

1996

# Mary Ann Werner-Jacobsen, Dennis N. Jacobsen v. Karen Bednarik : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Annette T. Jan; attorney for appellee.

Louise T. Knauer; attorney for appellant.

---

## Recommended Citation

Brief of Appellee, *Mary Ann Werner-Jacobsen, Dennis N. Jacobsen v. Karen Bednarik*, No. 960321 (Utah Court of Appeals, 1996).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/251](https://digitalcommons.law.byu.edu/byu_ca2/251)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

MICHAEL A. ZODY (5830)  
PARSONS BEHLE & LATIMER  
Pro Bono Appellate Counsel for  
Karen Bednarik  
201 South Main Street, Suite 1800  
Post Office Box 45898  
Salt Lake City, Utah 84145-0898  
Telephone: (801) 532-1234

**IN THE UTAH COURT OF APPEALS**

Mary Ann Werner-Jacobsen, and	)	
Dennis N. Jacobsen,	)	
	)	
Plaintiffs and Appellant,	)	
	)	Case No. 960321-CA
vs.	)	
	)	Priority No. 10
Karen Bednarik,	)	
	)	
Defendant and Appellee.	)	

**BRIEF OF APPELLEE, KAREN BEDNARIK**

---

On Appeal From Interlocutory Order of the Third District Court  
In and for Salt Lake County, State of Utah  
The Honorable J. Dennis Frederick, Presiding

---

Louise T. Knauer  
261 East 300 South, Suite 300  
Salt Lake City, Utah 84111

Annette T. Jan  
Legal Aid Society of Salt Lake  
225 South 200 East, Suite 200  
Salt Lake City, Utah 84111

Michael A. Zody  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84111

Attorney for Appellant

Attorneys for Appellee

MICHAEL A. ZODY (5830)  
PARSONS BEHLE & LATIMER  
Pro Bono Appellate Counsel for  
Karen Bednarik  
201 South Main Street, Suite 1800  
Post Office Box 45898  
Salt Lake City, Utah 84145-0898  
Telephone: (801) 532-1234

**IN THE UTAH COURT OF APPEALS**

Mary Ann Werner-Jacobsen, and	)	
Dennis N. Jacobsen,	)	
	)	
Plaintiffs and Appellant,	)	
	)	Case No. 960321-CA
vs.	)	
	)	Priority No. 10
Karen Bednarik,	)	
	)	
Defendant and Appellee.	)	

**BRIEF OF APPELLEE, KAREN BEDNARIK**

---

On Appeal From Interlocutory Order of the Third District Court  
In and for Salt Lake County, State of Utah  
The Honorable J. Dennis Frederick, Presiding

---

Louise T. Knauer  
261 East 300 South, Suite 300  
Salt Lake City, Utah 84111

Annette T. Jan  
Legal Aid Society of Salt Lake  
225 South 200 East, Suite 200  
Salt Lake City, Utah 84111

Michael A. Zody  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84111

Attorney for Appellant

Attorneys for Appellee

## TABLE OF CONTENTS

	Page
JURISDICTIONAL STATEMENT .....	2
STATEMENT OF ISSUES .....	2
Preservation of Issues .....	4
DETERMINATIVE STATUTES .....	4
STATEMENT OF THE CASE.....	6
STATEMENT OF FACTS .....	7
SUMMARY OF ARGUMENT .....	9
ARGUMENT .....	10
I. The District Court Did Not Abuse its Discretion by Joining Werner-Jacobsen Under Rule 19.....	10
II. The Alter Ego Theory Supports the Joinder of Werner-Jacobsen in This Action.....	11
III. The District Court’s Joinder of Werner-Jacobsen Can Be Affirmed on the Basis That She Has Received Fraudulently Conveyed Property. ....	14
IV. The District Court’s Joinder of Werner-Jacobsen Can Also Be Affirmed Under Utah Code Ann. § 78-45-4.1 Which Imposes A Duty of Support Upon Stepparents. ....	16
CONCLUSION.....	16

## TABLE OF AUTHORITIES

### FEDERAL CASES

<u>Patano v. Clark Equipment Co.</u> , 139 F.R.D. 40 (S.D.N.Y. 1991) .....	2
--	---

### STATE CASES

<u>Avila v. Winn</u> , 794 P.2d 20 (Utah 1990) .....	3
<u>Ball v. Peterson</u> , 912 P.2d 1006 (Utah App. 1996) .....	16
<u>BeBry v. Noble</u> , 889 P.2d 428 (Utah App. 1995) .....	4
<u>Benson v. Richardson</u> , 537 N.W.2d 748 (Iowa 1995) .....	15
<u>Burwell v. Neumann</u> , 37 A.2d 640 (Conn. 1943) .....	11
<u>Dockstader v. Walker</u> , 510 P.2d 526 (Utah 1973) .....	12
<u>Hebertson v. Willowcreek Plaza</u> , 923 P.2d 1389 (Utah 1996) .....	6
<u>Indian Village Trading Post v. Bench</u> , 929 P.2d 367 (Utah App. 1996) .....	4
<u>Johnson v. Johnson</u> , 572 P.2d 925 (Nevada 1977) .....	15
<u>LaBow v. LaBow</u> , 537 A.2d 157 (Conn. App. 1988) .....	11
<u>Ludlow v. Salt Lake County Board of Adjustment</u> , 893 P.2d 1101 (Ct. App. 1995) .....	2
<u>Lyons v. Lyons</u> , 340 So. 2d 450 (Ala. Civ. App. 1976) .....	12
<u>Messick v. PHD Trucking Service, Inc.</u> , 678 P.2d 791 (Utah 1984) .....	13
<u>Norman v. Murray First Thrift &amp; Loan Co.</u> , 596 P.2d 1028 (Utah 1979) .....	12
<u>Salt Lake City Corp. v. James Constructors, Inc.</u> , 761 P.2d 42 (Utah App. 1988) .....	11
<u>Seftel v. Capital City Bank</u> , 767 P.2d 941, 944 (Utah App. 1989), <u>aff'd sub nom.</u> <u>Landes v. Capital City Bank</u> , 795 P.2d 1127 (Utah 1990). ....	2, 10
<u>State v. South</u> , 924 P.2d 354 n.3 ( Utah 1996 ).....	4

## STATE STATUTES

Utah Code Ann. §§ 25-6-1 .....	3
Utah Code Ann. § 25-6-5 .....	4
Utah Code Ann. § 25-6-5(1)(a) .....	14
Utah Code Ann. § 78-45-4.1 .....	3
Utah Code Ann. § 78-45-4.1 .....	16
Utah Code Ann. § 78-45-4.1 .....	5
Utah Code Ann. § 78-45-4.1 .....	1
Utah Code Ann. § 78-45-7.1 .....	16
Utah Code Ann. § 78-45-7.4 .....	16
Utah Code Ann. § 25-6-5(2)(a), (b) and (d) .....	15

## **JURISDICTIONAL STATEMENT**

Defendant/appellee Karen Bednarik disputes plaintiff/appellant Mary Ann Werner-Jacobsen's standing to bring the appeal. The order being appealed joined Werner-Jacobsen as a party under Rule 19, Utah Rules of Civil Procedure. There is no requirement that the party to be joined must be given notice of the motion to join. Cf. Patano v. Clark Equipment Co., 139 F.R.D. 40, 42 (S.D.N.Y. 1991) (motion to add new party under Rule 14, Federal Rules of Civil Procedure, not required to be served on proposed new party). The only parties that must be given notice are those in the case. Id. Once the motion to join is granted, then the new party must be served and has an opportunity to move to quash service or file a motion to dismiss. In fact, Werner-Jacobsen was served, filed a motion to quash and a motion for reconsideration. R 246-252, 267-268. Accordingly, Werner-Jacobsen would only have standing to appeal when the district court rules on her motion to quash/reconsider.

## **STATEMENT OF ISSUES**

1. Whether the district court abused its discretion under Rule 19, Utah Rules of Civil Procedure, when it added Werner-Jacobsen as a party in order to insure that full equitable relief could be granted in connection with Bendarik's efforts to collect past due child support from her ex-husband. See Ludlow v. Salt Lake County Bd. of Adjustment, 893 P.2d 1101, 1103 (Ct. App. 1995) ("Ordinarily, we will not disturb a trial court's Rule 19 determination absent an abuse of discretion.") (citing to Seftel v. Capital City Bank, 767 P.2d 941, 944 (Utah App. 1989), aff'd sub nom. Landes v. Capital City Bank, 795 P.2d 1127 (Utah 1990)).

2. Whether the district court properly applied the “alter ego” doctrine to Werner-Jacobsen, the new spouse of Bendarik’s ex-husband, where Bednarik has alleged that assets of her ex-husband are being hidden in the name of Werner-Jacobsen in order to frustrate Bednarik’s ability to collect past due child support. See Avila v. Winn, 794 P.2d 20, 22 (Utah 1990) (as to issues of law, appellate court reviews for correctness without according deference to the district court)

3. Whether the district court’s ruling may be supported on the alternative ground that, pursuant to Utah Code Ann. §§ 25-6-1 to -13 (Uniform Fraudulent Transfer Act) Bednarik’s ex-husband has fraudulently conveyed assets to his new wife, Werner-Jacobsen, thus making Werner-Jacobsen an indispensable party to the underlying action to recover past due child support. See Avila v. Winn, 794 P.2d 20, 22 (Utah 1990) (as to issues of law, appellate court reviews for correctness without according deference to the district court)

4. Whether the district court’s ruling may be supported on the alternative ground that, pursuant to Utah Code Ann. § 78-45-4.1, which states that stepparents are obligated to support their stepchildren, Bednarik may pursue the assets of Werner-Jacobsen to collect past due child support that has accrued since Werner-Jacobsen married Bednarik’s ex-husband. See Avila v. Winn, 794 P.2d 20, 22 (Utah 1990) (as to issues of law, appellate court reviews for correctness without according deference to the district court)



### **Preservation of Issues**

Bednarik expressly referred to Rule 19(a), Utah Rules of Civil Procedure, as the basis for her Motion to Join Party [Werner-Jacobsen] and Amend Petition for Modification. R 120. Bednarik provided detailed analysis of the “alter ego” issue in her Memorandum in Support of Motion to Join Party and Amend Petition for Modification. R 121-131. These issues have been preserved.

Bednarik asks the Court of Appeals to consider two grounds not raised below upon which the district court’s decision to join Werner-Jacobsen may be affirmed: (1) fraudulent conveyance and (2) stepparent’s statutory support obligation. The Court of Appeals may do so under the rule in Utah that an appellate court may affirm on any proper grounds, even if not raised below. See Indian Village Trading Post v. Bench, 929 P.2d 367, 369 (Utah App. 1996) (affirming district court’s order of dismissal on grounds not raised below); BeBry v. Noble, 889 P.2d 428, 444 (Utah App. 1995) (same); but cf. State v. South, 924 P.2d 354, 355, n. 3 (Utah 1996) (acknowledges inconsistency of prior opinions but most recent opinion cited by court allows affirmance based upon argument not raised below).

### **DETERMINATIVE STATUTES**

#### **Utah Code Ann. § 25-6-5. Fraudulent transfer - Claim arising before or after transfer.**

(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:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

\* \* \*

(2) To determine "actual intent" under Subsection (1)(a), consideration may be given, among other factors, to whether:

- (a) the transfer or obligation was to an insider;
- (b) the debtor retained possession or control of the property transferred after the transfer;
- (c) the transfer or obligation was disclosed or concealed;
- (d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (e) the transfer was of substantially all the debtor's assets;
- (f) the debtor absconded;
- (g) the debtor removed or concealed assets;
- (h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

**Utah Code Ann. § 78-45-4.1. Duty of stepparent to support stepchild - Effect of termination of marriage or common law relationship.**

A stepparent shall support a stepchild to the same extent that a natural or adoptive parent is required to support a child. Provided, however, that upon the termination of the marriage or common law relationship between the stepparent and the child's natural or adoptive parent the support obligation shall terminate.

## STATEMENT OF THE CASE

Bednarik generally agrees with the Statement of the Case prepared by Werner-Jacobsen with the following exceptions. Werner-Jacobsen indicates that she was not served with the Motion to Join Party and Amend Petition for Modification. This is true. However, as noted above, Bednarik was not required to provide notice to her, only to the current parties to the action. The other exception pertains to Werner-Jacobsen's observation that the district court did not make detailed findings of fact. The district court was not required to do so. Bednarik's motion to join Werner-Jacobsen did not seek a conclusive finding of liability against Werner-Jacobsen but rather was in the form of a request to amend Bednarik's pleadings in order to join a new party. Because this was a pleading issue, as opposed to a bench trial (which would necessitate findings of fact, see Rule 52(a), Utah Rules of Civil Procedure) it should be treated as a motion to dismiss for failure to state a claim under Rule 12(b)(6). Under this rule, Bednarik's allegations in the fact statement of her Memorandum in Support of Motion to Join Party and Amend Petition for Modification must be taken as true and viewed in the light most favorable to her. See Hebertson v. Willowcreek Plaza, 923 P.2d 1389, 1390 (Utah 1996). Accordingly, Bednarik repeats those allegations (R 121-124) in her Statement of Facts.

## **STATEMENT OF FACTS**

1. Dennis N. Jacobsen was ordered to pay child support of \$150.00 per month in 1981 and then ordered to pay child support of \$75.00 per month per child commencing April 23, 1993.
2. Jacobsen has continually failed to pay his ongoing child support obligation and owes Bednarik substantial sums for child support arrears.
3. Bednarik obtained a judgment against Jacobsen for child support arrears on May 5, 1992 and said judgment totaled \$17,199.93, plus interest at the rate of 12% per annum accruing from the date of entry of the order.
4. Jacobsen has failed to satisfy this judgment or even make payments towards the outstanding judgment.
5. That since the parties divorced in 1981, Jacobsen has known of his ongoing child support obligation and purposefully took actions to avoid the payment and collection of such court ordered obligations.
6. Jacobsen has avoided his child support obligation from the first month he was ordered to pay it. As seen from the judgment obtained in 1992, Jacobsen failed to pay child support from July 1, 1981 through March 31, 1992. Jacobsen not only failed to pay the ongoing child support obligation as outlined, but has also failed to pay on this judgment since it was obtained by Bednarik.

7. That since the judgment was entered Jacobsen owed child support for thirteen (13) months at \$150.00 per month for a total of \$1,950.00 and child support for thirty-four (34) months at \$75.00 per month for a total of \$2,550.00. To date Jacobsen has paid \$2,235.00 and still owes \$2,265.00 in current child support arrears plus the outstanding judgment.

8. Jacobsen married Mary Ann Werner on June 14, 1990.

9. That since his marriage to Mary Ann Werner-Jacobsen, Jacobsen has hid all of his assets and income in the name of his new wife.

10. That the parties purchased a home on November 14, 1991 which they live in together, however, the home is titled solely in the name of Mary Ann Werner.

11. That the parties own many vehicles, including numerous taxi cabs. Jacobsen himself attached the titles of seven (7) vehicles to his Answer to the Order to Show Cause, all of which are solely in the name of Mary Ann Werner-Jacobsen. That the only vehicle which the parties own which is titled in the name of Jacobsen is a vehicle with a lienholder which cannot be taken for collection of child support.

12. That all of the Jacobsen's bank accounts are solely in the name of Werner - Jacobsen. The few times Bednarik has received child support payments from Jacobsen over the last few years, all of the bank accounts are in Werner - Jacobsen's name alone.

13. Jacobsen maintains that all of the taxi cabs mentioned above and income generated from the cabs belongs exclusively to his wife. Jacobsen continues to make such a claim in spite of a newspaper interview which he gave in the summer of 1995 in which he was

quoted as saying he makes \$200 to \$300 a day driving cabs and that "he owns four taxis, leasing cars to other drivers through Yellow Cab."

14. Jacobsen continues to make this claim in spite of having business cards with his name, number and the name and number of Yellow Cab. This business card was given to the parties' minor son by Jacobsen himself in January of 1996.

15. That by maintaining this position and shielding all of his income and assets in the name of Werner-Jacobsen, Jacobsen has thus far insured that he does not have a salary which can be garnished and does not own assets which could be surrendered or sold to collect for child support arrears.

### **SUMMARY OF ARGUMENT**

The district court acted within its discretion when it joined Werner-Jacobsen. Her presence is necessary in order for Bednarik to obtain complete relief in this action. Because Werner-Jacobsen is alleged to be assisting Jacobsen in hiding his assets, it is proper to treat her as his alter ego. Likewise, it is appropriate to bring her into this action on the grounds that she is alleged to have received fraudulently conveyed assets from Jacobson. Under both the alter ego and fraudulent conveyance theories, Bednarik does not seek to collect against the separate assets of Werner-Jacobsen. Rather, Bednarik seeks to establish the amount of funds that Jacobsen has improperly transferred to Werner-Jacobsen and obtain a judgment against Werner-Jacobsen for up to that amount. Lastly, the district court's decision can be affirmed under Utah statutory law which provides that stepparents are obligated to support their stepchildren. Under this theory,

Bednarik is entitled to recover past due child support that has accrued since Werner-Jacobsen married Jacobsen.

## **ARGUMENT**

### **I. The District Court Did Not Abuse its Discretion by Joining Werner-Jacobsen Under Rule 19.**

Pursuant to Rule 19(a)(1), Utah Rules of Civil Procedure, "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be afforded among those already parties, ...." Without Werner-Jacobsen in this action, Bednarik will not be able to obtain a judgment against Jacobsen's assets that have been hidden in Werner-Jacobsen's name. Likewise, to proceed against Werner-Jacobsen based upon her statutory duty of support as a stepparent, Werner-Jacobsen must be joined. As such, the district court acted within its discretion and has prevented the result of forcing Bednarik to bring a separate, but clearly related action, against Werner-Jacobsen. See Landes, 795 P.2d at 1130 (purpose of Rule 19 is to avoid multiple litigation and possibility of inconsistent judicial determinations). Furthermore, as noted in Section III below, courts have found that an alleged transferee of a fraudulent conveyance, like Werner-Jacobsen, is an indispensable party in an action to collect against the fraudulently conveyed property.

## **II. The Alter Ego Theory Supports the Joinder of Werner-Jacobsen in This Action.**

Bednarik acknowledges that the “alter ego” theory has typically been applied to corporations, not individuals. However, a “key feature of the alter ego theory is that it is an equitable doctrine requiring that each case be determined upon its peculiar facts.” Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 47 (Utah App. 1988). Some courts have extended the alter ego label to non-corporate entities. In one case, the court applied the “alter ego” label to two trusts that an ex-husband had used to hide assets from his ex-wife. LaBow v. LaBow, 537 A.2d 157, 167 (Conn. App. 1988) (affirming trial court’s modification of original alimony award based, in part, upon ex-wife’s evidence that ex-husband had failed to disclose assets in the trusts at the time of the divorce action). In another case, the court actually applied the “alter ego” label to an individual. Burwell v. Neumann, 37 A.2d 640 (Conn. 1943). The Burwell court ruled that the driver of a car that was involved in an accident was the “alter ego” of the owner and, thus, the owner could be held liable for the driver’s actions. 37 A.2d at 642.

The facts alleged by Bednarik support extension of the alter ego theory to Werner-Jacobsen in this case. Werner-Jacobsen is alleged to be an active participant in an effort by her husband, Jacobsen, to improperly shield his assets from Bednarik by placing them in Werner-Jacobsen’s name. If Bednarik is able to prove this allegation at trial, she will have met the key elements of the alter ego doctrine: (1) as to certain assets, the alleged separate ownership by Werner-Jacobsen is a sham, and (2) sanctioning the continued use of Werner-Jacobsen’s name as



a shield against Bednarik would lead to an inequitable result, i.e., Jacobsen would not be held accountable for his child support obligation.

In Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028 (Utah 1979), the Utah Supreme Court adopted a two-prong test in regards to the alter ego theory: "(1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow." This doctrine has been used by courts to disregard the legal distinction of titles held in the name of a corporation rather than a shareholder when such names were being used to perpetuate an injustice on third parties. The veil of protection invoked by a name or title will be pierced when a legal entity is "used to perpetrate a fraud, to justify a wrong, or to defeat justice." Dockstader v. Walker, 510 P.2d 526, 528 (Utah 1973).

In discussing the first prong of this test, courts have recognized that sometimes the creation and use of a separate legal entity is a well thought out scheme and in fact one individual is actually conducting business behind the legal shield of the name of another. In Lyons v. Lyons, 340 So.2d 450, 451 (Ala. Civ. App. 1976), the Court stated that "[a] court of equity looks through form to substance and has often disregarded the corporate form when it was fiction in fact and deed and was merely serving the personal use and convenience of the owner."

In the instant case, Jacobsen is hiding behind the separate legal entity of his wife's name in an effort to avoid child support orders and judgments against him. Jacobsen has the equitable benefit of residing in the home with his current wife, even though the title is in her name alone. Jacobsen has the equitable benefit of using the automobiles he shares with his current wife, even though the titles are in her name alone. Jacobsen, who has no banking accounts, has the equitable benefit of using the banking accounts of his current wife, his child support obligation has been paid out of them. Jacobsen has the equitable benefit of the taxi cab business, even though the titles to the cabs and business are in Werner-Jacobsen's name alone. Jacobsen hands out business card with his name and number and the business name and number. Drivers who drive the cabs owned by Werner-Jacobsen maintain that it is Jacobsen with whom they deal and to whom they pay their daily fees. Jacobsen was quoted by the Salt Lake Tribune in the summer of 1995 saying that he owned four taxi cabs and leased cars to other drivers through Yellow Cab. Werner-Jacobsen was not mentioned in this interview. Although Jacobsen has carefully made sure that every legal title is in the sole name of his current wife, he is still receiving the equitable benefit of such assets, including the taxi cab business.

The second element of the alter ego test is that the observance of the form would sanction a fraud, promote injustice or an inequitable result would follow. Courts have also stated that "[t]he [alter ego] test's second prong is addressed to the conscience of the court, and the circumstances under which it will be met will vary with each case." Messick v. PHD Trucking Serv., Inc., 678 P.2d 791, 794 (Utah 1984). In the instant case, if Jacobsen is allowed to continue

hiding assets and income in the name of his current wife, he will not be held responsible for his support obligations. It is evident that Werner-Jacobsen condones and participates in Jacobsen's scheme as she has signed and provided all of the necessary titles and paperwork to shield Jacobsen's assets and income. Accordingly, it was appropriate to join her as a party in this action based upon the alter ego doctrine.

**III. The District Court's Joinder of Werner-Jacobsen Can Be Affirmed on the Basis That She Has Received Fraudulently Conveyed Property.**

The district court's decision can be affirmed on the alternative theory of fraudulent conveyance. The allegations pled by Bednarik in support of her motion to join Werner - Jacobsen satisfy the elements of a fraudulent conveyance. Bednarik has alleged that her ex-husband, Jacobsen, has purposely transferred assets into the name of his new wife in order to frustrate her efforts to collect past due child support. These allegations satisfy the requirements under Utah Code Ann. § 25-6-5(1)(a) that the transfer be made "with actual intent to hinder, delay, or defraud any creditor of the debtor." Subsection (2) of this statute lists factors that should be considered in determining the issue of actual intent. Bednarik's allegations support the following factors: (1) the transfer was to an insider, Jacobsen's wife, (2) Jacobsen is alleged to have retained possession or control over the taxicab business, cars and checking accounts that are in his new wife's name, and (3) the transfers took place after Jacobsen had been ordered to pay child support and judgments were obtained against him. Utah Ann. Code § 25-6-5(2)(a), (b) and (d).

The Iowa Supreme court affirmed a fraudulent conveyance finding against a wife where her husband had transferred assets into her name in order to frustrate the ability of the husband's judgment creditors to collect. See Benson v. Richardson, 537 N.W.2d 748 (Iowa 1995) (affirming judgment of over \$500,000 against wife and imposition of constructive trust on real property where evidence established that husband transferred his income into accounts held in his wife's name, husband paid on mortgage on real property held in his wife's name and husband set up corporation owned exclusively by his wife in order to funnel his income through corporation, all of which were done to frustrate the collection efforts of creditors ). As in the Benson case, Bednarik's ex-husband has frustrated her collection efforts by hiding his income and business in the name of his wife, Werner-Jacobsen.

The Nevada Supreme Court held that where an ex-husband was alleged to have fraudulently conveyed assets to his new wife, the new wife was an indispensable party in the ex-wife's action to reach those assets. Johnson v. Johnson, 572 P.2d 925, 926-27 (Nevada 1977) ("Cases decided prior to the adoption of FRCP 19(a) hold that a transferee is an indispensable party in an action to set aside the conveyance of the transferred property. (citations omitted) To enter an order of reconveyance without joining the transferee would constitute the taking of property from one person and giving it to another without a hearing.") Applying this rule here, the district court's order was not only proper, it was required before Bednarik could attempt to collect against Werner-Jacobsen based upon the fraudulent conveyance theory.

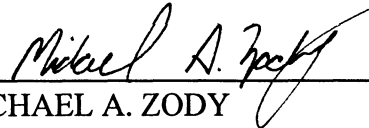
**IV. The District Court's Joinder of Werner-Jacobsen Can Also Be Affirmed Under Utah Code Ann. § 78-45-4.1 Which Imposes A Duty of Support Upon Stepparents.**

The State of Utah has imposed a duty of support upon stepparents. Utah Code Ann. § 78-45-7.1. Although a stepparent's income cannot be considered in calculating the amount of child support, Utah Code Ann. § 78-45-7.4, the income and assets of a stepparent can be reached to satisfy any back support obligations that have accrued since the stepparent married the obligor ex-spouse. See generally Ball v. Peterson 912 P.2d 1006, 1013 (Utah App. 1996) (noting that Utah statutory law "requires stepparents ... to support their stepchildren.") Accordingly, Werner-Jacobsen can be joined in this action based upon her duty as a stepparent to support her stepchildren.

**CONCLUSION**

By bringing Werner-Jacobsen into this action, Bednarik has not sought to ignore Werner-Jacobsen's separate existence or deny her any fundamental rights. Bednarik's purpose is to hold Werner-Jacobsen accountable to the extent that Bednarik's ex-husband has hidden his assets in Werner-Jacobsen's name. Also, the State of Utah has imposed a duty on stepparents to support their stepchildren. Because Bednarik's ex-husband has not satisfied his duty of support, Bednarik is entitled to collect from Werner-Jacobsen past due child support that has accrued since she became a stepparent. For these reasons, the district court did not abuse its discretion to join Werner-Jacobsen under Rule 19, Utah Rules of Civil Procedure.

DATED this 14<sup>th</sup> day of April, 1997.



MICHAEL A. ZODY  
PARSONS BEHLE & LATIMER  
Pro Bono Appellate Counsel for Appellee  
Karen Bednarik

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of April, 1997, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEE, KAREN BEDNARIK, to:

Louise T. Knauer  
261 East 300 South, Suite 300  
Salt Lake City, Utah 84111

