

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

On Appeal from Decision by Circuit Court Judge John R. Weber

**MATHER INVESTORS, LLC,
d/b/a MATHER NURSING CENTER,
A Michigan Limited Liability Company,**

Plaintiff / Appellant,

**Supreme Court No: 131654
Court of Appeals No: 261638
Marquette Circuit Court No:
03-40829-CK**

vs

WILLIAM LARSON,

Defendant / Appellee.

PLAINTIFF / APPELLANT'S BRIEF ON APPEAL

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OTHER AUTHORITIES

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2B SINGER, SUTHERLAND STATUTORY CONSTRUCTION (5th Ed), § 51.05, p 174. 47

STATEMENT OF QUESTIONS INVOLVED

There is no real dispute that the Debtor's transfer to Defendant (her close relative) of all her cash and real estate holdings was fraudulent under Michigan's UFTA, having been made without consideration and rendering her insolvent. *See Plaintiff/Appellant's Application for Leave to Appeal, filed in June 2006, Appendix at 62a (the "Application"), at 10-25.*

The Application addresses in detail how the transfers at issue, of substantially all of the Debtor's assets to a close relative without consideration, are presumably fraudulent and should be set aside under the UFTA. *Application at 10-25.*

This Honorable Court has requested briefing on nine specific, related issues, discussed in this Brief *in seriatim*. These issues focus on whether a creditor may set aside a debtor's fraudulent transfer of her assets in an action involving the transferee of those assets, the only party currently asserting a claim to them against that asserted by the creditor, without the debtor's presence.

All nine of the issues identified by this Honorable Court are related to whether Michigan's UFTA requires the presence of a debtor who no longer has an interest in the subject of a fraudulent transfer. Each of these questions is easily answered by reviewing the plain language of the statutes at issue. Those questions and their answers may be briefly summarized as follows:

Question 1: Did the circuit court properly dismiss this case under MCR 2.202(A) for the failure to substitute the estate of the deceased debtor, when the deceased debtor herself had never been party to the action?

Trial Court Answered: Yes.

Appellant Answers: No; the dismissal was error. MCR 2.202(A), by its own express terms, authorizes substitution after the death of "a party." MCR 2.202(A)(1) (emphasis added). Debtor never was a party to these proceedings, so by its own terms, MCR 2.202(A) does not apply here.

Question 2: Was the presence of the Debtor’s Estate “essential to permit the court to render complete relief” under MCR 2.205(A), and if so, should the circuit court have analyzed the effect of the failure to join the Debtor’s Estate under MCR 2.205(B)?

Trial Court Answered: Yes, but failed to analyze the effect of any failure to join.

Appellant Answers: No. The Debtor transferred away all interest in the subject assets during her lifetime; accordingly, her Estate has no interest in the subject matter, as required by MCR 2.205(A). MCR 2.205(A) has never been applied to require the presence of a person with no interest in the subject at issue.

Question 3: Would the Debtor’s Estate represent any separate rights or interests that are not otherwise represented by Defendant?

Trial Court Answered: The trial court did not answer this question.

Appellant Answers: No. Defendant can present all of the rights, interests, and defenses that the Debtor’s Estate could have. Accordingly, no prejudice to Defendant would result from proceeding with the Debtor’s Estate.

Question 4: Does the Debtor’s nephew have sufficient information and/or standing to raise any defenses or counter-claims the Debtor’s Estate may have against the Nursing Home?

Trial Court Answered: The trial court did not answer this question.

Appellant Answers: Yes. Because he stands in the shoes of the Deceased Debtor’s Estate, Defendant can raise all defenses and counter-claims that it could have. He is additionally free to assert that the Fraudulent Transfer was made in good faith, removing it from coverage under the UFTA – and he has always been free to request substitution of the Debtor’s Estate, if he feels in any way lacking of needed information.

Question 5: Does the UFTA, MCL 566.31 *et seq* generally require a debtor to be joined in an action, when she no longer has an interest in the property at issue?

Trial Court Answered: Yes.

Appellant Answers: No. The UFTA generally does not require a debtor to be joined in an action when the debtor no longer has an interest in the property at issue. MCL 566.31 *et seq*.

Question 6: Does the UFTA permit an action *solely* against the first transferee of an asset, regardless of whether a right to payment has been reduced to judgment?

Trial Court Answered: No.

Appellant Answers: Yes. Michigan’s UFTA expressly permits judgment to be entered against a *transferee* only, and it plainly and expressly defines a “claim” as a right to payment, “*whether or not the right is reduced to judgment.*” MCL 566.31(c) (emphasis added).

Question 7: Does the UFTA displace cases evaluating whether a debtor is a necessary party in an action to set aside a fraudulent conveyance under the common law, such as *Paton v Langley*, 50 Mich 428 (1883) and *Bixler v Fry*, 157 Mich 314 (1909), discussed in the opinion by the Court of Appeals below?

Trial Court Answered: The trial court did not answer this question.

Appellant Answers: No. The UFTA merely codifies long-standing Michigan precedent that a debtor transferor need *not* be joined in an action to set aside a fraudulent transfer. The *Paton* decision stands for precisely this point. The *Bixler* decision *is* impacted to the extent that it required a claim to be reduced to judgment; however, the common law had already virtually abrogated that aspect of the *Bixler* decision before the enactment of Michigan’s UFTA.

Question 8: Is a judgment against a debtor ever necessary to obtain a judgment avoiding a transfer against the transferee under MCL 566.38, and if not, is the avoidance of the transfer enforceable against the transferred asset under MCL 566.37(2), or only against the transferee’s unrelated assets?

Trial Court Answered: The trial court did not answer this question.

Appellant Answers: Although it is neither clear, nor relevant here, whether circumstances might *ever* exist rendering it necessary to obtain a judgment avoiding a transfer against a transferee, it certainly is not necessary here – and it is inconceivable how such circumstances ever *could* exist, given the UFTA’s express definition of a claim as a right to payment *regardless* of whether it is reduced to judgment. Equally plainly, the UFTA provides remedies against not only the fraudulently-transferred asset, but also against “other property of the transferee,” meaning that enforcement is available not only against the transferred asset, but also against a fraudulent transferee’s other, unrelated assets, under the UFTA’s clear and unambiguous terms.

Question 9: Are the UFTA and MCR 2.205(A) in conflict in this case? If so, which should prevail?

Trial Court Answered: The trial court did not answer this question.

Appellant Answers: No. The UFTA applies to the subject matter and transferee of a fraudulent transfer, while MCR 2.205 requires the joinder of necessary parties but has never applied to anyone without an interest in the subject of the controversy. Accordingly, these two laws are not mutually exclusive and do not conflict – either in this case or in any other. Even if and to the extent a conflict might ever exist, the terms of the UFTA would prevail.

These questions all focus on essentially two issues: first, whether Michigan’s UFTA requires the participation of a debtor (as opposed to the debtor’s fraudulent transferee and the fraudulently transferred assets); and second, whether a claim must be reduced to judgment in order for relief to be granted. The clear language of the UFTA and case law construing it, both in Michigan and in jurisdictions nationwide reviewing identical versions of the UFTA in other states,¹ address both of these issues.

¹ Michigan’s UFTA expressly states that it “shall be applied and construed to effectuate its general purpose to make uniform the law of fraudulent conveyance among the states enacting it.” MCLA 566.41. Thus, Michigan courts’ interpretation should be consistent with other jurisdictions’, particularly since Michigan’s version was adopted without substantive changes from the model UFTA drafted by the National Conference of Commissioners on Uniform State Laws. *Estes v Titus*, 273 Mich App 356; 731 NW2d 119 (Mich App 2006); see *LaBine, Jeffrey L*, 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 R 1479, 1481 (1999). Accordingly, decisions from other jurisdictions that have enacted virtually identical versions of the UFTA are instructive – and, under the UFTA’s express language, such decisions *should* be considered in construing Michigan’s version.

STATEMENT OF FACTS

The relevant facts are set forth in greater detail in the Nursing Home's Application for Leave to Appeal filed in June 2006 (the "Application"). However, a short summary is provided here for the Court's convenience.

A. The Nursing Home Provided Care and Services to the Debtor.

Plaintiff-Appellant Mather Investors, LLC, d/b/a Mather Nursing Center, a Michigan Limited Liability Company (the "Nursing Home"), is a state-licensed nursing home that provided nursing, room, board, and related services to a patient named Alice Maddock ("Mrs. Maddock," the "Debtor," or the "Deceased Debtor"). Mrs. Maddock resided at the Nursing Home from June 11, 2002 until her death on August 30, 2003. *See Admission Documents attached to Original Complaint and Death Certificate, Exhibit A to Answer to Complaint, Appendix at 22a.*

B. The Debtor Incurred a Growing Bill for Care and Services.

From June 2002 until August 2002, Mrs. Maddock's care at the Nursing Home was paid for by Medicare. *Original Complaint filed August 22, 2003, Appendix at 8a (the "Complaint") at ¶9.* After August 2002, she incurred usual and customary charges for services provided to her by the Nursing Home, including semi-private care, medical supplies, and drugs as a private-pay patient because she did not obtain third-party reimbursement from insurance or Medicaid. *Complaint ¶ 10.*

By late September 2002, the balance owed to the Nursing Home for Mrs. Maddock's care was \$11,426.75. *Affidavit by Nursing Home Administrator Nancy L. LaFreniere and Billing Activity statement, attached to the Nursing Home's August 5, 2004 Motion for Summary Judgment, Appendix at 43a.* The balance as of October 31, 2002 was \$16,442.11. While the Debtor was a patient at the Nursing Home, her nephew, Defendant-Appellee William Larson ("Defendant") controlled her Wells

Fargo Bank account as a joint owner. *Transcript of Deposition of William Larson, attached to Plaintiff's Brief in Support of Motion for Summary Disposition ("Larson Dep"), Appendix at 48a, at 32-33, 39.* Beginning in November 2002, the Nursing Home received a few payments from Defendant toward the Debtor's bill; however, the balance due increased to \$60,095.61 by the time the Debtor died on August 30, 2003.

C. The Debtor Transferred All her Assets to Defendant after Incurring Significant Bills but Prior to Collection Efforts.

Just before seeking Medicare reimbursement for private payment, on July 22, 2002, the Debtor transferred \$26,801.00 from her savings account to Defendant. *Larson Dep, Appendix at 48a, at 6, 24-25.* On October 29, 2002, she additionally conveyed all of her real estate holdings to Defendant by Quit Claim Deeds. These transactions collectively are referred to as the "Fraudulent Transfer" herein.

D. Procedural History.

On August 22, 2003, the Nursing Home filed this action against the Debtor and Defendant in the Marquette County Circuit Court, alleging breach of contract for failure to pay for services rendered, balance due on an open account, and fraudulent transfers. The Debtor died one week later, before service on her could be accomplished.

Defendant was deposed on July 1, 2004. On September 14, 2004, the Nursing Home filed a motion for summary judgment, attaching an affidavit confirming the balance then due, based on no facts being in dispute. MCR 2.116(C)(10); *Appendix at 43a.* Defendant filed a motion to dismiss pursuant to MCR 2.205 and MCR 2.116(C)(3) and (8). A hearing was held on November 16, 2004 with oral argument by both parties.

E. Fraudulent Transfer Timeline.

The relevant transactions and events can be summarized in a simple timetable:

Timeline of Simultaneous Debt Incursion and Asset Transfers to Defendant Without Consideration, Leaving Debtor Insolvent While Incurring Debts she was Unable to Pay	
Date	Activity
June 2002	Debtor is admitted to Nursing Home
July 22, 2002	\$26,801.00 transferred from Debtor's savings account to Defendant (her nephew) without consideration
August 2002	Medicare payments cease Debtor begins to incur private charges for nursing care
Sept. 2002	\$11,426.75 owed to Nursing Home
Oct. 29, 2002	Debtor's real estate holdings transferred to Defendant without consideration \$16,442.11 owed to Nursing Home
Late 2002 - Aug. 2003	Some payments received Debtor's income directed to bank account controlled by Defendant \$60,095.61 owed to Nursing Home
Aug. 22, 2003	Nursing Home files action seeking payment for balance due (\$60,095.61)
Aug. 30, 2003	Debtor dies (not yet served)

F. The Erroneous Decision Below.

The circuit court denied the Nursing Home's motion for summary judgment, ruling that the Debtor's Estate was a necessary party and therefore was not a debtor under the UFTA. The trial court held Defendant's motion in abeyance pending substitution of the Estate. Within days, the Nursing Home duly filed its motion to substitute, but the court denied it, instead granting Defendant's motion to dismiss on March 9, 2005.

The Nursing Home promptly initiated an appeal on March 25, 2005. The Michigan Court of Appeals rendered its opinion on June 6, 2006. *Mather Investors, LLC v Larson*, 271 Mich App 254; 720 NW2d 575 (2006), *Appendix at 59a*. This appeal ensued. Oral argument was held on May 10, 2007 by this Honorable Court (*see Michigan Supreme Court Transcript, May 10, 2007 (the "Transcript")*), *Appendix at 111a*), which granted the Nursing Home's Application for Leave to Appeal on June 1, 2007. *Order Granting Application for Leave to Appeal dated June 1, 2007, Appendix at 126a*.

The decisions below held in relevant part that a debtor transferee is a necessary party to a suit under the Uniform Fraudulent Transfer Act ("UFTA"). *Appendix at 52a, 59a*. The Nursing Home contends that, although a debtor transferor may be a *proper* party to such an action, she is not a *necessary* party under Michigan's UFTA. The Debtor here was not an indispensable party to an action seeking to have the transfer(s) set aside, since she did not retain any interest in the assets transferred.

The Nursing Home's Application addresses in detail how and why the transfer at issue was fraudulent and should be set aside, since it involved the transfer of substantially all of the Debtor's assets to Defendant, a close relative (her nephew) without consideration, leaving her insolvent while she was incurring debts that she was unable to pay, all of which occurred just before proceedings to collect payment for her residential nursing care were instituted. Such transfers are presumably fraudulent under the UFTA.

G. Potential Health Care System Impact.

The decision below, if permitted to stand, will cause material injustice not only to the Nursing Home here, but potentially to all Michigan long-term health care providers and patients alike. MCR 7.302(B) (1), (3), (5).

Followed to its logical conclusion, the opinion below would permit debtors to evade their obligations simply by transferring assets and leaving the state (or dying), which the Michigan legislature has not seen fit to delineate as an event triggering debt forgiveness. As a result, Michigan's health care professionals would face a potentially paralyzing minefield of uncertainty regarding payment for services to aging patients, virtually eviscerating the UFTA. Such a catastrophic result certainly cannot have been the intent of the Michigan Legislature in enacting the UFTA.

ARGUMENT & AUTHORITIES

This case involves the interpretation and application of Michigan’s relatively new UFTA.² Courts construing the UFTA and its predecessor³ have noted their statutory goal of striking a balance between the need to permit transacting parties to make deals and the need to fix a point beyond which courts will not permit grantors to enter into transactions that will too profoundly impair their ability to discharge their obligations to creditors. *In re TML, Inc*, 291 BR 400, 433 (Bankr WD Mich 2003).

The unequivocal language of Michigan’s UFTA defines a “claim” as a “right to payment, *whether or not the right is reduced to judgment . . .*” MCLA 566.31(c) (emphasis added). Furthermore, a debtor who has retained no interest in the fraudulently-transferred property is not a necessary party and need not be joined in a UFTA action to set aside the fraudulent transfer. MCL 566.31 *et seq.* Instead, the UFTA expressly provides that a judgment may be rendered against the *transferee*, as well as against the transferee’s assets to the extent of the value of the fraudulently-transferred asset, up to the amount of the debt. MCL 566.38(2)(a). Additionally, the UFTA plainly provides that a claim need not be reduced to judgment in order to support proceedings to set aside the underlying transfer. MCL 566.31(c).

The opinion below flies in the face of the UFTA’s express terms and should be reversed. The Nursing Home respectfully submits that this matter should be remanded to set aside the fraudulent

² The UFTA was adopted in 1998, simultaneously with repeal of the UFTA’s predecessor, the Michigan Fraudulent Conveyance Act (“MFCA” or “UFCA”), taking effect on December 30, 1998. MCL 566.43; *Winters v Bear Creek Investments, Inc*, 2002 WL 393489, *3, n5 (Mich App March 12, 2002); *Nationsbanc Mtg Corp of Georgia v Luptak*, 243 Mich App 560, 567, n2; 625 NW2d 385 (2000).

³ Michigan case law interpreting the UFCA is still viable after adoption of the UFTA. *In re Harlin*, 321 BR 836, 839 (Bankr ED Mich 2005).

transfer that left the Debtor insolvent while incurring debts that she was unable to pay, just before efforts to collect payment for her care at the Nursing Home.

The decision below flies in the face of express legislative intent expressed in the UFTA, and it defies long-established principles of statutory construction. As this Honorable Court correctly and aptly noted, the trial court – like the Court of Appeals – “what catches your eye about the [opinions below is that] it looks like it doesn’t care too much what’s in the Act . . .” *Transcript at 13*. The Nursing Home *does* care what is stated in the UFTA, as should this Honorable Court and every health care provider – indeed, every creditor of any kind – moving forward. If the decisions rendered by the trial court and the Court of Appeals are allowed to stand, they would essentially gut the UFTA and plunge this area of the law into an unpredictable chaos that would result in precisely the opposite result from that envisioned by the Michigan Legislature in enacting the UFTA in the first place.

I. Did the Circuit Court Properly Dismiss this Case under MCR 2.202(A) for the Nursing Home’s Failure to Substitute the Deceased Debtor’s Estate, when the Deceased Debtor Herself had never been Party to the Action?

No; the dismissal was error. Because the Debtor never was a party, MCR 2.202(A) is inapplicable under its express terms, which provide for substitution only in limited and specifically-described circumstances: after the death of “a party.” MCR 2.202(A)(1) (emphasis added).

Simply put, because the Debtor was never a party, MCR 2.202(A) does not apply. The Michigan Court Rules provide for substitution of parties only “[i]f a party dies and the claim is not thereby extinguished.” MCR 2.202(A)(1). Under this express statutory language, the Debtor’s Estate need not have been substituted, since the Debtor herself never was a party to this action. Since the Debtor never was a party to this action, no “party” died, meaning that MCR 2.202(A) is inapplicable.

This conclusion is confirmed by a survey of Michigan decisions applying MCR 2.202(A). In every other reported case discussing MCR 2.202(A), the decedent was a party to the proceedings. *See, eg, Van Til v Environmental Resources Mngmt, Inc*, 476 Mich 862; 719 NW2d 890 (2006) (death of plaintiff); *Smith v Wohlert Corp*, 459 Mich 1000; 595 NW2d 855 (1999) (deceased plaintiff); *Reno v Chung*, 591 NW2d 38 (Mich 1999) (motion to amend requesting substitution); *Jackson v City of Detroit*, 446 Mich 869, 869; 522 NW2d 631, 631 (Mich 1994) (dismissing plaintiff's action seeking relief under public building exception); *Fiebing v Kasben*, 2006 WL 782166, *5 (Mich App Mar 28, 2006) (No 257905) (not yet released for publication) (substitution of named plaintiff where property at issue was transferred during pendency of proceedings); *Tokar v Albery*, 258 Mich App 350, 351 n1; 671 NW2d 139, 141 n1 (2003) (motion filed on decedent's behalf); *Yee v Shiawassee County Bd of Com'rs*, 251 Mich App 379, 401; 651 NW2d 756, 769-70 (2002) (claim for damages against various defendants, including decedent); *Gustafson v Gould*, 2000 WL 33417340 (Mich App July 7, 2000) (No 218024) (not designated for publication) (substitution necessary where co-plaintiff died); *In re Collins*, 1999 WL 33454846, *1 (Mich App Feb 16, 1999) (No 204282) (not designated for publication) (no prejudice to continue litigation regarding decedent's will); *Thomas v Steuernol*, 185 Mich App 148, 156; 460 NW2d 577, 581-82 (Mich App 1990) (decedent's personal representative properly substituted in action to recover oil and gas lease interests held by decedent).

Here, the Debtor never was a party to these proceedings; accordingly, no substitution is necessary – or even authorized – under MCR 2.202(A).

II. Was the Presence of the Deceased Debtor’s Estate “essential to permit the court to render complete relief” under MCR 2.205(A), and if so, should the Circuit Court have Analyzed the Effect of the Nursing Home’s Failure to Join the Estate under MCR 2.205(B)?

No. The presence of the Debtor’s Estate was not “essential to permit the Court to render complete relief” under MCR 2.205(A). This ends the inquiry, obviating the need to address the second part of this question; however, as discussed in greater detail in the Application (*Application at 26-27*), no prejudice to Defendant would result from the failure to join the Estate, since appropriate relief can be granted to prevent a failure of justice.

A. The Presence of the Debtor’s Estate was Not Essential Because the Debtor had no Interest in the Subject of the Controversy.

The Michigan Court Rules provide for the joinder of persons “having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief.” MCR 2.205(A).

An extensive review of Michigan authorities construing MCR 2.205(A) reveals that not one held that a party with no interest in the subject of the controversy is ever a necessary party. *Troutman v Ollis*, 134 Mich App 332, 339-40; 351 NW2d 301 (1984); *Working, Inc v Heitsch*, 2006 WL 3826776, *4 (Mich App Dec 28, 2006) (No 264356) (not yet released for publication) (property owner and promissory were not essential parties to declaratory and breach of contract action); *Estes*, 273 Mich App at 385-86; 731 NW2d at 137 (joinder of person asserting competing claim to property at issue was necessary to accord her due process while litigating her and plaintiff’s claims to the same disputed property); *Healthsource v Urban Hosp Care Plus*, 2006 WL 3687776, *7 (Mich App Dec. 14, 2006) (No 270482) (not designated for publication) (trustee was necessary party because he held legal title to assets at issue); *Dombrowski v Eichinger*, 2006 WL 3019545 (Mich App Oct

24, 2006) (No 269281) (not designated for publication) (property owners not all necessary parties in litigation seeking easement by necessity); *Moskalik v Hilsinger*, 2005 WL 1460189, *5 (Mich App June 21, 2005) (No 251388, 251389) (not yet released for publication) (township's joinder necessary to decide whether public access had been maintained or abandoned); *McCain v McCain*, 2004 WL 316463, *1 (Mich App Feb. 19, 2004) (No 244426) (not designated for publication) (bank should be joined where claims would require it to forbear taking lawful action); *Schienze v Bennett*, 2004 WL 258147, *1 (Mich App Feb. 12, 2004) (No 242386) (not designated for publication) (appellants should have been permitted to intervene in action regarding disputed parcel where they shared equally with plaintiffs in same beach use easement rights); *Charter Twp of Northville v Northville Public Schools*, 469 Mich 285; 666 NW2d 213, 219 (2003) (in action to determine whether statute effected impermissible delegation of legislative authority to superintendent, superintendent would need to be party); *Vandriessche v Van Kampen Am Cap Grp*, 2000 WL 33534613, *1 (Mich App Feb. 11, 2000) (No 215589) (not designated for publication) (joint owners of fund were necessary parties in action to compel partition of the fund); *Winston Brothers Iron & Metal Co v Fink*, 1997 WL 33350523, *1 -2 (Mich App Apr. 25, 1997) (No 181929) (not designated for publication) (joint obligor was not necessary party in action for failure to pay interest on loan); *Meyers v Patchkowski*, 216 Mich App 513, 520; 549 NW2d 602, 605 (1996) (where injunctive relief was sought overturning school board's action, school board was necessary party and relief could not be obtained when it was not joined); *Gordon Food Svc, Inc v Grand Rapids Material*, 183 Mich App 241, 243; 454 NW2d 137, 138 (1989) (both insured and insurer are necessary parties to action seeking compensation for property damage and business interruption losses resulting from collapse of warehouse food storage rack).

Authorities construing identical UFTAs in other states provide for a direct statutory remedy against transferees of fraudulently conveyed property, under which “there is no requirement of a suit against the original debtor. Therefore, . . . the debtor [] cannot be said to be ‘[a] person . . . [in the absence of whom] . . . complete relief cannot be accorded among those already parties.’” *Citizens Bank of Massachusetts v Grand Street Parkway, LLC*, 21 Mass L Rptr 594; 2006 WL 3292672, *2 (Mass Super Oct 13, 2006) (No 060242A) (not reported in NE2d) (no requirement of suit against debtor who claims no interest in subject of action).

The recent *Estes* decision noted this Honorable Court’s holding regarding the necessity of the presence of parties asserting competing claims to the property at issue. *See Ocwen Fed Bank, FSB v Int’l Christian Music Ministry, Inc*, 472 Mich 923; 697 NW2d 155 (2005); *Estes*, 273 Mich App 356; 731 NW2d 119 (only transferee’s presence – *not* transferor’s – is essential to permit complete relief to be rendered in creditor’s UFTA claim). *Estes* was an action by a grantor’s creditor to set aside a settlement pursuant to a divorce decree by which the grantor transferred substantially all of his assets to his (ex)wife, in her divorce action filed after a wrongful death action was filed against the incarcerated grantor. The divorce property settlement was held to be a fraudulent transfer under UFTA. The trial court did not have authority to intervene in the pending divorce; however, it clarified that any orders entered under the UFTA in the creditor’s wrongful death action against the grantor would not operate to modify the judgment of divorce, but would operate only against persons and property within the trial court’s jurisdiction. Thus, *Estes* addressed the issue of whether the transferee – not the transferor – needed to be a party to proceedings to set aside a transfer under the UFTA. The court determined that the grantee’s presence – not the grantor’s – was essential to permit the trial court to render complete relief if the creditor’s UFTA claim was successful.

When a party's presence is not essential to rendering complete relief, factors such as avoiding multiple litigation and judicial economy are insufficient to compel joinder. *Lindsey v St John Health Sys, Inc-Detroit*, 2007 WL 397075, *5 (Mich App Feb 6, 2007) (Nos 268296, 270042) (not yet released for publication) (rights and legal obligations sought to be determined solely related to and arose from plaintiff's relationship with medical care provider and its governing entity; notwithstanding common interest by precluded defendants in subject matter, their joinder was not essential to determining rights and obligations between plaintiff and remaining defendant, nor necessary to permit trial court to render complete relief); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 96; 535 NW2d 529, 550 (1995).

B. Joinder is not Necessary merely because it is Permissible.

Even where a party *may* be joined, if joinder would grant no additional relief, its presence is not "essential to permit the court to render complete relief." *PT Today, Inc v Commissioner of Office of Fin and Ins Svcs*, 270 Mich App 110, 135-37; 715 NW2d 398, 415-16 (2006) (although Attorney General *may* engage in enforcement actions, it was not *necessary* party, and where claims against it would have failed as matter of law, its joinder would have granted plaintiffs no additional relief); *East Muskegon Roofing & Sheet Metal Co v Holwerda*, 2006 WL 355208, *2 (Mich App 2006) (not yet released for publication) (noting that key inquiry under MCR 2.205(A) is whether party's presence is necessary to render complete relief and that parties' presence was not necessary for plaintiff to obtain judgment). That is precisely the case here, where the joinder of the Deceased Debtor (or her Estate) would grant no additional relief.

Authorities nationwide construing similar statutes have held that someone with no legal or equitable interest in property fraudulently conveyed is not a *necessary* party to a proceeding to set

aside the conveyance, even though he may be a *proper* party. *Sheepscot Land Corp v Gregory*, 383 A2d 16, 24 (Me 1978) (fraudulent grantor is not indispensable party to action against grantees; grantor with no interest relating to subject of action is not indispensable party); *Damazo v Wahby*, 269 Md 252; 305 A2d 138 (1973); *Rozan v Rozan*, 129 NW2d 694 (ND 1964); *Cable v Cable*, 132 WVa 620; 53 SE2d 637 (1949); *Hewitt v Punta Gorda State Bank*, 117 Fla 126, 127; 157 So 420, 421 (1934) (debtor-grantor not necessary party in action to set aside fraudulent conveyance, since decree does not affect grantors of fraudulent conveyances unless relief is sought against them); *Frell v Frell*, 154 So2d 706, 708 (Fla Dist Ct App 1963) (debtor-grantor is not necessary or indispensable party defendant in action to set aside fraudulent conveyance); citing *Bank of Commerce & Trusts of Richmond, Va v McArthur*, 256 F 84, 85-86 (5th Cir 1919).

At common law, the debtor *could* be considered a necessary party if the claim has not been reduced to a judgment. See 37 AM. JUR 2D, FRAUDULENT CONVEYANCES AND TRANSFERS, § 189, p 666 (“Where the creditor has not reduced its claim to judgment, the debtor is an indispensable party since, in such circumstances, the debtor has the right to be heard in regard to the validity or amount of the claim.”). However, as discussed in Sections VIII, Michigan’s UFTA abrogated the common law to the extent that it expressly does *not* require a claim to be reduced to judgment, as will be discussed in greater detail in Sections VI and VII.

C. No Prejudice Resulted from the Failure to Join the Debtor’s Estate.

Analyzing MCR 2.205(B) reveals that no prejudice resulted from the failure to join the Debtor’s Estate in the action against Defendant, as discussed in greater detail in the Application (*Application at 26-27*) and in Sections II and III above.

Even if the Debtor's Estate had retained an interest in the subject matter of this action, MCR 2.205(B) permits proceeding without it by granting "appropriate relief to persons who are parties to prevent a failure of justice." MCR 2.205(B). In determining whether to proceed, the court must consider various issues centered around whether a valid judgment may be entered in the absence of the person not joined and whether prejudice would result to the person not joined or to the defendant. MCR 2.205(B)(1)-(4).

Because the Estate retained no interest in the subject fraudulently transferred assets, it also suffered no prejudice by its exclusion, since (as discussed in greater detail in Sections III and V below), in no event would any interest in those assets revert to the Estate.

III. Would the Debtor's Estate represent any separate rights or interests that are not otherwise represented by Defendant?

No. This question essentially asks whether Defendant is prejudiced by standing in the Debtor's shoes. However, as just discussed, Michigan law makes clear that no such prejudice would result. This action would proceed in exactly the same manner regardless of whether the Estate had been made a party, with the Nursing Home requesting the identical relief under the UFTA (payment of the Debtor's bills) against the identical party (the Defendant, not the Debtor's Estate, which no longer retained any interest in the subject assets). MCL 566.37; 566.38. Defendant is free to assert any defenses that might have been raised by the Estate, so he is not prejudiced by the Estate's absence.

A. Defendant can Raise Every Defense that would be Available to the Debtor's Estate.

Defendant has insinuated that Defendant would have raised substantive defenses to the Nursing Home's charges. *Transcript at 12-13*. However, Defendant is free to raise every defense,

if any there is, to payment that the Deceased Debtor could have raised. Not one defense was raised, or even mentioned, during the proceedings below or at any point to date, although Defendant is and has been free to assert any such objections or defenses at any time. Nothing in the UFTA prohibits the transferee of a fraudulently transferred asset from asserting any and every defense to payment that would have been available to the debtor from whom he received the fraudulently transferred assets. To the extent that substitution is not possible because no estate ever was opened, Defendant has been free to open one that could intervene in this action, if warranted.

B. Subrogation is Not Novel in Michigan.

The UFTA is so new that a body of precedent has not yet been established addressing all of the issues explored here; however, Michigan authorities construing other laws have concluded that where a party is sued based on his involvement through an absent party, he “stands in the shoes” of that absent party and can assert all claims and defenses that the absent party could have asserted. Such decisions are analogous to the situation presented here under the UFTA. *See In re Forfeiture of \$234,200*, 217 Mich App 320, 328; 551 NW2d 444, 448 (1996) (personal representative who stood in shoes of decedent was legally entitled to assert any claim that decedent could have made); *Crossley v Allstate Ins Co*, 139 Mich App 464, 470; 362 NW2d 760, 763 (1984) (by accepting assignment, plaintiff stands in shoes of assignor, so all defenses assertable against assignor are also assertable against plaintiff).

The concept substituting one party for another is not novel in Michigan, but has long existed in the form of subrogation, most commonly encountered in the insurance subrogation context. *See Auto-Owners Ins Co v Amoco Prod’n Co*, 468 Mich 53, 60; 658 NW2d 460, 464 (2003); *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 219; 565 NW2d 907, 914 (1997); *Auto*

Club Ins Ass'n v New York Life Ins Co, 440 Mich 126, 136; 485 NW2d 695, 699 (1992);
Commercial Union Ins Co v Medical Prot Co, 426 Mich 109, 118; 393 NW2d 479, 482 (1986).

Michigan authorities have defined subrogation:

A legal fiction through which a person who, not as a volunteer or in his own wrong, and in absence of outstanding and superior equities, pays debt of another, is substituted to all rights and remedies of the other, and the debt is treated in equity as still existing for his benefit, and the doctrine is broad enough to include every instance in which one party pays the debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by such other.

Foremost Life Ins Co v Waters, 88 Mich App 599, 603; 278 NW2d 688, 689-90 (1979), *rev'd on other grounds*, 415 Mich 303 (1982).

C. Party in Another's Shoes Can Assert Every Defense Available to the Absent Person.

Nor is the concept of one party standing in the shoes of another in asserting the defenses that would have been available to the other a novel one. *Neal v Neal*, 219 Mich App 490, 497; 557 NW2d 133, 137 (1996) (allowing insurer to stand in insured's shoes to collect mediation sanctions to cover defense costs best serves public policy underlying sanctions rule to expedite and simplify settlement by placing litigation burden on party who insists on trial by rejecting mediation evaluation); *Stram v Jackson*, 248 Mich 171, 176; 226 NW 888, 890 (1929) (defendant purchaser stands in shoes of corporation and can urge no defense to mortgage not open to mortgagor).

This is particularly true where involvement in a proceeding stems from a continuation of the ownership of a deceased person. *Michigan Nat Bank & Trust Co v Morren*, 194 Mich App 407, 411, n2; 487 NW2d 784, 786, n2 (1992); *citing Detroit v Stafford*, 320 Mich 6, 14; 30 NW2d 410 (1948) (estate executor stands in shoes of testator with respect to personal property, and his ownership is only continuation of deceased's ownership).

In other words, Defendant can defend this action every bit as effectively as, and to the full extent that, the Debtor's Estate could have.

IV. Does the Debtor's Nephew have sufficient information and/or standing to raise any defenses or counter-claims the Debtor's Estate may have against the Nursing Home?

Yes. As just discussed, because he essentially is standing in the Deceased Debtor's Estate's shoes, Defendant may raise all defenses or counter-claims that it could have raised. Additionally, he is free to assert a complete defense if and to the extent that the Fraudulent Transfer was made in good faith, which would remove it from coverage under the UFTA. If and to the extent that he feels lacking in any information (to which, as the Debtor's close relative, he would be more privy than the Nursing Home), he could have requested substitution, and he could even now request late substitution – which he never has done.

A. Late Substitution would be Permissible if Defendant were to Request it Here.

If and to the extent that Defendant feels ill equipped to respond to the claims here, he always has been, and remains, free to request substitution of the Debtor's Estate – a permissible request even at this late date in the proceedings.

MCR 2.202 specifies that unless a motion for substitution is made within 91 days after filing and service of a statement of the fact of death, an action must be dismissed as to a deceased party, “unless the party seeking substitution shows that there would be no prejudice to any other party from allowing later substitution.” MCR 2.202(A)(1)(b). The 91-day time limit for moving to substitute following the death of a party in MCR 2.202 is consistent with Fed. R. Civ. P. 25 (Substitution of Parties). However, later substitution is allowed if the party seeking it shows that no other party will be prejudiced because of the late motion.

Where a suit is brought in the name of the wrong party, either by mistake of law or fact, the real party in interest may be substituted as a plaintiff, and the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. *Wallis v US*, 102 F Supp 211, 212 (EDNC 1952). The substituted party steps into the same position as the original party. *Ransom v Brennan*, 437 F2d 513, 516 (5th Cir 1971), *cert denied*, 403 US 904; 91 SCt 2205; 29 LEd2d 680.

Thus, just as the Defendant here essentially “stands in the shoes” of the Debtor’s Estate, so too would the reverse be true if the Estate were substituted for him. Either way, as current holder of the fraudulently-transferred assets, Defendant is the real party in interest.

B. Defendant has Standing Here, and Needed Substitution would Require Reversal.

Defendant has ample “standing” simply because he essentially stands in the shoes of the Deceased Debtor. However, if and to the extent that the Defendant does *not* have sufficient information or standing to raise the defenses that would have been available to the Debtor’s Estate, then that fact alone would warrant reversal of the decisions below, given the trial court’s denial of the Nursing Home’s motion for substitution below.

Someone acting on a deceased person’s behalf has “standing” in actions where they are involved through the deceased person’s absence. For instance, the attorney for a deceased plaintiff had “standing” to file motions for enlargement of time to file a motion for substitution, following the filing of a suggestion of death, pending appointment of an administrator for the plaintiff’s estate. *Kernisant v City of New York*, 225 FRD 422, 430 (EDNY 2005) (noting that Federal Rules of Civil Procedure do not contemplate dismissal of claims “simply because the process of appointing an administrator for the deceased’s estate was delayed for a significant amount of time.”).

If the substitution of a non-party's estate is deemed warranted under MCR 2.202(A), the Michigan Court Rules further provide for such substitution to occur at any stage in the proceedings – including on appeal before this Honorable Court. MCR 2.202(D) (“Substitution of parties under this rule may be ordered by the court either before or after judgment or by the Court of Appeals or Supreme Court pending appeal.”).

Note that the fact that the Debtor's Estate has not been made a party to these proceedings is not the Nursing Home's doing, but another decision by the trial court. To the extent that the Debtor's Estate's involvement could be seen in any way as being beneficial or warranted, it comprises yet another basis for reversing the decision below. It was error to deny the Nursing Home's Motion to Substitute, which was filed within days of the trial court's ruling that the Debtor's Estate was a necessary party, where it has been shown that the requested substitution would have worked no prejudice to Defendant.

That no prejudice to Defendant would result from the joinder of the Debtor's Estate is clear. If the Estate were made a party,⁴ the Nursing Home would request the same relief, against the same party (the Defendant), under the same statute (Michigan's UFTA). MCL 566.37; 566.38. Note that if the Fraudulent Transfer were not fraudulent – ie if Defendant had taken the Debtor's assets “in good faith and for a reasonably equivalent value,” the Fraudulent Transfer would not be voidable under the UFTA's express terms, as discussed in greater detail in Sections VI and IX. MCL 566.38. As discussed in greater detail in Sections III and V, below, the Debtor's Estate's presence is not

⁴ To join the Estate as a party, a probate action would have to be filed against its personal representative. Defendant never commenced such an action, so the Nursing Home would have had to do so, naming itself personal representative – meaning it would act as both creditor and for the Debtor – an exercise that would be as absurd as it would be futile. MCL 700.1105(c); MCL 700.3203(1)(f).

essential in order to render complete relief—in fact, the presence of the Estate would have absolutely no bearing on these proceedings, since the it retained no interest in, and has no competing claim to, the property at issue. Any defenses that the Estate might have regarding the amount of the underlying claim could and should be raised by Defendant, although to date, no substantive defenses have been raised.

The passage of time does not alone prohibit enforcing a claim, unless a change of conditions would render it inequitable to do so. *Brydges v Emmendorfer*, 311 Mich 274, 279; 18 NW2d 822 (1945) (delay must have resulted in prejudice to party asserting laches which would make it inequitable to disregard lapse of time and incidental consequences).

Here, Defendant has enjoyed control and possession of the Debtor’s assets during the pendency of these proceedings, of which he has been aware since before these proceedings began in 2003, and even before that, beginning with shortly before efforts to collect the amount due were undertaken in late 2002. Making the Estate a party would neither surprise nor prejudice him.

The Nursing Home agrees fully with the statement that “the UFTA only permits voiding a transaction as to the creditor, not as between the debtor and the transferee.” *Mather*, 271 Mich App at 259; 720 NW2d at 578. In fact, this is the thrust of the Nursing Home’s argument regarding necessary parties: the Debtor is *not* a necessary party to these proceedings, precisely *because* the UFTA does not void transactions as between her as the debtor and Defendant as the transferee, but merely between the transferee (Defendant) and the creditor (the Nursing Home).

Because the crux of this matter is a dispute between Defendant and the Nursing Home, they are the only necessary parties, and this matter should be permitted to proceed under the express terms of the UFTA.

Additionally, the Nursing Home notes that Defendant has been, and remains, free to request late substitution if he feels that it would be more fair for the Debtor's Estate to be present; however, note that the Nursing Home attempted to achieve this result and had its request to do so refused by the trial court. Accordingly, to the extent that any prejudice might possibly result from the absence of the Debtor's Estate from these proceedings, reversal is warranted to correct that portion of the trial court's erroneous ruling below.

V. Does the UFTA, MCL 566.31 *et seq* generally require a debtor to be joined in an action, when she no longer has an interest in the property at issue?

No. The UFTA generally does not require a debtor to be joined in an action when the debtor no longer has an interest in the property at issue. MCL 566.31 *et seq*.

Under the UFTA, it is not necessary to join a deceased debtor in an action for relief from a fraudulent transfer where the debtor has retained no remaining interest in the transferred assets. This is clear under precedent not just from Michigan courts, but from decisions in numerous other jurisdictions construing identical statutory provisions nationwide, as discussed in greater detail in the Application. *Application at 23-24*.

Here, the Debtor retained no interest in the assets at issue, so joinder is not necessary. A debtor who has retained no interest in the assets transferred is not a necessary party in an action to set aside a fraudulent transfer under the UFTA. *Simmons v Clark Equipment Credit Corp*, 554 So2d 398, 399 (Ala 1989), *reh'g denied*; *Southern Ry v Hartshorne*, 150 Ala 217; 43 So 583 (1907) (grantor is necessary party only when he has outstanding interest in property not included in fraudulent conveyance); *Liuzza v Bell*, 40 Cal App 2d 417, 424-25; 104 P2d 1095 (Cal App 1st Dist 1940) (fraudulent grantor who reserved no interest in matter of conveyance is not necessary party

to action to set it aside; conveyance is binding on grantor and unaffected by his death); *Strong v Texas Co*, 70 Colo 546, 547-48; 203 P 675 (1922) (administrator for deceased debtor who has parted with title is proper but not necessary party); *Hewitt*, 117 Fla at 127; 157 So at 421; *Parnell Sav Bank of Parnell v Shuell*, 195 NW 247, 247 (Iowa 1923); *Springfield Gen'l Osteopathic Hosp v West*, 789 SW2d 197, 201-02 (Mo 1990) (grantor who allegedly conveys property to prevent its being subject to payment of debts cannot be prejudiced by determination that property is subject to creditors' claims; it has passed beyond control of grantor, who has no interest and is not necessary party); *Fischer v Rio Tire Co*, 65 SW2d 751, 756-57 (Tex Com App 1933); *Morgan v Ice*, 80 WVa 273; 92 SE 340, 341 (1917).

A. No Prejudice to Debtor from Judgment Regarding Property She no Longer Owns.

That a debtor who has parted with all interest in property is not a necessary party to a creditor's action to set aside the conveyance has long been held by courts nationwide. *See Keene v Hale-Halsell Co*, 118 F2d 332 (5th Cir 1941); *Keaton v Little*, 34 F2d 396, 397 (10th Cir 1929); *Allan v Moline Plow Co*, 14 F2d 912, 915 (8th Cir 1926); *McArthur*, 256 F at 86 (former owner of property in question no longer has any interest in it; transfers not binding against transferor's creditor); *Saracco Tank & Welding Co v Platz*, 65 Cal App 2d 306; 150 P2d 918 (1944); *Liuzza*, 40 Cal App 2d 417; *First Nat'l Bank of Monett v Vogt*, 344 Mo 284; 126 SW2d 199 (1939); *Hewitt*, 117 Fla 126; *Fischer*, 65 SW2d 751; *Fuentes v Suarez*, 7 Puerto Rico F 690 (1914); *Wescott v Sioux City*, 141 Iowa 453; 119 NW 749 (1909) (grantor is proper, but not necessary, party); *First Nat Bank v Dawson*, 127 Ill App 295 (1906), *aff'd*, 228 Ill 577; 81 NE 1128 (conveyance good as between parties thereto; judgment debtor had no interest to defend and was not necessary party); *California Consol Mining Co v Manley*, 10 Idaho 786; 81 P50 (1905); *error disp 'd*, 203 US 579; 27 SCt 779;

51 LEd 326 (insolvent grantor of interest in claim not necessary party in suit against later grantee).

This widely-recognized result is logical: a debtor who has retained no interest in the transferred property is not a necessary party; the property has passed irrevocably from her control, so she cannot be prejudiced by a decree subjecting it to paying her debts (nor can she enjoy the fruits of the successful prosecution, since after the creditor's demand is satisfied, the remainder goes to the fraudulent transferee). *See* 37 CJS FRAUDULENT CONVEYANCES § 253 (debtor not necessary party where debtor parted with all interest in property); 24 ALR2d 395; *Keaton*, 34 F2d at 397; *Allan*, 14 F2d at 915; *Hewitt*, 117 Fla 126 (unless relief is sought against grantor, she is not indispensable or necessary party, as decree can affect no rights of hers); *Homestead Mining Co v Reynolds*, 30 Colo 330, 333; 70 P 422 (Colo 1902) (fraudulent grantor who has parted with interest in property at issue is not necessary party to action to set aside conveyance); *Laughton v Harden*, 68 Me 208 (1878) (debtor who no longer has interest in land is not necessary party to fraudulent conveyance action).

The facts of the *McArthur* case were strikingly similar to those here: no service had been obtained on the debtor, and the suit was dismissed on the ground that the debtor was a necessary party. *McArthur*, 256 F at 84-85. In reversing the dismissal, the Fifth Circuit Court of Appeals held that the debtor had no such interest in the suit as required that he be made a party to it, since he would not be prejudiced or affected by a decree subjecting the property to the satisfaction of the plaintiff's demand, the transfer being binding as between him and his grantees, and the suit therefore could be abated against the debtor and prosecuted against the other defendants. *Id.*, 256 F at 86.

B. Property May Not Return to Debtor Regardless of Judgment.

The fraudulent grantor is not a necessary party to an action between a creditor and the fraudulent grantee, since the property may in no event go back to her. *Fuentes*, 7 Puerto Rico F 690

(property must go to either plaintiff or defendant in action, inasmuch as grantor has parted with title); *Schneider v Patton*, 175 Mo 684; 75 SW 155 (1903) (fraudulent grantor can be prejudiced in no way by determination that subject property, which already has irrevocably passed beyond her control, to payment of debts; thus, she has no interest in suit and therefore is not necessary party); *Glover v Hargadine-McKittrick Dry Goods Co*, 62 Neb 483; 87 NW 170, 171 (Neb 1901) (if vendor retained no title or interest in property fraudulently transferred, she has no rights to be affected by litigation result, and her presence may be dispensed with); *Leach v Shelby*, 58 Miss 681 (1881) (neither grantor nor his wife were necessary parties to suit by judgment creditor to set aside conveyances from grantor to wife to son); *see also Springfield*, 789 SW2d at 201-02 (“A grantor who allegedly conveys property to prevent its being subjected to payment of his debts cannot be prejudiced by a determination that the property is subject to creditors’ claims, as the property has passed beyond the grantor’s control, hence he has no interest in the suit and is not a necessary party.”); *Vogt*, 344 Mo 284; 126 SW2d at 201; *Schneider*, 175 Mo 684; 75 SW at 167-68. The reasons for this rule were astutely identified by the Mississippi Supreme Court:

“[U]pon what principle is that, after judgment and return of *nulla bona*, a fraudulent grantor, or his administrator or heirs, are deemed necessary parties to a bill to vacate a fraudulent conveyance? The grant is not only good against them, but it is absolutely unassailable by them. Under no circumstances can they be permitted to attack it, or to claim any interest in the property conveyed. . . . The truth is, that it is a proceeding *in rem*; and while the complainant may, if he chooses to do so, join as defendants all who are connected with the property or the transactions to be investigated, he is only compelled to join those in whom the legal title rests, or those who have a beneficial interest to be affected.”

Taylor v Webb, 54 Miss 36, 1876 WL 5131, *5 (Miss 1876) (debtor with neither legal nor equitable title to property cannot under any circumstances attack transfer or claim interest in property, and thus need not be defendant).

C. Neither Debtor nor her Estate is Necessary Party where Debtor Parted with All Interest in Property during her Lifetime.

At common law, most jurisdictions have held that, “having parted with all interest in the property the grantor can no longer be affected by any decree pertaining to the property, that the debtor is not a necessary party to the action, although the debtor may be a proper party.” 37 AM JUR 2D, FRAUDULENT CONVEYANCES AND TRANSFERS, § 189, p 666. Stated another way, regardless of whether the debtor is alive or dead, only if she retained some interest in the property would her presence be required under the UFTA. See 37 AM JUR 2D, FRAUDULENT CONVEYANCES AND TRANSFERS, § 191, p 667 (where during his lifetime debtor parted with all title and interest in property, debtor’s administrator or executor is not necessary party in action to set aside fraudulent conveyance). In accord, courts nationwide have held that, under states’ uniform fraudulent transfer acts and at common law, the debtor is *not* a necessary party.

Most jurisdictions have held that “a transferor who has parted with all interest in the property can no longer be affected by any decree pertaining to the property, and [] therefore the transferor is not a necessary party to a fraudulent transfer action.” *Tsiatsios v Tsiatsios*, 144 NH 438, 445; 744 A2d 75, 80 (1999); 37 AM JUR 2D FRAUDULENT CONVEYANCES § 203 (1968); see, eg, *Sheepscot*, 383 A2d 16; *Frell*, 154 So2d 706.

Divergent authorities applying this rule to deceased debtors are clearly distinguishable from this case. See *Tcherepnin v Franz*, 439 F Supp 1340, 1343 (ND Ill, 1977) (setting aside conveyance as fraudulent would restore property to Executor of estate as far as creditor is concerned; this restoration of property to Executor makes Executor necessary party). The *Tcherepnin* decision is readily distinguishable because it expressly stated that it could not determine whether the estate

would be affected by the decree. *Id.*, 439 F Supp at 1343. By contrast, a party is not necessary to an action where her rights in the property clearly would *not* be affected by a judgment in the case. *Tsiatsios*, 144 NH at 445 (no reason to require that estate be party to action because title to property at issue was in defendant's sole possession; "[b]ecause no relief could have been granted against the estate and the estate retained no interest in the property, . . . it was not a necessary party.").

Thus, a debtor is a necessary party only if she has *not* parted with legal title to, or interest in, the disputed assets. *Trotter v Brown*, 232 Ala 147; 167 So 310, 311-12 (1936); *Keene*, 118 F.2d at 334-35; 37 CJS FRAUDULENT CONVEYANCES § 253. In the case of intermediate grantees, only those who retain title to the property are indispensable parties. *In re Schneider*, 99 BR 52, 55-56 (Bankr WD Wash 1989); *Simmons*, 554 So2d at 399; *Tanaka v Nagata*, 868 P2d 450, 454-55; 76 Hawai'i 32, 36-37 (1994); *Mihajlovski v Elfakir*, 135 Mich App 528, 534-35; 355 NW2d 264 (1984); *reh 'g denied*; *Fraley Ins Agency v Johnston*, 784 P2d 430, 431; 1989 OK CIV APP 80 (1989); 37 CJS FRAUDULENT CONVEYANCES, §254 (grantee who still retains title to property is indispensable party, but general rule is that intermediate grantee whose title and interest in property have been divested is not necessary party).⁵

Here, Debtor's real estate holdings were conveyed to Defendant and her money was transferred to his bank account; thus, she retained no interest in any of the property that was transferred. Accordingly, the Nursing Home filed this action seeking relief by avoiding the transfers to the extent necessary to satisfy its claim for services rendered to the Debtor. MCL 566.37(1)(a). This is the proper procedure under the clear provisions of the UFTA.

⁵ This line of authorities apparently sidetracked the court below; however, they discuss intermediate transferors/transferees rather than debtor transferors such as the Debtor here.

VI. Does the UFTA permit an action *solely* against the first transferee of an asset, regardless of whether a right to payment has been reduced to judgment?

Yes. This question comprises two sub-issues: first, whether an action may be brought solely against an asset's first transferee, and second, whether a claim may be pursued even if the asserted right to payment has not been reduced to judgment. The answer to both issues is a resounding "yes." The UFTA expressly and plainly states that judgment may be entered against a transferee only and that the creditor's claim need *not* be reduced to judgment. MCL 566.31(c); 566.38(2).

A. The UFTA Expressly Provides that Claim Need Not be Reduced to Judgment.

This plain language could not be more clear in stating the Legislature's intent that a claim need *not* be reduced to judgment for the action to proceed. The UFTA's definitional section provides: a "[c]laim" means a right to payment, *whether or not the right is reduced to judgment . . .*" MCL 566.31(c) (emphasis added). That provision elaborates in excruciating detail that a claim need *not* be reduced to judgment, clarifying that a claim is "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." MCL 566.31(c).

Similarly, the UFTA's predecessor did not require claims to be reduced to judgment. Actions under the UFCA were restricted neither to judgments nor to specific types of claims. *Iden v Huber*, 259 Mich 3, 4; 242 NW 818, 818-19 (1932) (claim arising out of tort does not prevent claimant from being "creditor"). The explicit elimination of any requirement that a creditor obtain a judgment as a prerequisite to initiating a fraudulent conveyance action is a notable change from the UFCA (although the explicit elimination of this requirement was at least arguably unnecessary, given that the common law and the UFCA had virtually eliminated that requirement already). *See LaBine*, 45

WAYNE L REV at 1490; MCLA § 566.31(c). Likewise, authorities have noted that “it is no longer necessary in a proceeding to set aside a fraudulent conveyance that the claim of the plaintiff be first reduced to judgment.” *Emarine v Haley*, 892 P2d 343, 347 (Colo App 1994).

B. The UFTA Authorizes Suit Solely against Transferee.

Furthermore, the UFTA expressly permits judgment to be entered against a *transferee* only, with no requirement of the transferor’s presence.

1. Transferor’s Presence not Required where no Interest is Retained.

Regardless of whether the debtor is alive or dead, the transferor is a necessary party only where she retains some interest in the controversy. As discussed in greater detail in the Application (*Application at 23-24*) and in Sections III and V herein, the Debtor here was not a necessary party, since she retained no interest in the property at issue. Furthermore, the Nursing Home’s claim against her need not be reduced to judgment to support a proceeding to recover the property she fraudulently transferred to Defendant, under the express terms of Michigan’s UFTA. Michigan’s UFTA makes clear that a creditor’s claim may proceed against a transferee alone. The UFTA expressly provides:

- (2) . . . [T]o the extent a transfer is voidable in an action by a creditor . . . , the creditor may recover a judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor’s claim, whichever is less. The judgment may be entered against *either* of the following:
 - (a) The first *transferee* of the asset or the person for whose benefit the transfer was made.

MCLA 566.38(2)(a) (emphasis added). The UFTA contains absolutely no requirement that the *debtor* be made a party to an action. To the contrary, this section of the UFTA expressly provides that judgment may be entered against a *transferee* (either a first *or* subsequent transferee) alone.

Because of her death prior to service upon her, the Debtor never became a party below. The trial court dismissed the action because it considered her to be a necessary party under the Act. However, for a number of reasons she was not a necessary party for the Nursing Home to obtain the relief requested in this action under the UFTA.

If a debtor incurs an obligation in Michigan, transfers her assets to a third party for no consideration, rendering her insolvent, and then moves to Afghanistan, the UFTA provides an avenue for relief for a creditor, which can obtain relief by proceeding against the transfer itself and obtain a judgment against the transferee for the value of the asset transferred or the amount necessary to satisfy the creditor's claim. MCL 566.38(2). However, under the lower courts' reading of the statute, if the debtor is not joined as a party to the lawsuit, then the creditor has no remedy. Such a result would be ridiculous and would render superfluous the language in the UFTA regarding an absconding debtor. MCL 566.34(2)(f). Such a result would violate established principles of statutory construction, as discussed in greater detail in Sections VIII and IX below.

Meanwhile, as conceded by the court below, the UFTA contains no requirement that the debtor be made a party to proceedings to set aside a fraudulent transfer. *Mather*, 271 Mich App at 256; 720 NW2d at 576 ("The plain language of the UFTA does not require the creditor to join the debtor alleged to have made the fraudulent transfer").

Here, the debtor could not be made party to this action because she died before she was served. Her Estate could be made a party, but there was no reason to do so because it is not necessary to have the Estate involved in order for the Nursing Home to prove its claim – and it is not necessary to reduce the claim to judgment in order for this action to proceed, under the express terms of Michigan's UFTA. MCL 566.31(c).

Even authorities holding that a debtor is a necessary party to an action to vacate an allegedly fraudulent conveyance concede that the debtor is *not* indispensable if a sufficient excuse is shown for the failure to make her a party. *Lane v Newton*, 140 Ga 415; 78 SE 1082, 1084-85 (1913). Here, there was no reason to join the Estate (even if one had been opened) in the proceedings below, since there were no assets to collect from the Estate because Defendant already had taken them all. *Transcript of Motion for Rehearing, March 9, 2005, at 5:1-5*. As a result, the only relief available to the Nursing Home here is with regard to the transfers from the Debtor to the Defendant. No other relief is available because there are no other assets available. Thus, opening and joining the Estate would be a meaningless waste of time and resources. The only relief available to, or requested by, the Nursing Home is that contained in the UFTA. MCL 566.37, 566.38.

2. Innocent Transferees are not Subject to UFTA's Remedies.

Defendant has suggested that innocent transferees may be endangered by application of the UFTA. *Transcript at 12, 14-15*. Defendant additionally has argued that the availability of a remedy under the UFTA is unnecessary because other remedies exist, such as those under the Estates and Protected Individuals Code (“EPIC”), and that proceeding under UFTA amounts to an “end run” around other statutes. *Cf* MCL 700.1101 *et seq*; *Transcript at 15*. However, these arguments ignore the fact that the UFTA is applicable to situations involving *fraudulent* transfers. The UFTA expressly authorizes action against a transferee where the circumstances indicate that a transfer was fraudulent. MCL 566.34(2)(a)-(k). To hold otherwise would gut the UFTA.

As discussed in more detail in Section IX below, it must be remembered that a *fraudulent* transfer is a prerequisite to any remedy under the UFTA, thus protecting good-faith transfers. Actual intent to defraud may be inferred from the “badges of fraud” enumerated in detail in the UFTA.

MCL 566.34(2)(a)-(k); *Szkrybalo v Szkrybalo*, — NW2d —; 2007 WL 1575262, *2 (Mich App May 31, 2007) (No 269125) (not yet released for publication) (evidence of various “badges of fraud”); *Goucher v Goucher*, 2003 WL 22871116, *2-3 (Mich App Dec 4, 2003) (No 239219) (not designated for publication) (recognizing list of factors to be considered in determining whether debtor had actual intent to hinder, delay, or defraud creditors); *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659; 513 NW2d 441 (1994). These “badges of fraud” may be particularly strong depending on their nature and number occurring in the same case. *Szkrybalo*, 2007 WL 1575262 at *2; *Coleman-Nichols*, 203 Mich App at 659-60.

Here, there is no need to fashion equitable relief, since the terms of the UFTA expressly set forth remedies available. However, examining the totality of the circumstances, including the circumstances surrounding the Fraudulent Transfer, the UFTA clearly applies and provides clear rights and remedies for precisely this situation.

The Fraudulent Transfer was not an arms-length transaction under questionable circumstances, but it exhibited several clear “badges of fraud” giving rise to the presumption that the transfer was fraudulent under the UFTA. It was not *only* a transfer between close relatives, and it was not *only* made without the Deceased Debtor “receiving a reasonably equivalent value in exchange for the transfer,” but the Deceased Debtor *also* “believed or reasonably should have believed that . . . she would incur, debts beyond . . . her ability to pay as they became due.” MCL 566.34(b), (b)(ii).

VII. Does the UFTA displace cases evaluating whether a debtor is a necessary party in an action to set aside a fraudulent conveyance under the common law, such as *Paton v Langley*, 50 Mich 428 (1883) and *Bixler v Fry*, 157 Mich 314 (1909), discussed in the opinion by the Court of Appeals below?

Not really; the UFTA merely codifies long-standing Michigan precedent that a debtor transferor need *not* be joined in an action to set aside a fraudulent transfer. This underscores the *Paton* holding on precisely that point. The UFTA does affect the precedential value of *Bixler* to the extent that *Bixler* required that a claim be reduced to judgment: as discussed above, the UFTA expressly eliminated any such requirement – although the common law had already virtually abrogated this aspect of the *Bixler* holding. Accordingly, to the extent that the common law already had done so, the UFTA does not displace *Bixler*, either. *Bixler v Fry*, 157 Mich 314 (1909); *Paton v Langley*, 50 Mich 428; 15 NW 537 (1883).

The UFTA’s plain language does not require joinder of the debtor alleged to have made a fraudulent transfer. The court below acknowledged precedent establishing that a grantor who has retained no interest in transferred property is not a necessary party to an action to set aside the transfer. *Mather*, 720 NW2d at 578; 271 Mich App at 259; *citing Paton*, 50 Mich at 433-34; 15 NW 537 (no interest, legal or equitable, remained in grantors making them necessary parties to suit). The opinion need have gone no further since this precise issue here resolves the matter under the UFTA.

It must be remembered that, regardless of whether the UFTA changes existing precedent, its mandates must be followed. The decision below not only defies long-established principles of statutory construction, but it flies in the face of the express legislative intent evinced by the UFTA (which, incidentally, as discussed herein, merely codifies existing precedent). This Honorable Court aptly noted, “what catches your eye about the [opinion by the court below is that] it looks like it

doesn't care too much what's in the Act . . ." *Transcript at 13*. Michigan courts are bound to respect legislative intent regardless of whether it modifies or merely clarifies existing precedent, abiding by the Legislature's authority to change the law if and as it sees fit by enacting new legislation.

A. The UFTA Impacts the *Bixler* Holding to the Extent that Reduction of a Claim to Judgment was Required at the Common Law a Century Ago.

Bixler was a creditor's suit focusing on whether the creditor was a proper party, given that he was not a judgment creditor. The Court noted that a "court of equity is open to a judgment creditor to attack and set aside transfers of property made by his debtor." *Bixler*, 157 Mich at 316; 122 NW at 119. As noted above, the UFTA expressly eliminated any previous requirement under the common law that a claim be reduced to judgment.

Authorities have noted that the explicit statutory elimination of this requirement was "largely unnecessary" because the common law and the UFCA had virtually eliminated the requirement of judgment for fraudulent conveyance actions. *LaBine*, 45 WAYNE L REV at 1490; see *Bradford v Harford Bank*, 125 A 719 (Md 1924); *Hartford Accident & Indem Co v Jirasek*, 235 NW 836 (Mich 1931); *Schumacher v Streich*, 210 NW 634 (Minn 1926); *Lomonaco v Goodwin*, 260 A2d 10 (NJ Super Ct Ch Div 1969); *Am Surety Co v Connor*, 166 NE 783 (NY 1929). Michigan jurists have noted that the UFTA removed the

confusing and unnecessary distinction under the UFCA between remedies available to the holders of matured and unmatured claims. Under the UFTA, a creditor also has recourse against any transferee, including subsequent transferees, of the debtor's property, such as to obtain a money judgment against the transferee; however, the creditor's right to recover from the transferee is limited to the lesser of the transferred property's value of the amount of the claim. This is in stark contrast to the remedies available to creditors under the UFCA, which were only limited to *in rem* actions against or with respect to the property fraudulently transferred.

Wright, Robert E Lee, THE MICHIGAN UNIFORM FRAUDULENT TRANSFER ACT, at 1-14 (Institute of

Continuing Legal Education, 2002); MCL 566.38(2); UFCA §§ 9 and 10. This is consistent with recognition nationwide that the UFTA broadens creditors' remedies against transferees. *See Cook, Michael L. and Mendales, Richard E., THE UNIFORM FRAUDULENT TRANSFER ACT: AN INTRODUCTORY CRITIQUE*, 62 Am. Bankr. L.J. 87, 90-91 (Winter 1988) ("The remedies granted creditors by UFTA...substantially enhance creditors' rights against transferees... Provisional remedies are available against the asset transferred 'or [against] other property of the transferee'...").

Key to the decision below was the conclusion that *Bixler* required the seller's joinder not "merely as a debtor, but rather because the plaintiff had no right to proceed without demonstrating that the seller had, in fact, violated the provisions of the statute" at issue, which in that case was the Bulk Sales Act. *Mather*, 271 Mich App at 258; 720 NW2d at 577; *citing Bixler*, 157 Mich 314; 122 NW 119. Here, by contrast, as discussed, the UFTA does not require a demonstration of violation, where such violation can be inferred based on the debtor's transfer without consideration resulting in insolvency. The court below correctly noted that, in the *Bixler* case, the sale as between the buyer and seller was valid, "but if the seller has been guilty of any fraud to the injury of the buyer, or if there has been a grossly inadequate consideration . . . the seller cannot hide behind the statute and thus avoid liability to the purchaser." *Mather*, 271 Mich App at 258; 720 NW2d at 577-78; *citing Albright v Stockhill*, 208 Mich 468, 476; 175 NW 252 (1919).

Here, the issue of harm is not between the buyer and seller, but between the grantor and her creditor, the Nursing Home. As recognized by the court below, the "nature of the statute at issue [was what] mandated joinder of the debtor who had allegedly made the fraudulent transaction." *Mather*, 271 Mich App at 258; 720 NW2d at 578. The nature of the UFTA, the statute at issue here, does *not* mandate joinder of the debtor. Accordingly, the court below erred in its *Bixler* application.

B. The UFTA Solidifies the *Paton* Precedent of Not Requiring Joinder of a Debtor Transferor in an Action to Set Aside a Fraudulent Transfer.

The *Paton* holding was directly on point regarding the necessity of joining a debtor transferor in an action to set aside a fraudulent transfer, where a deed disposed entirely of the entire beneficial interest in the estate. *Paton*, 50 Mich at 432; 15 NW at 538. In a suit to avoid the title for fraud by one of the grantors in conveying the property, the Michigan Supreme Court held that it was sufficient to make the grantees defendants, *without* also joining the grantors. *Id.*, 50 Mich at 432-34; 15 NW at 538-39 (where deed’s intent is so far carried out as to secure to beneficiaries interests designed for them, grantors need not be made parties to creditor’s bill to set aside subsequent conveyances).

Paton held that where a deed already had conveyed the subject property, no “interest, legal or equitable, remained in the grantors which made them necessary parties to a suit to avoid the title for the fraud of [one of the grantors], or which would have enabled them, by release or otherwise, to avoid such a suit by submitting to the charges made.” *Id.* In a suit against the beneficiaries, “the parties were sufficient to authorize the suit to be disposed of.” *Id.*, 50 Mich at 434; 15 NW at 539.

VIII. Is a judgment against a debtor ever necessary to obtain a judgment avoiding a transfer against the transferee under MCL 566.38, and if not, is the avoidance of the transfer enforceable against the transferred asset under MCL 566.37(2), or only against the transferee’s unrelated assets?

In answer to the first portion of this question, a judgment against a debtor in order to obtain a judgment avoiding a transfer could *never* be necessary under MCL 566.38, given that the UFTA plainly and expressly defines a claim “*whether or not* [it is] reduced to judgment . . .” MCL 566.31(c) (emphasis added). In light of this unambiguous language, counsel for the Nursing Home cannot conceive of circumstances under which a judgment avoiding a transfer would, or ever could, be regarded as necessary.

The second portion of this question also is easily and clearly answered by the UFTA’s plain language, which expressly authorizes an attachment “against the asset transferred *or other property of the transferee*” to the extent authorized by MCL 600.4001.⁶ MCL 566.37(b).

A. Michigan Rules of Statutory Construction Dictate that Judgment Against a Debtor is Not Necessary under the UFTA.

Given the UFTA’s express statement that a claim need not be reduced to judgment at all (MCL 566.31(c)), there a judgment against a Debtor is clearly not necessary. This is particularly true here; hypothetical possibilities that other cases may present need not be considered in deciding this case – and even if and to the extent that such scenarios might feasibly exist, they are not presented here, were not presented below, and should not be considered by this Honorable Court in determining the issues presented here.

1. Michigan Courts Need Not, and Should Not, Address Issues not Properly Presented in the Instant Case.

A judgment against a debtor certainly is not necessary under the circumstances here. To the extent that there might conceivably exist other circumstances under which such a judgment might be required, this Honorable Court need not, and should not, consider such circumstances nor make a determination regarding such a hypothetical situation.

The Michigan Court Rules limit appellate consideration to issues properly raised on appeal. MCR 7.212(C)(5). Consistent with this rule, the Michigan Supreme Court consistently has declined to address issues and arguments not presented below. *Peterman v Dep’t of Nat Res’s*, 446 Mich 177, 183; 521 NW2d 499 (1994) (declining to address issue not presented to trial court); *Booth Newsp*,

⁶ MCL 600.4001 limits jurisdiction to those amenable to service and subject to the judicial jurisdiction of the state. MCL 600.4001. Neither of those criteria are at issue here.

Inc v Univ of Michigan Bd of Regents, 444 Mich 211, 234; 507 NW2d 422 (1993) (declining to address argument not presented in trial court); *In re Forfeiture of Certain Personal Prop*, 441 Mich 77, 84; 490 NW2d 322 (1992) (absent unusual circumstances, issues not raised at trial may not be raised on appeal); *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989) (declining to address argument not presented below); *Franklin Mining Co v Harris*, 24 Mich 115, 117 (1871) (absent unusual circumstances, issues not raised at trial may not be raised on appeal).

Lower courts of appeal have universally adhered to this principle by consistently declining to determine issues that were not presented to the trial court. *CB Martin Enters, LLC v TCM Progressive, Inc*, 2006 WL 401128, *2 (Mich App Feb 21, 2006) (No 263739) (not yet released for publication) (declining to address issue not presented to or decided by trial court); *Montgomery v Citibank NA*, 2005 WL 1875677, *1 (Mich App Aug 9, 2005) (No 260713) (not designated for publication) (declining to address arguments not raised below and not presented in statement of questions presented); *Winger Concrete Prods, Inc v Mildren*, 2005 WL 1249272, *2 (Mich App May 26, 2005) (not designated for publication) (declining to address argument not presented to trial court for resolution or sufficiently briefed and supported on appeal); *Drolett v Boltach*, 2002 WL 31013711, *2 (Mich App Sept 3, 2002) (No 230680) (not designated for publication) (declining to address argument not presented to trial court); *People v Little*, 2000 WL 33403020, *2 (Mich App Oct 31, 2000) (No 214717) (not designated for publication) (declining to address argument not presented below); *Brooks v Sciberras*, 2000 WL 33415202, *1 (Mich App July 28, 2000) (Nos 207743, 212273, 211227) (not designated for publication) (declining to address issue not presented to trial court).

2. Requiring Judgment against the Debtor would Impermissibly Render a Portion of the UFTA Superfluous.

The UFTA's express language makes clear that no judgment against the debtor is necessary. MCL 566.37(2). Otherwise, there would be no need for the plain language of MCL 566.37(2). This provision states, "If a creditor has obtained a judgment on a claim against the debtor, . . ." MCL 566.37(2). This language would be rendered purely superfluous if no judgment against the debtor were required. And under Michigan rules of statutory construction, such a result is impermissible.

A well-known rule of statutory construction is that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc v Andrews*, 534 US 19, 31; 122 SCt 441; 151 LEd2d 339 (2001); see *United States v Menasche*, 348 US 528, 538-39; 75 SCt 513; 99 LEd 615 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute"); *Nelski v Ameritech*, 2004 WL 1460001, *5 (Mich App June 29, 2004) (No 244644) (not designated for publication); *Zsigo v Hurley Med Ctr*, 2004 WL 952816, *8 (Mich App May 4, 2004) (No 240155) (not designated for publication), *aff'd in part, rev'd in part on other grounds*, 475 Mich 215 (2006) (noting that rendering part of statute superfluous would violate rule of statutory construction).

The general rule, according to 2A Sutherland, Statutory Construction (4th ed.), § 46.06, p. 63, is:

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

It is well established that:

"It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Inhabitants of Montclair v Ramsdell*, 107 US 147, 152; 2 SCt 391, 395; 27 LEd 431, 433 (1883).

People v Barry, 53 Mich App 670, 675; 220 NW2d 39, 43 (1974) (emphasis supplied); *see also Northville Coach Line, Inc v City of Detroit*, 2 Mich App 591, 599-600; 141 NW2d 316, 320 (1966).

Stated differently, “[a]ll parts of the specific provision to be construed must be given force and effect. This means that no phrase, or clause, or word, may be ignored in determining the construction of such provision.” *Barry*, 53 Mich App at 675; 220 NW2d at 43; *citing Melia v Employment Sec Comm’n*, 346 Mich 544, 562; 78 NW2d 273, 275 (1956). Simply put, rendering part of a statute superfluous is not in accord with sound statutory construction. *Nikolas v Patrick*, 51 Mich App 561, 566; 215 NW2d 715, 718 (1974).

Accordingly, since requiring judgment against a debtor would render superfluous the UFTA’s language contemplating the *possibility* of doing so (“*if a creditor has obtained a judgment on a claim against the debtor,*” MCL 566.37(2)), such a construction is impermissible. Thus, no such requirement can exist under the UFTA, if established principles of statutory construction are followed.

B. The UFTA Permits Judgment Against not Only the Asset Transferred but also against the Transferee’s other Unrelated Assets.

Similarly, Michigan’s UFTA expressly provides that a creditor “may obtain 1 or more of the following . . . [a]n attachment against *the asset transferred or other property of the transferee . . .*” MCL 566.37(1)(b) (emphasis added).

Authorities construing the UFTA’s predecessor expressly held that claims could be asserted against other individuals involved in fraudulent transfers. Specifically, under the UFTA’s predecessor, plaintiffs were permitted to assert claims against family members of corporate officer who received conveyances from officer. MCL 566.20; *Kelley v Thomas Solvent Co*, 722 F Supp

1492, 1498-99 (WD Mich 1989) (family members who received fraudulently-conveyed assets “stand in the shoes of the actual fraudulent grantee”). The resulting ability to sue family member recipients of fraudulent conveyances is identical to that permitted under the UFTA, which expressly provides for suit against the first recipient of a fraudulently transferred asset.

Similarly, an arrangement by which children contributed to a joint account to be used to maintain farms belonging to their father and pay off his indebtedness did not constitute a debtor-creditor relationship between the father and children that would support his conveyance of land to them during the time that the bank of which he was a partner was in serious financial condition, just before it went into receivership. *Towne v Lynch*, 273 Mich 161, 164-65; 262 NW 657, 659 (1935), *aff’d*, 273 Mich 161; 265 NW 761.

Additionally, the UFTA’s language authorizing action directly against the first transferee of fraudulently-transferred assets clearly authorizes action against the transferee’s unrelated assets, since it provides for recovery not only of the value of the asset transferred, but of the “amount necessary to satisfy the creditor’s claim,” rather than merely of the fraudulently-transferred asset. MCL 566.38(2)(a), (b).

The UFTA provides that to the extent a transfer is voidable, the creditor “may recover a judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor’s claim, whichever is less,” and that the judgment may be entered against “[t]he first transferee of the asset,” as well as against any subsequent transferee other than a good-faith transferee who took for value. MCL 566.38(2)(a),(b).

Appellant’s research has revealed no Michigan cases construing the extent of this provision as it might be applied to a fraudulent transferee’s other, unrelated assets; however, the plain language

of the statute refers in the alternative to “the amount necessary to satisfy the creditor’s claim, whichever is less.” MCL 566.38(2). This language would be purely superfluous if judgment could be had only against the transferred asset itself. Accordingly, logic and common sense dictate that a transferee’s unrelated assets may also be reached by a judgment voiding a fraudulent transfer under the UFTA.

IX. Are the UFTA and MCR 2.205(A) in conflict in this case? If so, which should prevail?

There is no conflict here. The UFTA applies to the subject matter and transferee of a fraudulent transfer. MCR 2.205 provides for the joinder of necessary parties, but it does not make anyone without interest in the subject of the controversy a necessary party. Accordingly, these two laws are not mutually exclusive, but can be applied simultaneously, at least in this case. Where a non-conflicting construction is possible, it is *required* by statutory construction principles. If a conflict did exist, the provisions of the UFTA would prevail.

As discussed above, the Debtor’s Estate’s presence is not essential to rendering complete relief here under MCR 2.205(A), and in fact, no Michigan court has held that someone with no interest in the subject of the controversy is a necessary party under MCR 2.205(A). See Sections III and V. Meanwhile, Defendant is subject to the claims presented here as both the first transferee and current holder of the fraudulently-transferred assets. Thus, there is no conflict between these rules.

However, even if and to the extent of any conflict, established principles of statutory construction dictate that the terms of the UFTA prevail. Additionally, fairness and common sense require the same result.

A. Statutory Construction not Resulting in Conflict is Required.

To the extent that some application of the UFTA might be imagined under other circumstances in which a conflict might potentially exist, such an application would be impermissible. If such a case were presented, the UFTA's terms would prevail, since they are the more specific.

A primary goal of statutory construction is to read statutes to avoid conflict with each other. *People v Carter*, 2001 WL 709249, *3 (Mich App Mar 16, 2001) (No 222467) (not designated for publication). A statutory construction that avoids conflict should control. *People v Anderson*, 2004 WL 103189, *1 (Mich App Jan 22, 2004) (No 241769) (not designated for publication); *People v Izarraras-Placante*, 246 Mich App 490, 498; 633 NW2d 18 (2001).

Where conflicting and non-conflicting constructions are possible, the non-conflicting construction must be applied. It is a long-accepted principle of statutory construction that “[s]tatutes which may appear to conflict are to be read together and reconciled, if possible.” *Farmers Ins Exch v Farm Bur Gen'l Ins Co of Mich*, 478 Mich 880; 731 NW2d 757, 762 (2007); *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006); *People v Bewersdorf*, 438 Mich 55, 68; 475 NW2d 231 (1991), *vacated on other grounds*, 209 Mich App 801; 533 NW2d 24 (1995); *Young v Flint City Council*, 2006 WL 3826976, *3, n3 (Mich App Dec 28, 2006) (No 263310) (not yet released for publication); *People v Buehler*, 271 Mich App 653, 658; 723 NW2d 578, 582 (2006).

1. The UFTA Prevails as the More Specific Statute.

When two statutes conflict, the statute that is more specific to the subject matter generally controls. *Loomis v Newberg Tp*, 2007 WL 914317, *2, n1 (Mich App Mar 27, 2007) (No 265866) (not yet released for publication); *Kaufman v Schaedler*, 2004 WL 2291347, *4 (Mich App Oct 12,

2004) (No 249173) (not designated for publication); *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116, 131; 673 NW2d 763 (2003); *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998); *Genesco, Inc v Michigan Dep't of Env'l Quality*, 250 Mich App 45, 53; 645 NW2d 319, 324 (2002); *Gebhardt v O'Rourke*, 444 Mich 535, 542-43; 510 NW2d 900 (1994); *Nat'l Ctr for Mfg Sciences, Inc v Ann Arbor*, 221 Mich App 541, 549; 563 NW2d 65 (1997); *Midland Cogeneration Venture Ltd P'ship v Public Serv Comm'n*, 199 Mich App 286, 328; 501 NW2d 573, 593 (1993).

Here, if and to the extent that there is any conflict between these two provisions, the UFTA provisions must prevail, since the UFTA is more specific – in applying specifically, and only, to cases such as this involving fraudulent transfers – than the Michigan Court Rules, which apply to all litigated proceedings.

2. The UFTA Controls as the Later-Enacted Law.

An alternative principle leads to the same result. Another rule of statutory construction is that when two statutes conflict, the later is said to have amended the earlier. *Ballard v Ypsilanti Tp*, 457 Mich 564, 572-73; 577 NW2d 890, 894-95 (1998); *Shrilla v Detroit*, 208 Mich App 434; 528 NW2d 753 (1995); *Washtenaw Cty Rd Comm'rs v Public Serv Comm'n*, 349 Mich 663; 85 NW2d 134 (1957); *Antrim Cty Social Welfare Bd v Lapeer Cty Social Welfare Bd*, 332 Mich 224; 50 NW2d 769 (1952); *see also Murphy v Michigan Bell Tel Co*, 447 Mich 93, 99, n2; 523 NW2d 310, 311, n2 (1994); *citing* 2B SINGER, SUTHERLAND STATUTORY CONSTRUCTION (5th Ed), § 51.05, p 174 (“Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail”).

Here, the recently-enacted UFTA was enacted more recently (December 1998) than the Michigan Court Rules (Section 2.205 became effective on March 1, 1985). Accordingly, applying the later-enacted principle of statutory construction, the UFTA would prevail.

B. Defendant's Liability Stems not Directly from his Close Personal Relationship with the Deceased Debtor, but from his Receipt of Fraudulently Transferred Property.

Finally, despite the potential to cloud the issues with hypotheticals, it must be remembered that the UFTA applies only to *fraudulent* transfers: the statute is riddled with safeguards to protect innocent and good-faith takers. In other words, regardless of the existence of a close personal relationship, the recipient of transferred assets would have no need for concern in light of the UFTA as long as the transfer is made without indications of fraudulent intent such as lack of consideration and the other “badges of fraud” enumerated in the UFTA. Accordingly, there is no cause for panic about the UFTA impacting ordinary transfers for consideration among parties lacking fraudulent intent.

1. UFTA Applies not based on Close Relationship but on Fraud.

Defendant has suggested that the claims raised here stem from his close personal relationship with the Deceased Debtor, arguing that her debt to the Nursing Home was incurred voluntarily and independently by her. *See Transcript at 12-13.* This argument is a misleading attempt to divert attention from the true issues here. Defendant's involvement is based not on his close personal relationship with his aunt (other than indirectly, since that close relationship was one of the factors rendering the transfer to him without consideration fraudulent), but based on his receipt of fraudulently-transferred assets from the Debtor in evasion of her existing (and then-increasing) payment obligations to her creditor, the Nursing Home.

These issues should not be confused: Defendant is not being sued here as a guarantor, as he seems to suggest (*see Transcript at 12*), nor even as the Deceased Debtor's close relative – but as the recipient of fraudulently transferred assets of precisely the nature to which the UFTA is addressed.

2. Innocent and Good Faith Transfers are Not Subject to the UFTA.

To the extent that concern has been raised regarding placing a cloud on the title to real property legitimately received by a good-faith transferee (*see Transcript at 12, 14*), such concerns are equally unfounded. The UFTA expressly addresses this issue by limiting its application to *fraudulent* transfers. Transfers made in good faith would be exempted from the terms of the UFTA, thus protecting innocent or good-faith takers.

Defendant was aware at the time of the fraudulent transfer that the Debtor (his aunt) was continuing to incur debts to the Nursing Home that she could not pay; accordingly, no claim for payment from the Debtor's assets, either before or after their transfer to Defendant, can be viewed as working any surprise or prejudice against him. Because he has enjoyed complete control and possession of the Debtor's assets since before these proceedings were instituted, a judgment against him to the extent of the value of those assets would be a complete, valid judgment both under the UFTA and under MCR 2.205.

CONCLUSION & RELIEF REQUESTED

The UFTA's plain language expressly abrogates the previous common-law requirement that a claim be reduced to judgment; it permits judgment to be entered only against the transferee of fraudulently transferred assets at issue in a UFTA action; and it makes clear that a debtor who has retained no interest in the subject assets is not a necessary party to a UFTA proceeding. Clear and

long-established principles of statutory construction dictate these conclusions and require that the decisions below be reversed and the fraudulent transfer be set aside.

Accordingly, for the reasons set forth herein as well as in the Application, the Nursing Home reiterates its request that this Honorable Court reverse the decisions below and remand this matter with instructions that this action proceed against Defendant under the UFTA, since a deceased debtor who has retained no interest in assets fraudulently transferred, without consideration and rendering her insolvent just before efforts began to collect payment for the residential nursing care for which she was continuing to incur debts that she was unable to pay, is not a necessary party to an action to set aside the fraudulent transfer under Michigan's UFTA.

Strictly in the alternative, the Nursing Home requests that this Court reverse the trial court's decision denying the substitution of the Estate as a party, there being no prejudice to any party involved here, with instructions that this action should proceed with the Estate as an additional party.

The Nursing Home requests all other and further relief as to which it may show itself to be otherwise entitled.

Respectfully submitted,

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PROOF OF SERVICE

In accordance with MCR 7.309(B)(1), the Proof of Service for the Appellant's Brief and Appendix on Appeal are being served and filed as follows on July _____, 2007:

- (a) Pursuant to MCR 7.309(B)(1)(a) and (d), an electronic copy in .pdf format and 24 hard copies of the Brief and Appendix, and an additional copy of this Proof of Service, with the clerk at the following address:

Michigan Supreme Court Clerk's Office
925 West Ottawa
4th Floor, Hall of Justice
Lansing, Michigan 48913

- (b) 2 copies to the counsel below via the United States Post Office of Grayling, Michigan, pursuant to MCR 7.309(B)(1)(b).

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IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

On Appeal from Decision by Circuit Court Judge John R. Weber

**MATHER INVESTORS, LLC,
d/b/a MATHER NURSING CENTER,
A Michigan Limited Liability Company,**

Plaintiff / Appellant,

**Supreme Court No: 131654
Court of Appeals No: 261638
Marquette Circuit Court No:
03-40829-CK**

vs

WILLIAM LARSON,

Defendant / Appellee.

PLAINTIFF / APPELLANT'S APPENDIX ON APPEAL

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