

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Southern Division

|                                |   |                            |
|--------------------------------|---|----------------------------|
| In Re:                         | ) | Bankr. No. 91-40439        |
|                                | ) | Chapter 7                  |
| PATRICIA H. GRIDLEY            | ) | Adversary No. 93-4046      |
| SS#360-14-6709                 | ) |                            |
| Debtor.                        | ) |                            |
|                                | ) |                            |
| JAMES A. CRAIG, Trustee,       | ) | MEMORANDUM OF DECISION RE: |
| and VALLEY BANK,               | ) | § 544(b) COMPLAINT         |
| Plaintiffs,                    | ) |                            |
| vs.                            | ) |                            |
|                                | ) |                            |
| JOHN N. GRIDLEY, III, PATRICIA | ) |                            |
| LEIGH GRIDLEY DICK, PAMELA A.  | ) |                            |
| GRIDLEY JAUDES and MARY JANE   | ) |                            |
| GRIDLEY SIMMONS,               | ) |                            |
| Defendants.                    | ) |                            |

The matter before the Court is the § 544(b) action brought by Trustee James A. Craig and unsecured creditor Valley Bank. This is a core proceeding over which this Court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2). A trial on Plaintiffs' complaint was held September 21 through 23, 1994. Appearances included Edward J. Leahy for Plaintiffs and David L. Nadolski for Defendants. Additional documents were submitted by the parties at the Court's request on March 21, 1995. After hearing the testimony presented and adjudging the credibility of witnesses and after having examined the evidence offered and heard and read counsels' arguments, the Court finds for Defendants on all Counts, as set forth below. This Memorandum of Decision and subsequent judgment shall constitute findings of fact and conclusions of law pursuant to F.R.Bankr.P. 7052.

I.

John N. Gridley, Jr. (Jack Gridley) and Patricia Gridley were husband and wife. They were the parents of Defendants John N.

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Gridley, III (John Gridley), Patricia L. Gridley Dick, Pamela A. Gridley Jaudes, and Mary Jane Gridley Simmons.

For several years prior to her death, Patricia Gridley and Jack Gridley had a poor relationship. Jack Gridley was diagnosed as a manic depressive in the 1970's. Patricia Gridley was in poor health most of her last years due to emphysema and did not leave home often. Patricia Gridley was intimidated by Jack Gridley. Jack Gridley's financial dealings were an ever-present worry for her. Besides maintaining a high standard of living, Jack Gridley had encountered severe financial set backs that had eroded severely the wealth he and his wife had inherited. While Patricia Gridley contemplated divorcing her husband, she refrained from doing so because of her religious convictions and because she feared her social standing would be tarnished. Patricia Gridley insured that her wills, prepared by Attorney N. Dean Nasser, Jr., in 1984 and 1989, did not leave anything to Jack Gridley since he already had dissipated her wealth.

One of Patricia Gridley's assets was a 15% interest in Pana Development Company. The other stockholders of this closely held corporation were Patricia Gridley's four children and Patricia Gridley's sister, Nancy Martz O'Brien, and Nancy O'Brien's children. Patricia Gridley and her children collectively held 50% of the stock. Nancy O'Brien and her children collectively held the other 50%. The principal asset of Pana Development Company is prime business development land in the southeastern area of greater Sioux Falls that was owned originally by Patricia Gridley and Nancy

O'Brien's maternal grandfather. For several years, the stockholders had been unable to agree to a disposition of any of the property. Based on the expert testimony of Dr. Courtney D. Anderson, an area developer, the land was worth approximately \$5,000,000.00 in mid 1989.

Jack Gridley had represented falsely to others that he had an interest in or was an agent of Pana Development Company.

*Hadleigh D. Hyde Trust Litigation.*

Patricia Gridley and her brother, Robert Hyde, were co-trustees of the Hadleigh D. Hyde Trust. Beneficiaries of the Trust were Patricia Gridley, Robert Hyde, their sister Nancy O'Brien, and their nieces, Catherine Nichols and Martha Brown. Trust assets included farm land, stocks, securities, and other interest-bearing investments. The co-trustees entered into a management agreement with Jack Gridley on October 17, 1980 whereby Jack Gridley became the agent for the real property. The agreement gave Jack Gridley exclusive control over the farms and their production but he was not to hold or manage money. The other investments were handled by a brokerage firm.

Upon the motion of co-trustee Patricia Gridley, the Hadleigh D. Hyde Trust was submitted to state court administration by Order entered March 28, 1988. On June 24, 1988, Nancy O'Brien filed an objection to the inventory of the Hadleigh D. Hyde Trust submitted by co-trustee Patricia Gridley and sought an accounting by Patricia Gridley and the management agent, Jack Gridley. By memorandum decision entered September 30, 1988, the state court concluded

that: Jack Gridley, after becoming an agent for the Trust, opened a commodities trading account; Patricia Gridley transferred Trust funds to Jack Gridley for him to trade in the commodities account; Jack Gridley's and the Trust's funds became co-mingled; the Trust lost \$29,232.00 on these transactions; Jack Gridley willfully violated his management agreement; Patricia Gridley intentionally breached her trust; and Patricia Gridley was liable for agent Jack Gridley's unauthorized acts, the commissions he received, and some accountant's fees. The state court delayed entry of formal findings and conclusions pending resolution of a request for attorney's fees and costs by the movant, Nancy O'Brien.

By Findings and Conclusions and Order entered May 22, 1989, the state court surcharged Patricia Gridley \$61,205.48, plus interest, from her beneficial interest in the Hadleigh D. Hyde Trust for the losses the Trust incurred due to the unauthorized transactions involving Jack Gridley.

On July 5, 1989, Patricia Gridley appealed the decision to the South Dakota Supreme Court. By Order entered July 12, 1989, the state court did not require a bond for a stay pending appeal since Patricia Gridley's beneficial interest in the Trust exceeded the surcharge and since the Trust was under court supervision.

On June 26, 1989, Patricia Gridley borrowed \$7,500.00 from First Interstate Bank<sup>1</sup> to pay attorney's fees related to the Hadleigh D. Hyde Trust litigation. She pledged 303 shares of

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<sup>1</sup> Whether Houston Haugo had ties to First Interstate Bank was not established at trial.

publicly traded stock as collateral. The value of the collateral exceeded the debt.

At Patricia Gridley's direction, in December 1989, First Interstate Bank sold some of the stock she had pledged for her June 26, 1989 loan. On December 22, 1989, the loan was paid in full and the excess of \$1,452.22 was returned to Patricia Gridley. The remaining 153 shares that were not sold were to be reissued in Patricia Gridley's name and returned to her.

The South Dakota Supreme Court affirmed in part and reversed in part. Upon remand, the state court entered an Order on September 7, 1990 that surcharged Patricia Gridley's beneficial interest in the Hadleigh D. Hyde Trust for \$76,543.02 plus interest after May 8, 1989.

A Final Decree of Distribution for the Hadleigh D. Hyde Trust was entered in state court on October 30, 1990. Patricia Gridley received nothing.<sup>2</sup>

*The Hand County State Bank Loans.*

Patricia and Jack Gridley borrowed \$120,000.00 from Norwest Bank on November 5, 1980. The purpose of the loan was to build or purchase a condominium in Sioux Falls, South Dakota. As collateral, they gave a mortgage on the condominium.

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<sup>2</sup> Trustee Craig commenced a preference action against the Hadleigh D. Hyde Trust beneficiaries on July 16, 1993. A separate decision in that adversary proceeding, numer 93-4049, is being entered at the same time as this Memorandum of Decision.

On July 2, 1981, Patricia Gridley signed an unsecured, personal guaranty for \$130,000.00 to Norwest for the debts of Jack Gridley and Associates, an insurance agency that Jack Gridley had. The amount of Jack Gridley and Associate's debt at that time is not known but the business had apparently borrowed from Norwest several times.

The Gridley's became delinquent on their mortgage payments in 1982. The condominium loan was modified on March 31, 1983 to provide easier repayment terms.

Also in late March 1983, Jack Gridley, doing business as Jack Gridley and Associates, borrowed another \$125,000.00 from Norwest. The note stated that it was secured by the personal guarantee of Patricia Gridley and a second mortgage on the condominium. Except for approximately \$30,000.00 that was used to pay taxes and to buy some furniture for the Gridley's condominium, the loan was intended for Jack Gridley's business.

On August 30, 1984, Jack Gridley filed a state court complaint against Norwest. Therein, he stated he had written two checks totaling over \$140,000.00 on February 13, 1982 to reimburse premiums on an insurance policy that was cancelled by the State of South Dakota. Jack Gridley further stated that when he issued the checks he expected his line of credit with Norwest to cover them. He said he went to Norwest on February 16, 1982 (the next business day) to sign a note to cover these checks but that Norwest refused to loan him additional sums unless more collateral was pledged. While Norwest later loaned money to Jack Gridley to cover these

checks (apparently the loan to Jack Gridley in late March 1983), the reimbursement check to the State of South Dakota was dishonored in the interim and Jack Gridley eventually lost his insurance agent license. Jack Gridley blamed Norwest for the loss of his license, the cost of the ensuing litigation to recover his license, the devaluation of his business, and the loss of income. He sought punitive and compensatory damages of over \$2,500,000.00. Norwest denied Jack Gridley's allegations and counterclaimed against Jack and Patricia Gridley by commencing foreclosure proceedings on the condominium. A jury found for Norwest on all counts of Jack Gridley's complaint.

Norwest obtained a foreclosure judgment for \$301,455.17 against Patricia and Jack Gridley's condominium on July 3, 1986. Although one appraisal on May 8, 1986 valued the condominium at \$134,000.00, the parties stipulated that the value was \$215,000.00. Norwest purchased the condominium for \$215,000.00 at the Sheriff's sale leaving a deficiency of \$88,315.18. Norwest was delayed in getting a sheriff's deed until June 2, 1987 because the Gridleys unsuccessfully had moved to set aside the sale.

Jack Gridley assumed responsibility for solving his and Patricia Gridley's financial problem with Norwest. After the foreclosure, he contacted Houston Haugo, an area banker, for help. Houston Haugo had known the Gridley family for thirty years through a college acquaintance with John Gridley. Houston Haugo and Jack Gridley also had prior business associations. In 1982, Houston Haugo had loaned money to the Gridley children so that they could

help their father with a financial problem. The children repaid the loan with an inheritance from the Gridley side of their family but Jack Gridley did not repay the children.

At Jack Gridley's request, Houston Haugo helped Jack and Patricia Gridley get a loan from Hand County State Bank so that the Gridleys could settle with Norwest. Patricia Gridley was not involved directly in this deal. Houston Haugo used his friendship with James F. Hart, an officer of Hand County State Bank, to facilitate the loan. Houston Haugo did not make the loan because he was not an active loan officer of any bank at that time. James Hart agreed to make the loan to the Gridleys based on Houston Haugo's oral promise that the loan would be repaid and because the parties expected the loan to be short-term until the Gridleys raised funds from a lawsuit in Illinois and the sale of stocks and "land along interstate," as that asset was described by James Hart. Houston Haugo also told James Hart that Patricia Gridley owned corporate stock. Houston Haugo intended to take over the Hand County State Bank condominium loan when he became the 100% stockholder of Valley Bank.

On June 29, 1987, Patricia and John Gridley executed a promissory note to Hand County State Bank for \$190,000.00. It was not a typical financial arrangement for a home loan where the debt is paid in small increments over twenty or thirty years. Instead, interest on the note was 11%, the interest was to be paid semi-annually, and the debt was to be repaid in one year. The first interest payment was due December 29, 1987. The proceeds of the

condominium loan from Hand County State Bank were distributed as follows:

|                                     |             |
|-------------------------------------|-------------|
| real estate taxes:                  | \$ 5,991.21 |
| judgment                            | 650.00      |
| attorney fees                       | 2,675.00    |
| Norwest Bank                        | 159,733.00  |
| title costs                         | 751.05      |
| Register of Deeds                   | 185.00      |
| Hand County Bank (origination fee)  | 3,800.00    |
| Jack and Patricia Gridley (balance) | 16,214.74   |

As security for the note, Patricia and John Gridley gave Hand County State Bank a mortgage on the condominium. As part of an agreement that resolved Norwest's deficiency claim against the Gridley's and Jack Gridley's claim against Norwest, Norwest quit claimed its interest in the condominium back to the Gridleys. Jack Gridley then quit claimed his interest to Patricia Gridley at the same time the Gridleys offered the mortgage to Hand County State Bank.

The Gridleys' condominium was not worth \$190,000.00 on June 29, 1987, so the loan from Hand County Bank was undersecured. Houston Haugo knew the loan was undersecured. He did not seek additional collateral nor advise Hand County State Bank to obtain additional collateral. At the time the mortgage was given to Hand County State Bank, Patricia Gridley's other assets included some cash, publicly traded stock, Pana Development Company stock, and some valuable personalty that could have been used as additional collateral.

Jack Gridley prepared a hand written list of some other assets owned by Patricia Gridley. Jack Gridley gave the unsigned list,

dated June 20, 1987, to Houston Haugo. Houston Haugo did not perfect a security interest in any of the stocks listed. Houston Haugo did not advise Hand County State Bank to obtain a security interest in any of the assets listed.

Neither Hand County State Bank nor Houston Haugo obtained a financial statement from Patricia Gridley. Houston Haugo never talked to Patricia Gridley about what stocks or assets she owned prior to the Gridleys getting the loan from Hand County State Bank.

Patricia Gridley made the first interest payment on June 21, 1988, six months late, with proceeds Jack Gridley received from a recent inheritance. On June 29, 1988, the date the second interest payment and the principal were due, the Gridleys paid the interest with the proceeds of a new unsecured loan from Hand County State Bank for \$10,650.40. Interest on this unsecured note was 11.5% and principal was due September 29, 1988. The Gridleys also renewed the condominium loan and extended the mortgage. Hand County State Bank raised the interest to 11.5% and the interest and principal were both due June 29, 1989.

Houston Haugo assisted Jack Gridley in arranging these new loans. James Hart consented because he was told that the Gridleys needed more time to arrange their financial affairs and because Patricia Gridley was in poor health.

James Hart wrote Houston Haugo on September 16, 1988 to remind him that the Gridleys' unsecured note was due September 29, 1988. He stated,

I trust [Jack Gridley] will be able to take care of it at this time. . . . I feel we have bent over backwards with [Jack Gridley] on this and he hasn't doen [sic] what has been promised.

Houston Haugo returned the letter to James Hart with a handwritten notation at the bottom dated September 28, 1988, that said Jack Gridley would like to renew the note for three months and then pay it from proceeds of "Lincoln City, Trust," an apparent reference to some litigation involving Jack Gridley. Enclosed with this message, Houston Haugo sent James Hart a check from Jack Gridley for \$1,959.11 to pay the interest and some of the principal due on the unsecured note, leaving a balance due of \$9,000.00. On September 30, 1988, Hand County State Bank sent to Houston Haugo a new note for \$9,000.00 for Jack Gridley. Interest was 12% and the note was to be repaid with interest on December 29, 1988. This note repaid the \$9,000.00 principal on the unsecured note that was due September 29, 1988. Patricia Gridley did not sign this second unsecured note.

Jack Gridley's unsecured note for \$9,000.00 was not repaid timely on December 29, 1988. Instead, on January 3, 1989, Hand County State Bank accepted a late payment of \$1,269.00, which brought the interest current and paid \$1,000.00 in principal. Then, on January 27, 1989, through Houston Haugo, Jack Gridley got another unsecured loan from Hand County State Bank for the balance due of \$8,078.27 plus a finance charge of \$423.27. Interest on this note was 12.5% and the loan was to be repaid by June 29, 1989,

the same day the Gridley's \$190,000.00 condominium loan was due. This note was not signed by Patricia Gridley.

In his cover letter to Houston Haugo with the January 27, 1989 note, James Hart asked Houston Haugo for a letter stating the Gridleys' circumstances. By hand-written letter dated February 10, 1989, Houston Haugo advised James Hart that the Gridleys could not consider selling their home at that time due to Patricia Gridley's very poor health. He also stated that, "Mr. Gridley doesn't want to approach [Patricia Gridley] with any financial matters that would upset her at this time of her life."

Again through Houston Haugo, the Gridley's got an extension of the \$190,000.00 condominium loan and mortgage from June 29, 1989 to June 29, 1990. Interest increased from 11.5% to 13%. Interest payments were due December 29, 1989 and June 29, 1990. James Hart, although concerned about the soundness of the Gridleys' loan, renewed the loan to June 29, 1990 based on Houston Haugo's assurances that "things [were] coming around" and because Houston Haugo would still "take him out."

On July 14, 1989, Jack Gridley wrote Houston Haugo about the Gridleys' condominium loan with Hand County State Bank. He stated, "We are in serious problem land financially at this time [sic]." He estimated Patricia Gridley's net worth to be \$1,002,160.00, including a \$776,160.00 interest in Pana Development Company. He further indicated that he and his son, John, were both working "on disposing Pana" but were concerned about the tax consequences.

On July 14, 1989, Patricia and Jack Gridley owed Hand County State Bank \$213,566.41 (principal of \$190,000.00 and accrued interest of \$23,566.41). This loan was not in default. Jack Gridley's unsecured note for \$8,078.27 was past due.

*Patricia Gridley's Transfer of the Pana  
Development Company Stock.*

As early as 1987, Patricia Gridley had expressed to her children and her priest, Father George Gumdrum, a desire to give the children her stock in Pana Development Company. She wanted to insure that the Pana Development Company stock remained with her side of the family and she wanted to keep the asset out of Jack Gridley's hands.

In two telephone conversations between May 31, 1989 and July 13, 1989, Attorney Brian J. Stuart discussed with Patricia Gridley her desire to give her Pana Development Company stock to her children. They discussed whether she wanted to make the gift and the possible implications of the gift on taxes and her eligibility for Medicaid assistance if she had to enter a nursing home. Patricia Gridley told Attorney Stuart that she wanted to insure that this asset went to her children. She also stated she had sufficient other stocks to support herself. She did not mention problems with any creditors or the state court litigation involving the Hadleigh D. Hyde Trust.

In late June or early July, 1989, Attorney Stuart obtained replacement certificates for the Pana Development Company shares

owned by Patricia Gridley and then prepared the documents for transfer as requested by Patricia Gridley.

John Gridley arranged for Attorney Nasser, a friend and former partner who had prepared Patricia Gridley's wills, to oversee Patricia Gridley's transfer of the Pana Development Company stock. On July 14, 1989, Attorney Nasser went to Patricia Gridley's home. He met privately with her and discussed her intention of gifting the Pana Development Company stock to her children. Based on that discussion, Attorney Nasser concluded the gift was not being made in contemplation of death since her health had improved from January, 1989, when he had prepared a new will for her. Patricia Gridley executed the transfer and thereby gave each of her four children 641.5 shares in Pana Development Company. Following Attorney Nasser's insistence for formality, Patricia Gridley then delivered the certificates to John Gridley on his and his sisters' behalf in the attorney's presence.

After July 14, 1989, Patricia Gridley did not have possession of the stock certificates nor did she exercise any power or control over the certificates or the business affairs of Pana Development Company. She was not aware of a letter that Jack Gridley wrote to Houston Haugo that same day.

John Gridley took the transferred Pana Development Company certificates to Attorney Stuart soon after Patricia Gridley signed them. Since the transfer certificates also needed the signature of Pana Development Company Acting President Nancy O'Brien, Attorney Stuart notified Steven N. Sanford, counsel for Nancy O'Brien, that

he had the certificates ready for Nancy O'Brien's signature. Attorney Sanford said he would discuss the matter with Nancy O'Brien. On August 18, 1989, Attorney Sanford informed Attorney Stuart that Nancy O'Brien was now available to sign the certificates. Attorney Stuart delivered the transferred stocks to Attorney Sanford on August 21, 1989 for Nancy O'Brien's signature. Attorney Sanford did not return the transferred Pana Development Company certificates until November 9, 1989, after Nancy O'Brien had signed them. On November 15, 1989, Attorney Stuart mailed the transferred Pana Development Company certificates to Patricia Gridley's daughters and hand delivered them to John Gridley.

In early December 1989, Gene Mogen, a CPA, drafted a federal gift tax return that Patricia Gridley signed and filed. The return reported the value of the transferred Pana Development Company stock was \$107,502.32. Accountant Mogen computed the value based on information provided by Attorney Stuart and John Gridley. He had no contact with Patricia Gridley. The stock was undervalued on the return.

*The Valley Bank Loans.*

Houston Haugo met with Patricia Gridley in her home on November 7, 1989, regarding the unpaid interest on the condominium loan and Jack Gridley's unsecured note due to Hand County State Bank. Patricia Gridley obtained a loan from Valley Bank, then owned by Houston Haugo, for \$38,536.48 with interest at 10%. The note was due November 7, 1990. The funds were used to pay the

interest on the Hand County State Bank condominium loan and Jack Gridley's unsecured loan from Hand County State Bank.

While at Patricia Gridley's residence on November 7, 1989, Houston Haugo asked for and took into his possession as collateral several stock certificates that Patricia Gridley owned for companies listed on the New York Stock Exchange. Based on expert testimony by Thomas Hall, a licensed stock broker, this stock taken as collateral was worth approximately \$55,000.00. On November 7, 1989, Houston Haugo did not ask Patricia Gridley for her Pana Development Company stock as collateral.

Requisite formalities were not followed closely when Valley Bank personnel prepared the necessary loan and security documents. On or about November 8, 1989, Marion "M.J." Maurstad, Executive Vice President of Valley Bank, at the direction of Houston Haugo, altered the Valley Bank note by typing in the date of "November 8, 89" where the note made a reference to a Security Agreement and by adding "Stock and Financial Statement" where the note made reference to collateral. Patricia Gridley did not authorize these alterations. On November 8, 1989, M.J. Maurstad also signed and mailed to Patricia Gridley a Statement of Purpose of the Proceeds of a Stock-Secured Extension of Credit by a Bank (Federal Reserve Form U-1) and several Stock Powers Irrevocable. No one from Valley Bank, including M.J. Maurstad and Houston Haugo, met with Patricia Gridley to explain the purpose of the Form U-1 or the Stock Powers Irrevocable. M.J. Maurstad dated Patricia Gridley's signature for

November 8, 1989 on the Stock Powers Irrevocable some time after he received them back from her.

On November 13, 1989, Houston Haugo sent a cashier's check to the Hand County State Bank that paid most of the past due interest on the condominium loan and that paid in full Jack Gridley's unsecured note. The payment was accompanied by a handwritten note from Houston Haugo to James Hart dated November 13, 1989 that stated:

Here is Interest on Gridley Note -- I know it is a very small amount short but I think their note has been 200-250 basis pts. above many other investments - Houston.

Hand County State Bank accepted the payment.

Between November 7, 1989 and November 13, 1989, Houston Haugo learned that Patricia Gridley had transferred the Pana Development Company stock to her children. Houston Haugo told Jack Gridley about the transfer on November 13, 1989. On November 14, 1989, Houston Haugo met with Jack and Patricia Gridley in their home to discuss the condominium loan, Patricia Gridley's transfer of the Pana Development Company stock, and possible tax consequences of the transfer. He did not request additional collateral for the \$38,536.48 note with Valley Bank nor for the condominium loan held by Hand County State Bank.

John Gridley and Houston Haugo coincidentally met in Jack and Patricia Gridley's garage on November 14, 1989. John Gridley told Houston Haugo that he and his sisters would take care of Patricia Gridley.

During his two meetings with Patricia Gridley in November of 1989, Houston Haugo was aware that Patricia Gridley's expected inheritance from the Hadleigh D. Hyde Trust could be lost due to the state court surcharge order that still was on appeal.

On November 17, 1989, Jack Gridley wrote a letter to his children. Therein, he stated he had handled the condominium loan transactions with Houston Haugo and Hand County State Bank because Patricia Gridley's health precluded her from handling the problem. The letter also said Houston Haugo had told him "last Tuesday" [November 13, 1989] about Patricia Gridley's gift of the Pana Development Company stock to the children. In the letter, Jack Gridley acknowledged John Gridley's statements to Houston Haugo that the "big" reason Patricia Gridley had transferred the Pana Development Company stock to her children was to keep it away from him [Jack Gridley]. Jack Gridley also stated he would "split" and no longer care for Patricia Gridley if the Pana Development Company stock "deal" was not reversed.

On December 14, 1989, Houston Haugo wrote Patricia and Jack Gridley advising them that they should seek the advice of a third party and financial planner, sell stock to pay the note to Valley Bank, apply the balance of the stock sale proceeds to the condominium loan with Hand County State Bank, sell the condominium as soon as possible in a prudent manner, and move to a lower cost residence. He also strongly suggested that the Gridley children may need to pay the debts. Houston Haugo further stated:

I have no interest in owning or participating in Pana Corporation or owning any of its stock. I offered to take Pana stock although it is not a truly bankable collateral since it is an illiquid closed corporation, but if anybody wants to pay this off and buy me out of these notes, I would be more than happy to do it--but we have to get it done soon.

He closed his letter with the hope that "cool heads prevail" and that "no lawsuits have to result from any of these actions." At the time of this letter Houston Haugo considered Patricia Gridley's transfer of the Pana Development Company stock to be imprudent but not fraudulent.

Jack Gridley wrote to his children again on December 15, 1989 to tell them that their mother needed \$25,000.00 immediately to pay interest on the condominium loan and to cover bills related to the Hadleigh D. Hyde Trust litigation. He said foreclosure was imminent. However, he did not want a distress sale of the condominium. He further stated that if Patricia Gridley would "redo" the Pana Development Company gift, the children would not have to come up with the money needed.

After showing the December 15, 1989 letter to Houston Haugo, Jack Gridley wrote a second letter to his children on December 19, 1989. Therein, Jack Gridley said Houston Haugo corrected him that interest due Hand County Bank on the condominium loan was nearly current (paid by the loan from Valley Bank). Jack Gridley also told his children that Houston Haugo initially had planned to use the condominium and the Pana Development Company stock as collateral when Valley Bank "took over" the Hand County State Bank loan.

The condominium was listed for sale on December 29, 1989 for \$141,900.00 with real estate agent Abbie Pagone. Jack Gridley did not foster the agent's efforts to sell it. Abbie Pagone estimated it would take 100 days to sell the property.

On December 29, 1989, the Gridleys' debt on the condominium loan was principal of \$190,000.00, accrued interest from November 7, 1989, of \$3,112.88, plus any unpaid real estate taxes. The Gridleys did not make the December 29, 1989 interest payment on the condominium loan to Hand County State Bank.

By a hand-written letter dated January 29, 1990, Houston Haugo urged the Gridleys to sell their condominium and get Hand County State Bank paid. By a hand-written letter dated February 19, 1990, Houston Haugo encouraged the Gridleys to switch the Hand County State Bank loan to Houston Haugo's bank, Valley Bank. Neither letter raised a concern that Patricia Gridley's transfer of her Pana Development Company stock to her children was fraudulent.

The condominium did not sell. Interest continued to accrue at \$59.86 per day, plus taxes, insurance, association fees, and maintenance.

On or about March 12, 1990, counsel for Houston Haugo and Valley Bank contacted Attorney Stuart and advised him that the Bank was going to buy the condominium loan held by Hand County State Bank. He also advised Attorney Stuart that the only way a foreclosure of the condominium mortgage and a subsequent fraudulent conveyance action to recover the Pana Development Company stock could be avoided was for the Gridley children to pledge Pana

Development Company stock as collateral for the condominium loan. Attorney Stuart informed the Bank's counsel that he did not represent Patricia Gridley in this matter and would not attend a meeting to discuss the issues raised on March 12, 1990.

By letter to Attorney Daniel F. Kock, counsel for Jack Gridley, dated March 12, 1990, the Gridley children offered to use funds from a sale of Pana Development Company assets to support their parents. The offer was conditional on Jack Gridley providing information about his disposition of certain assets.

On March 30, 1990, Valley Bank paid Union County Bank \$198,583.54 (\$190,000.00 principal plus \$8,583.54 accrued interest) for the condominium loan and took an assignment of the condominium loan and mortgage.

On April 26, 1990, Attorney Kock relayed Jack Gridley's counteroffer to Attorney Stuart. The letter stated Jack Gridley viewed his wife's transfer of the Pana Development Company stock to her children as one made "in contemplation of death" and he wanted it rescinded so that Patricia Gridley could pledge the asset and give them more time to sell the condominium. Attorney Kock said that real estate people had told Jack Gridley that a sale of the condominium would net \$150,000.00 and leave a deficiency of approximately \$40,000.00. Jack Gridley then wanted the Pana Development Company stock used as collateral for another loan to cover the deficiency. The letter also said Jack Gridley wanted the reversionary interest in the Pana Development Company stock placed in a living trust for him and his wife. Finally, the letter stated

that if the Pana Development Company stock was not handled his way, the "bank" [unidentified] would seek return of the stock as a transfer in fraud of creditors.

On April 23, 1990, Valley Bank sent a default letter to Jack and Patricia Gridley. There was no evidence that Patricia Gridley saw the letter.

Attorney Stuart forwarded Jack Gridley's counter proposal to John Gridley and his sisters on April 27, 1990. Attorney Stuart questioned what claim the bank [unidentified] could make to the Pana Development Company stock when the bank held as collateral sufficient publicly traded stock to cover any deficiency on the condominium loan.

Valley Bank began state foreclosure proceedings against the Gridley's condominium on June 8, 1990. Jack Gridley accepted service for Patricia Gridley. Eventually, the couple retained separate counsel and filed separate answers. Jack Gridley stated in his answer that he signed the note and mortgage as an accommodation party and that he and Valley Bank had "relied, if not primarily, then at least extensively for its security in the assets list on Defendant Patricia Gridley's statement of assets." In his answer, Jack Gridley also claimed Patricia Gridley had transferred assets listed on the statement of assets without consideration and so he should not be held responsible for any deficiency. Patricia Gridley offered a champerty defense upon advise of counsel, Michael B. Crew, in her answer to Valley Bank's amended complaint. The initial idea for the champerty defense came from John Gridley, who

was upset by Valley Bank's "quick" foreclosure after it took over the loan from Hand County State Bank.

In support of the champerty defense, Attorney Crew prepared for Patricia Gridley's signature an affidavit that stated, *inter alia*, that when she got the \$38,546.48 note from Valley Bank on November 7, 1989, Houston Haugo was aware of Patricia and Jack Gridley's financial condition and that he knew

we did not have an income sufficient to pay the interest on the Hand County State Bank note nor did we have sufficient assets to pay off the principal of the note other than out of any interest I might have owned in PANA Corporation. During these discussions, Mr. Haugo was aware that I had gifted all of the stock I owed in PANA Corporation to my children in July, 1989.

She also stated in her affidavit that after the proceeds of the Valley Bank loan for \$38,546.48 were used to pay the interest due on the Hand County State Bank condominium loan

neither my husband nor myself had any means by which we could raise sufficient funds to pay off the \$190,000.00 note at Hand County State Bank. Mr. Haugo was well aware of this fact as is apparent from the letter dated December 24 [14?], 1989, from Houston Haugo to [Jack Gridley] and myself[.]

Patricia Gridley signed the affidavit on January 16, 1991. When the affidavit was presented to her, Attorney Crew discussed with Patricia Gridley the ramifications of a fraudulent conveyance action regarding her transfer of the Pana Development Company stock to her children. However, he did not discuss with Patricia Gridley her present assets and liabilities nor her assets and liabilities when she transferred the Pana Development Company stock. Attorney Crew also did not have know the value of the Pana Development

Company stock when Patricia Gridley transferred it. Further, Attorney Crew did not know what assets Jack Gridley had nor the value of the Gridleys' condominium when he prepared the affidavit. Consequently, the affidavit was not an accurate, dispositive statement of Patricia Gridley's financial condition on July 14, 1989 or thereafter.

A partial summary judgment was entered in favor of Valley Bank on its foreclosure action on January 28, 1991, and as amended April 19, 1991. The state court determined on February 13, 1991 that the fair and reasonable value of the condominium was \$125,500.00. By Judgment entered April 29, 1991, the state court authorized Valley Bank to bid \$122,330.24 at the foreclosure sale of the condominium.

Valley Bank bought the condominium at a foreclosure sale on May 24, 1991, for \$122,330.24. The foreclosure sale costs were \$73.48 and the foreclosure judgment costs were \$4,902.54. Interest of \$1,886.82 from the date of the foreclosure judgment to the date of the foreclosure sale was also paid. The net from the sheriff's sale proceeds applied to the foreclosure judgment was \$115,467.40, leaving a deficiency on the foreclosure judgment of \$106,798.75 as of May 24, 1991.

On June 12, 1991, just before Patricia Gridley filed her Chapter 7 petition, Valley Bank commenced a fraudulent conveyance action against several parties in state court seeking to set aside Patricia Gridley's transfer of her Pana Development Company stock to her children.

Title to the condominium was transferred to Valley Bank by a Sheriff's Deed recorded on November 22, 1991. The Bank sold the condominium in June of 1992 for \$145,000.00, for a gain of \$22,669.76 less costs.

Through negotiations with all interested parties, including Jack Gridley, John Gridley attempted to resolve Valley Bank's deficiency claim against his mother's bankruptcy estate and a large tax lien against himself through a sale of Pana Development Company land or a pledge of Pana Development Company stock. He was not successful.

*Patricia Gridley's Bankruptcy Petition.*

After initial consultations by John Gridley, Attorney Clair Gerry, a partner of Attorney Stuart, made two appointments in March 1991 to meet with Patricia Gridley about the possibility of her filing bankruptcy. Both meetings were cancelled due to Patricia Gridley's poor health. Attorney Gerry finally met privately with Patricia Gridley on April 10, 1991 in her home. John Gridley was present for half the conversation but did not participate.

Over the course of one and a half hours, Attorney Gerry discussed with Patricia Gridley her assets and the pending foreclosure by Valley Bank. Patricia Gridley told Attorney Gerry that her husband was the cause of her financial problems. Attorney Gerry explained to her why Valley Bank was contemplating a fraudulent conveyance action. He also asked several pertinent questions to get necessary information from her if the fraudulent conveyance action was litigated, such as, her intent in making the

gift of the Pana Development Company stock, her financial situation at the time of the gift, the incidents of ownership after the gift, and her ability at that time to pay her debts as they came due. She was very distraught that Valley Bank considered her insolvent and she told Attorney Gerry that at the time of the transfer of the Pana Development Company stock her assets, excluding the Pana Development Company stock, exceeded \$260,000.00 and that she did not have any liabilities except normal living expenses. She said she had been assured by her husband and Houston Haugo that the value of the condominium exceeded the debt against it. She clearly stated that she had never provided Houston Haugo with a financial statement. She also said she never dreamed there would be a deficiency on the condominium loan. She did not mention the January 16, 1991 affidavit she had signed for the champerty defense against Valley Bank's foreclosure action. Her statements to Attorney Gerry were not clear on whether she understood the impact of the state court decision regarding her interest in the Hadleigh D. Hyde Trust, but she was pleased when Attorney Gerry told her that he thought the Trust assets could be recovered in bankruptcy as a preference. Attorney Gerry reported that she was very frail but alert, inquisitive, and understood very well the matters they discussed. At the conclusion of this meeting, Patricia Gridley told Attorney Gerry that she wanted to file bankruptcy because she did not know how she could avoid it. Attorney Gerry was "absolutely" comfortable that her decision was not influenced by her children. He left the meeting confident that any fraudulent

conveyance action to recover the Pana Development Company stock would be unsuccessful if Patricia Gridley could testify about her intent because, among other reasons, she was highly intelligent and sincere. Attorney Gerry wanted to do some pre-bankruptcy planning before he filed her petition. It was Attorney Gerry's opinion that she was solvent at the time of their conversation.

In early May, 1991, at Attorney Gerry's request, Sioux Falls auctioneer Terry Wingler, visited Patricia Gridley's home to make an informal appraisal. He told Attorney Gerry that he thought Patricia Gridley's personal property, excluding furs and jewelry, was worth up to \$60,000.00 with proper sale preparation and adequate time to sell it.

Patricia Gridley filed a Chapter 7 petition with this Court on June 17, 1991, through her son John Gridley, who had obtained a power of attorney on June 14, 1991. Patricia Gridley died on June 19, 1991.

Trustee Craig was appointed interim trustee for the bankruptcy estate on June 17, 1991 and became the trustee on July 19, 1991. Trustee Craig filed an application to hire Jeffrey Goeman as the bankruptcy estate auctioneer and appraiser on June 26, 1991. Trustee Craig took possession of estate personalty on June 27, 1991 and Auctioneer Goeman inventoried the property after removing it from the condominium. Trustee Craig sought court approval for an auction of the property.

In response to several objections, the auction sale scheduled for September 21, 1991 was postponed so that a second inventory of

the property could be made jointly by interested parties. A stipulation by interested parties regarding the inventory of estate property to be auctioned was approved by Order entered November 4, 1991.

On October 10, 1991, Trustee Craig filed a stipulation with Valley Bank that authorized Valley Bank to sell Patricia Gridley's stock that the Bank held as collateral and to apply the proceeds to the November 7, 1989 loan that Patricia Gridley had obtained from Valley Bank. The stipulation was approved by Order entered October 22, 1991.

At a Bankruptcy Court hearing on October 21, 1991, Trustee Craig and counsel for Valley Bank agreed to consider a more effective way to market Patricia Gridley's silver and other valuable personalty than by an auction at Goeman's auction house in Lennox, South Dakota. Trustee Craig sought an alternative market only for jewelry.

John Gridley contacted Christie's of New York to see if they were interested in selling the estate property. By letter dated October 23, 1991, they informed him that they were not interested and recommended a local sale.

Attempts by Patricia Gridley's children to reach a settlement with Valley Bank regarding payment of the Bank's deficiency claim and a delay of the auction sale failed.

Estate personalty was sold at auction by Auctioneer Goeman the evening of Friday, December 13, 1991 and most of the day on Saturday, December 14, 1991. The property was sold without reserve

and grossed \$64,884.00. Net proceeds after payment of the auctioneer's costs and commissions (\$16,213.08), the Trustee's interim commission (\$2,809.61), and the Trustee's interim attorney's fees (\$4,318.09) were \$41,543.22.

Based on the expert testimony of Mary E. Larsen, a Sioux Falls area decorator and designer who has traded in antiques and lectured on antiques, the prices obtained at the auction were not the true market value of all the items. Higher prices on more valuable pieces could have been obtained if the sale method used allowed more time for the sale, such as through an antiques dealer.

Proofs of claims were filed timely by:

|                       |    |            |
|-----------------------|----|------------|
| Crew & Crew           | \$ | 945.23     |
| Sioux Valley Hospital |    | 336.30     |
| Pamela G. Jaudes      |    | 60,792.35  |
| Valley Bank           |    | 107,653.15 |

All claims were unsecured. Pamela Jaudes's claim was disallowed by Order entered January 5, 1993.

Jack Gridley died on January 26, 1992. Trustee Craig has filed a claim against Jack Gridley's probate estate for \$149,932.00 based on various loans that Debtor made to Jack Gridley.

Trustee Craig filed the instant complaint on July 12, 1993, seeking a determination that Patricia Gridley's transfer of the Pana Development Company stock to her children on July 14, 1989 was a fraudulent transfer recoverable by Trustee Craig under 11 U.S.C. § 544(b). In seeking relief under § 544(b), the Trustee steps into the shoes of unsecured creditor, Valley Bank, to assert rights that the unsecured creditor had under state law.

Count One seeks relief pursuant to S.D.C.L. § 54-8A-4(a)(1) and alleges Debtor transferred the Pana Development Company stock to her children with an actual intent to hinder, delay, or defraud her creditors.

Count Two seeks relief under S.D.C.L. § 54-8A-4(a)(2) and alleges that Debtor gave her children the Pana Development Company stock without receiving a reasonably equivalent value in exchange for the stock and that Debtor was engaged, or was about to engage, in a business or a transaction for which her remaining assets were unreasonably small in relation to the business or transaction, or she intended to incur, or believed, or reasonably should have believed, that she would incur debts beyond her ability to pay them as they became due.

Count Three seeks relief under S.D.C.L. § 54-8A-5(a) and alleges Debtor transferred the Pana Development Company stock to her children without consideration when she was insolvent or that she became insolvent by the transfer.

Count Four was withdrawn by Plaintiffs at trial. Count Five and the equitable lien theory of Count Six were dismissed at trial based on the findings and conclusions entered on the record.

Count Six<sup>3</sup> also seeks relief under the theories of unjust enrichment, restitution, and implied contract.

Each Defendant filed an answer *pro se* on September 17, 1993. Attorney David L. Nadolski filed a Notice of Appearance on behalf

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<sup>3</sup> The complaint erroneously includes two Count Six.

of all four Defendants on December 15, 1993. By Order entered May 18, 1994, Valley Bank was joined as a Plaintiff. Attorney Edward J. Leahy represents both Plaintiffs.

At the time of trial, Trustee Craig had cash and assets totaling \$43,970.27 to pay administrative costs and claims. Unpaid, allowed claims against the estate totaled \$108,934.68 (all unsecured), of which Valley Bank holds a claim for \$107,653.15 (98.8%). John Gridley apparently owes the estate \$4,000.00. Valley Bank is holding \$9,459.71 in excess funds from the sale of the stock collateral. Pamela Jaudes may have in her possession jewelry that belongs to the bankruptcy estate. Furs that are estate property were to be turned over to Trustee Craig at the conclusion of the trial. Other estate assets may have been sold by the Gridley children to pay family legal and burial costs and to support Pamela Jaudes's defense of her proof of claim.

*Patricia Gridley's Financial Status.*

When Patricia Gridley transferred the Pana Development Company stock on July 14, 1989, she had the following assets (values are approximate):

|                                    |    |                  |
|------------------------------------|----|------------------|
| cash                               | \$ | 12,039.57        |
| money market fund                  |    | 4,750.98         |
| life insurance (cash value)        |    | 3,400.00         |
| condominium (net after sale costs) |    | 120,000.00       |
| stocks                             |    | 84,538.25        |
| jewelry                            |    | 10,000.00        |
| other personalty                   |    | <u>70,000.00</u> |
| Total:                             |    | \$304,728.80     |

Her liabilities to Valley Bank (\$213,566.41), First Interstate Bank (\$7,959.76), and Accountant Richard Fait (\$1,332.42) totaled \$222,858.59. Her assets exceeded her liabilities by \$81,870.21. She had met all her usual living expenses in 1989 and 1990 with personal funds, including proceeds from the sale of jewelry. Patricia Gridley had sufficient cash, marketable personalty, and publicly traded stock that she could have sold to pay the condominium loan in full. Moreover, her appeal of the state court surcharge of her interest in the Hadleigh D. Hyde Trust was pending on July 14, 1989, so she still thought she had a beneficial interest in the Trust.

By late 1989 and early 1990, Patricia Gridley's financial status had changed somewhat. She had paid Accountant Fait in full on January 26, 1990. She had paid her loan to First Interstate Bank with sale of the stock used as collateral but she then had a fully secured note with Valley Bank for the \$38,536.48 that was used to pay the interest due Hand County State Bank on the condominium loan and to pay Jack Gridley's unsecured note with Hand County State Bank. Interest of \$3,112.88 on the condominium loan that was due December 29, 1989 was not paid.

If the condominium had sold in early 1990, the sale would have netted \$120,000.00, based on expert testimony by Abbie Pagone, an active Sioux Falls area real estate agent. This net sale price would have left a deficiency of \$73,112.72 plus interest after December 29, 1989 on the condominium loan and real estate taxes to the date of sale.

## II.

Plaintiffs' statutory claims are governed by S.D.C.L. §§ 54-8A-4(a)(1), 54-8A-4(a)(2), and 54,8A-5(a). Plaintiffs bear the burden of proof. Whether a conveyance is fraudulent is a question of fact, not law. *Piner v. Jensen*, 519 N.W.2d 337, 339 (S.D. 1994). It may be established by circumstantial evidence. *Andrews v. Reynolds*, 409 N.W.2d 128, 130 (S.D. 1987) (citing *Kary v. Kary* 318 N.W.2d 334, 338 (S.D. 1982)). A close relationship between the parties of a conveyance justifies heightened scrutiny of the transfer for indicia of fraud. *Andrews*, 409 N.W.2d at 130 (cites therein). Failure to advise a creditor of a conveyance constitutes substantial evidence of a fraudulent transfer. *Id.* (citing *First National Bank of Beresford v. Anderson*, 291 N.W.2d 444, 446 (S.D. 1980)).

Plaintiffs' equitable claims are governed by South Dakota's common law. To obtain any equitable relief, Plaintiffs must first establish that they do not have an adequate remedy at law. *Life Benefit, Inc. v. Forbragd*, 298 N.W. 259, 260 (S.D. 1941). A remedy at law is adequate if it is "in all respects as efficacious as the remedy in equity." *Id.* The legal remedy must protect the right asserted by the aggrieved party or afford redress for a violation of the right asserted. *Winchester-Western Division of Olin Mathieson Chemical Corp. v. Gibson Dakota, Inc.*, 160 N.W.2d 413, 414 (S.D. 1968).

For recovery under the theories of unjust enrichment or restitution, Plaintiffs must show that Defendants were unjustly

enriched at the expense of another party. *A.G. Edwards & Sons, Inc. v. Northwest Realty Co.*, 340 N.W.2d 187, 189 (S.D. 1983) (citing *Thurston v. Cedric Sanders Co.*, 125 N.W.2d 496, 498 (S.D. 1963)). Defendants may be required to make restitution of the value of the enrichment unless Defendants innocently changed their position to such a degree as to make restitution inequitable. *Id.*

For recovery under the equitable theory of implied contract, Plaintiffs must show that Defendants' conduct manifested the existence and terms of an unwritten agreement with Hand County State Bank or its assignee, Valley Bank. *Lien v. McGladrey & Pullen*, 509 N.W.2d 421, 423 (S.D. 1993). Implied contracts are "fictions of the law adopted to achieve justice where no true contract exists." *Mahan v. Mahan*, 121 N.W.2d 367, 369 (S.D. 1963). "The pertinent inquiry is whether the facts and circumstances properly evaluated permit an inference that services were rendered in expectance by one of receiving and the other of making compensation." *Id.* In other words, if a benefit is conferred on a party who accepts or acquiesces in that benefit and if it would be inequitable to receive that benefit without paying for it, a contract between the parties will be implied. *Amert Construction Co. v. Spielman*, 331 N.W.2d 307, 310 (S.D. 1983) (cites therein).

### III.

#### *Plaintiffs' Objections to Certain Deposition Testimony.*

Plaintiffs' objection to the August 31, 1994 deposition testimony of Attorney Nasser on page 40, lines 1 through 10, is

overruled. Attorney Nasser's answer gave the reasons Debtor offered for not giving her husband anything under her will. The answer was based on Attorney Nasser's discussions with her and did not require speculation by Attorney Nasser on what Debtor intended.

Plaintiffs' objections to the August 31, 1994 deposition testimony of Attorney Nasser on page 64, line 25, and page 65, lines 1 through 18, are sustained to the extent that Attorney Nasser said Jack Gridley would think Attorney Nasser would handle Patricia Gridley's probate estate. That portion of the answer is stricken as speculative. Attorney Nasser's statement that Jack Gridley "obviously knew" that Attorney Nasser had Patricia Gridley's will may stand, as Attorney Nasser was not putting words in Jack Gridley's mouth nor speculating what Jack Gridley knew or thought.

Plaintiffs' objection to the August 29, 1994 deposition testimony of Attorney Gerry on pages 58 and 59 of the transcript is sustained. The pleadings filed and the transcript of the hearing adequately set forth who objected to the proposed auction sale by Trustee Craig and the grounds for those objections. Attorney Gerry's testimony could add nothing on that topic.

*Statutory Claims.*

Count One fails because Debtor did not transfer the Pana Development Company stock to her children with the *actual* intent to hinder, delay, or defraud her creditors, as required by S.D.C.L. § 54-8A-4(a)(1). Although Defendants are insiders as to Debtor, as defined by S.D.C.L. § 54-8A-1(7)(i)(A). Patricia Gridley

transferred the Pana Development Company stock to them as gifts because she wanted to keep the Pana Development Company assets on her side of the family and because she wanted to protect the Pana Development Company assets from Jack Gridley's imprudent business schemes. The transfer was not made in reaction to any of her dealings with creditors. Debtor was assisted by legal counsel in making these gifts. Counsel was confident that she made the gifts voluntarily for the purposes stated above. Debtor timely filed a gift tax return. She did not contribute to the undervaluation of the stock on the return. The gifts initially were kept confidential only as to Jack Gridley because of his prior meddling in Patricia Gridley's financial affairs and because Patricia Gridley did not want to face his acrimony. Debtor did not retain possession or control of the Pana Development Company stock after she made the gifts to her children. Debtor had no knowledge of pending suits or threats of suits at the time of the gifts. Finally, after making the gifts, Debtor possessed sufficient assets to cover her liabilities.

Count Two fails because on the date she transferred the Pana Development Company stock to her children, Debtor was not engaged in any business or transaction nor planning to engage in any business or transaction whose financial soundness would be impaired by the transfer of the Pana Development Company stock to her children without consideration, as required by S.D.C.L. § 54-8A-4(a)(2). At the time of the transfer, Debtor was not employed or engaged actively in any business or transaction,

including the financial problems regarding her condominium. Jack Gridley, not she, was handling the condominium financial arrangements with little or no consultation with her. Debtor did not contemplate entering into any new business or transactions. She was paying her usual living expenses timely, including the association fees on her condominium. Debtor was not incurring large debts nor spending her money beyond her means. Debtor had sufficient assets, excluding the Pana Development Company stock, to cover her liabilities. Moreover, on July 14, 1989, Debtor still expected benefits from the Hadleigh D. Hyde Trust and she had no foresight that the mortgage on the condominium loan would be foreclosed and that a deficiency would result.

Count Three fails because Debtor was not insolvent, as defined by S.D.C.L. § 54-8A-5(a) on the date she gave the Pana Development Company stock to her children nor did she become insolvent by the gift. Upon a fair valuation, Debtor's assets exceeded her debts on July 14, 1989. Her liabilities to Valley Bank and First Interstate Bank totaled \$222,858.59 and her assets totaled at least \$304,728.80, excluding the Pana Development Company stock.

*Equitable Claims.*

All equitable theories offered by Plaintiffs fail because Plaintiffs had adequate remedies at law. The Uniform Fraudulent Conveyance Act, S.D.C.L. Ch. 54-8A, offered Hand County State Bank, Houston Haugo, and Valley Bank (Hand County State Bank's assignee) the means to seek recovery of the deficiency upon an appropriate showing of fraud. While Valley Bank's state court complaint for

recovery under Chapter 54-8A was stayed by Debtor's petition in bankruptcy, the stay did not alter or diminish the relief Trustee Craig could seek post-petition under 11 U.S.C. § 544(b) when it stepped into Valley Bank's shoes. Moreover, recovery by Trustee Craig under § 544(b) and S.D.C.L. Ch. 54-8A would have voided the Pana Development Company stock transfer to the extent necessary to benefit the estate. *Moore v. Bay*, 284 U.S. 4, 5 (1931). Thus, Plaintiffs' potential recovery would not have been limited to the size of Valley Bank's claim. *Id.* Further, Plaintiffs have not shown how the equitable theories plead are not subsumed by S.D.C.L. Ch. 54-8A nor shown how Chapter 54-A8 fails to protect the rights they assert or fails to provide redress for a violation of the rights they assert. See *Winchester-Western Division*, 160 N.W.2d at 414.

Equitable relief also is not warranted because Houston Haugo and Valley Bank had sufficient knowledge and ability to require additional collateral from the Gridleys when Valley Bank took over the condominium loan from Hand County State Bank. The assignment of the condominium loan was several months after Patricia Gridley gifted the Pana Development Company stock to her children and Houston Haugo was aware of the gift at the time of the assignment. Patricia Gridley had other unsecured assets that Valley Bank could have taken as additional collateral for the condominium loan. Instead, Hand County State Bank and Valley Bank charged higher interest rates to reflect their risk on the loan to the Gridleys. Further, due to his relationship with Jack Gridley, Houston Haugo

did not address timely Hand County State Bank's poor collateral position on the condominium loan and he failed to obtain a timely resolution of the problem. Unpaid interest increased substantially while Houston Haugo waited with Jack Gridley for a more fortuitous resolution.

The equitable theories of unjust enrichment, restitution, and implied contract of Count Six also fail because Plaintiffs presented insufficient evidence to sustain these claims. There was no evidence of an implied contract between Hand County State Bank and Debtor, Hand County State Bank and Defendants, Valley Bank or Houston Haugo and Debtor, Valley Bank or Houston Haugo and Defendants, or Patricia Gridley and Defendants. Patricia Gridley offered no conduct that implied she was contracting her Pana Development Company stock as collateral for the condominium loan. Defendants at most offered words of settlement with Houston Haugo and Valley Bank. They did not exhibit any conduct that manifested an intent to offer their Pana Development Company Stock as collateral for their parents' condominium loan or to insure payment of the loan. Any discussions between Debtor and Defendants regarding their future support of her did not arise above familial concern for her well-being.

Finally, there was no evidence that Defendants were unjustly enriched at Valley Bank's expense. Valley Bank did not confer a benefit on Defendants for which Defendants must equitably be required to make restitution. Defendants played no role in Patricia and Jack Gridley obtaining loans from Hand County State

Bank or Valley Bank. The children had no obligation to protect Valley Bank or improve Valley Bank's collateral position.

Within ten days of entry of this Memorandum Decision, Defendants shall submit to the Court a proposed Judgment. No costs shall be awarded to any party.

Dated this 27<sup>th</sup> day of March, 1995.

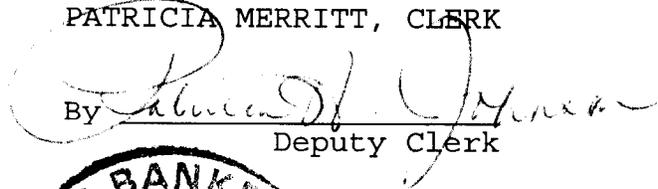
BY THE COURT:



Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By   
Deputy Clerk

**NOTICE OF ENTRY**  
Under F.R.Bankr.P. 9022(a)  
Entered

**MAR 27 1995**

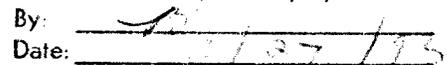
Patricia Merritt, Clerk  
U.S. Bankruptcy Court, District of S.D.



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to all parties in interest set forth on the attached service list.

Patricia Merritt, Bankruptcy Clerk

By:   
Date: 3/27/95

Case: 93-04046 Form id: 122 Ntc Date: 03/27/95 Off: 4 Page : 1  
Total notices mailed: 14 / 0

Plaintiff Craig, James A. 427 N. Minnesota, #101, Sioux Falls, SD 57104  
Debtor Gridley, Patricia H. c/o Frank P. Gibbs, Esq., 101 S. Main Ave. #611, Sioux Falls, SD 57102  
Plaintiff Valley Bank, PO Box 8915, Madison, WI 53708-8915  
Aty Leahy, Edward J. PO Box 1030, Sioux Falls, SD 57101  
Aty Gerry, Clair R. PO Box 966, Sioux Falls, SD 57101-0966  
Aty Sanford, Steven W. PO Box 1157, Sioux Falls, SD 57101-1157  
Aty Crew, Michael B. PO Box 923, Sioux Falls, SD 57101-0923  
Aty Nadolski, David PO Box 1920, Sioux Falls, SD 57101-3020  
Aty Stuart, Brian J. PO Box 966, Sioux Falls, SD 57101  
~~Interests U.S. Trustee, Chivers Square, Suite 502, 230 S. Phillips Avenue, Sioux Falls, SD 57102~~  
Aty Nail, Charles L. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57102