

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

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

Plaintiff/Appellee,

Supreme Court
File No. 133098

v

JEFF EDWARD TITUS,

Court of Appeals
No. 261968

Defendant/Appellee/,

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

and

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

Appellant.

Attorney for Plaintiff/Appellee
H. van den Berg Hatch (P14733)
Butler, Durham & Toweson – PLLC
202 N. Riverview Drive
Parchment, MI 49004
(269) 349-7686

Attorneys for Appellant
Russell A. Kreis (P16240)
James D. Lance (P68202)
Michael J. Toth (P36310)
Kreis, Enderle, Callander & Hudgins, P.C.
One Moorsbridge, P.O. Box 4010
Kalamazoo, MI 49003-4010
(269) 324-3000

Attorney for Defendant/Appellee
Randall L. Pomeroy (P43930)
Law Offices of Randy Pomeroy
7826 Ashton Woods Drive
Portage, MI 49024
(269) 207-1352

REPLY BRIEF OF APPELLANT JULIE L. SWABASH, f/k/a JULIE L. TITUS

ORAL ARGUMENT REQUESTED

Kreis
Enderle
Callander
Hudgins

Attorneys at Law
West Michigan Ave.
Battle Creek, MI
49017

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iv
Summary of Argument	1
Re-Statement of Facts	3
Argument I	4
V. ESTES FAILED TO FILE AN APPEAL FOR THE DENIAL OF HER MOTION TO INTERVENE IN A DIVORCE ACTION, THUS SHE WAIVED HER RIGHT TO APPEAL.	
Argument II	6
I. A LITERAL INTERPRETATION OF THE UFTA TO DIVORCE PRODUCES ABSURD RESULTS, AND THE POSITION THAT BECAUSE SOME STATES HAVE APPLIED THE UFTA TO DIVORCE IS NOT A VALID REASON FOR THIS STATE TO DO THE SAME, AS THERE COULD BE A NUMBER OF UNDERLYING REASONS WHY OTHER STATES DECIDED TO APPLY THE UFTA TO DIVORCE.	
Argument II	7
II. A JUDGEMENT OF DIVORCE IS NOT A TRANSFER BUT A COURT'S FINAL DETERMINATION OF THE RIGHTS AND OBLIGATIONS OF THE PARTIES IN A CASE.	
Argument II	9
VI. ESTES' FAILURE TO BRIEF AN ISSUE ON HER APPEAL CONSTITUTED AN ABANDONMENT OF THAT ISSUE ON APPEAL PURSUANT TO MCR 7.212(C)(5).	
Conclusion and Relief Requested	10

Kreis
Enderle
Callander
Hudgins

Attorneys at Law
101 West Michigan Ave.
Battle Creek, MI
49017

TABLE OF AUTHORITIES

Michigan Supreme Court Cases

Curry v Detroit, 394 Mich 327
231 NW2d 57 (1975) 5

Fox v Bd of Regents, 375 Mich 238;
134 NW 2d 146 (1965) 5

Gose v Monroe Auto Equipment Co, 409 Mich 147;
294 NW2d 165 (1980) 5

Gursten v Kenney, 375 Mich 330;
134 NW2d 764 (1965) 5

Mitcham v Detroit, 355 Mich 182;
94 NW2d 388 (1959) 9

Napier v Jacobs, 429 Mich 222;
414 NW2d 862 (1987) 9

People v Carter, 462 Mich 206;
612 NW2d 144 (2000) 5

People of the Mich. v Willie Henry Garrett, 450 Mich. 927;
543 N.W.2d 318 (2007)..... 9

Michigan Court of Appeal Cases

Binben v Continental Cas Co, 9 Mich App 97;
155 NW2d 883 (1967) 7

*City of Grand Rapids v Grand Rapids Employees Assn
of Public Administrators*, 235 Mich App 398;
597 NW2d 284 (1999) 3

Conlon v Treasurer, 23 Mich App 646;
179 NW2d 208 (1970) 5

Estes v Titus, 273 Mich App 356;
731 N.W.2d 119 (2006) 2

Kohn v Ford Motor Co, 151 Mich App 300;
390 NW2d 709 (1986) 5

Kreis
Enderle
Callander
Hudgins

Attorneys at Law
100 West Michigan Ave.
Battle Creek, MI
49017

<i>Krueger v Krueger</i> , 88 Mich App 722; 278 NW2d 514 (1979)	7
<i>People v Carter</i> , 462 Mich App 206; 612 NW2d 144 (2000)	3
<i>Sprague v Buhagiar</i> , 213 Mich App 310; 539 NW2d 587 (1995)	5
<i>Sumpter v Kosinski</i> 165 Mich App 784; 419 NW2d 463 (1988) (<i>app den</i> 430 Mich 887(1988)).....	4
<i>White v Michigan Life Ins Co</i> , 43 Mich App 653; 204 NW2d 772 (1972)	6, 7
<u>Michigan Statutes</u>	
MCL 566.31(g)	6
MCL 566.31(l)	8
MCL 566.34.....	6
<u>Michigan Court Rules</u>	
MCR 2.209(A)(3)	4
MCR 7.202(6).....	8
<u>Other Authorities</u>	
Blacks Law Dictionary (7th Edition).....	2, 8

I. SUMMARY OF ARGUMENT

It is understandable that the crux of Estes' arguments is emotion, but the underlying murder of her husband, while tragic, quite frankly, should not impact the Court's analysis of the fundamental issues before it.¹ Rather, the Court, in addressing the issues, must resolve two essential details: (1) Estes' failure to appeal her denial of intervention by the divorce court, which the Michigan Court Rules and case law mandate; and (2) the Uniform Fraudulent Transfer Act, MCL 566.31 et. seq. ("UFTA"), never been applied to divorce judgments.

The Court requested briefing on five core issues: (1) whether a Judgment of Divorce is subject to judicial review for purposes of a claim under the UFTA; (2) whether a division of marital assets pursuant to a Judgment of Divorce is a transfer subject to the UFTA; (3) whether and under what circumstances a division of marital assets under a Judgment of Divorce can be deemed fraudulent; (4) whether a judgment debtor can attach marital property for the debt of one of the spouses; and (5) the significance, if any, of the plaintiff's failure to appeal the denial of the motion to intervene in the divorce action.

Although determining whether the UFTA applies to a Judgment of Divorce is an issue of first impression in this state, and therefore, a more attractive and tempting issue to analyze first, this Court should first determine the significance of Estes' failure to appeal the denial of her motion to intervene in the divorce action.

According to well established case law and the Michigan Court Rules, Estes' failure to appeal waived her right to raise the issue of the UFTA. And, the subsequent Court of Appeals decision which allowed Estes' action to continue resulted in an

¹ For the record, all parties to these underlying actions have suffered, including Swabash and her children. Swabash had no idea that she was living with a murderer, who she divorced eventually, thus she lost husband and her children lost a father.

improper collateral attack, which, as courts in this state have held is improper with regards to Judgments of divorce.

Nonetheless, if this Court finds it necessary to clarify the law with respect to the UFTA and divorce judgments, Swabash contends that a literal interpretation of the UFTA statute and the resulting application to divorce proceedings would produce absurd results and unintended consequences that the Michigan Legislature clearly did not intend. Divorce courts are armed with a number of statutory duties, and must embark on a careful balancing analysis using established case law when dividing property between the divorcing couples and authorizing a Judgment of Divorce. If this Court upholds *Estes v Titus*, 273 Mich App 356; 731 N.W.2d 119 (2006), the statutory and long standing case law precedent that divorce courts relied on for guidance would become obsolete and all but meaningless to divorce proceedings. Third party creditors to divorce, if armed with the UFTA, could invade or at the very minimum, question, every property division or divorce settlement in this state by calling into question the rational and legitimacy of the parties involved (including the lawyers), the divorce courts, and appellate courts.

It would be irresponsible for this state's highest Court to hold that the UFTA applies to divorce because other states, including Ohio, have adopted a version of the UFTA that appears to mimic Michigan's UFTA. Although Ohio's UFTA language is identical to Michigan's UFTA language, the reasons behind the Ohio's Legislature in ratifying the UFTA could run the gamut of possibilities. In fact, states having different applications of similar laws embodies the principles of federalism, and this is no more apparent then Michigan having yet to apply the UFTA to divorce, unlike Ohio.

A Judgment of Divorce is not a transfer. Rather, Blacks Law Dictionary, (7th

Kreis
Enderle
allander
Hudgins

attorneys at Law
100 East Michigan Ave
Battle Creek, MI
49017

Edition) defines judgment as “a court’s final determination of the rights and obligations of the parties in a case.” Furthermore, the UFTA’s definition of transfer is excessively overbroad, to a point that a literal interpretation and application encompasses circumstances that clearly the legislature did not intend.

Finally, Estes failed to raise an issue in her brief to the Court of Appeals, yet, the Court of Appeals, *sua sponte*, addressed it in its’ decision. The Court of Appeals decision defied well-established case precedent. The Court of Appeals has regularly found that review of an issue not raised in the statement of questions on appeal is inappropriate. *City of Grand Rapids v Grand Rapids Employees Assn of Public Administrators*, 235 Mich App 398, 409-10; 597 NW2d 284, 289 (1999). As a result of Estes’ failure to raise the issue in her appeal, she abandoned said issue.

In sum, this Court should overturn the Court of Appeals decision because (1) Estes failed to appeal her denial of her motion to intervene; (2) the application of the UFTA to divorce compromises the divorce court’s statutory created authority, as well as upsets the analysis in established in case law for dividing marital property because (a) all divorces involve insiders and the UFTA presumes fraud to all transfers to insiders, (b) a Judgment of Divorce is not a transfer, and (c) the UFTA’s definition of transfer which includes “mode” is so overwhelming overbroad that it renders any loss of interest in an asset as a transfer, i.e. by definition, transfers could include theft and destruction; and lastly (3) Estes failed to brief the issue of adding Swabash as a party on her appeal, thus, Estes abandoned this issue.

II. RE-STATEMENT OF FACTS

The only relevant facts to this case are as follows:

Kreis
Enderle
Callander
Hudgins

Attorneys at Law
151 East Michigan Ave
Battle Creek, MI
49017

1. Titus' wife, Appellant Julie L. Swabash f/k/a Julie L. Titus ("Swabash"), filed for divorce on November 11, 2002. (Complaint for Divorce: pp. 1-4, a6-a9).
2. Titus and Swabash entered into a property settlement on December 28, 2002, before receiving a final Judgment of Divorce which entered March 10, 2003. (Judgment of Divorce: pp. 1-12, a10-a21).
3. Estes attempted to intervene in the divorce proceedings in a motion filed March 2, 2003. (Motion to Intervene: pp.1-4, a22-a25).
4. That Motion to Intervene was denied in an opinion by Judge Conlon of the Kalamazoo County Circuit Court Family Division on May 19, 2003 (Divorce Motion Opinion: pp. 1-7, a26-a32).
5. Estes chose not to appeal the denial of the Motion to Intervene.
6. Estes filed an application for leave to appeal in the Court of Appeals on July 21, 2005 with respect to her wrongful death action under the auspices of the UFTA.
7. Estes failed to raise in her brief the issue of whether Swabash could be added as a party in the wrongful death action.

III. ARGUMENT

V. ESTES FAILED TO FILE AN APPEAL FOR THE DENIAL OF HER MOTION TO INTERVENE IN A DIVORCE ACTION, THUS SHE WAIVED HER RIGHT TO APPEAL.

Michigan Court Rule 2.209(A)(3) permits a party the right to intervene in an action. If such a motion is denied it may be appealed under MCR 7.203(A) or (B)(Appeal of Right or Appeal by Leave). The right of intervention should be liberally construed to allow intervention when the applicant's interest may be inadequately represented. *Sumpter v Kosinski* 165 Mich App 784, 419 NW2d 463 (1988)(app den 430

Kreis
Enderle
Callander
Hudgins

Attorneys at Law
 West Michigan Ave.
 Battle Creek, MI
 49017

Mich 887(1988)). But, a party waives its right to appeal when it fails to dispute the decision of the trial court. *Carter*, at 462 Mich 220 (party approved the trial court's decision and therefore right to appeal decision was waived); *Kohn v Ford Motor Co*, 151 Mich App 300, 310; 390 NW2d 709 (1986)(party conceded to a verdict on a claim, and therefore appeal is waived).

Where an application to appeal is not filed, the Court of Appeals is without jurisdiction to entertain the appeal. *Conlon v Treasurer*, 23 Mich App 646, 647; 179 NW2d 208 (1970). "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox v Board of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965). Michigan law bars "not only claims actually litigated in the prior action, but every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not. *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995)(citing *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160; 294 NW2d 165 (1980); *Curry v Detroit*, 394 Mich 327, 332; 231 NW2d 57 (1975); *Gursten v Kenney*, 375 Mich 330, 333-335; 134 NW2d 764 (1965)).

In the instant case, it is undisputed that Estes failed to appeal her denial of her Motion to Intervene. Furthermore, the Divorce Court denied this motion because it found no "fraud or attempt to defraud is at foot in this divorce case." (Courts Opinion: p4, a29).

Estes waived her right when she failed to appeal, and because case law precedent is firm as to the consequences of failing to assert one's rights, it would be a mistake if this Court rewarded Estes as the Court of Appeals found fit to. As a matter of fact, if this

Court allows Estes to maintain her claim against Swabash, this Court would be allowing a third party to collaterally attack a divorce judgment, which is not allowed. *White v. Michigan Life Ins. Co.*, 43 Mich. App. 653, 657, 204 N.W.2d 772, 775 (1972).

I. A LITERAL INTERPRETATION OF THE UFTA TO DIVORCE PRODUCES ABSURD RESULTS, AND THE POSITION THAT BECAUSE SOME STATES HAVE APPLIED THE UFTA TO DIVORCE IS NOT A VALID REASON FOR THIS STATE TO DO THE SAME, AS THERE COULD BE A NUMBER OF UNDERLYING REASONS WHY OTHER STATES DECIDED TO APPLY THE UFTA TO DIVORCE.

MCL 566.34 states in pertinent part:

“(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:

(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.²”

Divorce only involves insiders, and the UFTA presumes fraud when transfers occur between insiders. A literal application of the UFTA to divorce then presumes every divorce and subsequent property division and transfer is fraud upon the creditor. Not only do the parties in the divorce have the burden of proving that the property division was not fraud, but now appellate courts could potentially have to review every divorce property settlement to confirm. In an atmosphere where the judiciary is already operating under stressful conditions and there are already questionable state resources available, this additional burden could be catastrophic.

The unique nature of divorce, the court’s authority in dividing property and the settlement agreements, makes the UFTA wholly inapplicable to divorce proceedings.

² “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.” MCL 566.31(g).

The property division in a divorce is a complicated process and the court is given broad statutory authority to ensure that the parties reach a property division that is equitable. The definition of insider presumes fraud for transfers to insiders. As such, this definition could include transfers in divorce proceedings where creditors may be allowed to interfere with an extremely complicated process and will invariably upset the delicate balance between the parties in a divorce and the State's role as the final arbitrators.

Unlike the Courts in other jurisdictions, Michigan Courts universally ruled that divorce settlements may not be attacked through a third-party claiming in a separate underlying action. *Binben v Continental Cas Co*, 9 Mich App 97; 155 NW2d 883 (1967); *White*, 43 Mich App 653; *Krueger v Krueger*, 88 Mich App 722; 278 NW2d 514 (1979).

Estes' position is that because other states have applied the UFTA to divorces, Michigan must follow suit. This position is shortsighted, and fundamentally rejects the principles of federalism. If Estes' position were true, then how can she reconcile the fact that only thirty-eight jurisdictions have adopted some version of the UFTA? Moreover, it is uncertain as to how many of those states have applied the UFTA to divorce. It is known that Michigan has not applied the UFTA to divorce. It would be imprudent if this Court determined that the UFTA applies to divorce because other states have decided to apply it.

Adopting the UFTA to divorce has far reaching policy implications, which the legislature is empowered to address, therefore, this Court should not insert its' policy preferences and exceed its responsibilities.

II. A JUDGEMENT OF DIVORCE IS NOT A TRANSFER BUT A COURT'S FINAL DETERMINATION OF THE RIGHTS AND OBLIGATIONS OF THE PARTIES IN A CASE.

The UFTA defines a transfer very broadly, to include, “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.” MCL 566.31(1).

In contrast, both legal dictionaries and the Michigan Court Rules have specific definitions for judgments. In other words, judgments are unique with respect to judicial proceedings.

Blacks Law Dictionary, (7th Edition) defines judgment as “a court’s final determination of the rights and obligations of the parties in a case.”

MCR 7.202(6) states:

“(6) “final judgment” or “final order” means:

(a) In a civil case,

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,

(ii) an order designated as final under MCR 2.604(B),

(iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,

(iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,

(v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee;”

Also, there is a danger of subjecting every disposition of an asset by using the UFTA’s overly broad definition of transfer. Stated differently, any disposition of interest in an asset is deemed a transfer under the UFTA. Technically, theft, destruction, or even losing an asset is considered a transfer under the UFTA, since the disposition of the property interest would involve a mode. It seems ridiculous that the legislature intended that theft, destruction or losing an asset to fall within the meaning of transfer. And

although very likely the parties in a divorce can prove that a transfer through theft or destruction was not fraud, a creditor could nevertheless, raise the issue on an appeal, thus prolonging and extending the divorce proceedings.

VI. ESTES' FAILURE TO BRIEF AN ISSUE ON HER APPEAL CONSTITUTED AN ABANDONMENT OF THAT ISSUE ON APPEAL PURSUANT TO MCR 7.212(C)(5).

If an appellant fails to include an issue in the questions presented in her brief, the issue is waived and the Court of Appeals should decline to address it. *People of the Mich. v Willie Henry Garrett*, 450 Mich. 927; 543 N.W.2d 318 (2007); Additionally, “failure to brief a question on appeal is tantamount to abandoning it.” *Napier v. Jacobs*, 429 Mich. 222, 233, 414 N.W.2d 862, 866 (1987) (quoting *Lawrence v. Will Darrah & Assocs.*, 445 Mich. 1, 5, 516 N.W.2d 43, 44 (1994)); see also *Mitcham v. Detroit*, 355 Mich. 182, 203, 94 N.W.2d 388, 399 (1959); *Butcher v. Dept. of Treasury*, 425 Mich. 262, 276, 389 N.W.2d 412, 418 (1986).

The rule that a party waives an issue on appeal if the party fails to appeal it is based upon the nature of the adversary process and the need for judicial efficiency. *Napier*, 429 Mich. at 233, 414 N.W.2d at 866. Although an appellate court may review an issue, even when the issue was not preserved, it should do so sparingly only when “some fundamental error would otherwise result in some egregious result” or “to avoid a miscarriage of justice.” *Id.* (a fundamental error or miscarriage of justice could occur, for example, where a criminal defendant faced with imprisonment claims that the evidence at trial was insufficient to support the verdict). Mere loss of money in a civil case is not enough to show a potential fundamental error or miscarriage of justice. *Id.* A contrary rule “would be in patent conflict with our adversary system of civil justice.” *Id.*

In this case, Estes failed to include the denial of her motion to add Swabash as a party to the wrongful death action in her brief on appeal. This failure constituted an abandonment by Estes of the issue on appeal. Nevertheless, the Court of Appeals addressed the issues anyway. The Court of Appeals erred because there was no risk of “fundamental error” or need to “avoid a miscarriage of justice” that would otherwise allow the Court to address the abandoned issue. This Court should reverse it and reinstate the trial court’s ruling to deny Estes’ motion to add Swabash as a party to the wrongful death proceedings.

IV. CONCLUSION AND RELIEF REQUESTED

The Court of Appeals ignored Estes’ myriad of procedural errors which included her failure to appeal the denial of her Motion to Intervene (i.e. waiver), and her failure to brief an issue on appeal (i.e. abandoned), and instead, awarded her with a judgment that not only punished Swabash, but has grave consequences to every divorce in this state. The Court of Appeals should have simply affirmed the divorce courts ruling because of Estes procedural failure.

This Court has an opportunity to remedy the Court of Appeals errors by reinforcing the importance of following established court procedures. Also, this Court has an opportunity to correct the Court of Appeals egregious attempt to legislate from the bench by determining that the UFTA does not apply to Judgments of Divorce. By applying the doctrine of absurd results, this Court can reconcile the apparent legislative inconsistencies.

For the reasons stated above, this Court should correct the flaws in the Court of Appeals’ decision on this principle of major significance to the State’s jurisprudence.

Kreis
Enderle
Callander
Hudgins

Attorneys at Law
101 West Michigan Ave.
Battle Creek, MI
49017

Respectfully submitted,

KREIS, ENDERLE, CALLANDER &
HUDGINS, P.C.

Dated: September 7, 2007.

By: 

Russell A. Kreis (P16240)

James D. Lance (P68202)

Michael J. Toth (P36310)

Attorneys for Appellant

One Moorsbridge

P.O. Box 4010

Kalamazoo, MI 49003-4010

Ph: 269-324-3000

Kreis
Enderle
Callander
Hudgins

Attorneys at Law
West Michigan Ave.
Battle Creek, MI
49017