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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In Re

LUCIE ROCA,

Debtor.

DAVID A. BIRDSELL, CHAPTER 7  
TRUSTEE,

Plaintiff,

LUCY N. ROCA,

Defendant.

Chapter 7

Case No. 2:05-bk-20725-SSC

Adv. No. 07-ap-00478

**MEMORANDUM  
DECISION CONCERNING A  
FRAUDULENT CONVEYANCE**

I. INTRODUCTION

This matter comes before the Court on a “Complaint to Avoid Fraudulent Transfer of Property” (“Complaint”) filed with the Court on August 31, 2007 by the Chapter 7 Trustee (“Trustee”). An “Answer to Complaint to Avoid Fraudulent Transfer of Property” was filed on October 3, 2007 by the Defendant, Lucy N. Roca, the Debtor’s mother (“Defendant”). After an appropriate amount of time for discovery and other pretrial matters, this Court conducted a trial on September 16, 2008, and thereafter took the matter under advisement.<sup>1</sup>

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<sup>1</sup> The parties agreed to a discovery cutoff date of March 31, 2008, which was extended by them to July 16, 2008. See Docket Entries No. 16 and 18. The parties filed their joint pretrial statement on September 9, 2008, which is Docket Entry No. 22.

1 Taking into account the evidence presented at trial, the arguments of the parties,  
2 the documents filed, and the entire record before the Court, the Court has set forth in this  
3 decision its findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52, Bankruptcy  
4 Rule 7052. The Court has jurisdiction over this matter, and this is a core proceeding. 28 U.S.C.  
5 §§ 1334 and 157 (West 2008).

6  
7 **II. FACTUAL BACKGROUND**

8 On or about September 6, 2004, Lucie Roca, the Debtor ("Debtor") and her  
9 mother, the Defendant, purchased real property located at 2205 W. Clearview Trail, Anthem,  
10 Arizona 85086 ("Anthem Property"),<sup>2</sup> which had an appraised value of \$370,000.<sup>3</sup> The Debtor  
11 and Defendant took legal title to the Anthem Property via Warranty Deed as joint tenants with  
12 the right of survivorship.<sup>4</sup> Additionally, the Debtor and Defendant were co-borrowers on the  
13 loan issued by Aegis Wholesale Corporation ("Aegis"), which was used to purchase the Anthem  
14 Property. The Debtor testified at the time of trial that the Aegis loan was necessary because the  
15 Defendant still owned her home in New Jersey, and the Debtor and the Defendant did not have  
16 the requisite financing to purchase the Anthem Property without the Aegis loan.

17 As to the home in New Jersey, the Debtor and the Defendant testified that the  
18 Defendant had resided there for a substantial period of time. However, after the death of the  
19 Defendant's husband, the Debtor assisted the Defendant with the upkeep and other financial  
20 matters as to the New Jersey property. For the convenience of the Defendant, the Debtor and the  
21 Defendant decided to sell the New Jersey property and have the Defendant reside with the  
22 Debtor. The Debtor testified that to prepare for the sale, she and the Defendant obtained a loan,  
23 as co-borrowers, secured by a deed of trust on the New Jersey property. Soon after the closing

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25 **2.** Docket Entry No. 22, ¶3, Stipulated Fact.

26 **3.** Docket Entry No. 22, ¶8.

27 **4.** Docket Entry No. 22, ¶3.

1 occurred on the Anthem Property, the refurbished home in New Jersey where the Defendant then  
2 resided was sold, and the Defendant moved to Arizona to reside at the Anthem Property. After  
3 payment of all liens encumbering the New Jersey property, a cashier's check in the names of the  
4 Defendant and the Debtor was issued. The Debtor was a co-borrower on at least one lien  
5 encumbering the New Jersey property.

6 On April 1, 2005, the Debtor and Defendant fully refinanced the Aegis loan on  
7 the Anthem Property through Bank of America N. A.<sup>5</sup> The Debtor and the Defendant were  
8 named as co-borrowers on the Bank of America loan. On the date the Aegis loan was  
9 refinanced, the Debtor and Defendant presented the Bank of America with a cashier's check in  
10 the amount of \$200,000, resulting in a net loan amount of \$97,860. The cashier's check  
11 contained the names of both the Debtor and the Defendant.

12 On April 25, 2005, the Debtor transferred her interest in the Anthem Property to  
13 the Defendant via Warranty Deed.<sup>6</sup> While the Warranty Deed indicates that the Defendant paid  
14 the Debtor \$10.00 and other valuable consideration for the Debtor's interest in the Anthem  
15 Property, the Debtor testified that she received no consideration from the Defendant.<sup>7</sup>

16 According to the Debtor, at the time of the transfer: (i) she was working for an  
17 airline and being paid \$7.50 per hour, (ii) she had between \$5,000 to \$10,000 in the bank, (iii)  
18 her business had approximately \$50,000 in credit card debt, and (iv) she was current on all  
19 payments to her creditors. The parties also stipulated that at the time of the April 25, 2005  
20 transfer, the value of the Debtor's assets was less than the amount of the Debtor's liabilities.<sup>8</sup>

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21  
22 **5.** See Exhibit 5.

23 **6.** Docket Entry No. 22, ¶4.

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25 **7.** Also see Docket Entry No. 22, ¶5. The stipulated fact was that "[t]he Debtor did not  
26 receive anything from the Defendant in exchange for the Debtor's transfer of her interest in the  
Property to the Defendant."

27 **8.** Docket Entry No. 22, ¶6.



1 mortgage interest and points deduction by the Debtor in the amount of \$11,021.<sup>12</sup> The Debtor,  
2 however, testified that the entire mortgage interest and points deduction was attributable to the  
3 Defendant.

4 As of September 9, 2008, the parties stipulated that according to an internet cite  
5 which places an approximate value on real estate, the Anthem Property had a value of \$334,500,  
6 and was encumbered by liens in the aggregate amount of \$180,000.<sup>13</sup> The Debtor testified that it  
7 was necessary to obtain a second lien on the Property to payoff the Defendant's credit card  
8 debts. However, there is no credible evidence to reflect that the Defendant had any credit card  
9 debt. Rather, the Debtor admitted during her testimony that she had previously had a business,  
10 that it had failed, and that she had incurred considerable credit card debt in attempting to save it.  
11 Of further concern as to the increase in the amount of the encumbrances against the Property  
12 after the April 25, 2005 transfer is the Debtor's testimony that the first lien on the Property  
13 provided for "negative amortization," a financing term which allowed the Debtor and the  
14 Defendant to pay less than the interest which was accruing on the principal amount of the loan.  
15 As a result, the principal balance of the first lien was increasing in amount over time which had  
16 the effect of decreasing the amount of the Debtor's and Defendant's equity in the Property.

17 When the Trustee questioned the Defendant as to how there was an  
18 increase of at least \$100,000 in the amount of the debt against the Property between the April 1,  
19 2005 refinancing of the Aegis loan and the filing of the joint pretrial statement on September 9,  
20 2008, the Defendant had no reasonable explanation. The Debtor later testified that the  
21 Defendant was "confused," but she could not quantify why the indebtedness had increased other

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22  
23 **12.** The interest which was paid was the amount of \$10,792.

24 **13.** Docket Entry No. 22, ¶¶ 9, 10, 11, and 12. Also *see* Exhibits 12 and 13, which  
25 reflect that the GMAC paid Bank of America in full, and held the first lien on the Property, and  
26 the Debtor and the Defendant obtained a second lien on the Property in favor Deer Valley Credit  
27 Union. Unfortunately, the only exhibits provided to the Court are monthly statements and not  
the underlying loan documents. Therefore, it is not clear to the Court when the loans were  
obtained or the original amount of the loans.

1 than to state that the Debtor and the Defendant had paid the “mother’s” credit card debt, which  
2 was not supported by the record.

3  
4 III. ISSUES

5 A. WHETHER THE TRANSFER WAS SIMPLY ALLOWING THE DEFENDANT  
6 TO QUIET TITLE IN HER NAME.

7 B. WHETHER A “TRANSFER” OCCURRED UNDER SECTION 548.

- 8 1. Whether the Debtor had an interest in the Property.  
9 2. If the Debtor had such an interest, whether the interest had value.  
10 3. Whether the transfer of exempt property, under Arizona law, created an  
exception to the provisions of Section 548.

11 C. UNDER SECTION 548, WHETHER THE TRANSFER WAS ACTUALLY  
12 FRAUDULENT AS TO THE DEBTOR’S CREDITORS.

13 D. UNDER SECTION 548, WHETHER THE TRANSFER WAS  
14 CONSTRUCTIVELY FRAUDULENT AS TO THE DEBTOR’S CREDITORS.

15 E. WHETHER THE TRUSTEE MAY RECOVER THE PROPERTY OR THE  
16 VALUE OF THE TRANSFER OF THE DEBTOR’S INTEREST IN THE  
PROPERTY UNDER SECTION 550.

17 F. WHETHER THE TRUSTEE MAY AVOID THE TRANSFER UNDER  
18 ARIZONA’S UNIFORM FRAUDULENT TRANSFER ACT, AS  
INCORPORATED BY SECTION 544(b).

19 Within each of the issues, the parties have set forth various sub-issues that must  
20 also be resolved by the Court. For instance, the Defendant states that the transfer could not be a  
21 fraudulent conveyance, because (1) the Debtor conveyed nothing of value to the Debtor, and (2)  
22 a transfer of exempt property is an exempt transaction not subject to avoidance. Although not  
23 articulated by the parties as an issue, the Defendant also discusses what is a fraudulent  
24 conveyance under Arizona law, and then applies that analysis to the fraudulent conveyance  
25 provisions under the Bankruptcy Code. As will be discussed in this decision, the Court  
26 concludes that the Trustee has carried his burden of proof as to whether the transfer was a  
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1 fraudulent conveyance under Section 548, but has not made the requisite showing of a fraudulent  
2 transfer under Section 544 of the Bankruptcy Code. Finally, this decision is complicated by the  
3 fact that the Trustee did not provide evidence of the value of the transfer as of April 25, 2005,  
4 when it occurred. However, the Trustee seeks the turnover of the value of the transfer, as of the  
5 time that it occurred, under Section 550 of the Bankruptcy Code. The parties have stipulated to  
6 the value of the Anthem Property on September 6, 2004, the Debtor has listed the value of the  
7 Property as of October 5, 2005, when she filed her bankruptcy petition, and the parties have  
8 stipulated as to the value of the Property as of September 9, 2008.

#### 9 10 IV. DISCUSSION

11 The Trustee seeks to set aside the Debtor's pre-petition transfer of the Property to  
12 the Defendant as fraudulent under 11 U.S.C. §§ 548(a)(1) and 544(b). At the time of trial, the  
13 Trustee focused his burden of persuasion on Section 548. Perhaps the Trustee believed that the  
14 provisions were coextensive and that proof under one provision would be sufficient to sustain his  
15 burden of proof under the other Section. However, as will be shown hereinafter, the Sections  
16 have different meanings, presumably to provide different types of strong-arm powers to the  
17 Trustee. In turn, the Defendant presented a number of arguments that the transfer did not meet  
18 the definition of a fraudulent transfer, that the Trustee had not proven all elements of a  
19 fraudulent transfer, that the Trustee had not shown that any value should be turned over to the  
20 estate under Section 550 of the Bankruptcy Code, and that the transfer was not fraudulent under  
21 Arizona's uniform fraudulent conveyance act.

22 Turning to Section 548(a)(1), a trustee "may avoid any transfer. . .of an interest of  
23 the debtor in property . . .that was made or incurred within 1 year before the date of the filing of  
24 the petition, if the debtor voluntarily or involuntarily—

25 (A) made such transfer . . . with actual intent to hinder, delay, or defraud  
26 any entity to which the debtor was or became, on or after the date that such  
27

1 transfer was made . . . ; or

2 (B) (i) received less than reasonably equivalent value in exchange for  
3 such transfer . . . ; and

4 (ii) (I) was insolvent on the date that such transfer was made. . . , or became  
5 insolvent as a result of such transfer. . ”<sup>14</sup>

6 Thus, the trustee must initially prove that (1) the debtor transferred the property, and (2) such  
7 transfer took place within one year prior to the filing of the debtor’s bankruptcy petition. Upon  
8 making this initial showing, the trustee is then required to prove that the debtor transferred the  
9 property with actual intent to defraud<sup>15</sup> or that the transfer was constructively fraudulent.<sup>16</sup>

10  
11 A. Whether the transfer simply quieted title in the Defendant.

12 The Defendant argues that the Court should never reach the issue of whether a  
13 fraudulent transfer has occurred under any provision of the Bankruptcy Code, because the  
14 Defendant has always been the legal and equitable owner of the Anthem Property, and the  
15 Debtor’s transfer in April 2005 was simply to correct an error in the title. First, the Court  
16 questions the raising of such an issue as a part of a fraudulent conveyance action. Normally a  
17 debtor or interested party seeking to quiet title in his or her name would need to commence an

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19 \_\_\_\_\_  
20 **14.** 11 U.S.C. §548(a)(1)(A), (B)(West 2008). The Court has included those provisions  
21 which are relevant to the controversy. The administrative case was filed prior to October 17,  
22 2005, the effective date of most of the provisions of BAPCPA. *See* BAPCPA, Pub.L.No. 109-8,  
23 §1501(b)(1), 119 Stat. 23, 216 (stating that unless otherwise provided, the amendments do not  
24 apply to cases commenced under title 11 before the effective date of BAPCPA); *also see*  
25 §1406(b) - “Avoidance Period–The amendment made by section 1402(1) shall apply only with  
26 respect to cases commenced under title 11 of the United States Code more than 1 year after the  
27 date of enactment of this Act.” As a result, the Court shall utilize the one-year, look-back period  
28 under prior law.

26 **15.** *See* 11 U.S.C. § 548(a)(1)(A).

27 **16.** *See* 11 U.S.C. § 548(a)(1)(B).





1 :Kennedy v. Morrow, 77 Ariz. 152, 268 P.2d 326 (1954). The Defendant has shown no credible  
2 facts which would support the Defendant’s argument that the Anthem Property should simply  
3 remain in the Defendant’s name.

4  
5 B. Whether A Transfer Occurred Under Section 548.

6 The Defendant raises a number of points under this issue, such as the Debtor had  
7 no interest in the Anthem Property, and that even if she had such an interest, nothing of value  
8 was conveyed. Finally, the Defendant also asserts that the transfer, because it involved  
9 homestead property, is not a “transfer” within the definition of the fraudulent transfer provisions  
10 of the Bankruptcy Code.

11 1. Whether the Debtor had an interest in the Property.

12 Pursuant to 11 U.S.C. § 548(a)(1), a transfer of property by a debtor may be  
13 avoided if such "transfer. . . was made. . .on or within 1 year before the date of filing the  
14 petition." 11 U.S.C. §101(54) defines a transfer as “every mode, direct or indirect, absolute or  
15 conditional, voluntary or involuntary, of disposing of or parting with property or with an interest  
16 in property. . .”

17 The Defendant argues, as a corollary to the fact that legal and equitable title  
18 should be vested in her, that the Debtor had no interest in the Property that was transferred.  
19 Certainly, at the time of the transfer, the Debtor had an interest in the Property as a joint tenant,  
20 with the right of survivorship; that is, if the Defendant predeceased her, the Debtor would  
21 succeed to the Defendant’s interest in the Anthem Property and own it outright. However,  
22 Section 548 of the Bankruptcy Code does not provide a definition of “property” or an interest in  
23 property. Consequently, the Court must look to applicable state law to determine the definition.  
24 In re Loken, 175 B.R. 56, 60 (9<sup>th</sup> Cir. BAP 1994); *see also*, In re Bright, 241 B.R. 664 n.3 (9<sup>th</sup>  
25 Cir. BAP 1999).

26 Since the real estate at issue is located in the State of Arizona, the Court will  
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1 the Defendant's legal and equitable title in the Anthem Property. The Debtor's actions reflected  
2 what her interest was in the Property. When the Debtor listed the Defendant as a dependent on  
3 the Debtor's Tax Returns, she was obtaining an additional exemption on her Tax Return; it did  
4 not turn her individual return into a joint return, nor did it relieve the Defendant of her burden to  
5 file a tax return.<sup>19</sup> The mortgage interest deduction was an independent deduction available to  
6 each party to use on her individual return based on the amount of interest actually paid by that  
7 party. By signing the tax return which included the benefit of the entire mortgage interest  
8 deduction, the Debtor was admitting that she was making the mortgage payments on the Anthem  
9 Property. If she were only making a portion of the payment, or if she were simply making the  
10 payment on behalf of the Defendant, at least on this record, she had no ability to claim the  
11 mortgage interest deduction on the Debtor's 2005 Tax Return. Finally, since the Debtor was  
12 also reducing the principal amount of the loan on the Anthem Property with each mortgage  
13 payment, the Debtor's equitable interest in the Anthem Property was also increasing over time.

14 2. Whether the interest of the Debtor had value.

15 There are no Arizona cases which are directly on point as to how to value a joint  
16 tenancy interest. However, in determining how to make welfare payments to such an interest  
17 under Arizona law, an appellate court has apportioned the interest, allowing one-half of the value  
18 of the property to be allocated to the one joint tenant. Crahan va. Allen, 463 P.2d 102, 104  
19 (Ariz. App. 1970). Therefore, as a guideline, this Court may conclude that the Debtor had an  
20 interest in the Anthem Property which was equal to one-half of the value of the Property at the  
21 time of the transfer in April 2005.

22 While there was no testimony or evidence presented by an appraiser as to the  
23 value of the Debtor's survivorship interest in the Anthem Property, the Court need not establish  
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25 **19.** There are limited exceptions which provide that a dependent may not have a filing  
26 requirement if the dependent makes less than a specified amount each year. But the Defendant  
27 failed to provide the necessary evidence to support any exception. *See* I.R.C. §§151, 152, and  
28 6012.

1 the precise value. The Court may take into account the Debtor's Schedules, executed under  
2 penalty of perjury, as to some indication of the value of the Debtor's interest. As noted  
3 previously, the Debtor listed her the interest in the Anthem Property, on her Schedule A, with a  
4 value of \$240,000. She also noted a lien encumbering the Property in the amount of \$98,000.  
5 However, the Debtor and the Defendant purchased the Property in September 2004, which had a  
6 value of \$370,000 at the time.

7           By October 2005, the Arizona real estate market was still "heated," and the value  
8 of real estate was increasing in value. Thus, it is reasonable to assume that the Anthem Property  
9 had a value well in excess of \$370,000 at the time of the transfer in April 2005. Since the Debtor  
10 listed her interest in the Property, as of October 2005, with a value of \$240,000, it is reasonable  
11 for the Court to assume that without the transfer, the Debtor would only have a one-half interest  
12 in the Property, and the value of the Debtor's one-half interest was \$240,000 in October 2005.  
13 Thus, the Property would have had, but for the transfer, twice the value of her interest, or a value  
14 of \$480,000. If the Trustee had been able to force a sale of the Property in October 2005, he  
15 could have paid off the first lien in the amount of \$98,000 and even paid the Defendant an  
16 exemption of \$150,000 for the Property. He would still have had \$191,000 in potential proceeds  
17 to distribute to the creditors of the estate.<sup>20</sup>

18           The Defendant also argues that even if the Debtor has an interest in the Property,  
19 if the first lien amount of \$98,000 is subtracted from the sum of \$240,000, only the amount of  
20 \$142,000 remains, less than the Arizona homestead exemption. However, there is nothing in the  
21 record to support the Debtor's assertion that the entire interest in the Property only had a value of  
22 \$240,000. As noted previously, the Debtor and the Defendant purchased the Property in October  
23 2004 for the appraised amount of \$370,000. The Arizona real estate market became heated, and  
24 the value of real estate only increased over the next year. It is reasonable to assume that the

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25  
26           **20.** \$480,000 minus \$98,000 = \$382,000. Divide by 2, and this leaves \$191,000 as the  
27 Debtor's potential interest in the Property. As will be set forth hereinafter, the Debtor would be  
28 unable to claim her own homestead exemption as a result of the operation of Section 522 (g).

1 value of the Property was at least in the amount of \$480,000 in April 2005, with the Debtor's  
2 one-half interest having a value of \$240,000 as listed on her Schedules. Based upon the  
3 foregoing, the Court concludes that in April 2005, the Debtor had an interest in the Anthem  
4 Property which had value.

5 3. Whether the transfer of exempt property is excepted from the provisions of  
6 Section 548.

7 The Defendant provides an interesting argument in noting that homestead  
8 property is excepted from the parameters of Arizona's Uniform Fraudulent Transfer Act  
9 ("UFTA"), and since the Anthem Property was homestead property, there was no property that  
10 could be transferred for purposes of Section 548.

11 Under Arizona's UFTA, assets do not include "property to the extent [it is]  
12 generally exempt under nonbankruptcy law" and a transfer is defined as the "disposing of or  
13 parting with an asset or an interest in an asset." A.R.S. § 44-1001(1)(b), (9). In reading these  
14 sections together, the Defendant also argues that since the Anthem Property is exempt under  
15 Arizona's homestead exemption, the Property may not be considered an asset under Arizona's  
16 UFTA and, thus, may not be challenged as a fraudulent transfer under Arizona's UFTA.  
17 Presumably the Defendant believes that if the transfer is excepted from the provisions of  
18 Arizona's UFTA, it may not be set aside as a fraudulent conveyance under the Bankruptcy Code.

19 However, there is no similar provision in Section 548 which carves out an  
20 exception for property which is exempt under federal or state law. Thus, since the joint tenancy  
21 interest is "property" under Arizona law, it is subject to the provision of Section 548 which  
22 allows the Trustee to "avoid any transfer of an interest of the [Debtor] in property." Next, since  
23 there is no provision, as under Arizona's UFTA, which carves out homestead property or other  
24 property which is exempt under "nonbankruptcy" law from the operation of Section 548, the  
25 Debtor's joint tenancy interest remains subject to avoidance. Congress has not chosen to provide  
26 such an exception within the parameters of Section 548, and this Court sees no basis to include  
27 one in its analysis of the Section. *Cf. U.S. v. Ron Pair Enterprises*, 489 U.S. 235, 109 S.Ct. 1026,

1 103 L.Ed.2d 290 (1989)(holding that where the language of a statute is plain, the Court has no  
2 choice but to follow the mandate of the language).

3           Finally, the Debtor chose to transfer her interest in the Property by Warranty  
4 Deed on April 25, 2005. Under Arizona law, the use of a warranty deed would prohibit a *bona*  
5 *fide* purchaser from acquiring a superior interest in the Property. Edwards v. Stewart Title &  
6 Trust of Phoenix, Inc., 156 Ariz. 531, 753 P.2d 1187 (Ariz. App. 1988); Bailey v. Kuida, 69  
7 Ariz. 357, 213 P.2d 895 (Ariz. 1950). Such a method is a voluntary, absolute transfer by the  
8 Debtor of her joint tenancy interest in the Anthem Property to the Defendant. Thus, the Trustee  
9 has shown, at least as to Section 548 of the Bankruptcy Code, that the Debtor had an interest in  
10 property, that the interest had value, and that the Debtor transferred that interest within the 1-  
11 year period prior to the filing of her bankruptcy petition. As such, the Trustee has proven all of  
12 the preliminary elements of a claim under Section 548.

13  
14 C. Whether the Transfer Was Actually Fraudulent as to the Debtor's Creditors Under Section  
15 548.

16           A transfer is actually fraudulent when a debtor makes a transfer with "actual  
17 intent to hinder, delay, or defraud any entity to which the debtor was or became. .  
18 . indebted."

19 11 U.S.C. § 548(a)(1)(A). A debtor's intent may be established by circumstantial evidence. In re  
20 Perez, 954 F.2d 1026 (5th Cir. 1992); In re Beverly, 374 B.R. 221, 235 (9<sup>th</sup> Cir.BAP 2007). In  
21 assessing this evidence, the courts consider "badges of fraud" which are "circumstances so  
22 commonly associated with fraudulent transfers that their presence gives rise to an inference of  
23 intent" and are allowed as proof "due to the difficulty of proving actual intent to hinder, delay[,]  
24 or defraud creditors." In re Sharp Int'l Corp., 403 F.3d 43, 56 (2d Cir. 2005), *quoting* Wall St.  
25 Assocs. v. Brodsky, 257 A.D.2d 526, 59 (1st Dept. 1999).

26           In considering circumstances commonly associated with fraudulent transfers,  
27 bankruptcy courts often look to state law for guidance when available. Although the Court has

1 concluded that the Trustee may not utilize Arizona's UFTA to avoid the transfer of the Anthem  
2 Property under Section 544(b), the Court may still review Arizona law as to certain non-  
3 exclusive factors which a court may rely on in determining whether actual intent exists, such as:

- 4 (1) Whether the transfer or obligation was to an insider;
- 5 (2) Whether the debtor retained possession or control of the property transferred after the  
6 transfer;
- 7 (3) Whether the transfer or obligation was disclosed or concealed;
- 8 (4) Whether, before the transfer was made or obligation was incurred, the debtor had  
9 been sued or threatened with suit;
- 10 (5) Whether the transfer was of substantially all of the debtor's assets;
- 11 (6) Whether the debtor absconded;
- 12 (7) Whether the debtor removed or concealed assets;
- 13 (8) Whether the value of the consideration received by the debtor was reasonably  
14 equivalent to the value of the asset transferred or the amount of the obligation  
15 incurred.

16 A.R.S. § 44-1004. When performing this analysis, it is the transferor's intent at the time of  
17 transfer which is crucial. In re Loken, *supra* at 235. Moreover, the trustee must only show the  
18 presence of the intent to hinder, or the intent to delay, or the intent to defraud; it is not necessary  
19 for the trustee to show the presence of all three types of intent in order to avoid the transfer. Id.

20 In this matter, the Debtor transferred her interest in the Property to her mother  
21 who would be considered an insider. 11 U.S.C. §101(31)(A)(I); In re Strickland, 230 B.R. 276  
22 (Bankr.E.D.Va. 1999). The Debtor's testimony also reflects that she continued to make  
23 mortgage payments concerning the Property, and she availed herself of the mortgage interest  
24 deduction on her 2005 Tax Return. The Debtor also retained possession of the Property by  
25 continuing to reside there. The transfer was also concealed in the sense that when the Debtor  
26 filed her bankruptcy petition, she disclosed her interest in the Property, but did not disclose any  
27





1 \$240,000, as of October 2005, at a time when the value of Arizona real estate was still increasing  
2 exponentially. Moreover, by listing the \$98,000 secured claim against the Property, which the  
3 Debtor stated on her Schedules had a value of \$240,000, the Debtor was attempting to claim her  
4 entire interest in the Property as exempt and remove it from the scrutiny of the Trustee. The  
5 Debtor had also already transferred her interest in the Property to the Defendant, but had not  
6 listed that transfer in any part of her Schedules. The Court can find no reason for the numerous  
7 inaccuracies in the Debtor's Schedules other than the Debtor's intent to hide the Anthem  
8 Property from her creditors and mislead the Trustee.

9           Based upon the foregoing, the Court concludes that the Debtor had the actual  
10 intent to hinder, delay, or defraud her creditors, and the transfer was "actually fraudulent"  
11 pursuant to 11 U.S.C. § 548(a)(1)(A).

12  
13 D. Whether the Transfer was Constructively Fraudulent as to the Debtor's Creditors under  
14 Section 548.

15           The Trustee further argues that the transfer of the Property was constructively  
16 fraudulent under 11 U.S.C. § 548(a)(1)(B).<sup>23</sup> Pursuant to 11 U.S.C. § 548(a)(1)(B), a transfer  
17 may be avoided if the debtor "received less than reasonably equivalent value in exchange for  
18 such transfer or obligation" and "was insolvent on the date that such transfer was made. . . or  
19 became insolvent as a result of such transfer or obligation." A person is insolvent when the  
20 person's debts are greater than that person's property "at a fair valuation, exclusive of property  
21 transferred, concealed, or removed with intent to hinder, delay or defraud such [person's]  
22 creditors." 11 U.S.C. § 101(32). The property calculation does not include "property [that was]

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24           

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25           **23.** The Debtor mentioned In re Gustafson, Case No. 06-72727 (W.D. Ark. 2008) (mem.)  
26 at the hearing. However, the In re Gustafson court denied the trustee's attempt to avoid a  
27 fraudulent transfer because the trustee did not provide evidence sufficient to establish that the  
debtor was insolvent at the time of the transfer. Since the parties have stipulated to the Debtor's  
insolvency and the Trustee has provided evidence of the Debtor's financial condition at the time  
the Property was transferred, the Court finds In re Gustafson inapplicable to the present case.

1 transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's  
2 creditors."

3           In considering the first prong of the analysis of whether the Debtor received  
4 reasonably equivalent value in exchange for the transfer of the Property, the Court finds the  
5 Debtor received little or no consideration from the Defendant. The Warranty Deed had the  
6 standard language that the Debtor received "\$10 and other good and valuable consideration."<sup>24</sup>  
7 If the Court relies on the language of the Warranty Deed alone, the Debtor received \$10 for the  
8 transfer of an interest which had a potential value of \$191,000 to unsecured creditors, assuming  
9 that the \$98,000 first lien was paid, and the Trustee allowed an exemption of \$150,000 to the  
10 Defendant in the Property.<sup>25</sup> As such, the Debtor received little or no value for her interest in the  
11 Property. Accordingly, the Debtor did not receive "reasonably equivalent value" in exchange for  
12 her property interest.

13           To determine whether the Debtor was insolvent at the time of the transfer, the  
14 Court must simply do an analysis of the Debtor's assets and the Debtor's liabilities, exclusive of  
15 the transferred Property. 11 U.S.C. §§548(a)(1)(B)(ii)(I), 101(32). Based on the stipulation of  
16 the parties, at the time of the transfer, the value of the Debtor's assets was less than the amount  
17 of the Debtor's liabilities.<sup>26</sup> Thus, the Court finds that the Debtor transferred property to the  
18 Defendant for less than reasonably equivalent value at a time when the Debtor was insolvent,  
19

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20  
21 **24.** The Warranty Deed provides in pertinent part:

22           For the consideration of TEN and NO/100 DOLLARS, and other valuable  
23           considerations, I or we, the grantor does convey to . . .the Grantee Lucy N. Roca  
24           the following described property situate in Maricopa County, Arizona: Lot 43  
25           Anthem Unit 49 . . .

26 *See Exhibit 6.*

27 **25.** The Property had a value of \$480,000 minus the first lien of \$98,000 = \$382,000.  
28 The Debtor's one-half interest would be \$191,000. The Debtor would not be entitled to a  
homestead exemption as a result of 11 U.S.C. §522 (g).

**26.** Docket Entry No. 22, ¶6.

1 making the transfer fraudulent under 11 U.S.C. § 548(a)(1)(B).

2  
3 E. Whether the Trustee May Recover the Property or the Value of the Transfer of the Debtor's  
4 Interest in the Property Under Section 550.

5 The Trustee requests that the Court allow the estate to recover the value of the  
6 transferred Property. Upon finding that a Debtor has fraudulently transferred property, “the  
7 trustee may recover, for the benefit of the estate, the property transferred, or, if the court so  
8 orders, the value of such property” from the transferee. 11 U.S.C. § 550(a). Thus, the preferred  
9 remedy for a trustee is to recover the property which has been fraudulently transferred, and the  
10 Court must exercise its discretion to order that the value of the property be transferred instead.  
11 In re Straightline Investments, Inc., 525 F.3d 870 (9<sup>th</sup> Cir. 2008); In re Schwartz, 383 B.R. 119  
12 (8<sup>th</sup> Cir. BAP 2008)(court has discretion to decide which remedy is appropriate under facts of  
13 case); In re Fehrs, 391 B.R. 53 (Bankr.D.Idaho 2008)(money judgment appropriate when return  
14 of real estate will injure innocent parties).

15 The Trustee did not introduce any evidence as to the value of the Debtor's one-  
16 half interest in the Property at the time of the April 25, 2005 transfer. As discussed above, the  
17 Court is able to place certain values on the Debtor's one-half interest to conclude that the Debtor  
18 had an interest in the Property, and that her interest had value, before the Property was  
19 transferred. However, given that the Debtor had a joint tenancy interest, with the right of  
20 survivorship, the Court may only conclude that the Debtor's interest had some value. At the  
21 time of the transfer on April 25, 2005, the Property had a value of roughly \$480,000, as outlined  
22 above. If the first lien in the amount of \$98,000 is subtracted, and the remaining equity of  
23 \$382,000 is divided in one-half, the Debtor's interest, at first blush, is \$191,000. However, if the  
24 Debtor's interest were sold at auction by the Trustee, presumably the market would have to  
25 account for the fact that there was a possibility that the Debtor would predecease her mother,  
26 which would wipe out the purchaser's interest in the Property. The Trustee has provided no  
27 valuation evidence as to this risk. Therefore, the Court is unable to place a value on the Property

1 with such certainty that it is able to order the Defendant to turn over said value to the Trustee.

2 11 U.S.C. §363(h) considers the possibility of the sale of the estate's and the co-  
3 owner's interest in the Property. However, to do so, the Trustee must make a showing that--

4 "(1) partition in kind of such property among the estate and such co-owners is  
5 impracticable; (2) sale of the estate's undivided interest in such property would  
6 realize significantly less for the estate than sale of such property free of the  
7 interests of such co-owners; (3) the benefit to the estate of a sale of such property  
8 free of the interests of co-owners outweighs the detriment, if any, to such co-  
9 owners; and (4) such property is not used in the production, transmission or  
10 distribution, for sale, of electric energy or of natural or synthetic gas for heat,  
11 light or power."

12 The Trustee would be required to bring an adversary proceeding if he wished to pursue such a  
13 remedy, and he has failed to do so at least as of this time.<sup>27</sup> This leaves the Trustee with  
14 something of a Pyrrhic victory. The Court may require that the Defendant execute a deed  
15 granting the bankruptcy estate an undivided, one-half interest in the Property. However, given  
16 the current value of the Property, the amount of the liens against the Property, and the  
17 Defendant's homestead interest, the Trustee would have little value to recover for the estate after  
18 any sale, if he were to succeed under Section 363(h). Unfortunately, the Court see no other  
19 alternative based upon the facts presented. The Court concludes that the Trustee is entitled to a  
20 recovery of the Debtor's interest in the Property. If the Trustee wishes to pursue such a remedy,  
21 he may lodge a form of judgment so providing.

22  
23 F. Whether the Trustee may Avoid the Transfer under Arizona's Uniform Fraudulent Transfer  
24 Act, as Incorporated by Section 544 (b).

25 Although not emphasized at the time of trial, the Trustee also included a count

26  
27 

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**27.** See Fed.R.Bank.P. 7001 (3).

1 that the transfer from the Debtor to the Defendant be avoided pursuant to Section 544(b) of the  
2 Bankruptcy Code. Section 544(b) provides, in relevant part:

3 (B) Except as provided in paragraph (2), the trustee may avoid any transfer of an  
4 interest of the debtor in property or any obligation incurred by the debtor that is  
5 voidable under applicable law by a creditor holding an unsecured claim that is  
6 allowable under section 502 of this title or that is not allowable only under section  
7 502(e) of this title.<sup>28</sup>

8 In this case, since the Property is located in Arizona, the applicable law would be Arizona's  
9 UFTA, which states that the transfer of "generally exempt" property is not subject to the  
10 provisions of the Act.<sup>29</sup> There is no case law or commentary which discusses or interprets the  
11 meaning of that particular phrase. Presumably the transfer of homestead property from one  
12 spouse to the other or from one family member to another would be within the parameters of the  
13 phrase. For instance, the Supreme Court first addressed the issue of whether a transfer of  
14 homestead property could be a fraudulent conveyance when Arizona was still a Territory.<sup>30</sup> At  
15 the time, the homestead consisted of land, together with the dwelling house, which did not  
16 exceed the value of \$5,000, and which had been selected by the owner as the homestead. Luhrs  
17 at 345-346, and 606.

18 The Arizona Supreme Court stated that the law then provided that the homestead  
19 exemption excluded creditors from all remedies that they had in all courts, noting "No execution  
20

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21 **28.** 11 U.S.C. §544(b)(1) (West 2008).

22  
23 **29.** See §44-1001(1), which states that "Asset" means property of a debtor, but asset  
24 does not include any of the following: . . . (b) Property to the extent that it is generally exempt  
25 under nonbankruptcy law." and §44-1001(9), which states that "Transfer" means every mode,  
26 direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting  
27 with an asset or an interest in an asset ..."

28 **30.** See Luhrs, Hancock, et al., 6 Ariz. 340, 57 P.605 (1899). Arizona did not become a  
state until 1912.

1 or other writ could be made a lien against [the homestead], nor could the creditor have a claim  
2 upon it in any form. Under such circumstances could the homestead be the subject of a  
3 fraudulent conveyance? The whole doctrine of annulling fraudulent conveyances rests upon the  
4 ground that the creditor has a right to resort to the property, and where he has no such right it is  
5 impossible that a conveyance can be deemed fraudulent.” *Id.* at 346 and 607. <sup>31</sup> Arizona law  
6 still supports this principle. *Ferguson v. Roberts*, 64 Ariz. 357, 170 P.2d. 855 (1946). Although  
7 the Debtor and Defendant are family members, they did jointly own homestead property.  
8 Therefore, the transfer of the Debtor’s interest to her mother was a transfer of a “generally  
9 exempt” asset, within the meaning of Arizona’s UFTA, and not subject to avoidance, since it  
10 was excepted from the provisions of the Act. As a result, the Trustee’s request for relief under  
11 Section 544(b) must be denied.

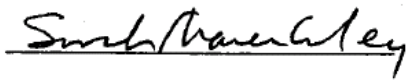
12           The Court recognizes that when other courts have addressed the issue of a  
13 fraudulent conveyance under applicable state law and Section 548, there has been a synthesis of  
14 the analyses, and a similar conclusion has been reached under either Section 548 or Section  
15 544(b) of the Bankruptcy Code. *In re Acequia, Inc.*, 34 F.3d 800 (9<sup>th</sup> Cir. 1994); *In re CyberCo*  
16 *Holdings, Inc.*, 382 B.R. 118 (Bankr. W.D. Mich. 2008); *In re McCarn’s Allstate Finance, Inc.*,  
17 326 B.R. 843 (Bankr. M.D. Fla. 2005). However, when Congress created the two provisions,  
18 presumably it was concerned with different types of transfers. Otherwise one of the provisions  
19 would be surplusage. The Court should not interpret a provision of the statute in a manner which  
20 renders it meaningless. *Beck v. Prupis*, 529 U.S. 494, 506, 120 S.Ct. 1608, (2000); *Li v. Eddy*,  
21 324 F.3d 1109 (9<sup>th</sup> Cir. 2003). Thus, we have the unusual result herein that the transfer is  
22 fraudulent under Section 548 of the Code, but not under Section 544(b).

#### 23 24 25 IV. CONCLUSION

26  
27           **31.** The Court noted parenthetically that in any event, no party had brought a proceeding  
to set aside the conveyance as fraudulent. *Id.* at 347, and 607.

1           The Court concludes that the transfer was both actually and constructively  
2 fraudulent under Section 548 of the Bankruptcy Code. The Trustee is entitled to a transfer of an  
3 undivided, one-half interest in the Property from the Defendant to the estate. The Court must  
4 deny the Trustee's request for relief under Section 544(b). The Trustee shall lodge an  
5 appropriate form of judgment and order in this matter.

6  
7           DATED this 26<sup>th</sup> day of January, 2009.

8  
9           

10           Honorable Sarah Sharer Curley  
11           U. S. Bankruptcy Judge