

Constructive Trust  
Laches  
Reconsideration

Schacher v. Dolph, Adversary No. 07-3326-rld  
Donald Brian Dolph, Case No. 04-37320-rld13

6/11/08; RLD Unpub.  
Reconsideration  
Denied  
7/24/08

Applying the standards for imposing a constructive trust, the court made an equitable determination in favor of plaintiff, awarding \$1,840.07 in damages, enforceable by a lien against defendant's residence. Plaintiff moved for reconsideration of the amount of damages. The court denied the motion on the basis that (1) no new evidence had been offered, and (2) no "manifest error" of law or fact had been established. See Brown v. Wright, 588 F.2d 708, 710 (9th Cir. 1978); Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 73 (9th Cir. BAP 1995).

P08-7(27)

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9 UNITED STATES BANKRUPTCY COURT  
10 FOR THE DISTRICT OF OREGON

11 In Re: ) Bankruptcy Case  
12 DONALD BRIAN DOLPH, ) No. 04-37320-rld13  
13 Debtor. )  
14 \_\_\_\_\_ )  
15 JIM SCHACHER, ) Adversary Proceeding  
16 Plaintiff, ) No. 07-03326-rld  
17 v. )  
18 DONALD BRIAN DOLPH, )  
19 Defendant. )  
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1 adjourned confirmation hearing on December 2, 2004, that the value of Mr.  
2 Dolph's residence (the "Residence") was \$143,500. See Docket No. 37 in  
3 the Main Case, Case No. 04-37320-rld13 ("Main Case").

4 Prior to the Trial, the court reviewed the parties' trial  
5 memoranda and the authorities cited therein. At the Trial, the court  
6 heard the testimony of witnesses presented by both parties and the  
7 arguments of counsel. Having carefully considered the parties' arguments  
8 in light of the evidentiary record from the Trial and relevant legal  
9 authorities, this Memorandum Opinion sets forth the court's findings of  
10 fact and conclusions of law under Fed. R. Civ. P. 52(a), applicable in  
11 the Adversary Proceeding pursuant to Fed. R. Bankr. P. 7052.

#### 12 Factual Background

13 "He that troubleth his own house shall inherit the wind."  
14 Proverbs, 11:29

15 This Adversary Proceeding is the latest battleground in an  
16 inheritance dispute among stepbrothers and stepsisters that has gone on  
17 for years.

18 Mr. Schacher is the duly appointed personal representative of  
19 the Estate of Patricia M. Schacher in Multnomah County Circuit Court  
20 probate case # 0308-91347, which was filed in August 2003 and is still  
21 pending. Patricia M. Schacher ("Patricia") was the mother of Mr. Dolph  
22 and the stepmother of Mr. Schacher. Patricia married William O. Schacher  
23 ("William"), Mr. Schacher's father, on June 2, 1970. On November 14,  
24 1988, William and Patricia entered into an Agreement to Execute Wills  
25 ("Agreement to Execute Wills") that provided that if one predeceased the  
26 other, all property of the deceased spouse would pass to the survivor,

1 but upon the death of the survivor, the probate estate would be allocated  
2 one-third to Patricia's children and two-thirds to William's children.  
3 Exhibit 2, at 12-13. Paragraph 4 of the Agreement to Execute Wills  
4 further provided that: "Each of the parties agree[s] that no  
5 modification shall be made to the provisions contained in their joint  
6 Wills except by written agreement." Exhibit 2, at 12. On the same date,  
7 Patricia and William each had prepared, and executed, a will consistent  
8 with the provisions of the Agreement to Execute Wills. Exhibit 2, at 1-  
9 11. Under each will, the survivor between William and Patricia was  
10 appointed as the personal representative of the estate, but the alternate  
11 personal representative under each will was William's daughter, Linda  
12 Ahlstrom. Exhibit 2, at 3 and 9. The Agreement to Execute Wills  
13 superseded a prior agreement between William and Patricia, dated June 2,  
14 1970, to execute mutual wills that provided for distributions from the  
15 ultimate survivor's estate to be allocated one-fourth to Patricia's  
16 children and three-fourths to William's children. Exhibit 1, at 11-12.

17 William died on February 4, 1992. On the date of his death,  
18 neither the Agreement to Execute Wills nor his will, dated November 14,  
19 1988, had been amended. Thereafter, Patricia had prepared, and executed,  
20 two codicils to her will: On March 3, 1992, less than 30 days after  
21 William's death, Patricia signed a codicil appointing Mr. Dolph as the  
22 personal representative of her estate in place of William's daughter, Ms.  
23 Ahlstrom. Exhibit 3. On February 2, 2001, Patricia signed a codicil  
24 providing for distributions of \$30,000 each to Mr. Dolph and her  
25 daughter, Marilyn Feik, prior to the distributions among her children and  
26 William's children, as provided for in her will dated November 14, 1988.

1 Exhibit 4, at 1. The codicil stated that Patricia already had  
2 distributed during her lifetime \$30,000 to her daughter Janis Churchill  
3 aka Janis Cates. Exhibit 4, at 1. Patricia died on July 3, 2003.

4 In 1992, Mr. Dolph was divorced and moved in with Patricia. In  
5 1995, Patricia authorized Mr. Dolph to sell a 1985 Ford pickup truck and  
6 RV trailer that had belonged to William, resulting in net proceeds of  
7 approximately \$19,000 that Mr. Dolph was allowed to retain. Mr. Dolph  
8 used those funds to make the down payment and pay closing costs for his  
9 purchase of the Residence.

10 On August 20, 2001, Patricia changed the beneficiary  
11 designation on an IRA account at Merrill Lynch, holding appreciated IRA  
12 funds received from William at his death, to make Mr. Dolph a 50%  
13 beneficiary. Exhibit 20. Mr. Dolph received his designated portion of  
14 the IRA account funds after Patricia's death, in the amount of  
15 \$21,540.42, net of taxes. Exhibits 29, 39, and 51, at 1.

16 Before Patricia's death, Mr. Schacher was informed by William  
17 and Patricia's long-time neighbor and friend, Ron McAtee, that Patricia  
18 was dissipating assets to her children. In fact, on cross-examination,  
19 Mr. McAtee testified that Patricia told him that she was not going to  
20 give anything to Mr. Schacher's kids, and she did not like them.

21 Mr. Schacher was able to obtain copies of the 1988 wills and  
22 the Agreement to Execute Wills, but was not able to obtain copies of  
23 Patricia's codicils until after Patricia's death. Shortly after  
24 Patricia's death in July 2003, Mr. Schacher retained counsel to represent  
25 his interests regarding Patricia's estate. Exhibit 22. On August 1,  
26 2003, Mr. Schacher's counsel wrote to Warner Allen, who had represented

1 Mr. Dolph in his divorce proceedings and had been contacted by Mr. Dolph  
2 to initiate probate proceedings for Patricia's estate, advising that  
3 counsel considered the March 3, 1992 codicil to Patricia's will, changing  
4 the alternate personal representative from Linda Ahlstrom to Mr. Dolph,  
5 to be legally unenforceable in light of the terms of the Agreement to  
6 Execute Wills. Exhibit 24, at 1. Mr. Schacher's counsel further advised  
7 that he had no opposition to Mr. Allen filing a petition to admit  
8 Patricia's will to probate, but would oppose any motion to have anyone  
9 other than Mr. Schacher appointed as personal representative. Exhibit  
10 24, at 2, and Exhibit 25. Shortly thereafter, Mr. Allen filed a petition  
11 for admission of Patricia's will to probate and for the appointment of  
12 Mr. Dolph as personal representative of the estate. Exhibit 26. The  
13 battle lines were drawn.

14 After contested proceedings in the probate court, Mr. Schacher  
15 was appointed as the personal representative of Patricia's estate on  
16 October 3, 2003. Exhibit 53, at 1. The record reflects that the parties  
17 sparred over a series of property issues, with Mr. Dolph turning over to  
18 Mr. Schacher miscellaneous personal property items and used furniture.  
19 Exhibits 58 and 62-64. It is particularly telling in considering how the  
20 protracted disputes between the parties have been fought out that Mr.  
21 Schacher and Mr. Dolph engaged in a short, intense and bitter exchange at  
22 the Trial (before the court put a stop to it) over the disposition of a  
23 used 48-inch television set that was last seen in Patricia's retirement  
24 center room some time before her death.

25 Ultimately, Mr. Schacher, in his capacity as personal  
26 representative of Patricia's estate, sued Mr. Dolph and his two sisters

1 in Multnomah County Circuit Court for damages totaling \$230,252.60 (the  
2 "Probate Litigation"). Exhibit 66. The claim against Mr. Dolph  
3 individually for distributions received from Patricia and her estate  
4 totaled \$75,111.70, itemized in paragraph 7 of the Probate Litigation  
5 complaint as follows:

6	1) 1992 transfer of 1984 Chrysler wagon	\$ 2,500.00
7	2) 1992 transfer of 1973 Dodge Charger	\$ 2,000.00
8	3) 1995 transfer from sale of 1985 Ford pickup and trailer	\$19,000.00
9	4) 1993-2001 transfers from Merrill Lynch account 311-59F456	\$ 9,333.70
10	5) 1993-2001 transfers from Wells Fargo accounts	\$ 1,640.00
11	6) 1993-2001 transfer from Yosemite Bank account	\$ 300.00
12	7) Distribution from Merrill Lynch IRA account	\$30,338.00
13	8) Series EE Bond	\$10,000.00
14		<hr/>
	TOTAL	\$75,111.70

15 Exhibit 66, at 3-4.

16 Before the Probate Litigation came to trial, Mr. Dolph filed  
17 his chapter 13 bankruptcy petition on July 8, 2004. Exhibit 73 at 1. In  
18 his Schedule F listing of unsecured claims, Mr. Dolph listed Mr.  
19 Schacher's claim as undisputed in the amount of \$75,112. Exhibit 73, at  
20 6. Mr. Schacher filed a proof of claim in Mr. Dolph's bankruptcy in  
21 behalf of Patricia's estate. Exhibit 74. Mr. Schacher's claim was by  
22 far the largest unsecured claim listed by Mr. Dolph in his schedules.  
23 Mr. Schacher's claim set forth the principal amount of the claim against  
24 Mr. Dolph at \$65,111.70 plus \$10,000 for the Series EE Bond in Mr.  
25 Dolph's name. Exhibit 74, at 2. The proof of claim also estimated the  
26 "Total Net Value of the [Probate] Estate" at \$438,808.61, to be split 2/3

1 to William's children and their descendants and 1/3 to Mr. Dolph and his  
2 sisters. Exhibit 74, at 2. Mr. Dolph's share of Patricia's estate,  
3 calculated from Mr. Schacher's proof of claim, is 1/3 of \$146,254.91, or  
4 \$48,751.64. Exhibit 74, at 2.

5 On December 15, 2006, the Multnomah County circuit court  
6 entered a judgment in favor of Mr. Schacher against Mr. Dolph's sister,  
7 Marilyn Feik, in the amount of \$88,319.97, plus interest at the Oregon  
8 state judgment rate of 9%. Exhibit 77. The record does not reflect how  
9 much, if anything, Mr. Schacher has collected from Ms. Feik on his  
10 judgment against her. The record further does not reflect that Mr.  
11 Schacher has obtained a judgment or collected anything in behalf of  
12 Patricia's estate on his claims against Mr. Dolph's other sister, Janis  
13 Cates.

14 Mr. Dolph has completed payments under his confirmed chapter 13  
15 plan, and Mr. Schacher received payments on his bankruptcy claim, to  
16 which no objection was filed, totaling \$14,519.99. Exhibit 80, at 2.<sup>1</sup>  
17 The \$10,000 Series EE Bond in Mr. Dolph's name was found by Mr. Schacher  
18 when he had Patricia's safety deposit box drilled open following her  
19 death. Mr. Schacher was granted relief from stay in order to realize  
20 upon the Series EE Bond in behalf of Patricia's estate by order of this  
21 court entered on October 29, 2004. Main Case Docket No. 33.

#### 22 Jurisdiction

23 This court has jurisdiction to hear and enter a final judgment  
24 in the Adversary Proceeding under 28 U.S.C. §§ 1334 and 157(a) and (b) (1)

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25  
26 <sup>1</sup>Apparently, no other unsecured claims were filed or allowed in the case.



1 and (2) (B) and (O).

2 Issues

3 1. Is Mr. Schacher's pursuit of a constructive trust remedy  
4 barred by laches?

5 2. Is Mr. Schacher entitled to prejudgment interest on his  
6 claims in behalf of Patricia's estate?

7 3. Has Mr. Schacher met his burden of proof to establish that  
8 a constructive trust should be imposed?

9 4. If a constructive trust is imposed, what should the  
10 judgment amount be, and on what asset(s) should the constructive trust be  
11 imposed?

12 Discussion

13 At the outset, some preliminary matters need to be addressed.

14 First, Mr. Dolph's chapter 13 case was commenced before  
15 Congress passed the Bankruptcy Abuse Prevention and Consumer Protection  
16 Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23. Consequently, the  
17 more liberal provisions of the pre-BAPCPA chapter 13 "superdischarge"  
18 under 11 U.S.C. § 1328 apply, and as recognized by counsel for Mr.  
19 Schacher during oral argument at the Trial, Mr. Schacher's claim for the  
20 imposition of a constructive trust is, in effect, the last arrow in Mr.  
21 Schacher's quiver available to aim at Mr. Dolph. All of Mr. Schacher's  
22 other claims that have been asserted or that could have been asserted  
23 against Mr. Dolph in the Probate Litigation will be permanently enjoined  
24 and precluded by Mr. Dolph's chapter 13 discharge.

25 In addition, among the defenses argued by counsel for Mr. Dolph  
26 in his trial memorandum was the assertion that the "strong-arm" powers of

1 a trustee under 11 U.S.C. § 544(a)(3) preclude the imposition of an  
2 equitable constructive trust, at least as to the Residence, based on the  
3 chapter 13 trustee's status as a hypothetical bona fide purchaser from  
4 the point in time when Mr. Dolph's chapter 13 petition was filed. After  
5 the court advised the parties of its tentative positions on the arguments  
6 advanced by the parties at the beginning of the Trial, before the  
7 presentation of testimony, Mr. Dolph's counsel expressly waived that  
8 argument, and the court will not address it further in this Memorandum  
9 Opinion.

10 1. Mr. Schacher's claim to impose a constructive trust is not barred by  
11 laches.

12 Mr. Dolph argues that the Adversary Proceeding to impose a  
13 constructive trust on his assets is time-barred, applying the doctrine of  
14 laches, and the complaint should be dismissed because Mr. Schacher  
15 delayed too long in bringing the Adversary Proceeding after obtaining  
16 full knowledge of relevant facts regarding Mr. Dolph's receipt of asset  
17 transfers. Mr. Dolph asserts that Mr. Schacher had full knowledge of the  
18 transfers from Patricia and her estate to him at the latest by the date  
19 of confirmation of Mr. Dolph's chapter 13 plan, December 20, 2004. The  
20 Adversary Proceeding was filed more than three years later on  
21 December 31, 2007. It is Mr. Dolph's position that it is not fair for  
22 Mr. Schacher to have waited to file the Adversary Proceeding until Mr.  
23 Dolph had essentially completed his chapter 13 plan obligations, after  
24 approximately three and one-half years of plan payments. The delay has  
25 resulted in substantial prejudice to Mr. Dolph by increasing his expenses  
26 in chapter 13 and delaying his discharge. Mr. Dolph argues that the

1 court should apply by analogy the Oregon two-year statute of limitations  
2 for fraud or deceit under O.R.S. § 12.110(1). Under that standard, the  
3 Adversary Proceeding complaint was filed too late.

4 Both parties recognize that laches is an equitable defense,  
5 citing Menard v. Menard, 180 Or. App. 181, 42 P.2d 359 (Or. Ct. App.  
6 2002).

7 [I]t is well established in Oregon law that mere lapse  
8 of time does not constitute laches. The question is  
9 whether the enforcement of the claim would be  
10 equitable. This is to be determined by an examination  
11 of all of the circumstances of the particular case.  
12 The factor of greatest significance is the presence or  
13 absence of injury to another. Indeed, the Oregon  
14 courts have repeatedly stated that such injury is an  
15 essential element of the defense. (citations  
16 omitted).

17 West Los Angeles Inst. for Cancer Research v. Mayer, 366 F.2d 220, 228  
18 (9th Cir. 1966).

19 As counsel for Mr. Schacher points out in his supplemental  
20 trial memorandum ("Supplemental Memorandum"), to which Mr. Dolph's  
21 counsel objected because it was filed the day before the Trial, the right  
22 of Patricia's estate to bring a constructive trust claim expressly was  
23 reserved in the order ("Confirmation Order") confirming Mr. Dolph's  
24 chapter 13 plan (see Main Case Docket No. 38), and Mr. Dolph cannot have  
25 been surprised, and should have been prepared, when Mr. Schacher asserted  
26 that right and filed the Adversary Proceeding. The court has considered  
27 the Supplemental Memorandum and takes judicial notice of the Confirmation  
28 Order.

29 However, in addition, waiting until plan payments were  
30 essentially complete before the parties had to confront Mr. Schacher's

1 constructive trust claims may have saved them time and money, or at least  
2 did not increase their expenses. At plan confirmation, the parties did  
3 not have more than an estimate of what distributions would be made under  
4 Mr. Dolph's plan on Mr. Schacher's claim. It is theoretically possible  
5 that when distributions under the plan were complete, Mr. Schacher might  
6 have decided not to pursue the constructive trust claims at all. It is  
7 also possible that if such claims had been brought earlier, the court  
8 would have abated their pursuit while plan payments were made, so that  
9 the plan distributions would not be dissipated in legal wrangling. The  
10 court agrees with Mr. Schacher that Mr. Dolph and his counsel could not  
11 have been surprised by the constructive trust claims asserted in the  
12 Adversary Proceeding. In these circumstances, Mr. Dolph did not suffer  
13 such prejudice as would support a laches defense, and the court finds  
14 that it would be inappropriate to dismiss the Adversary Proceeding as a  
15 matter of equity, applying the doctrine of laches.

16  
17 2. Mr. Schacher is not entitled to prejudgment interest on his  
constructive trust claim.

18 The asset transfers in issue between the parties extend over a  
19 considerable period of time and reach back at least until 1992. Mr.  
20 Schacher asserts that the estate is entitled to prejudgment interest at  
21 the 9% Oregon state judgment rate from the date of each transfer with  
22 respect to which a constructive trust is imposed. Such a result would be  
23 contrary to Ninth Circuit law.

24 Imposition of a constructive trust is an equitable remedy, and  
25 such a "trust" is not a property interest until its existence has been  
26 determined by a judicial decision.

1 A constructive trust is a remedy; as such, it is  
2 inchoate until its existence is established by court  
3 order. Elliott v. Frontier Properties (In re Lewis W.  
4 Shurtleff, Inc.), 778 F.2d 1416, 1419 (9th Cir. 1985)  
5 (“No state court decree imposing a [constructive]  
6 trust exists in the present case; thus appellants’  
7 entitlement to such a remedy is inchoate, at best.”);  
8 North American Coin, 767 F.2d at 1575; Airwork Corp.  
9 v. Markair Express, Inc. (In re Markair, Inc.), 172  
10 B.R. 638, 642 (9th Cir. BAP 1994)...Because it is a  
11 remedy, a constructive trust cannot affect rights in  
12 the res until it is imposed. (emphasis in original).

13 Taylor Assoc. v. Diamant (In re Advent Management Corp.), 178 B.R. 480,  
14 488 (9th Cir. BAP 1995).

15 A constructive trust judgment in this Adversary Proceeding  
16 would in effect establish the principal amount of the constructive trust  
17 res that would bear interest at the federal judgment rate from the date  
18 that the judgment is entered.

19 3. Mr. Schacher has met his burden of proof to establish that a  
20 constructive trust should be imposed.

21 Under Oregon law, the party seeking to impose a constructive  
22 trust bears the burden of proof to establish each of three elements:

23 (1) the existence of a confidential or fiduciary  
24 relationship; (2) a violation of a duty imposed by  
25 that relationship; and (3) failure to impose the  
26 constructive trust would result in unjust enrichment.

27 Hollen v. Fitzwater, 125 Or. App. 288, 292, 865 P.2d 1298 (Or. Ct. App.  
28 1993), rev. den., 319 Or. 80, 876 P.2d 783 (1994), as quoted in Brown v.  
29 Brown, 206 Or. App. 239, 251, 136 P.3d 745 (Or. Ct. App. 2006). A  
30 constructive trust is imposed by a federal court if appropriate under the  
31 applicable standards of underlying state law. See, e.g., Murphy v. T.  
32 Rowe Price Prime Reserve Fund, Inc., 8 F.3d 1420 (9th Cir. 1993). The

1 court will address each of the three elements for imposing a constructive  
2 trust in Oregon in turn.

3 A. Fiduciary relationship

4 Mr. Schacher alleges that Mr. Dolph engaged in a conspiracy  
5 with Patricia after William's death to divert assets from William's  
6 children to Patricia's children. Mr. Dolph's position is that he did not  
7 breach any duty in accepting gifts from his mother, and there is no  
8 evidence that he acted in any way to influence his mother in making such  
9 gifts to him. However, at least from 1995, when Mr. Dolph received  
10 approximately \$19,000 from Patricia to allow him to purchase the  
11 Residence, Mr. Dolph was aware that Patricia was making substantial gifts  
12 of assets to her children. Patricia nominated Mr. Dolph to serve as  
13 personal representative of her estate on her death, and Mr. Allen filed a  
14 probate petition at Mr. Dolph's request, applying for an order appointing  
15 Mr. Dolph as the personal representative of Patricia's estate. Mr.  
16 Schacher only was appointed personal representative of the estate after  
17 probate court proceedings contested by Mr. Dolph. In his trial  
18 memorandum, counsel for Mr. Dolph concedes that a fiduciary relationship  
19 "likely did exist." The court finds based on the record presented at  
20 Trial that Mr. Schacher has met his burden of proof to establish the  
21 existence of a fiduciary relationship between Mr. Dolph and Patricia's  
22 estate.

23 B. Breach of duty

24 Following Patricia's death, when Mr. Dolph was working with Mr.  
25 Allen to initiate probate proceedings, the letter communications from Mr.  
26 Schacher's counsel to Mr. Allen, commencing on August 1, 2003, alerted

1 Mr. Dolph both to the argument that appointment of Mr. Dolph as personal  
2 representative was contrary to the Agreement to Execute Wills and that  
3 Mr. Schacher contended that Patricia's children had been the recipients  
4 of inappropriate transfers of assets from Patricia. See Exhibits 24 and  
5 25. Yet, during the period while the contest to determine who would  
6 serve as personal representative of Patricia's estate was playing out,  
7 Mr. Dolph arranged for distributions to himself and his sister, Marilyn  
8 Feik, of all funds from the Merrill Lynch IRA account. Mr. Schacher  
9 challenged the IRA transfer as inappropriate in the Probate Litigation,  
10 and Mr. Dolph included the entire damages claim asserted against him by  
11 Mr. Schacher in the Probate Litigation as undisputed in his bankruptcy  
12 schedules. In these circumstances, the court finds that Mr. Schacher has  
13 met his burden of proof to establish that Mr. Dolph breached a duty to  
14 Patricia's estate.

15 C. Unjust enrichment

16 Mr. Dolph does not contest that he received approximately  
17 \$75,112 from Patricia and/or her estate. Based on the calculations  
18 contained in the proof of claim filed by Mr. Schacher in Mr. Dolph's  
19 bankruptcy case, Mr. Dolph's estimated share of Patricia's estate is  
20 approximately \$48,751.64. From this evidence in the record, the court  
21 finds that Mr. Schacher has met his burden of proof to establish that Mr.  
22 Dolph was unjustly enriched from the asset transfers he received from  
23 Patricia and/or her estate. Accordingly, the court ultimately finds that  
24 all of the elements required for the imposition of a constructive trust  
25 in this Adversary Proceeding have been met.

26 / / /

1 4. What is the appropriate remedy to impose?

2 The court starts from the proposition that the transfers  
3 received by Mr. Dolph from Patricia and her estate total \$75,111.70, as  
4 alleged by Mr. Schacher in the complaint in the Probate Litigation. See  
5 Exhibits 66 and 74, at 2. Mr. Dolph does not dispute that total. See  
6 Exhibit 73, at 6. However, Mr. Schacher concedes that Mr. Dolph is  
7 entitled to a \$10,000 credit for the Series EE bond in his name that was  
8 recovered by the estate, and the estate received a total of \$14,519.99  
9 from Mr. Dolph's chapter 13 plan payments. See Exhibit 80, at 2.  
10 Deducting those credits from the \$75,111.70 total, leaves a balance of  
11 \$50,591.71.

12 As previously noted, Mr. Dolph's estimated legitimate share of  
13 Patricia's estate, calculated from the proof of claim filed by Mr.  
14 Schacher in Mr. Dolph's bankruptcy case, is \$48,751.64. In his testimony  
15 and during argument from his counsel, Mr. Schacher asserted that the  
16 court cannot rely on that number because the estate is still attempting  
17 to collect its judgment against Mr. Dolph's sister, Marilyn Feik, and no  
18 judgment, let alone recovery, has yet been obtained against Mr. Dolph's  
19 sister, Janis Cates. Accordingly, Mr. Schacher would have this court  
20 impose a constructive trust on the Residence for the full amount of  
21 \$50,591.71 that the estate has not collected on its claim against Mr.  
22 Dolph and allow Mr. Dolph to recover in the future his one-ninth share of  
23 the net estate whenever it ultimately is settled.

24 The probate of Patricia's estate has been pending from early  
25 August, 2003 with no end in sight. From argument, the court understands  
26 that Mr. Schacher and his siblings have received no distributions from



1 the probate estate, a state of affairs that undoubtedly has exacerbated  
2 the bad feelings that have given rise to this litigation. However,  
3 frankly, the court does not understand why Mr. Schacher cannot apply to  
4 allow distributions from available estate assets. The court further does  
5 not believe that equity can or would be served by sanctioning, in effect,  
6 the taking of Mr. Dolph's home, after he has complied fully with the  
7 requirements of his chapter 13 plan and is ready to be discharged, and  
8 requiring him to participate in a modern-day reenactment of Jarndyce v.  
9 Jarndyce from Dickens' Bleak House.

10           The only evidence presented at the Trial as to Mr. Dolph's  
11 legitimate share of Patricia's estate is from Mr. Schacher's proof of  
12 claim, that estimates Mr. Dolph could expect to receive \$48,751.64.  
13 Subtracted from the balance, after credits, of the estate's claim against  
14 Mr. Dolph, the court calculates that he has been unjustly enriched to the  
15 extent of \$1,840.07, an amount well within the amounts of any of the  
16 larger transfers from Patricia or her estate to Mr. Dolph challenged by  
17 Mr. Schacher, including the transfer of the funds to enable Mr. Dolph to  
18 make the down payment on purchase of the Residence and the IRA transfer.  
19 The court specifically rejects the argument that a constructive trust  
20 should be imposed on the Residence to the extent of \$50,591.71 or even  
21 the approximately \$19,000 transferred to Mr. Dolph in 1995, which he used  
22 to acquire his interest in the Residence, because there is no evidence in  
23 the record that Mr. Dolph has been unjustly enriched in such amounts. In  
24 addition, imposing such a remedy, requiring Mr. Dolph to transfer equity  
25 in his Residence currently and wait for a recovery from the estate, is  
26 unworkable in the absence of a settlement because a condition to

1 confirmation of Mr. Dolph's chapter 13 plan, incorporated in the  
2 Confirmation Order, was that Mr. Dolph abandon any claim to a  
3 distribution from Patricia's estate. See Main Case Docket No. 38, at 3.

4 Conclusion

5 Based on the foregoing review of the evidence presented at  
6 Trial and analysis of the arguments made by the parties, the court  
7 concludes that a constructive trust should be imposed in favor of Mr.  
8 Schacher, as personal representative of Patricia's estate, on Mr. Dolph's  
9 Residence, the one asset acquired using assets transferred from Patricia  
10 to Mr. Dolph with available equity value, in the amount of \$1,840.07.  
11 The court will prepare the judgment to be entered, consistent with the  
12 conclusions set forth in this Memorandum Opinion, after a further hearing  
13 at which the parties' input as to the form of the judgment will be  
14 requested by the court.

15 ###

16 cc: Richard J. Parker  
17 Brian Wheeler  
18 Brian D. Lynch  
19 U.S. Trustee  
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9 UNITED STATES BANKRUPTCY COURT  
10 FOR THE DISTRICT OF OREGON

11 In Re: ) Bankruptcy Case  
12 Donald Brian Dolph, ) No. 04-37320-rld13  
13 Debtor. )  
14 \_\_\_\_\_ )  
15 Jim J. Schacher, ) Adv. Proc. No. 07-03326-rld  
16 Plaintiff, )  
17 v. ) MEMORANDUM OPINION  
18 Donald Brian Dolph, ) (Motion for Reconsideration)  
19 Defendant. )  
20 \_\_\_\_\_ )

21 On June 11, 2008, I entered a memorandum opinion ("Opinion") in  
22 this adversary proceeding through which I determined, based on the  
23 evidence presented at the trial ("Trial") held June 4, 2008, that  
24 imposition of a constructive trust on the residence of Defendant, Donald  
25 Dolph ("Mr. Dolph"), in the amount of \$1,840.07 was appropriate. The  
26 facts of the dispute are set out in detail in the Opinion.



1 A new trial may be granted to all or any of the parties  
2 and on all or part of the issues . . . (2) in an action  
3 tried without a jury, for any of the reasons for which  
rehearings have heretofore been granted in suits in  
equity in the courts of the United States . . . .

4 The Ninth Circuit has held that "[t]here are three grounds for  
5 granting new trials in court-tried actions under Rule 59(a)(2): (1)  
6 manifest error of law; (2) manifest error of fact; and (3) newly  
7 discovered evidence." Brown v. Wright, 588 F.2d 708, 710 (9th Cir.  
8 1978). See also Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 73 (9th Cir.  
9 BAP 1995).

10 Mr. Schacher asserts that he has filed the Motion "to make one  
11 final attempt [to] try to get to a logical and fair decision that will  
12 both withstand review and put an end to the conflict so no more  
13 unnecessary costs will incur in an appeal process by Plaintiff." Mr.  
14 Schacher does not articulate whether he considers the Opinion to contain  
15 errors of law, errors of fact, or both. Further, he addresses neither  
16 the legal standards which entitle him to relief from the Opinion, nor how  
17 those standards are met by his Motion. Both the Motion and Mr.  
18 Schacher's Reply appear to be nothing more than additional argument with  
19 respect to the proper calculation of damages. Nevertheless, I have  
20 parsed the text of Mr. Schacher's pleadings in an effort to determine  
21 whether his argument meets the standards which would entitle Mr. Schacher  
22 to relief from the determinations made in the Opinion.

23  
24 B. The Motion Establishes No Basis for Relief From the Opinion

25 As noted above, under Ninth Circuit standards, in order to  
26 grant Mr. Schacher relief from the findings included in the Opinion, I

1 must find that the Opinion is based on either a manifest error of law or  
2 a manifest error of fact. Alternatively, I must find that Mr. Schacher  
3 has newly discovered evidence which he should be allowed to present. I  
4 address this alternative first.

5 1. No new evidence has been offered

6 At the conclusion of the presentation of testimony at the  
7 Trial, I closed the evidentiary record. At the scheduling hearing I  
8 conducted with respect to the Motion, I reminded Mr. Schacher's counsel  
9 that the record had been closed. Fed. R. Civ. P. 59 allows a party to  
10 request that the evidentiary record be reopened. If such a request were  
11 made, under Ninth Circuit standards I would need to evaluate whether any  
12 additional evidence offered is "new" evidence that was not available at  
13 the time of Trial. Mr. Schacher has not made any such request.  
14 Consequently, "newly discovered evidence" does not provide a basis for  
15 granting the Motion.

16 2. No "manifest error" of law or fact has been established

17 Immediately prior to the commencement of Trial, I recited on  
18 the record a series of tentative rulings based upon my review of the  
19 parties' submissions. In my tentative rulings, I stated not only my  
20 tentative conclusion of law that interest could not be imposed in favor  
21 of Mr. Schacher until the date a constructive trust was judicially  
22 imposed, I also gave the parties the benefit of my proposed calculation  
23 of the amount of the constructive trust I believed it would be  
24 appropriate to impose if the evidence presented did not change. With  
25 full knowledge of my tentative damages analysis, Mr. Schacher produced no  
26 evidence of damages to suggest that my proposed calculation was not

1 correct. Instead, Mr. Schacher testified, and his counsel emphasized at  
2 argument, that the amount of the Patricia Schacher probate estate  
3 ("Probate Estate") cannot be ascertained until complete recoveries have  
4 been made from Mr. Dolph and his sisters. As noted above, after the  
5 presentation of evidence at the Trial, but before closing arguments  
6 commenced, I closed the evidentiary record. The Opinion is consistent  
7 with my tentative rulings.

8 In the Motion, Mr. Schacher objects to my finding of the amount  
9 of the constructive trust I imposed. Mr. Schacher does not argue any  
10 manifest error of law. However, there are two components to my  
11 calculations to which Mr. Schacher objects. First, Mr. Schacher contends  
12 that the amount Mr. Dolph received is not properly determined where I did  
13 not factor in the cost to the Probate Estate inherent in the delay in  
14 recovering the funds wrongfully received by Mr. Dolph. Second, Mr.  
15 Schacher contends it is improper to credit Mr. Dolph for his legitimate  
16 share of the Probate Estate, either because that share cannot be  
17 determined at this time or, alternatively, because Mr. Dolph has waived  
18 that share through his confirmed chapter 13 plan.

19 I address first Mr. Schacher's contention that I incorrectly  
20 calculated the amount Mr. Dolph received as a result of improper  
21 distributions from his mother and her estate. Mr. Schacher asserts my  
22 calculated amount, \$50,591.71,<sup>1</sup> is a minimal calculation of Mr. Dolph's

---

24 <sup>1</sup>The parties agreed at trial that Mr. Dolph received \$75,111.70  
25 total, from which Mr. Dolph is entitled to deduct \$10,000 as a credit for  
26 the Series EE bond in his name that was recovered by the Probate Estate  
and \$14,519.99 as a credit for Mr. Dolph's chapter 13 plan payments ("the  
(continued...)

1 unjust enrichment. However, Mr. Schacher contends, this amount is  
2 insufficient because it does not return the Probate Estate to the  
3 position it would have been in had the transfers to Mr. Dolph not been  
4 made. Since the Probate Estate is not entitled to prejudgment interest,  
5 a point Mr. Schacher appears to concede, Mr. Schacher proposes that the  
6 \$19,000 which Mr. Dolph used to make the down payment on his home be  
7 deducted from the \$50,591.71, and in its place, the Probate Estate should  
8 receive \$58,495.00, which represents all of the equity which had accrued  
9 in the home as of the petition date. Mr. Schacher thus asserts that a  
10 lien in the amount of \$89,786.71 should be imposed upon Mr. Dolph's home,  
11 calculated as follows:

12	\$50,291.71	net amount received by Mr. Dolph reflecting the
13		Credits and an additional credit of \$300
14		representing expenses Mr. Dolph incurred in moving
15		his mother prior to her death
16	-\$19,000.00	portion of the \$50,291.71 Mr. Dolph used in making
17		the down payment on his home
18	<u>\$31,291.71</u>	
19	+\$58,495.00	equity in Mr. Dolph's home as of the petition date
20	<u>\$89,786.71</u>	

21 In his response to the Motion, Mr. Dolph points out that this  
22 proposed calculation is not proper, because it stems from an improper  
23 premise. Specifically, the determination the court is to make is not the  
24 amount it would take to make the Probate Estate "whole again as much as  
25 possible." Instead, the court is required to determine the amount by  
26 which Mr. Dolph was unjustly enriched, and the amount of any constructive

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25 <sup>1</sup>(...continued)  
26 Credits"). The \$50,591.71 amount is calculated by deducting the Credits  
from the \$75,111.70 actually received by Mr. Dolph.



1 trust is further limited to the amount of money directly traceable from  
2 inappropriate distributions by Patricia Schacher to Mr. Dolph, to Mr.  
3 Dolph's home. Mr. Dolph asserts that of the \$19,000 he received from  
4 Patricia in 1995, only \$16,269 was used for the purchase of his home:  
5 \$11,000 as the down payment and \$5,269 for closing costs and other fees.  
6 Mr. Dolph contends that the equity arose not only from his down payment,  
7 but also from \$19,600 in additional money he invested into the home in  
8 the form of repairs and upgrades, and from thirteen years of mortgage  
9 payments he has made. Subtracting out these amounts, estimated to total  
10 \$29,600, Mr. Dolph contends there is only \$28,895 equity that could be  
11 attributable to the down payment. Further, because the down payment  
12 represented only 10.38% of the value of the home at the time of its  
13 purchase, any share in the equity that could be asserted by the Probate  
14 Estate could not exceed \$2,999.30 (10.38% of \$28,895).

15 As set forth in the Opinion, "[b]ecause it is a remedy, a  
16 constructive trust cannot affect rights in the res until it is imposed."  
17 Taylor Assoc. v. Diamant (In re Advent Management Corp.), 178 B.R. 480,  
18 488 (9th Cir. BAP 1995). For this reason, it is no more appropriate to  
19 include in the constructive trust amount a component for appreciation of  
20 the real property, than it is to include prepetition interest.  
21 Accordingly, I am not persuaded that the finding of the net amount  
22 received by Mr. Dolph as stated in the Opinion, i.e., \$50,591.71, is  
23 clearly erroneous.

24 Next, I address Mr. Schacher's contention in his Reply that the  
25 constructive trust lien should be in the full amount received by Mr.  
26 Dolph, less the Credits, without factoring in any offset for Mr. Dolph's

1 legitimate share of the Probate Estate. In making this argument, Mr.  
2 Schacher relies on the following provision of Mr. Dolph's confirmed  
3 chapter 13 plan:

4 12. The debtor shall abandon any further claim to a  
5 distribution from the Estate of Patricia Schacher, and shall  
6 use his best efforts to assist the personal representative of  
the Estate to close the Estate.

7 I do not agree that this provision precludes Mr. Dolph from asserting, as  
8 an offset for purposes of calculating the amount by which he was unjustly  
9 enriched, his legitimate share of the Probate Estate. Instead, the  
10 provision constitutes a waiver by Mr. Dolph of the right to receive any  
11 additional distribution he otherwise might be entitled to receive from  
12 the Probate Estate and was included, at my insistence, as a means to  
13 facilitate distributions from the Probate Estate for the benefit of the  
14 other siblings and step-siblings.

15 Finally, in the Motion, Mr. Schacher objects to the use of a  
16 "hypothetical probate asset value" in determining the amount of the  
17 credit to be applied against the amount Mr. Dolph actually received. The  
18 difficulty for Mr. Schacher in this approach is that I cannot impose a  
19 constructive trust in any amount that exceeds the extent to which Mr.  
20 Dolph has been unjustly enriched. In order to calculate the amount Mr.  
21 Dolph was unjustly enriched, I am required to subtract the amount Mr.  
22 Dolph was entitled to receive from the Probate Estate from the amount he  
23 actually received.

24 As I stated in the Opinion, the only evidence presented at  
25 Trial as to Mr. Dolph's legitimate share of the Probate Estate was set  
26 forth in Mr. Schacher's proof of claim. This evidence, submitted by Mr.

1 Schacher, of the value of the Probate Estate may or may not reflect  
2 current reality. Having served for five years as the Personal  
3 Representative of the Probate Estate, it certainly was within Mr.  
4 Schacher's power at the time of Trial to provide evidence either of the  
5 current value of the Probate Estate, or a supported estimate of his  
6 opinion of the amount he believed would be available for distribution  
7 from the Probate Estate. Instead, Mr. Schacher asserted at Trial and  
8 continues to assert in the Motion that the Probate Estate value is not  
9 ascertainable until the Probate Estate is closed and ready for  
10 distribution. If that determination must wait until Mr. Dolph's sisters  
11 "pay up," as suggested by Mr. Schacher in his Reply, the Probate Estate  
12 value may not be ascertainable during the remaining lives of the parties  
13 before me.

14           The burden of proof on this issue was on Mr. Schacher. In  
15 making my calculation of unjust enrichment I used the only evidence Mr.  
16 Schacher offered on the subject. To the extent Mr. Schacher contends  
17 that the amount of the constructive trust should have been greater based  
18 on a diminished value of the Probate Estate, I find there was a failure  
19 of proof. As a bottom line matter, I find that I did not clearly err in  
20 determining the amount of the constructive trust to impose on Mr. Dolph's  
21 residence as a matter of equity.

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#### CONCLUSION

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A motion for reconsideration is not an opportunity to retry a  
matter previously decided. It provides an opportunity to correct  
"manifest error" or to present "newly discovered" evidence. Mr. Schacher

1 has failed to carry his burden that the calculation of the amount of the  
2 constructive trust resulted from manifest error of law or fact. I  
3 therefore deny the Motion. A separate form of order will be entered.

4 ###

5 cc: Richard J. Parker  
6 Brian Wheeler  
7 Brian D. Lynch, Trustee  
8 U.S. Trustee  
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