

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)
)
LESLIE CAREY)
)
Debtor)
_____)

Chapter 7 Case
Number 91-10130

LESLIE CAREY)
)
Plaintiff)

vs.)
)
THE UNITED STATES OF AMERICA)
)
Defendant)
_____)

Adversary Proceeding
Number 91-1033

IN RE:)
)
LESLIE CAREY)
)
Debtor)
_____)

Chapter 7 Case
Number 91-10130

THE UNITED STATES OF AMERICA)
)
Plaintiff)

vs.)
)
LESLIE CAREY)
SHARRELL B. CAREY)
SHARRELL P. CAREY AND)
A. STEPHENSON WALLACE, TRUSTEE)
)

Adversary Proceeding
Number 91-1065

Defendants)

ORDER

Leslie E. Carey, the Chapter 7 debtor in the underlying case, brought adversary proceeding No. 91-1033 against the United States of America (hereinafter "the United States" or "the Government") seeking a determination that certain tax obligations assessed by the Internal Revenue Service are discharged in his Chapter 7 case. The United States brought adversary proceeding No. 91-1065 against debtor¹ seeking a determination as to the extent and validity of federal tax liens asserted against property alleged to be property of debtor's bankruptcy estate by virtue of a fraudulent conveyance under State law. By order dated July 5, 1991 I consolidated trial of the two adversary proceedings. Based on the evidence presented at trial and relevant legal authorities, I make the following findings.

¹The Government also named as defendants Sharrell B. Carey, debtor's wife; Sharrell Patrice Carey, debtor's daughter; A. Stephenson Wallace, the Chapter 7 trustee; and Trust Company Mortgage, the holder of a first mortgage on property which is the subject of adversary proceeding No. 91-1065. Suntrust Mortgage Company, successor by merger to defendant Trust Company Mortgage, was dismissed as a defendant by order dated October 2, 1991. Sharrell B. Carey and Sharrell Patrice Carey filed a joint answer to the Government's complaint raising a jurisdictional objection based on the fact that they are nondebtors. As the Government's complaint makes no prayer for relief as to Sharrell B. Carey and Sharrell B. Carey claims no interest in the property which is the subject of the Government's adversary proceeding, dismissal of the Government's complaint as to Sharrell B. Carey is appropriate. Jurisdiction is proper as to Sharrell Patrice Carey for the reasons stated later in this decision.

FINDINGS OF FACT

In 1978 debtor formed an automobile radio repair business in Martinez, Georgia known as the "Radio Doctor." The Government presented as evidence various "Certificate[s] of Assessments and Payments" which indicate debtor incurred the following tax liability in connection with the operation of the Radio Doctor:

<u>Type of Tax</u>	<u>Taxable Period</u>	<u>Account Balance</u>	<u>Date of First Notice to Debtor</u>
940	1984	159.95	Apr. 6, 1987
940	1985	159.37	Apr. 6, 1987
941	3rd qtr., 1983	302.64	Dec. 2, 1985
941	1st qtr., 1984	121.85	Sept. 1, 1985
941	3rd qtr., 1984	698.17	Feb. 25, 1985
941	4th qtr., 1984	1,432.54	Apr. 6, 1987
941	1st qtr., 1985	1,873.89	Apr. 6, 1987
941	2nd qtr., 1985	414.56	Nov. 11, 1985
941	3rd qtr., 1985	2,594.47	Apr. 6, 1987
941	4th qtr., 1985	2,344.60	Apr. 6, 1987

(Government's exhibit No. 3).

Additionally, a certificate of assessment reflects debtor and his wife, Sharrell B. Carey ("Mrs. Carey"), are jointly and severally liable in the amount of Four Thousand One Hundred Sixty-Three and 39/100 (\$4,163.39) Dollars for income taxes owed for the year 1985 and were sent notice of their income tax liability on February 26, 1990. (Government's exhibit No. 3). Debtor's total federal tax liability is Fourteen Thousand Two Hundred Sixty-Five and 47/100 (\$14,265.47) Dollars.² Of debtor's total tax liability for Form

²Although this figure differs from the total tax liability indicated in the Government's proposed findings of fact and conclusions of law (\$14,901.11) and its supplemental proposed

findings of fact and conclusions of law (\$17,928.24), it is based on the only evidence of debtor's tax liability submitted by

taxes (income and social security taxes required to be withheld from the earnings of the employees of the Radio Doctor), \$5,588.75 reflects the "trust fund" portion of these taxes.³ Debtor presented no evidence to contradict the correctness or validity of the assessments of federal tax liability evidenced by the certificates of assessment. Demand for payment has been made by the Government and the taxes remain unpaid. Notices of federal tax liens have been duly filed by the Internal Revenue Service.

Debtor was previously employed as Chief of the Martinez Volunteer Fire Department. On January 6, 1987 debtor, having pled guilty to various criminal charges in connection with his embezzlement of funds belonging to the fire department, was sentenced to five years in prison by the Columbia County Superior Court. At that time debtor and his wife were the joint owners of their residence at 119 Warren Road, Augusta, Georgia (hereinafter the "house" or the "real estate"), more particularly described as

the Government, the certificates of assessment. (Government's Exhibit No. 3). Although debtor disputes the amount of his outstanding federal tax liability, he offers no evidence to rebut the certificates of assessment.

³This figure is taken from the Government's supplemental proposed findings of fact and conclusions of law. Although the Government presented no evidence to support how it arrived at this figure, debtor concedes that the "trust fund" portion of his tax liability is \$8,000 (see debtor's proposed findings of fact and conclusions of law); therefore, the Government's figure is taken as correct.

follows:

All that tract of parcel of land, with all improvements thereon, situate, lying and being in Richmond County, Georgia, and being known and designated as Lot No. One (1), in Block "D" on a plat of Gardner Woods Subdivision recorded in the office of the Clerk of Superior Court of Richmond County, Georgia, in Realty Book 15-U, Page 148; specific reference being made to said plat for a more complete description as to the location, metes, courses and distances of the property herein described. Said property is bounded: North by West Road; East by Warren Road; South by Lot No. 2 of Block "D" of said plat; and West by property now or formerly of Mrs. Lillie F. West.

subject to an outstanding mortgage of approximately Eight Thousand and No/100 (\$8,000.00) Dollars⁴ held by Trust Company Mortgage, Inc. (now Suntrust). On January 14, 1987 debtor and his wife each conveyed by separate quit claim deeds a one-half interest in the real estate to their daughter, Sharrell Patrice White ("Mrs. White").⁵ The quit claim deed executed by debtor provides that the transfer of the real estate to his daughter was "in consideration of the sum of Ten Dollars (\$10.00 and other valuable consideration) .

⁴This figure is derived from debtor's bankruptcy schedules. Debtor's schedules were not introduced as evidence. However, the court may take judicial notice of the file in the underlying case. In re: Jackson, 49 B.R. 298 (Bankr. Kan. 1985); In re: Hatcher, Ch. 13 case No. 89-10834 (Bankr. S.D. Ga. Dalis, J. March 14, 1990); In re: Moraetes, Ch. 13 case No. 88-11384 (Bankr. S.D. Ga. Dalis, J. June 6, 1989). See also Allen V. Newsome, 795 F.2d 934 (11th Cir. 1986) (district court may take judicial notice of prior habeas corpus applications filed by petitioner in proceeding on habeas corpus petition).

⁵At the time of the transfer, Mrs. White was not yet married and her name was Sharrell Patrice Carey.

. . . " (Government's exhibit No. 1; debtor's exhibit No. 2). The quit claim deed does not specify what "other valuable consideration" was given in exchange for the transfer of title. Debtor, Mrs. Carey and Mrs. White testified that as consideration for title to the house, Mrs. White, who lived with debtor and Mrs. Carey, agreed to take care of her mother, who was to undergo surgery for cancer, during debtor's prison term which at the time of the transfer appeared would be five years. Debtor, Mrs. Carey and Mrs. White also testified that they agreed Mrs. White would be responsible for paying the household bills, including the mortgage payment on the house while debtor was in prison. Debtor also testified that he believed his daughter's management position at a Dairy Queen restaurant would make it easier for her to obtain credit, if for any reason borrowing was necessary to maintain the household, than it would be for Mrs. Carey because Mrs. Carey had not worked outside the home for many years. Debtor further testified that in transferring title to the house to his daughter, it was understood that he and Mrs. Carey would be free to live in the house for the rest of their lives or until they chose to move.

Debtor admitted that following the transfer of his onehalf interest in the house to his daughter, his only assets were some "shop equipment," kept in storage. He presented no evidence detailing the equipment or its value. Debtor previously owned a pickup truck, but also transferred title to the truck to his daughter at about the same time title to the house was transferred.

Debtor testified that at the time he transferred his one half interest in the house, it was his belief that all federal taxes

due had been paid. In support, debtor tendered into evidence a cancelled check payable to the Internal Revenue Service for One Thousand One Hundred Twenty-Seven and 70/100 (\$1,127.70) Dollars, dated August 21, 1985. (debtor's exhibit No. 7). Each certificate of assessment presented as evidence by the Government (Government's exhibit No. 3) was issued in 1990 or after.

On July 23, 1987, after debtor had served approximately six months of his five-year jail sentence, an order was entered by the Superior Court remoulding debtor's jail term to allow him to serve the remaining four and one-half years of his sentence outside of prison. Debtor was released and returned to live at the house. During part of the six months debtor was in jail, his daughter took care of Mrs. Carey, as agreed, and combined her pay along with that of Mrs. Carey's, who had obtained a minimum wage part-time job at the same Dairy Queen where Mrs. White was employed, to pay the household expenses, including the Suntrust mortgage. In May 1987, the daughter married, moved out of the house, and ceased making mortgage payments or caring for her mother. Title to the real estate remains in Mrs. White's name. Debtor and his wife currently reside at the house, and except for debtor's six-month jail term, debtor has lived there for twenty years.

In October, 1990 the United States initiated an action against debtor in the district court, case No. CV190-224, seeking to set aside debtor's transfer of his one-half interest in the house as a fraudulent conveyance. On January 23, 1991 debtor filed for protection under Chapter 7 of the Bankruptcy Code, staying the district court action pursuant to 11 U.S.C. §362(a). Debtor did not list

the real estate in his bankruptcy schedules as an asset; however, debtor listed the Suntrust mortgage as a liability.

At trial debtor presented as evidence a letter from the Office of the Richmond County Tax Commissioner indicating the value of the real estate in 1987 was Thirty-Seven Thousand Eight Hundred Twenty-Five and No/100 (\$37,825.00) Dollars. (debtor's exhibit No. 1). Debtor also tendered a property tax assessment issued by Richmond County indicating the value of the real estate was Forty Five Thousand Three Hundred Thirty and No/100 (\$45,330.00) Dollars as of November 30, 1987. (debtor's exhibit No. 6). The United States proposes that the current value of the property is Forty Eight Thousand Nine Hundred and No/100 (\$48,900.00) Dollars. Debtor contends the current fair market value of the real estate is between Thirty-Seven Thousand (\$37,000) and Forty-Seven Thousand (\$47,000) Dollars. Based on the evidence presented, I find the current fair market value of the real estate for purposes of resolving these adversary proceedings is at least Forty-Five Thousand and No/100 (\$45,000.00) Dollars.

The United States contends that debtor's transfer of his one-half interest in the house to his daughter constitutes a fraudulent conveyance under Georgia law and that the real estate is therefore property of the estate under 11 U.S.C. 541; that federal tax liens attach by operation of law to the real estate, subject to Suntrust's mortgage, securing the Government's lien; that the "trust fund" portion of debtor's tax liability is a nondischargeable debt under 11 U.S.C. §523(a)(1)(A), whether or not there was a fraudulent conveyance; and that if a fraudulent conveyance occurred, debtor's

entire tax liability is nondischargeable under 11 U.S.C. §523(a)(1)(C). Debtor denies that the transfer of his one-half interest in the house constitutes a fraudulent conveyance and contends that to the extent the Government's claim in his Chapter 7 case is nondischargeable it is unsecured.

CONCLUSIONS OF LAW

Mrs. White, a nondebtor, contends this court lacks jurisdiction as to her in the adversary proceeding filed by the Government. Pursuant to 28 U.S.C. §157(b)(1) the bankruptcy court has jurisdiction over debtor's complaint to determine dischargeability and over the Government's complaint to determine the validity and priority of liens, which under 28 U.S.C. §157(b)(2)(I) and (K), respectively, are core proceedings. Additionally, this court has jurisdiction over a cause of action seeking to avoid and recover a fraudulent conveyance under State law as a core proceeding, which cause of action if successful would render the property, that is subject of the fraudulent conveyance, property of the bankruptcy estate over which estate property this court also has jurisdiction. 28 U.S.C. §157(b)(2)(H), 1471(e). Subject matter jurisdiction over the causes of action asserted is in the bankruptcy court. Mrs. White is personally subject to the jurisdiction of this court. The fact that she is not a debtor in this court does not render her immune from the nationwide service of process established under Bankruptcy Rule 7004. In fact she does not challenge the service of process. As the title holder of the property that is the subject of the Government's complaint, over which this court has subject matter jurisdiction, she is a necessary

party to the action and subject to service of process. This court has jurisdiction over her person to render a final judgment binding upon her.

The United States, a creditor, seeks to set aside debtor's transfer of his one-half interest in the house as a fraudulent transfer pursuant to applicable State law. As the avoidance powers of a trustee or debtor-in-possession under 11 U.S.C. §544(b) are unavailable to creditors,⁶ see Boyd v. Martin Exploration Co., 56 B.R. 776, 781 (E.D. La. 1986), the United States asserts a State law cause of action seeking to set aside an alleged fraudulent conveyance pursuant to Official Code of Georgia Annotated (O.C.G.A.) §18-2-22.

Debtor argues that the Government's fraudulent conveyance action is barred under the doctrine of laches. Although laches may bar a claim prior to the running of the applicable statute of limitations,⁷ "to prevail on a plea of laches, it is essential that the pleading party prove harm cause him by the delay." Clover Rlty. Co. v. J.L. Todd Auction Co., 240 Ga. 124, 239 S.E.2d 682, 683

⁶The Chapter 7 trustee, apparently having determined that there is no value in the debtor's interest in the real estate above available homestead exemptions due to the liens asserted against the property by Suntrust and the United States and thus no benefit for the unsecured creditors, has opted not to bring an avoidance action pursuant to 11 U.S.C. §544(b).

⁷Debtor does not contend that Georgia's statute of limitations for bringing a fraudulent conveyance action bars the Government's claim. There is no statutory limitations period for asserting a fraudulent conveyance in Georgia; however, case law has interpreted the limitations period to be seven years. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486, 487 (1977); Beasley v. Smith, 144 Ga. 377, 381, 87 S.E. 293 (1915). The alleged fraudulent conveyance took place on January 14, 1987. The Government brought its action in the district court in October 1990, within the limitation period.

(1977). To the extent there has been a delay by the Government, debtor presents no evidence of resulting harm. The Government's fraudulent conveyance action is not barred by laches.

O.C.G.A. §18-2-22, entitled "Conveyances by debtors deemed fraudulent," provides:

The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:

(1) Every assignment or transfer by a debtor, insolvent at the time, of real or personal property or choses in action of any description to any person, either in trust or for the benefit of or on behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him;

(2) Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description had or made with intention to delay or defraud creditors, where such intention is known to the taking party; a bona fide transaction on a valuable consideration, where the taking party is without notice or ground for reasonable suspicion of said intent of the debtor, shall be valid; and

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

Except for transfers between husband and wife, the creditor bears the burden of proof by a preponderance of the evidence that a conveyance is fraudulent under O.C.G.A. §18-2-22. Stokes v. McRae, 247 Ga. 658, 278 S.E.2d 393, 395 (1981); Milligan v. Milligan, 209 Ga. 14, 70 S.E.2d 459, 461 (1952).

O.C.G.A. §18-2-22(1) renders null and void as to creditors a conveyance of property by the debtor while insolvent in an effort to place the property out of reach of creditors if some benefit is reserved for the debtor. Avary v. Avary, 202 Ga. 22, 41 S.E.2d 314, 321 (1947). Subsection (1) prevents an "attempt by the

assignment or transfer to cover up any portion of the debtor's property in trust for him, or in any way for his benefit, or of any favored creditor, so that it may not be reached by his creditors, should they elect to pursue it for the payment of their own claims." Avary, supra, 41 S.E.2d at 321 [quoting Lay v. Seago, 41 Ga. 82, _____ (1872)]. According to the testimony of the debtor and his daughter, Mrs. White, it was expressly agreed that following the transfer of the house to Mrs. White, the debtor and his wife would live in the house for as long as they desired. Debtor currently lives at the house and has lived there since his release from prison. Clearly, the debtor retained a "benefit" in the real estate within the intention of O.C.G.A. §18-2-22(1). Therefore, if the debtor was "insolvent at the time" of the transfer, the transfer was fraudulent under O.C.G.A. §18-2-22(1). Debtor was insolvent under O.C.G.A. §18-2-22(1) "at the time" of the transfer if after the conveyance his remaining property was insufficient to pay his existing debts. See Chambers v. Citizens and Southern Nat. Bank, 242 Ga. 498, 249 S.E.2d 214, 217 (1978); Avary, supra, 41 S.E.2d at 321. Debtor testified that his only assets following the conveyance were some "shop equipment," to which no evidence of value was tendered, and a pickup truck which was also transferred to his daughter. The Government has established 940 and 941 taxes and income taxes due from the debtor at the time of the transfer of Fourteen Thousand Two Hundred Sixty-Five and 47/100 (\$14,265.47) Dollars. (Government's exhibit No. 3). Debtor owned insufficient assets following his transfer of the house to pay his existing debts. Debtor was insolvent under O.C.G.A. §18-2-22(1). Therefore,

his transfer of his one-half interest in the house was a fraudulent conveyance under Georgia law. O.C.G.A. §18-2-22(1).⁸

The transferee of a fraudulent conveyance holds any assets fraudulently transferred in trust for the benefit of the transferor's creditors, Edwards v. United Foods Brokers, 195 Ga. 1, 22 S.E.2d 812, 816 (1942), and the assets transferred are subject to those debts existing at the time of the conveyance. Id. All of debtor's federal tax indebtedness accrued at the close of the respective taxable years in question (see, Government's exhibit No. 3), In re: Orlinski, 1991 Bankr. LEXIS 1864, Bankr. L. Rep. (CCH) P74, 482 (Bankr. S.D. Ga. Dalis, J. Dec. 16, 1991), In re: Dominguez, 67 B.R. 526, 528 (Bankr. N.D. Ohio 1986), In re: Conti, 50 B.R. 142, 148 (Bankr. E.D. Va. 1985), prior to the transfer of the house on January 14, 1987. The house, an asset fraudulently conveyed by the debtor, is subject to debtor's tax indebtedness. Edwards, supra. The Government having given notice to debtor of his tax liability and demanded payment thereof and the debtor having failed to pay the taxes owed, federal tax liens attached by operation of law to the real estate on the respective dates of assessment for each type of tax liability and for each year specified in the certificates of assessment. 26 U.S.C. §§6321,⁹

⁸Having determined under subsection (1) of O.C.G.A. §18-2-22 that the transfer in question was a fraudulent conveyance, I do not reach subsections (2) and (3).

⁹26 U.S.C. §6321 provides:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in

6322.¹⁰ Thus, the Government holds a valid lien on the real estate to the extent of Fourteen Thousand Two Hundred Sixty-Five and 47/100 (\$14,265.47) Dollars, the amount of debtor's outstanding tax indebtedness as established by the certificates of assessment. (Government's exhibit No. 3). The value of the real estate is Forty-Five Thousand and No/100 (\$45,000.00) Dollars, subject to an outstanding mortgage held by Suntrust in the approximate amount of Eight Thousand and No/100 (\$8,000.00) Dollars. Debtor's one-half interest in the property is therefore Eighteen Thousand Five Hundred and No/100 (\$18,500.00) Dollars, which exceeds his total federal tax liability. The balance of equity is within the debtor's available exemptions. See O.C.G.A. §44-13-100.

The Government argues that the "trust fund" portion of debtor's federal tax liability, that portion of the tax indebtedness which reflects debtor's personal liability for failing to withhold and pay over to the United States personal income and social security taxes from the pay of employees of the Radio Doctor for the years 1983, 1984 and 1985, Five Thousand Five

addition thereto) shall be a lien in favor of the United States upon all property and all rights to property, whether real or personal, belonging to such person.

¹⁰26 U.S.C. §6322 provides:

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

Hundred Eighty-Eight and 75/100 (\$5,588.75) Dollars, is a nondischargeable debt under 11

U.S.C. §523(a)(1)(A). The Government further argues that if I determine debtor's transfer of his one-half interest in the house was a fraudulent conveyance of property under State law, debtor's entire tax obligation is nondischargeable pursuant to 11 U.S.C. 523(a)(1)(C). The creditor objecting to discharge, here the United States, must establish an exception to discharge by a preponderance of the evidence. Grogan v. Garner, ___ U.S. ___, 111 S.Ct. 654, 112 L.E.2d 755 (1991).

Section 523(a) provides in pertinent part,

A discharge under section 727 . . . does not discharge an individual debtor from any debt-

(1) for a tax . . .

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title [11], whether or not a claim for such tax was filed or allowed; . . . or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . .

Relevant to the Government's argument under 523(a)(1)(A), §507(a)(7)¹¹ provides in pertinent part:

(a) The following expenses and claims have priority in the following order: . . .

(7) Seventh, allowed unsecured claims of governmental units only to the extent that such claims are for-- . . .

(C)¹² a tax required to be collected or

¹¹The exception to discharge provided for by §523(a)(1)(A) in conjunction with §507(a)(2) is not applicable in this case.

¹²As debtor's bankruptcy petition was filed more than three years after the close of each taxable year in question, the exception to discharge for the kind of tax and the period specified in §507(a)(7)(A)(i), see §523(a)(1)(A), cannot be established by the Government; and, other than the kind of tax specified in §507(a)(7)(C), the remainder of §507(a)(7) is not applicable to this case.

withheld and for which the debtor is liable in whatever capacity.

There are no statutory provisions limiting the time within which an exception to discharge pursuant to §523(a)(1)(A) of the kind of tax specified in §507(a)(7)(C) may be asserted. Compare §507(a)(7)(A)(i). Likewise, there is no time limitation imposed for asserting dischargeability of a tax debt pursuant to 11 U.S.C. §523(a)(1)(C). 3 Collier on Bankruptcy, §523.06[4] (L. King 15th ed. 1992).

Debtor does not dispute his liability for the "trust fund" portion of his total federal tax liability or that this portion of his tax liability is nondischargeable. (See debtor's proposed findings of fact and conclusions of law p. 4). The "trust fund" portion of debtor's total federal tax liability, Five Thousand Five Hundred Eighty-Eight and 75/100 (\$5,588.75) Dollars, is nondischargeable pursuant to 11 U.S.C. §523(a)(1)(A) as a debt described at §507(a)(7)(C).

Concerning the remainder of debtor's federal tax liability, the Government erroneously equates a fraudulent conveyance under State law to grounds for an exception to discharge under 11 U.S.C. §523(a)(1)(C). Although in a given case it may be that the particular facts support findings that both a State law fraudulent conveyance occurred and that an exception to discharge under 523(a)(1)(C) is justified, the elements of a fraudulent conveyance under O.C.G.A. §18-2-22 do not necessarily establish a "willful[] attempt[] in any manner to evade or defeat" a tax. 11 U.S.C. §523(a)(1)(C). Each subsection of O.C.G.A. §18-2-22 sets forth circumstances which, if proven, render a

transfer of property null and void as to the transferor's creditors. The elements of a

fraudulent transfer under any subsection of O.C.G.A. §18-2-22 are separate and distinct from and have no intended relation to the exception to discharge provided for in bankruptcy by 11 U.S.C. §523(a)(1)(C). In this case, to establish an exception to discharge under 11 U.S.C. §523(a)(1)(C), the Government must show that the debtor willfully attempted to avoid payment of his federal taxes, not that a fraudulent conveyance under State law occurred.¹³ In re: Jones, 116 B.R. 810 (Bankr. Kan. 1990); but cf. In re: Gathwright, 102 B.R. 211, 213 (Bankr. D. Or. 1989) (holding that evidence of a willful attempt to evade or defeat Payment of a tax is "not relevant to a determination of nondischargeability").

The phrase "in any manner" in §523(a)(1)(C) is "sufficiently broad to include willful attempts to evade taxes by concealing assets to protect them from execution or attachment" In re: Jones, supra, at 814. Because fraudulent intent is not typically susceptible to direct proof, courts look to certain "badges of fraud" in ascertaining whether there was a scheme to defraud. In re: Kaiser, 722 F.2d 1574, 1582 (2nd Cir. 1983). The following factors are indicative of an intent to defraud and apply in the context of 11 U.S.C. §523(a)(1)(C):

- (1) a transfer made to a member of the family;
- (2) a transfer made at a time when a large liability was fixed, about to become fixed, or about to be collected;
- (3) a transfer for little or no

¹³The Government makes no argument nor presents any evidence that the debtor filed a fraudulent tax return. See 11 U.S.C. §523(a)(1)(C).

consideration; (4) a transfer made when the debtor was insolvent or which rendered the debtor insolvent;
(5) a transfer in which the debtor retained

concealed control over the asset; and
(6) the debtor engaged in other questionable practices during the same time period.

In re: Sumpter, 136 B.R. 690, 701 (Bankr. E.D. Mich. 1991). Each of these "badges of fraud" is present in this case. Debtor's transfer of his one-half interest in the house was to a family member, his daughter. Debtor transferred title when his tax liability was fixed. The transfer was for little or no consideration. Debtor was rendered insolvent by the transfer. Following the transfer, debtor retained use and enjoyment of the real estate. Finally, debtor engaged in other questionable practices during the same period of time in transferring ownership of his only other item of property of potential value, his pickup truck, to his daughter. Although debtor testified that he believed on January 14, 1987, the date of the transfer, that the check dated August 21, 1985 (debtor's exhibit No. 7) satisfied his federal tax indebtedness existing at that time, the Government's uncontradicted certificates of assessment indicate that debtor received notice from the Government of at least some of his outstanding tax liability subsequent to August 21, 1985 and prior to January 14, 1987. (Government's exhibit No. 3). Moreover, at the time of the transfer debtor's entire federal tax liability was fixed and, as to the Form 940 and 941 taxes, debtor knew or should have known whether those taxes were paid as a result of his involvement in the day to day operation of his business. See In re: DeLorenzi, 1988 WL 159150 (Bankr. S.D. Ill. 1988); see also Wright v. United States, 809 F.2d 425 (7th Cir.

1987) (holding that a person responsible for withholding income and social security taxes from the wages of another taxpayer has an affirmative duty to investigate whether the taxes have been withheld and paid over to the United States). Debtor's conduct evidences a scheme to defraud the United States by attempting to place his assets beyond its reach. The Government has established by a preponderance of the evidence that debtor willfully attempted to evade or defeat payment of his entire federal tax liability. Cf. In re: Sumpter, supra; In re: Jones, supra. See also In re: Kaiser, supra. Debtor's conduct renders his entire federal tax obligation a nondischargeable debt. 11 U.S.C. §523(a)(1)(C).

It is therefore ORDERED that defendant Sharrell B. Carey is dismissed from the Government's complaint in adversary proceeding No. 91-1065;

further ORDERED that judgment is entered in favor of the United States in adversary proceeding No. 91-1033 and in adversary proceeding No. 91-1065;

further ORDERED that the transfer of the undivided onehalf interest of Leslie E. Carey, debtor in Chapter 7 bankruptcy case No. 91-10130, to Sharrell Patrice Carey n/k/a Sharrell Patrice White in and to the property known and designated as 119 Warren Road, Augusta, Georgia and more particularly described as follows:

All that tract of parcel of land, with all improvements thereon, situate, lying and being in Richmond County, Georgia, and being known and designated as Lot No. One (1), in Block "D" on a plat of Gardner Woods Subdivision recorded in the office of the Clerk of Superior Court of Richmond County, Georgia, in Realty Book 15-U, Page 148; specific reference being made to said plat for a more complete description as to the location, metes, courses

and distances of the property herein described. Said property is bounded: North by West Road; East by Warren Road; South by Lot No. 2 of Block "D" of said plat; and West by property now or formerly of Mrs. Lillie F. West.

by quit claim deed dated January 14, 1987 and recorded in the Office of the Clerk of Superior Court of Richmond County, Georgia in Realty Reel 250 at page 1385 is set aside and declared null and void as a fraudulent transfer pursuant to O.C.G.A. §18-2-22(1). Title is vested in the debtor rendering the debtor's undivided one-half interest property of the bankruptcy estate pursuant to 11 U.S.C. §541(a)(7);

further ORDERED that the federal tax lien of the United States against the debtor Leslie E. Carey is determined a valid enforceable lien against the debtor's undivided one-half interest in the aforescribed property subject to the security interest of Suntrust Mortgage Co.;

further ORDERED that the aforesaid property is abandoned by the trustee pursuant to 11 U.S.C. §554(b);

further ORDERED that the United States is allowed a secured claim in debtor's Chapter 7 bankruptcy proceeding in the amount of Fourteen Thousand Two Hundred Sixty-Five and 47/100 (\$14,265.47) Dollars; and

further ORDERED debtor's indebtedness to the United States of Fourteen Thousand Two Hundred Sixty-Five and 47/100 (\$14,265.47) Dollars is not discharged in the underlying Chapter 7 proceeding case No. 91-10130. No monetary damages are awarded.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 14th day of May, 1992.