



## Report on Public Policy Position

**Name of Section:**

Business Law Section

**Contact person:**

Michael S. Khoury

**E-mail:**

mkhoury@jaffelaw.com

**Other:**

Amicus Brief in *Estes v. Titus*

**Date position was adopted:**

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**Process used to take the ideological position:**

Position adopted after discussion and vote at a scheduled meeting.

**Number of members in the decision-making body:**

15

**Number who voted in favor and opposed to the position:**

Voted for position 14

Voted against position 0

Abstained from vote 0

Did not vote 1

**Position:**

Amicus submitted at invitation of Supreme Court.

**Explanation of the position, including any recommended amendments:**

Please see the attached.

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS  
PRESIDING JUDGE PETER D. O'CONNELL

JAN KAY ESTES, Personal Representative of  
the Estate of DOUGLAS DUANE ESTES,

Plaintiff/Appellee,

v

JEFF EDWARD TITUS,

Defendant/Appellee,

and

JULIE L. SWABASH, f/k/a JULIE L. TITUS,

Appellant.

Supreme Court  
File No. 133098

Court of Appeals  
No. 261968

Kalamazoo County Circuit Court  
File No. 02-000529-NZ

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BUTLER, DURHAM & TOWESON PLLC  
By: H. van den Berg Hatch (P14733)  
202 North Riverview Drive  
Parchment, MI 49004  
(269) 349-7686

Attorneys for Plaintiff/Appellee, Jan Estes

---

KREIS, ENDERLE, CALLANDER &  
HUDGINS, P.C.  
By: James D. Lance (P68202)  
One Moorsbridge, P.O. Box 4010  
Kalamazoo, MI 49003-4010  
(269) 324-3000

Attorneys for Appellant, Julie Swabash f/k/a  
Julie Titus

HOWARD & HOWARD ATTORNEYS, P.C.  
By: Lisa S. Gretchko (P29881)  
39400 Woodward Avenue, Suite 101  
Bloomfield Hills, MI 483904-5151  
(248) 723-0396

MICHAEL W. BARTNIK (P32524)  
101 West Big Beaver Road, 14<sup>th</sup> Floor  
Troy, MI 48084  
(248) 687-1838

Attorneys for *Amicus Curiae* The Business Law  
Section of the State Bar of Michigan

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LAW OFFICES OF RANDY POMEROY  
By: Randall L. Pomeroy (P43930)  
7826 Ashton Woods Drive  
Portage, MI 49024  
(269) 207-1352

Attorneys for Defendant/Appellee Jeff Titus

**BRIEF OF AMICUS CURIAE**  
**THE BUSINESS LAW SECTION OF THE STATE BAR OF MICHIGAN**

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## **STATEMENT OF BASIS OF JURISDICTION**

Amicus Curiae accepts Appellant's Statement of Basis of Jurisdiction as set forth at page xv of her Brief.

## STATEMENT OF QUESTIONS INVOLVED

- I. WHETHER A PROPERTY SETTLEMENT CONTAINED IN A JUDGMENT OF DIVORCE IS SUBJECT TO JUDICIAL REVIEW FOR PURPOSES OF A CLAIM UNDER THE UNIFORM FRAUDULENT TRANSFER ACT (“UFTA”) (MCL 566.31, *et seq.*)?

The Court of Appeals answered “NO.”

The Trial Court did not say.

Defendant/Appellee Jeff Titus did not say.

Appellee Jan Estes answers “YES.”

Appellant Julie Swabash f/k/a Julie Titus answers “NO.”

*Amicus Curiae* answers “NO.”

- II. WHETHER A DIVISION OF MARITAL ASSETS PURSUANT TO A JUDGMENT OF DIVORCE IS A TRANSFER SUBJECT TO THE UFTA?

The Court of Appeals answered “YES.”

The Trial Court did not say.

Defendant/Appellee Jeff Titus did not say.

Appellee Jan Estes answers “YES.”

Appellant Julie Swabash f/k/a/ Julie Titus answers “NO.”

*Amicus Curiae* answers “YES.”

III. WHETHER (AND UNDER WHAT CIRCUMSTANCES) A DIVISION OF MARITAL ASSETS UNDER A JUDGMENT OF DIVORCE CAN BE DEEMED FRAUDULENT?

The Court of Appeals answered “YES.”

The Trial Court did not say.

Defendant/Appellee Jeff Titus did not say.

Appellee Jan Estes answers “YES.”

Appellant Julie Swabash f/k/a Julie Titus answers “NO.”

*Amicus Curiae* answers “YES.”

IV. WHETHER A JUDGMENT DEBTOR CAN ATTACH MARITAL PROPERTY FOR THE DEBT OF ONE OF THE SPOUSES?

The Court of Appeals answered “YES.”

The Trial Court did not say.

Defendant/Appellee Jeff Titus does not say.

Appellee Jan Estes answers “YES.”

Appellant Julie Swabash f/k/a Julie Titus answers “NO.”

*Amicus Curiae*. Does not say.

V. WHETHER JAN ESTES’ FAILURE TO APPEAL THE DENIAL OF THE MOTION TO INTERVENE IN THE DIVORCE ACTION IS SIGNIFICANT?

The Court of Appeals answered “NO.”

The Trial Court did not say.

Defendant/Appellee Jeff Titus does not say.

Appellee Jan Estes answers “NO.”

Appellant Julie Swabash f/k/a Julie Titus answers “YES.”

*Amicus Curiae* answers “NO.”

## **STANDARD OF REVIEW**

Amicus Curiae accepts the Standards of Review set forth in Appellant's Brief, namely that this Court reviews statutes and rules of construction *de novo*.

## **INTEREST OF AMICUS CURIAE**

The Business Law Section of the State Bar of Michigan files this brief *amicus curiae* pursuant to the May 25, 2007 invitation of the Supreme Court of Michigan.

## **STATEMENT OF AMICUS CURIAE REGARDING POSITION TAKEN**

The Business Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join based on common professional interest. The positions expressed in this brief are that of the Business Law Section only, and not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The Business Law Section currently has approximately 3500 members. The positions taken in this brief were adopted by a vote of the Council of the Business Law Section after discussion at a Council meeting on September 20, 2007, held in conformance with the Section's bylaws. The Council of the Business Law Section consists of fifteen (15) members and the fourteen (14) Council members who attended the September 20, 2007 Council Meeting unanimously voted in favor of the positions that are presented in this Amicus Brief.

The subject matter of the positions taken in this Brief is within the jurisdiction of the Business Law Section, and the positions taken in this Brief were adopted in accordance with the Section's bylaws. The requirements of State Bar of Michigan Bylaw Article VIII have been satisfied.

## **STATEMENT OF FACTS**

On July 19, 2002 Jeff Titus was convicted of murdering Douglas Estes and another man: he was sentenced to life imprisonment (Appellant's Appendix at pg. 23; hereinafter, references to the

Appellant's Appendix will be indicated by "A", followed by the pertinent page number). In 2002, Jan Estes (Douglas Estes' widow and the personal representative of his estate) filed wrongful death action in Kalamazoo County Circuit Court. (A-3 through A-5).

On November 12, 2002, Julie Titus (Jeff Titus' wife) filed a Complaint for Divorce and Custody in the Family Division of the Kalamazoo County Circuit Court ("Divorce Court"). (A-6 through A-9). Julie Titus sought divorce and custody of the Titus' minor child who was then 17-years of age, and would turn 18 on September 30, 2003. (A-7). On March 10, 2003, the Divorce Court entered a judgment of divorce ("Divorce Judgment"; A-10 through A-21) that was based on the stipulation of the parties. The Divorce Judgment awarded Julie Titus substantially all of the marital assets. The Divorce Judgment also contained the following provision:

#### **SUPPORT OF CHILD**

IT IS FURTHER ORDERED AND ADJUDGED that due to the fact that the Defendant is currently incarcerated in a state prison, has not contributed support for the minor child preceding or during, nor is it anticipated he will contribute hereafter, the award of property herein made is intentionally not congruent or equal and the award of additional property to the Plaintiff is in lieu of his child support obligation, considering the term of the contemplated incarceration and the age of the child and, accordingly, no award is made.

On March 24, 2003, Jan Estes filed a motion to intervene in the Titus' divorce proceedings ("Estes Intervention Motion"; A-22 through A-25). Paragraph 17 of the Estes Intervention Motion asked the Divorce Court to temporarily set aside the property settlement provision of the Divorce Judgment and to enjoin Julie Titus and Jeff Titus from transferring, selling or disposing of most of the property described in the Divorce Judgment. (A-24, ¶ 17). The Estes Intervention Motion also requested a hearing to determine a fair and equitable division of the Titus' assets and liabilities. (A-25, ¶ C). The Divorce Court denied the Estes Intervention Motion (A-26 through A-32) stating: "...this Court is not able to conclude that it has the ability to allow third party intervention in these

facts before the Court, or that it would be equitably appropriate.” (A-27). The Divorce Court did not conduct an evidentiary hearing on the merits of Jan Estes’ fraudulent transfer claim.

Jan Estes did not appeal the Divorce Court’s denial of the Estes Intervention Motion.

The Court of Appeals opinion recites that, as soon as the Divorce Court denied the Estes’ Intervention Motion, Jan Estes filed a motion in the wrongful death case to enjoin Jeff Titus from transferring, selling, encumbering, or disposing of any of his marital assets, arguing that injunctive relief was necessary to ensure that she could collect any judgment from Jeff Titus. (A-49). Jeff Titus appeared *in propria persona* and objected to this motion, arguing that the property division in the divorce case was proper and that the trial court in the wrongful death case (“Trial Court”) lacked authority to set aside the Divorce Judgment. Jan Estes’ motion was granted, and the Trial Court entered a preliminary injunction enjoining Jeff Titus from transferring any of the marital assets that were awarded to him in the Divorce Judgment. (A-49).

On October 22, 2004, the Trial Court entered a \$550,000.00 judgment in favor of Jan Estes and against Jeff Titus. (A-33 through A-34).

On or about January 19, 2005, Jan Estes filed (in the wrongful death case) a Motion and Affidavit to Compel Discovery and Prevent Transfer of Property. (A-35 through A-39). This motion sought: (i) issuance of a subpoena for Julie Titus n/k/a Julie Swabash<sup>1</sup> to appear for discovery regarding assets in which Jeff Titus might have an interest, (ii) an order requiring Julie to show cause why she should not be made a party to the wrongful death case pursuant to MCL 600.6128, (iii) an order enjoining Julie from transferring or interfering with any of the property in which Jeff Titus might have an interest and (iv) an early hearing to determine the

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<sup>1</sup> Julie Titus remarried after she divorced Jeff Titus; her current name is Julie Swabash. For clarity, she is hereinafter called “Julie.”

extent of Jeff Titus' rightful interest in the marital property. (A-38). On January 21, 2005, the Trial Court issued an Order to Show Cause and Restraining Order (A-40 through A-41) that required: (i) Julie to appear at a hearing on February 7, 2005 to show cause why she should not be made a third party to the supplemental collection proceedings in the wrongful death case, and (iii) restrained Julie from transferring any of the property in which Jeff Titus had or might have an interest. (A-40 through A-41).

According to the Court of Appeals, on February 3, 2005, Julie's counsel filed a response to the Order to Show Cause and Restraining Order arguing that: (i) the Trial Court could not set aside the Divorce Judgment signed by a co-equal judge, (ii) Jan Estes' motion was time-barred pursuant to MCR 2.612, and (iii) the Trial Court lacked authority to overrule the Divorce Court's determination that the Divorce Judgment was fair and equitable. (A-49).

The Trial Court denied Jan Estes' motion to add Julie as a party and, on February 16, 2005, entered its Order Dismissing Plaintiff's Motion, Quashing Subpoena and Dissolving Restraining Order (A-42 through A-43). On February 23, 2005 Jan Estes' filed a Motion for Reconsideration (A-44 through A-45) which the Trial Court denied on March 11, 2005. (A-46 through A-47).

Jan Estes appealed to the Michigan Court of Appeals. On December 21, 2006 the Michigan Court of Appeals issued its opinion which unanimously affirmed the Trial Court's decision declining to set aside the property settlement contained in the Divorce Judgment and holding that the Trial Court lacked the authority to do so (A-51 and A-58). With a dissenting opinion (A-58 through A-59), the Michigan Court of Appeals reversed the Trial Court's February 16, 2005 Order that dissolved the January 21, 2005 restraining order and that denied both Jan Estes' request for an evidentiary hearing and her motion to add Julie as a party to the supplemental collection proceedings in the wrongful death case. (A-58). Consequently, the Michigan Court of Appeals remanded the case to the Trial Court for Julie to be added to the supplemental proceedings as a party defendant,

and for the Trial Court to conduct further proceedings consistent with the appellate opinion. (A-58).

Julie applied to this Court for Leave to Appeal which was granted on May 25, 2007. Also on May 25, 2007, this Court invited the Business Law Section of the State Bar of Michigan to file this brief *amicus curiae* and to address the issues set forth in this brief.

## ARGUMENT

### Preface

In granting leave to appeal and inviting the participation of *amicus curiae*, this Court stated:

The parties shall include among the issues to be briefed: (1) whether a judgment of divorce is subject to judicial review for purposes of a claim under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.*; (2) whether a division of marital assets pursuant to a judgment of divorce is a transfer subject to the UFTA; (3) whether and under what circumstances a division of marital assets under a judgment of divorce can be deemed fraudulent; (4) whether a judgment debtor can attach marital property for the debt of one of the spouses; and (5) the significance, if any, of the plaintiff's failure to appeal the denial of the motion to intervene in the divorce action.

#### **I. A PROPERTY SETTLEMENT CONTAINED IN A JUDGMENT OF DIVORCE IS NOT SUBJECT TO JUDICIAL REVIEW FOR PURPOSES OF A CLAIM UNDER THE UFTA.**

By definition, a divorce proceeding is a two-party dispute between a husband and a wife who seek a dissolution of the marriage and a determination of ancillary issues, such as child custody, spousal support, and equitable division of marital assets. MCL 552.6; *Reed v Reed*, 265 Mich App 131, 158; 693 NW2d 825 (2005). Creditors of the husband or wife should not be permitted to intervene in divorce proceedings because creditors are not the real parties in interest in the dissolution of the marriage. *See, e.g., In re Fordu*, 201 F3d 693, 705 (6<sup>th</sup> Cir 1999). If creditors are permitted to intervene in divorce proceedings, they will routinely seek to do so and divorce proceedings will become more contentious, complex, and costly than they already are.

Without creditor intervention in the divorce case, a judge in a divorce case will not be in a position to conduct a UFTA analysis or determination *that is binding on creditors*. Consequently, it is inappropriate to suggest that a divorce judgment is subject to judicial review for purposes of a UFTA claim that it is unable to evaluate and/or adjudicate in the absence of creditor intervention. It would be a waste of judicial resources for this Court to require judges in divorce cases to conduct a fraudulent transfer analysis that will not be binding on the persons who are most affected by that determination—the *creditors*.

In taking this position, however, the Business Law Section of the State Bar of Michigan wishes to emphasize that the Michigan Court of Appeals correctly distinguished between: (i) a co-equal court “attacking” or “reviewing” a divorce judgment (which is not permissible) and (ii) permitting a co-equal court to grant relief under the UFTA with respect to property that one spouse transferred to another (in excess of a fair and equitable division of marital property) pursuant to a property division that was incorporated into the judgment of divorce—which relief is permissible by virtue of the UFTA.

The property division in a judgment of divorce simply creates the “pot of money” from which creditors of either spouse can be paid. The fact that the Divorce Judgment was the vehicle by which Jeff Titus transferred his interest in property to Julie does not somehow “shield” that property transfer from the impact of the UFTA. The Titus’ divorce is no different from any other lawsuit in which two people argue over any sum, then settle their dispute: if the settlement of that dispute could be proven to be a fraudulent transfer (perhaps because one party “walks away” from the money intentionally, knowing that he/she has significant outstanding debt and that the money would only go to pay his/her creditors) then the UFTA provides a remedy for the transferor’s creditors. That is exactly what the UFTA is designed to do.

**II. A DIVISION OF MARITAL ASSETS PURSUANT TO A JUDGMENT OF DIVORCE IS A TRANSFER SUBJECT TO THE UFTA.**

This Court has already determined that transfers from husband to wife can violate the UFTA. In *Szkrybalo v Szkrybalo*, 477 Mich 1086; 729 NW2d 233 (2007), Jeff Szkrybalo sued his brother James alleging that James had embezzled funds from the estate of Harry Szkrybalo. Judgment for \$268,669.86 was entered against James. Shortly thereafter, James' wife, Andrea, purchased a home in the names of her daughters. Jeff then sued James and Andrea alleging that James paid for much of the purchase, upkeep, and refinancing of the home with actual intent to hinder, delay or defraud his creditors—because he failed to repay the judgment. The trial court granted summary judgment to James and Andrea. In lieu of granting leave to appeal, this Court found that in addition to Andrea's "insider" status, there were several other "badges of fraud" under MCL 566.34(2), and remanded the case to the Michigan Court of Appeals. On remand, the Court of Appeals reversed the trial court's grant of summary judgment in favor of James, and directed the trial court to proceed with trial. *Szkrybalo v Szkrybalo*, Michigan Court of Appeals, May 31, 2007, *on remand*, 2007 WL 1575262 (Mich App); copy attached as Exhibit 1. Although the instant case is considered to be a case of first impression, in *Szkrybalo* this Court already recognized that transfers from husband to wife can violate the UFTA. This Court also noted in the Action on the Application, that "Courts will closely scrutinize transactions between a husband and wife when creditors are involved." *Szkrybalo, supra*, 477 Mich 1086, *citation omitted*. The fact that the transfer occurs via property settlement contained in a judgment of divorce does not alter the fact that a transfer from husband to wife can constitute a violation of the UFTA in certain circumstances.

In the instant case, the Michigan Court of Appeals correctly determined that a division of marital property in a divorce proceeding constitutes a "transfer" within the meaning of the UFTA and its decision should be affirmed. The UFTA as adopted in Michigan defines "transfer" in MCL 566.31(l), which states:

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

This definition is extremely broad and is apparently designed to anticipate the creativity of parties to fraudulent transfers. Even though MCL 566.31(l) is broad enough to include a divorce judgment or division of marital assets as a “transfer” within the meaning of the UFTA, this does *not* mean that all divorce judgments constitute fraudulent transfers. In order for a transfer via divorce judgment to constitute a fraudulent transfer, it must *also* meet the criteria embodied in MCL 566.34 or 35, such as actual intent to hinder, delay or defraud creditors, or constructive fraud (*e.g.*, lack of reasonably equivalent value in exchange for the transfer, coupled with transferor’s insolvency or lack of working capital, etc.). MCL 566.34 states:

**566.34 Fraudulent transfer or obligation, generally; determination of actual intent**

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

- (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
- (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
  - (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
  - (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
- (2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:
  - (a) The transfer or obligation was to an insider.
  - (b) The debtor retained possession or control of the property transferred after the transfer.
  - (c) The transfer or obligation was disclosed or concealed.
  - (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
  - (e) The transfer was of substantially all of the debtor’s assets.
  - (f) The debtor absconded.
  - (g) The debtor removed or concealed assets.

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

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

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

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

MCL 566.35 states:

**566.35 Fraudulent transfer or obligation; claim of creditor arising prior to transfer or obligation**

Sec. 5. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

On page 10 of Appellant’s brief to this Court, Appellant (Julie) argues that because the UFTA defines “insider” to include “relative” (*see* MCL 566.31(i)), *if* this Court rules that a marital property division constitutes a “transfer” within the meaning of the UFTA, then *all* divorce judgments and property divisions will, necessarily, constitute fraudulent transfers. That is incorrect. In *In re Hill*, 342 BR 183, 199 (Banker D NJ 2006), the court held that an ex-spouse was *not* an “insider” based on the facts of that case and using the Bankruptcy Code definition of “insider,” which is substantively similar to the definition of “insider” under MCL 566.31(1). The court stated:

As to the first badge of fraud, this court does not find an insider relationship between the Debtor and her ex-husband, but nevertheless finds an insider relationship exists in the divorce settlement as the Debtor’s daughters benefit from the agreement as well. The Bankruptcy Code defines the term “insider,” stating in relevant part that the term includes “a relative of the debtor.” 11 U.S.C. § 101(31). The term “relative” is then defined as an “individual related by affinity or consanguinity within the third degree as determined by the common law ...” 11

U.S.C. § 101(45). A spouse of a debtor would be a relative because the definition includes relationships by affinity. A former spouse, however, is not related by affinity, and therefore “a former spouse will not be considered a relative.” 2 Collier on Bankruptcy ¶ 101.45 (15th ed. Rev. 2006). The inquiry does not end there however as the definition of insider is preceded by the non-limiting term “includes.” 11 U.S.C. § 101(31); 11 U.S.C. § 102(3). Therefore, former spouses may be subject to insider status, even though that status is not automatic. The legislative history of the statute has been adopted by courts as a test for finding insider status, which states that an insider is “one who has a sufficiently close relationship with a debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor.” (Citations omitted).

Here, there is no evidence of Daniel exerting control or influence over the Debtor. There is no allegation that the divorce was a sham divorce. There is nothing to indicate that the parties even maintained an amicable relationship after separating. For those reasons, Daniel will not be considered an insider.

*In re Hill*, 342 BR at 199.

In order for a divorce judgment or property division to constitute a fraudulent transfer it must be “actually” fraudulent under MCL 566.34(1)(a), or “constructively” fraudulent under MCL 566.34(1)(b) or MCL 566.35. The fact that a divorce judgment or property division might constitute a “transfer” to an insider for purposes of the UFTA does not, *ipso facto*, render it a fraudulent transfer as Julie alleges. Instead, the fact that an insider received the transfer is merely *one* of the criteria that a court *may* consider, under MCL 566.34(2), in determining whether that transfer was made with actual intent to hinder, delay or defraud creditors. When these criteria “are present in sufficient number, they may give rise to an inference or presumption of fraud”. *In re Knippen*, 355 BR 710, 732-733 (Bankr ND Ill 2006). A transfer between husband and wife is not “proof *per se*” of fraudulent intent. *In re Knippen*, *id.* at 733. “The presence or absence of one factor is not conclusive.” *In re Hill*, 342 BR 183, 198 (Bankr D NJ 2006).

Michigan’s legislature could have exempted a division of marital assets from the definition of “transfer” in the UFTA, but it chose not to do so. Michigan’s Courts must respect that legislative decision and enforce the UFTA; they are not permitted “to substitute their judgment for that of legislative bodies on...questions of economic and social policy.” *See, e.g., Muskegon Area Rental Ass’n*

*v Muskegon*, 465 Mich 456, 467; 636 NW2d 751 (2001). Other courts interpreting the UFTA have routinely held that transfers made as part of a divorce judgment or property division are subject to the UFTA.

In *In re Fordu*, 201 F3d 693, 702 (6<sup>th</sup> Cir 1998), Mrs. Fordu won the lottery in 1986 and was entitled to annual installments of \$19,444.40 through the year 2011. In 1991, the Fordus divorced and the divorce decree provided, *inter alia*, that Mrs. Fordu waived any claim to Mr. Fordu's restaurant, and Mr. Fordu waived his interest in the lottery proceeds. Two years after the divorce decree was entered, Mr. Fordu's restaurant failed and he filed a Chapter 7 bankruptcy petition. The bankruptcy trustee sued Mrs. Fordu under Ohio's version of the UFTA, seeking to avoid and recover the transfers that she received pursuant to the divorce decree—including Mr. Fordu's waiver of his interest in the lottery proceeds. The bankruptcy court dismissed the trustee's complaint, and the trustee appealed to the Bankruptcy Appellate Panel ("BAP"), which reversed. Mrs. Fordu appealed to the Sixth Circuit Court of Appeals. That appeal triggered the appellate court's analysis of Ohio's version of the UFTA—which is substantively similar to the UFTA as adopted in Michigan. In affirming the BAP, the Court of Appeals held:

In sum, we conclude that the lottery proceeds were part of the Fordus' marital estate and the Debtor thus held a property interest in such proceeds that was transferred to Ms. Fordu under the Separation Agreement. This transfer was properly subject to challenge by the Trustee through the assertion of his avoidance claims. (citations omitted) . . . We therefore conclude that the BAP correctly reversed the bankruptcy court's order granting Ms. Fordu partial summary judgment.

201 F3d at 702.

In *Greninger v Cromwell*, 140 Ore App 241, 246; 915 P2d 479, 481 (1996) the Oregon Court of Appeals interpreted Oregon's UFTA definition of "transfer" that is identical to MCL 566.31(l). Indeed, the facts of *Greninger* are similar to those of the instant case. In *Greninger*, Linwood Cromwell was convicted of raping Kelli Greninger and was sentenced to three years in prison. In March 1990, Ms. Greninger filed a civil action for sexual battery and, in 1992, a jury awarded her

damages of \$200,000.00. In May 1991, Linwood Cromwell and his wife, Doris, divorced and the stipulated judgment of divorced transferred virtually all of Linwood Cromwells' real and personal property to Doris Cromwell. In November 1991, Ms. Greninger filed suit against both Linwood Cromwell and Doris Cromwell alleging that their stipulated judgment of divorce was void as to her (Ms. Greninger) because it constituted a transfer of property with actual intent to hinder, delay or defraud creditors such as her and, consequently, violated the UFTA. After a first appeal the trial court (on remand) granted the Cromwells' motion for summary judgment and dismissed Ms. Greninger's case, but the Oregon Court of Appeals reversed, after concluding that a divorce judgment constitutes a "transfer" within the meaning of the UFTA, as follows:

We conclude that plaintiff's claim that the Clatsop County judgment constitutes a fraudulent transfer under the UFTA contains allegations that, if proven, could constitute extrinsic fraud and permit a collateral attack on the Clatsop County judgment. Under the circumstances, the broad definition of "transfer" in the UFTA statute together with ORCP 71C grant the trial court authority to provide an appropriate remedy to a creditor seeking to undo a fraudulent transfer. The trial court erred when it granted summary judgment to defendants on the ground that plaintiff's claim is an impermissible collateral attack on the Clatsop County judgment.

140 Ore App at 246-247; 915 P2d at 482.

In *Dowell v Dennis*, 998 P2d 206 (Okla Civ App 1999), Jerry Dowell obtained a \$300,000.00 judgment against Ken Boyer on December 8, 1998. Just two days later, on December 10, 1998, Tex Ann Dennis filed a divorce action against Ken Boyer. A divorce decree and stipulated property settlement was entered on December 30, 1998. Jerry Dowell filed suit against both Tex Ann Dennis and Ken Boyer alleging that their property settlement violated the UFTA because it was made without Ken Boyer receiving reasonably equivalent value in exchange, while he was insolvent, or that he would become insolvent as a result of the transfer. Jerry Dowell also alleged that the property division constituted a transfer made with actual intent to hinder, delay or defraud his (Dowell's) collection efforts. The trial court granted summary judgment in favor of Tex Ann Dennis and Ken Boyer, and Jerry Dowell appealed. The appellate court reversed, as follows:

Dowell alleged that the divorce decree must be avoided to the extent of his judgment as a fraudulent transfer. Dowell has therefore made his claim under the fraud exception to the general rule against collateral attacks. We find that Dowell is not bound by and may attack the divorce decree first, because Dowell was not a party in the divorce proceeding, and second, because he has alleged that the divorce decree effected a fraudulent transfer affecting his rights which had accrued prior to the divorce decree. Whether Dowell can actually prove a fraudulent transfer under the UFTA is not before us. Accordingly, the trial court's decision granting summary judgment to Dennis and Boyer is REVERSED and REMANDED for proceedings consistent with this opinion.

998 P2d at 212-213.

In *Mejia v Reed*, 31 Cal 4<sup>th</sup> 657; 74 P3d 166 (2003) the Supreme Court of California interpreted UFTA language identical to MCL 566.31(l) and held that it applied to a marital separation agreement, as follows:

On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (1) defines “[t]ransfer” as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset...” ....Thus, the UFTA on its face encompasses transfers made under an MSA [marital separation agreement]. Consequently, most decisions of other states construing parallel provisions of the UFTA hold that it does apply to marital property transfers, including those in connection with divorce. (citations omitted).

31 Cal 4<sup>th</sup> 664; 74 P3d at 170.

Although the foregoing cases are from other jurisdictions, each of them establishes that a property settlement in a divorce constitutes a “transfer” made from one spouse to another and is subject to the UFTA, so that it may be avoided and recovered if it satisfies the other statutory criteria of a fraudulent transfer. The substantive uniformity of the UFTA provisions which these cases from other jurisdictions interpret makes them extremely compelling. Julie has not cited any authority to the contrary and, after diligent research, the undersigned was unable to find any.

**III. A DIVISION OF MARITAL ASSETS UNDER A JUDGMENT OF DIVORCE CAN BE DETERMINED TO BE FRAUDULENT TO THE SAME EXTENT AS ANY OTHER TRANSFER.**

The UFTA sets forth the circumstances under which a transfer is considered to be a fraudulent transfer, and describes both “actually” fraudulent transfers, and “constructively” fraudulent transfers. Both are actionable. *See* MCL 566.34 and MCL 566.35. Because transfers made via divorce judgment or property division fall within the UFTA’s definition of “transfer,” they should therefore be subject to the rigors of the UFTA to the same extent as any other transfer, and should be subject to the UFTA in its entirety. Courts should not “pick and choose” which provisions of the UFTA apply in any given setting: that is a legislative function.

A fraudulent transfer exists if any of the circumstances in the UFTA exist. Both actual and constructively fraudulent transfers should constitute “fraud” for purposes of MCR 2.612, MCL 600.6128 and MCL 600.6134.

Julie’s brief to this Court seems to argue that because a divorce judge has signed the divorce judgment or property division, it is somehow immune from attack or that the court has somehow ratified or “blessed” the transfer for UFTA purposes. However, that argument ignores the reality best enunciated in *Kardynalski v Fisher*, 135 Ill App 3d 643; 482 NE2d 117 (1985) in which the court stated:

Special scrutiny is applied to transfers between spouses where the debtor spouse is thereby rendered insolvent and unable to satisfy the claims of his creditors.... The incorporation of the parties’ agreement into a judicial decree does not alter this result. While judicial approval in such circumstances may represent a determination that the agreement is fair and equitable as between the parties to the divorce, it does not represent a determination that the agreement perpetrated no fraud upon the creditors of one spouse, particularly where the claims of the creditors are not made known to the court or provided for in the decree.

#### **IV. WHETHER A JUDGMENT DEBTOR [SIC] CAN ATTACH MARITAL PROPERTY FOR THE DEBT OF ONE OF THE SPOUSES.**

The Business Law Section defers to the Family Law Section on this issue, but notes that a divorce severs any tenancy by the entireties, and that same property in the hands of the divorced spouses loses its character as “entireties property.” Consequently, upon divorce the “entireties

exemption” to creditors claims embodied in MCL 600.6023a evaporates. Page 18 of Julie’s brief to this Court argues that result is unfair, but it is axiomatic that only entireties property enjoys the “entireties” exemption from creditors’ claims. Because divorce automatically severs the entireties, the property distributed to the former spouses becomes subject to creditors’ claims by operation of law.

**V. JAN ESTES’ FAILURE TO APPEAL THE DENIAL OF THE MOTION TO INTERVENE IN THE DIVORCE ACTION IS OF NO SIGNIFICANCE.**

Jan Estes’ failure to appeal the Divorce Court’s denial of her motion to intervene in the divorce case means only that Jan Estes has given up her quest to become a party to the Titus’ divorce proceedings; it has no bearing on Jan Estes’ right to proceed with supplemental proceedings against Jeff Titus and Julie in the Trial Court in order to collect upon the wrongful death judgment. Because the Divorce Court never addressed the merits of Jan Estes’ fraudulent transfer case, her failure to appeal the Divorce Court’s denial of her motion to intervene in the divorce proceedings was of no significance and is not *res judicata*. See, e.g., *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

*Res judicata* requires that (1) the prior action was decided on the merits, (2) the matter contested in the second case was resolved in the prior case, and (3) both actions involved the same parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269, 645 NW2d 13 (2002). Based on the foregoing criteria the doctrine of *res judicata* does not bar Jan Estes’ fraudulent transfer claim. Jan Estes’ fraudulent transfer claim has not been adjudicated on its merits in *any* court.

Jan Estes was not even a party to the Titus’ divorce proceeding when the Divorce Court denied the Estes Intervention Motion. Consequently, her failure to appeal the Divorce Court’s denial of the Estes Intervention Motion cannot possibly be preclusive relative to the fraudulent transfer claims that Jan Estes has raised in the supplemental proceedings in the wrongful death case.

To the extent that the dissent below questioned the majority's authority to address the issue, Michigan law is clear that "(t)he general rule that a question may not be raised for the first time on appeal to this court is not inflexible. When consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied." *Dation v Ford Motor Co*, 314 Mich 152, 160-161; 22 NW2d 252 (1946).

### CONCLUSION AND REQUEST FOR RELIEF

Based on the foregoing reasons and authorities, the Business Law Section of the State Bar of Michigan prays that this Court affirm the December 21, 2005 Opinion and Order of the Michigan Court of Appeals in its entirety.

HOWARD & HOWARD ATTORNEYS, P.C.

Dated: October 19, 2007

By: \_\_\_\_\_

Lisa S. Gretchko (P29881)  
For Invited *Amicus Curiae* The Business Law Section  
of the State Bar of Michigan  
39400 Woodward Avenue, Suite 101  
Bloomfield Hills, MI 48304-5151  
(248) 723-0396  
(248) 645-1568 (facsimile)

By: \_\_\_\_\_

Michael W. Bartnik (P32524)  
For Invited *Amicus Curiae* The Business Law Section  
of The State Bar of Michigan  
101 West Big Beaver Road, 14<sup>th</sup> Floor  
Troy, MI 48084  
(248) 687-1838  
(248) 687-1001 (facsimile)