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Jacobsen v. Bednarik : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT, MARY ANN WERNER-JACOBSEN

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

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Appellant Mary Ann Werner-Jacobsen ("Werner-Jacobsen") hereby submits this Brief in Reply to the Brief of Appellee Karen Bednarik.

STATEMENT OF FACTS

Karen Bednarik ("Bednarik") set forth in her Brief what she claimed was a Statement of Facts of the case, citing to pages 121-124 of the Record in this case. That citation refers to, and quotes directly from, her unverified Statement of Facts in her Memorandum in Support of her Motion to Join Werner-Jacobsen in the action. The paragraphs in her Brief even carry the same numbers as those in her unverified Memorandum. None of the statements is made under oath in her Memorandum, nor would Bednarik be competent to testify as to any of these matters, other than the

issue of payment of child support, about which she testified inaccurately. With respect to her testimony concerning current arrearages, set forth in paragraph 7 of the Statement of Facts, she was inaccurate. In fact, the trial court, after a hearing, found that his actual arrearages were $1,965, the sum to which Dennis Jacobsen ("Jacobsen") admitted in his accounting, nor the $2,265 she claimed.

While there was documentation for the allegations numbered 3, 4, 8, 10, 11, 12, 13 and 14, there was none for her claims that Jacobsen has hidden all his assets in Werner-Jacobsen's name. The fact is, Bednarik has not even alleged that Jacobsen had any assets to transfer to Werner-Jacobsen, nor has she identified a single asset he might have owned that he could transfer to her. The reality is that Jacobsen had suffered a foreclosure, and also been discharged in bankruptcy from all his dischargeable debts shortly before he and Werner-Jacobsen married. He had at that time, and continues to have, substantial unpaid tax obligations, as well as non dischargeable judgments for child support arrearages. Had he had any assets when he and Werner-Jacobsen married, it is quite certain the I.R.S. would have seized them.

On the other hand, all of Werner-Jacobsen's allegations set forth in her **Statement of Facts** in her Brief cite either to Affidavit testimony, Decrees or Orders of the Court, or dates found in the Court's docket. There were no unverified facts included in her **Statement of Facts**.

Paragraphs 5, 7, 9, 12, and 15 of the Statement of Facts in Appellee's Brief must be stricken, since they are utterly without any foundation or basis in the record. Without those unverified statements, there can be no possible factual basis for joining Werner-Jacobsen in this action.

ARGUMENT

I. WERNER-JACOBSEN HAS STANDING TO APPEAL.

Bednarik claims, without relevant authority, in her **Jurisdictional Statement** that Werner-Jacobsen is without standing to appeal her joinder in this action, and that she should have filed a Motion to Quash and to Dismiss rather than filing the appeal. In fact, she did have standing to bring this appeal. Rule 5(a) of the Utah Rules of Appellate Procedure provides:

> An appeal from an interlocutory order may be sought by **any party** by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court... (Emphasis added.)

Clearly, once Werner-Jacobsen was joined by the Order entered April 29, 1996, she became a party to the action. Indeed, Bednarik's counsel believed Werner-Jacobsen was a party, since she submitted the Order joining her to Werner-Jacobsen's counsel for review and approval before submitting it to the Court for signature. (Letter dated April 10, 1996 from Melissa Patten-Greene to Louise Knauer, R. 254; Mailing Certificate on April 29, 1996 Order, R. 257.) Werner-Jacobsen had only twenty days within which to appeal that Order, and did so May 15, 1996.

Werner-Jacobsen also has the right to file a Motion to Quash Service and to Dismiss the Complaint, and she did so on May 13, 1996. However, although Judge Frederick granted Bednarik's Motion to Join Werner-Jacobsen without referring the matter to the Domestic Relations Commissioner as required, he refused to hear Werner-Jacobsen's Motion. (R. 281.) The Domestic Relations Commissioner cannot overrule the decision of the Judge in this matter. Therefore, once

the Court of Appeals granted the Interlocutory Appeal, it seemed pointless to pursue the Motion to Dismiss and Quash.

II. THE DISTRICT ABUSED ITS DISCRETION IN JOINING WERNER-JACOBSEN UNDER RULE 19.

Bednarik claims, without any cited authority, that the District Court did not abuse its discretion in joining Werner-Jacobsen in this action. However, as Werner-Jacobsen demonstrated in her Brief, the Court must follow a two-step analysis before joining a party under Rule 19 of the Utah Rules of Civil Procedure, and failure to do so constitutes error. The Utah Supreme Court held in **Landes v. Capital City Bank**, 795 P.2d 1127, 1130 (1990):

> In performing a Rule 19 analysis, the court should discuss specific facts and reasoning that lead to the conclusion that a party is or is not necessary under Rule 19(a) or indispensable under Rule 19(b). Thus, the Court of Appeals was correct in holding that the trial court erred by failing to discuss the facts and reasoning, within the framework of Rule 19, by which it made its determination of indispensability.

In this case, the Court failed to provide any evidence that it conducted any analysis before joining Werner-Jacobsen as Jacobsen's alter ego.

Bednarik also seemed to make an argument in her **Statement of the Case** that she only need made unsubstantiated allegations to justify joining Werner-Jacobsen in this action, claiming somehow that the requirements of Rule 12(b)(6) of the Utah Rules of Civil Procedure apply. Werner-Jacobsen is unable to make any sense of the argument, nor is Bednarik's only citation, **Hebertson v. Willowcreek Plaza**, 923 P.2d 1389, 1390 (Utah 1996), remotely on point. In that case, Hebertson sued Willowcreek Plaza, and both the Court of Appeals and the Utah Supreme Court, upheld the trial

court's dismissal of the action because the Plaintiff failed to name Valley Bank and Dime Savings, which were the actual parties involved in the transaction, and the banks did not collectively do business as "Willowcreek Plaza." Bednarik has not demonstrated any relevance of that holding to this case.

Even if her argument that the standards for Rule 12(b)(6) applied in this instance, Rule 12(b)(6) supports Werner-Jacobsen's position that she cannot rely on unverified allegations to join Werner-Jacobsen. Rule 12(b)(6) provides that if any matters outside the pleadings are presented to the court, the matter shall be treated as one for summary judgment. In this case, the trial court had the Affidavits of Mary Ann Werner-Jacobsen, Dennis Jacobsen and various documents before it. Jacobsen and Werner-Jacobsen disputed all of the allegations concerning Jacobsen's hiding assets in Werner-Jacobsen's name, and affirmatively state that the parties kept their assets separate because of Jacobsen's financial problems. Therefore, assuming that Bednarik is correct, and that the Court looks to Rule 12(b)(6) to determine whether there was a factual basis to join Werner-Jacobsen, Rule 12(b)(6) points the Court to Rule 56(e) of the Utah Rules of Civil Procedure, which applies to summary judgment proceedings

Rule 56(e) specifically provides that, in the event a party submits Affidavits, the other party "may not rest upon the mere allegations or denial of his pleadings..." In this case, Bednarik has provided absolutely no competent evidence that Jacobsen has hidden his assets in Werner-Jacobsen's name, but has merely alleged that to be the case. Using Bednarik's own argument, the trial court

must be reversed, since there was no competent evidence to support its Order joining Werner-Jacobsen as Jacobsen's alter ego.

III. WERNER-JACOBSEN CANNOT BE JACOBSEN'S ALTER EGO.

Werner-Jacobsen cannot be Jacobsen's alter ego for the reasons set forth in her Brief, nor can Bednarik reach Werner-Jacobsen's assets. Indeed, Bednarik herself "acknowledges that the 'alter ego' theory has typically been applied to corporations, not individuals." She has provided no argument against the obvious proposition that the Courts cannot simply ignore Werner-Jacobsen's legal existence. Bednarik further admitted in her **Summary of Argument** that Werner-Jacobsen is not, in fact, Jacobsen's alter ego. She stated:

> 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.

If Werner-Jacobsen were Jacobsen's alter ego, she would not exist as a legal entity capable of holding assets. All of her assets would be available to Bednarik to satisfy her judgments against Jacobsen. Apparently Bednarik does not dispute Werner-Jacobsen's argument that the Utah Constitution, statutes and decisional law clearly bar her from reaching Werner-Jacobsen's separate assets, unless they have been "improperly transferred" from Jacobsen to her.

Nevertheless, Bednarik continues to claim that, in this instance, joinder as an alter ego is proper because it would be unfair to do otherwise. In fact, Bednarik does have a remedy, she may file a **separate action** against Werner-Jacobsen, alleging fraudulent conveyance of assets from

Jacobsen to Werner-Jacobsen, and, as to those assets, collect on the judgment against Werner-Jacobsen. (See the argument set forth in Section V below.)

As an aside, Jacobsen's alleged use of Werner-Jacobsen's automobiles, residence in Werner-Jacobsen's home, and enjoyment of the benefit of the taxi cabs owned by Werner-Jacobsen, are identical to Bednarik's situation in her marriage. She lives in Mr. Bednarik's home, but has no ownership interest in it. She benefits from the income derived from Mr. Bednarik's business, but does not own it, nor receive income directly to herself from it. It seems obvious that her argument is sexist. Implicitly, she is claiming that if a woman is supported by a man, and the marital assets are owned solely by the man, the husband is **not** the alter ego of the wife nor do the assets really belong to the wife. However, she is asking the Court to find that if a man is supported by his wife, and enjoys the use of her property without financially contributing to its acquisition or improvement, that property **really** belongs to the husband, and should be available to pay his debts, notwithstanding the constitutional, statutory and decisional prohibitions against such an assumption.

Bednarik cites two cases from other jurisdictions in support of her contention that an alter ego theory may be used to reach Werner-Jacobsen's assets. In **LaBow v. LaBow**, 537 A.2d 157 (Conn. App. 1988) Mr. LaBow had failed to disclose two trusts at the time of the dissolution of the marriage in 1978. Subsequently, both parties filed Petitions for Modification, seeking to change the alimony award. In that case, the trial court found that the discovery of Mr. LaBow's failure to disclose his trusts at the time of the dissolution was a material change of circumstance, not

contemplated at the time of the dissolution, and served, in part, as a basis for an increased alimony award. The appellate court stated, in passing, that the trusts were Mr. LaBow's "alter egos", but the decision does not disclose whether they were revocable or irrevocable trusts, or the identify of the trustee or beneficiary. Nevertheless, whatever the actual facts concerning the trusts, a trust, like a corporation, is an artificial creation. The fact that a Court stated, in passing, that a trust is an alter ego of a person is not in conflict with Werner-Jacobsen's position that an individual cannot be another individual's alter ego. A trust can be terminated, as may the existence of a corporation. The existence of a human being cannot be terminated by the state, at least not unless he is convicted of a capital offense.

In the one case cited by Bednarik in which a court actually applied the term "alter ego" to an individual, the term was loosely used. The case of **Burwell v. Neumann**, 37 A.2d 640 (Conn. 1943) is described by the Connecticut Court as involving "the liability of an owner of an automobile for the damages resulting from the negligence of a driver, claimed by the plaintiffs to have been a **subagent**." **Burwell v. Neumann**, 37 A.2d at 640. (Emphasis added.) The case actually dealt with agency theory. Ms. Neumann entrusted her automobile to her brother, so that he could move a stove for her. He, in turn, allowed a friend (Mr. Dykun) to drive the car during the course of moving the stove. Mr. Dykun had an accident while driving Ms. Neumann's automobile. After reviewing the facts, the court held that Ms. Neumann's brother was her "servant and agent." **Burwell v. Neumann**, 37 A.2d at 642. After additional analysis, it held that Ms. Neumann had also authorized her brother to use other

people to held him move the stove, and that "Mr. Dykun's negligence was in effect that of Olson (Ms. Neumann's brother)." **Id.** The **Burwell** court never found that Dykun was Neumann's alter ego.

However, in reaching its decision, the Court quoted language from **Archambault v. Holmes**, 4 A.2d 420 (Conn. 1939) and that quote contained the words "alter ego." In the **Archambault** case, the Court determined that a potential purchaser of an automobile involved in an accident during a test drive was the agent of the actual owner of the automobile, so that the driver's negligence was imputed to the owner. **Archambault v. Holmes**, 4 A.2d at 421. In that context the Court stated:

> Where one person permits another to operate a car, but remains in control, the driver is no more than the alter ego of the other and his acts are in effect just as much the acts of that other as though he were the one actually operating the car. **Id.**

Clearly, the Connecticut line of cases deal with the question of agency, not alter ego as used by Bednarik. They do not support her position.

IV. BEDNARIK IS BARRED FROM RAISING ISSUES NOT BROUGHT BEFORE THE TRIAL COURT.

Bednarik asks this Court to affirm the Trial Court's joinder of Werner-Jacobsen on two grounds not raised and considered below. Specifically, she is asserting that the Trial Court's decision should be affirmed based on the Uniform Fraudulent Transfer Act, U.C.A. 25-6-1 et seq. and/or U.C.A. 78-45-4.1. However, she is barred from doing so. As the Utah Supreme Court stated in **Bangerter v. Poulton**, 663 P.2d 100, 102 (Utah 1983) "It is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal."

Bednarik cites two more recent cases in support of her contention that she may raise new issues on appeal, and one recent case which acknowledges the Supreme Court's inconsistency on that subject. In both **Indian Village Trading Post v. Bench**, 929 P.2d 367 (Utah App. 1996) and **Debry v. Noble**, 889 P.2d 428 (Utah App. 1995), the Court of Appeals quoted exactly the same language in support of its decision. "An appellate court may affirm a trial count's ruling on any property grounds, even though the trial court relied on some other grounds." **Debry v. Noble**, 889 P.2d at 444; **Indian Village Trading Post**, 929 P.2d at 369. However, in this case, the issue is not the grounds on which the trial court based its opinion, but rather the fact that neither Uniform Fraudulent Transfer Act nor the stepparent's alleged obligation to support his stepchildren was so much as mentioned or hinted at below. As the **Utah Supreme Court** pointed out in **State v. South**, 924 P.2d 354, 355, n. 3 (Utah 1996), its decisions on whether or not the appellate court may affirm a decision based on an argument not raised below "have been somewhat inconsistent." However, the only case cited in Footnote 3 in **State v. South** which allegedly permitted the use of an argument not raised below as the basis for affirmance is **Buehner Block Co. v. UWC Assocs.**, 752 P.2d 892 (Utah 1988). However, in the **Buehner Block** case the Supreme Court cited with approval and agreement **Bangerter v. Poulton**, even quoting the language that it is "axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal." **Buehner Block Co. V. UWC Assocs.**, 752 P.2d 892, n. 3 and 3. The Supreme Court did not appear to adopt a contrary rule in **Buehner Block**. See also **Loveland v. Orem City**, 746 P.2d 763, 767 (Utah 1987);

Tipik v. Thurber, 739 P.2d 1101,1103 (Utah 1987): **Instey Mfg. Corp. v. Draper Bank & Trust**, 717 P.2d 1341, 1347 (Utah 1986); **American Coal Co. v. Sandstrom**, 689 P.2d 1, 4 (Utah 1984); **L&M Corp. v. Loader**, 688 P.2d 448, 449-50 (Utah 1984).

While it may be possible under Utah law for an appellate court to affirm the decision of the lower court for a reason not stated by that court, the weight of the opinions of the Utah Supreme Court reject the contention that entirely new claims or defenses can be raised for the first time on appeal. Therefore, since Bednarik never raised the claim of fraudulent conveyance or stepparent's obligations below, neither theory may be raised on appeal to justify her joinder in this action.

V. EVEN ASSUMING A CLAIM OF FRAUDULENT CONVEYANCE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, SUCH A CLAIM CANNOT BE THE BASIS OF WERNER-JACOBSEN'S JOINDER TO A DIVORCE ACTION.

Even assuming that Bednarik can raise the issue of fraudulent conveyance for the first time on appeal, an claim under the Uniform Fraudulent Conveyance Act ("UFCA") U.C.A. 25-6-1 et seq. cannot constitute a basis for Werner-Jacobsen's joinder in the present action. Werner-Jacobsen does not deny that Bednarik may bring a separate action against her under the UFCA. However, she cannot join that cause of action to a divorce action.

The UFCA sets identifies and defines the elements of a fraudulent conveyance. At U.C.A. 25-6-8, it provides that **"in an action for relief against a transfer"**..., a creditor may obtain, *inter alia*, avoidance of the transfer, attachment of the asset, injunction or appointment of a receiver. A

separate action is statutorily required It clearly requires a separate action to set aside a fraudulent transfer of property

Under the previous fraudulent conveyance statute, at U C A 25-1-8, repealed and replaced with the current statute in 1988, the Utah Supreme Court required a separate action before execution on property The previous statute provided that

> Every conveyance made with the intent to delay, hinder or defraud creditors, as against the persons hindered, delayed or defrauded shall be **void** U C A 25-1-8, repealed in 1988 (Emphasis added)

Yet even with language that fraudulent transfers were **void**, not merely voidable, the Utah Supreme Court required that the creditor bring a separate action before permitting execution on fraudulently conveyed property The Court held in **Baldwin v. Burton**, 850 P 2d 1188, 1195 (Utah 1993)

> It was necessary for the Burtons to bring a prior, separate action to set aside and declare void the allegedly fraudulent conveyance before foreclosing and executing on Baldwin's interest in the property

Therefore, Bednarik must bring a separate fraudulent conveyance action

She cannot join that action with a divorce action, in part because she is entitled to a jury trial with respect to the fraudulent conveyance claims In reversing a summary judgment in a fraudulent conveyance action, the Utah Court of Appeals stated in **Territorial Savings & Loan Assoc. v. Baird**, 781 P 2d 452, 461 (Utah App 1989) "what constitutes good faith or fair equivalent under a fair consideration requirement is a **jury** question " (Emphasis added) Matters for which a party

is entitled to a jury cannot be joined to a divorce action. See **Walther v. Walther**, 709 P.2d 387, 388 (Utah 1985) (trial court should not have tried the wife's tort claim as part of the divorce action, award vacated);. **Noble v. Noble**, 761 P.2d 1369 n. 4 (Utah 1988) (a fact question on which a party is entitled to a jury verdict should not be decided in a divorce action.).

In fact, the only divorce/fraudulent conveyance case in Utah which Werner-Jacobsen has found reported is consistent with her position that Bednarik must bring a separate action against her in fraudulent conveyance to execute on her judgments against Jacobsen. In **Wade v. Burke**, 800 P.2d 1106 (Utah App. 1990) Wade, formerly Mrs. Burke, brought an action against her former husband and his sister, Sandra Maxwell, claiming that he had fraudulently conveyed certain assets to Ms. Maxwell. She did not join Ms. Maxwell to her divorce action. Similarly, Bednarik must bring a separate action against Werner-Jacobsen.

Bednarik cites **Benson v. Richardson**, 537 N.W.2d 748 (Iowa 1995) in support of her position that Bednarik may bring a fraudulent conveyance action against Werner-Jacobsen. Werner-Jacobsen does not dispute that she may do so, subject to Werner-Jacobsen's having statute of limitation and other defenses. However, **Benson** supports Werner-Jacobsen's contention that Bednarik's claim must be brought in a separate action. In **Benson**, the Mr. Richardson's creditors obtained a judgment against him in a federal court action, and then brought a state court fraudulent conveyance action against Mrs. Richardson, claiming that certain transfers to Mrs. Richardson were fraudulent and calculated to avoid payment of the federal litigation judgment. In that separate action,

the court found that the challenged transfers were fraudulent, and awarded judgment against Mrs. Richardson. Certainly, Bednarik may bring a separate action against Werner-Jacobsen.

Bednarik also cites **Johnson v. Johnson**, 572 P.2d 925 (Nevada 1977) in support of her fraudulent conveyance argument. That case was not brought under a fraudulent conveyance statute, and is irrelevant.

VI. WERNER-JACOBSEN HAS NO DUTY FOR SUPPORT WHILE JACOBSEN'S CHILDREN ARE IN BEDNARIK'S CUSTODY.

Bednarik claims that the State of Utah has imposed a duty of support upon stepparents. In fact, it has only imposed a duty of support upon a stepparent if the child for whom support is due lives with that stepparent.

Bednarik is correct that U.C.A. 78-45-4.1 does indeed provide:

> A stepparent shall support a stepchild to the same extend that a natural or adoptive parent is required to support a child.

However, the definition of "stepparent" in 78-45-1 et. seq. includes only the spouse of the custodial parent. It states:

> "Stepparent" means a person ceremonially married to a child's natural or adoptive **custodial** parent who is not the child's natural or adoptive parent... U.C.A. 78-45-2(19). (Emphasis added.)

While not relevant to the matters before the Court, it may be useful to explain the origin of U.C.A. 78-45-4.1, and the definition of "stepparent" which limits it. The Aid to Families with Dependent Children program ("AFDC"), established at 42 U.S.C. 601 et seq., and the Federal

regulations which accompanied it were intended to provide public assistance with families with children "who are deprived of parental support due to death, disability or absence of a parent." In order to determine whether or not a child is deprived of parental support, at the time U.C.A. 78-45-4.1 was first adopted, and then amended, a child met that requirement if there was only one "parent" in the home, or there were two parents there, one of whom was disabled. "Parent" was defined by Federal regulation as a natural parent, adoptive parent, **or a stepparent**

> who is ceremonially married to the child's natural or adoptive parent and is **legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend that natural or adoptive parents are required to support their children.** Quoted in **Concerned Parents of Stepchildren v. Mitchell**, 645 P.2d 629 632 (Utah 1982). (Emphasis added in original.)

Therefore, Utah, and many other states, amended their laws to make the spouses of custodial parents liable to support their stepchildren so that large numbers of children could be dumped from AFDC rolls. However, it was unnecessary to make stepparents of noncustodial parents liable, since only the number of nondisabled "parents" in a home was relevant to eligibility for AFDC. The opinion in **Concerned Parents** provides a detailed discussion of the statute. In the end, the Court upheld the statute and permitted the state to terminate benefits to a large number of children.

Bednarik cites **Ball v. Peterson**, 912 P.2d 1006 (Utah App. 1996) in support of the proposition that Utah stepparents must support their stepchildren. In that case, Mr. Ball, the new husband of the custodial parent of the Peterson children, is the stepparent to whom the Court

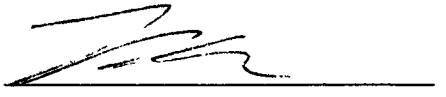
referred. Pursuant to statute, he did have a statutory obligation to support the children The new Mrs. Peterson, if there were one, would have no parallel obligation

Werner-Jacobsen cannot be joined in this action because she had no duty of support to the Jacobsen children so long as they resided with Bednarik.

CONCLUSION

Werner-Jacobsen cannot be joined in this action The Order joining her must be reserved

DATED this 16th day of June, 1997



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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of Appellant's Reply Brief were mailed, first class postage prepaid, on this 16th day of June 1997, to the following:

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