed his checks when he received them, and that he had not maintained a bank account. Before the divorce, the Debtor gave Rhoda money for expenses, including mortgage payments.
11. At the time of her marriage to the Debtor, Rhoda owned no interests in real property.

#### Real Estate Transactions

12. In December 1993, Rhoda acquired the Debtor's one-sixth interest in a commercial property located at 1127-33 W. Morena Boulevard in San Diego, California. The Debtor had purchased that property several years earlier for \$10,000.00. At trial, the Debtor and Rhoda testified that she paid the Debtor \$15,000.00 in cash for the San Diego property. Rhoda did not know the value of the property in 1993, although she had been told that there had been a recession. The Debtor testified that the property was not marketable and that there were numerous vacant properties in the area at the time of the sale.
13. In or around 1994, Rhoda acquired the Union Pier, Michigan property owned by the Debtor's corporation. The terms of the parties' agreement were that Rhoda would pay \$15,000 in cash, and that she would assume the mortgage on the property. The Debtor estimates that at the time of the transaction, the property had a value of approximately \$70,000.00 or \$75,000.00. Rhoda did not know what the value of the Michigan

property was in 1994.

14. According to the Debtor, Rhoda made monthly payments of \$350.00 to \$400.00 on the mortgage on the Michigan property, although she never formally assumed the mortgage. Both the Debtor and Rhoda also testified that Rhoda paid for several improvements to the property. After the Michigan property was sold for \$85,000.00 in 1995, the proceeds were deposited in Rhoda's bank account.
15. The parties stipulated in their pretrial statement that the Debtor<sup>1</sup> transferred the Michigan property to Rhoda in order to enable her to purchase a lot at 6105 Timber Ridge Court in Indian Head Park, Illinois. On or about February 28, 1996, Rhoda purchased the Indian Head Park lot for \$79,000.00. The Debtor testified at trial that the Chevries' intention was that Rhoda, who had begun a wholly owned home remodeling business, would begin by constructing a home on the lot.
16. The Debtor acted as general contractor with respect to the residence that was constructed on the Indian Head Park lot, but he received no compensation for his services. The residence constructed on the Indian Head Park lot would later become the Debtor's and Rhoda's marital residence.
17. To finance construction of the home on the Indian Head Park lot, Rhoda and the Debtor procured a construction loan of \$200,000.00 or more. Although Rhoda testified that she was the sole borrower, and that the construction loan was a "no income verification" loan, the Debtor testified more credibly that both he and Rhoda

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Although the Debtor testified that his corporation owned the Michigan property, in their pretrial statement and at trial, the parties described the transfer as having been made directly from the Debtor to Rhoda.

were named as borrowers on the loan.

18. Payments on the construction loan were made with funds drawn on Rhoda's bank account.
19. On or about August 22, 1996, Rhoda tendered \$52,490.55 as a down payment to purchase a residence at 5701 Grant Street in Hinsdale, Illinois. Rhoda was also named as borrower on a \$165,000.00 mortgage loan that financed the remainder of the \$220,000.00 purchase price. The cash for the down payment came from the Debtor's § 401(k) retirement account. According to the Debtor, the retirement account represented his only source of funds at the time. Both the Debtor and Rhoda testified that the money for the down payment was a gift made in fulfillment of a promise that the Debtor would buy Rhoda a house.
20. The Debtor and Rhoda used the Hinsdale property as a marital residence from August 1996 until some point in 1998. The Debtor maintains that he did not take title to the property because his credit was terrible.
21. On or about May 8, 1998, Rhoda refinanced the residence in Indian Head Park by procuring a loan in the amount of \$325,000.00. At the closing on the loan, Rhoda received cash proceeds of \$118,980.09.
22. Rhoda used a portion of the proceeds from the Indian Head Park loan to purchase a residence at 73 Norfolk in Clarendon Hills, Illinois. Rhoda tendered cash of \$49,738.69 and she assumed a mortgage loan obligation of \$168,700.00 when the Clarendon Hills sale closed on or about July 13, 1998. The Debtor testified that because of his poor credit, the lender would not have granted a mortgage on which he was a co-signer.



23. On or about September 17, 1999, Rhoda sold the Clarendon Hills property for \$255,000.00. Of that amount, she received proceeds of \$65,567.72.
24. Rhoda testified that between May 1998 and June 1999, she made wire transfers to the Philippine Islands totaling \$56,700.00. A remittance receipt indicates that Rhoda wired an additional \$50,000.00 to the Philippine Islands on September 27, 1999.

### The Chevries' Divorce

25. On or about January 20, 1999, the Debtor filed a divorce proceeding in the Circuit Court of Cook County, Illinois (the "State Court"). The Debtor was represented by counsel in the divorce proceeding, but Rhoda appeared pro se.
26. On February 2, 1999, about two weeks after the divorce petition was filed, the State Court held a prove-up and entered a judgment for dissolution of marriage.
27. The divorce proceeding was filed around the time that creditor Rosemary Benson ("Benson") brought supplementary proceedings to collect a judgment of \$80,000.00 against the Debtor.
28. The judgment for dissolution incorporated a marital settlement agreement that provided for a waiver of maintenance and support by both parties and a division of certain personal property. In addition, Rhoda waived any rights to the Debtor's retirement benefits, and he waived any right to the Indian Head Park, Hinsdale, Clarendon Hills and San Diego properties. Rhoda was to remain president and sole shareholder of Jaleco Construction Company, and the Debtor was to resign from any position held in the company.
29. Article III, paragraph 4 of the marital settlement agreement commences with an acknowledgment by the parties that "at one time they jointly owned" the four real properties awarded to Rhoda under the judgment for dissolution.
30. Michael Roberts ("Roberts"), the Debtor's divorce attorney, did not meet or speak with Rhoda before the prove-up. Roberts' impression was that the Debtor and Rhoda had already substantially agreed to the terms of the marital settlement before the Debtor approached him about the divorce in the fall of 1998.

31. Rhoda met Roberts once, at the prove-up. She did not speak to Roberts before then or hire her own attorney. According to Rhoda, she saw no need to discuss the property settlement because all the property was under her name. Rhoda did not know the value of the properties awarded to her in the marital settlement agreement.
32. At trial, Roberts was unable to remember the precise nature of some of his conversations with the Debtor. However, Roberts believed that they had discussed maintenance. Roberts' understanding was that Rhoda's primary source of support was Jaleco Construction, and that most properties were in Rhoda's name because she did not earn as much money as did the Debtor. Although the marital settlement agreement does not enumerate debts, Roberts and the Debtor would have discussed the amount of the debts the Debtor would assume. Roberts did not get the impression that the Debtor was insolvent, and he was unaware of any supplementary proceedings against the Debtor, or of any imminent bankruptcy filing.
33. Roberts knew that the real properties had already been conveyed to Rhoda. However, to avoid difficulties if any question as to title arose, Roberts inserted language in the settlement waiving the Debtor's rights to the realty. Since Rhoda was to receive all the properties, Roberts did not discuss with the Debtor whether particular properties were marital or non-marital property.
34. To Roberts' recollection, there was no testimony at the prove-up regarding the value of the assets conveyed or the amount of liabilities assumed as a result of the judgment for dissolution.
35. The Chevries' divorce was an amicable one. The Debtor and Rhoda have remained friends. After the divorce, the Debtor continued to live in the marital residence for

approximately a year, paying rent of \$1,500.00 per month to Rhoda. According to the Debtor, their arrangement was that he would pay Rhoda rent until she could sell the house.

#### The Debtor's Bankruptcy

36. On March 2, 1999, the Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code").
37. The bankruptcy schedules indicated that the Debtor owned no real estate. The schedules included personal property valued at \$92,170.00, comprised primarily of exempt retirement funds of \$57,500.00, and a 1999 Infiniti automobile valued at \$32,500.00. Per the schedules, the Debtor had cash on hand of \$20.00, but no bank accounts. The Debtor's statement of intention under Code § 521 indicated that he would reaffirm the automobile loan secured by the Infiniti.
38. The Debtor's statement of financial affairs indicated that he was plaintiff in a contract collection lawsuit, and that the cause of action had been assigned to Rhoda "pursuant to their divorce, as she put up all the money for the business . . ." The Debtor's schedules of current income and expenditures indicated that his monthly net income of \$3,360.00 exceeded his monthly expenditures of \$2,615.00.
39. The Debtor's schedules disclosed total debts of \$116,300.00. Of the six debts on the schedules, three were in the amount of \$500.00 or less. A debt of \$27,500.00 owed to American Express Travel Related Services ("American Express") and another obligation of \$7,500.00 for building supplies were described as having been incurred in a small business during 1991 and 1992. The remaining obligation on the schedules was a debt of \$80,000.00 owing on the June 27, 1997 judgment in favor of Benson.

40. In his response to question 5 in the statement of financial affairs, the Debtor stated that in approximately January 1999, Benson had garnished \$500.00. “It is believed to have been from a bank account.”

Evidence as to the Debtor’s Solvency

41. At trial, the Debtor testified that when he married Rhoda in August 1993, he “probably had a couple” creditors because he had gone through a corporate bankruptcy in or around 1990. (Tr. at 57.) American Express holds a judgment against the Debtor for charge card purchases prior to 1993.
42. Benson commenced her suit against the Debtor in 1994, but the \$80,000.00 judgment in her favor was not entered until June 1997.
43. Rhoda and the Debtor were questioned at trial as to whether the Debtor’s assets exceeded his liabilities at various points in time. While Rhoda generally denied having any knowledge concerning the Debtor’s financial affairs, the Debtor made several statements suggesting that at various points he might have been on the brink of insolvency.
44. For example, when asked whether his debts exceeded his assets at the time he sold the San Diego property to Rhoda, the Debtor stated, “[w]ell it depends on the assets, but they were probably pretty close.” (Tr. at 91.) At other points, the Debtor stated that in 1998 he was “deeply in debt,” (Tr. at 75), and that his name was not on the title to the Hinsdale or Clarendon Hills properties because his credit was “a sham,” or because lenders would not have provided financing had his name been on the title. (Tr. at 67, 95, 104.)
45. Notwithstanding his alleged credit problems, the Debtor acknowledged that the lender

required that he be a party to the construction loan for the Indian Head Park residence. (Tr. at 67.) At the time of his bankruptcy, the Debtor also expressed an intention to reaffirm the loan secured by his luxury automobile. While the Debtor made broad statements as to the existence of other debts in his testimony, he provided no details. The record contains no evidence that the Debtor ever applied for a loan but was rejected.

46. The Debtor contributed funds and services necessary to the construction of the Indian Head Park residence and funds for acquisition of the Hinsdale residence. Since the Clarendon Hills residence was purchased with the proceeds of a refinancing of the Indian Head Park property, the Debtor's contribution to the appreciation in value of the Indian Head Park property "rolled over" into the Clarendon Hills property.
47. This Court observed Charles' and Rhoda's demeanor at trial and heard their testimony concerning their financial situation prior to the Debtor's bankruptcy. The Court finds it incredible that Rhoda's earnings and borrowings were the primary source of funds used to acquire the Indian Head Park, Hinsdale and Clarendon Hills<sup>2</sup> residences.
48. The Debtor's vague statements about his financial difficulties are insufficient to establish that his debts exceeded his assets at any point prior to his divorce.
49. However, based on the information attested to under oath in his bankruptcy schedules, the Court concludes that the Debtor's debts exceeded his assets in March 1999.

Question Whether the Debtor Intended to Hinder, Delay or Defraud Creditors

50. In this adversary proceeding, the Trustee seeks to recover the Debtor's interest in the

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Since the Clarendon Hills residence was sold during the pendency of the Debtor's bankruptcy, the Trustee would recover the value of that property.

properties located in Indian Head Park, Hinsdale, and Clarendon Hills.

51. Both the Hinsdale and the Indian Head Park homes were the Debtor's and Rhoda's marital residence for some period.
52. The Clarendon Hills and Hinsdale residences have been used as rental properties. In her testimony, Rhode indicated that at some point in time, they generated monthly rental income of \$1,500.00 and \$1,450.00, respectively.
53. The funds used to acquire all three properties can ultimately be traced to assets once owned by the Debtor. There are two sources of funds.
54. First, the Debtor or his wholly owned corporation transferred the Michigan property to Rhoda. The sale of the Michigan property generated funds for construction of the Indian Head Park residence which, upon completion and refinancing, generated funds for the purchase of the Clarendon Hills property.
55. Turning to the second source of funds, the Debtor withdrew money from his retirement account to provide the down payment for the Hinsdale residence. Since the Debtor and Rhoda were then in the process of building the Indian Head Park residence, the Court does not credit their testimony that the down payment was intended as a gift, in fulfillment of a promise that the Debtor would build Rhoda a house.
56. At the time that funds were borrowed to finance the purchase of each of the three residences, American Express held a judgment against the Debtor. Benson's lawsuit against the Debtor was filed in 1994, although no judgment would be entered until several years later.
57. Incredibly, the Debtor and Rhoda testified that the principal source of funds for the

real estate transactions at issue in this suit came from Rhoda's wages and from undocumented transfers of funds from Rhoda's friends and relatives in the Philippines.

58. The Court discredits the Debtor's testimony that he spent most of his income from employment, without maintaining bank accounts or investments other than exempt retirement accounts.
59. The evidence of record supports an inference that Rhoda's investments in real estate were actually for both her benefit and that of the debtor. While the Debtor has experience in real estate development, Rhoda has no background in the field. Overall, Rhoda also displayed a lack of concern for financial matters that is inconsistent with the Chevries' assertions that she was in charge of the real properties at issue in this suit. At a number of points in her testimony, too, Rhoda indicated that the Debtor played a role in developing or managing the properties. For instance, Rhoda stated that "we" paid the construction loan on the Indian Head Park property (Tr. 40), "we" rented out the Clarendon Hills property (Tr. 45), and "we" paid the mortgage on the Michigan property (Tr. 151).
60. Having considered the totality of the evidence, the Court concludes that the Debtor intended to hinder, delay or defraud creditors by making sure that his name did not appear on the title to real properties acquired during his marriage to Rhoda.
61. Real estate broker David Schy ("Schy") opines that in February 1999, the Indian Head Park property probably would have sold at a price of \$455,000.00, and that the quick sale price would have been \$386,750.00. Both the quick sale and the probable selling prices are substantially in excess of \$325,000.00, the amount of the 1998 refinancing



loan.

62. Schy opines that in February 1999, the Hinsdale property would have sold for \$510,000.00, and that the quick sale price would have been \$433,500.00. Both the quick sale and probable selling prices are substantially in excess of the initial mortgage loan of \$165,000.00.
63. Schy further opines that in February 1999, the Clarendon Hills property probably would have sold for \$240,000.00, and that the quick sale price was \$225,000.00. That amount was substantially in excess of the \$168,700.00 mortgage loan used to purchase the property.
64. Were net equity computed by subtracting the initial principal amount of mortgage loans from the estimated market value of each of the three properties in February 1999, the total net equity in the properties would be \$546,300.00. In addition, under the terms of the marital settlement agreement, Rhoda received the San Diego property, the stock of Jaleco Construction, and the right to rental income from the Hinsdale and Clarendon Hills residences. In exchange, the Debtor retained only an exempt retirement account having a balance of approximately \$57,500.00.
65. A review of divorce attorney Roberts' testimony indicates that he was not fully and accurately informed about the Debtor's and Rhoda's individual liabilities and sources of income. Although a transcript of the prove-up was not introduced into evidence, Roberts does not recall that there was testimony regarding the value of assets conveyed or the amount of liabilities assumed as a result of the judgment for dissolution. Since Roberts was unaware of the Benson matter, or of the Debtor's bankruptcy, the State Court would not have been fully and accurately informed of the

Debtor's financial situation either.

66. The judgment for dissolution of marriage transferred to Rhoda any interest that the Debtor might have had in the real properties acquired during the Chevries' marriage. Bearing in mind the additional facts that Rhoda was content to proceed pro se in the divorce, and that the parties remained friends and continued to live in the same residence, the Court concludes that the divorce was a collusive one, intended to put the Debtor's interests in real property beyond the reach of his creditors.
67. Factual statements contained in the Conclusions of Law that follow are to be deemed additional Findings of Fact. Conversely, any statements of law within the Findings of Fact will stand as further Conclusions of Law.

#### **CONCLUSIONS OF LAW**

1. Counts I and III of the Trustee's complaint are brought under Code § 548(a)(1), which provides in relevant part as follows:

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 filing of the petition, if the debtor voluntarily or involuntarily—

(A) 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

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

(ii)(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 . . .

11 U.S.C. § 548(a)(1).

2. The cause of action under § 548(a)(1)(A) is commonly referred to as “actual fraud” because of the element of the debtor’s actual intention to hinder, delay or defraud creditors. In re FBN Food Services, Inc., 82 F.3d 1387, 1394 (7<sup>th</sup> Cir. 1996). Section 548(a)(1)(B) is often called “constructive fraud” because it omits any element of intent. Id. Here, the Trustee alleges actual fraud under Code § 548(a)(1)(A) in Count I and constructive fraud under Code § 548(a)(1)(B) in Count III.

3. One decision has provided the following description of differences between the two causes of action under § 548(a)(1):

The focus of the inquiry into actual intent under § 548(a)(1)(A) is on the state of mind of the debtor. Neither malice nor insolvency is required. . . Culpability on the part of the transferees is not essential.

Unlike constructively fraudulent transfers, the adequacy or equivalence of consideration provided for an actually fraudulent transfer is not material to the question whether the transfer is actually fraudulent. . . . Conversely, the transferor’s intent is immaterial to the constructively fraudulent transfer in which the issue is the equivalence of the consideration coupled with either insolvency, or inadequacy of remaining capital, or inability to pay debts as they mature.

Plotkin v. Pomona Valley Imports, Inc. (In re Cohen), 199 B.R. 709, 716-17 (9<sup>th</sup> Cir. BAP 1996).

4. Counts II and IV of the Trustee’s complaint are brought under Code § 544(b), which allows a trustee to avoid a transfer if a creditor could have done so under state law.

Liebowitz v. Parkway Bank & Trust Co. (In re Image Worldwide, Inc.), 139 F.3d 574, 576-77 (7<sup>th</sup> Cir. 1998); In re Leonard, 125 F.3d 543, 544 (7<sup>th</sup> Cir. 1997). Applicable state law is the Illinois Uniform Fraudulent Transfer Act, 740 ILCS 160/1 et seq. (“UFTA”).

5. The provisions of the UFTA essentially parallel Code § 548(a)(1). Levit v. Spatz (In

re Spatz), 222 B.R. 157, 164 (N.D. Ill. 1998); Martino v. Edison Worldwide Capital (In re Randy), 189 B.R. 425, 443 (Bankr. N.D. Ill. 1995).

6. Like § 548(a)(1), the UFTA reaches both transfers that are actually fraudulent, and those that are constructively fraudulent. See General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1078 (7<sup>th</sup> Cir. 1997); Scholes v. Lehmann, 56 F.3d 750, 757 (7<sup>th</sup> Cir.), cert. denied sub nom. African Enterprise, Inc. v. Scholes, 516 U.S. 1028, 116 S.Ct. 673 (1995). Here, Count II is based on actual fraud under UFTA § 5, while Count IV is based on constructive fraud under UFTA §§ 5 and 6.
7. In bankruptcy cases, the most significant difference between Code § 548(a) and the UFTA is that under the UFTA the trustee can recover property fraudulently transferred out of an estate over a year before the petition date. See Randy, 189 B.R. at 443. The statute of limitations under the UFTA is four years. 740 ILCS 160/10.
8. Due to the running of the statute of limitations under UFTA § 10, the Trustee does not seek recovery of the San Diego property. Nor does he seek to recover the value of the Debtor's interest in the Union Pier, Michigan property. The transfers challenged in this adversary proceeding are those of the Debtor's interests in the Indian Head Park, Hinsdale and Clarendon Hills properties.
9. The various counts of the Trustee's complaint do not name particular transfers that should be avoided. Instead, Counts I and III refer to a schedule attached as Exhibit B, which is simply a list of the properties at issue in this suit. Leaving it up to the Court to decide which transfers fall within the scope of the term, Counts I and III seek findings that "One Year Transfers" are voidable under Code § 548(a)(1). Counts II and IV seek findings that "all transfers" in Exhibit B are voidable under Code § 544(b)

and the UFTA. Since the statute of limitations under the UFTA is four years, any transfer within a year of the Debtor's bankruptcy filing falls within the scope of all four counts of the complaint.

10. Based on the evidence presented, the only "transfers" taking place over a year before the bankruptcy would be contributions of money and services for the acquisition or improvement of the properties that were maintained in Rhoda's name.
11. Although Rhoda attributes significance to the fact that the Debtor's name was not on the title to any of the properties, under Illinois law, property acquired during a marriage is presumed to be marital property unless it is shown by clear and convincing evidence that the property falls within a statutory exception under 750 ILCS 5/503(a). In re Marriage of Blunda, 299 Ill. App. 3d 855, 862, 702 N.E.2d 993, 998, 234 Ill. Dec. 339, 344 (2d Dist. 1998). The presumption applies "regardless of whether title is held individually or by the spouses in some form of co-ownership . . ." 750 ILCS 5/503(b)(1).
12. Here, the only evidence to rebut the presumption of marital property came when the parties testified that the down payment for the Hinsdale property was a gift to Rhoda from the Debtor. As already noted, the Court discredits the Chevries' testimony on that proposition. Also, during the period before the Hinsdale property was rented out to third parties, payments on the mortgage would have been made. Although funds for those payments might have been drawn on Rhoda's bank account, some of the Debtor's income probably went into the account. The Court finds that Rhoda has failed to rebut the presumption that the three residences were marital properties, and it concludes that the Debtor acquired an interest in the Indian Head Park, Hinsdale and

Clarendon Hills residences.

13. While the absence of the Debtor's name on the title to the three properties would have made it more difficult for his creditors to reach his interests in the properties, the Debtor did not relinquish those interests until his divorce. The Trustee having summoned no authority that the placing of title in another's name, without more, is a "transfer," the Court can not find that there was any fraudulent transfer of property before the Chevries' divorce.
14. The Debtor did, however, transfer his interests in the three residential properties upon his divorce.
15. An allocation of property pursuant to a divorce decree is a "transfer" of property that may be challenged by a bankruptcy trustee. Corzin v. Fordu (In re Fordu), 201 F.3d 693, 702 (6<sup>th</sup> Cir. 1999); Webster v. Hope (In re Hope), 231 B.R. 403, 415 (Bankr. D.D.C. 1999); Raleigh v. Haskell (In re Haskell), No. 96 B 14602, 1998 WL 809520 at \*10 (Bankr. N.D. Ill. Nov. 19, 1998); Blackwell v. Wallace (In re Wallace), 66 B.R. 834, 842 (Bankr. E.D. Mo. 1986).
16. Principles of collateral estoppel and res judicata are inapplicable, since creditors are not parties to a dissolution of marriage proceeding. Fordu, 201 F.3d at 705; Wallace, 66 B.R. at 836. A trustee is not in privity with a debtor where a judgment was obtained as part of a collusive scheme to hinder, delay or defraud creditors. Haskell, 1998 WL 809520 at \*5.
17. Looking to the Trustee's allegations of actual fraud in Counts I and II, it is often impractical, on direct evidence, to demonstrate an actual intent to hinder, delay or defraud creditors. Max Sugarman Funeral Home, Inc. v. A.D.B. Investors, 926 F.2d

1248, 1254 (1<sup>st</sup> Cir. 1991). Consequently, as under the common law of fraudulent conveyances, bankruptcy courts frequently infer fraudulent intent from the circumstances surrounding the transfer. Id.

18. In determining whether the circumstantial evidence establishes fraudulent intent, courts look to whether “badges of fraud,” which existed under the common law, are present in the transfer. Brown v. Third Nat’l Bank (In re Sherman), 67 F.3d 1348, 1353 (6<sup>th</sup> Cir. 1995). Although the presence of a single badge of fraud of fraud is insufficient to establish actual fraudulent intent, the confluence of several can constitute conclusive evidence of actual intent, absent significantly clear evidence of a legitimate supervening purpose for the transfer. Id. at 1354.
19. The following are some of the indicia of fraud recognized under the case law: (1) pending litigation at the time the property was transferred; (2) the debtor’s insolvency at the time of the transfer, or the fact that the debtor is rendered insolvent by the transfer; (3) the debtor’s retention of control over the transferred asset; and (4) the fact that the transfer is to a family member. United States ex rel. Hartigan v. Alaska, 661 F. Supp. 727, 730 (N.D. Ill. 1987).
20. While a transfer between family members is not proof per se of fraudulent intent, a familial relationship is weighty proof of such intent. Berland v. Mussa (In re Mussa), 215 B.R. 158, 168 (Bankr. N.D. Ill. 1997). A “fast track” divorce shortly before a bankruptcy filing is proof of a scheme to put the debtor’s property beyond the reach of creditors. Citibank, N.A. v. Williams (In re Williams), 159 B.R. 648, 657 (Bankr. D.R.I. 1993), remanded on other grounds, 190 B.R. 728 (D.R.I. 1996).
21. Applying the above principles here, the evidence establishes numerous badges of

fraud. The Debtor's divorce came at a time when Benson was pressing to collect on her judgment, and the divorce terminated the Debtor's interest in valuable real estate, leaving him with an exempt retirement account worth only about one-tenth of the value of the equity in real estate awarded to Rhoda. There are also numerous indicia that the divorce was collusive, including the facts that Rhoda appeared pro se, and that the Debtor continued to reside in the marital home for a year after the divorce. The divorce proceeding was filed on January 20, 1999, and the judgment for dissolution was entered on February 2, 1999, only one month before the Debtor's March 2, 1999 bankruptcy filing. Based on the presence of numerous badges of fraud, the Court finds that the transfer of the properties to Rhoda pursuant to the divorce decree was made with actual intent to defraud. Judgment will therefore be entered for the Trustee on Counts I and II.

22. Turning to the Trustee's causes of action for constructive fraud in Counts III and IV, the critical question is whether the Debtor received reasonably equivalent value in exchange for the transfer of properties to Rhoda. The Court makes that determination by comparing the value of what was transferred with the value of what was received. Barber v. Golden Seed Co., Inc., 129 F.3d 382, 387 (7<sup>th</sup> Cir. 1997); Scholes, 56 F.3d at 756. Since the State Court's judgment effected that transfer, this Court necessarily must consider the effect to be given to another tribunal's order.
23. Rhoda notes that there are recitations in the judgment for dissolution to the effect that the distribution of property under the Chevries' marital settlement agreement was equitable and fair. Thus, she takes the position that the State Court's order precludes the Trustee from bringing this suit.



24. In making an equitable division of property, state domestic relations courts apply markedly different standards than do bankruptcy courts considering reasonably equivalent value under Code § 548(a)(1)(B). Fordu, 201 F.3d at 707-08; Haskell, 1998 WL 809520 at \*8 (addressing Illinois law).
25. Although judicial approval of a marital settlement agreement may represent a determination that the agreement is fair and equitable as between the parties to the divorce, it does not represent a determination that the agreement perpetrates no fraud upon the creditors of one spouse, particularly where the claims of creditors are not made known to the court or provided for in the decree. Kardynalski v. Fisher, 135 Ill. App. 3d 643, 651, 482 N.E.2d 117, 122, 90 Ill Dec. 410, 415 (2d Dist. 1985). Because the claims of the Debtor's creditors were not made known to the State Court, the Trustee is not bound by the recitations in the judgment for dissolution of marriage.
26. In this adversary proceeding, Rhoda has presented no evidence to rebut Schy's opinions as to the values of the properties she received in her divorce from the Debtor. Nor is there evidence that the properties could not have been sold at market prices, or that they were encumbered in amounts exceeding the initial mortgage loan balances. Under the marital settlement agreement and judgment for dissolution, Rhoda received three real properties with a combined net equity of \$546,300.00, while the Debtor received a retirement account with a balance of \$57,500.00. Because the allocation of property was extremely disproportionate, the Court concludes that the Debtor did not receive reasonably equivalent value in exchange for his interests in the three residential properties.
27. To obtain relief under Code § 548(a)(1)(B), the Trustee must establish not only that

the transfers under the marital settlement agreement and judgment for dissolution were for less than reasonably equivalent value, but also that the Debtor was insolvent at the time of his divorce. Dunham v. Kiskak, 192 F.3d 1104, 1109 (7<sup>th</sup> Cir. 1999).

28. The Bankruptcy Code uses a balance sheet approach to insolvency. Steege v. Affiliated Bank/North Shore National (In re Alper-Richman Furs, Ltd.), 147 B.R. 140, 154 (Bankr. N.D. Ill. 1992). Under that standard, the Court looks to whether a debtor's assets exceeded its liabilities at the time of a challenged transfer. Id. See also Apex Automotive Warehouse, L.P. v. Carmell (In re Apex Automotive Warehouse, L.P.), 238 B.R. 758, 771 (Bankr. N.D. Ill. 1999) (under UFTA, debtor is insolvent if sum of its debts is greater than all its assets at a fair valuation).
29. The Debtor was insolvent at the time he filed his bankruptcy petition, and the Chevries' divorce preceded the bankruptcy filing by only one month. Given that short time frame, and because the Debtor makes no contention that he had assets other than those provided for in the marital settlement agreement, the Court concludes that he was rendered insolvent by the divorce.
30. Both elements of constructive fraud having been established with respect to the Chevries' divorce, the Court will enter judgment in favor of the Trustee on Counts III and IV.
31. Where a transfer is avoided, the next step is to look to Code § 550(a), which provides that the trustee may recover "the property transferred, or, if the court so orders, the value of such property . . ." In re FBN Food Services, Inc., 82 F.3d at 1396. Once the whole transfer is pulled into the estate, the money is then distributed according to the priorities under the Code and the debtor's own commitments. Id.

32. Although the general rule is that transferees must either return the property or pay its value, there are exceptions under Code § 548(c) and § 550(b). Plotkin v. Pomona Valley Imports, Inc. (In re Cohen), 199 B.R. 709, 719 (9<sup>th</sup> Cir. BAP 1996).
33. Where, as here, recovery is sought from the initial transferee of a property, only the defense under § 548(c) is potentially available. See In re Food & Fibre Protection, Ltd., 168 B.R. 408, 419 (Bankr. D. Ariz. 1994) (defense under Code § 550(b) is unavailable to “initial transferee”); Bucki v. Singleton (In re Carbon Realty Corp.), 146 B.R. 72, 79 (Bankr. W.D.N.Y. 1992) (same).
34. Section 548 (c) provides that “[e]xcept to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.” 11 U.S.C. § 548(c).
35. There are two prongs to the defense under § 548(c) - value and good faith. With respect to “good faith,” the majority of bankruptcy courts agree that if a transferee reasonably should have known of a debtor’s insolvency or of the fraudulent intent underlying a transfer, the transferee is not entitled to the defense under § 548(c). Sherman, 67 F.3d at 1355; Jobin v. McKay (In re M&L Business Machine Co., Inc.), 84 F.3d 1330, 1336 (10<sup>th</sup> Cir.), cert. denied, 519 U.S. 1040, 117 S.Ct. 608 (1996).
36. Here, Rhoda saw no need to employ an attorney to represent her in the allocation of valuable assets acquired during her marriage to the Debtor. Although the Chevries allege that Rhoda was the principal source of funding for the acquisition and

maintenance of the properties, there has been no evidence corroborating those allegations. On the other hand, the Debtor had financial resources, as well as experience in real estate development. The distribution of property was extremely disproportionate, and the timing of the “fast track” divorce is suspect. Having heard the testimony at trial and reviewed the transcript and other evidence, the only reasonable inference from the record is that Rhoda knew or should have known of the Debtor’s fraudulent intent at the time of his divorce. Accordingly, the Court finds that Rhoda is not entitled to the defense under Code § 548(c).

### **CONCLUSION**

For the reasons set forth in its findings of fact and conclusions of law, the Court finds that with respect to the transfers of the Indian Head Park, Hinsdale and Clarendon Hills properties taking place upon the Debtor’s divorce from Defendant Rhoda Chevie, the Trustee is entitled to judgment on all counts of his complaint.

**ENTERED:**

**Date: February 13, 2001**

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**SUSAN PIERSON SONDERBY**  
**United States Bankruptcy Judge**