

2012

Mark L. Shurtleff v. Bruce Wisan : Addenda

Utah Supreme Court

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Bridget K Romano; Utah Solicitor General; Attorney for the State of Utah and Utah Attorney General Mark L Shurtleff.

Jeffrey L Shields; mark L Callister; Zachary T Shields; Michael D Stanger; Callister, Nebeker and Mccullough; Attorneys for Special Fiduciary Bruce R Wisan; Mark P Bookholder; Arizona Attorney General .

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the United Effort Plan Trust

Mark L. Shurtleff,

Petitioner and Appellant,

v.

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 aka William E. Timpson; and doe Trustees I through X;

Respondents and Appellees,

and

Bruce Wisan; Dean Jessop Barlow; Don Ronald Fisher; Thomas Samuel Steed; Walter Scott Fisher; Brent Jeffs; Don Johnson; Merlin Jessop; Helaman Barlow; Hildale city, Colorado city; Twin Cities Water Authority;

Other Parties.

CASE NO. 20120300 - SC

SUPPLEMENTAL ADDENDA TO BRIEF OF APPELLEE
SPECIAL FIDUCIARY BRUCE R. WISAN

FILED
UTAH APPELLATE COURTS

MAY 20 2012

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SUPPLEMENTAL ADDENDA TO BRIEF OF APPELLEE
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UTAH RULES OF CIVIL PROCEDURE

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action that has been pending before it.

(d) Notice of hearings. Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

URCP 006

Advisory Committee Notes

The 2000 amendment attempts to clarify the interplay between Rules 6(a) and 6(e) by providing that the three extra days of response time that are added under Rule 6(e) following service of a

paper by mail are not counted when determining whether to exclude weekends and holidays from the response time under Rule 6(a). This approach is consistent with the approach taken by the majority of federal courts that have interpreted the corresponding provisions of Rule 6 of the Federal Rules of Civil Procedure.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b)(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b)(2) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by

citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

URCP 007

Advisory Committee Notes

The practice for courtesy copies varies by judge and so is not regulated by rule. Each party should ascertain whether the judge wants a courtesy copy of that party's motion, memoranda and supporting documents and, if so, when and where to deliver them.

Paragraph (f) applies to all orders, not just orders upon motion.

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(c)(1) **Generally.** Except as to a party against whom a judgment is entered by default, and except as provided in Rule 8(a), every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(d)(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action

or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

ADDENDUM N

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH CENTRAL DIVISION

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

Plaintiff,

v.

BRUCE R. WISAN, Special Fiduciary of
the United Effort Plan Trust; MARK
SHURTLEFF, Attorney General for the
State of Utah; TERRY GODDARD,
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.

**JOINT MOTION SETTING FORTH
THE SCOPE OF THE PRELIMINARY
INJUNCTION**

Civil No. 2:08-CV-772-DB

Judge Dee Benson

Plaintiff the Fundamentalist Church of Jesus Christ of Latter-Day Saints, an
Association of Individuals, (the FLDS Church) and Defendant Utah Attorney General

Mark L. Shurtleff, by and through counsel, jointly submit to the Court the proposed preliminary injunction, attached as Exhibit A.

Shurtleff personally, as well as his counsel, have participated in extensive negotiations with counsel for the FLDS Church in reaching agreement on the terms of the proposed preliminary injunction. With respect to paragraph 6 of the proposed Order, Shurtleff neither supports nor objects to transferring control over the property and assets of the Trust to the Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter-Day Saints. Given this Court's previous ruling that the continued administration of the Reformed Declaration of Trust of the United Effort Plan, dated October 25, 2006 constitutes an ongoing constitutional violation of the First Amendment to the United States Constitution, Shurtleff takes no position as to which person or entity should administer the property and assets of the Reformed Trust during the interim period between the entry of this Order and the entry of final judgment in this case.

By agreeing to the terms of the preliminary injunction, the FLDS Church and Shurtleff agree that Shurtleff has not waived his right to appeal the Court's February 24, 2011 Memorandum Opinion and Order (Doc. 118).

DATED this 5th day of April 2011.

/s/ Joni J. Jones
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Assistant Utah Attorneys General
Attorneys for Mark L. Shurtleff

/s/ David N. Wolf

DAVID N. WOLF

Assistant Utah Attorneys General
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/s/ Stephen C. Clark

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*(Signed by Filing Attorney with
permission of Stephen C. Clark)*

EXHIBIT A

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

THE FUNDAMENTALIST CHURCH OF)	[PROPOSED] PRELIMINARY
JESUS CHRIST OF LATTER-DAY)	INJUNCTION ORDER
SAINTS, an Association of Individuals,)	
)	No. 2:08-CV-772-DB
Plaintiff,)	
)	
v.)	
)	
BRUCE R. WISAN, Special Fiduciary of)	
the United Effort Plan Trust; MARK)	
SHURTLEFF, Attorney General for the)	
State of Utah; TERRY GODDARD,)	
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.)	
)	

This matter came before the Court for hearing on December 3 and 10, 2010, and February 10 and March 15, 2011, on Plaintiff's Renewed Motion for Temporary Restraining Order and/or Preliminary Injunction filed by Plaintiff The Fundamentalist Church of Jesus Christ of Latter-Day Saints. Based on the Court's consideration of the Amended Complaint, the filings of the parties, and the arguments presented at the hearings before this Court; this Court previously entered its Memorandum Opinion and Order granting Plaintiff's motion, describing the Court's reasoning; this Court having reiterated and amplified at the March 15, 2011 hearing the principal bases for that ruling and the reasons that it is necessary for a preliminary injunction to enter, including the strong likelihood of Plaintiff's success on the merits of its constitutional claims and the clear weight of the balance of harms in favor of preventing a serious, ongoing violation of the Establishment Clause; and this Court having indicated that a further order describing the precise extent of the preliminary injunction would be entered, and good cause appearing therefore,

Accordingly, IT IS HEREBY ORDERED that the following Preliminary Injunction be in place during the pendency of this action:

1. Defendants Bruce R. Wisan, Mark L. Shurtleff, and Thomas C. Horne and their agents and employees, are hereby enjoined from administration of the Reformed Declaration of Trust of the United Effort Plan, dated October 25, 2006.

2. Defendant Bruce R. Wisan is suspended from his position as Special Fiduciary and shall take no further action respecting that position except as is set forth herein.

3. All proceedings in the action pending in the Third Judicial District Court of Salt Lake County, Utah, Case No. 053900848, shall be and hereby are stayed. Without limiting the generality of the foregoing:

a. United Effort Plan Trust property, including the Berry Knoll Farm property, shall not be sold or encumbered under the direction of that Court;

b. Subdivision plats earlier approved by Judge Shumate for United Effort Plan Trust property located in Hildale, Utah shall not be recorded.

4. Litigation stay orders previously entered by the Third District Court shall remain in place until altered by this Court.

5. Defendant Wisan is ordered to provide the Plaintiff and the Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("COP") with all non-privileged records regarding his administration of the Trust, specifically including but not limited to financial records, property records, occupancy agreements, tax records, leases, contracts, agreements, billing records, accountings, financial projections, business communications, and lease records.

6. Control over the property and assets of the Trust, which was formerly vested in Defendant Wisan, is transferred to the COP. The COP may administer the property on a temporary basis according to its religious principles as contemplated by the reversionary clause of the 1998 Restated Declaration of Trust, subject to the following additional terms and restrictions:

a. The COP shall not sell or encumber Trust property without consent of the attorneys general or order of the Court;

b. The COP shall take no action to evict or otherwise impair the residency, occupancy, or use of any residential property against the wishes of the occupant;

c. The COP shall abide by the terms of any leases entered by the Special Fiduciary, but may enforce or terminate those leases according to their terms;

d. Control of Harker Farm and Dairy, including operations, produce, and income, is returned to the COP, subject to existing contractual obligations;

e. Control of Berry Knoll Farm, including operations, produce, and income, is returned to the COP subject to existing contractual obligations;

f. The proceeds of the post office lease shall be paid to the COP;

g. Net income generated from property leases, Harker Farm and Dairy, Berry Knoll Farm, the post office lease, and any rental or occupancy income from UEP property shall be first used for the payment of UEP Trust property taxes and then as the COP determines;

h. The COP shall maintain financial records sufficient to permit the Court to account for the funds received and confirm the use of those funds toward property taxes as described in paragraph (g) above;

7. No person or entity is to directly or indirectly interfere with, intimidate, harass or coerce any other person or entity in connection with the use or occupancy of Trust property. Prohibited acts include, but are not limited to, acts having the purpose or effect of harassment, intimidation or provocation; damage to or removal of personal property or fixtures; and harm to, harassment, or unauthorized movement or release of animals. This restraint is not intended to limit the authority of the COP to administer the Trust consistent with paragraph 6.

8. The Court's order is an interim order only, and does not finally resolve or determine the rights of any person or entity regarding the use or occupancy of Trust property.

9. The Court finds that the value of the property in issue vastly exceeds any conceivable costs and damages which might be sustained by any party found to have been wrongfully enjoined or restrained, and therefore orders that this injunction enter without bond.

SO ORDERED this _____ day of April, 2011.

BY THE COURT:

DEE BENSON, JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2011, I electronically mailed the foregoing [PROPOSED]

PRELIMINARY INJUNCTION ORDER to the following:

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s/Stephen C. Clark
STEPHEN C. CLARK

ADDENDUM O

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

APR - 8 2011

BY D. MARK JONES, CLERK
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE FUNDAMENTALIST CHURCH OF)	PROPOSED PRELIMINARY
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the United Effort Plan Trust; MARK)	
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State of Utah; TERRY GODDARD,)	
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,)	
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2. Defendant Bruce R. Wisan is suspended from his position as Special Fiduciary and shall take no further action respecting that position except as is set forth herein.

3. All proceedings in the action pending in the Third Judicial District Court of Salt Lake County, Utah, Case No. 053900848, shall be and hereby are stayed. Without limiting the generality of the foregoing:

a. United Effort Plan Trust property, including the Berry Knoll Farm property, shall not be sold or encumbered under the direction of that Court;

b. Subdivision plats earlier approved by Judge Shumate for United Effort Plan Trust property located in Hildale, Utah shall not be recorded.

4. Litigation stay orders previously entered by the Third District Court shall remain in place until altered by this Court.

5. Defendant Wisan is ordered to provide the Plaintiff and the Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("COP") with all non-privileged records regarding his administration of the Trust, specifically including but not limited to financial records, property records, occupancy agreements, tax records, leases, contracts, agreements, billing records, accountings, financial projections, business communications, and lease records.

6. Control over the property and assets of the Trust, which was formerly vested in Defendant Wisan, is transferred to the COP. The COP may administer the property on a temporary basis according to its religious principles as contemplated by the reversionary clause of the 1998 Restated Declaration of Trust, subject to the following additional terms and restrictions:

a. The COP shall not sell or encumber Trust property without consent of the attorneys general or order of the Court;

b. The COP shall take no action to evict or otherwise impair the residency, occupancy, or use of any residential property against the wishes of the occupant;

c. The COP shall abide by the terms of any leases entered by the Special Fiduciary, but may enforce or terminate those leases according to their terms;

d. Control of Harker Farm and Dairy, including operations, produce, and income, is returned to the COP, subject to existing contractual obligations;

e. Control of Berry Knoll Farm, including operations, produce, and income, is returned to the COP subject to existing contractual obligations;

f. The proceeds of the post office lease shall be paid to the COP;

g. Net income generated from property leases, Harker Farm and Dairy, Berry Knoll Farm, the post office lease, and any rental or occupancy income from UEP property shall be first used for the payment of UEP Trust property taxes and then as the COP determines;

h. The COP shall maintain financial records sufficient to permit the Court to account for the funds received and confirm the use of those funds toward property taxes as described in paragraph (g) above;

7. No person or entity is to directly or indirectly interfere with, intimidate, harass or coerce any other person or entity in connection with the use or occupancy of Trust property. Prohibited acts include, but are not limited to, acts having the purpose or effect of harassment, intimidation or provocation; damage to or removal of personal property or fixtures; and harm to, harassment, or unauthorized movement or release of animals. This restraint is not intended to limit the authority of the COP to administer the Trust consistent with paragraph 6.

8. The Court's order is an interim order only, and does not finally resolve or determine the rights of any person or entity regarding the use or occupancy of Trust property.

9. The Court finds that the value of the property in issue vastly exceeds any conceivable costs and damages which might be sustained by any party found to have been wrongfully enjoined or restrained, and therefore orders that this injunction enter without bond.

SO ORDERED this 7th day of April, 2011.

BY THE COURT:


DEE BENSON, JUDGE
UNITED STATES DISTRICT COURT

ADDENDUM P

FILED
UTAH APPELLATE COURTS

MAR 19 2012

CALLISTER NEBEKER & MCCULLOUGH
JEFFREY L. SHIELDS (2947)
MARK L. CALLISTER (6709)
ZACHARY T. SHIELDS (6031)
MICHAEL D. STANGER (10406)
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zachshields@cnmlaw.com
mstanger@cnmlaw.com

Attorneys for Plaintiff Bruce R. Wisan, as the Court-Appointed
Special Fiduciary of the United Effort Plan Trust

IN THE UTAH SUPREME COURT

THE STATE OF UTAH and MARK L.
SHURTLEFF, UTAH ATTORNEY
GENERAL,

Petitioner

v

HONORABLE DENISE P. LINDBERG,
Third District Court Judge,

Respondent.

AFFIDAVIT OF W. VAL OVESON

Case No.20120161

(Trial Court No. 053900848)

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

I, W. Val Oveson, declare under criminal penalty of the State of Utah that the following is true and correct:

1. I am over the age of 21 and competent to testify, and have personal knowledge of the facts set forth herein. I am a partner of Bruce R. Wisan, Fiduciary, at Wisan, Smith, Racker & Prescott LLP.

2. A decision was made by the Fiduciary to include a section in the December 31, 2010 Report to the Court on the "Cash Crisis" facing the Trust. I assisted with the drafting of that section of the report, which included language that indicated that the Trust might need to seek support from the government to continue administering the Trust.

3. On January 6, 2011 at 3:00 p.m. I met with John Swallow, the Deputy Attorney General at the Attorney General's Office at the State Capitol, during which meeting:

a. I told him I was there to deliver a copy of the December 31, 2010 Report to the Court from the United Effort Plan Trust and I then gave him a copy.

b. I called his attention to the "cash crisis" and told him how some of the individual lawyers working for the Trust were not being paid because

their firms had not collected sufficient cash on the UEP account to justify any salary. I indicated that it was harder and harder to convince people to work with the expectation of being paid in the future under the circumstances that we were under.

c. With no further prompting by me, John Swallow brought up the possibility of asking the Utah State Legislature for funds to cover the obligations of the Trust. John and I had a good discussion about the unfairness of private sector organizations bearing the burden of work performed at the request of the Court which provides a government purpose. I expressed my support for John's idea and told him that we would do all we could to help. John closed the meeting by saying that he couldn't do anything without Mark's (Shurtleff's) approval and suggested that we have a meeting with Mark and Bruce (Wisan) in the near future to discuss the funding possibilities.

4. On January 31, 2011 at 4:00 p.m. a meeting was held at Mark Shurtleff's Office at the State Capitol building with Mark Shurtleff, Utah Attorney General, John Swallow, Deputy Attorney General, Bruce Wisan, Special Fiduciary for the United Effort Plan Trust, and me.

- a. The atmosphere of the meeting was friendly and cordial with Mark Shurtleff expressing strong support for the idea of obtaining funding from the Utah State Legislature for the payment of outstanding costs of the Trust.
- b. Mark Shurtleff also expressed strong support for making sure that the Fiduciary and his professionals receive payment and indicated how unfair it was to continue working without payment.
- c. Mark Shurtleff indicated that he had asked his staff to research the legal issues surrounding the State of Utah's liability for payments of the outstanding expenses of the Trust. He also invited us to ask our attorneys to analyze if the State of Utah could be considered responsible for the payments and thus allow the Legislature to appropriate money for Trust costs.
- d. Mark Shurtleff came up with the idea of "assigning" assets to the State of Utah in exchange for the fees. This discussion ultimately resulted in the concept of placing a lien upon all of the United Effort Plan Trust's assets (with an estimated value of \$110,000,000.00) in favor of the State of Utah as security for the State of Utah advancing the funds to cover the outstanding expense and paying future operating costs of the Trust.
- e. Mark Shurtleff asked Bruce Wisan for a list of the attorneys and service providers who had not been paid. Bruce Wisan then provided a

verbal list (estimating the total amount to be about \$5,000,000.00) and told Mark that we would send him a detailed list after the meeting.

f. At the conclusion of the meeting I asked Mark if he would be okay if we started talking to some of the key Legislative Leaders about the funding plan. He encouraged me to talk to the Legislatures and we committed to work together to solve the "cash crisis."

5. Pursuant to the Fiduciary's commitment, on February 2, 2011, I sent Mark Shurtleff an email which included a list of attorneys and professional service providers who had not been paid by the Trust. A copy of the email is attached hereto as Exhibit A.

6. After achieving some early success with the Legislative Leaders for approval of an appropriation to pay the obligations of the Trust, all conditioned on having the support of the Attorney General, the discussions turned negative.

7. On February 22, 2011, I received a telephone call from John Swallow during which he left a voice message to the effect that the Attorney General could not support the United Effort Plan Trust funding concept. John expressed regret and apologized for not being more successful.

8. During the 2011 session I met with John Fellows, Legal Counsel to the Legislature. He expressed to me his concern that the State of Utah did not have a liability to the Trust and that made it difficult for the Legislature to appropriate the money. He indicated that it would be much easier if we could get a Judge's order.

9. Beginning in January of 2012, I met with members of the Utah State Legislature to inform them that Judge Lindberg of the third District court of Utah was likely to issue an order approving some amount of the outstanding fees and expenses of the United Effort Plan Trust which the State had earlier been ordered to pay.

10. After Judge Lindberg's February 10, 2012, Ruling and Order ("Order"), I met with Senator Lyle Hillyard, the Senate Appropriations Committee Chairman to make sure he was aware of the Order and to answer any questions he might have. The meeting was very brief. Senator Hillyard said that he was aware of the Order and that the Leadership of the Legislature has met and had determined that they were going to include the ordered amount in the appropriations bill and that it would get paid. He specifically mentioned that they were going to pay the ordered fees without regard to what happened with the Tenth Circuit Court of Appeals.

11. On February 14, 2012, I was informed that the Legislative Leaders had backed away from their commitment to fund the Order in the appropriations bill.

12. I continued to monitor the appropriations process for the remainder of the session. On about February 29, 2012, during a brief meeting with the Deputy Attorney General, John Swallow, he told me that the Attorney General's Office could not let the Judge's Order stand and they felt compelled to advise their client, the State of Utah, that the Order should not be funded or paid. Mr. Swallow said that he thought it was unfair

that those working for the Trust had been working without compensation for so long, but that they could not let the Judge's Order set a precedent for the State.

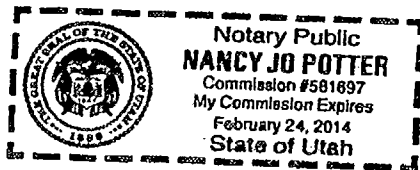
13. On March 5, 2012, I learned from Senator Hillyard that there would be no appropriation for the court Order. On March 6, 2012, I learned that the Attorney General's Office had filed a Petition for Extraordinary Writ with the Utah Supreme Court.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 19th day of March, 2012.

By: W. Val Oveson
W. Val Oveson

On March 19, 2012, before me, the undersigned Notary Public in and for said State, personally appeared W. Val Oveson, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.



Nancy Jo Potter
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AFFIDAVIT OF W. VAL OVESON** was served via the U.S. Mail, first-class postage fully pre-paid, on March 19, 2012, upon the following:

Bridget K. Romano
David N. Wolf
Joni J. Jones
Utah Office of the Attorney General
160 East 300 South, 6th Floor
P.O. Box 140856
Salt Lake City, UT 84114

Michael H. Hinson
Sandra R. Kane
Mark P. Bookholder
Arizona Office of the Attorney General
1275 West Washington
Phoenix, AZ 85007

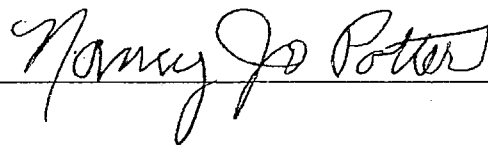
Roger H. Hoole
Heather H. Morrison
Gregory N. Hoole
Hoole & King LC
4276 South Highland Drive
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James C. Bradshaw
Mark R. Moffat
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10 West Broadway, Suite 210
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P.O. Box 45000
Salt Lake City, UT 84145

Brent Johnson
General Counsel
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, UT 84114-0241



Nancy Jo Potter

Exhibit A

From: W. Val Oveson
Sent: Wednesday, February 02, 2011 3:24 PM
To: 'Mark Shurtleff (mshurtleff@utah.gov)'
Cc: 'John Swallow'
Subject: Follow Up

Mark,

Thank you for taking the time to meet with us on Monday. We know it's a difficult time for you.

We appreciate your willingness to consider options to deal with the cash problems of the Trust. We will stay in close contact with you and John as we research solutions and talk with State leaders.

During our meeting you requested that we provide you a list of our accounts payable. The list below reflects the amounts that have been presented to us for payment by our service providers. It is important to note that there are additional amounts that the Trust owes where the billing has not been submitted to us as of today. However, the list will give you a reasonable range of the liabilities of the Trust.

Please let us know if you have any questions.

We wish you all the best,

Val

**United Effort Plan Trust
Accounts Payable
as of December 31, 2010***

Company	Amount
Atkinson, Hamill & Barrowclough, PC	\$403.91
Bruno, Brooks & Goldberg, PC	\$6,724.58
Bush & Gudgell, Inc.	\$354,807.13
Callister, Nebeker & McCullough	\$2,522,160.38
Custom Design & Consulting - (Jethro Barlow)	\$85,519.53
D'Arcy Downs-Vollbrach	\$19,175.00
Gallian, Wilcox, Welker, Olson & Beckstrom	\$1,213.00
Isaac Wyler	\$35,072.43
Jackson Walker, LLP	\$9,755.22
Maybe, Wright & James, LLC	\$12,980.00
Parsons, Behl & Latimer	\$398,516.68

Ray, Quinney & Nebeker	\$98,358.73
Sam Brower Investigation	\$2,287.10
Scalley, Reading, Bates, Hansen & R	\$83,532.66
The Exoro Group	\$74,610.96
Wisan, Smith, Racker & Prescott, LLP	\$882,429.00
Total	<u>\$4,587,546.31</u>

* The above balances represent the accounts payable that have been submitted to the Trust as of December 31, 2010. There are amounts owing to providers who have not remitted current billings to the Trust.

W. Val Oveson | Partner | Wisan, Smith, Racker & Prescott, LLP
 132 Pierpont Avenue, Suite 250 | Salt Lake City, UT 84101
 801-931-3846 (O) | 801-328-2015 (F) | 801-718-1400 (C)
voveson@wsrp.com

IRS Circular 230 Disclosure To ensure compliance with requirements imposed by the IRS, we inform you that, unless specifically indicated otherwise, any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. CONFIDENTIAL NOTICE: This message is intended only for the individual or entity to which it is addressed, and may contain information that is privileged, confidential, or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited.

ADDENDUM Q

Counsel for the State of Utah and Utah Attorney General
Mark L. Shurtleff

<p>THE STATE OF UTAH and MARK L. SHURTLEFF, UTAH ATTORNEY GENERAL,</p> <p>Petitioner,</p> <p>vs:</p> <p>HONORABLE DENISE P. LINDBERG, Third District Court Judge,</p> <p>Respondent,</p>	<p>AFFIDAVIT OF MARK L. SHURTLEFF IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT and EXPEDITED RELIEF</p> <p>Case No.</p> <p>(Trial Court No. 053900848)</p> <p>Petitioners Request the Utah Supreme Court Retain Jurisdiction of this Matter</p>
--	--

I, Mark L. Shurtleff, being over the age of 18, make the following statements based on my own personal knowledge and belief.

- Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

appropriation from the Utah State Legislature.

2. Each year, those funds are deposited into the Office's revenue accounts, but they are restricted, in part, and neither I nor my staff may dispose of them in any manner that we choose. But monies appropriated to my Office are appropriated upon the terms and conditions provided by the Utah Legislature.

3. Also, the State's and therefore my Office's budget operates on a fiscal, not a calendar year. The current fiscal year, FY 2011-2012, began on July 1, 2011 and will end at midnight on June 30, 2012.

4. Accordingly, funds now at my disposal were appropriated to the Office during the 2011 general legislative session -- which concluded in March 2011 -- and cover the period of July 1, 2011 to June 30, 2012. At present, the AG budget has insufficient means to satisfy the district court's Ruling.

5. Further, I believe that given the strictures of Utah's budget process, my ability to comply with the district court's Ruling will be similarly constrained based on my projected 2012-2013 budget appropriation. Because, just as Utah law requires the Governor to deliver a confidential draft of his proposed budget to the Legislature at least 30 days before the Legislature convenes, the Governor, in turn, requires this Office to provide him with its itemized budget request prior to the end of September each year. This year was no exception.

6. The district court issued its initial ruling on the Special Fiduciary's Motion to Award Costs and Expenses Against the State on August 1, 2011. I was provided a

copy of that Ruling, and understood at that time, that the court contemplated that the State, through me, would advance funds to the Special Fiduciary.

7. However, by September 30, the district court had not articulated any sum of money to be paid by the State. On that date and according to the terms of the district court's August 1 Ruling, I believed my Office would have an opportunity to appeal that Ruling and also, that before any sums should be paid, my Office would have a full and fair opportunity to review and to object to the Special Fiduciary's accountings.

8. None of those accountings had been submitted by September 30, 2011, but the Special Fiduciary submitted the first of his nine accountings on October 12, 2011. By that date, I had already provided Governor Herbert with my FY 2012-2013 budget request.

9. Consequently, my budget requests did not contain any sum directed toward the payment of the Special Fiduciary's costs or fees.

10. However, in October 2011, once an amount was provided to me and as a show of good faith, I sought leave from the Legislature to pay more than \$275,000 from my 2011-2012 budget to ease part of the Special Fiduciary's present indebtedness. Because that money was paid in October and prior to the beginning of the 2012 general session, I was able to include it as a supplement to my FY 2012-2013 budget request.

11. Finally, I took prompt measures when I received notice on February 13 of the district court's Ruling. That Ruling, entered late in the day on February 10, directs the State of Utah, through me, to secure, and to advance as a loan to the Special

Fiduciary, more than \$5.5 million dollars within 90 days.

12. Together with my Chief Deputies, I met with Legislative Leadership to inform them of the district court's Ruling and of the 90-day deadline.

13. Leadership expressed concern regarding the Ruling and asked several, pointed questions.

14. Leadership asked whether the Ruling constituted an adverse judgment, entered after a full and fair evidentiary hearing or other adjudication; they asked whether the monies contemplated by the Ruling were in the nature of a "settlement" or other claim subject to the Legislature's approval; and, finally, Leadership asked whether the Ruling constituted a statutory duty on the State to pay. I responded that the Ruling met none of those conditions.

15. Leadership, in turn, expressed that in the absence of full and fair appellate review of the district court's several rulings, the Legislature was not inclined to appropriate funds to accommodate the 90-day deadline included in the district court's order.

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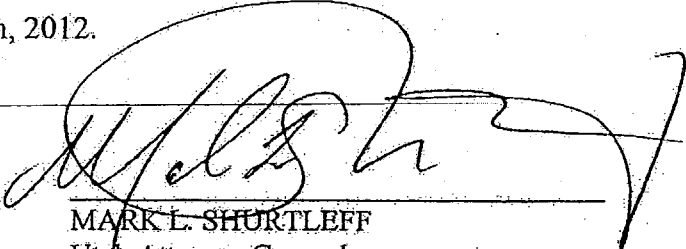
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16. To date, I have not received, nor do I anticipate that I will receive, any notice that the Legislature will make funds available in time to satisfy the district court's 90-day deadline,

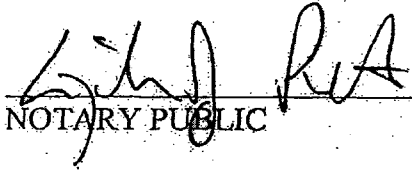
DATED this 5th day of March, 2012.

GLORIA J. POST
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires July 14, 2012



MARK L. SHORTLEFF
Utah Attorney General

Subscribed and sworn to before me this th20 day of March, 2012



NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2012, I caused a copy of the foregoing Affidavit of Mark L. Shurtleff in Support of Petition for Extraordinary Relief and Expedited Review to be sent by hand delivery (and by overnight mail the Arizona Attorney General's Office) to:

Kenneth A. Okazaki
Stephen C. Clark
**JONES WALDO HOLBROOK &
McDONOUGH**
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

James C. Bradshaw
Mark R. Moffat
BROWN, BRADSHAW & MOFFAT
10 West Broadway, Suite 210
Salt Lake City, UT 84101

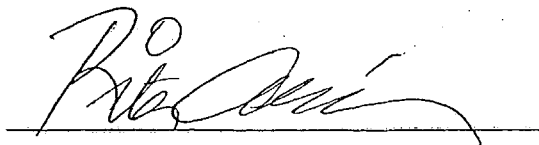
Rodney R. Parker
Richard A. Van Wagoner
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Heather H. Morrison
Gregory N. Hoole
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ADDENDUM R

JONI J. JONES (7562)
DAVID N. WOLF (6688)
Assistant Utah Attorneys General
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Attorneys for Mark L. Shurtleff
160 East 300 South, Sixth Floor
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Telephone: (801) 366-0100
Facsimile: (801) 366-0101
E-mail: jonijones@utah.gov
E-mail: dnwolf@utah.gov

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.

**UTAH ATTORNEY GENERAL'S
RESPONSE TO SPECIAL
FIDUCIARY'S REQUEST TO SUBMIT
FOR DECISION**

Civil No. 053900848

Judge Denise Lindberg

The Attorney General for the State of Utah, by and through counsel, files this response to the Special Fiduciary's Request to Submit for Decision on his Motion to Approve Expenditures in Accountings. As set out below, the Utah AG requests that the Court not issue a decision on the Fiduciary's fees motion until the Court has also resolved the Utah AG's pending motion for contribution from Arizona.

On January 18, 2012, the Utah AG filed a motion requesting that this Court require the Arizona Attorney General to pay a share of the Special Fiduciary's fees. (*See Motion for Contribution from the State of AZ for the Payment of the Fiduciary's Fees.*)¹ The Utah AG previously pointed out to the Court that it would be fair for Arizona to shoulder some of the burden of temporarily paying the Special Fiduciary's fees since most of the Trust property is in Arizona and since the Arizona AG has participated in and benefitted from these proceedings almost since the onset. (*See Utah AG's Memo In Opp. to Wisan's Motion To Award Costs & Expenses from the State of Utah, at 10* (pointing out that it would be unfair for Utah to pay all of the Fiduciary's fees when others, specifically Arizona, had benefitted from the administration of the Trust and when most of the Trust property is in Arizona)). The Court acknowledged that it was reasonable for those who benefitted from the Special Fiduciary's administration of the Trust to assist in paying his fees but noted there was no motion pending before the Court on the issue. (*See Ruling and Order on Motion to Award Costs and Expenses Chargeable to the State, 7-29-11 at 6* ("The Court also agrees with the Utah AG that others who have benefitted from the Special Fiduciary's efforts in administering the Trust should also bear some of that cost."))

Arizona's response to Utah's motion for contribution was originally due Monday, February 6th. The Utah AG agreed to allow Arizona an extension until Tuesday, February 7, 2012, to file its response. The Utah AG will make best efforts to file its reply memorandum on Wednesday, February 8, 2012, and anticipates the reply would be filed no later than February 9,

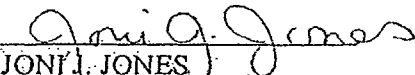
¹ The Utah AG did not file its motion earlier because he was attempting to negotiate a resolution with Arizona without Court involvement.

2012, before noon. Briefing on the Utah AG's request that Arizona pay a portion of the Fiduciary's fees would accordingly be completed before the date by which the Court indicated it would make its decision on the fees issue (February 10th). (*See Ruling Re: Utah's Motion for Extension of Time & Fiduciary's Motion to Approve Accounting, 1-4-12, at 6.*)

Insofar as the Utah AG must seek appropriation for the Fiduciary's fees from the Utah Legislature, it is important that the Utah AG be able to represent accurately the amount of fees that he is required to secure from the State's budget. The Court's ruling on this issue could have a significant impact on the amount of money that the Utah AG would have to request from the Legislature.

Accordingly, the Utah AG respectfully asks that this Court rule on its motion seeking contribution for the Fiduciary's fees from Arizona at the same time the Court rules on the Fiduciary's motion for approval of fees.

DATED this 2nd day of February, 2012.


JON J. JONES
DAVID N. WOLF
Assistant Utah Attorneys General
Attorneys for Defendant Mark L. Shurtleff

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2012, I caused a copy of the foregoing

**UTAH ATTORNEY GENERAL'S RESPONSE TO SPECIAL FIDUCIARY'S REQUEST
TO SUBMIT FOR DECISION** to be mailed postage prepaid, to the following:

Jeffrey L Shields
Mark L Callister
Zachary T Shields
Callister Nebeker & McCullough
10 East South Temple Suite 900
Salt Lake City UT 84133

Michael Hinson
William A Richards
Mark Bookholder
Assistant Arizona Attorney General
1275 W Washington Street
Phoenix AZ 85007-2926

Roger H Hoole
Gregory N Hoole
Hoole & King L C
4276 South Highland Drive
Salt Lake City UT 84124

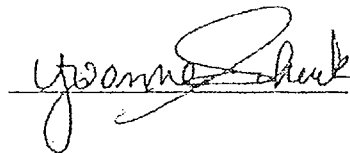
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Rodney R Parker
Snow Christensen & Martineau
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Salt Lake City UT 84145



ADDENDUM S

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Judge orders \$5.5M polygamy trust payment

10:00 PM, Feb. 14, 2012 | Comments

Jennifer Dobner
Associated Press

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News
Local News

SALT LAKE CITY - A judge has given Utah's attorney general 90 days to pay off more than \$5.5 million in debts incurred by managers of a communal land trust once run by jailed polygamist sect leader Warren Jeffs.

Third District Judge Denise Lindberg set the deadline in an order issued Monday.

The money is owed to Salt lake City accountant Bruce Wisan, his attorneys and other firms hired to assist with management of the United Effort Plan Trust - the \$114 million communal property trust of Jeffs' Fundamentalist Church of Jesus Christ of Latter Day Saints.

The trust holds the land and homes of FLDS members in the twin border communities of Hildale and Colorado City also in Bountiful, British Columbia.

No trust bills have been paid since 2008.

"We are disappointed in the ruling and are reviewing our options for appeal," Utah Attorney General Mark Shurtleff said. "We believe it is important to have the decision reviewed as expeditiously as possible."

Utah seized control of the trust in 2005 amid allegations of mismanagement by Jeffs and other Fundamentalist Church of Jesus Christ of Latter Day Saints leaders. The Arizona Attorney General's Office backed the effort.

Wisan was to be paid from the sale of trust assets, but a string of pending lawsuits, including one pending before Denver's 10th Circuit Court of Appeals, has blocked any land sales.

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Other expenses include fees for accounting services, property management, engineering and platting a plan to subdivide Hildale and Colorado City, and public relations and legislative consulting work.

Lindberg's ruling deems most of the expenses as legitimate, although she rejected and reduced the amounts to be paid on some claims. Overall, Lindberg cut just over \$65,000 from the more than \$5.6 million Wisan initially requested.

Lindberg also found no justification for the attorney general's request to cut Wisan's bill by 25 percent - a reduction state attorneys said was justified by a lack of results obtained in the case.

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Jennifer Dobner
Associated Press

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"Any lack of progress in this case has not been due to any failing on (Wisan's) part. Instead, the difficulties in this case have arisen largely from circumstances beyond (Wisan's) control, including, but not limited to the concerted efforts of the FLDS community," to frustrate Wisan's administration, ignore the court's authority and inundate the trust with lawsuits.

It's not clear how the Utah Attorney General's Office might pay the debt.

The money may have to be appropriated from the Utah Legislature, which is currently in session and working on the budget for fiscal year 2012-2013. Senate budget chairman Lyle Hillyard, R-Logan, on Tuesday said he expected lawmakers to give Shurtleff the money because the payment is tied to a judge's order.

Hillyard said Shurtleff has assured lawmakers that the state will be reimbursed once trust lawsuits are resolved and assets can be sold.

The Attorney General's Office has also asked Lindberg to consider ordering Arizona officials to share the debt burden. In court papers, state attorneys said the judge could base each state's share of payments on the percentage of trust lands located in each state.

About 54 percent of the trust's properties are on the Arizona side of the border.

Arizona objects to the proposal in court papers.

Lindberg did not include a decision on that issue in her Monday ruling.

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ADDENDUM T

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
ATTORNEY GENERAL

JOHN E. SWALLOW
Chief Deputy

Protecting Utah · Protecting You

KIRK TORGENSEN
Chief Deputy

Via Electronic Mail
February 29, 2012

Jeffrey L. Shields
jshields@cnmlaw.com

Re: UEP Trust

Dear Jeff:

As we recently discussed, we would like a lien filed on the UEP Trust to secure the State of Utah's ability to recoup the fees it has been ordered to pay to the Special Fiduciary and the professionals he employed to assist in administering the Trust. At this time, a lien for the previously-paid \$275,193.44 should be filed. Once the State of Utah has paid the final amount of fees, the State will request that a second lien be filed.

If you have any questions, please contact me. Otherwise, we ask that you prepare the appropriate documents as soon as possible and notify us when they are completed. Thank you for your assistance in this matter.

Sincerely yours,

A handwritten signature in cursive script, reading "Joni J. Jones".

JONI J. JONES
Assistant Utah Attorney General
Litigation Division

JJJ/ys
cc: Jim Christensen

ADDENDUM U

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Counsel for the State of Utah and Utah Attorney General
Mark L. Shurtleff

IN THE UTAH SUPREME COURT

THE STATE OF UTAH and MARK L.
SHURTLEFF, UTAH ATTORNEY
GENERAL,

Petitioner,

vs.

HONORABLE DENISE P. LINDBERG,
Third District Court Judge,

Respondent.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR EXTRAORDINARY
WRIT and EXPEDITED RELIEF

Case No.

(Trial Court No. 053900848)

Petitioners Request the Utah Supreme
Court to Retain Jurisdiction of this Matter

Petitioners, the State of Utah and Mark L. Shurtleff, its Attorney General, through counsel, and pursuant to Rule 19(b)(7) of the Utah Rules of Appellate Procedure submit this memorandum of points and authorities in support of their Petition for Extraordinary Writ and Expedited Relief.

RELEVANT FACTS

By now, this case is well known to the Court. The actions, however, that give rise to the present Petition may not be. Though set out in the Petition for Extraordinary Relief, Petitioners underscore here some the relevant facts.

In May 2005, the Utah Attorney General filed a petition in Utah's Third District Court to protect the beneficiaries of the United Effort Plan (UEP) charitable trust based on ongoing breaches by the then-trustees. *See Addendum A*, Petition In the Matter of the United Effort Plan Trust. In June, Third District Court Judge Denise Lindberg appointed Bruce Wisan as the Special Fiduciary¹ of the UEP Trust, and advised that Wisan's authority be "subject to and limited by the availability of funds in the Trust estate to reimburse the special fiduciary costs, fees and other approved expenses incurred the special fiduciary and his attorneys. *See Addendum B*, Memorandum Decision and Order Appointing Special Fiduciary, dated June 22, 2005. But as noted by Mr. Wisan in his first report to the Court filed August 2, 2005, apart from real property², the Trust has no liquid

¹ On Wisan's recommendation, the district court delayed its appointment of successor trustees, and instead, appointed an advisory board to assist Wisan's functions. Both the Court and the parties intended Mr. Wisan's and the advisory board's appointments to be temporary and last until successor trustees could be identified and appointed. For myriad reasons, however, successor trustees have never been appointed and to this day, Mr. Wisan continues to act in his role as a court-appointed fiduciary.

² That real property consists largely of the property and homes occupied by present and former members of the FLDS Church. It also consists of large tracts of undeveloped land, which has been the subject of much controversy since July 2008.

assets; namely, the Trust holds no cash, personal property, or income, and also, the Trust has no source of income. *See Addendum C, Report and Recommendation of Bruce Wisan, dated August 2, 2005.*

Shortly after his appointment, Mr. Wisan recommended that the district court reform the UEP Trust, because, in part, the former trustees, comprised of leaders of the FLDS Church, had ignored all previous court orders and appeared to have abandoned the Trust, and because with the removal of Warren Jeffs as Trustee, it was neither practical nor possible to administer the Trust according to its religious purpose. *See Addendum D, Report and Recommendation of Bruce Wisan, dated August 18, 2005.* In December 2005, the district court ratified Mr. Wisan's recommendation and approved the form of the reformed trust that Mr. Wisan submitted. *See Addendum E, Memorandum Decision and Order, dated December 13, 2005.* Since, that time, Mr. Wisan has continued to act in his role as Special Fiduciary of the Reformed Trust, and he has incurred costs and fees related to that effort.

The Special Fiduciary has incurred costs and fees that over time were paid, in part, directly from Trust proceeds. But since July 2008, as result of multiple actions in Utah's state and federal courts, the cost of administering the Trust has grown significantly. Despite that escalation, the Special Fiduciary did not submit regular accountings or seek interim orders directing payment from the Trust. And though admonished by the district

court and the Attorney General to do so, *see Add. O*, at Ex. A, for more than three years, Mr. Wisan submitted no bills, no accountings, and no requests for payment. In fact, prior to May 2011, Wisan submitted his last fee application in July 2008, which covered his fees for the months of February, March and April 2008.

That changed, however, when on May 27, 2011, through counsel and pursuant to Utah Code Ann. § 75-7-1004(1) (West 2004),³ Mr. Wisan moved the district court for an order directing the State of Utah to pay an estimated \$4.6 million to the Special Fiduciary as a loan secured by a lien on Trust proceeds, for the costs and fees Mr. Wisan alleged to have incurred in his administration of the Trust from April 2008 to time of his motion. *See Addendum F*, Motion to Award Costs and Expenses from the State of Utah and supporting memorandum. The State opposed the Fiduciary's request in a June 9, 2011 memorandum, and on June 20, Mr. Wisan submitted his final reply. *See State of Utah's* opposition memorandum and the Fiduciary's reply, respectively, attached as **Addendums G and H**.

³ That statute states:

(1) In a judicial proceeding involving the administration of a trust, the court may, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

Utah Code Ann. § 75-7-1004(1) (West 2004).

On August 1, 2011, Judge Lindberg rejected the State's response and granted Mr. Wisan's request. *See Addendum I, Ruling and Order on Motion to Award Costs and Expenses Chargeable to the State of Utah.* The district court acknowledged that "[a]t the outset of this case the Court ordered the costs and expenses of Trust administration be borne by the Trust," but based on what Judge Lindberg described "changed circumstances," the district court concluded "that justice and equity require that, as between the State and the Special Fiduciary, the State should be required to cover the costs and expenses of Trust administration until such time as the Trust can again bear those costs or Trust Assets can be sold to meet its financial obligations." *Add. I at p. 2.*

In sum, the district court ruled:

The Special Fiduciary's Motion is GRANTED. As to those fees previously approved by the Court but not paid because of the financial straits of the Trust, the Special Fiduciary is directed to submit those to the Utah AG for prompt payment.

As to the expenditures incurred after the Court's last review of fee requests, the Special Fiduciary is ordered to file an accounting containing a complete listing of all unpaid expenditures for the Court's and State's review. The Court will consider any objections by the State and make a determination whether to approve, modify or reject some or all of the fee requests. Once the Court has made that determination, it will be the State's duty to pay the obligation timely. Specifically, it shall be the duty and obligation of the Utah AG, as the State's agent and representative, to take all necessary action to secure prompt payment of the amounts approved by the Court.

Id. at p. 7.

Nearly three months later, on October 12, 2011, Mr. Wisan submitted the first of nine separate accountings. He filed subsequent accountings on October 20 and 26, and on November 3, 4, 8, 10, 14 and 16, 2011. Then, on November 17, Mr. Wisan moved the district court to approve his expenditures. *See Addendum J*, Motion to Approve Expenditures in Accountings.

Petitioners moved the district court reconsider its August 1 ruling on November 23, *see Addendum K*, and on November 28, Petitioners moved for a 90-day extension of time to review the Special Fiduciary's several accountings, and to conduct discovery and retain an expert as necessary to aid Petitioners' response to the Special Fiduciary's motion. *See Addendum M*. The district court denied Petitioner's motion to reconsider without calling for a response from the Special Fiduciary, *see Addendum L*, and after hearing from the Fiduciary, the district court denied Petitioners' request for additional time to review more than 2,000 pages of the Special Fiduciary's several accountings, to conduct discovery, and for an evidentiary hearing regarding the same. *See Addendum P*.

The district court called for Petitioners' objections within two weeks' time, by January 17, and directed Mr. Wisan to submit his Reply no later than January 31, 2012. *Add. P*, at p. 3. In turn, Judge Lindberg imparted that

[t]he Court will then act expeditiously to rule on the Special Fiduciary's Motion and the State's objections thereto. In any event, the Court will render a decision no later than February 10, 2012. This schedule will allow the A.G. sufficient time to request any necessary funds from the Legislature during the upcoming legislative session.

Id. (emphasis added).

As promised, on February 10, 2012, Judge Lindberg issued the court's Ruling Re: Special Fiduciary's Motion to Approve Expenditures in Accountings. *See Addendum S.* In it, the district court granted, in significant part, the Special Fiduciary's fee request and directed that "The State of Utah, through its Attorney General, is hereby ordered to pay [\$5,575,392.25] **within 90 (ninety) days** of the entry of this Ruling" *Add. Q* at p. 19 (emphasis in original).

SUMMARY OF THE ARGUMENT

With appreciation for the gravity of their request, Petitioners, the State of Utah and its elected Attorney General, seek an extraordinary writ of mandamus finding that Judge Lindberg's February 10, 2012 ruling directing "[t]he State of Utah, through its Attorney General," to pay to the Special Fiduciary the sum of \$5,575,392.25 "within 90 (ninety) days" intrudes on a pure legislative function and therefore constitutes an invalid exercise of the district court's judicial authority. That ruling violates the state constitutional separation of powers doctrine, and it also creates a condition – by demanding payment in a time and under terms – for which it is impossible for Utah's AG to comply.

Accordingly, and without waiving their ability to directly challenge the basis for Judge Lindberg's several rulings at such time as they are entered as final and conform to the rules, *see* Petition, discussion at pp. 10-14, Petitioners ask this Court (1) to declare the part of Judge Lindberg's February 10, 2012 Ruling that directs the Attorney General to seek and the State of Utah, therefore, to make a supplemental appropriation and substantial loan to the Special Fiduciary within 90 days (i.e., on or before May 10, 2012) violates the separation of powers doctrine contained in Article 5, Section I of the Utah constitution, and also 2) to restrain and enjoin further action in the district court based on the Attorney General's inability to meet the time constraints of that ruling.

ARGUMENT

Mandamus presents a drastic remedy, available only under extraordinary circumstances. Petitioners acknowledge that this Court does not view lightly whether to grant a petition for an extraordinary writ of mandamus, Petitioners' request is not made lightly.

To determine whether to grant mandamus, this Court must look to the relief sought, the circumstances alleged, and the purpose of the writ. *See Hogs R Us v. Town of Fairfield*, 2009 UT 21, ¶ 1, 207 P.3d 1221. Here, Petitioners ask this Court to grant them extraordinary relief that is well-within this Court's discretion.

By filing its petition, Petitioners do not seek to circumvent the rules of appellate

procedure or to have their request serve the equivalent function of an expedited appeal. Petitioners do not ask the Court to correct any lower court findings, or to contradict any of that court's legal conclusions. *See State v. Barrett*, 2005 UT 88, ¶ 127 P.3d 682 (unlike on direct appeal, party seeking mandamus is not entitled to a remedy that corrects a lower court's alleged mishandling of a case). But here, Petitioners seek only a declaration that by directing the State to pay to Mr. Wisan more than \$5 million within ninety (90) days is tantamount to ordering the State to make a specific appropriation of State funds. By so ordering, Judge Lindberg has intruded on a uniquely legislative function and her ruling violates the constitutional separation of powers doctrine. *See Utah Const. Art. 5, § 1*. Finally, because the district court's ruling crosses the line from judicial to legislative, and also, because it creates a condition to which the Attorney General cannot comply, Petitioners ask this court to restrain and enjoin further action in the district court based on the AG's inability to secure prompt payment with 90 days.

I. The District Court's Ruling that Directs the State of Utah to Pay More than \$5.5 Million by May 10, 2012 Intrudes on a Legislative Function and Violates the Utah Constitution.

In sparse but certain terms, the Utah Constitution mandates a clear separation of powers between the three branches of government:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislature, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to

one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art. V, sec. 1. “[T]he doctrine of separation of powers,” this Court has stated, “is the control gate harnessing the reservoir of powers of a government which functions at the will of the people” *Timpanogos Planning & Water Mgmt. Agency v. Central Utah Water Conservancy*, 690 P.2d 562, 565 (Utah 1984). Thus, powers properly belonging to each branch of government – and not reserved or delegated to any other branch – must be safeguarded. *See Wood v. Budge*, 374 P.2d 516, 518 (Utah 1962) (observing that to preserve the balance of the three branches of government, one branch, cannot circumvent powers reserved to another). And even as the doctrine has evolved from its “classical concept,”

[u]nder the modern interpretation of the doctrine, one branch of government may exercise some of the powers of the other departments ‘when it is essential to the discharge of a *primary function*, when it is not an assumption of the whole power of another department, and when the exercise of the other power does not jeopardize individual liberty

Timpanogos Planning, 690 P.2d at 567 (emphasis in original).⁴

⁴ In this respect, it is conceivable that a court can issue an order that gives the State the option of appropriating a sum of money to meet specific mandates of the court’s order, or, to comply with other provisions set out by the court. The several, federal prison reform cases come to mind. But in this instance, Judge Lindberg’s order gives the State no option. The ruling requires the State Legislature to appropriate nearly \$5.6 million, and to do so by May 10, 2012.

Respectively, Articles 6, 7, and 8, set out the authority of the Legislative, Executive and Judicial branches of Utah's Government. The Legislative power of the State "shall be vested" in the Senate and House of Representatives, Utah Const. Art. 6, § 1.1(a), and narrowly too, in the people through initiatives. *Id.* at §§ 1 1(b), (2). The Executive power is "vested in the Governor who shall see that the laws are faithfully executed."⁵ *Id.*, Art. VII, § 5. And Judicial power is centered "in a Supreme Court [and] in a trial court of general jurisdiction known as the district court . . .," *id.* Art. 8, § 1, whose proper reach includes

original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

Id., Art. 8, § 5.

Employed in the Constitution, the terms "legislative" and "judicial" are not capable of precise definition, and what may properly be characterized as legislative or judicial – and what may not – is, in part, a determined by the nature and function of each branch of government. Looking to other sources, the adjective "legislative" is defined as:

⁵ The Executive branch is also comprised of the "elective constitutional officers . . . of Governor, Lieutenant Governor, State Auditor, State Treasurer, and Attorney General," *Id.*, Art. 7, § 1.

1 a: having the power or performing the function of legislating; **b:** belonging to the branch of government that is charged with such powers as making law, levying and collecting taxes, and making financial appropriations.

[Http://www.merriam-webster.com/dictionary/legislative](http://www.merriam-webster.com/dictionary/legislative) (Last accessed on 3/5/2012)

(emphasis added). Conversely, the adjective “judicial” is defined as:

1 a: of or relating to a judgment, the function of judging, the administration or justice, or the judiciary <*judicial process*>;
b: belonging to the branch of government that is charged with trying all cases that involve the government and with the administration of justice within its jurisdiction.

[Http://www.merriam-webster.com/dictionary/judicial](http://www.merriam-webster.com/dictionary/judicial) (Last accessed on 3/5/2012).

As a matter of law, the term “judicial power” constitutes the authority of Utah’s courts to hear and to determine justiciable controversies, and also the power to enforce judgments, decrees and orders that flow therefrom. *Timpanogos Planning*, 690 P.2d 569. Judges, then, “are the interpreters of law.” *Id.* And though Utah’s district courts do possess the right and responsibility to pass judgment on the actions of Utah’s public officials and also on the functions of its government, *see State v. Jones*, 407 P.2d 571, 574 (Utah 1965), courts must exercise restraint and refuse, therefore, to interfere with orderly government processes that have not been granted to the courts by legislative mandate or through Utah’s constitution. *Id.* at 574-75.

To this end, Petitioners’ counsel have searched, but have nowhere found in Utah’s Constitution, the several volumes of the Utah Code, or even, through Utah’s common

law, that the judiciary has been vested with the power to raise revenue through taxes, or in turn, to direct the spending of the same. It is, perhaps, not surprising that counsel has been unable to locate any legal authority to support the proposition that a judge possesses the authority to order the Legislature to appropriate monies for a specific purpose, as that power is a legislative function, reserved exclusively to the Legislature.⁶ See Budgetary Procedures Act, Utah Code Ann. §§63J-1-101 et seq., Revenue Procedures Act, *Id.*, § 63J-2-101 et seq.; and State Appropriations and Tax Limitation Act, *Id.* § 63J-1-3-101 et seq. *see also* Utah Const., Art. 13; and *see, e.g., Denver & R.G.R. Co. v Grand County*, 51 Utah 294, 170 P. 74, 75-76 (Utah 1917) (recognizing that article 13 of Utah's Constitution vests the power to appropriate public funds in the Legislature).

To evaluate a separation of powers complaint, this Court asks, first, whether “the [actor] in question [is] ‘charged with the exercise of powers properly belonging to’ one of the three branches of government.” *In re Young*, 1999 UT 6, ¶ 8, 976 P.2d 581 (quoting Utah Const., Art. V, § 1). The Court then examines whether the function at issue is “one ‘appertaining to’ another branch of government’?” *Id.* And, finally, if the answers to

⁶ Not even Utah's Governor possesses the authority to compel specific appropriations. But “not later than 30 days before the date the Legislature convenes in the annual general session,” the Governor must deliver “a confidential draft copy of the governor's proposed budget *recommendations* to the Office of the Legislative Fiscal Analyst . . .” Utah Code Ann. § 63J-1-201(1) (emphasis added). Those recommendations, then, are acted on by the Legislature, who alone, has the power to appropriate. And even should the Governor object, his recourse is similarly constrained, curtailed and controlled by the Constitution and statute.

those questions is “yes,” the third step asks whether “the constitution ‘expressly’ direct[s] or permit[s] exercise of the otherwise forbidden function? If not, article V, section 1 is transgressed.” *Id.*

Applying that test here, the first questions are answered affirmatively. Judge Lindberg – as a sitting Third District Court Judge – is charged with the exercise of powers “properly belonging” to the Judicial Branch. Similarly, the function at issue – the power to compel a specific appropriation of state revenue – constitutes a function “appertaining to” another branch of the government, i.e. to the Legislature. Finally, because nothing in Utah’s Constitution permits a judicial officer to engage in legislative appropriations, Judge Lindberg’s actions “transgress” the separation of powers demanded by Article 5, Section 1 of Utah’s Constitution.

Thus, even accepting for the moment – which Petitioners do not – that requiring the State of Utah to pay, or to extend as a loan, more than \$5.5 million to the Special Fiduciary is “what justice and equity require,” the part of Judge Lindberg’s February 10 Ruling that also directs the State of Utah, through its Attorney General, to secure and therefore pay that sum to the Special Fiduciary **within ninety (90) days**,” invokes purely legislative power – the power to control the purse – and therefore violates Utah’s

Constitution.⁷ The Petition for Extraordinary Writ should therefore be granted.

II. The District Court's Ruling Bypasses the Checks and Balances Inherent in Utah Law and Imposes an Unreasonable Burden on Utah's Legislature to Pay.

The February 10 Ruling is not an adverse judgment, or even a ruling entered after a full and fair evidentiary hearing. It is, instead, an equitable determination and directive that the State of Utah should advance nearly \$5.6 million to the Special Fiduciary so that he may be reimbursed for costs and fees that he claims are reasonable and necessary and were incurred in the administration of the UEP Trust. That sum, now due by May 10, 2012, has never been presented to or subject to review by the Utah Legislature. The district court's order, therefore, bypasses all of the usual and appropriate checks and balances required as a matter of law to ensure the State will not, as here, be unexpectedly required to appropriate large sums from its budget as "justice and equity" may require.

Sovereign immunity bars most claims for money damages asserted against the State. Utah's Governmental Immunity Act, Utah Code Ann. §§ 63G-7-101, et seq., has long-precluded an award of money damages against the State except in instances where the Legislature has expressly waived its immunity from suit. Under that Act, claims made

⁷ That Judge Lindberg intended her February 10 ruling to result in a specific appropriation is without dispute. But in her January 2, ruling denying the Attorney General additional time to review the Fiduciary's several accountings, and setting a time frame for the district court's decision, Judge Lindberg stated, "the Court will render a decision no later than February 10, 2012. This schedule will allow the A.G. sufficient time to request any necessary funds from the Legislature during the upcoming session." *Add. P.*, at p. 3.

against the State are paid only when “approved by the state,” or when “a final judgment” has been obtained. *Id.* at § 63G-7-701(1)(a). A final judgment, in turn, can be obtained only upon a finding of liability, that the State can appeal before being required to pay. Without question, the ruling at issue here does not constitute a “claim for money damages,” nor was it obtained upon a finding of liability or been otherwise “approved” by the State.

And even in the absence of those facts, other checks exist to guard against unexpected or unwarranted claims that the district court’s ruling circumvents as well. First, the Board of Examiners Act, Utah Code Ann. §§ 63G-9-201, *et seq.*, governs the process for paying claims that are barred by Utah’s Immunity Act. *See id.*, at § 65G-7-701(1)(b). In such an event – when a party asserts a “claim against the state . . . for the payment of which specifically designated funds are required to be appropriated by the Legislature,” that claim must be acted on by the Board of Examiners before being passed on by the Legislature. *Id.* § 63G-9-201(3). Stated another way, a person who makes a “claim against the state. . . for which funds have not been provided for the payment thereof, or the settlement of which is not otherwise provided for by law, must present the same to the Board of Examiners . . .” *Id.* § 63G-9-302. For such claims, the Board must offer findings and recommendations to the Legislature, *id.*, § 63G-9-304(f), at least 30 days before the legislative session begins. *Id.* § 63G-9-305. And even then, the

Legislature may reject the recommendation. *Id.* The district court's order ignores this process and places the onus of securing a substantial appropriation on the Attorney General alone.⁸ But even if this Court deems it valid, Judge Lindberg's order contravenes another check against unbridled spending.

Under the State Settlements Agreement Act, Utah Code Ann. §§ 63G-10-101, *et seq.*, in the absence of a judgment on the merits, no state entity can resolve a claim for more than \$100,000 without approval of Utah's Governor. *Id.* § 63G-10-201. In addition, no state entity can settle a claim of \$1 million or more unless it has been presented to and approved by the Legislature in any general or special legislative session. *Id.*, § 63G-10-202. Judge Lindberg's Ruling defies those restrictions.

These provisions are prudent. They offer predictability and provide a means of reporting and review that ensures the State will not be faced with apportioning large sums of money in equity or otherwise. But ruling, as Judge Lindberg has here, that the State must allocate and pay nearly \$5.6 million by May 10, by-passes these checks. It ignores the need for balance. And, the ruling places the Legislature in the difficult and unwarranted position of appropriating millions of dollars without any mechanism for comment or review.

⁸ Counsel has searched on this point too, but has not found any authority that sanctions this approach.

III. This Court Should Enjoin and Restrain Further Action in the District Court on the February 10 Ruling Based on the Attorney General's Present Inability to Comply.

Utah law recognizes impossibility – or the inability to perform – as a defense against a finding of contempt. *See, e.g. Bradshaw v. Kershaw*, 627 P.2d 528 (Utah 1981); *Brown v. Cook*, 260 P.2d 544 (Utah 1953). By analogy, the Attorney General urges that because he is wholly unable to meet the dictates of Judge Lindberg's Ruling – to secure payment from the State of Utah by May 10, 2012 -- this Court should restrain, therefore, and enjoin further action in Utah's District court, relative to that deadline. The Attorney's General basis for this request follows and supported by the Affidavit of Mark L. Shurtleff filed herewith.

Annually, the Utah Attorney General's Office receives a budget appropriation from the Utah State Legislature. And though the funds appropriated to the Office are deposited into its revenue accounts, the funds are restricted. The AG may not dispose of them in any manner that he chooses. But monies appropriated by the Legislature are "appropriated upon the terms and conditions" provided by law, Utah Code Ann. § 63J-1-206(2)(a)(I) (West Supp. 2011), and "any department, agency or institution that accepts money appropriated by the Legislature does so subject to the requirements" of that law. *Id.* at § 63J-1-206(2)(a)(ii). Similarly, legislative appropriations are not approved in bulk, but the Legislature appropriates funds according to "items of appropriation."

Utah's AG may not "transfer[money] from one item of appropriation to any other item of appropriation." *Id.* at § 63J-1-206(3)(f)(i). And to the extent the AG may transfer money at all, he may do so only within programs contained "within an item of appropriation" and then, only as approved by the Legislature according to a statutorily proscribed process.

Id.

Also, the State's budget operates on fiscal, not calendar years. *Id.* § 63J-3-103(5). The current fiscal year, FY 2011-2012, began on July 1, 2011 and will end at midnight on June 30, 2012. *Id.* Accordingly, funds now at the AG's disposal were appropriated to the Office during the 2011 general legislative session – which concluded in March 2011 – and cover the period of July 1, 2011 to June 30 of the present year. At present, the AG has insufficient means to satisfy the district court's Ruling. And though he believes that a transfer request, even if made, would not be approved, the AG simply lacks the necessary funds to satisfy the substantial sum the Special Fiduciary now seeks.⁹

The AG also believes, that given the strictures of Utah's budget process, his ability to comply with the February 10 Ruling will be similarly constrained based on his 2012-2013 budget appropriation. Because, as settled law compels Utah's Governor to deliver a

⁹ Notably, in October 2011, as a show of good faith and not in recognition of the validity of Judge Lindberg's order, the AG requested and received leave to transfer more than \$275,000 from his budget to ease part of the Special Fiduciary's present indebtedness. That money, paid in October and prior to the beginning of the 2012 general session, was known by and therefore included in the AG's general FY 2012-2013 budget request.

confidential draft of the his proposed budget “not later than 30 days before the date the Legislature convenes,” *see id.*, § 63J-1-201(1), Utah law also requires the AG to provide his itemized budget request at a time and under guidelines that the Governor may direct. *Id.* § 63J-1-201(3)(A)(I), (ii). That time changes annually with the onset of the general session, but falls, generally, in the month September. This year, was no exception.

Judge Lindberg issued her initial ruling on the Special Fiduciary’s Motion to Award Costs and Expenses Against the State on August 1, 2011, but by September 30, she had not articulated any sum of money to be paid by the State. But on that date and according to the terms of the August 1 Ruling, the AG believed that before any sums should be paid, he would first have a full and fair opportunity to review and to object to the Special Fiduciary’s accountings. Without dispute, none of those accountings had been submitted by September 30, 2011. But the Special Fiduciary submitted the first of nine, separate accountings on October 12, 2011 – a time after the AG made his FY 2012-2013 budget request. Consequently, the AG’s 2012-2013 budget requests did not contain any sum directed toward the payment of the Special Fiduciary’s costs or fees.

Finally, and despite his objections, when given notice of the Ruling, the Attorney General took prompt measures, and together with his Executive staff met with Legislative Leadership. That meeting bore no fruit. But on information and belief, and because the February 10, 2012 Ruling is not a final judgment order, entered after a full and fair

evidentiary hearing or other adjudication; because the monies contemplated by the ruling are not in the nature of a "settlement" or other claim subject to the Legislature's approval; and, because the Ruling does not constitute a statutory duty on the State, unless directed to do so after the opportunity for full and fair appellate review, the Legislature will not appropriate funds to accommodate the strict time lines included in the district court's order.

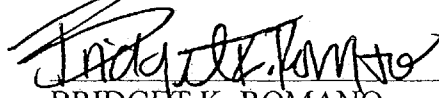
Accordingly, because of the dearth of funds in his present budget to satisfy the district court's order, and given that the AG will not likely receive sufficient funds in FY 2012-2013 with which he can immediately satisfy the district court's order, it is therefore impossible for the Attorney General to comply under the time and according to the terms set out. The district court's "ninety day" time line constitutes a term the AG simply cannot meet. Respectfully, therefore, Mark L. Shurtleff requests this Court to restrain and enjoin further action in the district court against him and based on his wholesale inability to comply.

CONCLUSION

For the foregoing and based on the information set out in the Petition for Extraordinary Relief, the State of Utah and its Attorney General, Mark L. Shurtleff, request that this Court grants them an extraordinary writ that declares unconstitutional that part of the district court's order that commands payment within ninety days by means

of a specific appropriation, and also, that restrains and enjoins further action in the district court based on the Attorney General's actual inability to comply with that time frame.

Respectfully submitted this 27th day of March, 2012.



BRIDGET K. ROMANO

Utah Solicitor General

JONI JONES

DAVID WOLF

Assistant Utah Attorneys General

Counsel for the State of Utah and Attorney General

Mark L. Shurtleff

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2012, I caused a copy of the foregoing UTAH ATTORNEY GENERAL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT and EXHIBITS to be sent by overnight mail to:

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Stephen C. Clark
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McDONOUGH**
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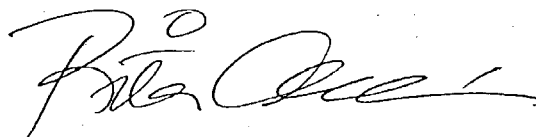
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ADDENDUM V

**Unofficial Transcript of KUTV Channel 2 Television Report
26 March 2012**

[Electronic Copy of Television Report Available Upon Request]

FLDS Land Dispute

Shauna Lake: Attorney General Mark Shurtleff says he is ready to go to jail rather than see Utah taxpayers bilked in a polygamist land dispute.

Mark Koelbel: A judge has ordered has ordered taxpayers to loan a court appointed trustee some \$6 million. Shurtleff tells our Rod Decker that's a wrongful order and that taxpayers shouldn't have to pay anything.

Mark Shurtleff: If I have to go to jail to show that a court cannot order an executive and legislative branch to put at risk taxpayer dollars, I'm willing to do that.

Rod Decker: Attorney General Mark Shurtleff fears Judge Denise Lindberg may put him in jail over polygamist land.

Mark Shurtleff: I think she is setting me up for contempt of court.

Rod Decker: The judge seized FLDS land here in Hildale/Colorado City. She appointed this man, Bruce Wisan, to run the land. He's amassed a bill of almost \$6 million.

Mark Shurtleff: From the very beginning it was understood that the Fiduciary and his attorneys would be paid out of the proceeds of the Trust.

Rod Decker: But Wisan hasn't been able to sell the land so he hasn't been paid. So Judge Lindberg has ordered Utah taxpayers to make a \$6 million loan to Wisan until the land can be sold. She may plan to hold Shurtleff responsible to make sure Utah comes up with the money.

Mark Shurtleff: Problem is we are standing right now on a federal judge's ruling that the actions of the Court are unconstitutional.

Rod Decker: Shurtleff says he is willing to go to jail rather than see taxpayers bilked in the polygamist land suit. He will appeal to the Utah Supreme Court. Rod Decker 2 News

Shauna Lake: As the Attorney General said, Judge Dee Benson has said the whole FLDS land seizure is unconstitutional.

Mark Koelbel: That decision is now before the Federal Court of Appeals in Denver, Colorado.

ADDENDUM W

MAR 19 2012

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Attorneys for Bruce R. Wisan, Court-Appointed
Special Fiduciary of the United Effort Plan Trust

IN THE UTAH SUPREME COURT

THE STATE OF UTAH and MARK L.
SHURTLEFF, UTAH ATTORNEY
GENERAL,

Petitioners,

vs.

HONORABLE DENISE P. LINDBERG,
Third District Court Judge,

Respondent.

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

Respondent.

**SPECIAL FIDUCIARY'S
RESPONSE TO PETITION
FOR EXTRAORDINARY WRIT
AND EXPEDITED RELIEF**

Case No. 20120161-SC

(Trial Court No. 053900848)

Bruce R. Wisan, Court-appointed Special Fiduciary of the United Effort Plan Trust (the "Fiduciary") hereby responds to the PETITION FOR EXTRAORDINARY WRIT AND EXPEDITED RELIEF (the "Petition") and the supporting Memorandum (the "Memorandum") filed by the state of Utah and Attorney General Mark L. Shurtleff (collectively the "State"), as follows:

INTRODUCTION

The Fiduciary submits this Response primarily for the purpose of providing more-complete factual information regarding the present Petition. Given the short response deadline, the Fiduciary has not attempted to fully address all of the constitutional arguments raised by the State.

STATEMENT OF RELEVANT FACTS

The Appointment of the Fiduciary

In May, 2005, the State, through the Attorney General's office (the "AG"), contacted Bruce Wisan and requested that he serve as special fiduciary in an anticipated trust probate case involving the United Effort Plan Trust (the "Trust"). On May 26, 2005, the State filed a petition (the "Probate Petition") with the Third District Court of Salt Lake County, Utah, Case No. 053900848 (the "Probate Action"). (*See* State's Addendum ("St.Add.") A). The Probate Petition included a request for the appointment of Mr. Wisan as special fiduciary, as well as a request for "the reformation of the Trust at the request of an interested party." (St.Add. A, p.19).

Based upon Mr. Wisan's concerns about accepting duties without the financial means with which to accomplish such duties, the State included a provision in both the Order appointing the Fiduciary (the "Appointment Order") (St.Add. B, p.6 ¶8) and the later Order expanding his authority (Fiduciary's Addendum ("Fid.Add.") B, p.4 ¶3) which provided that

the responsibilities of the Fiduciary would be “subject to and limited by the availability of funds in the Trust estate to reimburse the special fiduciary . . .”¹

Reformation of the Trust

After certain interested parties submitted requests seeking reformation of the Trust, and as it became apparent that the Trust could not be administered under its existing charter, the State and other participating parties agreed that it would be necessary to reform the Trust.² (See e.g. St.Add D, Fid.Add. C (p.7 n.5) & Fid.Add. D) After the submission of briefs, the Court entered a Memorandum Decision on December 13, 2005 (St.Add. E), which concluded

¹The State represents that this provision of the Appointment Order is a limitation on the Fiduciary’s “authority” and suggests that the Fiduciary violated this provision, and exceeded his authority, when he continued to serve during the time that the Trust did not have liquid funding to pay the Fiduciary’s compensation. (Memorandum, at p.2). In fact, this provision does not limit the Fiduciary’s authority but only his “responsibility.” (St.Add. B, p.6 ¶8; Fid.Add. B, p.4 ¶3). Under this provision, the Fiduciary is not required to continue to serve the Trust if there are not sufficient funds to compensate the Fiduciary, but he is not prohibited from continuing to serve if he so chooses. Nothing in this provision limits the Fiduciary’s authority or suggests that the Fiduciary must abandon the Trust during its time of financial crisis.

² The Petition does not disclose the State’s integral role in the reformation process and leaves the impression that the Court reformed the Trust without the State’s involvement and/or contrary to the State’s recommendations. In fact, the State was supportive of the reformation and was intimately involved from the beginning to the end. See St.Add. A p.19 (petitioning for reformation of the Trust if requested by an interested party); Fid.Add. D, p.2 (“the Utah AG concurs generally with the Special Fiduciary’s conclusion that reformation should be addressed prior to the appointment of new trustees.”); Fid.Add. E, pp.1-2 (“The Utah AG has no material objections to the Court’s Memorandum Decision . . . [and] generally concurs with the substantive provisions of the Proposed Reformed Trust Declaration”); Fid.Add. F, p.2 (“The Utah AG has no material concerns with the proposed reformation and believes that it complies with the Court’s Memorandum Decision.”); Fid.Add. G, at 55:17-19 (“On behalf of the Utah AG’s Office, as indicated in our pleadings, we don’t have any material objection.”); Fid.Add. H (wherein the Utah AG stipulates to the entry of the final Order approving the Reformed Declaration of Trust).

that reformation was necessary, established a framework for how the reformation would be accomplished, and invited interested parties to submit further briefing and reformation proposals. (*Id.* at ¶ 63). Over the next ten months, the State and other parties provided feedback to the Court and worked together to create a proposed Reformed Declaration of Trust consistent with the Court's framework.³

Subsequent to reformation, the Fiduciary remained in his role as special fiduciary pending the anticipated appointment of new trustees. The Fiduciary and his professionals served the Trust in numerous ways – including managing the Trust's assets, defending the Trust in litigation, and seeking the legal subdivision of the Trust's houses to enable distributions to the Trust's beneficiaries.

³ The Petition (at p.5) and Memorandum (at p.3) contain a number of errors regarding the reformation process – suggesting that reformation was accomplished by the Fiduciary alone, in a rushed manner, and without allowing interested parties an opportunity to be heard on the matter. For example, the State asserts that it was the Fiduciary who first raised the issue of reformation. Yet, it was actually the State who first raised the issue – in its very first filing. (St.Add. A, p.19). Next, the State asserts that the Court completed the reformation of the Trust in December 2005 by ratifying a proposed form of reformed trust which had been submitted by the Fiduciary. In fact, the Court's December 2005 Memorandum Decision did not accomplish any reformation of the Trust. Such ruling was not the end of the reformation process, but was the beginning – as it merely set the stage for the subsequent submission of briefing and reformation proposals. Next, the State asserts that the Court declined the State's recommendation to allow interested parties to submit briefing and be heard on the issue of reformation. To the contrary, the Court accepted the State's recommendation and expressly allowed interested parties to submit additional briefing on the issue of reformation. (St.Add. E, p.28 ¶ 63). Finally, the State's suggestion that the Fiduciary acted alone in reforming the Trust is contrary to the record. (*See* footnote 2, above). The record confirms that the Trust reformation was accomplished carefully and deliberately, after giving all interested parties an opportunity for input.

The Trust's Financial Crisis

One of the major problems facing the Trust has been a lack of liquid funds needed to pay the Trust's ongoing expenses. The Trust's net worth is valued in excess of \$100 million, but its property consists almost exclusively of illiquid real estate. Initially, the Fiduciary acquired some liquid funds from the proceeds of the Fiduciary's fraudulent-transfer litigation, the sale of property, and the collection of occupancy fees. Beginning in 2008, however, all such sources of funding dried up. The large majority of occupants of Trust land stopped making occupancy fee payments, and the Trust's ability to sell land was repeatedly stymied through a variety of liens and lawsuits. Thus, at the time when the Trust's legal needs were accelerating, the Trust lost its ability to pay for the professional services it required.

The Fiduciary's professionals continued to serve the Trust notwithstanding the Trust's inability to make timely payment. The Trust's delinquency caused hardship, but the professionals did not abandon the Trust and continued to serve in anticipation that the Trust would soon be in a position to pay. During this time, the professionals were encouraged to continue their service by statements of the Probate Court assuring that the Trust will pay its debts. (*See e.g.* St.Add. F, p.6 ¶19 (citing unofficial transcript of hearing dated May 27, 2009)).

During the Trust's funding crisis, the Fiduciary modified some of his practices – choosing to focus the Trust's limited resources on critical needs rather than non-essential administrative matters. Since there was no money to pay, the Fiduciary ceased filing his regular detailed fee applications, and, instead, filed periodic summary financial accountings

which listed the identity of the Trust's creditors and the amounts owed. In addition, the Fiduciary chose to file his court reports annually, rather than quarterly.⁴

Attempts to Obtain Interim Funding from the State

In late 2010, when the Trust was on the cusp of selling a large parcel of property, Judge Benson of the Federal District Court stayed the sale and entered a TRO and a subsequent preliminary injunction. Although the Tenth Circuit Court of Appeals subsequently stayed Judge Benson's preliminary injunction, the Probate Court ruled that the Fiduciary is not to sell the property pending resolution of the federal court appeal. Thus, for the time being, the Fiduciary cannot obtain funds through the sale of property.

⁴ The Memorandum (at pp.3-4) criticizes the Fiduciary for not filing regular fee applications, based upon several inaccurate accusations against the Fiduciary: First, the State asserts that the Fiduciary filed no accountings from 2008 to 2011. In fact, the Fiduciary filed several financial accountings during this period. (Fid.Add. I, pp. 22-25; Fid.Add. J, pp. 73-80; Fid.Add. K, at pp. 18-19 & Exh. D; St.Add. G, at 7-78). Such accountings did not provide the same level of detail as the fee applications, but they contained sufficient information to keep the Court and parties informed as to the Trust's obligations and delinquency. Next, the State asserts that the Fiduciary's decision to delay filing of fee applications was in violation of an admonishment of the district court. To the contrary, the Fiduciary informed the Court of his decision (*see* Fid.Add. J, p.74 ¶317) and the Court never expressed disapproval. Indeed, the Court later found that it would have been unreasonable for the Fiduciary to file regular fee applications during the time that the Trust lacked funds to pay its bills. (St.Add. I, at p.6). Finally, the State asserts that the Fiduciary's decision to delay filing his fee applications was in violation of an admonishment of the AG. (Memorandum, at pp.3-4). In fact, the AG's office recognized that it was *not* important for the Fiduciary to file fee applications while there were no funds for the payment of the fees. The State cites to only one document in support of its assertion that the Fiduciary violated admonishments of the AG and the Court. (St.Add. O, at Exh. A)). Yet, this document supports the exact opposite conclusion. In such document, which is a 2009 email exchange between an assistant AG and the Fiduciary's counsel, the assistant AG expressly agrees with the Fiduciary's position – stating that “[s]ince there is no money to pay fees the fee applications are not a priority.” (*Id.* at p.1). The Fiduciary complied with the requests of the AG's office by filing annual reports with the Court (*see* Fid.Add. I, J & K), while delaying the filing of the detailed fee applications (which were “not a priority”).

The Trust's funding crisis presents a serious threat to the Trust. If the Fiduciary and professionals cease serving the Trust, the Trust's property would likely be lost – whether through defaulting in the various lawsuits filed against the Trust, through property tax sales for the non-payment of taxes, or otherwise.⁵

In early 2011, having been stayed from selling Trust property, a representative of the Fiduciary, Val Oveson, met with representatives of the State to discuss the Trust's liquidity crisis. The parties discussed the hardships suffered by the Trust's professionals and the unfairness of having private persons and businesses performing unpaid work for a governmental purpose. A representative of the State raised the possibility of the Utah State Legislature providing funding for the Trust. The AG expressed strong support and encouraged the Fiduciary to work with members of the Legislature in seeking such funding. (See Affidavit of Val Oveson (Fid.Add. A) at ¶¶ 2-4).

In response, Mr. Oveson met with legislative leaders who initially indicated support for the idea – conditioned upon the AG's support. On February 22, 2011, however, a representative of the AG apologetically informed Mr. Oveson that the AG no longer supported the Trust's obtaining funding from the State. Thereafter, Mr. Oveson was informed that it would be much easier to obtain funds from the Legislature if there was a court order establishing that the State is liable to the Trust. (*Id.* at ¶¶6-8).

⁵ To default would likely result in the transfer of Trust property into the control of Warren Jeffs, who has been convicted of child rape, and who has previously used his control over Trust property to coerce others to allow their children to be raped by older, married men. (See United Effort Plan Trust v. Holm, 101 P.3d 641 (Ariz. App. 2004)).

The Fiduciary Seeks a Court Order

Accordingly, the Fiduciary then sought to obtain a Court Order which would provide a basis for the State to provide interim funding to the Trust. Section 75-5-1004(1) of the Utah Trust Code provides that, in a judicial proceeding involving the administration of a trust, the court may order any party to pay costs and expenses “as justice and equity may require.” Based on this statute, the Fiduciary filed a Motion with the Probate Court on May 27, 2011 – seeking the Court to order the State to pay the Trust’s professional fees on an interim basis, with a lien on Trust property to secure repayment to the State. (St.Add. F). The Motion included a listing of the estimated unpaid fees and expenses of the Trust which, at that time, totaled approximate \$4.7 million. (St.Add. F, pp.7-8).

The State filed an opposition memorandum (St.Add. G), but did not raise any separation-of-powers arguments (which it raised for the first time in the present Petition).

On August 1, 2011, the Probate Court entered a Ruling and Order granting the Fiduciary’s Motion. (St.Add. I). Therein, the Court made several findings and conclusions, including the following:

1. The State instituted the Probate Action and moved the Court for the appointment of the Fiduciary. (St.Add. I, at p.2).
2. Mr. Wisan did not seek his appointment, but accepted it at the request of the AG. (*Id.* at p.3, n.2).
3. The State had appeared at every hearing in the Probate Action and, up to that point, had never argued that the Fiduciary had incurred expenses in violation of his authority. (*Id.* at p.3).
4. Notwithstanding the fees and expenses which have been incurred by the Fiduciary, the Trust *res* has actually expanded since the appointment of the Fiduciary because

of the actions of the Fiduciary in recovering assets that had been improperly removed from the Trust. (*Id.* at p.3).

5. The State has made few, if any, efforts to assist the Fiduciary in recouping his fees and costs. (*Id.* at p.4).
6. The State has done little to lessen the legal obligations the Fiduciary has had to bear. (*Id.*).
7. Because the Fiduciary is an officer of the Court and has sought Court approval for all major actions and expenditures, the Court-approved expenditures of the Fiduciary “bear the Court’s imprimatur and the State must stand behind those obligations and ensure that those who have in good faith rendered services to the Trust will be fully compensated for their work.” (*Id.* at pp.4-5).
8. [T]here is little likelihood that the Trust assets will reasonably be available in the near future to pay past and present administrative fees and costs.” (*Id.* at p.1).
9. “The Trust now faces the real and substantial threat that it will be left without someone to manage it [or] . . . defend it.” (*Id.* at p.1).
10. It is unreasonable to ask those individuals and businesses who have served the Trust in good faith to continue to serve the Trust without payment. It is equally unreasonable to say that such individuals can simply quit. The Trust cannot be abandoned and the services of its professionals must continue until such time that there is a final disposition of the Trust. (*Id.* at p.5).
11. “[I]ndividuals or businesses . . . have been “carrying the burden of non-payment for over 3 years. . . . [A]s between the State on the one hand, and these businesses on the other, the State is clearly better situated to bear this burden while Trust administration issues are finally resolved through Court process. . . . [T]he equities weigh substantially in favor of the State bearing these costs and fees *in the interim*. . . . [T]his is not a permanent allocation of financial responsibility to the State. Rather it is just a temporary requirement until the disposition of the Trust is finally resolved.” (*Id.* at p.6 (emphasis in original)).
12. “[T]he only reasonable alternative is to require the State to make whole those individuals and businesses that have in good faith rendered services to the Trust. The State’s interests are still protected because the State can seek repayment from Trust assets and, in the meantime, the State can receive a lien against Trust property to ensure repayment.” (*Id.* at p.6).

Based upon its findings, the Court ordered the State to promptly pay all fees previously approved by the Court (for services through April 30, 2008). The Court further ordered the Fiduciary to submit accountings for all unpaid expenditures (for services subsequent to April 30, 2008), to be reviewed by the Court after considering any objections. The Court concluded its Ruling with the following Order:

Once the Court has made that determination [as to the approval of the Fiduciary's fee requests], it will be the State's duty to pay the obligation timely. Specifically, it will be the duty and obligation of the Utah AG, as the State's agent and representative, to take all necessary action to secure prompt payment of the amounts approved by the Court.

The State's Response to the Court's Ruling

On or about September 30, 2011, the AG submitted his itemized budget request to the Governor for the upcoming 2012-2013 fiscal year. (See *Shurtleff Aff.* at ¶¶5-9). At that time, the AG was aware that the Probate Court had entered its August 1 Ruling (*id.* at ¶6), wherein the Court had found that the Trust was facing a "substantial threat" because of the non-payment of professional fees and had instructed the AG to "take all necessary action to secure prompt payment of the amounts approved." The AG was also aware that the estimated amount of the unpaid obligations of the Trust was approximately \$4.7 million (as of May, 2011) (St.Add. F, at pp.7-8). Nevertheless, the AG did not include a request for the payment of *any* of the Fiduciary's fees in his budget request for the 2012-2013 fiscal year. (See *Shurtleff Aff.* at ¶9).

On December 29, 2011 (five months after the Court ordered the State to make "prompt payment"), the State made a partial payment of \$275,193.44, for fees and costs previously

approved by the Court.⁶ Such payment represented less than 5% of the total unpaid delinquency owing to the Trust's professionals.

On February 10, 2011, the Court entered a Ruling approving unpaid professional fees in the amount of \$5,757,392.25 for the period May 1, 2008 through September 30, 2011. (St.Add. S). The Ruling was entered after considering the objections filed by the State – after having granted the State a significant extension of time in which to submit such objections.⁷

In February, 2012, statements of the AG's office and others led the Fiduciary to believe that the AG intended to request funding from the Legislature for the payment of the Trust's obligations and that the Legislature intended to grant the AG's request.⁸ During this time, Val Oveson met with leadership of the Utah Legislature with the goal of assuring that necessary funds were allocated to enable the State to comply with the Court's Rulings. Mr. Oveson

⁶ The State mistakenly asserts that this payment was made in October, 2011. (See Memorandum, p.19 n.9). In fact, the payment was not made until December 29, 2011. (See Fid.Add. L).

⁷In the Petition, the State asserts that the Court denied the State's motion for an extension of time. (Petition, at p.9). In fact, the Court granted the State a significant extension of the deadline to file its objection. The Court did not grant the full 90-day extension requested by the State, but it extended the response deadline to 60 days after the filing of the Fiduciary's motion – which extended period is six times longer than the ordinary 10-day response period under U.R.C.P. 7(c)(1). Given that the Fiduciary's accountings were filed between October 12 to November 16, 2011, the State had between 62 and 97 days in which to review the accountings and file its objections.

⁸ See Fid.Add. M, p.3 (Utah AG requests Probate Court for expedited ruling on related motion by February 10, 2012, so that he can accurately represent the amount of the State's fee payment obligation in his request to the Legislature); Fid.Add. O (Utah AG requests a lien on Trust property to secure payments previously made, and a second lien after payment of the final amount of fees); Fid.Add. N, p.3 ("Senate budget chairman Lyle Hillyard, R-Logan, on Tuesday said he expected lawmakers to give Shurtleff the money because the payment is tied to a judge's order.")

initially received word that the necessary funds would be included in the Legislature's fiscal allocation. Thereafter, however, he was informed that, without the support of the AG, the Legislature would not approve such an allocation. (*See* Fid.Add. A, ¶¶9-13). Accordingly, the 2012 general session of the Legislature closed without any allocation of funds for the payment of the Trust's delinquent obligations.

Throughout this period, the State never filed an appeal of the August 1 Ruling. Similarly, the State never informed the Court or the Fiduciary that it did not consider the Ruling to be final under Rule 7(f)(2). Neither did the State submit a proposed order under Rule 7(f)(2) or take any other action to make the Ruling final. Nor did the State seek to file an interlocutory appeal of the Ruling. Rather, having made no preparation to be able to comply with its "prompt payment" obligations, the State waited more than seven months after the August 1 Ruling, and more than three weeks after the issuance of the February 10 Ruling, and then filed the present Petition seeking extraordinary relief under Rule 19 and expedited consideration under Rule 8A.

The March 12 Order

On March 12, 2012, the Probate Court issued an Order regarding the approval of one final outstanding fee request. (Fid.Add. P). Therein, the Court ruled that, based upon the AG's assertion that the State was unable to comply with the 90-day payment deadline, such deadline would be extended to August 1, 2012. (*Id.* at p.2). In addition, the Order included language to make it clear that it is final and appealable under both Rule 7(f)(2) and Rule 54(b). (*Id.* at p.2-3).

The Current State of the Trust's Liquidity Crisis

The State's failure to make timely payment has placed the Trust in a further precarious position. The Trust's professionals have worked for nearly four years without payment, which has imposed a hardship on the individual professionals as well as their firms. While the Fiduciary and the professionals have been willing to serve the Trust without payment up to this point, their ability to continue is reaching its limits.⁹

To make matters worse, the Trust is now facing another serious threat (beginning in May 2012) which will require a substantial amount of legal work in order to preserve the assets of the Trust.¹⁰ Such legal work will be in addition to the substantial legal work already being rendered by legal counsel. Without a source of funding, it is unlikely that the Trust will be able to obtain the legal assistance which the Trust desperately needs.

DISCUSSION

The State's Petition should be denied for a number of reasons:

First, the Petition does not meet the fundamental requirement necessary for obtaining extraordinary relief – a showing that “no other plain, speedy, or adequate remedy” is available. (Utah Rule Civ. Pro. 65B & Utah Rule App. Pro. 19). Here, there is no need for

⁹Yet, as recognized by the Probate Court, to simply resign is not an acceptable solution. (See August 1 Ruling, at p.5). Without management and legal representation, the Trust's property will almost certainly be lost, to the detriment of numerous charitable beneficiaries who reside on Trust property.

¹⁰Specifically, the Trust faces the potential risk of losing most, if not all, of its Utah property to claims of adverse possession which could vest as early as May 26, 2012. To ensure that such claims do not vest, it may be necessary to initiate legal action prior to May 26 as to all residences and buildings on Trust land in Utah, and all occupants therein. In addition, the Trust's Utah property could be lost to property tax sales in May, 2013, if legal enforcement actions are not commenced in the near future to compel the payment of property taxes. (See Fid.Add. Q, pp. 9-12).

extraordinary relief as the State can obtain timely review under ordinary appellate processes. The proper method for challenging the rulings of the Probate Court would be to file an appeal, and to seek a stay pending appeal if necessary. Such remedy is presently available to the State – just as it was more than seven months ago.

Notwithstanding the State's present arguments as to the non-finality of the Probate Court's Orders, the State has had multiple remedies available under regular appellate procedures which would allow for appropriate appellate review without invoking this Court's emergency or expedited procedures. While there may have been initial uncertainty as to whether the Court's Rulings were final and appealable as of right,¹¹ the State could have taken action to clarify the issue and, if necessary, to make the Rulings final. (*See Code v. Utah Dep't of Health*, 2007 UT 43, ¶7, 162 P.2d 1097 (“[A]ny party interested in finality—generally, the non-prevailing party—may submit an order.”)). Moreover, the State could have sought leave to file an interlocutory appeal. Alternatively, the State could have presented its purported funding dilemma to the Probate Court and sought a stay or extension of the payment deadline. Yet, the State did none of these things. Instead, after more than seven months, it went straight to this Court on an extraordinary and expedited basis, raising new arguments and issues which were never raised below.

Next, the Petition should be dismissed for failing to comply with the requirements of Rule 19(b)(10). That Rule requires that the petition include a statement as to whether the petitioner has sought relief through an interlocutory appeal, and, if not, why the petitioner

¹¹ *See Estate of Morrison v. West One Trust Co.*, 933 P.2d 1015, 1016 (Utah App. 1997) and *Code v. Utah Dep't of Health*, 2007 UT 43, 162 P.2d 1097.

could not obtain a plain, speedy, or adequate remedy through an interlocutory appeal. The State's Petition is silent on these issues. The State has offered no explanation as to why an interlocutory appeal would not provide an adequate remedy.

Next, even if the State were otherwise entitled to seek extraordinary relief at the time the Petition was filed, such extraordinary relief is no longer necessary. If there were any doubt, the Probate Court's recent March 12 Order resolves the matter. (*See* Fid.Add. P). Such Order moots the need for emergency relief and allows the State to seek relief through ordinary appellate procedures. Such Order is unequivocal as to its finality, and there is no uncertainty as to the State's right to file an appeal therefrom. Furthermore, the Court's granting the State an extension of the payment deadline eliminates any need for expedited review.

If the State is facing an "emergency" in this case (which it is not), such emergency was caused by the State's own inaction. Had the State pursued any of its ordinary appellate remedies over the past seven months, it would not have a need for an extraordinary writ at this time. As this Court has explained, self-created emergencies are not entitled to expedited review.

[R]ule 8 should not be employed as a means of . . . unjustifiably burdening respondents when ordinary procedural mechanisms would be adequate. This includes the circumstances where the "emergency" has arisen from petitioners' own unjustified delay in seeking relief.

Snow, Christensen & Martineau v. Lindberg, 2009 UT 72, ¶ 7 n.2, 222 P.3d 1141.

The State's present "emergency" was also caused by the State's failure to take action to comply with the Ruling of the Court. The State could have easily met the Court's 90-day payment deadline had it acted reasonably to comply with the Ruling in 2011. Upon the entry

of the Ruling, the State was aware that: (i) the Trust is facing a serious funding crisis which presents a “real and substantial threat” (St.Add. I, p.1); (ii) the amount of the Trust’s professional-fee delinquency was approximately \$5 million (St.Add. F, pp.7-8); and (iii) the State had been ordered to “take all necessary action to secure prompt payment of the amounts approved by the Court.” (St.Add. I, p. 7). Yet, the State did not take action to secure prompt payment. Rather, when making its budget request for the 2012-2013 fiscal year, the State did not even request any funds for the Trust.¹² (Shurtleff Aff. at ¶9). Had it done so, there would be no emergency at the present time.

The State is certainly entitled to appeal the Probate Court’s Ruling, but it was nevertheless obligated to make efforts to have the funding available in the event that the State was not successful on appeal, or in obtaining a stay pending appeal. Instead, the State elected not to request funding in the 2012-2013 budget and now alleges that it is “impossible” to timely comply with the Court’s Ruling. Such self-created impossibility does not provide a basis for extraordinary relief. Nor does it excuse the State of its obligation to abide by the Orders of the Court.

Next, the State’s Petition should be denied because it is without substantive merit. There is nothing about the Rulings of the Probate Court which violates constitutional

¹²Apparently, the State believed that it had no duty to make payment to the Trust until the 2013-2014 fiscal year, at the earliest. The State has not explained how such a payment could be considered “timely” or “prompt.” Neither has it explained how making payment in 2013 would do anything to alleviate the Trust’s financial dilemma, which was already at crisis levels in 2011. Given that the entire foundation for the Court’s Ruling was that the Trust needed quick interim funding in order to survive, the State knew that its failure to seek funds for 2012-2013 was not consistent with such Ruling.

separation-of-powers principles. Contrary to the State's assertion, the Court has not ordered the State to pay "by means of a specific appropriation." (Petition, at p. 14). The Court does not purport to command the Legislature to do anything. All the Court has done is award a monetary judgment against the State with a deadline in which to make payment.

The fact that the Rulings require the State to pay money does not mean that the judiciary is violating the province of the legislative branch. If that were the case, any monetary judgment against the State would be a constitutional separation-of-powers violation (given that the Legislature controls the finances of the State).

Similarly, the fact that the Court set a deadline for the State to make payment does not constitute an intrusion into the powers of the Legislature. The deadline was for the benefit of the State, as it gave the State additional time in which to obtain the necessary funding. The Court could have chosen to simply enter a judgment against the State with no time frame for payment. In such event, the judgment would have been immediately enforceable as soon as it was final. Instead, the Court gave the State additional time in which to secure the necessary funding.

The Probate Court in this case merely did what courts are required to do – it decided a Motion brought before it by applying the facts of the case to the applicable law. In this case, the Fiduciary filed his Motion under Section 75-5-1004(1) of the Utah Trust Code, asserting that justice and equity required that the State provide interim funding to the Trust. The Court applied the facts to the statute and found that, indeed, justice and equity do require that the State provide interim funding – and that it do so in a prompt and timely manner. In so doing,

the Court was simply doing its job and was not violating the province of the legislative branch.

It was the Utah Legislature that enacted Section 75-5-1004(1). In that statute, the Legislature made it clear that a “party” to a trust judicial proceeding may be required to pay fees and costs. At the time the statute was enacted (and at the present time), the law provided that the Attorney General has standing to initiate probate actions regarding the administration of charitable trusts. (See St.Add. A, pp.10-11 ¶¶30-33). Yet, the Legislature made no effort to exempt the Attorney General from the provisions of Section 75-5-1004(1). Thus, the Legislature has expressly authorized the judiciary to assess fees and costs against the State in probate proceedings.

Accordingly, it cannot be said that to apply Section 75-5-1004(1) against the State violates the separation of powers between the judiciary and the legislature. Neither can it be said that it violates governmental immunity. Any applicable governmental immunity was waived by the Legislature when it enacted Section 75-5-1004(1) without exempting the State from its provisions.

Finally, contrary to the State’s suggestion, it is not inequitable or improper to have the State provide interim funding to secure the ongoing representation of the Trust. Rather, it is inequitable to have private individuals work on the business of the State and the Court for four years without payment. The State initiated the Probate Action and obtained the appointment of the Fiduciary. Since that time, the Fiduciary has been serving as an officer of the Court at the State’s request – working against great difficulties to preserve a Utah

charitable trust. The Fiduciary's work has preserved the Trust and protected its charitable beneficiaries, and has resulted in numerous public benefits to the State, of Utah, as follows:

1. The Fiduciary recovered Trust assets wrongfully diverted from the Trust by Warren Jeffs with a value that exceeds the costs of the Fiduciary's trust administration;
2. The Fiduciary successfully defended and settled lawsuits against the Trust that could have resulted in judgments imperiling the homes of thousands of men, women and children who depend upon the Trust for their housing needs;
3. The Fiduciary uncovered and turned over to State authorities evidence of serious misappropriation of funds by Twin City Water Works;
4. The Fiduciary provided evidence of police impropriety resulting in the decertification of two police officers in Colorado City and Hildale;
5. The Fiduciary has defended and continues to defend numerous UEP beneficiaries against private and local government efforts to deny them basic public utilities, access to public parks, the use of family burial plots to inter deceased children and relatives, the use and enjoyment of court ordered leases of Trust property and other rights that citizens of this State are entitled to enjoy regardless of their religious affiliation;
6. Since appointment of the Fiduciary in May, 2005, the Trust has not been used as a means to coerce illegal conduct or to punish Trust residents for refusing to engage in such conduct, as happened under the control of Warren Jeffs;
7. Over \$100 million in property that was dedicated for charitable purposes under Utah law by deceased trustors has been preserved for those purposes as a result of the Trust reformation that prevented the Trust's assets from passing to Warren Jeffs under the termination clause. The services which the State petitioned the Fiduciary to perform establish a strong precedent that persons making charitable donations in Utah can be assured that the charitable purpose of such bequests will be vigorously protected by the State against criminal misappropriation or even worse, the use of charitable trusts to harm the very beneficiaries that the trustors intended to benefit; and
8. The Fiduciary has vigorously defended, and continues to defend, Utah's Constitutional right to resolve Utah probate disputes initiated in state court without intervention by lower federal courts that may disagree with the decisions of Utah courts. Costs incurred in defending this important principle of federalism inure to

the benefit of all Utahns who believe in the independence and sovereignty of this State's judicial system.

The State has expressed concern that if it is compelled to pay the Trust's fees and expenses, it will set a dangerous precedent. The Fiduciary submits that providing interim funding under the unique facts of the present case will not establish any precedent that is detrimental to the State. The State's concern about precedent would be better focused on the precedent which would be set if the Trust does *not* obtain funding. The real danger is a precedent that allows a charitable trust to fail because of a lack of funding to defend against litigation attacks by hostile litigants seeking to sabotage the State's administration of the trust. Similarly, it would set a dangerous precedent to allow private-sector professionals, recruited by the State to perform court-ordered functions, to go without payment because they do not have the resources to withstand relentless attacks by hostile litigants. If the Trust's professionals are denied payment for four years of service in this case, who would ever agree to accept a receivership assignment from the State in the future?

CONCLUSION

The Utah AG should be applauded for his courageous efforts in initiating the Probate Action. When the assets of a Utah charitable trust were placed at risk by the misconduct of a trustee, who used the Trust to coerce crimes against children and then chose to plunder and abandon it, the AG rose to the occasion to protect the Trust's charitable beneficiaries. By replacing the breaching trustee with a court-appointed administrator, the AG has (among other things) successfully prevented the loss of the homes of thousands of

beneficiaries, recovered assets which had been improperly removed from the Trust, and stopped the practice of using the Trust to coerce illegal activities.

While these successes have required significant effort, the Fiduciary submits that the results are well worth the cost.¹³ Now, it would be most inequitable if such efforts came to naught and if the many successes arising from the AG's Probate Petition were lost due to a lack of interim funding needed to complete the job which the AG so courageously began in 2005.

Wherefore, for the above-stated reasons, the Fiduciary respectfully requests that the State's Petition be denied.

DATED: March 19, 2012

CALLISTER NEBEKER & McCULLOUGH

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¹³This is especially true when the costs are considered in context. As found by the Probate Court, the Fiduciary's expenses are less than the value of the property which the Fiduciary has recovered for the Trust. Moreover, such costs pale in comparison to the amount of money expended by other states in combating the crimes and misconduct of the breaching trustee and his associates. If the State of Texas can spend an estimated \$30 million to protect children from such crimes in that state, it is not inequitable for the State of Utah to provide \$5 million in interim funding to continue the protection of innocent beneficiaries in this state.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **SPECIAL FIDUCIARY'S RESPONSE TO PETITION FOR EXTRAORDINARY WRIT AND EXPEDITED RELIEF** was served via United States mail, first class postage prepaid, on the 19th day of March, 2012, on the following

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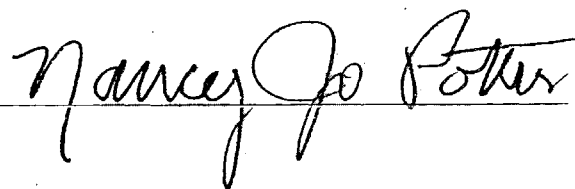
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