

FILED

JUN 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 296725

Superior Court No. 00-204021-5

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

A & W Farms, et al

Respondents

v.

Sunshine Lend & Lease, Inc., et al

Appellants

Appellant Adeline Johnson Opening Brief

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WSBA No. 02044
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III. ASSIGNMENTS OF ERROR

Assignment of Error No. 1.

The Court erred in denying Adeline Johnson's Motion for Reconsideration (CP 1253).

Assignment of Error No. 2.

The Court erred in finding and concluding that Adeline Johnson, who is a vulnerable adult, participated with Raymond E. Cook, Jr. in the fraudulent transaction to prevent seizure of property to avoid judgment creditors of Mr. Cook (CP 1230).

Assignment of Error No. 3.

The Court erred in concluding and entering judgment against Adeline Johnson, depriving her of \$200,000.00 equity in the subject real property by quieting title in the name of Defendant Raymond E. Cook, Jr., free of any lien claim of Adeline Johnson (CP 1267-1269).

Assignment of Error No. 4.

Findings 1.

The court erred in finding and concluding that

[i]n the instant case the first transfer was to [Adeline Johnson], a true insider and an individual who has been found by a prior court not to be credible in regards to testimony about her son-in-law's transactions in the underlying lawsuit. There is little credible evidence that Adeline Johnson intended to buy the ranch for herself. She financed it for her son-in-law and there is certainly no doubt she was taken advantage in that he has made no attempt to repay her. She has never had any benefit whatsoever from the property. Sadly, it appears Ms. Johnson was a co-conspirator, and a victim, as opposed to "merely" a straw person....

(CP 1230).

Assignment of Error No. 5.

Findings 3.

The Court erred in finding and concluding that

The transfer or obligation was disclosed or concealed. RCW 10.40.041(b)(3). [sic] Cook purchased the property with money he borrowed from his mother-in-law, and then titled it in her name specifically to avoid discovery or attachment....

(CP 1230).

Assignment of Error No. 6.

The Court erred in finding and concluding that

[w]hile it is terribly unfortunate Adeline will almost certainly never be repaid the \$200,000 her son-in-law borrowed from her to buy the property, it is noteworthy that she apparently willingly participated in two straw person transactions and has several times testified less than credibly regarding these transactions. It is unknown why she participated or what pressures may have been brought to bear on her.

(CP 1234).

Assignment of Error No. 7.

Findings 8.

The Court erred in finding and concluding that

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. RCW 19.40.041(b)(8).... Cook completed a purchase of real estate but titled the property in the name of an insider... [Ms. Johnson] did not buy the ranch either from Goff for [sic] from Cook. She gave or loaned \$200,000 to her son-in-law, so he could complete the transaction.

(CP 1232).

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1.

Whether Adeline Johnson is a vulnerable adult as defined under RCW chapter 74.34?

Issue No. 2.

Whether Adeline Johnson suffered financial exploitation by her son-in-law, Raymond E. Cook, Jr., at a time when she was a vulnerable adult.

Issue No. 3.

Whether Adeline Johnson is entitled to a proportionate interest in the property to the extent of her investment of \$200,000.00 regardless of the nature of the transaction being a loan or an outright purchase.

Issue No. 4.

Whether the judgment creditor should be limited in pursuing the subject real property to the extent of the interest invested of \$30,000.00 by Raymond E. Cook, Jr., which is a 13.04% interest in the subject real property.

Issue No. 5.

Whether there was a fraudulent conveyance on the part of Adeline Johnson, a vulnerable adult.

V. STATEMENT OF THE CASE

Adeline Johnson is suffering from dementia and is appearing by her Guardian Ad Litem, Joseph P. Delay, who has been duly appointed by the Court (CP 833-35). Ms. Johnson is a vulnerable adult, currently 85 years old (CP 815). She was 74 years old at the time of the subject transaction (CP 815, 1226). The subject transaction took place when Ms. Johnson purchased real property located at 169 Dead Medicine Road, Stevens County, Washington, under a Statutory Warranty Deed from Charles R. Goff on April 15, 1999, for which she advanced \$200,000 in cash from her inheritance (CP 1226).

Her son-in-law, Raymond E. Cook, Jr., had originally entered into the Earnest Money Agreement to purchase the subject real property for \$230,000.00 (CP 1226). Mr. Cook paid a cash down payment of \$30,000.00 to Mr. Goff (CP 1226). However, on closing he could not come up with the remaining balance of \$200,000 (CP 1226). Mr. Cook then was instrumental in convincing his mother-in-law, Ms. Johnson, into completing the purchase of the property who paid the remaining \$200,000 in two cash payments and received title in her name (CP 1226). The \$200,000.00 that Ms. Johnson paid came from her portion of an inheritance on the sale of property in Oregon (CP 1228). There is no

dispute that \$30,000.00 was paid originally by Mr. Cook who now lives on the property (CP 1226).

The Court found that the \$200,000.00 was a loan from Ms. Johnson to Mr. Cook and consequently the Judgment Creditor had the right to proceed against the entire real property, and not merely the interest of Mr. Cook (CP 1233-34). However, the Guardian Ad Litem contends that whether the \$200,000 was a loan to Mr. Cook, or a purchase of the property for her own benefit, Ms. Johnson is entitled to equitable relief as to the amount of her investment because she was a vulnerable adult and she also acted in good faith and without intent to defraud Mr. Cook's creditors and she possessed a recorded Warranty Deed in her name.

VI. STATEMENT OF THE FACTS

Ms. Johnson had a stroke in 1994 and 1995 (RP 370). At that time her face sagged and she was walking crookedly and since then she has had subsequent strokes (RP 270). Ms. Johnson was first deposed on June 12, 2001 (RP 200). On March 8, 2002, Dr. Daniel L. Husky, a board certified family practitioner practicing in Spokane County, Washington, along with Dr. Paul McClain, M.D., treated Ms. Johnson. In a statement opposing her deposition on March 8, 2002, Daniel L. Husky stated:

4. I was asked to give my opinion on the advisability of Mrs. Johnson giving testimony in a legal deposition before an open court and how it would affect her health.

5. Mrs. Johnson's memory is failing and she often does not understand questions or the significance of her answers. I believe the answers Mrs. Johnson would give at an adversarial legal deposition, or an open court would not be accurate, as she does not have the mental capacity to give accurate and truthful answers under pressure.

6. Mrs. Johnson is quite susceptible to stress and pressure. Her testimony could not be considered reliable.

7. It is my opinion that, because of Mrs. Johnson's advanced age and serious medical problems she currently suffers, the stress of a deposition or examination by the Court would clearly be deleterious and most dangerous.

(Ex. D201, CP 1315).

On March 14, 2002, notwithstanding the above medical report, the court ordered Ms. Johnson to be deposed again (RP 201-202). Her son, Kenneth E. Johansson (whose name was changed), testified that Ms. Johnson became progressively more pronounced in her condition since seeing Dr. Husky (RP 370).

Mr. Johansson testified that Ms. Johnson continued to have small strokes, especially in more high stress type situations (RP 370). He also testified as the strokes progressed he noticed her memory and reasoning issues have progressed (RP 370). Additionally, Mr. Johansson testified that Ms. Johnson presently is unable to take care of herself and cannot take

her medicines and prescriptions that are prescribed for her without help (RP 371).

Mr. Johansson testified that Ms. Johnson received an inheritance from Oregon in the amount of \$200,000.00 and she used those funds to purchase the Stevens County Ranch (RP 372). He also testified that he did obtain a Durable Power of Attorney from his mother on March 26, 2002, and was continuing to act as her Power of Attorney since that time (RP 368).

Her son was asked on direct examination if his mother was capable of making business decisions involving her business matters and her son indicated that she was not (RP 378). He also indicated that this condition of not being able to handle business decisions started around the year of 2000 (RP 378).

Mr. Johansson stated he was not familiar with the loan that his mother made to Mr. Cook on January 7, 1999, for \$200,000.00, which was secured by real property at 1810 Deer Park-Milan Road (RP 379-80). However, Mr. Johansson testified that his father passed away in 1996, and he did not become involved in his mother's financial business until after his father's passing (RP 381). He indicated he did not know of the business relationship between his mother and Mr. Cook until he became involved (RP 381).

Finally, Judge Eitzen asked:

To the best of your knowledge, based on your knowledge of what was going on with your Mom's finances, and your Mom, who bought the ranch? Did your Mom buy it, or did Ray and Arlene buy it, and your Mom loaned them the money to buy it?

Mr. Johansson: No. My Mom bought it as far as I know. It was in her name. That's what I recall. And you know, I helped orchestrate the inheritance, getting her inheritance to do that. So that's my recollection.

The Court: So it was your Mom's understanding that she was buying the ranch for herself with her inheritance?

Mr. Johansson: Yes.

(RP 381-82).

In addition to the examination by Dr. Daniel L. Husky, the following medical reports were obtained on Ms. Johnson and introduced into evidence:

October 2, 2008, Clark Ashworth Ph.D.

(Ex. D202, CP 1317). Dr. Ashworth diagnosed Ms. Johnson with the following:

- a cognitive disorder;
- a mood disorder, with depressive and anxious features;
- problems with primary support group; death of her husband, removal/move from her home; problems relating to the social environment; limited social contacts away from Davenport; housing problems; issues regarding residential facility and move from long term community; and

- serious symptoms of cognitive deficits.

November 24, 2008, Kathleen R. Schuerman, D.O.

(Ex. D203, CP 1323). Dr. Schuerman stated:

Ms. Johnson has a cognitive disorder due to her history of previous strokes. She also has a mood disorder. This is most likely associated with depressive and anxious features related to her current cognitive functioning and multiple recent losses in personal independence, with the loss of her husband, removal from her home and long-term familiar community. She has serious symptoms of cognitive deficits. Primary among these are her ability to manage her own medications as prescribed, as her cognitive disorder is "adversely affecting memory and orientation, judgment and expressive language use."

[Ms. Johnson] is able to dress herself, shower and currently is able to manage finances as she has the assistance of her son. Driving privileges have also been removed due to concerns regarding cognitive deficits and her ability to respond to an acute situation.

February 17, 2010, Kathleen R. Schuerman, D.O.

(Ex. D204, CP 1325). Dr. Schuerman stated:

[Ms. Johnson] has experienced significant cognitive and memory decline as a result of her strokes. Very typical of persons with dementia, when Adeline does not remember an event or something about an event, she will look to others for corroboration or she will fill in what she thinks probably happened. Often this a [sic] technique used to cover up embarrassment for lack of memory. Usually this confabulation is harmless and innocent.

It is my understanding that Mrs. Johnson may be asked soon to testify in a court of law regarding events which may have occurred. It is my opinion that placing Mrs. Johnson in that position would be anxiety producing for her and unreliable.

All of these reports support that Ms. Johnson does not have the mental capacity to handle her business affairs and is a vulnerable adult. For a period of time, Ms. Johnson was not represented in these proceedings until the Court appointed Joseph P. Delay, Guardian Ad Litem on July 1, 2010 (CP 833-35).

The Guardian Ad Litem contends that Ms. Johnson is a vulnerable adult who was physically unable to care for herself at the time of the subject transaction. Ms. Johnson is currently 85 years old and was approximately 75 years old at the time of the transaction (CP 815). Prior to the sale of April 15, 1999, Ms. Johnson had suffered strokes starting as early as 1994 or 1995 (RP 370). Mr. Johansson testified that Ms. Johnson was incapable of handling her business affairs since about 2000, and when he became Power of Attorney in 2002 he handled all the major decisions (RP 373).

It is undisputed that Mr. Cook paid \$30,000.00 cash down on the subject real property when the Earnest Money Agreement was entered into on July 10, 1998 (RP 304, 306).

Norman Storm testified that Ms. Johnson was his sister-in-law. He testified that Ms. Johnson's share of the sale of an Oregon property which she jointly inherited totaled \$200,000.00 (RP 351-352). Mr. Storm testified that \$80,000.00 was first paid to Ms. Johnson, then later she was paid an additional \$120,000.00. This testimony was covered in the deposition (RP 355). Mr. Storm testified that he was aware that besides the \$120,000.00, another \$80,000.00 was paid to Ms. Johnson. (RP 356) (RP 361) (CP 1331-1332). Her inheritance totaled \$200,000.00. Plaintiffs' expert, Marie Rice testified that \$200,000.00 were funds of Ms. Johnson. (RP 293). Similarly, Mr. Johansson testified that Ms. Johnson received \$200,000.00 from her inheritance in the State of Oregon (RP 372).

There is no dispute in the facts that Mr. Cook had originally entered into an Earnest Money Agreement to purchase the subject real property for \$230,000.00. (Ex. D108, CP 1222-3) (RP 372, 351, 352). Mr. Cook apparently paid a cash down payment of \$30,000.00 to Charles Goff to purchase the property (Ex. D108). He could not come up with the balance of the purchase price. Mr. Cook was instrumental in talking his mother-in-law, Ms. Johnson, into completing the purchase of the subject property. She paid the balance of \$200,000.00 (RP 351-352). An assignment from Mr. Cook to Ms. Johnson of the Earnest Money

Agreement was executed (Ex. D106). The closing took place between the parties and the Warranty Deed was recorded in the name of Adeline Johnson.

VII. STANDARD OF REVIEW

There were no formal Findings of Fact and Conclusions of Law entered. However, the Court's opinion was 9½ pages in length and under CR 52(a)(4), a written opinion or memorandum of decision is filed, it will be sufficient as if formal Findings of fact and Conclusions of Law were included. The Trial Court's Memorandum decision made clear what questions were decided by the Trial Court (CP 1225-1234). Consequently formal Findings of Fact and Conclusions of Law are not necessary. *Knudsen v. Patton*, 26 Wn.App. 134, 611 P.2d 1354 (1980). The standard of review under the Uniform Fraudulent Transfer Act ("UFTA") is whether or not the factors under the statute have been established by substantial evidence. All of the elements must be supported by very substantial proofs. *Columbia Etern. Corp. v. Perry*, 54 Wn.2d 876, 344 P.2d 509 (1959). The Standard of review on a vulnerable person is whether or not there is substantial evidence supporting the Trial Court's Findings of Fact. The quantum of the evidence necessary under the

vulnerable Adult Statute is clear, cogent and convincing evidence. *Endicott v. Saul*, 142 Wn.App. 899, 176 P.3d 560 (Div. I 2008).

VIII. ARGUMENT

Issue No. 1. Adeline Johnson was a vulnerable adult at the time of the alleged transaction as defined by Washington's Abuse of Vulnerable Adult Act, RCW 74.34.005 et. seq.

This issue involves Assignments of Error Nos. 1 through 4, and Issues Nos. 1 and 3. The Abuse of Vulnerable Adult Act ("AVA") was enacted in 1995 as a means to protect individuals who are unable to care for themselves and whose disabilities have placed them in a position of dependency. RCW 74.34.005; *See also Calhoun v. State*, 146 Wn.App. 877, 889, 193 P.3d 188, 194 (Div. II 2008). The AVA protects vulnerable adults from such acts as abuse, financial exploitation, and neglect by family members, care providers, and others with whom the vulnerable adult has a relationship. *Calhoun* at, 889, 193 P.3d at 194. Under the AVA, a court may intervene to protect both a vulnerable adult and its property from exploitation and abuse. RCW 74.34.130.

The AVA defines a "vulnerable adult" as a person who is "[s]ixty years of age or older who has the functional, mental, or physical inability to care for himself or herself." RCW 74.34.020 (13). "Exploitation" is defined as "an act of forcing, compelling or exercising undue influence

over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with past behavior, or causing the vulnerable adult to perform services for the benefit of another." RCW 74.34.020 (2)(d). To be afforded protection under the AVA, an individual must be considered a vulnerable adult at the time of the supposed exploitation. *Endicott*, at 920, 176 P.3d at 572. On appeal, the Court must determine whether there was substantial evidence to support the trial court's conclusion as to whether the individual was a vulnerable adult at the time of the transaction. *Id.*

The vast majority of cases brought under the AVA deal with protecting elderly and disabled residents of nursing homes. *See e.g. Warner v. Regent Assisted Living*, 132 Wn.App. 126 (Div. I 2006) (Action brought against nursing home for failing to provide vulnerable adult patient proper medication, and allowing patient to lie in feces and urine for prolonged periods); *Dabbae v. DSHS*, 144 Wn.App. 432 (Div. I 2008) (Caregiver who left several vulnerable adult patients completely unattended while he went to a store for headache medicine found in violation of the AVA). However, the AVA has been used to avoid the sale of a property owned by a vulnerable adult. *Endicott*, 142 Wn.App. 899, 176 P.3d 560.

The court in *Endicott* found that the defendants, close friends of Ms. Endicott, had convinced her to sell them real property for a price

considerably below the fair market value. *Id.* at 903, 176 P.3d at 563. Ms. Endicott, who did not feel she had been taken advantage of by her fiends, was belligerent, rude and loud when she disagreed with what was being said during the trial. *Id.* at 916, 176 P.3d at 570. Although a professional had examined Ms. Endicott and testified that she was fine and capable of managing her own affairs, the court found otherwise, stating that "it is the court's strong impression..., that she is not, in fact, fine but rather that she is incapacitated." *Id.*

The Court of Appeals agreed in *Endicott*, finding that there was substantial evidence to support the trial court's conclusion that Ms. Endicott was a vulnerable adult at the time she sold the property. *Id.* at 921, 176 P.3d at 572.

In the present case, there is not substantial evidence to support the trial court's findings and conclusion. Ms. Johnson was a vulnerable adult at the time of the transaction. In fact, the trial court found her to be "now incompetent" (CP 1228). Because of her incapacity, she was unable to testify at trial. Prior to trial, Ms. Johnson had been deposed on two separate occasions (CP 1228, n.9). The court found these depositions to be "contradictory, not credible, and evasive" (CP 1228, n. 9). However, prior to her second deposition in 2002, a medical doctor who was knowledgeable of Ms. Johnson's medical history felt that any answers Ms.

Johnson gave would "not be accurate" because she "does not have the mental capacity to give accurate and truthful answers under pressure." (Ex. D201, CP 1314-15). In 1994 or 1995, Ms. Johnson had her first stroke (RP 370). Since that time, she has had regular strokes which have impacted her memory and reasoning (RP 370). She has been diagnosed with a cognitive disorder and other deficiencies. (Ex. D202, CP 1317) (Ex. D203, CP 1323) (Ex. D204, CP 1325).

Additionally, since her husband passed away in 1996, Ms. Johnson has become depressed (CP 1323). Ms. Johnson during her depositions (RP 230) did not ask about the nature of the transaction (RP 228). One can reasonably conclude that Ms. Johnson has been a "vulnerable adult," as defined in the AVA since as early as 1994. The Court erred in disallowing Ms. Johnson any recovery in the funds used to purchase the subject property. As a matter of equity, she should be entitled to recover those funds to prevent Mr. Cook from receiving a windfall of \$200,000. Similarly, The Court erred in finding and concluding she was a coconspirator and knowingly participated as an insider in a fraudulent transfer. Ms. Johnson's actions during her two depositions were explained by Dr. Husky (Ex.D201, CP 1315). The court erred in giving so much weight to her testimony, which had been predicted to be unrealistic (Ex. D201).

Issue No. 2. Adeline Johnson's advancement of \$200,000.00 to purchase the Stevens County property was not a fraudulent transfer under Washington's Uniform Fraudulent Transfer Act ("UFTA"), RCW chapter 19.40.

This issue involves Assignments of Error Nos. 1, 2, 3, 4, and 5, and Issues Nos. 1, 2 and 3. Under the Uniform Fraudulent Transfer Act ("UFTA"), creditors may bring an action against a third party who received the property of a debtor through fraud. RCW 19.40.071; *See also Thompson v. Hanson*, 168 Wn.2d 738, 741-42, 239 P.3d 537, 538 (2010). Ms. Johnson did not receive the property through fraud, she paid \$200,000.00 in cash. The Washington Supreme Court stated that fraudulent transfers take place when "one entity transfers an asset to another entity with the effect of placing the asset out of the reach of a creditor, with either the intent to delay or hinder the creditor or with the effect of insolvency on the part of the transferring entity." *Thompson* at 744, 239 P.3d at 539.

Prior to the decision in *Thompson*, this court required transferees have knowledge or intent to assist the debtor in the fraudulent transfer in order to be liable under the UFTA. *See Deyong Mgmt. Ltd. v. Previs*, 47 Wn.App. 341, 347, 735 P.2d 79, 83 (Div. III 1987). However, *Thompson* makes it clear that knowledge or intent to defraud is not dispositive in order for a creditor to recover against the transferee. *Thompson* at 749, 9 P.3d at

541. Rather, it is the *amount* of recovery available to a creditor that is conditioned on whether or not the transferee acted in "good faith." *Id.* at 479-51, 239 P.3d at 542.

A. Good Faith Requirements under the UFTA.

Neither the UFTA nor Washington Courts have defined "good faith." However, under the Uniform Fraudulent Conveyance Act ("UFCA"), replaced by the UFTA in 1987, Courts have ascribed to the "good faith" requirement that a transferee have: "(1) [a]n honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, hinder, delay, or defraud others." *Sparkman & McLean Co. v. Derber*, 4 Wn.App. 341, 348, 481 P.2d 585 (Div. II 1971) (quoting *Tacoma Ass'n of Credit Men v. Lester*, 72 Wn.2d 453, 458, 433 P.2d 901, 904 (1966)).

In reviewing these factors, Courts looked to the intent behind the transfer rather than to its form. *Tacoma Ass'n*, at 458, 433 P.2d at 904. If the court finds that any one of these factors is not present, then the transfer was not done in good faith. *Sparkman & McLean*, 4 Wn.App. at 348, 481 P.2d 585. The burden of proving fraud lies with the party seeking to set aside an alleged fraudulent transaction. *Workman v. Bryce*, 50 Wn.2d 185, 189, 310 P.2d 228 (1957).

i. *Ms. Johnson had an "honest belief in the propriety of the activities in question."*

To prove that the transferee acted in good faith in a transfer, it must have an "honest belief in the propriety of the activities in question." *Sparkman & McLean*, 4 Wn.App. at 348, 481 P.2d 585. This is especially true when the parties engaged in the transaction are closely related. *See, e.g., Workman*, 50 Wn.2d 185, 310 P.2d 228 (1957).

To illustrate, in *Workman* a debtor Bryce had transferred his ranch and farm equipment to Ms. Shindel, his mother-in-law, so that Bryce could pay off some creditors. *Id.* at 186-87, 310 P.2d 228. After the purchase of the ranch, Ms. Shindel did not live on the ranch, but allowed Bryce to retain possession of the ranch and continue to farm. *Id.*

Subsequently, Bryce defaulted on a loan from another creditor, and the creditor brought an action to set aside the transfer as fraudulent. *Id.* at 186, 310 P.2d 228. The trial court held that Ms. Shindel acted in good faith and refused to set aside the transfer. *Id.* On review, the Court of Appeals reviewed the testimony of the Bryce and Ms. Shindel, stating that Bryce was "obviously bent upon defeating the plaintiff's judgment," and that Mrs. Shindel being honest and therefore "she acted in good faith." *Id.* at 189, 310 P.2d 228.

In the present action, Ms. Johnson is disadvantaged because she did not testify at trial due to her mental and physical condition. However, the record is silent as to whether Ms. Johnson had any knowledge of impropriety in the transaction. There is therefore insufficient proof to show that Ms. Johnson did not have an "honest belief in the propriety of the activities in question."

ii. Ms. Johnson did not have any "intent to take unconscionable advantage of others."

The second factor in determining whether a transferee acted in good faith is whether there was an "intent to take unconscionable advantage of others." *Sparkman & McLean*, 4 Wn.App. at 348, 481 P.2d 585. This factor requires that the transferee have actual knowledge of the fraudulent transaction. *See Deyong*, 47 Wn.App. 341, 735 P.2d 79.

In *Deyong*, the defendant had conveyed property to his parents for a low price. *Id.* at 343, 735 P.2d at 81. The parents had knowledge that the defendant had an intent to "hold the property safe from [his] creditors." *Id.* The plaintiff brought an action against the defendant's parents as transferees of fraudulent conveyances. *Id.* at 344, 735 P.2d at 82. The trial court dismissed the complaint finding that the conveyances were fraudulent, but that the property had not been placed out of the reach of creditors. *Id.* at 375, 735 P.2d at 82. On review, the Court of Appeals

reversed, holding that a transferee who has knowledge or intent to assist the debtor in the fraudulent transfer is "liable for the value of the property conveyed, up to the amount that the debtor owes to the creditor." *Id.* at 347, 735 P.2d at 83.

As with the first factor, there is nothing on the record to show that Ms. Johnson had any intent to take advantage of Mr. Cook's creditors. She did not have the capacity to do so. The trial court noted that Ms. Johnson's depositions showed her to be contradictory, not credible, and evasive. (fn. 9, CP 1228). This action is exactly what Dr. Husky predicted. (Ex. D201, CP 1315). Therefore, this finding does not provide sufficient proof to show that Ms. Johnson intended to take advantage of anyone.

iii. Ms. Johnson did not have any "intent to, or knowledge of the fact that the activities in question will, hinder, delay, or defraud others."

The last factor implies that the transferee knows, or intends the activities in question to hinder, delay, or defraud others. *Sparkman & McLean*, 4 Wn.App. at 348, 481 P.2d 585. As with the second factor, this requires that the transferee have actual knowledge of its actions.

Similar to the first two factors required of a transferee to show the transfer was made with good faith, Ms. Johnson did not have the requisite knowledge or intent to show otherwise. Ms. Johnson was a vulnerable adult subject to stress and pressure (Ex. D201, CP 1315). The Court found

adult subject to stress and pressure (Ex. D201, CP 1315). The Court found that she was taken advantage of by Mr. Cook (CP 1230). The record is silent as to Ms. Johnson's state of mind such that she was unable to participate knowingly in any way that would hinder, delay, or defraud others. As a result, Ms. Johnson is considered a "good faith" transferee under the UFTA and is entitled to an equitable remedy under the law.

B. Recovery under the UFTA when a Transferee has Good Faith in the Transaction.

RCW 19.40.081 states, in part:

(a) A transfer or obligation is not voidable under RCW 19.40.041(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under RCW 19.40.071(a)(1), *the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less.* The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or

(2) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, *subject to adjustment as the equities may require.*

(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on or a right to retain any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

(3) A reduction in the amount of the liability on the judgment.

...

(emphasis added). Thus, if the transferee purchased the property in good faith, the UFTA requires the judgment to be adjusted subject to the equity. To determine whether the transfer was made in good faith, a court should look to the intent of the parties involved in the transaction. *Eagle Pac. Ins. Co. v. Christensen*, 135 Wn.2d 894, 910, 959 P.2d 1052, 1059 (1998).

In the present action, Ms. Johnson did not have the mental capacity, the ability, the knowledge or the intent to assist Mr. Cook to delay or hinder his creditors. (Ex. D201, CP 1315). Mr. Cook manipulated and controlled her as she was subject to stress and pressure. (Ex. D201, CP 1315). While Mr. Cook may have intended to prevent the property from being claimed by creditors, Ms. Johnson should not be faulted for the desire to purchase a property as an investment (RP 381-82). Nothing in the record supports an inference that Ms. Johnson lacked good faith in the purchase of the property (RP 381-82) (Ex. D201, CP 1315).

If the court finds that Ms. Johnson received the property fraudulently from Mr. Cook to the extent that Cook advanced \$30,000.00, then pursuant to RCW 19.40.081(c), the court should provide Ms. Johnson with equitable relief. According to the *Thompson* court, this means that the \$30,000.00 paid by Mr. Cook must be deducted from the value of the asset transferred prior to determining the measure of judgment. 168 Wn.2d at 768, 239 P.3d at 543. Thus, the value of the property transferred was \$230,000. As a good faith transferee, the amount may be offset by the value given to Mr. Cook, \$200,000. The property should therefore be liquidated and the proceeds divided according to the percentage of investment by both parties. Ms. Johnson, contributing \$200,000.00 of the purchase price has an 86.94 percent interest in the property and should receive that percentage of the proceeds of the sale. The plaintiffs' creditors are therefore entitled to 13.04 percent of the value or the proceeds of the sale of the property - that is the value of property to which Ms. Johnson did not pay in consideration. Justice and equity to Ms. Johnson would be served if she received her value of 86.94 percent in the property.

Issue No. 3. Whether Adeline Johnson suffered financial exploitation by Raymond E. Cook, Jr. as a vulnerable adult?

This involves Assignments of Error Nos. 4, 5, and 7, and Issue No.

1. There is no question that Mr. Cook borrowed money from Ms. Johnson from time to time over the years and created problems for the family. (RP 371). There was an earlier loan of \$200,000.00 which was never repaid and as secured by a second lien on Cook's Deer Park real estate. (RP 307-308). Mr. Johansson testified that Ms. Johnson's first sign of memory problems were in the mid 1990's when she had her first stroke. (RP 370). Mr. and Mrs. Cook have borrowed money from Ms. Johnson from time to time over the years, and did not pay her back (RP 371). Ms. Johnson could not pay for her own care and farm expenses (RP 372). There is no question that Mr. Cook manipulated and took advantage of Ms. Johnson.

The Court in its opinion found that Ms. Johnson financed the purchase of the real property for her son-in-law and "there is certainly no doubt she was taken advantage in that he made no attempt to repay her". She has never had any benefit whatsoever from the property (CP 1225-1234).

Ms. Johnson suffered financial exploitation by Mr. Cook in that he had previously borrowed \$200,000.00 from her over prior years. (RP 332-33). She did not execute her durable power of attorney until 2002 (RP

368). The purpose of the AVA is to protect a vulnerable adult from predatory practices of Mr. Cook. There is no question that Ms. Johnson suffered financial exploitation by Mr. Cook as a vulnerable adult as Dr. Husky found her to be quite susceptible to stress and pressure. (Ex. D201, CP 1315). The Court found that she was taken advantage of by Mr. Cook (CP 1230). That is the very purpose of the AVA is to protect the vulnerable adult.

Issue No. 4. Whether it was a loan or an outright purchase by Adeline Johnson, was Adeline Johnson entitled to a proportionate interest in the real property to the extent of her investment of \$200,000.00?

This involves Issue no. 3 and Assignments of Error Nos. 4, 5, 6, and 7. The Trial Court found that the \$200,000.00 was a loan from Ms. Johnson to Mr. Cook, and consequently the Judgment Creditor had the right to proceed against the entire real property, and not merely the interest of Mr. Cook (CP 1233-34). The Guardian Ad Litem for Ms. Johnson contends because she was a vulnerable adult whether the advance was a loan, or whether it was intended to purchase, she is still entitled to her interest of \$200,000.00 in the subject real property as a vulnerable adult as she acted in good faith. Ms. Johnson had a recorded deed in her name and is therefore either the recorded property owner or a secured creditor. The

Trial Court found that the \$200,000.00 was inherited funds of Ms. Johnson (CP 1225-34). There is no question that \$30,000.00 of the funds in the real property is funds belonging to Mr. Cook. It is Ms. Johnson's position, by her Guardian Ad Litem, that the real property should be liquidated and that portion of Mr. Cook's funds of \$30,000.00, which is 13.04% of the sale proceeds be paid over to the Judgment Creditor and that 86.96% should be paid over to Ms. Johnson (CP 1239-43). The property should be sold and apportioned accordingly.

Plaintiffs' interest in the subject real property should be limited to the \$30,000.00 invested by Mr. Cook, which is 13.04% interest in the subject real property.

Under RCW 19.40.081, Ms. Johnson, who is a vulnerable adult, is a good faith transferee to the extent of the value given the debtor for the transfer, namely the \$200,000.00. Here, Ms. Johnson, due to her mental and physical condition, did not knowingly contribute \$200,000.00 with the intent to assist Mr. Cook in evading the Plaintiffs' judgment.

The Court has the obligation to protect the vulnerable adult as well as the Judgment Creditor. The Court in these proceedings apparently elected to protect the Judgment Creditor under the Fraudulent Conveyance Statute and disregard the Vulnerable Adult Statute as to Ms. Johnson.

There is no issue of fact that Mr. Cook had a \$30,000.00 interest in the property valued at \$230,000.00. This percentage can be calculated to 13.04%. The subject real property should be liquidated for cash and 13.04% of the net proceeds be paid over to the Plaintiffs and the remaining amount of 86.96% should be paid over to Ms. Johnson. Justice would therefore serve both parties. In the Court's ruling, the Court penalized Ms. Johnson and rewarded Mr. Cook for his outrageous conduct by allowing the entire \$200,000.00 to apply on the indebtedness.

In *Endicott v. Saul*, the Court found that the individual in that case did not have mental capacity to comprehend her financial affairs and thus deemed her a vulnerable adult. 142 Wn.App. 899, 176 P.3d 560. The Vulnerable Adult Statute is relatively new, having first passed the Legislature in 1999, and was amended in 2007. It was passed with the intent to prevent vulnerable adults from being subjected to abuse, neglect, and financial exploitation by a family member, care provider, or other person who has a relationship with the vulnerable adult. It is undisputed that Ms. Johnson suffered financial exploitation by her son-in-law, Mr. Cook. Allowing the Plaintiffs to execute on the entire real property will partially satisfy Mr. Cook's obligation at the expense of the vulnerable adult, Ms. Johnson. The Trial Court erred in the assessment and should have allowed Plaintiff to execute upon Mr. Cook's percentage of interest

only in the subject real property, which is 13.04%. To allow the present ruling to remain rewards Mr. Cook for his illegal and unlawful conduct that he has inflicted upon his mother-in-law, who will suffer the brunt of his misconduct.

The ruling of the Trial Court should be reversed. The property ordered sold and 13.04% of the net proceeds should be paid over to the Plaintiffs and the remaining proceeds should be paid over to Ms. Johnson.

In 27 Washington Procedure, Fraudulent Transfers, Section 5.146 at Page 580, states:

Proof of actual intent to defraud must be demonstrated by clear and convincing evidence, while only substantial evidence is necessary to establish the other types of fraud.

RCW 19.40.081(f):

A transfer is not voidable under RCW 19.40.051 (b):

(1) To the extent the insider gave new value to or for the benefit of the Debtor after the transfer was made, unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the Debtor and the insider; or

(3) If made pursuant to a good faith effort to rehabilitate the Debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

Here Ms. Johnson gave new value, namely \$200,000.00 and to the extent that Mr. Cook has a \$30,000.00 interest that is the only portion that should be considered a fraudulent transfer.

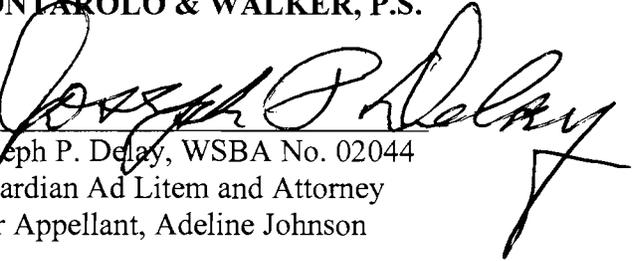
IX. CONCLUSION

The judgment of the Trial Court should be reversed, and the property ordered sold and 13.04% of the net proceeds should be paid over to Plaintiffs and the remaining portion should be paid over to Ms. Johnson.

Dated this 23rd day of June, 2011.

Respectfully Submitted.

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 296725

Superior Court No. 00-204021-5

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

A & W FARMS, WILLIAM GUHLKE, ALEX GUHLKE

Respondent

v.

ADELINE JOHNSON,

Appellant

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The undersigned, being first duly sworn on oath,
deposes and says:

I am competent to be a witness in the above-entitled
matter; on the 23rd day of June, 2011, I mailed a copy of
the attached Appellant's Opening Brief, by first class U.S.
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SUBSCRIBED AND SWORN to before me this 23rd
day of June, 2011.



NOTARY PUBLIC in and for the State of
Washington, residing at Spokane
My appointment expires: 11-22-13

