

**LAKE COUNTY BAR ASSOCIATION  
DEBTOR CREDITOR RIGHTS COMMITTEE  
ANNUAL SEMINAR**

**FUNDAMENTALS OF THE ILLINOIS  
UNIFORM FRAUDULENT TRANSFER ACT  
("IUFTA")**

**(OCTOBER 13, 2014)**

**PRESENTED BY:**

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## LAKE COUNTY BAR ASSOCIATION DEBTOR CREDITOR RIGHTS COMMITTEE SEMINAR

### Attorney Biographies

**David J. Schwab.** Since 1990, Mr. Schwab has developed a law practice with a focus in bankruptcy and creditor/debtor rights, business planning and restructuring, and commercial litigation. He and his law firm, Ralph, Schwab & Schiever, Chtd., are recognized by Martindale Hubbell's *Bar of Preeminent Lawyers* in the areas of Bankruptcy Law, Business Law, and Commercial Litigation. As a trained CPA and practicing attorney, Mr. Schwab is uniquely qualified to assist financially troubled companies, analyze their legal options, and assist them toward a successful resolution of their legal/financial issues.

Mr. Schwab received his law degree from the DePaul University College of Law. While in law school, he was an executive editor of the DePaul Business Law Journal. He also served as an "extern" for the Hon. Robert E. Ginsberg, United States Bankruptcy Judge. In that position he researched the law and drafted legal opinions for cases being heard by Judge Ginsberg.

Prior to law school, Mr. Schwab worked as a business consultant for Coopers & Lybrand (now PriceWaterhouseCoopers). He obtained his undergraduate degree in accounting from Indiana University.

Recognized by his peers as an experienced lawyer in bankruptcy and financial workouts, Mr. Schwab has served as a lecturer for the Lake County Bar Association (Bankruptcy Committee), the Association of Illinois Attorney-Certified Public Accountants, the Milwaukee County Bar Association and the Federal Reserve Bank of Chicago. He is a co-author of "Assignment of Rents in Bankruptcy" for the Commercial Law League of America (Seminar in Advanced Bankruptcy Practice). Mr. Schwab has served as past President of Illinois Association of Illinois Attorney-Certified Public Accountants, a member of the Board of Directors of Northwest Community Bank, and has served on the DePaul University College of Law Alumni Board. He is also an active member of the American Bankruptcy Institute and the Chicago Bar Association Bankruptcy Committee.

Mr. Schwab is admitted to practice in the State of Illinois and the U.S. Bankruptcy and U.S. District Courts for the Northern District of Illinois.

**Sharanya Gururajan** received her law degree from the University of Illinois College of Law, Urbana-Champaign, IL, cum laude in 2005. She received her undergraduate degree in Economics from the University of Illinois at Chicago, IL where she graduated with honors.

Ms. Gururajan has represented numerous debtors in bankruptcy court along with representing a Chapter 7 Trustee on routine and contested matters involving the liquidation of a bankruptcy estate. She has authored articles for the American Bankruptcy Institute on “Stripping Off a Wholly Unsecured Mortgage Lien in Chapter 7: Revisiting *Dewsnup* and *Nobelman*” and co-authored an article entitled "An Overview of the Form 22 Vehicle Operation Expense: Allowance or Cap on Actual Expense".

Ms. Gururajan has also been involved in mortgage foreclosure defense litigation in state and federal court along with contributing to the research and drafting of an article for the Lake County Docket entitled "Fundamentals of Illinois Mortgage Foreclosure Defense".

Ms. Gururajan is admitted to practice in the State of Illinois and the U.S. Bankruptcy and U.S. District Courts for the Northern District of Illinois. Ms. Gururajan also serves as the Vice-Chair for the Lake County Bar Association Debtor Creditor Rights Committee. She enjoys singing and giving stage performances along with her South Asian pop music band “Chicago Friends Melody”.

## **UNIFORM FRAUDULENT TRANSFER ACT – SECTION 5(a)(1) (740 ILCS 160/5)**

§ 5. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim ***arose before or after*** (emphasis added) the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

***Actual Fraud:*** (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

***Constructive Fraud:*** (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) 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; or

(B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

### **SECTION 5(b) – Badges of fraud to determine if there was actual intent to defraud under §5(a)(1)**

§ 5(b) In determining actual intent under paragraph (1) of subsection (a), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) 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;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

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

**UNIFORM FRAUDULENT TRANSFER ACT – SECTION 6 (740 ILCS §160/6)**

**Constructive Fraud** § 6. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose ***claim arose before*** (emphasis added) 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.

(b) 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.

**WHAT ARE THE KEY DIFFERENCES BETWEEN §160/5 AND 160/6**

<b>Class</b>	<b>Type of Fraudulent Conveyance</b>	<b>Chronology Type of Fraudulent Conveyance</b>	<b>UFTA Citation</b>	<b>Showing Required by Claimant</b>
1.	Actual (fraud in fact)	Plaintiff becomes creditor <b>either before or after</b> alleged fraudulent conveyance	740 ILCS 160/5(a)(1)	Actual transferor intent to defraud creditors
2.	Constructive (fraud in law)	Plaintiff becomes creditor <b>either before or after</b> alleged fraudulent conveyance	740 ILCS 160/5(a)(2)	Asset transfer for less than reasonable equivalent value and <i>other facts</i>
3.	Constructive (fraud in law)	Plaintiff was creditor <b>before</b> fraudulent conveyance	740 ILCS 160/6(a)	Asset transfer for less than reasonable equivalent value and a showing of insolvency
4.	Constructive (fraud in law)	Plaintiff was creditor <b>before</b> fraudulent conveyance	740 ILCS 106/6(b)	Asset transfer to an insider for an antecedent debt, debtor was insolvent at the time and the insider had reasonable cause to believe that the debtor was insolvent.

## ACTUAL FRAUD UNDER SECTION 5(a) OF THE UFTA

1. Referred to as “fraud in fact” or “actual fraud”.
2. Movant has the burden of proving, by clear and convincing evidence, all elements of actual fraud under the Illinois Uniform Fraudulent Transfer Act (UFTA). *In re Zeigler*, 320 B.R. 362 (Bankr. N.D. Ill. 2005). *Krol v. Wilcek (In re H. King & Assocs.)*, 295 B.R. 246, 287 (Bankr.N.D.Ill.2003) (citing *Martin*, 145 B.R. at 946; *Ray v. Winter*, 67 Ill.2d 296, 304, 10 Ill.Dec. 225, 367 N.E.2d 678, 682 (1977)); *McHugh v. Anderson (In re McHugh)*, Nos. 02 B 10425, 02 A 00254, 2003 WL 21018601 at \*6 (Bankr.N.D.Ill. May 1, 2003); *Helms v. Roti (In re Roti)*, 271 B.R. 281, 301 (Bankr.N.D.Ill.2002), *aff'd*, No. 02 C 0925, 2003 WL 1089363 (N.D.Ill. Mar.11, 2003). In *Baldi v. Lynch (In re McCook Metals, L.L.C.)*, 319 B.R. 570 (Bankr.N.D.Ill.2005).
3. For purposes of determining whether a transfer is made with actual intent to defraud, the Illinois Uniform Fraudulent Transfer Act (UFTA) sets forth several factors, also known as “badges of fraud,” from which an inference of fraudulent intent may be drawn. When “badges of fraud” are present in sufficient number, they may give rise to an inference or presumption of fraud, under the Illinois Uniform Fraudulent Transfer Act (UFTA). 740 ILCS 160/5(b). *In re Zeigler*, 320 B.R. 362 (Bankr. N.D. Ill. 2005)

Note: Under the Federal Rules of Evidence, “a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.” Fed.R.Evid. 301. The presence of seven badges of fraud have been held sufficient to raise a presumption of fraudulent intent. See *Berland v. Mussa (In re Mussa)*, 215 B.R. 158, 170 (Bankr.N.D.Ill.1997); *In re Zeigler*, 320 B.R. 362, 373 (Bankr. N.D. Ill. 2005)

4. **Defense to Actual Fraud Under §5(a)(1):** The IUFTA provides that a transfer is not avoidable under the actual intent provision against a person who took in good faith and for a reasonably equivalent value. 740 ILCS 160/9(a); *Zeigler*, 320 B.R. at 374, *In re Hennings Feed and Crop Care, Inc.*, 365 B.R. 868, 878 (Bankr.C.D.Ill.2007). The transferee has the burden of establishing both good faith and reasonably equivalent value. *In re Spatz*, 222 B.R. 157, 168–69 (N.D.Ill.1998). *In re Schneider*, 417 B.R. 907, 916 (Bankr. N.D. Ill. 2009)
5. To determine solvency on a balance-sheet basis, for purposes of determining “fraud in fact” or “actual fraud” under the Illinois Uniform Fraudulent Transfer Act (UFTA), a snapshot must be taken of a debtor's financial situation at the time of the transfer or shortly after the transfer, and the extant liabilities must be subtracted from the existing assets; for these purposes, debtor's assets do not

include annual income not yet earned. *In re Zeigler*, 320 B.R. 362 (Bankr. N.D. Ill. 2005)

### **CONSTRUCTIVE FRAUD OR FRAUD IN FACT – SECTION 5(a)(2) and SECTION 6**

1. Under the Illinois Uniform Fraudulent Transfer Act (UFTA), the movant has the burden of proving “fraud in law” or “constructive fraud” by a preponderance of the evidence. *In re Zeigler*, 320 B.R. 362 (Bankr. N.D. Ill. 2005).
2. For movant to establish that a conveyance is fraudulent in law, under the Illinois Uniform Fraudulent Transfer Act (UFTA), four elements must be present: (1) debtors made voluntary transfers, (2) at the time of the transfers, debtors had incurred obligations elsewhere, (3) debtors made the transfers without receiving a reasonably equivalent value in exchange for the transfers, and (4) after the transfers, debtors failed to retain sufficient property to pay their indebtedness. S.H.A. 740 ILCS 160/5(a)(2).
3. Under § 5(a)(2) of the UFTA, “fraud in law,” does not require any showing of fraudulent intent. *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1079 (7th Cir.1997). Rather, fraud is presumed if a debtor transfers property for less than adequate value and is thereby unable to meet his obligations. *Daley v. Chang (In re Joy Recovery Tech. Corp.)*, 286 B.R. 54, 73 (Bankr.N.D.Ill.2002). Because of its nature, the conveyance is deemed constructively fraudulent. *Daley v. Chang (In re Joy Recovery Tech. Corp.)*, 257 B.R. 253, 268 (Bankr.N.D.Ill.2001). The movant has the burden of proving fraud in law by a preponderance of the evidence. *Joy Recovery*, 286 B.R. at 73; *Martin*, 145 B.R. at 946. A different standard of proof applies to this theory because intent to defraud is presumed when the elements of constructive fraud are established. *Martin*, 145 B.R. at 946. The distinction between “fraud in fact” and “fraud in law” is derived from whether or not there is any consideration for the conveyance at issue. *Second Nat'l Bank of Robinson v. Jones*, 309 Ill.App. 358, 365, 33 N.E.2d 732, 736 (4th Dist.1941).

**REASONABLE EQUIVALENT VALUE - A CRITICAL ELEMENT TO BE ESTABLISHED IN PROVING ACTUAL OR CONSTRUCTIVE FRAUD**

1. **Actual Fraud:** In determining whether defendant acted with the actual intent to hinder, delay or defraud his or her creditor, whether or not defendant received reasonably equivalent value in exchange for the transfer is one of the badges of fraud that plaintiff may establish in support of actual fraud. See 740 ILCS 160/5(b)(8)
2. **Constructive Fraud:** In order to prove Constructive fraud under both Section 5(a) and Section 6 of the UFTA, plaintiff is required to establish that the transaction took place without defendant receiving reasonably equivalent value for the transfer of the asset. See 740 ILCS 160/6; *Wachovia Securities, LLC v. Neuhauser*, 528 F. Supp. 2d 834, 859 (N. D. Ill., 2007); *In re Jumer's Castle Lodge, Inc.*, 329 B.R. 837, 842 (Bankr. C.D.Ill. 2005).
3. The analysis regarding whether a debtor received reasonably equivalent value in exchange for a transfer is the same as between Section 5(a)(2) and Section 6. *In re Jumer's Castle Lodge, Inc.*, 329 B.R. at 843 citing *In re Joy Recovery Technology Corp.*, 286 B.R. 57, 77 (Bankr. N.D.Ill., 2002).
4. The factors to consider when determining whether or not a debtor was paid reasonably equivalent value in exchange for the alleged transfer of an asset are: "(1) whether the value of what was transferred is equal to the value of what was received, (2) the market value of what was transferred and received, (3) whether the transaction took place at arm's length, and (4) the good faith of the transferee." *Id.* citing *In re Roti*, 271 B.R. 281 at 295, 300 (Bankr. N.D. Ill., 2002), see also *In re Gluth Bros. Const., Inc.*, 424 B.R. 368 (Bankr. N.D. Ill. 2009).
5. While courts have indicated that there is no "fixed formula for determining whether debtor received "reasonably equivalent value" for property transferred...whether there was reasonable equivalence will depend on all the facts of each case, with an important element being fair market value". The key element being that reasonably equivalent value is measured at the time of the transfer. *In re Zeigler*, 320 B.R. 362 (Bankr. N.D. Ill. 2005)...“the analysis of reasonably equivalent value is a question of fact that must be evaluated as of the date of the transaction”...and “courts will not look with hindsight at transaction because such an approach could transform Illinois fraudulent conveyance law into an insurance policy for creditors”. S.H.A. 740 ILCS 160/5, 160/6. *Id.* at 845 citing *In re Joy Recovery Technology Corp.*, 286 B.R. 54 at 75 (Bankr. N.D. Ill., 2002).



## TIPS FOR PLEADING UNDER THE IUFTA

**Using Form 13 as a Model:** In *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F. 3d 1074 (7<sup>th</sup> Cir. 1997), the Court cited with approval the use of Form 13 as a model for the requisite allegations in a pleading attempting to plead a cause of action under the IUFTA. The court indicated that the requirements of F.R.C.P 9(b) is met if the complaint contains 1) an allegation of jurisdiction, 2) a statement of the date and the conditions under which the defendant executed a promissory note to the plaintiff, 3) a statement that the defendant owes the plaintiff the amount, 4) a description of the events surrounding the defendant's conveyance of all of his property to the transfer recipient for the purpose of defrauding and for delaying the collection of payment by the plaintiff, and 5) the plaintiff's demand of the court.

- The *General Elec. Capital Corp* Court denied defendant's motion to dismiss by finding a complaint with the following allegations sufficient:
  - The promissory note and guaranties for the airplane were executed on December 23, 1991. See Complaint ¶¶ 8–10.
  - Aero defaulted on its payments and GE Capital responded by replevying the airplane and obtaining a judgment against its guarantors (including Rental) for the remaining amount. See *id.* ¶¶ 12–13.
  - Rental settled an unrelated class action on March 4, 1993. See *id.* ¶ 15.
  - As part of the settlement, Rental “transferred, assigned and conveyed substantially all of its assets to LRC in exchange for a release of pending legal claims against Rental.” *Id.*
  - Rental allegedly did not receive from LRC or the limited partnerships any reasonably equivalent value that would be applied to the deficiency due GE Capital. See *id.* ¶ 37. This transfer rendered Rental insolvent and “effectively precluded Rental from meeting any deficiency obligation to GE Capital for the aircraft under Rental's guaranty.” *Id.* ¶ 15.
  - Finally, GE Capital asked the district court 1) to enter a judgment for the deficiency plus prejudgment interest and attorneys' fees, cost and expenses and 2) to declare the transfer of assets from Rental to LRC null and void to the extent of this judgment. See *id.* ¶ 43.
- In *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 186-87, 935 N.E.2d 963, 970 (Ill. App. Ct. 1st Dist. 2010), the court noted that in order to state a claim under the Uniform Fraudulent Transfer Act, “the factual situation must include a debtor

who is liable on a claim to a creditor.” *A.P. Properties, Inc. v. Goshinsky*, 186 Ill.2d 524, 528, 239 Ill.Dec. 600, 714 N.E.2d 519, 521 (1999).

- Under the Uniform Fraudulent Transfer Act, a creditor is “a person who has a claim” and a debtor is “a person who is liable on a claim.” 740 ILCS 160/2(d), (f) (West 2000).
- The creditor must show that it has “a right to payment” that it can seek to recover from the debtor. *A.P. Properties, Inc.*, 186 Ill.2d at 529, 239 Ill.Dec. 600, 714 N.E.2d at 522, citing 740 ILCS 160/2(c) (West 1996). A claim is “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.” 740 ILCS 160/2(c) (West 2006).
  - Illinois courts treat “claims” fairly broadly: “Indeed, a claim is a right to payment. The claim may or may not be reduced to judgment. It may be liquidated or unliquidated. It may be fixed or contingent. It may be matured or unmatured. It may be disputed or undisputed. It may be legal or equitable. It may be secured or unsecured.” *Falcon v. Thomas*, 258 Ill.App.3d 900, 909, 196 Ill.Dec. 244, 629 N.E.2d 789, 795 (1994).

## **SOME SCENARIOS INVOLVING FRAUDULENT TRANSFER ALLEGATIONS**

### **1. Transfer Of Home From Elderly Parents to Children:**

In *In re Zeigler*, 320 B.R. 362, 374 (Bankr. N.D. Ill. 2005), the Chapter 7 trustee filed an adversary complaint, seeking to avoid debtors' transfers of their home to their daughter and son-in-law, and to sell the property. Debtors testified that the transfers were made to help plan their estate because of their declining health and to refinance the mortgage and payoff the existing mortgage.

**X - No Actual Fraud:** The court found that despite finding the presence of the following six badges of fraud, there was not sufficient evidence to find that debtors had engaged in fraud in fact or actual fraud under Section 5(a)(1) of the UFTA:

- (1) the transfers were made to insiders—Debtors' daughter and son-in-law;
  - (2) the Debtors retained possession of the Property after the transfers;
  - (3) the Debtors removed the Property from their ownership by conveying it to their daughter and son-in-law;
  - (4) the Debtors were insolvent or became insolvent shortly after the transfers were made;
  - (5) the value of the consideration received by the Debtors was not reasonably equivalent to the value of the Property transferred; and
  - (6) the transfers of the Property were of substantially all of the Debtors' assets.
- However, the Court felt that the Debtors' testimony regarding transferring the property for estate planning purposes was credible.

**✓ Yes to Constructive Fraud Under §160/5(a)(2)** - The court found that the transfers were constructively fraudulent under § 160/5(a)(2) of the UFTA because:

- (1) Debtors made voluntary transfers to the children;
- (2) Debtors made the transfers to their children without receiving a reasonably equivalent value. Merely paying off the Debtors' mortgage was inadequate and left the children with over \$100,000.00 in equity in the Property;
- (3) Upon the transfer, Debtors failed to retain sufficient property to pay their debts since the house was their single largest asset; and
- (4) As a result of the transfer, Debtors were rendered balance-sheet insolvent with insufficient property to pay their debts.

**✓ Yes to Constructive Fraud Under §160/6** - The court found that the transfers were constructively fraudulent under § 160/5(a)(2) of the UFTA because:

- (1) creditors who had the right to assert claims still had claims that arose before the alleged fraudulent transactions;
- (2) Trustee had established that the Debtors made the transfers without receiving a reasonably equivalent value in exchange for the transferred Property; and

(3) the court had determined previously that the Debtors were insolvent at the time of the transfers or became insolvent as a result of the transfers.

## **2. Transfer Of Services To Spouse:**

In *Bressner v. Ambroziak*, 379 F.3d 478, 483 (7th Cir. 2004) the judgment Debtor worked for spouse who was sole owner of successful business. Judgment Debtor did not receive a salary from the business but was allegedly the moving force behind the company and the *de facto* manager of the company's affairs. Although judgment Debtor did not receive a salary, he had access to a company expense account and, of course, was married to, resided with, and enjoyed the financial support of his wife, whom the judgment Creditor refers to as the nominal head of the business. Among other things, judgment Creditor argued that judgment Debtor's services to the business was a fraudulent transfer under 160/5(a).

**X - No Actual Fraud –** The court noted that:

(1) a transfer is defined by UFTA as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.” 740 ILCS 160/2(l);

(2) The UFTA defines an asset as “property of a debtor....” 740 ILCS 160/2(b). Further, property is defined by the UFTA as “anything that may be the subject of ownership.” 740 ILCS 160/2(j); and

(3) Judgment Creditor had not identified assets that the judgment Debtor had transferred to the business. The court found no legal support under the IUFTA for the position that the property being transferred was the reasonable value of the services being provided to the business.

## **3. Transfer of Home From Debtor to his Mother's Trust in the Middle of a Contentious Divorce:**

In *In re Schneider*, 417 B.R. 907 (Bankr. N.D. Ill. 2009), Debtor's Chapter 7 Bankruptcy Trustee filed an adversary complaint against Debtor to set aside transfer of residential property, in exercise of strong-arm powers, as actually fraudulent to creditors, as well as to compel turnover of personal property by Debtor's mother.

✓ **Yes to Actual Fraud Under §160/5(b)** – The following were sufficient badges of fraud that Court found existed in support of finding that Debtor engaged in fraud in fact under 740 ILCS 160/5(a)(1):

- (1) Debtor continued to occupy the residence even after transfer to trust controlled by his mother;
- (2) the transfer was made at time when he was involved in contentious divorce proceeding with his estranged, former wife;
- (3) property had been repeatedly transferred back and forth between trust and Debtor as Debtor needed to use it to obtain funds;
- (4) All of the quitclaim deeds transferring the residence back and forth from the Debtor to his mother's trust indicated that the transfers were exempt from transfer tax, meaning little or no consideration was given. The court agreed that, this statement could be taken two ways - either the quitclaim deeds were correct and little or no consideration was given, or the quitclaim deeds were incorrect and the true nature of the transactions was concealed; and
- (5) With regards to the pending contentious divorce, Debtor's mother testified as follows:

**“[M]y son is divorced. I loaned him the money. I was thinking God forbid, if anything happens to my son, all this will go to—this is in my mind—to his children; and his ex-wife will be the executor. We didn't want that. I wanted the collateral so God forbid, if anything happened to my son, it would go into my trust and be part of my estate.**

...

**Like I said, it all was relevant, like I said, to the money I loaned him. And I felt that it would be safer if I was the one that owned the property as I said. It was a very bad divorce. And like \*919 we—I thought, God forbid, if anything happened, I did not want my ex-daughter-in-law to benefit from the house or the furnishings”**...to which the court responded in its opinion, “Giving a deed for a house that you continue to live in so an estranged family member/creditor, with whom you are involved in litigation, will in no way benefit from it smacks of bad faith.” citing *See Franceschi v. Franceschi*, 326 Ill.App. 494, 62 N.E.2d 1 (1945).

#### 4. **Judicial Sales Presumptively Non-Fraudulent:**

Chapter 11 Debtor brought fraudulent transfer proceeding to avoid mortgage foreclosure sale, on theory that price received at mortgage foreclosure sale was less than “reasonably equivalent value” of property. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994)

**X - No Constructive Fraud** - The Supreme Court affirmed all lower court decisions and held that price received at mortgage foreclosure sale conclusively established “reasonably equivalent value” of mortgage property and was not constructively fraudulent under 11 U.S.C. § 548(B), as long as requirements of state's foreclosure law were met and the sale was non-collusive.

- The Supreme Court declined to read the phrase “reasonably equivalent value” in [§ 548\(a\)\(2\)](#) to mean, in its application to mortgage foreclosure sales, either “fair market value” or “fair foreclosure price” (whether calculated as a percentage of fair market value or otherwise). A fair and proper price, or a “reasonably equivalent value,” for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.
- **Note:** Such a ruling does not exist with reference to non-judicial UCC sales. Therefore, such sales are subject to attack by creditors under the theory of either constructive or actual fraud for failure to realize reasonable equivalent value for the transfer.

5. **Transfer of Home Into Tenancy by Entirety After Entry of Judgment Against One of the Spouses:**

In *Harris Bank St. Charles v. Weber*, 298 Ill. App. 3d 1072, 1080, 700 N.E.2d 722, 728 (Ill. App. Ct. 2d Dist. 1998), a deficiency judgment gets entered against the judgment Debtor as a result of a foreclosure on a piece of real estate. Subsequent to the entry of the deficiency judgment, judgment Debtor gets married and transfers title to his residence (which had been solely in his name) to a tenancy by the entirety. When judgment Creditor attempts to schedule a sheriff sale on his residence to collect on the deficiency judgment, judgment Debtor argues that sale should be stricken since residence was transferred into a tenancy by the entirety.

- Judgment Debtor asked the court to follow ruling in *E.J. McKernan Co. v. Gregory*, [268 Ill.App.3d 383, 205 Ill.Dec. 763, 643 N.E.2d 1370 \(1994\)](#), in which this court had held that a judgment debtor's transfer of property into tenancy by the entirety in order to shield that property from the judgment creditor cannot violate the Uniform Fraudulent Transfer Act;
- Judgment Creditor asked the court to follow ruling in *In re Marriage of Del Giudice*, [287 Ill.App.3d 215, 222 Ill.Dec. 640, 678 N.E.2d 47 \(1997\)](#), in which, contrary to *E.J. McKernan*, the first district held that a judgment debtor who attempts to avoid a judgment creditor by transferring property into tenancy by the entirety after a judgment has been entered may violate the Uniform Fraudulent Transfer Act;

- On appeal, the Court noted that neither party had really addressed the August 1997 amendment to the Tenancy by the Entirety statute as follows:
  - “Any real property, or any beneficial interest in a land trust, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants, *except if the property was transferred into tenancy by the entirety with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due.*” (Emphasis added.) 735 ILCS Ann. 5/12–112 (Smith–Hurd Supp.1998).
- The Appellate court noted legislative history which indicated that amendment was also intended only as a clarification of existing law;
- The Appellate court ruled that in light of the amendment, neither *E.J. McKernan* nor *Del Giudice* was a correct statement of the law and the property was not liable to be sold to satisfy a judgment against only one spouse unless the property was transferred with “the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due.” 735 ILCS Ann. 5/12–112 (Smith–Hurd Supp.1998). As in other cases, the question of intent would be for the trier of fact; and
- The fact that the legislature had intentionally left out any reference to the Illinois Fraudulent Transfer Act indicates that the legislature intentionally chose not to apply the Uniform Fraudulent Transfer Act to transfers into tenancy by the entirety.

6. **Transfer of all Assets by Decedent/Debtor to his Trust While in Litigation With Landlord/Creditor**

In *Matthews v. Serafin*, 319 Ill. App. 3d 72 (Ill. App. Ct. 3d Dist. 2001), subsequent to personally guaranteeing a commercial lease for the benefit of his corporation, Debtor transferred certain stock and a promissory note payable to him into a revocable trust and named himself as Trustee. Subsequently, Debtor's corporation vacated the premises prior to the expiration of the lease and litigation ensued between Debtor's corporation and the Landlord. The trial court gave the Landlord possession of the property but reserved decision on the issues of unpaid rent and the affirmative defense of constructive eviction. Shortly thereafter, Debtor transferred additional property into his revocable trust. The property included his investments in his corporation as well as his clothing, jewelry, automobiles, household goods, provisions, furniture, furnishings and equipment and all interests in real estate. For four months the trust paid Debtor \$5,200 a month until he died in May of 1993. Upon his death, the trust's assets were valued at \$973,854 the majority of which remained in trust for Debtor's wife

and daughter. Several years after Debtor's death, the trial court found in favor of the Landlord and entered a judgment in the amount of \$33,119.76 against the Debtor/Decedent's estate. Three months later, the Landlord filed this action to set aside Debtor/Decedent's last transfer into his trust, claiming Debtor/Decedent fraudulently transferred all his assets into the trust to avoid paying the judgment in violation of sections 6(a), 5(a)(1) and 5(a)(2) of the UFTA. Trial court ruled against Landlord and Landlord appealed. On appeal,

**X - No Constructive Fraud Under §160/6(a) –** The appellate court ruled that:

- Landlord failed to put forth evidence establishing that Debtor/Decedent was not paying his debts as they became due, either before or after the transfer of assets to the trust;
- Debtor/Decedent received \$5,200-per-month income from the trust, and if this judgment had issued during his lifetime he could have paid it from these funds;
- Moreover, no evidence was presented that after Debtor/Decedent's death and after the judgment was entered his estate could not pay the judgment. In fact, the record fails to indicate whether Landlord ever made a demand to the trustees of Decedent's Trust or whether they refused to pay; and
- Accordingly, trial court's holding that Landlord failed to prove that Debtor was insolvent as required by section 6(a) of the UFTA was affirmed.

**X - No Actual Fraud Under §160/5(a)(1) –** The appellate court reasoned as follows:

- With regards to the various badges of fraud that may be used to provide actual intent under §5(a)(1):
  - Landlord failed to present case law or evidence in support of its position that a trust may personify an "insider";
  - While Debtor transferred much of his property into the trust shortly after this action was filed, the trust was created almost a year prior to the time his corporation stopped paying rent and defaulted on the lease;
  - There was no evidence that Debtor concealed the trust or any of his other assets;
  - Debtor was not insolvent and the judgment debt was not incurred until several years after the transfer. Even if the judgment was entered during Debtor's lifetime, the facts did not support Landlord's position that Debtor intended to hinder, delay, or defraud Landlord. As a result, trial court's decision was against the manifest weight of the evidence.

**X - No Constructive Fraud Under §160/5(a)(2) –** With regards to Landlord's argument that the transfer was constructively fraudulent pursuant to Section



5(a)(2) as a transfer made “without receiving a reasonable equivalent value in exchange for the transfer,” by a debtor who was engaged in a business for which the remaining assets of the debtor were unreasonably small in relation to the business, or the debtor believed he would incur debts beyond his ability to pay as they became due, the appellate court reasoned as follows:

- Debtor created the trust almost a year before the lawsuit was filed. While he did transfer most of his assets into the trust after the lawsuit was filed, it was well before any judgment was entered.
- Besides, the almost \$1 million worth of assets in the trust is significant compared to the \$6,300 owed for past rent.