

## **CAN AN ORCHESTRATED DIVORCE BE USED AS AN ASSET PROTECTION DEVICE**

For years clients under extreme financial distress have asked whether getting a divorce from their spouse will allow them to avoid paying creditors. The typical scenario involves a husband who has guaranteed significant loans to his real estate development company but now, because of deteriorated conditions in the home sales market, is being called upon by the bank to make good on his guaranty as the primary obligor is insolvent. Wife, with a wink and a nod, retains divorce counsel and files for divorce. Negotiations between wife's lawyer and husband's lawyer are amazingly easy as husband agrees to convey all or substantially all of his assets to his wife as part of the property settlement. The bank's lawyers look on in dismay as they recognize they cannot intercede in the divorce proceedings and thus may be faced with an insolvent guarantor-but one who may have transferred millions of dollars to his wife in the form of a property settlement. Now, in a case of first impression [footnote 1], the Michigan Court of Appeals has held that a court can review the division of marital assets in a divorce proceeding in the context of a fraudulent transfer claim.

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Footnote 1 Estes v. Jeff Edward Titus and Julie L. Swabash, 2007 Mich. Lexis 1023 (May 25, 2007) **NEED TO GET PROPER CITATION**

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The origin of the claim in *Estes* is not your usual business transaction. Jeff Titus was sentenced to mandatory life imprisonment for shooting Douglas Estes and another hunter two days into the 1990 firearm deer-hunting season. Plaintiff Jan Estes, who was Douglas Estes's wife and the personal representative of his estate, filed a wrongful death action against Jeff Titus. Less than 2 months after the wrongful death action was filed, Julie Titus, Jeff Titus's wife, filed for divorce and was awarded substantially all of the marital assets. Jan tried to intervene in the divorce action claiming that the property-settlement provisions constituted a fraud upon Jeff Titus's creditors but Jan's Motion was denied. Jan appealed to the Court of Appeals.

The Court of Appeals agreed with the trial court that it did not have jurisdiction to intervene in the divorce case or to modify the judgment of a sister court. However, the Court did find that Jan stated a valid claim under the Uniform Fraudulent Transfer Act and therefore the trial court has jurisdiction under that Act to grant relief with respect to property that Jeff Titus transferred pursuant to the agreed-upon division of marital property incorporated into the terms of the divorce judgment. The important distinction made by the appellate court is that any trial court orders under the UFTA would not operate to modify the divorce judgment; they would operate against persons and property within the trial court's jurisdiction. The court concluded that a transfer of marital assets pursuant to a settlement incorporated in an uncontested divorce judgment may be a fraudulent transfer under UFTA with respect to a transferring spouse.

The court found support for its conclusion in both Oklahoma and Oregon cases as well as in California. It then proceeded to analyze whether Jan alleged sufficient facts to present a justiciable claim that the settlement constituted a fraudulent transfer. The court analyzed the Michigan version of the UFTA and found she would be entitled to recover under the facts alleged; namely even though the alleged fraudulent transfer took place prior to the judgment in the wrongful death claim under MCL 566.35, the claim arose before the transfer was made, the transfer was made without receiving a reasonably equivalent value in exchange and the debtor became insolvent as a result of the transfer. Also, the transfer to insider provision of MCL 566.35(2) would apply since the transfer to a spouse is a transfer to an insider under MCL 566.31(k).

**EDITOR'S NOTE: It is now fairly evident that a transfer of property pursuant to an orchestrated divorce (or marriage for that matter... in such case in the guise of a transfer of property as partial consideration for a party entering into a prenuptial agreement), may well constitute a fraudulent transfer under Michigan's UFTA.**