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Monday, July 13, 1987

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

STEVEN P. WILSON,

No. 1-86-01758

[Debtor](#) .

_____ /

STEVEN P. WILSON,

[Plaintiff](#) ,

v.

A.P. No. 1-86-0219

ROBERTA LYNN WILSON,

[Defendant](#) .

_____ /

ORDER SPECIFYING ISSUES

Facts

Plaintiff Steven Wilson and defendant Roberta Wilson were formerly married to each

other. On July 31, 1986, the Humboldt County Superior Court entered a decree of dissolution of the marriage which awarded all of the community property to Steven and gave Roberta a [lien](#) on all the former community property to secure Steve's obligation to pay her \$63,000.00, which was the value of her community interest. An abstract of judgment reflecting the decree was recorded on August 18, 1986, which created a lien on Steven's separate property as well as the former community property. On November 5, 1986, Steven filed a [Chapter 11](#) petition. Soon after, he commenced this [adversary proceeding](#) seeking to avoid as preferences Roberta's interest in the former community property as well as his separate property. On May 1, 1987, this court entered an order intended to avoid as a preference any lien on Steven's separate real property created by the recording of the abstract of judgment. However, this order did not fully resolve the case, as Roberta still had a lien on the former community property. The court now deals with the avoidability of this interest.

Real Property

The debtor's position is that Roberta's lien on the former community real property was created on July 31 but not perfected until August 18, a date within the 90-day preference period. Since section 547(e)(2)(B) of the [Bankruptcy Code](#) provides [that the transfer](#) date is the date of perfection, the debtor argues that a preference has been clearly established. While this theory is perfectly valid as to property in which Roberta had no interest of record before August 18, it fails as to the rest of the property because Roberta's interest in that property was perfected as of the date of the decree, not its recording, at least as to her half.

Section 547(e)(1)(A) provides in pertinent part that a transfer of real property is perfected when a bona fide purchaser of such property from the debtor could not acquire an interest superior to the transferee. Thus, as to any property held jointly in the name of the debtor and Roberta, there was never a time when a bona fide purchaser could have obtained rights from the debtor superior to those of Roberta. It matters not that the public record named Roberta as a joint owner in fee when she had been turned into a lienholder; any cloud on title, even if defective, is sufficient to perfect rights against subsequent purchasers. [In re Elin](#) (Bkrcty.D.N.J.1982) 20 B.R. 1012 (aff'd 707 F.2d 1400); [In re Gurs](#) (9th Cir.BAP 1983) 27 B.R. 163. The same rationale applies to property which may have been in Roberta's possession, even if she was not a record title holder. Open possession is sufficient to perfect an interest in real property against subsequent purchasers. [In re Gulino](#) (9th Cir.1985) 779 F.2d 546.

As to real property neither in Roberta's name nor possession, the court finds that the contemporaneous exchange exception of section 547(c)(1) does protect Roberta to the extent of her former community interest, but not for the reasons she argues. Roberta's argument that her rights in the former community property were cut off at exactly the same time she obtained her lien - on August 18 when the abstract was recorded - has no validity. Her ownership rights were cut off on July 31, when the decree was entered; her lien was [perfected](#) on August 18. Nonetheless, delays in perfection of twenty days ([In re Burnette](#) (Bkrcty.E.D.Tenn.1981) 14 B.R. 795), thirty-three days ([In re Arnett](#) (Bkrcty.E.D.Tenn.1982) 17 B.R. 912), and even forty-five days ([In re Martelle](#) (Bkrcty.D.Colo.1982) 22 B.R. 649) have all been found to be substantially contemporaneous. It is clear that the state court intended there to be a simultaneous transfer of Roberta's rights from that of a co-owner to that of a lienholder; the court finds that the transaction was a substantially contemporaneous exchange as to the real property notwithstanding the eighteen-day delay in perfection. It should be noted, however, that Roberta gave up only her community interest in exchange for the lien. Since section 547(c)(1) excepts transfers from avoidance only to the extent new value is given, only Roberta's lien on her former interest in each property is unavoidable.

Applying the foregoing, it appears that Roberta has unavoidable liens as follows:

310 Crockett Crossing Road	\$5034.50	Hydesville property	\$8052.50
Sandy Prairie Road	\$25,817.50		

Personal Property

Section 547(e)(2)(C) provides that a transfer is deemed to have been made on the day the case commenced if it had not been perfected before that date. It is admitted that Roberta's security interest in the personal property has never been perfected. The transfer date as to personal property not in Roberta's name or possession is therefore November 5, 1986, taking it out of the contemporaneous exchange exception and making her interest avoidable.

Solvency

Roberta's argument that solvency is measured as of the date of the decree has no merit. Solvency is measured as of the date of the transfer, at which time the debtor had a \$63,000.00 debt to Roberta which must be counted.

Order

The above legal conclusions shall be deemed to be without substantial controversy pursuant to FRCP 56(d). Trial of the matter will be held on August 5, 1987, at 3:00 P.M. at Eureka, California, to apply the above ruling to individual items of property, to the extent the parties cannot reach agreement, and to resolve any remaining issues.

Dated: July 13, 1987

ALAN JAROSLOVSKY

U.S. [BANKRUPTCY JUDGE](#) 

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