NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-08-1291-HMoJu
MICHAEL ALBERT PRICE,	Bk. No. 07-13078
Debtor.	Adv. No. 08-01084
QUEEN HIGH FULL HOUSE, LLC,	
Appellant,	
v.	**M E M O R A N D U M**[1]
PETER H. ARKISON, Trustee,	
Appellee.	

Argued and Submitted on May 19, 2009
at Seattle, Washington

Filed - June 24, 2009

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover Bankruptcy Judge, Presiding

Before: HOLLOWELL, MONTALI and JURY, Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Michael Price ("Debtor") bought residential property in Washington ("Property") with money provided to him by his son, Thomas Price ("Price"). The title to the Property was placed in the name of one of Price's companies, Queen High Full House, LLC ("Queen High"). The chapter 7[2] bankruptcy trustee, Peter Arkison ("Trustee"), filed an action to have the Property declared property of the bankruptcy estate. The bankruptcy court determined Debtor was the equitable owner of the Property and ordered the title quieted in the name of the Trustee for the benefit of the estate. We AFFIRM the bankruptcy court's ruling.

I. FACTS

Debtor was an owner and guarantor of the debts of a real estate development company, T&W Financial Corporation, that filed for bankruptcy in 2001. He subsequently struggled financially. On July 3, 2007, Debtor filed for chapter 7 bankruptcy.

On his bankruptcy schedules ("Schedules"),[3] Debtor listed his address as the Property. However, Debtor did not list any real property assets.[4] According to Schedule J, Debtor pays taxes, insurance, and utilities on the Property, but no rent.

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[2] Unless otherwise indicated, all "chapter," "Code," "section," and "Rule" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[3] The Schedules were not submitted in the record on appeal. We have taken judicial notice of the underlying bankruptcy records. O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert), 887 F.2d 955, 957-58 (9th Cir. 1988).

[4] Debtor amended the Schedules on December 12, 2007 to list a 1/7th equitable interest in a revocable trust as a real property interest.

Since at least 2004, Price contributed substantially to Debtor's financial support by paying Debtor's rent and giving him money. In 2006, Price provided Debtor with $2 million by making two separate payments from the account of Prium Companies, LLC ("Prium") to AST, Inc. ("AST"). Debtor is the CEO of AST, a company with no business or assets. Prium is a large real estate development company one-quarter owned by Price. The first check, in the amount of $1.3 million, was deposited by Debtor on February 16, 2006, into an account jointly held by Debtor and AST at Citigroup Smith Barney ("Citigroup Account"). The second check was written on April 17, 2006, and deposited into the same account.

In early 2006, Debtor and his wife viewed the Property, which was under construction, for possible purchase. On February 24, 2006, Debtor signed a Residential Real Estate Purchase and Sale Agreement ("Sale Agreement") to buy the Property for the sum of $730,000 with no financing contingency. The buyer was listed as "Michael A. Price and/or assigned."

On March 2, 2006, Debtor sent $15,000 as an earnest money deposit for the Property drawn on the Citigroup Account to Land Title Company. Debtor and his wife then met with the builders, made decisions regarding the finishes on the Property, selected appliances and lighting, and contracted with landscapers for landscaping services for the Property.

On April 20, 2006 (three days after Debtor received the $700,000 check from Prium), the remaining $715,789.04 purchase price was wired, at Debtor's request, from the Citigroup Account to close the sale. A preliminary title report for the Property,

generated as part of the sales transaction, listed three judgment liens totaling more than $3 million against the Debtor.

The draft escrow closing documents listed the buyer/borrower as "Michael Price or its assigns". The Debtor signed the draft escrow documents on behalf of Queen High, a company in which Price held a 50% interest. The Debtor, however, did not have an interest in Queen High or authority to sign on its behalf. Nor was the Sale Agreement assigned by Debtor to Queen High.

The sale closed on April 28, 2006. The final escrow closing documents were signed by Price on behalf of Queen High and Queen High took title to the Property. Price also executed a real estate excise tax affidavit on behalf of Queen High. Queen High subsequently booked the Property acquisition as a capital contribution made by Price. In October 2006, Queen High borrowed $550,000 from Centrum Financial Services, Inc. ("Centrum"), secured by a deed of trust on the Property.

On April 8, 2008, the Trustee filed a complaint for declaratory relief to determine the extent of the estate's interest in the Property. The Trustee contended that in 2006, Price gave Debtor a total of $2 million, with which Debtor bought the Property as his residence. The Trustee alleged the Property, even though titled in the name of Queen High, was equitably owned by Debtor because Debtor bought the Property and maintained it as his residence.

Price admitted the money he gave Debtor was a gift except for approximately $700,000 that was used to buy the Property. Price argued this portion of the $2 million was provided to

Debtor in order to purchase a home in the name of Price or his designee.

Trial was held on September 16, 2008. The Debtor did not appear. Price was the only witness. At the conclusion of the trial, the bankruptcy court announced its findings: (1) the evidence showed Price did not provide the $2 million as a loan or for investment on behalf of Price or with any restrictions, and therefore, Price intended to give the full $2 million to the Debtor; and, (2) the Debtor retained all indicia of real ownership in the Property. Based on those findings, the bankruptcy court concluded that Debtor held the equitable ownership in the Property when he filed for chapter 7 relief and that the Trustee, therefore, succeeded to the Debtor's ownership interest.

The bankruptcy court entered its judgment and order on November 10, 2008, ordering that all right, title, and interest in the Property, including the bare legal title of Queen High, be quieted in the name of the Trustee. The bankruptcy court's written Findings of Fact and Conclusions of Law, consistent with its oral findings, were entered November 12, 2008.[5] Queen High timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1), (b)(2). We have jurisdiction to hear appeals from final judgments, orders, and decrees under 28 U.S.C. § 158.

[5] The bankruptcy court made no findings or conclusions regarding Centrum's lien rights in the Property.

III. ISSUE

Did the bankruptcy court err in finding the Property was property of the bankruptcy estate?

IV. STANDARDS OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509 (9th Cir. BAP 2007). Under the "clear error" standard, we accept findings of fact unless the findings leave the "definite and firm conviction that a mistake has been committed." Id.; Latman v. Burdette, 366 F.3d 774, 781 (9th Cir. 2004).

We give findings of fact based on credibility particular deference. Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985); Hansen v. Moore (In re Hansen), 368 B.R. 868, 875 (9th Cir. BAP 2007); Fed. R. Bankr. P. 8013 (on appeal, "due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses"). If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. Id.; Anderson, 470 U.S. at 573-75.

V. DISCUSSION

Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541 (a)(1). Section 541(a)(1) defines what interests of a debtor are included in the estate; however, the existence and scope of a debtor's property interest is determined by state law. State v. Farmers Mkts., Inc. (In re Farmers Mkts., Inc.), 792 F.2d 1400, 1402 (9th Cir. 1986); Butner v. United States, 440 U.S. 48, 54-55 (1979). The bankruptcy court based

its determination that the Property was property of the bankruptcy estate on Washington law regarding gifts and trusts.

Under Washington law, absent evidence of a contrary intent, when property is purchased by one person, but placed in the name of another, the person with legal title is presumed to hold it subject to the equitable ownership interest of the purchaser. Engel v. Breske, 681 P.2d 263, 264 (Wash. App. 1984). The bankruptcy court concluded the Debtor had an equitable ownership interest in the Property based on two findings: (1) Price intended to give $2 million to Debtor, a portion of which was used to purchase the Property; and, (2) Debtor intended to retain the beneficial interest in the Property even though the title was held in the name of Queen High. We discuss each finding in turn.

A. Price Intended to Give $2 Million To Debtor.

A gift is a voluntary transfer of property without consideration. City of Bellevue v. State, 600 P.2d 1268, 1270 (Wash. 1979). The essential elements of a gift consist of: (1) a donative intent; (2) a subject matter capable of passing by delivery; and, (3) an actual delivery. Old Nat'l Bank & Union Trust Co. v. Kendall, 126 P.2d 603, 605 (Wash. 1942); Vogleson v. Cottin (In re Gallinger's Estate), 199 P.2d 575, 578-79 (Wash. 1948). Queen High does not argue that the money provided by Price to Debtor was incapable of passing by delivery or that there was no delivery. Rather, Queen High simply argues Price did not intend to give the full $2 million to Debtor.

Queen High contends Price provided a portion of the $2 million to Debtor with the intent that Debtor purchase a house on behalf of Price or his designee. Queen High argues this

intention is proved by Price's testimony, by Price's involvement with the acquisition of the Property (he reviewed the preliminary title report, appraisal, and signed the final escrow closing documents), and by the submission of tax documents showing the Property as a capital contribution to Queen High.

Queen High contends Price's testimony that he did not intend to give all of the $2 million to Debtor is presumptively true because it was not rebutted by any evidence submitted by the Trustee. The existence or absence of a donative intent is a factual issue to be resolved by a trier of fact through clear, convincing, strong and satisfactory evidence. Matter of Estate of Little, 721 P.2d 950, 960 (Wash. 1986); Gallinger's Estate, 199 P.2d at 579. The trier of fact evaluates and weighs the testimony of witnesses, and:

> must necessarily consider the demeanor of the witness upon the witness stand, his or her fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates and the interest, if any, which the witness has in the result of the trial, together with any other fact or circumstance arising from the evidence which in anywise affects the credibility of such witness.

Id.

In this case, while the bankruptcy court did not expressly find Price's testimony regarding his intent to withhold the value of the Property from his gift was not credible, it is clear the bankruptcy court evaluated the reasonableness of Price's testimony, together with the facts and circumstances affecting the credibility of that testimony, and concluded the entire $2

million was a gift to Debtor. At the close of trial, the bankruptcy court found the evidence showed Price was "willing to help Michael Price to the tune of $2 million" and that Price "did not intend to loan that sum to his father or make an investment in anything that his father was doing." Trial Tr. at 69:10-16. As a result, the bankruptcy court found Price intended to give $2 million to Debtor without restriction.

The bankruptcy court determined that, after Price agreed to give Debtor $2 million and the Debtor undertook the purchase of the Property, the nature of the transaction changed, but not Price's donative intent:

> Now, then as later events occur, the argument comes up, well, it was true that he intended to give the $1.3 million, but not the $700,000 plus that related to the [Property].
> * * * *
> Then when you pull the title report, you find that if he comes into title, why, there's some serious liens that are going to come against this particular property. And it's that point in time that the transaction begins to change, in my view. And that is - - I'm not sure the gift intent changes at all, frankly. But certainly, the way that the transaction is to be documented changes.

Trial Tr. at 69:17-20; 70:6-13.

The bankruptcy court found that Price "provided all the money for the purchase of the Property, in my view, by gifting it to his father. And I think he knows that." Trial Tr. at 71:7-9. We defer to the bankruptcy court's finding, based upon the facts and circumstances presented, regarding the credibility or reasonableness of Price's testimony. Gallinger's Estate, 199

P.2d at 579; Rule 8013. Furthermore, the evidence supports the bankruptcy court's finding that Debtor received all of the $2 million as a gift.

At trial, Price testified that Debtor was "going through tough times" and that Price and Debtor "had talked about getting [Debtor] back on his feet." As a result of this discussion, Price testified that "the total [Price] was going to help him out with was about $2 million." Trial Tr. at 15:4-11, 17-18. Price testified the $1.3 million check was "just what [he] agreed to write the check for at that period of time," and the subsequent $700,000 payment was the remaining balance of the $2 million he agreed to provide to Debtor. Trial Tr. at 15:17-21.

Price testified he had previously helped his father financially, providing him several checks at various times in amounts ranging from $25,000 to $100,000. Price stated he gave this money to Debtor without restriction and did not know how the money was spent.

Even though Price testified he gave $2 million to his father in 2006, he asserts that a portion of that money was excluded from the gift amount because it was intended that Debtor use that portion of the money to purchase a house in the name of Price or his designee. However, Price admitted there was no contract or agreement, promissory note, resolution from Prium, or any other formal or informal document memorializing any agreement to carve out a portion of the $2 million as something other than a gift.

In its Reply brief, Queen High contends Debtor was "a mere bailee who acted as [Price's] agent by providing escrow with the purchase money that [Price] previously provided to the debtor,"

and therefore, the Debtor held the purchase money in trust for Queen High. See Reply Brief at 2. At oral argument, Queen High suggested Debtor was a conduit for Price's purchase of the Property because the delivery of the $700,000 check to Debtor on April 17, 2006, was nearly contemporaneous with Debtor's payment of the balance of the purchase price on April 20, 2006. This argument is not particularly persuasive given that Price admitted at trial that Debtor did not need the $700,000 to buy the Property since Debtor already had $1.3 million available as a result of the February 16, 2006 transfer.

The argument that Debtor was a bailee or conduit for Queen High or Price was only raised in Queen High's Reply brief. An "appellate court will not consider issues not properly raised before the [trial] court. Furthermore, on appeal, arguments not raised by a party in its opening brief are deemed waived." Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999); In re E.R. Fegert, 887 F.2d 955, 957 (9th Cir. 1988).

Even if the argument had been timely raised, it lacks merit. Price testified the Debtor did not have any interest in Queen High or managerial or signing authority for Queen High. Price admitted there were no documents memorializing any agency agreement between Price/Queen High and the Debtor.[6] There were

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[6] At oral argument, Queen High contended the bankruptcy court conceded there was an agency relationship between Debtor and Queen High when it determined: "Even though [the funds for the Property] came from Tom Price, Tom Price gave them to him absolutely. Michael Price could have done anything he wanted with them. I must observe, I'm a little surprised he didn't."

(continued...)

no informal writings or email exchanges between Price and the Debtor to support Queen High's claim that Debtor was acting on behalf of Price or Queen High when he purchased the Property.

Alternatively, Queen High urges the Panel to find the money Price provided to Debtor was a loan rather than a gift. Queen High asks the Panel to adopt the reasoning of the court in Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178 (9th Cir. 2003), that the intent to donate must be unequivocally established to distinguish whether a payment is a gift or loan. Dyer concerns a transaction between family members; the debtor's father-in-law provided the downpayment for debtor's purchase of a house. In Dyer, the Ninth Circuit found that even though the traditional features of a loan did not exist, "the existence of a signed and notarized loan document and deed of trust, both insisted upon by [the father-in-law] and created only after considerable effort on his part, is powerful evidence that [he] intended the transaction to be a loan." Id. at 1189. The facts in this case are distinct from those in Dyer because Price did not testify he intended to provide a loan to Debtor and there was no evidence presented regarding any kind of loan or repayment agreement.

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[6](...continued)
Trial Tr. 71:20-24 (emphasis added). Queen High argues the observation made by the bankruptcy court that Debtor did not spend the money in an alternative fashion implies that Debtor was complying with conditions Price placed on providing the $2 million. We do not agree that the bankruptcy court made any such finding given that it made express findings about the lack of memorialization of any agreement regarding the transaction and given that Queen High did not even argue to the bankruptcy court that an agency relationship existed between Debtor and Price/Queen High.

In the absence of documentary evidence demonstrating Debtor was purchasing the Property on behalf of Queen High or any evidence that Price and/or Queen High loaned Debtor the money to purchase the Property, the record supports the bankruptcy court's finding that Price intended to give Debtor the full $2 million without restriction. Accordingly we find no error.

B. Debtor Intended to Retain The Beneficial Interest in the Property.

A resulting trust is created when a person conveys a property's legal title to another under circumstances that reasonably show the person did not intend for the grantee to have the beneficial interest in the property. Holt v. Schweinler, (Matter of Estate of Spadoni), 430 P.2d 965, 967 (Wash. 1967); Thor v. McDearmid, 817 P.2d 1380, 1388-89 (Wash. App. 1991). Thus, absent evidence of a contrary intent, where property is purchased by one person but placed in the name of another, the person with legal title is presumed to hold it subject to the equitable ownership interest of the purchaser. Engel v. Breske, 681 P.2d 263, 264 (Wash. App. 1984).

The presumption that the person who holds title is not intended to also have the beneficial interest is implied from the character of the transaction rather than from any declaration of intention by the party making the disposition of the property. Id. The intention that the beneficial interest in the property not go with the legal title is a necessary element of a resulting trust. "By definition, this intent is not express, but may be inferred from the terms of the disposition or from the

accompanying facts and circumstances." Id.; Thor, 817 P.2d at 1388.

Therefore, a resulting trust will not be imposed if the person who paid the purchase money manifested an intention that no resulting trust should arise. If there is contrary intent, the presumption is rebutted and a resulting trust may be proven with parol evidence that is clear, cogent, and convincing. Estate of Spadoni, 430 P.2d at 967. Evidence is clear, cogent, and convincing if it shows that the ultimate fact in issue is highly probable. Sanford v. Freeman (Matter of Estate of Watlack), 945 P.2d 1154, 1158 (Wash. App. 1997).

In this case, it is undisputed that the money used to purchase the Property came from Debtor's Citigroup Account. Queen High provided no funds for the purchase of the Property. Accordingly, the Debtor presumptively holds an equitable ownership interest in the Property. Richards v. Richards, 489 P.2d 928, 930-31 (Wash. App. 1971); Engel, 681 P.2d at 264-65. Even though Debtor did not appear at trial to testify as to his intent to retain the beneficial ownership in the Property, his intent may be inferred by the facts and circumstances surrounding the transaction.

The bankruptcy court found that Queen High, under the control of Price, obtained legal title to the Property, but that "all the indicia of real ownership" remained with the Debtor. The bankruptcy court specifically cited the following facts as evidence of Debtor's intent to retain beneficial ownership of the Property: (1) Debtor bought the Property; (2) Debtor signed the Sale Agreement; (3) Debtor signed the earnest money agreement;

(4) Debtor shopped for the Property and made all prospective owner's elections in its finishing; (5) Debtor paid for landscaping on the Property; (6) Debtor had the keys to the Property and resided there; and, (7) Debtor maintains the Property and pays the Property's taxes and insurance. The bankruptcy court found Queen High provided no funds at the time of closing and "other than signing the escrow documents- - which didn't require applying for credit or anything like that- - has bare and legal title." Trial Tr. at 72:3-6.

Queen High argues, however, that there was ample evidence of contrary intent. First, Queen High argues that the money used by Debtor to purchase the Property was not the Debtor's money, but Price's money. The bankruptcy court disagreed, finding that the purchase money was provided to Debtor by Price as a gift. For the reasons outlined above, we do not find error with its finding.

Second, Queen High contends that contrary intent was established because (1) Price testified he did not intend to give the Property to Debtor or to create a trust for Debtor's benefit; (2) Price filed federal income tax returns and a real estate excise tax affidavit reflecting that Queen High owned the Property; and, (3) Queen High later secured a loan with the Property.

None of these contentions is persuasive. The issue is whether the Debtor intended to give Queen High the beneficial interest in the Property at the time Debtor paid the consideration and title was put in Queen High's name. Engel, 681 P.2d at 265; see also, Thor, 817 P.2d at 1388. Price's intent

is not at issue because Price did not buy the Property.

The bankruptcy court concluded that Queen High did not rebut the presumption that Debtor held an equitable ownership interest in the Property. The only evidence demonstrating that Queen High was to have the beneficial interest of the Property is the subsequently filed tax returns showing the Property as a capital contribution and the existence of the Centrum loan. Each of the enumerated findings made by the bankruptcy court was supported by the evidence presented at trial.

Additionally, there was no evidence of an agreement, informal or otherwise, between Debtor and Price, or Debtor and Queen High, demonstrating that Debtor did not intend to retain the beneficial ownership in the Property after purchasing the Property and putting title in the name of Queen High. Debtor pays no rent to Queen High (or Price) in return for living at the Property.

For these reasons, we do not find the bankruptcy court committed clear error in determining that Debtor intended to retain the beneficial ownership in the Property.

On appeal, Queen High argues that the bankruptcy court should have imposed a constructive trust on the Property in favor of Queen High. As noted above, we will generally not consider issues raised for the first time on appeal. In re E.R. Fegert, 887 F.2d at 957. In any event, the argument is unpersuasive.

A constructive trust is an equitable remedy used to compel restoration when a person inequitably acquires or retains property. Scymanski v. Dufault, 491 P.2d 1050, 1057 (Wash. 1972); City of Lakewood v. Pierce County, 30 P.3d 446, 450

(Wash. 2001). Constructive trusts are usually created in situations of bad faith or misrepresentation; however, they may also arise if retention of property would result in unjust enrichment. Consulting Overseas Mgmt. Ltd. v. Shtikel, 18 P.3d 1144, 1148-49 (Wash. App. 2001). Queen High argues that the bankruptcy estate will be unjustly enriched at Queen High's expense if it is allowed to retain the Property.

However, unjust enrichment "occurs when a person retains money, property, or benefits that in justice and equity belong to someone else." Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc., 810 P.2d 12, 18 (Wash. App. 1991). Here, the record demonstrates that Queen High provided no consideration for the purchase of the Property. Debtor bought the Property and retains beneficial ownership of the Property. Even if the money used to buy the Property was given to Debtor by Price, the checks were written from Prium, not Queen High. Thus, there is no basis for Queen High to assert Debtor (or the Trustee) is retaining property that rightfully belongs to it.

Lastly, Queen High asserts that Price gave Debtor only a license to live on the Property, which was revocable. We decline to embark on an analysis of this undeveloped argument loosely inserted in Queen High's Reply brief because it was neither supported by the evidence nor properly raised before the bankruptcy court.

VI. CONCLUSION

For the foregoing reasons, the bankruptcy court did not commit clear error when it found Debtor held the equitable interest in the Property and ordered title quieted in the name of

the Trustee as property of the estate. Therefore, we AFFIRM the bankruptcy court's decision.

Montali, J., dissenting:

I respectfully dissent. The majority recites the appropriate standard for review of factual determinations, but in my opinion it ignores or overlooks several instances in the record where the only witness, the Debtor's son, Price, provides evidence that contradicts what the bankruptcy court found. We must accept factual findings unless we are left with a distinct and firm conviction that a mistake has been made, I have exactly that conviction and belief. This is because Price was the only witness, his story was internally consistent, and the applicable standard of proof of the Trustee's case under the law he chose to invoke cannot be met with that one witness's testimony. Thus, the finding was clearly erroneous.

The Trustee could have pursued Queen High under a fraudulent transfer theory (11 U.S.C. § 548) based on Debtor's transfer of approximately $700,000 to close escrow, with the Property going directly from the sellers to Queen High. That seems like an easy, straight-forward case that probably would have been successful. Instead, the Trustee relied on Washington law's presumption that applies when the title to real property is not in the name of the purchaser, as explained by the majority (citing Engel v. Breske, 681 P.2d 263, 264 (Wash. App. 1984)).

But that doctrine operates "absent evidence to the contrary" that I believe was ignored.

The parties agree that the applicable standard of proof requires "clear, convincing, strong and satisfactory evidence (emphasis added). Matter of Estate of Little, 721 P.2d 950, 960 (Wash. 1986); Gallinger's Estate, 199 P.2d at 579.

Had the Trustee presented any other witness or evidence to make his case, perhaps he would have carried his burden and won my vote. Instead he relied solely on Debtor's wealthy son who quite obviously (and with no risk to his father's creditors) provided the financial wherewithal for the Debtor to acquire a place to live. The fact that title was taken in Queen High does not establish on this record that Debtor was the equitable owner. Of course the finder-of-fact is not bound to believe the only witness presented to testify. That does not mean that the fact-finder can pick and choose selected testimony to believe or to reject. Observe the following exchanges:

> Q Is this a gift to your father?
>
> A To the extent that it was not being used to purchase the house, I did not expect him to return the funds to me.
>
> Q You had no expectation of repayment?
>
> A No.
>
> Q It was a gift?
>
> A Yes, you could say it was a gift.

Trial Tr. at 16:18-25.

> Q And this check was the second part of the overall agreement between you and your dad to provide him with $2 million, right?
>
> A Yes.

Trial Tr. at 22:20-23.

> Q (By Mr. Wenokur) And what was the purpose of the $700,000 check?
>
> A The house that was found in Anacortes was about ready to close, and roughly about the balance to purchase the house.

Trial Tr. at 23:16-20.

The court acknowledged, as did Price, the $2 million dollar gift but refused to recognize (as the above quotes demonstrate) that there was a string attached to $700,000 of that gift. The following exchange proves the point:

> Q So you gave your dad $2 million in early 2006, right?
>
> A I wrote him two checks that totaled $2 million, correct.
>
> Q Okay. And your testimony is there was no strings attached, except for the house?
>
> A Correct.
>
> Q Anything that didn't go to the house, he could do whatever he wanted with?
>
> A Yes.

Trial Tr. at 33:16-24.

The court became suspicious when it learned that Price took steps to protect his money:

> The evidence is clear that Tom Price did not intend to loan that sum ($2 million) to his father or make an investment in anything that his father was doing. Instead, he intended to give it to him.
>
> Now, then as later events occur, the argument comes up, well, it was true that he intended to give the $1.3 million, but not the $700,000 plus that related to the house in Anacortes.

Trial Tr. at 69:13-20.

The following reveals what the court thought was pivotal:

> Then when you pull a title report, you find that if he [Debtor] comes into title, why, there's some serious liens that are going to come against this particular property. And it's that point in time that the transaction begins to change, in my view. And that is - I'm not sure the gift intent changes at all, frankly. But certainly the way the transaction is to be documented changes.

Trial Tr. at 70:6-13.

The problem I have with this reasoning is that it starts with a false premise, namely that Debtor was going to take title initially. There is no proof of that; instead the purchase contract on its face recognized that Debtor could assign it. Next, the reasoning assumes that the deal changed because of the title report. The problem is there was no deal when the title report was issued (March 1, 2006) and revealed the liens against Debtor. Price did not advance the $700,000 to purchase the Property until mid-April. Price had every right to earmark the portion of the gift to his father to purchase the Property and make sure Queen High took title.

Based on the above excerpts of the record, and notwithstanding the court's focus on other statements more helpful to the Trustee, I cannot in good conscience conclude that the bankruptcy court did not err in its factual determinations. It extracted as credible selected snippets from Price's testimony, while ignoring evidence to the contrary, as noted above. In my view, deference to the fact-finder's determinations does not require us to endorse selective beliefs and a refusal to believe the same witness describing the transaction. While I find it amazing that someone with Price's sophistication and real

estate experience would be so careless in risking $700,000, I can neither condone giving the Debtor's bankruptcy estate a $700,000 windfall (or less, depending on the outcome of the Centrum lien problem) based on such a weak case presented by the Trustee.