

2012

Mark L. Shurtleff v. Bruce Wisan : Brief of Appellee

Utah Supreme Court

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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

BRIEF OF APPELLEE SPECIAL FIDUCIARY BRUCE R. WISAN

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UTAH APPELLATE COURTS
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Hildale City

Colorado City

Twin Cities Water Authority

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Appellee Bruce Wisan (“Fiduciary”), court-appointed special fiduciary of the United Effort Plan Trust (“Trust”), respectfully submits this brief on appeal.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED

This appeal raises two primary issues and four secondary issues:

- I. Whether the court abused its discretion in its application of Utah Code Ann. § 75-7-1004(1) in finding that “justice and equity” require that the State pay the Trust’s “costs and expenses, including reasonable attorney’s fees”?
 - I.A. Whether the court abused its discretion in denying the State’s motion for reconsideration of the court’s prior ruling requiring the State to pay the Trust’s fees and expenses?
 - I.B. Whether the court violated the Utah Constitution in allowing the State a specified time period in which to pay the fee award – rather than simply entering an immediately-enforceable judgment against the State?
 - I.C. Whether the court violated the Utah Constitution in providing that the State may obtain repayment of the amounts it pays to the Trust from the assets of the Trust – rather than simply entering a judgment against the State with no provision for the State to receive repayment?
- II. Whether the court abused its discretion in approving most of the expense and fee requests of the Fiduciary and his professionals for the period May 1, 2008 through September 30, 2011?
 - II.A. Whether the court abused its discretion in granting the State 61 days in which to respond to the Fiduciary’s motion for approval of fees and expenses – rather than granting the State’s request for a 90-day extension?

Standard of Review

Issue Nos. I and II: The Fiduciary agrees with the State (at 3-5) that the court’s equitable award of attorney fees is governed by an abuse of discretion standard.

Issue Nos. I.A. and II.A.: The Fiduciary agrees with the State (at 4-5) that requests for reconsideration and for time extensions will not be overturned unless there is “no reasonable basis for the decision.”

Issue Nos. I.B. and I.C.: The Fiduciary agrees with the State (at 7) that an interpretation of the Utah Constitution is a question of law which is reviewed for correctness, but submits that there is no lower court interpretation for this Court to review, as none of the State’s constitutional arguments were raised below.

Preservation:

The Fiduciary disputes that the State preserved Issue Nos. I.B. and I.C. Both of these issues were raised for the first time to the Utah Supreme Court.

APPLICABLE AUTHORITIES

All determinative authorities are set forth in Addenda A and M.

STATEMENT OF THE CASE

Nature of the Case

This appeal is a consolidated appeal of two primary rulings and five related rulings arising out of a probate court’s exercise of discretion to approve and order the payment of the fees and expenses of the court-appointed fiduciary and his professionals who have served a charitable trust without payment for more than four years. The State initiated the probate case in 2005 and sought the services of Bruce Wisan to administer the Trust as a court-appointed Special Fiduciary – as a substitute for the former trustees who were suspended for breach of fiduciary duties. During the first three years, the Fiduciary submitted regular fee applications which were approved without objection by the State.

Such fees were paid almost exclusively from the assets of the Trust – primarily through the liquidation of fraudulently-transferred assets recovered by the Fiduciary.

In 2008 the Trust’s funding situation changed dramatically when numerous persons, under the direction of Warren Jeffs, initiated a barrage of legal attacks against the Trust in an attempt to overwhelm the Trust with litigation while simultaneously starving it of the funds needed to defend itself. As a result, the Trust’s need for professional services grew dramatically, while its sources of funding dried up.

The lack of funds threatened the Trust’s survival and caused hardship to the uncompensated individuals and businesses serving the Trust. After three years without funding, and with no other alternatives, the Fiduciary asked the State for assistance. The State initially indicated a willingness to voluntarily provide funding, but later indicated that it needed a court order. Accordingly, the Fiduciary moved the court for such an order, which resulted in the rulings on appeal.

Proceedings Below

On May 27, 2011, the Fiduciary filed a motion (R19818) seeking an order requiring the State to pay the Trust’s unpaid professional fees based upon Section 1004(1) of the Utah Trust Code (Utah Code Ann. § 75-7-1 *et seq.*), which provides that a probate court may order any party to pay the fees and expenses of another where required by “justice and equity.”

On August 1, the court entered an Order (the “Fee Payment Order”) finding that justice and equity requires the State to pay the approved fees of the Trust. (Addendum B)

Between October 17 and November 16, the Fiduciary submitted 12 accountings of the services of the Trust's professionals for the period May 1, 2008 through September 30, 2011. (R19938-22171).

On November 17, 2011, the Fiduciary filed a motion seeking court approval of the accountings (the "Fee Approval Motion"). (R22172).

On November 23, the State sought reconsideration of the Fee Payment Order. (R22347).

On November 28, the State moved for a 90-day extension of the deadline to respond to the Fiduciary's Fee Approval Motion. (R22334).

On December 2, the court denied the State's motion for reconsideration (the "Reconsideration Ruling"). (Addendum C)

On January 4, 2012, the court partially granted the State's motion for extension, extending the State's response deadline until 61 days after the filing of the Fee Approval Motion – instead of the 90-day extension the State requested.¹ (The "Time Extension ruling") (Addendum D)

On February 10, the court entered an Order (the "Fee Approval Order") approving most of the requested fees for the period May 1, 2008 through September 30, 2011, in the amount of \$5,757,392.25; and allowing the State 90 days to pay the approved fees. (Addendum E)

¹The State also filed a Motion for Contribution from the State of Arizona, which was denied by the court on February 22, 2012. This brief does not address that issue.

On March 12, the court ruled on one fee request which had been re-submitted to the Court (the “Re-submission Ruling”). The court modified the Fee Approval Order (supplementing the approved fees by \$44,541.00); extended the State’s payment deadline to August 1, 2012; and certified the Fee Payment Order and Fee Approval Order as final under Rule 54(b). (Addendum G).

On March 29, the court certified the Reconsideration Ruling and Time Extension Ruling as final (the “Certification Ruling”). (R23025).

On April 6, 2012, the State appealed the various final orders. (R23161).

STATEMENT OF FACTS²

The Fiduciary’s Appointment

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 the anticipated probate case of the United Effort Plan Trust (the “Trust”). (R1124). 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”). (R1). Among other things, the Probate Petition sought removal of the trustees for breach of fiduciary duties; Mr. Wisan’s appointment as special fiduciary; and “the reformation of the Trust at the request of an interested party.” (R18-19).

Administration of the Trust

² This Brief includes a recitation of the relevant facts to supplement and correct factual errors and omissions in the State’s Brief. It is beyond the scope of this Brief to address all the inaccuracies in the State’s Brief, but a comprehensive response is unnecessary, as many inaccuracies are immaterial to this appeal.

After his appointment, the Fiduciary and his professionals served the Trust in numerous ways. (See R1122, R3024, R3690, R4424, R5704, R6858, R7805, R8390, R9261, R10585, R11145, R12558, R17593). The Fiduciary pursued fraudulent-transfer and damage claims and successfully recovered for the Trust a number of assets, valued in excess of \$8 million (which value exceeds the amount of fees and costs incurred by the Fiduciary). (R15894).

Funding of Trust Operations

For three years, the Fiduciary regularly submitted 22 separate fee applications seeking court approval of payment of compensation to the Fiduciary and his professionals for services rendered through April 30, 2008. (R3216A, R3367, R3768, R3937, R4308, R4339, R5479, R6244, R6624, R7524, R7566, R7766, R8190, R9608, R8914, R9052, R10326, R10517, R11620, R11660, R12250, R12305). The Fiduciary provided notice and opportunity for objection for each application. No party (including the State) ever objected, and the applications were approved by the court. (R3500, R3503, R4023, R4028, R4784, R4787, R6303, R6612, R7454, R7976, R7979, R7981, R8675, R8760, R10173, R10176, R10999, R11001, R19897, R19901).

During this time, the primary funding source for the payment of professional fees was cash recovered through litigation, and money obtained from a sale of a building recovered in fraudulent-transfer litigation. (R3033, R6865, R7809, R7831). After

depleting those funds, the Fiduciary could not pay professional fees and he was forced to look for other funding to continue Trust operations.³ (R10624-10625).

In early 2008, the Fiduciary imposed a court-approved \$100 monthly occupancy fee for each residence on Trust land. Such fees potentially provide \$70,000 per month, as there are more than 700 residences. (R10608-10610).

The Trust Under Attack

In July 2008, legal counsel for Hildale and Colorado City signaled a change in the strategy of Warren Jeffs' followers in a press release declaring that "the days of the FLDS people not defending themselves in Court is over." (R12937).⁴ Almost immediately, the Trust became the target of scorched earth/starvation litigation commenced in several different jurisdictions by seven different law firms (R17603).⁵ Simultaneously, the Trust

³One of the Trust's continuing challenges is the lack of liquidity. The Trust's net worth is in excess of \$100 million, but its property consists almost exclusively of real estate which cannot readily be liquidated. (R1130-1134).

⁴ This change of strategy was directed by Warren Jeffs. (*See* R17605, R17685).

⁵ Actions filed against the Trust in the latter-half of 2008 include (1) a lawsuit and *lis pendens* filed by FLDS members against the Trust-owned Harker dairy companies designed to block the sale of the Harker property; (2) a motion for TRO seeking to remove the Fiduciary and to restrain his ability to manage Trust property; (3) a motion for stay of Trust property sales; (4) a lawsuit against the Fiduciary accusing him of fraud in obtaining a judgment against the suspended trustees; (5) a counterclaim challenging the Trust's ownership and control of Trust property, including the authority to remove persons from Trust property who refuse to pay monthly occupancy fees; (6) a lawsuit challenging the Trust's ownership and control of Trust property; (7) a lawsuit in federal court in Utah seeking to undo the reformation of the Trust and to enjoin the Fiduciary and probate court; (8) a lawsuit and *lis pendens* in Arizona seeking to prohibit the sale of Trust property; and (9) a petition for emergency relief in the Utah Supreme Court seeking to prevent the probate court from hearing a motion for the sale of Trust property. (*See* R13557 n.1; R17617-17622). Additional attacks were initiated in 2009 (notwithstanding

lost its sources of funding when the FLDS litigants ceased making occupancy fee payments (R17632-17634) and stopped the Trust from selling property through a series of lawsuits, liens, and lis pendens. (R17629). As a result, the Trust's need for legal representation escalated at the same that it lost its ability for pay for legal services. (*See generally* R17602-17631).

Attempt to Sell the Berry Knoll Farm

In an effort to obtain funding, the Fiduciary sought court approval to sell Trust property called the Berry Knoll Farm. (R13553). After the Fiduciary successfully defended at least six attempts by FLDS litigants to stop the hearing on the sale (R13940, R3972, R14551, R17619-17621), the hearing was stayed at the last moment when the State orally moved the court in-chambers to continue the hearing to allow for settlement negotiations. (R14623, R17397 p.4). The court granted the State's motion in reliance upon assurances that the FLDS litigants would resume making monthly occupancy fee payments. (R17397 4:9-10; R14714, R15473).⁶

the entry of a litigation stay) including: (10) a lawsuit in federal court in Arizona collaterally attacking the probate court's authority over the Trust; (11) a lawsuit in federal court in Utah challenging the constitutionality of the Trust's reformation; (12) an extraordinary writ petition in the Utah Supreme Court seeking to enjoin the probate court from authorizing the sale of Trust property; (13) an extraordinary writ petition in the Utah Supreme Court seeking to declare the reformation of the Trust unconstitutional; (14) an extraordinary writ petition and Rule 8 motion for stay in the Utah Supreme Court; and (15) a petition for emergency relief in the Utah Supreme Court seeking to stop the sale of Trust property (Case No. 20090859). (R17623-17627).

⁶ The State's Brief mischaracterizes events surrounding the proposed Berry Knoll Farm sale. Contrary to the State's assertion (at 18) the court did not approve the Fiduciary's request to sell Berry Knoll Farm, but scheduled a hearing that was continued at the last moment upon the State's motion. Contrary to the State's assertion (at 19), the

Partial Payment of Occupancy Fees

Despite assurances to the Court, the FLDS litigants quickly balked at paying occupancy fees and refused to pay the same (R17633) – notwithstanding the court’s clear instructions that they were to be paid without conditions. (R15473).

The FLDS litigants claim that they stopped making their payments due to communications from the AG that they were not required to do so. (R16312; R15763).⁷

After the probate court threatened to terminate the stay, the FLDS litigants submitted a partial fee payment to the AG, but he did not convey it to the Fiduciary because the FLDS litigants asked him not to. (R15731-15732). The probate court found that this “side agreement” to not disburse the funds to the Fiduciary – was “inconsistent with the Court’s prior Orders” and ordered the AG to immediately deposit the funds with the court. (R16382). Thereafter, the FLDS litigants refused to make any additional occupancy fee payments – which refusal has continued up to the present. (R19633).

Settlement Proposals

In April and May, 2009, the parties participated in mediation, but no settlement agreement was reached.⁸ (R15663). Thereafter, the AG submitted a “settlement”

Fiduciary never agreed to stay the sale. Rather, the stay was imposed by the probate court pursuant to the State’s motion. (R14623, R17397 p.4)

⁷ Eighteen months later, the AG submitted an affidavit disputing this allegation. (R22190).

⁸ The allegations in the State’s Brief (at 20) regarding the mediation are inaccurate in several respects (and are contrary to the mediation’s confidentiality requirements). The State’s assertion that it acted to ensure payment of the Fiduciary’s unpaid fees is wholly inconsistent with the actual written proposal which the State submitted to the court. (*See*

proposal to the court requesting that the Court instruct the Fiduciary to negotiate a settlement consistent with his proposal. (R15638). The State's proposal provided that virtually all of the property of the Trust would be given to the President of the FLDS Church (Warren Jeffs) (*see analysis at* R15901-15904; R15942-15944), but contained no provision for payment of the Trust's outstanding obligations.⁹

The Fiduciary, Arizona, and others filed objections to the State's proposal. In addition to the fundamental objection (that the proposal would return Trust control to the very person who breached his fiduciary duties), the Fiduciary objected that the proposal failed to provide for payment of the Trust's financial obligations. (R15893-15896).¹⁰

On July 22, the probate court rejected the State's proposal – finding that it “fails on several fundamental grounds.” (R16425).

Thereafter, the court held the continued hearing on the proposed sale of the Berry Knoll Farm. (R16447, R16448). On August 24, the court authorized the Fiduciary to sell the property to the highest bidder and directed him to establish bidding and publication procedures. (R16483, R16732, R16735).

Additional Petitions for Extraordinary Relief

n.9, *infra*).

⁹ The State admits this fact in its Brief, at 23 (“The settlement did not include a provision for paying Wisan’s fees . . .”).

¹⁰ The State’s Brief (at 24) wrongly asserts that the Fiduciary did not object to the proposal’s “lack of provision for paying Wisan’s fees”. In fact, the Fiduciary’s written objection devoted 3½ pages to such failure. (R15893-15896).

Such Order was followed by five additional extraordinary relief petitions filed under Rule 8A and/or Rule 19 in the Utah Supreme Court – including a Petition for Extraordinary Writ filed by an association of FLDS litigants, Case No. 20090859, which sought a declaration that the reformation of the Trust was unconstitutional.¹¹ Ultimately, this Court denied the petition based upon a finding that the petitioners' claims are barred by the doctrine of laches. (See FLDS v. Lindberg, 2010 UT 50, 238 P.2d 1054).

Federal Court Litigation

The FLDS litigants then returned to federal court and renewed their motion for injunctive relief. The federal court entered a TRO enjoining the sale of Trust property, and later issued a Memorandum Decision finding the Trust's reformation unconstitutional. (Addendum K).

The State and the FLDS litigants then jointly prepared a preliminary injunction order, which the State submitted to the court. (Addendum N). Although the State stated that it took no position on who should control the Trust after removal of the Fiduciary, the jointly-proposed order specifically removed the Fiduciary and probate court from Trust oversight, and provided that the control of the Trust immediately be turned over to Warren Jeffs. (*Id.* at ¶¶ 2, 6).

Despite vigorous objections from the Fiduciary and the State of Arizona, the federal court signed the State's proposed order without modification. (Addendum O).

¹¹ The other extraordinary petitions were filed by various FLDS litigants in Case Nos. 20090781, 20091006, and 20090859. (R17623-17627).

Thereafter, the probate court and other defendants immediately appealed to the Tenth Circuit and moved to stay the preliminary injunction order pending the appeal. The probate court also ordered the Fiduciary to not sell property pending resolution of the appeal. (R19810). The Tenth Circuit granted a stay pending appeal, and the Trust currently remains under the administration of the probate court and Fiduciary.

The Trust's Financial Crisis

By 2011, the Trust was in severe financial crisis – more than three years' delinquent in the payment of its professionals – while its debts had mushroomed due to the need for assistance from attorneys in many jurisdictions. (R19827-19830).

The Fiduciary and his professionals were not bound to continue serving the Trust, but their resignation would likely result in the loss of Trust property. The Trust's inability to pay its obligations caused hardship to the individuals and businesses who continued to serve. But, relying on statements of the court that the Trust will pay its debts,¹² and based on their court-appointed duties to protect the rights of the Trust beneficiaries dependent upon the Trust for their housing, many professionals continued to represent the Trust without immediate compensation. (See R19878).¹³

Attempts to Obtain Interim Funding from the State

¹² See e.g. R19827 ¶19 (citing unofficial transcript of hearing dated May 27, 2009).

¹³ As recognized by the probate court, resignation is not an acceptable solution. Without management and legal representation, the Trust's property would almost certainly be lost, to the detriment of numerous charitable beneficiaries who reside on Trust property. (R19878).

In early 2011, the Fiduciary's representative, Val Oveson, met with representatives of the State regarding the liquidity crisis. After considering the hardships suffered by the Trust's professionals and the unfairness of having private persons and businesses performing unpaid work for a governmental purpose, Assistant AG John Swallow raised the possibility of the Legislature providing interim funding. The AG expressed strong support and encouraged the Fiduciary to work with the Legislature to seek such funding. (See Addendum P at ¶¶ 2-4).

Mr. Oveson then met with legislative leaders who indicated support for the idea – conditioned upon the AG's support. On February 22, 2011, however, Mr. Swallow apologetically informed Mr. Oveson that the AG no longer supported the State's providing interim funding for the Trust. Mr. Oveson was also informed that the Trust would be more likely to obtain funds from the Legislature if a court order established the State's liability to the Trust. (*Id.* at ¶¶6-8).

The Fiduciary Seeks a Court Order

Accordingly, on May 27, 2011, the Fiduciary moved for a court order requiring the State to pay the Trust's Fiduciary and professional fees (the "Fee Payment Motion"). (R19818). The Fee Payment Motion was based upon Section 1004(1) of the Trust Code which provides that, in a judicial proceeding involving the administration of a trust, the court may order any party to pay "costs and expenses, including reasonable attorney's fees" as "justice and equity may require." (*Id.*). The motion included an estimate of the

unpaid fees and expenses of the Trust (at that time, approximately \$4.7 million). (R19828).

The State raised various arguments in opposition – including denying that it is equitable to award payment of the Fiduciary’s expenses and arguing that the Fiduciary should be paid from the assets of the Trust after the resolution of the Tenth Circuit Court appeal in the federal litigation. The State’s opposition did not acknowledge the seriousness of the Trust’s financial crisis or provide any reasonable alternative to address the crisis. (R19835).

The Fiduciary filed a reply agreeing with many of the State’s assertions (R19855 n.3), but disagreeing as to the key issue – whether justice and equity require the State’s payment of the Fiduciary’s fees. (R19854).

On August 1, 2011, the court entered its Fee Payment Order granting the Fiduciary’s Fee Payment Motion (Addendum B) and making specific findings and conclusions, including the following:

1. The State instituted the Probate Action and moved the court for the appointment of the Fiduciary. (*Id.*, p.2).
2. The Fiduciary did not seek his appointment, but accepted it at the request of the AG. (*Id.*, p.3, n.2).
3. The State appeared at every hearing in the Probate Action and, prior to its opposition, never argued that the Fiduciary had incurred expenses in violation of his authority. (*Id.*, p.3).
4. Notwithstanding the fees and expenses incurred by the Fiduciary, the Trust *res* has actually expanded because of the actions of the Fiduciary in recovering assets that had been improperly removed from the Trust. (*Id.*, p.3).

5. The State has made few, if any, efforts to assist the Fiduciary in recouping his fees and costs. (*Id.*, p.4).
6. The State has, at times, undercut the Fiduciary's ability to obtain payment. (*Id.*).
7. The State has done little to lessen the legal obligations the Fiduciary has had to bear. (*Id.*).
8. The State has taken positions that undermine the Fiduciary in litigation.¹⁴ (*Id.*).
9. 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.*, pp.4-5).
10. [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.*, p.1).
11. “The Trust now faces the real and substantial threat that it will be left without someone to manage it [or] . . . defend it.” (*Id.*, p.1).
12. 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.*, p.5).
13. “[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

¹⁴ The court also noted that over the past two years the Utah AG had “substantially altered” his position with respect to the probate action, and that his recent actions were in “marked contrast” to his actions prior to such time – and in contrast to the support that the Arizona AG had continued to offer the court and the Fiduciary. The court recognized that the AG is certainly entitled to alter his position “in any way he finds to be legally defensible”, but found that such shift in position “left the Special Fiduciary without Utah’s support, thereby substantially increasing the fees the Special Fiduciary has had to incur.” (*Id.*, n.3).

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.*, p.6 (emphasis in original)).

14. “[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.*, p.6).

Based upon its findings, the court ordered the State to promptly pay all previously-approved fees.¹⁵ (*Id.* p.7).

The court further ordered the Fiduciary to submit accountings for services rendered subsequent to April 30, 2008, to be reviewed by the court after considering any objections. (*Id.*)

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.*

(*Id.*, p.7) (emphasis added).

The State’s Response to the Fee Payment Order

On September 30, 2011, less than two months after the ruling, the AG submitted his annual budget request for the 2012-2013 fiscal year. Notwithstanding the Fee Payment

¹⁵ Such previously-approved fees were for services up to April 30, 2008, with an unpaid balance of \$275,193.44. (R19935, R22415).

Order – the AG did not request *any* funds for the payment of the Fiduciary’s fees in his budget request. (See Addendum Q ¶¶5-9).

The Fiduciary Requests State Input on the Fee Review Process

On October 11, 2012, the Fiduciary submitted a court filing outlining his planned course of action for the submission of fee accountings and inviting input from the State (and others) as to how the review process could be accomplished in a prompt and efficient manner.

The Fiduciary is open to any suggestions or recommendations from the Court or other parties in interest, *particularly the State of Utah*, as to how the Fiduciary can provide the appropriate review of unpaid expenses in a thorough, prompt and efficient manner.

(R19930 ¶4) (emphasis added). The State did not respond to the Fiduciary’s invitation.¹⁶

The Fee Approval Motion

Thereafter, the Fiduciary submitted accountings for the Fiduciary and Trust professionals for the period May 1, 2008 through September 30, 2011, consisting of 12 separate accountings filed between October 17, 2011 and November 16, 2011. (R19938-22171) which generally followed the same format and detail provided in the 22 prior accountings.

On November 17, 2011, the Fiduciary moved for approval of the fee applications (the “Fee Approval Motion”) (R22172).

The Motion for Reconsideration

¹⁶ The first communication from the State on such matter was the filing of the Extension Motion seven weeks later. (R22338)

Nearly four months after the entry of the Fee Payment Order, the State moved for reconsideration (R22179) – seeking to re-argue the issue of whether it was just and equitable for the court to award payment of the Fiduciary’s fees and further raising new arguments. The State did not explain why it could not have presented such arguments earlier. (*Id.*).

Thereafter, the court denied the motion for reconsideration. (Addendum C). After addressing the factors governing reconsideration, the court found no basis for reconsideration and let its prior ruling stand.¹⁷ (*Id.*).

The Extension Motion

On November 28, 2011, the State sought a 90-day extension to respond to the Fiduciary’s Fee Approval Motion, arguing that it needed additional time in order to review the fee accountings, conduct discovery, and engage an expert witness.¹⁸ The motion also requested an evidentiary hearing after the completion of discovery. (R22334-22342).

¹⁷ Recognizing the Trust’s financial crisis, the court entered the ruling without requiring a response from the Fiduciary “in order to ensure that the limited funds available to the Trust are not wasted in responding to motions lacking in merit.” (*Id.* n.1).

¹⁸ Contrary to the State’s assertions (at 44, 45), the State did not request leave of court to conduct discovery, take depositions, or engage an expert witness in its motion (R22334) and the court did not deny such relief in its ruling. (R22414). Such relief was neither requested nor denied because the State did not need leave of court for such things. The court questioned whether expert testimony was necessary (R22414 n.1), but it never denied the State the right to expert testimony. The State could have conducted discovery and obtained an expert witness as early as August 2011. It is inappropriate to blame the court’s for the State’s failure to do so.

Thereafter, the court partially granted the State's motion in its Time Extension Ruling (R22414) – extending the response deadline to 61 days after the filing of the Fee Approval Motion rather than the 90-day extension requested by the State.¹⁹ The extended deadline was six times longer than is provided under Rule 7(c)(1); 92 days after the Fiduciary filed his first accounting; and 62 days after the filing of the last accounting. The court explained that granting a time extension was appropriate, but that the court was “sensitive to the fact that [the] Trust’s financial situation is precarious” and that it is “unreasonable for the Trust to have to risk going without payment for another full year if the State is unable to timely secure funds from the legislature.” (R22415).²⁰

Payment of Previously-approved Expenses

On December 29, 2011, the State made a payment of \$275,193.44, for unpaid fees (incurred prior to April 30, 2008) previously approved by the court.²¹ (R22415).

¹⁹The court’s ruling did not address the State’s request for an evidentiary hearing – as the request was for a hearing after the completion of discovery (which had not occurred). The State never made any further effort to request a hearing. (*See* n.22, *infra*). (R22525).

²⁰ Contrary to the State’s assertion, the court did not order the Legislature to do anything. The court’s reference to the timing of the legislative session was merely an acknowledgment that the State would likely need an appropriation of funds from the Legislature in order to comply with the court’s rulings, and that to delay ruling on the Fee Approval Motion beyond the legislative session could delay the State’s ability to comply for up to a year. (*Id.*)

²¹Such payment was made five months after the court ordered prompt payment. The payment was helpful to the Fiduciary, but did not resolve the Trust’s financial crisis as it represented less than 5% of the total unpaid delinquency owing to the Trust’s professionals – who have still not received any payment for services rendered since April 2008.

The State Objects to the Fee Requests

On January 17, 2012, the State objected to the Fiduciary's fee requests (R22525) raising a number of objections to the professionals' billing practices which the State had not found objectionable in any of the Fiduciary's 22 prior fee applications. The State sought to penalize the professionals for such practices retroactively – by requesting an across-the-board 25% reduction of all fees.²² (R22540).

The Fiduciary submitted a point-by-point reply memorandum arguing that any reduction of fees was unwarranted and that the requested 25% reduction was unnecessarily harsh as it would deny payment for nearly a full-years worth of work. (R22761).

The Fee Approval Order

On February 10, 2011, the court entered its 19-page Fee Approval Order, wherein the court carefully considered and addressed the State's objections in detail, and approved most of the fee requests of the Fiduciary and his professionals. (Addendum E). The court recognized that approving fees in a probate matter is different from awarding "prevailing party" fees under a fee-shifting statute or contract and explained that these fees were governed by Sections 709(1), 1004(2), and 1004(1) of the Utah Trust Code, and that the standard for approval was [i] whether the expenses "were 'properly incurred,' [ii] whether the Special Fiduciary acted in good faith in prosecuting or defending against actions, and

²² Despite previously indicating that it desired an evidentiary hearing, the State's response did not include a request for hearing under Rule 7(e).

[iii] whether the expenditures (i.e. fees, costs, and attorney's fees) were 'reasonable.'" (*Id.* at 2). Employing that standard, the court sustained various objections and disallowed \$65,097.15, while approving the remaining \$5,757,392.25. (R22850). The court found no basis for a 25% reduction. Rather, the court found if there were to be any adjustment, it would be upward. (*Id.* at 17-18).

The court further ordered the State to pay such amount within 90 days (*Id.* at 19) – while again indicating that the obligation to assure payment rested with the AG:

[T]he Court expects the Utah AG to take expeditious action to secure the necessary funds so that the payment authorized by this Ruling is made without delay. It is simply not fair to hold hostage long-overdue payments to those who have in good faith rendered services to the Trust”

(*Id.* at 1, n.1).

The Court's Re-Submission Ruling followed, approving certain re-submitted billings of an Arizona law firm, and further extending the State's payment deadline to August 1, 2012. (Addendum G). With respect to the AG's obligation to make payment, the court explained:

[T]he Utah Attorney General is free to seek appellate review of the Court's determination. In the meantime, however, the Court expects him to take whatever steps he deems necessary to ensure he complies with this Order and Judgment. The Court will not presume to tell the Utah Attorney General what to do to satisfy the obligation imposed by this ruling. It does, however, expect him to comply in good faith with this and all Court orders, as one would expect from (a) the highest law enforcement officer of the State; (b) a party who voluntarily submitted to the jurisdiction of the Court by initiating this trust case, and (c) an officer of the Court.

(*Id.* at 2).

The State's Response

In February, 2012, the State gave the Fiduciary reason to believe that it intended to comply with the court's rulings: (1) The State requested an expedited ruling on its Contribution Motion indicating that a quick ruling could "have a significant impact on the amount of money that the Utah AG would have to request from the Legislature." (Addendum R p.3). ; (2) Senate budget chairman Lyle Hillyard was quoted in the media as stating that "he expected lawmakers to give [the AG] the money because the payment is tied to a judge's order." (Addendum S p.3). ; (3) the State sent a letter to the Fiduciary requesting a lien on Trust property "[o]nce the State of Utah has paid the final amount of fees." (Addendum T). ; and (4) legislative leaders informed Val Ovesen that the funds would be included in the Legislature's fiscal allocation. (Addendum P, at ¶¶9-10).

Shortly thereafter, however, the State made it clear that it would not comply with the court's orders absent a final ruling from this Court: (1) Mr Ovesen was informed that the Legislature would not allocate funding without the AG's support (*id.* at ¶¶11-13); (2) the State filed an Extraordinary Writ Petition with the Utah Supreme Court wherein it revealed that the State does not intend to abide by the orders of the probate court until and unless it is directed to do so by the Utah Supreme Court (Addendum U, p. 21); (3) the 2012 general legislative session closed without any allocation of funds; (4) a television news story reported: "[The AG] says he is willing to go to jail rather than see taxpayers bilked in the polygamist land suit." (Addendum V);²³ and (5) the State filed this appeal.

²³ While the AG is certainly entitled to oppose the Fiduciary's efforts to obtain interim funding to pay Trust debts owing to professionals who have served the Trust for

The Current State of the Trust's Financial Crisis

With the passage of another year (since the filing of the Fee Payment Motion), the Trust's professionals have now gone more than four years without payment – placing the Trust in a further precarious position and exacerbating the hardship on the private individuals who are serving the Trust and the court. The Fiduciary accordingly seeks an expedited ruling on this appeal affirming the Orders of the probate court.

SUMMARY OF THE ARGUMENT

The probate court properly applied Utah law and exercised its discretion in finding that, under the circumstances of this case, justice and equity require the State to provide interim funding to the Trust. Such funding is necessary to preserve the Trust and prevent inequity to professionals who have served the Trust without compensation. Utah law expressly authorizes the court to award the payment of fees and the material facts supporting the court's ruling are not disputed.

The court did not abuse its discretion in denying the State's belated motion for reconsideration – as the State waited nearly four months to file the motion, provided no explanation for its delay, and further delay would be harmful to the Trust. Moreover, the

many years without payment, his public characterization of these efforts as "bilking the taxpayer" is untrue. It is furthermore inconsistent with the State's assertion (at 27) that "the State and AG stand ready to negotiate, and to voluntarily agree to assume some funding for Wisan on an interim basis." Indeed, the actions of the State over the past year belie any intent to voluntarily provide funding to the Fiduciary. At no time has the State ever voluntarily paid anything to the Fiduciary. Nor has it proposed any solution which would be sufficient to address the Trust's financial crisis and provide for the preservation of the Trust.

State did not present any new evidence or meritorious argument which would alter the court's prior ruling.

The court's rulings are not contrary to the Utah Constitution or public policy. The court did not violate the separation of powers doctrine, as it did not order the Legislature to do anything but merely entered a monetary judgment with an extended time period for payment. The court did not violate Article VI, Section 29 as it did not require the State to lend its credit, but merely provided a means for the State to obtain repayment of the interim funding provided.

Finally, the court did not abuse its discretion in approving the fees and expenses of the Trust's professionals. The court granted the State a significant time extension which provided adequate time in which to review the accountings and any further extension would have greatly compromised the Trust's ability to receive payment in a timely manner. The court's review and approval of the professional fees was proper under Utah law.

ARGUMENT

I. The State has Failed to Marshal the Evidence

A party challenging a trial court's factual determination must "marshal the evidence in support of the court's findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." Eggett v. Wasatch Energy Corp., 94 P.3d 193, 203 (Utah 2004). In the present appeal, each of the rulings at issue is a discretionary ruling based upon factual determinations made by the probate court. Yet,

the State has failed to marshal the evidence supporting any of the court's conclusions – ignoring the numerous facts in the record supporting the court's findings. For this reason alone, the appeal should be dismissed and the rulings of the court affirmed.

II. The Court Properly Exercised its Discretion in Finding that Justice and Equity Require the State to Pay the Costs and Expenses of the Trust

A. The Court's Findings are Based Upon Undisputed Facts

In applying Section 1004(1), the probate court relied upon numerous facts not subject to dispute. Indeed, the State does not dispute most of the findings which formed the basis for the court's conclusions, including the findings regarding: (1) the State's role in initiating the Probate Action and procuring the appointment of the Fiduciary; (2) the State's appearing at every probate court hearing without ever objecting to the actions of the Fiduciary; (3) the Fiduciary's bringing assets into the Trust valued in excess of the total amount of Fiduciary's fees and expenses; (4) the numerous lawsuits and legal challenges filed against the Trust in different jurisdictions; (5) the Fiduciary's inability to use Trust assets for the payment of Trust expenses for the foreseeable future; (6) the lack of any alternative funding source for payment of the Trust's expenses; (7) the burden borne by those who have served the Trust for more than three years without payment; and (8) the crisis facing the Trust as a result of its inability to pay professional fees.

These undisputed findings, standing alone, are more than sufficient to justify an award of fees under Section 1004(1). Where a court-appointed fiduciary acting at the bidding of the State is denied payment for his services over a period of years because of circumstances beyond his control, where the ongoing services of the fiduciary are needed

in order to further the interest of the State in preserving the trust and protecting its charitable purposes, where a source of funding is needed in order to allow the fiduciary to continue his services, and where there is no other source of funding for the foreseeable future, it is wholly just and equitable for the State to provide interim funding until such time as payment may be obtained from the assets of the trust. Indeed, it would be unjust and inequitable to deny funding under such circumstances – and the court so found.

In addition to the undisputed findings discussed above, the court's ruling included additional findings regarding the role of the State in contributing to the Trust's financial crisis. Specifically, the court (at R19877) found that the State had failed to lessen the Fiduciary's legal and financial burdens and had taken actions which undermined the Fiduciary's efforts to obtain funding – thereby "substantially increasing the fees the Special Fiduciary has had to incur." (*Id.* n.3).

In challenging the court's ruling, the State essentially ignores the core undisputed findings upon which the ruling was based, and has instead only challenged the court's findings as to the State's role in the financial crisis.²⁴ The State's objections to such findings, however, are without substantive merit and are not material to the court's decision. Rather than acknowledging the undisputed evidence in the record which supports the court's conclusions, the State simply relies upon an affidavit of the AG which was submitted long after the fact. (R22224). Yet, a review of such affidavit reveals that it does not dispute the facts upon which the court's findings were based.

²⁴ The State's Brief does not contest any specific finding of the court, but in its Reconsideration Motion, the State identified four findings which it found objectionable (*See* n.25, *infra*).

Indeed, the State cannot deny the facts underlying the court's findings because each finding is based upon documents which were prepared and filed by the State.²⁵ Thus, instead of contesting the court's factual findings, the State merely attempts to explain and justify its actions in connection with such events. Such explanation, however, does not undermine the truthfulness of the facts or the validity of the court's findings.²⁶

²⁵ In its Reconsideration Motion (at R22207-22211), the State challenged four findings: (1) that the State agreed with FLDS litigants to not disburse occupancy fee payments in the possession of the State without FLDS approval in contravention of an order of the court; (2) that the State submitted a settlement proposal that would have conveyed the Trust's property to the FLDS church "without any guarantees that all those who had rendered services to the Trust would ever be paid for their work"; (3) that the State submitted a proposed preliminary injunction in federal court that would immediately turn Trust property over to the FLDS Church with no assurances of payment of the Fiduciary's expenses; and (4) that the State has taken positions that undermine the Fiduciary in litigation. (R19877). Yet, each of these findings was based upon documents prepared and filed by the State itself. *See* (R15731) (State reveals agreement to withhold payment of occupancy fees); (R15638) (State submits settlement proposal with no provision for the payment of professional expenses); (Addendum N) (State submits proposed preliminary injunction order in the federal court litigation which would immediately remove the Fiduciary with no provision for the payment of professional expenses); and (4) (R19844) (State reveals that it no longer supports Fiduciary's administration of the Trust).

²⁶ Moreover, the State fails to acknowledge that the court's findings are supported by additional evidence. Had the State marshaled the evidence which supports the court's findings, it would have revealed, among other things, the following facts in the record: (1) the State deprived the Fiduciary of funding at a critical time by moving for a continuance of the November 14, 2008 hearing on the sale of Berry Knoll Farm (*see* p.8, *supra*); (2) the State declined to pursue a mandamus action against Hildale City officials who were in violation of their governmental duties, and instead left the burden on the Trust to seek such mandamus relief. (R7816, R7878-7880); and (3) the FLDS litigants have alleged that they stopped paying their occupancy fees in 2009 because of communications from the Utah AG that the Trust's dairy income was a substitute for the occupancy fees (*see* p.9, *supra*). Each of these facts supports the court's conclusion that the State played a role in the Trust's funding crisis.

Thus, the State has failed to meet its burden to disprove any of the court's factual findings and the court did not abuse its discretion in awarding fees under Section 1004(1).

B. The Fee Payment Order is Not Contrary to Utah Law

In arguing that the Fee Payment Order is contrary to law, the State devotes substantial argument to a discussion of the common law and Sections 709 and 1004(2) of the Trust Code, while ignoring the specific statute upon which the court's ruling was based. A review of the applicable statute shows that the court's ruling is fully in compliance with Utah law (and is further consistent with the common law and other Utah statutes).

Under the common law, the general rule was that a receiver would look to the assets of the receivership for the payment of his fees and expenses. Atlantic Trust Co. v. Chapman, 208 U.S. 360, 375 (1908). The common law also recognized an exception to the general rule which would allow a receiver to recover his expenses from the party who obtained his appointment where the receivership assets are not sufficient. (*Id.* at 373, 375). This exception applies in "special" or "peculiar" circumstances where the court finds that it is "right and equitable" to do so.²⁷ (*Id.* at 373).

In 2004, the Utah Legislature enacted the Uniform Trust Code, which modified and replaced the common law (to the extent that the common law was different from the

²⁷Many courts have applied this exception to award a receiver his fees from a party to the litigation rather than from the receivership estate. *See e.g.* Stanton v. Pratt, 18 Cal. 2d 599, 603 (1941); Brill v. Southerland, 14 A.2d 408, 413 (Del. Ch. Ct. 1940); Andrade v. Andrade, 13 P.2d 676, 677 (Cal. 1932). Such authorities further show that, contrary to the State's assertion, it is not required to show fraud, bad faith, or unfair action under this common law exception. While a showing of such egregious conduct would certainly be relevant in considering the equities, it is not a requirement.

Trust Code). (See Utah Code Ann. § 75-7-106). With respect to the compensation of trustees, the Trust Code is similar to the common law in that it provides that a trustee is generally to be paid from the assets of the trust (Section 709(1)). In addition, the Utah Code includes another provision designed to assure that a trustee may obtain reimbursement for good faith expenses incurred in litigation – regardless of the results obtained in such litigation. (Section 1004(2)).²⁸ Under both 709(1) and 1004(2), a trustee is “entitled” to reimbursement from the trust assets for fees which were incurred “properly” and in “good faith.”

Like the common law, the Trust Code also provides an exception to the general rule. Section 1004(1) provides an alternative source for payment of trustee expenses (from a party to the case) as justice and equity may require.²⁹ This exception was added as a safety valve to protect trusts and trustees from unfairness in circumstances where the assets of the trust are not available.

²⁸Section 1004(2) is not found in the Uniform Trust Code, but is unique to Utah. Section 1004(2) was enacted in response to concerns of estate planners and institutional trustees that Section 1004(1) could be misconstrued to mean that a trustee acting in good faith in litigation may not be entitled to reimbursement of fees from the assets of the trust unless he could show that “justice and equity” required such reimbursement. This potential chilling effect on persons willing to serve as trustees was addressed by adding Section 1004(2) to clarify that, absent a showing of bad faith, trustees are “entitled” to recover expenses from trust assets.

Thus, Utah law is clear that trustees are “entitled” to recover fees *from the trust*, but that they may not recover fees *from a party* unless they meet the higher “justice and equity” standard of Section 1004(1).

²⁹Section 1004(1) is based upon a Massachusetts statute which similarly provides that fees may be assessed against a party “as justice and equity may require.” (See Uniform Law Commission’s UTC § 1004 (citing Mass. Gen. Laws 215 § 45)).

Contrary to the State's assertion, Section 1004(1) is not in conflict with Sections 709(1) or 1004(2), but supplements those provisions by adding an additional source for recovery under certain circumstances. While Sections 709 and 1004(2) set forth the general rule that a trustee is entitled to repayment from the assets of the Trust, they do not provide that this is the exclusive source of repayment, or prohibit the court from applying the exception found in Section 1004(1).

Similarly, Section 1004(1) is not contrary to the common law. Rather, it is consistent with the common law's "special circumstances" exception in allowing an alternative source of recovery when necessary to avoid injustice.

Thus, the court's ruling is not contrary to law, but was a proper and dutiful application of a Utah statute.³⁰

C. The Court Did Not Abuse its Discretion in Denying the State's Motion for Reconsideration

Motions for reconsideration are not recognized under the Rules, and courts are under no obligation to consider them. Rather, under the "law of the case" doctrine, courts have extremely broad discretion to refuse to reconsider prior rulings. (See Radakovich v. Cornaby, UT APP 454, ¶6, 147 P.3d 1195; Tschaggeny v. Millbank Ins. Co., 2007 UT 37,

³⁰ The State also argues that the Fee Payment Order was contrary to terms of the Fiduciary's appointment in 2005. However, nothing in the Appointment Order (R546) limits the Fiduciary's funding to the assets of the Trust or restricts the Fiduciary from seeking funding under Section 1004(1). Paragraph 8 of the Appointment Order merely relieves the Fiduciary of the obligation to fulfill duties for which he lacks the funds to accomplish. (See Addendum W at 3 n.1). Furthermore, even if there were such a prohibition in the Appointment Order, the probate court is entitled to modify the Order when it subsequently becomes apparent that an alternative source of funding is needed to prevent injustice and inequity.

¶15, 163 P.3d 615; IHC Health Services, Inc. v. D & K Management, Inc., 2008 UT 26, 196 P.3d 588). On appeal, a denial of a reconsideration motion will not be overturned unless there is “no reasonable basis for the decision.” Tschaggeny ¶16.

In the present case, there are many facts which provide a reasonable basis for declining to entertain the State’s Reconsideration Motion, including: (1) the motion was not filed until four months after the court’s ruling; (2) the State provided no explanation for its delay in filing the motion; (3) the Trust was experiencing a serious funding crisis and could ill afford to engage in repetitive litigation or to endure the delay associated therewith; and (4) the State offered no alternative solution to the Trust’s funding crisis. Given such facts, the court was well within its discretion to decline to entertain the motion.

Further, the court reviewed the motion under the six factors of Trembly v. Mrs. Field's Cookies, 884 P.2d 1306, 1311 (Utah Ct. App. 1994) and found that none of the factors had been met, but that “[t]he State merely seeks to re-argue, in a more extended format, many of the same points it argued in its opposition”. (R22352). Such findings were correct.

The Reconsideration Motion did not present any “new evidence” to alter the court’s decision, but merely recounted old facts that could have been presented six months earlier in the State’s original response. Although the State asserts that it was denied the opportunity to present new evidence, it does not identify specific facts

established by such new evidence, or explain how such fact would change the court's decision.³¹

None of the arguments in the Reconsideration Motion provide a basis for altering the court's ruling:

The State's first argument – that the ruling violated public policy – was found “unavailing” by the probate court (R22352), and, as discussed below, is meritless. (*See* Part II.E., *infra*).

The second argument – that there is no evidence of bad faith or false assurances – is meritless as a matter of law and fact. As discussed above, there is no requirement of showing bad faith in order to prevail under Section 1004(1) or the common law³² (*see* Part II.B.) and the State's factual challenges are deficient, in that they fail to refute the facts upon which the court's findings were based or to acknowledge the substantial other evidence which further supports such findings.³³ (*See* nn.25-26, *supra*).

³¹ By failing to identify any of the “new” findings or show how they were erroneous, the State essentially concedes they would not alter the outcome.

³²The Fiduciary did not allege bad faith in the Fee Payment Motion because the law does not require such allegations. The court's subsequent findings, regarding the State's role in the funding crisis, were not made to show bad faith, but were relevant to the court's “justice and equity” analysis under Section 1004(1).

³³The court's findings regarding the State's role in the financial crisis were not new or unexpected. They were based upon the record and were directly related to the issue before the court (whether justice and equity required interim funding from the State). Indeed, it was the State that raised the issues giving rise to the findings – the pending federal court litigation and the State's settlement proposal – in its initial memorandum. (R19836, R19843)

The State's third argument – that it should not be required to pay until the entry of a formal judgment and an opportunity for review by the Legislature – is now moot because the court granted such relief by entering a final judgment and allowing the State until August 1 to make payment.

The State's final argument – that it should not be required to pay the Fiduciary's fees until after the Tenth Circuit/federal court litigation is resolved – ignores the Trust's financial crisis and the burdens borne by those who are serving the Trust without payment. Delaying payment would frustrate the very purpose for the court's ruling: to provide relief from the Trust's financial crisis and thereby avoid injustice and inequity.³⁴ Without funding in the interim, the Trust's ability to defend itself in the federal court litigation, and to otherwise survive, would be substantially compromised.

D. The Fee Payment Order is Not Contrary to the Utah Constitution

1. The Fee Payment Order Does Not Violate the Separation of Powers Doctrine

This Court has held that a violation of the separation of powers doctrine occurs only with respect to powers that are so "inherently legislative, executive, or judicial in character that they must be exercised exclusively by their respective departments." Taylor v. Lee, 302, 226 P.2d 531 (Utah 1951) *See also In re Young*, 1999 UT 6, ¶32, 976 P.2d 581, 592 (Howe, C.J., concurring) and that the "cases on separation of powers do not

³⁴ The State's argument on this point is apparently based upon the notion that the outcome of the federal court litigation will alleviate the State from the obligation to pay the Fiduciary's expenses. This is questionable. If the Fiduciary prevails in the federal court litigation, there will still be a need for interim funding. Several funding hurdles remain – the FLDS litigants have filed several other pending lawsuits, liens and lis pendens encumbering the property of the Trust.

enunciate bright lines whereby each of the three governmental powers may be quickly and clearly identified." Timpanogos Planning & Water Mgmt. Agency v. Central Utah Water Conservancy Dist., 690 P.2d 562 (Utah 1984).

In the present case, it is clear that the probate court did not intrude upon the powers of the Legislature. Contrary to the State's assertion (at 58), the court has not compelled the State to pay "a specific, legislative appropriation." Indeed, the court does not require the Legislature to do anything. It has simply entered judgment against the State with an extended deadline for payment.

The fact that the court's rulings require the State to pay money does not mean that the judiciary is usurping legislative power. If that were the case, any monetary judgment against the State would be a separation-of-powers violation because the Legislature controls State finances. Instead, it is "unquestionably" within the judicial power to enter money judgments. See In re Young, at ¶33 (Howe, C.J., concurring).

Similarly, the fact that the court set an extended deadline for the State to make payment does not usurp legislative power. The judiciary's power "includes the authority to enforce any valid judgment, decree or order." Timpanogos Planning, 690 P.2d at 569. The payment deadline was for the benefit of the State – giving it additional time in which to obtain funding. The court could have entered an immediately-enforceable judgment against the State, but it instead granted the State an accommodation and allowed more time. Such accommodation does not violate the constitution.

The probate court did that which courts are required to do – decide a motion by applying facts to the relevant law. Here, the Fiduciary filed his motion under Section

1004(1) of the Trust Code. The court applied the facts to the statute and entered a judgment. Nothing about this process involves the province of the legislative branch.

Indeed, it was the Utah Legislature that enacted Section 1004(1), and made it clear that a "party" to a trust proceeding may be required to pay fees and costs. At the time of such enactment, the law was clear that a state AG has standing to appear as a party in trust proceedings involving charitable trusts – as the State acknowledges. (R10-11). Yet, the Legislature did not exempt the State from the application of Section 1004(1). Thus, the Legislature has expressly contemplated and authorized that fees and costs be assessed against the State in probate proceedings, when justice and equity so require.

It is ironic that the State would accuse the probate court of invading legislative territory (for applying a legislative enactment), while at the same time urging this Court to strike down such enactment. Such action would contravene this Court's well-established boundaries of legislative interpretation. In interpreting statutes, this Court is to "carry out legislative intent while avoiding constitutional conflicts." Provo City Corp. v. Willden, 768 P.2d 455, 458 (Utah 1989). Further, "[a] fundamental principle of statutory construction is that unambiguous language in the statute itself may not be interpreted so as to contradict its plain meaning." Johnson v. Utah State Retirement Bd., 770 P.2d 93, 95 (1988). Here, the State does not identify any ambiguity in Section 1104(1)'s clear pronouncement that "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...." As the State is a party to this case, applying Section 1004(1) against the State does not violate the separation of powers between the judiciary and the legislature.

2. The Fee Payment Order Does Not Violate Article VI Section 29

In a new argument, the State now contends that the court violated the Utah Constitution when it ordered that the State would be entitled to reimbursement for the amounts paid to the Trust, to be secured by a lien on Trust assets.³⁵ Specifically, without analysis or explanation, the State argues the court's ruling violates Article VI, section 29, which provides: "[t]he Legislature shall not authorize the State . . . to lend its credit . . . in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking." This argument is based upon a misreading of the constitution and is wholly without merit.

a. Section 29 Does Not Apply Where the State is a Creditor.

Section 29 only applies where the State functions as a debtor or guarantor. *See e.g. Utah Tech. Fin. Corp. v. Wilkinson*, 723 P.2d 406, 412 (Utah 1986) ("...the lending of state funds is not a lending of credit."); *Allen v. Tooele County*, 21 Utah 2d 383, 385, 445 P.2d 994 (1968) (stating that a constitutionally impermissible lending of credit to private enterprise could only be found if "the county might . . . be required to pay the obligation [of the private enterprise]"). Here, the State is not lending its credit, and is neither a debtor nor guarantor. Rather, the State is obtaining security for the repayment of funds it was ordered to pay. Such does not run afoul of Section 29.

b. Section 29 does not Apply to Transactions that Benefit the State or Serve a Public Purpose.

³⁵ The Fiduciary struggles to understand why the State would complain about such a ruling – which was made for the benefit of the State. Under the statute, the court could have ordered the State to pay the fee award outright, with no provision for reimbursement from Trust assets. If the State prefers such an outcome, the Trust would readily agree.

Section 29 is also inapplicable where the State's purpose is to contract or invest for its own benefit. *See Utah State Land Bd. v. Utah State Fin. Comm'n*, 365 P.2d 213, 214 (Utah 1961) ("When the underlying purpose is to invest for the benefit of the State or a political subdivision thereof, there is no lending of credit.").³⁶ Here, the State has benefitted from the services it requested from the Fiduciary, which served the public purpose of protecting and preserving the assets of a charitable trust. Consequently, the court's orders regarding a secured loan to the Trust do not violate Section 29.

E. The Fee Payment Order is Not Contrary to Public Policy

The State (at 39) argues that the court's ruling is against public policy because it would discourage the AG from filing petitions to protect trusts in the future. Such "public policy" argument is unavailing for many reasons.

First, the State has overstated the chilling effect of the ruling. The fact that the court entered an award under the extremely unique facts of the present case does not mean that it will do so in another case. Courts rarely award fees under Section 1004(1), as it is the exception to the general rule of trustee compensation and only arises in special circumstances where such an award is necessary to prevent injustice. The State is protected by the court's discretion, and will not be required to pay unless it would be unfair or unjust to deny payment.

Next, there are stronger countervailing public policy reasons which support the court's application of Section 1004(1). First, the statute promotes an important public

³⁶ In *Wilkinson*, 723 P.2d at 409, this Court set forth a lengthy list of cases finding that there was no unconstitutional lending of credit because a public purpose was served by the challenged transaction.

policy interest of protecting court-appointed receivers whose services benefit public interests. The safety net of Section 1004(1) assures that such receivers will not suffer personal harm where ordinary funding sources become unavailable. Without such protection, professionals would be hesitant to accept a receivership appointment – and the court would have difficulty in procuring competent professionals willing to serve as receivers.

Next, the statute serves an important public interest of protecting the assets of charitable trusts – by providing a means for continued management of the trust even in those situations where estate funds are not available to pay for such management. Section 1004(1) is part of a larger statutory scheme designed to encourage donations to charitable trusts and to instill confidence in potential donors that their donations will not be wasted by breaching trustees or failure of the trust. The Trust Code fosters this interest by providing that breaching trustees may be replaced by court-appointed fiduciaries (who are properly protected under the law).

Finally, regardless of which “public policy” the court favors, such is not the basis for refusing to enforce an enactment of the Legislature. Absent a constitutional violation, the court should not strike down a statute based upon “public policy”, but should defer to the will of the people, through the legislative branch, as to which public policies should be promoted.

In reviewing the facts of this case, there is no doubt that the court’s ruling is in harmony with sound public policy. After carefully considering the unique facts of this case, the court concluded that the private parties *recruited* by the AG and appointed and

supervised by the court should be reimbursed by the State for costs incurred in protecting fundamental state interests. Compensating court-appointed receivers for costs incurred in rendering services that inure to the benefit of the State is consistent with sound public policy.

There is no question that the costs at issue here resulted in important public benefits. (*See* Addendum W pp. 19-20). Over \$100 million in property that was dedicated for charitable purposes under Utah law by deceased trustors has been preserved for such purposes as a result of the Fiduciary's efforts that prevented the Trust's assets from passing to Warren Jeffs. 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.

The State has also benefitted from the Fiduciary's defense of Utah's Constitutional right to resolve Utah probate disputes initiated in state court without intervention by lower federal courts. Defending the independence and sovereignty of the State's judicial system is clearly a benefit to the State.

Construing Section 1004 to exempt the State from any responsibility for the costs incurred by private parties in protecting important state interests *that the State petitioned the parties to perform* is contrary to public policy because it would deter individuals from accepting such appointments. More importantly, 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 oversight of the trust would encourage the misappropriation of charitable trust assets by persons (like Warren Jeffs) who have the resources to overwhelm and outlast court-appointed private parties.

III. The Court Properly Exercised its Discretion in Approving the Fees and Expenses of the Trust's Professionals.

A. The Court Did Not Abuse its Discretion in Partially Granting the State's Motion for Extension

“When. . . an act is required or allowed to be done at or within a specified time, the court *for cause shown* may ... *in its discretion* ...order the period enlarged....” UTAH R. CIV. P. 6(b) (emphasis added). An abuse of discretion is only found when “the trial court's decision is unreasonable.” Huston v. Lewis, 818 P.2d 531, 534-37 (Utah 1991).

In the present case, the court's ruling on the State's Motion for Extension was well within the court's discretion and was imminently reasonable. The court carefully balanced the interests of the parties and fashioned a ruling that provided the State a lengthy extension without causing undue delay. The extension gave the State adequate time to review the accountings, as the new deadline was 61 days after the filing of the Fiduciary's Motion, 62 days after the filing of the last accounting, 92 after the filing of the first accounting, and 97 days after the Fiduciary requested the State's input on the proposed review process. Given that the State had never needed a time extension with respect to the 22 prior fee applications in this case, the time granted to the State was wholly reasonable.

The court wisely declined to grant the full 90-day extension requested by the State because such would have placed resolution of the Fee Approval Motion beyond the close of the Legislative Session, which would likely have resulted in a significant delay in the

State's ability to comply with the Fee Payment Order – perhaps up to a year. The State simply ignores the undisputed fact which led the court to limit the requested extension – that the Trust faced a severe financial crisis and needed a prompt source of funds to survive and avoid inequity.

Finally, contrary to the State's assertion (at 45), the court did not deny the State the right to conduct discovery or engage an expert witness – as the State did not need leave of court for such and had not requested any such leave from the court. (*See* n.18, *supra*). Similarly, the court did not deny the State's request for an evidentiary hearing – as the court's ruling was merely silent on the matter. (R22414). The State had the right to seek a hearing under Rule 7(e) when filing its response memorandum, but it did not do so. (*See* n.22, *supra*). In any event, even if the court had denied the State's hearing request (which it did not), such denial would not be an abuse of discretion. *See* ClearOne Commc'ns, Inc. v. Biamp Systems, 653 F.3d 1163, 1186 (10th Cir. 2011) (finding no abuse its discretion when trial court did not hold an evidentiary hearing on attorney's fees).

B. The Court did not Abuse its Discretion in Reviewing the Fees.

1. The Legal Standard for Review of the Fiduciary's Fees and Costs.

A trial court has wide discretion in reviewing attorney fees for reasonableness. *See* Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); In re Estate of Quinn, 830 P.2d 282, 285 (Utah Ct. App. 1992). The court's factual findings supporting its determination will not be overturned absent a showing of a clear abuse of the court's discretion. *See* Dixie, at 988; Quinn at 285-86. Such broad discretion, however, does not entitle the court to unilaterally reduce the amount of a fee award. A court abuses its

discretion and "commits legal error if it awards less than the reasonable fee to which the successful litigant is entitled." See Dixie, at 991; Brown v. David K. Richards & Co., 978 P.2d 470, 474 (Utah Ct. App. 1999) ("this court has been critical of judges who simply reduce a fee award 'ad hoc'").

While courts often review attorney fees in the litigation context (where a fee-shifting statute or contract provides that the prevailing litigant's attorney fees shall be paid by the losing party) the present case arises in a different context – a probate case. In probate, the court reviews all of the expenses of the administration of a trust (including attorney fees) to determine whether they were incurred “properly” and in “good faith” such that they may be reimbursed from the trust assets under Sections 709 and/or 1004(2). The issues and standards of court review may vary greatly between the two contexts.³⁷

2. The District Court Properly Rejected the State's Objections.

a. Block Billing

The State first objects to "block billing" – asserting that the law requires that professionals prepare separate time entries for each individual task performed throughout the day. However, the State is unable to cite to any applicable legal authority to support its assertion. There is no Utah authority which provides that block billing is inconsistent with the Dixie test, or that it is cause for disallowance or reduction of a fee award. In the only

³⁷ For example, the impact of a court's denial of fees is very different in the probate context. In litigation, where a court denies a fee application under a fee-shifting statute, the attorneys still gets paid for their services – it is just that the payment comes from their client rather than from their client's opponent. In contrast, in the probate context, a denial of a fee application has a much harsher impact upon the professionals – as it deprives the attorneys and other professionals of any compensation for such services.

cited case that even addresses the issue of block billing, Brown, 978 P.2d 470, the court's holding is directly contrary to the State's position. There, the prevailing party in litigation sought \$540,000 in fees. The opponent objected to the fee award on multiple grounds, including the use of block billing. (See Brown, ¶10). The Brown court acknowledged the block billing argument (*id.*), but did not find that such argument provided a basis for reducing the award. Instead, without further discussion of the issue, the court affirmed the full \$540,000 awarded below. (Brown, ¶ 24). Thus, rather than condemning block billing, Brown reveals that it is acceptable and is *not* a cause for reducing a fee award.

The use of block billing may become relevant in certain circumstances, as where a court is required to segregate attorney time entries between compensable and non-compensable tasks.³⁸ Such concerns, however, are not relevant in the present case – as all of the time entries in the professional billings were for services rendered to the Trust. In such circumstances, segregating the time entries as to each individual task would do nothing to assist the court's review, and would be unnecessary and wasteful.

In the present case, the Trust's professionals have used a block billing format from the beginning. In 22 prior applications, the State did not see fit to object to such billing practices, despite its duty to review the applications and protect the assets of a charitable trust. Yet, in 2011, it sought to introduce a new billing requirement, and it sought to apply such requirement retroactively. Having never given the Trust's professionals any reason to believe that their billing practices were insufficient, the State suddenly attempted to

³⁸ For example, this may arise in a fee-shifting context where a party prevailed upon some, but not all claims, such that it is necessary to allocate the attorney services with respect to specific claims.

deny them payment for nearly one-years' work (a 25% penalty) because of such practices.³⁹ The probate court rightfully rejected such attempt.

b. Reasonableness of the Fees/Duplication/Attorney Staffing

The State's complaints about attorney staffing issues and duplication of efforts are without substance. As recognized by the court, the reasonableness of staffing must be considered in light of the circumstances of this case. A heavy litigation load required the attention of many attorneys. Because the Trust could not pay its attorneys for years, the Trust's attorneys had no incentive to duplicate efforts or over-staff. It was difficult to attract new counsel willing to work without consistent payment, and those attorneys who were willing to serve the Trust were often spread thin, handling multiple matters for the Trust while working for other timely-paying clients.

As other firms were recruited to handle litigation assignments, communication and coordination among the attorneys became necessary. This was not duplication of effort, but a reasonable and necessary part of representing the Trust. *See In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719, 736 (Bankr. N.D. Ill. 1998) ("there is a difference between duplication and coordination of services"). The court understood the circumstances facing the Trust, made reductions where warranted, and stayed well within its discretion in reviewing and approving the fees.

³⁹ Contrary to the State's assertion, the Fiduciary does not assert that the State's failure to object to the prior 22 accountings constitutes a waiver of its right to object to present accountings. Nevertheless, the State should be estopped from attempting to impose new billing requirements retroactively, such that the professionals would be punished for employing billing practices which they had no reason to know were objectionable to the State.

3. The District Court Properly Weighed the Dixie Factors.

The fee award reflects a careful weighing of the State's arguments, giving them credence where well-taken. The court did not abuse its discretion in deeming the Fiduciary's accountings reasonable, proper and in good faith.⁴⁰

The accountings clearly met the four-step test of Dixie. First, the billing statements were very detailed and provided more than enough information to reveal the work performed and the time spent.

Second, the time spent was reasonably and necessarily incurred in the service of the Trust. Having presided over the Probate Action for nearly seven years, the court was well aware of the work performed by the Trust's professionals and was fully capable of determining whether such work was reasonable and necessary.⁴¹

⁴⁰ The State has failed to marshal (or to even acknowledge) the substantial evidence in the record which support's the court's findings. Such failure is fatal to its challenge. See Eggett, 94 P.3d at 202-203 (upholding attorneys fees award because appellant failed to marshal evidence relied on by trial court in awarding fees).

⁴¹ The court considered every objection raised by the State and went even further to review other portions of the accountings to satisfy herself that they were incurred properly and in good faith. The State's complaint (at 51-52) that the court did not review each and every entry in the accountings is unavailing. Having considered every objection of the State, the court was not obliged to scour every word of the accountings in a search for additional potential deficiencies. If any deficient billing was missed in the court's review, it is not the fault of the court, but of the State for failing to bring it to the court's attention.

Moreover, there is no evidence that the court missed anything in its review. It has now been more than six months since the accountings were filed, and the State's Brief fails to identify a single alleged deficiency which was not already raised and considered in the court below. The court's ruling should not be reversed merely because of the theoretical possibility that there may be a deficient billing entry somewhere in the accountings which was missed in the court's review. Given the lack of any evidence of any deficiency, the court's ruling must be affirmed.

Third, as found by the court, the billing rates of the Trust's professionals "are consistent with (if not on the low side) of what is currently charged in the local market for work of this complexity and the expertise required." (R22842).⁴²

Finally, the probate court was well within its discretion to reject the State's unfounded request for a punitive 25% downward adjustment. Indeed, to make such an *ad hoc* reduction would be an abuse of the court's discretion. Brown at ¶17. Moreover, as the court correctly found, if there were to be any adjustment under the circumstances of this case, it should be an upward adjustment – based upon the faithful service of the Trust's professionals under extremely difficult circumstances without compensation over an extended period of time.

CONCLUSION

The State should be applauded for its 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 State rose to the occasion to protect the Trust's charitable beneficiaries. By replacing the breaching trustee, the State has (among other things) successfully prevented the loss of the homes of thousands of beneficiaries, recovered lost assets, and stopped the practice of using the Trust to coerce illegal activities.

⁴²The State's objection (at 55-56) to this finding is puzzling. The finding was undisputedly correct. Tellingly, the State did not present any evidence to contradict such finding (as there is none). Furthermore, the State fails to acknowledge that the court was well equipped to make such a finding, as trial courts are routinely called upon to review attorney fee applications and are in a better position than the State to know the customary billing rates in the market.

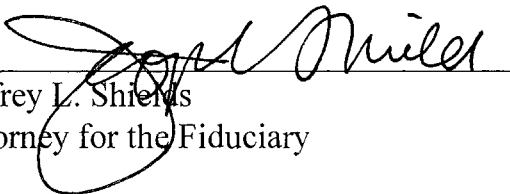
While these successes have required significant effort, the Fiduciary submits that the results are well worth the cost.⁴³ Now, it would be most inequitable if such efforts came to naught and if the many successes arising from the State's Probate Petition were lost due to a lack of interim funding needed to complete the job. Moreover, it would be inequitable to delay further the payment of compensation to those who have faithfully served the Trust at the State's behest for so long.

The probate court properly applied the facts to the law and fashioned a remedy which is in accordance with law, justice, and equity.

Wherefore, the Fiduciary respectfully requests that the rulings of the probate court be affirmed.

Dated: May 29, 2012

CALLISTER NEBEKER & McCULLOUGH



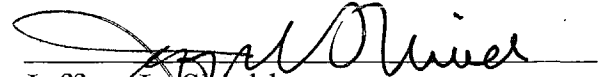
Jeffrey L. Shrens
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⁴³This is especially true when the costs are considered in context. As found by the court, the Fiduciary's expenses are less than the value of the property which the Fiduciary has recovered for the Trust. Moreover, such costs pale 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 COMPLIANCE WITH TYPE-VOLUME LIMITATION

The above brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 13,973 words, excluding sections of the brief not included in the word count by Rule 24(f)(1)(B).

Dated this 29th day of May, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2012, two (2) true and correct copies of the foregoing BRIEF OF APPELLEE BRUCE R. WISAN were mailed via U.S. mail, first class with postage fully prepaid, to the following:

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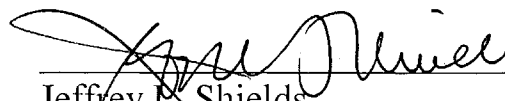
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