

11 U.S.C. § 101(31)

11 U.S.C. § 101(45)

11 U.S.C. § 547

Insider

Preference

Relative

Sticka v. Anderson (In re Anderson), Case No. 692-63583-AER7,
Adv. No. 93-6065-AER

3/21/94

Radcliffe, J.

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Debtor Gerald Anderson and defendant Ronald Anderson were brothers and the sons of Dorothy Anderson. When Dorothy Anderson died intestate, both were appointed co-personal representatives of her estate. They were also the only (equal) beneficiaries of her estate. During the administration of Dorothy's probate estate, the debtor, without the knowledge of the Ronald, converted assets of the probate estate to his own use. After the conversion was discovered, Ronald was appointed sole personal representative of the probate estate. Then, as personal representative of the estate, he sued the debtor under the Arizona Racketeering and Corrupt Influences Act (RICO) and obtained a judgment of \$1,800,000 against the debtor. More than 90 days but less and 1 year before the debtor filed his chapter 7 petition Ronald, in his capacity of personal representative of Dorothy's estate obtained a lien on a piece of the debtor's real property via a Writ of Attachment.

The trustee commenced this proceeding to avoid, as a preferential, the fixing of that lien. The issue presented to the court was whether Ronald, as personal representative of the estate

of Dorothy Anderson, was an insider of the debtor's bankruptcy estate.

The court held that the trustee could not avoid the fixing of the lien as preferential because Ronald was not an insider. The defendant in the preference action was the probate estate. Probate estates are not included in the Code's list of "per se" insiders, § 101(31). However, other entities not in the list of "per se" insiders will be considered insiders if they have a sufficiently close relationship with the debtor that their conduct make them subject to closer scrutiny than those dealing at arm's length with the debtor. Here, however, there was clearly an adversarial relationship between the debtor and the defendant and hence, the court held that the defendant was not an insider of the debtor.

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8 UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF OREGON
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11 IN RE)
12)
13 GERALD WAYNE ANDERSON,) Case No. 692-63583-AER7
14)
15 Debtor.)
16)
17 RONALD R. STICKA, Trustee,) Adversary Proceeding
18) No. 93-6065-AER
19 Plaintiff,)
20)
21 v.)
22)
23 GERALD WAYNE ANDERSON, JOELE) MEMORANDUM OPINION
24 BETH GOLDMAN, COREY GERALD)
25 ANDERSON AND RONALD W. ANDERSON,)
26 Domiciliary Foreign Personal)
Representative of the Estate of)
DOROTHY STEWART ANDERSON,)
Defendants.)

22 This matter comes before the court on the parties' cross-
23 motions for summary judgment. This adversary proceeding has been
24 brought by the trustee to avoid the fixing of a lien on the
25 debtor's interest in certain real property, to quiet title to the
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1 property, and for declaratory relief. The parties have requested
2 that the court decide this matter as a trial on stipulated facts.

3 **FACTS**

4 In 1983, the debtor filed a Chapter 7 bankruptcy petition in
5 Arizona. When he filed that petition, he owned real property in
6 Arizona ("the property"). Defendant Joele Beth Goldman, the
7 debtor's girlfriend, purchased the property from the debtor's
8 Arizona bankruptcy estate on June 6, 1985. On September 23, 1987
9 Goldman deeded the property to defendant Corey Gerald Anderson, the
10 debtor's son¹.

11
12 Sometime after that, Dorothy Stewart Anderson, a California
13 resident and the mother of the debtor and defendant, Ronald W.
14 Anderson (the debtor's brother), died intestate leaving property in
15 California, Arizona and Texas. In 1988, defendant, Ronald W.
16 Anderson (Ronald) and the debtor were appointed co-personal
17 representatives of Dorothy Stewart Anderson's probate estate (the
18 probate estate). Under California probate law, they are the only
19 residual beneficiaries of her estate. Each would be entitled to
20 receive a 50% share of the estate. California Probate Code §§
21 6402(a), 240 (West 1994).

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23
24 ¹The debtor, Joele Beth Goldman and Corey Anderson are also
25 defendants in this action. Neither Joele Beth Goldman nor Corey
26 Gerald Anderson have responded to the complaint. Although there
may be other issues in this adversary proceeding regarding the
ownership of the property in question and in regards to the
trustee's claims for declaratory relief and to quiet title, the
court is not deciding any of those at this time.

1 Subsequently, the debtor, without the knowledge of Ronald,
2 converted assets of the probate estate to his own use. After the
3 conversion was discovered by Ronald, Ronald made an ex parte
4 application to the California probate court to allow him to
5 continue sole administration of the probate estate.

6 After the debtor refused to account for the property he had
7 converted and sold, Ronald, as personal representative of the
8 ancillary estate in the State of Arizona, sued the debtor under the
9 Arizona Racketeering and Corrupt Influences Act (RICO) and
10 obtained, in his capacity as personal representative of the probate
11 estate, a judgment of \$1,800,000 against the debtor. On January
12 10, 1992, Ronald, again acting as the personal representative of
13 the probate estate, obtained a lien on the property via a Writ of
14 Attachment.

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16 On August 19, 1992, the debtor filed his Chapter 7 bankruptcy
17 petition, herein. Ronald has obtained a judgment, in this
18 bankruptcy proceeding, that the Arizona RICO debt and the claims of
19 the probate estate are non-dischargeable.

20 The trustee, as plaintiff, then commenced this adversary
21 proceeding to avoid, as a preferential transfer, the fixing of the
22 lien, via a Writ of Attachment, on the property. Plaintiff also
23 seeks a decree to quiet title to the property and to order its
24 immediate turnover. The fixing of the lien occurred more than 90
25 days but within one year prior to the date the debtor filed his
26 petition, herein.

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ISSUE

The only issue presented to this court is whether Ronald W. Anderson, acting in his capacity as the personal representative of the probate estate of Dorothy Stewart Anderson, or such probate estate itself, was an insider of the debtor, when the lien attached to the property.

DISCUSSION²

There are five elements to an action to avoid a transfer as preferential under § 547.³ The parties agree that all but one of those elements has been established. If the transfer occurs between ninety days and one year before the date of the filing of

² All statutory references to are to the Bankruptcy Code, 11 U.S.C. §§ 101 et. seq., unless otherwise indicated.

³ The five elements are contained in § 547(b); § 547(b)(4)(B) is at issue:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

1 the petition, the transfer can be avoided, as a preference, only if
2 the transferee was, at the time of the transfer, an insider.

3 Section 101(31) of the Code, defines four entities as
4 "insiders" when the debtor is an individual:

5 "insider" includes -

- 6 (A) if the debtor is an individual -
7 (i) relative of the debtor or of a
8 general partner of the debtor;
9 (ii) partnership in which the debtor
10 is a general partner;
11 (iii) general partner of the debtor;
or
(iv) corporation of which the debtor
is a director, officer, or person in
control;

12 The word "includes" as used in the definition is meant to be
13 expansive.⁴ "Relative" is defined in section 101(45) as:

14 . . . individual related by affinity or consanguinity
15 within the third degree as determined by the common law,
16 or individual in a step or adoptive relationship within
such third degree.

17 The parties agree that when the transfer in question occurred,
18 Ronald was acting only in his capacity as the personal
19 representative of the probate estate. The plaintiff has sued
20 Ronald in that capacity⁵. Plaintiff admits that "If Ronald were
21 being sued personally, he would clearly be an insider. . . . Being
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23 ⁴ " 'includes' and 'including' are not limiting." § 102(3).

24 ⁵ Paragraph 9 of the Complaint states:

25 Defendant, Ronald W. Anderson ("R. Anderson"), named as a
26 Defendant in this case in his representative capacity only, is
Domiciliary Foreign Personal Representative of the Estate of
Dorothy Stewart Anderson. . .

1 sued in his representative capacity, the defendant is actually the
2 probate estate itself."⁶ Ronald agrees with this characterization.
3 The real issue before the court then becomes whether the probate
4 estate is an insider.

5 The Code's definition of "insider" is illustrative; Congress
6 did not intend to limit the classification. "Use of the word
7 "includes" in § 101(25) now § 101(31) evidences Congress' expansive
8 view of the scope of the insider class, suggesting that the
9 statutory definition is not limiting and must be flexibly applied
10 on a case-by-case basis." Wilson v. Huffman (In re Missionary
11 Baptist Foundation of America, Inc.), 712 F.2d 206, 210 (9th Cir.
12 1983).

13
14 Insiders fall into two categories, those entities specifically
15 mentioned in the statute ("relative," "partnership," "general
16 partner," and "corporation"), i.e. per se insiders, or those not
17 listed in the statutory definition, but who have a
18 ". . . sufficiently close relationship with the debtor that
19 . . . conduct is made subject to closer scrutiny than those dealing
20 at arm's length with the debtor." Wilson v. Huffman, 712 F2d at
21 210.

22 When the transferee is a per se insider, the court does not
23 need to examine the actual nature of the relationship. In Zakroff
24 v. Markson (In re Ribcke), 64 B.R. 663, (Bankr. D. Md. 1986), the
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26 ⁶Plaintiff's Memorandum in Support of Motion for Summary
Judgment, p.1, line 27 - p. 2, line 2.

1 trustee brought an action against the debtor's deceased wife's
2 parents to recover a conveyance of real property by the debtor to
3 them within one year before the filing of a Chapter 7 petition.
4 Under the facts in that case, the court held that the death of the
5 debtor's wife did not terminate the relationship of affinity
6 between her parents and the debtor. The court also noted "The
7 Marksons are subject to the label of insiders in this case by
8 virtue of the statutory definition which may be expanded by a
9 factual presentation but never contracted." 64 B.R. at 666. See
10 also, Venn v. Purcell (In re Winn), 127 B.R. 697 (Bankr. N.D. Fla.
11 1991), where the Chapter 7 trustee sought to recover payments made
12 to the debtor's former father-in-law. There, the court held that
13 the defendant was an insider and noted: . . . "Once the defendant
14 is statutorily defined as an 'insider' the inquiry stops. After
15 that point, there is no reason to determine the degree of control."
16 127 B.R. at 699.

17
18 Here, the defendant is the probate estate. It is true that it
19 is the probate estate for Dorothy Stewart Anderson, the mother of
20 the debtor. Its personal representative, is Ronald, the debtor's
21 brother. Either of these individuals would be per se insiders.
22 Probate estates, however, are not listed within the Code's
23 definition of insiders as set forth in § 101(31).

24
25 The plaintiff likens this situation to that of a closely held
26 corporation. The debtor is entitled to receive 1/2 of the probate
estate. The debtor is, in effect, a 50% shareholder of the equity

1 of the probate estate. Under §§ 101(2)(B) and 101(31)(B)(vi)⁷ of
2 the Code, if the probate estate were a corporation in which debtor
3 held a 50% ownership, the corporation would be an insider.

4 If the plaintiff's argument is correct, the probate estate
5 would become a per se insider because of the debtor's beneficial
6 interest therein. This court has found no cases in which the "per
7 se" insider status of probate estates has been discussed.

8 Generally, courts are required to interpret a statute according to
9 its plain meaning. See, United States v. Ron Pair Enterprises,
10 Inc., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). Giving
11 § 101(31) its plain meaning, it is clear that probate estates are
12 not listed as per se insiders. Since the statute specifically
13 includes definitions for relatives, partners, partnerships and
14 certain corporations, it is clear that Congress could have included
15 probate estates of relatives if it had chosen to do so. The
16 plaintiff's analogy is misplaced.⁸

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19 ⁷Section 101(2)(B) defines "affiliate" in part as a
20 "corporation 20 percent or more of whose outstanding voting
21 securities are directly or indirectly owned, controlled, or held
22 with power to vote, by the debtor . . ."

23 Section 101(31)(b)(vi) provides that if the debtor is a
24 corporation, insider includes a "relative of a general partner,
25 director, officer, or person in control of the debtor."

26 ⁸One may speculate that Congress did not include probate
estates within the definition of per se insiders for a number of
reasons. In many cases, probate estates are not controlled or
operate in a manner analogous to that of a corporation. While one
owning more than twenty percent of the voting stock of a
corporation may indeed exercise control and influence over the
corporation's affairs, even a fifty percent beneficiary of a
probate estate may have little control in the day to day operations
(continued...)

1 Since the probate estate is not a per se insider of the
2 debtor, the court must examine the relationship of the parties and
3 the nature of the transfer presented here to see if the probate
4 estate falls within the second category of insider, i.e. not listed
5 in the statutory definition, but an entity with a sufficiently
6 close relationship to the debtor that transactions and conduct
7 between them should be subject to closer scrutiny. "Who will
8 qualify as an insider must be held as a question of fact." Miller
9 v. Schuman, (In re Schuman), 81 B.R. 583, 586 (9th Cir. BAP 1987)⁹.
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12 The cases which have considered whether insider status exists
13 for entities not specifically defined as insiders have usually
14 focused on two factors; (1) the closeness of the relationship
15 between the parties and (2) whether the transactions were, in fact,
16 conducted at arms length.

17 Here, it is helpful to compare two cases, both involving a
18 debtor's ex-spouse. In Browning Interests v. Allison, (In re
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20 ⁸(...continued)
21 of that estate. Probate estates are normally controlled by
22 personal representatives. In this case, Ronald was appointed the
23 personal representative by a state court. He may manage the day to
24 day affairs of the probate estate without much input from the
debtor. Indeed, the facts in this case illustrate that the
relationship between the probate estate and the debtor has been
adverse and hostile.

25 ⁹ "The Panel agrees that the insider determination might be
26 considered a 'question of fact' in the sense that it is made on a
case-by-case basis, after the consideration of various factors.
Nevertheless, where the underlying facts are undisputed . . . it
would be more accurate to consider the insider determination as a
mixed question of law and fact." 81 B.R. at 586, footnote 1.

1 Holloway), 955 F.2d 1008 (5th Cir. 1992), certain creditors moved
2 to set aside the debtor's transfer of a security interest to the
3 debtor's former wife. There, it appeared that the defendant and
4 the debtor had been married to each other for twenty years and had
5 three children in common. At the time of the transfer, the
6 defendant was no longer married to the debtor. The Fifth Circuit
7 noted that the defendant did not fall within the per se insider
8 class since, under the state law in question, a divorce terminates
9 the marital relation, hence, the debtor's ex-wife could not be
10 defined as a "relative" under § 101(31). She had, however,
11 continued to have frequent contacts with the defendant and had
12 loaned him large sums of money to provide for his living expenses.
13 The court concluded that the relationship between the defendant and
14 the debtor was a close one and that the transactions conducted
15 between them were not conducted at arms length. Accordingly, it
16 held that the debtor's ex-wife was an insider.

18 In Miller v. Schuman, (In re Schuman), supra, the Ninth
19 Circuit Bankruptcy Appellate Panel reached a different result.
20 There, the defendant was once again an ex-wife of the debtor. The
21 trustee sought to set aside, as a preference, the debtor's transfer
22 to the defendant, of a community property residence, pursuant to a
23 modification of decree of dissolution of marriage. As in Holloway,
24 supra, the debtor and the defendant had been married for a long
25 period of time and there were children of the marriage. The
26 transfer of the residence to the defendant was in return for a

1 credit against child support obligations, a partial satisfaction of
2 property awarded to the defendant in the dissolution proceedings
3 and other miscellaneous consideration. The debtor had remarried at
4 the time of the transfer. The court found that the relationship
5 between the debtor and the defendant was one marked by hostility
6 rather than closeness and cooperation. Accordingly, the appellate
7 panel affirmed the bankruptcy court's decision that the defendant
8 did not exercise the necessary degree of control or influence to
9 render her an insider.
10

11 The plaintiff argues that the relationship between the debtor,
12 Ronald and their mother's probate estate is the type of
13 relationship which makes the probate estate an insider. First, he
14 argues that probate estates are similar to trusts, which are not
15 per se insiders, but which have been held to be insiders.

16 In In re 1000 International Building Associates, Ltd., 81 B.R.
17 125 (Bankr. S.D. Fla. 1987), the Chapter 11 debtor was a limited
18 partnership. H. Schreiber was a general partner of the debtor and
19 "dominated" the other general partner, a corporation. Class 3 of
20 the debtor's plan consisted of Mortgage Investors Trust, a trust
21 for the benefit of the two oldest sons of H. Schreiber. The court
22 had no trouble finding that the trust was an insider of the debtor
23 for purposes of § 1129(a)(10) (citing § 101(31)(C)(ii), a relative
24 of a general partner is an insider of the partnership). See also
25 In re Hempstead Realty Associates, 38 B.R. 287 (Bankr. S.D. N.Y.
26 1984), (a trust established for the benefit of its trustee and his

1 wife was an insider for purposes of § 1129(a)(10) because the
2 trustee was a general partner of debtor).

3 Although the probate estate could be an insider of the debtor
4 if, in fact, the circumstances demonstrate the type of closeness
5 and degree of control illustrated by these two cases, in this case
6 there was clearly an adversarial relationship between the defendant
7 and the debtor.

8 "An insider is one who does not deal at arms-length with the
9 debtor." Tennessee Wheel and Rubber Company v. Street (In re
10 Tennessee Wheel and Rubber Company), 62 B.R. 1002, 1005 (Bankr.
11 M.D. Tenn. 1986). Here, the debtor and the probate estate did deal
12 at arms-length. The debtor converted assets of the probate estate.
13 He refused to account to Ronald for the taking and whereabouts of
14 probate estate assets or the proceeds therefrom. It was only
15 through investigation that Ronald was able to determine the extent
16 of the conversion. The transfer which the plaintiff seeks to
17 avoid, as a preference, was a transfer effectuated by way of a Writ
18 of Attachment obtained after a judgment was entered by a court of
19 competent jurisdiction in a contested proceeding. It was not a
20 transfer obtained because of a closeness which allowed the probate
21 estate to exert control or influence over the debtor. The probate
22 estate has also obtained a judgment of this court declaring the
23 debtor's debt to the probate estate to be non-dischargeable. The
24 relationship between the probate estate and the debtor compares
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1 with the relationship between the debtor and his former wife in In
2 re Schuman, supra.

3 CONCLUSION

4 When the debtor is an individual, the probate estate of a
5 relative is not included within the Code's definition of "insider".
6 Given the hostility between Ronald, acting on behalf of the probate
7 estate, and the debtor, which existed when the transfer occurred as
8 well as the circumstances leading up to the Writ of Attachment, it
9 is clear that the probate estate did not exercise sufficient
10 control over the affairs of the debtor so as to render the probate
11 estate an insider. Since the transfer occurred more than 90 days
12 before the debtor filed his bankruptcy petition herein, the
13 plaintiff may not avoid the lien as preferential.

14 This opinion shall constitute the court's findings of fact and
15 conclusions of law pursuant to Bankruptcy Rule 7052; they shall not
16 be separately stated, a judgment consistent herewith shall be
17 entered.
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22 ALBERT E. RADCLIFFE
23 Bankruptcy Judge
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