



THE ENFORCER

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Give Me Security and Satisfaction: the JOD & the UCC

You've artfully negotiated the terms of the divorce, and obtained a favorable property settlement for your client. Part of that spectacular settlement provides your client with a lien in the ex-spouse's business as security for the performance and payment of the settlement. How do you actually go about getting your client that "security?" Can you perfect the lien on the business? Dust off your Secured Transactions treatises. This article will explore the narrow question of whether a Judgment of Divorce can constitute a security agreement under Article 9 of the Uniform Commercial Code ("UCC").

It is necessary to first explore the nature of divorce and the power of the court. A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case. Once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy.¹

When a court grants a lien on property, it impliedly grants money to one of the parties. A lien is a security interest for money owed by one party to the other.² A court possesses the inherent authority to enforce its own directives³ and Michigan law further provides circuit courts with jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments.⁴

Since the power of the court in divorce cases has been established, we now address the UCC and its relevant provisions. The UCC defines "Security Agreement" as an agreement that creates or provides for a security interest.⁵ Generally, it is effective according to its terms between the parties, against subsequent purchasers of collateral, and against creditors.⁶ When a written security agreement is required, it must satisfy the formal requirements set forth by the UCC.⁷

The question of *when* a security interest can be attached and enforced is a crucial question. When a security interest arises or comes into existence, it is said to "attach." Attachment arises upon the satisfaction of the following three requirements:

- (a) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has

signed a security agreement which contains a description of the collateral; and

- (b) value has been given; and

- (c) the debtor has rights in the collateral.⁸

A security interest does not attach and cannot be enforced unless certain conditions have been satisfied. These conditions are the same for both enforceability and attachment; "a security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment."⁹

The UCC language defining attachment in terms of enforceability is immediately followed by a statement to the effect that attachment occurs as soon as all the elements specified in MCL 440.9203(2) have taken place. But do not confuse attachment with perfection.

What this means to you, the family law practitioner, is this: If you intend to "secure" performance for payment of a monetary award by utilizing a business as collateral, you had better make sure that you comply with the provisions of Article 9 of the UCC, MCL 440.9101, *et seq.* Draft the Judgment of Divorce so that it meets the requisites of a security agreement, containing a description of the collateral, and very importantly the signature of the "debtor." Otherwise, you may choose to prepare a separate security agreement.

By securing the award with the business, in the example above, the Judgment of Divorce created a lien, a form of security interest.¹⁰ By creating a security interest, the Judgment of Divorce can constitute a security agreement under the UCC. An enforceable security agreement allows you to "perfect" by filing a UCC financing statement with the Secretary of State. However, if you cannot obtain the assent of the ex-spouse to the security agreement, the security your client desires may be unattainable.

Endnotes

1. *Schaeffer v Schaeffer*, 106 MichApp 452, 457; 308 NW2d 226 (1981)

2. *Lawrence v Lawrence*, 150 MichApp 29, 33; 388 NW2d 291 (1986)
3. *Greene v Greene*, 357 Mich 196, 202; 98 NW2d 519 (1959)
4. MCL § 600.611
5. MCL 440.9102(III)
6. MCL 440.9201
7. MCL 440.9203(2)
8. *In re Piscitello*, 67 B.R. 893 (E.D.Mich., 1986); See also, MCL 440.9203(2)
9. MCL 440.9203(1)
10. *Walworth v Wimmer*, 200 MichApp 562, 564, 504 NW2d 708 (1993)

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