

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>WILLIAM H. HOWISON,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 96-296-P-DMC</i></b>
	)	
<b>JAYNE M. HANLEY,</b>	)	
	)	
<i>Defendant</i>	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>**

**Findings of Fact**

1. Prior to April 30, 1993, James McFarlane was the owner of a one-half undivided interest in real estate located at 164 Spurwink Road in Scarborough, Maine (the “residence”).
2. On April 30, 1993, James McFarlane transferred his interest in the residence to his wife, Jayne Hanley, the defendant in this action.
3. McFarlane received no payment of money or other goods in exchange for his transfer of his interest in the residence to Hanley.
4. At the time McFarlane conveyed his interest in the residence to Hanley, the residence was encumbered by the following liens: a mortgage to Marine Midland in the amount of \$84,624.34; a

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<sup>1</sup> Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

mortgage to U.S. Trust Company in the amount of \$29,370.19; and a statutory lien to the Internal Revenue Service (“IRS”) in the amount of \$26,540.68.

5. Simultaneously with his conveyance of his interest in the residence to Hanley, McFarlane and Hanley obtained a new refinancing loan from Gorham Savings Bank which was secured by a mortgage on the residence granted by Hanley. McFarlane’s personal liability on the loan was equal and identical to that of Hanley.

6. At the time McFarlane conveyed his interest in the residence to Hanley, he was insolvent.

7. Some of the proceeds of the refinancing loan were used to discharge an IRS lien.

8. On September 22, 1995 McFarlane filed a Chapter 7 petition in the United States Bankruptcy Court for the District of Maine which was given the case number 95-20793.

9. On April 30, 1993 Peoples Heritage Savings Bank and William Hobbs held claims against McFarlane. Peoples Heritage had extended mortgage loans to McFarlane on apartment houses the market value of which was known to McFarlane on April 30, 1993 to be substantially less than the principal balances owing on those loans.

10. On September 22, 1995 Peoples Heritage Savings Bank and William Hobbs continued to hold those unsecured claims against McFarlane.

11. In January 1993 the residence was appraised for the purpose of the refinancing loan at \$168,000.

12. After the transfer of his interest in the residence, McFarlane continued to reside there and paid the property taxes and insurance on the residence as well as all utilities and maintenance bills. During this time his income was substantially greater than that of the defendant.

13. On April 30, 1993 the residence had a cesspool system for disposal of waste. This system

occasionally backed up. An underground tank was also present on the property. Neither of these facts was known to Robert Libby, who performed the review appraisal on the residence in January 1993.

14. If Robert Libby had known about the cesspool and the underground tank he would have made a downward adjustment to the appraised valuation of 50% of the cost of installation of a new septic system and of the full cost of removal of the underground tank.

15. A new septic system was installed to serve the residence prior to the sale of the property in 1995 at a cost of \$5,966. The underground tank was removed at the same time at a cost of \$1,907.50.

16. McFarland and the defendant paid \$10,334.11 in cash to Gorham Savings Bank at the closing. This money came from a joint account.

17. The closing costs on the Gorham Savings Bank refinancing were \$798.90.

18. The existing mortgages and IRS lien on the residence were discharged at the time of closing on the Gorham Savings Bank refinancing.

### **Conclusions of Law**

1. The plaintiff, trustee in bankruptcy of McFarlane's estate, seeks to avoid the transfer from McFarlane to Hanley and recover twice the value of the asset transferred pursuant to 11 U.S.C. § 544(b) and 14 M.R.S.A. § 3578(1)(C)(3). The federal statute provides that the trustee

may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under Section 502 of this title or that is not allowable only under Section 502(e) of this title.

2. The trustee asserts that the transfer at issue is voidable under the applicable law of Maine, specifically 14 M.R.S.A. §§ 3575(1)(A), 3575(1)(B)(2)<sup>2</sup> and 3576(1). Those portions of the statute read as follows:

**§ 3575 Transfers fraudulent as to present and future creditors**

1. **Fraudulent transfer.** A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

A. With actual intent to hinder, delay or defraud any creditor of the debtor; or

B. Without receiving a reasonably equivalent value in exchange for the transfer or obligations and the debtor:

(1) Was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as the debts became due.

**§ 3576 Transfers fraudulent as to present creditors**

1. **Transfers without receipt of reasonably equivalent value.** A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer or obligation.

3. Hanley asserts that the conveyance was not a transfer under the Maine statute, based on the

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<sup>2</sup> While a claim under this section of the statute is included in the complaint and is discussed in the plaintiff's trial brief, no evidence directed specifically to this section was presented at trial. Therefore, I will not discuss it further.

definitions of the terms “transfer” and “asset” in Maine’s version of the Uniform Fraudulent Transfer Act, of which 14 M.R.S.A. § 3575 is a part. Those definitions read as follows:

“Transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease or creation of a lien or other encumbrance.

14 M.R.S.A. § 3572(12).

“Asset” means property of a debtor, but does not include:

A. Property to the extent that it is encumbered by a valid lien; or

B. Property to the extent that it is generally exempt under nonbankruptcy law.

14 M.R.S.A. § 3572(2).

4. Hanley asserts that the residence was McFarlane’s homestead and therefore he had an exemption from attachment and execution under nonbankruptcy law, specifically 14 M.R.S.A. § 4422(1), in the amount of \$12,500, that, when added to the other valid liens on the property at the time of the conveyance, generated a total in excess of the value of the property, so that the property did not constitute an asset. Therefore, she argues, no fraudulent transfer could have taken place.

5. I conclude that the value of the residence for the purpose of determining whether the conveyance was fraudulent was the appraised value as of January 1993, *to wit*, \$168,000, less the sum of the mortgages and lien and one-half the cost of installation of the septic system (\$2,983) and the cost of removing the underground tank (\$1,907.50). The resulting number must be further adjusted by adding in the funds paid in cash by the defendant and McFarlane at closing (less closing costs), because those funds were used to discharge the mortgages and the IRS lien, as is apparent from the closing statement, Plaintiff’s Exhibit 3. These calculations generate a final figure of

\$32,110.

6. Because the residence was jointly owned by the defendant and McFarlane, this value is divided by 2 to generate a value for McFarlane's interest. The resulting number is \$16,055.

7. Therefore, assuming *arguendo* that the homestead exemption is applicable in determining whether a fraudulent transfer occurred, the value of McFarlane's interest in the property at the time of sale is a positive number (\$3,550). I thus need not determine whether the homestead exemption should apply in the determination of the question whether an asset was conveyed when McFarlane transferred his interest to the defendant. Under Maine law an asset was conveyed by McFarlane to Hanley.

8. Hanley argues in the alternative that McFarlane's interest in the residence would not be equal to one-half the fair market value of the property because it would be necessary for a creditor to bring a partition action in order to execute on his interest in the property, and therefore the value of McFarlane's interest should be discounted to what a purchaser would pay for it under those circumstances. Hanley has submitted no evidence concerning what that discounted value would be or any legal authority supporting her position. I reject her theory in this regard.

9. I conclude that McFarlane's conveyance of his interest in the residence to Hanley was fraudulent under 14 M.R.S.A. § 3576(1) because (i) McFarlane had creditors whose claims arose before the transfer occurred, (ii) he did not receive reasonably equivalent value in exchange for the transfer, and (iii) he was insolvent at the time of the transfer.

10. I conclude that McFarlane's conveyance of his interest in the residence to Hanley was also fraudulent under 14 M.R.S.A. § 3575(1)(A) because (i) it was made to an insider, § 3572(7)(A)(1); (ii) the debtor retained possession of the residence after the transfer and exercised as much control

over the property as he had before the conveyance; (iii) the debtor received no consideration for the transfer, or at least nothing of substantially equivalent value; (iv) the debtor was insolvent before the transfer was made; and (v) the transfer occurred at a time when the market value of the properties owned by the debtor subject to the Peoples Heritage mortgages had become substantially less than the principal balance owing on the underlying loans. McFarlane testified that it “never occurred to” him that the transfer of his interest in the residence to the defendant would protect it from the claims of Peoples Heritage. I find this testimony not credible and conclude that he was, in fact, motivated by that concern when he conveyed his interest to the defendant.

11. I will not apply the homestead exemption in determining the value of the interest fraudulently transferred because the plain language of 14 M.R.S.A. § 4422, denying the exemption to the extent that such property has been fraudulently conveyed, must apply once there has been a determination that McFarlane did indeed convey his interest in the property fraudulently. The plaintiff may recover \$16,055, plus interest and costs.

12. The plaintiff argues that his award of damages should be doubled under 14 M.R.S.A. § 3578(1)(C)(3). He concedes that the statutory language does not mandate a doubling of the award, but rather sets a ceiling of damages not to exceed double the value of the property transferred or concealed. Nevertheless, he asserts that he is entitled to double damages in this case to compensate him for the cost of recovering the value of the fraudulent transfer, relying on language from the Statement of Fact accompanying L.D. 695 of the 115th Maine Legislature, the most recent amendment of § 3578, which provides that “Without the double damages, the creditor pays more when the creditor is defrauded than when the creditor is not defrauded.”

13. The defendant responds that under 11 U.S.C. ¶ 544(b), pursuant to which this action is

brought, only the question whether the transfer is voidable may be determined under “applicable law,” or Maine law in this case, and that the only available remedy once that determination has been made is found in 11 U.S.C. § 550(a), which does not allow recovery of more than the property transferred or the value of such property.

14. The plaintiff relies on *In re Oxford Homes, Inc.*, 180 B.R. 1, 7-8 (D. Me. 1995), as authority for his position that state law also determines the remedy in an action brought pursuant to section 544(b). In that opinion, which dealt only with a request for preliminary injunction, Judge Haines states in *dictum* that “the plaintiff [trustee] may employ a state cause of action under § 544(b) of the Bankruptcy Code,” *id.* at 7, and that “[a] successful creditor might obtain relief . . .” pursuant to 14 M.R.S.A. § 3578(1)(A) and (C), *id.* at 8. Judge Haines determined that injunctive relief was available under both the state statute and section 105(a) of the Bankruptcy Code. *Id.* at 13. Thus, the question of a possible conflict between the remedial provisions of the Code and state law did not arise. The only reported cases on point that my own research has unearthed — both Ninth Circuit cases — hold that section 550 governs. *In re Acequia, Inc.*, 34 F.3d 800, 809 (9th Cir. 1994); *Lippi v. City Bank*, 955 F.2d 599, 605 (9th Cir. 1992). *See also Congress Credit Corp. v. AJC Int’l*, 186 B.R. 555, 558 (D.P.R. 1995) (differentiating avoidance and recovery, holding that recovery must be sought under § 550). I am persuaded that the language of section 544(b) extends only to the determination whether a fraudulent conveyance has occurred and is voidable, and that the availability and extent of remedial relief is governed solely by 11 U.S.C. § 550 and not by state law. Therefore, double damages are not available in this case.

In light of the foregoing, judgment shall enter in favor of the plaintiff trustee and against the

defendant for the sum of \$16,055.00.

So ordered.

*Dated this 11th day of August, 1997.*

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*David M. Cohen*  
*United States Magistrate Judge*