

1 JUDGE HERB ROSS (Recalled)

2 UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA
3 605 West 4th Avenue, Room 138, Anchorage, AK 99501-2296 - (Website: www.akb.uscourts.gov)
4 Clerk's Office 907-271-2655 (1-800-859-8059 In-State) - Judge's Fax 907-271-2692

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7 Case No. F12-00501-HAR
8 In re MARGARET A. BERTRAN,
9 Debtor(s)
10 DONALD A. TANGWALL, Trustee of
11 Toni 1 Trust,
12 Plaintiff and Counter-Defendant
13 v.
14 LARRY D. COMPTON, Bankruptcy
15 Trustee,
16 Defendant and Counter-Claimant,
17 BARBARA WACKER and WILLIAM
18 WACKER, jointly and severally,
19 Defendants.

In Chapter 7

ADV PROC NO F12-90037-HAR

MEMORANDUM REGARDING LACK OF
AUTHORITY TO FILE NOTICE OF
APPEAL [ECF No. 73]

20 Donald Tangwall filed a notice of appeal¹ from the final judgment finding that the debtor
21 had fraudulently conveyed Montana real property and avoiding those transfers, and from the
22 order denying a motion for reconsideration². The notice of appeal appears to be both untimely
23 and improperly filed by Donald Tangwall, and not by an attorney for him as trustee.

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25 ¹ECF No. 73.

26 ²ECF Nos. 68 and 69 (Memorandum Decision and Final Judgment); ECF No. 70 (Motion for
27 Reconsideration); ECF Nos. 71 and 72 (Memorandum and Order Denying Motion for Reconsideration).

1 This memorandum is principally to address the second issue, the improper filing by
2 Tangwall, himself.³ Even though I believe the *pro per* notice of appeal is improper, I will not *sua*
3 *sponte* strike it since I am not certain that I retain jurisdiction to do so. ***I am filing this***
4 ***memorandum, nonetheless, to call the issue of the unauthorized pro per filing of the notice of***
5 ***appeal to the attention of the appellate court, which undoubtedly will have power to deal with***
6 ***it.***⁴

7 Regarding the first issue, timeliness of the notice of appeal, a *sufficient*⁵ notice of appeal
8 generally divests the bankruptcy court of jurisdiction of any matters directly involved in the
9 appeal, such as the timeliness of the notice of appeal.⁶ The **motion for reconsideration** appears to
10 have been timely filed on October 29, 2013, thirteen days after entry of the final judgment.⁷ But,
11 even if Tangwall had authority to file a **notice of appeal**,⁸ it appears to be untimely because it was
12 filed eighteen days after the order denying reconsideration.⁹ However, it is the appellate court's
13 call as to whether or not it has jurisdiction based on that issue.

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15 ³This memorandum is filed *sua sponte*. There is no pending motion raising the issue discussed.

16 ⁴*Intercontinental Enterprises Inc. v. Keller (In re Blinder Robinson & Co., Inc.)*, 132 B.R. 759, 763 (D.
17 Colo. 1991) (attorneys lacked standing to appeal an order disqualifying them from representing a creditor).

18 ⁵*In re Combined Metals Reduction Co.*, 557 F.2d 179, 200-01 (9th Cir. 1977). Query whether a notice of
19 appeal by someone related to the controversy, but not authorized to represent the party as its attorney, is
"sufficient."

20 ⁶*Collier on Bankruptcy*, ¶ 8001.04 (2013 Online Ed.); *In re Bialac*, 694 F.2d 625, 627 (9th Cir. 1982);
21 *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 (9th Cir. 1981); *In re Combined Metals*
Reduction Co., 557 F.2d 179, 200-01 (9th Cir. 1977).

22 ⁷ECF No.70, filed within 14 days of the final judgment, ECF No. 69.

23 ⁸ECF No. 73, filed on Monday, November 18, 2013.

24 ⁹ECF No. 72, filed on Thursday, October 30, 2013. FRBP 8002(b).

1 That said, could Joe Blow, with no authority to be involved with the case, walk in off the
2 street and file a valid notice of appeal for the plaintiff and divest this bankruptcy court of
3 jurisdiction?¹⁰ The answer is undoubtedly “No.” Closer to the facts, can Donald Tangwall, who
4 has been ordered not to file papers on behalf of plaintiff, nonetheless file a valid notice of appeal?
5 Again, probably not, but can the *trial court* make that call?

6 The Supreme Court has said: “The rule that only parties to a lawsuit, or those that properly
7 become parties, may appeal an adverse judgment, is well settled.”¹¹ So, if Tangwall filed the notice
8 of appeal in his individual capacity, as opposed to as trustee, it would be defective because he is
9 not a party to this adversary proceeding in his individual capacity. That is not the precise
10 question confronting the court, however; here the notice of appeal was signed by “Donald A.
11 Tangwall, Trustee of Toni 1 Trust,” so it was filed on behalf of plaintiff Tangwall as trustee of Toni
12 1 Trust.

13 Before entry of the final judgment, Tangwall was ordered not to continue representing
14 himself as the plaintiff trustee or continue filing *pro per* papers in this adversary proceeding. He
15 was required to be represented by an attorney if he wished to continue with the litigation.¹² The
16 Ninth Circuit has said a trustee of a plaintiff trustee, appearing only as a fiduciary, must appear
17 through an attorney:

18 Although a non-attorney may appear in *propria persona* in his own
19 behalf, that privilege is personal to him. *McShane v. United States*, 366 F.2d

20 ¹⁰*Order Requiring Plaintiff to Appear Through an Attorney [ECF No. 34] and Dismissing Complaint*
21 *[ECF No. 1]*. ECF 55, filed August 14, 2013.

22 ¹¹*Marino v. Ortiz*, 484 U.S. 301, 108 S.Ct. 586 (1988); *Felzen v. Andreas*, 134 F.3d 873, 877-78 (7th Cir.
23 1998), *affirmed* 525 U.S. 315, 119 S.Ct. 720 (1999) (nonparty shareholders are not entitled to appeal judgment
against corporation issuing their shares).

24 ¹²ECF No. 55.

1 286, 288 (9th Cir.1966). He has no authority to appear as an attorney for
2 others than himself. *Russell v. United States*, 308 F.2d 78, 79 (9th Cir.1962);
3 *Collins v. O'Brien*, 208 F.2d 44, 45 (D.C.Cir.1953), cert. denied, 347 U.S. 944,
4 74 S.Ct. 640, 98 L.Ed. 1092 (1954). In the instant case, the record shows no
5 matter before the district court presented by, or on behalf of, Richard
6 Stradley. Stradley's status as trustee is fiduciary; his statutory responsibility
7 is the orderly administration of assets. *United States v. Cooke*, 228 F.2d 667,
8 669 (9th Cir.1955). Here the record does not identify the Trusts'
9 beneficiaries. Because Stradley is not the actual beneficial owner of the
10 claims being asserted by the Trusts (so far as one can tell from the record),
11 he cannot be viewed as a "party" conducting his "own case personally"
12 within the meaning of Section 1654 [28 U.S.C. § 1654]. He may not claim
13 that his status as trustee includes the right to present arguments *pro se* in
14 federal court.¹³

15 In fact, not appearing through counsel, after being given ample time to procure one, was
16 the basis for granting entry of a default.¹⁴

17 It does not seem appropriate for Tangwall to potentially stop the clock in the bankruptcy
18 court with his unauthorized notice of appeal and hold property of the estate hostage pending an
19 appeal. But, I have not found a convincing case in my brief research that is directly on point as to
20 whether a notice of appeal by a *pro per* party that has previously been required to appear only
21 through counsel may be stricken by the *trial court*.¹⁵

22 This is not an inconsequential matter. The appeal may wrongfully tie up disposition of the
23 estate by the bankruptcy trustee for an extended period at significant expense, although the
24 bankruptcy trustee may be able to conduct a final sale of the Montana real property if 11 USC
25 § 363(m) is invoked.

26 ¹³*C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987).

27 ¹⁴ECF No. 61, relying on *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987).

28 ¹⁵On the other hand, many cases support the general rule of divestiture. *E.g., Hogg v. United States*,
411 F2d 578, 580-81 (6th Cir. 1969) (holding that a district court had no power to strike an IRS notice of appeal,
even though the court determined that the appeal was not authorized by the appropriate IRS officer).

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DATED: November 25, 2013

/s/ Herb Ross
HERB ROSS
U.S. Bankruptcy Judge

Serve:

Donald A. Tangwall, Trustee of Toni 1 Trust, π, HC10, M311, Fairbanks, AK 99701
Cabot Christianson, Esq., for Δ
Larry Compton, chapter 7 trustee
Erik LeRoy, Esq., for Δs Wacker
Cheryl Rapp, Adv. Proc. Mgr.
Janet Stafford, Adv. Closing Clerk