

STATE OF MICHIGAN
IN THE SUPREME COURT

MATHER INVESTORS, LLC
dba MATHER NURSING CENTER,
a Michigan Limited Liability Corporation,

Plaintiff/Appellant,

Supreme Court Case No. 131654

Court of Appeals Case No. 26163

Marquette Circuit Court No. 03-040829-CK

v

WILLIAM LARSON,

Defendant/Appellee,

and

ALICE MADDOCK,

Defendant.

DEFENDANT-- APPELLEE'S BRIEF ON APPEAL

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ORAL ARGUMENTS REQUESTED



TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii-iv

STATEMENT OF QUESTIONS INVOLVED 1

STATEMENT OF FACTS 4

STATEMENT OF PROCEEDINGS 5

ARGUMENT 7

I. Is the presence of Maddock’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 plaintiff’s failure to join the estate under MCR 2.205(B)? 7

II. Did the circuit court properly dismiss this case under MCR 2.202(A) for plaintiff’s failure to substitute in a timely manner the estate of Alice Maddock, the deceased debtor? 12

III. Would Maddock’s estate represent any separate rights or interests that are not otherwise represented by defendant Larson? 15

IV. Does defendant Larson have sufficient information and/or standing to raise any defenses or counterclaims the estate may have against plaintiff? 16

V. Does the UFTA MCL 566.31 *et seq.* generally require a debtor to be joined in an action, when the debtor no longer has an interest in the property at issue? 17

VI. Does the UFTA permit an action *solely* against the first transferee of an asset, MCL 566.38(2)(a), regardless of whether a right to payment has been reduced to judgment, MCL 566.31(c)? 17

VII. Does the UFTA affect the significance of Patton v Langley, 50 Mich App 428 (1883), and Bixler v Fry, 157 Mich 314 (1909)? 18

VIII. Is a judgment against a debtor ever necessary to obtain a judgment avoiding a transfer against the transferee under MCLA 566.38? If so, is the avoidance of the transfer enforceable against the transferred assets under MCL 566.37(2), or only against the transferee’s unrelated assets? 19

IX. Are the UFTA and MCR 2.205(A) in conflict in this case? If so, which should prevail? 20

RELIEF REQUESTED 21

INDEX OF AUTHORITIES

CASES

<i>In re Abbott</i> , 187 Mich 229 (1915)	8
<i>American Surety Co. v. Conner</i> , 251 N.Y. 1 (166 NE 783)	8
<i>Beland v. Estey</i> , 116 NH 8, 351 A 2d, 62 (1976)	12, 17
<i>Bixler v. Fry</i> , 157 Mich 314, 122 NW 119 (1909)	2, 13, 18
<i>Churchill v. Palmer</i> , 57 Mich App 210, 226 NW 2nd 6th (1974)	9, 18
<i>Citizens Bank of Massachusetts v. Grand Street Parkway, LLC</i> , 21 Mass L Rep 594 (Mass Super, 2006)	11, 18
<i>Comstock v. Horton</i> , 235 Mich 282 (1926)	8
<i>Eames v. Manley</i> , 121 Mich 300 (1899)	8
<i>Emarine v. Haley</i> , 892 P2d 343, 348 (Colo App, 1994)	12, 17
<i>Estes v. Titus</i> , __NW__; 2006 WL 3759232 Mich App Dec 21, 2006) (No. 261968) (not yet released for publication)	10, 18
<i>Frell v. Frell</i> , 154 So 2d 706, 708 (Fla Dist Ct App, 1963)	11
<i>Gillen v. Wakefield State Bank</i> , 246 Mich 158, 224 NW 761 (1929)	8
<i>Gross v. Pennsylvania Mtg. & Loan Co.</i> , 101 N.J. Eq. 51 [137 Atl. 89]	8
<i>Hartford Accident and Indemnity Company v. Jirasek</i> , 254 Mich 131, 235 NW 836 (1931)	8, 9
<i>Hatch v. Daugherty</i> , 145 Mich 569 (1906)	8

<i>Lipskey v. Woloshen</i> , 155 Md. 139 [141 Atl. 402]	8
<i>Lucking v. Barker</i> , 274 Mich 103, 264 NW 306 (1936)	8, 9
<i>Maldonado v. Ford Motor Company</i> 476 Mich 372, 388; 719 NW 2nd 809 (2006)	15
<i>Mather Investors, LLC, dba Mather Nursing Center, a Michigan Limited Liability Company v. William Larson</i> , 271 Mich App 254; 720 NW 2nd 575 (2006)	14
<i>Morse v. Roach</i> , 229 Mich 538 (1924)	8
<i>Nash v. Burchard</i> , 87 Mich 85	8
<i>Paton v. Langley</i> , 50 Mich 428 (1883)	2, 14, 18
<i>Root v. Potter</i> , 59 Mich. 498 (1886)	8
<i>Sheepscot Land Corp v. Gregory</i> , 383 A2d 16, 24 (Me, 1978)	11, 17
<i>Sniadach v. Family Finance Corp of Bayview</i> 395 US 337 (1969)	19
<i>Springfield General Osteopathic Hospital v. West</i> , 789 SW2d 197, 201 (Mo App, 1990)	11
<i>Trowbridge v. Bullard</i> , 81 Mich. 451 (1890)	8
<i>Tsiatsios v. Tsiatsios</i> , 144 NH 438, 445; 744 A2d 75 (1999)	11
<i>United Stores Realty Corp. v. Asea</i> , 102 N.J. Eq. 600 [142 Atl. 38]	8

STATUTES

Uniform Fraudulent Transfer Act, MCL 566.31 *et seq.* 2, 5, 8, 10, 12, 17, 19

MCR 2.116(C)(8) 6

MCR 2.202(A) 1, 12

MCR 2.202(A)(1) 5

MCR 2.202(1)(b) 6

MCR 2.205(A) 1, 3, 7, 14, 20

MCR 2.205(B) 1, 7

MCLA 566.38 1, 2, 14, 17, 19

MCLA 566.37 2, 10, 14, 19

STATEMENT OF QUESTIONS INVOLVED

The central issue presented by this breach of contract action by a nursing home is whether Section 8(b)(1), MCLA 566.38(2)(2)(a) dramatically changes Michigan law by allowing a creditor to skip reducing its claim against a debtor to judgment and instead sue only the first transferee of property.

The Court, in its Order of June 1, 2007, has identified the following nine questions it would like addressed:

- I. Is the presence of Maddock'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 plaintiff's failure to join the estate under MCR 2.205(B)?
Appellant answers "No."
Appellee answers "Yes."
Court of Appeals answers "Yes."
- II. Did the circuit court properly dismiss this case under MCR 2.202(A) for plaintiff's failure to substitute in a timely manner the estate of Alice Maddock, the deceased debtor, when Maddock was never a party to the action?
Appellant answers "No."
Appellee answers "Yes."
Court of Appeals answers "Yes."
- III. Would Maddock's estate represent any separate rights or interests that are not otherwise represented by defendant Larson?
Appellant answers "No."
Appellee answers "Yes."

IV. Does defendant Larson have sufficient information and/or standing to raise any defenses or counter-claims the estate may have against plaintiff?

Appellant answers "Yes."

Appellee answers "No."

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

Appellant answers "No."

Appellee answers "It depends."

VI. Does the UFTA permit an action *solely* against the first transferee of an asset, MCL 566.38(2)(a), regardless of whether a right to payment has been reduced to judgment, MCL 566.31(c)?

Appellant answers "Yes."

Appellee answers "No."

VII. Does the UFTA displace those cases that evaluate 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), both discussed in the Court of Appeals opinion?

Appellant answers "No."

Appellee answers "No."

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, MCL 566.37(2), or only against the transferee's unrelated assets?

Appellant answers "No."

Appellee answers "Sometimes."

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

Appellant answers "UFTA."

Appellee answers "No conflict."

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A. Statement of Facts

Since Alice Maddock was never served with the complaint and an estate was never added or substituted, very little information appears in the court file concerning Alice. Only one of her eleven nephews and nieces and none of her other friends or relatives were deposed in the one and one-half years from the time suit was filed until summary disposition was granted for failure to join her estate. Her death certificate appears in Appellant's Appendix at page 37a.

Alice Maddock then age 86, a widowed, retired bookkeeper lost consciousness and fell in her modest Ishpeming home [her deceased husband had built] in June 2002. She was found by her nephew, William Larson and taken to the local hospital where she was treated for her diabetes, congestive heart problems, and renal problems and discharged. Still weak and concerned about returning home alone and not wanting to burden anyone, she asked to be taken to the Mather Nursing Home in Ishpeming which is managed by a division of Centennial Healthcare. She was admitted and remained there in gradually declining health until her death August 30, 2003. Alice continued to manage her own finances, writing checks or having her nephew whom she placed on her accounts write them. She got her affairs in order: completing a Medicaid application and having an attorney prepare deeds for her home and a fractional interest in family swampland to her nephew, one of eleven nieces and nephews. Her nephew brought her the mail which included her bills, shoveled her roof so the rafters would not crack, took her to the doctor and dentist and ran her errands though she retained her driver's license and 1992 Dodge Dynasty which she kept licensed and insured. She personally wrote checks to the nursing home including one for \$9,192.00 on November 22, 2002 and one for \$2,000.00 on June 19, 2003, Appellee's Appendix p. 5. Alice was taken to task more than once by the nursing home finance division over disputed charges and threatened with the loss of her house. Alice did not have a TV or watch TV but every month there

was a charge for cable tv on the bill because her roommate had one. Alice developed an ulcer on her foot that would leak fluid onto the floor while she was sitting in her wheelchair. On August 30, 2003 Alice died in the nursing home of a myocardial infarction.

One of Alice's complaints was people wandering into her room at night. Wandering was an ongoing problem at the nursing home with an elderly patient freezing to death in the interior courtyard of the building, Marquette County File No. 99-35704-NO, and which culminated in the December 12, 2005 fire, started by a wandering patient with matches, requiring the evacuation of all the patients of the home.

Mather Investors, LLC also was experiencing financial difficulty with a bankruptcy claim for \$482,000.00 against Centennial Healthcare, the operator, and facing a mortgage foreclosure on the property in January 2004. Centennial Healthcare was in Chapter 11 proceedings, Western District of Georgia, File #02-74974 *et al.*, the employees lost their accrued vacation and the nursing home was no longer as tidy. Not surprisingly, Medicare.gov Nursing Home Results listed twelve violations for Mather Nursing Home, more than the total of all the rest of the nursing homes in the area and the lowest nursing home staff ratio per resident per day at 3.42 hours.

B. Statement of Proceedings

Mather initially sued Alice in five counts alleging breach of contract, express and implied, for the balance due on her account and included one count against Alice and her nephew, William Larson, under the Uniform Fraudulent Transfers Act (UFTA), MCL 566.31. Alice died in the nursing home before she was served. Larson timely filed an Answer to the Complaint advising Plaintiff and the court of Alice's death and attaching a copy of her death certificate, Appellant's Appendix, page 37a, and denying any liability under the UFTA. The Plaintiff elected **not** to substitute Alice's estate as a party Defendant under MCR 2.202(A)(1) and Alice was **dismissed** as a party by the clerk for lack of service on December 8, 2003. A Scheduling Conference was held February 25, 2004 with the Court setting a deadline of June 15, 2004 to add parties. Plaintiff

amended the caption of its Complaint to reflect the correct name of Plaintiff but again did **not** add the estate of Alice Maddock. Plaintiff conducted discovery concerning the alleged transfers and filed a Motion for Summary Judgment seeking to impose liability on Larson under the Uniform Fraudulent Transfers Act. Larson responded with a Motion to Dismiss under MCR 2.116(C)(8) based on the lack of a judgment or the possibility of obtaining one by failure to include the alleged debtor's estate as a necessary party.

At the hearing on November 16, 2004 in an opinion (which was incorporated into an Order dated December 20, 2004), the Court denied Plaintiff's Motion for Summary Judgment and granted Defendant's Motion to Dismiss but held it in abeyance giving the Plaintiff twenty-one (21) days to file a motion under MCR 2.202(1)(b) to add the estate and to show a lack of prejudice to Defendant Larson by the late substitution of the estate of Alice Maddock. Plaintiff filed a Motion for Reconsideration and/or for Substitution of the Estate of Alice Maddock. The Court in its Order of March 9, 2005, denied Plaintiff's Motion for Reconsideration and granted Defendant's Motion to Dismiss.

The Court of Appeals in its decision of June 6, 2006 upheld the decision of the trial court finding that the substitution of Alice Maddock's estate was properly within the trial court's discretion under the court rules and, because the motion was not timely, the Defendant had been prejudiced by the delay during which time the "property has been tied up by a lis pendens notice" and "memories of witnesses ... have faded ..."

The Supreme Court granted leave to appeal in its order dated June 6, 2007, three years and 280 days after Alice Maddock died.

ARGUMENT

- I. Is the presence of Maddock'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 plaintiff's failure to join the estate under MCR 2.205(B)?

Appellant answers "No."

Appellee answers "Yes."

Court of Appeals answers "Yes."

This lawsuit was started as a simple collection action alleging the breach of contract by a nursing home resident to fully pay for the goods and services for which she was billed. The initial pleading named Alice as a party and alleged the breach of express and implied contracts in failing to pay the amount billed. The pleadings also included Count VI alleging liability under the Uniform Fraudulent Transfer Act.

Had Alice not died and instead been served with a copy of the Summons and Complaint, the matter would have proceeded as these types of cases typically do with two possibilities. The first possibility is that Alice would take no action and a default for failure to defend and, ultimately, a default judgment determining the amount of her liability to the nursing home would be entered. More likely, given what is known about Alice, she would have filed an answer, affirmative defenses, counter-claims and these matters would have proceeded to trial along with the UFTA claim. At the trial of the matter, the trier of fact, after hearing evidence on claims and counter-claims, would have determined if there was a debt owing by Alice to the nursing home or the nursing home to Alice and the amount of the debt. If Alice were found not to be the debtor, any transfers by her would be irrelevant. If Alice was found to be the debtor, that is a person liable on a claim, the court would proceed to examine the issues under the UFTA claim and determine

whether any transfers she had made were voidable. At the conclusion of that process, if the transfers were voidable, a judgment could have been entered against the first transferee of property under UFTA for the value of the claim (the judgment against Alice) or the value of property transferred by the debtor whichever was less.

Unfortunately, Alice died and the nursing home elected not to pursue a claim against Alice for the debt but, instead, to proceed only under Section 8(1) of UFTA against the first transferee of property. Therein lies the rub.

Short History of Development of the Michigan Fraudulent Conveyance Act

Prior to the enactment of the Fraudulent Conveyance Act, the predecessor of the Uniform Fraudulent Transfer Act, general creditors without a judgment or a lien on the debtor's property could not even bring an action to attack conveyances they believed fraudulent to creditors. Gillen v Wakefield State Bank, 246 Mich 158, 224 NW 761 (1929) states:

“A creditor is not entitled to the aid of a court of equity to attack conveyances or other dealings for fraud until he has become a judgment creditor. Root v. Potter, 59 Mich 498; Trowbridge v. Bullard, 81 Mich 451; Nash v. Burchard, 87 Mich 85; Eames v. Manley, 121 Mich 300; Hatch v. Daugherty, 145 Mich 569; In re Abbott, 187 Mich 229; Comstock v. Horton, 235 Mich 282.”

With the enactment of the Fraudulent Conveyance Act (now the Fraudulent Transfer Act) cases such as Lucking v Barker, 274 Mich 103, 264 NW 306 (1936) and Hartford Accident and Indemnity Company v Jirasek, 254 Mich 131, 235 NW 836 (1931) allowed the action to proceed while the creditor sought to reduce its claims to judgment. The Court in Hartford, supra, at page 141 quoted Justice Cardozo in American Surety Co. v. Conner, 251 N.Y. 1 (166 NE 783):

“We think the effect of these provisions is to abrogate the ancient rule whereby a judgment and a lien were essential preliminaries to equitable relief against a fraudulent conveyance. The uniform act has been so read in other States (Gross v. Pennsylvania Mtg. & Loan Co., 101 N.J. Eq. 51 [137 Atl. 89]; United Stores Realty Corp. v. Asea, 102 N.J. Eq. 600 [142 Atl. 38]; Morse v. Roach, 229 Mich 538; Lipskey v. Woloshen, 155 Md. 139 [141 Atl. 402]). *** The reading seems to be inevitable, aside from any precedent. The act is explicit that a creditor may now maintain a suit in equity to annul a fraudulent conveyance, though his debt has not matured. *** He (the creditor) may seek the aid of equity, and without attachment or execution, may establish his debt,

whether matured or unmatured, and challenge the conveyance in the compass of a single suit.”

“This is not a judgment creditor’s bill, for plaintiff, although he brought suit at law, has no judgment. The bill, however, under the fraudulent conveyance act, may precede judgment. Hartford Accident & Indemnity Co. v. Jirasek, 254 Mich 131.” Lucking, supra, p. 105.

This approach presented a satisfactory balancing of the debtor’s right to his day in Court and creditors’ concerns about the conveyance away of the debtor’s assets while liability was being litigated.

The UFCA Extended Protection to Tort Claimants

The Act allowed potential non-traditional creditors such as tort claimants to include a suit to preserve the debtor’s estate while at the same time litigating liability of the tortfeasor. For example, in Churchill v Palmer, 57 Mich App 210, 226 NW 2d 6th (1974), page 217, Dr. Gene Fredricks shot and killed Mrs. Churchill’s husband. The widow brought an action for wrongful death against Dr. Fredricks who had disposed of his assets through a pro-confesso divorce from his wife and conveyance of entireties property to a trust. When his attorney advised Plaintiff that Dr. Fredricks had no assets, the widow commenced an action based on the Fraudulent Conveyance Act against Dr. Fredricks, his wife, the trustee and transferee’s property. The Court of Appeals reviewed the Fraudulent Conveyance Act and ruled that the Plaintiff could maintain her action under the Fraudulent Conveyance Act as a tort claimant prior to obtaining a judgment in the wrongful death action but observed: “Plaintiff is to have discovery, but trial on the merits must await the outcome of Plaintiff’s wrongful death action.”

All of the reported cases under the Uniform Fraudulent Conveyance Act appear to have followed the two step process with a creditor either establishing a debtor’s liability through a judgment prior to the UFCA proceeding or as in Churchill, supra, of first determining in a combined action proceeding the question of liability and then proceeding to address the issue of whether a conveyance was fraudulent.

Adoption of the UFTA

On December 29, 1998 Michigan replaced the UFCA with the Uniform Fraudulent Transfer Act, (UFTA), MCL 566.31 (attached as Appendix D). UFTA continues the basic structure of the UFCA and contains the following definitions: (3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; (e) "Debt" means liability on a claim and (f) "Debtor" means a person who is liable on a claim. The act contains nothing abrogating the necessity of a creditor establishing liability on a claim and of depriving an alleged debtor of her day in court. Again, in the words of Justice Cardozo: "He (the creditor) may seek the aid of equity, and without attachment or execution, may establish his debt, whether matured or unmatured, and challenge the conveyance in the compass of a single suit." The new act simply continued existing Michigan practice requiring a finding of liability on the part of a debtor in conjunction with analysis of transfers of assets claimed to be fraudulent to creditors.

UFTA Continued the Requirement of a Judgment

No reported Michigan cases decided under either the UFCA or the UFTA appear to have been decided without either a judgment entered against the debtor in a prior proceeding or in the UFCA or UFTA proceeding itself. The recent case of Estes v Titus, 2006 WL 3759232 Mich App (Dec 21, 2006) (not yet released for publication) follows the usual pattern of a wrongful death case and judgment followed by a UFTA proceeding to overturn a divorce judgment. There was no suggestion that the widow could proceed directly against the now ex wife of the murderer as a transferee without a prior judgment. The murderer remained a necessary party to the proceeding.

Plaintiff/Appellant contends that under the UFTA it is no longer necessary to establish liability on the part of the debtor and that, in this case, he can proceed directly against the transferor. He cites Section 7 of the Act, 566.37 in support of this contention that it is no longer necessary to establish a debtor's liability on a debt either prior to or in conjunction with an action to set aside a transfer. While Section 7 provides for several protective measures a creditor may obtain to preserve assets, only in (2) does it provide: "If a creditor has obtained a **judgment** on

a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.” (emphasis added) Only after there has been a judgment which determines or establishes that in fact a debt exists and the amount of the debt may the creditor recover.

A judgment against a debtor is entered after they have been served with a complaint and failed to appear and defend or have had a trial on the merits of the creditor’s claim and their defenses and counterclaims are heard by the court and a decision rendered.

Other Jurisdictions Continue to Require a Judgment

Similarly, in all the Uniform Fraudulent Transfer Act cases reviewed from other jurisdictions in which it was found the debtor was not a necessary party, the creditor **already had a judgment** against the principal debtor. In Citizens Bank of Massachusetts v Grand Street Parkway, LLC, 21 Mass L Rep 594 (Mass supra, 2006), the bank held an assignment of a judgment against an individual who conveyed property to a middle man, Dworman, who then conveyed it to Grand Street Parkway, LLC. The court did not find either the debtor or Dworman to be necessary parties. Again, there was a judgment against the principal Defendant.

In Springfield General Osteopathic Hospital v West, 789 SW 2nd, 197 MO App S.D. 1990, April 27, 1990, the hospital obtained a default judgment against principal debtors who had conveyed away their one-sixth interest in property held with siblings upon receipt of the Summons and Complaint in the collection action. In the subsequent suit under the UFTA for partition, the Court found the debtors not to be necessary parties, again because the creditor had a judgment.

In both Sheepscot Land Corp v Gregory, 383 A2d 16, 24 (Me, 1978). and Frell v Frell, 154 So. 2d 706, 708 (Florida District Court App, 1963), ex-wives were attempting to enforce divorce judgments under either the UFCA or the UFTA. Again, because the ex-wives had the divorce judgments, the debtors were not a necessary party.

The same principal holds true in the case of deceased debtors, namely that the possession of a judgment against the original debtor excuses the debtor’s involvement in a subsequent UFTA proceeding. For example, in Tsiatsios v Tsiatsios, 144 NH 438, 445, 744, A 2d 75 (1999), a prior

Probate Court judgment ruling an oral promise enforceable was given collateral estoppel in a subsequent UFTA proceeding against the decedent's widow who had also been the personal representative of the estate. The Court distinguished Beland v Estey, 116 NH 8, 351 A 2d, 62 (1976), in which an estate was deemed to be necessary party to a fraudulent transfer action because these children had not established themselves as creditors with the right to payment.

In the case of Emarine v Haley, 892 P2nd, 343, Colorado App 1994, a battle over priority between two judgment creditors with one creditor claiming the other's suit under UFTA was premature because it was brought prior to having a judgment the Court properly found that a judgment was not a prerequisite under the UFTA and that the debtor was not a necessary party since both of these creditors already had judgments.

II. Did the Circuit Court properly dismiss this case under MCR 2.202(A) for Plaintiff's failure to substitute in a timely manner the estate of Alice Maddock, the deceased debtor?

Appellant answers "No."

Appellee answers "Yes."

Court of Appeals answers "Yes."

It should be noted that the appellant did not raise the claim before either the trial court or the Court of Appeals that, because Alice was never served, she was never really a party to the action and, therefore, dismissal under MCR 2.202(A) for failure to timely substitute was inappropriate.

The Plaintiff filed suit against Alice Maddock in five counts alleging breach of contract, express and implied, for the balance due on her account and included one count against Alice and her nephew, William Larson, under the Uniform Fraudulent Transfers Act (UFTA), MCL 566.31. Alice died in the nursing home before she was served. A copy of her death certificate was filed and served on Plaintiff. An order of dismissal was entered on December 8, 2003 for non service.

MCR 2.202 Substitution of Parties provides in relevant portion:

"(A) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.

(a) A motion for substitution may be made by a party or by the successor or representative of the deceased party.

(b) Unless a motion for substitution is made within 91 days after filing and service of a statement of the fact of the death, the action must be dismissed as to the deceased party, unless the party seeking substitution shows that there would be **no prejudice to any other party from allowing later substitution.** (emphasis added)

The basis of all six counts of Plaintiff's claim was an alleged debt by Alice Maddock for nursing home services. The UFTA defines "debt" as liability on a claim and "debtor" as a person liable on a claim. Prior to Alice's death, there was no determination of liability for Plaintiff's claim by Alice or anyone else. If the Plaintiff's claim was not to be extinguished, Alice's estate needed to be substituted or joined as a party in order to allow the court to determine the issue of liability. Without Alice or her estate there could be no one liable on plaintiff's claimed debt and the action under UFTA could not proceed.

As Justice Ostrander observed in Bixler v Fry, 157 Mich 314, 122 NW 119 (1909) at page 316:

"It is one of the elementary rules of equity pleading that necessary parties shall be brought upon the record. The debtor, the person against whom the demand of the complainant is asserted, the party to the contract which is the foundation of complainant's right to proceed at all, the person charged with making a void sale of his property, is a necessary party defendant."

The debtor has the right to require the creditor to prove up its claim and to present to the court her defenses to a claim such as the quality of care and assert any counterclaims whether for negligence, usury, malpractice. This right does not vanish when a claimed debtor dies which is why there are procedures under the Probate Code for a creditor to pursue its claims against a debtor's estate and for the personal representative to present defenses to the claims.

The plaintiff in the instant proceeding sought to avoid the alleged debtor's **defenses** to its claims by proceeding on the UFTA count against an alleged transferor. But by failing to take steps to establish liability on the debt, despite ample opportunity to do so, it made the UFTA count meaningless since there could be no "debt" to collect from an alleged transferor and no reason to scrutinize any of the alleged debtor's transactions.

In his Decision and Order Denying Motion for Reconsideration or Rehearing and Granting Defendant's Motion to Dismiss, the trial judge cited the law review article by Labine, 45 Wayne

Law Review 1479, Federal Rules of Civil Procedure 18(b) and Section 7 of the Michigan Fraudulent Transfer Act, MCLA 566.37(2) as supporting the proposition that the plaintiff could sue for relief under the UFTA only in an action joined with a claim against the estate of Alice Maddock. FRCP 18(b) provides as follows:

“(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.”

Nowhere does the plaintiff point to any authority allowing it to proceed **without including the alleged debtor/transferor or her estate.**

As the Court of Appeals notes in Mather Investors, LLC, dba Mather Nursing Center, a Michigan Limited Liability Company v William Larson, 271 Mich App 254; 720 NW 2nd 575 (2006), “the transferor must actually be liable for the claim to be a ‘debtor’.” Indeed, the remainder of the UFTA appears to presume that liability has already been established. A claim under the UFTA cannot proceed otherwise. Furthermore, the UFTA only permits voiding a transaction upon action by the creditor, not by the transferee, MCL 566.37(1)(a); 566.38(2). As was the case in Paton, the transferor here is ostensibly parted with any interest in the assets. However, the transferor, or her estate, has not parted with an interest in the adjudication of liability to another individual. Therefore, unless the transferor’s liability has already been determined in a proceeding that afforded the transferor a meaningful opportunity to defend, the transferor’s “presence in the action is essential to permit the court to render complete relief ...” MCR 2.205(A).

Alice Maddock’s death did not extinguish the plaintiff’s complaint, but substitution of Alice’s estate was necessary in order for the claim on the debt to proceed simultaneously with the claim under the UFTA. The plaintiff had properly commenced suit against Alice but then adamantly refused to open an estate and add the estate as a party this by being given ample opportunity to do so. When it did finally request to substitute the estate, granting the request was properly within a trial court’s discretion. The Court of Appeals in Mather, supra, found no abuse

of discretion because the defendant was prejudiced by the delay, during which time the “property had been tied up by a lis pendens notice” and “memories of witnesses ... have faded ...”.

The trial court’s decision is appropriate under the most recently adopted definition of an abuse of discretion, Maldonado v Ford Motor Company, 476 Mich 372, 388; 719 NW 2nd 809 2006 which states in relevant portion as follows:

“An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome” ... “when the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment.”

In the present case, the nursing home billed a resident who disputed the bill and then proceeded to sue her and a transferor of property. After the resident’s death, the nursing home attempted to avoid giving the debtor her day in court by not creating and substituting her estate but instead attempted to proceed only against the first transferee of property under the UFTA who was not otherwise liable or claimed to be liable on the decedent’s debt. The trial court’s decision was clearly appropriate under the circumstances of this case.

III. Would Maddock’s estate represent any separate rights or interests that are not otherwise represented by defendant Larson?

Appellant answers “No.”

Appellee answers “Yes.”

The administration of decedent’s estates in Michigan is within the exclusive perview of the Michigan Probate Court and is specifically governed by the Estates and Protective Individuals Code (EPIC), MCL 700.1101, *et seq*, MCL 700.1301. Chapter 5 of the Michigan Court Rules covers procedural matters in probate proceedings.

EPIC maintains the enlarged jurisdiction of the probate courts that existed under former law and under MCL 700.1302, .1303, the probate court has jurisdiction over a contract proceeding or action by or against an estate, a trust, or a ward; and jurisdiction over the determination of property rights and interests. Creditors’ claims are covered by MCL 700.3801-.3815 and MCR 5.306, .307.

Presumably, in the instant case, the personal representative would disallow the claim presented by the nursing home under MCR 5.101(c). The nursing home could substitute the estate in the circuit court action or conceivably seek to transfer the matter to the probate court.

The personal representative stands in the shoes of the debtor. The personal representative can obtain medical records, financial documents and assert any defenses the debtor could raise. The defenses include usury, violation of the Michigan Debt Collection Statutes, MCL 339.901, MCL 445.251 and violation of the Federal Debt Collection Act, 15 USC 1692 (since Alice was never sent an 809 validation letter).

In addition to the defenses, the personal representative could assert claims for violation of the Michigan Consumer Protection Act, MCL 445.901; the Fair Credit Billing Act, 15 USC 1601, *et seq*; and violation of HIPAA, 45 CFR 164.530. Additional potential causes of action the personal representative could bring include invasion of privacy and fraudulent use of financial documents.

Exhaustively searching cases under the Uniform Fraudulent Conveyance Act and the Uniform Fraudulent Transfer Act reveals no cases in which courts have allowed a first transferee to raise defenses or prosecute action such as counterclaims available to a debtor.

IV. Does defendant Larson have sufficient information and/or standing to raise any defenses or counterclaims the estate may have against plaintiff?

Appellant answers "Yes."

Appellee answers "No."

Defendant William Larson does not have the medical records of Alice Maddock and, unlike the personal representative of her estate, cannot obtain them under HIPAA, *supra*. Obviously without Alice's medical records, he lacks critical information concerning Alice's health and any effect on it by treatment or lack thereof at the nursing home which claims payment for services. Similarly, it is impossible to tell whether the goods and services allegedly rendered were necessary or appropriate. Similarly, with regard to information concerning Alice Maddock's financial situation, he only has knowledge concerning assets transferred to him. He has no authority to

obtain records from any financial institutions concerning accounts on which his name does not appear.

Simply put, Larson lacks the information to properly defend or to pursue counterclaims which a personal representative of her estate could do.

Larson is one of eleven nieces and nephews who, along with any creditors of Alice such as the nursing home, would be the interested parties in any estate. The nursing home was free to open an estate and involve itself with all of the duties, responsibilities, headaches, disruption of family ties and aggravation that such an action involves and it elected not to do so despite the law being clear that the estate was a necessary party in order for it to pursue its claims.

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

Appellant answers “No.”

Appellee answers “Yes.”

The answer depends on whether liability of the debtor on a claim has been already been proven. If liability on a debt has not been established, the debtor is a necessary party because without the establishment of a debt, a creditor has no standing to challenge the actions of the alleged debtor, Beland, *supra*. If liability on a debt has previously been established, as in Emarine, *supra*, and Sheepscot, *supra*, the debtor may not be required to be joined if in fact she has no continuing interest in the property at issue, but, because of the myriad circumstances in which the debtor may have interest or involvement, the better practice is to join the debtor so that all parties are present before the court.

VI. Does the UFTA permit an action *solely* against the first transferee of an asset, MCL 566.38(2)(a), regardless of whether a right to payment has been reduced to judgment, MCL 566.31(c)?

Appellant answers “Yes.”

Appellee answers “No.”

Court of Appeals answers “No.”

The nursing home persists in confusing the procedural remedy of allowing claim against a debtor and a transferee to proceed at the same time with the substantive right of the debtor to have her day in court which has not been abrogated or changed by the Uniform Transfer Act.

Federal Rule of Civil Procedure 18(b) Joinder of Remedies; Fraudulent Conveyances, lays out the situation most succinctly:

“Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.”

This is consistent with existing Michigan law prior to the Uniform Fraudulent Conveyance Act and under the Uniform Fraudulent Conveyance Act. Without liability on a debt, there is no basis to inquire into a transfer of assets. Without a determination of liability and damages for murders by their husbands, Mrs. Fredericks (Churchill v Palmer, supra) and Mrs. Titus (Estes v Titus, supra), would not have their divorce judgments examined by another court.

VII. Does the UFTA affect the significance of Patton v Langley, 50 Mich App 428 (1883) and Bixler v Fry, 157 Mich 314 (1909)?

Appellant answers “No.”

Appellee answers “No.”

The UFTA really does not affect the significance of Patton, supra, or Bixler, supra, because it did not change existing Michigan law. In Patton, the court determined that an interim transferee of the property who retained no interest was not a necessary party using the same analytical approach as used by the Massachusetts court in CitizensBank, supra. In Bixler, the court found the debtor, who had failed to comply with the Bulk Sales Statute to be a necessary party because liability had not been determined. Justice Ostrander observed at page 316:

“It is one of the elementary rules of equity pleading that necessary parties shall be brought upon the record. The debtor, the person against whom the demand of the complainant is asserted, the party to the contract which is the foundation of

complainant's right to proceed at all, the person charged with making a void sale of his property, is a necessary party defendant."

The UFTA continued the requirement of establishing liability through the definitions: (e) "Debt" means liability on a claim and (f) "Debtor" means a person who is liable on a claim. As noted above, in all of the reported cases the debtor's liability on an underlying debt was a prerequisite of an action under UFTA.

VIII. Is a judgment against a debtor ever necessary to obtain a judgment avoiding a transfer against the transferee under MCLA 566.38? If so, is the avoidance of the transfer enforceable against the transferred assets under MCL 566.37(2), or only against the transferee's unrelated assets?

Appellant answers "No."

Appellee answers "Sometimes."

Returning again to the definitional portions of the Uniform Fraudulent Transfer Act, 566.31(e) "Debt" means liability on a claim and (f) "Debtor" means a person who is liable on a claim. Before a judgment avoiding a transfer may be entered, there must be a determination of liability on a claim. If there has not been a judgment, we are left in the arena of pre-judgment action which was extensively dealt with by the United States Supreme Court in Sniadach v Family Finance Corp of Bayview, 395 US 337 (1969). Only after someone has determined to be "liable" on a debt, may the court set aside a transfer under 566.38 and execute on property under 566.37(2).

Again, without a determination of liability on a debt, a court cannot reach the question of avoidance of a transfer. Any judgment against a transferee "for the value of the asset transferred, as adjusted under Subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less requires liability on a claim. MCL 566.38(2) establishment of the amount of a judgment against a transferee is predicated on the establishment of a claim which is defined at 566.31(c) as "a right to payment."

As the prefatory note to the Uniform Fraudulent Transfer Act "Section 7 lists the remedies available to creditors under the new act. It eliminates as unnecessary and confusing a

differentiation made in the original act between the remedies available the holders of matured claims and those holding unmatured claims. Since promulgation of the Uniform Fraudulent Conveyance Act, the Supreme Court has imposed restrictions on the availability and use of pre-judgment remedies.”

Nowhere in the notes or in any of the commentary concerning the adoption of the Uniform Fraudulent Transfer Act is there any suggestion of eliminating the necessity of establishing a debt on the underlying obligation.

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

Appellant answers “UFTA.”

Appellee answers “No conflict.”

There is no conflict between the Uniform Fraudulent Transfer Act and MCR 2.205(A). The Uniform Fraudulent Transfer Act and its predecessor, the Uniform Fraudulent Conveyance Act, were predicated on the establishment of a claim or right to payment. Establishing the claim or right to payment may be done in the same cause of action alleging the fraudulent transfer but does not eliminate the necessity for establishment of a debtor’s liability on the underlying debt.

The interpretation of the UFTA urged by the nursing home seeks to expand a procedural nicety promoting efficient use of judicial resources by allowing a contract claim or tort claim and a claim for fraudulent transfer to proceed at the same time into a dramatic change imposing liability on a first transferee for a transferor’s debt unconnected with the property transferred. Under plaintiff’s interpretation, anyone purchasing or receiving property from a debtor could be required to defend not only issues pertaining to the value of the property they received or the consideration they tendered, but also against the transferor’s liability on some unknown debt. The interpretation in this case also seeks to strip away the protection from decedent’s estate for claims of creditors. It is inconceivable that the legislature intended and that all of the commentators and courts which have dealt with the Uniform Fraudulent Transfer Act have overlooked the fact that a debtor is no longer a necessary party to an action on a claim.

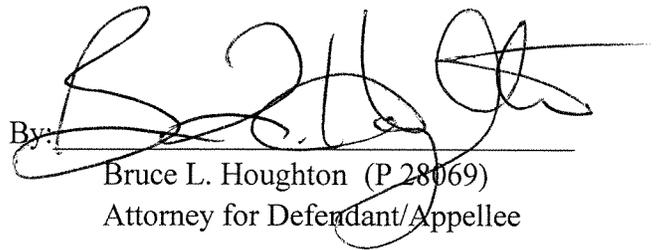
RELIEF REQUESTED

Appellee requests that the Supreme Court uphold the Decision of the Trial Court and the Court of Appeals that the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31, does not obviate the necessity of establishing liability on a debt through a suit against the debtor in which the debtor has the opportunity to defend.

Appellee requests further that the Court uphold the Decision of the Trial Court and the Court of Appeals denying the untimely Motion to Add the Estate of Alice Maddock.

RESPECTFULLY SUBMITTED,

HOUGHTON LAW OFFICE,

By: 
Bruce L. Houghton (P 28069)
Attorney for Defendant/Appellee

Dated: August 29, 2007