

2009

# In the Matter of the United Effort Plan Trust v. Jessop : Brief of Appellee

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

IN THE MATTER OF THE UNITED  
EFFORT PLAN TRUST

**BRIEF OF APPELLEE BRUCE R.  
WISAN, AS THE COURT-APPOINTED  
SPECIAL FIDUCIARY OF THE  
UNITED EFFORT PLAN TRUST**

Supreme Court Case No. 20090691-SC

Third District Court Case No. 053900848

**APPEAL FROM THE JULY 17, 2009 ORDER OF THE  
THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, UTAH  
HONORABLE JUDGE DENISE P. LINDBERG PRESIDING**

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## **STATUTES AND RULES**

Utah R. Civ. Pro. 24(a); UTAH CODE ANN. § 75-7-405(3). (*See* Addendum).

## **STATEMENT OF THE CASE**

This appeal arises out of a trust probate action commenced on May 26, 2005, by the Attorneys General of Utah and Arizona alleging breach of fiduciary duties by the trustees of the Trust. After the trustees defaulted, the Third Judicial District Court (“Court” or “District Court”) granted certain relief requested in the petition – suspending the trustees and appointing Bruce R. Wisan (the “Fiduciary”) to serve as a special fiduciary for the Trust. On October 25, 2006, the Court reformed the declaration of trust and executed an order certifying the reformation as final under Rule 54(b). Appellants have never appealed the reformation order. Appellants did not appear in the trust probate case until August, 2008, when they began filing a number of motions in the trust probate case. On November 10, 2008, the Court entered an Order that Appellants have no legal standing in the trust probate case. Appellants did not appeal the Court’s ruling as to lack of standing. Six months later, on May 13 and 21, 2009, Appellants filed the present motions to intervene. The motions were denied by the Court on July 17, 2009,<sup>1</sup> and the present appeal followed.

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<sup>1</sup> See Corrected Ruling and Order on Pending Motions, dated July 17, 2009, at pp. 1-2 (R. 16381) (copy included in addendum). In such Order, the Court reaffirmed its prior rulings on standing, which includes the Court’s Decision and Order, dated Nov. 10, 2008 (R. 14063) (copy included in addendum). The Court also relied upon and incorporated by reference the analysis of the Arizona Attorney General in its Memorandum, dated June 5, 2009 (R. 15604) (copy included in addendum).

## **INTRODUCTION**

Appellants present a misleading and false account of the facts to create a false picture of what really transpired in this case. Warren Jeffs and his followers, including the former trustees, members of the FLDS Church, and the present Appellants (collectively, the “Jeffs Adherents”) created a legal mess in 2004 and 2005 when they abandoned the Trust and left its assets at risk of loss – thereby endangering the homes of thousands of people. They then dumped such mess into the laps of the Attorneys General, the Court, and the Fiduciary. In abandoning the Trust, Warren Jeffs knew that government officials would be legally obliged to protect the assets of the Trust. Indeed, this was Jeffs’ intent and purpose in abandoning the Trust. Jeffs believed that by inducing governmental intervention with the Trust he was “fulfilling the directive of the Lord” that his people be “driven” from Trust lands. (R. 19598). Jeffs desired such outcome so that he and a few elite could go to Texas to practice underage marriage, while leaving homeless many other followers who were deemed less worthy.

Thus, Jeffs made the Attorneys General, the Court, and the Fiduciary his tools to accomplish his desire for governmental intervention with the Trust.

With the assets of the charitable Trust at risk, the Attorneys General were under a legal duty to step in to protect the Trust from the malfeasance of its trustees. Acting in accordance with the law, the Attorneys General brought the matter to the District Court and obtained the appointment of the Special Fiduciary to administer the Trust. In turn, the District Court and Fiduciary both acted in good faith to clean up the mess – to administer the Trust and to protect its assets in accordance with the law. Over the past five years, the

Fiduciary has successfully protected the assets of the Trust and saved the homes of the people, while also recovering additional assets valued far in excess of the total amount of the Trust's costs during such time period.

The record reflects that, contrary to Appellants' false accusations, the Fiduciary and the Court were not discriminatory against the FLDS people. Rather, they reached out to the FLDS people and treated them with fairness and respect. Indeed, Warren Jeffs admits that he received favorable reports from his followers: "the woman judge and this man named Wisan . . . want[] to be friendly toward our people"; and "our people feel like [the Fiduciary] and this judge will be kind and allow us our rights and protect us." (R. 19596). Unfortunately, Jeffs put a quick stop to such thinking. Using vile racist imagery, Jeffs told his followers that the Fiduciary and the Court were "of the devil" and that their friendliness was "flattery." (*Id.*) Jeffs assured that his followers would not communicate, cooperate, or participate in the legal process by telling them that they must "answer them nothing" or else face religious condemnation. (*Id.*)

Thus began a war of hostility by the Jeffs Adherents against the Fiduciary and the Court. For more than three years, the war was waged from the underground. Then, when Warren Jeffs' hopes and plans for an underage marriage haven in Texas did not work out as he anticipated, Jeffs effectuated a drastic change in strategy by issuing new litigation instructions to a few of his followers. (R. 19571). In 2008, Appellants and a few other Jeffs Adherents responded to their new instructions by emerging from the underground and commencing a full-scale litigation assault on the Trust. They engaged the services of eight

different law firms to overwhelm the Trust with an avalanche of litigation and to starve it of the funds needed for its survival.

Having used the Fiduciary to defend the Trust from the Tort Lawsuits, and having had the assets of the Trust preserved thereby, Appellants suddenly claimed to have individual rights in the property and sought to usurp control over the Trust. In so doing, the Jeffs Adherents did not explain or apologize for their multi-year refusal to participate in the reformation process.<sup>2</sup> Neither did they acknowledge the actions of the Court and the Fiduciary in preserving the Trust. In pursuing their litigation war, Appellants have not disclosed that they are acting at the bidding of Warren Jeffs, but have alleged that they are appearing as individuals who had a special interest in the property of the Trust. Such allegations are belied by the fact that they have opposed all efforts to convey Trust property to the individual residents, and instead seek to place it all under FLDS leadership control.

Now, Appellants seek to expand their assault again by attempting formally to intervene as parties in the Trust Probate Action. They seek intervention so that they can file even more legal attacks as they seek to usurp control over the Trust and overwhelm it with vexatious litigation.

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It was only when this Court questioned counsel for Appellants at the February 17, 2010 hearing in Case NO. 20090859 that any explanation was publicly provided:

...the answer to that question lies inside the religious box. That . . . there was a religious decision being made. It was a test of faith and . . . it came to a point where the people determined that the test of faith was over and they needed to move forward and try to protect this property . . . themselves.

Court recording: Oral Argument before the Utah Supreme Court in FLDS v. Lindberg, No. 20090859-SC, (Feb. 17, 2010) *available at* <http://www.utcourts.gov/courts/sup/streams/index.cgi?mon=20102> (session I 22:42-25:08) (last visited July 3, 2010).

This Court should not be misled by Appellants' revisionist history. If the true and complete facts are known, it is readily apparent that Appellants are not entitled to intervene, and the appeal should be denied.

## **STATEMENT OF RELEVANT FACTS**

### **I. Historical Background of the UEP Trust (1942 to 2004)**

#### **A. The UEP Trust**

1. The United Effort Plan Trust (the "Trust" or "UEP Trust") is a Utah trust created in 1942 pursuant to a DECLARATION OF TRUST, dated November 9, 1942 (the "Original Trust Declaration") by certain members of a religious movement. (R. 1, at Exhibit "B").

2. In the 1980s and 1990s, the Trust engaged in extensive litigation with a number of people who were residing in houses built upon Trust land. Such litigation primarily involved the question whether the trustees of the Trust were permitted to evict people residing upon Trust property who had fallen into disfavor with the trustees, and, if so, whether the Trust was required to compensate evicted persons for the value of the improvements which they constructed upon Trust property.<sup>3</sup> In 1998, this Court issued an opinion in the UEP Trust litigation, wherein the Court determined, among other things, that the Trust was a private trust. (*See Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998)).

3. Shortly after this Court issued its opinion, Rulon Jeffs, the sole surviving settlor of the Trust, executed an AMENDED AND RESTATED DECLARATION OF TRUST OF

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<sup>3</sup>Through the years, numerous people donated land to the Trust and/or constructed housing and improvements upon the Trust's land. Today, the property of the Trust consists almost entirely of land and improvements. The Trust owns approximately 5,000 acres of property with over 700 homes located in Hildale, Utah and Colorado City, Arizona, an area known as Short Creek, as well as in British Columbia, Canada. (R. 3037-3039, 3070).



THE UNITED EFFORT PLAN TRUST, dated November 3, 1998 (the “Restated Trust Declaration”), which replaced the Original Trust Declaration. (R. 21).

4. The Restated Trust Declaration, among other things, converted the Trust to a charitable trust with two purposes: (i) promoting the doctrines and goals of the Fundamentalist Church of Jesus Christ of Latter Day Saints (the “FLDS Church”); and (ii) providing for the just wants and needs of FLDS members.<sup>4</sup> (R. 22-23).

5. The Restated Trust Declaration further provided that donations to the Trust were unconditional, that improvements added to Trust land become property of the Trust, and that the trustees of the Trust could revoke the privilege of residing upon Trust property with no obligation to provide compensation for improvements or donations to the Trust. (R. 23).

B. The Trustees Fail to Defend the Trust in Tort Litigation

6. In July and August, 2004, a number of litigants initiated two tort lawsuits seeking large damage awards against the Trust, Warren Jeffs, the FLDS Church and other defendants in the Third District Court of Salt Lake County: Case Nos. 040915857 and 040918237 (Such cases are hereinafter referred to as the “Tort Lawsuits”).<sup>5</sup> (R. 7-8, 1133, 3049-3050).

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<sup>4</sup> The FLDS Church was organized in the 1990s by Rulon Jeffs. Its membership consisted of many of the people who had donated to the Trust and constructed improvements on Trust land. However, a significant number of people who had donated to the Trust were not included within the membership of the newly-formed FLDS Church.

<sup>5</sup>The claims in the Tort Lawsuits alleged damages based upon the conduct of Warren Jeffs. At the time the Tort Lawsuits were filed, Jeffs was the president of the FLDS Church, the corporation sole of the Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter Day Saints (the “FLDS Corporation”), a trustee of the UEP Trust, and the president of the board of trustees of the UEP Trust.

7. After the Tort Lawsuits were filed, Jeffs and the other trustees failed to defend the Trust in the Tort Lawsuits. Notwithstanding their fiduciary duties to the Trust, the trustees dismissed the Trust's legal counsel and refused to appear or defend the Tort Lawsuits – thereby exposing the Trust to the entry of default. (R. 8-9).

C. Fraudulent Transfers of Trust Property

8. Within days after the filing of the Tort Lawsuits, the trustees transferred valuable Trust property away from the Trust. Specifically, in September, 2004, the trustees transferred 1,311 acres of Trust property, as well as a large state-of-the-art manufacturing building, to entities who were affiliated with and/or controlled by Jeffs. The Trust received no, or very little, consideration in exchange for such transfers. (R. 14-15, 80-89, 91-99, 179-200).

9. Such transfers met nearly all of the characteristic “badges of fraud” set forth in the Utah Uniform Fraudulent Transfer Act. (*See* UTAH CODE ANN. § 25-6-5(2)).

10. The transferred property was the most valuable non-residential property of the Trust. After the transfers, the only remaining property with significant value was the improved property – containing hundreds of houses occupied by thousands of people. (R. 15, 3037, 3039, 3070).

**II. The Trust Probate Action/Reformation of the Trust (2005 to 2006)**

D. The Trust Probate Action

11. In 2005, the actions of the trustees came to the attention of the Attorneys General of the states of Arizona and Utah (the “AGs”). The AGs became concerned that the trustees were breaching their fiduciary duties to the Trust. They were particularly concerned that

the trustees' actions placed the homes of the people residing upon Trust land at a risk. Accordingly, on May 26, 2005, in order to protect the Trust from the malfeasance of its trustees, the AGs initiated a trust probate action in the Third District Court of Salt Lake County, Utah, Case No. 053900848 (the "Trust Probate Action"). Acting pursuant to their authority and obligations under the Utah Uniform Trust Code and the common law, the AGs filed a petition with the Court seeking to suspend the trustees and appoint a special fiduciary. The petition also sought other relief, including reformation of the trust at the request of interested parties. (R. 1).

12. In connection with the filing of the Trust Probate Action, the AGs contacted Bruce R. Wisan, a certified public accountant in Salt Lake City, and requested him to serve as special fiduciary for the Trust in accordance with UTAH CODE ANN. § 75-7-1001(2)(e). (R. 16-17).

13. The breaching trustees refused to appear in the Trust Probate Action. Indeed, no person or entity, whether trustee, beneficiary, or otherwise, appeared or spoke in opposition to the AGs' petition. (*See* docket). (R. 511, 547).

14. Having received no opposition to the petition, the Court entered Orders suspending the trustees and ordering them to provide an inventory, accounting, and final report; to deliver Trust documents, records, and property; and to cooperate in providing information regarding the Trust. The Court also appointed Mr. Wisan (the "Fiduciary") to serve as a special fiduciary of the Trust. (R. 220, 548, 1996).

E. The Suspended Trustees' Disobedience of the Court's Orders

15. The suspended trustees received actual notice of the Trust Probate Action (*see* ¶¶ 24 & 64(p), below), but they failed to comply with any aspect of the Orders of the Court. (R. 3028). Rather, they acted to oppose the Fiduciary. Shortly after his appointment, the Fiduciary was advised that Church leaders/trustees had instructed their followers to not acknowledge or honor the Court's suspension of the trustees of appointment of the Fiduciary. (R. 3028, 3694-95).

F. The Court Seeks Input as to the Future of the Trust

16. With the trustees' abandonment of the Trust, and their refusal to participate in the Trust Probate Action, the Court reached out to all interested individuals for guidance and input as to the future of the Trust. To that end, the Court invited interested individuals to submit proposals to the Court. Specifically, the Court declared that it would consider proposals from the AGs, the suspended trustees, the FLDS Church, and the members of the Trust's beneficiary class (which the Court defined to mean any person who had contributed property, time, talents, or resources to the Trust). (R. 895).

17. Many members of the beneficiary class responded to the Court by appearing and/or providing recommendations to the Court. All of the responding entities agreed that the Court should appoint new leadership for the Trust. (*See e.g.* R. 937, 1195, 1213, 2091).

18. After receiving input from interested individuals, the Court issued a 28-page Memorandum Decision, dated December 13, 2005, setting forth its findings and analysis with respect to the future of the Trust. (R. 3452).

G. Reformation of the Trust

19. The Memorandum Decision sets forth the framework for a reformed trust instrument which would allow the Trust to survive despite FLDS leadership's abandonment of the Trust. (*Id.*). Accordingly, the Fiduciary, the AGs, and some of the members of the Trust's beneficiary class cooperated in preparing a proposed reformed trust declaration in accordance with the Memorandum Decision. (*See e.g.* R. 937, 1195, 1213, 2091). Not a single person or entity submitted any objection to the Court's Memorandum Decision, or to the specific proposals for reformation of the Trust. (*See* docket).

20. On October 25, 2006, the Court completed the formal reformation of the Trust pursuant to the execution of the Reformed Declaration of Trust of the United Effort Plan Trust Dated October 25, 2006 (the "Reformed Trust Declaration"). (R. 6537 (copy in Appellants' Appendix)). At the same time, the Court executed an Order formally removing the trustees of the Trust and certifying the trust reformation as a final judgment under Rule 54(b) of the Utah Rules of Civil Procedure. (R. 6538).

21. No party or individual filed any appeal or other opposition with respect to the reformation of the Trust. (*See* docket).

22. Accordingly, 30 days later, on November 25, 2006, the Reformed Trust Declaration became final and non-appealable.

H. Notice to the Beneficiary Class

23. From the beginning of the Trust Probate Action through the completion of the reformation process, the Court allowed and encouraged the members of the beneficiary class to participate and be heard with respect to the Trust. While charitable trust

beneficiaries do not have formal legal standing, the Court nevertheless provided that such members would be given notice and an opportunity to participate and provide input. (R. 549-550, 895, 1996).

24. The Court, the AGs, and the Fiduciary went to great lengths to provide notice to the beneficiary class and to keep them informed of the Trust Probate process. Formal service of process was accomplished upon the FLDS Church and the trustees of the Trust, through personal and substitute service. (*See generally* R. 285, 299, 350-546). Furthermore, Rodney Parker of Snow Christensen & Martineau (former and current legal counsel to the FLDS Church, its leadership and many of its members, including the present Appellants) was on the case service list from the beginning and received regular notice of filings. (*See e.g.* R. 228, 424, 3766, 4001). Moreover, notices regarding the Trust Probate Action were published in newspapers in Utah, Colorado, Texas, and British Columbia. (R. 539-545).

In addition, the Fiduciary served multiple notices by mail to every single post office box in Hildale, Utah and Colorado City, Arizona, and by hand delivery to every residence on Trust land in Canada. On other occasions, the Fiduciary served notices by hand delivery to every residence on Trust land. Moreover, the Fiduciary held public information meetings, in Hildale and in Canada. (For a summary of the many attempts to provide notice, *see* R. 13373-13375).

*I. The Jeffs Adherents' Refusal to Participate*

25. Notwithstanding the efforts made to provide notice to the community, the Jeffs Adherents (including Appellants) chose to abstain from appearing or participating in the Trust Probate Action. (*See* docket).

26. In addition, such persons refused to cooperate with the Fiduciary in his efforts to administer the Trust. (R. 1130). From the outset of his appointment, the Fiduciary attempted to reach out to the Jeffs Adherents for input and guidance as to how the Trust should be administered. Such attempts, however, were repeatedly rebuffed. For the most part, the Jeffs Adherents refused to even communicate with the Fiduciary. (R. 13249-13250, 3694-3695).

27. Moreover, the Jeffs Adherents took a number of actions to damage the Trust, to increase the costs and burdens of the Trust, and to interfere with the Fiduciary's administration of the Trust. Such actions include the destruction and removal of substantial property from Trust land. (R. 3059, 3581-3588, 16488, at p. 47). The Jeffs Adherents refused to acknowledge the authority of the Court or the Fiduciary, and continued to act as if the suspended trustees were still in control of the Trust.<sup>6</sup> (R. 3694, 13695).

J. Reliance Upon the Validity of the Reformation of the Trust

28. Subsequent to the Court's rulings in the Trust Probate Action, numerous people relied upon the Court's final and non-appealable order. While many acts of reliance have not been memorialized into the District Court's file, the Fiduciary is aware of many actions

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<sup>6</sup> In stark contrast to the actions of the Jeffs Adherents, a significant number of members of the beneficiary class chose to respond to the Court and the Fiduciary. Such persons acknowledged the authority of the Court and respected the rule of law. They participated in the Trust Probate Action, provided input to the Fiduciary and the Court, paid their share of property taxes, entered into occupancy agreements with the Trust, paid monthly occupancy fees, filed petitions for benefits with the Trust, and/or otherwise cooperated with the Fiduciary in administering the Trust. (For a general description of activities taken by people in connection with the Fiduciary's administration of the Trust, see the Fiduciary's Reports, at Reports, at R. 1122, 3024, 3690, 4424, 5704, 6858, 7805, 8390, 9261, 10585, 11145, 12557, 17593).

taken by many people because of the rulings of the Court. This reliance included making their religious beliefs publicly known in reliance on the Court's assurance of religious neutrality; uprooting families and relocating to housing upon Trust property; devoting time and effort to improving homes upon Trust property; settling legal claims against the Trust; entering into occupancy agreements and/or leases with the Trust; paying property taxes for Trust property; submitting petitions for benefits to the Trust; devoting time and resources in assisting the Trust and the Fiduciary; entering into contracts with the Trust through the Fiduciary; purchasing property from the Trust; and providing legal, engineering and/or professional services to the Trust.<sup>7</sup> (For a general description of activities taken by people in connection with the Fiduciary's administration of the Trust, see the Fiduciary's Reports, at Reports, at R. 1122, 3024, 3690, 4424, 5704, 6858, 7805, 8390, 9261, 10585, 11145, 12557, 17593).

29. After the Fiduciary was appointed, a number of people alleged legal claims against the Trust as a result of the conduct of Warren Jeffs and the former trustees. Most were dissuaded from filing legal actions against the Trust based upon the fact that Warren Jeffs and the other trustees had been suspended, that the abuses which had occurred under the

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<sup>7</sup>With the Court's suspension and removal of the former trustees, people reasonably expected to be able to reside upon Trust property, and to freely make improvements to such property, without the threat of losing their homes and improvements based upon their religious beliefs – as had happened under the administration of the former trustees. (*See Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998)). They also expected that they would not be subjected to an eviction action for refusing to support the “marriage” of young girls to much older men – as had happened under the administration of the former trustees (*See United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101 P.3d 641, 643 (Ariz. App. 2004) (Warren Jeffs' attempts to evict family from home on Trust property within 10 minutes after mother withdrew her consent for 15-year old daughter to marry 39-year old man)).



former trustees had stopped, and that the Trust was being reformed. (R. 8410; 3708-3709). Similarly, the plaintiffs in the Tort Lawsuits agreed to settle such lawsuits on favorable terms to the Trust based upon the fact that the Court had reformed the Trust and the former trustees would not be in control. (R. 8026).

### **III. Post-Reformation Operations of the Trust (2006 to 2008)**

#### **K. The Fiduciary's Administration of the Trust**

30. In fulfilling his Court-appointed duties, the Fiduciary was guided in all things by the rulings of the Court – particularly the Memorandum Decision and the Reformed Trust Declaration. Indeed, the Reformed Trust Declaration is the Trust's "constitution" which has governed the Fiduciary's administration of the Trust. The Fiduciary takes very seriously his obligations under such document to protect the assets of the Trust and to provide for the just wants and needs of the beneficiary class in a religiously-neutral manner. (R. 13257, 17659).

31. In fulfilling his duties, the Fiduciary has undertaken myriad difficult and complex tasks on behalf of the Trust.<sup>8</sup> Such tasks involved significant time and effort on the part of

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<sup>8</sup> Such tasks included, but are not limited to: (1) pursuing fraudulent transfer litigation for the recovery of property transferred away from the Trust; (2) defending the Trust in the Tort Lawsuits (and ultimately settling the lawsuits on terms which were favorable to the Trust, and which preserved the homes of the people); (3) defending the Trust in additional lawsuits filed against the Trust (including an additional tort lawsuit seeking a very large damage award); (4) investigating and inventorying the assets of the Trust; (5) pursuing claims for breach of trust against the suspended trustees, the FLDS Church, and those acting with them; (6) participating in the Trust reformation process; (7) managing the assets of the Trust; (8) protecting the property of the Trust; (9) investigating the theft of property attached to Trust lands; (10) obtaining injunctive relief to help stop the theft of Trust property; (11) attempting to achieve payment of the Trust's property taxes; (12) establishing a process for members of the beneficiary class to submit petitions for benefits from the Trust; (13) considering petitions for benefits received from members of the beneficiary class; (14)

the Fiduciary, his assistants, engineers, and legal counsel – and necessarily resulted in the Trust’s incurrence of costs and expenses. (See ¶ 34, below).

32. The Fiduciary’s primary goal is to provide for the housing of the beneficiary class by transfer of deeds of outright ownership to individual members. To that end, the Fiduciary has sought to subdivide the Trust’s property and has established a process for the submission of petitions for benefits by members of the beneficiary class. The Fiduciary desires to distribute deeds of outright ownership without regard for the religion of the petitioning beneficiaries. Such distributions would be without restriction or limitation, such that the recipients would be free to transfer the property to any person or entity of their liking – including Warren Jeffs and/or the FLDS Church. (R. 17675-17678).

L. The Trust’s Liquidity Problems

33. One of the problems which has beset the Trust from the beginning of the Trust Probate Action has been a lack of liquid funds to meet the expenses of the Trust. While the Trust has many assets, such assets consist almost exclusively of illiquid assets – land and improvements. (R. 1130, 3037-3039, 3070). Thus, the Trust is obliged to liquidate assets

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seeking to meet the housing needs of Trust beneficiaries; (15) seeking to accomplish the survey and subdivision of the Trust’s residential property; (16) seeking governmental approval for the subdivision of the property; (17) enforcing the Trust’s legal rights through mandamus litigation; (18) resolving disputes as to the use of Trust property; (19) overseeing litigation involving the Trust; and (20) seeking a source of funding for the Trust’s financial obligations; and (21) submitting regular reports to the Court. (For further details as to the actions of the Fiduciary, see the Fiduciary’s Reports, at R. 1122, 3024, 3690, 4424, 5704, 6858, 7805, 8390, 9261, 10585, 11145, 12557, 17593).

and/or find alternative sources of funding in order to meet its ongoing expenses.<sup>9</sup> (R. 13261, 17627-17631).

34. After the commencement of the Trust Probate Action, the Trust incurred substantial expenses and attorney's fees (*see e.g.* R. 3216A, 3367, 3768, 3937, 7566, 7766), most of which were caused and/or exacerbated by the actions (and inactions) of the former trustees and the Jeffs Adherents. (R. 17604-17605).

35. Initially, the Fiduciary was able to obtain liquid funds sufficient to meet the ongoing obligations and attorneys' fees of the Trust. However, as time went on, and as the costs and expenses of the Trust increased, the Trust found itself unable to meet its financial obligations. (R. 10624, 11180).

36. After consultation with the Court, the Fiduciary devised two methods to raise liquid funds: (i) collect assessments from the occupants of Trust property; and/or (ii) sell Trust property. (R. 17627-17631).

37. The Fiduciary first attempted to raise funds by assessing each residence on Trust land in Colorado City and Hildale a modest \$100 monthly occupancy fee. Unfortunately, this method proved to be inadequate because a majority of occupants joined together in refusing to make their monthly assessment payments. Thus, the assessment payment funds received by the Fiduciary were not sufficient to satisfy the expenses of the Trust. (R. 10608-10610, 17632-17634).

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<sup>9</sup> Historically, prior to the appointment of the Fiduciary, the Trust received funding by collecting donations from the occupants of Trust land, which payments were used toward the Trust's financial obligations – including substantial legal fees.

38. Next, the Fiduciary determined that it would be necessary to sell property in order to meet the financial obligations of the Trust. The Fiduciary first attempted to sell the Beryl dairy farm. Such attempted sale, however, was prevented by certain Jeffs Adherents' recording of encumbrances against the property and filing of two separate lawsuits seeking to stop the sale. (R. 11176, 12579-12582, 17614-17616). With the dairy property tied up in litigation, the Fiduciary then determined to sell certain farm property known as the Berry Knoll farm.

M. The Berry Knoll Farm

39. The Berry Knoll property consists of vacant farm ground situated in the southwest portion of Colorado City. In the past, the property was farmed by Merlin Jessop (one of the Appellants in this case) acting at the direction of a former trustee of the Trust. Under Merlin Jessop, the farming operations were never profitable and were heavily subsidized by the trustees of the Trust. By 2004, Merlin Jessop had stopped farming the property, and irrigation equipment has been removed from the property. When the Fiduciary was appointed in 2005, the property has been abandoned for some time. (R. 13891-13892\*, 16448, at pp. 22-23, 47, 53-56).

40. When the Fiduciary was appointed in 2005, the property had been abandoned. In 2007, the Fiduciary received a number of complaints about the condition of the property. People complained that the property had become a dustbowl and that blowing sand was causing a nuisance in the community. Accordingly, the Fiduciary made efforts to find someone who would be willing to farm the property. (R. 16488, at pp. 55-56).

41. The Fiduciary first sought to have Merlin Jessop return to the property and resume his farming operations. On multiple occasions, the Fiduciary's assistant contacted Merlin Jessop and asked him to farm the property. Each time, however, Merlin Jessop declined – stating that he was not interested in farming the property or entering into any kind of lease or agreement with the Fiduciary. After several attempts, the Fiduciary was finally successful in finding a willing lessee, Shane Stubbs, who entered into a lease agreement with the Trust. (R. 16488, at pp. 50-51, 53-56).

42. Later, when the Fiduciary's liquidity problems became severe, the Fiduciary determined that it would be necessary to sell a portion of the Berry Knoll farm property. (R. 13556).

43. After initial inquiries and marketing efforts, the Fiduciary located a potential buyer who made an offer for a portion of the property. Such offer was subject to (i) approval of the Court; and (ii) better offers. (R. 13556, 16785, 16796).

44. To date, the Trust has been unable to complete the sale of the Berry Knoll property as a result of Jeffs Adherents voluminous litigation attacks. (See ¶¶ 45-55, below).

#### **IV. The Trust Comes Under Attack (2008 to 2009)**

##### **N. Appellants' Change of Tactics**

45. After refusing to participate in the Trust Probate Action for more than three years, in August 2008, Appellants hired legal counsel and the Trust became the target of a litigation assault designed to collaterally attack the Court's reformation of the Trust, to cripple the Fiduciary's ability to administer the Trust in accordance with the Reformed

Declaration of Trust, and/or to starve the Trust of funds needed to defend itself in litigation.<sup>10</sup> (R. 17603-17606).

46. Appellants employed the services of five different law firms, while various other Jeffs Adherents employed three additional firms, to attack the Fiduciary, the Trust, and the Court in several different courts.

47. Underlying each of Appellants' various attacks was a refusal to accept the fact that the Trust has been reformed. (R. 13243, 13253-13258).

48. In suddenly appearing in the litigation process, the Jeffs Adherents did not disclose that they were acting at the bidding of Warren Jeffs, but alleged that they were acting as individuals and on behalf of associations of individuals. (See ¶¶ 45-56, below).

O. Numerous Attempts to Stop the Sale of the Berry Knoll Property

49. Initially, the focus of Appellants' litigation attacks was to prevent the sale of the Berry Knoll property. This included litigation attacks in four different Courts seeking to stop the Court from even holding a hearing on the proposed sale:

- a. Appellants filed at least six different filings in the Trust Probate Court designed to stop the sale of the property. (R. 13193, 13826, 13940, 13965, 14582, 14624.)
- b. In October, 2008, Appellants' counsel filed a lawsuit against the Fiduciary, the AGs, and Judge Lindberg in the United States District Court for the District of Utah, Case No. 2:08-CV-772. On November 5, 2008, the plaintiffs filed a Motion for Temporary Restraining Order in such lawsuit – seeking to enjoin the Trust Probate Court from holding the scheduled hearing on the sale of the Berry Knoll property. (R. 17618-17620).
- c. On November 7, 2008, Appellants filed a lawsuit in Arizona State Court, together with an Emergency Application for Temporary Restraining Order, again seeking to

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<sup>10</sup> The Fiduciary subsequently discovered that the Appellants' change in tactics was done at the instruction of Warren Jeffs. (See ¶ 65, below).

enjoin the sale of the property. Case No. CV2008-2047 in the Superior Court of Mohave County, Arizona. (R. 17620-17621).

- d. On November 10, 2008, Appellants filed a Rule 8 Petition for Emergency Relief in the this Court seeking to enjoin the Trust Probate Court from holding a hearing on the sale of the property. Case No. 20080928-SC. (R. 17621-17622).
- e. Plaintiffs also attempted to stop the sale by recording improper notices of interest as encumbrances against the property. (R. 17629).

P. Other Vexatious Litigation

50. In addition to the above-stated attacks of Appellants, the Trust was subjected to many other vexatious lawsuits and litigation attacks in 2008 – mostly by other Jeffs Adherents.

- a. In February, 2008, the Trust was sued by a litigant alleging a lien upon Trust property based upon the actions of the former trustees. Case No. 080500593 in the Fifth District Court of Washington County, Utah. (R. 17612-17613).
- b. In March, 2008, the Trust was sued by Sterling Harker and William Harker (a Jeffs Adherent) in an effort to prevent the sale of the Trust's dairy farm, Case No. 080500225 in the Fifth District Court of Iron County, Utah. (R. 17614).
- c. In July, 2008, a law firm (representing the cities of Hildale and Colorado City and their citizens) issued a press release stating that "the days of the FLDS not defending themselves in Court is over." (R. 12573, 12937). Thereafter, the law firm initiated a number of litigation attacks against the Fiduciary – in the Trust Probate Action and elsewhere – including attacks on the proposed sale of the Berry Knoll farm property. (See e.g. R. 11961, 14098)
- d. In July, 2008, a lawsuit was filed by Ammon Harker and a number of other Jeffs Adherents asserting claims to the Trust's dairy property. Case No. 080500538 in the Fifth District Court, Iron County, Utah. (R. 17615-17616).
- e. On August 29, 2008, the former trustees and the FLDS Church filed a lawsuit against the Fiduciary alleging fraud upon the court in connection with the Trust's obtaining default judgment in its 2006 lawsuit, Case No. 080918199 in the Third Judicial District Court of Salt Lake County, Utah. (R. 17617).
- f. On September 10, 2008, a Trust beneficiary, Guy Steed, filed a lawsuit against the Trust challenging the Fiduciary's ability to control the property of the Trust, Case

No. 080502450 in the Fifth District Court of Washington County, Utah. (R. 17617-17618).

Q. The Litigation Stay

51. On November 14, 2008, the Court in the Trust Probate Action ordered that it would delay ruling on the proposed sale of the Berry Knoll farm in order to give the parties an opportunity to pursue settlement negotiations. In so doing, the Court recognized that the stay of the sale would hinder the Trust's ability to defend itself in litigation. Accordingly, the Court entered a litigation stay enjoining any and all parties from pursuing litigation against the Trust without obtaining leave of the Trust Probate Court. (R. 14707).

R. Continued Litigation Attacks After the Entry of the Litigation Stay

52. In violation of the litigation stay, Appellants continued to pursue legal attacks against the Trust in 2009. ( R. 15229, 15283, 15324, 15244, 19027, 19611, 19648.)

53. In addition, Appellants filed a misleading attack on the Fiduciary related to the sale of some cattle by the Trust's dairy farm. (R. 14754.)

54. Furthermore, in 2009 Appellants were involved in the filing of four appeals/petitions with this Court: (i) Case No. 20090691-SC; (ii) Case No. 20090859-SC; (iii) Case No. 20091006-SC; and (iv) a petition for emergency relief, dated December 29, 2009 (filed in Case No. 20090859-SC). (R. 17623, 17626-17627).

55. In addition to Appellants' attacks, a number of other Jeffs Adherents violated the litigation stay by initiating additional legal proceedings against the Trust in 2009 – without obtaining relief from the litigation stay, as follows:

- a. In the Trust Probate Action, numerous motions were filed in violation of the litigation stay. (R. 16506, 19830A, 16870, 16892, 19513.)



- b. On September 4, 2009, a lawsuit was filed against the Fiduciary and his accounting firm in the United States District Court for the District of Arizona, Case No. 3:09-cv-8152, by Roland Cooke, a member of the beneficiary class. (R. 17624).
- c. On September 23, 2009, a lawsuit was filed by Guy Ream, purportedly acting on behalf of the UEP Trust and FLDS Church, against Judge Lindberg, the Utah Attorney General, the Fiduciary, and the State of Utah in the United States District Court for the District of Utah, Case No. 2:09-cv-856, attacking, among other things, the reformation of the Trust. (R. 17624-17625).
- d. On September 23, 2009, the municipalities of Hildale and Colorado City filed a Petition for Extraordinary Relief with the this Court seeking to enjoin the Trust Probate Court from authorizing the sale of the Berry Knoll property, Case No. 20090781-SC. (R. 1762-17626).

56. Thus, despite the litigation stay, the Trust has continually faced litigation attacks and has continued to incur legal fees – thereby worsening its liquidity crisis.

S. Appellants Usurp Control Over the Berry Knoll Property

57. In connection with their change of litigation tactics, Appellants also changed their position with respect to the use of the Berry Knoll farm property. Having refused to farm the property for several years, Appellants decided to claim the property for themselves through self-help – without obtaining the consent of the Fiduciary or the Court and knowing that the property had been leased to someone else. (JR. 16488, at pp. 50-51, 55-56; R. 17642-17644).

58. Appellants placed sheep and cattle on the property, destroyed crops planted by Shane Stubbs, the rightful lessee, and planted their own crops on the property. The Fiduciary attempted to have the trespassers removed from the property, but the Colorado City police officers refused to do anything. To this day, Appellants continue to usurp

control over the property, in violation of the instructions of the Fiduciary and the rights of Shane Stubbs. (R. 16488, at pp. 50-51, 55-56; R. 17642-17644).

#### **V. The Trust in Crisis**

59. Today, the Trust faces a serious liquidity crisis and litigation crisis.

60. The Trust is in a liquidity crisis because it has incurred in excess of \$2 million in unpaid professional fees going back to 2007 without being able to raise the funds needed to pay such fees. (R. 17627-17629, 17669-17675). The Trust's efforts to generate funds for the payment of expenses has been stymied at every turn by the Jeffs Adherents. The Trust's inability to pay its financial obligations has placed a serious burden upon the Trust, the Fiduciary, as well as its legal counsel and engineers.<sup>11</sup> (R. 17672-17675).

61. The Trust is in a litigation crisis due to the bombardment of legal attacks. Since 2008, the Trust has been a party in 23 different civil actions and appeals, most of which are still pending. (R. 17602-17626). The Trust's ability to defend itself in such litigation has been severely compromised because of its inability to pay its financial obligations. During much of the time that the Jeffs Adherents have used the services of eight different law firms

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<sup>11</sup> The Trust's financial obligations were reasonably and necessarily incurred by the Trust in the course of the Fiduciary's fulfillment of his Court-appointed duties. The overwhelming amount of litigation facing the Trust has necessarily resulted in substantial legal fee obligations. (R. 17602-17627, 17669-17675). Even so, the total amount of the Trust's debt is only a small fraction of the value of the Trust's assets.

in attacking the Trust, the Trust has had only one primary law firm to defend its interests.<sup>12</sup> (See ¶¶ 45-56, above). (R. 17669-17673).

62. The combination of the liquidity crisis and litigation crisis threatens the very survival of the Trust. The Trust faces a serious risk that it may be unable to defend itself in litigation, and may be forced to default in one or more of the lawsuits filed against it.

63. Appellants have effectively employed a two-pronged approach in attacking the Trust: (i) inundate the Trust with overwhelming litigation; while (ii) starve the Trust of desperately-needed funds. (R. 17627-17631).

#### **VI. The Knowledge and Intent of Warren Jeffs and His Followers**

64. In recent months, the Fiduciary has received copies of relevant documents which provide insight as to the knowledge and intent of Warren Jeffs and his adherents, as follows:

- a. Warren Jeffs believed that it was a “the directive of the Lord” that the FLDS people “be driven from Short Creek.” (R. 19598).
- b. Jeffs taught that “we will be scattered as a people and then the faithful will be gathered.” (R. 19596).
- c. Jeffs taught that the UEP Trust land was “rejected of God, and is not the gathering place.”; (R. 19596).

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<sup>12</sup> The Trust’s lack of funding has made it difficult for the Trust to find other counsel willing to represent the Trust. Fortunately, the Fiduciary has been successful in obtaining the services of some additional law firms, who have been willing to represent the Trust in certain areas on a delayed-payment basis. This, along with the litigation stay, has saved the Trust from defaulting in the many lawsuits filed against it, and has allowed the Trust to survive for the time being. However, without a source of funding in the near future, it will be extremely difficult for the Fiduciary and legal counsel to continue to defend the interests of the Trust. (R. 17680-17681).

- d. Jeffs taught that the people would be rejected unless they moved away from the Trust's land and qualified for relocation to new "lands of refuge" (located in Texas and elsewhere). (R. 19596).
- e. Jeffs was involved in criminal conduct – ordering an increasing number of "marriages" of "very young girls." (R. 19602, 19600, 19601).
- f. Jeffs accelerated the practice of marrying young girls for the purpose of bringing the government against his people. (R. 19602, 19600, 19601)
- g. At an official meeting of the UEP trustees, Jeffs and the trustees made the unanimous decision to default in the Tort Lawsuits. (R. 19604-19606).
- h. At the same meeting , the trustees unanimously agreed to transfer certain property out of the Trust so that such property would "not get into the courts." (R. 19605).
- i. Jeffs believed that his refusal to defend the Trust in the Tort Lawsuits would cause the government to intervene and would put the Trust's land "under government control." (R. 19605).
- j. Jeffs believed that in causing the government to intervene he was "fulfilling the directive of the Lord" that the people be driven from the Short Creek area. (R. 19598).
- k. Jeffs knew that the decision to default in the Tort Lawsuits would be viewed by the courts as a breach of the trustees' fiduciary duties. (*See* UEP Response, dated February 11, 2010, filed in Utah Supreme Court Case No. 20090859, at Exh. 5).
- l. Jeffs instructed the trustees that "our fiduciary duty is to God and Priesthood not to the courts." (R. 19604).
- m. After defaulting in the Tort Lawsuits, Jeffs made arrangements to gather and sequester the UEP Trust records. (R. 19607-19608).
- n. Jeffs forbade his followers from becoming involved in Trust litigation, with the instruction: "Answer them nothing and don't give them any testimony or witness." (R. 19741).
- o. Shortly after the commencement of the Trust Probate Action, Jeffs made arrangements for the destruction of many documents and for the sequestering of other documents into a vault in Texas. (*See* UEP Response, dated February 11, 2010, filed in Utah Supreme Court Case No. 20090859, at Exh. 2).

- p. Jeffs received regular updates as to the actions of the Court and the Fiduciary in the Trust Probate Action. (*See e.g.* R. 19592, 19593).
- q. Notwithstanding their being suspended as trustees, Jeffs and other trustees continued to exercise control and management over Trust property. (R. 19578).
- r. Jeffs received favorable reports about Judge Lindberg and the Fiduciary “wanting to be friendly to our people” (R. 19596).
- s. Jeffs told his people that Judge Lindberg and the Fiduciary were “of the devil.” and that their friendliness was “flattery.” (R. 19596).
- t. Jeffs instructed his followers that they must “continue to answer them nothing and not give into their proposals and ways.” (R. 19596).
- u. Jeffs stated that “we will not work out our differences so called with this judge and the government.” (R. 19596).

65. Later, while incarcerated in the Washington County Jail, Jeffs modified his “answer them nothing” command and issued a new instruction to some of his followers. Specifically, Jeffs instructed Willie Jessop to lead a coalition of followers, hire legal counsel, become involved in the Trust Probate Action, and “demand[] to have their rights protected concerning their homes.” (R. 19571 & 19572). Willie Jessop was further told to conceal Warren Jeffs’ role in the new litigation strategy, as Jeffs instructed that the so-called coalition appear “as a group of individuals . . . without bringing in the authorities of the Church.” (*Id.*).

66. A few months after such instruction, Willie Jessop and the other Appellants, with their numerous law firms, began their litigation attack. (*See* ¶¶ 45-56, above).

67. Now, Appellants have filed the present appeal seeking to formally intervene in the Trust Probate Action – so they can be in an even greater position to harass the Trust with frivolous, vexatious litigation.

## **RESPONSE TO APPELLANTS' FACTUAL ALLEGATIONS**

It is beyond the scope of this Brief to provide a point-by-point rebuttal to every false and misleading allegation of Appellants. However, the examples discussed below are indicative of Appellants blatant disregard for the truth.

### **I. False Accusations of Religious Discrimination**

Appellants have fabricated claims of religious discrimination in an attempt to falsely blame the Fiduciary for the consequences of their decision to abandon the Trust and their refusal to participate in the trust probate proceedings.

Appellants complain that Court did not appoint any FLDS members to serve on the Trust's advisory board. When the board was established, and later expanded, no FLDS person applied to serve on the board. On two different occasions, in 2005 and 2007, the Court opened up the process for receiving applications for board membership, but did not receive a single application from any FLDS person. Thus, the religious make-up of the advisory board is not because of any discrimination on the part of the Court. Rather, it was merely the natural consequence of the choices of the FLDS people to not seek membership on the board.<sup>13</sup>

Next, Appellants accuse the Fiduciary of discrimination in the hiring of non-FLDS persons to assist in the administration of the Trust. No FLDS person was willing to work for the Fiduciary – or even talk to the Fiduciary. The Fiduciary tried to hire and/or do

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<sup>13</sup> Now, Appellants would have the Court re-open the nomination process again to allow only FLDS members to be appointed to the board. When the time comes for the appointment of new members to the advisory board, the Court will consider all applicants in a fair manner without religious discrimination for or against any person. Now, as always, the Fiduciary is open to input from the FLDS and non-FLDS.

business with FLDS persons, but he has been repeatedly rebuffed in his efforts. (R. 17643, 17656-17659). The Fiduciary hired non-FLDS persons because they were the only ones available – not because of any religious discrimination.

Next, Appellants accuse the Fiduciary of discrimination in the disposition of Trust housing.<sup>14</sup> The Fiduciary established a non-discriminatory process for the submission of petitions for benefits from the Trust. The FLDS beneficiaries overwhelmingly refused to participate in such process. The Fiduciary received petitions and housing requests from over three hundred members of the beneficiary class. The Fiduciary responded to such petitions based upon the merits of the petitions and the housing available. In so doing, the Fiduciary did not ask the religion of the petitioners, nor did he base any decisions on the professed religion of the petitioner. If non-FLDS beneficiaries have received more benefits than FLDS beneficiaries, it is because they petitioned for benefits while the other did not. The Fiduciary cannot grant a petition he never received.

Next, Appellants accuse the Fiduciary of discrimination because one of the Trust's attorneys characterized the situation with Jeffs and the Trust beneficiaries as a sociological and psychological war. Such war was commenced and fueled by Warren Jeffs long before the Fiduciary was appointed. The Fiduciary and the reformed Trust were thrust into the war.<sup>15</sup>

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<sup>14</sup> Appellants' accusations against the Fiduciary are based solely upon the Affidavit of Jake Barlow, dated May 21, 2009. This affidavit contains improper hearsay and argument, and suffers from numerous other defects. (For a more detailed response to such affidavit, see the Fiduciary's December, 2009 Report (R.17661-17666)).

<sup>15</sup> Certainly, the Fiduciary was not responsible for the war. The record shows that, shortly after his appointment, the Fiduciary reached out to the FLDS Trust beneficiaries and

The core problem underlying Appellants' claims of discrimination is a refusal to accept or acknowledge the Court's reformation of the Trust and its requirement of religious neutrality. Appellants cling to the superseded Restated Trust Declaration and demand that the Fiduciary administer the Trust in a manner which will discriminate in favor of FLDS beneficiaries and against non-FLDS beneficiaries. (See R. 13243, 13253-13258). Thus, Appellants mischaracterize religious neutrality as religious discrimination. Expecting discriminatory treatment in their favor, they misperceive religious neutrality as religious discrimination against them.

## **II. Mischaracterization of the Trust Probate Action**

Appellants mischaracterize the motives and actions of the AGs and the Court. In initiating the Trust Probate Action, the AGs were not attempting to take over the Trust, or to harm the FLDS people.<sup>16</sup> Rather, they were merely complying with their legal duties to

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sought to protect their interests. When Jeffs received favorable reports about the Fiduciary, he told his followers that the Fiduciary and the Court were "of the devil", and that their friendly overtures were "flattery." (See ¶ 64(s), above). Jeffs had strong psychological and sociological power over his followers. As the FLDS prophet, Jeffs threatened severe religious penalties to those who disobeyed him. Falling out of Jeffs' favor routinely resulted in immediate loss of church status, spouse(s), children, home, and livelihood. Thus, the Jeffs Adherents followed Jeffs' instructions by refusing to have anything to do with the Fiduciary and the Court, and by acting with hostility. The Fiduciary is desirous of bringing an end to the hostility and improving communication and cooperation.

Accordingly, when the Fiduciary's counsel learned that Jeffs had confessed that he was not a prophet, he was hopeful that this would allow for a thawing of relations with the Jeffs Adherents. As Jeffs was the apparent cause of the beneficiaries' hostility, it was hoped that his confession would bring an end to the war. Thus, in its proper context, the attorney's notation that Warren Jeffs' confession may be relevant in the ongoing war is not inaccurate or improper. It is simply an expression of hope that the confession may bring about an end of the war and cause the Trust beneficiaries to communicate and cooperate.

<sup>16</sup>Contrary to misperception, the AGs did not take any assets away from the FLDS Church. The assets of the Trust were never assets of the FLDS Church. Those who created



protect the Trust from the malfeasance of its breaching trustees, and in so doing protect the homes of the people. (See 15 Am. Jur. 2d Charities § 136 (Attorney General has duty to institute proceedings to stop or redress wrongful conduct of trustees of charitable trust)).

Similarly, the Court was not operating under any improper motive in granting the AGs' petition, but was merely fulfilling its legal obligations. Given the unrefuted evidence of the trustees' abandonment and of fraudulent transfers, and given the trustees' refusal to appear and account for their conduct, the Court had no choice but to grant the petition.

Neither the Court nor the AGs asked to be placed into such positions. The problem was dumped in their laps by the breaching trustees. They nevertheless responded in good faith by following the law and protecting the assets of the Trust for the entire beneficiary class.

Appellants claim that the Court erred in reforming the Trust to require that decisions be made on the basis of religious neutrality. Appellants failed to appeal the order of reformation and are barred from collaterally attacking it now. Regardless, the Court acted properly in its order. With the trustees' abandonment of the Trust, and their refusal to participate, the Court faced a difficult decision regarding what to do with the Trust and its property. The Court could: (i) do nothing; (ii) terminate the Trust; or (iii) appoint new leadership to administer the Trust.

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the Trust, and those who contributed to it, could have donated such property to the FLDS Church had they so desired. They did not. Instead, they chose to create the Trust, and donate property to it. They further chose to make it a Utah charitable trust, subject to all of the laws of charitable trusts in Utah – including the doctrine of *cypres*.

Doing nothing would result in the loss of the homes of the Trust beneficiaries – both FLDS and non-FLDS. Without intervention and the appointment of new leadership, the Trust would be subjected to large default judgment awards in the Tort Lawsuits, resulting in the eventual loss of Trust assets.

If the Court were to terminate the Trust, the likely result would be the same: a loss of the Trust's property in the Tort Lawsuits. The then-governing Restated Trust Declaration provided that if the Trust were terminated the property of the Trust would go to Warren Jeffs, as the FLDS corporation sole.<sup>17</sup> At the time the Trust Probate Action was filed, both Jeffs and the FLDS Church were defendants in the same Tort Lawsuits which had been filed against the Trust. Both of these defendants had defaulted in such lawsuits and default had been entered as to such defendants. Thus, terminating the Trust and transferring its property to Warren Jeffs would have made such property, once again, subject to the execution of default judgments in the Tort Lawsuits.

The Court's third option – to appoint new leadership for the Trust – would provide the best chance for saving the homes of the people. Newly-appointed leadership would be under a fiduciary duty to appear in the Tort Lawsuits and defend the Trust. Furthermore, the third option was the only option which would comply with governing trust law. The law does not favor termination of a charitable trust. It disfavors the forfeiture of property which has been pledged toward a charitable purpose. Where it becomes impossible or

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<sup>17</sup>Warren Jeffs was the very man who was in breach of his fiduciary duties to the Trust, who had refused to defend the Trust in the Tort Lawsuits, and who had transferred Trust property away from the Trust as soon as the Tort Lawsuits were filed. He had also disobeyed the Court's Order to provide records and an accounting regarding the Trust.

unfeasible for a charitable trust to continue under its existing charter, a trust may be reformed under the doctrine of *cy pres*, properly surviving with a charitable purpose. (See e.g. Matter of Gerber, 652 P.2d 937, 939-40 (Utah 1982)).

In connection with the Trust Probate petition, and the hearings held thereon, not a single person or entity argued in favor of the first two options. Rather, every person who appeared on the matter urged the Court to appoint new leadership in order to protect Trust property. Thus, given the law, and given the circumstances facing the Court, the Court was clearly correct in its decision to reject termination of the Trust in favor of appointing new leadership and reforming the Trust.

The Court correctly recognized that the appointment of new leadership would require reformation of the Trust. As it stood, no FLDS adherent was willing to defend or administer the Trust. Thus, any new leadership would have to come from outside the Church. The Court correctly recognized that such non-FLDS leadership would be unable to administer the Trust in accordance with one of its stated purposes. Specifically, the Court found that the Trust had two purposes under the Restated Trust Declaration: (i) to promote the doctrines and goals of the FLDS Church; and (ii) to provide for the just wants and needs of the beneficiary class. The Court determined that, because the Trust existing at that time promoted illegal activity and because no FLDS person was willing to serve as new leadership for the Trust, the Trust could not appropriately be administered in a manner to promote the doctrines of the FLDS Church. Thus, it was necessary to reform the trust instrument to focus exclusively on the second purpose of the Trust – to provide for the just wants and needs of the beneficiary class. The religious purposes of the Trust were

necessarily reformed because, under the law, it would not be appropriate for the Court, or any non-FLDS leadership, to promote illegal activity or to make determinations as to what would, or would not, promote the doctrines of the FLDS Church.

By reforming the Trust, the Court saved the Trust's property and assured that it would continue to be used toward a charitable purpose. Although such reformed purpose was not exactly the same as the original purposes stated in the Restated Trust Declaration, it was as close to such purpose as was reasonably possible under the circumstances. Without reforming the Trust to modify its impossible, impracticable purposes, the Trust would have failed and its assets would have been lost.<sup>18</sup>

Next, Appellants' Brief mischaracterizes the holdings of the District Court with respect to standing, and wrongfully suggests that the Court has been inconsistent in its treatment of Appellants and other interested parties in this case. The record shows that the Court's actions have been consistent and in accordance with the law. From the beginning of its involvement of this case, the Court has invited input from the members of the Trust's beneficiary class (R. 895) and has allowed them to be heard with respect to matters affecting the Trust. The Court has not varied from such practice, and continues to entertain input from interested beneficiaries, including Appellants.

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<sup>18</sup>Appellants fail to acknowledge that, even if the District Court erred in reforming the Trust (which it did not), it is now too late to undo such reformation. The Court's reformation has been final and non-appealable since 2006. Hundreds of people have made decisions in reliance upon the validity and finality of such reformation. They have done so in respect for the rule of law and the authority of the judicial system of the State of Utah. In contrast, Appellants knew about the Trust Probate Action, yet they willfully failed to appear or be heard. Under such circumstances, there is neither a legal or equitable case for undoing the reformation of the Trust. To do so would violate the legitimate expectations of hundreds of people, reward dilatory and inequitable behavior, and make a mockery of the rule of law.

That being said, the Court has never ruled that individual beneficiaries are formal parties with standing to appear in all aspects of the case. It is one thing to allow beneficiaries to be heard and provide input. It is quite another to grant them formal party status – and place them in a position to micro-manage the Trust and to inundate it with vexatious litigation. The members of the beneficiary class exceed 10,000 in number. It would be wholly impracticable and detrimental to afford formal party status to the members of such a large class.

As discussed below, it is a black letter legal rule that the members of the beneficiary class of a charitable trust do not have standing as parties (subject to the extremely rare “special interest” exception). (See pp. 42-44, below). The primary purpose for this rule is to prevent the Trust from being subjected to vexatious litigation by potential beneficiaries. The present case is a textbook example of the wisdom of such principle. Here, the present Appellants have not been content to merely appear and provide input to the Court. Rather, they have deluged the Trust with a flood of litigation which has threatened its very survival. The Court was wholly correct in denying formal standing to Appellants – there was nothing inconsistent or discriminatory in such denial.

Next, Appellants falsely accuse the Fiduciary of violating the Orders of the Court by incurring debt without available liquid funds to pay such debt. In making such accusations, Appellants have taken a partial quote from the Court’s Order out of context, and have completely misconstrued its meaning and purpose. The provision at issue does not prohibit

the Fiduciary from incurring debt. Rather, it was designed to protect the Fiduciary. Indeed, this provision was included in the Order at the Fiduciary's request.<sup>19</sup> (R. 1146).

Next, Appellants falsely accuse the Fiduciary of "collusion" with counsel for the Trust's opponents in connection with the defense of the Tort Lawsuits filed against the Trust. The Fiduciary vigorously defended the interests of the Trust in the Tort Lawsuits – and thereby avoided default judgment and preserved the homes of the people.<sup>20</sup>

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<sup>19</sup>In 2005, when considering whether to accept appointment to serve as a special fiduciary in this case, the Fiduciary recognized that the Trust may have a liquidity problem – whereby there would be a lack of liquid funds available to meet the Trust's financial obligations. The Fiduciary knew that the Trust could likely incur significant obligations before liquid funds would become available to satisfy such obligations. The Fiduciary was concerned about accepting responsibilities from the Court without having the funds necessary to fulfill such responsibilities. Accordingly, the Fiduciary requested that the Court's Order include a provision which limited his responsibilities to the extent of funds available for the fulfillment of such responsibilities. Contrary to Appellants' assertion, this provision did not limit the "activities" of the Fiduciary, it merely protected the Fiduciary by allowing him to limit his "responsibilities" in the event of a lack of funds. At no time was it ever intended that this provision would prohibit the Trust from incurring debt for the payment of the professional fees. On the contrary, it was always understood that the Trust lacked liquid funds, that the Fiduciary and legal counsel would be obliged to work without immediate payment, and that they would be reimbursed when liquid funds were made available.

In the present case, the Fiduciary and his legal counsel could have stopped functioning the moment the Trust ran out of liquid funds to pay their professional fees without violating the Fiduciary's Court-appointed duties. Had they done so, the Trust would likely have failed. It would have been left without defense in pending lawsuits and without ongoing management or administration. Its property, including the homes of the people, would likely have been lost. The Fiduciary and legal counsel did not walk away due to a lack of liquid funds. Rather, operating on the promise of payment in the future, the Fiduciary and legal counsel continued to serve the Trust without immediate payment – at significant hardship and sacrifice.

<sup>20</sup> The fact that opposing counsel was adverse to the Trust in the Tort Lawsuits does not mean that the Fiduciary or his counsel were forbidden from communicating or cooperating with such counsel in connection with other matters where the parties were not adverse. In certain respects, the interests of the Trust and the plaintiffs in the Tort Lawsuits were aligned. This is true with respect to the Fiduciary's efforts to increase the assets of the Trust and to obtain recompense for damages which had been inflicted on the Trust by the

Finally, Appellants have grossly mischaracterized the financial impact of the Trust Probate Action. They falsely assert that the Fiduciary's administration has been financially devastating to the Trust, when in reality, the net assets of the Trust have actually increased substantially under the leadership of the Fiduciary.

It is true that the Trust has incurred substantial costs and attorneys fees since 2005. This is not surprising given the multitude of tasks facing the Fiduciary, and the constant hostility, obstruction, and litigation attacks which have been directed toward the Trust. Given that the Trust has been involved in 23 different civil actions and appeals since 2008, it is to be expected that the Trust would have substantial legal fees.

Moreover, the Fiduciary has brought a number of assets into the Trust, and the value of such assets is significantly greater than the total amount of the Trust's costs and expenses, including legal fees, since the appointment of the Fiduciary.<sup>21</sup> The Trust's balance sheet is in a better position today than it was on the day the Fiduciary was appointed in 2005.

The Fiduciary has also prevented the loss of Trust property to litigants who have filed lawsuits against the Trust. Not only did the Fiduciary prevent the entry of default

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breaching trustees and their associates. Accordingly, it was wholly appropriate for the Fiduciary and opposing counsel to communicate and cooperate as to such matters.

<sup>21</sup> The Fiduciary reached successful settlement agreements in the fraudulent-transfer lawsuit which resulted in the Trust receiving (1) a return of the manufacturing building, valued at approximately \$1,600,000; (2) a return of 715 acres of land; and (3) approximately \$1,600,000 in cash. Later, the Fiduciary was successful in obtaining a default judgment in the Trust's lawsuit against the former trustees and the FLDS Church. Through judgment collection efforts, the Trust obtained ownership of the companies which own the dairy farm in Beryl, Utah – which was then valued at approximately \$5 million. Thus, the Fiduciary has brought property into the Trust valued at approximately \$10 million.

judgments in the two Tort Lawsuits, he has also defended the Trust in other lawsuits which have been filed against the Trust – including a third tort action seeking large monetary damages against the Trust.

Thus, rather than decimating the Trust, the Fiduciary has saved it and improved it.

### **III. Response to Allegations About the Berry Knoll Farm Sale**

Appellants suggest that the proposal to sell Berry Knoll Farm is intended to harm the FLDS people when, in reality, the Fiduciary is simply trying to resolve the Trust's liquidity crisis. After considering numerous alternatives, the Fiduciary has determined that selling non-residential property is the best (possibly the only) feasible method for raising badly-needed funds.

When the Fiduciary determined to sell the Berry Knoll property, he did not believe (and still does not believe today) that the property had economic or religious significance precluding the Trust from selling it. The property had been abandoned and allowed to become a dustbowl.

Appellants' argument, that the property has economic and religious significance to the FLDS people, is not credible. Such claims are pretexts. The real motive of Appellants is to stop the Trust from selling any property at all – such that the Trust will be starved of funds needed for its survival. It is telling that, every time the Fiduciary seeks to sell property, Appellants try to sabotage the sale by alleging that such property has special economic or religious significance. This includes the Berry Knoll farm, the Beryl dairy farm, and even ordinary cows. Each time, Appellants' claims have been exposed as falsehoods and pretexts.



In the case of the Fiduciary's proposal to sell the Berry Knoll farm, Appellants first claimed that the farm had special economic significance – alleging that the property is the “breadbasket” of the community and a major contributor to the FLDS storehouse. (R. 13826.) Such allegations were disproven when it was revealed that the ground is poor, that the farming operations on the property had never been profitable, that the farm had historically required heavy subsidies from the Trust, that the Trust had stopped subsidizing the farm by 2004, that the farming of the property had ceased by 2004, and that the former farmers of the property had abandoned the property. (R. 13891-13892; R. 16488, at pp. 22-23).

Next, after the weaknesses of their “economic” allegations were exposed, Appellants suddenly began alleging that the property held special religious significance – that it was a prophesied future temple site of the FLDS Church. Such allegations are suspect due to their late timing. Appellants filed a verified motion and memorandum seeking to stop the sale which never once mentioned that the property was a future temple site. Similarly, in two days of deposition testimony regarding the Berry Knoll property, Appellants never once raised the “temple site” allegation. It was only after their original “economic significance” allegations were discredited that they first raised the allegation of “religious significance.” (R. 13880\*).

The Fiduciary has investigated Appellants' “temple site” allegations and has confirmed that they are a pretext. The FLDS Church long ago rejected the leadership of the man who made the temple site prophesy. Church leaders have since stated that no temple would be built on the Berry Knoll property. Warren Jeffs has revealed that he intends to

abandon the Short Creek area. (R. 13887-13889\*; R. 16448, at pp. 22-23). (*See also* ¶ 64(c), above).

Even if the Berry Knoll property had special economic or religious significance to Appellants, it would not change the fact that it is in the best interests of the Trust to sell such property. Due to the Trust's severe liquidity crisis, it is critical that the Trust sell property. After extensive consideration, it has been determined that the Berry Knoll farm is the best-suited property to be sold by the Trust. While the Fiduciary would like to accommodate Appellants' concerns, his duty is to the Trust – not Appellants. The Fiduciary cannot sacrifice the interests of the Trust in order to satisfy Appellants' desires.

The Fiduciary is not aware of any feasible alternative. Appellants have not identified an alternative. (Appellants would likely object to the sale of *any* property of the Trust).

Next, Appellants complain that the Fiduciary is proposing to sell the property to a “competing religious group”. In truth, the proposed buyer is not a religious group, but a limited liability company. The Fiduciary has not inquired as to the religion of the owners of the company – as it would be inappropriate to do so. It would not be proper for the Fiduciary to sell, or refuse to sell, based upon religion. Appellants intimate that the Trust should refuse to sell the property to the proposed buyer because Appellants find its owners' religion distasteful.

The Fiduciary's willingness to sell the property to this particular buyer is not based upon religion. Rather, such willingness is based upon one reason: the buyer is willing to buy the property. No one else has made an offer to buy the property from the Trust.

Moreover, there is nothing stopping Appellants from obtaining the property because the sale is **subject to better offers**. If the property is truly significant to Appellants, they may purchase it by offering more money.

### **SUMMARY OF LEGAL ARGUMENT**

The Appellants' motion to intervene is untimely and procedurally defective. Appellants have failed to identify the scope of their intended intervention and have been inconsistent with respect to the matters for which they seek authorization to intervene. It is a black letter legal principle that the members of a beneficiary class lack standing to enforce a charitable trust. Although there is an exception to such principle, the exception is rare and does not apply here. Appellants cannot establish any of the factors necessary to meet the exception: the beneficiary class is not small and strictly defined; the requested intervention would result in vexatious litigation to the Trust; and Appellants cannot show that the AGs have been absent or ineffective in this case. Appellants have no special claim or interest in Trust property which would distinguish them from the other members of the class or which would afford standing in this case. The Court properly denied the motions to intervene.

### **LEGAL ARGUMENT**

#### **I. The Motions to Intervene Were Untimely.**

"The first requirement under [Rule 24] is that the intervenor make 'timely application.'" Republic Ins. Group v. Doman, 774 P.2d 1130, 1131 (Utah 1989). In the present case, Appellants did not apply to intervene until May, 2009, four years after the Trust Probate Action was commenced and two-and-a-half years after the Court's final, non-

appealable reformation judgment was entered.<sup>22</sup> It was also nine months after Appellants first began filing motions in the Trust Probate Action and six months after the Court ruled that Appellants have no standing (which ruling was not appealed). Appellants' motions to intervene were untimely.

## **II. The Motions to Intervene Were Procedurally Defective.**

Rule 24(c) provides that a motion to intervene “shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.” In the present case, the motions of Appellants were not accompanied by an intervention complaint, or any other “pleading” (*see* Utah R. Civ. P. 7(a)). Furthermore, Appellants have failed to set forth “the claim or defense for which intervention is sought.”

## **III. Appellants Have Failed to Identify the Scope of Their Requested Intervention.**

Compliance with the requirements of Rule 24(c) is not a mere technicality, but is absolutely essential for the Court to make an informed decision on an application for intervention.<sup>23</sup> In the present case, Appellants failed to identify or explain the scope of their anticipated intervention. Are Appellants seeking a limited, single-issue intervention? Or, are they trying to intervene generally as to all matters in the case? The filings of Appellants

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<sup>22</sup> "Generally, the cases hold that intervention is not to be permitted after entry of judgment." Jenner v. Real Estate Services, 659 P.2d 1072, 1074 (Utah 1983) (holding intervention application filed within 11 days after applicant learned of judgment untimely).

<sup>23</sup> The planned scope of intervention is one of the critical factors in determining whether a litigant meets the “special interest” exception to the general rule that charitable trust beneficiaries lack standing. The court must consider whether the litigant seeks only a one-time challenge to a particular act, or seeks to continually interfere with on-going trust administration. Hooker v. Edes Home, 579 A.2d 608, 614 (D.C. Ct. App. 1990); Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 91 P.3d 1019, 1028 (Ariz. App. 2004). (*See* Part V, below).

are not clear on the matter, and indeed appear inconsistent.<sup>24</sup> Similarly, Appellants' filings appear inconsistent with respect to their alleged status as representatives of other members of the beneficiary class.<sup>25</sup> Having failed to clarify such matters, and having failed to comply with Rule 24(c), Appellants are not entitled to intervene in this case.

#### **IV. As Members of a Charitable Trust Beneficiary Class, Appellants Lack Standing.**

It is a well-accepted legal rule that, subject to one rare exception, the members of a beneficiary class of a charitable trust do not have standing to enforce the trust.<sup>26</sup> At common law, the “exclusivity rule” provides that the Attorney General has primary, and nearly exclusive, standing to enforce a charitable trust (*see Hooker v. Edes Home*, 579 A.2d 608, 611-12 (D.C. Ct. App. 1990)).<sup>27</sup> The only parties with standing under the common

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<sup>24</sup> In places, (where is it to their advantage to so argue), Appellants suggest that they seek intervention on a limited basis – to challenge an alleged fundamental act. (*See* Appellants' Brief, at p. 32 (“Selling Berry Knoll is precisely the type of fundamental act that . . . ‘will only be litigated once’”). In other places, Appellants seek to litigate numerous different issues, including on-going administration of the Trust. (*See e.g.* ¶ 53, above).

<sup>25</sup> In places, they claim to be representative of thousands of church members and the “vast majority” of beneficiaries. (Appellants' Brief, at pp. 17, 24). In other places (when it is to their advantage) they claim to be unique and distinct from the other members of the beneficiary class. (*Id.* at 30). Appellants have never sought to certify a class under Rule 23, and have never complied with the requirements which would allow them to appear as representatives of a class.

<sup>26</sup> *See Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.*, 91 P.3d 1019, 1028 (Ariz. App. 2004); *Indianapolis Humane Society v. The Humane Society of Indianapolis, Inc.*, 829 N.E.2d 1039, 1048 (Ind. Ct. App. 2005); *State ex rel. Nixon v. Hutcherson*, 96 S.W.3d 81, 84 (Mo. 2003); *Weaver v. Wood*, 680 N.E.2d 918, 923 (Mass. 1997); *Hooker v. Edes Home*, 579 A.2d 608, 615 (D.C. Ct. App. 1990); and *Alco Gravure, Inc. v. Knapp Foundation*, 479 N.E.2d 752, 755 (N.Y. 1985); *Kania v. Chatham*, 254 S.E.2d 528 (N.C. 1979).

<sup>27</sup> The primary purpose of the exclusivity rule, and a major factor in considering the exception to the rule, is to protect the trust property and leadership from vexatious litigation. (*See Hooker*, 579 A.2d at 612-15; *Alco Gravure*, 479 N.E.2d at 756; *Kania*, 254 S.E.2d at

law are (i) the Attorney General, (ii) co- trustees, and (iii) persons who qualify under a rare “special interest” exception. (See Restatement (Second) of Trusts, § 391). The Utah Trust Code modified this rule by adding one more party to the list of those with standing: the settlor. (See UTAH CODE ANN. § 75-7-405(3) (“The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.”)).<sup>28</sup>

In the present case, it is undisputed that Appellants are members of the beneficiary class. Accordingly, unless they qualify under the rare “special interest” exception (discussed below), they lack standing as a matter of law.<sup>29</sup>

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<sup>28</sup>Contrary to Appellants’ assertion, the District Court’s ruling is not in conflict with the “among others” language of UTAH CODE ANN. § 75-7-405(3). The comments to the uniform statute and the Restatement of Trust reveal that the term “others” includes the Attorney General, co-trustees, and persons with a special interest – and does not include the members of the beneficiary class.

<sup>29</sup> Appellants have misconstrued and mischaracterized the District Court’s ruling with respect to such matters. (See Appt. Brief, at pp. 2, 22, 25). Contrary to Appellants’ assertion, the Court did not rule that “no one besides the state can participate as a party under any circumstances.” (*Id.* at p. 2). Rather, the Court found that the Utah and Arizona Attorney Generals and the Fiduciary are the only ones with standing *in this particular case*. The Court did so after noting the “black letter law” that potential beneficiaries of charitable trusts have no standing, and after finding that the present Appellants in this case are not “uniquely situated” and do not have “particularized interests.” (Corrected Ruling, dated July 17, 2009, at pp. 1-2). Thus, contrary to Appellants’ assertion, the District Court did not find that the Attorney General has exclusive standing in all cases involving charitable trusts filed at any time, nor did it deny the existence of the “special interest” exception. It merely found that the present Appellants did not meet such exception.

Moreover, the District court stated in its July 17, 2009, Order that it expressly relied upon and incorporated by reference the analysis of the Arizona Attorney General in a Memorandum, dated June 9, 2009 (a copy of which is included in the addendum). (See Order, at p. 2). The Arizona Attorney General’s Memorandum, at pp. 3-6, contains a thorough discussion of the “special interest” exception and a persuasive showing as to why these particular Appellants do not meet the exception. The Court recognized the existence of the “special interest” exception. It just did not apply to these Appellants in this case.

#### **V. Appellants Do Not Meet the “Special Interest” Exception.**

The “special interest” exception is a rare<sup>30</sup> and limited<sup>31</sup> exception to the general rule of non-standing to charitable trust beneficiaries.

Courts have identified a number of factors which must be present before the exception applies.<sup>32</sup> Appellants cannot meet any of the required factors.

First, Appellants must show that the beneficiary class is small. The class must be “sharply defined” and “limited in number.” Hooker, 579 A.2d at 614. This factor is not met in the present case as the UEP Trust has a very large class (believed to consist of over 10,000 members), which is not sharply defined or limited in number.

Next, Appellants must show that their proposed litigation would not expose the Trust to vexatious litigation. They must show that they are intervening for a limited, one-time purpose of challenging an act which is extraordinary and fundamental, as opposed to challenging acts of ordinary discretion or ongoing administration of the Trust. (See Schalkenbach, 91 P.3d at 1029; Hooker, 579 A.2d at 614-17).

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<sup>30</sup> See Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 Cornell J. L. & Pub. Pol’y 1, 45 (2009) (the exception applies “only in the most unusual circumstances”); Brody, *From the Dead Hand to the Living Dead: the Conundrum of Charitable-Donor Standing*, 41 Ga. L. Rev. 1183, 1199 (2007) (“standing is rarely granted”).

<sup>31</sup> Where a litigant is permitted standing under the special interest exception, such standing is allowed for the enforcement of the particular special interest only – not for general enforcement of the trust. (5 Scott & Asher on Trusts (5<sup>th</sup> ed.) § 37.3.10 at p. 2443-44).

<sup>32</sup> See Schalkenbach, 91 P.3d at 1026; Blasko, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 61 (1993); Hooker, 579 A.2d at 614.

In the present case, Appellants have failed to meet this test. Appellants have failed to explain the scope and purpose of their proposed intervention, and their filings are inconsistent on this issue. Even so, Appellants cannot be challenging anything extraordinary or fundamental in this case. At the present time, there is nothing pending in the Trust Probate Action which involves fundamental or extraordinary actions.<sup>33</sup>

Appellants attempt to characterize the proposed sale of the Berry Knoll farm as a “fundamental” event. In reality, it is not. The proposed sale consists of vacant, unimproved ground, and comprises only a small fraction of the Trust’s property. This sale is an exercise of the Fiduciary’s ongoing management discretion – to liquidate a small portion of property in order to pay the Trust’s financial obligations.

From reviewing Appellants’ filings, it is clear that they do not intend to limit themselves to challenging fundamental acts. On the contrary, they seek to challenge the discretionary decisions of the Fiduciary and the ongoing Trust administration. Allowing standing for such purposes would devastate the Trust with additional vexatious litigation.

Next, Appellants must show the presence of fraud or misconduct on the part of the Fiduciary or the Court. (*See Schalkenbach*, 91 P.3d at 1026). This Appellants cannot do – as there has been no fraud or misconduct in any way.<sup>34</sup>

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<sup>33</sup> This is in contrast to 2005 and 2006 years, when the Trust was reformed. Certainly, reformation was an extraordinary and fundamental event. However, given that the reformation was completed in 2006, and was not appealed, such matter has been finally decided and provides no basis for intervention at this late date.

<sup>34</sup> Appellants have attempted to meet this test by citing to two different legal actions which have been brought against the Fiduciary. (*See Appellants’ Memo*, at 14-15).] Such actions, however, are wholly frivolous and outrageous, constitute an abuse of the legal system, and should not be given any weight by this court:



Next, Appellants must show that the Attorney General is unavailable or ineffective in enforcing the Trust. (See Schalkenbach, 91 P.3d at 1026). Appellants clearly cannot make such a showing – notwithstanding Appellants’ scathing criticisms of the Attorneys General. (Appt. Brief, at 27). Bombast is not a substitute for factual analysis. The record clearly shows that both of the AGs have been active and effective participants throughout the Trust Probate Action and have assured that the actions of the Court and the Fiduciary have been in accordance with the law and in the best interests of the Trust. Appellants nowhere explain how the *legitimate* interests of the Trust have not been protected, either by the Fiduciary or by the AGs.

The fact that the AGs have not jumped to meet every whim and demand of Appellants does not mean that they are derelict in their duties. Since 2008, the AGs have investigated numerous accusations and allegations of Appellants and, time and time again, have found them to be without merit. The AGs’ refusal to fulfill the unreasonable, unrealistic, and unlawful demands of Appellants does nothing to strengthen Appellants’ standing argument. Similarly, to the extent Appellants are upset that their illegal practice of forced marriages

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We give little, if any, weight to . . . allegations of fraud because any plaintiff can allege such misconduct, regardless of the merits of the complaint. If we found that mere allegations of grave misconduct were sufficient to confer standing, the purposes of limiting standing to protect trustees from vexatious litigation would be undermined.

Schalkenbach, 91 P.3d at 1026 n. 7. Furthermore, regardless of the merits of such legal actions, they do nothing to afford standing to these Appellants in this case. Appellants are not parties to such actions, were not the “victims” of the alleged misconduct, and their present attempt to intervene is not related to such misconduct. (See 5 Scott & Asher on Trusts (5<sup>th</sup> ed.) § 37.3.10 at p. 2443-44). (special interest standing is limited to enforcement of the special interest only)).

of child brides has been curbed by the Reformed Trust, Appellants have no right to complain.<sup>35</sup>

Finally, Appellants have failed to show that their situation is unique in any relevant way which would distinguish them from the other members of the beneficiary class. Three of the Appellants allege that they have a special interest in the Berry Knoll property because they received “stewardships” to use such property from the former trustees. This is not a distinguishing factor. There are numerous members of the beneficiary class who received stewardships (*i.e.* permission) to use Trust property in the past.<sup>36</sup> Two of the Appellants claim a special interest by virtue of their positions as bishops in the FLDS Church. Such positions, however, do not give any legally enforceable interests in the property of the Trust – whether under the 1998 Restated Trust Declaration or the Reformed Trust Declaration.<sup>37</sup>

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<sup>35</sup> One of the protections that FLDS leadership sought through the conversion of the UEP into a charitable trust was the right to evict persons from the land whom Church leadership determined did not qualify for charitable benefits. *See United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101 P.3d 641, 643 (Ariz. App. 2004) (former trustees brought forcible detainer action against family living on UEP land after mother revoked her consent to the marriage of her 15 year-old daughter to a 39 year-old married man).

<sup>36</sup> Furthermore, the receipt of a stewardship does not give any legally enforceable claim or interest in property. The 1998 Restated Trust Declaration made it clear that the trustees had sole power and discretion over the Trust’s property and could grant or revoke permission to use such property at will. (*See* ¶ 4, above). The Reformed Trust Declaration did not change this.

<sup>37</sup> In the past, some bishops of the FLDS Church were made trustees of the Trust, and therefore had the authority to administer Trust property, including granting and revoking permission to use Trust property. Such authority, however, was based upon the fact that they were trustees of the Trust. There is nothing about the former Restated Trust Declaration which gave any authority, claim or interest to the position of church bishops. Rather, all control over the Trust was reserved to the trustees. Similarly, there is nothing about the present Reformed Trust which would give bishops any special interest in the Trust.

The District Court properly found that Appellants failed to satisfy the strict “special interest” exception to the Rule of Standing.

**VI. Appellants Cannot Invoke Intervention as a Means of Avoiding the Consequences of Their Willful Choices.**

Despite having indisputable notice of all on-going proceedings, Appellants chose not to appear or be heard when the Trust was reformed. They failed, timely or otherwise, to appeal the final order of reformation. Hundreds of individuals have relied on the provisions of the Reformed Trust to make critical decisions governing their lives.

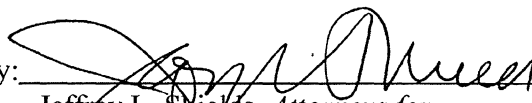
Yet, after having sat silent for years, Appellants sought to intervene, take over the Trust administration, get rid of the Fiduciary, and presumably undo everything done in the case to date, upsetting all settled expectations that final judicial orders really are final judicial orders. Appellants’ efforts were inexcusably late. Intervention was properly denied.

**CONCLUSION**

The District Court properly denied Appellants’ motions to intervene.

Dated: July 14, 2010

CALLISTER NEBEKER & McCULLOUGH

By:   
Jeffrey L. Shields, Attorneys for  
Appellee, Bruce R. Wisan, as the Court-  
Appointed Special Fiduciary of the  
United Effort Plan Trust

**CERTIFICATE OF SERVICE**

I hereby certify that two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE BRUCE R. WISAN, AS THE COURT-APPOINTED SPECIAL FIDUCIARY OF THE UNITED EFFORT PLAN TRUST** were mailed by first-class mail, postage prepaid, to the following:

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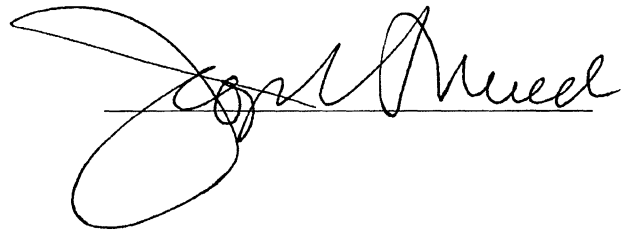
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A handwritten signature in black ink, appearing to read "Jon Reed", is written over a horizontal line. The signature is stylized with large loops and a cursive script.

### **ADDENDUM**

- A. Utah R. Civ. Pro. 24(a)
- B. UTAH CODE ANN. § 75-7-405(3)
- C. Corrected Ruling and Order on Pending Motions, dated July 17, 2009
- D. Decision and Order Granting the Fiduciary's Motion to Compel, The Fiduciary's Motion to Disqualify Counsel, and Denying Movants' Emergency Motion to Stay Sale of Trust Property, dated Nov. 10, 2008
- E. Memorandum in Opposition to Movants' Motion to Stay Proceedings, to Replace Special Fiduciary, and to Enjoin Further Actions of Special Fiduciary Pending Evidentiary Hearing, dated June 5, 2009

## **Addendum A**

**Rule 24. Intervention.**

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Constitutionality of statutes and ordinances.

(d)(1) If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact. The court shall permit the state to be heard upon timely application.

(d)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the county or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the county or municipal attorney of such fact. The court shall permit the county or municipality to be heard upon timely application.

(d)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted.



## **Addendum B**

West's Utah Code Annotated Currentness

Chapter 7. Utah Uniform Trust Code (Refs & Annos)

**§ 75-7-405. Charitable purposes--Enforcement**

- UNIFORM LAW COMMENTS[UTC § 405]

Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. See Restatement (Second) of Trusts Section 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. See Restatement (Second) of Trusts Section 397 cmt. d (1959). Pursuant to Section 110 (b), the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests. For the law on the enforcement of charitable trusts, see Susan N. Gary, Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law, 21 U. Hawaii L. Rev. 593 (1999).

## HISTORICAL AND STATUTORY NOTES

Former § 75-7-405 related to powers exercisable by joint trustees.  
Laws 2004, c. 89, repealed and reenacted this section, which formerly provided:

"(1) Any power vested in three or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise; and a dissenting trustee is not liable for the consequences of an act in which he joins at the direction of the majority of the trustees, if he expressed his dissent in writing to any of his co-trustees at or before the time of the joinder.

"(2) If two or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly

"(3) This section does not excuse a co-trustee from liability for failure either to participate in the administration of the trust or to attempt to prevent a breach of trust."

### Uniform Law

This section is similar to § 7-405 of the Uniform Trust Code. See Volume 7C Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw

## LIBRARY REFERENCES

Trusts ¶238  
Westlaw Key Number Search. 390k238.  
C.J.S. Trusts § 345

## RESEARCH REFERENCES

### Treatises and Practice Aids

Bogert - The Law of Trusts and Trustees § 530, Survivorship Among Co-Trustees.

## NOTES OF DECISIONS

Surviving or remaining trustees 1

### 1. Surviving or remaining trustees

Reference to trustees of revocable inter vivos trust that used the plural "us" did not limit power to only the joint trustees, but applied to the joint trustees or the sole surviving trustee, where trust provided for surviving joint trustee continuing as sole trustee "[u]pon the death of the survivor of us " Perrenoud v. Harman, 2000, 8 P 3d 293, 411 Utah Adv. Rep. 25, 2000 UT App 241, certiorari denied 13 P 3d 599 Trusts 242

Revocable intervivos trust set up by husband and wife for their benefit during their lifetimes with any remaining assets going to their children from previous marriages, which specifically provided that surviving settlor could not change beneficiaries, did not preclude surviving wife, in her capacity as sole trustee after husband's death, from revoking trust or selling trust assets, where trust granted those powers to trustee. Perrenoud v. Harman, 2000, 8 P.3d 293, 411 Utah Adv. Rep. 25, 2000 UT App 241, certiorari denied 13 P.3d 599. Trusts § 59(1); Trusts § 242

Since husband and wife, as joint trustees of revocable inter vivos trust which held marital residence, had power to sell or dispose of residence, and, under statute and express terms of trust, surviving joint trustee succeeded to all of the powers exercisable by joint trustees, upon death of wife, husband, as sole trustee, had power to sell or dispose of residence. U.C.A.1953, 75-7-405(2). Matter of Estate of West, 1997, 948 P.2d 351, 331 Utah Adv. Rep. 11. Trusts § 191(1)

U.C.A. 1953 § 75-7-405, UT ST § 75-7-405

Current through 2010 General Session

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## **Addendum C**

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7-17-09

FILED DISTRICT COURT  
Third Judicial District

JUL 17 2009

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE DEPARTMENTIN THE MATTER OF THE UNITED EFFORT  
PLAN TRUSTCORRECTED  
RULING AND ORDER ON PENDING  
MOTIONS

Case No. 053900848

Judge Denise Posse Lindberg

Date: July 17, 2009

This matter is before the Court on a number of Motions that have been submitted for decision or are otherwise ripe for determination. They are (1) Willie Jessop's, Dan Johnson's and Merlin Jessop's Motion to Intervene; (2) Lyle Jeffs' and James Oler's Motion to Intervene; (3) Potential Intervenors' Motion to Stay Proceedings, to Replace Special Fiduciary and to Enjoin Further Actions of Special Fiduciary Pending Evidentiary Hearing; (4) Motion for Expedited Discovery; (5) Special Fiduciary's Motion for Relief to Preserve Assets of the Trust; and (6) Arizona Attorney General's Motion for Partial Lift of Stay. Having considered the Motions, the Court rules as follows:

Motions to Intervene and Proposed Intevenor's Other Motions

All the Motions to Intervene are DENIED. The Court has previously determined that individuals who may be potential Trust beneficiaries have no standing to intervene in this action. The memoranda in support of the Motions do not persuade the Court that the proposed Intervenors are uniquely situated or have a particularized interest that satisfies the requirements of Utah Rule of Civil Procedure 24(a). Categorical assertions of interest with respect to Trust property are insufficient to establish a right to intervene under Rule 24(a). What proposed Intervenors must show—which they have not—is that they have a legally cognizable interest in any Trust property. Any “claim of interest” under Rule 24 must have a legal basis; without it, no claimant has a right to a remedy and, therefore, no right to participate in the case as a party.<sup>1</sup>

<sup>1</sup> That said, since the inception of this case the Court has agreed to consider comments from various non-parties, including interested potential beneficiaries, and has broadly noticed its hearings to anyone who is interested. Upon request, the Court has also been willing to include such individuals (or their counsel) in its distribution of Court decisions. Those actions by the Court should not be understood as anything more than what they are—a courtesy to interested individuals and as a way of ensuring that the Court receives relevant input on issues affecting the Trust. The Court remains committed to receiving input from non-parties in order for the Court to be fully and fairly informed on the issues it must decide. However, the Court's courtesies should not be misunderstood to imply that the Court recognizes those individuals as having standing in the case.

It is black letter law that potential beneficiaries of charitable trusts have no right to make claims upon such trusts. Because the UEP Trust is a charitable trust, the only individuals with legally cognizable interests are the Utah and Arizona Attorneys General (A.G.s) as representatives of the community, and the Court-designated Special Fiduciary. The Court reaffirms its prior rulings on standing. The Court also relies upon and incorporates by reference the analysis set forth in Section II.a of the Arizona Attorney General's Office's Memorandum in Opposition to Movants' Motion to Stay Proceedings, to Replace Special Fiduciary, and to Enjoin Further Action of Special Fiduciary.<sup>2</sup> Because the Motions to Intervene must be denied for lack of standing, the proposed Intervenor's remaining motions are also DENIED.

Lifting of Stay/Sale of Berry Knoll property

The Special Fiduciary's Motion for Relief to Preserve Assets of the Trust, and the Arizona A.G.'s Motion for Partial Lift of Stay are GRANTED. During the telephonic status conference held on May 27, 2009, the Court reiterated its position(also expressed during the January 20, 2009 telephonic status conference) that the stay of the proposed sale of the Berry Knoll Farm was predicated upon the timely and unconditional payment of the monthly fees charged for use or occupancy of UEP Trust property. As detailed in the Court's written ruling of June 1, 2009, during its off-the-record meeting with all counsel on November 14, 2008, the Court was asked to stay the proposed sale of the property and grant the various participants a period of time to explore settlement. To induce the Court to take that action, and as a show of "good faith" by the FLDS community, the Court was promised that monthly payments of approximately \$64,000 would be made timely to the Utah A.G. Those payments would then be forwarded to the Special Fiduciary and would be used to meet the Trust's financial obligations. However, at the May 27<sup>th</sup> telephonic conference the Court was informed that the promised payments had not been forthcoming. In light of that information the Court unequivocally ordered that the unpaid occupancy fees be paid "forthwith." Although the payments were five months delinquent, the Court allowed the FLDS to catch-up their payments, in full, through two equal installments payable on June 1 and June 15, 2009. A few days later, on June 1, 2009, the Court issued a written ruling that restated its Order and clarified that the payments were to be made unconditionally. Furthermore, the Court made it clear that if the terms of its Order were not complied with fully, the stay would be lifted and the Court would promptly proceed to consider the proposal to sell the Berry Knoll Farm.

Notwithstanding the Court's Order, and its further requirement that the Utah A.G. immediately forward the payments to the Special Fiduciary for his use in meeting Trust obligations, the payments were made "under protest." That designation effectively rendered the funds unusable by the Special Fiduciary. Further, the Utah A.G. agreed with FLDS representatives that he would not disburse the second payment without FLDS approval. That side agreement is inconsistent with the Court's prior Orders. The Court concludes that the promises and representations upon which the stay of the sale and litigation were predicated have not been honored. As a result, badly-needed funds have not been available

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<sup>2</sup>The Special Fiduciary also filed an opposition, asserting that the Trust lacked sufficient funds to defend against the Motion. The Special Fiduciary requested a hearing to resolve any factual disputes underlying the motions. Because the Motions are resolved on the issue of standing, there are no factual issues to resolve.

to meet the Trust's pressing obligations. Therefore, within two business days of the issuance of this Ruling and Order, the Utah A.G. is ordered to deposit with the Court all of the funds received to date from/or on behalf of the FLDS. The Court will distribute the funds to the Trust to meet its obligations.

Additionally, the Court has no choice but to proceed promptly to set a hearing on the proposed sale of the Berry Knoll Farm. The hearing will be held on Wednesday, July 29, 2009, from 9:00 a.m. to noon, in courtroom W-46 at the Matheson Courthouse. Because of the limited seating available in the courtroom, and in order to avoid potential disruption of other court hearings at the Matheson Courthouse that day, a decorum order for that hearing will be forthcoming shortly.

#### Settlement proposals

The Court has received, and is in the process of reviewing, various settlement proposals that have been filed. The Court is also reviewing the comments received by the June 30<sup>th</sup> deadline. Although the Court's review is not yet complete, it is apparent that there remain widely divergent views on what the appropriate course of action should be. Because of their roles as community representatives in this action, the fact that the Utah and Arizona A.G.s have taken such divergent positions regarding the viability of any settlement is of significant concern. The Court is studying all submissions and considering its options; the Court will announce its decision(s) as promptly as possible.


#### **ORDER**

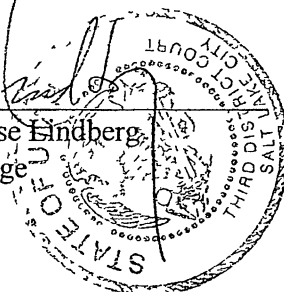
For the reasons stated in this Ruling and Order, the various pending Motions to Intervene and all other motions brought by proposed Intervenors, are hereby DENIED.

A hearing on the sale of the Berry Knoll property will take place on Wednesday July 29, 2009, between 9:00 a.m. and noon, in W-46 of the Matheson Courthouse in Salt Lake City.

Within 48 hours of the issuance of this Ruling and Order, the Utah A.G. shall deposit with the Court all funds received from/on behalf of the FLDS in connection with this action. The Court will assume responsibility for disbursal of the funds to the Special Fiduciary in order to ensure that the Trust's financial obligations are addressed.

SO ORDERED BY THE COURT this 17<sup>th</sup> day of July, 2009.

  
Judge Denise Posse Lindberg  
District Court Judge





## **Addendum D**

NOV-10-2008 MON 02:46 PM 3RD DISTRICT COURT

FAX NO. 8012387542

P. 02/17

352  
11-10-08  
3RD DISTRICT COURT  
Third Judicial District

NOV 10 2008

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE DEPARTMENT

In re: UNITED EFFORT PLAN TRUST

DECISION AND ORDER GRANTING  
THE FIDUCIARY'S MOTION TO  
COMPEL, THE FIDUCIARY'S  
MOTION TO DISQUALIFY COUNSEL,  
AND DENYING MOVANTS'  
EMERGENCY MOTION TO STAY  
SALE OF TRUST PROPERTY

Case No.053900848

Judge Denise Posse Lindberg

¶1 On October 8, 2008, this Court heard oral argument on three motions: (1) a Motion to Compel Compliance with Subpoenas ("motion to compel"), brought by Bruce Wisan in his capacity as Special Fiduciary (the "Fiduciary") of the United Effort Plan Trust (the "Trust"); (2) the Fiduciary's Motion to Disqualify the law firm of Snow, Christensen & Martineau ("SC&M") and attorney Rodney Parker from representing parties in any matters adverse to the Trust; and (3) an Emergency Motion to Stay Sales of Trust Property (the "Emergency Motion") brought by three individuals ("Movants") claiming an interest in Trust property because of their membership in the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS Church") and their present, albeit unauthorized, use of certain Trust property.<sup>1</sup>

¶2 At the end of the hearing the Court made oral rulings GRANTING the Fiduciary's Motion

<sup>1</sup>Movants are three individuals—Willie Jessop, Dan Johnson, and Merlin Jessop—who presumably are active FLDS members, although they do not claim to be official representatives of the FLDS Church. Nevertheless, in several submissions to this Court Movants have included statements to the effect that they are acting "on behalf of themselves and others similarly situated." The Court rejects Movants' suggestion that they represent any persons other than themselves. This is *not* a class action lawsuit. In any event, because the Trust qualifies as a charitable trust, the only individuals clearly authorized by law to represent potential Trust beneficiaries are the Attorneys General of Utah and Arizona.

to Compel, GRANTING the Fiduciary's Motion to Disqualify SC&M, and DENYING AS MOOT the Movants' Emergency Motion. Alternatively, the Court DENIES the Emergency Motion on the basis that the Movants lack standing to request relief.

¶3 The Court asked the Fiduciary's counsel to prepare orders memorializing the Court's judgment. After reviewing the proposed orders submitted by the Fiduciary the Court determined that a more thorough explanation of the reasoning underlying its rulings was appropriate. This Decision and Order expands and clarifies the legal analysis supporting the Court's judgment as announced on October 8. In addition to the analysis provided herein, the Court has also relied upon additional analyses offered in the various submissions by the Fiduciary and the Attorneys General of Utah and Arizona. To the extent those submissions are consistent with the Court's rulings herein, the Court adopts them by reference.

Fiduciary's Motion to Compel Compliance with Subpoenas<sup>2</sup>

¶4 SC&M, joined by attorney Raymond Scott Berry, has opposed the Fiduciary's motion to compel and has resisted subpoenas issued by the Fiduciary on the grounds that the subpoenas violate attorney-client privilege and the attorney work product doctrine.<sup>3</sup> Specifically, SC&M and Mr. Berry (collectively referenced as SC&M), have raised the following arguments: (a) that the Trust is incapable of holding an attorney-client privilege, (b) that the Fiduciary is not a successor to the prior trustees of the Trust, and (c) that even if the Fiduciary can assert the attorney-client privilege as a successor to the prior trustees, the subpoenas are overbroad.

¶5 The Court rejects SC&M's claim that the Trust is not an "entity" capable of holding the attorney-client privilege under Utah R. Evidence 504. SC&M's argument is based upon an unduly cramped reading of R.504. By its terms, Subsection (a)(1) of Rule 504 is drafted broadly to encompass an association, *or other organization or entity* that is rendered legal services or

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<sup>2</sup>This section of this Decision and Order is identical in substance to the analysis presented in the Court's Decision and Order Granting the Special Fiduciary's Motion to Compel Compliance with Subpoenas, filed October 24, 2008, in Case No. 060908716.

<sup>3</sup>As noted in the Fiduciary's Reply memorandum (and again in Court during oral argument), SC&M never responded to the Fiduciary's legal analysis supporting his assertion that the documents referenced in the subpoenas would, in any event, be discoverable under the joint client exception to the attorney client privilege, see Utah R. Evid. 504(d)(5). Similarly, other than a general reference to the attorney work-product doctrine, SC&M failed respond to the Fiduciary's assertion that his need for the documents fell within the exception to the attorney work-product doctrine. Utah R. Civ. P. 26(b)(4). Accordingly, the Court finds SC&M has abandoned those arguments as grounds for objecting to the subpoenas.

consultation with a view to obtaining legal services. This language is broad enough to accommodate trusts. Moreover, Subsection (c) of the Rule acknowledges that the privilege may be claimed by the client or the client's representatives, including a guardian, conservator, successor trustee, or "similar representative of a corporation, association or other organization, whether or not in existence." The Court concludes that the Fiduciary is a "similar representative" within the meaning of R 504.

¶6 SC&M's argument is wholly undermined by prior actions it has taken in the course of its long representation of the UEP Trust and of the FLDS Church. During that time, SC&M and Mr. Parker filed several actions on behalf of the Trust as the sole named Plaintiff.<sup>4</sup> In another case litigated by SC&M on behalf of the Trust and the then-trustees of the Trust, the Trust itself was represented by Mr. Berry, while the trustees of the Trust were separately represented by Mr. Parker.<sup>5</sup> SC&M, Mr. Parker, and Mr. Berry have, by their own actions, acknowledged the Trust's capacity to sue and to retain counsel to represent it in various courts.

¶7 Further support for the Court's conclusion that the Trust is capable of securing legal representation in its own right is found in the many contexts in which the Utah Code has explicitly recognized and defined a trust as a "person" or "entity" for legal purposes.<sup>6</sup> Additionally, even the 1998 Trust (on which much of SC&M's argument relies) states that the Trust is "the legal entity" established to operate a "religious and charitable trust" under the direction of a Board of Trustees. Having so clearly demonstrated their understanding that the Trust is an entity capable of receiving legal representation, SC&M, Mr. Parker, and Mr. Berry are now estopped from asserting a contrary argument.

¶8 SC&M also argues that even if the Trust is capable of holding the attorney client privilege, this Court's reformation of the Trust in 2006 has so fundamentally altered the Trust as redrafted in

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<sup>4</sup> E.g., *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101 P.3d 641; *United Effort Plan Trust v. Chatwin*, CV-04-83 (Superior Court, Mojave County, Az, filed Jan. 29, 2004), *aff'd in part, rev'd in part*, CA-CV 04-0647 (Az. Ct. App. Division One, filed Nov. 08, 2005).

<sup>5</sup> *United Effort Plan, et al., v. Stubbs, et al.*, Case No. 89-2850 (Consolidated case nos. 930500305 QT and 930501020 CV), Fifth Judicial District Court, Washington County, Utah (mem. decision, 21 Jan. 2000), on remand following the Utah Supreme Court's decision in *Jeffs v. Stubbs*.

<sup>6</sup> See Utah Code sections cited at note 2 of the Fiduciary's Reply memorandum in support of the motion to compel.

1998 by Mr. Parker ("the 1998 Restatement"),<sup>7</sup> that it cannot be considered a continuation of the 1998 Trust. While there is greater merit to this argument, the Court ultimately concludes that it, too, fails.

¶9 In 2005, at the request of the Attorneys General of Utah and Arizona, this Court suspended the trustees of the Trust. The Court acted after finding that the then-trustees had violated their fiduciary duties to the Trust and its beneficiaries. Among other things, the Court found that the suspended trustees had failed to defend in various lawsuits filed against the Trust—thereby exposing the Trust to the possibility that default judgments would be entered against it.<sup>8</sup>

¶10 The suspension of trustees left the Court with an immediate need for assistance in administering the Trust and in collecting and preserving Trust assets. The Court appointed Bruce Wisan as Special Fiduciary to administer the Trust and granted him broad authority to act under the Court's oversight. The Fiduciary took over *the very same Trust* that the suspended trustees had overseen. Thus, SC&M's argument is at least partially flawed—the Fiduciary's authority was established over the Trust in the form it existed at the time the trustees were suspended and removed—that is, as it existed under the terms of the 1998 Restatement.

¶11 To be sure, the Court thereafter used its authority under the Probate Code and the common law doctrine of *cy pres* to reform the Trust. At that time the Court *could have* opted to terminate the Trust and directed the distribution of the Trust's assets.<sup>9</sup> But that was not the course the Court

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<sup>7</sup>The Trust's foundational documents were redrafted following the Utah Supreme Court's decision in *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert. denied sub nom Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Bradshaw*, 526 U.S. 1130 (1999). The Utah Supreme Court disagreed with SC&M's argument that the then-existing Trust was charitable in nature. The *Jeffs v. Stubbs* Court found to the contrary, holding that because it had clearly designated beneficiaries, it was a private trust. The redrafted document that became the 1998 Restatement eliminated designated beneficiaries and restated the drafters' intent that the UEP Trust qualify as a charitable trust under Utah law.

<sup>8</sup>The Court also found that the suspended trustees had committed other breaches of trust, including, but not limited to, failing to administer the Trust with reasonable care and caution, failing to account for Trust assets, failing to segregate assets between charitable and private beneficiaries, and failing to appear in Court when ordered to do so.

<sup>9</sup>According to Utah Probate Code §75-7-413, "if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful," the trust does not fail, in whole or in part, nor does the trust property revert to the settlor or the settlor's successors. Rather, at its discretion the Court may apply *cy pres* to modify or terminate a trust. As stated above, the Court

chose to follow. Rather, the Court *preserved* and *reformed* the Trust so as to maintain its legitimate charitable purpose to “provide for Church members according to their [just] wants and their needs . . . .”<sup>10</sup> See Memorandum Decision, December 13, 2005. The Court disagrees with SC&M’s suggestion that the only thing the reformed Trust has in common with the Trust that operated under the 1998 Restatement is the Trust *res*. The reformed Trust continues the charitable mission that was clearly stated as a goal of the 1998 Restatement, and provides a proper and appropriate mechanism to fulfill that purpose.<sup>11</sup> See Reformed Declaration of Trust of the United Effort Plan Trust, filed August 31, 2006.

¶12 The Court does agree with SC&M that the Fiduciary is not a successor *trustee*. The Probate Code makes separate reference to, and grants authority for, the appointment of special fiduciaries and trustees. Clearly, under the Code the two roles are not identical. That said, the Probate Code grants courts great flexibility in defining the role of the fiduciary. In this case, Mr. Wisan, as Fiduciary, has been appointed by this Court and has been given broad authority to administer the Trust until such time as the Court finalizes its oversight of the Trust and appoints a permanent Board of Trustees. In sum and substance, the duties and responsibilities that the Court has established for the Fiduciary are closely analogous to—if not virtually indistinguishable from—the duties and responsibilities that a trustee would have in administering the Trust. The Fiduciary is the person empowered to ‘act’ for the Trust in *all* aspects of its administration until

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decided that the legal purposes of the UEP Trust could be maintained by reforming the Trust.

<sup>10</sup>Under Utah Code §75-7-404, “[a] trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve.” To the extent that any part of the Trust under the 1998 Restatement supported purposes that were not lawful (*e.g.*, polygamy, underage marriages), those portions of the restated Trust would have been void *ab initio*. Therefore, in eliminating those aspects of the Trust that were legally problematic, the Court simply implemented the presumed lawful intentions of the Trust settlor(s).

<sup>11</sup>SC&M’s argument conflates the role of the UEP Trustees with that of the FLDS Church leadership. While it is true that between 1998 and 2005 the same individuals held both positions, that does not mean that the two roles and functions cannot be separated without undermining the legal and legitimate charitable purposes of the Trust. Indeed, as the Court’s Memorandum Decision of December 13, 2005 shows in its section by section analysis of the 1998 Restatement, from the face of the document itself one can discern that two separate, if closely related, entities are contemplated—the United Effort Plan (the “Plan”), and an accompanying Trust. The Plan was intended to operate under the priesthood direction of the President of the FLDS Church. The Trust, on the other hand, was intended to operate under the direction of the Board of Trustees. In reforming the Trust the Court adopted, and gave meaning to, the separate areas of authority and responsibility already recognized by the 1998 Restatement.

such time as the Court terminates its oversight. As the U.S. Supreme Court stated in *Commodity Future Trading Comm'n v. Weintraub*, 471 U.S. 343, 351-52 (1985), "the actor whose duties most closely resemble those of management should control the privilege. . . ." Thus, the Court concludes that, for present purposes, the Fiduciary is the appropriate individual to invoke and exercise the attorney-client privilege on behalf of the Trust.<sup>12</sup>

¶13 The Court is not persuaded by SC&M's argument that the Fiduciary in this case must be viewed differently because he is in an adversarial position to the prior trustees of the Trust. It is true that successor trustees are generally not at odds with the trustees they replace, but that is not always the case. If a prior trustee has committed a breach of fiduciary duty such that the trustee is replaced, the successor trustee has a *duty* to pursue vigorously claims against the prior trustee. In this case the Fiduciary is doing no more than would be expected of a successor trustee who found himself in an analogous situation. Moreover, to accept the position urged by SC&M—that is, that the privilege should be deemed personal to the prior trustees who had originally engaged the firm's services—would place unreasonable hurdle to any successor's ability to fulfill his fiduciary duties. The result would be that the interests of the true client—the trust—would suffer injury. Such a result is inconsistent with the policy purposes that the attorney-client privilege was devised to protect.

¶14 Finally, the Court has reviewed the subpoena requests and finds that they are circumscribed to requesting information directly relevant to the administration of the Trust, or to identifying assets that may be properly claimed by the Trust in satisfaction of judgments entered in its behalf. Accordingly, the Court grants the Fiduciary's motion to compel compliance with the subpoenas.

Motion to Disqualify SC&M from Representing Parties in Any Matters Adverse to the Trust.

¶15 "A party wishing to disqualify opposing counsel under [Utah Rule of Professional Conduct] 1.9 must demonstrate three factors: (1) that a previous attorney-client relationship arose with the moving party; (2) that the present litigation is "substantially factually related" to the

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<sup>12</sup>Although the factual contexts are not identical, the Court finds support for its conclusion in the Supreme Court's decision in *Weintraub*, (holding that a bankruptcy trustee had the power to waive the debtor corporation's privilege with respect to the communications that took place prior to the filing of the bankruptcy petition) and California Supreme Court's decision in *Moeller v. Superior Court*, 16 Cal. 4<sup>th</sup> 1124, 947 P 2d 279 (1997) (holding that the powers of a trustee are not personal to any particular trustee but, rather are inherent in the office of trustee. A successor trustee has all the powers of that office, including the power to assert the attorney client privilege as to confidential communications between a predecessor trustee and an attorney providing services to the trust).

previous representation; and (3) that the attorney's present client's interests are materially adverse to the movant." *Poly Software Int'l, Inc., v. Yu Su*, 880 F. Supp. 1487, 1490 (D. Utah 1995).<sup>13</sup>

¶16 For the reasons stated in the preceding section, the Court rejects SC&M's argument that it did not establish an attorney-client relationship with the Trust. The Court also rejects SC&M's argument that the Trust it represented under the 1998 Restatement is so fundamentally different from the 2006 Reformed Trust that the two cannot be considered the same client for purposes of the attorney-client privilege. The Court has also held that the Fiduciary is the person presently authorized to invoke and exercise the attorney-client privilege on behalf of the Trust. The issue, now is whether SC&M's broad-based and lengthy representation of the Trust mandates its disqualification from representing individuals or entities asserting positions that are materially adverse to the Trust.

¶17 The Fiduciary argues that SC&M's prior representation and advocacy on behalf of the Trust involved matters that are "substantially related" to its present work for the Movants, and that the Movants' claims are materially adverse to the Trust. The Fiduciary argues that under these circumstances, Rule 1.9 requires SC&M to obtain the Fiduciary's express written informed consent before undertaking to represent the Movants. Because SC&M has not obtained written consent from the Fiduciary (on the Trust's behalf), SC&M must be disqualified under Rule 1.9. The Court agrees.

¶18 The Court does not take this action lightly. It is well aware that "disqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary." Memorandum in Opposition to Fiduciary's Motion to Disqualify Counsel, at 5 (quoting *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7<sup>th</sup> Cir, 1982)) SC&M's 17-year history representing the Trust on a broad range of issues foundational to the Trust's existence, authority, and administration, together with its role as the Trust's litigation counsel against persons who claimed rights in Trust property, now requires that it be disqualified from all substantially related

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<sup>13</sup>Rule 1.9(a) provides that an attorney may not represent "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing." Subsection (b) of the rule addresses the ongoing duty of confidentiality, and prohibits the use of confidential information obtained during the representation of the former client unless the former client gives informed consent, confirmed in writing. Subsection (c) focuses on the ongoing duty of loyalty, and prohibits the use of any information obtained during the former representation to the disadvantage of the former client.



matters in which SC&M would advocate positions materially adverse to the Trust.<sup>14</sup>

¶19 Comment 3 to Utah's Rule 1.9 states that "[m]atters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Although Comment 3's reference to matters involving "the same transaction or legal dispute" might suggest a narrow construction to "substantially related" matters, federal case law from the District of Utah and the U.S. Court of Appeals for the Tenth Circuit lead the Court to conclude that this phrase should not be construed in an unduly narrow fashion. For example, in *Poly Software*, the federal district court noted that

[a] 'substantially factually related matter,' . . . is not defined by any particular, discrete legal proceeding. By its terms, it includes aspects of past controversies which are similar, but not necessarily identical, to those encompassed within the present dispute. So long as there are substantial factual threads connecting the two matters, the criteria of Rule 1.9 are met.

880 F.Supp. at 1492.

¶20 In *Smith v. Whatcott*, 758 F.2d 1098, 1100 (10<sup>th</sup> Cir. 1985), the U. S. Court of Appeals for the Tenth Circuit held that "substantiality is present if the factual contexts of the two representations are similar or related." The Tenth Circuit elaborated on this issue in *SLC Ltd. V v. Bradford Group West, Inc.*, 999 F.2d 464, 467 (10<sup>th</sup> Cir. 1993), holding that substantiality "focus[es] on the factual nexus between the prior and current representations rather than a narrower identity of legal issues." Moreover, "if there is a reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation, a substantial relation between the two cases is presumed." *Id.*, quoting *Trone v. Smith*, 621 F.2d 994, 998 (9<sup>th</sup> Cir. 1980). Notably, all three of these cases (*Poly Software*, *Whatcott*, and *SLC Ltd. V*), the federal courts were construing the substantiality requirement under Utah's Rule 1.9. The analyses adopted in those decisions are persuasive and will be followed by this Court.

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<sup>14</sup>Most relevant for present purposes are the many times that SC&M advocated the Trust's ownership of property and its right to control that property to the exclusion of any interest by individuals who may have previously contributed to, or received benefits from, use of such property. That said, the Court's decision to disqualify SC&M applies more broadly than just to those issues presently before the Court. Because of the broad range of issues in which SC&M provided legal services to the Trust over its 17 year representation, SC&M should be disqualified from representing adverse parties on any and all other issues substantially related to those encompassed by SC&M's former involvement with the Trust.

¶21 Applying the above reasoning to the facts of this case, it is abundantly clear that during the 17 years that SC&M (and, in particular, Mr. Parker) represented the Trust, SC&M advocated positions on matters “substantially factually related” to those presently at issue before this Court. Furthermore, the positions previously advocated by SC&M on behalf of the Trust are directly contrary to their present arguments on behalf of the Movants. For example, SC&M does not dispute that the 1998 Restatement drafted by Mr. Parker expressly provided that any donations to the Trust would be made “without any reservation or claim of right and/or ownership,” and that “use of property owned by the [Trust] is not and does not become a right or claim of anyone who may benefit in any way from the Trust.” SC&M, on behalf of the Trust, vigorously litigated this position in several cases referenced *supra* at note 4. In those cases SC&M argued that persons using Trust land were “tenants-at-will” and their permission to use Trust land could be revoked by the Trust at any time. See, e.g., *UEP v. Holm*; *UEP v. Chatwin*. See Exhibits D, E, to Fiduciary’s Reply Memorandum. Now, in its Memorandum in Support of [the Movants’] Emergency Motion for Stay of Sale of Trust Property [hereinafter “Emergency Motion”], SC&M argues that the Movants “presently ha[ve] a stewardship from priesthood leadership” to use Trust land,<sup>15</sup> and that such use invests them with “rights” to seek an injunction against the Fiduciary in order to prevent the sale of certain Trust land.<sup>16</sup>

¶22 After carefully reviewing applicable case law in light of the breadth of SC&M’s prior representation of the Trust and the arguments it is now making *against* the Trust, the Court is persuaded that the substantiality requirement is satisfied in that there is “a factual nexus between [SC&M’s] prior and current representations.”

¶23 In *Bodily v. Intermountain Health Care Corp.*, 649 F. Supp. 468 (D. Utah 1986), the court quoted the Tenth Circuit decision in *Whatcott* as follows:

Once a substantial relationship has been found, a presumption arises that a client

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<sup>15</sup>Because they have never requested authorization to use Trust property from the Fiduciary or this Court, Movants cannot claim any right to use and benefit from Trust land as they have admitted doing. Movants’ admissions strongly suggest that they are trespassing upon Trust property and converting assets derived from Trust land.

<sup>16</sup>But see *infra* discussion regarding Movants’ Emergency Motion. The Court assumes, without deciding, that the Movants are members of a large and indefinite class of individuals who may be beneficiaries of the Trust. The Court has set up an orderly and structured process by which members of the beneficiary class may request, but are not necessarily entitled to receive, specific benefits from the Trust. To date, Movants have chosen not to participate in that process. Therefore, their admitted use of Trust property outside the authorized process gives them no rights to object to the use or disposition of Trust property.

has indeed revealed facts to the attorney that require his disqualification. The majority of circuits that have considered the issue have held this presumption to be irrebuttable. We agree. The presumption is intended to protect client confidentiality as well as to avoid any appearance of impropriety 649 F. Supp. at 473-74 n.10 (quoting *Whateott*, 757 F.2d at 1100).

¶24 Furthermore, as the Ninth Circuit explained in *Trone*:

The underlying concern is the possibility, or appearance of the possibility, that the attorney *may have* received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought. *The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule was intended to protect. The inquiry is for this reason restricted to the scope of the representation engaged in by the attorney. It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.* *Id.*, at 999 (emphasis added) <sup>17</sup>

¶25 Because many of the matters in which SC&M represented the Trust in the past are substantially related to SC&M's present representation, there is an irrebuttable presumption that confidential communications were exchanged between SC&M and the Trust during SC&M's lengthy representation. The Court rejects SC&M's suggestion that the Trust must offer specifics about what confidential communications may have been exchanged. As the *Trone* court stated, "it is the *possibility* of the breach of confidence, not the fact of the breach, that triggers disqualification." That standard is more than met here. Therefore, the Court grants the Fiduciary's motion to disqualify SC&M. Absent express written informed consent obtained from the Fiduciary, Utah R. Prof. Conduct 1.9 bars SC&M generally, and Mr. Parker in particular, from representing any parties adverse to the Trust on matters substantially related to the broad range of issues covered during their prior representation of the Trust. It also stands to reason that SC&M attorneys should be barred from doing *indirectly* what Rule 1.9 prohibits them from doing directly. Were it otherwise, the protection offered by Rule 1.9 would be easily circumvented. Therefore the Court holds that SC&M cannot consult or advise adverse parties (or their legal representatives) on matters substantially related to SC&M's former representation of the Trust.

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<sup>17</sup>Although some of *Trone*'s broad language about the disqualification of other lawyers in a firm once one attorney has been disqualified has been called into question by subsequent cases, the principle for which the *Trone* decision is cited here is still good law and has been followed by other state and federal courts.

Emergency Motion to Stay Sale of Trust Property

¶26 Movants filed their Emergency Motion on August 18, 2008, asking the Court to enter an order “staying all transactions involving UEP Trust property for a period of 90 days; and further that the Court enter an order prohibiting the Special Fiduciary from entering into any binding transactions to sell Trust property without making such transactions subject to Court approval, and providing movants with notice and an opportunity to be heard.” Memorandum in Support of Emergency Motion, at 1-2. Movants also requested that the Court enter a preliminary injunction to protect Movants’ alleged “rights.”<sup>18</sup> *Id.* at 14.

¶27 In opposition to the Emergency Motion, the Fiduciary argues that it is nothing more than a belated collateral attack on prior determinations and Orders of this Court. Memorandum in Opposition to Emergency Motion, at 2-3. Quoting Movants’ own admissions the Fiduciary argues that Movants lack standing to request relief because they “have no enforceable rights with respect to the Trust and cannot suffer any legally cognizable injury with respect to [sic] thereto.” *Id.*, at 19. In any event, the Fiduciary argues, the Emergency Motion should be denied “based upon waiver and unclean hands.” *Id.*, at 23. Finally, the Fiduciary argues that the 2006 revisions to the Trust do not require him to request Court approval before selling or otherwise disposing of Trust assets.

¶28 The Attorney General of Utah agrees with the Fiduciary that Movants lack standing to request relief because the Court has determined that the Trust is charitable in nature. Utah Attorney General’s Objection to the Emergency Motion for Stay of Sales of Trust Property, at 3. [“Utah AG Objection”]. Indeed, the Utah Attorney General argues that the only parties with legal standing to enforce terms of the reformed Trust are the Attorneys General of Utah and Arizona, the Fiduciary, and, once assigned, the Board. AG Objection, at 4. The Utah Attorney General [Utah AG] also agrees that “the Fiduciary is not presently under an obligation to obtain court approval on sales or distributions of Trust property,” but citing Utah Code Ann. §75-1-302(2), the Utah AG argues that “the Court [has] jurisdiction to limit the power of the Fiduciary as it deems appropriate.” *Id.*, at 5. Furthermore, he suggests “there is merit to requir[ing] court approval in limited circumstances,” although “[a]ny limitation placed by the Court upon the Fiduciary’s power . . . should be narrow.” *Id.*, at 6. The Utah AG offers certain suggestions for the Court to consider if it decides to require that the Fiduciary give notice regarding an anticipated sale or distribution of

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<sup>18</sup>Movants never explain how they have acquired “rights” against the Trust when they themselves acknowledge that under the express terms of the 1998 Restatement (with which they agree), their contributions of time or substance were made “without any reservation or claim of right and/or ownership” and their “use of property owned by the [Trust] is not and does not become a right or claim of anyone who may benefit in any way from the Trust.” See also *infra* ¶31 (Movants’ admission that they had “no enforceable beneficial interests” in the Trust).

Trust property. *Id.*, at 7.

¶29 The Arizona Attorney General argues that the Emergency Motion fails because (1) the “type of notice relief they request is within the Court’s discretion but not mandatory”; (2) “any attempt[s] to challenge the reformation of the [Trust] and the Court’s administration of the Trust are barred by the doctrine of laches”; and (3) the Movants have failed “to establish the prerequisites to injunctive relief.” Arizona Attorney General’s Response to Emergency Motion for Stay of Sales of Trust Property, at 1-2 [“Arizona AG Response”].

¶30 At oral argument, counsel for Movants conceded that the Emergency Motion was “probably moot” because its primary purpose was to ensure that the Fiduciary not conduct a sale of the Berry Knoll property “in secret,” and as a result of the October 8 hearing (and the Fiduciary’s submissions in anticipation of that hearing), that purpose had been accomplished. The Court accepts Movants’ concession and therefore holds that the Emergency Motion should be denied as moot. However, in the event a reviewing court were to find that the Emergency Motion is not moot, the Court alternatively holds that Movants lack standing to assert any claim for relief.

¶31 In their memorandum in support of the Emergency motion, Movants admit that “[a]s participants in a charitable trust in which they had no enforceable beneficial interests, they were [] powerless to challenge or change [the Court’s decision to remove the prior trustees of the Trust].” This admission is fatal to their Emergency Motion. If this statement was true with respect to any claims by potential beneficiaries under the 1998 Restatement, it is all the more true under the Court’s 2006 Trust reformation. As they themselves recognize, because of its charitable nature Movants have no legal standing to assert *any* claim with respect to this Trust.

¶32 This conclusion requires that the Court correct and clarify certain prior statements it has made. *See, e.g.*, Minute Entry of July 19, 2005 (the “Minute Entry”); Memorandum Decision dated December 13, 2005 (referencing the Minute Entry). In those earlier rulings the Court used language imprecisely and in a way that could lead Movants and other interested individuals to conclude that they have “standing” to make demands upon the Trust. Specifically, in its Minute Entry the Court stated that “all beneficiaries of the UEP, including those who have brought civil actions against the Trust” had “standing” to nominate trustees. In reviewing the substance of that Minute Entry it is evident that the Court’s reference to “standing” was unfortunate, and, more to the point, was legally incorrect. The Court was focused on encouraging “interested parties”<sup>19</sup> to

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<sup>19</sup>For that matter, the phrase “interested parties” is also a misnomer that should be corrected. As with “standing,” “party” or “parties” are terms of art that are not applicable to persons asserting that they are eligible for beneficiary status under the Trust. Therefore, going forward, those persons who have previously been referenced in these Court proceedings as “interested parties” will now be referred to as “interested individuals.”

nominate individuals to a future Board of Trustees. In the course of doing so the Court misused a legal term of art when it stated that "all beneficiaries of the UEP, including those who have brought civil actions against the Trust" had "standing." "Standing" has a clearly defined meaning in law, and the Court's Minute Entry may have created confusion on this matter. If so, the Court apologizes for that misstep. The Utah AG correctly notes that with respect to charitable trusts, there are a limited number of parties with "legal standing." That does not mean, however, that the Court cannot invite other interested individuals to participate and/or comment on issues before the Court involving the Trust. That is all that the Court intended to convey by its Minute Entry.

¶33 As it did in July 2005, the Court—and the Fiduciary—have tried through many means (*e.g.*, mailings, a website, and regular Court hearings), to keep interested individuals informed of developments concerning the Trust. The Court continues to believe that it is advisable and appropriate—within reason—to provide various mechanisms through which members of the potential beneficiary class can comment on issues involving the Trust and its administration. The Court emphasizes that this opportunity to comment is *not* an entitlement, and that the mechanisms that the Court may employ from time to time to inform members of the beneficiary class of issues related to the Trust and Trust assets are not "set in stone." The fact that, on certain occasions, the Court may employ one or more means for communicating information to interested individuals does not mean that the Court is bound to do so on *every* occasion. Additionally, the fact that the Court has sought (and in the future may seek) comment from interested individuals regarding the Trust and its administration "does not establish a substantive right to require Court action." Utah AG Objection, at 4.

¶34 Within the bounds of reasonableness, interested individuals should have mechanisms available to them through which they can stay informed about major issues involving the Trust. That said, there are legitimate reasons why the Fiduciary may, on occasion, decline to announce immediately his intent to take certain actions. It is entirely appropriate for the Fiduciary to exercise his best business judgment in determining when a particular issue of Trust administration is ready for public airing. The history of this case has been that in prior attempts to be "transparent" about Trust administration, individuals intent on undermining the work of the Trust, the Court, and/or the Fiduciary have used such information as a weapon against the Trust, thereby causing the Trust to incur unnecessary losses and/or expense. The Court is satisfied with the course of action that the Fiduciary has followed over the past three years to keep the Court informed of his activities on behalf of the Trust, including his management of Trust assets. The Court therefore declines the invitation to impose rigid requirements on how the Fiduciary is to discharge his responsibilities to the Trust.

¶35 The Court specifically rejects any argument that the Court must hold public hearings or that the Fiduciary must seek Court approval prior to *any* disposition of Trust property. The Court also rejects demands by Movants or other interested individuals to conduct discovery in advance of any such actions by the Fiduciary.

¶36 As it stated during the October 8, 2008 hearing, the Court has no intention to micro-manage the Trust or to second-guess every decision of the Fiduciary. Nevertheless, the Court reserves the right to require that it receive advance notice of, and explanation for, proposals to dispose of major Trust assets. The Utah AG suggested that the Court adopt a threshold value of \$100,000 before the Fiduciary would be required to obtain Court approval to dispose of Trust assets. The Court concludes that the threshold amount suggested by the Utah AG would unnecessarily restrict the Fiduciary's ability to exercise his business judgment on behalf of the Trust and would enmesh the Court unduly in the day to day administration of the Trust. As stated previously, the Court has been satisfied with the Fiduciary's performance and his efforts to keep the Court apprised of issues. After considering the matter further, however, the Court concludes it is reasonable to require the Fiduciary to seek advance Court approval of transactions involving \$500,000 or more in Trust assets. The Court has considered the other procedural suggestions offered by the Utah AG and concludes that in those instances when advance Court approval is required, the AG's suggestions are reasonable and can be implemented without imposing significant additional burdens upon the Trust. Accordingly, the Court will adopt the suggested guidelines for those instances involving disposition of major Trust assets.

¶37 As a final matter, the agrees with the Fiduciary that the Emergency Motion appears, at bottom, to be a collateral attack upon the Court's jurisdiction over and reformation of the Trust. The Court further agrees with the Arizona AG that any attempts to challenge the Court's authority and jurisdiction over the reformed Trust are barred by laches. In this respect the Court adopts by references the arguments put forward by the Fiduciary and the Utah and Arizona AGs

#### ORDER

¶38 Based on the foregoing, the Court GRANTS the Fiduciary's Motion to Compel Compliance with the Subpoenas, GRANTS the Fiduciary's Motion to Disqualify SC&M, and DENIES AS MOOT Movants' Emergency Motion. Alternatively, the Court DENIES the Emergency Motion on the basis that Movants lack standing to request relief.

¶39 SC&M and Mr. Berry shall respond promptly and fully to the subpoenas.<sup>20</sup>


¶40 SC&M and Mr. Parker are disqualified from advising, consulting, or representing any litigants adverse to the Trust in any matter that is substantially related to any of the issues on which they previously represented the Trust.

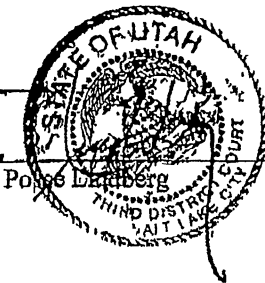
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<sup>20</sup>The Court is aware that Movants have now filed a motion to stay these Orders pending appellate review. The Fiduciary has not yet had an opportunity to respond, so the Court will not address that issue here.

¶41 This Decision and Order shall suffice as the final expression of the Court's judgment on these issues. Counsel need not submit any separate Orders.

So Ordered by the Court this 10<sup>th</sup> day of November, 2008.

  
Judge Denise Ponce Liebberg





MAILING CERTIFICATE

I hereby certify that on the 10<sup>th</sup> day of November, 2008, I sent  
via facsimile and mail a true and correct copy of the foregoing  
Minute Entry, addressed as follows:

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## **Addendum E**

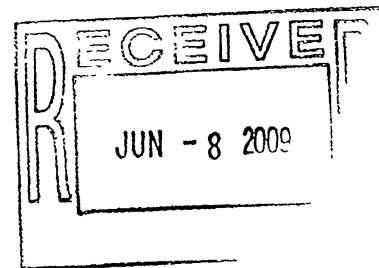
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Attorneys for State of Arizona Attorney General's Office



**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR**

**SALT LAKE COUNTY, STATE OF UTAH**

IN THE MATTER OF THE UNITED  
EFFORT PLAN TRUST Dated November 9,  
1942, Amended April 10, 1946, and  
Amended and Restated on November 3,  
1998; and its TRUSTEES, including known  
trustees TRUMAN BARLOW, WARREN  
JEFFS, LEROY JEFFS, WINSTON  
BLACKMORE, JAMES ZITTING and  
WILLIAM E. JESSOP a/k/a WILLIAM E.  
TIMPSON and DOE TRUSTEES I  
THROUGH IX.

MEMORANDUM IN OPPOSITION TO  
MOVANTS' MOTION TO STAY  
PROCEEDINGS, TO REPLACE SPECIAL  
FIDUCIARY, AND TO ENJOIN  
FURTHER ACTIONS OF SPECIAL  
FIDUCIARY PENDING EVIDENTIARY  
HEARING

Civil No. 053900848

Judge Denise P. Lindberg

The Court should deny Movants' Motion To Stay Proceedings, To Replace Special Fiduciary, And To Enjoin Further Actions Of Special Fiduciary Pending Evidentiary Hearing ("Motion to Stay") because:

- 1) Movants' Motion to Stay is an attempt to reargue the Court's previous holdings in this matter.
- 2) Movants lack standing and are equitably estopped from bringing their claims.

- 3) Movants' requested relief is procedurally unsound and equitably unacceptable.<sup>1</sup>

**I. MOVANTS' MOTION FOR STAY IS AN ATTEMPT TO REARGUE THE COURT'S PREVIOUS HOLDINGS IN THIS MATTER.**

**a. Movants' Motion for Stay is actually a Motion for Reconsideration.**

Movants' Motion for Stay is actually a belated motion for reconsideration of the Court's November 10, 2008 Decision and Order. In its original Motion for Stay of Sales of Trust Property, Movants Willie Jessop, Dan Johnson, and Merlin Jessop asked the Court "for an emergency order staying all transactions involving UEP Trust property" and "prohibiting the Special Fiduciary from entering into any binding transactions to sell Trust property without making such transactions subject to Court approval, and providing movants with notice and an opportunity to be heard." (Emergency Mot. for Stay of Sales of Trust Property 1-2.) Movants' current Motion for Stay asks the Court to grant identical relief: a request to intervene and be heard on the sale of Trust property, stay further actions by the Fiduciary, and an evidentiary hearing. (Mot. to Stay 18.) The Court should deny Movants' Motion for Stay absent a showing of new facts or legal authority that could not have been brought to its attention earlier.

**b. Movants' Motion for Stay is a Collateral Attack on the Court's 2006 Trust Reformation.**

Movants' Motion is another collateral attack on the Court's 2006 Trust Reformation. "Issue preclusion," also referred to as "collateral estoppel," prevents parties or their privies from relitigating issues which were once adjudicated on the merits and have resulted in a final judgment. *Brigham Young University v. Tremco Consultants, Inc.*, 110 P.3d 678, 686 (2005). Movants assert that their "Motion to

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<sup>1</sup> Movants also raise similar – if not identical – arguments in Movants' Motions to Intervene. The Movants' arguments are discussed in the Arizona Attorney General's Response to Emergency Motion for Stay of Trust Property, and its memorandums in opposition to Movants' motions to intervene. This memorandum incorporates by reference the arguments made in those papers.

Intervene seeks to fill a void.” (Mot. to Stay 12-13.) But, Movants’ continued assertions of standing are simply collateral attacks on the Court’s default judgments against the previous trustees and reformation of the United Effort Plan Trust (“Reformed Trust” or “Trust”). Despite Movants’ desire to turn back the clock to before the Trust’s reformation, their claims are collaterally estopped. *See e.g. Snyder v. Murray City Corp.*, 73 P.3d 325, 332 (2003).

## **II. THE COURT SHOULD UPHOLD ITS PREVIOUS DECISION TO DENY THE MOVANTS STANDING.**

Movants allege misconduct by the Fiduciary in the hope that the Court will reverse its previous rulings and grant them standing. However, even assuming any of Movants’ allegations were substantiated, they do not grant Movants standing. Movants do not have standing because: (a) at most, they are potential charitable trust beneficiaries; (b) they cannot intervene at this stage in the litigation; and (c) their claims are barred by the doctrines of laches and promissory estoppel.

### **a. Movants Do Not Have Standing as Charitable Trust Beneficiaries.**

The Court’s Decision and Order declares that “because of its charitable nature Movants have no legal standing to assert *any* claim with respect to this Trust.” (Court’s November 10, 2008 Decision and Order 12.) The Court’s denial of standing is supported by public policy and the general common law rule. Rest. 2d Trusts §§ 364, 391 (West 2009).

To begin with “suits by a representative of a class of potential beneficiaries should aim to vindicate the interest of the entire class and should be addressed to trustee action that impairs those interests, not the interests of a given individual.” *Hooker v. EDES Homes*, 579 A. 2d 608, 615 (1990). Movants’ Motion places their interest over those of all other Trust beneficiaries, focusing solely on the proposed sale’s effect on their revocable religious stewardships. (Mot. to Stay 4, 12-13.) Movants do not claim to vindicate the interest of all potential Trust beneficiaries. In fact, Movants assert just the

opposite - claiming to represent the interest of only “faithful” FLDS Church members. (*Id.* at 4, 10.)

Furthermore, the public policy behind the decision to limit standing is “the avoidance of a multiplicity of lawsuits challenging the trustee’s discretionary day-to-day administration of the trust.” *Hooker*, 579 A.2d at 614. Giving potential charitable beneficiaries the right to challenge the Fiduciary’s administrative actions raises the danger of the proliferation of wasteful lawsuits. *Id.* Movants have previously demonstrated a tendency to engage in repetitive litigation. *Id.* Since August 2008, Movants have filed Motions for a Temporary Restraining Order, Preliminary Injunction, Emergency Motion to Stay the Sale of Property, two Motions to Intervene, Motion to Stay Proceedings, Motion to Replace the Special Fiduciary, Motion to Enjoin Further Actions of the Fiduciary Pending Evidentiary Hearing, and a Motion for Expedited Discovery. These are just the motions filed in this Court, and does not account for Movants’ related filings in U.S. District Court, Mohave County, Arizona, and before the Utah Supreme Court. The Court should not allow “potential beneficiaries to clog court dockets and dissipate trust assets with attacks on ordinary exercises of trustees’ judgment.” *Id.* at 615.

Movants argue that they are entitled to a special interest exception to the general rule denying them standing, but they do not qualify for such an exception. The party claiming the special interest must establish that: (1) he or she is part of a class of potential beneficiaries that is sharply defined and limited in number; and (2) the challenge to the trustee’s actions must be fundamental and not a challenge to the trustee’s normal exercise of discretion. *Hooker*, 579 A.2d at 612-16. Movants do not satisfy either of these criteria. The Court, in its December 13, 2005 Memorandum Decision, determined that the Trust’s class of beneficiaries is potentially in the thousands and indefinite. (Court’s December 13, 2005 Mem. Decision, 13.) The existence of thousands of indefinite beneficiaries cannot meet the requirement that the class be sharply defined and limited in

number. *See Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458, 465, 490 N.Y.S.2d 116, 119, 479 N.E.2d 752, 755 (1985).

The sale of Trust property is not of a fundamental nature and outside of the Fiduciary's discretion. The proposed sale of Berry Knoll Farm, which by all accounts has largely sat fallow for the past several years, is not an "extraordinary measure threatening the existence of the trust. . . ." *Hooker*, 579 A.2d at 614-15. The sale of property is an ordinary exercise of discretion on a matter expressly committed to the Fiduciary. (Reformed Trust § 5.3.5.) There is no credible allegation that the Trust itself will cease to exist if the Berry Knoll Farm is sold.

Movants' claimed special interest in Trust property is also unenforceable under the provisions of the Reformed Trust. (Reformed Trust, §§ 2.4, 4.1, 6.4.9.) Movants now claim to seek intervention directly on behalf of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS Church"). (Mot. for Stay 4.) Even assuming Movants' allegations are true, membership in a religious sect historically affiliated with the Trust does not automatically give Movants standing. Members of a religious sect are not given standing in an action where the interest of the members are too general or remote, or are otherwise adequately protected. *Krauthoff v. Attorney Gen.*, 240 Mass. 88, 92, 132 N.E. 865, 866 (1921). Movants' self-proclaimed revocable religious and economic stewardships over Trust property are insufficiently remote and too general to establish standing. (*See* Court's November 10, 2008 Decision and Order, 9, f.n. 15.) Moreover, Movants have not demonstrated a special interest in the Berry Knoll Farm that can be adopted by the Fiduciary or recognized by the Court without violating the Reformed Trust's religious neutrality requirement. (Reformed Trust §§ 2.4, 4.1, 6.4.9.) Movants do not claim an interest based on any factor apart from their religious stewardships, but, granting Movants standing based solely on their alleged religious stewardship over the Berry Knoll Farm would contradict the secular terms and intent of the Reformed Trust.

Movants' situation is analogous to the New Jersey case of *Larkin v. Wikoff*, 72 A. 98, 75 N.J. Eq. 462 (1907). In *Larkin*, church members sued to prevent the sale of church property. *Larkin*, 72 A. at 102-03. In denying the church members' claims, the New Jersey Court emphasized that the trustees' broad discretion in administering the trust afforded them wide latitude in implementing the trust so long as they acted in good faith and were "not influenced by improper motives." *Id.* at 104. Here, there is no evidence that the proceeds from the sale of the Barry Knoll Farm will be used for anything other than to pay the debts incurred in administering and defending the Trust.

- b. As a general rule individuals are barred from intervention after judgment and the Court should not deviate from the general rule at this late stage.**

Movants failed to appear prior to the Court's 2006 reformation of the Trust. As a general rule, intervention is not permitted after a court has entered judgment. *Oster v. Buhler*, 989 P.2d 1073, 1077, 380 Utah Adv. Rep. 24 (1999). The Court's 2006 reformation of the Trust is an entry of judgment. *In re Estate of Christensen*, 655 P.2d 646, 648 (1992). Movants waited years before attempting to intervene in this matter, and did not attempt to engage the Court or the Fiduciary despite the significant notice provided to their community. (See Arizona Attorney General's Resp. to Emergency Mot. for Stay of Sales of Trust Property, 4-6.) Nor do Movants provide any justification for why they did not seek intervention earlier. *Jenner v. Real Estate Services*, 659 P.2d 1072, 1074 (1983). The Court should be reticent to allow the Movants to intervene after having for years ignored the Court's and the Fiduciary's requests to participate in the Trust proceedings.

- c. Movants' claims are barred by laches and equitable estoppel.**

Movants' challenges are barred by laches. See *Nilson-Newey & Co. v. Utah Resources Int'l.*, 905 P.2d 312, 314 (1995). In its Decision and Order, the Court stated that any attempts to challenge the Court's authority and jurisdiction over the Reformed Trust are barred by laches. (Court's November 10, 2008 Decision and Order, 14.)



Movants' actions demonstrate a lack of diligence and would result in an injury to the Trust and community members who have relied on the Fiduciary's administration of the Trust for the previous several years. *Papanikolas Bros. Enterprises v. Sugarhouse Shopping Ctr. Assoc.*, 535 P.2d 1256, 1260 (1975).

The doctrine of equitable estoppel operates similar to the doctrine of laches. *See Rothery v. Walker Bank & Trust Co.*, 754 P.2d 1222, 1224 (1988). For equitable estoppel to apply there must be: (1) a representation, act, or omission, (2) justifiable reliance, and (3) a change of position to one's detriment based on that reliance. *Id.* Movants failed to act and the case has proceeded with all involved justifiably relying on the fact that no further timely objections to the Trust's reformation existed. The Fiduciary has administered the Trust and taken action in reliance on the Trust's reformation. Movants are therefore equitably estopped from claiming that the Fiduciary's actions in administering the Trust are a violation of their rights.

**d. The Court has agreed to consider Movants' comments on the proposed sale of the Berry Knoll Farm and Movants' due process allegations are unfounded.**

In its November 10, 2008 Minute Entry, the Court held that "[a]lthough the Court determined that Movants had no legal standing to challenge the anticipated sale of the property –and consistent with past practice – the Court agreed to schedule another hearing on the Fiduciary's proposal." (Court's November 10, 2008 Mem. Decision, 1.) The Court has agreed to read Movants' comments on the proposed sale and Movants are not entitled to any further relief.

Movants' due process claims are also tenuous and unproven. "To prevail on a due process claim, a party must first establish that it has a "protectible property interest." *Heideman v. Washington City*, 155 P.3d 900, 906 (2007). A protectible property interest "is an interest in which one has 'a legitimate claim of entitlement.'" *Patterson v. Am. Fork City*, 67 P.3d 466, 466 (2003). "It is not an 'abstract need for, or [a] unilateral

expectation of, a benefit.” *Hyde Park Co. v. Santa Fe Council*, 226 F.3d 1207, 1210 (2000). “Rather, it is a ‘right to a particular decision reached by applying rules to facts.’” *Fluery v. Clayton*, 847 F.2d 1229, 1231 (1988). At most, Movants are asserting a unilateral expectation of a potential benefit and are thus not entitled to due process. As potential charitable beneficiaries, Movants do not possess a protectible property interest and under the Reformed Trust cannot make a legitimate claim of entitlement.

Further, Movants cannot claim a realistic deprivation of due process in light of the considerable and varied notice provided by the Court and the Fiduciary both before the Trust’s reformation and during its administration. Movants’ due process claims are also discredited by the Court’s stated willingness to hold a hearing on the sale of the Berry Knoll Farm and to consider interested individuals’ comments on the Fiduciary’s disposition of Trust assets worth more than \$500,000.

### **III. MOVANTS’ REQUESTED RELIEF IS PROCEDURALLY UNSOUND AND EQUITABLY UNACCEPTABLE.**

- a. Movants’ requested relief is not within a Probate Court’s jurisdiction and the Fiduciary’s decision to sale Trust property is reviewable under an abuse of discretion standard.**

Movants’ claims appear to be at some level a claim of title to the Berry Knoll Farm and other Trust property. For example, Movants assert that “[t]he Bishops had had specific responsibility for ensuring the proper use and disposition of Trust assets under the original Trust, and they maintain that responsibility to the extent they can do so under the Reformed Trust.” (Mot. to Stay 13.) To the extent Movants are making a claim to title on the Berry Knoll Farm or any other Trust property, such claims are not within the Court’s jurisdiction while sitting in probate. *In re Rogers’ Estate*, 284 P. 992, 997, 75 Utah 290 (1930).

In addition, under the Reformed Trust’s terms the Fiduciary has the discretion to sale property for any legitimate Trust purpose. (Reformed Trust § 5.3.5.) “When a

trustee has discretion with respect to the exercise of power, its exercise is subject to supervision by a court only to “prevent abuse of discretion.” Rest. 3d Trusts § 87 (West 2007). “What constitutes an abuse of discretion depends on the terms and purposes of the trust. . . .” Rest. 3d Trusts § 87, *Comment a.* (West 2007). “An abuse of discretion may result from the exercise of discretionary authority in bad faith or from improper motive. Thus, a discretionary power is abused if a trustee acts dishonestly, such as when the trustee receives an improper inducement for exercising the power in question.” Rest. 3d Trusts § 87, *Comment c.* (West 2007). A court may also intervene “if it finds that the trustee's conduct, in exercising a discretionary power, fails to satisfy the applicable standard of care, skill, and caution.” *Id.* In this case, the Reformed Trust grants the Fiduciary the authority to sale Trust property and the only limitation the Court placed on that authority is to require Court approval for the sale of Trust assets worth more than \$500,000, which the Fiduciary has done with respect to its proposed sale of the Berry Knoll Farm. Nothing in the Fiduciary’s proposed sale of the Berry Knoll Farm suggest a disregard for the Trust’s terms and purposes, or the applicable standard of care, skill, and caution required in administering the Trust.

**b. Granting Movants’ requested relief is inconsistent with basic principles of justice and equity.**

It is “fundamental that equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief.” *Salt Lake County v. Kartchner*, 552 P.2d 136, 140 (1976). “This fundamental principle is expressed in the maxim: ‘He who comes into court of equity must come with clean hands.’” *Id.* Movants’ Motion touts their participation in the recent settlement negotiations, stating “[t]hey have indisputably participated in the settlement discussion in good faith.” (Mot. to Stay 3.) Movants’ Motion, however, fails to mention their failure to pay the Court ordered occupancy fees since January 2009. On June 1, 2009, Movants and other members of the community paid under protest three months of occupancy fees,

alleging that “we should not be required to pay the occupancy fees until Harker Farm came back to our control.” *See* Exh. 1, Monday, June 1, 2009 Press Release. At the time of the filing of this Memorandum, Movants still owed an additional three months of occupancy fees.

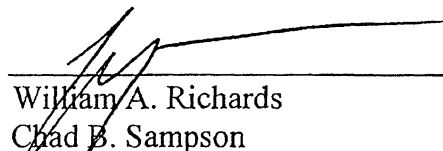
A Court of equity is also reluctant to reward a party who has been dilatory in seeking his remedy, as equity aids the vigilant. *Jacobson v. Jacobson*, 557 P.2d 156, 159-60 (1976). Movants claim to represent the interest of the FLDS Church. Assuming this is true, they then must also accept that it was FLDS Church leadership that abandoned protection of the Trust requiring the Court to appoint the Fiduciary and reform the Trust. (Court’s December 13, 2005 Mem. Decision, 10.) Also, FLDS Church leaders have not provided the accounting ordered by this Court more than four years ago. (*See* Court’s June 22, 2005 Order, 5.) There is little evidence that Movants or other leaders of the FLDS Church attempted to cooperate with the Fiduciary in defending the assets of the Trust from suit, indeed the FLDS Church and its leaders defaulted on at least two lawsuits leaving the Fiduciary to defend the assets of the Trust. (Court’s November 10, 2005 Decision and Order, 13.) Equity is reserved for those who are themselves acting in fairness and good conscience. *Jacobson*, 557 P.2d at 158. It is unfair to allow individuals who claim to represent an entity that abandon the Trust and provided little if any help to the Fiduciary in protecting the assets of the Trust to reappear and gain standing at the eleventh hour for the sole purpose of preventing the Fiduciary’s continued administration of the Trust.

#### **IV. CONCLUSION**

For all the foregoing reasons, the Court should deny Movants’ Motion to intervene, stay this action, and enjoin further action by the Fiduciary. The Court should further deny Movants’ request to schedule an evidentiary hearing on all pending issues including whether the Fiduciary should be removed and replaced.

Respectfully submitted this 5th day of June, 2009.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2009, I caused a copy of the foregoing MEMORANDUM IN OPPOSITION TO MOVANTS' MOTION TO STAY PROCEEDINGS, TO REPLACE SPECIAL FIDUCIARY, AND TO ENJOIN FURTHER ACTIONS OF SPECIAL FIDUCIARY PENDING EVIDENTIARY HEARING to be faxed and mailed to:

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By:  \_\_\_\_\_

# **Exhibit 1**

FOR IMMEDIATE RELEASE

Monday, June 1, 2009

HILDALE, UTAH—In compliance with the Court's recent order to the FLDS to pay occupancy fees or immediately lose the opportunity to settle, we have tendered the required payment of \$192,600 to the Utah Attorney General today.

In February of this year we expressed to the Utah Attorney General our objection to the fact that the Fiduciary was receiving payment of his fees twice; first, from the occupancy fees of those living on UEP property; and second, by selling the milk produced by UEP Harker Dairy.

The Utah Attorney General agreed that the Fiduciary should get either the occupancy fees or the Harker Farm money and stated that, in his opinion, we should not be required to pay the occupancy fees until Harker Farm came back to our control. We understand that the Attorney General recommended to the Fiduciary that he choose one source of payment or the other. Because the milk proceeds were over \$100,000 per month, \$40,000 a month more than he would receive from the occupancy fees, we understood that the Fiduciary elected to take the milk sale revenue. Thus, the profits from the Harker Farm were a substitute for occupancy fees.

Although we believe the agreement regarding the milk sale revenue satisfied the occupancy fee requirement, the FLDS have tendered the \$192,600 to the Attorney General under protest, because the Court stated that if we do not make that payment the stay of litigation will be lifted and all the work that has been done to settle this case will be lost. The issue that brought this case to the Court was the Attorney General's concern that the assets of the Trust were being wasted. Now the issue has become how to pay over \$5 million that has been incurred in administering the Trust, while also protecting the land from being sold for non-payment of property taxes. We went directly to the Attorney General because of his concern for the welfare of the trust.

As a peaceful people, we believe that settlement is the best way to resolve differences. Our payment of these funds continues our commitment to work in good faith to achieve a settlement of this dispute.

Further information may be obtained by contacting the following:

Willie Jessop (435) 467-2416

Rodney R. Parker (801) 521-9000