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No. 59738-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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JOSEPH D. SANDERS, and the martial community composed of Joseph D. Sanders and Jane Doe Sanders; SOOS CREEK VISTA, INC., a Washington corporation,

Appellants,

vs.

DBM CONSULTING ENGINEERS, INC., a Washington corporation,

Respondent.

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# APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

Respondent DBM Consulting Engineers, Inc. ("DBM") maintains that at any time after a judgment has been entered, a creditor can effectively bootstrap its new fraudulent transfer claims within a request to levy execution and have them attach to the property of non-parties. DBM has not pointed to a single statute, rule, or case that directly supports this contention. The cases cited by DBM are easily distinguished on their facts and applicable law.

The instant case was never amended to include a claim for fraudulent transfer. There has never been a complaint filed or amended in this case to include a claim for fraudulent transfer. The fraudulent transfer allegations at issue in this case were only included in DBM's motion for order to levy execution.

DBM clearly got the cart before the horse. While RCW 19.40.071(b) allows execution upon property if a creditor has a judgment, the determination of whether there has been a fraudulent transfer must be made in an "action" filed within the time periods required under RCW 19.40.091. Otherwise the actions are "extinguished."

This is the reasoning of Professor Rombauer when she comments that the creditor must ultimately file a fraudulent transfer action to establish a fraudulent transfer even if the creditor first pursues execution:

> **In any case however, the creditor must ultimately establish the fraudulent character of the transfer in court if the debtor and/or transferee resists the creditor's attack."**[1]

DBM seeks to cloud the simple and direct issues involving jurisdiction and due process with a great deal of irrelevant detail about the tortured history of the Soos Creek development. This is simply an effort to paint Mr. Sanders in a negative light through innuendo and should be ignored by this court. The details about checks and bank accounts are entirely irrelevant to this appeal and should be disregarded.

The sole questions before this court are: 1) Whether Respondents filed a timely "action" under RCW 19.40.051, and 2) whether the trial court had personal jurisdiction over Mr. Sanders.

## II. RESTATEMENT OF RESPONDENT'S ISSUES AND SUMMARY OF ARGUMENT

The following respond to Respondent's Issues in the order presented:

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[1] 27 Rombauer, ***Washington Practice*** §5.141 (1998)

**A. <u>Tolling The RCW 19.051(b) Limitations Period: Respondent's Issues 1, 2, And 3</u>. Does Execution Under Civil Rule 69 or Supplemental Proceedings Under RCW 6.32 Toll The Limitations Period For Fraudulent Transfer Actions? No.**

Respondent's entire claim for fraudulent transfer rests solely upon RCW 19.40.051(b):

> "(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider has reasonable cause to believe that the debtor was insolvent."

The trial court's Order is based entirely upon RCW 19.40.051(b).[2] The fraudulent transfer act provides for a one year limitations period for actions under RCW 19.40.051(b):

> "A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought . . .
>
> (c) Under RCW 19.40.051(b), within one year after the transfer was made or the obligation was incurred."[3]

RCW 4.16.170 provides that "For the purposes of tolling any statute of limitations an action shall be deemed commenced when the

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[2] Order, CP 530, ¶11.
[3] RCW 19.40.091..

complaint is filed or summons is served whichever occurs first."[4] Respondent's argument that the term "action" is "flexible"[5] in common usage borders on the absurd and is contrary to RCW 4.16.170 and Civil Rule 3. The statute and the rule are clear – an action is a lawsuit and is started by filing a complaint or serving a summons. A motion to execute under Civil Rule 69 is not an "action" tolling the limitations period.

DBM's only argument that it met the requirements of the limitations period is that its motion to levy execution constituted an "action" within the meaning of RCW 19.40.091, RCW 4.16.170, and Civil Rule 3. Of course this is unsupportable and should be rejected by this court.

DBM also makes an attempt to argue that its original action for breach of contract was an "action" that tolled the statute. But there was never any fraudulent transfer claim alleged in its original action.

**B. <u>Lack Of Personal Jurisdiction Over Joseph Sanders: Respondent's Issues 4, 5, And 6</u>. Does A Court Have Personal Jurisdiction Over An Individual Shareholder And His Assets Because**

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[4] RCW 4.16.170.

[5] Respondent's Brief, pp. 20-21.

**A Corporate Creditor Requests Execution On Corporate Assets? No.**

DBM claims that because Mr. Sanders was Soos Creek's President and sole shareholder, it was unnecessary to file an action for fraudulent transfer and include Mr. Sanders as a party. This flies in the face of well established concepts of due process. A court obtains personal jurisdiction when a summons is served. No summons was ever served on Mr. Sanders and no complaint alleging claims against Sanders was ever filed with the court.

DBM makes the incredible claim that a court effectively has personal jurisdiction over a corporation's directors and shareholders because they are in privity with the corporation and therefore bound by judgments involving the corporation. This is based upon the doctrines of res judicata and collateral estoppel. But none of these cases allow a corporate creditor to attach the personal assets of the shareholders or officers without adding them as a party. The trial court had no jurisdiction to determine that Mr. Sanders was the transferee of a fraudulent transfer or to order him to turn over his personal assets.

**C. <u>Attorney Fees And Costs</u>.** DBM admits that a contract clause in the original contract between DBM and Soos Creek is the basis

for its claims for attorney fees. Mr. Sanders as a prevailing party is entitled to have his attorney fees and costs paid in accord with ***Herzog Aluminum.***[6]

## III. RESTATEMENT OF THE CASE

Sanders and Soos Creek incorporate the original Statement of the Case included in their opening brief.

### A. Contested Facts Are Irrelevant To This Appeal.

DBM recounts check register entries and transactions predating the alleged fraudulent transfer in a lame effort to discredit Sanders. The only relevant facts presented by DBM in its Statement of the Case is that for the most part DBM does not contest the fact that they did not file a separate action alleging fraudulent transfer and never added Mr. Sanders as a party.

Sanders was a secured creditor and received payments for debts due him from Soos Creek. These were made in the ordinary course of business and pursuant to his rights as a secured creditor. The facts surrounding the debt held by Mr. Sanders have been the source of significant dispute in the pleadings leading up to the trial court's Order.

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[6] ***Herzog Aluminum v. General American***, 39 Wn. App. 188 (1984).

But Sanders and Soos Creek have not based this appeal upon these contested factual issues.

Rather, this appeal is based upon the discrete legal issues of whether DBM filed a timely fraudulent transfer action and whether the trial court had personal jurisdiction over Mr. Sanders. Thus DBM's factual statements concerning contested factual issues and ancillary transactions are largely irrelevant other than to give general background to the dispute. For instance, there is no relevance to the fact that Soos Creek received $26,183.72 in note payments in 2004. These transactions have no significance whatsoever as to whether DBM brought a timely action for fraudulent transfer.

The undisputed relevant facts show that: 1) The trial court ruled as a matter of law that the transferred notes were fraudulent transfers under RCW 19.40.051(b)[7]; 2) DBM never filed an action for fraudulent transfer; and 3) DBM never added Mr. Sanders as a party to any of these proceedings. Thus the trial court's findings and conclusions were based entirely upon a claim that had expired. Moreover the trial court lacked jurisdiction over Mr. Sanders and his property. Therefore the trial court's Order must be vacated in its entirety.

## IV. ARGUMENT

### A. Standard Of Review.

The standard for review in this case is clearly ***de novo*** because the trial court committed errors of law.[8] DBM erroneously refers to summary judgment. There was no possibility of summary judgment because final judgment had already been entered. The only motion before the court was a post-judgment motion to levy execution under RCW 19.40.071(b). There was no summary judgment motion and the court did not have any authority for entering findings or conclusions. Therefore it must be assumed that the court was ruling as a matter of law and therefore the appropriate standard is ***de novo*** review.

### B. The Trial Court Erroneously Based Its Order Upon A Cause Of Action That Was Time Barred.

#### 1. Arguments Concerning Whether The June 1, 2005 Transfers Were Fraudulent Transfers Are Irrelevant.

DBM's first argument that the June 2005 transfers violated RCW 19.40.051(b) misses the critical issues upon which this appeal is based: 1) Whether trial court could issue execution based upon a fraudulent

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[7] Order, CP 526-533.

transfer claim that was time barred, and 2) Whether the trial court had personal jurisdiction over Mr. Sanders to find him liable as a transferee.[9]

The factual questions concerning whether there was a fraudulent transfer were hotly contested, but the underlying legal questions are the basis of this appeal. DBM effectively admits this when it finds it necessary to reargue these factual issues to this court. There are certainly material questions of fact concerning whether Mr. Sanders had a security interest in the promissory notes and whether the transfer was in the ordinary course. These factual issues were argued and briefed to the trial court.

The trial court ruled as a matter of law that Sanders did not have valid liens against the promissory notes.[10] The trial court also ruled as a matter of law that the transfers to Sanders were preferential under RCW 19.40.051(b).[11] It also ruled that the transfers were not done in the

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[8] Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc., 159 Wn.2d 292, 298 (2006).

[9] These issues correspond directly to the Assignments of Error originally plead by Sanders and Soos Creek.

[10] Order, CP 530, ¶10

[11] Order, CP 530, ¶11.

ordinary course of Soos Creek's business.[12] These and numerous other legal conclusions were included in the trial court's Order.

But none of this answers the question of whether the claims against Mr. Sanders were timely under RCW 19.40.091(c). Even assuming for the sake of argument that the June 2, 2005 transfers were fraudulent transfers within the ambit of RCW 19.40.051(b), DBM clearly failed to bring a timely action within one year of the alleged transfers.

**2. Washington Law Requires Filing Of A Complaint Or Service Of A Summons To Start An "Action."**

This court has previously held, "A cause of action under the UFTA "is extinguished unless action is brought" within the prescribed time period. RCW 19.40.091."[13]

RCW 19.40.091 requires filing of an action under RCW 19.40.051(b) within one year of the date of the transfer:

> § 19.40.091. Extinguishment of cause of action
>
> A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought: ....

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[12] Id.

[13] ***McMaster v. Farmer***, 76 Wn. App. 464, 469 (1994) ***overruled on other grounds***, ***Freitag v. McGhie***, 133 Wn.2d 816 (1997).

> **(c) Under RCW 19.40.051(b), within one year after the transfer was made or the obligation was incurred.**[14]

Other Washington statutes and court rules are equally clear that in order to toll a limitations period, there must be a summons served or a complaint filed to start an "action."

**RCW 4.16.170 Tolling of statute — Actions, when deemed commenced or not commenced.**

> **For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first....**[15]

Civil Rule 3 also requires filing a summons and complaint to start a civil action:

> Rule 3. Commencement Of Action
>
> (a) Methods. Except as provided in rule 4.1, a civil action is commended by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint. . . . An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170.[16]

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[14] RCW 19.40.091 (emphasis ours).
[15] RCW 4.16.170 (emphasis ours).

It is difficult to imagine a clearer requirement that in order to toll the one year statute applicable to actions for preferential transfers under RCW 19.40.051(b) that a summons must be served or a complaint filed.

DBM claims that because judgment creditors are allowed to execute on their judgments under RCW 6.32 and RCW 19.40.071(b) a new or amended action is not needed: "fraudulent transfer claims have been made in the course of supplemental proceedings. . . ."[17]

The problems with this argument are immediately apparent. First, we are not dealing with supplemental proceedings in this instance. The motion in this case was to order levy of execution and the court's Order was based solely upon claims of fraudulent transfer.[18] Second, even if the supplemental proceedings statute somehow applies, the statute regulating supplemental proceedings requires that if there are competing claims to title, non-parties are entitled to have those claims determined by trial.[19] Moreover, non-parties are to be served with process and are entitled to a jury trial:

**RCW 6.32.270 Adjudication of title to property — Jury trial.**

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[16] Civil Rule, 3(a).
[17] Respondent's Brief, p. 18.
[18] Order, CP 526-533.
[19] See, RCW 6.32.270.

> In any supplemental proceeding, where it appears to the court that a judgment debtor may have an interest in or title to any real property, and such interest or title is disclaimed by the judgment debtor or disputed by another person, or it appears that the judgment debtor may own or have a right of possession to any personal property, and such ownership or right of possession is substantially disputed by another person, the court may, if the person or persons claiming adversely be a party to the proceeding, adjudicate the respective interests of the parties in such real or personal property, and may determine such property to be wholly or in part the property of the judgment debtor. **If the person claiming adversely to the judgment debtor be not a party to the proceeding, the court shall by show cause order or otherwise cause such person to be brought in and made a party thereto, and shall set such proceeding for hearing on the first open date in the trial calendar. Any person so made a party, or any party to the original proceeding, may have such issue determined by a jury upon demand therefor and payment of a jury fee as in other civil actions**: PROVIDED, That such person would be entitled to a jury trial if the matter was adjudicated in a separate action.[20]

This statute contains a clear requirement to protect the due process rights of non-parties to the underlying action. There is no such requirement in any of the non-Washington authority cited by DBM.

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[20] RCW 6.32 (Emphasis ours). The requirement for a trial is clearly mandatory.

Mr. Sanders was not a party to the underlying lawsuit. He and his wife had been previously dismissed "with prejudice."[21] Thus if DBM was going to attempt to attach property as part of its supplemental proceedings, it would have had to have some form of process served if it were to meet the requirements of RCW 6.32.270. This was never done. There is no proof any legal process served upon Mr. or Mrs. Sanders.

The only order to appear for supplemental proceedings in this case was specifically directed to "an officer of the incorporated Judgment debtor Soos Creek Vista, Inc."[22] Thus no action of any sort (supplemental proceedings or otherwise) was ever served on Sanders.

DBM considers supplemental proceedings to be the equivalent of a new "action" that can toll the limitations statute. But this misperceives the nature of supplemental proceedings. Washington courts uniformly hold that supplemental proceedings are a continuation of the original action, not a new and separate action.

> We affirm the position consistently adhered to in this jurisdiction that supplemental proceedings are not a

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[21] *See*, Stipulated Order Of Dismissal, CP 1-3. The fact that Sanders was dismissed entirely from the case has not been contested by DBM.

[22] Order To Appear For Supplemental Proceedings, July 25, 2005, CP 13.

> new and independent action but are merely a continuation of the original or main action and are auxiliary thereto.[23]

In ***McDowell***, the Supreme Court made clear that unlike other states, Washington does not consider supplemental proceedings to be separate and new actions, but merely a continuation of the underlying action:

> Proceedings supplementary to execution are not a new suit or separate action. They are simply a step in aid of the satisfaction of the judgment of the court by proceedings ancillary to the judgment, the validity of which the debtor does not question.
>
> The New York authorities cited are not applicable. In that state, a proceeding supplementary to execution is not a part of the original action, but independent thereof, while in this state the proceeding is auxiliary to the original action and a continuance thereof. The provisions of the statutes of the two states are dissimilar.[24]

Thus the supplemental proceedings process in Washington courts is clearly not the place to bring an action for fraudulent transfer. DBM has failed to cite a single Washington case where such a claim has been allowed.

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[23] ***Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n***, 42 Wn.2d 648, 652-653 (1953).

[24] ***State ex rel. McDowell v. Superior Court for King County***, 152 Wash. 323, 327 (1929) (Garnishment dismissed because garnishee defendant was non-resident of county.)

The precedent cited by DBM in favor of its claims is easily distinguishable and in many cases supports Sanders and Soos Creek.[25] In ***Thomas, Head and Greisen Employer Trust v. Buster***, the judgment creditor amended its complaint to include fraudulent transfer claims and added the transferees as indispensable parties.[26] ***Thomas, Head*** clearly does not support DBM's position. Even though the court utilized supplemental proceedings to levy against the property at issue, the fraudulent transfer claims were made part of the complaint by amendment.[27] This hardly supports DBM.

In ***HBE Leasing Corp. v. Frank***, the creditors brought a new fraudulent transfer action in the form of a "special proceeding" under New York law.[28] This special proceeding was a separate and entirely new action against transferees that were not original defendants.[29] The New York statute is CPLR § 5225 and it provides for summary

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[25] DBM cites three non-Washington cases in support of its contention that post-judgment claims for fraudulent transfer can be incorporated in supplemental proceedings.

[26] ***Thomas, Head and Greisen Employee Trust v. Buster***, 95 F.3d 1449, 1451 (9th Cir. 1996) (Transferees were indispensable parties to fraudulent transfer claims.)

[27] ***Thomas, Head***, 95 F.3d at 1451.

[28] ***HBE Leasing Corp. v. Frank***, 48 F.3d 623 (2nd Cir. 1995).

[29] ***HBE Leasing***, 48 F.3d at 631 (fn. 2) (A Rule 69(a) proceeding is treated as a separate action . . . .)

proceedings involving transfers of a judgment debtor's property.[30] It must also be noted that New York has never adopted the Uniform Fraudulent Transfer Act.[31] Therefore this case does not address the issues in this appeal and does not support DBM.

Finally, in ***Shockey v. Harry Sander Realty Co., Inc.***,[32] the Missouri Court of Appeals dismissed a judgment creditor's untimely lawsuit alleging corporate alter ego and fraud. The court also reversed the trial court's dismissal of a "creditor's bill" because it said such an equitable claim could be maintained for ten years based upon Missouri law. An equitable action known as a "creditor's bill" is the precursor to our modern supplemental proceedings.[33] The holding of ***Shockey*** is of dubious value in the current debate.

Washington law requires an "action" to be filed to toll the one year limitations period required by RCW 19.40.091(c). The statute is clear and does not include provision for claims brought up in supplemental proceedings or in motions to levy execution.

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[30] N.Y.C.P.L.R. §5225(b). Appendix E attached.
[31] See, RCWA 19.40 Preface (West, 2010) Appendix F attached.
[32] ***Shockey v. Harry Sander Realty Co., Inc.,*** 771 S.W.2d 922 (Mo. App. 1989).
[33] ***Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n***, 42 Wn.2d 648, 653 (1953).

In the leading case on the subject, failure of a judgment creditor to formally add parties to a summary proceeding under the supplemental proceedings statute made the resulting judgment void:

> Section 638-1 sets out the procedure to be followed where the title or the right to possession of real or personal property is disclaimed by the judgment debtor, or is substantially disputed by another person. That this section was meant to be the exclusive procedure to be followed in such circumstances is made evident from a reading of this section and noting that,
>
> "In any supplemental proceeding [where the right to the property is substantially disputed], . . . the court may, if the person or persons claiming adversely be a party to the proceeding, adjudicate the respective interests . . ." (Italics ours.)[34]

The claim that a motion to levy execution based solely upon a fraudulent transfer theory without amending the original action or starting a new action is contrary to established law and should be rejected. DBM has presented no legal authority for this viewpoint and the only case that directly addresses the issue on analogous facts has rejected DBM's arguments.

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[34] ***Junkin v. Anderson***, 12 Wn.2d 58, 66 (1941) (RRS § 638-1 is the precursor statute to RCW 6.32.270 and is identical in relevant parts to that cited in this case).

The trial court's Order was based upon a claim that was time barred under RCW 19.40.091(c) and must be vacated.

**C. The Trial Court Did Not Have Personal Jurisdiction Over Sanders.**

**1. Concepts Of Res Judicata And Collateral Estoppel Are Not A Substitute For Due Process And Personal Jurisdiction.**

DBM claims that because Sanders was a corporate officer and sole shareholder, the trial court had personal jurisdiction over Sanders and his assets. None of the authority cited by DBM is factually analogous. None of the cases cited by DBM involve a levy of execution against the transferee of a fraudulent transfer. Rather, all of the cases cited by DBM deal with concepts of res judicata and collateral estoppel. That is not the case before this court. Here, the question is whether the trial court may order a non-party (over whom the court has acquired no personal jurisdiction) to turn over property that is not the property of the judgment debtor. Clearly the answer is no.

In this case the trial court's Order specifically finds as a matter of law that Sanders was the recipient of a fraudulent transfer:

> Pursuant to this statute, and in view of the Court's finding that Joseph Sanders is an "insider" of Judgment Debtor, the Court has the authority to command Joseph

> D. Sanders, in his individual capacity, (sic) & in his corporate capacity, to return the subject promissory notes and deeds of trust to the Judgment Debtor.[35]

The court further ordered Mr. Sanders to return the notes and proceeds. If Mr. Sanders failed to obey the court's order he would be subject to an order for contempt.[36] The title to the notes and proceeds had been transferred to Mr. Sanders years before the Order.[37] There was no question that Mr. Sanders had been transferred title. The trial court was ordering him to convey his personal property to the corporation. Mr. Sanders obviously did not "have his day in court"[38] because he was never served with any process and was never made a party. The fundamental requirements of RCW 4.28.020 were not met and therefore the trial court lacked personal jurisdiction over Mr. Sanders.

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[35] Order, CP 531, ll. 6-9.
[36] Order, CP 531, ll. 4-5.
[37] See, Sanders Declaration, CP 103-212 and Appellant's Appendix, pp.3-6. The Sterling and Shaw notes were actually transferred to Mr. Sanders in November of 2004. The assignments were recorded on June 2, 2005.
[38] Respondent's Brief, p. 26.

2. **Sanders Is An Indispensable Party To A Fraudulent Transfer Action Regardless Of Whether He Is A Corporate Officer.**

DBM makes the argument that it really wasn't necessary to add Sanders as a party because the trial court has authority to order corporate officers to turn over property. The fallacy of this argument is that corporate officers are only required to turn over property of the judgment debtor – not their personal assets. No Washington statute requires corporate shareholders to contribute their personal assets to the corporation without due process. DBM does not cite a single case where a corporate officer or shareholder has been found personally liable as a transferee when they have not been made a party to a lawsuit.

Indeed, DBM's own authority holds that transferees are indispensable parties in a fraudulent conveyance action:

> Under Alaska law, **transferees are indispensable parties in actions to recover fraudulent conveyances**. Sylvester v. Sylvester, 723 P.2d 1253, 1259 (Alaska 1986) ("Both longstanding common law and cases arising under comparable versions of [Alaska's] Civil Rule 19 hold a grantee of an alleged fraudulent conveyance indispensable to a proceeding to strike the transfer."). Thus, Thomas, Head was required to join the Johnson parties in order to raise its fraudulent conveyance claims. (emphasis ours).[39]

[39] ***Thomas, Head & Greisen Emples. Trust v. Buster***, 95 F.3d 1449, 1452 (9th Cir. Alaska 1996) (Plaintiff was required to join transferees as parties in order to pursue fraudulent conveyance claim). It should also be noted that Alaska has

Moreover, established Washington precedent from our Supreme Court holds that alleged transferees are indispensable parties. "Since the grantee of the property acquires an interest therein by reason of the conveyance, such grantee is a necessary and indispensable party to any proceeding brought to subject the property to the debt."[40]

DBM should have filed an action for fraudulent transfer against Sanders. This is what was done in ***Thomas, Head*** under Alaska law.[41] A careful reading of the case shows that the plaintiff amended their original complaint to include claims for fraudulent transfer, added the alleged transferees as parties and then secured an execution against the property. It was only after all of these preliminary steps were completed that the court entered default judgment on the fraudulent transfer claims based upon the transferees' failure to comply with the execution order. Contrary to the inaccurate arguments by DBM, the fraudulent conveyance claims in ***Thomas, Head*** were not brought in the

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not adopted the Uniform Fraudulent Transfer Act, therefore the reference is to "fraudulent conveyance" rather than "fraudulent transfer." ***See***, RCWA 19.40 Preface (West, 2010), Appendix F attached.

[40] ***Eggleston v. Sheldon***, 85 Wash. 422, 434 (1915) (Judgment for fraudulent conveyance reversed.)

supplemental proceedings. Rather, the plaintiff's complaint was amended to include fraudulent conveyance claims. That is a far cry from the situation here where there was never complaint containing fraudulent transfer claims - amended or otherwise.

The instant case is directly analogous to another case cited by DBM, ***Tanaka v. All Lease, Inc.*** [42] In that case the Supreme Court of Hawaii held that the transferees were indispensable parties and dismissed the trial court's judgments and orders to the contrary. The underlying judgment was based upon the breach of a vehicle lease agreement. Judgment was entered and the judgment creditor instituted supplemental proceedings. When the judgment could not be collected from the judgment debtor the court issued an execution order against the parents of the debtor. The court ordered the parents to pay back condominium sale proceeds that were the property of the parents. The parents were never parties to the action.

The Court held that in any action alleging fraudulent transfer, the alleged transferee must be expressly named as a party. Moreover, the

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[41] ***Thomas, Head and Greisen Employee Trust v. Buster***, 95 F.3d 1449, 1451 (9th Cir. 1996) Copy attached as **Appendix H**.

[42] ***Tanaka v. All Lease, Inc.***, 76 Haw. 32, 868 P.2d 450 (Haw. 1994) Copy attached as **Appendix G**.

Court characterized the use of the supplemental proceedings to pursue the claims "an improper vehicle for establishing a fraudulent transfer." ***Tanaka*** is directly analogous to the instant case and is directly contrary to DBM's position.

The inescapable conclusion is that DBM used an "improper vehicle" to establish a fraudulent transfer. DBM's arguments would subject the property of non-parties to the execution orders of courts without notice and without due process. This is dangerous precedent indeed. The trial court's order should be vacated.

**D. Soos Creek And Sanders Are Entitled To Attorney Fees.**

DBM admits in its response that attorney fees are at issue based upon its contract with Soos Creek. Sanders is equally entitled to his attorney fees if he prevails in this appeal:

> The Court of Appeals has held that a party who successfully defends an action on a contract by arguing the contract is void is nevertheless entitled to fees pursuant to the contract. This line of cases begins with Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn. App. 188, 197, 692 P.2d 867 (1984). In Herzog, Division One of the Court of Appeals held that even though no contract had been formed, the prevailing party

was entitled to fees and cost pursuant to RCW 4.84.330 . . . .[43]

Sanders was not a party to the contract between DBM and Soos Creek, yet he has been forced to incur significant legal expense due to the actions of DBM. Now DBM seeks award of its fees based upon its contract. In accord with RAP 18.1 Sanders should be awarded his fees and costs.

## V. CONCLUSION

DBM failed to file a timely action for fraudulent transfer and failed to serve Sanders with any legal process that would give the trial court personal jurisdiction. The trial court's order should be vacated in its entirety.

DATED this 3rd day of March , 2010.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By _____
William A. Linton - W.S.B.A. #19975
Attorneys for Appellants

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[43] ***Mt. Hood Bev. Co. v. Constellation Brands, Inc.***, 149 Wn.2d 98, 121 (2003).

# APPENDIX E

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*** THIS SECTION IS CURRENT AS OF DECEMBER 15, 2009 ***
*** THROUGH RELEASED CH. 507 ***
CIVIL PRACTICE LAW AND RULES
ARTICLE 52. ENFORCEMENT OF MONEY JUDGMENTS

Go to the New York Code Archive Directory
NY CLS CPLR § 5225 (2010)
§ 5225. Payment or delivery of property of judgment debtor

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

(c) Documents to effect payment or delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery.

# APPENDIX F

## UNIFORM FRAUDULENT TRANSFER ACT

*Table of Jurisdictions Wherein Act Has Been Adopted*

*For text of Uniform Act, and variation notes and annotation materials for adopting jurisdictions, see Uniform Laws Annotated, Master Edition, Volume 7A, Pt. II.*

| Jurisdiction | Laws | Effective Date | Statutory Citation |
|---|---|---|---|
| Alabama | 1989, No. 89–793 | 1–1–1990 | Code 1975, §§ 8–9A–1 to 8–9A–12. |
| Arizona | 1990, c. 17 | 4–4–1990* | A.R.S. §§ 44–1001 to 44–1010. |
| Arkansas | 1987, Act 967 | | A.C.A. §§ 4–59–201 to 4–59–213. |
| California | 1986, c. 383 | 7–16–1986* | West's Ann.Cal.Civ. Code, §§ 3439 to 3439.12. |
| Colorado | 1991, c. 137 | 7–1–1991 | West's C.R.S.A. §§ 38–8–101 to 38–8–112. |
| Connecticut | 1991, P.A. 91–297 | 6–25–1991 * | C.G.S.A. §§ 52–552a to 52–552*l*. |
| Delaware | 70 Del. Laws, c. 434 | 7–3–1996 | 6 Del.C. §§ 1301 to 1311. |
| District of Columbia | 1995, D.C. Law 11–83 | 2–9–1996 | D.C. Official Code, 2001 Ed. §§ 28–3101 to 28–3111. |
| Florida | 1987, c. 87–79 | 1–1–1988 | West's F.S.A. §§ 726.101 to 726.112. |
| Georgia | 2002, c. 427 | 7–1–2002 | O.C.G.A. §§ 18–2–70 to 18–2–80. |
| Hawaii | 1985, No. 216 | 6–4–1985 | HRS §§ 651C–1 to 651C–10. |
| Idaho | 1987, c. 202 | | I.C. §§ 55–910 to 55–921. |
| Illinois | 1989, P.A. 86–814 | 1–1–1990 | S.H.A. 740 ILCS 160/1 to 160/12. |
| Indiana | 2002, P.L. 2–2002 | 7–1–2002 | West's A.I.C. 32–18–2–1 to 32–18–2–21. |
| Iowa | 1994, H.F. 2384 | 1–1–1995 | I.C.A. §§ 684.1 to 684.12. |
| Kansas | 1998, c. 13 | 1–1–1999 | K.S.A. §§ 33–201 to 33–212. |
| Maine | 1985, c. 641 | 7–16–1986 | 14 M.R.S.A. §§ 3571 to 3582. |
| Massachusetts | 1996, c. 157 | 7–8–1996* | M.G.L.A. c. 109A, §§ 1 to 12. |
| Michigan | 1998, P.A. 434 | 12–30–1998 | M.C.L.A. §§ 566.31 to 566.43. |
| Minnesota | 1987, c. 19 | 4–7–1987* | M.S.A. §§ 513.41 to 513.51. |
| Mississippi | 2006, c. 371 | 7–1–2006 | Code 1972, §§ 15–3–101 to 15–3–121. |
| Missouri | 1992, S.B. 448 | 8–28–1992 | V.A.M.S. §§ 428.005 to 428.059. |
| Montana | 1991, c. 324 | | MCA 31–2–326 to 31–2–342. |
| Nebraska | 1989, LB 423 | 8–25–1989 | R.R.S.1943, §§ 36–701 to 36–712. |
| Nevada | 1987, c. 8 | 3–3–1987* | N.R.S. 112.140 to 112.250. |
| New Hampshire | L. 1987, c. 215 | 1–1–1988 | RSA 545–A:1 to 545–A:12. |
| New Jersey | 1988, c. 74 | 1–1–1989 | N.J.S.A. 25:2–20 to 25:2–34. |

| Jurisdiction | Laws | Effective Date | Statutory Citation |
|---|---|---|---|
| New Mexico | 1989, c. 382 | 4–7–1989* | NMSA 1978, §§ 56–10–14 to 56–10–25. |
| North Carolina | 1997, c. 291 | 10–1–1997 | G.S. §§ 39–23.1 to 39–23.12. |
| North Dakota | 1985, c. 186 | | NDCC 13–02.1–01 to 13–02.1–10 |
| Ohio | 1990, H.B. 506 | | R.C. §§ 1336.01 to 1336.11. |
| Oklahoma | 1986, c. 100 | 11–1–1986 | 24 Okl.St.Ann. §§ 112 to 123. |
| Oregon | 1985, c. 664 | 1–1–1986 | ORS 95.200 to 95.310. |
| Pennsylvania | 1993, No. 70 | 60 days after 12–3–1993 | 12 Pa. C.S.A. §§5101 to 5110. |
| Rhode Island | 1986, c. 438 | 6–25–1986 | Gen. Laws 1956, §§ 6–16–1 to 6–16–12. |
| South Dakota | 1987, c. 365 | | SDCL 54–8A–1 to 54–8A–12. |
| Tennessee | 2003, c. 42 | 7–1–2003 | T.C.A. §§ 66–3–301 to 66–3–313. |
| Texas | 1987, c. 1004 | 9–1–1987 | V.T.C.A. Bus. & C. §§ 24.001 to 24.013. |
| Utah | 1988, c. 59 | 4–25–1988 | U.C.A. 1953, 25–6–1 to 25–6–14. |
| Vermont | 1996, No. 179 | 7–1–1996 | 9 V.S.A. §§ 2285 to 2295. |
| Washington | 1987, c. 444 | 7–1–1988 | West's RCWA 19.40.011 to 19.40.903. |
| West Virginia | 1986, c. 166 | 7–1–1986 | Code, 40–1A–1 to 40–1A–12. |
| Wisconsin | 1987–89 Act 192 | 4–8–1988 | W.S.A. 242.01 to 242.11. |
| Wyoming | 2006, c. 55 | 7–1–2006 | Wyo.Stat.Ann. §§ 34–14–201 to 34–14–212. |

* Date of approval.

## 19.40.011. Definitions

### Research References

**ALR Library**

89 ALR 751, Conveyance or Transfer by Stockholder as Fraudulent as Regards His Liability as Stockholder to Creditors of Corporation.

**Treatises and Practice Aids**

Restatement (2d) of Property, Don. Trans. § 34.3, Creditors of Donor.

24 Wash. Prac. Series § 22.39, Fraudulent Transactions.

27 Wash. Prac. Series § 5.142, Types of Fraudulent Transfers.

27 Wash. Prac. Series § 5.144, When a Transfer is Made or an Obligation is Incurred.

27 Wash. Prac. Series § 5.147, Constructive Fraud—Reasonably Equivalent Value (REV) Not Received in Exchange.

27 Wash. Prac. Series § 5.148, Constructive Fraud—Transfer to Insider on Antecedent Debt.

### Notes of Decisions

**1. Purpose**

An explicit purpose of the Uniform Fraudulent Transfer Act (UFTA) is uniformity among the states that have adopted it, and thus the interpretation of courts of other states

# APPENDIX G

LEXSEE 868 P.2D 450

**JAMES K. TANAKA, FUSAKO TANAKA, Petitioners, and BEN T. TANAKA, Defendant, v. RUSSELL S. NAGATA, Judge, First Circuit Court, State of Hawaii, and ALL LEASE, INC., Respondent/Plaintiff**

**No. 17615**

**SUPREME COURT OF HAWAII**

*76 Haw. 32; 868 P.2d 450; 1994 Haw. LEXIS 10*

**February 11, 1994, Decided**
**February 11, 1994, Filed**

**PRIOR HISTORY:** [***1] PETITION FOR AN EXTRAORDINARY WRIT. (CIV. NO. 92-2858-08)

**HEADNOTES**

MANDAMUS -- existence and adequacy of other remedy -- in general.

Mandamus is an extraordinary remedy that is not issued unless the petitioner demonstrates a clear and indisputable right to relief and a lack of other means adequately to redress the alleged wrong or obtain the requested action.

MANDAMUS -- nature and scope of remedy.

Mandamus is an appropriate remedy where the petitioner: (1) has an indisputable right to defend his or her interest in property; (2) has not been named as a party in the proceeding in the lower court; and (3) has no remedy by way of appeal.

FRAUDULENT CONVEYANCES -- grantee of property -- rights.

Where a creditor alleges a fraudulent transfer of property from a judgment debtor to a transferee who retains title to the subject property or who claims an interest in the property or its proceeds, the transferee is a necessary party to any action seeking to set aside the transfer.

FRAUDULENT CONVEYANCES -- grantee of property -- rights.

Fundamental principles of due process require that a transferee who claims an interest in real property or its proceeds have a full and fair opportunity [***2] to contest claims of fraudulent transfer.

**COUNSEL:** George K. Noguchi on the writ and reply for Petitioners.

Jeffrey Daniel Lau, Keith Y. Yamada, and Carina Y. Miyazawa, on the answer for Respondent.

**JUDGES:** MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, JJ.

**OPINION**

[*34] [**452] *Per Curiam.* In his original proceeding, the petitioners James K. Tanaka and Fusako Tanaka (the petitioners) petition this court for an extraordinary writ directing the Honorable Judge Russell Nagata, Judge of the District Court of the First Circuit assigned to serve temporarily as a Judge of the Circuit Court of the First Circuit, [1] to vacate and set aside his order granting a motion for execution on fraudulently transferred asset, entered on October 6, 1993, in *All Lease, Inc. v. Tanaka,* Civil No. 92-2858-08 *(All Lease),* and any subsequent orders related to it. The petitioners contend that they should have been named as party defendants in the *All Lease* action because the subject property was transferred to them and they have an interest in the property.

1 By order of the Chief Justice dated August 27, 1993. *See Article VI, § 2 of the Hawaii Constitution* (1978).

[***3] Upon review of the record before us, we conclude that the petitioners have an interest in the subject property and were indispensable parties in any action to set aside the conveyance to them. Accordingly, we grant the requested relief and vacate the order granting motion for execution on fraudulently transferred asset and any subsequent orders related to it.

I. *BACKGROUND*

The petitioners are the parents of the defendant Ben Tanaka (Ben). When Ben and his wife, Mari Tanaka (Mari), divorced in 1991, the couple owned a condominium (the property). Mari conveyed her half interest in the property to the petitioners on April 30, 1991. As a consequence, the petitioners owned a one-half interest and Ben owned a one-half interest in the property as tenants in common. On July 15, 1991, the petitioners and Ben entered into an agreement to sell the property to Hakim Properties, Inc. (Hakim Properties) for $ 432,000.00. Ben quitclaimed his remaining one-half interest in the property to the petitioners on September 18, 1991, purportedly to satisfy debts owed to the petitioners. Because Hakim Properties was unable to obtain financing, the contract for the sale of the property was amended to [***4] an agreement of sale, which was executed on October 9, 1992. According to the agreement of sale, Hakim Properties agreed to assume three existing mortgages on the property for which Ben was liable and agreed to pay the petitioners $ 3,736.67 per month for thirty-six months, beginning on November 5, 1992.

On August 6, 1992, All Lease, Inc. (the respondent) filed the *All Lease* complaint in the circuit court against Ben for default of a vehicle lease agreement. The complaint sought back payments on the lease and repossession of the vehicles. On February 17, 1993, a judgment was entered against Ben in the amount of $ 67,770.00.

On May 24, 1993, the respondent moved to examine the petitioners about Ben's financial affairs and was granted leave to question them regarding the transfer of the property. Unable to collect the judgment from Ben, the respondent filed a motion for execution on fraudulently transferred asset on September 3, 1993. In the motion, the respondent alleged that the petitioners were not the actual owners of the property because there was no consideration for the transfer and the transfer was made to the petitioners in contemplation of avoiding Ben's debt. [2] The petitioners [*35] [***5] [**453] were not named as parties, but the respondent did serve them with notice of the hearing. Although Ben filed no opposition, his attorney appeared at the hearing on September 24, 1993 to request a continuance. The circuit court denied the continuance and granted the respondent's motion. On October 6, 1993, the circuit court entered the order granting the respondent's motion for execution of fraudulently transferred asset that decreed as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Execution on Fraudulently Transferred Asset be and is hereby granted;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is allowed to execute on the receivables of James K. Tanaka and Fusako Tanaka arising out of their Agreement of Sale to Hakim Properties, Inc. dated October 9, 1992 relating to the sale of Apt. 601, Punahou Palms condominium and to credit any monies received thereunder to the outstanding Judgment in favor of Plaintiff and against Defendant Ben T. Tanaka.

The circuit court subsequently issued a garnishee summons and order and directed Hakim Properties to hold all debts owed to the petitioners and to make the monthly payments to the respondent. [***6] Although the petitioners were not parties to the action, they nevertheless filed a motion for reconsideration. The motion was denied, and the petitioners filed the instant petition.

2 The Uniform Fraudulent Transfer Act is codified under Hawaii Revised Statutes (HRS) ch. 651C (1985). *HRS § 651C-4(a)(2)* provides in relevant part:

*§ 651C-4 Transfers fraudulent as to present and future creditors.* (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made and the obligation was incurred, if the debtor made the transfer or incurred the obligation:

. . . .

(2) Without receiving a reasonably equivalent value in exchange for the transfer of obligation, and the debtor:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small to the business or transaction; or

(B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

*HRS § 651C-7* provides in relevant part:

*Remedies of creditors.* (a) In any action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations provided in *section 651C-8*, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

. . . .

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor may, if the court so orders, levy execution on the asset transferred or its proceeds.

*HRS § 651C-8* delineates the defenses, liability, and protection accorded to transferees. The petitioners are transferees in the instant case.

[***7] II. *STANDARD FOR DISPOSITION*

This court has consistently held that a writ of mandamus is an extraordinary remedy that is usually not issued unless the petitioner demonstrates: (1) a clear and indisputable right to relief; and (2) a lack of other means adequately to redress the alleged wrong or obtain the requested action. *Breiner v. Takao, 73 Haw. 499, 502, 835 P.2d 637, 640 (1992)* (citations omitted). Such writs are neither meant to supersede the legal discretionary authority of the lower courts nor to serve as legal remedies in lieu of normal appellate procedure. *State ex rel. Marsland v. Town, 66 Haw. 516, 668 P.2d 25 (1983).* Mandamus is an appropriate remedy where the petitioners, as in the instant proceeding, have an indisputable right to defend their interest in property, have not been named as parties to the lower court action, and have no remedy by way of appeal. *See Stewart Properties, Inc. v. Brennan, 8 Haw. App. 431, 807 P.2d 606 (1991)* (only parties to a lawsuit may appeal from any adverse judgment). [3]

3 In *Stewart Properties,* the ICA suggested that a non-party whose interest is affected by a trial court's judgment should seek intervention for the purposes of appeal and that a denial of such a motion to intervene would be appealable. *Stewart Properties, 8 Haw. App. at 433 n.1., 807 P.2d at 607 n.1.* (citing *Marino v. Ortiz, 484 U.S. 301, 303, 98 L. Ed. 2d 629, 108 S. Ct. 586 (1988)).* In the present case, the petitioners, who were not represented by counsel until after the respondent's motion was granted, did not move to intervene. We decline, under these circumstances, to require them to have intervened.

[***8] III. *DISCUSSION*

The petitioners argue that: (1) they were denied due process when their property was taken without notice and an opportunity to be heard; (2) the circuit court had no authority to issue the disputed order because the petitioners were not named as parties to the *All Lease* action; and (3) there is no alternative to a writ because the petitioners were not parties to the proceedings below and have no remedy by way of appeal. The respondent acknowledges that the petitioners were not parties to the action, but contends that it was unnecessary to name the petitioners as parties because: (1) the evidence established conclusively that the property was fraudulently transferred; [4] and (2) any proceeds [*36] [**454] from the sale of the property belonged to Ben and not to the petitioners. The respondent also contends that the petitioners have a remedy against Ben and that relief by way of mandamus is therefore not warranted.

4 Although the circuit court did not specifically find that the conveyance from Ben to the petitioners was fraudulent, that finding is implicit in the court's order that allowed the respondent to execute on the proceeds that the petitioners had received.

[***9] A. *The Respondent Should Have Filed A Separate Action Against The Petitioners In Their Attempt To Set Aside The Alleged Fraudulent Transfer.*

Although there is no recent Hawaii authority expressly denominating the necessary parties to an action to set aside an alleged fraudulent transfer, our territorial court noted that, in this jurisdiction, a transfer to defraud a creditor is void as to the creditor and the question whether the transfer was bona fide may be adjudicated in an action at law; in order to do so, however, it is clearly necessary to have the alleged fraudulent transferee before the court in order to bind him. *Hoffschlaeger Co. v. Jones, 24 Haw. 74 (1917)* (citations omitted). Although the statement regarding a transferee in *Hoffchaeger* is dictum, it is consistent with decisions from courts in other jurisdictions that have ruled that a grantee or transferee of property, who claims an interest therein, is a necessary and indispensable party to the resolution of a claim of fraudulent transfer. *See, e.g., Simmons v. Clark Equipment Credit Corp., 554 So. 2d 398, 399 (Ala. 1989)* (grantee who retained title [***10] to property was necessary party to action by grantor's creditors to set aside conveyance as fraudulent); *T W M Homes, Inc. v. Atherwood Realty & Investment Co., 214 Cal. App. 2d 826,*

*848, 29 Cal. Rptr. 887, 899 (1963)* (transferees were necessary party defendants in action to set aside fraudulent conveyance); *Guice v. Modica, 337 So. 2d 302, 303 (La. App. 1976)* (children to whom debtor made donation of property were indispensable parties to suit by creditor to nullify donation); *Mihajlovski v. Elfakir, 135 Mich. App. 528, 534, 355 N.W.2d 264, 267 (1984)* (presence of grantee who retains title to property was essential to permit court to render complete relief in action to set aside fraudulent conveyance); *Murray v. Murray, 358 So. 2d 723, 725 (Miss. 1978)* (grantee is necessary party in action to set aside fraudulent conveyance); *Dempsey & Spring, P.C. v. Ramsay, 79 A.D.2d 1017, 1018, 435 N.Y.S.2d 336, 337 (1981)* (trial court acted improperly in determining that defendant's conveyance [***11] of property to his daughter was fraudulent where no notice or opportunity to appeal was afforded to daughter, who was present owner of record); *Fraley Ins. Agency v. Johnston, 784 P.2d 430 (Okl. App. 1989)* (in action to set aside fraudulent conveyance or transfer of property, grantee or transferee claiming interest in subject property was necessary and indispensable to resolution of claim); *Becker v. Becker, 138 Vt. 372, 380, 416 A.2d 156, 162 (1980)* (transfer of property creates interest in grantee that made grantee necessary party to action for fraudulent conveyance, even though no fraud on grantee's part needed to be shown); *see also* Kennedy, *Reception of the Uniform Fraudulent Transfer Act,* 43 S.C.L. Rev. 655, 673 (1992) (to avoid constitutional due process objections, any transferee or other claimant to property transferred or its proceeds should be party to any creditor's action that would affect claimant's rights in property).

We agree with the authority cited above, reaffirm the dictum in *Hoffschaleger,* and hold that where a creditor alleges a fraudulent transfer [***12] of property from a judgment debtor to a transferee who retains title to the subject property or who claims an interest in the property or its proceeds, the transferee is a necessary party to any action seeking to set aside the transfer. [5] Such an action for relief against a transfer alleged to be fraudulent should be brought pursuant to Hawaii Revised Statutes (HRS) ch. 651C (1985), *see supra* n.2, and should expressly name the alleged fraudulent transferees as defendants. Our holding is consistent with established Hawaii law regarding the naming of parties in property disputes. *Cf. Rossiter* [*37] [**455] *v. Rossiter, 4 Haw. App. 333, 337, 666 P.2d 617, 620 (1983)* (record owner of property was necessary and indispensable party to action affecting her interest in property, and family court had no jurisdiction to adjudicate questions affecting title to property where record owner not named as party). Fundamental principles of due process require that transferees who claim an interest in real property or its proceeds have a full and fair opportunity to contest claims of fraudulent transfer. Because the respondent resorted to an improper vehicle for [***13] establishing a fraudulent transfer, the order granting the respondent's motion to execute on fraudulently transferred asset must be vacated. [6]

5 Although the petitioners sold the property by way of agreement of sale to Hakim Properties, they remain the titleholders of the property until the payments under the agreement of sale are completed in 1995. The petitioners also have a claim to the monthly proceeds from the sale of the property.

6 By issuing this opinion, this court renders no decision on the respondent's allegation that Ben transferred the subject property to the petitioners to avoid payment of the respondent's judgment against Ben.

B. *The Petitioners Have No Alternative Remedy To A Writ.*

Contrary to the respondent's contention, the petitioners have no alternative remedy to a writ. As the circuit court ruling now stands, the petitioners have no right to appeal because they were not parties to the *All Lease* action. *See Stewart Properties, Inc., 8 Haw. App. at 433, 807 P.2d at 607* [***14] (only parties to a lawsuit may appeal from an adverse judgment). The circuit court allowed the petitioners to file a motion for reconsideration, but this action alone did not make them parties to the proceedings. Furthermore, it is questionable whether a non-party could even file such a motion in a pending action. However, as we have noted, after the disputed order is vacated, the respondent can file an action under HRS ch. 651C naming the petitioners as defendants. It is possible that the circuit court may conclude that the respondent is entitled to garnish the payments that Hakim Properties makes to the petitioners. Should it do so, the petitioners, as named defendants, would then have a remedy by way of appeal.

IV. *CONCLUSION*

For the foregoing reasons, we direct Judge Nagata, the administrative judge of the First Circuit Court, or the latter's designee, to vacate the October 6, 1993 order granting the respondent's motion for execution on fraudulently transferred asset and any subsequent orders related to it.

# APPENDIX H

LEXSEE

Caution
As of: Feb 10, 2010

**THOMAS, HEAD AND GREISEN EMPLOYEES TRUST; RONALD E. GREISEN, and; HENRY P. HEAD, Plaintiffs-Appellees, v. JACK B. BUSTER; JANICE SUE BUSTER, aka JANICE SUE JOHNSON; HORIZONS WEST, INC., an Oregon Corporation; SCORPIO, INC., an Alaska Corporation; WESTERN INVESTMENT TRUST; SUSAN BENEDICT, TRUSTEE, of the Western Investment Trust, Defendants-Appellants. THOMAS, HEAD AND GREISEN EMPLOYEES TRUST; RONALD E. GREISEN, and; HENRY P. HEAD, Plaintiffs-Appellees, v. JACK B. BUSTER; JANICE SUE BUSTER, aka JANICE SUE JOHNSON; HORIZONS WEST, INC., an Oregon Corporation; SCORPIO, INC., an Alaska Corporation; WESTERN INVESTMENT TRUST; SUSAN BENEDICT, TRUSTEE, of the Western Investment Trust, Defendants, WESTWOOD ACRES, Intervenor-Appellant.**

**No. 94-35872, No. 95-35619**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**95 F.3d 1449; 1996 U.S. App. LEXIS 24672; 36 Fed. R. Serv. 3d (Callaghan) 114; 20 Employee Benefits Cas. (BNA) 2364; 96 Cal. Daily Op. Service 7012; 96 Daily Journal DAR 11505**

**May 7, 1996, Argued, Submitted, Seattle, Washington**
**September 19, 1996, Filed**

**PRIOR HISTORY:** [**1] Appeal from the United States District Court for the District of Alaska. D.C. No. CV-89-00071-JAV. James A. von der Heydt, District Judge, Presiding.

Appeal from the United States District Court for the District of Alaska. D.C. No. CV-89-00071-JKS. James K. Singleton, District Judge, Presiding.

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellants, judgment debtor, fraudulent transferees, and partnership, challenged default judgments from the United States District Court for the District of Alaska, granted in favor of appellee judgment creditors. Appellee had sought to execute on its judgment against appellants, under the district court's ancillary jurisdiction and pursuant to Fed. R. Civ. P. 69(a). Appellant partnership's motion under Fed. R. Civ. P. 60(b)(4) was denied.

**OVERVIEW:** In supplementary proceedings, appellee judgment creditors successfully sought to execute on its judgment against appellants, judgment debtor, fraudulent transferees, and partnership. The court affirmed. First, ancillary jurisdiction was properly exercised over appellants, judgment debtor and fraudulent transferees, under Fed. R. Civ. P. 69(a), because Alaska law permitted appellees to bring their fraudulent conveyance claims in a supplementary proceeding, including claims against appellant fraudulent transferees that were not parties to the original action or judgment. Second, the court did not consider a challenge by appellants, judgment debtor and fraudulent transferees, to a preliminary injunction because these appellants, having failed to appeal the injunction, could not challenge the issuance on appeal. Third, appellant partnership's Fed. R. Civ. P. 60(b)(4) motion was properly denied because the default judgment did not deprive this appellant of property without due process of law. Appellant partnership had no property right in the distributions to which appellant judgment debtor would otherwise have been entitled.

**OUTCOME:** The court affirmed judgments against appellants, judgment debtor, fraudulent transferees, and partnership. The court held that appellee judgment creditors could bring claims for fraudulent conveyance in supplementary proceedings against appellants. The court also held that appellant partnership was not deprived of property without due process of law in the denial of its motion for relief from judgment.

**CORE TERMS:** preliminary injunction, default judgment, fraudulent conveyance, contempt, deposit, injunction, supplementary proceedings, receiver, partnership interest, notice of appeal, judgment debtor, registry, default, judgment creditor, general partner, ancillary jurisdiction, transferee, invalid, notice, supersedeas bond, counterclaim, partnership, ancillary, issuance, void, property right, indispensable parties, supplementary, transparently, fraudulently

**LexisNexis(R) Headnotes**

***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers***
***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution***
[HN1]Fed. R. Civ. P. 69(a), provides in part: The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers***
***Real Property Law > Deeds > Delivery***
***Real Property Law > Purchase & Sale > Fraudulent Transfers***
[HN2]Although Alaska R. Civ. P. 69 does not expressly authorize postjudgment fraudulent conveyance actions, Alaska R. Civ. P. 69(c) provides that the court may make an order restraining the judgment debtor from selling, transferring, or in any manner disposing of any of his property liable to execution pending the proceeding. Alaska procedure thus permits the use of postjudgment orders to prevent fraudulent conveyances.

***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution***
[HN3]Fed. R. Civ. P. 69(a) is in substance a choice-of-law provision not meant to put the judge into a procedural straitjacket, whether of state or federal origin.

***Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties***
***Real Property Law > Deeds > Delivery***
[HN4]Under Alaska law, transferees are indispensable parties in actions to recover fraudulent conveyances. Both longstanding common law and cases arising under comparable versions of Alaska R. Civ. P. 19 hold a grantee of an alleged fraudulent conveyance indispensable to a proceeding to strike the transfer.

***Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview***
***Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review***
[HN5]Although Alaska Stat. § 09.35.130 does not grant a court authority to determine title to property, it has inherent power to do so because an ownership determination is reasonably necessary to the fair administration of justice.

***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Writs of Execution***
***Contracts Law > Secured Transactions > Perfection & Priority > Priority > Accessions & Fixtures > Mechanics' Liens***
[HN6]An order of subordination can be viewed as an order in aid of collection of judgment which is within the inherent power of a court.

***Civil Procedure > Equity > Relief***
***Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties***
[HN7]A court of equity has power to entertain an action which has for its purpose the enforcement of a judgment in order that complete justice may be done to the parties in interest as the exigencies of the case or the interests of justice may require.

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview***
***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers***
***Real Property Law > Purchase & Sale > Fraudulent Transfers***

[HN8]Federal courts generally possess the power to protect their judgments by setting aside fraudulent conveyances of a judgment debtor.

***Admiralty Law > Practice & Procedure > Attachment & Garnishment > General Overview***
***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers***
[HN9]A federal court's power to protect its jurisdiction from being thwarted by a fraudulent transfer applies equally whether it is concerned with executing its judgment or authorizing an attachment to secure an independent maritime claim. This power derives from the long-recognized principle that a federal court may assert authority over non-federal claims when necessary to give effect to the court's judgment.

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction***
[HN10]That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved.

***Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview***
***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction***
[HN11]Irrespective of the citizenship of the parties, the protection and preservation of federal jurisdiction lie at the very foundation of ancillary jurisdiction.

***Constitutional Law > The Judiciary > Jurisdiction > General Overview***
[HN12]A federal court's jurisdiction is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.

***Constitutional Law > The Judiciary > Jurisdiction > General Overview***
[HN13]Judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after a judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction.

***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > General Overview***
***Constitutional Law > The Judiciary > Jurisdiction > General Overview***
[HN14]An execution is the fruit and end of a suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution, are proceedings in the suit.

***Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > General Overview***
***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction***
[HN15]Absent an independent basis for federal jurisdiction, a new defendant may not be joined in a supplementary proceeding to pierce the corporate veil.

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction***
[HN16]Whether a judgment creditor's post-judgment action is within a federal district court's ancillary enforcement jurisdiction hinges on whether it seeks not merely to collect a judgment but also to establish liability on the part of the third party.

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction***
***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers***
***Real Property Law > Purchase & Sale > Fraudulent Transfers***
[HN17]Federal district courts possess ancillary jurisdiction over a fraudulent conveyance action against the transferee of the judgment debtor's assets.

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview***
***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers***

***Real Property Law > Purchase & Sale > Fraudulent Transfers***
[HN18]It has long been familiar federal practice to entertain an "ancillary" claim without independent jurisdictional basis, if that claim seeks either to make a principal judgment effective or to make some lawfully required reallocation of the burden imposed by the principal recovery. Such a supplemental proceeding may serve to effectuate a principal judgment and may achieve full justice by bringing into a suit a third party who should be required to pay the judgment on a claim because of a transfer to him in fraud of creditors.

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview***
[HN19]The Federal Rules neither extend nor limit a federal court's subject matter jurisdiction. Fed. R. Civ. P. 82.

***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers***
***Real Property Law > Purchase & Sale > Fraudulent Transfers***
[HN20]The fact that a joinder and some transfers take place after judgment is not dispositive of whether the district court has jurisdiction to effectuate its judgment by recapturing a judgment debtor's fraudulent conveyances.

***Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview***
[HN21]Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.

***Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview***
***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction***
[HN22]Ancillary enforcement jurisdiction is, at its core, a creature of necessity.

***Civil Procedure > Appeals > Standards of Review > General Overview***
[HN23]A party may not, upon appealing a contempt order, challenge the constitutionality of the underlying restraining order it has violated, unless that order is "transparently invalid" or has been declared unconstitutional in an unrelated proceeding.

***Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers***
***Civil Procedure > Judgments > Entry of Judgments > Stays Pending Appeals > Supersedeas Bonds***
***Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions***
[HN24]Under Alaska law, courts are clearly authorized to enjoin any "act, removal, or disposition" of property done or made "with intent to delay or defraud creditors." Alaska Stat. § 09.40.230.

***Civil Procedure > Sanctions > Contempt > Civil Contempt***
***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***
[HN25]The imposition of civil contempt and contempt sanctions is normally reviewed for an abuse of discretion.

***Civil Procedure > Appeals > Standards of Review > De Novo Review***
[HN26]The issue of whether a district court provided an alleged contemnor due process is a legal question subject to de novo review on appeal.

***Civil Procedure > Judgments > Relief From Judgment > Void Judgments***
[HN27]Fed. R. Civ. P. 60(b)(4) provides in part: On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (4) the judgment is void.

***Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities***
***Civil Procedure > Pretrial Judgments > General Overview***
***Contracts Law > Types of Contracts > Partnership Agreements***
[HN28]Under Alaska law, a trial court is entitled to require a partnership to pay distributions, to which a judgment debtor is entitled, to a judgment creditors who assumed the role of assignees of the judgment debtor's partnership interests. Alaska Stat. § 32.11.340.

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview***
***Civil Procedure > Judgments > Relief From Judgment > Void Judgments***
[HN29]A judgment is not void merely because it is erroneous. It is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law. A party has standing to make a Fed. R. Civ. P. 60(b)(4) motion on due process grounds only if its property rights were adversely affected by the challenged judgment.

***Civil Procedure > Appeals > Reviewability > Notice of Appeal***
[HN30]Ordinarily a circuit court lacks jurisdiction to consider an appeal from a district court order unless a notice of appeal is filed as to that order. Fed. R. App. P. 4 (a)(1).

***Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction***
***Constitutional Law > The Judiciary > Jurisdiction > General Overview***
[HN31]The general rule is that an appeal to a circuit court deprives a district court of jurisdiction as to any matters involved in the appeal. This rule does not apply if the district court has a continuing duty to maintain the status quo pending appeal and if new facts and circumstances arise which require further action to supervise the case and to maintain the status quo.

**COUNSEL:** G. Jefferson Campbell, Jr., Medford, Oregon, for the defendants-appellants.

A. Michael Zahare and Thomas A. Hause, Matthews & Zahare, Anchorage, Alaska, for the plaintiffs-appellees.

A. Lee Petersen, Anchorage, Alaska, for the intervenor-appellant.

**JUDGES:** Before: Donald P. Lay, * Herbert Y. C. Choy and Edward Leavy, Circuit Judges. Opinion by Judge Lay.

* Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

**OPINION BY:** DONALD P. LAY

**OPINION**

[*1451] **OPINION**

LAY, Circuit Judge:

In *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114 (9th Cir. 1994), *cert. denied*, 130 L. Ed. 2d 881, 115 S. Ct. 935 (1995), this court affirmed a judgment of $ 142,745.71 against Jack Buster and others not parties to this appeal under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. The district court ruled in favor of Thomas, [**2] Head & Greisen Employees Trust, Ronald Greisen, and Henry Head (collectively, "Thomas, Head") upon finding that Buster breached his fiduciary duties to Thomas, Head in the sale of certain deed-of-trust notes.

The initial appeal (No. 94-35872) arises out of supplementary proceedings in which Thomas, Head has attempted to execute on its judgment against Buster. In February 1993, Thomas, Head amended its complaint to join as defendants Janice Sue Buster, a/k/a Janice Sue Johnson, Horizons West, Inc., Scorpio, Inc., Susan Benedict, trustee of the Western Investment Trust (collectively, "the Johnson parties"), and others not party to this appeal. The amended complaint alleges that Buster fraudulently transferred various properties to the Johnson parties in an effort to avoid payment of the judgment. The district court [1] denied the Johnson parties' motion to dismiss the supplementary proceeding for lack of jurisdiction and subsequently entered a preliminary injunction freezing certain assets and requiring Buster and the Johnson parties to deposit $ 125,000 into the court registry. When Buster and the Johnson parties failed to deposit the money or to show cause for their failure to do so, [**3] the court held them in contempt, declared them in default, and later entered default judgment against them on Thomas, Head's fraudulent [*1452] conveyance claims. Buster and the Johnson parties appeal the default judgment against them.

1 The Honorable James A. von der Heydt, presiding.

The above appeal has been consolidated with a second appeal (No. 95-35619) by Westwood Acres ("Westwood"), a limited partnership in which Buster is the general partner. Westwood attacks the validity of the default judgment as it relates to its property. At the time of the default judgment, Westwood was not a party to the supplementary proceedings. Shortly thereafter, however, the magistrate judge [2] entered an order, pursuant to the default judgment against Buster and the Johnson parties, appointing a receiver to freeze Westwood's bank accounts and distributions to prevent the dissipation of Buster and the Johnson parties' assets. Westwood moved to intervene and to vacate or modify the order appointing a receiver. The magistrate judge [**4] modified the or-

der, and whether the modification or the underlying receivership was proper is not an issue before us in this appeal. Following notice of the sale of Buster's limited partnership interest in Westwood, however, Westwood made another motion, pursuant to Fed. R. Civ. P. 60(b)(4), for relief from the default judgment. The district court [3] denied the Rule 60(b)(4) motion, and Westwood appeals its denial.

2 The Honorable John D. Roberts.
3 The Honorable James K. Singleton, presiding.

I

Thomas, Head commenced this supplementary proceeding, alleging that Buster had fraudulently conveyed his assets to the Johnson parties in violation of Alaska law. Buster and the Johnson parties assert that, under Fed. R. Civ. P. 69(a) and the Alaska procedure it incorporates, a judgment creditor must bring an independent action in state court to set aside the postjudgment fraudulent conveyances of a judgment debtor. Rule 69(a) provides in relevant part:

> [HN1]
>
> The procedure on execution, in proceedings supplementary [**5] to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

*Alaska Supplementary Procedure*

The Johnson parties and Buster urge that Alaska R. Civ. P. 69 does not permit judgment creditors to maintain supplementary fraudulent conveyance proceedings against nonparties to the underlying action. [4] [HN2]Although Alaska R. Civ. P. 69 does not expressly authorize postjudgment fraudulent conveyance actions, Alaska Rule 69(c) provides that "the court may make an order restraining the judgment debtor from selling, transferring, or in any manner disposing of any of his property liable to execution pending the proceeding." Alaska procedure thus permits the use of postjudgment orders to *prevent* fraudulent conveyances. Since [HN3]Federal Rule 69(a) is in substance a choice-of-law provision not "meant to put the judge into a procedural straitjacket, whether of state or federal origin," *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, [**6] 1226 (7th Cir. 1993), we think "the procedure followed here . . . accorded with the spirit of the Rules and . . . [was] a sufficiently close adherence to state procedures." *See Chambers v. Blickle Ford Sales, Inc.*, 313 F.2d 252, 256 (2d Cir. 1963). [5]

4 [HN4]Under Alaska law, transferees are indispensable parties in actions to recover fraudulent conveyances. *Sylvester v. Sylvester*, 723 P.2d 1253, 1259 (Alaska 1986) ("Both longstanding common law and cases arising under comparable versions of [Alaska's] Civil Rule 19 hold a grantee of an alleged fraudulent conveyance indispensable to a proceeding to strike the transfer."). Thus, Thomas, Head was required to join the Johnson parties in order to raise its fraudulent conveyance claims.

5 Buster and the Johnson parties rely on two Alaska cases, *First National Bank v. Enzler*, 537 P.2d 517 (Alaska 1975), and *Blumenstein v. Phillips Insurance Center, Inc.*, 490 P.2d 1213 (Alaska 1971), in support of their argument that fraudulent conveyance claims may not be raised in supplementary proceedings. These cases, however, do not support their contention; they simply illustrate fraudulent conveyance claims raised in ordinary, nonsupplementary proceedings under Alaska law.

[**7] [*1453] The Alaska Supreme Court has twice upheld a trial court's exercise of jurisdiction over supplementary proceedings not expressly authorized by Alaska Rule 69. In *Keltner v. Curtis*, 695 P.2d 1076 (Alaska 1985), the judgment creditor sought to execute on property within the judgment debtor's possession. Two third parties filed claims to the property under Alaska Stat. § 09.35.130, which delineates the circumstances in which property levied upon by a third party may be retained by its possessor. The trial court held an evidentiary hearing to resolve the ownership dispute. The Alaska Supreme Court upheld the lower court's jurisdiction, reasoning that, [HN5]although § 09.35.130 did not grant the court authority to determine title to the property, it had inherent power to do so because the ownership determination was "reasonably necessary to the fair administration of justice." *Id.* at 1079 n.4.

Similarly, in *Great Western Savings Bank v. George W. Easley Co.*, 778 P.2d 569 (Alaska 1989), the trial court entered an order subordinating a construction lender's deed of trust to a general contractor's mechanics' lien. On appeal, the Alaska Supreme Court ruled that, because it was affirming [**8] a money judgment against the lender, "the [HN6]order of subordination can be viewed as an order in aid of collection of the judg-

ment which is within the inherent power of the court." Id. at 581. In a footnote to this passage, the court stated that "'[[HN7]a] court of equity has power to entertain an action which has for its purpose the enforcement of a judgment in order that complete justice may be done to the parties in interest as the exigencies of the case or the interests of justice may require.'" Id. at 581 n.12 (quoting Shields v. Thomas, 59 U.S. (18 How.) 253, 262, 15 L. Ed. 368 (1856)).

Buster and the Johnson parties note that the third parties in *Keltner* voluntarily filed their ownership claims with the court, and that the subordination of the deed of trust to the mechanics' lien in *Great Western* involved the original parties. We do not find those distinctions dispositive. *Keltner* and *Great Western* together suggest that the Alaska Supreme Court approves of a broad exercise of jurisdiction over third-party claims as "the exigencies of the case or the interests of justice may require." Great Western, 778 P.2d at 581 n.4 (quotation omitted). We are thus persuaded that [**9] Alaska courts would permit Thomas, Head to bring its fraudulent conveyance claims in a supplementary proceeding such as the one presented to the district court.

*Subject Matter Jurisdiction*

We still must satisfy ourselves, however, given the posture of this case, that the district court had federal subject matter jurisdiction over the proceedings involving the Johnson parties, who were not parties to the original action or judgment, but were impleaded by Thomas, Head and joined in the supplementary proceedings. There can be little question that [HN8]federal courts generally possess the power to protect their judgments by setting aside fraudulent conveyances of the judgment debtor. *See* Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 694-95, 94 L. Ed. 1206, 70 S. Ct. 861 (1950) ([HN9]federal court's power "to protect its jurisdiction from being thwarted by a fraudulent transfer . . . applies equally whether it is concerned with executing its judgment or authorizing an attachment to secure an independent maritime claim"); Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329, 333, 31 L. Ed. 179, 8 S. Ct. 148 (1887). This power derives from the long-recognized principle that a federal court may assert authority over [**10] non-federal claims "when necessary to give effect to the court's judgment." Finley v. United States, 490 U.S. 545, 551, 104 L. Ed. 2d 593, 109 S. Ct. 2003 (1989) (citing Local Loan Co. v. Hunt, 292 U.S. 234, 239, 78 L. Ed. 1230, 54 S. Ct. 695 (1934), and Julian v. Central Trust Co., 193 U.S. 93, 112-14, 48 L. Ed. 629, 24 S. Ct. 399 (1904)). [6] In the present [*1454] case, however, there is no diversity of citizenship between the Johnson parties and Thomas, Head. As such, the Johnson parties challenge the district court's ancillary jurisdiction over them.

6 In *Local Loan*, the Court stated:

> [HN10]
>
> That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved[.]

292 U.S. at 239 (citations omitted). *See also* Julian, 193 U.S. at 113 ([HN11]irrespective of the citizenship of the parties, "the protection and preservation of [federal] jurisdiction . . . lie at the very foundation of ancillary jurisdiction" (quotation omitted)); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 23, 6 L. Ed. 253 (1825) (Marshall, C.J.) ([HN12]a federal court's jurisdiction "is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied"); Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53, 6 L. Ed. 264 (1825) ("The [HN13]judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after the judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction[.]"); id. at 64 ("[HN14]An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution, are proceedings in the suit[.]").

[**11] In Peacock v. Thomas, 133 L. Ed. 2d 817, 116 S. Ct. 862, 867-69 (1996), the Supreme Court held that, [HN15]absent an independent basis for federal jurisdiction, a new defendant may not be joined in a sup-

plementary proceeding to pierce the corporate veil. The Court reasoned that federal district courts do not possess ancillary jurisdiction over such claims where the judgment creditor is attempting to establish the new defendant's liability for the original judgment. Id. at 868-69. [7] Under Alaska law, however, the Johnson parties are indispensable parties to the fraudulent conveyance claims, and Thomas, Head seeks only to disgorge from them, as alleged fraudulent transferees, the property Buster wrongfully transferred to them. Because Thomas, Head is not attempting to establish the Johnson parties' liability for the original judgment, we find *Peacock* inapposite.

7 *Peacock* suggested that [HN16]whether a judgment creditor's post-judgment action is within a federal district court's ancillary enforcement jurisdiction hinges on whether it seeks not merely "to *collect* a judgment" but also "*to establish liability*" on the part of the third party. *See* 116 S. Ct. at 868 n.6 (quotation omitted). The Court expressly declined to address the argument, raised by the United States as *amicus curiae*, that Thomas's supplementary claims were "intended merely as a supplemental bill to preserve and force payment of the ERISA judgment by voiding fraudulent transfers of [the judgment debtor's] assets," on the ground that "neither Thomas nor the courts below characterized this suit that way." *Id.* The issue left open in *Peacock* is precisely the issue presented in this case.

[**12] In the 1887 decision of *Dewey v. West Fairmont Gas Coal Co.*, the Supreme Court held that [HN17]federal district courts possess ancillary jurisdiction over a fraudulent conveyance action against the transferee of the judgment debtor's assets. In *Dewey*, as here, the transferee was not originally a party to the proceeding, and jurisdiction over the transferee was challenged because the latter was a citizen of the same state as the judgment creditor. On appeal, however, the Court rejected that objection on the ground that joinder was necessary to prevent avoidance of the judgment. 123 U.S. at 333; *see also* Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 F.2d 295, 296-97 (2d Cir. 1927) (L. Hand, J.). The Supreme Court recently explained *Dewey*, stating:

> This Court's decision in *Dewey* . . . explicitly rested upon "ancillary" jurisdiction, citing Krippendorf v. Hyde, 110 U.S. 276, 28 L. Ed. 145, 4 S. Ct. 27 (1884), in support of its holding that "the suit in equity was an exercise of jurisdiction . . . ancillary to that which it had already acquired in the action at law." 123 U.S. at 333. In *Dewey*, the new defendant added in the equitable counterclaim was asserted [**13] to have been the recipient of a fraudulent conveyance from the insolvent plaintiff, and the counterclaim was brought under a West Virginia statute authorizing suits to set aside such conveyances in assistance of an anticipated judgment or decree against the conveying debtor. Any decree on the counterclaim would presumably have been worthless if the fraudulent conveyance could not have been recaptured.

[*1455] Finley, 490 U.S. at 551 n.4. [8]

8 In Pennsylvania Railroad Co. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1963), Judge Hastie, citing *Dewey*, succinctly answered any concern the parties have expressed as to ancillary jurisdiction in the present case:

> [HN18]
>
> It has long been familiar federal practice to entertain an "ancillary" claim without independent jurisdictional basis, if that claim seeks either to make a principal judgment effective or to make some lawfully required reallocation of the burden imposed by the principal recovery. Such a supplemental proceeding may serve to effectuate a principal judgment . . . [and] may achieve full justice by bringing into a suit a third party who should be required to pay the judgment on a claim because of a transfer to him in fraud of creditors. Dewey v. West Fairmont Gas Coal Co., [123 U.S. 329, 31 L. Ed. 179, 8 S. Ct. 148 (1887)].

Id. at 845 (internal citations omitted).

[**14] The Johnson parties urge that *Dewey* is superseded by Fed. R. Civ. P. 69(a) and is distinguishable in that the transferee therein was joined in the prejudgment stage of the proceedings. [9] We reject both arguments. As to the argument that Rule 69(a) supersedes *Dewey*, [HN19]the Federal Rules neither extend nor limit a federal court's subject matter jurisdiction. Fed. R. Civ.

P. 82. As to the timing issue, [HN20]the fact that the joinder and some of the transfers took place after judgment is not dispositive of whether the court has jurisdiction to effectuate its judgment by recapturing the judgment debtor's fraudulent conveyances. The principle of *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187, 18 L. Ed. 768 (1867), remains sound: "[HN21]Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." In this case, the supplementary proceeding to set aside the fraudulent transfers is essential to prevent Buster's efforts to avoid the district court's original judgment. *See Peacock*, 116 S. Ct. at 869 ("[HN22]Ancillary enforcement jurisdiction [**15] is, at its core, a creature of necessity."). We therefore find *Dewey* applicable, and hold that the district court properly exercised ancillary jurisdiction over both Buster and the Johnson parties in Thomas, Head's supplementary proceeding to set aside the alleged fraudulent conveyances.

9 In the present case, some of the transfers were alleged to have been made prior to the underlying judgment and some afterward.

II

*The Preliminary Injunction*

Buster and the Johnson parties each challenge the lower court's issuance of the preliminary injunction. Buster contends that the court erred in requiring him to post what amounted to a "mandatory" $ 125,000 supersedeas bond; the Johnson parties contend that the injunction was an invalid prejudgment attachment. We conclude that neither Buster nor the Johnson parties, having failed to appeal the preliminary injunction, may challenge its issuance on appeal from the entry of default judgment for their failure to obey the district court's order.

In *FTC v. American* [**16] *National Cellular*, 868 F.2d 315, 317 (9th Cir. 1989), this court held that [HN23]a party may not, upon appealing a contempt order, challenge the constitutionality of the underlying restraining order it has violated, unless that order is "transparently invalid" or has been declared unconstitutional in an unrelated proceeding. The "transparently invalid" exception traces from *dictum* in *Walker v. City of Birmingham*, 388 U.S. 307, 315, 18 L. Ed. 2d 1210, 87 S. Ct. 1824 (1967), and, although this circuit has never found the "transparently invalid" exception applicable, *Walker* suggests there may be times when an injunction is so plainly unconstitutional as to permit it to be challenged after its violation. *See In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 727 (9th Cir. 1989). Buster and the Johnson parties suggest this is such a case. We disagree.

In its request for a preliminary injunction, Thomas, Head expressly asked the court to consider "whether Buster should be required to pay into the registry of the court the $ 125,000 that was previously in Buster's counsel's law office trust account." ER 311 at 7. The court informed the parties that it would "consider . . . the question of payment [**17] of money into the court registry." ER 313 at [*1456] 1. The transcript of proceedings from oral argument on the preliminary injunction indicates that counsel for Buster was aware that a requirement to deposit the $ 125,000 with the registry of the court would be part of the injunction. The district court granted the injunction, including a requirement that Buster and the Johnson parties, on a joint and several basis, deposit $ 125,000 with the registry of the court. Upon entering the preliminary injunction, the district court found:

> Jack B. Buster's counsel, A. Lee Peterson, was in possession of $ 125,000 that this court understood was to be used by defendant Buster in order to post a supersedeas bond. Based on evidence presented to this court, there is a substantial likelihood that the $ 125,000 are proceeds of transferred assets which are the subject of plaintiffs' fraudulent conveyance action and covered by the February 19, 1993 Temporary Restraining Order. *There is an appreciable risk that defendant Jack Buster or the impleaded defendants will dispose of these funds prior to resolution of plaintiffs' fraudulent conveyance action.* If these funds are dissipated, irreparable [**18] harm will be incurred by plaintiffs.

SER 334 at 2-3 (emphasis added).

*Buster*

The record clearly reveals that there is no merit in Buster's contentions that the district court failed to consider the requisite factors for preliminary injunctive relief - i.e., the likelihood of success on the merits and irreparable injury - and that the district court failed to give Buster notice that the injunction could include the requirement of a $ 125,000 deposit with the registry of the court. Nor is there merit in Buster's argument that the $ 125,000 deposit requirement was an inappropriate means of requiring him to post a supersedeas bond. The district court found it substantially probable that the $ 125,000

was related specifically to property which was fraudulently conveyed to defraud Thomas, Head; the deposit requirement was not a substitute for a supersedeas bond. [HN24]Under Alaska law, upon which Buster relies, courts are clearly authorized to enjoin any "act, removal, or disposition" of property done or made "with intent to delay or defraud creditors." Alaska Stat. § 09.40.230. Furthermore, even if the district court erred as alleged by Buster, such a mistake would not render [**19] the injunction transparently invalid. Accordingly, we hold that Buster may not challenge the issuance of the preliminary injunction in this appeal from the finding of contempt and entry of default judgment. As the court explained in *American National Cellular*, Buster should have challenged the injunction "by direct appeal of the order." 868 F.2d at 317.

*The Johnson Parties*

The Johnson parties raise a distinct challenge to the preliminary injunction. They suggest the district court erred in requiring a deposit of $ 125,000 under the injunctive relief provisions of Fed. R. Civ. P. 65. They urge that, as to them, the deposit requirement was actually a prejudgment attachment subject to Fed. R. Civ. P. 64. They argue that the district court required the deposit before adjudicating the merits of Thomas, Head's claims or complying with Alaska procedure, which requires plaintiffs to deposit "sufficient sureties" prior to obtaining prejudgment attachments. Alaska R. Civ. P. 89(a). The Johnson parties maintain that these errors render the preliminary injunction transparently invalid.

In view of the court's order and its concern that the $ 125,000 had been fraudulently conveyed, [**20] we reject the Johnson parties' attack on the preliminary injunction. The court heard argument on the proposed injunction and found that Thomas, Head's fraudulent conveyance claims were likely to succeed. The Johnson parties' claim in no way implicates the court's inherent authority or jurisdiction to enter an order to preserve the possibility of equitable remedies. *See Reebok Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 559 (9th Cir. 1992); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035, 104 L. Ed. 2d 404, 109 S. Ct. 1933 (1989). The $ 125,000 does not represent a money judgment for damages. The ultimate relief sought, the invalidation of various fraudulent conveyances, is equitable in nature. The injunction merely sought equitably [*1457] to preserve assets and monies found to be the product of fraudulent conveyances to the Johnson parties, in order to protect the court's earlier judgment against Buster. In such circumstances, the injunction cannot be characterized as having "only a frivolous pretense to validity." *Walker*, 388 U.S. at 315. Accordingly, we find that the Johnson parties may not challenge the issuance of the preliminary [**21] injunction in this appeal. *American National Cellular*, 868 F.2d at 317.

*The Default Judgment*

When Buster and the Johnson parties failed to comply with the district court's preliminary injunction, Thomas, Head moved for an order to show cause why they should not be held in contempt. The court requested briefing on the motion, but Buster missed the deadline by twelve days and the court refused to consider his brief. The Johnson parties filed a timely brief and argued, as they have argued here, that the preliminary injunction was an invalid prejudgment attachment and, alternatively, that they did not have the money to comply. The claim that they could not comply, however, was unsupported by any admissible evidence. [10]

10 The Johnson parties's brief was supported only by an unsigned affidavit simply asserting, without supporting documentation, that they did not have sufficient funds to comply.

On September 28, 1993, the district court rejected the Johnson parties' arguments and granted Thomas, Head's [**22] motion for an order to show case. The court stated:

> Defendants failed to respond in any way to the court's preliminary injunction. No appeal was taken by defendants regarding any aspect of the preliminary injunction. Defendants ignored all directives of the preliminary injunction.
>
> Defendant Jack Buster has previously submitted to the court that while the court may order him to post a supersedeas bond, the court cannot force him to actually post the bond. That argument is inapplicable under the present circumstances. The court has entered a preliminary injunction. As part of the preliminary injunction, defendants are directed to pay $ 125,000 into the court registry. There is nothing in the preliminary injunction regarding the posting of a supersedeas bond. The court may, through its use of civil contempt orders, do what is necessary under the facts of the case to require a party to comply with the directives of a preliminary injunction.
>
> Defendants Janice Sue Buster, et al make two arguments why they did not respond to the court's preliminary injunc-

tion. First, defendants argue that the preliminary injunction requires them to pay a final judgment before the case is tried. [**23] Second, defendants submit that they cannot comply with the preliminary injunction because they do not have the funds.

Neither argument forms a basis on which defendants can ignore an order of the court. The preliminary injunction was issued as part of plaintiffs' fraudulent conveyance action. The court found, when it issued the preliminary injunction, that funds have fraudulently been transferred or dissipated. To prevent the loss of funds that might be used to satisfy plaintiffs' judgment, defendants were directed to deposit $ 125,000 into the court registry. Defendants could have appealed the issuance of the preliminary injunction. They did not. Defendants' submission that they cannot comply is inadequate. A mere assertion of inability to comply with a court's order is insufficient. Defendants must introduce evidence supporting their assertion. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297 (11th Cir. 1991).

No cause having been shown by defendants why they should not be held in contempt for ignoring an order of this court, plaintiffs' motion to show cause is granted. As of the date of this order, default is entered in plaintiffs' fraudulent conveyance action [**24] as to defendants . . . . Default will be vacated upon compliance with the court's preliminary injunction.

Further, plaintiffs are granted costs to be determined by the clerk of court and reasonable attorney's fees to be determined by the court upon submission of appropriate documentation.

[*1458] ER 363 at 3-4. Although the district court indicated that it would vacate default upon compliance with the preliminary injunction, Buster and the Johnson parties neither complied with its terms nor showed cause for their failure to do so. The court entered default judgment on the fraudulent conveyance claims nearly a year later, on August 8, 1994. [11] Buster and the Johnson parties appeal from the entry of default judgment.

11 The district court did not explicitly label its chosen contempt sanction, but we presume, as the parties do, that the entry of default and award of attorney fees were contempt sanctions for the parties' failure to comply with the directives of the preliminary injunction. Upon the court's entry of default judgment in 1994, the court awarded Thomas, Head attorneys' fees in the amount of $ 7500 plus costs and interest. ER 436 at 12-13.

[**25] Regarding the finding of contempt and entry of default judgment, Buster and the Johnson parties contend that the district court omitted several necessary procedural steps and erroneously combined its contempt determination with its decision to grant Thomas, Head's motion to show cause. They argue that the court merged into one action what should have been a five-step process: (1) deciding whether to grant plaintiffs' motion to show cause; (2) issuing the show cause order; (3) providing a hearing; (4) making a finding of contempt on the basis of affidavits and other evidence; and (5) determining and imposing sanctions. Quoting *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991), they maintain that "due process requires that the court inform the alleged contemnor of the contemptuous conduct, and provide a hearing in which the alleged contemnor may explain why the court should not make a contempt finding." All of the defendants contend that they understood that the motion would result in either a grant or denial of the order to show cause, not a finding of contempt. [12]

12 Although Buster did not timely respond to the court's request for opposition to the motion to show cause, he notes that he had previously filed an affidavit with the court stating that he could not comply with the $ 125,000 deposit requirement, that he objected to the preliminary injunction on the basis that it included a "mandatory" deposit provision, and that he filed a response to the court's minute order requiring a deposit of funds. Buster suggests that this opposition, though not filed in response to the request for opposition to the motion for an order to show cause, indicates that a hearing was warranted.

[**26] [HN25]

The imposition of civil contempt and contempt sanctions is normally reviewed for an abuse of discretion. *Reebok Int'l, Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir.), *cert. denied*, 133 L. Ed. 2d 197, 116 S. Ct. 276 (1995). [HN26]The issue of whether a district court provided an alleged contemnor due process, however, is a legal question subject to *de novo* review on appeal. *See Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492 (9th Cir. 1983); *see also* Fed. R. Civ. P. 43.

We find that Buster and the Johnson parties had ample notice and an opportunity to respond to the possibility that the court would find them in contempt. The district court expressly requested briefing in response to Thomas, Head's motion for an order to show cause why Buster and the Johnson parties should not be held in contempt. Buster failed timely to respond to the court's request and, although the Johnson parties filed a brief, they presented no admissible evidence to support their claim that they could not comply with the injunction. Although the district court did not set an evidentiary hearing on the contempt issue, the record reflects that neither Buster nor the Johnson parties asked for such a hearing [**27] in response to Thomas, Head's motion for an order to show cause. Moreover, while the district court's order provided that default would be vacated upon compliance with its preliminary injunction, Buster and the Johnson parties still failed to comply, even in part, throughout the following year, when default judgment was finally entered. Given these facts and the overwhelming evidence supporting Thomas, Head's request, [13] we think it is clear that the district court's actions did not constitute a denial of due process. In Commodity Futures Trading [*1459] Comm'n v. Premex, Inc., 655 F.2d 779, 782 n.2 (7th Cir. 1981), the court rejected the argument that contempt should be set aside pending a full evidentiary hearing, stating:

> The refusal to grant a full evidentiary hearing did not constitute a due process denial where the documentary evidence presented by the CFTC was more than sufficient to establish the contemptuous conduct. In addition, defendants received the CFTC's motion and supporting papers in ample time to prepare for a show cause hearing. They also failed to demand such a hearing at that time and did not present any arguments which created any material issue of fact. [**28] Unlike the situation in United States v. Alter, 482 F.2d 1016, 1023-24 (9th Cir. 1973), Premex was not deprived of a meaningful opportunity to present its defense. Defendants merely failed to take advantage of the chance they were afforded in the court below. This failure in no way negates the legal proof of the contemptuous conduct tendered by the CFTC.

Accordingly, we affirm the finding of contempt, the entry of default, the subsequent entry of default judgment, and the award of attorney fees against Buster and the Johnson parties.

13 Our review of the record evidence, *see* note 9, *supra*, requires that we reject the Johnson parties's argument that contempt was inappropriate because she could not comply with the injunction.

III

*Westwood's Rule 60(b)(4) Motion*

Westwood separately challenges the entry of default judgment against Buster and the Johnson parties as void for lack of jurisdiction as it affects Westwood's operations and property. Westwood was not a defendant at the time [**29] of the August 8, 1994 default judgment, although Westwood had notice of the proceedings by virtue of the notice to Buster, Westwood's general partner. *See* Alaska Stat. § 32.05.070. The default judgment set aside Buster's transfer of certain interests in Westwood, directed Westwood to "pay to the plaintiffs all present and future shares of all distributions, credits, draws, or payments which would have been paid to Jack Buster for his general and/or limited interest in Westwood" until the underlying judgment was satisfied, and authorized the sale of Buster's limited partnership interest in Westwood at an auction at which Thomas, Head was permitted to bid. ER 436 at 9-10. [14]

14 On May 9, 1995, the magistrate judge appointed a receiver to assist Thomas, Head in the recovery of the defendants' interests in Westwood. The order granted the receiver access to Westwood's financial records and directed him to freeze Westwood's bank accounts and distributions of proceeds from the collection of payment on promissory notes to Westwood until the court could determine what portion of the account funds and the note payments belonged to Buster and the Johnson parties. Westwood then sought leave to intervene. In its motion to intervene, Westwood stated that "prior to the issuance of [the May 9] Order, Westwood Acres, as a limited partnership entity, was in no way affected by this lawsuit." ER 546, Memorandum in Support of Motion to Intervene, at 2. Westwood sought to vacate the May 9 order. On May 30, the magistrate judge granted Westwood's motion to intervene. On June 7, the magistrate judge found that the May 9 order exceeded the district court's authority and vacated that portion of the order which authorized the receiver to freeze Westwood's bank accounts and the distribution of promissory note payments. Although Westwood criticizes the May 9 order in its opening brief on appeal, it did not appeal either the May 9 or the

June 7 order. This issue is therefore not before us on appeal.

[**30] On June 1, 1995, Thomas, Head issued a notice of public sale of Buster's limited partnership interest in Westwood. On June 6, Westwood filed a motion under Fed. R. Civ. P. 60(b)(4) for relief from the default judgment entered against Buster and the Johnson parties. [15] Westwood argued that the default judgment, to the extent it affected its property, was void for lack of jurisdiction because it was not a party to the proceeding. Further, Westwood argued that under Alaska law a judgment creditor is limited to the rights of an assignee of the judgment debtor's interests, *see* Alaska Stat. § 32.11.340, and that the default judgment violated due process by depriving Westwood of its property interest in Buster's limited partnership interest under the partnership agreement. Specifically, Westwood's partnership agreement, which governs the rights of assignees under [*1460] § 32.11.340, gives the general partner the right to veto the sale of any limited partnership interest, although there is no limitation on the assignment of the right to distributions. On June 13, the district court rejected Westwood's Rule 60(b)(4) motion because the default judgment had only a limited effect on Westwood [**31] and because Buster effectively controlled Westwood. [16] Westwood appeals the denial of the Rule 60(b)(4) motion.

15 [HN27]Fed. R. Civ. P. 60(b)(4) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; . . . ."

16 On June 20, 1995, Buster's limited partnership interest was sold at an auction to Thomas, Head for what Westwood contends was less than its fair market value.

We find that the district court properly denied Westwood's Rule 60(b)(4) motion. [17] As we have found, the district court had supplementary jurisdiction over Buster's limited partnership interest and the other interests in Westwood that Buster had previously conveyed. Those interests were subject to the court's jurisdiction because Buster and the transferees of those interests were parties to the proceeding at that time. The default judgment did not deprive Westwood [**32] of property without due process of law. First, Westwood had no property right as to the distributions to which Buster would otherwise have been entitled. [HN28]Under Alaska law, the district court was entitled to require Westwood to pay the distributions to which Buster was entitled to Thomas, Head as judgment creditors who assumed the role of assignees of his partnership interests. *See* Alaska Stat. § 32.11.340. Second, to the extent that the default judgment had an incidental effect on Westwood's property right in *controlling the sale* of Buster's limited partnership interests under the partnership agreement, that right was not violated without due process of law. Westwood had notice of the proceedings through its general partner and could have intervened earlier in order to protect its interests. Furthermore, the specific asserted property interest - i.e., the right of the general partner to consent to the sale - was fully protected by the general partner's involvement in the proceedings. Under these circumstances, we find no deprivation of Westwood's property rights without due process. [18]

17 "[HN29]A judgment is not void merely because it is erroneous. It is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law." *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985). A party has standing to make a Rule 60(b)(4) motion on due process grounds only if its property rights were adversely affected by the challenged judgment. *Id.* at 1445.

[**33]

18 Westwood was not an indispensable party to the proceedings. Westwood had not claimed an interest in Buster's limited partnership interest at the time of the default judgment and the district court was able to craft appropriate and meaningful relief in the absence of Westwood which, as we have discussed, did not prejudice Westwood's property rights. *See* Fed. R. Civ. P. 19. Thus, we find that the default judgment against Buster and the Johnson parties is not void for lack of jurisdiction for failure to join Westwood as an indispensable party. Furthermore, even if Westwood had been an indispensable party to the proceedings, that would not necessarily be a jurisdictional defect that would make the default judgment amenable to attack by way of a Rule 60(b)(4) motion. *See* *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 824-25 & n.2 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 955, 66 L. Ed. 2d 220, 101 S. Ct. 363 (1980).

For the foregoing reasons, the default judgment against Buster and the Johnson parties and the denial of Westwood's 60(b)(4) motion is AFFIRMED. [19]

19 Westwood filed its notice of appeal from the denial of its Rule 60(b)(4) motion on June 16, 1995. Prior to that, on May 30, Westwood filed a claim for damages against Thomas, Head. On June 19, Thomas, Head filed a response to Westwood's counterclaims and filed its own counter-

claim against Westwood, requesting the appointment of a receiver for Westwood. On September 14, 1995, the magistrate judge appointed a receiver for Westwood - the same receiver as appointed in the May 9 order that was subsequently vacated in part, *see* note 14, *supra* - as requested by Thomas, Head. As in the partially vacated May 9 order, the receiver was empowered to freeze Westwood's assets and distributions until the court determined whether they belonged to Buster and the Johnson parties.

On December 19, 1995, in its reply brief to this court on appeal from the denial of its Rule 60(b)(4) motion, Westwood complained that the district court's September 14 order exceeded the district court's jurisdiction pending the appeal from the denial of its Rule 60(b)(4) motion. Although Westwood was entitled to appeal the September 14 order appointing a receiver under 28 U.S.C. § 1292(a)(2), it did not do so.

[HN30]Ordinarily this court lacks jurisdiction to consider an appeal from a district court order unless a notice of appeal is filed as to that order. Fed. R. App. P. 4 (a)(1); *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978). Because Westwood had filed a prior notice of appeal from the denial of its Rule 60(b)(4) motion, Westwood suggests that its failure to file a notice of appeal from the subsequent order does not deprive this court of appellate jurisdiction over the subsequent order. In *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983), this court exercised appellate jurisdiction to determine whether the district court had jurisdiction to enter an order, after the filing of a notice of appeal as to a prior order, despite the lack of a timely notice of appeal from the subsequent order. *Id.* at 519. *Miranda* also recognized, however, that this court would not have jurisdiction to consider the merits of the subsequent order if the district court had possessed jurisdiction to enter that order. *Id.* at 519 n.6. Thus, under *Miranda*, we have jurisdiction to determine whether the magistrate judge had jurisdiction to enter the September 14 order, which was entered after Westwood's notice of appeal from the denial of its Rule 60(b)(4) motion, but not to determine whether the September 14 order was correct on the merits.

"[HN31]The general rule is that an appeal to the circuit court deprives a district court of jurisdiction as to any matters involved in the appeal." *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). This rule does not apply if the district court has a continuing duty to maintain the status quo pending appeal and if new facts and circumstances arise which require further action to supervise the case and to maintain the status quo. *Id.; see also Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1480 n.14 (9th Cir. 1994).

The magistrate judge found that Buster, as the general partner of Westwood, had concealed from Thomas, Head certain Westwood distributions; that Thomas, Head agreed not to oppose legitimate distributions to Westwood's limited partners unrelated to Buster; and that Thomas, Head was at risk of losing monies to which it was entitled as a result of Westwood's unsupervised distributions. These factual findings, which we discern no basis on the present record to find in error, suggest that the magistrate judge had a duty to rule on Thomas, Head's counterclaim in order to prevent the depletion of Westwood's assets. Thus, we find that the district court properly exercised its jurisdiction notwithstanding Westwood's prior notice of appeal. Accordingly, Westwood was required to file a separate notice of appeal in order to challenge the merits of the September 14 order, as the parties did in *Meinhold*, 34 F.3d at 1473, and *Hoffman*, 536 F.2d at 1271.

[**34]

No. 59738-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

---

JOSEPH D. SANDERS, and the martial community composed of Joseph D. Sanders and Jane Doe Sanders; SOOS CREEK VISTA, INC., a Washington corporation,

Appellants,

vs.

DBM CONSULTING ENGINEERS, INC., a Washington corporation,

Respondent.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on this 3rd day of March, 2010, I caused to be served a true and correct copy of the following document(s):

1. Appellant's Reply Brief; and
2. Certificate of Service

to the individual(s) named below in the specific manner indicated:

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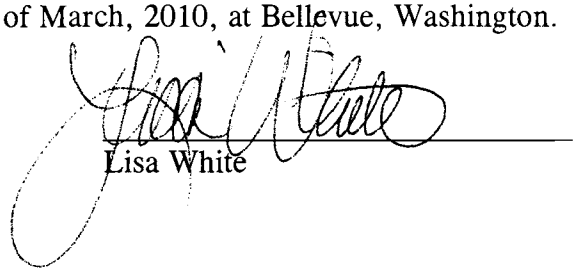

Lisa White