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Sunday, June 23, 2002
BRUCE JENKINS,

No. 01-11285

[Debtor](#)  (s).

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JEFFRY LOCKE, [Trustee](#) ,

[Plaintiff](#)  (s),

v.

A.P. No. 01-1141

LINDA JENKINS,

[Defendant](#)  (s).

Memorandum of Decision

I. FACTS

Debtor Bruce Jenkins is the former husband of defendant Linda Jenkins. In September, 2000, the state court entered a judgment on their marital settlement agreement. In the agreement, Linda got the marital residence with an equity of about \$90,000.00 in return for a payment of \$30,000.00 to Bruce and waiver of spousal support. Linda was unable to obtain the refinancing the parties had anticipated; all she could obtain was an unfavorable loan which provided for negative amortization. Bruce agreed that if Linda took this loan he would accept the net proceeds of about \$18,000.00 in satisfaction of his right to the \$30,000.00. Linda paid Bruce \$18,476.45 in September, 2000. Bruce's quitclaim deed to the house was recorded on

April 12, 2001. Bruce filed his [Chapter 7](#) [bankruptcy petition](#) on May 17, 2001.

Plaintiff Jeffry Locke is the Chapter 7 trustee. He alleges that Linda still owes the difference between the \$30,000.00 she agreed to pay Bruce and the \$18,476.45 she actually paid and [that the transfer](#) of the home is avoidable either as a fraudulent transfer because there was insufficient consideration or as a preference because the deed was recorded just before the bankruptcy.

II. SIMPLE DEBT

Linda does not still owe anything on the \$30,000.00 debt. She agreed to accept an unfavorable loan, rather than the normal market-rate loan both parties had contemplated, in return for Bruce's agreement to reduce the amount to which he was entitled. The agreement was fair and reasonable and supported by adequate new consideration.

III. FRAUDULENT TRANSFER

The Trustee correctly notes that for purposes of determining if a marital settlement agreement should be set aside as a fraudulent transfer, valuation is viewed from the standpoint of creditors. However, most or all of the claims in this case arose after Bruce and Linda separated and are his debts alone. If anyone received the short end of the stick in the marital settlement it was Linda, who waived her right to spousal support in return for perhaps \$25,000.00 in equity in the home. This left Bruce's income substantially available for [creditor](#) [claims](#). Contrary to the Trustee's assertions, Bruce's earnings potential is far higher than Linda's; she undoubtedly waived support rights far in excess of Bruce's rights in the home.

The Trustee is not correct in arguing that the issue of reasonably equivalent value must be raised as an affirmative defense and that Linda waived the defense by not pleading it. Where the plaintiff has established that a transfer was made with actual fraudulent intent, the transferee's right to a [lien](#) for value actually given must indeed be raised as an affirmative defense. However, where (as here) the transfer was not made with fraudulent intent then the plaintiff must prove that the debtor received less than a reasonably equivalent value as part of his case in chief. 11 U.S.C. §§ 548(a)(1)(A), 548(a)(1)(B), 548(c). In *In re Roosevelt*, 176 B.R. 200 (9th Cir. BAP 1994), upon which the Trustee relies, the court found that the debtor had entered into the marital settlement agreement with the intent to defraud creditors. That is not the case here.

IV. PREFERENCE

Although Linda gives the argument scant attention, it appears inescapable that she received a preferential transfer when, either through negligence or design,⁽¹⁾ Bruce waited until just before his bankruptcy to record the deed transferring his interest in the property to her. A former spouse having rights against the other spouse pursuant to a state court divorce decree is a creditor of the other spouse. In *re Dupus*, 265 B.R. 878, 883 (Bkrcty.N.D.Ohio 2001). Where a husband transfers his interest in the marital residence to his spouse pursuant to a dissolution decree the date of the transfer is the date the deed was recorded, not the

date of the decree. In re Schuman, 81 B.R. 583, 587 (9th Cir.BAP 1987). Any time a transfer must be perfected to be effective and perfection is delayed the delayed transfer is on account of an antecedent debt. In re Gulino, 779 F.2d 546, 551 (9th Cir. 1985). The evidence accordingly established a transfer to a creditor on account of an antecedent debt within the preference period and while the debtor was presumed insolvent. The transfer allowed Linda to receive more than she would have received if it had not been made and she received payment pursuant to the [Bankruptcy Code](#)⁽ⁱ⁾. Accordingly, all of the elements of a preference have been shown.

Linda brushes aside the preference [claim](#)⁽ⁱ⁾ on the grounds that she had sole possession of the property and thereby perfected by possession, as did the purchasers in Gulino. However, she ignores the fact that she was already on title to the property, either as a joint tenant, tenant in common, or community interest holder.⁽²⁾ In order to perfect against a bona fide purchaser by possession, the possession must be inconsistent with record title. 3 Cal. Real Estate L & P, § 82.14[5]. Possession by one joint owner is not inconsistent with joint ownership. Kane v. Huntley Financial (1983) 146 Cal.App.3d 1092, 1095-96.

V. RULE 26

Linda made a motion in limine to bar the Trustee from calling witnesses because he had failed to make required witness disclosures under FRCP 26. However, the only witness the Trustee called was for the purpose of establishing insolvency, which is presumed as to preferences for the 90 days prior to bankruptcy pursuant to 11 U.S.C § 547(f). In addition, Linda's motion was not supported by an adequate memorandum of law. Accordingly, the court declines to impose any sanction on the Trustee or his counsel beyond a warning that under some circumstances not present here failure to comply with all of the provisions of Rule 26 might result in serious consequences.

VI. CONCLUSION

For the foregoing reasons, the transfer of the real property to Linda will be avoided as a preference and preserved for the benefit of the estate pursuant to § 550(a) and § 551 of the Bankruptcy Code. This memorandum constitutes the court's findings and conclusions pursuant to FRCP 52(a) and FRBP 7052. Counsel for the Trustee shall submit an appropriate form of judgment forthwith.

Dated: June 23, 2002

Alan Jaroslovsky
U.S. [Bankruptcy Judge](#)⁽ⁱ⁾

1. Bruce is a law school graduate. Linda did not have legal representation during the dissolution proceedings.

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