

**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.**

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**PLAINTIFF / APPELLANT'S REPLY BRIEF ON APPEAL**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

INDEX OF AUTHORITIES. .... ii

STATEMENT OF FACTS. .... 1

REPLY ARGUMENT & AUTHORITIES. .... 2

I. The Presence of the Deceased Debtor’s Estate was not “essential to permit the court to render complete relief” under MCR 2.205(A) . .... 2

II. The Circuit Court Erred in Dismissing this Case under MCR 2.202(A) for the Failure to Substitute the Debtor’s Estate, since the Debtor Herself was never a Party. .... 3

III. The Debtor’s Estate would not represent any separate rights or interests that are not otherwise represented by Defendant. .... 4

IV. The Debtor’s Nephew has sufficient information and/or standing to raise any defenses or counter-claims the Debtor’s Estate may have against the Nursing Home.. .... 5

V. The UFTA, MCL 566.31 *et seq* does not require a debtor to be joined in an action, when she no longer has an interest in the property at issue. .... 6

VI. The UFTA expressly permits an action *solely* against the first transferee of an asset, regardless of whether a right to payment has been reduced to judgment..... 7

VII. The UFTA does not displace cases regarding 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). .... 8

VIII. A judgment against a debtor is never necessary to obtain a judgment avoiding a transfer against the transferee under MCL 566.38, and the avoidance of the transfer is enforceable against the transferred asset under MCL 566.37(2). .... 9

IX. The UFTA and MCR 2.205(A) are not in conflict here, although if and to the extent that any conflict exists, the UFTA must prevail. .... 9

CONCLUSION & RELIEF REQUESTED..... 10

PROOF OF SERVICE

**INDEX OF AUTHORITIES**

*Listed alphabetically by Jurisdiction*

**MICHIGAN CASES**

**Michigan Supreme Court**

*Albright v Stockhill*, 208 Mich 468; 175 NW 252 (1919). . . . . 8

*Bixler v Fry*, 157 Mich 314; 122 NW 119 (1909). . . . . 8

*Detroit v Stafford*, 320 Mich 6; 30 NW2d 410 (1948) . . . . . 4

*Ocwen Fed Bank, FSB v Int’l Christian Music Ministry, Inc*,  
472 Mich 923; 697 NW2d 155 (2005).. . . . . 3

*Paton v Langley*, 50 Mich 428; 15 NW 537 (1883). . . . . 8

**Michigan Courts of Appeal**

*Crossley v Allstate Ins Co*, 139 Mich App 464; 362 NW2d 760 (1984) . . . . . 4

*Estes v Titus*, 273 Mich App 356; 731 NW2d 119 (2006).. . . . . 3

*In re Forfeiture of \$234,200*, 217 Mich App 320; 551 NW2d 444 (1996) . . . . . 4

*Michigan Nat Bank & Trust Co v Morren*, 194 Mich App 407; 487 NW2d 784 (1992). . . . . 4

*PT Today, Inc v Commissioner of Office of Fin and Ins Svcs*,  
270 Mich App 110; 715 NW2d 398 (2006) . . . . . 3

**STATE STATUTES**

MCL 566.31 *et seq.*.. . . . *passim*

MCR 2.202(A).. . . . . 3, 4

MCR 2.205(A) and (B). . . . . 2, 9, 10

## STATEMENT OF FACTS

Defendant-Appellee's Brief on Appeal (the "Response") takes liberties with the facts, which are set forth in detail in the Nursing Home's Application for Leave to Appeal (the "Application") and Brief on Appeal (the "Brief"), which address in detail how and why the transfer 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 efforts began to collect payment for her residential nursing care. Such transfers are presumably fraudulent under the UFTA.

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. The transfers at issue, of substantially all of the Debtor's assets to a close relative without consideration, were presumably fraudulent under the UFTA. *Application at 10-25.*

This Honorable Court requested briefing on nine specific issues bearing on whether a creditor may set aside a debtor's fraudulent transfer in an action involving the transferee as the only party currently asserting a claim to them against that asserted by the creditor, without the presence of a debtor who no longer has an interest in the subject of the fraudulent transfer. These questions all revolve around two essential questions: first, whether Michigan's UFTA requires the participation of a debtor (as opposed to her 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 the case law construing it expressly answer both of those questions with a resounding "no."

## REPLY ARGUMENT & AUTHORITIES

This case involves Michigan’s relatively new UFTA, which unequivocally provides that a claim need not be reduced to judgment to support proceedings to set aside the underlying transfer, defining 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 retaining no interest in the transferred property is not a necessary party and need not be joined in a UFTA action. MCL 566.31 *et seq.* Instead, the UFTA expressly provides that a judgment may be rendered against the *transferee* (and even against his other assets) up to the amount of the debt. MCL 566.38(2)(a).

This Honorable Court aptly noted, “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*. Concern about the UFTA’s contents prompted this appeal, since the decisions below would essentially gut the UFTA.

**I. The Presence of the Deceased Debtor’s Estate was not “essential to permit the court to render complete relief” under MCR 2.205(A).**

The Response characterizes this as “a simple collection action.” *Response at 7*. It simply seeks payment for services rendered based on a contract to pay for those services. Defendant takes issue with being sued as the first transferee of the Debtor’s assets, arguing that had the Debtor been joined, she might have disputed the charges she incurred at the Nursing Home. *Response at 7-8*. Defendant mischaracterizes the Nursing Home’s argument as contending that it can proceed directly against the transferor (*Response at 10*); the proceedings here are against the first *transferee*, as expressly provided in the UFTA.

The thrust of Defendant’s argument is that a judgment is a necessary prerequisite to a UFTA action – which simply is not the case. To the extent that Defendant’s authorities suggest that the

UFTA requires simultaneous proceedings regarding liability and collection (*Response at 8-10*), it must be noted that this action asserts claims for both breach of contract (liability) and collection. Defendant's argument that the UFTA requires a *prior* judgment (*Response at 10-12*) simply ignores the plain, express language of the statute, which clearly and unequivocally defines a "claim" as a right to payment, "whether or not the right is reduced to judgment . . ." MCL 566.31(c).

The *Estes* decision noted this Honorable Court's holding that only the transferee – *not* the transferor – is essential to permit complete relief in a UFTA claim. See *Response at 10; Estes v Titus*, 273 Mich App 356; 731 NW2d 119 (2006); citing *Ocwen Fed Bank, FSB v Int'l Christian Music Ministry, Inc*, 472 Mich 923; 697 NW2d 155 (2005). As detailed in the Brief, nationwide authorities have held that someone with no interest in property fraudulently conveyed is not a *necessary* party to a proceeding to set aside the conveyance. To the extent that a transferor's joinder may be *permitted*, it is not *required*: if joinder would not grant 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). That is precisely the case here, where joinder of the Deceased Debtor (or her Estate) would grant no additional relief.

**II. The Circuit Court Erred in Dismissing this Case under MCR 2.202(A) for the Failure to Substitute the Debtor's Estate, since the Debtor Herself was never a Party.**

As observed in the Brief, MCR 2.202(A) simply does not apply, because the Debtor was never a party. 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). This provision is inapplicable here, since under this express statutory language, substituting the Debtor's Estate was neither required nor permitted under MCR 2.202(A), since the Debtor herself never was a party to this action.

The Defendant circularly cites the decision being appealed, arguing that the transferor parted with interest in the assets, but not with interest in adjudicating liability, asserting that the Nursing Home somehow “sought to avoid the alleged debtor’s defenses to its claims by proceeding on the UFTA count against an alleged transferor.” *Response at 13-14*. However, this action has proceeded not against a transferor, but against the first transferee of fraudulently-transferred assets – precisely as provided by the UFTA (MCLA 566.38(2)(a)), as discussed in detail in the Brief at Section VIII.

The Debtor was *not* a party to this action; therefore, the Nursing Home was neither permitted nor required to substitute her estate under the express terms of MCR 2.202(A).

**III. The Debtor’s Estate would not represent any separate rights or interests that are not otherwise represented by Defendant.**

Defendant continues to suggest that the Deceased Debtor might have raised defenses to the Nursing Home’s charges that he cannot. *Response at 4-5, 7-8, 13-16*. However, Michigan law establishes that someone sued based on involvement through an absent party “stands in the shoes” of the absentee and can assert all claims and defenses that the absentee could have asserted. *See In re Forfeiture of \$234,200*, 217 Mich App 320, 328; 551 NW2d 444, 448 (1996); *Crossley v Allstate Ins Co*, 139 Mich App 464, 470; 362 NW2d 760, 763 (1984). This is particularly true where the current involvement stems from a continuation of ownership by 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). Defendant can defend this action as fully as, and is free to raise any defense that, the Deceased Debtor could have. Nothing in the UFTA prohibits the transferee of a fraudulently transferred asset from asserting every defense that would have been available to the debtor from whom he received the fraudulently transferred assets.

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

Because he stands 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.

Defendant claims a lack of knowledge regarding the Deceased Debtor's records and finances (*Response at 16-17*), but there is no indication of any information that he has sought and been unable to obtain: for instance, he never has requested any of the now-described information from the Nursing Home during the course of this litigation, which he has been free to do for several years now. Furthermore, he acknowledges his “knowledge concerning assets transferred [from the Deceased Debtor] to him.” *Response at 16*. Those (fraudulently) transferred assets are the only assets that the Nursing Home seeks to recover in this action. Accordingly, Defendant is fully capable of addressing any defenses or counter-claims that the Debtor's Estate may have had.

Interestingly, Defendant repeatedly notes that an estate was not opened for the Deceased Debtor, pointing out that the Nursing Home was free to do so. *See Response at 16-17*. While this may be true, the Nursing Home was not *required* to do so by the UFTA. To the extent that the Defendant feels that an estate should have been opened, he was equally free to have done so himself. And to the extent that he has any legitimate concerns about not having access to personal information regarding his close family member, prudence might have dictated that he have done so upon being

named in an action seeking to retrieve assets fraudulently transferred to him while his aunt – with whose finances he was admittedly at least somewhat familiar (*Response at 4, 16*) – was incurring significant debts that she could not pay. The Nursing Home has in fact suggested this to him previously during the course of this litigation (*see Brief at 21-22, 25*). His continued failure to do so should not penalize the Nursing Home, which simply has proceeded in accordance with the clear and express terms of the UFTA in seeking to proceed against the first transferee. *See* MCLA 566.38(2)(a).

Note that the fact that the Debtor’s Estate was not made party to these proceedings was the trial court’s decision, comprising yet another basis for reversing the decision below. It was error to deny the Nursing Home’s Motion to Substitute, filed days after the ruling that the Debtor’s Estate was a necessary party, where the requested substitution would have worked no prejudice to Defendant. If and to the extent that any prejudice might possibly result from the absence of the Debtor’s Estate from these proceedings, that alone would warrant reversing the decision below.

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

The UFTA does not require that a debtor be joined in an action for relief from a fraudulent transfer where she has retained no remaining interest in the transferred assets. MCL 566.31 *et seq*. Under Defendant’s own cited authorities, a debtor is not required to be joined “if in fact she has no continuing interest in the property at issue.” *Response at 17*. Defendant contends that requiring joinder depends on whether liability has been proven; however, as discussed above, the UFTA expressly states that claims need not have been reduced to judgment. MCL 566.31(c).

As discussed in detail in the Brief, a debtor who has retained no interest in the transferred property 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). A grantor is not a necessary party to an action between a creditor and the grantee, since the property may in no event go back to her. A debtor is a necessary party only if she has *not* parted with legal title to, or interest in, the disputed assets.

Here, Debtor's real estate holdings were conveyed to Defendant and her money was transferred to his bank account; she retained no interest in any of the transferred property. 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 UFTA's clear provisions.

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

The UFTA expressly provides 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). 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). Thus, the Nursing Home's claim against the Deceased Debtor 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.

Furthermore, the UFTA expressly permits judgment to be entered against a *transferee* only, with no requirement of the transferor's presence, providing that "the creditor may recover a judgment . . . against . . . [t]he *first transferee* of the asset . . ." MCLA 566.38(2)(a) (emphasis added). Alive or dead, the transferor is a necessary party only if she retained some interest in the assets in controversy. As discussed in greater detail in the Application (*Application at 23-24*) and in Sections III and V of the Brief and above, the Debtor here was not a necessary party, since she retained no interest in the property at issue.

**VII. The UFTA does not displace cases regarding 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).**

The parties agree that the UFTA does not really affect the significance of *Paton* or *Bixler*. *Response at 18*. However, the parties differ on interpreting those cases' relevant holdings.

As discussed in greater detail in the Brief, 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, underscoring the *Paton* holding on precisely that point. The Defendant acknowledges that under *Paton*, someone who retained no interest in the subject assets is not a necessary party. *Response at 18*. The UFTA statutorily eliminated *Bixler*'s requirement that a claim be reduced to judgment, but as discussed above, the common law had already abrogated this aspect of *Bixler*. 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, there is no indication of *any* consideration for the Fraudulent Transfer.

**VIII. A judgment against a debtor is never necessary to obtain a judgment avoiding a transfer against the transferee under MCL 566.38, and the avoidance of the transfer is enforceable against the transferred asset under MCL 566.37(2).**

Defendant argues valiantly that a judgment is required before an action may proceed under the UFTA. *Response at 19-20*. However, UFTA unequivocally provides that a claim need *not* be reduced to judgment and authorizes action against the transferred asset. MCL 566.38 (defining claim “*whether or not* [it is] reduced to judgment”); MCL 566.37(b) (authorizing attachment “against the asset transferred”). Although not sought here, the UFTA actually permits action against other assets belonging to the fraudulent transferee. The Nursing Home does not dispute that liability must be established – note that this action does seek to establish liability for, as well as to collect on, the debt.

**IX. The UFTA and MCR 2.205(A) are not in conflict here, although if and to the extent that any conflict existed, the UFTA must prevail.**

The parties agree that there is no conflict between the UFTA and MCR 2.205(A). *See Response at 20*. As with the issue of whether the UFTA impacts previous Michigan decisions, the parties’ dispute has to do with the proper interpretation of the UFTA. Defendant characterizes the UFTA as merely providing “a procedural nicety” (*Response at 20*), rather than any substantive law; however, as discussed in detail above and in prior briefing, the UFTA has significant substantive content, solidifying existing law as well as addressing procedural and jurisdictional issues.

As discussed above, the Debtor’s Estate’s presence is not essential to rendering complete relief here under MCR 2.205(A). In fact, no Michigan court has held that someone with no interest in the subject property is a necessary party under MCR 2.205(A). Defendant is subject to the claims here as both the first transferee and current holder of the fraudulently-transferred assets. There is no conflict between these rules – but if there were, the more specific UFTA must prevail.

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 clarifies the common law abrogation of the ancient requirement that a claim be reduced to judgment; it permits judgment to be entered against the transferee of fraudulently transferred assets; and it makes clear that a debtor who has retained no interest in the subject assets is not a necessary party. 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.

The Nursing Home reiterates its request that this Honorable Court reverse the decisions below and remand with instructions that this action proceed. 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) and 7.212(G), the Proof of Service for the Appellant's Brief and Appendix on Appeal are being served and filed as follows on September 19, 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  
Supreme Court Clerk  
Post Office Box 30052  
Lansing, Michigan 48909

- (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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