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### **Pre-Bankruptcy Planning Issues and Strategies for Debtors' Attorneys Regarding Protection of Assets**

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**PRE-BANKRUPTCY PLANNING ISSUES AND STRATEGIES FOR  
DEBTORS' ATTORNEYS REGARDING PROTECTION OF ASSETS**

**Honorable Daniel S. Opperman**

- *Maximizing exemptions without getting into trouble*

**Charles J. Schneider**

- *Analyzing and counseling the client on the vulnerability of transfers of property that the debtor already made to family members or trusts before seeking your counsel.*
- *Permissible actions to mitigate liabilities on account of a debtor's pre-petition transfers.*

**Michael A. Stevenson**

- *What can legitimately and ethically be done to enable a debtor to maximize their exemptions without jeopardizing their discharge?*

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- *The use of self-settled trusts and the effect of the new Domestic Asset Protection Trust Act in Michigan.*

MAXIMIZING EXEMPTIONS WITHOUT GETTING INTO TROUBLE

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Maximizing Exemptions Without Getting In Trouble

The exemption minefield is tricky in even the most routine case. Let's start with the known landmarks and then navigate the course.

I. 11 U.S.C. § 522 allows a debtor to choose federal or state exemptions. If federal exemptions are selected, the Section 522 list sets the basic exemptions. Selection of the state exemptions requires consulting a scattered list of exemptions in the Michigan statutes, starting with a series of statutes at MCL 600.6023 and 600.5451.

II. Existing case law

Two cases, *Law v. Siegel*, 134 S.Ct. 1184 (2014) and *Baker v. Elderman*, 791 F.3d 678 (6th Cir. 2015) give debtors significant exemption rights. *Law* holds that federal law exemptions under 11 U.S.C. § 522 cannot be surcharged. *Baker* follows *Law*, overrules *Lucius v. McLemore*, and allows debtors to amend schedules until the case is closed. To add uncertainty, however, the *Baker* court did not address the trustee's arguments that in a closed case a debtor must ask for leave to amend schedules.

Although debtors may not have their federal law exemptions surcharged, the *Law v. Siegel* court did preserve a list of options available to a trustee:

- A. Denial of discharge under 11 U.S.C. § 727
- B. Rule 9011 sanctions
- C. Criminal prosecution

*Law v. Siegel* did also hold that if a debtor claims a state created exemption the scope of the exemption is determined by state law, which may result in a finding that certain conduct of the debtor warrants a denial or reduction of the exemption. Accordingly, a third, very old case, *In re Shuman*, 276 F. 292 (6th Cir. 1921), comes into play. *Shuman* did allow a trustee to object to exemptions claimed under Michigan law because the trustee believed fraud or improper conduct existed. This exemption appears preserved in *Law v. Siegel*.

III. So the debtor can keep her stuff or money, but also wants to get a discharge, avoid sanctions, and avoid going to jail.

1. How to do this:

A. Discover/uncover every asset; put a value of that asset on Schedule A/B and exempt in Schedule C.

B. Problem areas:

- Debtor may not realize she has an asset
- Debtor may not know she has an asset
- Debtor may not tell you she has an asset
- How to value an asset

C. Tactics for debtor counsel

- Spend time with the client
- Advise
- Ask questions
- Look for tell tale signs

- Go to the high end of each exemption
- Difficulty of wild card
- Stay in contact with the client after discharge
- Any change in assets - AMEND IMMEDIATELY
- Stay in contact with the trustee
- If the case is closed, move to reopen the case immediately, say why, give a date certain to amend schedules, then amend
- Difficult to do because personal injury defendants usually contact trustee first
- Consider asking for abandonment of asset
- Consider Chapter 13 - 5 year case; longer time to amend if need be

**ANALYZING AND COUNSELING THE CLIENT ON THE VULNERABILITY  
OF TRANSFERS OF PROPERTY THAT THE DEBTOR ALREADY MADE TO  
FAMILY MEMBER OR TRUSTS BEFORE SEEKING COUNSEL AND  
PERMISSIBLE ACTIONS TO MITIGATE LIABILITIES ON ACCOUNT OF A  
DEBTOR'S PRE-PETITION TRANSFERS**

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Common Consumer Bankruptcy Predicaments

By Charles Schneider

Bankruptcy planning is part of the preparation of a bankruptcy case. Debtors are entitled to maximize the protection of their assets prior to the filing of their bankruptcy case. The court in *Norwest Bank Nebraska, NA v Tveten*, 848 F2d 871, 874 (8th Cir 1988) (citing *Ford v Poston*, 773 F2d 52, 55 (4th Cir 1985)), stated that "absent extrinsic evidence of fraud, mere conversion of non-exempt property to exempt property is not fraudulent as to creditors even if the motivation behind the conversion is to place those assets beyond the reach of creditors." In *Forsberg v Security State Bank*, 15 F2d 499, 501 (8th Cir 1926), the court recognized that the debtor "should [not] be penalized for merely doing what the law allows him to do."

1. Your client has previously seen another attorney about filing a bankruptcy case. The attorney had advised your client that to keep his various investment properties, business property and home owned as tenancy by the entireties he must convey them to a solely owned LLC and then file bankruptcy. He was insolvent. The client has followed this advice but the attorney has now written a letter to the client declining representation and recommending to the client that not to file a bankruptcy. Do you have a strategy for keeping the properties if you file the client's bankruptcy? Would it matter if the advice he followed was obtained anonymously from a website on the internet?

*Dunn v. Minnema*, 323 Mich. 687 (1949)

Debtors had a land contract for purchase, as tenants by the entireties, of their home. Debtors made payments on the contract from time to time. The husband was involved in an automobile accident, as a result of which a judgment was obtained against him. To enforce the judgment, garnishment proceedings were brought against the husband, but the amount received by the judgment creditor was very small. Some years later, the judgment creditor brought an action to recover on the judgment. The husband filed bankruptcy and the only claim filed against the bankruptcy estate was that of the judgment creditor. The trial court found that the payments were not fraudulent as to the judgment creditor. On appeal, the court reversed, agreeing with the trustee that the result was a constructive fraud against which relief could be granted. As against the rights of the judgment creditor, the husband was not entitled to add to his investment in the entireties property, thereby increasing its value to the extent of the payments in question.

*In re Elkins*, 94 B.R. 932 (Bankr. W.D. Mich. 1988)

Debtors realized a profit from the sale of jointly owned commercial property. On the eve of bankruptcy and upon the advice of counsel, they divided the profit and invested their respective halves in property held as tenants by the entireties with their wives. Both debtors then filed petitions seeking Chapter 7 bankruptcy protection, and both sought to exclude the entireties properties pursuant to § 522(b)(2)(B). Their bankruptcy trustees sought to avoid the transfers under the Michigan Fraudulent Conveyance Act, M.S.A. §§ 26.881 to 26.978(2). The trustees argued that the transfers were made while the debtors were insolvent and that they therefore constituted fraud. Debtors argued that 11 U.S.C. §



522 supported their claimed exemption. The Court found the transfers were fraudulent and could be avoided by the trustees.

*Lim v. Greenfield* (In re Greenfield), 249 B.R. 856 (Bankr. E.D. Mich. 2000)

Chapter 7 trustee filed adversary complaint alleging debtor's transfer of home to himself and his non-debtor wife, as tenants by the entireties, and transfer of vehicle, was avoidable under 11 U.S.C.S. § 548, and that discharge should be denied under 11 U.S.C.S. § 727(a)(2), (4) for failure to disclose these and other conveyances. Debtor and wife filed a motion for summary judgment. Trustee filed motion for summary judgment on the voidable transfer issues. The court found the transfer of the home was to keep it from creditors. Wife's dower and homestead interests, obtained by operation of law, could not be confused with the entireties interest transferred by debtor. Debtor received no consideration for money transferred to wife for purchase of car. Both transfers were voidable.

*Nino v. Moyer*, 437 B.R. 230, 231 (W.D. Mich. 2009)

A Chapter 7 debtor challenged a decision of the United States Bankruptcy Court for the Western District of Michigan, which denied an exemption claimed by the debtor pursuant to 11 U.S.C.S. § 522(b)(3)(B) and Mich. Comp. Laws § 600.5451(1)(o) and § 600.6023a. Debtor and his wife owned their home as tenants by the entireties. Debtor suffered a massive heart attack and incurred significant medical expenses as a result. He and his wife transferred their interests in the home to the wife alone by quitclaim deed. That same day, the debtor received a summons and complaint from a health care provider for recovery of unpaid medical expenses. On the advice of bankruptcy counsel, the debtor's wife executed a quitclaim deed to return the home to the debtor and his wife as entireties property. The bankruptcy court denied the debtor's claimed exemption in the home. In reversing the bankruptcy court's decision, the court held that, in the absence of a fraudulent or preferential transfer, the bankruptcy court erred because creditors were not harmed by the transfers. The court also held that, to the extent that the bankruptcy court relied upon a finding of constructive fraud under the Uniform Fraudulent Transfer Act (UFTA), Mich. Comp. Laws § 566.31 et seq., to invalidate the claimed exemption, its decision was in error because exempt property, including entireties property, could not be subject to a claim of fraudulent transfer under the UFTA. The court reversed the bankruptcy court's decision.

The explanation of the appellate Court as to why the UFTA was not applicable is essential to understanding the "no harm no foul" rule.

The UFTA applies to "transfers," which are defined as "every mode, direct or indirect ....disposing of or parting with an asset or an interest in an asset . . . ." Mich. Comp. Laws § 566.31(l) (emphasis added). The definition of "asset" in the UFTA expressly excludes "[p]roperty to the extent it is generally exempt under nonbankruptcy law" as well as "[a]n interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant." *Id.* at § 566.31(b). Thus, the UFTA is consistent with the "no harm, no foul" rule in that exempt property (including entireties property) cannot be subject to a claim of fraudulent transfer under the UFTA. See *Estes v. Titus*, 481 Mich. 573, 581-82, 751 N.W.2d 493 (Mich. 2008) ("Therefore, [property] held as tenants by the entirety cannot be the subject matter of a UFTA claim if only one spouse is the debtor. This conclusion fits into the larger statutory purpose of avoiding fraudulent transfers because it is difficult to comprehend how disposing of property that a creditor cannot reach could 'defraud' that creditor.").

2. Your clients have a revocable living trust which has been funded with property previously held as tenancy by the entirety. They ask whether the property will be protected from the chapter 7 Trustee should they file. What can you do to protect it?

MCLS § 700.7506: (1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply: (a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

In re Bellingroehr, 403 B.R. 818 (2009)

A debtor filed for relief under Chapter 7 of the United States Bankruptcy Code. A Chapter 7 trustee objected to the debtor's claimed exemptions in certain assets as tenancy by entirety, pursuant to 11 U.S.C.S. § 522(b)(3)(B). In July 2001, the debtor and her non-filing spouse created a revocable trust agreement and transferred their real estate and an account into the trust by general warranty deed. Before the property was transferred to the trust, it was held by the debtor and her spouse as tenants by the entirety. The debtor claimed her asset interests in the trust, pursuant to 11 U.S.C.S. § 523(b)(3)(B). The court noted that neither spouse had authority, while the other was alive, to revoke the trust unilaterally or to transfer any asset of the trust. The court rejected the trustee's contention that the restrictions imposed by a tenancy by the entirety were not available to property held in the name of the trust. The court found that the debtor and her spouse did not sever the tenancy by the entirety protection when they transferred the entirety property into the trust. The debtor could claim the property as exempt in the same manner as she could if the property had not been transferred to the trust. The trustee had not shown that there were any joint unsecured debts to be paid from the property held by the debtor and her spouse as tenants by the entirety. The court overruled the trustee's objections to claimed exemptions.

3. Your client had received an income tax refund of \$6,000.00 three months earlier and paid off his mother's well documented loan to him. Can you advise the client that he should have his mother document a new loan to him for \$6,000.00 and pay the \$6,000.00 to the client before filing as the same can be exempted after filing under 11 U.S.C. § 522(d) (5)? Is this good advice? Does the new loan undo the previous repayment? Does it have to be disclosed then?

11 USCS § 547

(c) The trustee may not avoid under this section a transfer--

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

4. Your client received his \$7,000.00 income tax refund three months ago. He was insolvent. He has used the refund to purchase a used car for his 21 year old daughter's college graduation gift. At the

time of the conveyance the client was insolvent. Can you cure the transfer by creating a sale where she now pays \$7,000.00 to your client? He gives her a receipt, the client files and then exempts the \$7,000.00 under 11 U.S.C. § 522(d) (5)?

11 USCS § 547

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

11 USCS § 548

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title [11 USCS § 544, 545, or 547], a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

5. A debt negotiator had convinced your client that they could negotiate away her debts. Pursuant to their instructions she withdrew \$25,000.00 from her 401K retirement fund to do so. She has deposited \$5,000 with them so far and none of her \$100,000 debt has been reduced. She has \$20,000.00 left in a bank account. She asks you how she can keep the money now. Her only source of income is social security. Can you advise her to put the money back into the 401K plan? Can you advise her to spend the money to put a new roof and windows on her house? Can you advise her to create a new bank account and save her future deposits of social security in it while expending the 401K withdrawal from a different account?

Ncnb Fin. Servs. v. Shumate, 829 F. Supp. 178, 180-181

Social security benefits are protected even if they are commingled in a savings or checking account with funds from other sources. See *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 416-17, 34 L. Ed. 2d 608, 93 S. Ct. 590 (1973). If the recipient of social security benefits commingles the benefits with other funds, he is entitled to protection as to those funds that are reasonably traceable to social security income. See *Philpott*, 409 U.S. at 416-17. In this case as in many other cases of comingling the first in first out accounting method may be used to determine what is traceable to social security.

6. Your client has his paychecks electronically deposited in a joint bank account with a credit union. He also has a credit card debt with the same credit union. You can exempt the cash in the joint account. Is the money safe from creditors once the bankruptcy is filed?

MCLS § 490.64: Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, when a party to a multiple-party account is indebted to a credit union, the credit union has a right to set-off against the entire amount of the account.

7. Your clients have not been able to manage their money and debts. They have looked to Mom to help them. They have been depositing their earnings to her bank account for the past two years so that she can manage their money and pay their creditors in an organized and timely matter. They still can't pay their debts and come to you for a bankruptcy case. Does Mom have problem? Can you fix it and file a bankruptcy case?

*Taunt v. Hurtado (In re Hurtado)*, 342 F.3d 528 (2003)

The court held that the mother had dominion and control over the conveyance at issue so as to make her liable under § 550. The funds were deposited in an account in her name; hence, she had legal control over the money. The fact that she did not use the mother other than as directed was immaterial. Moreover, the very point of the conveyance as to give her legal title to the money so that the debtors did not have to report it as their own.

**CONVERTING NONEXEMPT ASSETS TO EXEMPT ASSETS WITHOUT  
JEOPARDIZING YOUR DISCHARGE**

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**PRE-BANKRUPTCY PLANNING ISSUES AND STRATEGIES FOR  
DEBTOR'S ATTORNEYS REGARDING PROTECTION OF ASSET**

- I. What can legitimately be done to enable debtors to maximize their exemptions without jeopardizing their discharges?

**INTRODUCTION**

Practicing bankruptcy law for more than 32 years as primarily a debtor's counsel and more than 22 years as a Chapter 7 trustee has taught me that the most important thing you can do at the outset of a case in which you represent an individual debtor, especially if your aim is to maximize your client's exemptions without jeopardizing the debtor's discharge, is to get as accurate an understanding of his assets as you can. Only then will you be able to make informed judgments about which set of exemptions or combination of exemptions within a given set best fits your client's situation. It might seem easy, but if that were the case, trustees would be a lot less successful in challenging exemptions than consistently proves to be true. What, therefore is the secret?

It might seem like it goes without saying, but it is vital that you really talk to your client in detail in language he can understand about what led him to believe he needs bankruptcy protection. That is, what in his mind caused his financial difficulties? Is it the result of overspending? If he thinks it is overspending, what is he spending his money on? Does he have valuable assets he has not told you about as a result of that spending that might require special consideration when it

comes to choosing an exemption or even choosing whether or not to file? Does he have large amounts of liquid assets such as cash, stock or other cash equivalents that may be difficult to exempt? Is the cause business reversals? If so, what is the status of his business? How many businesses does he have? Who is he in business with? How is the business run? Who runs the business? Is there a history of transfers between the owners or the business and the owners that may result in a challenge to the debtor's discharge? What is the nature and extent of his close familial relationships? Does he take care of elderly adult family members? Has he commingled funds with any of them to the extent that a trustee could claim that the commingled funds are property of the estate? Do he and his family members own assets with nonexempt equity together, which might subject those assets to liquidation in the bankruptcy case? Do any of his family members owe him money, to the extent that a trustee might sue the family member for turnover? Is he contemplating or in the process of a divorce proceeding that might give rise to causes of action to recover property based on the assertion that certain transfers pursuant to the divorce judgment are avoidable as fraudulent transfers? Those kinds of probing conversations provide insight into the kinds of issues that might exist in a particular client's case and what kinds of follow up questions you might ask to determine if there might be information important to your case that your client never thought to volunteer.

Finally what goals would he like to achieve through the bankruptcy process? Is keeping his house or baseball card collection more or less important than discharging his debt? Is he willing to part with any assets to obtain a discharge? Is a discharge even necessary to achieve the relief the debtor needs? You must continuously evaluate the answers the client gives you in the context of the bankruptcy relief he is seeking. When you ask the debtor if he owns an interest in real estate, do you think he knows you are also talking about the house his mother lives in and he has nothing to do with but the deed has his name on it? Are you sure he knows you mean the joint bank account he is on with his elderly grandparents to assist them in paying their bills but in which he commingles his own funds? Do you think he knows that the mass tort case he has been a plaintiff in for the past five years is an asset of the estate and must be disclosed and an exemption claimed?

The danger is if he does not know and you do not ask, you might fail to disclose valuable assets, which the trustee can later liquidate because there is no exemption to protect them, the debtor might make false oaths in his petition, schedules, and statements, and testimony at creditors meetings or 2004 examinations, which could result in proceedings to deny his discharge or to prosecute him for bankruptcy crimes. And, of course, the first person he will blame is you.



Unless you have detailed, thorough, and probing conversations with your clients about their lives before you met them and actively listen, verify the information they give you with appropriate documentation prior to filing a case, and draw intelligent conclusions about how the specific client came to be in your office and the type of relief he actually needs—not to mention the type of relief which is actually possible—you have little hope of formulating the right strategy for choosing exemptions and shepherding your clients through the bankruptcy process to discharge, and you may be borrowing more trouble than any attorney fee is worth.

II. What are the circumstances under which you may legitimately convert nonexempt assets into exempt assets in contemplation of filing bankruptcy without jeopardizing your client's discharge?

In 1939 in the case of Shanks v. Hardin, 101 F. 2d 177 (1939), the Sixth Circuit Court of Appeals announced the rule in the Sixth Circuit that a debtor in bankruptcy may not convert nonexempt assets into exempt assets in contemplation of filing bankruptcy for the purpose of putting the assets out of the reach of his creditors. The Court concluded that converting assets that would have been subject to execution by creditors into assets that were beyond the reach of creditors constitutes fraud. In that case, Shanks owned a 1/5 interest in real estate with his four siblings who each owned a 1/5 interest in the real estate. On appeal Shanks stipulated that he requested that his siblings transfer their interests in the real estate

to him so he could file bankruptcy, claim the homestead exemption, and defeat the claims of his creditors. The *Shanks* Court found such a conversion of nonexempt assets on the eve of bankruptcy, which were subject to execution by the debtor's creditors to be impermissible.

Compare the holding in *In re Hurt*, 542 B.R. 798 (2015). In that case, the debtor, Troy Hurt, opened two bank accounts, one in his name and one in his wife's name, three days before filing bankruptcy, with funds he received from the sale of real estate he and his brother inherited from his mother two years prior. He placed 50% of the funds in his individual account and 50% of the funds in his wife's individual account. The husband would not have been able to exempt the full amount of the funds, himself. The Chapter 7 trustee objected to the wife's claim of exemption in 50% of the funds base on the assertion that the deposit of 50% of the funds into an individual account for the co-debtor wife by the debtor husband was a transfer which defrauded his creditors. In addition, the trustee alleged that the wife fraudulently asserted the exemption in violation of Fed. R. Bankr. P. 4003 (b) (2). Finally, the trustee argued that the claim of exemption in the funds should be disallowed based on a Tennessee state law statute that prohibits exempt personal property assets obtained by defrauding another.

The trustee offered the case of *In re Seymour*, 2010 WL 9597117 in support of his position. The *Seymour* case involved an action to deny the debtor's

discharge based on the contention that the debtor's transfer of a truck titled solely in his name to his joint debtor wife so they each could take an exemption in one vehicle was an attempt to defraud his creditors and should be disallowed. The *Seymour* court, relying on courts that hold that conversion of nonexempt assets to exempt assets on the eve of bankruptcy is allowable absent extrinsic evidence of actual intent to defraud creditors, found that there was such extrinsic evidence in that case and denied the debtor's exemption. See the holding in *Ford v. Poston (In re Ford)*, 773 F. 2d 52, 54 (4<sup>th</sup> Cir. 1985) (citing *First Texas Savings Ass'n v. Reed*, 700 F. 2d 986, 991 (5<sup>th</sup> Cir. 1983) that "Mere conversion of property from nonexempt to exempt on the eve of bankruptcy—even though the purpose is to shield the asset from creditors—is not enough to show fraud."

However, the right to conversion is qualified if there is "extrinsic evidence of actual intent to defraud creditors." *Id.* (citing *First Texas Savings Ass'n*, 700 F. 2d at 990.) "Extrinsic evidence of fraud...can be comprised of conduct intentionally designed to materially mislead or deceive creditors about a debtor's position; conveyances for less than fair value; or continued retention, benefit or use of property allegedly conveyed together with evidence that conveyance was for inadequate consideration." *In re Weldon*, 184 B.R. 710, 713 (Bankr. D.S.C. 1995) (citing *In re Johnson*, 880 F. 2d 78, 82 (8<sup>th</sup> Cir. 1989).

The *Hurt* court went on to analyze the transfer in terms of the badges of fraud articulated by Judge Keith Lundin in Gigandet v. Covington (In re Covington), 171 B.R. 294, 296 (Bankr. M.D. Tenn. 1994). According to Judge Lundin, inasmuch as the determination of whether a given transfer is fraudulent is fact intensive, the Tennessee appellate courts identified various “badges of fraud” to assist trial courts in deciding whether a debtor had fraudulent intent when making a transfer. Those badges of fraud are:

1. The transferor is in precarious financial condition.
2. The transferor knew there was or soon would be a large money judgment rendered against the transferor.
3. Inadequate consideration for the transfer.
4. Secrecy or haste in carrying out the transfer.
5. A family or friendship relationship between the transferor and the transferee(s).
6. The transfer included all or substantially all of the transferor’s nonexempt property.
7. Retention by the transferor of a life estate or other interest in the property transferred.

8. Failure of the transferor to produce available evidence explaining or rebutting a suspicious transaction.

9. Lack of innocent purpose or use for the transfer.

After applying the *Covington* factors to the transfers in that case, Judge Lundin concluded that the transfers in that case were “overwhelmingly tainted with badges of fraud and allowed the Chapter 7 trustee to avoid the pre-petition purchase by the debtor of a single premium life insurance policy with the nonexempt \$40,000.00 insurance proceeds the debtor received when the residence was destroyed by fire and the subsequent transfer of the vacant lot from the debtor to family members, reserving a life estate to herself, even though the debtor knew there were substantial mortgage liens against the property. Gigandet v. Covington (In re Covington), 171 B.R. 294 at 297-98 (1994).

Conversely, in the *Hurt* case the court found no taint from badges of fraud. The court was sufficiently persuaded that inasmuch as Mr. Hurt made no effort to transfer an interest in the real estate he inherited from his mother into his wife’s name for the two years after he inherited the property, he divided the proceeds of the sale between his individual account and his wife’s account and treated those funds as a marital asset to be used in the same way and under the same circumstances as he and his wife used all of their other marital assets, and he made

no effort to insure that he and his wife could each transfer funds between accounts, the *Hurt* court was convinced that Mr. Hurts did not intend to defraud his creditors by transferring 50% of the funds to Mrs. Hurt and her claiming an exemption in the 50% of the funds she received. The *Hurt* court was persuaded that they simply intended to treat those funds in the same way as they treated all of their other assets—like marital property. The court held that the trustee had failed to establish that Mr. Hurt had actual intent to defraud his creditors and overruled his objection to Mrs. Hurt’s claim of exemptions. In re Hurt, 542 B.R. 798 at 807-08.

See also, In re Wilmoth, 397 B.R. 915, 920, 921 (2008) where the Bankruptcy Appellate Panel for the Eight Circuit Court of Appeals (“BAP”) found that a debtors who converted nonexempt assets into exempt assets on the eve of bankruptcy by liquidating some construction equipment and using some of the proceeds to pay down their mortgage because although the transfer benefitted the debtors and the transfer took place close in time to the entry of a large judgment against the debtors, the debtors did not liquidate substantially all of their assets, they fully disclosed the transfer, they sold the assets for adequate consideration, they used the proceeds to pay off the creditors who held liens against the construction equipment, they retained a substantial amount of assets that would be liquidated in the bankruptcy case to pay unsecured creditors, and they took the actions to liquidate the assets on the advice of counsel. As a result, the BAP

concluded that although some badges of fraud existed, it did not find any extrinsic evidence that the debtors had actual intent to defraud their creditors. The court was also persuaded that the debtors failing to act in the way they did would have resulted in the equipment continuing to decrease in value and the creditors would ultimately have been in a worse financial position over time.

Finally, the *Wilmoth* court explained that the Eight Circuit Court of Appeals held that the adoption of 11 U.S.C. § 522 (o) does not create a new standard for analyzing whether the debtor has engaged in fraudulent conduct for determining if extrinsic evidence of fraud exists. It simply lengthens the look-back period for identifying fraudulent behavior on the part of the debtor that could impact viability of his exemption or discharge to ten years. Addison v. Seaver (In re Addison), 540 F.3d 805, 813 (8<sup>th</sup> Cir. 2008). It is useful to note that although many of the cases cited in this article analyze the conversion of nonexempt assets into exempt assets on the eve of bankruptcy in terms of reducing or denying altogether a debtor's claim of exemption in the converted asset and some of the cases are prior to the U.S. Supreme Court's decision in Law v. Siegel, 134 S. Ct. 1188 (2014), the controlling authority on a debtor's right to an exemption even where the debtor has acted in bad faith, the analysis with respect to whether a debtor's discharge may be denied pursuant to 11 U.S.C. § 727 (a) (2) is the same. Section 727 (a) (2) provides:

The court shall grant the debtor a discharge, unless—

- (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed—
  - (A) property of the debtor, within one year before the date of the filing of the petition; or
  - (B) property of the estate, after the date of the filing of the petition;

Therefore, while a debtor may be entitled to retain his exemption in assets he failed to disclose, removed, actively concealed, or permitted to be removed or concealed (unless the debtor is relegated to state law exemptions and there is controlling state law that prohibits exemption of undisclosed, removed, or concealed assets, or assets procured in bad faith or by fraud), Law v. Siegel, Id., the debtor may end up keeping his assets at the expense of losing his discharge. In the case of the avoidance of assets fraudulently transferred the debtor could end up losing the assets and losing the discharge. Under 11 U.S.C. § 522 (g), if the debtor fraudulently transfers assets voluntarily and the transfer is avoided pursuant to 11 U.S.C. § 548 and recovered under 11 U.S.C. § 550, the debtor will lose his right to exempt the recovered assets.



### CONCLUSION

As the cases cited in this article make clear, it is vitally important that an attorney representing a debtor in bankruptcy proceedings should take great care to learn the full nature and extent of the debtor's interest in all of his assets and the origin of those interests. If the facts and circumstances of a given case require the debtor and the attorney manage the protection of those assets with pre-bankruptcy planning within the avoidance periods set out in 11 U.S.C. §§ 544, 547, 548, and 549, the attorney should analyze each option for protecting each asset against the "badges of fraud" and "extrinsic evidence of fraud" tests set out in the cases and by all means disclose in detail how you chose to handle each asset, whether the choice was to transfer the asset, liquidate the asset and use the proceeds to pay creditors, or to convert it to an exempt asset by liquidating it and using the proceeds to pay down the debtor's mortgage.

There is no question that you have a much better chance of convincing a court that the conversion of nonexempt assets to exempt assets, the simple transfer of assets, or the dissipation of assets on the eve of bankruptcy was not to defraud creditors and done for a legitimate purpose if you disclose it and provide justifications for the options you chose. As with each decision you make in representation of a client in a bankruptcy case, such decisions require careful and deliberate consideration.

**THE USE OF SELF-SETTLED TRUSTS AND THE EFFECT OF THE NEW  
DOMESTIC ASSET PROTECTION TRUST ACT IN MICHIGAN**

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**Michigan Adopts Domestic Asset Protection Trusts Legislation**

By: Jason P. Smalarz

**I. Introduction**

Earlier this year the Michigan Legislature passed the Qualified Dispositions in Trust Act (MCL 700.1041–.1050) which allows a transferor<sup>1</sup> (the party establishing and contributing assets to the trust) to create a Michigan domestic asset protection trust (DAPT). This is a substantial change in Michigan law and allows those with accrued wealth to set aside a portion of that wealth and place it in a trust that is protected from creditor claims. Subject to specific conditions, assets placed in the DAPT are protected from the transferor's creditors even if, following the transfer, the transferor is sued and is held liable for a significant sum. DAPTs are irrevocable and cannot be amended by the transferor.

**II. What is the Relevance of the Qualified Dispositions in Trust Act?**

Throughout history, those with substantial assets have always sought to protect their assets from creditors while also holding onto the ability to manage and access the assets when need be. The laws in all states historically prevent a person from creating a self-settled spendthrift.

Alaska was the first state to buck the trend. In 1997, Alaska enacted legislation permitting individuals to establish self-settled spendthrift trusts. Not surprisingly, 16 other states have since followed. Michigan is the 17<sup>th</sup> state to adopt DAPT legislation. In the past Michigan residents established Delaware DAPTs, but a 2013 judicial decision threw into question the ability of a resident of a state not permitting DAPTs to take advantage of the laws of another state, where DAPTs were permitted (see e.g., Waldron v. Huber (In re Huber), 493 B.R. 798 (May 17, 2013)).

The new Michigan DAPT legislation was enacted, in part to eliminate this concern.

The Michigan DAPT legislation also overrides common law rule allowing creditors to attach assets transferred to a self-settled trust. See MCL 700.1049(2)

**III. Who Could Benefit from Michigan DAPTs?**

Michigan DAPTs can benefit anyone who may become liable for a significant debt or claim. DAPTs are likely to be very attractive to those individuals more likely to be sued. Such individuals may include those acting as fiduciaries, bank officers, individuals involved in real estate transactions, and professionals subject to malpractice claims (i.e.

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<sup>1</sup> The term Transferor for purposes of this discussion is the same as Settlor. The statute uses the term Transferor.

doctors, attorneys, etc.). DAPTs may also be effective asset protection tools for those with substantial wealth, business owners or a celebrity/professional athlete.

A Michigan DAPT may also be attractive to people planning on marriage but wanting their premarital wealth to be shielded in a later divorce proceeding. A Michigan DAPT may be used with a traditional prenuptial agreement or by itself. To be protected the transfer to the DAPT should be made more than 30 days before the marriage.

Individuals who do not have excess funds or assets are not likely candidate for a DAPT. Potential DAPT candidates must also be willing to give up the requisite control over the assets.

#### **IV. What Contributions are Protected?**

Contributions made more than 30 days before a marriage: (i) will not be considered marital property, (ii) will not be considered part of the beneficiary's real or personal estate, and (iii) will not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance. The parties can agree in writing to waive the 30 day rule, so that contributions made within 30 days of marriage are also protected.

Only qualified distributions to an DAPT are protected under the law. To be a qualified, there must first be a disposition. A disposition is a transfer creating a relationship between a trustee and a trust beneficiary. See MCL 700.1042(g). Dispositions include a transfer to a newly created trust or a transfer of property to a preexisting qualified trust. The transfer may be made by assignment, conveyance, by exercise of a power of appointment including the power to substitute one trustee for another. *Id.* In this fashion, a transferor desiring to convert an existing Michigan trust to a trust qualifying under the Act may exercise a power of appointment to change the nonqualifying trustee of the Michigan trust to a qualified trustee as defined in MCL 700.1042(r). The exercise of the power would, in effect, constitute a disposition to a Michigan DAPT.

#### **V. What is a Qualified Disposition?**

To be a qualified disposition:

- (1) The property must be owned by one or more trustees at least one of whom is a qualified trustee; and
- (2) The subject property must be governed by a trust instrument under which the transferor has only certain limited rights, powers, and interests.

See MCL 700.1042(p)(i) and (ii).

A disposition is not a qualified:

- (1) To the extent that, at the time of the disposition, the transferor is in arrears on a child support obligation by more than 30 days; and
- (2) If a transferor or any person related or subordinate to the transferor within the meaning of IRC 672(c) acts as an advisor. However, an advisor who is related or subordinate to the transferor may be given the power to direct the investment decisions of the trust, the power to veto a distribution from the trust, or the right to remove a trustee or another advisor and appoint a new trustee or advisor without causing the disposition to fail to be a qualified disposition.

See MCL 700.1042(p)(iii) and (iv).

#### **VI. Who is a Qualified Trustee?**

A qualified trustee is a person, other than the transferor, who meets all of the following conditions:

- (1) In the case of an individual, the individual is a Michigan resident;
- (2) In the case of a person other than an individual, such person is authorized under Michigan law to serve as a trustee and is subject to supervision by applicable state or federal regulatory agencies;
- (3) The person maintains or arranges for custody in Michigan of some or all of the property that is the subject of the qualified disposition and administers all or part of the trust in this state;
- (4) The person's usual place of business where some of the records pertaining to the trust are kept is located in Michigan or, if the person does not have such a place of business, the person's residence is in this state; and
- (5) For a corporate trustee, the usual place of business is the business location of the primary trust officer.

See MCL 700.1042(r).

#### **VII. Transferor: Rights and Control**

A trust created under the Act must be an irrevocable trust.

Under the Act, a transferor only has the powers and rights that are conferred by the trust instrument itself. A transferor does not have any powers or rights with regard to the principal or income of an DAPT, other than those that are specifically allowed under the Act, and incorporated into the terms of the trust. Agreements or understandings that attempt to grant additional rights or powers to the transferor are deemed void under the Act.

The Act permits an DAPT to grant one or more of the following rights to a transferor who transfers assets to the trust:

- (1) The transferor can have the right to direct the investment decisions of the trust;
- (2) The transferor can be granted the right to veto a distribution from the trust;
- (3) The transferor can have a special power of appointment exercisable by will or other written instrument of the transferor, which power can only become effective on the death of the transferor;
- (4) The transferor can be given the right to receive income from the trust, including the right to receive the income retained under the trust agreement.
- (5) Where a charitable remainder or unitrust, or a charitable remainder annuity trust, is involved, the transferor can be granted the right to receive income or principal and is permitted to include in the trust a term which permits the transferor to release his or her interest in the trust in whole or in part in favor of a charitable organization or organizations that have a succeeding beneficial interest in the trust, by delivering a written instrument to the trustee documenting such release;
- (6) If the DAPT is in the form of a grantor retained annuity trust or a grantor retained income trust, the transferor can be given the right in the trust to receive income or principal from the trust or the right to receive each year a percentage up to 5 percent as identified in the trust instrument of the initial value of the trust property. This value can be expressed as a percentage or fixed amount as determined from time to time by the trust instrument;
- (7) The transferor can have the right to receive principal distributions from the trust if such distribution is the result of the following permitted terms in the trust:
  - (a) A discretionary provision exercisable by the trustee;
  - (b) A support provision or standard; and
  - (c) A direction by an advisor acting under a discretionary or support provision in the trust;
- (8) The transferor can have the right to remove a trustee or trust advisor and to appoint a new trustee or trust advisor;
- (9) If the DAPT is in the form of a qualified personal residence trust, the transferor can be given the potential or actual right to use the real property, or can be given a qualified annuity interest;
- (10) A transferor can be granted the right to receive income of principal distributions to be used to pay income taxes generated in connection with the income of the trust, provided that there is a specific provision in the trust agreement that provides for the payment of such taxes and if the receipt of the income or principal results from (a) action by a qualified trustee on a discretionary basis or pursuant to a mandatory term in the trust calling for such distribution or (b) pursuant to direction received from a trust advisor acting within the discretion granted under the trust agreement to such advisor;
- (11) On the death of a transferor, a qualified trustee can be granted the right to pay the transferor's debts, estate expenses, or estate or inheritance taxes imposed in connection with the transferor's estate; and
- (12) The transferor can have the right to receive distribution of an amount equal to a required minimum distribution under a retirement account.

See MCL 700.1044(2).

A potential issue looms regarding a transferor's right to remove and replace a trustee or advisor under MCL 700.1044(2)(h). The issue will arise when a transferor attempts to remove a trustee for refusing to make a discretionary distribution to the transferor. Because a primary requirement of the Act is that distributions to the transferor be discretionary, subject to the transferor's ability to include certain mandatory distribution provisions in the trust, this removal power may become subject to abuse and an attempt to impermissibly control discretionary distributions.

In such a case, the trustee may be forced to contest the removal and have the probate court determine whether removal is permitted under the Act. To the extent a transferor is attempting to use his or her removal power to direct the actions of a qualified trustee, the transferor would be in violation of MCL 700.1049(1) which states that a trust beneficiary does not have the power or capacity to transfer any of the income from a trust that is a qualified disposition by his or her order, or by an order or directive of a court.

### **VIII. Implementation of the Trust**

The three components of implementing a DAPT under the Act are: (1) due diligence at the outset; (2) drafting the trust agreement; and (3) funding and administering the trust.

#### **1. Due Diligence**

There are several things an attorney should consider when contacted by a client about establishing a Michigan DAPT:

- (a) Does the client have sufficient assets to fund the trust and still maintain an expected lifestyle;
- (b) Is the client anticipating a divorce or may he or she become involved in a child support situation;
- (c) If the client is contemplating the establishment of a discretionary irrevocable trust for another purpose, should the trust include provisions so it will also meet the requirements of a qualified DAPT in Michigan;
- (d) What is the status of the client's credit history and are there existing creditor claims or pending issues that will or may result in claims;
- (e) Is the client a party to any written agreement with a creditor that requires disclosure of qualified dispositions, requires prior approval of such dispositions, or imposes other restrictions or requirements in connection with qualified dispositions by the client;
- (f) With respect to the parties involved and the potential individuals or corporate fiduciaries who may be named in the trust, is there any actual or potential conflict of interest;
- (g) Is the client in a position to execute a valid qualified affidavit in connection with any proposed or contemplated qualified disposition;

- (h) Should the trust include appointment of a trust advisor (trust protector) and what powers should be given to this fiduciary within the parameters of the Act; and
- (i) Is there a suitable individual in Michigan who can serve as a qualified trustee or should a corporate fiduciary be named as sole or a co-trustee of the trust?

The attorney should review the statute of limitations provisions of the Act with the client relative to attempts by a creditor to set aside a qualified disposition.

Creditors have the right to insist the transferor sign a written agreement that provides among other things that the transferor must disclose any previous qualified dispositions.

Creditors also have the right under the Act to place conditions with respect to qualified dispositions when such conditions are contained in a written agreement between the creditor and transferor.

An agreement can impose a requirement that the transferor disclose to the creditor, on a continuing or periodic basis, any qualified dispositions, that a qualified disposition require prior written approval by the creditor and that the transferor be under "other obligations as the creditor may require" with respect to qualified dispositions. *Id.*

The penalty for violating the terms of such provisions in a written agreement is that the transfer that would otherwise have been protected under the Act is no longer qualified as to *that creditor*, and the protections of the Act do not apply.

See MCL 700.1045.

## 2. Drafting the Trust Document

Start with a standard irrevocable trust form. Many of the issues related to administration of an irrevocable trust will already be in the document. The next step is to correctly draft and include the following:

- a. Discretionary trust - The trust must be a purely discretionary trust and should specifically state that the transferor will have no right or powers to or over the assets of the trust, other than those specifically contained in the trust agreement itself (i.e., those permitted under MCL 700.1044, which are included);
- b. Rights and powers of the transferor - Include in the trust agreement those terms and conditions that are permitted under MCL 700.1044, after discussion with the client;
- c. Trustee provisions - Distribution provisions must conform to the requirements of the Act. All distributions to the transferor are discretionary except as otherwise provided by the specific terms of the trust. Specifically include terms to the effect that the transferor has the power to veto proposed distributions and a provision



for the distribution of income or principal to pay taxes due on the income of the trust pursuant to an included provision of the trust that provides for the payment of such taxes. Include a provision which outlines the requirements for a qualified trustee under the Act and provide for a procedure for replacement of a trustee who ceases to meet the requirements of a qualified trustee;

- d. Trust adviser/protector - Consider the inclusion of a qualified trust adviser under the Act with specific powers to remedy defects that may otherwise defeat the effectiveness of the trust in protecting transferred assets;
- e. Death of transferor - Include a provision permitting, but not requiring, on the death of the transferor the payment of the transferor's debts, expenses of administration, estate or inheritance taxes incurred in connection with the estate;
- f. Defense of creditor claims against the trust - Provide authority to the trustee to defend any claims brought by creditors against the trust and provide that all expenses associated with such defense, including attorney and expert witness fees and all other associated costs, are to be paid by the trust; and
- g. The trust agreement must also expressly state that it incorporates Michigan law. MCL 700.1042(aa)(i).

### 3. Funding the Trust

The first thing to do is to obtain a tax identification number for the trust since it is irrevocable. Next, a qualified affidavit for signature by the client is needed, containing the following representations, which must be true at the time a qualified disposition is made to the trust:

- a. The transferor has full right, title, and authority to transfer the property to the trust;
- b. The transfer of the property to the trust will not render the transferor insolvent;
- c. The transferor does not intend to defraud a creditor by transferring property to the trust;
- d. The transferor does not know or have reason to know of any pending or threatened court actions against the transferor other than as disclosed on the attached schedule;
- e. The transferor is not involved in any administrative proceeding except as disclosed on the attached schedule;
- f. The transferor is not currently in arrears on a child support obligation by more than 30 days;
- g. The transferor does not contemplate filing for relief under the bankruptcy code 11 USC 101 to 1532; and
- h. The property being transferred to the trust was not derived from unlawful activities.

MCL 700.1046.

*The affidavit should be signed on the date that the property is transferred into the trust.*

Note that each qualified disposition is treated separately under the Act. MCL 700.1045(8)(a).

## **IX. Creditor Issues**

### **A. In General**

Sections 5 and 7 of the Act (MCL 700.1045 and MCL 700.1047) set forth the rights of creditors to reach property which is the subject of a qualified disposition.

### **B. Can a Creditor Reach Trust Property?**

MCL 700.1045(2) provides that a creditor's action for attachment of the property or avoidance of the qualified disposition (e.g., a fraudulent transfer claim) is subject to the following rules:

1. The action must be brought under either MCL 566.34 or 566.35. These are the sections of the Fraudulent Transfer Act<sup>2</sup> that describe actual fraud (intent to hinder, delay, or defraud creditors), constructive fraud (transfers made without receiving reasonably equivalent value), and transfers when the debtor was insolvent or became insolvent as a result of the transfer;
2. If the creditor's claim arose after the qualified disposition was made, the action must involve actual intent (constructive fraud claims or transfers involving insolvency cannot be brought);
3. The creditor must prove allegations by clear and convincing evidence. This puts quite a burden on the creditor claiming actual intent since the creditor must now prove badges of fraud using a very high proof standard.

Property transferred to a DAPT which is subject to a valid lien remains subject to the lien after its transfer.

### **C. Statute of Limitations**

MCL 700.1045(3) sets the statute of limitations applicable to creditor claims challenging a qualified disposition. The limitations periods are based on whether the claim arose before or after the qualified disposition was made.

If the claim arose before the qualified disposition occurred the creditor may bring its claim upon the later of:

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<sup>2</sup> Effective April 10, 2017, Michigan's Uniform Fraudulent Transfer Act ("UFTA") was replaced by the Uniform Voidable Transactions Act ("UVTA"). This was done to make the former UFTA consistent with the new DAPT legislation.

1. Two years after the qualified disposition was made or the obligation was incurred, or
2. One year after the qualified disposition or obligation was or could reasonably have been discovered by the claimant, if the person who is or may be liable for any claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim.

If the claim arose concurrent with or after the qualified disposition, the creditor must bring its claim within two years after the qualified disposition was made.

**\*\*While the ACT provides a shortened statute of limitations, 11 U.S.C. §548(e)(1) provides a 10 year lookback period on DAPTs. Federal bankruptcy law will preempt state law.**

There is sparse case law interpreting DAPTs and their overall effectiveness, however there are a few case son point.

Battley v. Mortensen, 2011 LEXIS 5560 (Bankr. D.C. Alaska 2011) – Mortensen lived in Alaska and created a self-settled Alaska Asset Preservation Trust. Mortensen transferred real estate valued at \$60,000 and approximately \$80,000 cash into the trust. When the trust was created he had credit card debt of \$50,000 - \$80,000. That debt tripled by the time he filed bankruptcy.

The Bankruptcy Court determined Mortensen's trust to be valid under Alaska law and also found him to be solvent when the trust was established. However, the Court set aside the trust under the ten (10) year lookback provisions of Section 548(e) of the Bankruptcy Code. The Court found that language in the trust regarding its stated purpose of protecting assets from creditors, among other things, evidence of fraudulent intent by Mortensen.

In re Huber, 493 B.R. 798 (Bankr. W.D. Wash. 2013) – Huber, a real estate developer and resident of Washington, created an Alaska Limited Liability Company and transferred most of his assets to the entity. Later, he created an Alaska asset protection trust and transferred his membership interest in the LLC, as well as other assets, into the trust. The vast majority of the assets were not held in Alaska.

Huber filed bankruptcy in 2011, the trustee sought to avoid the transfers under Washington law, Washington's Fraudulent Transfer Act and under 11 U.S.C. §548(e). The trustee won on all 3 counts. The Bankruptcy Court held that Washington law applied, even though the trust was established under Alaska law, because the vast majority of the trust property was in Washington.

In re Reuter, 499 B.R. 655 (Bankr. W.D. Mo. 2013) – Bankruptcy Court upheld the spendthrift provisions of an irrevocable trust the debtor and his wife created.

#### D. Marital Property/Divorce

Under MCL 700.1045(4) a qualified disposition made more than 30 days before the marriage will not be considered marital property, will not be considered part of the beneficiary's real or personal estate and will not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.

Qualified dispositions made more than 30 days before the marriage should not be considered by a court as part of the transferor's property in determining a property settlement or other terms of the divorce.

The parties may also agree in writing that the protections afforded by the Act will apply to contributions made within 30 days of the marriage. A prenuptial agreement, signed within 30 days of the marriage affirmatively stating that the provisions of MCL 700.1045(4)(b) of the Act apply, will shield a transferor's qualified dispositions.

#### E. Can Creditors Enhance Their Rights?

MCL 700.1045(11) allows creditors and transferors to enter into agreements to alter the rights of the parties otherwise applicable under the Act. For example, the parties can agree that as a condition to a loan (i) the transferor must disclose future qualified dispositions, (ii) all future qualified dispositions must first be approved by the creditor, and (iii) certain other obligations may be imposed on the transferor with respect to qualified dispositions.

If the transferor breaches the agreement with the creditor, the otherwise qualified disposition will not be treated as a qualified disposition as to that creditor only and the provisions of the Act will not apply to the transferred property. However, the qualified disposition will retain its status as to other creditors.

#### F. How Creditors Attach Trust Property

MCL 700.1047 lays out specific rules regarding how much of a qualified disposition may be avoided, the priority of claims against the qualified disposition, the right of a trust beneficiary to retain previous distributions, standard creditor collection devices (attachment, seizure, levy, garnishment, etc.) being only available against a qualified disposition as permitted by the Act (MCL 700.1047(4)), limitations on creditors' rights to challenge qualified dispositions because of certain rights of transferor contained in the trust instrument, tenancy by the entireties property, and the creditor's sole remedy being a court order compelling the trustee to *distribute to the transferor* only the amount necessary to satisfy the transferor's debt to the creditor.

MCL 700.1047(1) provides that where the amount of the debt is uncertain (e.g., an unliquidated claim) and an action is commenced for avoidance of the transfer, the creditor can receive no more than the present value of its claim, taking into consideration any uncertainty of the transferor's debt to that creditor.

MCL 700.1047(2) provides that the portion of the qualified disposition that is avoided is subject to the following rules:

1. If the court is satisfied the trustee did not act in bad faith in accepting or administering the property the trustee has a super priority lien against the property (a priority over all other liens) for all costs incurred in challenging the creditor's avoidance action, and the Trustee and its predecessors may retain fees, costs, preexisting rights, claims, and interests incurred in reference to the property which is the subject of the avoidance.
2. If the court is satisfied a transferor beneficiary has not acted in bad faith, the transferor beneficiary is entitled to retain any distribution received before the creditor commenced an action to avoid the qualified disposition. It is presumed the transferor beneficiary did not act in bad faith by creating the trust or accepting a distribution from the trust.

MCL 700.1047(3) establishes the burden of proof standard regarding a trustee and transferor beneficiary acting in bad faith. In the case of a trustee, the creditor must prove bad faith by clear and convincing evidence. In the case of a transferor beneficiary, the creditor must prove bad faith only by a preponderance of the evidence.

MCL 700.1047(5) provides that the existence of certain trust beneficiary rights does not give the creditor a right against the beneficiary's interest in the trust. Accordingly, the right of the beneficiary to authorize or direct the trustee to pay all or part of the trust property in satisfaction of estate or inheritance taxes imposed on or with respect to the trust beneficiary's postdeath estate, or the debts of the trust beneficiary's postdeath estate, or the expenses of administering the trust beneficiary's postdeath estate gives the creditor no special rights against the beneficiary's interest in the trust unless the trust beneficiary actually directs the payment of the taxes, debts, or expenses, and then only to the extent of the direction.

MCL 700.1047(6) addresses a qualified disposition of property held as a tenancy by the entireties. Tenancy by the entireties property does not lose its status as such after the married couple transfers the property to the trust. If a creditor seeks to avoid the qualified disposition of tenancy by the entireties property, its sole remedy is an order directing the trustee to transfer the property to both spouses as tenants by the entireties. The creditor merely gets the property returned to the transferors and then can attempt to reach the property outside the Act using traditional collection tools.

It is unclear what happens if the married couple divorces after the qualified disposition. Does the property constituting the qualified disposition lose its status as tenancy by the

entireties property in the trust? Does the sole remedy change if the transferors are no longer married due to death or divorce? Would the property be treated as non-entireties property?

MCL 700.1047(7) provides that to the extent a qualified disposition is permitted to be avoided, *the sole remedy of the creditor is an order directing the trustee to transfer to the transferor the amount necessary to satisfy the transferor's debt to the creditor at whose instance the disposition has been avoided.* The transfer itself is not actually avoided. There appear to be no safeguards in the Act protecting the creditor from the transferor paying other creditors or otherwise disbursing the funds upon their receipt.

MCL 700.1049(1) provides that a trust beneficiary, neither on his own volition nor pursuant to a court order, has the power or capacity to transfer trust income or that portion of the trust that is a qualified disposition. This section provides a defense to a trust beneficiary ordered by a court to obtain trust funds to pay a creditor. The trust beneficiary is able to claim "impossibility" when threatened with contempt because the beneficiary lacks the power or capacity to comply with the court order.

MCL 700.1049(2) contains spendthrift trust language making it clear that the interest of a beneficiary in that portion of the trust constituting a qualified disposition is not subject to attachment. None of the trustee, beneficiary, trust estate, or any part of the income of the trust is subject to execution by the creditor. The whole of the trust estate and income of the trust must be used for the benefit of the beneficiary free and discharged from beneficiary's obligations. MCL 700.1049(4) clarifies that a beneficiary may disclaim an interest in a trust or the portion of the trust that is a qualified disposition and may exercise a power of appointment over trust property and these acts will not be deemed violations of the spendthrift language.

MCL 700.1049(3) requires a trustee to oppose any efforts of a beneficiary or a creditor which is contrary to MCL 700.1049. A trustee is entitled to payment for its efforts in this regard and is granted a lien against property that is the subject of qualified dispositions to insure payment. However, if the trustee breaches its duty to oppose a party's efforts to assign, attach, or execute against trust property, the trustee is not liable to a trust beneficiary for such breach unless the trustee's breach was in bad faith or the result of reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

PROBATE PROCEEDINGS—TRUSTS AND..., 2016 Mich. Legis....

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2016 Mich. Legis. Serv. P.A. 330 (S.B. 597) (WEST)

MICHIGAN 2016 LEGISLATIVE SERVICE

Ninety-Eighth Legislature, Regular Session

Additions are indicated by Text; deletions by

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Vetoed are indicated by ~~Text~~ ;  
stricken material by ~~Text~~ .

PUBLIC ACT NO. 330

S.B. No. 597

PROBATE PROCEEDINGS—TRUSTS AND TRUSTEES—QUALIFIED DISPOSITIONS IN TRUST ACT

AN ACT relating to certain trusts; to provide for the powers and procedures of the court that has jurisdiction of certain trusts; to provide for the validity and effect of certain transfers and contracts that relate to certain trusts; to provide remedies; and to provide procedures to facilitate enforcement of certain trusts.

The People of the State of Michigan enact:

<< MI ST 700.1041 >>

M.C.L.A. § 700.1041

Sec. 1. This act shall be known and may be cited as the "qualified dispositions in trust act".

<< MI ST 700.1042 >>

M.C.L.A. § 700.1042

Sec. 2. As used in this act:

- (a) "Advisor" means a person who is given authority by the terms of a trust instrument to remove, appoint, or both, 1 or more trustees or to direct, consent to, approve, or veto a trustee's actual or proposed investment or distribution decisions. A person is considered an advisor even if the person is denominated by another title, such as trust protector. Any person may serve as an advisor.
- (b) "Ascertainable standard" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.
- (c) "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.
- (d) "Creditor" means, with respect to a transferor, a person who has a claim whether directly or indirectly.
- (e) "Debt" means liability on a claim.
- (f) "Discretionary trust provision" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.

(g) "Disposition" means a transfer of property that either creates a new fiduciary relation between at least 1 trustee and a trust beneficiary or newly subjects property to a preexisting fiduciary relation between at least 1 trustee and a trust beneficiary. The transfer may be by conveyance or assignment, by exercise of a power of appointment, including a power to substitute 1 trustee for another or to add 1 or more new trustees, or a power of revocation or amendment or, except as provided in this subdivision, by disclaimer, release, or relinquishment. A disposition, however, does not include a disclaimer, release, or relinquishment of property that was previously the subject of a qualified disposition. For purposes of this subdivision, as between a given trustee and a given beneficiary, a new fiduciary relation is created whenever the terms of the governing trust instrument are materially altered including alteration by an election described in section 5(6) with respect to the trust beneficiary in question.

(h) "Distribution decision" means a decision regarding the distribution of trust property to or for the benefit of a trust beneficiary. Distribution decision also includes a decision regarding whether to make or guaranty a loan to or for the benefit of a trust beneficiary.

(i) "Fiduciary disposition" means a disposition made by a trustee acting in a fiduciary capacity.

(j) "Fiduciary qualified disposition" means a qualified disposition made by a trustee acting in a fiduciary capacity.

(k) "General power of appointment" means a general power as that term is defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112. However, a power exercisable in favor of the donee, his or her estate, his or her creditors, or the creditors of his or her estate that is limited by an ascertainable standard is not a general power of appointment.

(l) "Investment decision" means a decision regarding whether or not to purchase, sell, exchange, tender, or pledge any trust property. Investment decision also includes decisions regarding other transactions affecting the ownership of or rights in any trust property, other than distribution decisions. Unless otherwise provided in the trust instrument, investment decision includes a decision regarding whether to make or guaranty a loan to or on behalf of an entity in which the trust owns an interest, directly or indirectly, in the entity's debt or equity.

(m) "Organization" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(n) "Person" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(o) "Property" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(p) "Qualified disposition" means, subject to subparagraphs (iii) and (iv), a disposition after which both subparagraphs (i) and (ii) apply to the subject property:

(i) The subject property is owned by 1 or more trustees at least 1 of whom is a qualified trustee.

(ii) The subject property is governed by a trust instrument including, but not limited to, a trust instrument as modified by an election described in section 5(6), under which the transferor only has rights, powers, and interests that are permitted by section 4(2).

(iii) A disposition is not a qualified disposition to the extent that, at the time of the disposition, the transferor is in arrears on a child support obligation by more than 30 days.



(iv) A disposition is not a qualified disposition if a transferor or any person that is related or subordinate to the transferor within the meaning of section 672(c) of the internal revenue code of 1986, 26 USC 672(c), may act as an advisor. For the purposes of this subparagraph, act as an advisor does not include the power to direct the investment decisions of the trust, the power to veto a distribution from the trust, or the right to remove a trustee or advisor and to appoint a new trustee or advisor.

(q) "Qualified trust beneficiary" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.

(r) "Qualified trustee" means a person, other than the transferor, who meets all of the following conditions:

(i) For an individual, the individual is a resident of this state or, in all other cases, is authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the department of insurance and financial services, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision.

(ii) The person maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition and administers all or part of the trust in this state.

(iii) The person's usual place of business where some of the records pertaining to the trust are kept is located in this state or, if the person does not have such a place of business, the person's residence is in this state. For a corporate trustee, the usual place of business is the business location of the primary trust officer.

(s) "Retirement benefit" means an interest in 1 of the following types of assets if payable to a trust as a beneficiary or owned by the trust: a qualified or nonqualified annuity; a benefit under a qualified or nonqualified plan of deferred compensation; any account in, or benefit payable under, any pension, profit-sharing, stock bonus, or other qualified retirement plan; any individual retirement account or trust; and all benefits under a plan or arrangement that is established under section 401, 403, 408, 408A, or 457 or a similar provision of the internal revenue code of 1986, 26 USC 401, 403, 408, 408A, and 457.

(t) "Settlor" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.

(u) "Special power of appointment" means a special power as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.

(v) "Spendthrift provision" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.

(w) "Spouse" and "former spouse" mean only an individual to whom the transferor was married at, or before, the time the qualified disposition is made.

(x) "Support provision" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.

(y) "Transferor" means any of the following, as applicable:

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(i) A person and, for more than 1 owner of undivided interests, each of several persons, who, as a beneficial owner of certain property, or as the holder of a general power of appointment over certain property, directly or indirectly, makes a disposition of the property or causes a disposition to be made.

(ii) For a fiduciary disposition, the person or persons who, as of the time of the fiduciary disposition, most recently fit the description in subparagraph (i) with respect to the property subject to the fiduciary disposition.

(z) "Trust beneficiary" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.

(aa) "Trust instrument" means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition to which all of the following apply:

(i) The instrument expressly incorporates the law of this state to govern the validity, construction, and administration of the trust.

(ii) The instrument is irrevocable.

(iii) The instrument provides that the interest of the transferor or other trust beneficiary in trust property may not be transferred, assigned, pledged, or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute trust property to the trust beneficiary, and that provision of the trust instrument is considered a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of section 541(c)(2) of the bankruptcy code 11 USC 541(c)(2).

<< MI ST 700.1043 >>

M.C.L.A. § 700.1043

Sec. 3. (1) The probate court has exclusive jurisdiction over an action that addresses either of the following questions:

(a) Whether a transfer is a qualified disposition.

(b) The extent of the transferor's interest in, or the income from, a qualified disposition.

(2) The probate court has concurrent jurisdiction over an action brought under section 5(2).

(3) Venue for a proceeding under subsection (1) or (2) is as follows:

(a) For a trust registered under section 7209 of the estates and protected individuals code, 1998 PA 386, MCL 700.7209, the place of registration.

(b) For a trust that is not registered, in any place where the trust properly could be registered.

(4) If a trust has no qualified trustee and has not been registered, and there is no place in this state where the trust properly could be registered, venue for a proceeding under subsection (1) or (2) is in the following order of priority, except to the extent otherwise provided by court rule:

(a) In a county in this state in which the immediately preceding qualified trustee had its usual place of business or residence.

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- (b) In a county in this state in which a trust beneficiary resides.
- (c) In a county in this state in which any trust property is located.
- (d) In any county in this state.

<< MI ST 700.1044 >>

M.C.L.A. § 700.1044

Sec. 4. (1) A transferor has only the powers and rights that are conferred by the trust instrument. Except as otherwise provided in subsection (2), a transferor does not have powers or rights with respect to the property that is the subject of a qualified disposition or the income from the property, and any agreement or understanding that purports to grant or permit the retention of any greater powers or rights is void.

(2) A trust instrument may provide for 1 or more of the following rights, powers, or interests, none of which grants or is considered, either alone or in any combination, a power to revoke a trust:

- (a) The transferor's power to direct the investment decisions of the trust.
- (b) The transferor's power to veto a distribution from the trust.
- (c) A special power of appointment exercisable by will or other written instrument of the transferor effective only on the transferor's death.
- (d) The transferor's potential or actual receipt of income, including rights to the income retained in the trust instrument.
- (e) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as those terms are defined in section 664 of the internal revenue code of 1986, 26 USC 664; and the transferor's right, at any time by written instrument delivered to the trustee, to release the transferor's interest in the trust, in whole or in part, in favor of a charitable organization that has or charitable organizations that have a succeeding beneficial interest in the trust.
- (f) The transferor's potential or actual receipt of income or principal from a grantor retained annuity trust or grantor retained unitrust as those terms are described in section 2702 of the internal revenue code of 1986, 26 USC 2702, or the transferor's receipt each year of a percentage, not to exceed 5%, as provided in the governing instrument of the initial value of the trust property which value may be described either as a percentage or a fixed amount or determined from time to time under the governing instrument.
- (g) The transferor's potential or actual receipt or use of principal if the potential or actual receipt or use of principal would be the result of a trustee's acting under any of the following:
  - (i) A discretionary trust provision.
  - (ii) A support provision.
  - (iii) The direction of an advisor acting under a discretionary trust provision or support provision.
- (h) The transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor.

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(i) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of that term as described in section 2702(c) of the internal revenue code of 1986, 26 USC 2702(c), or the transferor's possession and enjoyment of a qualified annuity interest within the meaning of that term as described in 26 CFR 25.2702-5(c)(8).

(j) The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if the potential or actual receipt of income or principal is under a provision in the trust instrument that expressly provides for the payment of those taxes and if the potential or actual receipt of income or principal would be the result of a qualified trustee's or qualified trustees' acting in any of the following ways:

(i) In the qualified trustee's or qualified trustees' discretion or under a mandatory direction in the trust instrument.

(ii) At the direction of an advisor who is acting in the advisor's discretion.

(k) After the transferor's death, the power of a qualified trustee to pay the transferor's debts, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate, without regard to the source of the payment.

(l) The transferor's actual or potential receipt of a minimum required distribution as defined in 26 USC 4974(b) with respect to a retirement benefit.

<< MI ST 700.1045 >>

M.C.L.A. § 700.1045

Sec. 5. (1) Notwithstanding any other provision of this act, with respect to any qualified disposition, a creditor has only the rights provided in this section and section 7.

(2) For an action brought by a creditor for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition, all of the following apply:

(a) Except for the limitation period provided under subsection (3), the action may only be brought under sections 4 and 5 of the uniform fraudulent transfer act, 1998 PA 434, MCL 566.34 and 566.35.

(b) For a creditor whose claim arose after a qualified disposition, the action must involve a qualified disposition that was made with actual intent to defraud the creditor.

(c) The allegations in the action must be proved by clear and convincing evidence.

(3) A person shall not bring or maintain an action under subsection (2) unless the action is commenced within either of the following periods:

(a) If the claim arose before the qualified disposition was made, on the later of the following:

(i) Two years after the qualified disposition was made or the obligation was incurred.

(ii) One year after the qualified disposition or obligation was or could reasonably have been discovered by the claimant, if the person who is or may be liable for any claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim.

- (b) If the claim arose concurrent with or after the qualified disposition, 2 years after the qualified disposition was made.
- (4) If a trust beneficiary who has an interest in a qualified disposition or in property that is subject to a qualified disposition is a party to an action for annulment of a marriage, divorce, or separate maintenance, all of the following apply:
  - (a) If the trust beneficiary is not the transferor of the qualified disposition, the trust beneficiary's interest in the qualified disposition or in property that is the subject of the qualified disposition is not considered marital property, is not considered, directly or indirectly, part of the trust beneficiary's real or personal estate, and shall not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.
  - (b) If the trust beneficiary is the transferor of the qualified disposition, the trust beneficiary's interest in the qualified disposition or in property that is the subject of the qualified disposition is not considered marital property, is not considered, directly or indirectly, part of the trust beneficiary's real or personal estate, and shall not be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance if either of the following apply:
    - (i) The trust beneficiary transferred the property that is the subject of the qualified disposition more than 30 days before the trust beneficiary's marriage that is the subject of the action.
    - (ii) The parties to the marriage agree that this subdivision applies to the qualified disposition.
  - (c) If subdivisions (a) and (b) do not apply, subsections (2) and (3) do not limit the transferor's spouse's property division claims.
- (5) Except as otherwise provided in subdivision (a), a fiduciary qualified disposition is considered made as of the time the property that is subject to the disposition was first transferred to the trustee who is making the fiduciary qualified disposition, or any predecessor of that trustee in an unbroken succession of fiduciary ownership of the property, in a form that meets either of the following requirements:
  - (a) The requirements of a qualified disposition. If the property that is subject to the qualified disposition was first transferred to the trustee making the disposition or the predecessor trustee before the effective date of this act in a form that would otherwise meet the requirements of a qualified disposition, the qualified disposition is considered to have been made as of the effective date of this act.
  - (b) Both of the following requirements:
    - (i) The requirements of section 2(p)(ii).
    - (ii) The requirements to be considered a qualified disposition or its equivalent under the laws of another state.
- (6) If a trustee of an existing trust proposes to make a disposition that, but for the exercise of authority granted in this subsection, would not be a qualified disposition because of a nonconforming power of appointment of the transferor, the trustee may modify the trust instrument by delivering to the qualified trustee an irrevocable written election to modify the nonconforming power of appointment to conform to the requirements of section 4(2)(c) or section 4(2)(k). An irrevocable written election described in this section must include both of the following:
  - (a) A description of the modified power of appointment.

- (b) The transferor's written consent to the modification. The transferor's consent is not a disposition.
- (7) With respect to a qualified disposition, a creditor does not have a claim or cause of action against any of the following:
  - (a) The trustee of a trust that is the subject of a qualified disposition.
  - (b) An advisor of a trust that is the subject of a qualified disposition.
  - (c) A person involved in the counseling, drafting, preparation, execution, or funding of a trust that is the subject of a qualified disposition.
- (8) If more than 1 qualified disposition is made by means of the same trust instrument, all of the following apply:
  - (a) With respect to a prior qualified disposition, both of the following apply:
    - (i) The making of a subsequent qualified disposition is disregarded in determining whether a creditor's claim is extinguished as provided in subsection (3).
    - (ii) The making of a subsequent qualified disposition is disregarded in determining, as provided in subsection (4), whether a trust beneficiary's interest in a qualified disposition or in property that is the subject of a qualified disposition is considered marital property, is considered part of a trust beneficiary's real or personal estate, or may be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance.
  - (b) A distribution to a trust beneficiary is considered to have been made from the most recent qualified disposition.
- (9) In an action against a trustee that received property in a qualified disposition, if a court takes any action declining to apply the law of this state in determining the validity, construction, or administration of the trust, or the effect of a spendthrift provision in the trust instrument, the trustee shall immediately on the court's action, and without the further order of any court, cease in all respects to be trustee of the trust. The former trustee does not have any power described in section 4(2) except to convey the trust property to the successor trustee and, at the former trustee's election, to petition the court for appointment of a successor trustee and collect its attorney fees, costs, and expenses. If the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, all of the following apply:
  - (a) The probate court, on the request of a qualified trust beneficiary of the trust, shall appoint a successor trustee on the terms and conditions it determines to be consistent with the purposes of the trust and this act.
  - (b) A former trustee may, but has no duty to, petition the probate court to appoint a successor trustee if a petition for appointment of a successor trustee is not brought by a qualified trust beneficiary within 30 days after the date on which the former trustee ceases to be a trustee of the trust. If the former trustee elects to petition for the appointment of a successor trustee, the former trustee is entitled to reimbursement for all attorney fees, costs, and expenses associated with the petition, and the amount of the attorney fees, costs, and expenses is a lien against the trust's property.
- (10) A valid lien attaching to property before a qualified disposition of the property survives the disposition, and the trustee takes title to the property subject to the valid lien and the trustee is subject to any agreements that created or perfected the valid lien.
- (11) A written agreement between a transferor and a creditor may provide for any of the following:
  - (a) The transferor will have a continuing or periodic obligation to disclose any qualified dispositions to the creditor.

- (b) A qualified disposition will require the prior written approval of the creditor.
- (c) That the transferor is under those other obligations as the creditor may require with respect to qualified dispositions.
- (12) If a transfer that would otherwise be a qualified disposition violates an agreement with a creditor described in subsection (11), with respect to the creditor only, the transfer is not a qualified disposition and this act does not affect the rights of the creditor.

<< MI ST 700.1046 >>

M.C.L.A. § 700.1046

Sec. 6. (1) Except as provided in subsection (6), for purposes of this section, a "qualified affidavit" means an affidavit in which the transferor states that at the time of the transfer of the property to the trust all of the following apply:

- (a) The transferor has full right, title, and authority to transfer the property to the trust.
  - (b) The transfer of the property to the trust will not render the transferor insolvent.
  - (c) The transferor does not intend to defraud a creditor by transferring the property to the trust.
  - (d) The transferor does not know of or have reason to know of any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit.
  - (e) The transferor is not involved in any administrative proceedings, except for those administrative proceedings identified on an attachment to the affidavit.
  - (f) The transferor is not currently in arrears on a child support obligation by more than 30 days.
  - (g) The transferor does not contemplate filing for relief under the bankruptcy code, 11 USC 101 to 1532.
  - (h) The property being transferred to the trust was not derived from unlawful activities.
- (2) The transferor shall sign a qualified affidavit before a qualified disposition is made.
- (3) A qualified affidavit is defective if it materially fails to meet the criteria set forth in subsection (1), except that a qualified affidavit is not defective because of any of the following:
- (a) Nonsubstantive variances from the language set forth in subsection (1).
  - (b) Statements or representations in addition to those set forth in subsection (1) if the statements or representations do not contradict those required by subsection (1).
  - (c) Technical errors in administering an oath if the errors were not the fault of the transferor and the transferor reasonably relied on another person to prepare or administer the oath.
- (4) A qualified affidavit is not required in any of the following circumstances:
- (a) From the settlor for a fiduciary qualified disposition.

(b) From a transferor who is not the settlor of the qualified disposition, except to the extent the transferor is a beneficiary of the qualified disposition and the property subject to the qualified disposition was not previously subject to a qualified disposition with respect to which the transferor signed a qualified affidavit.

(c) In connection with dispositions that are part of, required by, or the direct result of a prior qualified disposition supported by a qualified affidavit that otherwise complies with the requirements of subsection (1).

(5) If a qualified affidavit is required by this section, and a transferor fails to timely sign a qualified affidavit or signs a defective affidavit, the failure or defect may be considered as evidence in an action described in section 5(2) to the extent permitted by the Michigan rules of evidence, but the validity of the qualified disposition is not affected in any other way because of the failure or defect.

(6) If subsection (4)(b) applies, the required affidavit must omit the statements described in subsection (1)(a) and (c), and include a statement that the qualified disposition is not intended to defraud any creditor.

<< MI ST 700.1047 >>

**M.C.L.A. § 700.1047**

Sec. 7. (1) A qualified disposition may be avoided only to the extent necessary to satisfy or provide for the present value, taking into consideration any uncertainty of the transferor's debt to the creditor at whose instance the disposition had been avoided.

(2) If all or any portion of a qualified disposition is avoided as provided in subsection (1), all of the following apply:

(a) If the court is satisfied that a trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition, both of the following apply:

(i) The trustee has a lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorney fees, incurred by the trustee in the defense of an action to avoid the qualified disposition. The lien has priority over all other liens against the property, whether or not the other liens accrued or were recorded before the accrual of the lien created by this act.

(ii) The qualified disposition is avoided subject to the fees, costs, preexisting rights, claims, and interests of the trustee and of any predecessor trustee that has not acted in bad faith.

(b) If the court is satisfied that a trust beneficiary has not acted in bad faith, the avoidance of the qualified disposition is subject to the right of the trust beneficiary to retain any distribution received before the creditor's commencement of an action to avoid the qualified disposition. It is presumed that the trust beneficiary, including a trust beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made under the terms of the trust.

(c) For purposes of this subsection, it is presumed that a trustee did not act in bad faith merely by accepting the property, with or without a qualified affidavit, or by making any distribution under the terms of the trust.

(3) A creditor has the burden of proving by clear and convincing evidence that a trustee or trust beneficiary acted in bad faith as required under subsection (2), except that, for a trust beneficiary who is also the transferor, the burden on the creditor is to prove that the transferor-beneficiary acted in bad faith by a preponderance of the evidence. This subsection provides substantive not procedural rights.



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(4) With respect to a qualified disposition, a levy, attachment, garnishment, notice of lien, sequestration, or other legal or equitable process is permitted only in those circumstances permitted by this act.

(5) Notwithstanding any other provision of this act or section 13 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.123, a creditor does not have a right against the interest of a trust beneficiary in a trust or portion of a trust that was a qualified disposition solely because the trust beneficiary has the right to authorize or direct the trustee to pay all or part of the trust property in satisfaction of estate or inheritance taxes imposed on or with respect to the trust beneficiary's postdeath estate, or the debts of the trust beneficiary's postdeath estate, or the expenses of administering the trust beneficiary's postdeath estate, unless the trust beneficiary actually directs the payment of the taxes, debts, or expenses, and then only to the extent of the direction.

(6) Except as otherwise provided in the trust instrument, if a married couple make a qualified disposition of property and, immediately before the qualified disposition, the property, any part of the property, or any accumulation to the property was, under applicable law, owned by the married couple as tenants by the entirety, then notwithstanding the qualified disposition, the property, any part of the property, or any accumulation to the property is, while held in trust during the lifetime of both spouses, treated as though it were tenancy by the entirety property. In an action concerning whether a creditor of either or both spouses may recover the debt from the trust, on avoidance of the qualified disposition, the sole remedy available to the creditor with respect to trust property treated as though it were tenancy by the entirety property is an order directing the trustee to transfer the property to both spouses as tenants by the entirety.

(7) Except as otherwise provided in subsection (6), on avoidance of a qualified disposition to the extent permitted under subsection (1), the sole remedy available to the creditor is an order directing the trustee to transfer to the transferor the amount necessary to satisfy the transferor's debt to the creditor at whose instance the disposition has been avoided.

<< MI ST 700.1048 >>

M.C.L.A. § 700.1048

Sec. 8. (1) If a person serving as qualified trustee ceases to meet the requirements of a qualified trustee and there remains no trustee that meets the requirements of a qualified trustee, the person serving as qualified trustee is considered to have resigned as of the time of the cessation, and the successor qualified trustee provided for in the trust instrument becomes a qualified trustee of the trust on the successor qualified trustee's acceptance of trusteeship, or in the absence of a successor qualified trustee provided for in the trust instrument, the probate court shall, on petition of a qualified trust beneficiary, appoint a successor qualified trustee.

(2) A disposition that was a qualified disposition does not cease to be considered a qualified disposition as a result of a subsequent vacancy in the position of qualified trustee if a successor qualified trustee is appointed or a proceeding for the appointment of a successor qualified trustee is commenced within a reasonable time after a person with authority to appoint a qualified trustee or commence a proceeding to appoint a qualified trustee knows of the vacancy.

<< MI ST 700.1049 >>

M.C.L.A. § 700.1049

Sec. 9. (1) A trust beneficiary does not have the power or capacity to transfer any of the income from a trust or portion of a trust that is a qualified disposition by his or her order, voluntary or involuntary, or by an order or direction of a court.

(2) Except as otherwise provided in this act, the interest of a beneficiary in a trust or portion of a trust that is a qualified disposition is not subject to a process of attachment issued against the beneficiary, and may not be taken in execution

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under any form of legal process directed against the beneficiary, trustee, trust estate, or any part of the income of the trust estate, but the whole of the trust estate and the income of the trust estate must go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged of and from all obligations of the beneficiary.

(3) The trustee of a qualified disposition shall disregard and oppose an assignment or other act, voluntary or involuntary, that is attempted contrary to this section. The trustee is entitled to reimbursement for all attorney fees, costs, and expenses associated with carrying out this duty, and the amount of the attorney fees, costs, and expenses is a lien against the property that is the subject of the qualified disposition. A trustee is not liable, and a trust beneficiary or any successor trust beneficiary does not have a claim or cause of action against a trustee, for a breach of this duty unless the trustee's breach was in bad faith or the result of reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

(4) This section does not prohibit a beneficiary from disclaiming an interest in a trust or portion of a trust that is a qualified disposition or from exercising a power of appointment.

<< MI ST 700.1050 >>

M.C.L.A. § 700.1050

Sec. 10. (1) Subject to section 5(5), this act applies to qualified dispositions made on or after the effective date of this act.

(2) If any provision of this act conflicts with any provision of chapter 63 of 1846 RS 63, MCL 555.1 to 555.28, or the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, the provision of this act prevails.

<< Note: MI ST 700.1041 >>

M.C.L.A. § 700.1041 Note

Enacting section 1. This act takes effect 90 days after the date it is enacted into law.

<< Note: MI ST 700.1041 >>

M.C.L.A. § 700.1041 Note

Enacting section 2. This act does not take effect unless House Bill No. 5504 of the 98th Legislature is enacted into law.

This act is ordered to take immediate effect.

Approved December 8, 2016. Filed December 8, 2016.

Effective date: March 8, 2017.

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UNIFORM FRAUDULENT TRANSFER ACT  
Act 434 of 1998

AN ACT to define and regulate fraudulent transfers and conveyances; to set aside and modify certain transfers and conveyances; to make uniform the law of fraudulent transfers; and to repeal acts and parts of acts.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

*The People of the State of Michigan, enact:*

\*\*\*\*\* 566.31 THIS SECTION IS AMENDED EFFECTIVE MARCH 8, 2017: See 566.31.amended \*\*\*\*\*

566.31 Definitions.

Sec. 1. As used in this act:

(a) "Affiliate" means 1 or more of the following:

(i) A person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole discretionary power to vote the securities.

(B) Solely to secure a debt, if the person has not exercised the power to vote.

(ii) A corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole power to vote the securities.

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote.

(iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor.

(iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(b) "Asset" means property of a debtor, but the term does not include any of the following:

(i) Property to the extent it is encumbered by a valid lien.

(ii) Property to the extent it is generally exempt under nonbankruptcy law.

(iii) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant.

(c) "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.

(d) "Creditor" means a person who has a claim.

(e) "Debt" means liability on a claim.

(f) "Debtor" means a person who is liable on a claim.

(g) "Insider" includes all of the following:

(i) If the debtor is an individual, all of the following:

(A) A relative of the debtor or of a general partner of the debtor.

(B) A partnership in which the debtor is a general partner.

(C) A general partner in a partnership described in sub-subparagraph (B).

(D) A corporation of which the debtor is a director, officer, or person in control.

(ii) If the debtor is a corporation, all of the following:

(A) A director of the debtor.

(B) An officer of the debtor.

(C) A person in control of the debtor.

(D) A partnership in which the debtor is a general partner.

(E) A general partner in a partnership described in sub-subparagraph (D).

(F) A relative of a general partner, director, officer, or person in control of the debtor.

(iii) If the debtor is a partnership, all of the following:

(A) A general partner in the debtor.

(B) A relative of a general partner in, a general partner of, or a person in control of the debtor.

(C) Another partnership in which the debtor is a general partner.

- (D) A general partner in a partnership described in sub-subparagraph (C).
- (E) A person in control of the debtor.
- (iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.
- (v) A managing agent of the debtor.
- (h) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.
- (i) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.
- (j) "Property" means anything that may be the subject of ownership.
- (k) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.
- (l) "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. Transfer includes payment of money, release, lease, and creation of a lien or other encumbrance. Transfer does not include any of the following:
  - (i) The lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a third party. As used in this subparagraph, "donee" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.
  - (ii) The disposing of or parting with an asset or interest in an asset held in trust to the person who created the trust if all of the following apply:
    - (A) The trust is an irrevocable trust for the benefit of third parties.
    - (B) The trust is a grantor trust with regard to the person for income tax purposes pursuant to sections 671 to 679 of the internal revenue code, 26 USC 671 to 679.
    - (C) The trustee has the discretionary authority to reimburse or advance trust property to the person for taxes concerning income attributable to the trust property.
  - (D) The disposing of or parting with the asset or interest in the asset is the exercise by the trustee of the discretionary authority described in sub-subparagraph (C).
- (m) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998;—Am. 2009, Act 44, Eff. Apr. 1, 2010.

\*\*\*\*\* 566.31.amended THIS AMENDED SECTION IS EFFECTIVE MARCH 8, 2017 \*\*\*\*\*

**566.31.amended Definitions.**

- Sec. 1. As used in this act:
- (a) "Affiliate" means 1 or more of the following:
    - (i) A person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:
      - (A) As a fiduciary or agent without sole discretionary power to vote the securities.
      - (B) Solely to secure a debt, if the person has not exercised the power to vote.
    - (ii) A corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:
      - (A) As a fiduciary or agent without sole power to vote the securities.
      - (B) Solely to secure a debt, if the person has not in fact exercised the power to vote.
    - (iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor.
    - (iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.
  - (b) "Asset" means property of a debtor. Asset does not include any of the following:
    - (i) Property to the extent it is encumbered by a valid lien.
    - (ii) Property to the extent it is generally exempt under nonbankruptcy law.
    - (iii) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant.
  - (c) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated,

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unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

- (d) "Creditor" means a person who has a claim.
- (e) "Debt" means liability on a claim.
- (f) "Debtor" means a person who is liable on a claim.
- (g) "Insider" includes all of the following:
  - (i) If the debtor is an individual, all of the following:
    - (A) A relative of the debtor or of a general partner of the debtor.
    - (B) A partnership in which the debtor is a general partner.
    - (C) A general partner in a partnership described in sub-subparagraph (B).
    - (D) A corporation of which the debtor is a director, officer, or person in control.
  - (ii) If the debtor is a corporation, all of the following:
    - (A) A director of the debtor.
    - (B) An officer of the debtor.
    - (C) A person in control of the debtor.
    - (D) A partnership in which the debtor is a general partner.
    - (E) A general partner in a partnership described in sub-subparagraph (D).
    - (F) A relative of a general partner, director, officer, or person in control of the debtor.
  - (iii) If the debtor is a partnership, all of the following:
    - (A) A general partner in the debtor.
    - (B) A relative of a general partner in, a general partner of, or a person in control of the debtor.
    - (C) Another partnership in which the debtor is a general partner.
    - (D) A general partner in a partnership described in sub-subparagraph (C).
    - (E) A person in control of the debtor.
  - (iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.
  - (v) A managing agent of the debtor.
- (h) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.
- (i) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.
- (j) "Property" means anything that may be the subject of ownership.
- (k) "Qualified disposition" means that term as defined in section 2 of the qualified dispositions in trust act.
- (l) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.
- (m) "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. Transfer includes payment of money, release, lease, and creation of a lien or other encumbrance. Transfer does not include any of the following:
  - (i) The lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a third party. As used in this subparagraph, "donee" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.
  - (ii) The disposing of or parting with an asset or interest in an asset held in trust to the person who created the trust if all of the following apply:
    - (A) The trust is an irrevocable trust for the benefit of third parties.
    - (B) The trust is a grantor trust with regard to the person for income tax purposes under sections 671 to 679 of the internal revenue code of 1986, 26 USC 671 to 679.
    - (C) The trustee has the discretionary authority to reimburse or advance trust property to the person for taxes concerning income attributable to the trust property.
    - (D) The disposing of or parting with the asset or interest in the asset is the exercise by the trustee of the discretionary authority described in sub-subparagraph (C).
- (n) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998;—Am. 2009, Act 44, Eff. Apr. 1, 2010;—Am. 2016, Act 331, Eff. Mar. 8, 2017.

#### 566.32 Insolvency.

Sec. 2. (1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

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- (2) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.
- (3) A partnership is insolvent under subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.
- (4) As used in this section:
- (a) Assets do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this act.
- (b) Debts do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

**566.33 Transfer for value.**

Sec. 3. (1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) For the purposes of sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

\*\*\*\*\* 566.34 THIS SECTION IS AMENDED EFFECTIVE MARCH 8, 2017: See 566.34.amended \*\*\*\*\*

**566.34 Transfer with intent to defraud.**

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.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

\*\*\*\*\* 566.34.amended THIS AMENDED SECTION IS EFFECTIVE MARCH 8, 2017 \*\*\*\*\*

**566.34.amended Transfer with intent to defraud.**

Sec. 4. (1) Except as otherwise provided in subsection (3), 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) or (3), 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.
- (3) A qualified disposition is fraudulent as to the creditor whose claim arose after the qualified disposition only if the qualified disposition was made with actual intent to hinder, delay, or defraud any creditor of the debtor.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998;—Am. 2016, Act 331, Eff. Mar. 8, 2017.

**566.35 Transfer by debtor as fraud.**

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.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

**566.36 Completion of transfer; perfection.**

Sec. 6. (1) A transfer is made under this act when 1 of the following occurs:

- (a) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.
- (b) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this act that is superior to the interest of the transferee.
- (2) If applicable law permits the transfer to be perfected as provided in subsection (1) and the transfer is not so perfected before the commencement of an action for relief under this act, the transfer is considered made immediately before the commencement of the action.
- (3) If applicable law does not permit the transfer to be perfected as provided in subsection (1), the transfer

is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made under this act until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred under this act if 1 of the following occurs:

(a) If oral, when it becomes effective between the parties.

(b) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

**566.37 Action for relief against transfer or obligation; right of creditor to execution on asset or proceeds.**

Sec. 7. (1) In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in section 8, may obtain 1 or more of the following:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(b) An attachment against the asset transferred or other property of the transferee to the extent authorized under section 4001 of the revised judicature act of 1961, 1961 PA 236, MCL 600.4001, and applicable court rules.

(c) Subject to applicable principles of equity and in accordance with applicable court rules and statutes, 1 or more of the following:

(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property.

(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee.

(iii) Any other relief the court determines appropriate.

(2) 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.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

**566.38 Transfer or obligation not voidable; recovery of judgment; rights of good-faith transferee or obligee.**

Sec. 8. (1) A transfer or obligation is not voidable under section 4(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under section 7(1)(a), the creditor may recover a judgment 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. The judgment may be entered against either of the following:

(a) The first transferee of the asset or the person for whose benefit the transfer was made.

(b) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under subsection (2) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(4) Notwithstanding the voidability of a transfer or an obligation under this act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to 1 or more of the following:

(a) A lien on or a right to retain any interest in the asset transferred.

(b) Enforcement of any obligation incurred.

(c) A reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under section 4(1)(b) or 5 if the transfer results from either of the following:

(a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

(b) Enforcement of a security interest in compliance with article 9 of the uniform commercial code, 1962 PA 174, MCL 440.9101 to 440.9708.

(6) A transfer is not voidable under section 5(2) if 1 or more of the following occur:

(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien.

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider.

(c) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998;—Am. 2000, Act 362, Eff. July 1, 2001.

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\*\*\*\*\* 566.39 THIS SECTION IS AMENDED EFFECTIVE MARCH 8, 2017: See 566.39.amended \*\*\*\*\*

**566.39 Cause of action; extinguishment.**

Sec. 9. A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:

(a) Sections 4(1)(a) and (b) and 5(1), within the time period specified in sections 5813 and 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

(b) Section 5(2), within 1 year after the transfer was made or the obligation was incurred.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

\*\*\*\*\* 566.39.amended THIS AMENDED SECTION IS EFFECTIVE MARCH 8, 2017 \*\*\*\*\*

**566.39.amended Cause of action; extinguishment.**

Sec. 9. A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:

(a) Except as otherwise provided in subdivision (c), sections 4(1)(a) and (b) and 5(1), within the time provided in section 5813 or 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

(b) Except as otherwise provided in subdivision (c), section 5(2), within 1 year after the transfer was made or the obligation was incurred.

(c) Sections 4 and 5, with respect to a qualified disposition, the time provided in section 5 of the qualified dispositions in trust act.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998;—Am. 2016, Act 331, Eff. Mar. 8, 2017.

**566.40 Supplemental principles of law and equity.**

Sec. 10. Unless in conflict with the provisions of this act, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement the provisions of this act.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

**566.41 Application and construction of act.**

Sec. 11. This act shall be applied and construed to effectuate its general purpose to make uniform the law of fraudulent conveyance among the states enacting it.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

**566.42 Short title.**

Sec. 12. This act shall be known and may be cited as the "uniform fraudulent transfer act".

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

**566.43 Repeal of MCL 566.11 to 566.23.**

Sec. 13. The uniform fraudulent conveyance act, 1919 PA 310, MCL 566.11 to 566.23, is repealed.

History: 1998, Act 434, Imd. Eff. Dec. 30, 1998.

2016 Mich. Legis. Serv. P.A. 331 (H.B. 5504) (WEST)

MICHIGAN 2016 LEGISLATIVE SERVICE

Ninety-Eighth Legislature, Regular Session

Additions are indicated by Text; deletions by

\*\*\*

Vetoed are indicated by ~~Text~~ ;  
stricken material by ~~Text~~ .

PUBLIC ACT NO. 331

H.B. No. 5504

FRAUDULENT TRANSFERS—TRUSTS AND TRUSTEES—DISPOSITION

AN ACT to amend 1998 PA 434, entitled "An act to define and regulate fraudulent transfers and conveyances; to set aside and modify certain transfers and conveyances; to make uniform the law of fraudulent transfers; and to repeal acts and parts of acts," by amending sections 1, 4, and 9 (MCL 566.31, 566.34, and 566.39), section 1 as amended by 2009 PA 44.

The People of the State of Michigan enact:

<< MI ST 566.31 >>

M.C.L.A. § 566.31

Sec. 1. As used in this act:

(a) "Affiliate" means 1 or more of the following:

(i) A person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole discretionary power to vote the securities.

(B) Solely to secure a debt, if the person has not exercised the power to vote.

(ii) A corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole power to vote the securities.

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote.

(iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor.

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(iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(b) "Asset" means property of a debtor-\*\*\*. Asset does not include any of the following:

(i) Property to the extent it is encumbered by a valid lien.

(ii) Property to the extent it is generally exempt under nonbankruptcy law.

(iii) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant.

(c) "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.

(d) "Creditor" means a person who has a claim.

(e) "Debt" means liability on a claim.

(f) "Debtor" means a person who is liable on a claim.

(g) "Insider" includes all of the following:

(i) If the debtor is an individual, all of the following:

(A) A relative of the debtor or of a general partner of the debtor.

(B) A partnership in which the debtor is a general partner.

(C) A general partner in a partnership described in sub-subparagraph (B).

(D) A corporation of which the debtor is a director, officer, or person in control.

(ii) If the debtor is a corporation, all of the following:

(A) A director of the debtor.

(B) An officer of the debtor.

(C) A person in control of the debtor.

(D) A partnership in which the debtor is a general partner.

(E) A general partner in a partnership described in sub-subparagraph (D).

(F) A relative of a general partner, director, officer, or person in control of the debtor.

(iii) If the debtor is a partnership, all of the following:

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- (A) A general partner in the debtor.
- (B) A relative of a general partner in, a general partner of, or a person in control of the debtor.
- (C) Another partnership in which the debtor is a general partner.
- (D) A general partner in a partnership described in sub-subparagraph (C).
- (E) A person in control of the debtor.
- (iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.
- (v) A managing agent of the debtor.
- (h) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.
- (i) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.
- (j) "Property" means anything that may be the subject of ownership.
- (k) "Qualified disposition" means that term as defined in section 2 of the qualified dispositions in trust act.
- (l) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.
- (m) "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. Transfer includes payment of money, release, lease, and creation of a lien or other encumbrance. Transfer does not include any of the following:
  - (i) The lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a third party. As used in this subparagraph, "donee" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.
  - (ii) The disposing of or parting with an asset or interest in an asset held in trust to the person who created the trust if all of the following apply:
    - (A) The trust is an irrevocable trust for the benefit of third parties.
    - (B) The trust is a grantor trust with regard to the person for income tax purposes ~~\*\*\*~~ under sections 671 to 679 of the internal revenue code of 1986, 26 USC 671 to 679.
    - (C) The trustee has the discretionary authority to reimburse or advance trust property to the person for taxes concerning income attributable to the trust property.

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(D) The disposing of or parting with the asset or interest in the asset is the exercise by the trustee of the discretionary authority described in sub-subparagraph (C).

(n) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

<< MI ST 566.34 >>

M.C.L.A. § 566.34

Sec. 4. (1) ~~\*\*\*~~ Except as otherwise provided in subsection (3), 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) or (3), 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.

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

(3) A qualified disposition is fraudulent as to the creditor whose claim arose after the qualified disposition only if the qualified disposition was made with actual intent to hinder, delay, or defraud any creditor of the debtor.

<< MI ST 566.39 >>

**M.C.L.A. § 566.39**

Sec. 9. A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:

(a) ~~\*\*\*~~ Except as otherwise provided in subdivision (c), sections 4(1)(a) and (b) and 5(1), within the time ~~\*\*\*~~ provided in section 5813 or 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

(b) ~~\*\*\*~~ Except as otherwise provided in subdivision (c), section 5(2), within 1 year after the transfer was made or the obligation was incurred.

(c) Sections 4 and 5, with respect to a qualified disposition, the time provided in section 5 of the qualified dispositions in trust act.

<< Note: MI ST 566.31 >>

**M.C.L.A. § 566.31 Note**

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

<< Note: MI ST 566.31 >>

**M.C.L.A. § 566.31 Note**

Enacting section 2. This amendatory act does not take effect unless Senate Bill No. 597 of the 98th Legislature is enacted into law.

This act is ordered to take immediate effect.

Approved December 8, 2016. Filed December 8, 2016.

Effective date: March 8, 2017.

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Act No. 552  
Public Acts of 2016  
Approved by the Governor  
January 6, 2017  
Filed with the Secretary of State  
January 10, 2017  
EFFECTIVE DATE: April 10, 2017

STATE OF MICHIGAN  
98TH LEGISLATURE  
REGULAR SESSION OF 2016

Introduced by Senator Schuitmaker

ENROLLED SENATE BILL No. 982

AN ACT to amend 1998 PA 434, entitled "An act to define and regulate fraudulent transfers and conveyances; to set aside and modify certain transfers and conveyances; to make uniform the law of fraudulent transfers; and to repeal acts and parts of acts," by amending the title and sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 (MCL 566.31, 566.32, 566.33, 566.34, 566.35, 566.36, 566.37, 566.38, 566.39, 566.40, 566.41, 566.42, and 566.43), sections 1, 4, and 9 as amended by 2016 PA 331 and section 8 as amended by 2000 PA 362, and by adding sections 14 and 15.

*The People of the State of Michigan enact:*

TITLE

An act to provide for the setting aside and modification of certain transfers, conveyances, and obligations; to make uniform the law of fraudulent transfers; and to provide remedies.

Sec. 1. As used in this act:

(a) "Affiliate" means a person that is 1 or more of the following:

(i) A person that directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person that holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole discretionary power to vote the securities.

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote.

(ii) A corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person that directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person that holds the securities in either of the following circumstances:

(A) As a fiduciary or agent without sole discretionary power to vote the securities.

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote.

(iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor:

(iv) A person that operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(b) "Asset" means property of a debtor. Asset does not include any of the following:

(i) Property to the extent it is encumbered by a valid lien.

(ii) Property to the extent it is generally exempt under nonbankruptcy law.

(iii) An interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only 1 tenant.

(254)

(c) "Claim", except as used in "claim for relief", 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.

(d) "Creditor" means a person that has a claim.

(e) "Debt" means liability on a claim.

(f) "Debtor" means a person that is liable on a claim.

(g) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(h) "Insider" includes all of the following:

(i) If the debtor is an individual, all of the following:

(A) A relative of the debtor or of a general partner of the debtor.

(B) A partnership in which the debtor is a general partner.

(C) A general partner in a partnership described in sub-subparagraph (B).

(D) A corporation of which the debtor is a director, officer, or person in control.

(ii) If the debtor is a corporation, all of the following:

(A) A director of the debtor.

(B) An officer of the debtor.

(C) A person in control of the debtor.

(D) A partnership in which the debtor is a general partner.

(E) A general partner in a partnership described in sub-subparagraph (D).

(F) A relative of a general partner, director, officer, or person in control of the debtor.

(iii) If the debtor is a partnership, all of the following:

(A) A general partner in the debtor.

(B) A relative of a general partner in, a general partner of, or a person in control of the debtor.

(C) Another partnership in which the debtor is a general partner.

(D) A general partner in a partnership described in sub-subparagraph (C).

(E) A person in control of the debtor.

(iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.

(v) A managing agent of the debtor.

(i) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(j) "Organization" means a person other than an individual.

(k) "Person" means an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(l) "Property" means anything that may be the subject of ownership.

(m) "Qualified disposition" means that term as defined in section 2 of the qualified dispositions in trust act.

(n) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(o) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(p) "Sign" means to do any of the following with present intent to authenticate or adopt a record:

(i) Execute or adopt a tangible symbol.

(ii) Attach to or logically associate with the record an electronic symbol, sound, or process.

(q) "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. Transfer includes payment of money, release, lease, license, and creation of a lien or other encumbrance. Transfer does not include any of the following:

(i) The lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a third party. As used in this subparagraph, "donee" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.

(ii) The disposing of or parting with an asset or interest in an asset held in trust to the person who created the trust if all of the following apply:

(A) The trust is an irrevocable trust for the benefit of third parties.



(B) The trust is a grantor trust with regard to the person for income tax purposes under sections 671 to 679 of the internal revenue code of 1986, 26 USC 671 to 679.

(C) The trustee has the discretionary authority to reimburse or advance trust property to the person for taxes concerning income attributable to the trust property.

(D) The disposing of or parting with the asset or interest in the asset is the exercise by the trustee of the discretionary authority described in sub-subparagraph (C).

(r) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Sec. 2. (1) A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets.

(2) A debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

(3) As used in this section:

(a) Assets do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this act.

(b) Debts do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

Sec. 3. (1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) For the purposes of section 4(1)(b) and section 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

Sec. 4. (1) Except as otherwise provided in subsection (4), a transfer made or obligation incurred by a debtor is voidable 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 circumstances:

(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 the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(2) In determining actual intent under subsection (1)(a) or (4), 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 that transferred the assets to an insider of the debtor.

(3) A creditor making a claim for relief under subsection (1) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

(4) A qualified disposition is fraudulent as to the creditor whose claim arose after the qualified disposition only if the qualified disposition was made with actual intent to hinder, delay, or defraud any creditor of the debtor.

Sec. 5. (1) A transfer made or obligation incurred by a debtor is voidable 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 voidable 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.

(3) Subject to section 2(2), a creditor making a claim for relief under subsection (1) or (2) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Sec. 6. (1) A transfer is made under this act when 1 of the following occurs:

(a) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against which applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.

(b) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this act that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in subsection (1) and the transfer is not so perfected before the commencement of an action for relief under this act, the transfer is considered made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in subsection (1), the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made under this act until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred under this act if 1 of the following occurs:

(a) If oral, when it becomes effective between the parties.

(b) If evidenced by a record, when the record signed by the obligor is delivered to or for the benefit of the obligee.

Sec. 7. (1) In an action for relief against a transfer or obligation under this act, a creditor, subject to the limitations in section 8, may obtain 1 or more of the following:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee if available under applicable law.

(c) Subject to applicable principles of equity and in accordance with applicable court rules and statutes, 1 or more of the following:

(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property.

(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee.

(iii) Any other relief the court determines appropriate.

(2) 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.

Sec. 8. (1) A transfer or obligation is not voidable under section 4(1)(a) against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.

(2) To the extent a transfer is avoidable in an action by a creditor under section 7(1)(a), all of the following rules apply:

(a) Except as otherwise provided in this section, the creditor may recover a judgment 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. The judgment may be entered against either of the following:

(i) The first transferee of the asset or the person for whose benefit the transfer was made.

(ii) An immediate or mediate transferee of the first transferee, other than either of the following:

(A) A good-faith transferee who took for value.

(B) An immediate or mediate good-faith transferee of a person described in sub-subparagraph (A).

(b) Recovery pursuant to section 7(1)(a) or (2) of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in subdivision (a)(i) or (ii).

(3) If the judgment under subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer; subject to adjustment as the equities may require.

(4) Notwithstanding the voidability of a transfer or an obligation under this act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to 1 or more of the following:

- (a) A lien on or a right to retain an interest in the asset transferred.
- (b) Enforcement of an obligation incurred.
- (c) A reduction in the amount of the liability on the judgment.
- (5) A transfer is not voidable under section 4(1)(b) or section 5 if the transfer results from either of the following:
- (a) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

(b) Enforcement of a security interest in compliance with article 9 of the uniform commercial code, other than an acceptance of collateral in full or partial satisfaction of the obligation it secures.

(6) A transfer is not voidable under section 5(2) in 1 or more of the following circumstances:

(a) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, except to the extent the new value was secured by a valid lien.

(b) If made in the ordinary course of business or financial affairs of the debtor and the insider.

(c) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

(7) The following rules determine the burden of proving matters referred to in this section:

(a) A party that seeks to invoke subsection (1), (4), (5), or (6) has the burden of proving the applicability of that subsection.

(b) Except as otherwise provided in subdivisions (c) and (d), the creditor has the burden of proving each applicable element of subsection (2) or (3).

(c) The transferee has the burden of proving the applicability to the transferee of subsection (2)(a)(ii)(A) or (B).

(d) A party that seeks adjustment under subsection (3) has the burden of proving the adjustment.

(8) The standard of proof required to establish matters referred to in this section is preponderance of the evidence.

Sec. 9. A claim for relief with respect to a transfer or obligation under this act is extinguished unless action is brought within 1 or more of the following time periods:

(a) Except as otherwise provided in subdivision (c), if the claim for relief is under section 4(1)(a) or (b) or 5(1), within the time provided in section 5813 or 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

(b) Except as otherwise provided in subdivision (c), if the claim for relief is under section 5(2), within 1 year after the transfer was made or the obligation was incurred.

(c) If the claim for relief is under section 4 or 5, with respect to a qualified disposition, the time provided in section 5 of the qualified dispositions in trust act.

Sec. 10. (1) In this section, the following rules determine a debtor's location:

(a) A debtor who is an individual is located at the individual's principal residence.

(b) A debtor that is an organization and has only 1 place of business is located at its place of business.

(c) A debtor that is an organization and has more than 1 place of business is located at its chief executive office.

(2) A claim for relief in the nature of a claim for relief under this act is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

Sec. 11. (1) As used in this section:

(a) "Protected series" means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in subdivision (b).

(b) "Series organization" means an organization that, pursuant to the law under which it is organized, has the following characteristics:

(i) The organic record of the organization provides for creation by the organization of 1 or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of or associated with the protected series.

(ii) Debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only, and not against the property of or associated with the organization or other protected series of the organization.

(iii) Debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

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(2) A series organization and each protected series of the organization is a separate person for purposes of this act, even if for other purposes a protected series is not a person separate from the organization or other protected series of the organization.

Sec. 12. Unless displaced by the provisions of this act, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement the provisions of this act.

Sec. 13. This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among the states enacting it.

Sec. 14. This act modifies, limits, or supersedes the electronic signatures in the global and national commerce act, 15 USC 7001 to 7031, but does not modify, limit, or supersede 15 USC 7001(c) or authorize electronic delivery of any of the notices described in 15 USC 7003(b).

Sec. 15. (1) This act, which was formerly known and cited as the "uniform fraudulent transfer act", shall be known and may be cited as the "uniform voidable transactions act".

(2) All of the following apply to sections 1 to 13 as amended, and to section 14 and this section as added, by the amendatory act that added this section:

(a) The sections as amended or added apply to a transfer made or obligation incurred on or after the effective date of the amendatory act that added this section.

(b) The sections as amended or added do not apply to a transfer made or obligation incurred before the effective date of the amendatory act that added this section.

(c) The sections as amended or added do not apply to a right of action that accrued before the effective date of the amendatory act that added this section.

(d) For purposes of this subsection, a transfer is made and an obligation is incurred at the time provided in section 6.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 98th Legislature are enacted into law:

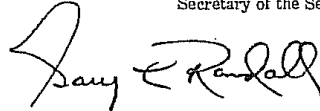
(a) Senate Bill No. 983.

(b) Senate Bill No. 984.

(c) Senate Bill No. 985.



Secretary of the Senate



Clerk of the House of Representatives

Approved .....

.....  
Governor