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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	ID-11-1081-MkDJu
	)		
RAYMOND KEITH PRINGLE,	)	Bk. No.	09-41653
	)		
Debtor.	)	Adv. No.	10-08023
	)		
_____	)		
JOLENE HASSE,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
GARY L. RAINSDON, Chapter 7	)		
Trustee,	)		
	)		
Appellee.	)		
_____	)		

O P I N I O N

Argued by Video Conference on November 17, 2011  
Submitted on January 7, 2013

Filed - July 2, 2013

Appeal from the United States Bankruptcy Court  
for the District of Idaho

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
 Clayne Zollinger, Jr., for appellant Jolene Hasse;  
 Daniel C. Green, of Racine, Olson, Nye, Budge &  
 Bailey, Chartered, for appellee Gary L. Rainsdon.  
 \_\_\_\_\_

Before: MARKELL, DUNN and JURY, Bankruptcy Judges.

1 MARKELL, Bankruptcy Judge:

2  
3 Before the debtor, Raymond Pringle, filed his chapter 7<sup>1</sup>  
4 bankruptcy, he transferred his house to Jolene Hasse. The  
5 bankruptcy court found this transaction to be avoidable as a  
6 fraudulent transfer under 11 U.S.C. § 548. Hasse appeals. After  
7 finding that the bankruptcy court and this Panel have authority  
8 to decide the matters involved in this appeal, we AFFIRM.

9 **I. FACTS**

10 **A. Prepetition Actions**

11 Hasse and Pringle had a long-term relationship as boyfriend  
12 and girlfriend. They lived together in Pringle's house (the  
13 "Residence") for at least eight years.

14 In April 2008, about a year and a half before he filed  
15 bankruptcy, Pringle transferred the Residence to Hasse. Pringle  
16 used a form of gift deed to effectuate the transfer; on its face,  
17 it recites that the transfer was being made "For Love and  
18 Affection." Compl. (Feb. 23, 2010) at ¶ 1 and Ex. A; Answer  
19 (Mar. 26, 2010) at ¶ 1.

20 At the time of the April 2008 transfer, the Residence was  
21 not encumbered and was worth at least \$35,000. Also at that  
22 time, Pringle had less than \$5,000 in nonexempt assets. His  
23 liabilities were roughly \$24,000 and were mostly in the nature of  
24 credit card debt.

25 \_\_\_\_\_  
26 <sup>1</sup>Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure .

1 **B. Pringle Files Bankruptcy**

2 Pringle filed his chapter 7 bankruptcy case in October 2009.  
3 Appellee Gary Rainsdon (the "Trustee") was appointed to serve as  
4 Pringle's trustee. In Pringle's statement of financial affairs,  
5 he disclosed the transfer of the Residence to Hasse, and  
6 described the transfer as a gift, with no value received in  
7 exchange.

8 The meeting of creditors pursuant to § 341(a) was held in  
9 December 2009. At that time, the Trustee asked Pringle about the  
10 transfer of his Residence, and Pringle testified that at the time  
11 of the transfer he had a legal matter that was coming up and he  
12 figured it would be better if the Residence was not in his name.  
13 According to Pringle, he was being sued by a man named Jose Luna  
14 for roughly \$100,000 on account of an automobile accident, and  
15 Pringle was concerned that Luna ultimately might try to take away  
16 his Residence. By the time of his bankruptcy filing, however,  
17 Pringle did not list Luna as a creditor, and no one named Luna  
18 filed a proof of claim.

19 **C. The Trustee Files the Fraudulent Transfer Action**

20 Based on this information, in February 2010 the Trustee  
21 filed a complaint against Hasse seeking to avoid Pringle's  
22 transfer of the Residence as a fraudulent transfer under § 548<sup>2</sup>

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24 <sup>2</sup>The complaint stated a claim for relief alleging a  
25 "constructive" fraudulent transfer under § 548(a)(1)(B); that is,  
26 an avoidable fraudulent transfer in which the mental state of the  
27 transferor is irrelevant. There were no allegations in the  
28 complaint that Pringle transferred the Residence with the intent  
to hinder, delay, or defraud his creditors, as required for  
avoidance of a transfer under § 548(a)(1)(A). At trial, however,  
(continued...)

1 and state law.<sup>3</sup>

2 The Trustee's complaint alleged that the bankruptcy court  
3 had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(H).  
4 In her answer, Hasse admitted the Trustee's jurisdictional  
5 allegations. Both parties' pleadings thus agreed that the matter  
6 was a core proceeding under 28 U.S.C. § 157(b)(2)(H). As a  
7 likely consequence of this understanding, neither party included  
8 in their respective pleadings a statement as to whether they  
9 consented to the bankruptcy court's entry of final judgment. See  
10 Rules 7008(a) and 7012(b).

11 After Hasse answered the Trustee's complaint, the parties  
12 engaged in discovery. In response to the Trustee's  
13

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14 <sup>2</sup>(...continued)

15 the bankruptcy court expressly found that Pringle had the  
16 requisite actual intent for liability under § 548(a)(1)(A).  
17 Hasse challenges the finding of actual intent itself, but not the  
18 predicate issue of whether the § 548(a)(1)(A) claim was properly  
19 before the bankruptcy court. Accordingly, we decline to address  
20 that predicate issue. See Golden v. Chicago Title Ins. Co. (In  
21 re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002); see also Moldo  
22 v. Matsco, Inc. (In re Cybernetic Servs., Inc.), 252 F.3d 1039,  
23 1045 n.3 (9th Cir. 2001) (declining to consider ramifications of  
24 new argument, and deeming argument waived, when argument was  
25 raised for the first time on appeal). Essentially, however, the  
26 bankruptcy court sua sponte amended the complaint to conform to  
27 the evidence of actual intent introduced at trial – an action  
28 which neither party objected to. See Civil Rule 15(b)(2)  
(incorporated by Rule 7015). The "amended" complaint thus pleads  
claims for relief under §§ 548(a)(1)(A) and (a)(1)(B).

25 <sup>3</sup>There is no indication in the record that the bankruptcy  
26 court ever disposed of the Trustee's second cause of action  
27 seeking to avoid the transfer of the Residence under Idaho  
28 fraudulent transfer law. Nonetheless, we may treat Hasse's  
notice of appeal as a motion for leave to appeal, and we hereby  
grant that leave. See Rule 8003(c); Magno v. Rigsby (In re  
Magno), 216 B.R. 34, 38 (9th Cir. BAP 1997).

1 interrogatories, Hasse gave a different account of the reason why  
2 Pringle transferred the Residence to her:

3       The transfer of the property was pursuant to a verbal  
4 agreement between the Defendant and the Debtor. The  
5 Defendant, Jolene Hasse, agreed to allow Mr. Pringle to  
6 stay in the home for the rest of his life. The  
7 Defendant assumed the responsibility for paying for the  
8 taxes, the utilities, and all the upkeep on the home.  
9 She also agreed to take care of Mr. Pringle for the  
10 rest of his life. Mr. Pringle suffers from diabetes  
11 and has limited vision and needs someone to help him  
12 and especially drive him as he is unable to drive at  
13 night.

14 See Trustee's Pretrial Memorandum (Dec. 2, 2010) at p. 2 (quoting  
15 Hasse's response to the Trustee's Interrogatory No. 8).<sup>4</sup>

16 **D. The Nonjury Trial and the Bankruptcy Court's Entry of a  
17 Final Judgment**

18       The bankruptcy court tried the case in December 2010.  
19 Pringle was the only witness the Trustee called. Pringle  
20 acknowledged his prior testimony at the December 2009 meeting of  
21 creditors, but at the same time maintained that he gave Hasse the  
22 residence in exchange for Hasse's oral agreement to continue to  
23 take care of him and to let him continue to live there.

24       At the close of evidence, Hasse conceded that Pringle's  
25 transfer of the Residence rendered Pringle insolvent.

26 Regardless, Hasse maintained that the transfer could not be  
27  
28

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29       <sup>4</sup>Even though neither of the parties provided us with copies  
30 of their pre- and post-trial briefs, we have obtained copies by  
31 accessing the bankruptcy court's online adversary proceeding  
32 docket and the imaged documents attached thereto. We can take  
33 judicial notice of the filing and contents of these documents.  
34 See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887  
35 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan  
36 Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP  
37 2003).

1 avoided because she had given reasonably equivalent value in  
2 exchange for the transfer.

3 Hasse also argued that § 548 should not apply at all because  
4 the transfer could not have harmed Pringle's creditors. If  
5 Pringle had not transferred the Residence to her, Hasse reasoned,  
6 it would have been exempt. He thus could have precluded his  
7 creditors from ever realizing the Residence's value, a sort of  
8 "no harm, no foul" argument.

9 Both sides filed post-trial briefs, and in January 2011, the  
10 bankruptcy court reconvened the matter and orally stated its  
11 findings of fact and conclusions of law on the record. The court  
12 apparently credited, at least in part, Hasse's contention and  
13 Pringle's testimony that Hasse made certain promises in exchange  
14 for the transfer of the Residence:

15 [Pringle], at some point in time, prior to April of  
16 2008, . . . reached an oral agreement with the  
17 defendant that he would deed his home located, I  
18 believed it's in Albion, Idaho, to her, in  
19 consideration of her promise to maintain the home, pay  
20 the taxes on the home, and to allow him to live in the  
home for the rest of his life with her and in exchange  
and consideration of her agreement to provide care and  
comfort to him and particular with respect to caring  
for him as a result of his medical condition.

21 Hr'g Tr. (Jan. 4, 2011) at 4:20-5:3. However, the court also  
22 held that value for purposes of § 548 must result in economic  
23 benefit to creditors. He then found that "whatever value, real  
24 value came out of [Hasse's] promise was not reasonably equivalent  
25 to the value that the debtor gave up in this exchange and that  
26 was a \$35,000 unencumbered house." Hr'g Tr. (Jan. 4, 2011) at  
27 7:21-8:2.

28 In addition, the court rejected Hasse's "no harm, no foul"

1 argument. The court held that Fox v. Smoker (In re Noblit), 72  
2 F.3d 757 (9th Cir. 1995) and Trujillo v. Grimmett (In re  
3 Trujillo), 215 B.R. 200 (9th Cir. BAP 1997) aff'd, 166 F.3d 1218  
4 (9th Cir. 1999) (table) had rejected the argument, and that he  
5 was bound to follow both. In expanding on the argument, the  
6 court noted that Hasse's argument hinged on a false premise: that  
7 Pringle still was entitled to an exemption in the Residence after  
8 he voluntarily transferred the Residence to Hasse. As the court  
9 stated:

10 Congress has, I think, made it pretty clear that if  
11 debtors want the benefit of an exemption they should  
12 not transfer the property away to another before filing  
13 for bankruptcy. If they do so and the transfer's  
14 avoided, then under Section 522(g) the exemption can't  
be claimed and if I were to honor the no harm, no foul  
doctrine in a -- in a case like this, effectively I'd  
be allowing a debtor [to] escape the consequence of  
that.

15 Hr'g Tr. (Jan. 4, 2011) at 9:18-25.

16 As an alternate basis for ruling in favor of the Trustee,  
17 the court found that Pringle had made the transfer with the  
18 intent to hinder and delay Luna, who was suing Pringle at the  
19 time the transfer was made.

20 The court entered judgment in favor of the Trustee avoiding  
21 Pringle's transfer of the Residence to Hasse. Hasse timely  
22 appealed.

## 23 **II. CONSTITUTIONAL AUTHORITY**

24 Under Stern v. Marshall, 131 S. Ct. 2594 (2011), we have an  
25 independent duty to consider whether the bankruptcy court had the  
26 constitutional authority to determine the fraudulent transfer  
27 claim. This issue is reviewed de novo. Cf. Rosson v. Fitzgerald  
28 (In re Rosson), 545 F.3d 764, 769 n.5 (9th Cir. 2008); Cal.

1 Franchise Tax Bd. v. Wilshire Courtyard (In re Wilshire  
2 Courtyard), 459 B.R. 416, 423 (9th Cir. BAP 2011).

3 This is not, however, an inquiry into subject matter  
4 jurisdiction, as the Ninth Circuit recently confirmed. "Stern  
5 . . . made clear that § 157 'does not implicate questions of  
6 subject matter jurisdiction.'" Executive Benefits Ins. Agency v.  
7 Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553, 567  
8 (9th Cir. 2012) (quoting Stern, 131 S. Ct. at 2607), cert.  
9 granted, 2013 WL 3155257 (U.S. June 24, 2013) (No. 12-1200).  
10 Rather, what is implicated is whether "[s]ection 157  
11 [constitutionally] allocates the authority to enter final  
12 judgment[s] between the bankruptcy court and the district court."  
13 Stern, 131 S. Ct. at 2607 (emphasis supplied).

14 Here, it is beyond doubt that an Article III district court  
15 would have had subject matter jurisdiction under 28 U.S.C.  
16 § 1334(b), as a proceeding under § 548 "arises under" the Code.  
17 What is at issue here is whether the referral authorized under  
18 both 28 U.S.C. § 157(a) and the District of Idaho's general order  
19 of reference, Third Amended General Order No. 38 (D. Idaho, April  
20 24, 1995), was constitutionally valid as applied in this case.<sup>5</sup>

21 **A. Bellingham**

22 In December 2012, the Ninth Circuit decided Bellingham.  
23 That case holds that, despite Congress's designation of

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24  
25 <sup>5</sup>At oral argument in November 2011, the Panel raised the  
26 effect of Stern, and offered the parties the opportunity to brief  
27 the issue, as Bellingham was then under consideration by the  
28 Ninth Circuit. Both sides submitted briefs. After Bellingham  
was decided, the Panel offered the parties the opportunity to  
brief Bellingham's effect on this appeal. Both sides again  
submitted briefs.

1 fraudulent conveyance actions as core matters,<sup>6</sup> bankruptcy courts  
2 do not have authority to unilaterally hear and determine them.  
3 702 F.3d at 565-66. But more importantly to this appeal, the  
4 Ninth Circuit also held that, notwithstanding this lack of  
5 unilateral authority, a bankruptcy court could still hear and  
6 determine - and enter a final judgment - in such a proceeding  
7 with the parties' consent. 702 F.3d at 567.<sup>7</sup> It further held  
8 that such consent need not be express, but could be implied. Id.

9 Bellingham's basic arguments are simple. The congressional  
10 allocation of authority in 28 U.S.C. § 157 recognizes that,  
11 especially in matters "related to" a bankruptcy case, a non-  
12 Article III judge may not unilaterally enter a final judgment.  
13 That was the learning of Northern Pipeline Constr. Co. v.  
14 Marathon Pipe Line Co., 458 U.S. 50 (1982). 702 F.3d at 566-67.

15 But Congress anticipated that concentrating decisionmaking  
16 in one court for bankruptcy matters was desirable. As noted by a  
17 leading treatise, the broad scope of section 1334(b) of title 28

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19 <sup>6</sup>Section 157(b) (2) (H) designates proceedings to recover  
20 "fraudulent conveyances" as core matters. This reference  
21 undoubtedly includes section 548 fraudulent transfers. As was  
22 noted when the Uniform Fraudulent Transfer Act was promulgated in  
1984:

23 The Committee determined to rename the Act the Uniform  
24 Fraudulent Transfer Act in recognition of its  
25 applicability to transfers of personal property as well  
26 as real property . . . ."

27 Prefatory Note, Uniform Fraudulent Transfer Act (1984), 7A, pt.  
28 II, U.L.A. 5 (2006).

29 <sup>7</sup>The Sixth Circuit has adopted a contrary rule. Waldman v.  
30 Stone, 698 F.3d 910 (6th Cir. 2012). The Supreme Court has  
31 granted certiorari in Bellingham and presumably will resolve the  
32 split between the circuits.

1 "evidences the intent of Congress to bring all bankruptcy-related  
2 litigation within the purview of the district court, at least as  
3 an initial matter, irrespective of congressional statements to  
4 the contrary in the context of other specialized litigation."

5 1 COLLIER ON BANKRUPTCY ¶ 3.01[3] (Alan N. Resnick & Henry J.  
6 Sommer, eds., 16th ed. 2013).

7 In this spirit, Congress also drafted the applicable  
8 bankruptcy jurisdictional statutes to allow bankruptcy courts to  
9 hear - but not determine - matters that they may not  
10 constitutionally decide. 28 U.S.C. § 157(c)(1). But Congress  
11 went further: it allowed the bankruptcy court to determine those  
12 disputes - that is, enter a final decision, subject only to  
13 appellate and not de novo review - "with the consent of all the  
14 parties to the proceeding." Id. § 157(c)(2). See Mann v.  
15 Alexander Dawson, Inc. (In re Mann), 907 F.2d 923, 926 (9th Cir.  
16 1990). Congress thus determined that parties could consent to a  
17 non-Article III judge hearing and entering a final judgment in  
18 matters in which that non-Article III judge could not  
19 unilaterally act.

20 From this, Bellingham reasoned that "[i]f consent permits a  
21 non-Article III judge to [finally] decide [] a non-core  
22 proceeding, then it surely permits the same judge to decide a  
23 core proceeding in which he would, absent consent, be disentitled  
24 to enter final judgment. The only question, then, is whether  
25 [the party objecting to the bankruptcy court's authority] did in  
26 fact consent to the bankruptcy court's jurisdiction [i.e.,

1 authority].” 702 F.3d at 567 (emphasis supplied).<sup>8</sup>

2 **B. Sufficiency of Implied Consent**

3 Although Bellingham required consent, consent does not have  
4 a unitary meaning. See generally Daniel J. Bussel & Kenneth N.  
5 Klee, Recalibrating Consent in Bankruptcy, 83 Am. Bankr. L.J. 663  
6 (2009). Does it include “implied” consent, or must the consent  
7 be express? And do there have to be procedural safeguards to  
8 ensure that it is informed?

9 Bellingham made short work of the first question; it  
10 rejected the argument that consent must be express. This  
11 rejection was based on two statutory arguments; one related to  
12 the manner in which 28 U.S.C. § 157 deals with jury trials, and  
13 one related to analogies to the Federal Magistrates Act.

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15 <sup>8</sup>Although the Ninth Circuit referred to the lack of  
16 “jurisdiction,” we understand that reference to be to the  
17 bankruptcy court’s ability under the Constitution to “determine”  
18 a matter as contemplated by 28 U.S.C. § 157(b)(1): “[B]ankruptcy  
19 judges may hear and determine all cases under title 11 and all  
core proceedings arising under title 11[.]” Id. (emphasis  
supplied).

20 Unfortunately, the imprecise use of “jurisdiction” is not  
21 uncommon. As the Supreme Court has noted, “Courts, including  
22 this Court, it is true, have been less than meticulous in this  
23 regard; they have more than occasionally used the term  
‘jurisdictional’ to describe emphatic time prescriptions in rules  
of court. ‘Jurisdiction,’ the Court has aptly observed, ‘is a  
24 word of many, too many, meanings.’” Kontrick v. Ryan, 540 U.S.  
443, 454 (2004) (quoting Steel Co. v. Citizens for Better Env’t,  
523 U.S. 83, 90 (1998)). The “time prescriptions” reference is  
25 obviously irrelevant here, but the overall observation is  
relevant.

26 As a result, although Bellingham uses “jurisdiction” to  
27 refer to the authority to determine a core proceeding, we refer  
28 directly to the bankruptcy court’s “authority” to avoid any  
possible confusion stemming from the use of the word  
“jurisdiction.”

1           1.    Jury Trial Analogy

2           With respect to jury trials, Bellingham looked to 28 U.S.C.  
3 § 157(e), which permits bankruptcy judges to conduct jury trials  
4 only with "express" consent. The court found meaning in the  
5 inclusion of the adjective "express," finding that the omission  
6 of that adjective in 28 U.S.C. § 157(c) (2) was purposeful.  
7 Bellingham, 702 F.3d at 569. Accordingly, Bellingham stated that  
8 "in cases like this one – in which the defendant was aware of its  
9 right to seek withdrawal of the reference but opted instead to  
10 litigate before the bankruptcy court – consent is established."  
11 Id.

12           2.    Magistrate Analogy

13           The Ninth Circuit next analogized the bankruptcy consent  
14 statute to the consent provision in the Federal Magistrates Act,  
15 28 U.S.C. § 636(c) (1).<sup>9</sup> Bellingham, 702 F.3d at 569. The  
16 Magistrate Act provides that a magistrate judge may order final  
17 judgment "[u]pon the consent of the parties." 28 U.S.C.

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19           <sup>9</sup>This method of inquiry mirrors congressional thought at the  
20 time of 28 U.S.C. § 157's enactment. This is reflected in the  
21 remarks of Rep. Kindness, co-author of the amendment that became  
22 28 U.S.C. § 157(c). 130 Cong. Rec. 6242-43 (1984) ("In  
23 Marathon-type suits, the bankruptcy judge will exercise the same  
powers as the magistrate."). See also 1 COLLIER ON BANKRUPTCY,  
supra, at ¶ 3.03[2]:

24           Section 157(c) (1) is drawn from 28 U.S.C. § 636(b) (1),  
25 which is part of the United States Magistrate Judges  
26 Act and that contains analogous provisions for proposed  
27 findings and recommendations to be made by magistrate  
28 judges and submitted to district judges. The powers  
accorded magistrate judges under section 636(b) (1) have  
passed constitutional muster, and the teachings of the  
case upholding that section apply directly to the  
treatment contained in section 157(c) (1).

1 § 636(c)(1). The Supreme Court has held that this language  
2 permits implied consent when the allegedly consenting party has  
3 “be[en] notified of [its] right to refuse and after being told  
4 that [the Magistrate Judge] intended to exercise case-dispositive  
5 authority.” Roell v. Withrow, 538 U.S. 580, 586 (2003). In this  
6 calculus, “notification of the right to refuse the magistrate  
7 judge is a prerequisite to any inference of consent.” Id. at 587  
8 n.5.<sup>10</sup>

9 Bellingham thus reasoned that “[l]ike the provision of the  
10 Federal Magistrate Act at issue in Roell, the text of § 157(c)  
11 only requires consent simpliciter.” 702 F.3d at 569.<sup>11</sup>

### 12 **C. Implied Consent, Waiver, and Forfeiture**

13 As in Bellingham, Hasse actively participated in the  
14 fraudulent transfer proceeding. Her affirmative actions -  
15 answering the complaint, participating in discovery, contesting  
16 issues at trial - resemble the similar activities of EBIA - the  
17 non-creditor defendant - in Bellingham. But much of Bellingham  
18 focuses on the “sandbagging” aspects of EBIA’s actions and how  
19 those actions stood proxy for consent. Id. at 568; see Stern,  
20 131 S. Ct. at 2608 (“[T]he consequences of a litigant . . .

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21  
22 <sup>10</sup>The Court expressed concern over “the risk of a full and  
23 complicated trial wasted at the option of an undeserving and  
24 possibly opportunistic litigant” - sandbagging, in other  
words. Id. at 590.

25 <sup>11</sup>The text of the bankruptcy consent statute is nearly  
26 identical to the relevant section of the Magistrate Act; the  
27 Magistrate Act confers authority “[u]pon the consent of the  
28 parties,” 28 U.S.C. § 636(c)(1), whereas a bankruptcy judge may  
enter final orders in non-core matters “with the consent of all  
the parties to the proceeding.” 28 U.S.C. § 157(c)(2).

1 sandbagging the court – remaining silent about his objection and  
2 belatedly raising the error only if the case does not conclude in  
3 his favor – can be particularly severe.”) (internal quotation  
4 marks and citation omitted).

5 This focus requires careful consideration as to whether  
6 “sandbagging” is necessary for implied consent, or whether it is  
7 merely sufficient. Upon examination of Bellingham and Stern, and  
8 their treatment of “sandbagging,” we hold that while a showing of  
9 “sandbagging” may be sufficient for consent, it is not necessary.  
10 There are other ways in which the parties may convey their  
11 consent, including those present here.

12 In Bellingham, EBIA’s consent was found by and through its  
13 actions in the bankruptcy court. Bellingham, 702 F.3d at 570.  
14 EBIA’s initial action was to move for a jury trial, which the  
15 district court treated as a motion to withdraw the reference.  
16 Id. at 568. Instead of pursuing a hearing on the withdrawal  
17 motion in an Article III court, EBIA petitioned the district  
18 court to stay consideration of the motion until the bankruptcy  
19 court decided the plaintiff’s motion for summary judgment. Id.  
20 When the bankruptcy court granted summary judgment to the  
21 plaintiff, EBIA abandoned its motion to withdraw the reference  
22 and separately appealed to the district court. Id. At the  
23 district court, EBIA again failed to object to the bankruptcy  
24 court’s authority. Id. EBIA even failed to raise the issue in  
25 its briefing to the Ninth Circuit, only raising it in a motion to  
26 dismiss shortly before oral argument. Id.

27 In sum, EBIA had been alerted to the bankruptcy court’s  
28 possible lack of authority, had ample opportunity to object,

1 affirmatively participated in litigation at the bankruptcy court  
2 and district court, and only objected once it had lost in both  
3 those courts.

4 Because EBIA waited so long to object, and in light of  
5 its litigation tactics, we have little difficulty  
6 concluding that EBIA impliedly consented . . . . "No  
7 procedural principle is more familiar to this Court  
8 than that a constitutional right, or a right of any  
9 other sort, may be forfeited . . . by the failure to  
10 make timely assertion of the right before a tribunal  
11 having jurisdiction to determine it."

12 Id. (quoting U.S. v. Olano, 507 U.S. 725, 731 (1993)) (internal  
13 quotation marks and citation omitted).

14 Thus, under Bellingham, sandbagging can supply consent  
15 through the knowing failure to object while purposefully  
16 proceeding through the bankruptcy court system.

#### 17 **D. Hasse's Participation with Notice as Consent**

18 But, as indicated before, Hasse's case is different than  
19 Bellingham. There, the non-creditor defendant "sandbagged" the  
20 court and its opponent in a way that belied its knowledge of  
21 potential Stern problems. The Ninth Circuit thus found consent  
22 from the non-creditor's conscious and knowing manipulation of the  
23 process to its own perceived advantage. This type of volitional  
24 calculation squares with the level of consent necessary to confer  
25 upon a non-Article III court the power to enter a final judgment,  
26 as found in the magistrate cases relied upon by Bellingham.

27 Here, however, Hasse was not calculating; she and her  
28 counsel were clueless. It was only after this Panel raised the  
29 issue that she even formulated an objection to the authority of  
30 the bankruptcy judge to "determine" the matter and enter a final  
31 order. These facts thus present a variation on the consent

1 theme: the record here is devoid of facts that indicate any  
2 "sandbagging" or manipulation of the litigation process. The  
3 record, however, is replete with instances of Hasse's conscious  
4 engagement and use of the bankruptcy court and the services of  
5 this Panel to resolve the Trustee's claim in her favor. More  
6 importantly, these actions were undertaken against an almost  
7 unavoidable backdrop which called the bankruptcy court's  
8 authority into question. As stated previously, despite the  
9 background rumblings of Marshall v. Stern (In re Marshall), 600  
10 F.3d 1037 (9th Cir. 2010) at the Ninth Circuit and Stern v.  
11 Marshall at the Supreme Court, Hasse stood mute while the  
12 bankruptcy court and this Panel endeavored to resolve the  
13 dispute. Under Bellingham, is that level of knowing inaction  
14 sufficient?

15 To answer that question is to examine in detail what level  
16 of consent is required. Bellingham tells us that implied consent  
17 works, but does not address whether that implied consent must be  
18 accompanied by at least something akin to unexpressed  
19 acquiescence - some acknowledgment of the issue coupled with  
20 inaction - or whether simply participating in the court  
21 proceeding without raising the issue is sufficient.

22 The issue of the proper basis for consent to a bankruptcy  
23 court's authority to enter a final judgment has a long history.  
24 The Supreme Court has long held that simple participation by a  
25 creditor in the claims resolution process constitutes consent to  
26 the entry of a final order as to that claim. Bryan v.  
27 Bernheimer, 181 U.S. 188, 197 (1901) (consent to summary  
28 jurisdiction by filing proof of claim); Katchen v. Landy, 382

1 U.S. 323, 334 (1966) (filing proof of claim confers summary  
2 jurisdiction on bankruptcy court over preference actions and  
3 actions to recover property filed by the bankruptcy trustee in  
4 claim disallowance action); Cline v. Kaplan, 323 U.S. 97, 99  
5 (1944) (dicta). Cf. Alexander v. Hillman, 296 U.S. 222, 238-39,  
6 242-43 (1935) (claim filed in federal equity receivership submits  
7 claimant to court's jurisdiction in respect of all defenses,  
8 objections, and counterclaims).

9 It has also held that filing a proof of claim is a waiver of  
10 the right to have a jury determine the existence and amount of  
11 the claims against the estate, Langenkamp v. Culp, 498 U.S. 42,  
12 44-45 (1990) (per curiam), and is also a waiver of any state  
13 sovereign immunity otherwise protected by the Eleventh Amendment.  
14 Gardner v. New Jersey, 329 U.S. 565, 573-74 (1947).

15 The main difference here, however, is that Hasse is not a  
16 creditor of the estate. Thus, the constitutional ability of  
17 Congress to allocate final adjudicatory power over a claim for  
18 relief to a non-Article III court is more limited.<sup>12</sup> As a  
19

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20 <sup>12</sup>One of the most enduring definitions of Congress's power  
21 under the Bankruptcy Clause is that the power:  
22 extends to all cases where the law causes to be  
23 distributed, the property of the debtor among his  
24 creditors: this is its least limit. Its greatest, is a  
25 discharge of the debtor from his contracts. And all  
intermediate legislation, affecting substance and form,  
but tending to further the great end of the  
subject-distribution and discharge-are in the  
competency and discretion of congress.

26 In re Klein, 42 U.S. (1 How.) 277, 281 (1843) (emphasis supplied)  
27 (Catron, J., sitting as circuit justice; case reported in a note  
28 to Nelson v. Carland, 42 U.S. (1 How.) 265 (1843), inserted  
therein "as being of general interest"). Klein was indicated as  
(continued...)

1 consequence, those cases finding the power to decide exists  
2 because of mere participation, regardless of consent, are not  
3 particularly persuasive.

4 The issue thus turns to whether Bellingham's concept of  
5 consent requires waiver - the intentional relinquishment of a  
6 known right - or whether the required consent can be supplied  
7 through forfeiture. Although the two doctrines are similar, the  
8 distinction between them is well-known: "Waiver is different from  
9 forfeiture. Whereas forfeiture is the failure to make the timely  
10 assertion of a right, waiver is the intentional relinquishment or  
11 abandonment of a known right." Olano, 507 U.S. at 733 (internal  
12 quotation marks and citation omitted). That forfeiture might be  
13 sufficient is foreshadowed by Bellingham itself, which quotes  
14 Olano when describing the actions relevant there. Bellingham,  
15 702 F.3d at 568.

16 But we need not wade into this issue. There is more  
17 happening here than simple forfeiture. Throughout, Hasse was  
18 represented by counsel, who actively represented her interests  
19 and who made all of the discretionary decisions such  
20 representation entails. These types of discretionary decisions  
21 include the decision to challenge the authority of the court  
22 hearing the matter. Hasse's counsel knew or should have known of  
23 Stern. The Ninth Circuit's opinion in Marshall v. Stern was  
24 issued one week before Hasse answered the adversary complaint and  
25

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26 <sup>12</sup> (...continued)  
27 the source of one of the "oft-quoted" definitions of the  
28 bankruptcy power in Louisville Joint Stock Land Bank v. Radford,  
295 U.S. 555, 588 n.18 (1935).

1 nine months before trial. The Supreme Court granted certiorari  
2 in Stern v. Marshall two months before trial. Under Bellingham,  
3 this is notice of the issue. Bellingham, 702 F.3d at 569 (citing  
4 Marshall v. Stern, 600 F.3d at 1037).

5 The moment when such a decision is presented matters,  
6 because, to the extent the magistrate analogy relied upon by  
7 Bellingham holds, courts both before and after Roell have held  
8 that a represented party who participates without objection in  
9 proceedings before a magistrate judge has impliedly consented to  
10 that judge's authority to enter a final order or judgment.<sup>13</sup>  
11 Stevo v. Frasor, 662 F.3d 880, 883-84 (7th Cir. 2011) (express  
12 consent to first magistrate judge deemed implied consent to  
13 authority of second magistrate judge where plaintiff had  
14 proceeded through discovery and summary judgment without  
15 objection); Heft v. Moore, 351 F.3d 278, 281 (7th Cir. 2003)  
16 (implied consent found in participation in proceeding without  
17 objection); Baker v. Socialist People's Libyan Arab Jamahirya,  
18 810 F. Supp. 2d 90, 98-99 (D.D.C. 2011) (implied consent found  
19 where properly-served defendants, including the Syrian Arab  
20 Republic, chose to "sit back and wait" and only moved to vacate a  
21 default judgment after eight years of litigation because the  
22 judgment was "not to their liking"); Warren v. Thompson, 224

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24 <sup>13</sup>We do not reach the issue of whether unrepresented parties  
25 are inherently deemed unaware of the right to refuse consent and  
26 demand an Article III forum. The Ninth Circuit, however, has  
27 found that a pro se plaintiff who had expressly consented to the  
28 authority of one magistrate judge thereby impliedly consented to  
the authority of a different magistrate judge upon case  
reassignment. Wilhelm v. Rotman, 680 F.3d 1113, 1119 (9th Cir.  
2012).

1 F.R.D. 236, 238-39 (D.D.C. 2004) (plaintiff's counsel  
2 participated in pre-trial and trial proceedings).<sup>14</sup> Cf. U.S. v.  
3 Gamba, 541 F.3d 895, 900 (9th Cir. 2008) (consent of client to  
4 magistrate judge's presiding over closing argument to jury could  
5 be vested in counsel alone, and not require client's  
6 participation or express consent); 12 Charles Alan Wright, Arthur  
7 R. Miller & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE § 3071.2  
8 & n.19.3 (2d ed. 1997 & Supp. 2013); 14 JAMES WM. MOORE ET AL.,  
9 MOORE'S FEDERAL PRACTICE ¶ 73.03[6] (3d ed. 2012).

10 Under this authority, passive and unwitting participation is  
11 not sufficient for a finding of voluntary consent. The Ninth  
12 Circuit, for example, has rejected implied consent where a pro se  
13 plaintiff's initial act was to demand a hearing in the district  
14 court; the plaintiff proceeded with the magistrate judge only  
15 because she thought it was her only choice to obtain relief.  
16 Anderson v. Woodcreek Venture Ltd., 351 F.3d 911, 919 (9th Cir.  
17 2003). Similarly, the Seventh Circuit held that neither the  
18 plaintiff nor defendant had consented to bankruptcy court  
19 jurisdiction simply because they had filed motions for abstention  
20 and withdrawal of the reference, respectively. Ortiz v. Aurora  
21 Health Care, Inc. (In re Ortiz), 665 F.3d 906, 915 (7th Cir.  
22 2011). The Fifth Circuit held that a pro se state prisoner  
23 plaintiff in a 42 U.S.C. § 1983 action did not impliedly consent

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24  
25 <sup>14</sup>One bankruptcy court has reasoned that Roell and  
26 Bellingham lead to the conclusion that a defendant in a  
27 preference action impliedly consents to the entry of default  
28 judgment by failing to respond to a summons that states that such  
failure might result in a default judgment. Exec. Sounding Bd.  
Assocs. Inc. v. Advanced Mach. & Eng'g Co. (In re Oldco M Corp.),  
484 B.R. 598 (Bankr. S.D.N.Y. 2012).

1 where it was not shown that he “was notified of his right to  
2 withhold consent and retain his right to object to the magistrate  
3 judge’s findings before the district court.” Donaldson v.  
4 Ducote, 373 F.3d 622, 624-25 (5th Cir. 2004).

5 These cases distill into a relatively simple principle: once  
6 a party is alerted, or is held to be alerted, to the potential  
7 risks of failing to raise the issue of the tribunal’s authority,  
8 there is a rebuttable presumption that such failure to act was  
9 intentional, and that further purposeful proceeding in the forum  
10 indicates consent. If applicable, this presumption then shifts  
11 the burden to the objecting party to show a lack of consent, a  
12 burden that requires more than a simple statement after  
13 litigation has been completed that consent had never been fully  
14 given.<sup>15</sup>

15 In this case, there was early notice of the possible  
16 infirmity. Bellingham established that the Ninth Circuit opinion  
17 in Marshall v. Stern, combined with the Supreme Court decision in  
18 Granfinanciera, alerted the legal world to bankruptcy courts’  
19 possible lack of authority to decide fraudulent transfer actions.  
20 Bellingham, 702 F.3d at 569. In this case, the Ninth Circuit  
21 issued its opinion in Marshall v. Stern one week before Hasse  
22 answered the Trustee’s complaint.

23 The continued participation in light of the infirmity in  
24 \_\_\_\_\_

25 <sup>15</sup>The same reasoning applies to the grant of default  
26 judgments. The silence of a defendant who has been properly  
27 served is a waiver of the right to contest the factual  
28 allegations in the complaint. See Rule 7055; 10A FEDERAL PRACTICE  
AND PROCEDURE, supra, at § 2682 (3d ed. 2012); cf. Televideo Sys.  
Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

1 authority is also present. Bellingham held that the non-  
2 creditor's failure to object to the bankruptcy court's authority  
3 until the appeal reached the Ninth Circuit – such objection  
4 relying on Stern and made more than one year after the Ninth  
5 Circuit issued Marshall v. Stern – amounted to a waiver of its  
6 right to have an Article III court determine the matter. Id. at  
7 569-70. Bellingham is thus consistent with those magistrate  
8 cases that find participation by represented parties involves the  
9 type of knowing engagement or purposeful availment that equates  
10 with the required consent.

11       Against this background, Hasse's conduct undoubtedly aligns  
12 with those cases that find implied consent. She was and is  
13 represented by counsel, and we thus can assume that she was aware  
14 of her right to refuse consent and demand an Article III forum.  
15 The Ninth Circuit's publication of Marshall v. Stern made, or  
16 should have made, her counsel aware of the bankruptcy court's  
17 possible lack of constitutional authority. Despite this  
18 knowledge, Hasse extensively participated in litigation at the  
19 bankruptcy court and on appeal without raising any challenge to  
20 the bankruptcy court's constitutional authority.<sup>16</sup> To allow her  
21 to now challenge the court's authority to enter a final order on  
22 the basis of lack of consent would be to ignore Bellingham's  
23 equating such participation with the voluntary acceptance of the  
24 bankruptcy court's ability to determine the matter and enter a

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26       <sup>16</sup>In the permitted supplemental briefing, Hasse offered no  
27 coherent or consistent explanation as to why her conduct did not  
28 constitute consent; indeed, Hasse never raised or discussed the  
issue before this Panel raised it on its own.

1 final judgment. We thus hold that Hasse's conduct constituted  
2 consent to the authority of the bankruptcy court to hear and  
3 determine - and enter a final judgment - in this case. As a  
4 consequence of this holding, and despite Bellingham's citation of  
5 Olano, we do not reach the issue of whether simple forfeiture - a  
6 failure to act without examination of the intent or motivation,  
7 if any, of that failure - can suffice for the type of consent  
8 Bellingham requires.<sup>17</sup>

### 9 III. FRAUDULENT TRANSFER ANALYSIS

#### 10 A. The Bankruptcy Court's Finding That Pringle Did Not Receive 11 Reasonably Equivalent Value Was Not Clearly Erroneous

12 The substantive issue on appeal is whether Pringle's gift  
13 deed of the Residence to Hasse is avoidable under § 548. Section  
14 548 allows a trustee in bankruptcy to set aside or avoid certain  
15 "transfer[s] . . . of an interest of the debtor in property."  
16 § 548(a)(1). Section 101(54)(D) defines a transfer as "each  
17 mode, direct or indirect, absolute or conditional, voluntary or  
18 involuntary, of disposing of or parting with-[(¶)] (i) property; or  
19 [(¶)] (ii) an interest in property." In short, "a transfer is a  
20 disposition of an interest in property. The definition is as  
21 broad as possible." Bernard v. Sheaffer (In re Bernard), 96 F.3d  
22 1279, 1282 (9th Cir. 1996).

23 Here, under applicable Idaho law, the gift deed Pringle

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24  
25 <sup>17</sup>In supplemental briefing, Hasse specifically requested  
26 that a state court determine the matter. To the extent this is  
27 an objection to this Panel's authority, we simply point out that  
28 Hasse affirmatively sought appellate review before this Panel  
when she could have opted out and appealed directly to the  
district court. 28 U.S.C. § 158(c)(1). That election surely  
constitutes consent as contemplated by Bellingham.

1 signed and delivered conveyed all of his interest in the  
2 Residence to Hasse. See Hawe v. Hawe, 89 Idaho 367, 406 P.2d 106  
3 (1965). As such it was a "transfer" of his interest in the  
4 property.

5 Once the requisite transfer exists, a trustee must show the  
6 following to avoid that transfer under § 548(a)(1)(B):

7 a bankruptcy trustee must prove that: (1) the transfer  
8 involved property of the debtor; (2) the transfer was  
9 made within [two years] of the bankruptcy filing;  
10 (3) the debtor did not receive reasonably equivalent  
11 value for the property transferred; and (4) the debtor  
was insolvent, made insolvent by the transaction,  
operating or about to operate without sufficient  
capital or unable to pay debts as they become due.

12 Spear v. Global Forest Prods. (In re Heddings Lumber & Bldg.  
13 Supply, Inc.), 228 B.R. 727, 729 (9th Cir. BAP 1998) (citing Wyle  
14 v. C.H. Rider & Family (In re United Energy Corp.), 944 F.2d 589,  
15 594 (9th Cir. 1991)).<sup>18</sup>

16 On appeal, Hasse only challenges one of these elements as  
17 found by the bankruptcy court: that Pringle did not receive  
18 reasonably equivalent value in exchange for his transfer of the  
19 Residence.

20 Even though the Bankruptcy Code does not define what  
21 "reasonably equivalent value" means, it "is not an esoteric  
22 concept: a party receives reasonably equivalent value . . . if it  
23 gets roughly the value it gave." VFB LLC v. Campbell Soup Co.,

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24  
25 <sup>18</sup>Spear was decided when the relevant time frame was one  
26 year. The Bankruptcy Abuse Prevention and Consumer Protection  
27 Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23., extended  
28 the coverage of § 548 to transfers occurring within two years of  
the bankruptcy filing for all bankruptcy cases filed on or after  
April 21, 2006. See 5 COLLIER ON BANKRUPTCY, supra, at  
¶ 548.12[13].

1 482 F.3d 624, 631 (3rd Cir. 2007). "Reasonably equivalent value"  
2 is a key concept in fraudulent transfer law. As the underlying  
3 goal of § 548 is to preserve estate assets, courts assess  
4 reasonably equivalent value from the creditors' perspective. See  
5 In re United Energy Corp., 944 F.2d at 597; Greenspan v. Orrick,  
6 Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison  
7 LLP), 408 B.R. 318, 341-43 (Bankr. N.D. Cal. 2009).

8 This examination requires the court to consider all of the  
9 circumstances surrounding the transfer, id., but "the focus is  
10 whether the net effect of the transaction has depleted the  
11 bankruptcy estate." Harman v. First Am. Bank of Maryland (In re  
12 Jeffrey Bigelow Design Group, Inc.), 956 F.2d 479, 485 (4th Cir.  
13 1992).

14 An examination into reasonably equivalent value is comprised  
15 of three inquiries: (1) whether value was given; (2) if value was  
16 given, whether it was given in exchange for the transfer; and (3)  
17 whether what was transferred was reasonably equivalent to what  
18 was received. In re Brobeck, Phleger & Harrison LLP, 408 B.R. at  
19 341-43; Meeks v. Don Howard Charitable Remainder Trust (In re  
20 Southern Health Care of Arkansas, Inc.), 309 B.R. 314, 319 (8th  
21 Cir. BAP 2004); 5 COLLIER ON BANKRUPTCY, supra, ¶ 548.05[2][a].

22 "Value" is defined in the statute as: "property, or  
23 satisfaction or securing of a present or antecedent debt of the  
24 debtor, but does not include an unperformed promise to furnish  
25 support to the debtor or to a relative of the debtor . . . ."

26 11 U.S.C. § 548(d)(2). "Case law has embroidered this concept to  
27 include 'any benefit' to the debtor, 'direct or indirect' as  
28 value. Indeed, with only limited exceptions, "any . . . kind of

1 enforceable executory promise is value for purposes of section  
2 548." 5 COLLIER ON BANKRUPTCY, supra, ¶ 548.03[5]. Regardless of  
3 its form, the economic benefit must be real and quantifiable.  
4 Gold v. Marquette University (In re Leonard), 454 B.R. 444, 458-  
5 59 (Bankr. E.D. Mich. 2011); Zubrod v. Kelsey (In re Kelsey), 270  
6 B.R. 776, 781 (10th Cir. BAP 2001).

7 Here, however, at least part of the value Hasse promised was  
8 for Pringle's future care. Section 548(d)(2) is explicit in its  
9 exclusion of that type of value from the reasonably equivalent  
10 value calculus; value "does not include an unperformed promise to  
11 furnish support to the debtor." To the extent Hasse's value fell  
12 into this category, it cannot factor into the reasonably  
13 equivalent value calculation. See, e.g., Simone v. Nationsbank  
14 of Del., N.A. (In re Simone), 229 B.R. 329, 335 (Bankr. W.D. Pa.  
15 1999).

16 But arguably some of the value given by Hasse consisted in  
17 the satisfaction of Pringle's obligations to Hasse for support  
18 given or provided to Pringle before the transfer. Although an  
19 executory promise of future support is not value, the  
20 satisfaction of an existing valid debt for past support is. See  
21 Schilling v. Montalvo (In re Montalvo), 333 B.R. 145, 149 (Bankr.  
22 W.D. Ky. 2005) (spouse's transfer of money to other spouse for  
23 customary household and living expenses was for value in that it  
24 satisfied spouse's legal support obligation).

25 For that part of Hasse's value not excluded by section  
26 548(d)(2), the value to the estate must be reasonably equivalent  
27 to the value given up - here as represented by the Residence's  
28 \$35,000 value. This equivalence need not be precise. "By its

1 terms and application, the concept of 'reasonably equivalent  
2 value' does not demand a precise dollar-for-dollar exchange."  
3 Advanced Telecomm. Network, Inc. v. Allen (In re Advanced  
4 Telecomm. Network, Inc.), 490 F.3d 1325, 1336 (11th Cir. 2007)  
5 (citation omitted).

6 Even against this relatively relaxed standard, Hasse does  
7 not point to any particular error in the manner in which the  
8 bankruptcy court determined reasonably equivalent value; instead,  
9 Hasse contends that the services she promised to perform for  
10 Pringle (Pringle's care and allowing him to continue to live in  
11 the Residence) were sufficient consideration to support the deed.  
12 In support, she cites Baker v. Pattee, 684 P.2d 632, 635-36 (Utah  
13 1984).

14 But Hasse's reliance on Baker is misplaced. Consideration  
15 sufficient to support a simple contract is a different concept  
16 than reasonably equivalent value under fraudulent transfer law.  
17 Baker demonstrates this. It upheld a trial court's finding that  
18 the defendant gave sufficient consideration to defeat an  
19 equitable action under Utah law to cancel a deed for failure of  
20 consideration. It made no finding of the equivalence of  
21 exchange, instead finding that the grantor had given "adequate  
22 and substantial consideration" for the property, id. at 636, a  
23 standard quite different from "reasonably equivalent value."

24 Here, we are not dealing with a finding concerning the  
25 sufficiency of consideration under state law, but rather with a  
26 finding under § 548 that Pringle did not receive reasonably  
27 equivalent value. As the cases we cite above reflect, the  
28 concept of reasonably equivalent value is markedly different from

1 the concept of sufficiency of consideration. Moreover, Baker is  
2 based in large part on the "considerable deference" that the Utah  
3 Supreme Court gave to the trial court's finding of sufficient  
4 consideration. Id. at 634. The bankruptcy court's finding here,  
5 that Pringle did not receive reasonably equivalent value, also is  
6 entitled to considerable (if not even greater) deference under  
7 the applicable federal standard of review. See Rule 8013; Forest  
8 Grove School Dist. v. T.A., 638 F.3d 1234, 1239 (9th Cir. 2011).

9 The bankruptcy court did not specify what (if any) market  
10 value it assigned to Hasse's promises or to her past care, but we  
11 know of no authority compelling it to do so under these  
12 circumstances. The court simply found: "whatever value, real  
13 value came out of [Hasse's] promise, was not reasonably  
14 equivalent to the value that the debtor gave up in this exchange  
15 and that was a \$35,000 unencumbered house." Hr'g Tr. (Jan. 4,  
16 2011) at 7:23-8:2.

17 We believe that the record was sufficient to support the  
18 court's finding. A bankruptcy court's determination of  
19 reasonably equivalent value is a finding of fact that we review  
20 under the clearly erroneous standard. See Rule 8013; Decker v.  
21 Tramiel (In re JTS Corp.), 617 F.3d 1102, 1109-10 (9th Cir.  
22 2010). The clearly erroneous standard of review is difficult for  
23 any appellant to overcome. Under the clearly erroneous standard  
24 we may not reverse based on the bankruptcy court's factual  
25 findings unless they are: "[1] illogical, [2] implausible, or  
26 [3] without support in inferences that may be drawn from the  
27 facts in the record.'" Forest Grove School Dist, 638 F.3d at  
28 1239 (quoting United States v. Hinkson, 585 F.3d 1247, 1263 (9th

1 Cir. 2009) (en banc)).

2 Hasse's evidence on the nature, timing and extent of her  
3 promises was equivocal at best.<sup>19</sup> Furthermore, even if we were  
4 to assume that Hasse's promises and past care had substantial  
5 market value, a number of different concerns could have  
6 legitimately caused the bankruptcy court to discount that value.  
7 Those concerns include but are not limited to: the risk of future  
8 nonperformance, the nebulous/unquantifiable value of some aspects  
9 of what services were promised or rendered, the likelihood that  
10 Hasse was willing to, and did, take care of Pringle even without  
11 the transfer (based on their longstanding relationship), and  
12 § 548's express exception to the definition of value of  
13 "unperformed promise[s] to furnish support."

14 In short, on this record, we simply cannot conclude that the  
15 bankruptcy court's reasonably equivalent value finding was  
16 "[1] illogical, [2] implausible, or [3] without support in  
17 inferences that may be drawn from the facts in the record." See  
18 Forest Grove School Dist., 638 F.3d at 1239 (internal quotation  
19

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20 <sup>19</sup>Indeed, on appeal, Hasse suggested that the value given in  
21 exchange included her prior care for Pringle (as much as her  
22 promise to care for him in the future). And yet there was no  
23 evidence in the record indicating that Hasse ever intended to  
24 charge Pringle for the prior care he received, or that the  
25 transfer of the Residence was quid pro quo for such prior care.  
26 See In re Brobeck, Phleger & Harrison LLP, 408 B.R. at 341 ("A  
27 transfer is for value [for purposes of § 548] if one is the quid  
28 pro quo of the other."); Slone v. Lassiter (In re Grove-Merritt),  
406 B.R. 778, 806 (Bankr. S.D. Ohio 2009) (citing cases and  
holding that the value must be given quid pro quo for the assets  
the debtor transferred). Hasse's references to both prior care  
and promises of future care further muddy the waters regarding  
what was agreed to and the value of what was received in exchange  
for the Residence.

1 marks and citation omitted). As a result, the bankruptcy court  
2 did not commit reversible error when it found that Pringle did  
3 not receive reasonably equivalent value in exchange for the  
4 transfer of the Residence.

5 **B. The Bankruptcy Court Did Not Err When it Rejected as a**  
6 **Matter of Law Hasse's "No Harm, No Foul" Argument**

7 Hasse argues that the transfer of the Residence does not  
8 constitute a fraudulent transfer because, if Pringle had not  
9 transferred it, he would have been able to claim an exemption in  
10 the Residence in any event, so his creditors are no worse off as  
11 a result of the transfer than they would have been absent the  
12 transfer. This is the so-called "no harm, no foul" argument.<sup>20</sup>

13 The Ninth Circuit rejected this argument in In re Noblit, 72  
14 F.3d at 758-59. In that case, before filing for bankruptcy, the  
15 debtor had transferred a portion of the proceeds from the sale of  
16 her house to Arlan and Donna Smoker to satisfy a preexisting  
17 debt. When the trustee sued the Smokers to avoid and recover the  
18 transfer as a preference under § 547, the Smokers argued that, if  
19 the debtor simply had kept the house, she would have been  
20 entitled to claim a homestead exemption, so the debtor's  
21 creditors were no worse off as result of the transfer. Id. at  
22 758. In rejecting this argument, Noblit reasoned that the  
23 exemption was "personal to the debtor" and that when the debtor  
24 made the transfer, she essentially waived any exemption that she  
25

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26 <sup>20</sup>As this is an interpretation of section 548 and the Code  
27 generally, this argument raises a question of law which we review  
28 de novo. See Tavener v. Smoot, 257 F.3d 401, 405-07 (4th Cir.  
2001); In re Trujillo, 215 B.R. at 203.

1 otherwise might have claimed. Id. After all, the debtor thereby  
2 gained the use of the proceeds of the transfer. Noblit further  
3 reasoned that the Smokers, as the transferees who had received  
4 the preference, had no standing to raise any such exemption as a  
5 defense against the trustee's preference avoidance action. Id.

6 In In re Trujillo, 215 B.R. at 205, we followed Noblit in  
7 rejecting a similar argument under § 548. We also rejected an  
8 alternate argument based on the same "no harm, no foul" theory  
9 that, even if the subject transfer was a fraudulent transfer  
10 under § 548, the transfer should not be avoided because the  
11 transfer did not diminish the debtor's bankruptcy estate. Id. at  
12 204. We acknowledged that this no-diminishment-of-the-estate  
13 argument had validity prior to the 1978 enactment of the  
14 Bankruptcy Code because, under the Bankruptcy Act of 1898, exempt  
15 property did not qualify as property of the estate. See id. at  
16 205. In contrast, we pointed out that the Bankruptcy Code treats  
17 the debtor's property subject to exemptions as property of the  
18 estate. Id. In other words, unless and until the debtor  
19 actually claims an exemption in the subject property and that  
20 exemption is allowed, the subject property remains property of  
21 the estate. Id. We further noted that the no-diminishment-of-  
22 the-estate argument cannot be reconciled with § 522(g), which in  
23 relevant part effectively prohibits a debtor from claiming an  
24 exemption in property recovered by the trustee to the extent the  
25 debtor voluntarily transferred away that property. 215 B.R. at  
26 205.

27 A handful of cases since the enactment of the Bankruptcy  
28 Code have accepted the no harm, no foul argument. See, e.g.,

1 Kapila v. Fornabaio (In re Fornabaio), 187 B.R. 780, 782-83  
2 (Bankr. S.D. Fla. 1995); Jarboe v. Treiber (In re Treiber), 92  
3 B.R. 930, 932 (Bankr. N.D. Okla. 1988). But the majority of  
4 courts addressing the issue have rejected the argument for  
5 essentially the same reasons that Noblit and Trujillo rejected  
6 it. See, e.g., Tavenner, 257 F.3d at 406-07; Sullivan v. Welsh  
7 (In re Lumbar), 457 B.R. 748, 754 (8th Cir. BAP 2011).

8 Regardless of contrary authority outside the circuit, binding  
9 authority within the circuit has not changed. Following Noblit  
10 and Trujillo, as we must, we conclude that the bankruptcy court  
11 did not err when it rejected Hasse's no harm, no foul argument.

12 **C. The Bankruptcy Court Did Not Commit Reversible Error When it**  
13 **Found That Pringle Made the Transfer with the Intent to**  
14 **Hinder or Delay Luna and That Pringle Was Indebted to Luna**  
15 **for Purposes of § 548**

16 Hasse also challenges the bankruptcy court's alternate  
17 determination that the transfer of the residence constituted an  
18 intentional fraudulent transfer under § 548(a)(1)(A).<sup>21</sup> Here  
19

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20  
21 <sup>21</sup>Unlike the Uniform Fraudulent Transfer Act, "reasonably  
22 equivalent value" is not a defense to avoidance with respect to a  
23 transfer made with the actual intent to hinder, delay, or  
24 defraud. Compare Unif. Fraudulent Transfer Act § 8(a) ("A  
25 transfer or obligation is not voidable under [the provision  
26 related to transfers made with the intent to defraud] against a  
27 person who took in good faith and for a reasonably equivalent  
28 value or against any subsequent transferee or obligee.") with 11  
U.S.C. § 548(c) ("[A] transferee or obligee of such a transfer or  
obligation that takes for value and in good faith has a lien on  
or may retain any interest transferred or may enforce any  
obligation incurred, as the case may be, to the extent that such  
transferee or obligee gave value to the debtor in exchange for  
such transfer or obligation.").

1 again, given the inherent factual nature of these questions, we  
2 review the bankruptcy court's findings that Pringle intended to  
3 hinder or delay Luna and that Pringle was indebted to Luna at  
4 that time for error under the clearly erroneous standard. See  
5 Rule 8013; Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34  
6 F.3d 800, 805 (9th Cir. 1994).

7 Because direct evidence of intent is rare, courts tend to  
8 infer the existence of an intentional fraudulent transfer from  
9 the circumstances surrounding the transfer. In re Acequia, Inc.,  
10 34 F.3d at 805-06.

11 Among the more common circumstantial indicia of  
12 fraudulent intent at the time of the transfer are:  
13 (1) actual or threatened litigation against the debtor;  
14 (2) a purported transfer of all or substantially all of  
15 the debtor's property; (3) insolvency or other  
16 unmanageable indebtedness on the part of the debtor;  
17 (4) a special relationship between the debtor and the  
18 transferee; and, after the transfer, (5) retention by  
19 the debtor of the property involved in the putative  
20 transfer.

21 The presence of a single badge of fraud may spur mere  
22 suspicion; the confluence of several can constitute  
23 conclusive evidence of actual intent to defraud, absent  
24 "significantly clear" evidence of a legitimate  
25 supervening purpose.

26 Id. at 806 (quoting Max Sugarman Funeral Home, Inc. v. A.D.B.  
27 Investors, 926 F.2d 1248, 1254-55 (1st Cir. 1991)). See also  
28 Unif. Fraudulent Transfer Act § 4(b)(1)-(11) (listing badges of  
fraud); 5 COLLIER ON BANKRUPTCY, supra, ¶ 548.04[1][b][i].

29 The record contains uncontroverted evidence of virtually all  
30 of Acequia's indicia of fraudulent intent. The Residence  
31 constituted most if not all of Pringle's net worth. The transfer  
32 was to a long-term companion, and Pringle remained in possession.  
33 Finally, and as a sockdolager, Pringle admitted that he

1 transferred the Residence in part because of his concern over  
2 Luna's lawsuit.

3 Hasse has not disputed any of these facts. She argues,  
4 however, that there was insufficient evidence from which the  
5 court could have concluded that Pringle was indebted to Luna.  
6 Again, the clearly erroneous standard requires a strong showing  
7 of error: we cannot dismiss the bankruptcy court's factual  
8 finding of the existence of a claim unless that finding was  
9 "[1] illogical, [2] implausible, or [3] without support in  
10 inferences that may be drawn from the facts in the record."  
11 Forest Grove School Dist., 638 F.3d at 1239 (internal quotation  
12 marks and citation omitted).

13 Hasse has not met this standard. As noted above, Pringle  
14 admitted at trial that, at the time of the transfer, Luna was  
15 suing him for roughly \$100,000 on account of an automobile  
16 accident. This was more than sufficient evidence to support the  
17 court's finding that Pringle was indebted to Luna within the  
18 meaning of § 548. While Congress did not define the word  
19 "indebted" either in § 548 or elsewhere in the Bankruptcy Code,  
20 "indebted" commonly and unambiguously refers to the condition of  
21 being in debt.<sup>22</sup> In turn, the Bankruptcy Code defines "debt" as  
22 "liability on a claim," § 101(12), and broadly defines "claim"  
23 as:

24 (A) right to payment, whether or not such right is  
25 reduced to judgment, liquidated, unliquidated, fixed,

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26 <sup>22</sup>See Oxford English Dictionary, Online edition,  
27 <http://www.oed.com/view/Entry/94198?redirectedFrom=indebted#eid>  
28 (last visited July 2, 2013) (stating that "indebted" means "Under  
obligation on account of money borrowed; owing money; in debt.").

1 contingent, matured, unmatured, disputed, undisputed,  
2 legal, equitable, secured, or unsecured; or

3 (B) right to an equitable remedy for breach of  
4 performance if such breach gives rise to a right to  
5 payment, whether or not such right to an equitable  
6 remedy is reduced to judgment, fixed, contingent,  
7 matured, unmatured, disputed, undisputed, secured, or  
8 unsecured.

9 § 101(5).

10 In light of the definitions of "claim" and "debt," the  
11 bankruptcy court reasonably inferred that Luna's \$100,000 claim  
12 against Pringle constituted a debt under § 101(12) - albeit an  
13 unliquidated and disputed one. Pringle was thus "indebted" to  
14 Luna within the meaning of § 548(a)(1)(A). The bankruptcy  
15 court's finding was not clearly erroneous.

16 In addition, given the admission of intent as to Luna, and  
17 the other badges of fraud evident here, the bankruptcy court  
18 could have inferred that Pringle had a general intent to defraud  
19 his present or future creditors at the time of the transfer. See  
20 5 COLLIER ON BANKRUPTCY, supra, at ¶ 548.04[1] (stating that  
21 "general intent to hinder, delay or defraud present or future  
22 creditors" is sufficient; "proof of the target's identity is not  
23 required.").

24 Against this background, the bankruptcy court did not commit  
25 reversible error when it found that Pringle made the transfer of  
26 the Residence with the intent to hinder or delay Luna and that  
27 Pringle was indebted to Luna for purposes of § 548(a)(1)(A).

#### 28 **IV. CONCLUSION**

For the reasons set forth above, the judgment of the  
bankruptcy court is AFFIRMED.