

Best Practices in Representing Debtors: From Preparing Papers to Reaffirmation Agreements

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Overview and Best Practice Pointers

The concept of “best practices” encompasses all phases of a bankruptcy case, from the initial client interview through the entry of a discharge and all the stages in between.

Internal processes and procedures insure consistency and allow for the fewest errors and oversights. Practitioners, solo or in a firm, are encouraged to develop written policies governing bankruptcy case administration.

Topics:

- Preparing the Pleadings, highlights of the “Working Paper”.
- Tips: Client expectations and understanding of the process.
- Tips: Compliance with 11 USC 521 and local bankruptcy rules.
- Tips: 11 USC 341 Meeting of Creditors.
- Tips: Chapter 7 reaffirmation agreements.
- Sources, resources, and other helpful hints and links.

Please note that Schedule C (exemptions, planning, and strategy) and preparation of the 22A or 22C aka “The Means Test” are far too expansive of topics to be included in this discussion, but practitioners are encouraged to utilize available resources to increase their knowledge and understanding of issues particular to these two topics. See the list of resources included herein for additional information.

Preparing the Pleadings

One of the greatest challenge facing bankruptcy attorneys is accurately and completely preparing the Petition, Schedules, Statement of Financial Affairs, and the 22A or 22C. Preparation of the

documents presents many opportunities for error or omission. Understanding the pleadings, requirements, and how to elicit the information from the client is a necessity.

The Task Force on Attorney Discipline's Best Practices Working Group, Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process published the "Working Paper: Best Practices for Debtors' Attorneys", 64 Bus. Law 79 (2008)¹, a working paper on the preparation and completion of a debtor's pleadings.

Our panel identified two issues of ongoing concern that are not addressed in the ABA Best Practices Report, but which seem to cause significant confusion, misunderstanding and potentially unnecessary angst for debtors, their counsel and trustees. Those issues are the proper disclosure and scheduling of:

- 1) Assets in which the debtor has an interest, but are not estate property within the scope of § 541;
- 2) Assets titled in the name of the debtor, but in which the debtor has no interest and / or are owned by a 3rd party.

Official forms 6A and 6B provide that the schedules include the "current value of debtor's interest, in property, without deducting any secured claim or exemption" and the Advisory Committee notes state:

Schedule B - Personal Property. This schedule is to be used for reporting all of the debtor's interests in personal property except leases and executory contracts, which are to be listed on the Schedule of Executory Contracts and Unexpired Leases.

The dilemma for most debtor's and their counsel is how to properly disclose / schedule these interests while, at the same time, not allowing fulfillment of the disclosure duty to give rise to an inference or concession that the items are estate property that may be subject to administration by a trustee.

ASSETS IN WHICH THE DEBTOR MAY HAVE AN INTEREST, BUT ARE NOT ESTATE PROPERTY WITHIN THE SCOPE OF § 541

This category began to arise with increasing frequency shortly after the Patterson v. Shumate decision, in the context of the debtor's interests in ERISA qualified plans. Examples of these types of property interests include: interests in defined benefit and defined contribution ERISA plans; interests in trusts; right to receive student loan proceeds; professional licenses ?

In reviewing, analyzing and determining how to properly disclose / schedule these items, counsel should:

- 1) Confirm clearly what items of property the debtor owns or has interests in;

¹ The Best Practices article was a follow up to an earlier Report by the Task force, entitled "Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005", 61 Bus. Law. 697 (2006).

- 2) Determine if the item or interest is or is not property of the estate;
 - a. Consult the scope of § 541(a); and
 - b. Review the exclusions in § 541(b) & (c);²
 - c. Review the applicability of the legal title / equitable interest rules in § 541(d).³
- 3) Determine how to schedule the items.

One method of scheduling these assets is to fully describe the asset in the “Description and location of property” box including disclosure of the value of the debtor’s interest in the property and adding a statement similar to the one below to explain why the property is not estate property:

AMERICAN FUNDS SEPP, ACCOUNT # 9876

FMV AS OF 12/31/08 WAS APPROXIMATELY \$91,050

SCHEDULED FOR DISCLOSURE PURPOSES ONLY. DEBTORS INTEREST IN PLAN IS EXCLUDED FROM THE ESTATE UNDER SECTION 541(C) (2) AND PATTERSON v. SHUMATE, 112 S. CT. 2242 (1992). DISCLOSURE HEREIN DOES NOT CONSTITUTE AN ADMISSION THAT THIS ITEM IS PROPERTY OF THE ESTATE.

ASSETS TITLED IN THE NAME OF THE DEBTOR, BUT IN WHICH THE DEBTOR HAS NO INTEREST AND / OR ARE OWNED BY A 3RD PARTY

This category includes things such as:

- 1) Joint bank accounts where the elderly parent added the debtor child “for convenience”;
- 2) The car owned by the minor child but titled in the name of the debtor parent;
- 3) The real estate transferred by the elderly parent to the adult child who becomes a debtor.

² This is not the same as determining the property is exempt. Exemptions need only be claimed if property comes into the estate; if the property never makes it into the estate, no need to exempt it. “No property can be exempted unless it first falls within the bankruptcy estate.” Owen v. Owen, 500 U.S. 305, 308, 111 S. Ct. 1833, 1835 (1991).

³ Section 541 (d) provides: “Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.”

The common issue in these fact patterns is legal title is in the name of the financially distressed debtor but the debtor has no equitable interest. At first blush, this issues seems to be dealt with in § 541(d), which provides that property of the estate includes:

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section **only to the extent of the debtor's legal title** to such property, **but not to the extent of any equitable interest** in such property that the debtor does not hold.

The legislative statement found in Senate Judiciary Committee report No. 95-989 explains section 541(d) as follows:

Section 541(d) of the House amendment is derived from section 541(e) of the Senate amendment and reiterates the general principal that *where the debtor holds bare legal title without any equitable interest, that the estate acquires bare legal title without any equitable interest in the property.* [emphasis added].

The United States Supreme Court in United States v Whiting Pools, Inc., 462 US 198, 204; 103 S Ct 2309, 2313; 76 L Ed 2d 515, 520, n.8 (1983) explained that:

[t]he legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title. See 124 Cong. Rec. 32399, 32417 (1978) (remarks of Rep. Edwards); . . . 124 Cong. Rec. 33999 (1978) (remarks of Sen. DeConcini) (§541(d) “reiterates the general principle that where the debtor holds bare legal title without any equitable interest, . . . the estate acquires bare legal title without any equitable interest in the property. Similar statements to the effect that §541(a)(1) does not expand the rights of the debtor in the hands of the estate were made in the context of describing the principle that the estate succeeds to no more or greater causes of action against third parties than those held by the debtor. See H.R. Rep. No. 95-595, pp. 367-368 (1977). [Whiting Pools, Inc. 462 US 198, 204; 103 S Ct 2309, 2313; 76 L Ed 2d 515, 520, n. 8].

“The application of this provision is usually in the context of the imposition of a constructive trust, . . .but it applies as well to equitable interests generally.” Software Customizer, Inc. v Bullet Jet Charter (In re Bullet Jet Charter, Inc.), 177 BR 593, 604 (Bankr ND Ill 1995).

However, the precise (or imprecise) line between bare legal title and equitable interest(s) is defined by state property law. Thus, counsel will need to consult relevant state law relating to the applicable theory of joint ownership (gift, trust, joint tenancy or contract), presumptions of shares in jointly owned assets and related matters to determine what interests come into the estate.

A good starting point for Michigan practitioners is "Joint Bank Accounts: One Size Does Not Fit All" in the March 1999 Michigan Bar Journal, pp.292-297 which also sheds some light on the issue in the bank account context.

See also cases from other jurisdictions:

Iowa: Ackley State Bank v. Thielke, 920 F.2d 521 (CA 8 1990), good discussion of the different theories applied to joint ownership, the existence of the "rebuttable presumption rule", the introduction of parol evidence and the sufficiency of the evidence needed to overcome the rebuttable presumption.

Massachusetts: Blanchette v. Blanchette, 362 Mass. 518, 523 & n. 1, 287 N.E.2d 459 (1972)

"If the creation of a joint account is intended as a gift, the gift is completed upon the creation of the account since the usual requirement of delivery when consummating a gift is replaced by the contract with the bank." Desrosiers v. Germain, 12 Mass.App.Ct. 852, 855, 429 N.E.2d 385 (1981),

Bonanno v. Sarmanian, 67 Mass.App.Ct. 1106, 853 N.E.2d 609 (Table) Mass.App.Ct., 2006.

A Recent Practical Example:

While preparing these materials, in October 2009 Mr. Cossitt had a case in which the debtor, a self employed contractor, received an advance of \$37,000 from a customer and deposited the sum in his business checking account (no LLC or Inc., just a Schedule C d/b/a) just prior to filing. The total balance in the account at the time of filing was \$37,257. His analysis and advice was:

OPTION 1: File now and disclose:

- a. The entire amount in the text of Schedule B-2 along with an explanation as to why the \$37,000 was not an interest of the debtor in property other than a possessory interest (earmarked, held in trust, etc.);
- b. Enter \$257 as the value of the debtor's interest in the account;
- c. Disclose \$37,000 in SOFA # 14 and cross reference that entry with the text in Schedule B-2

Based on his research, he thinks a filing now will be fine and the customer's funds will not be subject to administration by the Trustee.

OPTION 2: Spend the money on goods, product, materials and subs for the customer's project and file the case later.

See also "Additional Cases and Considerations" section at the end of these materials.

Tip: "Ask it seven ways from Sunday". Remember, the client does not know or fully understand what information you are trying to obtain. Asking the same questions multiple times with different words will usually result in additional information being provided by the client as he or she didn't really understand what you were asking the first time.

Tip: Cross reference the pleadings in your questionnaire. Bankruptcy case management software typically includes a generic questionnaire to be completed by the client during the initial client interview. Developing your own questionnaire, based on the needs and experiences

of your particular practice and client profile, will allow you to essentially cross reference the client's information, resulting in fuller or more complete disclosure on the part of the client.

Tip: It is a good practice to have the client review all the pleadings in final form and for the practitioner to then answer any outstanding questions, make necessary corrections, and enter any additional clarifying information. At that point, the practitioner may wish to utilize a comprehensive final questionnaire, similar to one a Chapter 7 Trustee may use at the 341, to confirm that all assets and all liabilities have been fully disclosed. This is just one more way to "ask it seven ways from Sunday."

Tip: In Chapter 13 cases, at the time the Chapter 13 Plan is written, and signed by the client, practitioners should consider providing an outline of responsibilities to the client, to be acknowledged by the client independent of the Chapter 13 Plan. This outline should include, at the minimum:

- The plan payment amount,
- The payment method (certified funds),
- The payment address, and
- The payment start date.

Other client responsibilities practitioners may wish to highlight could include: requirement to file tax returns, requirements to remit refunds to the Chapter 13 Trustee, how to determine if debts are "direct by debtor" or paid by the Trustee, continuing to pay current utility bills and property taxes, etc.

Setting the Course: Client Expectations and Understanding of the Process

Typically clients are not knowledgeable, or possess misconceptions, of the bankruptcy process when they first meet with an attorney. The knowledge they may have, correct or incorrect, has been obtained from family, friends, the internet, or other outside sources and is often times a hurdle the practitioner must overcome by educating the client about bankruptcy and how it applies to the client's specific situation.

In addition to the method by which a practitioner addresses these issues, there are several resources available to debtors to assist the attorney in educating the debtor and providing the debtor with a general, but accurate, framework of the bankruptcy process.

The Administrative Office of the U.S. Courts offers an on-line informational video service on basic bankruptcy matters, which can be accessed at:

<http://www.uscourts.gov/video/bankruptcybasics/bankruptcyBasics.cfm>. Debtors may also access written materials on the site at

<http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html>. These resources may also be accessed through links on the court websites for the Eastern and Western Districts of Michigan.

In the Eastern and Western Districts of Michigan, practitioners may also refer Chapter 13 debtors to the following resources:

Debtor handbooks:

- Krispen S. Carroll, Standing Chapter 13 Trustee, ED MI (Detroit):
http://www.det13ksc.com/pdfs/chpt13_handbook.pdf.
- Brett N. Rodgers, Standing Chapter 13 Trustee, WD MI:
<http://www.rodgersch13.com/PDF%20Subfile/revise%20YELLOW%20BOOK%203-9-07.pdf>.
- Tammy L. Terry, Standing Chapter 13 Trustee, ED MI (Detroit):
<http://www.det13.net/PDF/DebtorHandbook.pdf>.

Note: This list is a sample only and is not exhaustive. Please check with each Chapter 13 Trustee’s office for handbooks and other resources they may provide directly to debtors.

Debtor Orientation Program: Detroit, Monday mornings, starting at 9:30 am and repeating every hour thereafter until early afternoon, in Room D of the 3rd floor meeting rooms at 211 West Fort, Detroit. The orientation is offered by the Office of the Standing Chapter 13 Trustee David Wm. Ruskin, ED MI (Detroit). “The purpose of the Orientation is to help debtors better understand the Chapter 13 process (not to provide legal advice) [and] will consist of a 30-45 minute PowerPoint presentation followed by Q & A” (www.det13.com). A handout of the slide presentation is also available at the orientation.

Articles for Debtors: Carl Bekofske, Standing Chapter 13 Trustee, ED MI (Flint):
http://www.flint13.com/index.php?option=com_content&view=category&id=20:debtor-abcs&Itemid=77&layout=default.

Tip: Remember, when the final goal is obtaining a discharge, an educated client, armed with accurate information and understanding, has the highest opportunity to succeed.

Compliance: 11 USC 521 and LBRs

Pursuant to 11 USC 521(a)(1)(iv), as modified by local bankruptcy rules⁴, at the minimum debtors must provide both Chapter 7 and Chapter 13 trustees with their last sixty (60) days of paystubs or other income. The debtors must also provide the Chapter 7 trustee with the last tax return filed⁵ and, in the case of Chapter 13, debtors must provide their last two (2) years of tax returns⁶. Failure to do so may result in dismissal of their case. There are also deadlines, longer than those which are set forth in the Code, and additional document requirements depending on the chapter and the trustee.

Understanding the objective of the “paystubs” requirement will assist the practitioner in determining how to best comply with that requirement. In its most basic form, the requirement demonstrates the recent historical income of the debtors and sets the basis for the figures asserted

⁴ To protect against public disclosure of personally identifying information such as social security numbers.

⁵ 11 USC 521(e)(2).

⁶ Joint memo dated October 3, 2003 issued by the Chapter 13 Trustees (Detroit). See <http://www.det13.com/PDF/341docs.pdf>

on Schedule I. Keeping this objective in mind, for every source of income set forth on Schedule I, proof must be provided.

Tips on “priority of proof”: In its best form, proof is established by 3rd party direct documents, such as paystubs or other stubs (i.e. pension/unemployment/disability/etc.) produced by the payor. The next best form is proof established by 3rd party indirect documents, such as bank statements, supplemented by an award letter, or profit and loss statements prepared by an accountant or other financial professional. These preferred forms of proof are followed by affidavits of 3rd parties and then affidavits of the debtor. Practitioners should use affidavits⁷ to establish proof of income that cannot be established by any other method, such as household contributions, resident and non-resident family support, rent from a boarder or tenant, payments of debtor’s financial obligations by another party, etc.

As a practical matter, practitioners should also use affidavits to establish the non-existence of income or household contribution. In the event debtor or spouse have not had income or paystubs in the sixty days prior, an affidavit should be filed to that effect. Similarly, if another adult party lives in the household but does not contribute, it may be best to file an affidavit to that effect.

Practitioners are well advised to develop internal processes and procedures to insure consistency and compliance with the document requirements. For the specific document deadlines of Chapter 13 trustees, please refer to each trustee’s website. Links to each trustee can be found on the courts’ websites.

Tip: The practitioner should make every effort to anticipate the questions the Trustee may have regarding the income listed on Schedule I (and perhaps on the 22A or 22C) and submit appropriate documentation in support.

Tip: As practitioners should be in possession of the required paystubs and tax returns at the time the pleadings are drafted, sending the required documents to the Trustee immediately upon case assignment will insure compliance with the deadlines established by each trustee’s office.

Tip: Document requirements in the Eastern District of Michigan are established pursuant to local bankruptcy rule and it is recommended that practitioners utilize a checklist, including all the items set forth in the rule, to insure all documents are obtained from the client prior to filing the case. For a complete list of documents required, see LBR 2003-2 (EDMI).

Tip: It is Ms. Lassner’s policy to provide the Chapter 7 Trustee with all documents set forth in LBR 2003-2 (EDMI) at the time she completes her compliance. This allows the trustee the opportunity to review the documents prior to the hearing and determine what, if any, issues exist and what additional information the trustee may require to conclude the hearing. This policy

⁷ This reference is not all inclusive. Affidavits may also be used to establish the amount, frequency, and duration of unique expenses set forth on Schedule J, such as private in-home child care, debtor’s rental of a private party’s vehicle or other item, etc.

also shortens her client’s hearings and decreases the likelihood that she and her clients will have to return “for control purposes” or attend a 2004 exam⁸.

341 Meeting of Creditors

Prior to the Meeting:

- Know your Trustee and his or her preferences, practices, and target issues,
- Arrive prior to the Meeting,
- Meet with your client,
- Complete any questionnaires or supplemental statements required by the Trustee with the client,
- Review additional documentation provided by client,
- Outline the hearing process for the client,
- Explain to your client what the Trustee’s job/role/objective is.

During the Meeting:

- Hand the completed questionnaire or supplemental statement, if any, to the Trustee,
- Advise the Trustee of any changes to the pleadings that have not already been amended,
- Advise the Trustee of any amendments made in the days just prior to the hearing,
- Advise the Trustee of any additional documents provided by the client,
- Hand over additional documents at the hearing, to the extent that you have had a chance to fully review and analyze, otherwise, advise the Trustee that you will forward copies to his or her office following the hearing,
- Preemptively address issues the Trustee has advised you of prior to the hearing by taking testimony of your client,
- Note issues the Trustee questions your client about, to determine if further investigation/inquiry/proof of the information provided in the pleadings may be necessary.

Following the Meeting:

- Explain “what to expect” to the client, will a discharge be issued, will there be objections to confirmation, will the client have to come in for an appointment to amend a pleading, etc.,
- Give the client the next step: confirmation, hearings, complete debtor education, etc.,
- Follow up with the client in writing.

Tip: Counsel’s objective is to have the Meeting held and concluded. It is only upon conclusion of the 341 that the case can move to the next stage: discharge or confirmation. Therefore, the foregoing process should be adapted to individual practice with that single objective in mind.

⁸ FRBP 2004

Tip: In a Chapter 7, even if the 341 is concluded, if the Trustee holds the case open beyond the discharge date, additional services may be necessary.

Chapter 7: Reaffirmation Agreements

Upon request of the judges of the Eastern District of Michigan, a committee was formed to draft a best practices paper regarding reaffirmation agreements. The paper has been completed and the final draft has been submitted to the Bench as well as the State Bar of Michigan Ethics Committee. The paper, entitled CBA Best Practices for Reaffirmation Agreements, A Debtor's Attorney's Duties to the Client regarding Reaffirmation Agreements, was written by attorneys Noel Aaron Cimmino (Steinberger & Associates, Southfield, MI) and Heather McGivern (Orlans Associates, Troy, MI) on behalf of the Detroit Consumer Bankruptcy Association and provides practitioners the basis on which to evaluate and establish a reaffirmation policy within their own practices. The paper can be accessed at <http://www.steinbergerlaw.com/bankruptcy-articles/general/cba-best-practices-for-reaffirmation-agreements>.

Other Tips:

A word on status conferences: Several Chapter 13 trustees, by direction of their assigned judges, hold status conferences. These conferences are a chance for the Trustee, counsel, and creditors to resolve any last minute issues that may be preventing confirmation of a Chapter 13 case. The key words here are "last minute". Proper preparation and administration of your case should reduce the number of cases, issues per case, and time you will spend at status conferences. Status conferences are not intended to involve extensive resolution of all outstanding issues. Work with your trustee and creditors in the weeks prior to confirmation to resolve as many issues as possible.

Resources and References:

Books, Papers, and other printed materials:

The Task Force on Attorney Discipline's Best Practices Working Group, Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process, "Working Paper: Best Practices for Debtors' Attorneys", 64 Bus. Law 79 (2008).

ABI: _____

ABA Business Law Section, Consumer Bankruptcy Law Committee:
http://www.abanet.org/buslaw/tbl/tblonline/2008_064_01/home.shtml

ABA Solo & Small Practice Section, Bankruptcy Law Committee:
<http://new.abanet.org/committees/GP207000/Pages/default.aspx>

West's Bankruptcy Exemption Manual, 2009 ed. Regarding duty to accurately disclose, properly schedule, and the consequences of not properly scheduling assets, specifically:

- 1) Sections 2.21 to 2.26 address property that is excluded from the estate,
- 2) Section 7.1 discusses the need for adequacy of descriptions,

- 3) Sections 8.4 and 8.5 discuss the impact of omission of assets & inaccurate valuations,
- 4) Section 8.22 is entitled "Ambiguity construed against debtor"

Handling Consumer and Small Business Bankruptcies in Michigan, edited by Richardo I. Kilpatrick, Stuart A. Gold, and John T. Gregg. ICLE, February 2009.

Bankruptcy practitioners' communities:

The ABI Consumer Bankruptcy Committee is included in ABI membership and offers a list serve. Go to <http://committees.abiworld.org/consumer> to join.

Consumer Bankruptcy Association of the Eastern District of Michigan. An association devoted to excellence in the practice of consumer bankruptcy law. Go to <http://www.cbadetroit.com> for more information.

"DET13" list serve for soliciting questions, thoughts, opinions, and for dissemination of information relevant to the practice of bankruptcy in the Detroit court. The list serve is managed and administered by the office of Standing Chapter 13 Trustee David Wm. Ruskin. Go to <http://det13.com/DET13.shtml> to join.

National Association of Consumer Bankruptcy Attorneys (NACBA) "is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. Formed in 1992, NACBA now has more than 4,000 members located in all 50 states and Puerto Rico." (<http://www.nacba.com>)

Means Test:

"Statement of the U.S. Trustee Program's Position on Legal Issues Arising Under the Chapter 13 Disposable Income Test"

http://www.usdoj.gov/ust/eo/bapcpa/docs/Disposable_Income_Ch13_UST_Policies.pdf

Rules:

Eastern District of Michigan, Local Bankruptcy Rules and other important information:
<http://www.mieb.uscourts.gov/rulesAndForms/rules.html>

Western District of Michigan, Local Bankruptcy Rules and Administrative Orders:
<http://www.miwb.uscourts.gov/content/services/rules.asp>.

Additional cases and considerations:

Swanson v Stoffregen (In re Stoffregen), 206 BR 939 (Bankr ED Wisc. 1997) (parents convey to children, one child reconveys to parents for no consideration and then files chapter 7, trustee cannot recover).

In re Rosenberg, 69 BR 3 (Bankr. EDNY 1986)(Debtor's fiancée paid \$42,000 for the purchase for a house, debtor on title briefly and reconveys to fiancée, trustee cannot recover)

In re Jensen, 120 BR 219 (Bankr MD Fla 1990)(mother & son bought lots as joint tenants using mom's money, convenience title case, son files bankruptcy, trustee loses)

In re Hulk, 8 BR 444 (Bankr D Conn 1981) (trustee loses)

In re Reynolds, 151 BR 974 (SD Fla 1993) (debtors have bare legal title because the son could not obtain financing. Debtors convey title to son and the trustee attacked the transfer as being fraudulent under section 548. The court held that:

[a] fraudulent transfer under §548 of the Bankruptcy Code presupposes the existence of a transfer of an interest of the debtor in the property. Since the Debtors did not in fact have such an interest but only bare record title for the convenience of the real owner, their son Barry, there could not be a fraudulent transfer. Without such an interest in property there would also be lacking, as required by §548, an intent to hinder, delay or defraud creditors.

B. Michigan Law Looks to Substance over Form When Determining Property Interests

While federal bankruptcy law determines the effect of legal or equitable interests in property, the court must look to state law to determine the nature and extent of the interest. Butner v United States, 440 US 48; S Ct 914, 59 L Ed 2d 136 (1979). As the court will see from the decisions discussed below, Michigan courts look beyond the mere form of the transaction to determine property interests in a variety of ways.

1. Equitable Mortgages, or Deeds in Lieu of Mortgages

Perhaps the most obvious example of Michigan courts going beyond the form of the transaction to determine the substance of the transaction is the doctrine of deed lieu of mortgage, or equitable mortgage. In Barber v Milner, 43 Mich 248 (1880) the plaintiff found himself indebted to Citizens Bank of Flint, Michigan ("Citizens") and in various financial predicaments "because of a habit he had acquired of using intoxicating liquors to excess." *Id.* at 248. To secure payment of the debt to Citizens, the plaintiff executed a deed to the property in question to a cashier at the bank. The oral agreement the plaintiff and his wife, who, of course, had to join in the conveyance, had with Citizens was that upon the plaintiff paying his debt to Citizens in whole, Citizens would convey the property to the plaintiff's wife, Mrs. Barber, or to any other person that the plaintiff directed. (Presumably another creditor). Sometime later, Mrs. Barber directed Citizens to convey the property to her son-in-law, Milner, who paid the bank the sum of \$1,500, which was in excess of the outstanding indebtedness owing on the loan. Upon receiving the overpayment, the cashier conveyed the property to Milner who then conveyed the property to Mrs. Barber. Mr. Barber, possibly to fuel his addiction to intoxicating liquors, drew out the amount of the surplus payment made by his son-in-law, Milner. In discussing the transaction, the court held that "Gibson [the cashier for Citizens] could not under any circumstances, be considered the absolute owner of the property, and having obtained the title as security upon an agreement to convey to a third party, the law would not permit him to claim or dispose of the property contrary to such agreement." *Id.* at 250. The court also clearly held "that parol evidence is admissible to show that a deed absolute on its face was intended as a mortgage." *Id.* at 249. The court also ruled that an express trust had been created and was provable by the fact that the terms of the trust had been executed, stating "[h]ere he has conveyed as agreed, the trust

has been executed, and whether valid, because in writing, or not, is no longer an open question.” Id. at 250.

The court also determined that a deed had been intended as a mortgage in McKeighan v Citizens Commercial & Savings Bank of Flint, 302 Mich 666 (1942). Quoting Wells v Park, 233 Mich 277 (1925), the court stated:

‘It is well settled that a deed, though absolute in form, may be shown to be a mortgage by oral proof.’ In the case at bar, the deed from McKeighan to the bank was in effect a mortgage. All interested parties treated it as a mortgage. The McKeighans made payments on the loan from the bank, platted the property, sold some pieces on contract, paid some taxes assessed against the property, exercised control over it and in all ways considered themselves the owners subject to the indebtedness owing to the bank. [McKeighan at 670].

The Michigan Supreme Court also has held that deed holders who hold the deeds for security are not the true owners of the property subject to the mechanics’ liens and that the “sellers” are mortgagors and, as such, are the true owners. See Huebner v Lashley, 239 Mich 50 (1927).

2. Equitable Liens

As the court will recall, the Stoffregen court also held that the defendants held an equitable lien on the property, which related back to the time when the one-quarter property interest had been deeded to Jonathan Stoffregen. Stoffregen, 206 BR 939, at 944. The court relied on Wisconsin law to determine whether Jonathan Stoffregen had any real property interest beyond “bare legal title” and to impose an equitable lien on the property in favor of the defendant, Gertrude Stoffregen. Michigan courts had long recognized the doctrine of equitable liens. See, e.g., Cheff v Haan, 269 Mich 593 (1939); Kelly v Kelly, 54 Mich 30 (1884).

In Cheff, the Michigan Supreme Court explained that equitable liens upon real estate could be imposed when:

There [is a] contract in writing out of which the equity springs, indicating an intention to make particular property identified in the written contract security for the debt or obligation, or whereby it is promised to assign, transfer, or convey the property as security. In the absence of such written contract, equity from the relations of the parties may declare an equitable lien out of considerations of right and justice based upon the fundamental principles of equity jurisprudence, such as cases where one joint owner improves property for the benefit of both; where a party innocently makes permanent improvements and repairs which presently enhance the value of the property; but in all cases, the person seeking to establish the lien must show that in equity, in good conscience, he is entitled to the lien claimed. [Id. at 598-99 (emphasis added) (citing Kelly v Kelly, 54 Mich 30 (1884))].

Like the court in Stoffregen, this court will be presented with ample evidence of the contributions made by defendant Debra Jernigan to the property at issue, including supplying funds to purchase the property, funds to renovate the property, and, to this day, funds expended to pay the mortgage on the property. Ms. Jernigan made all of the expenditures innocently, as the Cheff court requires, with the honest belief that she alone owned the property and that she alone would benefit from the increase in value which resulted from the fruits of her efforts.

3. Trusts (Constructive or Otherwise)

Michigan law is replete with examples of court imposing trusts, constructive or otherwise, to prevent fraud, mistake, or other inequities. In Chapman v Chapman, 31 Mich App 576 (1971), the Michigan Court of Appeals imposed a constructive trust on property which had been conveyed to relatives of the plaintiff during a financial crisis for the purpose of securing funds advanced by the family member. The Court of Appeals upheld the trial court's decision to impose a constructive trust on the property. The court stated that "[i]n order for the trial court to have imposed a constructive trust on the proceeds from the two sales, plaintiffs must have established at the trial that the agreement between the parties was to vest only legal title in defendants while plaintiff's retained the beneficial interest." Id. at 579. The court, therefore, looked to substance, not simply to the form of the parties' dealings.

Likewise, in Robair v Dahl, the Michigan Court of Appeals imposed a constructive trust where a deceased grantor conveyed a deed to her sons, Bernard Dahl and Edward Dahl. As she conveyed the property to the two, the mother stated loudly "I am putting this in the name of the two boys for all of you." Id. at 462. Predictably, the brothers invoked the parol evidence rule. The court quoted Professor Wigmore at length. Wigmore makes the distinction between the act of transfer and the user of the property transferred or, put another way, between the character of the estate conveyed (fee simple, life estate, etc.) and the quality of the estate conveyed (security, trust, etc.). [Wigmore] then states his belief as to the proper inquiry to be made by the court: Whether the parties under all of the circumstances, appear to have intended the document to cover merely the kind of estate transferred, including that of the quality of the estate. [Id. at 463 (citing 9 Wigmore, Evidence (3d Ed.), §2437, pp 119-122) (further citations omitted)].

More significantly, the court quoted Cornell v Hall, 22 Mich 377 (1871), which stated a rule Wigmore "urged." The Michigan Supreme Court stated that "[e]ach case must be decided in view of the peculiar circumstances which belong to it and mark its character, and . . . the only safe criterion is the intention of the parties, to be ascertained by considering their situations and the surrounding facts, as well as the written memorials of the transaction." Cornell at 382 (emphasis added). Cornell's approach has been repeatedly adopted by the Michigan Supreme Court to support the court's conclusion that a trust exists. See, e.g., Prentis v Prentis, 189 Mich 1, 6 (1915) ("we think that this testimony was proper to explain the voluntary conveyance had with reference to this property, and to show why Mary Prentis received her deed, and why she conveyed it to Browse, and in 1912 quitclaimed to John F."); Lasley v Delano, 139 Mich 602, 606 ("The parol contract between complainant and Mr. Delano has been performed, and the parol trust imposed upon him fully executed."); Patten v Chamberlain, 44 Mich 5, 6-7 (1880) (Justice Cooley) ("Jane E. Chamberlain defends this suit in the interest of her daughter, and avows the trust in her answer. That is a sufficient declaration of trust in writing to answer the requirements of the statute of frauds."). Applied to the instant case, Donald Schuitema's declaration that he held the property as a "guardian" on this bankruptcy schedules, under oath, and under penalty of perjury, can serve as the writing to prove the existence of the trust

In Digby v Thorson, 319 Mich 524 (1948), the Michigan Supreme Court held that a constructive trust would be imposed "if circumstances are such as to render it inequitable for the holder of the legal title to retain the same, the court may charge it with a trust in favor of the equitable owner." Id. at 538. Again, as the court noted in Software Customizer, Inc. v Bullet Jet Charter (In re Bullet Jet Charter, Inc.), 177 BR 593, 604 (Bankr ND Ill 1995) cited supra, while the application

of section 541(d) “is usually in the context of the imposition of a constructive trust, . . . but it applies as well to equitable interests generally” and “[w]hether or not an equitable interest is labeled a constructive trust is of no moment.” *Id.* The point being that Michigan courts, via constructive trusts, equitable liens, equitable mortgages, or simply by using equitable principles generally, look beyond the face of the transactions to determine the true nature of the parties’ affairs and ownership interests.