

STATE OF MICHIGAN  
IN THE SUPREME COURT

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**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.

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**DEFENDANT-- APPELLEE'S SUPPLEMENTAL BRIEF  
IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL**

**FILED**

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**STATEMENT OF DECISION APPEALED FROM AND RELIEF SOUGHT**

The Plaintiff/Appellant seek leave to appeal from a decision from the Michigan Court of Appeals in Mather Investors, LLC, dba Mather Nursing Center, a Michigan Limited Liability Company v William Larson, docket number 261638 \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2006) which upheld the Marquette County Circuit Court's grant of summary disposition that a debtor or her estate were a necessary party and the trial court properly denied an untimely motion for substitution under MCR 2.202(A)(1)(b). The decision is not inconsistent with any other decision of the Michigan Supreme Court of Court of Appeals.

**STATEMENT OF SUPPLEMENTAL QUESTIONS INVOLVED**

I. Is Alice Maddock's estate a necessary party, in light of the Uniform Fraudulent Transfer Act's (UFTA) definition of "claim" as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured," MCL 566.31(c)?

Appellant answers "No."

Appellee answers "Yes."

II. 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."

III. 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."

IV. 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."

V. Is the presence of Alice Maddock's estate "essential to permit the Court to render complete relief" under MCR 2.205(A)?

Appellant answers "No."

Appellee answers "Yes."

VI. Should the Circuit Court have analyzed the effect of Plaintiff's failure to join the estate under MCR 2.205(B)?

Appellant answers unknown

Appellee answers "No."

## STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Alice Maddock age 86, a widowed, retired book keeper lost consciousness and fell in her modest Ishpeming home 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 until August 30, 2003. Alice continued to manage her own finances, writing checks or having her nephew who 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 11 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 1983 Dodge Dynasty. She did not always promptly pay the nursing home bill but personally wrote checks to them including one for \$9,192.00 on November 22, 2002 and was taken to task more than once by the finance division who threatened to take her house. Alice did not have a TV or watch TV but every month there was a charge for cable tv on the bill. 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. Alice developed an ulcer on her foot that would leak fluid onto the floor. On August 30, 2003 Alice died of a myocardial infarction.

Mather 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 (Appendix A) 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 timely 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.

## ARGUMENT

- I. Is Alice Maddock's estate a necessary party, in light of the Uniform Fraudulent Transfer Act's (UFTA) definition of "claim" as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured," MCL 566.31(c)?

Appellant answers "No."

Appellee answers "Yes."

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 the creditors concerns about the conveyance away of the debtor’s assets while liability was being established.

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. For example, in Churchill v Palmer, 57 Mich App 210, 226 NW 2nd 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 the UFCA proceeding the question of liability and then proceeding to address the issue of whether a conveyance was fraudulent.

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: (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.

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 was

Plaintiff/Appellant contends that under the UFTA it is no longer necessary to establish liability on the part of the debtor, 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

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 had judgments.

- II. 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. If liability on a debt has previously been established, 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.

III. 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 was a requisite of an action under UFTA.

IV. 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."

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 on 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 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.

V. Is the presence of Alice Maddock's estate "essential to permit the Court to render complete relief" under MCR 2.205(A)?

Appellant answers "No."

Appellee answers “Yes.”

The Court of Appeals thoroughly reviewed whether the presence of the debtor was necessary in its decision from which the appeal is taken and observed “the transferor, or her estate, has not parted with an interest in an 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). Mather Investors, LLC v Larson, 2006 WL 154464 1p3-4

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 on 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 as a party in order to allow for the court to determine the issue of liability. Without such a determination of liability, the claim under the UFTA could not proceed because there was no debt.

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.

VI. Should the Circuit Court have analyzed the effect of Plaintiff’s failure to join the estate under MCR 2.205(B)?

Appellant answers unknown

Appellee answers “No.”

MCR2.205(B) provides in relevant part as follows:

“(A) **Necessary Joinder of Parties.** Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

(B) **Effect of Failure to Join.** When persons described in subrule (A) have not been made parties and are subject to the jurisdiction of the court, the court shall order them summoned to appear in the action, and may prescribe the time and order of pleading. If jurisdiction over those persons can be acquired only by their consent or voluntary appearance, the court may proceed with the action and grant appropriate relief to persons who are parties to prevent a failure of justice. In determining whether to proceed, the court shall consider

(1) whether a valid judgment may be rendered in favor of the plaintiff in the absence of the person not joined;

(2) whether the plaintiff would have another effective remedy if the action is dismissed because of the nonjoinder;

(3) the prejudice to the defendant or to the person not joined that may result from the nonjoinder; and

(4) whether the prejudice, if any, may be avoided or lessened by a protective order or a provision included in the final judgment.

Notwithstanding the failure to join a person who should have been joined, the court may render a judgment against the plaintiff whenever it is determined that the plaintiff is not entitled to relief as a matter of substantive law.

**(C) Names of Omitted Persons and Reasons for Nonjoinder to Be Plead.** In a pleading in which relief is asked, the pleader must state the names, if known, of persons who are not joined, but who ought to be parties if complete relief is to be accorded to those already parties, and must state why they are not joined.”

Initially, the plaintiff properly crafted a complaint alleging liability against Alice Maddock for breach of a contract and predicated on the establishment of such liability, properly included a count under the UFTA alleging liability of a transferor. Plaintiff failed to serve Alice before she died and then took no further action to establish her liability on its claim by adding her estate as a party or amending its pleadings under 2.205(C) to state the reasons for nonjoinder despite having notice of her death. Without liability on the debt either through a prior judgment or by including the alleged debtor or her estate in the UFTA action there was no “debtor” liable on a “debt” and the action could not proceed. The trial court having given the plaintiff ample opportunity to add the decedent’s estate was not required to second guess the plaintiff’s tactical decision and order the creation and joinder of decedent’s estate.

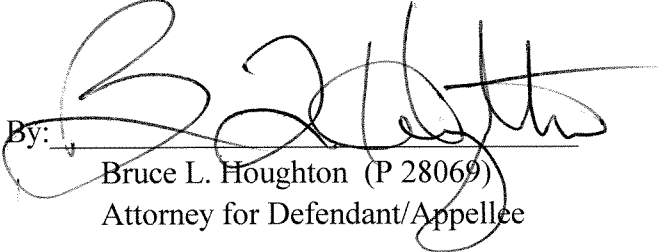
**RELIEF REQUESTED**

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: March 14, 2007