

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(O'Connell, P.J., and White and Markey, JJ.)

Jan Kay Estes, Personal Representative of the
Estate of Douglas Duane Estes,

Supreme Court No. 133098

Plaintiff-Appellee,

Court of Appeals No. 261968

v

Jeff Edward Titus,

Trial Court No. 02-00528-NZ
(Kalamazoo Circuit Court)

Defendant-Appellee,

and

Julie L. Swabash f/k/a Julie L. Titus,

Appellant.

**BRIEF OF *AMICUS CURIAE* THE STATE BAR OF MICHIGAN'S
FAMILY LAW SECTION**

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THE STATE BAR OF MICHIGAN'S
FAMILY LAW SECTION

respectfully submits the following position on:

*

Jan Kay Estes v Julie L. Titus

*

The Family Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Family Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The total membership for the Family Law Section is approximately 3,000 members.

The position was adopted by a divided vote of the Council of the Family Law Section after discussion at Council meetings on June 2, 2007 and October 6, 2007, held in conformance with the Section's bylaws. The number of members in the decision-making body is 21. Eleven members voted in favor, four members opposed, and one member abstained from voting on the position that is presented in this Amicus Brief.



Report on Public Policy Position

Name of Section: Family Law Section

Contact Person: Karen Sendelbach

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Other: *amicus curiae* brief in the matter of Estes v Titus

Date position was adopted: October 6, 2007

Process used to take the ideological position: Discussion at Council meetings on June 2, 2007 and October 6, 2007

Number of members in the decision-making body: 21

Number who voted in favor and opposed to the position:

11 in favor

4 opposed

1 abstained

5 absent

FOR SECTIONS ONLY:

- ✓ This subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section's bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position: The Section respectfully requests that the Court hold that a property division in a divorce judgment is not a transfer under the Uniform Fraudulent Transfer Act, MCL 566.31.

Text of the statutes that are the subject of this report:

§

566.31. Definitions.

Sec. 1. As used in this act:

(a) "Affiliate" means 1 or more of the following:

(i) A person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole discretionary power to vote the securities.

(B) Solely to secure a debt, if the person has not exercised the power to vote.

(ii) A corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole power to vote the securities.

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote.

(iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor.

(iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(b) "Asset" means property of a debtor, but the term does not include any of the following:

(i) Property to the extent it is encumbered by a valid lien.

(ii) Property to the extent it is generally exempt under nonbankruptcy law.

(iii) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant.

(c) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(d) "Creditor" means a person who has a claim.

(e) "Debt" means liability on a claim.

(f) "Debtor" means a person who is liable on a claim.

(g) "Insider" includes all of the following:

(i) If the debtor is an individual, all of the following:

(A) A relative of the debtor or of a general partner of the debtor.

(B) A partnership in which the debtor is a general partner.

(C) A general partner in a partnership described in sub-subparagraph (B).

(D) A corporation of which the debtor is a director, officer, or person in control.

(ii) If the debtor is a corporation, all of the following:

(A) A director of the debtor.

(B) An officer of the debtor.

(C) A person in control of the debtor.

(D) A partnership in which the debtor is a general partner.

(E) A general partner in a partnership described in sub-subparagraph (D).

(F) A relative of a general partner, director, officer, or person in control of the debtor.

(iii) If the debtor is a partnership, all of the following:

(A) A general partner in the debtor.

(B) A relative of a general partner in, a general partner of, or a person in control of the debtor.

(C) Another partnership in which the debtor is a general partner.

(D) A general partner in a partnership described in sub-subparagraph (C).

(E) A person in control of the debtor.

(iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.

(v) A managing agent of the debtor.

(h) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(i) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(j) "Property" means anything that may be the subject of ownership.

(k) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(l) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(m) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

§ 566.34. Transfer with intent to defraud.

Sec. 4. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

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STATEMENT OF BASIS OF JURISDICTION

Appellant Julie L. Swabash f/k/a Julie L. Titus (“Titus”) timely filed her application for leave to appeal from the December 21, 2006 judgment of the Court of Appeals. In an order dated May 25, 2007, this Court (1) granted the application for leave to appeal, (2) directed the parties to include among their briefing five issues, and (3) invited the Family Law and Business Law sections of the State Bar of Michigan to file *amicus curiae* briefs. The Family Law Section submits this *amicus curiae* brief in response to the Court’s invitation.

STATEMENT OF RELIEF SOUGHT

The Family Law Section requests this Court reverse the Court of Appeals’ judgment on the grounds that a property division in a divorce judgment does not qualify as a transfer under the Uniform Fraudulent Transfer Act. MCL 566.31.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is a judgment of divorce subject to judicial review for purposes of claim under the Uniform Fraudulent Transfer Act?

The Family Law Section answers: No.

2. Is a division of marital assets pursuant to a judgment of divorce a transfer subject to the UFTA?

The Family Law Section answers: No.

The Family Law Section does not take a position with respect to any of the other questions presented by the parties or framed by this Court in its May 25, 2007 order.

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

STATEMENT OF FACTS

The facts and proceedings most pertinent to the legal issues presented in this *amicus curiae* brief are summarized as follows:

On September 23, 2002, Jan Estes (“Estes” or “Appellee”) filed a wrongful death action against Jeff Titus, who had shot her husband in 1990. (Court of Appeals opinion at 2). Her husband’s death had been a cold case and Jeff Titus was not convicted of the offense until 2002. (COA opinion at 1). Jeff Titus was sentenced to mandatory life in prison. (COA opinion at 1). After Estes filed suit, Julie Titus (“Titus” or “Appellant”) filed for divorce against her husband, Jeff Titus, on November 12, 2002. (COA opinion at 2). The Tituses entered into a consent judgment for divorce and the family court entered the divorce decree on March 10, 2003. (COA Opinion at 2).

As part of the consent judgment, Titus obtained custody of the couple’s seventeen year old daughter. (COA opinion at 2). Due to Jeff Titus’s incarceration, the divorce judgment recognized that the property division was “not congruent or equal and the award of additional property to [Titus] in lieu of [Jeff Titus’s] support obligations.” (COA opinion at 2). Considering their child was already 17 years of age, Titus would only have received child support for one year. The divorce judgment awarded Titus substantially all the marital assets. (COA opinion at 2).

Shortly after the entry of the divorce decree, Estes attempted to file a motion in the family court to intervene in the divorce proceedings to show that the property division was a fraud upon Jeff Titus’s creditors. (COA opinion at 2). The family court denied Estes’s motion. (COA opinion at 2). Estes then filed a motion in the trial court where her wrongful death action was pending, in an attempt to prevent Titus from transferring any of the assets

she obtained in the divorce decree. (COA opinion at 2). The trial court enjoined Titus from transferring, encumbering, or disposing of any marital assets awarded to her. (COA opinion at 2). After a bench trial, the trial court concluded that Jeff Titus was liable for the wrongful death of Estes's husband. (COA opinion at 3). The trial court entered a judgment against Jeff Titus in the amount of \$550,000. (COA opinion at 3).

This appeal arose from Estes's attempt to collect the wrongful death judgment against Julie Titus under the Uniform Fraudulent Transfer Act ("UFTA") on the theory that Titus's imprisoned husband transferred the entire marital estate to Titus to avoid creditors. (COA opinion at 3). The trial court dissolved the restraining order against Titus, declined to add Titus as a party to the wrongful death action, and quashed a judgment-creditor discovery subpoena that Estes had issued against Titus. (COA opinion at 4).

The Court of Appeals reversed the trial court, in part, holding that Estes could properly bring an UFTA action against Titus. The Court reasoned that the trial court could set aside a property division in a divorce decree, even though the trial court would have no authority to set aside the divorce judgment itself. (COA opinion at 6). In reaching this conclusion, the Court of Appeals held the UFTA's definition of transfer is broad enough to include the division of marital assets in the property settlement of an uncontested divorce. (COA opinion at 7). After analyzing various provisions of the UFTA and the facts of this case, the Court of Appeals further held that Estes sufficiently established a claim for relief under the UFTA and that the trial court should have added Julie Titus as a party to Estes's supplemental UFTA proceedings. (COA opinion at 13, 16).

ARGUMENT

I. Introduction.

This Court granted leave to appeal on May 25, 2007. In its order, this Court advised the parties to address (1) whether a judgment of divorce is subject to judicial review for purposes of a claim under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.*; (2) whether a division of marital assets pursuant to a judgment of divorce is a transfer subject to the UFTA; (3) whether and under what circumstances a division of marital assets under a judgment of divorce can be deemed fraudulent; (4) whether a judgment debtor can attach marital property for the debt of one of the spouses; and (5) the significance, if any, of the plaintiff's failure to appeal the denial of the motion to intervene in the divorce action.

Amicus Curiae the State Bar of Michigan's Family Law Section has great sympathy for Appellee Estes who lost her husband at the hands of Jeff Titus and was forced to raise her family by herself for the past 17 years. Notwithstanding Estes's unenviable position, the Family Law Section agrees with Appellant Titus that a property division in a divorce judgment is not a transfer under the UFTA. The Family Law Section submits this brief for the purpose of bringing this Court's attention to the Legislature's intent in drafting the UFTA, and various concerns that might arise should this Court determine that a property division in a divorce judgment can qualify as an UFTA transfer.

Certainly if the Legislature had included language in the text of the statute that demonstrated that it should apply (and how it would apply) to set aside a property division in divorce judgment, then the facts presented by this case sufficiently raise the issue of fraud for the trial court to consider setting aside this property division. However, the UFTA

as currently written does not apply to property divisions in divorce judgments, and until the legislation is modified, then this Court should hold that the UFTA cannot apply to this case.

If the Legislature decides it is necessary to modify the UFTA, then it would need to consider the special concerns that are specific to divorce actions and are not currently envisioned in the UFTA legislation.

II The Legislature did not Intend to Include Property Divisions in Judgments of Divorce under its Definition of a “Transfer” in the Uniform Fraudulent Transfer Act.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted. *Elia v Hazen*, 242 Mich App 374, 381; 619 NW2d 1 (2000). The courts “may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute.” *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). In the event that reasonable minds differ regarding the meaning of a statute, the courts must look to the object of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the purpose of the statute. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994).

The Michigan Legislature enacted the UFTA in 1998 to replace the statute known as the Uniform Fraudulent Conveyance Act (“UFCA”). The purpose of the UFTA is to “define and regulate fraudulent transfers and conveyances” and to “set aside certain

transfers and conveyances.” Preceding MCL 556.31. The UFTA defines a “transfer” as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.” MCL 566.31(I). In a similarly broad fashion, the UFTA’s predecessor (UFCA), defined a conveyance as “every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance.” MCL 566.11 (repealed) (former UFCA).

The enactment of the UFTA was not meant to significantly alter the character or scope of the UFCA. Although the UFTA drafters expanded the definitional section of the statute, the drafters drew the vast majority of the added definitions from section 101 of the Bankruptcy Code, which largely correspond to the definitions that courts have utilized in construing the UFCA. See Labine, *Michigan’s Adoption of the Uniform Fraudulent Transfer Act: An Examination of the Changes Effected to the State of Fraudulent Conveyance Law*, 45 Wayne L Rev 1479 (1999).

The term "transfer" is new to the act but it is intended to cover the same actions as the comparable term in the Bankruptcy Code and its counterpart in the UFCA (conveyance). The only substantive difference between the definition in the UFTA and that in the UFCA is the specific inclusion of involuntary transfers. This addition gives the false impression that the UFTA encompasses previously uncovered transactions. Although the UFCA did not directly address application to involuntary transfers, the decisions were generally consistent with an interpretation that included involuntary transfers within its scope.

LaBine, *supra* at 1491-1492 (footnotes omitted).

An examination under the UFCA reveals very few cases even mentioning divorce, let alone discussing divorce judgments. This dearth of cases is revealing to the extent that

the UFCA did not contemplate inclusion of divorce judgments as “conveyances.” See, eg, *Hubers v Miller, Canfield, Paddock & Stone, PLC*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 2006 (Docket No 258746) (holding divorce judgment not conveyance under UFCA).

In the recent case of *In re Prichard*, 361 BR 11 (Bankr D Mass, Feb 12, 2007), a bankruptcy court found in favor of the debtor in a fraudulent conveyance action brought by the trustee. The debtor had owned a house with his ex-wife which he transferred to her alone pursuant to a separation agreement incorporated into a judgment of divorce. The case was brought under the old Massachusetts version of the UFCA which was repealed in favor of the UFTA in 1996. However, much of the reasoning in the case applies under both laws.

In the actual-fraud prong of the trustee’s case, he alleged that the debtor had an actual intent to hinder, delay or defraud creditors when he made the transfer. This sort of allegation requires an examination of indicia or so-called “badges” of fraud. It appears that the trustee brought this case because after the divorce the debtor moved back in with his ex-wife. The debtor’s wife testified that this was not a “normal situation” but it also appears from the testimony that the couple did not resume a married lifestyle but merely carried on a civil co-existence. The trial court stated: “I could conclude that the Trustee met his initial burden of demonstrating actual fraud under § 7 of the UFCA simply because [the debtor] conveyed his property in favor of a family member over his creditors.” *Id* at 17. The court then went on to find additional badges of fraud that solidified its conclusion that the trustee had met his initial burden. *Id* at 17.

The issue in *Prichard* then became whether there was “sufficient evidence of a legitimate supervening purpose for the transfer of the Property, such as to rebut the indication that [the debtor] effected the transfer of the Property with fraudulent intent.” *Id* at 18. The trial court declined to find that the marital difficulties leading to the transfer were a sham, stating that at “at the time of the transfer, [the debtor] did not retain any interest in the Property, but transferred his interest in it to [his ex-wife] who assumed complete responsibility for the Property and household’s upkeep. To conclude now that this transaction was some sort of sham would require that I find that [the debtor and his ex-wife] staged their marital difficulties, while [the debtor] set up separate residences in 1989 and for the five years following, with the full intention of eventually returning to live in the Property in 1994. The evidence does not so prove and I do not so conclude.” *Id* at 18.

The cases analyzing the UFCA concluded that the statute did not apply to property divisions in divorce judgments. Because the Legislature’s enactment of the UFTA was not intended to broaden the UFCA, then this Court should likewise hold that transfers under the UFTA do not apply to divorce judgments. Any reading of “transfer” that expands its meaning to reach divorce judgments goes beyond the intent of the Legislature.

On other occasions, the courts have grappled with the problem of taking the literal use of a term in a statute in deciding how far the Legislature intended a particular term to extend. Just as the Court of Appeals determined in *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006), that the Legislature’s broad use of the word “injury” only pertained to physical injuries, and not financial injuries, the seemingly broad use of the term “transfer” in the UFTA presents a similar dilemma. The issue in *Melton* was whether the Legislature

intended to include financial injuries in its definition of “victim.” *Id.* The *Melton* court reasoned that the Legislature only intended to count persons who faced a “risk of physical injury,” even when imposing sentences for a category of crimes unlikely to pose such a risk,” such as the property crime at issue in that case. *Id.* The court concluded that financial injuries are not included in the plain language of MCL 777.39.

The Court of Appeals in *Melton* recognized that the Legislature did not intend “such an open-ended application [of the statute], especially when the word ‘injury’ is viewed in the context of the rest of the statute.” *Melton, supra* at 595. Even though the Legislature appeared to give “victim” a broad definition under the sentencing guidelines by including any person who was “placed in danger of injury,” MCL 777.39, the court examined how the term “injury” was used throughout the statute. In doing so, the court recognized that “injury” did not have as broad a meaning as it seemed at first glance. *Id.* at 595. The court focused on the overriding concerns of the statutory scheme. “It appears that the Legislature was sufficiently concerned about physical injuries that it wished sentencing courts to take them into account no matter what kind of underlying crime was committed [including property crimes].” *Melton, supra* at 595. The year after the court’s decision in *Melton*, the Legislature broadened MCL 777.39 to specifically include loss of property. MCL 777.39 (effective March 30, 2007).

Like the court’s decision in *Melton*, this Court should not use an “open-ended application” of the UFTA so that “transfers” apply to property divisions in divorce judgments. The following sections of this brief detail some of the reasons why the Legislature did not intend the statute to apply to divorce judgments, and the various perils

that arise should this Court determine that creditors can utilize the UFTA to set aside property divisions in divorce judgments.

A. If “transfer” is broadly read to include divorce judgments, then every single divorce judgment, by definition, would be subject to an UFTA challenge as a fraudulent transfer.

The statutory scheme of the UFTA demonstrates why the Legislature could not have intended to apply it to divorce judgments. For instance, one section of the UFTA defines a method of showing that a transfer was fraudulent:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:

(a) With **actual intent to hinder, delay, or defraud** any creditor of the debtor.

(b) Without receiving a **reasonably equivalent value** in exchange for the transfer or obligation, and the debtor did either of the following:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining **actual intent** under subsection (1)(a), consideration may be given, among other factors, to whether **1 or more of the following occurred**:

(a) The **transfer or obligation was to an insider**.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

MCL 566.34 (emphasis added). According to MCL 566.34, a debtor makes a transfer with intent to defraud under two possible scenarios: when a transfer is made with an “actual intent to hinder, delay, or defraud a creditor” or when the debtor makes the transfer “without receiving a reasonably equivalent value in exchange for the transfer.” MCL 566.34(1)(a), (b).

Applying the UFTA to property divisions in divorce judgments fails to recognize the unique nature of the marriage relationship that affects all aspects of a divorce judgment that terminates that marriage. In a divorce, the judgment is not just dividing up assets, and not even just apportioning responsibility for child support. It also takes into consideration the unique relationship of marriage—one that is so unique that it has sometimes been said that the marital couple is “one person.” A divorce judgment is a best attempt to split that

"one person" back into two persons. The divorce judgment must consider such intangible factors as the fact that, by virtue of traditional roles, one party may have less earning capacity than the other, and conversely, the other person was aided in gaining a higher earning power than he otherwise would have been able to achieve without the spouse's aid (i.e., if he had to do his own child care and housework, and in some cases, if he did not have the free advice and aid of his spouse in his business).

These considerations not only weigh into the level of alimony, but also to the property division and division of the marital debts. Also, fault for the breakdown of the marriage is a consideration in a divorce judgment. There are often other factors taken into consideration in the property provisions of a divorce judgment, such as compensation for and resolution of tort claims between the spouses, such as assault and battery claims. *See, eg, Gramer v Gramer*, 207 Mich App 123, 126; 523 NW2d 861 (1994) (property settlement in divorce judgment that purported to settle all claims or rights arising out of the marriage, barred divorced spouse from seeking redress for torts that arose out of the parties' marriage relationship); *Goldman v Wexler*, 122 Mich App 744, 746-747; 333 NW2d 121 (1983) (property settlement which was incorporated into the divorce judgment took into account the fault of the parties and wife received at least partial compensation for the injuries she suffered as a result of her husband's alleged battery of her during their marriage).

Many problems arise with the UFTA when one carefully examines the UFTA's methods of proving "fraudulent transfers" in the divorce context. In particular, the language of the statute pertaining to "insiders" and to "reasonably equivalent values" creates special problems if the courts are to re-examine divorce judgments.

1. All divorcing parties are “insiders”

The UFTA elaborates “actual intent to defraud” by specifically defining it within MCL 566.34(2). Only one of eleven possible scenarios has to be present for a court to deem the transfer fraudulent. For instance, under Subsection 34, a court may automatically deem a transfer fraudulent if it is one that is made to an “insider.” MCL 566.34(2)(a). The Legislature defined an “insider” to include a relative of the debtor, which also includes a spouse. MCL 566.31(g), (k). If divorce judgments are included in the meaning of the term “transfer” under the UFTA, then every single divorce judgment could be a “fraudulent transfer” because every divorce broadly “transfers” property or assets from one insider to another insider.

The Legislature could not have possibly intended to declare every divorce judgment a fraudulent transfer. It is apparent from this “insider” provision that the UFTA was not written with divorce judgments in mind because so many of the aspects highlighted in the UFTA would apply to every single judgment of divorce, regardless of whether there was any intent to defraud creditors. By broadly interpreting “transfer” to include divorce judgments, this Court would be declaring open season on all divorcing parties.

The “insider” language in the UFTA presents many problems in the divorce context. For example, the factors listed for consideration under MCL 566.34(2)(a)-(k) should require some evaluation to conclude that a party acted fraudulently. However the effect of applying this provision to divorce is automatic and immediate; the court is not obligated to evaluate whether the divorcing spouses acted fraudulently because they, by the definition of “insider” had an “actual intent to defraud.” The “insider” factor of Subsection 34

demonstrates that the Legislature did not consider divorce judgments when it enacted the UFTA.

2. *A court reviewing an UFTA challenge cannot calculate “reasonably equivalent value” in divorce cases*

In addition to the fact that the Court of Appeals’ interpretation of the UFTA could mean that every single divorce judgment is entered into with an “actual intent to defraud” because it is made between two insiders, other factors contained in Subsection 34 have a different meaning within the divorce context than what the Legislature intended in its enactment of the UFTA. For example, the Legislature defines a fraudulent transfer as one where the debtor does not receive a “reasonably equivalent value in exchange for the transfer or obligation” and the debtor either engaged in a business transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or the debtor intended to incur debts beyond his ability to pay when they became due. MCL 566.34(1)(b).

The UFTA’s use of “reasonably equivalent value” as a ground for establishing a fraudulent transfer does not take into account the special nature of divorce actions. In the divorce context, a party may transfer assets for less than a “reasonably equivalent value,” such as when one spouse transfers property in exchange for not having to pay alimony or child support. But under the Court of Appeals’ interpretation, as long as one of the two other elements of Subsection 34(1)(b) are met, then the divorce judgment becomes “fraudulent” even if the divorcing party made the exchange as part of an equitable divorce judgment.

The UFTA does not define “reasonably equivalent value” and it would be very hard for an UFTA court to place a dollar amount on any “exchanges” that occur in divorces, as divorce judgments often include intangibles or property which the parties may intrinsically value more than the “fair market value” or other compromises for which a dollar amount cannot be placed in the commercial context, as envisioned by UFTA.

The difficulty of applying “reasonable equivalent value” to divorce cases becomes evident when one considers that cases from Michigan and other jurisdictions that analyze the “indirect benefits” that are to be included in a “reasonable equivalent value” analysis. Only a handful of Michigan cases have examined the meaning of “reasonably equivalent value” and “indirect benefits”—all of them are unpublished per curiam opinions from the Michigan Court of Appeals. None of those cases discussing “reasonably equivalent value” and “indirect benefits” arise from the divorce context.

The Court of Appeals in *Multi-Grinding* analyzed the “reasonably equivalent value” issue by looking to other jurisdictions. *Multi-Grinding, Inc v Richardson Sales & Consulting Servs*, unpublished per curiam opinion of Court of Appeals, issued June 15, 2004 (Docket No 235779). The court in *Multi-Grinding* examined a decision from the Seventh Circuit Court of Appeals, which considered the indirect benefits to the debtor-transferor when the net worth of the debtor-transferor is not affected. *Multi-Grinding* at 4 (citing *Leibowitz v Parkway Bank & Trust Co (In re Image Worldwide Ltd)*, 139 F3d 574, 579 (CA 7 1998)). The *Leibowitz* Court explained “reasonably equivalent value” as follows:

The most straightforward indirect benefit is when the guarantor receives from the debtor some of the consideration paid to it. See [*Rubin v Manufacturers Hanover Trust Co*, 661 F2d 979, 991 (CA 2, 1981)]; [*Heritage Bank Tinley Park v Steinberg (In re Grabill Corp)*, 121 BR 983, 995-996 (ND Ill 1990)]. But

courts have found other economic benefits to qualify as indirect benefits. For example, in *Mellon Bank, NA v Metro Communications, Inc*, 945 F2d 635, 646-648 (CA 3, 1991), the court found reasonably equivalent value for a debtor corporation's guarantee of an affiliate's debt when the loan strengthened the corporate group as a whole, so that the guarantor corporation would benefit from "synergy" within the corporate group. The *Mellon* court stated that indirect benefits included intangibles such as goodwill, *id.* at 647 and an increased ability to borrow working capital. *Id.* at 648. *TeleFest [Telefest, Inc v VU-TV, Inc*, 591 F Supp 1368 (D NJ 1984)] indicated that indirect benefits to a guarantor exist when "the transaction of which the guaranty is a part may safeguard an important source of supply, or an important customer for the guarantor. Or substantial indirect benefits may result from the general relationship" between affiliates. 591 F. Supp. at 1380-1381 (quoting Normandin, "Intercorporate Guarantees and Fraudulent Conveyances," in *Personal Property Security Interests Under the Revised UCC* 361, 370-371 (1977)). In *Xonics [In re Xonics Photochemical, Inc*, 841 F2d 198 (CA 7, 1988)], we recognized the ability of a smaller company to use the distribution system of a larger affiliate as an indirect benefit as well. See *Xonics*, 841 F.2d at 202.

Multi-Grinding, at 4-5 (quoting *Leibowitz*, *supra* at 579).

After reviewing the Seventh Circuit's analysis in *Leibowitz*, the Court of Appeals concluded that to make a "reasonably equivalent value" determination "a court should consider all the facts and circumstances . . . keeping in mind that any significant disparity between the value received and obligation assumed by the debtor-transferor will significantly harm innocent creditors." *Multi-Grinding*, *supra* at 5. However, the indirect benefits contemplated by the various courts have all related to commercial transactions, and are capable of reduction to a dollar value. For instance, indirect benefits include goodwill, corporate synergy, increased ability to borrow working capital, and safeguarding company operations.

Other unpublished decisions of the Court of Appeals have examined the meaning of "reasonably equivalent value" in light of indirect benefits that a party may receive from

the debtor's transfers. But like the cases from other jurisdictions, in all of these Michigan cases, the facts are limited to financial determinations of indirect benefits. See *Zervos Group, Inc v Thompson Asphalt Products, Inc*, unpublished per curiam opinion of Court of Appeals, issued May 2, 2006, at 10-11 (Docket No. 265397) (debtor's loan of \$553,000 to his son's company created a fact issue as to "reasonably equivalent value" because debtor made the loan so that the company could continue to operate after a fire and the money was a loan for which the debtor expected to be repaid from the proceeds of the sale of the company's assets); *Alden State Bank v Borton*, unpublished per curiam opinion, issued November 17, 2005, at 8 (Docket No. 262160) (although creditor's appraisal showed debtor condominium property was worth more than what debtor was paid, debtor received "reasonably equivalent value" for condominium property when the best offer on the property was less than the amount owed the bank at the time of the conveyance); *Taljonick v Stebbins*, unpublished per curiam opinion of Court of Appeals, issued September 28, 2004, at 4 (Docket No. 246740) (debtor received "reasonably equivalent value" for annuity even though he sold annuity worth \$342,000 for \$121,000 because debtor obtained immediate lump sum payment while purchaser had to wait until 2011 to collect the entire amount of the annuity); *Holley v Mumford*, unpublished per curiam opinion of Court of Appeals, issued July 8, 2003, at 4 (Docket No. 232047) (debtor who received one dollar per property was not a "reasonably equivalent value" even though debtor and his daughter testified that the transfers were made as an early inheritance).

Placing a dollar figure on items of "value" included in a judgment of divorce becomes very problematic because divorces involve the type of intangibles that are incapable of

being quantified. The courts and parties cannot readily determine the “reasonably equivalent value” in a divorce context because, as seen in the cases above, to reach a “reasonably equivalent value” the court would have to place a dollar amount on the benefit received from the debtor, which in many divorces cases is nearly impossible. The consequences of applying this provision to divorce proceedings are enormous. As mentioned above, judgments of divorce very often include exchanges that have nothing to do with actual “reasonable exchanges.” One divorcing party may relinquish certain property in exchange for being able to raise the couple’s children in the family home. Other times, one of the parties to the marriage may not have pursued an education or career to raise the couple’s children. A property division in a divorce may compensate one of the spouses for the types of intangibles that cannot be reduced to a dollar amount, such as a party taking on the bulk of child care responsibilities, transportation of the children, home schooling of the children, sentimental property, and many other factors that are unique to every divorce action. The property division in a divorce judgment compensates parties for all types of sacrifices and intangibles that may not have an ascertainable fair market value.

B. Divorcing parties need finality in their divorce judgments and property divisions, which cannot be accomplished if these judgments were subject to an UFTA challenge.

The UFTA provides a six-year statute of limitations for filing a claim that a transfer was fraudulent. MCL 566.39(a). The statute also provides a two-year discovery rule. MCL 566.39(a). So up to six years after a couple divorces, divides the marital estates, establishes child support and alimony payments, and child custody and parenting time, a

creditor could come into the divorce and attempt to set aside part of the judgment of divorce.

The limitations period contained in the UFTA creates instability in the divorcing parties' ability to rely on a property settlement. If a divorced spouse sells all the property she received in a divorce judgment to support her children, then a later-filed UFTA suit could wreak havoc on her family. Based on the language of the UFTA, the divorced spouse would only be able to dispose of property from a divorce after *at least* six years had passed in the event that the ex-spouse defrauded creditors by transferring the property to her. There are an endless number of problems and scenarios that could arise in this context, which is a further reason why the Legislature did not intend to apply the UFTA to divorce cases.

III The UFTA reveals that the Legislature did not intend to include divorce judgments in its purview because the Legislature did not address the many factors that a court would need to consider before setting aside a property division in a divorce judgment.

The Legislature did not address the many factors that a court (jury or judge in an UFTA action) would have to consider in attempting to use the UFTA to set aside a property division in a divorce judgment. The jury must fully understand the limits of their determinations in an UFTA case. The jury is not deciding the equities between the two UFTA-action parties;¹ the issue of equity arises only in the divorce context, i.e., whether, between the two spouses, the divorce judgment is equitable. The UFTA jury is actually

¹ Here, the plaintiff happens to be another family, but in another case, the plaintiff could be a corporation or another type of creditor of one of the parties.

deciding whether any property should have been awarded to husband (Jeff Titus), and whether this property could then be used to satisfy the wrongful death judgment (enforced through the fraudulent transfer action).

The Court of Appeals' decision properly recognized that the trial court had no authority to set aside the property-division of the Tituses' divorce judgment pursuant to MCR 2.613(B). (COA Opinion at 4). However, the Court of Appeals found that the trial court would have authority to provide relief under the UFTA with respect to a division of marital property pursuant to a judgment of divorce, holding that such relief would not operate to modify a divorce judgment, and would only operate "against persons and property within the trial court's jurisdiction." (COA Opinion at 6). A brief look at what a trial court granting UFTA relief would be required to review, reveals that these two points are highly contradictory.

The Court of Appeals' reasoning is contrary to both MCR 2.613(B) and the statutory scheme of UFTA. To grant relief under UFTA, the trial court would be required to analyze the divorce judgment and everything within it to determine whether the alleged "transfer" fits the UFTA factors required before the "transfer" can be set aside. Because these factors require the trial court to look at such things as the value given in exchange, and the conduct and intent of the parties, the review cannot be said to be limited to "operate against persons and property within the trial court's jurisdiction," as opined by the Court of Appeals.

The actual substance of an action to provide relief under UFTA would touch the entire divorce judgment and have the same content and effect as: (1) allowing the third party to delve into the divorce proceedings, and (2) setting aside a divorce judgment.

Consequently, a trial court cannot possibly grant relief under UFTA without essentially re-doing the divorce judgment and violating MCR 2.613(B).

To determine what the fraudulent portion of a divorce judgment is, if any, the fact-finder (judge or jury) in the UFTA case would have to consider all the laws pertaining to divorce, just as if they were judges in a divorce trial. In actuality, the UFTA attorneys would be explaining and arguing to the UFTA jury virtually the same arguments on law and fact as the attorneys would have argued (in trial briefs and in closing argument) if the divorce had gone to trial.

As in any divorce case, the first property determination is whether the parties' property is separate or marital property. The basic rules for the division of marital and separate property can appear fairly straightforward.

- First, in dividing a marital estate, a court *must first* make a determination of what is marital property and what is separate property,² *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997); MCL §552.19.
- Second, the court must divide the marital property—and as a prelude to property division, a trial court *must* make specific findings regarding the value of the property being awarded in the judgment. *See, eg, Olson v Olson*, 256 Mich App 619, 628; 671 NW2d 64 (2003); *Beaty v Beaty*, 167 Mich App 553, 556; 423 NW2d 262 (1988).

² The separate property remains the owner-party's property and is not divided, at least, not until after the marital property is divided and not unless a claim is made against separate property under MCL 552.23 or 552.401.

- Third, a property division need not be equal but must be equitable, *Bone v Bone*, 148 Mich App 834, 838-839; 385 NW2d 706 (1986); and any significant departure from congruence must be clearly explained by the court. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003); *see also Sands v Sands*, 442 Mich 30, 34-35; 497 NW2d 493 (1993).

Furthermore, the legal and factual issues in a divorce are not separate, discrete issues. In a divorce, the issue of property distribution is inextricably interwoven with the other divorce issues, including spousal support and child support. *See Jansen v Jansen*, 205 Mich App 169, 172; 517 NW2d 275 (1994) (spousal support and property distribution go hand in glove); MCL 552.605(2)(c) (property may be awarded in lieu of child support).

Furthermore, a property division does not have to be equal, but only to be equitable (as between the spouses, without considering the UFTA parties). There are many factors which may cause a division to be equitable even though it is not equal. The UFTA jury would have to consider all of the factors considered by a divorce court in dividing property,

the so-called *Sparks* factors,³ some of which are not easily translatable into a specific dollar amount or a specific percentage of property.

Fault for the breakdown of the marriage is a proper consideration in dividing marital property—even though it is difficult to quantify fault. The UFTA jury would have some guidance from appellate case law, but there are no hard and fast rules. *Compare McCoy v Cooke*, 165 Mich App 662, 664; 419 NW2d 44 (1988) (“Plaintiff was determined to be thirty percent at fault for the breakdown of the marriage, while defendant was seventy percent at fault. The marital property was divided according to the assessment of fault.”) with *Jansen, supra* at 170-171 (67% to 23% disparity between the parties not justified). On a related issue, the divorce court may consider a party’s responsibility for dissipation of marital assets. *See, eg, Sparks, supra* at 155 (“Presumably, fault is one factor in determining the division when the conduct at issue dissipates the value of the marital property”); *McCallister v McCallister*, 101 Mich App 543, 550-551; 300 NW2d 629 (1980) (court may consider dissipation of assets).

³ The *Sparks* factors are: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. “There may even be additional factors that are relevant to a particular case . . . But where any of the factors delineated in this opinion are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors. It is hoped that this requirement will result in greater consistency and provide for more effective and meaningful appellate review.” *Sparks v Sparks*, 440 Mich 141, 158-160, 485 NW2d 893 (1992). In *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996), this Court stated “There may even be additional factors that are relevant to a particular case. For example, the court may choose to consider the interruption of the personal career or education of either party. The determination of relevant factors will vary depending on the facts and circumstances of the case.”

Likewise, other mandatory factors such as the ages of the parties, the length of the marriage, and the parties' earning capacities do not readily translate into dollars, yet must be calculated into a property distribution in a divorce. These factors are relevant in a divorce context because the divorce is, by its very nature, not an arms-length transaction; rather a divorce is the partition of a relationship that is almost inextricably interwoven, much more so than a business partnership, in that, for example, the married parties have divided up roles and responsibilities in a way that often disadvantage one of the parties but is beneficial to the family group as a whole. For example, one party may have, long ago, interrupted her personal career or education to become a homemaker, and thus may have permanently decreased her earning capacity. As noted in *McDougal*, *supra* at 89, this is a factor in a property distribution in divorce.

Furthermore, a divorce judgment must consider the benefit and welfare of the divorcing parties' minor children. See *Harvey v Harvey*, 470 Mich 186, 192-193, 194; 680 NW2d 835 (2004) (circuit court has affirmative duty under Child Custody Act to ensure children's best interests). Divorcing parties must provide adequate support for their minor children, and the court must ensure that they do so. See, eg, MCL 722.3(1); MCL 552.15; see also *Napora v Napora*, 159 Mich App 241, 246-247; 406 NW2d 197 (1986) (best interests of the children, not the claims, personal rights, or desires of the parents, is paramount in determining child-related issues).

In conclusion, an attempt to develop jury instructions for an UFTA case would quickly reveal the inherent impossibility in attempting to use the UFTA to set aside a property division in a divorce judgment. The many factors that a court (jury or judge in an UFTA action) would have to consider for each of the major divorce issues—property, child

support, and spousal support—combined with the fact that each of those issues are, as a matter of law, inextricably interwoven with each of the other factors, clearly reveals why the Legislature did not address the many factors that a court (jury or judge in an UFTA action) would have to consider in attempting to use the UFTA to set aside a property division in a divorce judgment. This complex system of separating interwoven factors also clearly reveals that the Legislature never intended to include divorce judgments within the ambit of the UFTA.

CONCLUSION

As the Uniform Fraudulent Transfer Act is currently written, the Legislature could not have intended to apply it to set aside property divisions in divorce judgments. Although the Legislature broadly defined the term “transfer,” other provisions of the UFTA reveal that the UFTA is unworkable in the divorce context. If the Legislature wanted to apply the UFTA to divorce judgments, then it would have needed to address a whole host of problems that are unique to divorcing parties.

RELIEF REQUESTED

Amicus Curiae State Bar of Michigan’s Family Law Section respectfully requests that this Honorable Court reverse the decision of the Court of Appeals.

Respectfully submitted,

/s/ Liisa R. Speaker

DATED: October 19, 2007

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I certify that I served this document on this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record as listed below, and by depositing them in the United States mail.

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I declare that the statements above are true to the best of my information, knowledge, and belief.

Respectfully submitted,

Dated: October 19, 2007

/s/ Liisa R. Speaker