

JUL 24 2007

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	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	EDWARD M. WOLKOWITZ,	)	Bk. No.	LA 04-29840 TD
		)		
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.	)	<b>O P I N I O N</b>	
		)		
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

FACTS

1  
2 William Beverly, a lawyer, and his spouse executed an MSA on  
3 April 9, 2004, in a hostile divorce filed in August 2002.

4 The MSA was signed during a recess of a legal malpractice  
5 trial ("Outland litigation") in which Beverly told his spouse's  
6 attorney, Nancy Dunaetz, that he would lose up to \$1 million and  
7 end up in bankruptcy.<sup>1</sup>

8 The community assets to be divided included Beverly's share  
9 of his law firm pension plan, which plan is ERISA-qualified and  
10 is exempt under California law. The Outland liability arose  
11 before 2002 and was conceded in the MSA to be community debt.

12 The MSA purported to divide and allocate all community  
13 property and debts. In addition to unexceptionable divisions of  
14 personal property, Beverly received the entire community property  
15 interest, worth about \$1.1 million, in the exempt pension plan.  
16 He also received \$100,000 for Outland litigation expenses (as a  
17 loan backed by a \$135,000 deed of trust on property in escrow).

18 Beverly's spouse received: the entire community property  
19 interest in about \$1 million from four nonexempt bank accounts,  
20 including proceeds from sale of the family home;<sup>2</sup> an Individual  
21 Retirement Account ("IRA") worth \$100,000; the \$135,000 deed of  
22 trust (as "equalizing payment" securing \$35,000 for her  
23 attorneys' fees and \$100,000 loaned to Beverly); miscellaneous  
24

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25 <sup>1</sup>Ltr. Beverly to Dunaetz, Apr. 9, 2004 ("It is very likely,  
26 if not probable, that I will be required to file bankruptcy  
27 within the next 30 to 60 days and perhaps close this office.").

28 <sup>2</sup>The parties agree the bank accounts contained about  
\$1 million. For simplicity, we refer to the sum as \$1 million.

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.<sup>3</sup> 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 <sup>3</sup>Ltr. 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.<sup>4</sup>  
2 On January 2, 2004, Beverly complained to Dunaetz that delays  
3 were eroding asset planning opportunities.<sup>5</sup> The concern gained  
4 urgency as the house sale loomed.<sup>6</sup> Dunaetz acknowledged the  
5 prospect of a judgment.<sup>7</sup> The risk was apparent to both spouses.<sup>8</sup>

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6  
7 <sup>4</sup>Ltr. 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 <sup>5</sup>Ltr. 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 <sup>6</sup>Ltr. 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 <sup>7</sup>Ltr. 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 <sup>8</sup>Ltr. 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.<sup>9</sup>

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           <sup>8</sup>(...continued)  
22 settle now.”).

23           <sup>9</sup>Ltr. 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.<sup>10</sup> As  
24 relevant to this appeal, it ruled that the MSA did not embody a  
25 fraudulent transfer for purposes of § 727(a)(2).

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26  
27 <sup>10</sup>Although 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 The court's basic line of analysis was that exemption  
2 planning is tolerated in bankruptcy, that the MSA embodied a  
3 transfer for reasonably equivalent value, and that there was no  
4 actual intent to defraud, hence there was no fraudulent transfer  
5 for purposes of § 727(a)(2). The trustee and the Outlands each  
6 appealed (BAP Nos. 06-1273 and 06-1284).

7 The court disposed of the trustee's avoiding action (No. 05-  
8 1649) on cross-motions for summary judgment, reasoning that the  
9 protection given to MSAs and exemption planning also blocked  
10 exercise of the trustee's avoiding powers, including UFTA and  
11 § 548. The judgments entered seriatim in favor of each of the  
12 Beverlys, the first of which was accompanied by a Rule 54(b)  
13 certification, were appealed (BAP Nos. 06-1250 and 06-1449).

#### 14 15 JURISDICTION

16 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334  
17 over these core proceedings under 28 U.S.C. §§ 157(b)(2)(F), (H),  
18 and (J). We have jurisdiction under 28 U.S.C. § 158(a).

#### 19 20 ISSUES

21 (1) Whether the judgment in the consolidated discharge  
22 objection actions was final.

23 (2) Whether the MSA included a fraudulent transfer under  
24 California's UFTA.

25 (3) Whether the trial evidence warranted denial of discharge  
26 under § 727(a)(2)(A).



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).<sup>11</sup>

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

---

21 <sup>11</sup>The 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).<sup>12</sup>

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 <sup>12</sup>Section 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)<sup>13</sup> & 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 <sup>13</sup>Section 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.<sup>14</sup>

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

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21 <sup>14</sup>The 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).<sup>15</sup>

21  
22 <sup>15</sup>Section 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).<sup>16</sup>

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22  
23           <sup>16</sup>The 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

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14 <sup>16</sup>(...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."

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).<sup>17</sup> Thus, although Beverly retained his

---

25  
26 <sup>17</sup>"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).<sup>18</sup> Before the MSA transfer, Beverly's UFTA

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11  
12 <sup>17</sup>(...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 <sup>18</sup>Insolvency 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);<sup>19</sup> 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 <sup>19</sup>The 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.

1 III

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 normally<sup>20</sup> 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.

18  
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

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24  
25 <sup>20</sup>There 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.

3  
4 1

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.

13  
14 2

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.<sup>21</sup> 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  
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25 <sup>21</sup>The 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.<sup>22</sup> 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.

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26  
27 <sup>22</sup>Because 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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