

2012

The Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Thomas C. Horne; Bruce R. Wisan; Mark Shurtleff; and Hon. Denise Posse Lindberg; et al. : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Legal Brief, *The Fundamentalist Church v. Wisan*, No. 20120158 (Utah Court of Appeals, 2012).
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IN THE SUPREME COURT FOR THE STATE OF UTAH

THE FUNDAMENTALIST CHURCH
OF JESUS CHRIST OF LATTER-DAY
SAINTS, an Association of Individuals,

Plaintiff/Appellee,

vs.

BRUCE R. WISAN, Special Fiduciary
of the United Effort Plan Trust; MARK
SHURTLEFF, Attorney General for the
State of Utah; THOMAS C. HORNE,
Attorney General for the State of
Arizona; and DENISE POSSE
LINDBERG, Judge of the Third Judicial
District Court of Salt Lake County, State
of Utah,

Defendants/Appellants,

and

RICHARD JESSOP REAM; THOMAS
SAMUEL STEED; DON RONALD
FISCHER; DEAN JOSEPH BARLOW;
WALTER SCOTT FISCHER;
RICHARD GILBERT; BRENT JEFFS,

Intervenors/Appellants.

**INTERVENORS' BRIEF ON
CERTIFIED QUESTION
FROM THE UNITED STATES
COURT OF APPEALS FOR
THE TENTH CIRCUIT**

Case No. 20120158 SC

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FILED
UTAH APPELLATE COURT
APR 23 2012

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Intervenors, Thomas Samuel Steed, Don Ronald Fischer, Dean Joseph Barlow, Richard Gilbert, Brent Jeffs, Walter Scott Fischer and Richard Jessop Ream, address the following question of state law certified to this Court by the United States Court of Appeals for the Tenth Circuit:¹

Under Utah preclusion law, is the Utah Supreme Court’s discretionary review of a petition for extraordinary writ and subsequent dismissal on laches grounds a decision on the merits when it is accompanied by a written opinion, such that later adjudication of the same claim is barred?

I. INTRODUCTION

In *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 2010 UT 51, 238 P.3d 1054, this Court recognized that people have “made irreversible decisions and changed their positions” based on the district court’s “unappealed” and “unchallenged final orders.” *Id.* at ¶ 33. Specifically, as to Intervenors,² the Court stated:

Further, the Original Interested Individuals whose looming default judgments led to the district court’s reformation of the Trust, have expressed that their settlements with the Trust were predicated upon the Trust’s reformation. That is, ‘[h]ad it not been for the UEP Trust’s reformation, the Original Interested Individuals would never had settled their lawsuits against the Trust.’ The FLDS Association’s delay in filing this petition has injured the Original Interested Individuals because it has caused the Individuals to change positions on their own claims, and

¹ On March 2, 2012, the Tenth Circuit entered an Order Certifying State Law Questions, and on March 13, 2012, this Court entered its Order of Acceptance.

² Intervenors were the Original Interested Individuals in *Lindberg*.

any relief we granted the FLDS Association would operate against the interests of the Original Interested Individuals.

Id. at ¶ 34.

The federal district court³ opinion in *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Wisan*, No. 2:08-cv-772, 2011 WL 754286 (D. Utah Feb. 24, 2011), threatens to completely vitiate the rights of the Intervenors that this Court protected in *Lindberg*. Intervenors therefore seek this Court's clarification for the Tenth Circuit that *Lindberg* was decided on the merits. The risk that Intervenors' rights would be trampled caused them to intervene before the federal district court initially and to appeal the decision in *Wisan*.

Importantly, Intervenors brought their original tort and racketeering lawsuits against the United Effort Plan Trust ("Trust") not only to seek compensation for the abuses they suffered, but to stop the Trust from being used to facilitate illegal FLDS child abuse practices. Because of *Wisan*, Intervenors have still not received what they were awarded in the court-approved settlement and, more importantly, the risk of the Trust being used again to continue illegal FLDS practices is alarmingly high. Thus, the importance of this Court's ruling on the certified question cannot be overstated.

³ All references to "federal district court" are to the United States District Court for the District of Utah.

In the papers filed by Intervenors before the district court,⁴ the federal district court, the Tenth Circuit and this Court they have consistently raised and addressed the various forms of child abuse facilitated by the Trust.⁵ For their part, the FLDS have steadfastly ignored these problems at each litigation stage. Unwilling to engage the facts, the FLDS papers have instead focused only on tenuous religious freedom claims, which, if recognized, would give their institutions, including their trusts and corporations, broad religious immunity, essentially making the FLDS a law unto themselves, contrary to *Reynolds v. United States*, 98 U.S. 145, 1878 WL 18416 (U.S. Utah). *See also Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998) (rejecting FLDS/Trust claims to religious freedom from court action).

The outcome here is not only significant to Intervenors, it will impact the rule of law in Utah, the ability and willingness of Utah to address child abuse, and it will govern the sovereignty of Utah's courts. The correct outcome is clear. This Court in *Lindberg* considered all the FLDS's constitutional claims, yet declined to address all

⁴ All references herein to "district court" are to the court presiding over the Trust's probate proceedings in the Third Judicial District Court for Salt Lake County, State of Utah.

⁵ For example, on March 25, 2011, Intervenors filed a brief with this Court, Case Nos. 20090691 and 20091006, entitled Supplemental Brief of the Original Interested Individuals. For more current information and legal decisions regarding FLDS child abuses, see Intervenors Brief and Reply Brief in the Tenth Circuit.

but one of them (which it found not to be ripe) in its written opinion in light of clearly established law concerning laches.

II. *LINDBERG* WAS DECIDED ON THE MERITS.

Wisán incorrectly holds that *Lindberg* should not be given preclusive effect because the FLDS were not afforded a full and fair hearing on their claims. *Wisán* is based on the false premise that, because this Court found laches dispositive without reaching constitutional issues in its written opinion, it must have decided the case in a vacuum without first considering the merits of the parties' various claims and defenses. Intervenors do not agree that *Lindberg* was decided in this manner.

In *Day v. Wiswall's Estate*, 381 P.2d 217 (Ariz. 1963), the Arizona Supreme Court noted that, “[u]nlike the statute of limitations, the doctrine of laches is properly applied *only after a consideration of the circumstances and merits of a suit*. *Day* at 220 (emphasis added). The *Day* court noted that “[t]he judgment in the [prior] suit was not one of dismissal,” but was entered “after a full hearing and consideration of evidence and a finding of laches as a fact” *Id.* Thus, only after undertaking a review of the evidence and a full hearing was the court prepared to hold “that the plaintiff take nothing by reason of the [plaintiff’s] actions.” *Id.* Based on this adjudicative process, the Arizona Supreme Court properly held that the previous decision was “a judgment on the merits.” *Id.*

Similarly, before rendering its decision in *Lindberg*, this Court (1) received and reviewed some 65 volumes of procedural history, factual record, and evidence; (2) received and considered *new evidence* by way of affidavits submitted by the FLDS; (3) reviewed and considered the parties' numerous and lengthy briefs; (4) heard the parties' extended oral arguments; and (5) only then prepared and issued a written opinion. In short, the Court did not merely read the FLDS petition and dismiss it with a cursory ruling, it analyzed all of the claims based on the extensive record which included evidence introduced for the first time before this Court and wrote a dispositive opinion.

The fact that the Court did not “reach” that is, specifically address, all of the constitutional issues in its written opinion certainly does not mean that the constitutional issues were not considered during the process of deciding the writ. “Courts should generally resolve cases on the narrowest applicable grounds unless specific reasons exist for offering broader guidance.” *Alliant Techsystems, Inc. v. Salt Lake City Bd. of Equalization*, 2012 UT 4, ¶ 27 n. 41, 110 P.3d 691 (alterations omitted) (internal quotation marks omitted). As an example, this Court recently resolved a question of state law, certified to it by the Tenth Circuit, by simply stating: “Because we conclude that the incarceration exception does not apply in this case, we need not reach Ms. Whitney’s argument that the incarceration exception violates the

Utah State Constitution.” *Whitney v. Division of Juvenile Justice Services, et al.*, 2012 UT 12, ¶ 19 n. 3, ___ P.3d ___, WL 698182. Surely it cannot be said that Ms. Whitney’s claims were not resolved on the merits even though her constitutional claim was not reached in the opinion. The decision in *Lindberg* was no different.

Although courts are not required to address constitutional challenges when a laches defense is dispositive,⁶ and do not reach constitutional issues unless necessary,⁷ in *Lindberg* this Court actually reviewed the extensive record and afforded the parties a full hearing on the merits to address completely their claims and defenses. Significantly, it did so on the heels of years of deliberate avoidance by the FLDS of the proceedings before the district court and when the only remedy left to the FLDS was a petition for extraordinary writ.

⁶ See e.g., *Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472, 1475-76 (10th Cir.1990) (holding because plaintiffs waited seventeen years from time they should have known, and nine years from time they actually knew, of County’s actions to make challenges to zoning ordinance, plaintiffs’ constitutional challenges were barred by laches); *Peter Henderson Oil Co. v. City of Port Arthur, Texas*, 806 F.2d 1273, 1275 (5th Cir.1987) (holding because appellants waited over five years after cause of action arose to challenge allegedly unconstitutional delegation, challenge was barred by laches).

⁷ See e.g., *Anderson v. Bell*, 2010 UT 47, ¶ 7, 234 P.3d 1147 (reaffirming jurisprudence of not addressing “constitutional issues unless required to do so.”) (citations omitted); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 116–17 (1998) (noting court’s reluctance in addressing constitutional questions when matter can be resolved on another basis).

It is undisputed that the FLDS had for years exercised their religious rights by choosing to “answer the courts nothing” as directed by Warren Jeffs:

This is an official Trustees meeting of the United Effort Plan Trust. . . . We now have three lawsuits filed against us. They are direct attacks against the Celestial Law⁸] and Priesthood. And I tell you this much that *the Lord is requiring of me to answer them nothing. For me to testify in court, answer subpoenas or do anything about my Father's doings and my doings and the Celestial Law it would prove us the traitor and I am to answer them nothing.* Do you uphold that brethren? . . . all the trustees agree with that thus far. By me not answering the courts, brethren, that means I have dismissed our lawyers . . . *To even talk about marriages and our doing in the Priesthood would be out of order.* And our stand is that no government or court on the face of the earth can bring God into question in the handling of His own Church and people. . . . *But brethren, this will bring the government down upon us quickly. Even put the United Effort Plan Trust lands under government control. . . . Dear brethren, this is a test the Lord is allowing to come upon the Priesthood people to see what we love most. Do we love God Priesthood and the Celestial Law most or will we surrender Priesthood and give up the Prophet to hold onto our lands and our earthly comforts? And I say to us: Stand with God and Priesthood and let us uphold the Celestial Law.*

Record of Warren Jeffs, entry for September 1, 2004, App. at 3155-56 (emphasis

⁸ In the Record of Warren Jeffs, the phrase “Celestial Law” refers to the increasing practice of arranging and entering into illegal underage “marriages.” For example, the entry for July 2, 2004 states:

. . . the *Lord wanted me to receive this thirteen-year-old bride . . . for her deliverance as well as the Lord allowing this to be a reason in the government's eyes to come stronger against this people. . . . [B]y me [sic] performing these works that would bring the wicked against us to justify the Lord in destroying them, at a quicker pace.*

Record of Warren Jeffs, for November 26, 2003, App. at 1982 (emphasis added).

added).⁹ Jeffs later elaborated on this contempt for the courts:

And I say to you brethren, no person, no court, no government, no people on the face of the whole earth has the right or authority to bring God into question what He has his Prophets do in the Celestial Law among His Priesthood people on His consecrated lands. That is what these present lawsuits and attacks are. And so the Lord told me, “Answer them nothing, and don’t give them any testimony or witness.”

Training Given by President Warren S. Jeffs On the Places of Refuge to a Group of Men, dated February 21, 2005 at 29–30, App. at 3186-87. (underscoring is as in original).¹⁰

Perhaps to buttress this command, Warren Jeffs repeatedly taught the FLDS that the “Trust is rejected of God.” *See e. g.* App. at 3190. Regardless, the practice of subjecting underage girls to sexual relations with older men in “spiritual marriages”—knowing this would bring the Trust into direct conflict with the law—was all part of a defiant religious test:

⁹ The Record of Warren Jeffs is an example of the evidence seized by law enforcement during the 2008 raid on the Yearning For Zion Ranch in Texas. This evidence was admitted at Warren Jeffs’ Texas trial, which resulted in convictions, after *Lindberg* was decided. In *Lindberg*, this Court had deferred ruling on Intervenors’ request to supplement the record with some of this evidence and the FLDS motion to strike the evidence. “Because of our resolution in this case, we find it unnecessary to rule on any of these deferred motions.” *Lindberg*, 2010 UT 51, ¶ 22 n. 8. However, this evidence was subsequently placed in the record in the collateral federal district court case, is part of the record on appeal to the Tenth Circuit, and is therefore now available in the record before this Court.

¹⁰ This “training” was seized by law enforcement from Warren Jeffs’ vehicle when he was arrested. This record evidence is also in the Tenth Circuit’s record.

The Lord is showing me the young girls of this community, those who are pure and righteous will be taken care of at a younger age. As the government finds out about this, it will bring such a great pressure upon us, upon the families of these girls, upon the girls who are placed in marriage. . . . And I will teach the young people that there is no such thing as an underage Priesthood marriage but that it is a protection for them if they will look at it right and seek unto the Lord for a testimony. *The Lord will have me do this, get more young girls married, not only as a test to the parents, but also to test this people to see if they will give the Prophet up.*

Record of Warren Jeffs, entry for November 24, 2003, App. at 3151 (emphasis added).¹¹

Thus, rather than confront evidence of child abuse before the district court and rather than argue that religions are constitutionally immunized to engage in illegal activities, the FLDS simply answered the district court nothing for over three years. Only after Warren Jeffs' arrest and subsequent conviction in Utah on accomplice to rape charges did the FLDS attempt to engage by filing a petition with this Court seeking extraordinary relief from the district court's reformation of the Trust.

¹¹ Despite FLDS efforts to keep child sexual and other illegal abuses secret by answering the courts nothing, the district court was aware of evidence of abuse facilitated by the Trust. Moreover, in the years since the Trust's reformation, the wisdom of the district court's reforming the Trust to eliminate its illegal purposes and this Court's laches decision have been further demonstrated as substantially more evidence of the Trust's role in facilitating illegal abuses has started to surface. Extensive evidence of these practices is beyond the scope of the question certified by the Tenth Circuit, but a fairly current summary of the evidence (supported by the record on appeal) is contained in Intervenors' Opening Brief and Intervenors' Reply Brief, which were filed before the Tenth Circuit, and are now among the briefs before the Court.

On February 4, 2011, this Court held extended oral argument in *Lindberg*. When counsel for the FLDS was asked why the FLDS waited so many years before challenging the Trust’s reformation, Rodney R. Parker responded that “the answer to that question lies inside the religious box” and relates to “a test of faith.” Transcript of Recorded Hearing in *Lindberg*, App. at 4106, 4127-28. The test of faith concerning what was in the “religious box,” of course, was whether, in light of the command to marry more girls at a younger age, the people would give up the prophet and the priesthood to protect their property: “The Lord will have me do this, get more young girls married, not only as a test to the parents, but also to test this people to see if they will give the Prophet up.” App. at 3151. The consequence of this religious choice was also clear: “But brethren, this will bring the government down upon us quickly. Even put the United Effort Plan Trust lands under government control. . . .” .

It was this religious test and what was in the “religious box”—child abuse and rape—that put counsel’s constitutional arguments in *Lindberg* in the proper context. Counsel argued that this Court’s commitment to the Constitution should have been strong enough to stay outside the religious box even if it did not agree with what was happening inside. App. at 4106, 4127-28, 4154. According to counsel, the problem was that the States of Utah and Arizona were “in that box” and “it [was] not appropriate for them to be in there.” *Id.*

Counsel's suggestion that the Constitution required this Court to turn a blind eye to child abuse and rape simply because it was done in a religious box was obviously considered by the Court at oral argument but rejected. There was no need for the Court to address the fact that the First Amendment provides no immunity for child abuse or other illegal activity, even when performed in the name of religion. By resolving the case on laches, this Court made it abundantly clear that it fully understood the facts and claims, and based on the same, concluded that it would not return the Trust to the very individuals responsible for using it for illegal practices and child abuses.¹²

In light of all this, it simply cannot be said that the FLDS were not afforded a full and fair hearing on the merits prior to this Court's issuance of its written opinion in *Lindberg* in which it stated that it would not vitiate Intervenor's rights and declined to reach some of the FLDS's constitutional claims in its opinion. *Lindberg* at ¶ 43.

III. THIS COURT'S OPINION ON LACHES REFLECTS ITS REVIEW OF THE CONSTITUTIONAL VIOLATIONS ALLEGED BY THE FLDS.

That, after considering the record, affidavits, briefs and arguments in *Lindberg*, this Court chose not to reach most of the constitutional issues in its opinion says much

¹²As this Court was certainly aware, the district court had concluded that any FLDS effort to regain control over the Trust is "troubling in that it potentially provides for unconstitutional distribution of Trust property to an organization that likely will use it in support of an illegal practice." Minute Entry Ruling Rejecting Settlement Proposals and Ordering Release of Funds to the Special Fiduciary, App. at 1362.

about the merits vel non of the FLDS's constitutional claims. Before the Court were undisputed facts dispositive of these claims on the merits: (1) the FLDS elected to hold the property in question in a Utah charitable trust¹³ (2) the Trust expressly existed, in significant part, to further illegal religious practices;¹⁴ and (3) there was substantial evidence before the district court that the FLDS were, in fact, using the Trust to facilitate illegal and constitutionally unprotected religious practices, including the abuse of children.¹⁵

Both the district court and this Court were well aware that a Utah trust cannot be used to promote or facilitate an illegal or criminal purpose, especially those involving sexual and other abuses of children. *See* UTAH CODE ANN. § 75-7-404 (“An

¹³ Mr. Parker acknowledged the State of Utah's role in overseeing and protecting the Trust when, after withdrawing from representing the Trust in the Intervenor's tort and racketeering lawsuits in 2004, he petitioned the Third District Court to give notice to the Utah Attorney General before default judgments were allowed to be taken so that the State of Utah could defend the “beneficial interest” of the Trust. *See* Memorandum in Support of Motion to Require Notice, App. at 560-63.

¹⁴ *See e.g.* Intervenor's Opening Brief and Reply Brief.

¹⁵ To understand how the Trust was deliberately used by FLDS leaders (who were also the trustees of the Trust) to facilitate and accomplish various forms of child abuse, see the MJ complaint, App. at 4632-41; the Lost Boys complaint, App. at 4606-30; and the Brent Jeffs complaint, App. at 3623-47. The FLDS Church and Warren Jeffs admitted the well-pleaded facts in these complaints by their defaults. *See Utah Ass'n of Credit Men v. Bowman*, 113 P. 63, 67 (Utah 1911) (“[A] default admits all the facts in the complaint that are well pleaded”). These cases were each before the district court or brought to its attention after Warren Jeffs and the FLDS Church were served and defaulted and before the Trust was reformed.

intended trust or trust provision is invalid if . . . its purpose is unlawful or its performance calls for the commission of a criminal or tortious act.”); *See also* RESTATEMENT (SECOND) OF TRUSTS, § 371 cmt. e (Illegal Purposes) (1959) (“A trust to promote a religious organization or doctrine is invalid if it is criminal or against public policy. Thus, a trust to promote polygamy^[16] is illegal, *even though the belief in polygamy is one of the tenets of a religious sect.*”) (emphasis added); RESTATEMENT (SECOND) OF TRUSTS, § 377 cmt. a (Criminal Purposes) (1959) (“Where by the terms of the trust the trust estate is to be used for a criminal purpose, the trust is invalid. . . . So also, a trust for the promotion of polygamy or other sexual offenses is invalid.”).

The Trust document, as amended in 1998, itself recognizes the fact that it is governed by Utah law: “This Declaration of Trust shall be construed, administered and governed by the laws of the State of Utah in effect from time to time.” *See* Amended and Restated Declaration of Trust of the United Effort Plan Trust, App. 1245. This, alone, was a sufficient basis for rejecting the FLDS constitutional claims in *Lindberg* on the merits.

¹⁶ As to the harms caused by polygamy, *see e.g. Reference Re: Section 293 of the Criminal Code of Canada*, 2011 BSCS 1588 (Recently upholding Canada’s laws against polygamy in a 277 page opinion that extensively analyzes the inherent harms of polygamy to children, adults and society.) This opinion, which contains an extensive analysis of the available evidence and expert testimony, can be located at <http://www.courts.gov.bc.ca/jdb-txt/SC/11/15/2011BCSC1588.htm>.

It is beyond ironic that the FLDS Church would subject its property to the laws and oversight of the State of Utah by holding it in a charitable trust,¹⁷ formally ask the State of Utah to protect the Trust from default judgments, and then to complain that the

¹⁷ Prior to the Trust's reformation, there were serious questions regarding the validity of the 1998 Restatement. First, there is evidence that Rulon Jeffs, the last living Trust settlor and former president of the Trust and the FLDS Church, was not competent when he signed the 1998 Restatement. Winston Blackmore, a former trustee and FLDS Bishop of Canada, explained that Rulon Jeffs twice rejected any changes to the predecessor Trust document before Rulon Jeffs had a series of incapacitating strokes, and that he watched as others assisted Rulon Jeffs in finally signing the amendment after the strokes, at a time when Rulon Jeffs had the mental capacity of a child. *See* Transcript of Confidential Interview of Winston Blackmore, copies of relevant excerpts of which are attached hereto as Exhibit C to the Supplemental Brief of the Original Interested Individuals, at 44:13–46:6.

Second, even assuming Rulon Jeffs had sufficient capacity to amend the Trust, the larger question remained whether or not it was a lawful trust. Intervenors, known in 2005 as the "Interested Parties," in addition to another group of Trust participants known as the "Private Beneficiary Petitioners," specifically reserved their right to challenge the validity of the Trust. *See e.g.*, Notice of Interested Parties and Response to Petitions, App. at 5218-5222 at ¶¶ 4 and 8; and Private Beneficiaries' Petition For (i) Removal of Current Trustees and Appointment of New Trustees; (ii) Suspension of the Current Trustees Pending a Hearing on Their Removal; (iii) an Inventory, Accounting and Final Report of the Current Trustees; (iv) the Appointment of a Special Fiduciary; (v) a Hearing For the Appointment of New Trustees Proposed by Interested Parties, (vi) All Available Relief Under Utah Code § 75-7-1001 (2)(i); and (viii) Special Notice For Hearings, App. at 5198-5217.

Intervenors' concerns were focused on the Trusts' illegal purpose and its facilitation of child abuse. They did not pursue this issue because it was resolved by the district court's recognition that the Trust needed to be reformed to eliminate its illegal purpose while preserving its legal purpose. This, in addition to agreeing to settle their lawsuits in reliance on the Trust's reformation, is yet another example of how they relied to their detriment on the reformation of the Trust.

district court refused to turn a blind eye to the insidious illegal activities that the Trust was being used to accomplish.

IV. THE ARGUMENT THAT THIS COURT'S DECISION WAS NOT ON THE MERITS IS AN ATTEMPT TO REESTABLISH THE TRUST'S ILLEGAL PURPOSES AND USE.

There are many other reasons to conclude that *Lindberg* was decided on the merits. For instance, through its review of the record, briefs, and oral argument, this Court undoubtedly knew that the district court had only two options in light of the Trust's illegal purposes: (1) reform the Trust consistent with the *cy pres* doctrine; or (2) allow it to fail, with its assets passing back to Warren Jeffs as the corporate sole of the FLDS Church.¹⁸ Intervenors argued to this Court that the Trust had long facilitated systemic crimes against children. Indeed, in deciding to reform the Trust, the district court observed that the Trust would have failed had its sole purpose been to promote the practice of "polygamy, bigamy, or sexual activity between adults and minors . . . even in the name of sincerely held religious beliefs." *See* Memorandum Decision dated December 13, 2005, App. at 926.

¹⁸ During the reformation process, Warren Jeffs was on the FBI's 10 Most Wanted list, running from the law, impregnating girls as young as 12, and teaching that the "Trust was rejected by God." App. at 3190. Moreover, like the district court, this Court was well aware that the Trust had to be reformed to eliminate its illegal purpose and that Utah law requires courts to reform charitable trusts rather than let them fail. *In the Matter of Gerber*, 562 P.2d 937 (Utah 1982).

Reformation was also necessary as a practical matter because (1) all the trustees had “answered the courts nothing;” (2) were suspended for malfeasance; and (3) the 1998 Restatement prevented anyone other than Warren Jeffs, from nominating replacement trustees. UTAH CODE section 75-7-704(4) is clear. A vacancy in the trusteeship of a charitable trust must be filled by the court if no one comes forward pursuant to the trust’s terms to fill the vacancy and no “charitable organizations expressly designated to receive distributions under the terms of the trust” nominate a successor approved by the attorney general. *Id.* This Court’s opinion in *Lindberg* shows that all of this was fully understood, and that the decision was on the merits.

Therefore, the FLDS’s argument that this Court’s decision was not on the merits is contrary to the facts, the law, and is inconsistent with the content and intent of the Court’s written opinion. It was the FLDS’s desire to avoid having to answer to increasing evidence of abuses that induced Warren Jeffs to receive a revelation prohibiting the FLDS Church/Trust and its members from contesting the Intervenors’ tort and racketeering lawsuits and the Trust’s reformation. The FLDS have never disputed any of the evidence in the record showing the Trust’s role in these abuses. The FLDS claims can only be seen as another attempt to immunize illegal practices and systemic child abuse.

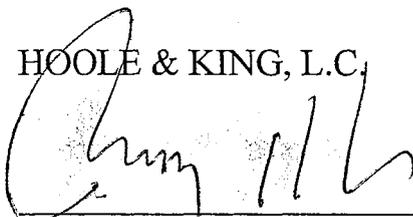
V. CONCLUSION

The Court was willing to review the voluminous record from the district court, consider new evidence presented by the FLDS, analyze the parties' lengthy briefs, listen to extended oral arguments, and question counsel. There is no basis to conclude that the Court did not provide a full and fair hearing on the issues simply because it ultimately concluded that applying laches was appropriate under all of the circumstances. In so holding, the Court's ruling was consistent with the well-advised practice of not reaching constitutional issues unnecessarily in written opinions.

Accordingly, the Court's decision on laches should be clarified as having been on the merits under Utah law, and *Lindberg* should be afforded the preclusive effect that is afforded all decisions made following a full and fair hearing on the merits.

DATED this 20th day of April, 2012.

HOOLE & KING, L.C.



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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2012, I caused two copies of the foregoing INTERVENORS' BRIEF ON CERTIFIED QUESTION to be mailed, with first class postage prepaid, to the following:

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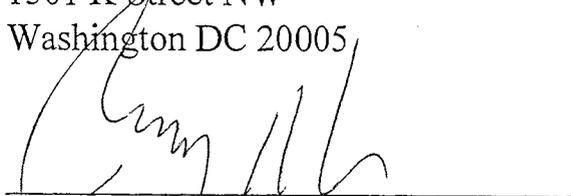
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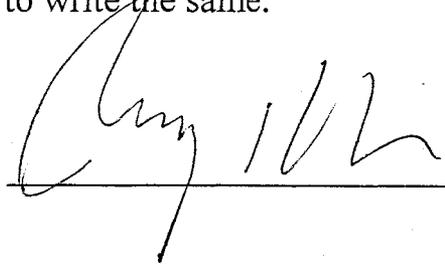
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CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)(C)

I hereby certify that the foregoing Joint Brief of Appellant complies with the type-volume limitation ordered by this Court and contains 4,825 words as determined by the word processing program used to write the same.



A handwritten signature in black ink, appearing to read "Cory 1/12", is written over a solid horizontal line.