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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. CC-06-1250-KBN
) CC-06-1449-KBN
6 WILLIAM J. BEVERLY,) CC-06-1273-KBN
) CC-06-1284-KBN
7 Debtor.) (Related Appeals)
))
8) Bk. No. LA 04-29840 TD
EDWARD M. WOLKOWITZ,))
9 Appellant,) Adv. Nos. LA 05-01254 TD
) LA 05-01257 TD
10 v.) (Consolidated)
) LA 05-01649 TD
11 STEPHANIE BEVERLY; WILLIAM J.)
BEVERLY,)
12 Appellees.)
))
13)
CATHERINE OUTLAND; ADMINISTRATOR)
14 OF THE ESTATE OF CHRISTINE)
MARTELL; SUSAN OUTLAND GLEASON,)
15)
Appellants,)
16 v.) O P I N I O N
))
17 EDWARD M. WOLKOWITZ, Chapter)
7 Trustee; WILLIAM J. BEVERLY,)
18)
Appellees.)
19)

Argued and Submitted on March 21, 2007
at Pasadena, California

Filed - July 24, 2007

Appeals from the United States Bankruptcy Court
for the Central District of California

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: KLEIN, BRANDT and NIELSEN*, Bankruptcy Judges.

*Hon. George B. Nielsen, Jr., Bankruptcy Judge for the
District of Arizona, sitting by designation.

1 KLEIN, Bankruptcy Judge:
2

3 The bankruptcy planning dispute presented in these related
4 appeals requires us to transit waters made turbulent by cross-
5 currents of exemptions, fraudulent transfer, denial of discharge,
6 and divorce. We publish to dispel the myth that the toleration
7 of bankruptcy planning for some purposes insulates such planning
8 from all adverse consequences – it does not. In matters of
9 bankruptcy and insolvency planning, supposed safe harbors from
10 one danger are exposed to dangers from other quarters and may, in
11 any event, be too small to shelter large capital transactions.

12 Here, a lawyer, anticipating a large judgment on a community
13 debt, used a marital settlement agreement (“MSA”) in his pending
14 divorce to shoulder the debt but strip himself of assets with
15 which to pay the debt. Colluding with his spouse, he transferred
16 his interest in \$1 million of nonexempt funds in exchange for her
17 interest in his \$1.1 million exempt retirement fund.

18 Notwithstanding compelling evidence regarding intent, the
19 court reasoned that such “planning” transfers can neither be
20 avoided in bankruptcy, nor lead to denial of discharge.

21 We REVERSE as to both fraudulent transfer and denial of
22 discharge. This is a paradigm case of actual intent to hinder,
23 delay, or defraud creditors under the Uniform Fraudulent Transfer
24 Act (“UFTA”). The California Supreme Court has held that MSA
25 transfers may be avoided under UFTA. The same conduct leads to
26 denial of discharge under 11 U.S.C. § 727(a)(2).
27
28

1 personal property. She also would receive spousal support
2 (\$6,500/month after August 2004) and child support.

3 As to community debts under the MSA, Beverly undertook to
4 pay the Outland litigation liability, together with tax liens and
5 obligations attributable to him or to property he retained. His
6 spouse assumed about \$25,000 in credit card debt.

7 During MSA negotiations, Beverly proposed a "trade" in lieu
8 of immediate distribution of proceeds when the sale of the family
9 residence closed in March 2004. He would "trade" his share of
10 more than \$600,000 in proceeds for his spouse's share of the
11 exempt pension plan.³ The net result would be that he would be
12 left with only exempt or illiquid assets, while his spouse would
13 receive all nonexempt liquid assets.

14 In the absence of agreement, a California court presumably
15 would have divided community assets equally, the consequence of
16 which would have been that each spouse would have had assets that
17 included half of the exempt pension and more than \$500,000 of
18 cash each (of which \$50,000 or \$75,000 could have been rolled
19 over into a new California exempt homestead).

20 Moving assets beyond the reach of the Outland creditors was
21

22 ³Ltr. Beverly to Dunaetz, Jan. 14, 2004 ("I want my half of
23 the money distributed to me at the closing so I can relocate it.
24 It makes no sense to close the deal and have the money 'held in
25 escrow' as you previously demanded where it would make an easy
26 target for the judgment creditor. Alternatively, I will trade
27 all of my share of the house for a fair share of Stephanie's
28 interest in the profit sharing plan. Assuming there is \$650,000
in equity in the house (all 'after tax dollars') then I would
trade my \$325,000 residence equity for \$500,000 in retirement
plan interests (all 'pre-tax'). She would then take the entire
\$650,000 from the house and I would take just about the entire
profit sharing plan."). [Emphasis in original.]

1 explicitly part of the MSA negotiations as early as March 2003.⁴
2 On January 2, 2004, Beverly complained to Dunaetz that delays
3 were eroding asset planning opportunities.⁵ The concern gained
4 urgency as the house sale loomed.⁶ Dunaetz acknowledged the
5 prospect of a judgment.⁷ The risk was apparent to both spouses.⁸

6
7 ⁴Ltr. Beverly to Dunaetz, Mar. 11, 2003 ("The amount that we
8 expect to net, . . . , is about \$650,000. . . . I still have no
9 malpractice insurance and am expecting service of the second
10 complaint shortly. The house now becomes a very large asset for
11 potential creditors of my business.").

12 ⁵Ltr. Beverly to Dunaetz, Jan. 2, 2004 ("Also enclosed is a
13 copy of the order setting the trial in which there is no
14 insurance for March 10, 2004. We have now lost any asset
15 protection planning opportunity regarding which I recommended
16 repeatedly. If Stephanie is required to satisfy a portion of the
17 judgment[,] you can explain to her why you stalled until it was
18 too late to do anything to protect her.").

19 ⁶Ltr. Beverly to Dunaetz, Jan. 14, 2004 ("The bad news is
20 that we lost another round in the Outland case and the other side
21 was awarded interim attorney fees of about \$93,000. Our total
22 exposure is now between \$500,000 and \$600,000 by my estimate.
23 That is all of the equity in the Ardmore [family] house. What
24 are you doing while Rome burns?").

25 ⁷Ltr. Dunaetz to Beverly, Jan. 15, 2004 ("[S]ubmit the
26 Counter Offer [on the house sale] on time, or you are going to
27 risk losing the sale entirely, which could result in a huge
28 charge against you if the equity in the house is thereafter loss
[sic] to the anticipated Judgment against you.").

29 ⁸Ltr. Beverly to Dunaetz, Mar. 17, 2004 ("The trial starts
30 next week. Things are getting progressively bleaker on that
31 front. . . . The point of all that is that we better get this
32 done this week or your client and I both stand to loose [sic]
33 almost everything. The consensus is that we are looking at a
34 judgment in the neighborhood of one million dollars. . . . [MSA
35 counteroffer omitted] If we can not agree to this you can make
36 your motion. I will be in trial fighting to save an estate for
37 us to fight over. I actually will relax a little knowing that
38 Stephanie will be paying for half of the judgment if we do not

(continued...)

1 When he executed the MSA, Beverly gave notice that the dire
2 financial situation created for him by the MSA could lead to
3 bankruptcy and to requesting spousal support for himself from the
4 funds transferred to his spouse.⁹

5 On May 4, 2004, the Outland jury awarded \$424,450 against
6 Beverly personally (legal malpractice \$289,350, breach of
7 fiduciary duty \$111,300, and constructive fraud \$23,800), plus
8 another \$153,650 against two other defendants. The Outland
9 judgment was entered on May 20, 2004. Beverly appealed.

10 The final divorce judgment, which incorporated the MSA, was
11 entered on July 20, 2004. The record does not suggest that the
12 state court was informed that the MSA left Beverly without assets
13 from which to satisfy a \$424,450 community debt assigned to him.

14 After Beverly told the judgment creditors he lacked assets
15 to pay the judgment, they filed an involuntary chapter 7 case.

16 Relief was ordered on November 1, 2004, and Beverly was
17 ordered to file schedules and statements by November 16, 2004.

18 Beverly filed the schedules and statements on March 17,
19 2005, six days after the trustee and the Petitioning Creditors
20

21 ⁸(...continued)
22 settle now.”).

23 ⁹Ltr. Beverly to Dunaetz, Apr. 9, 2004 (“I want to be
24 certain that there is no misunderstanding or miscommunication as
25 we sit down to execute the [MSA]. Stephanie is receiving nearly
26 \$1,000,000 . . . in cash and I am receiving only about \$100,000 .
27 . . in cash. I have no net income so far this year It
28 is very likely, if not probable, that I will be required to file
bankruptcy within the next 30 to 60 days and perhaps close this
office. If that occurs, I will also be making applications to
modify the support and perhaps even seek support from the cash
that Stephanie is receiving.”).

1 had objected to discharge on various 11 U.S.C. § 727(a) theories
2 in two parallel adversary proceedings (Adv. Nos. 05-1254 and 05-
3 1257). The creditors' action included nondischargeability counts
4 under 11 U.S.C. §§ 523(a)(3) and (4).

5 Beverly exempted his \$1,161,467.08 interest in the pension
6 plan and claimed a \$50,000 homestead exemption on a mobile home.

7 On June 14, 2005, the trustee sued Beverly and his former
8 spouse to recover Beverly's share of the nonexempt funds
9 transferred through the MSA, alleging counts under 11 U.S.C.
10 §§ 544(b), 547, 548(b) and 550 (Adv. No. 05-1649).

11 The bankruptcy court consolidated the objections to
12 discharge for trial, bifurcating (and later staying during this
13 appeal) the creditors' § 523 nondischargeability counts.

14 Trial was held in three installments on the consolidated
15 discharge objection adversary proceedings, which by then asserted
16 counts under §§ 727(a)(2)(A), (a)(3), and (a)(6). The parties
17 proceeded solely by declaration, deposition, and documentary
18 evidence and chose not to present live testimony in open court.

19 The second and third installments of the discharge objection
20 proceedings were combined with hearings on cross-motions for
21 summary judgment in the trustee's avoiding action.

22 The court rendered oral findings of fact and conclusions of
23 law, rejecting all three discharge denial theories.¹⁰ As
24 relevant to this appeal, it ruled that the MSA did not embody a
25 fraudulent transfer for purposes of § 727(a)(2).

26
27 ¹⁰Although its findings are opaque because the court adopted
28 parts of proposed findings that were not made part of the record,
we are able to discern enough of the reasoning to enable review.

1 STANDARD OF REVIEW

2 Whether orders are final relates to our jurisdiction, may be
3 raised sua sponte, and is reviewed de novo. Menk v. LaPaglia (In
4 re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).

5 We review summary judgment de novo, viewing the facts in the
6 light most favorable to the nonmoving party, to determine whether
7 genuine issues of material fact remain for trial and which party
8 is entitled to judgment as a matter of law. Harmon v. Kobrin (In
9 re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); Miller v.
10 Snavelly (In re Snavelly), 314 B.R. 808, 813 (9th Cir. BAP 2004).

11 In bankruptcy discharge appeals, we review findings of fact
12 for clear error, conclusions of law de novo, and also apply de
13 novo review to "mixed questions" of law and fact that require
14 consideration of legal concepts and the exercise of judgment
15 about the values that animate the legal principles. Murray v.
16 Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997) (en
17 banc), overruling, e.g., Finalco, Inc. v. Roosevelt (In re
18 Roosevelt), 87 F.3d 311, 314, as amended, 98 F.3d 1169 (9th Cir.
19 1996) (§ 727 reviewed for abuse of discretion), and Friedkin v.
20 Sternberg (In re Sternberg), 85 F.3d 1400, 1404-05 (9th Cir.
21 1996) (same); First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d
22 1339, 1342 (9th Cir. 1986) (§ 727 finding of transfer of property
23 with intent to defraud is finding of fact).

24 Under the "clear error" standard, we accept findings of fact
25 unless the findings leave the "definite and firm conviction that
26 a mistake has been committed" by the trial judge. Latman v.
27 Burdette, 366 F.3d 774, 781 (9th Cir. 2004).

1 DISCUSSION

2 After clarifying a basic civil procedure issue that affects
3 appellate jurisdiction, we consider the application of
4 California's UFTA in the context of an MSA intended to make a
5 divorcing spouse "judgment proof." Then we address the § 727
6 discharge facet of the same conduct (BAP Nos. 1273 and 1284).

7
8 I

9 The procedural issue involves finality in consolidated
10 actions. The court consolidated the trustee's and the Outlands'
11 adversary proceedings objecting to discharge under § 727 pursuant
12 to Federal Rule of Civil Procedure 42(a) because there were
13 common questions of law and fact. Fed. R. Civ. P. 42(a),
14 incorporated by Fed. R. Bankr. P. 7042.

15 The choice to consolidate, instead of merely to hold the
16 joint trial that Rule 42 also authorizes, had an unanticipated
17 procedural consequence because the Outlands' adversary proceeding
18 also alleged counts under § 523 challenging dischargeability of
19 particular debts that remain unresolved.

20 The court bifurcated the Outlands' § 523 counts, as
21 permitted by Rule 42(b), by limiting the trial to the § 727
22 issues. Fed. R. Civ. P. 42(b). The court stayed the bifurcated
23 § 523 claims pending this appeal but did not make a "Rule 54(b)
24 certification" and direct entry of judgment when it overruled the
25 objections to discharge. Fed. R. Civ. P. 54(b), incorporated by
26 Fed. R. Bankr. P. 7054(a).

27 This left the problem that the "judgment" on the § 727
28 counts asserted by the trustee and the Outlands was, under Rule

1 54(b), interlocutory. A judgment as to fewer than all the claims
2 or fewer than all the parties is not a "final judgment" unless
3 the court makes an "express determination that there is no just
4 reason for delay" and "an express direction for the entry of
5 judgment." Fed. R. Civ. P. 54(b). The requirement cannot be
6 ignored: if there is no Rule 54(b) certification, then an order,
7 even an order titled "judgment," does not end the action as to
8 any claims or party and is subject to revision at any time before
9 entry of the judgment that adjudicates all of the claims and the
10 rights and liabilities of the parties. Id.

11 The Rule 42(b) bifurcation of the portion of the
12 consolidated adversary proceedings that addressed § 523
13 nondischargeability does not excuse compliance with Rule 54(b).

14 In this circuit, a judgment in a consolidated action that
15 does not resolve all claims against all parties is not appealable
16 as a final judgment without a Rule 54(b) certification. Huene v.
17 United States, 743 F.2d 703, 704-05 (9th Cir. 1984).¹¹

18 As a result, the § 727 judgment rendered in the consolidated
19 adversary proceedings is not a "final judgment" unless and until
20

21 ¹¹The circuits are divided three ways. Huene, 743 F.2d at
22 704-05; accord, Trinity Broad. Corp. v. Eller, 827 F.2d 673, 675
23 (10th Cir. 1987); cf. Road Sprinkler Fitters Local Union v.
24 Cont'l Sprinkler Co., 967 F.2d 145, 148-50 (5th Cir. 1992)
25 (depends on nature of consolidation); Bergman v. City of Atlantic
26 City, 860 F.2d 560, 564 (3d Cir. 1988) (same); Hageman v. City
27 Investing Co., 851 F.2d 69, 71 (2d Cir. 1988) (same); Sandwiches,
28 Inc. v. Wendy's Int'l, Inc., 822 F.2d 707, 709 (7th Cir. 1987);
contra, FDIC v. Caledonia Inv. Corp., 862 F.2d 378, 380-81 (1st
Cir. 1988); Kraft, Inc. v. Local Union 327, Teamsters, 683 F.2d
131, 133 (6th Cir. 1982); see generally Jacqueline Gerson,
Comment, The Appealability of Partial Judgments in Consolidated
Cases, 57 U. CHI. L. REV. 169, 178-91 (1990).

1 a Rule 54(b) certification is made, even though there would have
2 been a "final judgment" as to the trustee's action if the Rule
3 42(a) alternative of joint trial had been employed instead of
4 consolidation. Fed. R. Civ. P. 54(b); Huene, 743 F.2d at 705.

5 The status of an order as a "final judgment" has important,
6 but different, ramifications for appellate jurisdiction at the
7 two different levels of bankruptcy appeals. While jurisdiction
8 over timely appeals from final judgments is automatic at both
9 levels of appeal, courts of appeals ordinarily lack jurisdiction
10 to review orders that are not final. Huene, 743 F.2d at 705.

11 In addition, bankruptcy appellate panels and district
12 courts, but not courts of appeals, have broad discretionary
13 authority to entertain interlocutory appeals from orders that are
14 not final judgments. Compare 28 U.S.C. § 158(a), with id.
15 §§ 158(d) & 1292. Upon grant of leave to appeal, a bankruptcy
16 appellate panel or district court may entertain an interlocutory
17 appeal. 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8003.

18 The prescribed procedure to obtain leave to appeal under
19 § 158(a)(3) is a Rule 8003 motion for leave to appeal, but the
20 rule also confers discretion to regard an appeal improperly taken
21 as a motion for leave to appeal. Fed. R. Bankr. P. 8003.

22 Having exercised our discretion to treat the notice of
23 appeal improperly taken (because the order being appealed is not
24 final) as a motion for leave to appeal and having granted leave
25 to appeal the interlocutory judgment, we have appellate
26 jurisdiction over the § 727 appeals by virtue of § 158(a)(3),
27 notwithstanding the absence of a Rule 54(b) certification.

28

1 II

2 The key question in the trustee's avoiding action appeals
3 (BAP Nos. 06-1250 and 06-1449) is whether it was error to rule
4 that the MSA does not embody an actually fraudulent transfer
5 under California's UFTA, which applies in bankruptcy by way of
6 § 544(b). Cal. Civ. Code § 3439.04(a)(1).

7 As there were cross motions for summary judgment, we look
8 for genuine issues of material fact and, if none, determine which
9 moving party is entitled to judgment as a matter of law. Fed. R.
10 Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056.

11
12 A

13 Section 544(b) confers on bankruptcy trustees the power to
14 avoid any transfer of an interest of the debtor in property that
15 is voidable under nonbankruptcy law by a creditor holding an
16 allowable unsecured claim. 11 U.S.C. § 544(b).¹²

17 If a transfer is avoidable under nonbankruptcy law, then it
18 is avoided unless the Bankruptcy Code provides otherwise. The
19 statutory exceptions relate to charitable contributions and
20 certain payments and agreements in the finance industry. 11
21

22
23 ¹²Section 544(b) provides, in pertinent part:

24 (b) (1) Except as provided in paragraph (2), the trustee
25 may avoid any transfer of an interest of the debtor in
26 property . . . that is voidable under applicable law by
27 a creditor holding an unsecured claim that is allowable
under section 502 of this title or that is not

28 11 U.S.C. § 544(b)(1).

1 U.S.C. §§ 544(b) (2)¹³ & 546(e)-(g) & (j).

2 The consequences of avoidance are set forth at § 550
3 ("Liability of transferee of avoided transfer"). Congress
4 explicitly separated the concepts of avoiding a transfer and
5 recovering from a transferee. Lippi v. City Bank, 955 F.2d 599,
6 605 (9th Cir. 1992); Plotkin v. Pomona Valley Imps., Inc. (In re
7 Cohen), 199 B.R. 709, 718 (9th Cir. BAP 1996) ("Cohen").

8
9 B

10 The Outland judgment creditors satisfy the § 544(b)
11 requirement that there be a creditor holding an unsecured claim
12 that is allowable under § 502.

13 California's UFTA is the relevant § 544(b) "applicable law"
14 that the Outland judgment creditors could invoke in the absence
15 of bankruptcy. Cal. Civ. Code § 3439.01 et seq.

16 Whether a transfer is avoidable under California's UFTA is a
17 question purely of California law as to which the California
18 Supreme Court is the final authority. Thus, a federal court
19 construing UFTA is merely predicting what the state supreme court
20 would rule if presented with the question. Comm'r v. Estate of

21
22 ¹³Section 544(b) (2) provides:

23 (b) (2) Paragraph (1) shall not apply to a transfer of a
24 charitable contribution (as that term is defined in section
25 548(d) (3)) that is not covered under section 548(a) (1) (B),
26 by reason of section 548(a) (2). Any claim by any person to
27 recover a transferred contribution described in the
preceding sentence under Federal or State law in a Federal
or State court shall be preempted by the commencement of the
case.

28 11 U.S.C. § 544(b) (2).

1 Bosch, 387 U.S. 456, 465 (1967).

2 The § 544(b) requirement of a transfer of "an interest of
3 the debtor in property," which is a phrase common to §§ 544(b),
4 547, and 548, refers to property that would have been part of the
5 estate had it not been transferred before bankruptcy. See Begier
6 v. IRS, 496 U.S. 53, 58 (1990); Keller v. Keller (In re Keller),
7 185 B.R. 796, 799 (9th Cir. BAP 1995). In other words, the focus
8 is on the interest of the debtor that was transferred.

9 As pertinent here, the "interest of the debtor in property"
10 is Beverly's transfer to his spouse of his half of the
11 unencumbered \$1 million in bank deposits. This is a transfer.
12 It is not an equal division of bank deposits that would have had
13 the effect of confirming to Beverly the interest that he already
14 had. Here, Beverly was entitled to the one-half of the funds
15 that he transferred.

16 Nor does the community property origin of the debtor's
17 transferred interest in property make a difference. Nobody
18 disputes the effectiveness of the state court's decree dividing
19 the community property pursuant to the MSA to transform all
20 property from community to separate property status before the
21 Beverly involuntary bankruptcy was filed. See Gendreau v.
22 Gendreau (In re Gendreau), 191 B.R. 798, 803 (9th Cir. BAP 1996).

23 The issue, rather, is whether the prebankruptcy transfer of
24 the debtor's interest in \$1 million can be avoided under UFTA.
25 If so, then the transferred property would be recoverable for the
26 benefit of creditors cheated by the MSA that did something other
27 than evenly dividing divisible property. The trustee does not
28 attack the MSA or the order approving it. To be sure, a win by

1 the trustee may precipitate revision of the property division
2 among the former spouses, but that does not affect avoidance.

3
4 C

5 It is settled California law that a transfer accomplished
6 through an MSA can be avoided as a fraudulent transfer pursuant
7 to UFTA. Mejia v. Reed, 74 P.3d 166, 173-74 (Cal. 2003) (“UFTA
8 applies to property transfers under MSA’s [sic]”).

9 In Mejia, the California Supreme Court harmonized UFTA with
10 the provision of California Family Code § 916 that insulates a
11 spouse, and property received on dissolution, from involuntary
12 liability for the other spouse’s debt.¹⁴

13 The state supreme court noted it is California legislative
14 policy that, in allocating debts to divorcing parties, account be
15 taken of the rights of creditors “so there will be available
16 sufficient property to satisfy the debt by the person to whom the
17 debt is assigned.” Mejia, 74 P.3d at 171, quoting Lezine v. Sec.
18 Pac. Fin. Servs., Inc., 925 P.2d 1002, 1013 (Cal. 1996).

19 Moreover, it is also California legislative policy that
20

21 ¹⁴The pertinent provision is:

22 (2) The separate property owned by a married person at the
23 time of the division [of community and quasi-community
24 property] and the property received by the person in the
25 division is not liable for a debt incurred by the person’s
26 spouse before or during marriage, and the person is not
27 personally liable for the debt, unless the debt was assigned
28 for payment by the person in the division of the property.
Nothing in this paragraph affects the liability of property
for the satisfaction of a lien on the property.

Cal. Fam. Code § 916(a)(2).

1 creditors be protected from fraudulent transfers, including
2 transfers between spouses. Accordingly, transfers before and
3 after dissolution can be avoided as fraudulent transfers. Mejia,
4 74 P.3d at 173. When a court divides marital property in the
5 absence of agreement by the parties, it must divide the property
6 equally, but an MSA need not be equal. Mejia, 74 P.3d at 173.

7 From these considerations, the California Supreme Court
8 concluded that divorcing couples do not have "a one-time-only
9 opportunity to defraud creditors by including the fraudulent
10 transfer in an MSA." Mejia, 74 P.3d at 173. Hence, it ruled
11 that Family Code § 916 does not trump UFTA.

12 The state supreme court also noted that the majority of
13 other UFTA jurisdictions that had considered the question had
14 construed UFTA to apply to marital property transfers. Mejia, 74
15 P.3d at 170 (citing cases). It regarded these decisions as
16 informing its analysis. UFTA provides it "shall be applied and
17 construed to effectuate its general purpose to make uniform the
18 law . . . among states enacting it." Mejia, 74 P.3d at 171
19 (ellipsis in original), quoting Cal. Civ. Code § 3439.11.

20 Finally, the state supreme court noted that there are other
21 California theories, as well as federal theories, for setting
22 aside MSAs on account of fraud. It specifically noted its
23 expectation that a bankruptcy trustee could "set aside the
24 property division of a dissolution judgment on the ground of
25 fraud." Mejia, 74 P.3d at 174, citing Britt v. Damson, 334 F.2d
26 896, 902 (9th Cir. 1964); and Webster v. Hope (In re Hope), 231
27 B.R. 403, 415 & n.19 (Bankr. D.D.C. 1999) (cataloging cases).

28 In the end, the supreme court concluded that "while the law

1 respects the finality of a property settlement agreement 'that is
2 not tainted by fraud or compulsion or is not in violation of the
3 confidential relationship of the parties,' we find no legislative
4 policy to protect such agreements from attack as instruments of
5 fraud." Mejia, 74 P.3d at 174, quoting Adams v. Adams, 177 P.2d
6 265, 267 (Cal. 1947). In other words, while there is no
7 requirement that a California MSA divide property equally, an MSA
8 cannot divide property in a manner fraudulent to creditors.

9 Thus, the California Supreme Court held, as a matter of
10 California law, that "UFTA applies to property transfers under
11 MSA's [sic]." Mejia, 74 P.3d at 174. It follows that the
12 Beverly MSA is vulnerable to scrutiny under UFTA.

13 In entering the judgments against the trustee, the
14 bankruptcy court discounted Mejia, saying it did not "really
15 decide anything" and, inexplicably conflating § 544(a) with
16 § 544(b), ruled that the trustee had no rights as a hypothetical
17 lien creditor. The court did not grapple with the implications
18 of the holding that UFTA applies to MSAs under California law.

19 This was error. Mejia decided a great deal. The California
20 Supreme Court established that, as a matter of California law, an
21 MSA may be attacked as a California fraudulent transfer under
22 UFTA and disapproved contrary California intermediate appellate
23 authority. Mejia, 74 P.3d at 174 n.2, disapproving Gagan v.
24 Gouyd, 86 Cal. Rptr. 2d 733 (Cal. Ct. App. 1999). This
25 definitive determination of California law cannot be brushed
26 aside in federal litigation in which California law provides the
27 rule of decision.

28 The error was compounded by the court's focus on whether the

1 trustee was a hypothetical lien creditor for purposes of the
2 conceptually distinct "strong arm" power under § 544(a) that is
3 used to defeat imperfectly perfected liens. Hypothetical lien
4 creditor status is irrelevant to the nonbankruptcy avoiding
5 powers that are incorporated by § 544(b). There is nothing
6 hypothetical about the Outland judgment creditors and their
7 eligibility to serve as the basis for a § 544(b) avoiding action.

8 In sum, the trustee had the ability to attack the transfer
9 by way of MSA of Beverly's interest in the nonexempt \$1 million.

10
11 D

12 The question becomes whether the transfer is avoidable under
13 California's UFTA as an actually fraudulent transfer.

14
15 1

16 Actually fraudulent transfers are avoidable under UFTA by
17 present and future creditors. A transfer is said to be "actually
18 fraudulent" as to a creditor if the debtor made the transfer
19 "with actual intent to hinder, delay, or defraud any creditor of
20 the debtor." Cal. Civ. Code § 3439.04(a)(1).¹⁵

21
22 ¹⁵Section 4 of UFTA, as enacted in California provides:

23 (a) A transfer made or obligation incurred by a debtor is
24 fraudulent as to a creditor, whether the creditor's claim
25 arose before or after the transfer was made or the
26 obligation was incurred, if the debtor made the transfer or
27 incurred the obligation as follows:

(1) With actual intent to hinder, delay, or defraud any
creditor of the debtor.

28 Cal. Civ. Code § 3439.04(a)(1) (UFTA § 4(a)(1)).

1 The focus is on the intent of the transferor. While intent
2 to defraud is the usual rubric, the intended effect of the
3 transfer need only be hindrance of a creditor or delay of a
4 creditor. Any of the three – intent to hinder, intent to delay,
5 or intent to defraud – qualifies a transfer for UFTA avoidance,
6 even if adequate consideration is paid by someone other than a
7 good faith transferee for reasonably equivalent value. Cohen,
8 199 B.R. at 716-17 (California UFTA).

9 Whether there is actual intent to hinder, delay, or defraud
10 under UFTA is a question of fact to be determined by a
11 preponderance of evidence. Bulmash v. Davis, 597 P.2d 469, 473
12 (Cal. 1979); Filip v. Bucurenciu, 28 Cal. Rptr. 3d 884, 890 (Cal.
13 Ct. App. 2005); Annod Corp. v. Hamilton & Samuels, 123 Cal. Rptr.
14 2d 924, 929 (Cal. Ct. App. 2002).

15 Since direct evidence of intent to hinder, delay or defraud
16 is uncommon, the determination typically is made inferentially
17 from circumstances consistent with the requisite intent. Filip,
18 28 Cal. Rptr. 3d at 890. Thus, UFTA lists eleven nonexclusive
19 factors that historically (since the Statute of 13 Elizabeth in
20 1572) have been regarded as circumstantial “badges of fraud” that
21 are probative of intent. Cal. Civ. Code § 3439.04(b).¹⁶

22
23 ¹⁶The statutory list is:

24 (b) In determining actual intent under paragraph (1) of
25 subdivision (a), consideration may be given, among other
factors, to any or all of the following:

26 (1) Whether the transfer or obligation was to an insider.
27 (2) Whether the debtor retained possession or control of
the property transferred after the transfer.

28 (3) Whether the transfer or obligation was disclosed or

(continued...)

1 The UFTA list of "badges of fraud" provides neither a
2 counting rule, nor a mathematical formula. No minimum number of
3 factors tips the scales toward actual intent. A trier of fact is
4 entitled to find actual intent based on the evidence in the case,
5 even if no "badges of fraud" are present. Conversely, specific
6 evidence may negate an inference of fraud notwithstanding the
7 presence of a number of "badges of fraud." Filip, 28 Cal. Rptr.
8 3d at 890; Annod Corp., 123 Cal. Rptr. 2d at 932-33.

9
10 2

11 The summary judgment evidence in this appeal contains an
12 extraordinary amount of direct evidence of the requisite intent,
13

14 ¹⁶(...continued)
15 concealed.

16 (4) Whether before the transfer was made or obligation was
17 incurred, the debtor had been sued or threatened with suit.

18 (5) Whether the transfer was of substantially all the
19 debtor's assets.

20 (6) Whether the debtor absconded.

21 (7) Whether the debtor removed or concealed assets.

22 (8) Whether the value of the consideration received by the
23 debtor was reasonably equivalent to the value of the asset
24 transferred or the amount of the obligation incurred.

25 (9) Whether the debtor was insolvent or became insolvent
26 shortly after the transfer was made or the obligation was
27 incurred.

28 (10) Whether the transfer occurred shortly before or
shortly after a substantial debt was incurred.

(11) Whether the debtor transferred the essential assets
of the business to a lienholder who transferred the assets
to an insider of the debtor.

Cal. Civ. Code § 3439.04(b). California did not codify the
"badges of fraud" in UFTA § 4 until January 1, 2005. Filip, 28
Cal. Rptr. 3d at 890; S.B. 1408, 2003-04 Reg. Sess., Sen. Rules
Comm. Bill Analysis (Cal. Apr. 15, 2004) ("This bill is sponsored
by the Business Law Section of the California State Bar.").

1 as well as circumstantial evidence of "badges of fraud."

2
3 a

4 The direct evidence in the debtor's own words in letters to
5 his spouse's counsel, Nancy Dunaetz, is remarkably candid:

6 . . . I still have no malpractice insurance and am expecting
7 service of the second complaint shortly. The house now
8 becomes a very large asset for potential creditors of my
9 business. (Mar. 11, 2003).

10 ***

11 We have now lost any asset protection planning opportunity
12 regarding which I recommended repeatedly. If Stephanie is
13 required to satisfy a portion of the judgment[,] you can
14 explain to her why you stalled until it was too late to do
15 anything to protect her. (Jan. 2, 2004).

16 ***

17 I want my half of the money distributed to me at the closing
18 so I can relocate it. It makes no sense to close the deal
19 and have the money 'held in escrow' as you previously
20 demanded where it would make an easy target for the judgment
21 creditor. (Jan. 14, 2004) (Emphasis in original).

22 ***

23 I will trade all of my share of the house for a fair share
24 of Stephanie's interest in the profit sharing plan.
25 Assuming there is \$650,000 in equity in the house (all
26 'after tax dollars') then I would trade my \$325,000
27 residence equity for \$500,000 in retirement plan interests
28 (all 'pre-tax'). She would then take the entire \$650,000
from the house and I would take just about the entire profit
sharing plan. (Jan. 14, 2004).

Our total [Outland litigation] exposure is now between
\$500,000 and \$600,000 by my estimate. That is all of the
equity in the [family] house. What are you doing while Rome
burns? (Jan. 14, 2004).

A big issue will be the practice which you value at
\$150,000. At the moment[,] I value it at a negative
\$500,000 due to the Outland-Maupin liability which will be
at least \$250,000 and possibly \$500,000 and other issues.

1 Stephanie must share in the obligation. She can not take
2 the assets generated by my business and not share in the
3 exposure. . . . I am anxious to do this as soon as possible
because of the imminent trial. I need to do some planning.
(Jan. 24, 2004).

4 ***

5 If you want to hold the [house sale proceeds] in a joint
6 account, I can not agree because that is the same as giving
7 the money away. If you run to court and get such an order
you are setting Stephanie up to lose the entire amount.
(Jan. 28, 2004).

8 ***

9 I suggest we each take \$100,000 now and make it disappear as
10 fast as we can for the same reason. Pay debts etc. now. I
11 am fully expecting that bankruptcy will be my only option
six months from now. (Jan. 28, 2004).

12 ***

13 The trial starts next week. . . . [W]e better get this done
14 this week or your client and I both stand to lose almost
15 everything. The consensus is that we are looking at a
16 judgment in the neighborhood of one million dollars. . . .
I actually will relax a little knowing that Stephanie will
be paying for half of the judgment if we do not settle now.
(Mar. 17, 2004).

17 ***

18 Stephanie is receiving nearly \$1,000,000 . . . in cash[,]
19 and I am receiving only about \$100,000 . . . in cash. I
20 have no net income so far this year It is very
21 likely, if not probable, that I will be required to file
22 bankruptcy within the next 30 to 60 days and perhaps close
this office. If that occurs, I will also be making
applications to modify the support and perhaps even seek
support from the cash that Stephanie is receiving. (Apr. 9,
2004).

23 These statements are properly part of the summary judgment
24 evidence because they were proffered by the trustee as affidavit
25 exhibits and, in the words of Rule 56(e), "would be admissible in
26 evidence." Fed. R. Civ. P. 56(e), incorporated by Fed. R. Bankr.
27 P. 7056. Specifically, Beverly's own statements, when offered
28 against him, are admissions that are not hearsay. Fed. R. Evid.

1 801(d)(2). It was established that during depositions Beverly
2 authenticated the letters containing these statements.

3 The evidence demonstrates that the Outland litigation was
4 the main reason Beverly structured the MSA so as to transfer his
5 entire interest in the \$1 million nonexempt fund. If there had
6 been a simple equal division of community assets (as presumed by
7 California law when a court makes the division), he would have
8 had about \$500,000 of nonexempt funds (\$50,000 eligible to be
9 rolled over into a new homestead) that he knew would be
10 vulnerable to collection of the \$424,000 Outland judgment.

11
12 b

13 The circumstantial evidence consists of a number of the
14 statutory "badges of fraud."

15 First, the transfer to Mrs. Beverly was a transfer to an
16 insider. Cal. Civ. Code § 3439.04(b)(1).

17 Second, the transfer was made after Beverly had been sued in
18 the Outland litigation. Cal. Civ. Code § 3439.04(b)(4).

19 Third, the transfer was of substantially all of Beverly's
20 assets. Cal. Civ. Code § 3439.04(b)(5). His retention of his
21 interest in the exempt retirement plan does not count because
22 exempt property is not an UFTA "asset."

23 UFTA's definition of "asset" excludes exempt property. Cal.
24 Civ. Code § 3439.01(a).¹⁷ Thus, although Beverly retained his

25
26 ¹⁷"Asset" is defined in UFTA as:

27 (a) "Asset" means property of a debtor, but the term does
28 not include, the following:

(continued...)

1 interest in the exempt retirement plan (and received his spouse's
2 interest), that value counts as zero in calculating whether the
3 transfer was of substantially all of Beverly's assets for
4 purposes of UFTA badge-of-fraud analysis.

5 Fourth, the MSA transfer rendered Beverly insolvent. Cal.
6 Civ. Code § 3439.04(b)(9).

7 As to insolvency, the exclusion of exempt property from
8 UFTA's definition of "asset" is crucial. UFTA defines insolvency
9 as the sum of debts being greater than all the assets. Cal. Civ.
10 Code § 3439.02(a).¹⁸ Before the MSA transfer, Beverly's UFTA

11
12 ¹⁷(...continued)

13 (1) Property to the extent it is encumbered by a valid
14 lien.

15 (2) Property to the extent it is generally exempt under
16 nonbankruptcy law.

17 Cal. Civ. Code § 3439.01(a).

18 ¹⁸Insolvency is defined in UFTA as:

19 (a) A debtor is insolvent if, at fair valuations, the sum
20 of the debtor's debts is greater than all of the debtor's
21 assets.

22 . . .

23 (d) Assets under this section do not include property that
24 has been transferred, concealed, or removed with intent to
25 hinder, delay, or defraud creditors or that has been
26 transferred in a manner making the transfer voidable under
27 this chapter.

28 (e) Debts under this section do not include an obligation
to the extent it is secured by a valid lien on property of
the debtor not included as an asset.

Cal. Civ. Code § 3439.02.

The Bankruptcy Code reaches the same result by defining
"insolvent" to exclude exempt property from the asset side of the
balance sheet. 11 U.S.C. § 101(32)(A)(ii).

1 assets included \$500,000 in nonexempt bank deposits, and his
2 debts included the \$424,450 judgment. After the MSA transfer,
3 his only UFTA assets were of nominal value, but his debts
4 remained the same. Thus, if Beverly was not already insolvent,
5 the MSA transfer made him insolvent for UFTA purposes.

6 Fifth, the transfer occurred shortly after a substantial
7 debt was incurred. Cal. Civ. Code § 3439.04(b)(10). The MSA
8 transfer was agreed upon in the midst of trial that led to a
9 \$424,450 judgment and was incorporated in the marital dissolution
10 decree shortly after the money judgment was entered.

11
12 3

13 The cumulative effect of the trustee's direct and
14 circumstantial summary judgment evidence that is probative of
15 intent to hinder, delay, or defraud creditors is powerful.

16 Beverly's summary judgment evidence in opposition makes two
17 basic points in the nature of confession and avoidance. First,
18 he subjectively believed that his "planning" transfers could not
19 be avoided. In support, he asserts that a bankruptcy lawyer with
20 offices in the same building told him that the transfers were
21 permissible and that a commentary in a legal newspaper regarding
22 an appellate decision also supported his view. Second, he
23 contends that the MSA negotiations were not collusive because the
24 divorce was hostile and was resolved through mediation.

25 Beverly's summary judgment evidence is not of a quality to
26 raise a genuine issue of material fact in the face of the
27 trustee's powerful evidence. His (imperfect) understanding of
28 bankruptcy law is beside the point. The crucial question was

1 whether the MSA transfer could be avoided as a matter of
2 California law. The Bankruptcy Code does not generally preempt
3 state-law avoiding powers. Regardless of bankruptcy, Beverly
4 always faced the need to run the UFTA gauntlet. Even cursory
5 research would have turned up the California Supreme Court's
6 Mejia decision, which squarely exposes MSA transfers to UFTA
7 avoidance. As to the MSA negotiations, both spouses had an
8 incentive to thwart collection of the Outland judgment. Nor is
9 there any evidence regarding the extent to which the mediator was
10 apprised of the UFTA issues that would be triggered by the MSA.

11 On balance, there is no genuine issue of material fact as to
12 any of the essential elements of avoidance under UFTA.

13
14 4

15 As a defense to avoidance, Mrs. Beverly contends that she
16 was a good faith transferee for reasonably equivalent value.

17 Unlike Bankruptcy Code § 548, UFTA protects good faith
18 transferees from avoidance of fraudulent transfers based on
19 actual intent to hinder, delay, or defraud creditors so long as
20 the good faith transferee also gave reasonably equivalent value.
21 Cal. Civ. Code § 3439.08(a); Filip, 28 Cal. Rptr. 3d at 887-92.
22 And, good faith transferees of all other UFTA fraudulent
23 transfers have a lien to the extent of value given to the debtor.
24 Cal. Civ. Code § 3439.08(d).

25 In contrast, § 548 does not provide a good faith transferee
26 defense to avoidance for any category of fraudulent transfer, but
27 does grant a good faith transferee for value whose transfer is
28 avoided a lien to the extent of value given. 11 U.S.C. § 548(c).

1 As it is a matter of defense and not an essential element of
2 avoidance, the proponent of good faith transferee status has the
3 burden of proof. Cohen, 199 B.R. at 718-19.

4 The summary judgment evidence belies Mrs. Beverly's
5 contention that she is a good faith transferee. All of the
6 correspondence that contains direct evidence of Beverly's
7 actually fraudulent intent was directed to Mrs. Beverly's
8 counsel, who was her agent for those purposes. Moreover, copies
9 of many of the letters were also directed to Mrs. Beverly.

10 That Beverly's message registered with Mrs. Beverly and her
11 counsel is apparent from a letter from Mrs. Beverly's counsel:

12 [S]ubmit the Counter Offer [on the house sale] on time,
13 or you are going to risk losing the sale entirely,
14 which could result in a huge charge against you if the
equity in the house is thereafter loss [sic] to the
anticipated Judgment against you. (Jan. 15, 2004).

15 The statement in this letter, which is presented by the
16 trustee's summary judgment affidavits, likewise meets the Rule
17 56(e) "would be admissible" standard. It is a statement offered
18 against a party made by a person (her lawyer) authorized to make
19 a statement concerning the subject and also constitutes a
20 statement by the party's agent (her lawyer) concerning a matter
21 within the scope of the agency made during the existence of the
22 relationship. Fed. R. Evid. 801(d)(2)(C) & (D).

23 In short, the proponent of good faith transferee status has
24 not produced enough to demonstrate the existence of a genuine
25 issue of material fact that would support such a finding.

26 It follows that the MSA transfer was an actually fraudulent
27 transfer under UFTA not subject to the good-faith-transferee-for-
28 reasonably-equivalent-value defense and may be avoided.

1
2 The Ninth Circuit decision in Gill v. Stern (In re Stern),
3 345 F.3d 1036 (9th Cir. 2003) ("Stern"), which affirmed a summary
4 judgment that a pension plan was exempt and was not funded by an
5 UFTA fraudulent transfer, does not compel a different result.

6 Although there was an MSA in the background of Stern in
7 which the debtor's interest in nonexempt property was transferred
8 to the former spouse, that transfer was not challenged. Rather,
9 Stern was an attempt by the trustee to obtain control over an
10 exempt retirement plan.

11 The Ninth Circuit faced only two questions in Stern that
12 pertain to the Beverly appeal: first, whether the pension plan
13 was exempt under California law; and, second, whether the
14 transfer of IRA funds into the pension plan was avoidable as an
15 actual intent UFTA fraudulent transfer. Stern, 345 F.3d at 1040.

16 Although Stern is obscure on the point, the transfer that
17 survived the UFTA challenge was a transfer from one form of
18 exempt asset to another form of exempt asset. Transfers from one
19 form of exemption to another are commonly protected, even if
20 proceeds pass through a nonexempt account. Cf. Love v. Menick
21 (In re Love), 341 F.2d 680, 681-82 (9th Cir. 1965) (from life
22 insurance to savings and loan account).

23 The conclusion that the pension plan in Stern was fully
24 exempt necessarily means that it passed muster under the
25 California statutory requirement that it be "designed and used
26 for retirement purposes." Cal. Civ. Proc. Code § 704.115(a)(2);
27 Bloom v. Robinson (In re Bloom), 839 F.2d 1376, 1378 (9th Cir.
28 1988); Daniel v. Sec. Pac. Nat'l Bank (In re Daniel), 771 F.2d

1 1352, 1358 (9th Cir. 1985).

2 The IRA whence the transfer was made was also exempt, in
3 whole or in part. The funds in the IRA had been rolled over from
4 a tax-qualified defined benefit pension plan. Stern, 345 F.3d at
5 1039. In California, an IRA is exempt as a "private retirement
6 plan," to the extent necessary to provide for support upon
7 retirement, if it is designed and used principally for retirement
8 purposes. Cal. Civ. Proc. Code §§ 704.115(a)(3) & (e);¹⁹ Dudley
9 v. Anderson (In re Dudley), 249 F.3d 1170, 1176 (9th Cir. 2001).

10 Thus, while we do not know whether all of the IRA was exempt,
11 Stern is not a simple instance of eve-of-bankruptcy exemption

13 ¹⁹The version of § 704.115(a)(3) in effect in 1992 was:

14 (a) As used in this section, "private retirement plan"
15 means:

16 . . .

17 (3) Self-employed retirement plans and individual retirement
18 annuities or accounts provided for in the Internal Revenue
19 Code of 1954 as amended, to the extent the amounts held in
20 the plans, annuities, or accounts do not exceed the maximum
21 amounts exempt from federal income taxation under that code.

22 Cal. Civ. Proc. Code § 704.115(a)(3) (West Supp. 1992). A 1999
23 amendment substituted "1986" for "1954" and added the clause:
24 "including individual retirement accounts qualified under Section
25 408 or 408A of that code." Id. (West Supp. 2000).

26 Subsection (e) provides, in relevant part:

27 (e) . . . [T]he amounts described in [§ 704.115(a)(3)] are
28 exempt only to the extent necessary to provide for the
support of the judgment debtor when the judgment debtor
retires and for the support of the spouse and dependents of
the judgment debtor, taking into account all resources that
are likely to be available for the support of the judgment
debtor when the judgment debtor retires.

Cal. Civ. Proc. Code § 704.115(e) (West 1987 & Supp. 2000).

1 planning.

2 As to UFTA, the Stern ruling was that, in the absence of any
3 direct evidence regarding intent, the circumstantial evidence of
4 repositioning assets from a (fully or partially) exempt IRA to an
5 exempt pension plan before filing a short-lived chapter 11 that
6 apparently was prompted by the earlier arbitration award was
7 "unspectacular" and inadequate, standing alone, to support a
8 finding of actual intent to hinder, delay, or defraud creditors.
9 Stern, 345 F.3d at 1045.

10 As Stern was fact-intensive, the relevant chronology is
11 important to understanding it:

| | | |
|----|-------|--|
| 12 | 1989 | Stern terminates qualified, defined benefit pension plan and transfers assets to IRA; |
| 13 | | |
| 14 | 4/92 | Stern creates corporate pension plan; |
| 15 | 9/92 | \$4.6 million arbitration award against Stern; |
| 16 | 10/92 | Stipulated divorce and MSA – former spouse retains nonexempt \$2 million, while Stern assumes arbitration liability, retains corporation, and retains \$1.4 million IRA; |
| 17 | | |
| 18 | 10/92 | Stern transfers IRA assets to 4/92 pension plan; |
| 19 | 11/92 | Stern files chapter 11 case; |
| 20 | 12/92 | Stern obtains dismissal of chapter 11 case because he does not agree to appointment of chapter 11 trustee to operate his business; |
| 21 | | |
| 22 | 7/93 | State-court UFTA action to avoid \$1.4 million transfer from IRA to profit sharing pension plan; |
| 23 | | |
| 24 | 8/95 | Stern files chapter 7 case; |
| 25 | 6/96 | Trustee intervenes as plaintiff in UFTA action removed to bankruptcy court from state court. |

26 Against this background, Stern materially differs from the
27 present case. It was not an MSA fraudulent transfer decision –
28 the MSA transfer was not challenged. Nor did the challenged

1 transfer involve an entirely nonexempt asset; rather, it was a
2 transfer of an exempt IRA to an exempt pension plan. Nor was
3 there direct evidence probative of intent. The circumstantial
4 evidence was little more than the timing of the questioned
5 transfer before filing a short-lived chapter 11 case. Finally,
6 Stern was atypical because the debtor waited thirty-three months
7 to file a chapter 7. The chapter 11 filing and its voluntary
8 dismissal suggested there was intent to deal with the creditors.

9 Beverly reads too much into Stern's dicta. To be sure, the
10 Stern panel was influenced by settled law that mere conversion by
11 a consumer of nonexempt into exempt property on the eve of
12 bankruptcy does not, without more, disentitle a debtor to an
13 exemption. Wudrick v. Clements, 451 F.2d 988, 989-90 (9th Cir.
14 1971), cited with approval, Stern, 345 F.3d at 1043-44. Despite
15 its references to precedent, Stern's invocation of federal
16 exemption doctrine from Wudrick was merely an analogy used to
17 help explain why, under California law, the circumstantial
18 evidence was too weak to establish a genuine issue of material
19 fact suggesting that the IRA transfer was animated by actual
20 intent to hinder, delay, or defraud creditors.

21 Several factors counsel against construing Stern as
22 exporting substantive federal bankruptcy exemption planning
23 doctrine from Wudrick to nonbankruptcy UFTA law. First,
24 expanding Wudrick exemption planning law to apply to fraudulent
25 transfers of property of proportions greater than the scope of
26 traditional individual bankruptcy exemptions would place the
27 Ninth Circuit in conflict with four other circuits. Smiley v.
28 First Nat'l Bank (In re Smiley), 864 F.2d 562, 568 (7th Cir.

1 1989) (intent to hinder or delay); Norwest Bank Neb., N.A. v.
2 Tveten, 848 F.2d 871, 874-76 (8th Cir. 1988) (debtor "did not
3 want a mere fresh start, he wanted a head start"); Ford v. Poston
4 (In re Ford), 773 F.2d 52, 55 (4th Cir. 1985); First Tex. Sav.
5 Ass'n v. Reed (In re Reed), 700 F.2d 986, 990-92 (5th Cir. 1983).
6 We doubt that the Ninth Circuit would have stepped out of the
7 mainstream without being deliberate about doing so.

8 Nor is there a hint that Stern purported to construe UFTA in
9 a manner inconsistent with California law. Wudrick states
10 federal law regarding allowability of exemptions in bankruptcy.
11 UFTA is a matter of California statute. It would be
12 extraordinary for federal decisional law regarding exemptions to
13 be binding on a different general question of California law,
14 especially in the face of the California Supreme Court decision
15 that MSA transfers may be avoided as UFTA fraudulent transfers.

16 It follows that Stern should be understood as an elementary
17 summary judgment decision in which the constellation of facts did
18 not yield a genuine issue of material fact. The requirement of
19 summary judgment is that there be a genuine issue, not merely an
20 issue, of material fact. There was no genuine issue in Stern.

21 Beverly is at the opposite end of the spectrum. There is
22 overwhelming direct evidence of his intent to hinder, delay, or
23 defraud creditors. Circumstantial evidence, other than evidence
24 regarding the timing of the transfer, corroborates the direct
25 evidence. Hence, Stern does not undermine the conclusion that
26 Beverly actually intended to hinder, delay, or defraud creditors.

2 In the objection-to-discharge appeals (BAP Nos. 06-1273 and
3 06-1284), the appellants challenge the ruling that Beverly did
4 not transfer property with "intent to hinder, delay, or defraud"
5 a creditor or the trustee for purposes of § 727(a)(2).

6 The bankruptcy court's line of analysis was that tolerance
7 of basic bankruptcy exemption planning, the protection afforded
8 to MSAs under California law, and the relatively equal value in
9 the Beverly MSA all negate § 727(a)(2) intent to hinder, delay,
10 or defraud creditors. None of these reasons, however, suffice to
11 overcome the overwhelming evidence of Beverly's intent vis-à-vis
12 the Outland litigation.

13
14 A

15 First, the statute. Under § 727(a)(2)(A), a discharge may
16 be denied if it is demonstrated that:

17 (2) the debtor, with intent to hinder, delay, or
18 defraud a creditor . . . has transferred, removed,
19 destroyed, mutilated, or concealed . . . (A) property
of the debtor, within one year before the date of the
filing of the petition[.]

20 11 U.S.C. § 727(a)(2)(A).

21 Since the Beverly MSA transfer unambiguously occurred within
22 one year before the filing of the petition, the question is
23 whether the transfer of Beverly's interest in \$1 million of
24 nonexempt property was accompanied by "intent to hinder, delay,
25 or defraud" the Outland creditors. 11 U.S.C. § 727(a)(2)(A).

26 The commonality between the fraudulent transfer avoiding
27 power and denial-of-discharge provisions is the requirement of
28 "intent to hinder, delay, or defraud" creditors. 11 U.S.C.

1 §§ 548(a)(1)(A) & 727(a)(2); Cal. Civ. Code § 3439.04(a)(1).

2 As the requirement is stated in the disjunctive, it suffices
3 to demonstrate any of the three alternatives, intent either to
4 hinder or to delay or to defraud creditors. Adeeb, 787 F.2d at
5 1343 (“debtor who knowingly acts to hinder or delay his creditors
6 acts with the very intent penalized by [§ 727(a)(2)]”); Devers v.
7 Bank of Sheridan (In re Devers), 759 F.2d 751, 753 (9th Cir.
8 1985); Searles v. Riley (In re Searles), 317 B.R. 368, 379 (9th
9 Cir. BAP 2004), aff’d, 212 F. App’x 589 (9th Cir. 2006). In
10 other words, proof of mere intent to hinder or to delay may lead
11 to denial of discharge. Id.

12 In view of the three alternatives, generic descriptive
13 phrases such as “fraudulent transfer,” “fraudulent intent,” and
14 “actual fraudulent intent” are misleadingly imprecise
15 generalizations to the extent that, in addition to fraud, they
16 subsume adequate independent grounds of mere hindrance and delay.

17 In theory, the “intent” requirement differs as between
18 denial of discharge under § 727(a)(2) and avoidable fraudulent
19 transfers under § 548(a)(1) and UFTA. Mere intent to hinder,
20 delay, or defraud a creditor is all that is needed to deny
21 discharge under § 727(a)(2)(A). In contrast, for a transfer to
22 be avoided under § 548(a)(1)(A) and UFTA, there must be proof of
23 actual intent to hinder, delay, or defraud.

24 In practice, however, there may be little difference between
25 “intent to hinder, delay, or defraud” and “actual intent to
26 hinder, delay, or defraud.” In § 727(a)(2) cases, the Ninth
27 Circuit has used “intent” and “actual intent” interchangeably.
28 Emmett Valley Assocs. v. Woodfield (In re Woodfield), 978 F.2d

1 516, 518 (9th Cir. 1992); Adeeb, 787 F.2d at 1342.

2 Whether a debtor harbors intent to hinder, or delay, or
3 defraud a creditor is a question of fact reviewed for clear
4 error. Woodfield, 978 F.2d at 518; Searles, 317 B.R. at 379; cf.
5 Bammer, 131 F.3d at 791 (distinguishing among standards).

6 Intent may be inferred from surrounding circumstances.
7 Woodfield, 978 F.2d at 518; Adeeb, 787 F.2d at 1342-43. The
8 surrounding circumstances include the various "badges of fraud"
9 that constitute circumstantial evidence of intent. Woodfield,
10 978 F.2d at 518. A course of conduct may also be probative of
11 the question of intent. Adeeb, 787 F.2d at 1343; Devers, 759
12 F.2d at 753-54; Searles, 317 B.R. at 380.

13 The burden of proof on an objection to discharge under
14 § 727(a)(2) is preponderance of evidence. See Grogan v. Garner,
15 498 U.S. 279, 289 (1991); Lansdowne v. Cox (In re Cox), 41 F.3d
16 1294, 1297 (9th Cir. 1994); Searles, 317 B.R. at 376; 6 COLLIER ON
17 BANKRUPTCY ¶ 522.08[4] (Henry J. Sommer & Alan N. Resnick eds.
18 15th ed. rev. 2006) ("COLLIER 15th ed.").

19 As applied to Beverly's MSA transfer of his interest in
20 \$1 million of nonexempt property to his former spouse, the
21 evidence of Beverly's intent to hinder, delay, or defraud the
22 Outland creditors is so overwhelming for the reasons we
23 previously have described with respect to UFTA that the contrary
24 conclusion was clear error.

25
26 B

27 The avoidance of a fraudulent transfer under § 548 or UFTA
28 does not necessarily compel the denial of discharge even though

1 the issue of "intent to hinder, delay, or defraud" creditors may
2 have been resolved in fraudulent transfer litigation.

3 For example, a transfer avoidable as constructively
4 fraudulent does not qualify for denial of discharge. Compare 11
5 U.S.C. § 548(a)(1)(B), with id. § 727(a)(2).

6 Time periods may differ. Denial of discharge requires that
7 the offending transfer normally²⁰ occur within one year before
8 bankruptcy, while avoiding periods may be longer. Compare, e.g.,
9 Cal. Civ. Code § 3439.09(a) (4 years), with 11 U.S.C. § 548(a)(1)
10 (2 years after 2005) and id. § 727(a)(2) (1 year).

11 The most difficult problems arise when there is a conversion
12 of nonexempt to exempt property. Such a transfer, by definition,
13 cannot be for reasonably equivalent value because both UFTA and
14 Bankruptcy Code exclude exempt property when assessing insolvency
15 for fraudulent transfer purposes. 11 U.S.C. § 101(32); Cal. Civ.
16 Code § 3439.01(a)(2). Thus, the question boils down to whether
17 there is intent to hinder, or to delay, or to defraud creditors.

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19 C

20 The exemption planning aspect of the situation does not
21 compel a different result. Based on the overall MSA transaction,
22 the bankruptcy court reasoned that the toleration of bankruptcy
23 exemption planning means that discharge cannot be denied because

24
25 ²⁰There is a continuing concealment doctrine. Hughes v.
26 Lawson (In re Lawson), 122 F.3d 1237, 1240-42 (9th Cir. 1997),
27 aff'g 193 B.R. 520 (9th Cir. BAP 1996); Rosen v. Bezner (In re
28 Rosen), 996 F.2d 1527, 1531-32 (3d Cir. 1993); Thibodeaux v.
Olivier (In re Olivier), 819 F.2d 550, 554-55 (5th Cir. 1987);
Friedell v. Kauffman (In re Kauffman), 675 F.2d 127, 128 (7th
Cir. 1981) (Bankruptcy Act).

1 there cannot be intent to hinder, delay, or defraud creditors.
2 This overstates the effect of exemption planning.

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5 Under the Bankruptcy Act of 1898, exemptions could be
6 rejected on equitable principles if the act of placing the
7 property into exempt status entailed fraud. E.g., Miguel v.
8 Walsh, 447 F.2d 724, 726 (9th Cir. 1971); Freedman Bros. Co. v.
9 Parker (In re Gerber), 186 Fed. 693, 696-97 (9th Cir. 1911); 1A
10 JAMES WM. MOORE, COLLIER ON BANKRUPTCY ¶ 6.11[3] (Lawrence P. King,
11 ed., 14th ed. 1978) ("COLLIER 14th ed.") (collecting cases).

12 But the mere fact of the timing of the conversion on the eve
13 of bankruptcy, without additional evidence probative of fraud,
14 was insufficient to support rejection of an exemption as having
15 been obtained by fraud. E.g., Wudrick, 451 F.2d at 990; COLLIER
16 14th ed. at ¶ 6.11[3] (collecting cases).

17 The perennial difficulty was that the boundary between a
18 legitimate and a fraudulent exemption was difficult to discern.
19 As explained in the contemporary Collier treatise, "[T]he
20 distinction is often a close one and depends entirely on the
21 facts." COLLIER 14th ed. at ¶ 6.11[3].

22 Although the Bankruptcy Code of 1978 made extensive
23 revisions to the procedure for claiming exemptions, it did not
24 contain a provision directly authorizing exemption planning.
25 Rather, it preserved the judge-made exemption planning doctrine
26 forged under the Bankruptcy Act. The House and Senate Committee
27 Reports each state that "[a]s under current law, the debtor will
28 be permitted to convert nonexempt property to exempt property

1 before filing a bankruptcy petition" and that the practice "is
2 not fraudulent as to creditors." H.R. REP. No. 95-595 at 361
3 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6317; S. REP. No. 95-
4 989 at 76, reprinted in 1978 U.S.C.C.A.N. 5787, 5862.

5 The survival of the exemption planning doctrine results from
6 the rule of construction that judge-made doctrines established
7 under the Bankruptcy Act are presumed to have been carried
8 forward in the Bankruptcy Code except to the extent Congress
9 indicated a contrary intent. Kelly v. Robinson, 479 U.S. 36, 47
10 (1986); Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325
11 B.R. 282, 291 (9th Cir. BAP 2005). Here, Congress indicated
12 explicit approval of the established doctrine.

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15 The exemption planning doctrine that was carried forward
16 into the Bankruptcy Code includes the fraud exception, which
17 exception can have an impact on multiple fronts.

18 The exemption might be defeated on a fraudulent transfer
19 theory. E.g., Jensen v. Dietz (In re Sholdan), 217 F.3d 1006,
20 1009-10 (8th Cir. 2000).

21 Even if the exemption is not defeated, the existence of
22 intent to hinder, delay, or defraud creditors nevertheless may
23 warrant denial of discharge under § 727(a)(2). Smiley, 864 F.2d
24 at 568 (7th Cir., intent to hinder or delay); Tveten, 848 F.2d at
25 874-76 (8th Cir., debtor "did not want a mere fresh start, he
26 wanted a head start"); Ford, 773 F.2d at 55 (4th Cir.); Reed, 700
27 F.2d at 990-92 (5th Cir.); cf. Coughlin v. Cataldo (In re
28 Cataldo), 224 B.R. 426, 430 (9th Cir. BAP 1998) (dictum citing

1 Tveten and Smiley).

2 As noted in the Collier treatise, the "potential for the
3 denial of the debtor's discharge is a powerful incentive to tread
4 carefully in this area." 4 COLLIER 15th ed. at ¶ 522.08[4].

5 Treading carefully is necessary because, as noted, it is
6 difficult to draw the line between legitimate bankruptcy planning
7 and intent to defraud creditors. Only two things are certain
8 about the line.

9 First, as already explained, denial of discharge involving
10 exemption planning requires that there be evidence other than the
11 mere timing of the transformation of property from nonexempt to
12 exempt status. See generally 6 COLLIER 15th ed. ¶ 727.02[3][g].

13 Second, there is a principle of "too much." In classical
14 terms, it is the Sword of Damocles.²¹ In the agrarian terms used
15 by the Fifth Circuit affirming the denial of a discharge, "when a
16 pig becomes a hog it is slaughtered." Swift v. Bank of San
17 Antonio (In re Swift), 3 F.3d 929, 931 (5th Cir. 1993) (§ 727 in
18 context of exemption planning), quoting Dolese v. United States,
19 605 F.2d 1146, 1154 (10th Cir. 1979) (tax case), and Albuquerque
20 Nat'l Bank v. Zouhar (In re Zouhar), 10 B.R. 154, 157 (Bankr.
21 D.N.M. 1981) (§ 727-exemption planning case). Damoclean or
22 agrarian, the limiting concept is the same.

23 The reality is that cases finding discharge-disqualifying
24

25 ²¹The legend related by Cicero is that Damocles, a courtier
26 of Dionysius the Elder in the 4th Century BCE, opined how happy
27 the ruler must be. Dionysius made the point that such happiness
28 was tempered by precarious fortune by seating Damocles at a
banquet beneath a sword that was suspended over Damocles' head by
a single horse hair. CICERO, TUSCULANAE DISPUTATIONES, 5.61.

1 intent to hinder, delay, or defraud creditors typically involve
2 some combination of large claims of exemption and overtones of
3 overreaching. 6 COLLIER 15th ed. ¶ 727.02[3][f].

4 Beverly fits the denial-of-discharge model notwithstanding
5 his exemption planning. Before the MSA transfer, he had
6 nonexempt assets sufficient to pay substantially all of the
7 \$424,450 Outland judgment. After the transfer, he had no assets
8 with which to pay the judgment. Moreover, the record is replete
9 with evidence that Beverly was fixated on moving assets away from
10 the reach of the Outlands. In any event, however, the appellants
11 do not challenge the exemption; they want to recover the
12 nonexempt property that was transferred in exchange for it.

13
14 D

15 The court erred when it found that Beverly's exchange of
16 nonexempt assets for exempt assets in the process of the debtor's
17 divorce was not fraudulent as a matter of law.

18 The evidence provided by the trustee and the Outlands
19 compels the conclusion that Beverly actually intended to hinder
20 or delay, if not defraud, the Outlands in their effort to collect
21 upon the judgment he expected to be rendered in the Outland
22 litigation in state court.

23 Under § 727(a)(2)(A), Beverly's intent to hinder or delay a
24 creditor constitutes the requisite "intent penalized by the
25 statute notwithstanding any other motivation he may have had for
26 the transfer." Adeeb, 787 F.2d at 1343.

27 There is a remarkably large volume of evidence of Beverly's
28 intent to hinder or delay that is extrinsic from the fact that he

1 transferred nonexempt property for exempt property in the MSA.
2 As a result, it is beyond cavil that Beverly's intent was to
3 become judgment proof and not just to protect his assets.

4 In short, we are left with the "definite and firm
5 conviction" that the bankruptcy court made a mistake with respect
6 to its findings of fact. This was clear error.

8 CONCLUSION

9 There being overwhelming evidence of record that the debtor
10 actually intended to hinder or delay creditors when he
11 transferred his interest in \$1 million of nonexempt property
12 through the MSA, all elements of § 727(a)(2)(A) are satisfied and
13 the debtor's discharge shall be denied.²² Hence, the judgments
14 entered in BAP Nos. CC-06-1273 and CC-06-1284 are REVERSED and
15 REMANDED with instructions to enter judgment denying the
16 discharge of the debtor.

17 The bankruptcy court also erred when it ruled that transfer
18 of the debtor's interest in the nonexempt \$1 million was not
19 avoidable as a fraudulent transfer under California's UFTA, as
20 incorporated by § 544(b). There being no genuine issue of
21 material fact, and the plaintiffs being entitled to judgment as a
22 matter of law, judgments entered in BAP Nos. CC-06-1250 and CC-
23 06-1449 are REVERSED and REMANDED with instructions to enter
24 judgment in favor of the plaintiffs, avoiding the transfer of the
25 debtor's interest in \$1 million of nonexempt property.

26
27 ²²Because the debtor's discharge is being denied pursuant to
28 § 727(a)(2)(A) and the transfer is being avoided under UFTA, we
need not address the remainder of the arguments.

1 We emphasize that our determinations do not constitute an
2 exercise of dominion over the retirement plan and do not affect
3 either its exempt status under California law or its ERISA-
4 qualified status. To the extent that the result may vitiate the
5 MSA, that is a matter to be resolved by the former spouses in
6 state court.

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