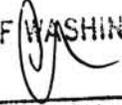


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 46235-4 II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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SHELCON CONSTRUCTION GROUP, LLC,

Respondent,

v.

SCOTT M. HAYMOND and JANE DOE HAYMOND; A-3  
VENTURE LLC; A-4 VENTURE; A-1111 VENTURE LLC;  
14224 PIONEER LIVING TRUST and ANCHOR MUTUAL  
SAVINGS BANK,

Appellants.

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**RESPONDENT'S BRIEF**

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ORIGINAL

## TABLE OF CONTENTS

<b>I. INTRODUCTION</b> .....	1
<b>II. STATEMENT OF THE CASE</b> .....	3
a. Haymond’s Transfer of Club Membership.....	3
b. Haymond’s Transfer of His House.....	5
<b>III. ARGUMENT</b> .....	6
a. Transfer of Club Membership.....	6
b. Transfer of House.....	10
c. Trust unaffected by trial court’s orders.....	13
d. Opportunity to Challenge.....	13
e. No Claim of Fraudulent Conveyance.....	14
f. Divestiture of Trustor’s Ownership.....	14
<b>IV. CONCLUSION</b> .....	15
<b>V. REQUEST FOR FEES AND EXPENSES</b> .....	16

**TABLE OF AUTHORITIES**

CASES:

*Columbia Int'l Assoc. Corp. v. Perry*, 54 Wn.2d 876, 344 P.2d 509 (1959)... 9  
*Edwards v. Edwards*, 1 Wn.App. 67, 70, 459 P.2d 422, 424 (1969)... 14,15  
*Sedwick v. Gwinn*, 73 Wn.App. 879, 873 P.2d. 528 (1994)... 10

STATUTES:

RCW 19.40.041... 3-4, 5, 7, 8

RULES:

CR 19(a)... 11,12  
CR 24(c)... 11, 12  
RAP 3.1... 11  
RAP18.1... 16  
WAC 458-61A-211... 5

## I. INTRODUCTION

Scott M. Haymond (“Haymond”) made two transfers of personal property. Shelcon Construction Group, LLC (“Shelcon”) was a judgment creditor of Haymond. Shelcon challenged the legitimacy of the transfers on the basis that both transfers purported to place Haymond’s property beyond Shelcon’s right to execute on those properties. Both were set aside by the trial court. CP 233-235.

The first transfer was a 03/12/2012 transfer of Haymond’s membership interest in the East End Lake Tapps Rod and Gun Club (“Club”) through which membership interest Haymond was entitled to exclusively possess and occupy a certain parcel of legally described real property located on Lake Tapps to which the Club owned legal title. This parcel was but one of twenty-two parcels that comprised approximately 6.25 acres of land located on Lake Tapps (CP 186). The Club holds the legal title. There are 22 members of the Club. CP 185. Club membership entitles a member to live on whatever parcel was occupied by the person who transferred his/her membership interest to the buyer. Title to the parcel itself is never transferred. The Club always holds the legal title. A seller transfers his Club membership to the buyer on the Club books; not the legal title maintained as a public record by the county. Then the buyer takes occupancy; not legal title to the property. The Club must first approve all transfers. CP 186. There can be no transfer of a Club membership until the Club *first* approves the transfer. CP 186.

The second transfer was the 04/06/2006 transfer of Haymond's house to the Darra Marie Haymond Living Trust ("Trust"). Haymond's house is situated on the subject parcel. CP 195.

Shelcon contends that Haymond's transfer of his Club membership was an avoidable transfer under the Uniform Fraudulent Conveyance Act codified at RCW Ch. 19.40. Shelcon further contends that the transfer of Haymond's house to the Trust was void because Haymond retained exclusive occupancy, possession, use, control, and complete equitable and beneficial ownership of his house.

The trial court set aside both transfers as follows:

(1) Scott M. Haymond's transfer of his membership interest in the East End Lake Tapps Rod and Gun Club shall and is hereby voided to the extent necessary to satisfy the judgment of Shelcon Construction Group, LLC against Scott M. Haymond, and the

(2) transfer of Haymond's personal residence to either Darra M. Odenwalder or to Darra M. Odenwalder as trustee for the Darra M. Haymond Living Trust shall and hereby is voided to the extent necessary to satisfy the judgment of Shelcon Construction Group, LLC against Scott M. Haymond.

(CP 234 - 235)

## II. STATEMENT OF THE CASE

### A. Haymond's Transfer of Club Membership

Shelcon's motion to avoid Haymond's transfer of his Club membership to Darra M. Odenwalder ("Odenwalder") was based upon the highlighted portions of RCW 19.40.041 as set out below.

- (a) 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:
  - (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
  - (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
    - (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
    - (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
- (b) In determining actual intent under subsection (a)(1) of this section, consideration may be given, among other factors, to whether:
  - (1) The transfer or obligation was to an insider;
  - (2) The debtor retained possession or control of the property transferred after the transfer;
  - (3) The transfer or obligation was disclosed or concealed;
  - (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

- (5) The transfer was of substantially all the debtor's assets;
- (6) The debtor absconded;
- (7) The debtor removed or concealed assets;
- (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Haymond transferred his membership to Odenwalder (not to the Trust) on 03/12/2012. CP 187. Prior to the transfer of Haymond's Club membership, Shelcon became a judgment creditor of Haymond on 10/28/2011. CP 303-306. According to the deposition of Odenwalder (CP 23-28), the transfer was made with actual intent to hinder, delay or defraud Haymond's creditors such as Shelcon. The transfer was without payment or receipt of any value. CP 197-200. The transfer was to an insider: Haymond's sister. Odenwalder Deposition, CP 21. Haymond at all times prior and subsequent to the transfer retained exclusive possession, beneficial use, and control of the property. Odenwalder Deposition, CP 31. The transfer occurred shortly after Shelcon obtained its judgment against Haymond on 10/28/2011. The Bill of Sale expressly stated that the transfer was only a "CHANGE IN IDENTITY". CP 197-200. The

transfer was therefore tax exempt on the basis of Haymond's representation that Haymond retained complete beneficial ownership of both the Club membership and the house. WAC 458-61A-211.

Haymond's transfer of his membership interest in the Club was an avoidable preference because his conveyance violated RCW Ch. 19.40.

#### **B. Haymond's Transfer of His House**

The purpose of the Trust was to put both Haymond's Club membership and his house beyond the reach of present and potential creditors. Odenwalder Deposition CP 23-28. All expenses of maintaining Haymond's house were personally paid by Haymond with Haymond's money which Haymond channelled through Odenwalder. CP 39-41. The two of them established a ruse, a contrivance, whereby Haymond and his sister met at a bank and Haymond gave his cash to Odenwalder. CP 56-64. Odenwalder then purchased money orders with Haymond's money and then Odenwalder paid the utility bills, the insurance bills (CP 56-64), property taxes, etc. with the money orders so that the two of them made it to look like the Trust was paying the utilities, taxes, etc. on Haymond's house when in fact at all times it was actually Haymond himself paying these bills. Odenwalder Deposition, CP 56-64. Haymond and Odenwalder created and operated this ruse so that it would *not* appear that Haymond was personally paying his own expenses incurred in maintaining his house. Odenwalder Deposition, CP 70. Nothing was paid by the Trust because the Trust had no bank account. CP 63. The Trust

had no money of its own. Odenwalder Deposition, CP 63. Odenwalder's authority and the Trust's right to retain ownership of Haymond's house is subject to the sole approval of Haymond himself. CP 115. The Trust was revocable at Odenwalder's unfettered whim or will. CP 74. Haymond continued to pay the membership dues to the Club. CP 66-67.

Haymond purchased the house on 01/14/2002 and took occupancy. Since 01/14/2002 Haymond has been the sole and exclusive resident and occupant. CP 186.

Haymond's transfer of his house to the Trust was a mere contrivance. The trial court found that the contrived "transfer" was ineffective to place Haymond's house beyond the reach of Shelcon. The transfer was unreal. It was a ruse. Haymond retained complete and exclusive equitable and beneficial ownership of his house.

### **III. ARGUMENT**

#### **A. TRANSFER OF CLUB MEMBERSHIP**

##### **1. Standard of Review**

The applicable standard of review is *de novo*.

##### **2. Argument**

Haymond contends that he transferred his Club membership interest to Odenwalder on either 04/04/2006 or 11/14/2008. Both dates

preceded the date that judgment was entered against Haymond in favor of Shelcon.

However, the effective date of Haymond's date of transfer of his Club membership interest was 03/12/2012. Haymond's Club membership could only be transferred after the Club first approved the transferee and the transfer. Haymond requested the Club to backdate the transfer. CP 187. The Club declined to backdate the transfer. CP 187. Shelcon's judgment was entered on 10/28/2011, a date prior to Haymond's conveyance of his Club membership to Odenwalder.

Haymond argues that the trial court erred in not taking oral testimony from Haymond. Haymond appeared in person at the 03/14/2014 hearing. However, for reasons undisclosed by his counsel, Haymond was not called by his counsel to testify. Further, Haymond himself submitted no request to the court to testify. Haymond was present in the courtroom together with his sister, Odenwalder. Haymond submitted his personal declaration to the trial court and presumably believed that he had nothing further to contribute than what he submitted in his declaration.

Haymond contends that his declaration presents evidence that he did not intend to hinder, delay, or defraud Shelcon in violation of RCW 19.40.041(a)(1). That is incorrect. Haymond's declaration nowhere denies that he intended to hinder, delay, or defraud creditors such as Shelcon. CP 220 – 224. On the contrary, his very own sister,

Odenwalder, testified at her deposition that removing Haymond's Club membership from the reach of Haymond's creditors was the precise and only reason for the transfer. From the evidence submitted by Shelcon, the trial court could not help but find that Haymond's transfer of his Club membership:

- (1) was made with actual intent to hinder, delay, or defraud Shelcon (RCW 19.40.041(a)(1)),
- (2) was made without receiving a reasonably equivalent value in exchange for the transfer (RCW 19.40.041(b)(8)),
- (3) was a transfer to an insider (RCW 19.40.041(b)(1)),
- (4) was concealed (RCW 19.40.041(b)(3)), and
- (5) was transferred after Haymond had been sued and judgment awarded to Shelcon (RCW 19.40.041(b)(10)).

Haymond argues that Haymond's transfer of his Club membership was to a trust. The supposed inference is that even if Haymond's transfer violated RCW Ch. 19.40, the transfer was nonetheless unobjectionable because the transferee was a trust. However, Haymond's transfer of his Club membership was directly to his sister, Odenwalder. No trust ever acquired or held Haymond's Club membership.

Haymond argues that Shelcon should have testified. However, Haymond provides no explanation how Shelcon's testimony could have

conceivably affected the trial court's analysis or decision. Nor does Haymond suggest that any such explanation exists.

Haymond argues that the hearing was scheduled on a day when the trial court was addressing other calendared matters. However, Haymond does not explain how this could have conceivably affected the trial court's analysis or decision. Nor does Haymond suggest that any such explanation exists.

Haymond cites *Columbia Int'l Assoc. Corp. v. Perry*, 54 Wn.2d 876, 344 P.2d 509 (1959) for the following proposition:

“Circumstances which are merely suspicious are not enough to render a conveyance fraudulent. All of the elements must be supported by very substantial proof.”

In *Columbia Int'l Assoc. Corp. v. Perry*, the issue before the Court was the transferee's intent. A transferee's intent is no longer a consideration under the Uniform Fraudulent Transfer Act. In *Columbia Int'l Assoc. Corp. v. Perry*, the issue was whether or not the transferee (Trosper) had constructive knowledge of the transferor's fraudulent intent.

“Here, the testimony is undisputed, and the trial court properly found that Trosper had no actual knowledge of Perry's intent to defraud appellant (the creditor). The question to be answered is whether the circumstances surrounding the transaction were sufficient to charge Trosper (the transferee) with constructive knowledge of the fraudulent intent (of the transferor, Perry).”

*Columbia Int'l Assoc. Corp. v. Perry* is not a relevant case on this appeal because Odelwalder's knowledge or good faith/bad faith is no longer a consideration under the Uniform Fraudulent Conveyance Act.

Haymond also cites *Sedwick v. Gwinn*, 73 Wn.App. 879, 873 P.2d. 528 (1994) for the following proposition:

“Where the debtor denied intent to defraud, the issue cannot be conclusively determined by the tryor of fact until it has heard testimony and assessed witness creditability”.

But here, Haymond's declaration did not deny that his intent was to hinder, delay, or defraud. In fact, his sister, Odenwalder, testified that Haymond's specific intent was to hinder, delay, or defraud creditors such as Shelcon.

## **B. TRANSFER OF HOUSE**

### **1. Standard of Review**

The applicable standard of review is *de novo*.

### **2. Odenwalder is not a party**

Odenwalder designates herself as an “appellant” in this case. But Odenwalder is not a party to this case. This is openly acknowledged by Odenwalder. Odenwalder's Appellant Brief declares:

“This appellant Darra Odenwalder, the trustee of the aforementioned trust, was not and is not a party to this action *whatsoever*.”

(Emphasis supplied)

Odenwalder’s Appellant Brief, pg. 2

Odenwalder was served on 02/08/2014 with the Order to Appear and Show Cause. CP Declaration of Service filed 02/13/2014 – *not yet designated as Respondent will designate supplemental clerk’s papers pursuant to RAP 9.6(a)*. The show cause hearing did not occur until 03/14/2014. That is about 2½ months of elapsed time. Somewhere in that 2½ months of time, Odenwalder could have filed either a motion for intervention or a motion for joinder respectively pursuant to CR 24(c) or CR 19(a). Odenwalder did neither. Odenwalder has offered no excuse, explanation, or reason for not availing herself of the applicable court rules. There is simply her statement that she “...is not a party to this action, *whatsoever*.” (Emphasis supplied).

Only an aggrieved “*party*” may seek review by the appellant court.

RAP 3.1.

### **3. Odenwalder could have intervened and become a Party**

Odenwalder seems to argue that a joining party has a greater obligation than an intervening party in interest: that the rights and obligations of a joining party are more compelling or more weighty or somehow more necessary than the rights or obligations of an intervening

party in interest. Put another way, Odenwalder seems to presume that a party's interest in properly joining other parties is greater than an interested party's interest in becoming a party by intervention. Regardless of the procedures afforded to potential parties under CR 19 and CR 24, it was Odenwalder's tactical decision to participate in the trial court proceeding as a nonparty. Odenwalder requested and obtained a continuance of the trial court proceedings in order to fully prepare for the show cause hearing. Odenwalder is silent on why she declined or neglected to make any attempt whatsoever to intervene in this action and thus become a party. Odenwalder offers no explanation why she failed to request permission from either the Court or request a stipulation from Shelcon's counsel for permission to intervene and thus become a party. Odenwalder offers no explanation as to why Odenwalder did not ask the Court for a continuance of the Show Cause hearing in order for Odenwalder to submit a motion to intervene pursuant to CR 24. All that Odenwalder says is that she requested and received a 2½ month continuance in order to "review and prepare for the show cause hearing" (Odenwalder Appellant Brief, pg. 3). Odenwalder does not claim that she was not given the time necessary in order to adequately prepare for the show cause hearing. Nor does she contend that she was not adequately prepared. But Odenwalder offers no explanation why her counsel's preparation did not include filing a motion to intervene pursuant to CR 24.

It is almost as if *not intervening* was a tactical decision made by Odenwalder in order to preserve some appealable trial court error in the event that Shelcon's motion was granted by the trial court. That is sort of what it looks like.

On 03/14/2014, Odenwalder was in the courtroom. Odenwalder could have spoken or provided testimony to the Court. She did not do so. Nor did she ask to do so nor was she called as a witness by her counsel.

### **C. TRUST UNAFFECTED BY TRIAL COURT'S ORDERS**

The Trust remained unaffected by the trial court's orders. The trial court voided a transfer. The trial court did not void the Trust. The trial court voided Haymond's transfer to the Trust because the transfer was no transfer at all. Haymond retained the complete equitable and beneficial ownership of his house. The trial court's order was that the transfer was void and of no effect against Shelcon.

Haymond's "transfer" was faked. Haymond's "transfer" was expressly A CHANGE IN IDENTITY: meaning that the transferor and the transferee remained identical. Only a change in identity. There was no change in beneficial ownership. That's what the Bill of Sale stated. Haymond signed the Bill of Sale. CP 162 – 172.

### **D. OPPORTUNITY TO CHALLENGE**

Odenwalder argues that she should have been "...given the full opportunity to challenge the issue of ownership at trial". Odenwalder

Appellants Brief, pg. 6. Odenwalder was given a 2½ month continuance to prepare for such a challenge, if one was to be made. But, Odenwalder submitted no declaration to the trial court. She did not request to testify. Her counsel did not call her as a witness. She neither spoke nor wrote a word.

#### **E. NO CLAIM OF FRAUDULENT CONVEYANCE**

Shelcon did not request the trial court to void Haymond's "transfer" of his house to the Trust as a fraudulent conveyance. The trial court did not do so.

#### **F. DIVESTITURE OF TRUSTOR'S OWNERSHIP**

Odenwalder cites *Edwards v. Edwards*, 1 Wn.App. 67, 70, 459 P.2d 422, 424 (1969) as follows:

"It is essential to the creation of an express trust that the settlor presently and unequivocally make a disposition of property by which he divests himself of the full legal and equitable ownership thereof. He may make himself the trustee or one of the trustees, thus retaining the legal title in whole or part, or by making himself the beneficiary or one of the beneficiaries of the trust, he may retain the equitable ownership in whole or part, but he cannot retain the full legal and equitable ownership. The legal title must be definitely reposed in the trustee, whether he is the trustor or another. Such present and unequivocal disposition of the property in trust must constitute an actual carrying out and execution of the settlor's intention to create a trust by some proper transaction or mode, and it does not suffice to create a trust that he merely intends or manifests an intention to create a trust in the future or conditionally directs or gratuitously

promises a disposition of property in trust in the future.”

*Edwards v. Edwards* states that it is essential to the creation of an express trust that the settlor (Haymond) unequivocally make a disposition of property (his house) by which he divests himself of the full legal and equitable ownership. Haymond did neither. He could have conveyed his house to the Trust and still retained legal title, but only if he had made himself a co-trustee of the Trust. He did not make himself a co-trustee. Also, Haymond could have retained equitable or beneficial ownership of his house by making himself a beneficiary of the Trust. He did not make himself a beneficiary.

In a nutshell, that was the basis for the trial court’s order. Haymond did not unequivocally make a disposition of his house by which he divested himself of the full legal and equitable ownership.

#### **IV. CONCLUSION**

Regarding Haymond’s Club membership, if there was ever a fraudulent conveyance with whistles, red-flags, and flashing signs, this was the one.

Regarding Haymond’s transfer of his house to the Trust, the trial court did not attack either the trustee or the Trust. The trial court voided an obviously fake transfer where the trust settlor (Haymond) contrived to retain the full legal and equitable ownership of his house.

## V. REQUEST FOR FEES AND EXPENSES

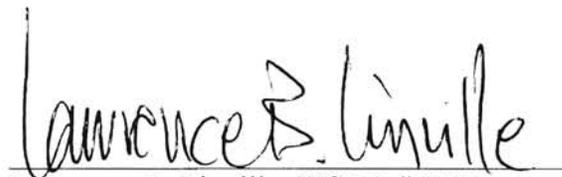
The appeals of both Haymond and Odenwalder are frivolous. Haymond's appeal does not dispute that transfer of his Club membership was made with intent to hinder, delay, or defraud Shelcon: only that Haymond was solvent when he violated RCW Ch. 19.40.

Odenwalder obviously recognized she was not a party in this case but nonetheless filed this appeal in flagrant violation of RAP 3.1.

Shelcon requests the imposition of sanctions against Odenwalder pursuant to RAP 18.9(a) and the award of attorney's fees and expenses against both Haymond and Odenwalder pursuant to RAP 18.1 on the basis that both appeals are frivolous and on the further basis of the terms of the judgment entered against Haymond (CP 13 -16) which provides for Shelcon's recovery of attorney's fees and expenses incurred in collecting upon its judgment against Haymond.

DATED this 24<sup>th</sup> day of September, 2014

LINVILLE LAW FIRM, PLLC



Lawrence B. Linville, WSBA #6401  
David E. Linville, WSBA #31017  
Linville Law Firm, PLLC  
Attorneys for Shelcon Construction  
Group, LLC

CERTIFICATE OF SERVICE

Kristen Wayman declares as follows:

1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-referenced action, and competent to be a witness therein.
2. I caused to be served a copy of

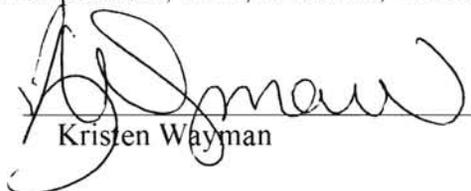
**RESPONDENT'S BRIEF**

on counsel as follows:

<u>Attorney at Law</u> Allan L. Overland 705 S 9 <sup>th</sup> St, Suite 101 Tacoma, WA 98405  <input type="checkbox"/> VIA U.S. MAIL <input type="checkbox"/> VIA FACSIMILE <input checked="" type="checkbox"/> VIA MESSENGER <input type="checkbox"/> VIA EMAIL	<u>Attorney at Law</u> Mark E. Bardwill 615 Commerce St., Ste 102 Tacoma, WA 98402  <input type="checkbox"/> VIA U.S. MAIL <input type="checkbox"/> VIA FACSIMILE <input checked="" type="checkbox"/> VIA MESSENGER <input type="checkbox"/> VIA EMAIL
<u>Court of Appeals Division II</u> 950 Broadway, Suite 300 Tacoma, WA 98402  <input checked="" type="checkbox"/> VIA MESSENGER	

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 24<sup>th</sup> day of September, 2014, at Seattle, Washington.

  
Kristen Wayman