

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

LOIS A. ROBERTS

Case No. 02-14180-MAM-7

Debtor.

THEODORE L. HALL, TRUSTEE

Plaintiff,

v.

Adv. No. 02-1186

REGINALD L. ROBERTS, SR.

Defendant.

**ORDER AND JUDGMENT FINDING THAT TRUSTEE MAY NOT
AVOID DEBTOR'S TRANSFERS UNDER HER DIVORCE AGREEMENT**

Theodore L. Hall, Mobile, Alabama, Attorney for Trustee

Pamela K. Millsaps, Mobile, Alabama, Attorney for Reginald L. Roberts

This matter is before the Court on the trial of an adversary proceeding involving the trustee's complaint that Lois Roberts' transfer of property under her divorce agreement with her former husband, Reginald Roberts, is avoidable under 11 U.S.C. §§ 547 or 548. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has authority to enter a final order. For the reasons indicated below, the Court finds that the trustee may not avoid Ms. Roberts' transfers pursuant to 11 U.S.C. §§ 547 or 548.

FACTS

Reginald L. Roberts, Sr. and Lois A. Roberts married on October 21, 1965. They later had a son, Reginald L. Roberts, Jr., and a daughter, Lisa A. Hayes, both of whom are now adults. The Roberts acquired two pieces of real property that are relevant to this proceeding. They

purchased a home located at 7061 Lee Circle in West Irvington, Alabama and a vacant lot located at 7770 North Valley Court in Irvington, Alabama. The Roberts then purchased a mobile home and placed it on the vacant lot so that their son and his family could live there. No testimony was given regarding whether both Mr. Roberts and Ms. Roberts signed the mortgage notes on the real property they acquired during their marriage.

Sometime prior to 1998 Ms. Roberts accumulated approximately \$54,000 of credit card debt (“the 1998 credit card debt”) on joint accounts she held with her husband. Mr. Roberts was unaware of the debt because Ms. Roberts concealed her borrowing from him. He only became aware of the problem when he received calls at work from creditors. Mr. Roberts confronted Ms. Roberts with the information he received from the creditors and she admitted she had concealed the debt. The Roberts took out a second mortgage on their home and borrowed money against Mr. Roberts’ 401(K) plan to pay the debt. Mr. Roberts threatened to divorce Ms. Roberts if she ever incurred similar debts.

Nonetheless, Ms. Roberts accumulated an additional \$67,000 in credit card debt by 2002 (“the 2002 credit card debt”) by reopening certain joint accounts in Mr. Roberts name and by establishing new joint accounts. Once again, she concealed the debt from Mr. Roberts and he only became aware of the problem in 2002 when he again received calls at work from creditors. Mr. Roberts then initiated divorce proceedings.

The Roberts entered into a divorce settlement agreement that was ratified in a judgment by the Circuit Court of Mobile County, Alabama on May 20, 2002. Pursuant to the divorce agreement, the Roberts both waived alimony and divided their real and personal property. Mr. Roberts received ownership of the Roberts’ home as well as the lot and mobile home where the

Roberts' son and his family live. Ms. Roberts received ownership of the Roberts 1996 Chevrolet Lumina.

The Roberts' home was worth approximately \$70,000 when the divorce judgment was entered. It was subject to 2 mortgage liens that totaled \$48,500. The Roberts testified that the lot and mobile home are now worth less than they paid for them - \$8,300 to \$8,500 for the lot and \$10,000 for the mobile home. The mobile home was subject to a \$4,700 lien at the time of the divorce. Reginald Roberts, Sr. testified that he is liable for payments on the mobile home but his son lives there and is making the payments. It was never clarified if both Mr. and Ms. Roberts were liable on the mobile home debt or not. Ms. Roberts listed the 1996 Chevrolet Lumina's value as \$1,500 in her bankruptcy schedules.

The Roberts also agreed to divide their 2002 credit card debt under their divorce agreement. Mr. Roberts agreed to assume the Roberts' credit card debt solely on accounts that both he and Ms. Roberts had used, including an \$8,000 joint debt for a Visa account. Ms. Roberts agreed to assume all the Roberts' credit card debt on accounts that she only had used. She assumed approximately \$67,000 in total credit card debt. Mr. Roberts agreed not to file criminal charges against Ms. Roberts and to provide her with COBRA medical insurance coverage for 18 months from the judgment of divorce. Mr. Roberts testified that the total cost of maintaining the medical coverage over 18 months will be \$3,500 to \$4,000 if the premiums do not go up. The medical coverage is important to Ms. Roberts because she suffers from medical problems relating to a degenerative disc condition in her back.

After the Roberts divorced, Ms. Roberts lived with both her sister and her son, Reginald Roberts, Jr., and his family at different periods. She primarily lived with her sister. She lived with her son and his family for about a month because they needed her to help take care of her

granddaughter after her granddaughter underwent surgery. Ms. Roberts signed an affidavit stating that her son's mobile home was her primary residence after the divorce. She stated that she was very upset about her granddaughter's surgery when she signed the affidavit and she did not read it carefully. It was also the residence in which she was living at that time.

Ms. Roberts filed a chapter 7 bankruptcy case on July 26, 2002. In her schedules, Ms. Roberts listed total assets of \$1,900 and total liabilities of \$67,830. Her assets consisted of her personal effects and her car; her liabilities consisted almost exclusively of unsecured nonpriority claims by credit card companies and collection agencies. The trustee filed this suit on October 31, 2002 seeking to avoid Ms. Roberts' transfer of property under the Roberts' divorce agreement on the basis that the transfers were fraudulent pursuant to 11 U.S.C. § 548. Ms. Roberts filed an answer asserting that the property transfers were equitable based on facts leading up to the divorce. She then filed a motion for summary judgment. Shortly thereafter, the trustee filed an amended complaint to add an allegation that Ms. Roberts' transfer of property to Mr. Roberts was a preferential transfer pursuant to 11 U.S.C. § 547.

The Court held a hearing on Ms. Roberts' motion for summary judgment on January 21, 2003. The Court denied Ms. Roberts' motion for summary judgment in an oral ruling; its findings and conclusions are on the record. The Court held the trial on the adversary proceeding on February 25, 2003. The trustee and Ms. Roberts disagree regarding the application of 11 U.S.C. §§ 547 and 548 to the transfers made by Ms. Roberts under her divorce agreement. The trustee argues that the transfers should be avoided as either fraudulent transfers or preferential transfers. Ms. Roberts argues that the transfers were equitable based on the facts leading up to her divorce from Mr. Roberts and are not fraudulent transfers or preferences.

LAW

Reginald Roberts, Sr. and Lois Roberts were divorced in 2002. They allocated their property and debt pursuant to an agreement. The transfers of property and assumptions of debt by Ms. Roberts left her with virtually no assets and a large amount of unsecured debt. She was unable to fulfill her debt obligations after the divorce; therefore, she filed a chapter 7 bankruptcy case. The Court must now decide if the transfers made by Ms. Roberts constitute fraudulent transfers or preferences under the Bankruptcy Code.

The trustee bears the burden of proof on all issues in a fraudulent conveyance action. *CJW Limited, Inc. v. Davis (In re CJW Limited, Inc.)*, 172 B.R. 675, 679-80 (Bankr. M.D. Fla. 1994) (citing to *In re Rodriguez*, 895 F.2d 725, 726 n.1 (11th Cir. 1990)). In a preference action, the trustee bears the “burden of proving that the pre-petition transfer is avoidable because it constitutes a preferential transfer . . . [t]he burden of proof then shifts to the defendant . . . to prove that it is entitled to one of the affirmative defenses to preferential transfers. *McElroy v. McElroy (In re McElroy)*, 228 B.R. 791, 793 (Bankr. M.D. Fla. 1999).

The Court must consider the following issues to make its determination regarding whether the trustee may avoid the transfers made by Ms. Roberts pursuant to her divorce agreement with Mr. Roberts:

1. Did the transfers made by Ms. Roberts pursuant to her divorce agreement with Mr. Roberts constitute fraudulent transfers under §548(a)(1)(A)?
2. Did the transfers made by Ms. Roberts pursuant to her divorce agreement with Mr. Roberts constitute fraudulent transfers under §548(a)(1)(B)?
3. If not, were they preferences under 11 U.S.C. § 547(b)?

Did the Transfers Made by Ms. Roberts Pursuant to Her Divorce Agreement
With Mr. Roberts Constitute Fraudulent Transfers Under §548(a)(1)(A)?

“Section 548 of the Bankruptcy Code . . . sets forth the powers of a trustee in bankruptcy (or, in a Chapter 11 case, a debtor in possession) to avoid fraudulent transfers,” *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994), by a debtor “on or within one year before the date of the filing of the petition.” 11 U.S.C. § 548. “It permits to be set aside not only transfers infected by actual fraud but certain other transfers as well--so-called constructively fraudulent transfers.” *Id.* Transfers involving actual fraud are governed by 11 U.S.C. §548(a)(1)(A); transfers involving constructive fraud are governed by 11 U.S.C. §548(a)(1)(B). The Court will discuss §548(a)(1)(A) first and then §548(a)(1)(B).

11 U.S.C. §548(a)(1)(A) provides:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(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

The Bankruptcy Code defines a “transfer” as “every mode, direct, or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption.” 11 U.S.C. § 101(54). The surrender of Ms. Roberts’ interest in the Roberts’ real property was a transfer under this definition.

The transfers made in this case were pursuant to the Roberts’ divorce agreement, which was ratified in a divorce judgment on May 20, 2002. Ms. Roberts filed her chapter 7 bankruptcy petition on

July 26, 2002. Therefore, §548 is applicable to the transfers made by Ms. Roberts because the transfers were made within one year before Ms. Roberts filed her bankruptcy case.

To avoid the transfers under §548(a)(1)(A), the trustee must prove that Ms. Roberts made the transfers “with actual intent to hinder, delay, or defraud” her creditors. As this Court has previously stated “it is very rare that a debtor will admit to such an intent,” therefore, “the trustee must prove such intent by circumstantial evidence.” *Mixon v. O’Connor (In re Koontz)*, Case No. 95-13354-MAM-7 (Bankr. S.D. Ala., February 6, 1998).

The circumstantial evidence that courts look at to prove actual intent includes the 6 badges of fraud. *Id.* The badges are:

1. The lack or inadequacy of consideration;
2. The family, friendship or close associate relationship between the parties;
3. The retention of possession, benefit or use of the property in question;
4. The financial condition of the party sought to be charged both before and after the transaction in question;
5. The existence or cumulative effect of a pattern or series of transactions or courses of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; and
6. The general chronology of events and transactions under inquiry.

Id. (citing to *Cates-Hazrman v. Reininger-Bone (Matter of Reininger-Bone)*, 79 B.R. 53 (Bankr. M.D. Fla. 1987)). The Court finds that the trustee has failed to meet his burden to show that the transfers by Ms. Roberts pursuant to the Roberts’ divorce agreement were fraudulent under 11 U.S.C. §548(a)(1)(A) of the Bankruptcy Code. There was no “actual intent to hinder, delay, or defraud” her creditors based on the 6 badges of fraud listed by the Court. Each badge will be discussed in turn below.

1. Lack of Adequate Consideration.

Ms. Roberts transferred her interest in both the Roberts' home as well as her interest in the lot and mobile home where the Roberts' son and his family live to Mr. Roberts. The home was worth approximately \$70,000 and it was subject to 2 mortgages liens totaling \$48,500. The lot and the mobile home were worth less than what the Roberts paid for them - \$8,300 to \$8,500 for the lot and \$10,000 for the mobile home according to the Roberts' testimony. Reginald Roberts, Jr. testified that the mobile home is subject to a \$4,700 mortgage lien. Ms. Roberts' one half interest in these assets (excluding her homestead exemption) is approximately \$13,250. She received the auto and \$4,000 of health coverage, giving her \$5,500 in value.

Under Alabama law, "a division of marital property in a divorce case does not have to be equal, only equitable, and a determination of what is equitable rests within the sound discretion of the trial court. *Walls v. Walls*, 2003 WL 393824 (Ala. Civ. App. 2003) (citing to *Golden v. Golden*, 681 So.2d 605 (Ala. Civ. App. 1996)). Although not equal consideration, the consideration received by Ms. Roberts is adequate in light of Mr. Roberts' possible criminal charge threat and Mr. Roberts provision of health insurance. The Court finds that Ms. Roberts received adequate consideration for the transfers she made pursuant to the Roberts' divorce agreement.

2. Relationship Between the Parties.

The Roberts were in the process of getting a divorce when they entered into the divorce agreement requiring Ms. Roberts to transfer her interest in the Roberts' property to Mr. Roberts. Mr. Roberts and Ms. Roberts both testified that the divorce was not entirely amicable. The Court observed the testimony of both parties regarding the divorce and finds them both to be

credible. The Court finds that the Roberts did not have the type of close relationship indicative of actual fraudulent intent.

3. Retention of Possession, Benefit, or Use of Property.

Ms. Roberts lived with her son and his family for a period of time in the mobile home in which she transferred her interest to Mr. Roberts. However, she only lived with them for a short period of time to help take care of her granddaughter after her granddaughter underwent surgery. The Court finds that Ms. Roberts did not retain any interest or benefit in the real property she transferred to Mr. Roberts.

4. Financial Condition Before and After the Transfers.

Ms. Roberts' divorce from Mr. Roberts left her with fewer assets available for her creditors to satisfy their claims against her but her liability on the Roberts' joint debts did not change. Ms. Roberts transferred her interest in the Roberts' 2 pieces of real property to Mr. Roberts and she received assets of \$4,000 in medical coverage and her auto. She assumed primary responsibility for approximately \$67,000 in credit card debt and received Mr. Roberts' assurances that he would not file criminal charges against her.

Mr. Roberts and Ms. Roberts both testified that they acquired the 2 pieces of real property in which Ms. Roberts transferred her interest during their marriage; there was no testimony regarding whether both Mr. Roberts and Ms. Roberts signed the mortgage notes on the property. The trustee carried the burden of proof on this issue and he did not prove that the Roberts did not both sign the mortgage notes. Therefore, the Court will assume for this analysis that the Roberts were jointly and severally obligated on the mortgage notes. *See Kelly v. Beneficial Finance Co.*, 374 So.2d 338, 340 (Ala. Civ. App. 1979) (finding that because both [husband and wife] were required to sign the note on which [the creditor] brought suit, they

became jointly and severally liable to [the creditor] under Alabama law). Mr. Roberts and Ms. Roberts are both jointly and severally liable on the Roberts' joint debts notwithstanding the Roberts' divorce agreement. Therefore, Ms. Roberts' liability on the Roberts' joint debts did not change after her divorce from Mr. Roberts.

5. Courses of Conduct After the Incurring of Debt.

Ms. Roberts' 2002 credit card debt was approximately \$67,000. She incurred all of this debt prior to the Roberts' divorce. No evidence was presented to indicate that she continued to accumulate debt after the divorce. To the contrary, the evidence and testimony presented indicate that Ms. Roberts entered into the divorce agreement with Mr. Roberts to place herself in the best financial condition possible under the circumstances.

6. General Chronology of Events and Transactions.

Ms. Roberts filed her chapter 7 bankruptcy case shortly after the Roberts' divorce. No evidence was presented to show that Mr. Roberts and Ms. Roberts worked together to allocate a large portion of their joint debt to Ms. Roberts while transferring substantially all of their joint assets to Mr. Roberts.

The Court finds that the trustee has failed to meet his burden under 11 U.S.C. §548(a)(1)(A). The trustee may still be able to avoid Ms. Roberts' transfers under §548(a)(1)(B) if the trustee can prove that the transfers were constructively fraudulent.

2.

Did the Transfers Made by Ms. Roberts Pursuant to Her Divorce Agreement
With Mr. Roberts Constitute Fraudulent Transfers Under §548(a)(1)(B)?

The trustee may avoid Ms. Roberts transfers to Mr. Roberts if the transfers were constructively fraudulent transfers. These type of transfers are governed by 11 U.S.C. §548(a)(1)(B), which provides:

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

(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;

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

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

The Court has already found that Ms. Roberts received adequate consideration for the transfers she made under the divorce agreement with Mr. Roberts. The term “adequate consideration” is analogous to “reasonably equivalent value.” *Varon v. Trimble, Marshall & Goldman, P.C. (In re Euro-Swiss Int. Corp.)*, 33 B.R. 872 (Bankr. S.D. N.Y. 1983) (holding that “[r]easonably equivalent value requires only a ‘full and adequate’ consideration, not a penny-for-penny exchange”) (citing to *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981); *In re Vaniman Intern, Inc.*, 22 B.R. 166 (Bankr. E.D. N.Y. 1982)).

Additionally, the Roberts’ property division was ratified by the divorce judgment entered by the Circuit Court of Mobile County, Alabama. Case law holds that bankruptcy courts must only do “a ‘surface determination’ . . . that the division of marital property between the divorcing parties was within the range of likely distribution that would be ordered by the state divorce court if the property division had actually been litigated in the state court.” *Harman v. Sorluccho (In re Sorluccho)*, 68 B.R. 748, 753 (Bankr. D. N.H. 1986). Under Alabama law, courts may consider numerous factors when making a property division determination, including “the conduct of the parties pertaining to the cause of the divorce.” *Nichols v. Nichols*, 824 So.2d 797,

802 (Ala. Civ. App. 2001) (quoting *Pickett v. Pickett*, 723 So.2d 71, 73 (Ala. Civ. App. 1998)).

The circuit court found the Roberts' agreement to be equitable under the circumstances. This Court will not disturb the circuit court's findings regarding the equity of the Roberts' divorce agreement without stronger proof of inequity.

The Court finds that Ms. Roberts received reasonably equivalent value for the transfers she made to Mr. Roberts. Therefore, the Court finds that the trustee has failed to meet his burden under 11 U.S.C. §548(a)(1)(B).

3.

If Not, Were They Preferences Under 11 U.S.C. § 547(b)?

Section 547 of the Bankruptcy Code permits "a trustee in bankruptcy to avoid certain preferential payments made before the debtor files for bankruptcy." *Cohen v. McElroy (In re McElroy)*, 228 B.R. 791, 793 (Bankr. M.D. Fla. 1999) (quoting *Begier v. Internal Revenue Service*, 496 U.S. 53, 58-59 (1990)). "This mechanism prevents the debtor from favoring one creditor over others by transferring property shortly before filing bankruptcy." *Id.* Unlike a §548 fraudulent conveyance action in which the trustee bears the burden of proof on all issues, §547(g) contains a shifting burden of proof.

The trustee must prove that the prepetition transfer is avoidable because it meets all the requirements of 11 U.S.C. §547(b). *In re McElroy*, 228 B.R. 791, 793 (Bankr. M.D. Fla. 1999). The burden then shifts to Ms. Roberts to prove that she is entitled to an affirmative defense to a preferential transfer under §547(c). *Id.* The Court will discuss §547(b) first and then §547(c), if it is applicable.

11 U.S.C. § 547(b) provides:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made--
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if--
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The Court will not discuss each element of §547(b) because the first two requirements are not met.


Section 547(b)(1) requires a preferential transfer to be made “to or for the benefit of a creditor.” Mr. Roberts was not a creditor of Ms. Roberts before the divorce judgment. They jointly held property and jointly had debts. Their divorce settlement simply divided their assets and liabilities. Neither one owed a predivorce “debt” to the other. *See Roost v. Wilber (In re Parker)*, 241 B.R. 722, 725 (Bankr. D. Or. 1999) (holding that “parties to whom property is awarded are not creditors under Code § 101(10)”).

Second, Ms. Roberts did not make the transfer “on account of an antecedent debt” as required by §547(b)(2). Although Ms. Roberts testified that she made the transfers to Mr. Roberts partially in satisfaction of the past credit card debts that he assumed under their divorce agreement, case law holds that these transfers are not avoidable under §547(b) because they are not made “for or on account of an antecedent debt.” 11 U.S.C. §547(b)(2). The debts were joint debts and the assets were joint assets.

Predivorce, there was no legal allocation of the marital debts and assets between them. *See In re Parker*, 241 B.R. 722, 725 (Bankr. D. Or. 1999) (holding that “[a] partition of jointly held property’ is not a transfer on account of a debt, antecedent or otherwise . . . [t]he determination, and the consequent division of assets, do not constitute a transfer to a creditor on account of an antecedent debt”); *Raleigh v. Haskell* (*In re Haskell*), 1998 WL 809520 (Bankr. N.D. Ill. 1998) (holding that the “assignment of property interests pursuant to the Divorce Decree did constitute transfers under the expansive definition of the Bankruptcy Code . . . [h]owever, the transfer of property pursuant to the Divorce Decree, was not on account of an antecedent debt . . .”). Based on this case law, the Court finds that the trustee has failed to meet his burden of proof under 11 U.S.C. §547(b) and it is not necessary to consider whether any defenses Ms. Roberts might have are valid.

It is ORDERED that the trustee’s complaint is DISMISSED with prejudice.

Dated: March 14, 2003


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE