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Mark L. Shurtleff v. Wisan : Unknown

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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

Petitioners/Appellants,

v.

IN THE MATTER OF THE UNITED EFFORT PLAN TRUST, et al.

Respondents/Appellees,

and

BRUCE WISAN, the INTERESTED PARTIES, HILLDALE CITY,
COLORADO CITY, and TWIN CITY WATER AUTHORITY,

Other Parties.

**THE STATE OF UTAH AND UTAH ATTORNEY GENERAL MARK L.
SHURTLEFF'S OPENING BRIEF ON APPEAL OF FEE ORDERS OF
THE THIRD JUDICIAL DISTRICT COURT, JUDGE DENISE P.
LINDBERG, PRESIDING**

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Dated this 14th day of May, 2012.

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**THE STATE OF UTAH'S AND ATTORNEY GENERAL MARK L.
SHURTLEFF'S OPENING BRIEF**

The State of Utah and Utah Attorney General, Mark L. Shurtleff,
respectfully submit this opening brief on appeal.

Jurisdictional Statement

The State and its AG appeal from a March 12, 2012 Ruling and Order
granting the Special Fiduciary costs and fees, and certifying as final

additional orders charging costs and expenses to the State of Utah. They also appeal from a March 30, 2012 Order certifying and entering as final orders (1) denying the State's motion to reconsider, (2) denying, in part, the State's requested extension of time, and in total, its request to conduct discovery, engage an expert, and for an expedited hearing relative to its objections; and (3) denying the State's motion for contribution from the State of Arizona. This Court possesses jurisdiction under Utah Code Ann. § 78-3-102(3)(j) (West 2009).

Issues Presented

I. Entry of the Order Awarding Fees Chargeable to the State.

From the outset, the probate court limited the Fiduciary's duties and obligation to administer the United Effort Plan (UEP) Trust to funds available in the Trust to satisfy his costs and expenses. That court directly modified that term on August 1, 2011, when under Utah Code § 75-7-1004 (West 2004), and based on "considerations" that had neither been raised nor adjudicated, the court determined that justice and equity compelled the State of Utah to assume and to loan the Special Fiduciary more than \$5.6 million dollars in costs, fees and expenses that he incurred and for which no liquid funds were available in the Trust to compensate him.

Does Section 75-7-1004(1) permit a Utah State probate court to modify the terms of the Fiduciary's appointment and direct the State or its AG to temporarily assume more than \$5.6 million in costs, fees, and expenses?

Standard of Review

This Court reviews an equitable award of costs and fees under an abuse of discretion standard. *Hughes v. Cafferty*, 2004 UT 22, ¶ 20, 89 P.3d 148. But the Court gives no deference to a trial court's determination that fees are allowed under a statute; **that determination constitutes a question of law that this Court reviews for correctness.** *See Still v. Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 8, 122 P.3d 556

Preservation

Appellants challenged the probate court's ruling as precluded at law and by the court's prior orders in the State's opposition memorandum and motion and memorandum in support of reconsideration. R. 22179-22333; 2234-22350. The probate court rejected those arguments in its August 1 and December 2, 2012 rulings and orders. Add. B and C.

II. The Court's Abuse of Discretion.

Sitting in equity, the probate court was required to adhere to the Utah

Uniform Probate Code, and also, to make decisions respecting the proper administration of the UEP Trust as the twin interests of justice and equity requires. Did the probate court serve those interests when, in its equitable discretion (1) the court declined to entertain the State's motion for reconsideration that sought to address the court's findings respecting the several "considerations" the court raised for the first time in its August 1 ruling and order, and that State had been denied notice or an opportunity to rebut; (2) it denied the State's motion for additional time to make objections, and for leave to conduct discovery and to engage an expert accountant, and for an evidentiary hearing respecting its substantial fee award, but then declined to adequately consider the State's several objections, finding them "vague"; and (3) the court granted, but then denied the State leave to seek indemnification or contribution from the State of Arizona, stating the issued had been waived.

Standard of Review.

Trial courts are accorded broad discretion to determine how matters shall proceed before them. *See Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615, *reh'g denied*. In a normal case, an appellate court will not overturn a court's discretionary decision unless there exists "no

reasonable basis for the decision.” *Id.*

Preservation.

Appellants raised the foregoing in the State’s reconsideration memorandum, R. 22179-22333; its pleadings seeking leave to adequately review and object to Wisan’s several accountings and its objections, R. 22358-22377; 2252-22707; and the State’s contribution memorandum. R. 22708-22717. The probate court denied each request by rulings and orders entered December 2, 2011, Add. C; January 4, Add. D; February 10, Add. E.; and February 22, 2012. Add F.

III. Entry of the Amount of Fees

After denying the State a meaningful opportunity to object to Wisan’s fee award in the first instance, the probate court awarded costs and fees in excess of \$5.6 million. Support more by presumption than facts in the record, is that award of fees reasonable under the circumstances.

Standard of Review

The Court will not overturn a fee award absent an abuse of discretion. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). But an abuse of discretion exists when a fee award lacks adequate support in the record. *Id.*

Preservation

Appellants raised the foregoing in the Response and Objections to Wisan's motion for approve accountings. R. 22525-22707. The probate court overruled those, in large part, in its February 10, 2012 Ruling and Order. Add. E.

IV. The Court's Enforcement Orders

Utah's governmental power is divided into three distinct branches; the Legislature, the Executive, and the Judicial. Each branch possesses unique duties and functions, and no person charged with the exercise of power belonging to one branch of Utah's government may exercise powers vested in the other branches.

Do the probate court's rulings and orders that require the State or its AG to advance and pay the Special Fiduciary more than \$5.6 million by date certain, the appropriation of which funds the Utah State Legislature has not approved, violate this constitutional separation of powers.

Does Utah's Constitution permit a Utah State probate court to compel the State or its AG to loan a court-appointed special fiduciary millions of dollars to satisfy his debts?

Standard of Review

Interpretation of the Utah Constitution is a question of law that this Court reviews for correctness. *State v. Hernandez*, 2011 UT 70, ¶ 3, 286 P.3d 822.

Preservation

This issue arose out the probate court's February and March 2012 orders for payment of funds. It is therefore unique to this appeal, and no preservation is required. *See* Notwithstanding, the State and AG Shurtleff squarely raised this issue in its petition for extraordinary relief, that this Court dismissed in furtherance of this "plain, speedy, and adequate remedy." R. 23164-23169, Add. I.

Whether the probate court's order that extends the State's credit offends the Utah constitution constitutes plain error, which the State Appellants allege for the first time on appeal. *See State v. Winfield*, 2006 UT 4, ¶ 14, 128 P.3d 1171 (unpreserved issue may be reviewed in presence of plain error or exceptional circumstances).

Determinative Statutory and Constitutional Provisions

All determinative statutes and constitutional provisions are set forth in addendum A to this Brief.

Statement of the Case

Nature of the Case

This case stems from a lengthy state court probate proceeding and subsequent orders reforming the UEP Trust. This appeal raises several searching questions, that at their core ask whether, as a matter of law, and in the absence of a full and fair opportunity to address several, alleged “considerations” or to adequately object to the nature and basis of the fees in the first instance, it is just, equitable, or proper to require the State of Utah, or its Attorney General, to make a substantial loan to a Special Fiduciary to fund ongoing trust litigation, by assuming past costs, fees and expenses associated with the Fiduciary’s administration of a charitable trust. The State of Utah and its AG maintain the answer to that question is “no.”

Course of Proceedings Below.

In May 2005, the Utah AG filed a petition in the Third District Court to protect the many UEP Trust beneficiaries and moved for an immediate, temporary order to appoint a special fiduciary pending further hearing. R. 166-167. The probate court granted the AG’s ex parte motion, appointed a special fiduciary on a limited basis, and set the matter for further hearing. R. 220-224.

After notice to all interested parties, at a June 2005 hearing, Judge Denise Lindberg granted the AG's petition and entered an order suspending the trustees, requiring them to provide an inventory of all trust assets, and appointing Bruce Wisan as Special Fiduciary of the UEP Trust. In part, the court granted Wisan authority to act on the Trust's behalf, but limited his court-appointed duties to the funds available in the Trust to pay his ongoing fees and expenses. R. 546-554.

In December 2005, based on an August 2005 recommendation by Wisan that Utah's AG did not oppose, Judge Lindberg reformed and modified the UEP Trust to remove its religious purpose. R. 3452-3480.

From June 2005 to the present, Wisan has acted as the Trust's Special Fiduciary, and has incurred costs and fees related to that effort. Between October 2005 and July 2008, Wisan submitted and was paid nearly all of his requested costs and fees, and also those incurred by his counsel from Trust proceeds directly. See R. 3367-3406, 3937-3962, 4308-4338, 6244-6282, 7524-7559, 7766-7804, 8608-8647, 8914-8947, 10517-10559, 11620-11659, and 12250-12304.¹ Prior to May 2011, Wisan submitted his last fee

¹ From June 2005 through April 2008, Wisan, his counsel, and the persons and entities who provided services of their respective behalf, submitted bills and accountings that the probate court approved and that

request in July 2008, which detailed costs incurred by Wisan and his counsel in February, March and April 2008. R. 12250-12304.

Then, on May 27, 2011, through counsel and under Utah Code Ann. § 75-7-1004(1) (West 2004), Wisan moved the district court for an order directing the State of Utah to advance a then-estimated \$4.6 million to Wisan as a loan secured by a lien on the Trust proceeds, for the costs and fees Wisan incurred in his administration of the Trust from May 2008 to the time of his motion. R. 19818-19834. The State opposed that request in a June 9, 2011 memorandum, R. 19835-19847, and on June 20, Wisan replied. R. 19854-19865.

Judge Lindberg rejected the State's response and granted Wisan's request on August 1, 2011. R.19874-19881. Immediately, the State, through its AG and the AAG's assigned to this matter, undertook discussions with Wisan and his counsel, and with counsel for FLDS Church.² When those efforts proved fruitless, on October 17, 2011, Wisan submitted the first of twelve accountings. R. 19983-20349. He filed

resulted in more than \$3 million in expenses being paid from Trust assets.

² Assistant Utah AG's also contacted their counterparts in the State of Arizona to seek a resolution; however, at a later date.

subsequent accountings on October 24 and 26, and on November 3, 7, 9, 10, 14 and 16, 2011. R. 20350-22171. Then, on November 17, Wisan moved the district court to approve his expenditures. R. 22172-22178.

A week later, the State filed a motion and supporting memorandum asking Judge Lindberg to reconsider her August 1 ruling. R. 22179-22333. Without calling for Wisan's response, the court elected "not to entertain" the State's motion and therefore denied it. R. 22351-22354, n.1.

On November 28, Appellants moved for a 90-day extension of time to complete their review of review Wisan's several accountings, which spanned nearly 3,000 pages, included the work of more than 70 individuals, and delineated thousands of individual time entries. The State also moved for leave to conduct discovery and retain an expert as necessary to aid its response to Wisan's motion to approve his expenditures, and for an evidentiary hearing. R. 22334-22343. Wisan opposed the request and the court largely denied it. R. 22358-22377, 22414-22417, respectively.

In a January 4 ruling, Judge Lindberg called for the State's objections by January 17, and directed Wisan to submit his Reply no later than January 31, 2012. R. 22414-22417. Petitioners submitted their objections and Wisan his reply. R. 22525-22707, 22761-22792, respectively.

On February 10, 2012, Judge Lindberg issued the court's Ruling Re: Special Fiduciary's Motion to Approve Expenditures in Accountings. R. 22832-22851. In it, the court granted, in significant part, the Wisan's fee request and directed the State, through its AG "to pay [\$5,575,392.25] **within 90 (ninety) days** of the entry of th[at] Ruling." *Id.* at p. 19.

On March 5, the State and AG Shurtleff petitioned this Court for extraordinary relief from the fee order, arguing the court's enforcement mechanism violated Utah's separation of powers doctrine. *See* Addendum H. Wisan and Judge Lindberg separately opposed the Petition on March 19 and 30, respectively. *Id.*

In the time intervening, on March 12, 2012, the court entered a further and final fee order, that (1) added \$45,000 to the prior sum, (2) moved the deadline for payment to August 1, 2012, (3) and converted the court's prior ruling and order directing the State, through its AG to loan money to Wisan, into an adverse judgment entered in Wisan's favor and against AG Shurtleff, in his official capacity. R. 22899-22902. The next day, this Court entered an order accepting a question certified it by the Tenth Circuit Court of Appeals. Addendum M.

Following argument, this Court dismissed the State and AG's petition

for extraordinary relief, finding they possessed a plain, speedy and adequate remedy based on this appeal. R. 23164-23169.

Statement of the Facts

The FLDS Church is a fundamentalist off-shoot of *the Church of Jesus Christ of Latter-Day Saints*, that unlike its predecessor continues to openly practice polygamy and to commingle and hold its assets communally. In 1942, FLDS Church leaders established the UEP, which according to church doctrine, required members to contribute to and receive benefits from the UEP Trust. In the 1990s, church leaders reformed the Trust in response to this Court's decision and order in *Jeffs v. Stubbs*, 970 P.2d 1234, 1252 (Utah 1998), that held the 1942 trust was not a charitable trust.

In 2004, two tort lawsuits were filed against then-church president Warren Jeffs, the UEP, the FLDS Church, and others. Jeffs and his fellow trustees failed to respond to those suits, and those affiliated with the church were told to do nothing; consequently the Trust's and Jeff's attorneys withdrew. *See FLDS v. Lindberg*, 2010 UT 50, 238 P.2d 1054. The UEP was therefore not defended and defaults were entered against it and the other, named defendants. *Id.*

Prior to entry of those defaults, notice was served on the AG and also the people residing on Trust property. In response, in May 2005, AG Shurtleff, a small group of private beneficiaries, and several interested parties submitted separate petitions in a Utah probate court, seeking to remove or suspend the UEP trustees. R. 1-118, 119-138; 139-165, respectively. The AG also moved for immediate appointment of a special fiduciary to serve until new trustees could be appointed. R. 166-217. Shurtleff and the interested parties each recommended that Bruce Wisan be appointed. R. 1-118, 139-165, generally. The probate court considered the AG's petition, but did not dismiss the other submissions. The court granted the AG's ex parte motion, granted Wisan limited authority and set the matter for hearing. R. 220-224.

At that hearing, held June 22, 2005, the Court affirmed Wisan's appointment, defined Wisan's authority, and expressly ruled that his duties and responsibilities were "subject to and limited by the availability of funds in the Trust estate to reimburse [Wisan] for the costs, fees and other court approved expenses incurred by [him] and his attorneys." R. 546-554 at p. 6 ¶ 8. And when later, the court expanded Wisan's authority, it stated that Wisan's responsibilities be subject to similar limitations and "availability of

the funds in the Trust estates” to reimburse him. R. 1996-2001, p. 4 ¶ 3.

Shurtleff viewed Wisan as independent of the State and its AG; in fact, on his appointment, Wisan promptly retained his own counsel. *Id.*, Shurtleff Aff. ¶¶ 17, 18. On Wisan’s appointment, the AG’s role diminished. R. 22179-22333, Shurtleff Aff. ¶ 21.

Wisan submitted an initial report in August 2, 2005, and detailed that apart from real property, the Trust had no liquid assets; namely, the Trust held no cash, personal property, or income, and also, the Trust had no source of income. Wisan recommended that the court delay appointment of successor trustees, and appoint an advisory board instead. R. 1122-1182.

Later, on August 18, Wisan recommended that the Trust be reformed, because, in part, the former trustees, comprised of FLDS Church leaders, 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. R.1544-1602.

While not opposing Wisan’s request, the AG recommended that the court set a briefing schedule to permit notice to and an opportunity for other interested parties to be heard. R. Judge Lindberg rejected that request,

instead issuing a memorandum decision and ruling that the Trust be reformed and set out a framework to accomplish that task. R. 3452-3480.

Accordingly, Wisan submitted a response and proposed form of the reformed trust that the Court approved by memorandum decision dated December 13, 2005. *Id.*

The AG did not materially object to proposed reformed trust, noting it was consistent with the Court's ruling. R.4100-4102. The probate court's reformation order granted Wisan's August 2, 2005 request for an advisory board. R. 3452, 3480, p. 24-27. And while Shurtleff supported that request, he was not involved in selecting or approving any members of the Advisory Board. R. 22179-22333, Shurtleff Aff. ¶ 23.

Because most of the Trust beneficiaries are FLDS members; Shurtleff grew concerned that no current FLDS members were appointed to the Advisory Board, but he did not object because he did not want the State to control key Trust decisions, and because the FLDS were reluctant to respond to the Trust proceedings given Warren Jeffs' instruction to "answer them nothing." *Id.*, Shurtleff Aff. ¶¶ 24-26; *see also* R. 3452-3480, p. 27 n.95.

Wisan quickly undertook the Trust's business and in early November,

2005, he recommended that Trust land be divided into parcels for each residence to permit separate tax assessments could be levied against each residence. R.3024-3101, p. 21. The AG approved that proposal, which was aimed at resolving the overdue property taxes. R. 3024-3101, p. 18-2.; R. 22179-22333, Shurtleff Aff. ¶ 37.

To meet his efforts and, therefore, growing Trust expenses, Wisan received and accepted a \$10,000 donation from an interested party, and in September 2005 and June 2006, respectively, Wisan liquidated the Apple Valley Farms property and sold Western Precision. R. 2452-2459; 4777-4779. Each sale generated funds necessary to meet Wisan's costs and expenses.

Also in December, 2007, Wisan requested that Trust land occupants be required to pay a modest fee, to make more funds available to pay for his Trust administration. R. 10585-10891, p. 18-19. The Attorney General did not object, and the Court granted the request. *See id.*

Then, in September, 2008, Wisan moved the probate court to approve the sale of Berry Knoll Farm, a large parcel of real property held by the Trust. R. 13553-13555. As before, Wisan deemed the sale necessary to meet his costs and expenses, and because the beneficiaries had stopped

cooperating with Wisan and had stopped paying the court-approved occupancy fees. *Id.* at 2.

This sea-change coincided with a July, 2008, press statement from FLDS Church counsel that “the days of the FLDS people not defending themselves in Court is over.” *Id.* Also at this time, FLDS members had begun to file numerous lawsuits and legal challenges to the reformed Trust and Wisan’s trust administration, including motions to halt the sale of all Trust property and to remove Wisan as special fiduciary. *See id.* at 2, n.1; *see also* R. 13196-13229.

Wisan viewed those efforts as a “full scale assault” against him and the Trust, and as an attempt by FLDS Church leaders “to regain control over the Trust and to deprive [him] of the funds needed to defend the Trust” against the legal attacks. R. 13553-13555, p. 2. Judge Lindberg quickly dispatched those efforts, and in November, 2008 approved Wisan’s request to sell Berry Knoll Farm. The court also ruled that the FLDS members did not have standing to object to the sale, and held for the first time, that the only persons with standing to represent potential Trust beneficiaries were the Arizona and Utah AGs. R. 14063-14085, p. 11-14.

Several FLDS members responded swiftly by filing suit in federal

court on October 6, 2008, alleging the Trust reformation violated the FLDS Church members' First Amendment rights, and seeking a temporary restraining order halting the sale of Berry Knoll Farm. Addendum K, Memo Opinion and Order, Case No. 2:08cv772, at 12. The parties to that suit, which included Wisan and Utah and Arizona AGs, agreed to stay the proposed sale of Berry Knoll Farm, and Judge Benson urged the parties to reach a settlement. R. 22179-22333, Shurtleff Aff. ¶ 43.

During this time period, counsel for the FLDS Church began communicating with Shurtleff directly regarding the disputes it had with Wisan. *Id.*, Shurtleff Aff. ¶ 44. To understand their perspective, Shurtleff agreed to travel to the Hildale and Colorado City areas to meet the FLDS beneficiaries and discuss their concerns. *Id.*, Shurtleff Aff. ¶ 45.

His goal in meeting with the FLDS church members and visiting the Trust's real property was to gain a better understanding of how the FLDS members perceived the Trust administration, and to begin to mediate some of the differences that had arisen between Wisan and the FLDS beneficiaries. *Id.*, Shurtleff Aff. ¶ 46.

The AG informed the FLDS members with whom he met that they should respect Wisan and that if they disagreed his actions, they should go

to Wisan. If that was unsuccessful, Shurtleff told them to appeal to the probate court for relief. *Id.*, Shurtleff Aff. ¶ 47.

For four days in April and May 2009, the parties engaged in mediation with former federal court judge Paul Cassell. R. 15638-15651, p.

3. There, Shurtleff made clear in his opening statement and throughout, that one non-negotiable item was that the Wisan had to be paid. *Id.*, 22179-22333, Shurtleff Aff. ¶ 56; *also* Trans. May 27, 2009 hearing, p. 16.

Throughout, Shurtleff worked to facilitate an agreement to end the prolonged litigation and to ensure Wisan was compensated for his services. *Id.*, Shurtleff Aff. ¶¶ 56-59; 5/27/2009 Tran, p. 16.

At the end of three days, the parties reached a workable settlement, which included payment of Wisan's then, approximately \$2.4 million in unpaid fees. *Id.*, Shurtleff Aff. ¶ 57. The mediation broke for approximately four weeks and when it resumed in May, Wisan and Arizona's AG were no longer willing to support the prior terms. *Id.*, Shurtleff Aff. ¶ 58.

Despite that failure, Shurtleff continued to work with the parties to reach a settlement recommendation that the court would accept. *Id.*, Shurtleff Aff. ¶ 59. During this time, new disputes arose between the FLDS

and Wisan over the payment of occupancy fees. *Id.*, Shurtleff Aff. ¶ 48.

Counsel for the FLDS members originally approached Shurtleff in or about February, 2009, to discuss concerns they had with paying the occupancy fees. *Id.*, Shurtleff Aff. ¶ 50. They complained that Wisan was unfairly receiving payment from two sources: 1) from the milk sales from Harker Farm; and 2) from the occupancy fees paid by those living on Trust property. *Id.*, Shurtleff Aff. ¶ 50. Shurtleff expressed an understanding of their position, but did not instruct or advise Association to not pay the fees. Shurtleff Aff. ¶ 51.

Shurtleff maintained that because the court had ordered the fees, FLDS members had a duty to comply. *Id.*, Shurtleff Aff. ¶ 52; *see also* R. 16483-16491, p. 5 (“The Utah AG correctly noted [at the hearing] that much of the financial pressure on the Trust could have been alleviated had all those presently occupying Trust property regularly paid the modest \$100 occupancy fee.”) But because Warren Jeffs had expressed that Wisan was antithetical to the Church, the FLDS did not believe it was appropriate to pay Wisan, and opted instead to remit payment to the AG, directly, a process that the probate court was aware of and had approved. R.15472-15486, pp 2, 6, ¶19 and n.7; R. 22179-22333, 5/27/2009 Trans. p. 17.

On May 27, 2009, the Court agreed to continue to stay the proposed sale of Berry Knoll Farm on condition that the parties continued to negotiate a settlement in good faith, and also that the FLDS members paid the past due occupancy fees. R. 22179-22333, 5/17/09 Trans., p. 23. Judge Lindberg repeatedly acknowledged that the past due occupancy fees should “be made and be funneled without condition through the Utah AG to the Special Fiduciary to meet the ongoing expenses and the past obligations of the Trust.” *Id.*, Trans. at 24.

In response, an Assistant AG informed the Court that his office could “not be an escrow agent” for the transmission of occupancy fees, and expressed concern that his Office would be caught in the middle and subject to liability if a dispute arose between the FLDS members and the Special Fiduciary with respect to the payment of occupancy fees. *Id.*, Trans. at 25.

On June 1, 2009, the FLDS paid a portion of the occupancy fees, under protest, and the AG deposited the check and promptly delivered it to the Special Fiduciary. R. 15590-15596. On June 15, 2009, the FLDS tendered another check for the remaining balance, but placed a hold on the funds. The AG notified the court that he took no position on the dispute, but that he believed the he could not release the funds given the hold. R. 15731-

15753.

Despite that notice, in a July 17, ruling the probate court stated its belief that the AG had “agreed with FLDS representatives that he would not disburse the second payment without FLDS approval,” and that this “side agreement” was “inconsistent with the Court’s prior orders.” R. 16381-16383, p. 2. The court ordered the AG to deposit the funds with the Court within two business days. *Id.* He complied. R. 22179-22333, check to Third District Court, dated 7/20/09, attached as Ex B.

On or about June 15, 2009, the AG submitted his proposed settlement. R. 15638-15651 and 15685-15698. The settlement did not include a provision for paying Wisan’s fees, but asked the court to direct Wisan to negotiate a proposed settlement along the lines of the AG’s recommendations. *Id.*, p 7.

The AG believed the court could direct that any settlement include a provision for paying Wisan’s fees. R. 22179-22333, Shurtleff Aff. ¶ 62. He also recognized the governing statutes required that prior to distributing Trust assets, the court had to identify Trust debts, which included Wisan’s fees and costs, and to retain sufficient assets in the Trust to satisfy those debts. *See* Utah Code Ann. §§ 75-7-709(a), 75-7-511, 75-3-805.

The proposed settlement was not perfect; but Shurtleff recognized it was imperative that Trust assets be distributed and that further Trust administration halt:

The Proposed Settlement combines the resolution of claims with a plan for the distribution of Trust assets. The Utah AG believes that it is in the best interest that the assets be distributed. Indefinite administration by the Reformed Trust of residential property will lead to unrest by occupants and the continued dissipation of Trust assets. A division and distribution of Trust assets must occur.

R. 15638-15651 and 15685-15698.

The Arizona AG and Wisan objected to the proposed settlement, and the probate court refused to adopt it. R. 16424-16431.

Absent from those reasons was the lack of a provision for paying Wisan's fees. *See generally id.*

Soon after settlement failed, on August 24, 2009, the Court authorized the sale of Berry Knoll Farm to pay the mounting costs of Trust administration. R.16483-16491, p. 8. And because Lindberg had previously ruled that FLDS Church members lacked standing to intervene to stop the sale, R. 16381-16383, p. 1-2, they filed a petition for extraordinary relief with the Utah Supreme Court. *See FLDS v. Lindberg*, 2010 UT 50.

That petition sought to halt sale of Berry Knoll Farm, and raised

essentially the same claims that the Association members had raised in the federal litigation. *Id.*, 2010 UT 51 ¶ 20; Add. K, Memo Decision at 13.

There, the AG and others maintained the Association was barred by laches from claiming the reformation violated their First Amendment rights. *See generally FLDS v. Lindberg.*

This Court agreed with the several respondents, who then argued in the federal court litigation that this Court's ruling should be given *res judicata* effect, barring the federal claims. *See* Add. K, Memo Decision, 35-43. The federal court rejected that argument, ruled that the Trust reformation violated the Association's First Amendment rights, and granted the Association's motion for a preliminary injunction. *See id.* 13-27.

The AG's office moved for a stay of enforcement of the preliminary injunction until after this Court could rule on whether its decision in *Lindberg* barred the federal litigation. *See* 22179-22333, 3/15/2011 Hrg. Trans., Ex D, p 15. The federal court denied that request, and instructed the parties to negotiate an order consistent with his ruling. *Id.* at 15-16; *see also* Shurtleff Aff. ¶ 70.

Shurtleff believed he had a duty to ensure the State agreed to the terms of a preliminary injunction that ceased state action that the federal court

believed violated the United States Constitution. *Id.*, Shurtleff Aff. ¶ 73.

Shurtleff took no position, however, as to who should take over Trust administration. *See* R. 22179-22333, Shurtleff Aff. ¶ 74.

The State appealed the federal court's order to the Tenth Circuit Court of Appeals on March 23, 2011, and joined Judge Lindberg's emergency motion to stay the federal district court's preliminary injunction, pending the Tenth Circuit's review. The State also moved the Tenth Circuit to certify questions of state law to this Court, which eventually, the Tenth Circuit did. This Court accepted that question on March 13. Addendum L.

Preliminary Statement

The certified question is dispositive of not only the federal court litigation, but too this fee issue. Namely, as urged by the several federal defendants, this Court should determine that its 2010 decision and order denying the FLDS Association's petition for extraordinary relief constitutes a final decision on the merits of that controversy that is entitled to preclusive effect. Such a decision will bring an end to the federal court litigation, and with it, an end to the stay of the sale of Berry Knoll farm or of any other Trust property. Lifting that stay, will, in turn, enable Wisan to raise the funds necessary to meet his costs and expenses. That result would obviate

the need that Judge Lindberg saw for the State of Utah, or its AG, to lend Wisan any taxpayer funds on an interim basis. Too, such result would restore constitutional balance and obviate, therefore, the State's complaints here.

Appellants recognize the important role Wisan, his counsel, and those who have worked for him, have served in this matter. They also recognize that Wisan has incurred significant costs and now carries significant debt. Appellants agree Wisan's situation is dire, and through AG Shurtleff, have attempted to remedy, in part, those financial straits, to no avail. And while the State and AG stand ready to negotiate, and to voluntarily agree to assume some funding for Wisan on an interim basis, the probate court's orders that compel the State or its AG to do so constitutes error. But those orders contravene the law and were entered as an abuse of discretion. For those reasons, and despite the foregoing, the State and its AG bring this appeal.

Summary of the Argument

This appeal challenges probate court orders purportedly entered according to that court's discretion and in the interests of justice and equity. But those orders violate Utah law. Namely, the fee order, in the first

instance, finds no support in the underlying Trust orders or relevant sections of the Utah Code. Too, that order is not supported by the common law.

Also, the manner in which the court granted the special fiduciary's several requests, but denied all of the State's motions seeking equitable consideration are the product of that court's abuses of discretion. They should be reversed.

Finally, the probate court's alternative orders requiring the State or its AG to loan the fiduciary in excess of \$5.6 million are not supported according to the law governing equitable fee awards. Those orders, based on their terms of payment, also violate Utah's constitution.

Thus, based on these serial and several errors, the State asks this Court to reverse the probate court's order to the extent they contravene settled law, and to otherwise reverse and remand the orders as warranted.

Argument

I. The Probate Court Erred When it Granted the Special Fiduciary's Motion to Award Him Costs and Fees Chargeable to the State.

Under circumstances that he deemed just, in May 2005, Utah's AG petitioned the court to protect and promote the beneficiaries of the UEP Trust, because its trustees had abandoned it, leaving the Trust vulnerable to

default. *See* Petition, R. 1-118. Now, in response to those efforts, and under circumstances that the probate court has described as just, Utah, through its AG, is being called on to pay more than \$5.6 million dollars to offset the costs and expenses of that beneficial trust administration. That order contravenes the terms of Wisan's appointment, is at odds with the common law, and contrary to public policy. This Court should reject the probate court's erroneous order and accordingly reverse it.

A. The Probate Court's Order Requiring the State to Pay the Special Fiduciary's Costs and Fees Is Not Supported by the Terms of Wisan's Appointment or Utah Law.

Background

The probate court first, and then only temporarily, appointed Wisan to serve as the special fiduciary to the UEP Trust at a May 25, 2005 hearing. Following notice to all interested parties, that court affirmed Wisan's appointment in June 2005, and directed that his duties and authority to act be "subject to and limited by the availability of funds in the Trust estate to reimburse the special fiduciary for the costs, fees and other court approved expenses incurred by [Wisan] and his attorneys." R. , 6/22/2005 Order, p. 6, ¶ 8. In September of that year, the court expanded Wisan's role, and reiterated "[t]hat [his responsibilities] be subject to and limited by the

availability of the funds in the Trust estate to reimburse [him] for the costs, fees, and other Court-approved expenses incurred by the Special Fiduciary and his attorneys.” R. , 9/7/2005 Order, p. 4, ¶ 3.

Since the time of his appointment, then, Wisan was aware, and all interested parties understood, that to the extent they were approved and incurred as necessary to administer the Trust, Wisan was entitled to seek payment from the Trust directly for his costs and fees, and those of people and entities who provided services on the Trust’s behalf.³ And for several years – May 2005 through January 2008 – Wisan sought and was reimbursed from the Trust the costs, fees, and expenses that he incurred and that others – primarily his several attorneys – had incurred at Wisan’s request and on the Trust’s behalf. Those reimbursements totaled more than \$ 3 million. *See, infra*, p. 9.

Coinciding with a July 2008 press release that declared “the days of

³ The terms of Wisan’s appointment are neither novel nor remarkable. They are, instead, consistent with Utah law: “(1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for: (a) expenses that were properly incurred in the administration of the trust.” Utah Code Ann. § 75-7-709(1)(a). The probate court’s order, however, that shifts payment of Wisan’s costs and expenses from the trust to the taxpayers of the State of Utah, is not. A trial has no discretion to misapply a statute. *See State v. Peterson*, 810 P.2d 421, 425 (Utah 1991).

the FLDS people not defending themselves in court are over,” some Trust beneficiaries began to defy Wisan, some members began to file suit against the Trust and Wisan’s administration. That stalemate persisted; consequently on May 27, 2011, Wisan filed a motion under Utah Code Ann. § 75-7-1004(1) requesting that the State of Utah be required to pay Wisan’s then-accrued costs and expenses. After briefing, the probate court granted Wisan’s request in and order that contravenes that court’s prior orders and Utah law.

Discussion

Wisan’s motion and supporting memorandum were succinct and pointed. His memorandum recounted the relevant background facts and contained less than two pages of argument or analysis. There, Wisan detailed a financial crisis that he attributed to the FLDS members’ failure to pay the court-ordered occupancy fees and to the federal court’s order barring Wisan from selling any additional Trust property to satisfy his growing debt. R. 19822-19834.

Wisan neither stated nor averred that there were insufficient assets in the Trust to pay his expenses. But he maintained that Trust was valued at more than \$100 million. *Id.*, p. 8, ¶ 27. Notwithstanding the Trust’s

significant assets, and ignoring the prior orders directing Wisan to look to the Trust for payment of his fees, citing Utah Code Ann. § 75-7-1004(1), Wisan remarked that because it was through state action that he had been nominated and successfully appointed as a special fiduciary, it was therefore “just and equitable” that the State be required to shoulder the costs borne by Wisan’s trust administration. *Id.*, p. 2-3, 10. Over the State’s opposition, the probate court granted Wisan’s motion. Neither the face of that statute, nor any common sense understanding, support an award of attorney fees under those circumstances.⁴

In its entirety, Utah Code Ann. § 75-7-1004 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.

(2) If a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney’s fees.

⁴ For its part, the probate court did not limit the “equitable” considerations supporting its fee award to the fact the State had initiated the underlying action, and had nominated Wisan in the first instance. But the on pp. 2 to 5 of its Ruling and Order, the court detailed several additional considerations. The State and AG Shurtleff address those considerations – which the court raised for the first time in its order – at Point II. A. below.

Id. And respecting ongoing trust administration costs, Utah Code Ann. § 75-7-709, in part, provides: “(1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for: (a) expenses that were properly incurred in the administration of the trust.”

That August 1, 2011 ruling, ignores subsection -709, directing a trustee – here, a fiduciary – to look to the trust for payment of his administration expenses. The ruling also ignores subsection - 1004(2), permitting a trustee, who in good faith brings or defends a proceeding respecting the subject trust, to also look to the trust for payment of his costs and fees. *See also Sundquist v. Sundquist*, 639 P.2d 181, 188 (Utah 1981) (“A trustee who has . . . successfully [defended the trust from depletion of its assets] is entitled to have the corpus of the trust pay the reasonable attorney’s fees incurred in that defense.”)

Clearly then, the terms of Wisan’s appointment, subsections -709(1)(a) and -1004(2), each direct Wisan to look *to the Trust* for reimbursement of the costs that he has incurred in the administration, or in defense of the Trust. Those terms govern Wisan’s fees. Those terms, then, should have governed the fees orders. The probate court’s decision to assess costs and fees based on subsection -1004(1) alone, contravenes that court’s own

orders and the Utah Code. It is error and should be reversed.

B. The Probate Court's Order is Not Supported by the Common Law.

Just as the probate court's August 1 fee order finds no support in the terms of Wisan's appointment and settled statutes, it also finds no support in the common law. Instead, consistent with the Utah Code, the common law rule directs appointed fiduciaries to the income or *res* of the Trust for the payment of their expenses:

The general common law rule is that a receiver must look to the income or *res* of the property for his expenses and fees.

City of Chicago v. Kideys, 617 N.E.2d 162, 165-66 (Ill. Ct. App. 1993).

This rule, outlined by the United States Supreme Court in 1908, remains viable today. *See Atlantic Trust Co. v. Chapman*, 208 U.S. 360 (1908).

Below, Wisan and the court cited *Atlantic Trust* with approval and to support their shared but erroneous view that it is just and equitable to require the party who filed a petition to appoint a trustee to bear the costs of that appointment. *Atlantic Trust* stands for a different proposition.

There, a mortgagee requested that a receiver be appointed to run a mortgaged company. On appeal from the district court, the court of appeals required the mortgagee to pay the receiver's expenses and fees, because

money from the foreclosed company was inadequate to cover them. The Supreme Court reversed that decision, and held that the mortgagee could not be personally liable under those circumstances:

[T]he court of appeals erred in holding that the trust company was liable for the deficiency found to exist. No such liability could arise from the simple fact that it was on plaintiff's motion that a receiver was appointed to take charge of the property pending the litigation.

Id. at 370. Adhering instead to the general rule, that Court stated that absent a showing of fraud or unfair action, “[t]he liabilities which [a receiver] incurs are liabilities chargeable upon the property and not liabilities of the parties.” *Id.* at 376. The Court explained: “The mere inadequacy of the property or fund to meet such [receiver] expenses constitutes in itself no reason why liability should be fastened upon the [mortgagee], who has been guilty of no irregularity.” *Id.* at 375-376.

This view, seemingly rejected by the probate court, is the view held by the majority of courts that have considered this issue. Instead, consistent with the majority view, because Wisan did not allege, nor the probate find, that the State or its AG had engaged in fraud, bad faith or unfair action, “[t]he liabilities which [a receiver] incurs are liabilities chargeable upon the property and not liabilities of the parties.” *Rosenblatt v. Michigan Ave.*

Nat'l Bank, 389 N.E.2d 182 (Ill. 1979); see *Bowersock Mills & Power Co., v. Joyce*, 101 F.2d 1000, 1002 (8th Cir. 1939) (“[W]here a receiver is regularly and lawfully appointed, his expenses and compensation are to be charged only against the receivership funds and not against the party who procured the appointment.”); *Presido Min. Co. v. Overton*, 286 F. 848 (9th Cir. 1923) (where petitioner acted in good faith in asking for appointment of receiver, receiver’s costs were properly charged against the property even though appointment receiver was erroneous and unauthorized); *Ferguson v. Dent*, 46 F. 88, 97-98 (C.C. W.D. Tenn. 1891) (“The authorities uniformly hold that when no question is made as to the legality and propriety of the appointment of the receiver, and he has closed up his business in pursuance of his appointment, his compensation should be paid from the funds in his hands.”); *Radford v. Folsom*, 7 N.W. 604 (Iowa 1880) (receiver is entitled to have compensation paid from funds in his hands; such compensation cannot be taxed as costs against plaintiff, who secured receiver's appointment and who was eventually defeated in the suit); *Commercial Nat'l Bank in Shreveport v. Connolly*, 176 F.2d 1004 (5th Cir. 1949) (absent convincing evidence that appointment was collusive, capricious, venal or in bad faith, law does not contemplate receivership’s expenses be charged other than

against the funds administered by the receiver). Thus, to the extent the probate court's order rests on the fact the State is the party who petitioned the court for Wisan's appointment, it contravenes settled law and should be reversed.

Here, Wisan claimed only that because the State had procured his appointment and was better able to bear his expenses, the State, not Wisan should pay them in the interim. Wisan did not claim, nor did the probate court conclude that AG Shurtleff lacked the authority to file a petition to protect the UEP Trust assets. Wisan did not claim and probate court did not find that Wisan's appointment was illegal or improper. Moreover, Wisan did not allege, and the probate court did not conclude that the State, or its AG, had engaged in a fraud or unfair action relative to the trust administration; but the court acknowledged that Utah's AG possessed the "right" to address ongoing Trust administration "in any way he [deemed] legally defensible." R. 19874-19881, n. 3. Further, Wisan did not allege and the probate court did not find that the State had caused the increase or protracted nature of the fee dispute; but the probate court repeatedly acknowledged the increased costs of trust administration, and Wisan's consequent indebtedness were due to "(a) the continuing and proliferating

FLDS litigation and (b) the failure of the FLDS to honor commitments . . . that they would pay modest occupancy fees.” *Id.*, p. 5 and *passim*.

Thus, where here, the State’s fraud, bad faith, false action neither being alleged nor shown, Wisan’s expenses should be paid from Trust assets. And, in turn, the probate court’s order should be reversed.

C. The Probate Court’s Order is Not Supported by Public Policy.

Charitable trusts “are favorites of the law” and should be vigilantly protected. *In re Gerber*, 652 P.2d 937, 939 (Utah 1982); *In re Estate of Roberts*, 373 P.2d 165, 171 (1962). In Utah, as elsewhere, it is often the AG, who represents the public benefitted by a charitable trust, and who “will or can act as advocate in support of the validity of [a] charitable provision.” *In re Estate of Zahn*, 16 Cal. App. 3d 106, 114 (Cal. Ct. App. 1971) (internal citation and quotation marks omitted); *see also*, Bogert, *The Law of Trusts and Trustees*, § 411 (2011) (the AG is the “chosen [] protector, supervisor, and enforcer of charitable trusts”); Utah Code Ann. § 75-7-413 (West 2004): *see* 15 Am. Jur. 2d Charities § 136 (AG has duty to institute proceedings to stop or redress wrongful conduct of trustees of charitable trusts).

The probate court’s orders that requires the State or its AG to pay an

estimated \$5.6 million in fees that Wisan claims to have incurred in the last four years, is contrary not only to that tradition, but also then, to public policy. The challenged fees have and will deter the AG from fulfilling his duty to protect charitable trusts. Because, if a consequence of filing a petition to prevent a trust from failing is that the State will be tasked with paying millions of dollars of administrative fees chargeable to the trust, the AG will no longer be able to file petitions to protect trusts. In the AG's absence, those trusts will be left without protection. *See e.g.*, Corrected Ruling and Order On Pending Motions, 7/17/09, at 2 ("Because the UEP Trust is a charitable trust, the only individuals with legally cognizable interests are the Utah And Arizona Attorneys General . . . as representatives of the community, and the Court-designated Special Fiduciary.").

The State and its AG firmly agrees that Wisan should be paid, but neither public policy, established law, nor equity dictate that the AG and the people of Utah should be required to pay more than \$5.6 million toward that end. Instead, the policy favoring the AG's ability, in the future, to bring an action to protect the beneficiaries of a charitable trust, compels reversal of the probate court's order.

II. This Court Should Reverse the Fees Orders Based on the Probate Court's Several Abuses of Discretion.

When hearing probate matters, the district court sits as a court of equity, possessing discretion and latitude when fashioning appropriate remedies. *See Hughes v. Cafferty*, 2004 UT 22, ¶ 24, 89 P.3d 148. Sitting in equity, it is the court's obligation "to effectuate a result that serves equity given the overall facts and circumstances" of the case. *Id.* When a court's decision favors only one party, or fails to consider all of the overall facts and circumstances, equity is not served; but an abuse of discretion exists.

Here, though sounding in equity, several of the probate court's order do not serve that end. Instead, (1) the probate court's orders denying the State's motion for reconsideration, (2) its orders denying the State leave to adequately object to the requested fees in the first instance, and rejecting, in large part, the State's objections thereafter; and (3) the court's order granting the State leave to seek, but then denying its request to order the State of Arizona to bear its pro rata share of Wisan's fees, were each entered as an abuse of discretion. They should be reversed.

A. The Probate Court Abused its Discretion When it Denied the State's Motion for Reconsideration.

Whether to reconsider an issue, rests with the court's sound discretion.

See IHC Health Servs., Inc. v. D & K Mgmt., Inc., 2008 UT 73, ¶ 27, 196

P.3d 588. To determine whether to reconsider a prior ruling, a court considers, among other factors, whether

(1) the matter is presented in a 'different light' or under 'different circumstances;' (2) there has been a change in the governing law; (3) a party offers new evidence; (4) 'manifest injustice' will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Wasatch Oil & Gas, LLC v. Reott, 2011 UT App. 152, ¶ 9, 263 P.3d 391

(quoting *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah App. 1994)).

In its order denying the State's motion for reconsideration, the court focused not on the sum of those factors, but only on whether there was a change in the governing law, or other exceptional circumstances. And in the absence of those factors – one which finds no support in case law – the court declined to entertain the motion, believing the State merely sought “to reargue, in a more extended format, many of the same points” it had raised

in its initial opposition. Add. C, Order at 2. A complete reading of the motion, however, compels a different result.⁵

The State's motion was thorough and thoughtful; well-supported in fact and law. At its core, the State's motion sought an opportunity to confront for the first time the several, erroneous considerations that the court, and not the parties, had raised in support of its August 1, decision. See R. 19822-19834, p 2-5. Consistent with *Reott*, the State's motion, therefore, (1) presented the matter in a "different light" and according to "different circumstances;" (2) underscored the injustice to the State if the court allowed its order to stand in the face of equitable considerations that the State had been deprived of both notice and opportunity to be heard; (3) detailed new evidence⁶ necessary to counter the probate court's several,

⁵ In reality, the court paid little heed to the State's motion and supporting memorandum, in fact, the court ruled almost immediately, and denied the motion without calling for Wisan's response, stating the motion was "lacking in merit." *Id.*, n 1.

⁶ A court abuses its discretion when it denies reconsideration despite the presence of new evidence sufficient to support the substantive standard for granting a new trial. See *In the Matter of the General Determination of Water Rights*, 982 P.2d 65, (Utah 1999), *reh'g denied*. Under that standard, the new evidence must "(i) be such as it could not with reasonable diligence have been discovered and produced in opposition to the motion []; (ii) not be merely cumulative; and (iii) be such as to render a different result." *Id.* The State's evidence satisfied that test.

equitable considerations; and, (4) presented the probate court the opportunity to correct its own errors. *Id.*, 884 P.2d at 1311; *see* R 22179-22333, Memo at pp. 27-36; *see also, infra*, pp. 15-26.

By denying the State's motion, without considering those factors, or even the factual basis for the State's request, the probate court, therefore, reached its equitable determination unaware of the "overall facts and circumstances" on which the motion was based. By so doing, the probate court failed to do equity, but instead, abused its discretion.

B. The Probate Court Abused Its Discretion When It Failed Grant the State Leave to Adequately Object to Wisan's Fee Requests, or to Consider the Objections that State Later Made.

The probate court's August 1 order did not fix an exact sum, but the order directed Wisan to submit his accountings, and gave the State, the opportunity to conduct thoroughly review the requested costs, fees and expenses, and to articulate and any all reasonable objections to the same. R. 19822-19834, Ruling and Order, p. 6. Beginning in mid-October, and continuing until mid-November, 2011, Wisan compiled and submitted twelve, separate accountings, containing nearly 3,000 pages and detailing the work of more than 70 individuals or entities. Reviewing and making

sense of those materials, proved a daunting task.

Accordingly, on November 28, and in response to Wisan's November 17 motion seeking an order immediately approving those expenditures, that State moved the court for beneficial relief. Namely, based on their sheer size and the amount of detail contained in the accountings, the State asked for a 90-day extension of time to review and to object to the information. Also to aid its objections, the State sought leave to conduct discovery, take depositions, and to obtain an expert to review and cull through the numerous time records. And, the State asked the court to direct Wisan to provide additional detail respecting the non-attorney billings, and to set the matter for an evidentiary hearing when its objections were complete. *See generally* R. 22338-22343.

The court granted the State's request, only in limited part, giving the state 60 days from the date Wisan served his final accounting on November 17 to submit its responses.⁷ R. 22414-22417, Ruling at p. 2. The court acknowledged the State's request for additional detail in the non-attorney

⁷ Although the court stated in its order that the State should have 60 days to review the accountings and make its objections; effectively, the State received less than two weeks to complete that task. But the court's order, entered January 4, called for the State's by January 17; thereby by giving the State only 13 days to comply. R. 22414-22417, p. 3.

items, but did not order Wisan to provide that detail, relying instead on his voluntary compliance. *Id.*, p. 1-2 & n.1. And despite stating on August 1 that the State would have the opportunity to conduct a complete and thorough review of the accountings, the court directly questioned the State's need to conduct discovery or to hire an expert, and denied those requests by calling for the State's objections within 13 days of the date of the court's order. Finally, the court ignored, in total, the State's request for an evidentiary hearing. *Id.*

According to that order, the State submitted its objections on January 17, 2012. There, the State challenged (1) Wisan's use of block billing to account for his attorney's time; (2) the necessity of several categories of expenses; (3) Wisan's and his counsel's significantly increased billing rates that had not previously approved by the court; and (4) the overall amount of Wisan's substantial fees. Wisan offered a terse response, and urged the Court to overrule the State's objections and to award Wisan all of his costs and fees, which the probate court, in large part, did. R. 22832-22851.

At the outset, the court "note[d] that [the] State's objections are broad based and often vague." *Id.*, p. 1. The court faulted the State for failing to specifically object to every improper billing, criticizing the State's resort to

raising its exceptions by way of illustration and according to categories of activities. *Id.* The court recognized the State and its AG were “under some time pressure to file objections,” *id.* and also, that “it can be difficult to raise specific objections in instances where the billing records don’t provide adequate detail,” *id.* 1-2, but inexplicably ruled, “[a]ccordingly, objections that have not been clearly stated in the State’s Response are deemed waived.” *Id.*, p. 3. Finally, ignoring the fact the State had sought, but been denied additional time and resources to conduct a full and searching review of Wisan’s fee records, and on inapposite law, the court complained that it was not ““simply a depository in which the [objecting] party may dump the burden of argument and research.”” *Id.*, p. 2, n.2 (quoting *Johnson v. Johnson*, 2012 UT App 22, ¶ 30, – P.3d – (case analyzing appellate rule 24) (alteration in court’s original)).

The court’s observation and, too, its sanction – waiver – are at odds with its prior ruling. But by denying in large part the State’s request for additional time and for leave to conduct discovery and retain an expert, the court unreasonably tied the State’s hands. Its criticism and consequent refusal to consider any objections, not raised with sufficient detail, reflects the probate court’s failure “to effectuate a result that serves equity given the

overall facts and circumstances” of the case. *Cafferty*, 2004 UT 22, at ¶ 24.

The probate court’s February 10 ruling and order, therefore, is predicate on its abuse of discretion. It should be reversed and that matter remanded.

C. The Probate Court Abused Its Discretion When It Denied the State of Utah’s Contribution Request.

In ruling that the State of Utah should be required to pay the Fiduciary’s fees, the trial court recognized that “others who have benefitted from the Special Fiduciary’s efforts in administering the Trust should bear some of the cost.” Ruling at p.6. But when the State filed its motion asking the court to order Arizona to pay its share of the fees, the trial court refused to invoke the same equitable power it drew on to order Utah to pay, and instead denied the State of Utah’s motion based on a legally flawed technicality. This ruling was an abuse of discretion.

In its motion, the State pointed out that “[i]t would be *inequitable* to require the State of Utah to pay all of the Fiduciary’s fees when others benefitted from the Fiduciary’s administration of the Trust,” R. at, and asked that because Arizona had benefitted from the Fiduciary’s work it should be required to contribute to the payment of the Fiduciary’s fees.” R. The State also asked that the Fiduciary provide a statement of the number of

residents in each state, from which the trial court could determine the “appropriate percentage of each State’s contribution to the payment of the Special Fiduciary’s fees.”

Although the State captioned its motion a “motion for contribution,” the State made its motion based on equity, and never asserted or took the position that it had paid a debt that Arizona also owed and thus should be required to pay, which are the elements of contribution.

Nevertheless, the trial court incorrectly ruled that the State’s motion was one for contribution. The trial court then asserted, despite the clear statements in the State’s opening memorandum that it sought its relief based on equity, that the State did not make its “equitable allocation” argument until its reply memorandum. Finally, the trial court refused to consider Utah’s request for contribution because the court claimed the State should have raised the issue during the May-July 2011 period, when the Special Fiduciary filed his briefs asking for payment and the State filed its opposition. But the State did raise the issue.

Once it refused to recognize the State’s argument as one for equitable allocation, the trial court determined that the State’s motion was one for contribution, and thus it did not have jurisdiction to resolve a claim by one

state brought against another.

The trial court's refusal to consider the State's equitable contribution argument purportedly because the State did not raise the argument until its reply (which was plainly incorrect) and purportedly because the State had not asked the Court to allocate some of the Special Fiduciary's fees to Arizona during the period when the parties were briefing the fees issue (which was plainly incorrect), constitutes an abuse of discretion. This Court should reverse.

III. The Probate Court Erred When It Granted Wisan More than \$5.6 Million in Costs, Fees and Expenses.

In many respects, the probate court's February 10 ruling is inconsistent and arbitrary. But more than that, the ruling is at odds with the governing law.

In Utah, attorney fees may be awarded if authorized by contract or statute. *See Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). But regardless, a court may award only reasonable attorney fees. *See Canyon Country Store v. Bracey*, 781 P.2d 414, 420 (Utah 1990). What constitutes a reasonable fee rests with the court's discretion, but every fee – even those awarded in equity – must find support in the record. *Dixie State*

Bank, 764 P.2d at 988.

More than thirty years ago, this Court constructed a set of “practical guidelines” governing equitable fee awards. Stated as a four-part test, under *Dixie*,

a trial court should begin its fee analysis by determining *exactly what legal work* the petitioning attorney or attorneys performed, both in terms of the nature of the work and the time spent in its performance. *Id.* at 990. Second, the court should consider how much of that work was *reasonably necessary to adequately conclude* the matter for which legal representation had been sought. *Id.* Third, the petitioning attorney's billing *rate should be compared* with those “customarily charged in the locality for similar services,” to ensure the reasonableness of the attorney's rate. *Id.*

Finally, after the preliminary fee is established, *Dixie* 's fourth step asks that courts adjust the amount of that fee, when necessary, to reflect the court's consideration of various criteria set forth in [Rule 1.5 of the Utah Rules of Professional Conduct]. *Id.*

In re Estate of Quinn, 830 P.2d 282, 285 (footnotes omitted) (summarizing the *Dixie* four-part test).

Thus, when a fee dispute exists, the trial court must make a factual record that supports its reasonableness determination. *Id.* at 285-86.

“Unless the record clearly and uncontrovertedly supports the trial court’s decision, the absence of adequate findings of fact precludes appellate review

of the evidentiary basis underlying the trial court's decision and requires remand for more detailed findings by the trial court." *Id.* In several respects, the probate court's record departs from *Dixie's* practical guidelines.

A. The Court's Findings Are Not Sufficiently Detailed, But Are Based on Presumption and Spot Checks.

To be sufficiently detailed, the court's findings must contain subsidiary facts detailing the steps by which the fee decision was reached. The absence of such facts, precludes this Court's review and erodes the parties' reliance on the award. *Id.*

As an initial matter, the State's objections and responses to Wisan's and his attorneys fee reports, were perhaps, academic. But Judge Lindberg openly expressed her belief that all of the fees incurred by Wisan were reasonable, required, and compensable:

The Court notes that [Wisan] has always provided accountings sufficient for the Court to determine whether the fees were necessary for the administration of the Trust. [Wisan] has been endowed with a certain amount of discretion in incurring fees and is entitled to exercise his best business judgment. It is not the province or goal of the Court to usurp [Wisan's] role and re-scrutinize every element of every expenditure.

R. 22414-22417, 1/4/2012, Ruling, p. 1-2, n.1. Similarly, respecting the

February 10 ruling itself, Judge Lindberg remarked that the court had “reviewed generally the records,” by conducting its own “‘spot checks’ to ensure the fees charged [were] reasonable.” R. 22832-2285, 2/12/2012, Ruling and Order, p. 3. And on that review, the probate court “satisfied” itself that “(a) it under[stood] what ha[d] been billed, and (b) the payments authorized fully compl[ied] with statutory and case law requirements.” *Id.* By any measure, whether based on the court’s presumption, or a subsequent “spot-check,” the sufficiency of Judge Lindberg’s review necessary fails. The resulting order must therefore be reversed.

B. The Probate Court’s Fee Order Fails the First *Dixie* Test.

The first *Dixie* step requires the reviewing court to determine “exactly” what work was actually performed. *Id.*, 764 P.2d at 990. This step necessarily requires the attorney seeking its fees – or a fiduciary seeking to have the State pay attorney fees on his behalf – to establish both the nature of the work and the time spent to perform it. *Id.*

Here, Wisan’s counsel utilized a “block billing” format to record and report their fees. That format, which “involves recording only a daily overall time-total for all tasks performed, rather than separately recording time spent of each task performed on a particular day,” *Brown v. David K.*

Richards & Co., 978 P.2d 470, 473 (Utah App. 1999) (defining term), was wholly insufficient to enable either the State's or the court's adequate review. But that block-billing format prevents a reviewing party from determining exactly what work Wisan's counsel performed – either in terms of the nature and/or the time it took to perform it.

When a fee applicant's documentation proves inadequate, a "court may reduce the award accordingly." *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Documentation that includes multiple tasks in a single entry, complicates the court's review. The morass created by counsel's use of block-bills, therefore diminished both the State's ability to meaningfully review or object to those bills, and the court's ability to adequately conduct its mandatory review. But seemingly unconcerned over the use of block-billing, the court denied, with little comment, the State's request to modify the fee award downward.⁸ That order is an abuse of discretion. It should be reversed.

⁸ The court also criticized the State's objection, stating "it is too late for the State to object to a format (i.e., block billing) that it never questioned previously. R. Ruling and Order, p. 5. But that criticism stands in stark contrast to the court's earlier ruling that the State had not waived its right to object to the pending accountings, based on the fact it had not objected to the accountings that Wisan had submitted in the past. R. , Ruling Re. Motion for Extension, p. 2, n.3.

C. The Probate Court's Order Fails the Second *Dixie* Test.

The second *Dixie* factor looks to the reasonableness of the fee charged, and examines whether the work “was reasonable necessary to adequately conclude the matter.” *Dixie*, 764 P.2d at 990. Below, the State complained, that to the extent it could even be ascertained from the block billing, much of the work of Wisan’s attorneys was duplicative, performed by an attorneys whose billing rate and expertise was higher than necessary to complete the task; and also, that in several discrete instances, Wisan’s attorneys had billed for work not related to their role in the Trust administration. R. 22525-22107, Response, at pp. 12.

The court rejected out of hand the State’s complaints about Wisan’s use of high paid, senior counsel, and reduced the overall fee award by \$890 in response to the duplicative billing that the State had been able to identify. But the court took no other steps to guard against the State’s concern that their could be multiple instances of such billing hidden inside the voluminous records. *See id.*, state’s Response, p. 7, n.3 (wherein State requested that before finalizing fee award, court require Wisan to identify every instance of duplicative billing and, where appropriate, delete the fees for attorneys who were not necessary to complete the task.) And then,

arbitrarily, the probate court reduced by 5% the amount of Wisan's bills that the State had – in the limited time given it – identified to illustrate its concern over using attorneys to perform clerical tasks. Finally, the court sanctioned Wisan's bills in the remaining categories, finding on Wisan's report alone, that they were necessary to his understanding, and to that of his attorneys, in administering the Trust. Because, in at least two categories, the court found merit to the State's objections, prior to finalizing its fee award, it was incumbent on the court to satisfy that itself that additional irregularities did not exist. Its failure to do so is an abuse of discretion.

D. The Probate Court's Order Fails the Third *Dixie* Test.

The third *Dixie* factor looks to the attorney's billing rate, and, to whether it is consistent with rates charged by other attorneys for similar work in that locale. *Dixie*, 764 P.2d at 989. On this point, the State noted that since July 2008, when Wisan last submitted a fee request, that his fees, and those of many who worked for him had increased. The increases, the State noted, had not previously been presented to or approved by the Court. R. 22250-22707, Exs. G, H & I. The probate court acknowledged those increases and then ratified them. It did so without the show of evidence, but based only on the court's statement "that the rates currently

being charged by [Wisan], his associates, and his counsel 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.” R. 22832-22851, Ruling and Order, p. 11. That approach is not supported at law. But when a fee amount is controverted, that court must make detailed findings, not assumptions. *Dixie*, 764 P.2d at 989 (trial court’s discretion involves evaluation of evidence, not self-interested testimony).

E. The Probate Court Abused its Discretion When It Refused to Reduce Wisan’s Fees.

Once a court has adequately determined the legal work that was actually performed; that it was reasonable and necessary; and that the billing rate is consistent with that charged by others in the local, the final *Dixie* step requires the court to multiply the “necessary” number of hours, by the appropriate billing rate. *Quinn*, 830 P.2d at 289. But in so doing, the court also possesses the discretion to adjust the fee as warranted. Here, given the fact that most of the accountings were presented in a block-billing format, and because that format made it difficult – if not impossible – for the State and the court to identify whether items had been improperly billed and should be deleted, the State requested the court to apply a 25% percent

reduction to the total fee. The court rejected that request.

IV. The Probate Court's Ruling that Directs the State of Utah to Pay More than \$5.6 Million by Date Certain Intrudes on Legislative Functions and Violates the Utah Constitution.

A. The Probate Court's Order Violates the Separation of Powers Doctrine.

In sparse but certain terms, the Utah Constitution mandates a clear separation of powers between the three branches of government. Utah Const. art. V, sec. 1. 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). 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) (to preserve balance of the three branches of government, one branch, cannot circumvent powers reserved to another).

Respectively, Articles 6, 7, and 8 of the Utah Constitution, set out the authority of the Legislative, Executive and Judicial branches of Utah's Government. Legislative power "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). Executive power is “vested in the Governor who shall see that the laws are faithfully executed.” *Id.*, Art. 7, § 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, 5.

“Judicial power” constitutes the authority of Utah’s courts to hear and to determine justiciable controversies. *Timpanogos Planning*, 690 P.2d at 569. Judges, then, “are the interpreters of law.” *Id.* And though Utah’s courts 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), those 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.

Here, through its orders compelling prompt payment by the State or its AG by date certain – first, by May 10, 2012, and then, by August 1 – the probate court directly and indirectly seeks a specific, legislative appropriation. Enforcement of the court’s orders under those terms, finds

no support in Utah law. But the Utah Code is replete with statutes making clear that the power to appropriate is a legislative function, reserved exclusively to the Legislature. *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). The Utah Code also provides, that even on entry, a state court may not, through "[e]xecution, attachment, or garnishment," execute on a judgment against the State. *See* Utah Code Ann. § 63G-30d-603(2) (West 2009).

Finally, while no Utah case is on point, the majority of courts that have considered this issue make clear that a state court judge may not compel its state legislature to appropriate funds – either directly, or indirectly – to satisfy its judgments. This axiom is long-standing and spans judicial decision for more than 100 years:

When a judgment has been rendered, the liability of the state has been judicially ascertained, but there the power of the court ends. The state is at liberty to determine for

itself whether to pay the judgment or not.

Baltzer v. State of North Carolina, 161 U.S. 240, 243 (1896).

The State and AG agree they should honor any and all validly entered judgments or similar orders; but the United States Supreme Court has long-recognized that even in the face of a lawful judgment order, a state “may refuse to make the necessary appropriation, and the courts are powerless to compel them to do so.” *Id.* at 244-45. That principle has guided the approach taken by a majority of the states that, too, have considered this issue.

For example, in *Smith v. State of North Carolina*, 222 S.E.2d 412 (N.C. 1976), the North Carolina Supreme Court considered a wrongful termination suit brought by former state employee. In its order remanding the matter, the North Carolina Court observed that “any judgment against the state will be uncollectible unless the legislature appropriates funds which can be used to pay the obligation.” *Id.* at 418. The Court determined that although plaintiff was entitled to his day in court, thereafter, the court was powerless to enforce any resulting judgment. *Id.* at 424 (citation omitted). The court observed, that once the judiciary has “performed its function to the limit of its constitutional powers[, s]atisfaction will depend

upon the manner in which the General Assembly discharges its constitutional duties.” *Id.*

The Louisiana Supreme Court reached a similar conclusion in *Newman Marchive Partnership, Inc. v. City of Shreveport*, 979 So.2d 1262 (La. 2008). In that factually analogous case, the court granted certiorari to consider whether the judicial branch could, through writ of mandamus, compel a political subdivision to satisfy a judgment with funds appropriated to it by the legislature, “but not for the payment of that specific judgment.” *Id.* at 1264. The court answered that question, “no,” finding that absent a specific legislative appropriation, taxpayer funds – even those set aside to pay claims and judgments generally – were “public” and “not subject to seizure.” *Id.* “[T]he judicial branch,” that court noted, “is empowered to render judgments against the state[, but] the constitution does not provide the judiciary with the ability to execute those judgments. The constitution reserves that power to the legislature.” *Id.* at 1265 (internal citations omitted). Instead, “[j]udgments against a political subdivision of the State may only be paid ‘out of funds appropriated for that purpose by the named political subdivision.’” *Id.* at 1266 (quoting LSA-R.S. 13:5109(B)(2)).

Each decision above is in accord with the majority view,⁹ and with Utah law.

Annually, Utah's AG receives a budget appropriation from the Utah State Legislature. And though the funds appropriated to his 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

⁹ See *AFSCME v. State of Iowa*, 484 N.W.2d 390, 393 (Iowa 1992) (separation of powers claim as "grounded in the belief that the spending of public money cannot be delegated to arbitrators or members of the judiciary. This is because the power to appropriate public funds rests exclusively with the General Assembly and the governor"); *New Jersey Div. of Youth and Family Servs. v. D.C.*, 571 A.2d 1295, 1298, 1301 (N.J. 1990) ("[n]o money may be drawn from the State treasury but for appropriations made by law. The judiciary could not order the Legislature to appropriate money, or the Governor to approve an appropriation if one were made."); *Amantia v. Cantwell*, 213 A.2d 251, 256 (N.J. 1965) ("while petitioners are legally and morally entitled to reimbursement," "[t]his court should not interfere [with the functioning of the Legislature]" and therefore "[t]he only course available to petitioners was and is the Legislature"); but see *Mandel v. Myers*, 629 P.2d 935, 939 (Cal. 1981) ("[a]lthough the separation of powers doctrine generally bars a court from compelling the Legislature to enact an appropriation bill, once the Legislature has appropriated funds the constitutional doctrine does not preclude a court from ordering state officials to disregard invalid instructions upon the expenditure of such funds.")

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.*

Therefore, even accepting – which Appellants do not – that requiring the State of Utah to pay, or to extend as a loan, more than \$5.6 million to the Special Fiduciary is “what justice and equity require,” the probate court’s February and March 2012 rulings that direct the State, or its AG, to secure and therefore pay that sum to Wisan by a date certain, invokes purely legislative power – the power to control the purse – and violates Utah’s Constitution. Accordingly, should this Court find any basis in the law to support the fees orders in the first instance, it should reform those orders to conform to Utah’s Constitution.

B. The Probate Court's Order Extends the State's Credit in Violation of the Constitution

Finally, the probate court's order violates the state constitution in another respect. Article VI, section 29 of the Utah Constitution precludes even the Legislature from authorizing "the State, or any county, city, town, school district, or other political subdivision of the State to lend its credit . . . in aid of any . . . private individual or corporate enterprise or undertaking . . ." Utah Const., art. 6, § 29. In derogation of this provision, the probate court ordered the State of Utah, or its AG, to loan Wisan more than \$5.6 million, secured by a lien on Trust proceeds. That order violates the constitution, and should be reversed.

At the outset, the State and AG Shurtleff concede they failed to raise this issue in the proceedings below. But given the gravity of the probate court's error, and the substantial size of the loan that the court has called on the State to make, the probate court's plain error and these exceptional circumstances support this Court considering this issue for the first time on this appeal. *See State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346.

"[T]he exceptional circumstances exception," this Court has stated, "is ill-defined and applies primarily to rare procedural anomalies." *id.*, ¶ 12

(quoting *State v. Dunn*, 850 P.2d 1201, 1209 n.3). The plain error exception, in turn, “enables the appellate court to ‘balance the need for procedural regularity with the demands of fairness.’” *Id.*, ¶ 13 (quoting *State v. Verde*, 770 P.2d 116, 122 n. 12 (Utah 1989)). To demonstrate plain error, the State must show (1) that an error exists, (2) that it should have been obvious to the trial court, and (3) that the error is harmful. *Id.*

The probate court’s error satisfies both. First, the probate court entered its order under admittedly rare circumstances, and in doing so granted Wisan relief that is unrivaled by any other case that counsel has located. Next, the relief the court gave Wisan is not contemplated on the face of the statute. But Utah Code Ann. § 75-7-1004(1), if it applies here at all, enables the court to award one party its costs and fees to be *paid* by another party to the trust administration proceeding. The statute does not permit the court to require the State to make a substantial *loan* of state funds. That error not only exists, it is under the circumstances, plain, and from the face of the statute, obvious. Finally, absent the court’s error, the State’s surety would be not be at issue.

Utah’s courts must construe a statute to effectuate legislative intent and to avoid constitutional conflicts. *See In re Marriage of Gonzalez*, 2000

UT 28, ¶ 23. Here, the probate court did neither. But its decisions compelling the State, or its AG, to make a substantial loan violates Utah's constitution. Its decisions must be reversed.

Conclusion

For the foregoing reasons, and in the interest of justice and equity, the State of Utah and its Attorney General asks this Court to reverse the probate court's August 2011 Ruling and Order charging costs and fees to the State of Utah based on its legal error. Alternatively, these Appellants ask the Court to reverse that ruling as a violation the Utah Constitution. And to the extent, this Court upholds the same, Appellants ask this Court, therefore, to reverse and to remand for further proceedings as required.

Respectfully submitted this 14th day of May, 2012.

s/ Bridget K. Romano
BRIDGET K. ROMANO
Utah Solicitor General
Attorney for Utah Attorney General
Mark L. Shurtleff

Certificate of Service

I hereby certify that I sent a true and correct copy of **The State of Utah and Utah Attorney General Mark L. Shurtleff's Opening Brief on Appeal of Fee Orders of the Third Judicial District Court, Judge Denise P. Lindberg, Presiding** to the following by United States Mail, postage prepaid, this 14th day of May, 2012:

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ADDENDA

Addendum A

§ 75-7-709. Reimbursement of expenses

(1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

(a) expenses that were properly incurred in the administration of the trust; and

(b) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(2) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Laws 2004, c. 89, § 81, eff. July 1, 2004.

Uniform Law Comments [UTC § 709]

A trustee has the authority to expend trust funds as necessary in the administra-

tion of the trust, including expenses incurred in the hiring of agents. See Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of administration from trust).

Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. See Restatement (Third) of Trusts Section 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust. The purpose of this provision, which is derived from Restatement (Second) of Trusts Section 245 (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reim-

bursment for expenses which benefitted the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust. See Restatement (Second) of Trusts Section 245 cmt. g (1959).

Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. See 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 245 (4th ed. 1988).

Historical and Statutory Notes

Uniform Law

This section is similar to § 7-709 of the Uniform Trust Code. See Volume 7C Uniform Laws

Annotated, Master Edition, or ULA Database on Westlaw.

§ 75-7-1004. Attorney's fees and costs

(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.

(2) If a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney's fees, incurred. Laws 2004, c. 89, § 109, eff. July 1, 2004.

Uniform Law Comments [UTC § 1004]

This section, which is based on Massachusetts General Laws chapter 215, Section 45, codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation

costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts Sections 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 188.4 (4th ed. 1988).

Historical and Statutory Notes

Uniform Law

This section is similar to § 7-1004 of the Uniform Trust Code. See Volume 7C Uniform

Laws Annotated, Master Edition, or ULA Database on Westlaw.

1. In general

It is responsibility of court to examine legislation and agency-promulgated regulations to ensure their conformity with Constitution. *Joslin v. Secretary of Dept. of Treasury*, 1985, 616 F.Supp. 1023, vacated 832 F.2d 132. Constitutional Law ⇨ 67

2. Creation and constitution of courts

Such a construction must be put on the powers which are conferred and the restrictions which are imposed on each judicial tribunal as is most consonant to the general design of the constitutional convention to provide for the whole people of the state through the several judicial tribunals, the most free, easy, cheap, speedy, and convenient administration of justice and as will be most effectual in enforcing and carrying into effect the expressed will of the convention. Const. art. 8, §§ 1-27. *State v. Johnson*, 1941, 100 Utah 316, 114 P.2d 1034. Courts ⇨ 42(1)

A power to constitute courts is a power to prescribe their powers and the mode of trial, and hence in absence of any provision in the Constitution to the contrary, the Legislature is at liberty to prescribe what cases should be tried therein, but the specification of an obligation that all criminal cases may be tried in the district court does not abridge the power of the Legislature to provide that some must be commenced and first tried in another tribunal. Const. art. 8, §§ 1-27. *State v. Johnson*, 1941, 100 Utah 316, 114 P.2d 1034. Courts ⇨ 43

Const. art. 8, § 1, provides that: "The judicial power of the state shall be vested in the Senate sitting as a court of impeachment, in a supreme court, in district courts, in justices of the peace, and such other courts inferior to the supreme court as may be established by law." Act

March 14, 1901 (Sess. Laws 1901, p. 117, c. 112), reads: "That in all cities of this state having a population of more than fifteen thousand and less than forty thousand inhabitants, there is hereby created a court to be called 'The municipal court for _____ city, Utah.' Said court shall consist of a judge. * * *" Held clearly within the power granted the Legislature by the constitutional provision. *State v. Howell*, 1903, 26 Utah 53, 72 P. 187. Courts ⇨ 42(5)

The courts of the state having been classified or enumerated in Const. art. 8, § 1, no other classification can be made which will either increase or diminish legislative power in this regard. *Love v. Liddle*, 1903, 26 Utah 62, 72 P. 185. Courts ⇨ 42(1)

3. Distribution of governmental powers

Under Utah Constitution, those persons who exercise judicial power in courts of record are subject to both careful selection and continuing review, and any attempt by either legislature or judicial council to transfer or assign power of such judges to others would circumvent and violate Constitution. Const. Art. 8, § 1. *Salt Lake City v. Ohms*, 1994, 881 P.2d 844. Constitutional Law ⇨ 52; Constitutional Law ⇨ 75

Appointment of commissioners of water conservancy districts by district court violated separation of powers clause of state Constitution because such appointment power was totally unrelated to primary function of court, even though court had jurisdiction to establish district and had a continuing role in its operation, overruling *Patterick v. Carbon Water Conservancy District*, 106 Utah 55, 145 P.2d 503. U.C.A.1953, 73-9-1 et seq. 73-9-9; Const. Art. 5, § 1; Art. 7, §§ 5, 10; Art. 8, §§ 1, 7. *Timpagogs Planning and Water Management Agency v. Central Utah Water Conservancy Dist.*, 1984, 690 P.2d 562. Constitutional Law ⇨ 74; Waters And Water Courses ⇨ 183.5

Power to hear and determine matters more or less affecting public and private rights may be conferred upon and exercised by administrative and executive officers. Const. art. 5, § 1; art. 8, § 1. *Citizens' Club v. Welling*, 1933, 83 Utah 81, 27 P.2d 23. Constitutional Law ⇨ 74

The questions of the wisdom, justice, policy, or expediency of a statute are for the Legislature alone. *Salt Lake County v. Salt Lake City*, 1913, 42 Utah 548, 134 P. 560. Constitutional Law ⇨ 70.3(3); Constitutional Law ⇨ 70.3(4); Constitutional Law ⇨ 70.3(5); Constitutional Law ⇨ 70.3(7)

4. Encroachment on judiciary

The legislature properly granted to the Governor the right to remove for cause members of the Commission of Finance, even though the removal might involve exercise of some power

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usually considered judicial. U.C.A.1943, 82C-2-2; Const. art. 5, § 1; art. 8, § 1. Taylor v. Lee, 1951, 119 Utah 302, 226 P.2d 531. Constitutional Law ⇨ 80(1); States ⇨ 52

Statute authorizing secretary of state to revoke charter of club or association used for gambling or other unlawful acts held not unconstitutional as conferring judicial power upon secretary of state. Comp.Laws 1917, § 898X, as added by Laws 1923, c. 14, as amended by Laws 1925, c. 111; Const. art. 5, § 1; art. 8, § 1. Citizens' Club v. Welling, 1933, 83 Utah 81, 27 P.2d 23. Constitutional Law ⇨ 74

Under Laws 1919, c. 67, §§ 32, 33, providing that the state engineer shall, after investigation, formulate a proposed determination of the rights to use water and mail notice thereof to all claimants interested, and that, if no contest is made, the court shall render judgment in accordance with such proposed determination, does not confer judicial powers on the state engineer, as claimants after notice may file objections and judgment will be entered in accordance with the evidence, and if no objection is made, a claimant by his silence confesses statements contained in the determination. Eden Irr. Co. v. District Court of Weber County, 1922, 61 Utah 103, 211 P. 957. Constitutional Law ⇨ 80(1)

The scheme of compensation for injury to workmen provided for by Comp. Laws 1917, § 3148, as amended by Laws 1919, c. 63, adding section 3148a, authorizing awards by an Industrial Commission, does not usurp the functions of the courts in violation of Const. art. 5, § 1, article 8, §§ 1, 5, and 7, nor article 1, §§ 7 and 11. Utah Fuel Co. v. Industrial Commission, 1920, 57 Utah 246, 194 P. 122. Constitutional Law ⇨ 62(11)

Laws 1909, c. 74, as amended by Laws 1911, c. 53, authorizing the creation of irrigation districts, does not confer judicial power contrary to Const. art. 8, § 1, providing that the judicial power shall be vested in enumerated courts and such other inferior courts as may be established by law. Lundberg v. Green River Irrigation Dist., 1911, 40 Utah 83, 119 P. 1039. Constitutional Law ⇨ 80(3)

5. Source of judicial authority

A statutory court has only the power specifically granted to it by the act creating it and such other powers as are necessarily implied to carry out its specified functions. U.C.A.1953, 55-10-63 et seq., 55-10-108; Const. art. 8, §§ 1, 7. R. v. Whitmer In and For Salt Lake County, 1973, 30 Utah 2d 206, 515 P.2d 617. Courts ⇨ 1

6. Judicial power

Courts have both power and responsibility to address alleged violations of constitutional rights such as right to equal protection; if dis-

crimination is sufficiently shown, right to relief under equal protection clause is not diminished by fact that discrimination relates to political rights. U.S.C.A. Const.Amends. 5, 14. Meyers By and Through Meyers v. Board of Educ. of San Juan School Dist., 1995, 905 F.Supp. 1544. Constitutional Law ⇨ 67; Constitutional Law ⇨ 225.2(1)

The power and duty of ascertaining the meaning of a constitutional provision resides exclusively with the judiciary. Utah School Boards Ass'n v. Utah State Bd. of Educ., 2001, 17 P.3d 1125, 412 Utah Adv. Rep. 45, 413 Utah Adv. Rep. 19, 2001 UT 2. Constitutional Law ⇨ 67

Supreme Court has responsibility to assure rational and evenhanded application of the criminal laws. State v. Bryan, 1985, 709 P.2d 257. Constitutional Law ⇨ 67

"Judicial power" of the courts as used in state Constitution is the authority to hear and determine justiciable controversies, including the authority to enforce any valid judgment, decree or order. Const. Art. 8, §§ 1, 7. Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy Dist., 1984, 690 P.2d 562. Constitutional Law ⇨ 67

The judiciary has the awesome prerogative and responsibility of judging the scope of powers of the executive, legislative, and of its own and, for this reason, it is essential that the judiciary be especially circumspect in maintaining an awareness of fact that when anyone has the power to decide wherein his own interests are involved, there is the danger of consciously or subconsciously leaning toward the protection, and perhaps the magnification, of his own self-interest. Shelmidine v. Jones, 1976, 550 P.2d 207. Constitutional Law ⇨ 67

Court operates upon a state of facts to effect justice between contending parties and interests in accordance with established legal and equitable rules and regulations. Trade Commission v. Skaggs Drug Centers, Inc., 1968, 21 Utah 2d 431, 446 P.2d 958. Constitutional Law ⇨ 67

It is function of courts and juries to determine whether claims are valid or false and responsibility should not be shunned merely because task may be difficult to perform. Samms v. Eccles, 1961, 11 Utah 2d 289, 358 P.2d 344. Constitutional Law ⇨ 67

Term "judicial power," as used in constitutional provisions, though embracing all suits and actions, does not necessarily include power to hear and determine matters not necessarily in nature of suit or action between parties, and does not apply to cases where judgment is exercised as mere incident to execution of ministerial power or duty. Const. art. 5, § 1; art. 8, § 1. Citizens' Club v. Welling, 1933, 83 Utah 81, 27 P.2d 23. Constitutional Law ⇨ 67

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Term "judicial power" of courts is generally understood to be power to hear and determine controversies between adverse parties and questions in litigation. Const. art. 5, § 1; art. 8, § 1. *Citizens' Club v. Welling*, 1933, 83 Utah 81, 27 P.2d 23. Constitutional Law. 67

7. Court commissioners

Instant decision, holding that court commissioner does not have authority to issue search warrant, is prospective, and any prior search warrant issued by commissioner is valid under de facto doctrine, except that present defendant would be given benefit of his victory, in making his constitutional challenge. Const. Art. 8, § 1; U.C.A.1953, 78-3-31, 78-3-31(6)(a). *State v. Thomas*, 1998, 961 P.2d 299, 343 Utah Adv. Rep. 32, on remand 1999 UT App 51, 1999 WL 33244831, denial of post-conviction relief affirmed 2002 UT App 31, 2002 WL 257678, certiorari denied 49 P.3d 853, certiorari denied 123 S.Ct. 408, 537 U.S. 958, 154 L.Ed.2d 309. Court Commissioners 3; Courts 100(1)

Holding in *Ohms* prohibiting court commissioners from performing core judicial functions did not deconstitutionalize court commissioners given that court commissioners are still able to perform many important functions in assistance to courts such as conducting fact finding hearings, holding pretrial conferences, and making other recommendations to judges. Const. Art. 8, § 1; U.C.A.1953, 78-3-31. *State v. Thomas*, 1998, 961 P.2d 299, 343 Utah Adv. Rep. 32, on remand 1999 UT App 51, 1999 WL 33244831, denial of post-conviction relief affirmed 2002 UT App 31, 2002 WL 257678, certiorari denied 49 P.3d 853, certiorari denied 123 S.Ct. 408, 537 U.S. 958, 154 L.Ed.2d 309. Court Commissioners 3

Issuance of search warrant is core judicial function, which court commissioners lack authority to perform, though statute purports to give such authority to magistrates, which term includes commissioners, given that issuing search warrant could not be characterized as permissible functions of commissioner of either recommendation to judge or other action reviewable by judge, and, when judge issues law enforcement order to search and seize, judge simultaneously exercises power and authority to enforce such order, and once armed with issued warrant, law enforcement proceeds to search and seize at will. Const. Art. 8, § 1; U.C.A. 1953, 77-1-3, 77-23-201, 78-3-31, 78-3-31(6)(a). *State v. Thomas*, 1998, 961 P.2d 299, 343 Utah Adv. Rep. 32, on remand 1999 UT App 51, 1999 WL 33244831, denial of post-conviction relief affirmed 2002 UT App 31, 2002 WL 257678, certiorari denied 49 P.3d 853, certiorari denied 123 S.Ct. 408, 537 U.S. 958, 154 L.Ed.2d 309. Court Commissioners 3

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Core judicial functions can be performed only by duly appointed judges, and not by court commissioners, and thus, only duly appointed judges can issue search warrants. Const. Art. 8, § 1. *State v. Thomas*, 1998, 961 P.2d 299, 343 Utah Adv. Rep. 32, on remand 1999 UT App 51, 1999 WL 33244831, denial of post-conviction relief affirmed 2002 UT App 31, 2002 WL 257678, certiorari denied 49 P.3d 853, certiorari denied 123 S.Ct. 408, 537 U.S. 958, 154 L.Ed.2d 309. Court Commissioners 3

Statute empowering court commissioners, upon consent of defendant, to conduct misdemeanor trials, impose sentence, and enter final judgments of conviction delegated judicial power of State of Utah to nonjudges in violation of Utah Constitution. U.C.A.1953, 78-3-31(6); Const. Art. 8, § 1. *State v. Taysom*, 1994, 886 P.2d 513. Constitutional Law 60; Court Commissioners 3

Statute providing for appointment of court commissioners to exercise judicial authority of courts of record, and specifically granting commissioners ultimate judicial power of entering final judgments and imposing sentence in criminal misdemeanor cases, violated Utah Constitution; commissioners were not subject to constitutional selection and retention requirements, and delegation of authority violated separation of powers doctrine; moreover, statutorily required consent of defendant could not confer upon commissioner subject matter jurisdiction. U.C.A.1953, 78-3-31, 78-3-31(6)(a); Const. Art. 8, § 1. *Salt Lake City v. Ohms*, 1994, 881 P.2d 844. Constitutional Law 56

Commissioner exceeded her authority by attempting to exercise ultimate judicial power in deciding mother's motion for Utah to assume jurisdiction over child custody dispute, by informing mother's attorney that it was her order that Ohio change of custody order be enforced, by ordering police to enforce undomesticated Ohio change of custody order, and by denying mother's attorney's request for a hearing before court with regard to undomesticated Ohio order; furthermore, such errors could not be cured by ratification by judge. Judicial Administration Rule 6-401(6)(A); Const. Art. 8, § 1. *Holm v. Smilowitz*, 1992, 840 P.2d 157. Court Commissioners 4

8. Jurisdiction

Under Utah Constitution, Utah legislature may define jurisdiction of lower courts as it sees fit. Utah Const. Art. 8, § 1 et seq. *Pratt v. Hercules, Inc.*, 1982, 570 F.Supp. 773. Constitutional Law 56

Under Utah Constitution, Utah legislature could remove court jurisdiction over nuisance action against manufacturer of explosives, rocket fuels, insecticides and other chemical products by means of statute eliminating any com-

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mon-law cause of action for nuisance against manufacturer which had been in existence for three years or more and had not been nuisance in that time. U.C.A.1953, 78-38-5; Utah Const. Art. 8, § 1 et seq. Pratt v. Hercules, Inc., 1982, 570 F.Supp. 773. Constitutional Law ⇨ 56

9. Courts of record

District courts are courts of record, and record of all official proceedings should be made. Const. Art. 8, § 1. Olson v. Park-Craig-Olson, Inc., 1991, 815 P.2d 1356. Courts ⇨ 111

10. Juvenile courts

The juvenile court has continuing jurisdiction to modify an order made or to terminate it during the minority of a child when a change of circumstances warrants it. U.C.A.1953, 55-10-63 et seq., 55-10-108; Const. art. 8, §§ 1, 7. R. v. Whitmer In and For Salt Lake County, 1973, 30 Utah 2d 206, 515 P.2d 617. Child Custody ⇨ 555

Juvenile Court Act does not and could not limit or curtail authority of district court; when district court has taken jurisdiction, jurisdiction of juvenile court may be invoked and it may act in the interest of children in cases specified therein, but its action must be regarded as supplementary to action of district court, and it may not make orders in direct conflict with those of district court, and its authority does not supersede or divest district court of jurisdiction. U.C.A.1953, 30-3-5, 55-10-63 et seq., 55-10-77, 55-10-78; Const. art. 8, §§ 1, 7. Anderson v. Anderson, 1966, 18 Utah 2d 89, 416 P.2d 308. Courts ⇨ 475(1)

Where district court had granted divorce and awarded custody of children and support money, different order of juvenile court in proceeding in interest of children did not supersede judgment of district court and deprive it of jurisdiction to enforce its decree as originally made. U.C.A.1953, 30-3-5, 55-10-63 et seq., 55-10-77, 55-10-78; Const. art. 8, §§ 1, 7. Anderson v. Anderson, 1966, 18 Utah 2d 89, 416 P.2d 308. Courts ⇨ 475(15)

The legislature has the power to give to the juvenile court exclusive jurisdiction of cases of neglect or delinquency of children, since the state stands with reference to the persons and property of infants in the situation of "parens patriae". Rev.St.1933, 14-7-4, subds. 3, 4; 104-65-1, 104-65-3, 104-65-20; Const. art. 8, § 1 et seq. Jensen v. Sevy, 1943, 103 Utah 220, 134 P.2d 1081. Courts ⇨ 472.1

Under constitutional provisions expressly authorizing the Legislature to create courts inferior to the Supreme Court, judgments of the juvenile court, although a court of special and limited jurisdiction, have the same effect as those of any other court, and a resident of a city which may become liable for the support of

delinquent children cannot collaterally attack them on the ground that they affect his rights as a taxpayer. Salt Lake County v. Salt Lake City, 1913, 42 Utah 548, 134 P. 560. Judgment ⇨ 474

Laws 1905, p. 182, c. 117, establishing juvenile courts, is not unconstitutional because conferring on them jurisdiction and powers previously exercised by the district courts; Const. art. 8, § 1, vesting the judicial power in a Supreme Court, in district courts, in justices of the peace, and in such other courts inferior to the Supreme Court as may be established by law. Ex parte Sahlberg, 1907, 31 Utah 489, 88 P. 616. Courts ⇨ 52

Laws 1905, p. 182, c. 117, establishing juvenile courts, is not unconstitutional because conferring on them jurisdiction and powers previously exercised by the district courts; Const. art. 8, § 1, vesting the judicial power in a Supreme Court, in district courts, in justices of the peace, and in such other courts inferior to the Supreme Court as may be established by law. Mill v. Brown, 1907, 31 Utah 473, 88 P. 609, 120 Am.St.Rep. 935. Courts ⇨ 52

11. Justice courts

There is a substantial barrier to be encountered in making an analysis and judicial determination of the merits or the demerits of the justice of the peace system as established by the State Constitution and whether a justice of the peace may deal with cases wherein jail sentences may be imposed when it is not required that he be a lawyer. Const. art. 8, § 1. Shelmidine v. Jones, 1976, 550 P.2d 207. Criminal Law ⇨ 90(1)

It should be assumed that the founders who fashioned the State Constitution in awareness of the general nature of the state created the justice of the peace system in the realization of the necessity and desirability of providing a realistic and expeditious means for law enforcement and the administration of justice, particularly so in rural areas, as the condition then existed and as they still exist. Const. art. 8, § 1. Shelmidine v. Jones, 1976, 550 P.2d 207. Criminal Law ⇨ 90(1)

A writ could not properly issue prohibiting defendant justices of the peace from proceeding in respect to cases charging plaintiffs with driving while intoxicated on ground that it amounted to a denial of due process when justices were not required by the Constitution to be lawyers. Const. art. 8, § 1. Shelmidine v. Jones, 1976, 550 P.2d 207. Prohibition ⇨ 10(3)

The justice of the peace system in the state has and continues to serve a useful purpose by providing a readily accessible and expeditious means of handling minor cases and is more of an aid in assuring the constitutional guarantees of a speedy disposition of one's case, and thus of

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due process of law, than the contrary. Const. art. 8, § 1. *Shelmidine v. Jones*, 1976, 550 P.2d 207. Constitutional Law ⇨ 259; Criminal Law ⇨ 90(1)

Under Const. art. 8, § 1, vesting the judicial power in the Senate, Supreme Court, district court, justices of the peace, and such other courts inferior to the Supreme Court as may be established by law, justices of the peace constitute one distinct class of judicial officers. *Love v. Liddle*, 1903, 26 Utah 62, 72 P. 185. Justices Of The Peace ⇨ 1

12. Justiciable claims

Golfers' complaint, in which they alleged that city misused and mismanaged revenue generated by its golf operations in order to meet other obligations for unrelated parks and recreation expenses, presented justiciable claim and did not challenge purely political decision that was beyond the scrutiny of the courts, as it presented legal questions for which manageable standards for resolution existed. U.S.C.A. Const. Art. 3, § 1 et seq.; Const. Art. 5, § 1. *Skokos v. Corradini*, 1995, 900 P.2d 539. Action ⇨ 6; Constitutional Law ⇨ 68(1)

13. Judicial restraint

The principle of judicial restraint is necessary and desirable under our system which honors the doctrine of separation of powers of the three branches of government. *Stone v. Department of Registration*, 1977, 567 P.2d 1115. Constitutional Law ⇨ 67

Court must voluntarily restrain itself by holding strictly to an exercise and expression of its delegated or innate power to interpret and adjudicate. *Trade Commission v. Skaggs Drug Centers, Inc.*, 1968, 21 Utah 2d 431, 446 P.2d 958. Constitutional Law ⇨ 67

Courts have responsibility of passing judgment on actions of public officials and functions of departments of government, but should exercise judicial restraint and refuse to interfere with orderly processes of government except under circumstances in which it is clearly apparent that legislative mandate or constitutional provision requires it to be done. *State v. Jones*, 1965, 17 Utah 2d 190, 407 P.2d 571. Constitutional Law ⇨ 67

14. Political questions—In general

Political question doctrine holds that certain matters are not appropriate for judicial consideration but are really political in nature and best resolved by body politic. *Meyers By and Through Meyers v. Board of Educ. of San Juan School Dist.*, 1995, 905 F.Supp. 1544. Constitutional Law ⇨ 68(1)

Under political question doctrine, courts must hold strictly to exercise and expression of their delegated or innate power to interpret and adju-

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dicate. U.S.C.A. Const. Art. 3, § 1 et seq.; Const. Art. 5 § 1. *Skokos v. Corradini*, 1995, 900 P.2d 539. Constitutional Law ⇨ 68(1)

Not all litigation that concerns discretionary decisions made by political officials can be dismissed out of hand as raising political questions exempt from judicial scrutiny. U.S.C.A. Const. Art. 3, § 1 et seq.; Const. Art. 5, § 1. *Skokos v. Corradini*, 1995, 900 P.2d 539. Constitutional Law ⇨ 68(1)

Political question doctrine prevents judicial interference in matters wholly within control and discretion of other branches of government. U.S.C.A. Const. Art. 3, § 1 et seq. *Skokos v. Corradini*, 1995, 900 P.2d 539. Constitutional Law ⇨ 68(1)

Claims involving policies and decisions promulgated by government officials or entities are not automatically barred from judicial review as nonjusticiable political issues. U.S.C.A. Const. Art. 3, § 1 et seq. *Skokos v. Corradini*, 1995, 900 P.2d 539. Constitutional Law ⇨ 68(1)

Political question doctrine is equally applicable to prevent interference by state courts into powers granted to executive and legislative branches of state and local governments. U.S.C.A. Const. Art. 3, § 1 et seq. *Skokos v. Corradini*, 1995, 900 P.2d 539. Constitutional Law ⇨ 68(1)

Argument that cost of administering withholding of income taxes from wages due employees places burden on employers should be addressed to electorate as an invitation to change personnel and philosophy of Legislature and not to courts. U.C.A.1953, 59-14-71. *Salt Lake City v. Tax Commission of Utah*, 1961, 11 Utah 2d 359, 359 P.2d 397. Constitutional Law ⇨ 68(4)

Courts may exercise power over political matters only as provided by legislative power. *Ewing v. Harries*, 1926, 68 Utah 452, 250 P. 1049. Constitutional Law ⇨ 68(1)

15. — Particular questions, political questions

The existence of war and restoration of peace are determined solely by political departments of government and such determinations are conclusively binding on courts in all matters of state or public concern, and war having been declared, its existence must be recognized by courts until peace is proclaimed, although actual warfare may have ceased. *New York Life Ins. Co. v. Durham*, 1948, 166 F.2d 874. Constitutional Law ⇨ 68(1)

Validity of taxes is always subject of judicial inquiry. *Jones v. Box Elder County*, 1931, 52 F.2d 340, certiorari denied 52 S.Ct. 456, 285 U.S. 555, 76 L.Ed. 944. Constitutional Law ⇨ 68(4)

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Issue of proper location of off-reservation school conducting secondary education programs for Navajo youth was a nonjusticiable political question. U.S.C.A.Const. art. 1, § 8; art. 4, § 3. *National Indian Youth Council v. Bruce*, 1973, 366 F.Supp. 313, affirmed 485 F.2d 97, motion denied 94 S.Ct. 1467, 415 U.S. 946, 39 L.Ed.2d 562, certiorari denied 94 S.Ct. 2628, 417 U.S. 920, 41 L.Ed.2d 226, rehearing denied 95 S.Ct. 158, 419 U.S. 886, 42 L.Ed.2d 129. Constitutional Law ⇨ 68(1)

Notwithstanding fact that members of State House of Representatives were employed by or had contracts with state when House was not in session, court would not interfere with House's rejection of challenges to their qualification and its seating of members. Const. Art. 5, § 1; Art. 6, § 10. *State v. Evans*, 1987, 735 P.2d 29. Constitutional Law ⇨ 68(3)

Where neither constitution nor statute imposes absolute restrictions on power of taxation, courts may not arbitrarily impose any, unless it clearly appears that tax imposed is oppressive or clearly and unreasonably discriminatory, and thus is an abuse of taxing power. U.C.A.1953, 17-31-1 to 17-31-7; Const. art. 13, § 3. *Menville v. Salt Lake County*, 1966, 18 Utah 2d 203, 418 P.2d 227. Constitutional Law ⇨ 68(4)

Court could nullify act reapportioning legislature only if act departed so far from constitutional provisions as to be unreasonable and arbitrary. U.C.A.1953, 36-1-1 to 36-1-4; Const. art. 9, §§ 1 et seq., 2. *Parkinson v. Watson*, 1955, 4 Utah 2d 191, 291 P.2d 400. Constitutional Law ⇨ 68(3)

The fixing of tax rates is a legislative function. *Intermountain Title Guaranty Co. v. State Tax Commission*, 1944, 107 Utah 222, 152 P.2d 724. Constitutional Law ⇨ 68(4)

The power of taxation is a legislative function, and, unless restrained by the constitution, exercise of such power is vested in legislature; whose power over subject is plenary and supreme. *Garrett Freight Lines v. State Tax Commission*, 1943, 103 Utah 390, 135 P.2d 523, 146 A.L.R. 1003. Constitutional Law ⇨ 68(4); Taxation ⇨ 25

The choice of subjects for imposition of excise or privilege tax is for Legislature up to point of arbitrary classification. *Globe Grain & Milling Co. v. Industrial Commission*, 1939, 98 Utah 36, 91 P.2d 512, rehearing denied 98 Utah 48, 97 P.2d 582. Constitutional Law ⇨ 68(4)

Creation of city and fixing of its boundaries is essentially a legislative and not a judicial function. Const. art. 11, § 5. Application of Peterson, 1937, 92 Utah 212, 66 P.2d 1195. Constitutional Law ⇨ 68(1)

Changing of territorial limits of city or town is legislative function which Legislature has exercised by providing method for segregation of

property from corporate limits by court proceeding. Rev.St.1933, 15-4-1 to 15-4-4. Application of Peterson, 1937, 92 Utah 212, 66 P.2d 1195. Constitutional Law ⇨ 68(1)

Exemption from taxation of bequests to tax-supported public agencies, such as the State University, rests with Legislature and not with courts. Rev.St.1933, 80-12-1 to 80-12-44. *State Tax Commission v. Backman*, 1936, 88 Utah 424, 55 P.2d 171. Constitutional Law ⇨ 68(4)

Where neither the Constitution nor the statute imposes absolute restrictions on the power of taxation, the courts may not arbitrarily impose any, unless it clearly appears that the tax imposed is oppressive or clearly and unreasonably discriminatory, and thus is an abuse of the taxing power. *Salt Lake City v. Christensen Co.*, 1908, 34 Utah 38, 95 P. 523. Constitutional Law ⇨ 68(4)

Under Const. art. 6, § 10, making each house of the legislature the judge of the election and qualifications of its members, and article 5, § 1, forbidding any person charged with the exercise of the powers of one department of the government from exercising any functions appertaining to either of the other departments, the courts have no jurisdiction to try and determine contests for seats in the legislature. *Ellison v. Barnes*, 1901, 23 Utah 183, 63 P. 899. Constitutional Law ⇨ 68(3)

16. Equity

Equitable claims or defenses may be asserted and tried along with or against legal claims or defenses in the same action, and equitable principles may be applied in an action at law; the principles of equity and justice are universal and apply wherever appropriate and necessary to enforce rights or to prevent oppression and injustice. Const. art. 8, § 19; Rules of Civil Procedure, rule 2. *Williamson v. Wanlass*, 1976, 545 P.2d 1145. Action ⇨ 22

17. Prerogative or remedial writs

Supreme Court's constitutional power to issue "extraordinary writs" includes prerogative writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus and all writs necessary and proper for Supreme Court's appellate jurisdiction. Const. Art. 8, § 3. *Petersen v. Utah Bd. of Pardons*, 1995, 907 P.2d 1148. Constitutional Law ⇨ 67

Extraordinary writs do not authorize Supreme Court to exercise same scope of review as may be exercised pursuant to statutory appeals. Const. Art. 8, § 3. *Petersen v. Utah Bd. of Pardons*, 1995, 907 P.2d 1148. Constitutional Law ⇨ 67

Elimination by statutory amendment of supervisory control of district court over circuit courts did not curtail constitutional authorization for district court's issuance of "all extraor-

Art. 8, § 1

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dinary writs," and district court was authorized thereunder to issue extraordinary writ reversing circuit court's forfeiture of bail bonds and enjoining circuit court's revocation of bondsmen's bonding authority. U.C.A.1953, 78-1-1 et seq., 78-3-4; Const. Art. 8, §§ 1 et seq., 5. *Heninger v. Ninth Circuit Court, State of Utah, Washington County*, 1987, 739 P.2d 1108. Courts ⇐ 207.1

18. Habeas corpus

The proceeding proper in habeas corpus is instituted by the writ of the court commanding defendant to produce to body, and show by what authority he detains the body in whose behalf the writ is issued, and when the writ has issued, there is nothing on which the court can proceed until the return is made, and until made the court can take no action on the writ. Rev.St.1933, 104-65-3, 104-65-10, 104-65-20; Const. art. 8, § 1 et seq. *Jensen v. Sevy*, 1943, 103 Utah 220, 134 P.2d 1081. Habeas Corpus ⇐ 680.1

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19. Appellate court jurisdiction

Court of Appeals has power to rule on constitutionality of statutes by virtue of its exercise of judicial power under Constitution. Const. Art. 8, § 1; U.C.A.1953, 78-2a-1. *Renn v. Utah State Bd. of Pardons*, 1995, 904 P.2d 677. Courts ⇐ 248

20. Stare decisis

Three-judge panel that held three-month statute of limitations for habeas corpus petitions unconstitutional did so pursuant to "judicial power of the state" and holding thus had binding effect of stare decisis on other panels of Court of Appeals; to hold otherwise would be to disregard nature of Court of Appeals' jurisdiction, manner in which it must act, and necessity for uniformity and predictability in law established by panels of Court of Appeals. Const. Art. 8, § 1; U.C.A.1953, 78-2a-1, 78-2a-2(2); U.C.A.1953, 78-12-31.1(1) (Repealed). *Renn v. Utah State Bd. of Pardons*, 1995, 904 P.2d 677. Courts ⇐ 90(2)

Sec. 29. [Lending public credit and subscribing to stock or bonds forbidden—Exception]

(1) Neither the State nor any county, city, town, school district, or other political subdivision of the State may lend its credit or, except as provided in Subsection (2), subscribe to stock or bonds in aid of any private individual or corporate enterprise or undertaking.

(2) Except as otherwise provided by statute, the State or a public institution of post-secondary education may acquire an equity interest in a private business entity as consideration for the sale, license, or other transfer to the private business entity of intellectual property developed in whole or in part by the State or the public institution of post-secondary education, and may hold or dispose of the equity interest.

Laws 1972, S.J.R. 1; Laws 1996, S.J.R. 6, § 1, adopted at election Nov. 5, 1996, eff. Jan. 1, 1997; Laws 1999, S.J.R. 5, § 4, adopted at election Nov. 7, 2000, eff. Jan. 1, 2001; Laws 2004, H.J.R. 12, § 1, adopted at election Nov. 2, 2004, eff. Jan. 1, 2005.

Formerly Utah Const., Art. VI, § 31.

Historical Notes

Laws 2004, H.J.R. 12, § 1, rewrote the section that prior thereto provided:

"The Legislature may not authorize the State, or any county, city, town, school district, or other political subdivision of the State to lend its credit or subscribe to stock or bonds of any railroad, telegraph, or other private individual or corporate enterprise or undertaking, except as provided in Article X, Section 5."

at the next regular general election, the amendment shall take effect on January 1, 2005."

Laws 2004, H.J.R. 25, was approved by the electorate at the November 2, 2004 general election.

Laws 2008, H.J.R. 12, § 1, purported to amend this section.

Laws 2004, H.J.R. 12, §§ 3 and 4, provide:

"Section 3. Submittal to voters.

"The lieutenant governor is directed to submit this proposed amendment to the voters of the state at the next regular general election in the manner provided by law.

"Section 4. Effective date.

"If the amendment proposed by this joint resolution is approved by a majority of those voting on it

Laws 2008, H.J.R. 12, § 3, provides:

"If the amendment proposed by this joint resolution is approved by a majority of those voting on it at the next regular general election, the amendment shall take effect on January 1, 2009."

Laws 2008, H.J.R. 12 was not approved at the General Election on November 4, 2008.

Addendum B

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

**IN THE MATTER OF THE UNITED
EFFORT PLAN TRUST**

**RULING AND ORDER ON MOTION
TO AWARD COSTS AND EXPENSES
CHARGEABLE TO THE STATE OF
UTAH**

Case No. 053900848

Judge Denise P. Lindberg

Date: July 29, 2011

This matter is before the Court on the Special Fiduciary's Motion to Award Costs and Expenses from the State of Utah. Having fully considered the memoranda submitted by the Special Fiduciary and Utah Attorney General, the Court GRANTS the Fiduciary's Motion.

As an initial matter, the Court rejects the State's argument that consideration of this Motion violates either the voluntary stay the Court imposed in this case on April 11, 2011 or the Tenth Circuit's reliance upon that stay. On April 11, 2011, the Court directed the Special Fiduciary not to take any action in this case "other than those actions necessary to preserve and protect the assets of the Trust." Ruling and Order Directing the Special Fiduciary to Retain UEP Trust Assets Pending Further Order of this Court, at 4. Consideration of this Motion is necessary to preserve and protect the assets of the Trust. Since early 2008 the Special Fiduciary, the Trust's attorneys, and the other professionals retained by the Special Fiduciary have received only a fraction of the payments due to them, if they have been paid at all. The Trust now faces the real and substantial threat that it will be left without someone to manage it, attorneys to defend it, or other professional assistance. Although the Trust was already in dire financial circumstances before the federal litigation began, the drain on Trust resources has only increased due to the demands of defending that lawsuit and the on-going failure of occupants of Trust lands to pay the modest occupancy fees authorized by this Court. Moreover, the fact that aspects of that litigation are now on interlocutory appeal means that there is little likelihood that the Trust assets will reasonably be available in the near future to pay past and present administrative fees and costs. If the interim relief sought is not granted, the Special Fiduciary and others with whom he has contracted on the Trust's behalf are unlikely to continue rendering necessary services to the Trust. Finally, consideration of this Motion does not implicate any of the issues pending either in the federal district court or the U.S. Court of Appeals for the Tenth Circuit.

Pursuant to Utah Code Annotated § 75-7-1004(1), the Special Fiduciary argues that it is now just and equitable to require the State of Utah pay costs and expenses of the Fiduciary, including the reasonable attorneys' fees he has incurred. The Court agrees.

Section 75-7-1004(1) provides:

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.

At the outset of this case the Court ordered that the costs and expenses of Trust administration be borne by the Trust. Since then, however, changed circumstances have caused the Court to re-examine how the financial obligations incurred on the Trust's behalf should be addressed. The Court concludes 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.

The relevant considerations that have led the Court to this conclusion are as follow:

1. The State, through the Utah Attorney General (Utah AG), instituted this action by filing a probate Petition and moving for the issuance of a Temporary Restraining Order (TRO) to remove the then-existing UEP trustees and to appoint Bruce Wisan as a Special Fiduciary to administer the Trust. Mr. Wisan was known to the Utah AG because Mr. Wisan had done work on another (unrelated) case at the request of the Utah AG. As a result, Mr. Wisan's was the only name recommended by the Utah AG for appointment by the Court. Presumably, the Utah AG made that recommendation because he was convinced that Mr. Wisan had the knowledge, skill, and experience necessary to carry out this assignment. Nowhere in the Court submissions recommending his appointment did the Utah AG suggest that Mr. Wisan had agreed to render services to the Trust without expectation of timely payment. On the contrary, the Utah AG's Petition (in which he sought Mr. Wisan's appointment among other things) specifically noted that the Special Fiduciary's fees of \$205.00 per hour should be paid as a "priority claim" under Utah Code §75-7-511.¹ See Utah Attorney General's Petition for (i) Removal of Current Trustees and Appointment of New Trustees; (ii) the Suspension of the Current Trustees Pending a Hearing on their Removal; (iii) an Inventory, Accounting and Final Report of the Current Trustees; (iv) the Appointment of a Special Fiduciary; (v) A Hearing for the Appointment of New Trustees Proposed by Interested Parties; (vi) Special Notice for Hearings ("Petition"), at ¶¶ 61-67. There is no evidence that either Mr. Wisan or his lawyers ever agreed to

¹The early record of this case is silent on the question whether Mr. Wisan's professional fee would be subject to adjustment over time. At this point the Court is not making any determination, one way or another, on that question. However, the Court notes that nearly all professional fees are periodically adjusted to reflect changing market rates for comparable services.

assume the risk that they would not be paid for services rendered to the Trust.²

2. It was the Utah AG who further suggested to the Court that Mr. Wisan's role be expanded from the initial duties outlined in the Petition. See Appointment Order dated June 22, 2005. Therefore, the Utah AG cannot argue that Mr. Wisan improperly expanded his role by undertaking duties beyond the AG's contemplation at the time he nominated Mr. Wisan.
3. A representative of the Utah AG has attended every Court hearing, including every hearing at which the Court received, reviewed, and approved the fee requests submitted by the Fiduciary and/or his attorneys. The Utah AG's representative never expressed to the Court any concern with the fee submissions, and made no protest when, following review of the fee requests, the Court approved those fees for payment. In fact, the Utah AG has *never* argued that the Special Fiduciary has incurred fees or expenses in violation of the authority given to him by this Court. On this record it is clear that the Utah AG, as the State's representative, has tacitly agreed that the fees and expenses incurred by the Trust have been reasonable and appropriate for the services rendered. Having acquiesced at each step of the process with the fee and expense requests, the State of Utah must now stand behind the obligations incurred as part of the Trust's administration.
4. Legal and professional fees incurred in this action have generally resulted from (a) costs incident to Trust reformation and administration, (b) Court-sanctioned litigation by the Special Fiduciary in order to protect Trust assets from dissipation, or (c) litigation required to defend the Trust against a multi-front legal attack from FLDS-affiliated individuals and entities, including the cities of Hildale and Colorado City. Additionally, under Court-approval, professional fees have also been incurred in order to evaluate available water resources and to pursue the platting of UEP land in order to fairly apportion property taxes to users of UEP land. In the Court's judgment, all of these are legitimate purposes that were or should have been contemplated by the Utah AG either at the time he filed the probate Petition asking for removal of the UEP trustees, or when his representatives supported the Fiduciary's fee requests.
5. Although the Utah AG now complains about the fees and expenses that have accrued in this case, he fails to credit the fact that as a direct result of actions by the Special Fiduciary to recover assets that had been improperly removed from the Trust, the Trust *res* has actually expanded from what it was when the Special Fiduciary assumed administrative duties over the Trust.
6. Having brought the Special Fiduciary and his attorneys into this complex case, it is noteworthy that

²It bears noting that Mr. Wisan did not seek this appointment, but accepted it at the request of the Utah AG. See Report and Recommendation of Bruce Wisan, the Court-Appointed Special Fiduciary, Dated August 2, 2005, at 1, ¶¶ 4-6.

the Utah AG has made few, if any, efforts to assist Mr. Wisan in recouping his fees and costs from the limited sources available to the Trust. In fact, at times, the Utah AG has taken actions that have undercut the Special Fiduciary's ability to obtain payments owed to the Trust. For example, in 2009 the Utah AG agreed with FLDS representatives not to disburse to the Special Fiduciary occupancy fee payments without FLDS approval. It was only when the Court stepped in and ordered the Utah AG to turn over without delay the funds the AG was holding, that the Trust finally received payments promised as an inducement to the Court to stay the case and allow settlement discussions to proceed. Also in 2009, the Utah AG entered into a proposed settlement with FLDS representatives which would have undone all the work the Court had done and would have returned the 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. Not surprisingly, the Court rejected that proposed settlement. More recently, in the federal litigation, the Utah AG backed away from his prior support of the Special Fiduciary and of this Court's orders, and agreed with Plaintiffs that Trust property should be immediately turned over to the Corporation of the President of the FLDS Church (COP), a non-party to the federal action. Had this Court (and the Arizona AG) not opposed it, the Utah AG's agreement with the federal Plaintiffs likely would have meant that neither the Special Fiduciary nor those with whom he has contracted on the Trust's behalf would be paid.

7. The Utah AG has done little to lessen materially the legal obligations the Special Fiduciary has had to bear. Instead of defending the Special Fiduciary appointed at his request, of late the Utah AG has taken positions that undermine the Special Fiduciary in this (and in the federal) litigation.³
8. The Special Fiduciary is an officer of the Court. Although the Court has committed the day-to-day administration of the Trust to the business judgment of the Special Fiduciary, major decisions are still subject to Court-imposed limits and oversight. Consistent with this arrangement, in the discharge of his administrative duties the Special Fiduciary has brought for the Court's approval all major actions and expenditures required to administer the Trust. As such, the expenditures incurred and approved by the Court 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

³ As noted in the main text, the actions of the Utah AG over the past two years stand in marked contrast to his earlier intervention in this matter. It also stands in contrast to the support that the Arizona AG continues to offer to this Court and to the Special Fiduciary. The Court does not view this as a shift in the Special Fiduciary's or Arizona's position. Rather, for reasons of his own, in recent years the Utah AG has substantially altered the State's position with respect to this Court's administration of the Trust. Certainly the Utah AG has the right to alter his position in any way he finds to be legally defensible. However, this shift in position has left the Special Fiduciary without Utah's support, thereby substantially increasing the fees the Special Fiduciary has had to incur.

compensated for their work.⁴

9. Largely because of (a) the continuing and proliferating FLDS litigation and (b) the failure of the FLDS to honor commitments given by their representatives that they would pay modest occupancy fees for their use of UEP land, for over three years now the Trust has not been able to pay costs as they have accrued. As a result, the Special Fiduciary, the attorneys he has engaged, and other professionals with whom he has contracted have received at most, only partial payment for their services. Nevertheless, these individuals have continued in good faith to render services to the Trust. Because of the pending federal litigation, it is unclear when the Trust may be in the position to have assets available to pay its debts. It is unreasonable to ask those individuals and businesses to continue bearing these costs and still render services. It is equally unreasonable to say that they can simply quit doing so. Clearly, the Trust cannot be abandoned. If the Trust must terminate, such termination must occur in an orderly manner under Court oversight. Until such time as there is a final disposition of the Trust, those services must continue.⁵

The Court disagrees with the Utah AG's argument that the law does not support the Special Fiduciary's request. As discussed previously, Utah Code Ann. § 75-7-1004(1) specifically contemplates that another party to a trust action can be held liable for fees and costs if justice and equity so require. In this case there is no doubt in the Court's mind that justice and equity so require. This is one of those admittedly rare instances in which, "because of their special circumstance, it is equitable to require the parties, at whose

⁴Although services have continued to be rendered to the Trust, fee requests have not been filed for some time. The Court will need to review those requests before payment will be due from the State. However, there are a number of fee requests that the Court has already reviewed and approved, but which have not been paid. The State's obligation to pay those previously-approved expenditures has now matured.

⁵The Court categorically rejects the AG's suggestion that the Special Fiduciary has the option to resign if he is unhappy with the fact he's not been paid. Even if that were the case, that would not solve the problem of the already-incurred fees and costs. All who have rendered services to the Trust have a right under law to be fully compensated for their work. Moreover, the Trust still needs to be administered, something this Court cannot realistically do without the assistance of another Special Fiduciary. A new Fiduciary, in turn, would also require the assistance of others. Given all the problems that have arisen in recent years, the Court would be hard pressed to find anyone willing to undertake those responsibilities. In short, whether with this or another Special Fiduciary, the costs of administration will remain until such time as a final resolution is reached in this case. In the meantime, the Trust would lose the invaluable knowledge and experience that the present Special Fiduciary has acquired over the past 6 years. The Court cannot state strongly enough its view that no resolution to this case will be acceptable to the Court until all the obligations of the Trust have been fully paid.

instance a receiver of the property was appointed, to meet the expenses of the receivership." *Atlantic Trust Co v. Chapman*, 208 U.S. 360 (1908). As noted earlier, the Special Fiduciary, who effectively acts in a receivership role, was appointed upon the recommendation of the State of Utah acting through its Attorney General. Thus, it is entirely consistent with binding precedent for the Special Fiduciary to bring this request, and for this Court to grant it.

The Court does not, however, disagree with the Utah AG's argument that the fees incurred in administering the Trust should ultimately be paid from Trust assets if at all possible. The issue is one of timing. Presently, individuals or businesses (e.g., the Special Fiduciary, his attorneys/law firms, and others with whom the Fiduciary has contracted) have been carrying the burden of non-payment for over 3 years. As the Court sees it, as 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 processes. To be sure, the depth of the State's coffers is not determinative of who should be required to reimburse the Special Fiduciary and those he has retained to assist him. The State is not being ordered to pay these fees solely because the State has a greater financial ability to meet these obligations than the Special Fiduciary. Instead, the aforementioned considerations show that the equities weigh substantially in favor of the State bearing these costs and fees *in the interim*. It bears repeating that this 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.

Based on the foregoing, the Court concludes that the 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. Once all litigation is resolved, Trust assets can be sold or other arrangements made to reimburse the State. It is entirely proper for the State to expect recoupment from Trust assets and/or those who use Trust assets.

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. Nothing in the Court's ruling prohibits the State from seeking such contribution. In this Motion the Court is only asked to weigh who should bear the cost as between the State of Utah and the Special Fiduciary. The Court has not considered whether other individuals or entities should also bear part responsibility for paying those costs. The State of Utah is free to seek indemnification or contribution from other parties and non-parties as it sees fit.

The Utah AG complains that the Special Fiduciary has not submitted an annual accounting for any of the claimed fees or costs for more than three years. See *supra* note 4. While true, this issue is irrelevant to whether the State should be ordered to make these payments pending resolution of this case. Given the dire financial circumstances of the Trust, it would have been unreasonable for the Fiduciary to expend limited resources to compile and submit claims for fees that could not, in any event, be paid. With respect to fee requests that have not yet been approved by the Court, if the State wishes to challenge individual requests, it may do so by filing its objections with the Court and allowing the Court to resolve those concerns

before payment is required.

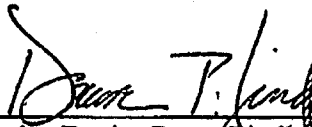
Finally, the Court finds no merit to the Utah AG's suggestion that the Special Fiduciary should not have objected to the settlement proposal negotiated between his office and the FLDS in 2009. As the Utah AG well knows, the Court rejected the State's settlement proposal for reasons stated in its various Rulings. The Special Fiduciary's (and the Arizona AG's) objections to that proposed settlement were well-taken. Even if the Special Fiduciary had not opposed that proposed settlement, the Court would still have rejected it. It is not the Special Fiduciary's fault that Utah AG agreed to settlement terms that were unreasonable, unworkable and, in this Court's view, contrary to law.

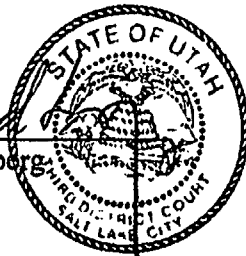
ORDER

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.

DATED this 1st day of August, 2011.


Judge Denise Posse Lindberg
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 053900848 by the method and on the date specified.

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BY HAND: JONI J JONES

BY HAND: DAVID N WOLF

Date: 7/29/11

KF
Deputy Court Clerk

Addendum C

DEC 02 2011

SALT LAKE COUNTY

By KF
Deputy Clerk

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

IN THE MATTER OF THE UNITED
EFFORT PLAN TRUST, et al.,

RULING DENYING STATE'S
MOTION TO RECONSIDER RULING
AWARDING COSTS AND EXPENSES
AGAINST THE STATE
AND DENYING MOTION FOR OVER-
LENGTH MEMORANDUM IN SUPPORT
OF RECONSIDERATION MOTION

Case No. 053900848

Judge Denise Posse Lindberg

On May 27, 2011 the Special Fiduciary ("Fiduciary") of the United Effort Plan Trust filed a Motion to Award Costs and Expenses from the State of Utah, together with a supporting memorandum of law. The State filed its Opposition on June 9, 2011; the Fiduciary's Reply was filed on June 20, 2011 and a Request to Submit for Decision was docketed June 22, 2011. The matter having been fully briefed, the Court considered the parties' arguments and issued its decision (hereinafter "Ruling and Order") granting the Fiduciary's Motion on August 1, 2011. On November 28, 2011, just shy of four months after the Court issued its Ruling and Order, the State has asked the Court to "reconsider" its August 1st decision. The State also seeks leave to file an over-length brief in support of its "Motion to Reconsider." Both of the State's Motions are DENIED.¹

The State argues that the Court's Ruling and Order is subject to "reconsideration" because it is not a "final judgment," citing *Gillett v. Price*, 2006 UT 24, 135 P.3d 861. "A

¹The Court has opted to issue the present Ruling without awaiting a responsive filing by the Fiduciary in order to ensure that the limited funds available to the Trust are not wasted in responding to motions lacking in merit.

motion to reconsider is not expressly available under the Utah Rules of Civil Procedure. . . . However, by implication Rule 54(b) . . . does allow for the possibility of a judge changing his or her mind in cases involving multiple parties or multiple claims.” *Salt Lake City Corp v. James Constructors, Inc.*, 761 P.2d 42 (Utah Ct App 1988). Nevertheless, it is fully within the Court’s discretion whether or not to grant “reconsideration” of an earlier decision. *Id.* at 45. “Although ‘any judge is free to change his or her mind on the outcome of a case until a decision is formally rendered, the ‘law of the case’ doctrine is employed to avoid . . . the delays and the difficulties involved in repetitious contentions and rulings upon the same propositions in the same case.’” *Id.* (citations omitted). That is especially true where, as here, the State is not relying on an intervening change in law nor on any other exceptional circumstance that would warrant reconsideration of the Court’s ruling. *Cf. Trembly v. Mrs. Field’s Cookies*, 884 P.2d 1306 (Utah Ct. App 1994) (approving a district court’s reconsideration of its earlier denial of employer’s motion for summary judgment where the judge believed that subsequent case law warranted reconsideration of the earlier decision). In *Trembly* the Court noted several factors that courts could consider in determining the propriety of reconsideration, including whether (a) the matter is presented in “different light” or under “different circumstances;” (b) there has been a change in governing law; (c) a party offers new evidence; (d) manifest injustice will result if court does not reconsider its prior ruling; (e) the court needs to correct its own errors; or (f) the issue was inadequately briefed when first contemplated by the court. *Id.* at 1311. None of those circumstances apply here. The State merely seeks to re-argue, in a more extended format, many of the same points it argued in its Opposition.

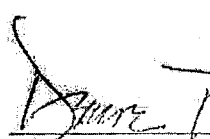
In issuing its August 1st Ruling and Order the Court carefully considered the parties’ fully briefed arguments. Based on that, and the absence of any exceptional circumstances or change of law since the issuance of the Court’s decision, there is no legitimate reason for the Court to re-examine its prior judgment. The Court acted properly and within its statutory authority when it issued its August 1st Ruling and Order. *See* Utah Code Ann. §75-7-1004(1). Moreover, while the Court required the State to pay the outstanding fees and costs owed by the Trust to the Fiduciary and to those with whom he has contracted, the Court also was careful to note that its decision was a temporary measure, and the State’s interest would be protected by a lien on Trust property to ensure that the State would be repaid from Trust assets and/or from those who use Trust assets. Ruling and Order, at 6. Therefore, the State’s “public policy” argument against the Court’s Ruling is unavailing because the Court has taken measures to protect the State’s interests.

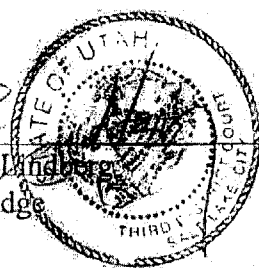
In sum, the Court declines the State’s invitation to revisit its prior judgment and stands by its earlier Ruling and Order as the “law of the case” on this issue. *Salt Lake City v. James Constr.*, 761 P.2d at 44 (“The ‘law of the case’ doctrine . . . promotes a measure of predictability . . . by creating a kind of presumption that the court’s prior rulings, even if not certified as final under Rule 54(b), were correct and should stand”)(citations omitted).

ORDER

The State's Motion to Reconsider is DENIED. Moreover, because the Court has exercised its discretion not to entertain the Motion, it follows that the State's accompanying motion for leave to file an over-length memorandum (in support of the State's Motion to Reconsider) is unnecessary. That Motion is therefore denied as moot.

Entered by the Court this 2d day of December, 2011.


Judge Denise P. Lindberg
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 053900848 by the method and on the date specified.

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Date:

12/5/11

KF

Deputy Court Clerk

Addendum D

JAN 04 2012

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

SALT LAKE COUNTY

By: _____

Deputy Clerk **KF**

IN THE MATTER OF THE UNITED
EFFORT PLAN TRUST

:
: RULING RE: (1) STATE OF UTAH'S
: MOTION FOR EXTENSION OF TIME
: TO RESPOND TO THE SPECIAL
: FIDUCIARY'S MOTION TO APPROVE
: EXPENDITURES IN ACCOUNTINGS
: AND REQUEST FOR DISCOVERY AND
: EVIDENTIARY HEARING AND (2)
: SPECIAL FIDUCIARY'S MOTION TO
: APPROVE EXPENDITURES IN
: ACCOUNTINGS

Case No. 053900848

Judge Denise P. Lindberg

Date: January 4, 2012

This matter is before the Court on (1) the State of Utah's Motion for an Extension of Time to Respond to the Special Fiduciary's Motion to Approve Expenditures in Accountings and Request for Discovery and Evidentiary Hearing and (2) the Special Fiduciary's Motion to Approve Expenditures in Accountings. Having fully considered the Motions, the State's Motion is GRANTED in PART, as will be more comprehensively explained below. Because the resolution of the State's Motion precludes consideration of the Special Fiduciary's Motion at this time, the Court does not consider it further in this Ruling.

On November 17, 2011, the Special Fiduciary served his Motion to Approve Expenditures in Accountings upon the Court and the State. The accountings had previously been filed on October 12, October 20, October 26, November 3, November 4, November 8, November 10, November 14, and November 16. On November 28, the Utah A.G.'s office timely responded, asking for 90 days to review the fee applications, conduct necessary discovery and offer objections. Further, the State contends that the Special Fiduciary should be required to provide itemized accounting statements for fees incurred by non-attorney creditors.

First, it does not appear that the Special Fiduciary has opposed providing more detailed accounting statements for the non-attorney creditor fees. He asserted that he "can and will provide additional details and itemized statements." The Court has been satisfied with the level of detail in the accountings the Special Fiduciary has provided in the past and will not require more of him at this point.¹ However, if the State would like more detailed statements, they are certainly entitled to

¹ The Court notes that the Special Fiduciary has always provided accountings sufficient for the Court to determine whether the fees were necessary for the administration of the Trust. The Special Fiduciary has been endowed with a certain amount of discretion in incurring fees and is

review the accountings which the Special Fiduciary possesses. From the Special Fiduciary's assertions, it appears that the State need merely ask the Special Fiduciary for the accountings. At this point, the Court will not order to the Special Fiduciary to produce more information when there is no need for such an order. There is no dispute regarding the accountings and the parties can work together to ensure that the State has access to the documents it believes it needs.²

Second, the Court agrees that accountings are voluminous and it is not reasonable to expect the State to review and file objections to the accountings within 10 days of receiving them.³ However, the Court is also sensitive to the fact that Trust's financial situation is precarious and it is similarly 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. Thus, the Court finds that the State should be allowed approximately 60 days to review the accountings and file any objections. The last accounting was provided to the State on November 16 and the State could have and should have begun its review of the accountings as of the time they were provided. Sixty days from November

entitled to exercise his best business judgment. It is not the province or goal of the Court to usurp the Special Fiduciary's role and re-scrutinize every element of every expenditure. Certainly, the Court has reviewed and will continue to review the accountings provided to ensure that Special Fiduciary is appropriately exercising his business judgment but the Court will give some the level of deference to the Special Fiduciary's decisions in light of his role as an officer of the Court. Thus, the Court notes that while the State is entitled to employ whatever level of scrutiny it deems necessary to the accountings and the Court will fully consider its objections, the Court will continue to defer to the Special Fiduciary's business judgment, so long as the evidence shows that the Special Fiduciary is appropriately exercising that judgment.

Further, the Court questions whether it is necessary for the State to employ experts to review the accountings provided. For all the attorney's fees accountings, the State's attorneys should be sufficiently qualified to review the itemized statements. Just as with any request for attorney's fees, the attorney(s) opposing the fee request is/are capable of reviewing the requests and lodging any objections without outside assistance.


² Though the Court notes that the State has not brought a Motion to Compel discovery of the itemized statements pursuant to Utah Rule of Civil Procedure 37, the State's request is analogous to such a Motion. Pursuant to Rule 37(a)(2)(A), a party bringing a Motion to Compel is required to certify that he/she has in good faith conferred or attempted to confer with the other party before seeking Court intervention. Certainly, the Court can expect two reasonable parties such as these to confer and come to an agreement without Court intervention.

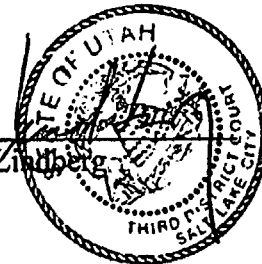
³ The Court disagrees with the Special Fiduciary's statement that the fact that the State has never needed more time in the past precludes the State from seeking more time to review these accountings. Even if the State conceded that previous fee requests were appropriate, the State has not waived its right to more fully scrutinize and object to current and future fee requests.

16 is January 17 and the State's objections are due on that day.⁴ Any reply by the Special Fiduciary must then be filed by January 31, 2012. The 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 should allow the A.G. sufficient time to request any necessary funds from the Legislature during this upcoming legislative session.

As a final matter, it appears that the State has not paid the Special Fiduciary the \$275,193.44 in fee obligations that had been previously approved by the Court. Pursuant to the Court's Ruling on August 1, 2010, those fees are now due and owing and not subject to objection. The Court hereby orders the Attorney General to ensure that State to pay those fees within 30 days of this Ruling.

DATED this 4th day of January, 2012.


Judge Denise Posse Lindberg
District Court Judge



⁴ January 16 is Martin Luther King Jr. Day, a legal holiday. Therefore, the State is given the benefit of an extra day and its objections are due January 17.

In actuality, because the majority of the accountings were provided prior to November 16 as discussed earlier, the State has had more than 60 days to review most of the accountings. In fact, the State will have had its requested 90 days to review the first accounting.

Addendum E

IN THE THIRD JUDICIAL DISTRICT COURT FEB 10 2012
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT By: SALT LAKE COUNTY

IN THE MATTER OF THE UNITED
EFFORT PLAN TRUST

RULING RE: SPECIAL FIDUCIARY'S
MOTION TO APPROVE
EXPENDITURES IN ACCOUNTINGS

Deputy Clerk

Case No. 053900848

Judge Denise P. Lindberg

February 10, 2012

This matter is before the Court on the Special Fiduciary's Motion to Approve Expenditures in Accountings and the State of Utah's Response and Objections thereto. Having fully considered the Motion and Objections, the Court GRANTS the Special Fiduciary's Motion in large part, although it sustains some of the State's Objections.¹ This Ruling is more fully explained below.

On November 17, 2011, the Special Fiduciary served his Motion to Approve Expenditures in Accountings upon the Court and the State. The accountings had previously been filed on October 12, October 20, October 26, November 3, November 4, November 8, November 10, November 14, and November 16, 2011. The Special Fiduciary now seeks an order approving fees of \$5,640,489.40 and authorizing payment from the State of Utah. The Utah Attorney General ("AG" or "State") has filed a number of objections.

Before addressing the specific objections, the Court makes the following observations:

First, the Court notes that State's objections are broad-based and often vague. When specific objections are raised, it is often by way of illustration rather than as comprehensive objections. In fact, the State's Response and Objections acknowledges that it has raised objections to "categories of activities" and that it "does not represent that every improper billing has been identified." See pg. 6-7 n.2. Although the Court recognizes that the AG's office was under some time pressure to file objections, and that it can be difficult to raise specific objections in instances where billing records

¹The Court is aware of the latest Motion by the Utah AG seeking contribution from the State of Arizona towards the payment of the fees and costs currently under consideration by the Court. The Court declines Utah's request to defer ruling on the present Motion pending resolution of that motion. The Court has received an opposition from the Arizona Attorney General, but time for a reply has not yet run. When the matter is properly submitted for decision, the Court will address the contribution Motion. In the meantime, the 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 pending resolution of the dispute over contribution.

don't provide adequate detail, the State's approach has made it difficult for the Court to ensure that it addresses all of the objections. Further, the State's approach effectively (and in this Court's view, impermissibly), shifts the burden of identifying all potentially objectionable entries onto the Court.²

Second, the fee award in this case is not being made to a prevailing party in litigation, as a sanction against a party, or on the basis of an express contract provision—the typical grounds for attorney fee requests considered in other cases. Instead, the order to pay the Special Fiduciary's fees and costs is entered pursuant to provisions of the Utah Trust Code. Specifically, Utah Code Annotated § 75-7-709(1) allows a trustee (or the Special Fiduciary in this case) to be reimbursed out of the Trust for “expenses that were properly³ incurred in the administration of the trust.” Further, Utah Code Annotated § 75-7-1004(2) provides, “[i]f a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney's fees, incurred.” Finally, § 75-7-1004(1) authorizes the Court to “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” if “justice and equity” so require (emphasis added). In this case the Court, for the reasons stated in prior decisions, has already ruled that “justice and equity” require that the State of Utah, through its AG, advance the necessary funds to cover the “fees and costs, including reasonable attorney's fees” that have been incurred by the Special Fiduciary in administering the UEP Trust, subject to a lien being placed on Trust property to reimburse the State once litigation involving the Trust has been finally resolved. *See, e.g.,* Ruling and Order on Motion to Award Costs and Expenses Chargeable to the State of Utah, dated July 29, 2011. Therefore, the Court's task is to determine whether expenses for which payment is sought were “properly incurred,” whether the Special Fiduciary acted in good faith in prosecuting or defending against actions, and whether the expenditures (*i.e.*, fees, costs, and attorney's fees) were “reasonable.”

²*Cf. Johnson v. Johnson*, 2012 UT App 22, ¶ 30, – P.3d – (“An adequately briefed argument ‘contains the contentions and reasons of the [party] with respect to the issues presented, including . . . citations to the authorities, statutes, *and parts of the record relied on.*’ An issue is inadequately briefed ‘when the overall analysis of the issue is so lacking as to shift the burden of research . . . to the reviewing court. The reviewing court ‘is not simply a depository in which the [objecting] party may dump the burden of argument and research.’”)(internal citations omitted)(emphasis added).

³ The Court has been unable to find any precedent interpreting the meaning of “properly.” Thus, the Court relies on common usage of “proper,” which is “appropriate to the purpose or circumstances. . . fitting [or] right.” Random House Webster's Dictionary, 576 (4th Ed. 2001).

1. Attorneys' and Special Fiduciary's Fees

The State has raised several objections to the attorney's fee request as well as to other expenses that have been submitted for payment. For clarity's sake, the Court will address all objections to attorney fees in this subsection, except for those related the criminal defense issue.

The vast majority of the fees incurred in this case are attorney's fees. To the extent that the State has made specific objections, each of those will be addressed. However, as noted *supra*, note 2, it is the State's responsibility to identify with specificity charges he believes are questionable or unwarranted. The billing records are voluminous and while the Court has a duty to ensure that the expenditures are reasonable, it is not this Court's responsibility to scrutinize every line of the records searching for charges to which the State might object without specific guidance. Accordingly, objections that have not been clearly stated in the State's Response are deemed waived. That said, the Court has reviewed generally the records, with more detailed "spot checks" to ensure the fees charged are reasonable. The Court is satisfied that its review has been sufficiently thorough to ensure that (a) it understands what has been billed, and (b) the payments authorized fully comply with the statutory and case law requirements.

As noted above, only those attorney's fees which are "reasonable" may be awarded against a party in a trust action, §75-7-1004(1), and this reasonableness inquiry applies regardless of whether the fees were incurred in litigation or in the administration of the Trust. §75-7-1004(2); *see generally* Utah R. Civ. P. 73(b)(3). In *Matter of Estate of Quinn*, 830 P.2d 282 (Utah Ct App. 1992), the Court of Appeals elaborated on the "practical guidelines" outlined in the seminal Utah case on attorney fees, *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988):

[A] trial court should begin its fee analysis by determining exactly what legal work the petitioning attorney or attorneys performed, both in terms of the nature of the work and the time spent in its performance. Second, the court should consider how much of that work was reasonably necessary to adequately conclude the matter for which legal representation had been sought. Third, the petitioning attorney's billing rate should be compared with those "customarily charged in the locality for similar services," to ensure the reasonableness of the attorney's rate. After consideration of these first three criteria, a trial court can establish a preliminary fee by multiplying the number of necessary hours of legal work performed by the appropriate hourly rate.

Finally, after the preliminary fee is established, Dixie's fourth step asks that courts adjust the amount of that fee, when necessary, to reflect the court's consideration of various criteria set forth in Utah Code of Professional Responsibility These criteria include the novelty and complexity of the issues involved; the likelihood that

the representation will preclude the lawyer or lawyers from accepting other employment; the expertise, experience, and reputation of the lawyer or lawyers; the amount involved and results obtained; the time limitations imposed by the client or the circumstances; the length and nature of the attorney-client relationship; and whether the requested fee is fixed or contingent.

Id., at 285 (citing *Dixie State Bank*, 764 P.2d at 989-90).

Put more simply, based on the evidence before it the Court must be able to answer the following questions before awarding attorney's fees: (1) "What legal work was actually performed?"; (2) "How much of the work performed was reasonably necessary to adequately prosecute the matter?"; (3) "Is the attorney's billing rate consistent with rates customarily charged in the locality for similar services?"; and (4) "Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?" *Blevins v. Isaacson*, 2004 UT App 265. With the foregoing guidelines in mind, the Court now addresses the State's objections.

A. Block Billing

The State argues that it is inappropriate for attorneys to utilize "block billing" which records time on a daily basis instead of on a task-by-task basis. The Court notes that the "block billing" at issue does not simply list an amount of time spent on the case on a given day. Instead, the bills contain detailed break downs of each task performed on that day for the case, although there is not an allotment of time for each task. The State relies upon *Brown v. David K. Richards & Co.*, 978 P.2d 470 (Utah Ct. App. 1999) and a number of cases from the 10th Circuit and other federal circuits to say that block billing is inappropriate.

Contrary to the State's contention, the Court is unaware of any Utah cases that have prohibited or discouraged "block billing." Certainly, the *Brown* case does not state that it is impermissible to engage in "block billing"; all that *Brown* does (on this point) is simply to explain in a footnote what is meant by "block billing." 978 P.2d at 473, n.1. The case does not offer guidance on whether it is or it is not acceptable to engage in "block billing," nor are there other Utah cases holding that "block billing" is inappropriate.

The State's reliance on federal cases is misplaced. The federal cases are inapposite because in contrast to Utah law on attorney fees, the law in the Tenth Circuit is much more stringent in its requirements, mandating that attorneys:

prove and establish the reasonableness of each dollar, each hour, above zero. To meet that burden, the Tenth Circuit requires that lawyers keep meticulous,

contemporaneous time records . . . In particular, [t]he records must reveal, for each lawyer for who fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks - for example, how many hours were spent researching, how many interviewing the client, how many drafting the complaint, and so on.

Jane L. v. Bangerter, 828 F.Supp. 1544, 1547-48 (D. Utah 1993) (internal citations and quotations omitted) (first alteration in original).

The Court has reviewed the billing records at issue and finds that the "block billing" employed in this case does not offend the requirements of Utah law. Although the information is presented in block billing form, the accountings are sufficiently detailed to allow the Court to answer all of the questions set forth in *Blevins*. Additionally, the Court approved the block billing format in prior fee submissions by the Trust's counsel, without receiving any objection thereto from the State. Accordingly, it is too late for the State now to object to a format that it never questioned previously, and to argue that the format warrants an across the board reduction of fees by 25%. As the Court noted in its January 4, 2012 Ruling, "the Special Fiduciary has always provided accountings [including those for attorney's fees] sufficient for the Court to determine whether the fees were necessary for the administration of the Trust." Note 1. The Court rejects the State's request that the fees be reduced solely on the grounds that counsel employed a block billing method in submitting the various fee requests.

B. "Unnecessary Work"

The State asserts that some of the work that the Special Fiduciary's attorneys performed was not necessary because it was duplicative, performed by a higher billing attorney than necessary to achieve the task, or performed by an attorney when staff could have performed the task. In its exhibits the State has identified a number of times when it alleges "unnecessary work" was performed.

The Court does not agree with the State's argument that every instance in which more than one attorney billed for work performed is necessarily "duplicative." Instead, the Court must examine the circumstances of each contested entry to determine if it was reasonable to involve more than one attorney. Additionally, the Court is persuaded by the Special Fiduciary's argument that the non-payment of fees and costs for a number of years led to unique circumstances. Specifically, counsel for the Trust was not always able to employ less senior attorneys or even clerical staff to work on this case because the Trust was not able to guarantee that those individuals would be paid within a reasonable period of time. As a result, the Trust was required to rely upon those attorneys who were sufficiently committed (and/or financially able) to represent the Trust while payment was deferred.

Further, due to the nature and complexity of this case, the Court believes it was not unreasonable for the Trust to employ more senior attorneys as needed to respond to its unique needs.

The State has identified 28 instances which it believes involved duplicative work. The vast majority of these alleged duplications involve participation in meetings or discussions about the case among multiple attorneys. The Court finds nothing inappropriate in attorneys conferring to discuss strategy, prepare for hearings or meetings with opposing counsel, or analyze legal issues. After examining the specific instances noted by the State, the Court concludes that it is not appropriate to reduce the attorneys' fees for attendance at meetings by more than one attorney. The Court also disagrees with the challenge to participation by more than one attorney at particular hearings. The Court is persuaded that in most of the instances noted, when more than one attorney was involved it was because each brought a particular area of expertise to the issues being addressed in order to advise the lead counsel.

That said, a few of the State's specific challenges do have merit. For example, on February 17, 2010, it appears that four Trust attorneys attended oral argument at the Utah Supreme Court, although only one attorney actually argued. While it may have been necessary for Jeffrey Shields to receive the assistance of colleagues in preparing for the argument, the Court agrees that attendance at oral argument by four attorneys who were not directly contributing to the presentation was unnecessary. Therefore, the Court will reduce the attorneys' fees for the oral argument by \$890 (which appears to be the amount of time that Mark Callister and Michael Stanger spent at the oral argument). Similarly, on April 12, 2011, four attorneys attended a hearing before the Utah Supreme Court on behalf of the Trust. There is no indication of the need for that level of participation, so the Court will also reduce the requested fees by \$890 to reflect the over-representation at that hearing. The remainder of the State's objections based upon duplication are overruled.

The State has also identified eight instances where it alleges that a task was performed by a senior attorney when it could have been performed by a less senior attorney or by other staff. While these instances represent a very minimal amount of the billing for these attorneys, they nevertheless merit examination.

In determining whether the fees requested in these particular instances were reasonable and appropriate, the Court has weighed the considerations discussed above, specifically (a) the fact that non-payment made it necessary for senior attorneys to do more work, (b) the unique and complex posture of this case, (c) the fact that objected-to tasks constitute a small amount of each attorney's bill, against the argument that the expertise of senior level attorneys was not needed for the tasks at hand, thereby not warranting billing at their full rate. The total billing for the days in which the State has identified "staffing" as the issue was \$8,052. After balancing the competing considerations the Court concludes that a 5% reduction of these particular fees is appropriate. Thus, the fees

attributable to those eight particular instances will be reduced to \$7,649.40.

C. Meetings with the Utah Legislature

Relying again on federal precedent, the State argues that it was inappropriate for the Special Fiduciary and his counsel to bill for time spent meeting with the Utah Legislature. This objection is not well-founded.

First, the minimal amount of time the Special Fiduciary and his counsel spent pursuing legislative solutions appears to have been appropriate to the purposes of the Trust. For example, the Special Fiduciary and counsel sought the legislature's assistance in dealing with the seeming lawlessness by officials of Hildale, Utah. The Court concludes such minimal time was appropriate under the unique circumstances of the case. Second, it appears that Utah's Attorney General specifically encouraged the Special Fiduciary to approach the legislature. It is, therefore, disingenuous for the State to now object to such meetings. Third, the Court disagrees with the State's argument that the case of *Jane L. v. Bangerter*, 828 F.Supp. 1544 (D. Utah 1993) prohibits the Special Fiduciary and his counsel from billing for meetings with the legislature. The *Jane L.* case holds that "[t]ime spent by attorneys in public relations is noncompensable." *Id.* at 1550 (citations omitted). As far as the Court can determine, the time spent by the Special Fiduciary and his counsel with the legislature was not time devoted to either public relations or lobbying. Rather, it concerned discrete efforts seeking specific solutions from the legislature in furtherance of Trust governance.

D. Investigation of Allegations of Discrimination by Cities

The State argues that the Special Fiduciary and his counsel cannot be reimbursed for the costs associated with investigating claims of discrimination by Hildale and Colorado City. The State asserts that such discrimination did not directly affect the Trust (though it may have affected occupants of Trust lands) and the Special Fiduciary is not charged with investigating discrimination.

The Court overrules this objection. The Court record in this case, as well as these submissions, strongly suggest that there are factual bases for believing that there have been instances of discrimination by agents of the twin cities against (a) individuals who have entered into occupancy agreements with the Special Fiduciary to occupy certain Trust property, (b) the Fiduciary himself as the Trust's administrator, and (c) other individuals with whom the Fiduciary has contracted to provide services to the Trust. Addressing discrimination against the Trust, its administrator, and those with whom the Trust has contracted, is work that is "properly" done by the Special Fiduciary and his counsel. In order to effectively administer the Trust and ensure that Trust beneficiaries can derive the full benefit from occupancy agreements the Special Fiduciary negotiated, it is appropriate

for him and his counsel to involve themselves in efforts to ensure that the cities or its agents do not discriminate against Trust beneficiaries who no longer happen to be active FLDS. The uneven enforcement of laws against former FLDS members working with or residing on Trust property inevitably undermines the Special Fiduciary's ability to conduct the business of the Trust. It is therefore appropriate for him to investigate such claims. The Court rejects the State's argument that in looking into these issues the Fiduciary was somehow acting outside the scope of his authority.

E. *Reading Books about Polygamy and Reading Newspaper Articles*

The State next objects for time charged by counsel for reading books like *MJ's Book*, *Escape* and *The Lost Boys*, and for reading newspaper articles involving FLDS and Trust controversies. The Court overrules the State's objections on this point. The administration of this particular Trust has posed a unique challenge to the Court and the Special Fiduciary, and has required far more expertise than a simple understanding of Trust law. In their attempt to work effectively with Trust beneficiaries (both FLDS and non-FLDS), counsel and the Special Fiduciary necessarily had to understand the culture and history of the FLDS communities in the Short Creek area. It was wholly appropriate for the Fiduciary and his counsel to engage in non-legal research to gain insight into the issues of concern to this unique and isolated community. Reading accounts of individuals who have been part of the FLDS faith was a legitimate way of learning about the community that created and is largely dependent upon the Trust the Fiduciary oversees. Additionally, because MJ and a number of individuals identifying themselves as "Lost Boys" have brought claims against the Trust, it was reasonable for the Special Fiduciary and his counsel to investigate the background of these individuals by reviewing autobiographical and/or biographical materials. Finally, there are good reasons for continuing to read newspaper accounts of the Trust administration and of the ongoing changes in the community. Reading such articles can reveal statements from individuals, including beneficiaries or others involved in this case, that could be material to the administration of the Trust. The Special Fiduciary also has a legitimate interest in seeing how the media reports developments in the community. Frequently, such accounts provide insight into how successful (or not) the Fiduciary has been in communicating with beneficiaries of the Trust.

F. *Reading Materials from Warren Jeff's Trial*

Similarly, objections to reviewing materials from Warren Jeff's trial are also unfounded. At a minimum, the Special Fiduciary and his counsel were justified in reviewing this material because Jeffs was a former Trustee who had refused to provide the Special Fiduciary with any information regarding the Trust. Those materials arguably have yielded information that has been useful in administering the Trust. The Special Fiduciary and his counsel were also justified in reviewing these materials because, as discussed previously, they lend insight into the mindset and concerns of Trust beneficiaries. The record in this case is replete with evidence that despite his removal as a trustee

and his time spent as a fugitive or incarcerated, Warren Jeffs continues to dictate the actions of those Trust beneficiaries who remain active members of the FLDS Church. He has provided specific direction to his members regarding how they should act in these proceedings, how they should treat the Special Fiduciary, and how they should treat Trust property. He has also provided guidance that more generally affects the Trust and its administration.

G. *Harker Farm*

The State maintains that the Special Fiduciary and his counsel should not have billed the Trust for services related to the management and operation of Harker Farms because Harker Farms is not part of the Trust but is a separate legal entity. The Special Fiduciary counters that (1) much of the billing referencing "Harker" was not actually work for the Harker Companies but was work for the Trust which related to the Harker Companies and (2) it was nearly impossible to segregate which work was performed for Harker Companies and which work was performed by the Trust because of the substantial overlap in the issues affecting both entities.

At the outset, the Court rejects the State's suggestion that if Harker Farm was not generating sufficient income to pay its own management costs, the Fiduciary should have allowed Joseph Harker and his family to manage the farm for free, as they allegedly offered to do. The State's contention is not supported by the record. There is no evidence that Joseph Harker has ever been willing to manage the farm for free. In fact, the Special Fiduciary maintains that he attempted to hire Joseph Harker to manage the Harker Farm when the Trust gained control of the property, but Joseph Harker refused to do so.

After considering the State's objections, the Court overrules all but two instances further discussed below. The Court makes a couple of observations regarding the overruled objections. First, although Harker Farm is managed by a separate legal entity, the property remains part of the Trust and the Special Fiduciary has an interest in ensuring that the property is productive and beneficial to the Trust. Second, in reviewing the billing records the State has identified as improperly billing for Harker work, the Court is persuaded that the majority of the work was actually performed for the Trust in reference to Harker Farm. For example, on January 5, 2009, the Trust's attorney billed for a meeting with J. Jensen regarding the status of the Harker Farm transaction. As this transaction was between the Trust and Harker Companies, it was proper for the Trust's attorney to bill the Trust for work on it.

There are two instances, however (identified by the State in Exhibits A-D), where it appears that the Trust's attorneys may have performed work for the Harker Companies in addition to working for the Trust. Those instances occurred on January 7, 2009 and January 21, 2009. Because it is not completely clear from the billing statements that the work was not for Harker Companies, the Court

will reduce the billing for those two days by a total of \$200.

H. Other Objections Noted in the Exhibits to the State's Response and Objections

The Court has reviewed the State's Exhibits where it has identified a number of attorneys' fee entries which it claims are either irrelevant or involve an excessive number of hours billed. The Court has considered all of the entries which the State has so identified, but after careful review the Court declines to reduce the fees based upon these objections.

Although the Court addresses many of the relevance concerns in different subsections of this Ruling, the Court specifically notes that research, meetings, and the like devoted to MJ/ Alissa Wall were not irrelevant to Trust management. MJ filed suit against the Trust and it was reasonable for Trust attorneys to gather as much information about her and her allegations as possible. Further, research into MJ's history gave the attorneys background information on the Trust participants in general.

Similarly, the Court has reviewed the entries in which the State claims that attorneys spent an excessive number of hours working on particular task. The Court finds no evidence of overbilling. None of the instances identified by the State appear to be true examples of excessive billing. For example the State has identified JCF's entry on March 3, 2010 for 6.4 hours as excessive. However, the description of the work indicates that counsel reviewed seven boxes of documents, participated in an office conference, and read *Lost Boys* in that time. In the Court's judgment, the time billed was not excessive for the amount of work performed.

Finally, the State has provided a list of "Examples of Questionable Costs Charged by CN&M." The Court has carefully reviewed the State's Response and Objections and is not clear on why all of these costs are "questionable." The State objects to the law firm charging its payroll costs to the Trust and it objects to the costs for indexing. Counsel for the Special Fiduciary has explained that the indexing and payroll costs were actually payment to Jeff Barlow and Mark Barlow, two young men the firm employed at \$10 per hour to review, summarize, and index key documents. Although the billing records are not the model of clarity here, the Court accepts the Trust's explanation for these charges and notes that the Special Fiduciary had previously informed the Court of the plan to employ the Barlows in this way. Moreover, had the work been done by regular law firm employees instead of the Barlows, the hourly cost would have likely been substantially more. Therefore the Court overrules this objection and declines to reduce the fees on this basis.

I. Increase in Billing Rates

The State argues that the Special Fiduciary, members of his accounting firm, and his counsel

have all increased their billing rates “significant[ly]” from the amounts previously approved by the Court. The Court has reviewed the rate increases and does not find that they are as “significant” as the State maintains. Additionally, the Court finds that the rates currently being charged by the Special Fiduciary, his associates, and his counsel 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. The Special Fiduciary in particular was not able to adjust his billing fees for quite some time. Accordingly, an adjustment to his billing rate was long overdue. The Court concludes that the present billing rates are all fair and appropriate.

The State complains that the Special Fiduciary did not first seek Court approval before increasing his billing rate in the accountings submitted to the Court. While the Court agrees in principle with the general proposition that adjustments to billing rates should be cleared in advance, the Court is also mindful of the fact that except for the recent payment of approximately \$275,000 by the Utah Attorney General’s office (of which only a fraction was actually received by the Fiduciary), he had not been paid since 2008. Notably, it has been precisely this 2008-2011 period that has included the most active litigation and greatest difficulties faced by the Fiduciary in administering the Trust. Moreover, during this same period of time there was no real reason for the Fiduciary to request increases in his hourly rate, since the funds available to the Trust were being consumed by mushrooming litigation and, in any event, he was not being paid for any of his work. This is not a case where the Fiduciary has inflated his billing rate beyond reason. The Special Fiduciary’s billing rate, at \$250 per hour, is only \$15 dollars more per hour than the amount approved by the Court the last time it had occasion to consider the Fiduciary’s fees. Taking into account the amount of work he has undertaken during the past three years, and the enormous difficulties that have resulted from going without payment for such an extended period of time, the Court rejects the State’s suggestion that his fees be adjusted downward because they were not expressly approved in advance by the Court. Prospectively, and to avoid a recurrence of this objection, the Court concludes that a \$5.00 per year upward adjustment to the Special Fiduciary’s billing rate is certainly within the realm of reasonableness and will be approved by the Court absent unusual circumstances.

2. The Exoro Group

The State argues that some invoices have been submitted without any explanation of what work was performed. It appears⁴ that the State objects to the Exoro billings on this basis.

⁴ The Court uses the term “appears” because the State does not specifically name the Exoro Group. However, in the Court’s review of the record, the State’s objections seem aimed at the Exoro Group.

Additionally, the State appears to argue that the services of the Exoro Group were not reasonably necessary and proper for the administration of the Trust. Specifically, the State argues that the Special Fiduciary improperly "seeks to recover fees for a public relations firm as well as the time he and his counsel spent interacting with the media." It appears that the "public relations firm" is the Exoro Group.

According to the Special Fiduciary, the Exoro Group provided consulting services to the Trust "relating to communications, media relations and legislative matters." In his Reply Memorandum the Special Fiduciary explains that the Exoro Group provided valuable help in the form of clear and meaningful communications to the beneficiaries (and to former trustees) because most of those individuals refused to communicate through usual and ordinary means. The Exoro Group also assisted the Trust in meeting with legislators to seek legislative solutions to many of the problems plaguing the Trust.

First, the Court finds that these fees were incurred in the administration of the Trust and were not litigation costs. Thus, the Court must determine whether they were "properly incurred." In making this determination the Court defers to some extent to the Special Fiduciary's business judgment. See Ruling re: (1) State of Utah's Motion for Extension of Time to Respond to the Special Fiduciary's Motion to Approve Expenditures in Accountings and Request for Discovery and Evidentiary Hearing, and (2) Special Fiduciary's Motion to Approve Expenditures in Accountings, dated January 4, 2012, at 1-2, note 1 ("It is not the province or goal of the Court to usurp the Special Fiduciary's role and re-scrutinize every element of every expenditure . . . [T]he Court will continue to defer to the Special Fiduciary's business judgment, so long as the evidence shows that the Special Fiduciary is appropriately exercising that judgment"). The Special Fiduciary is charged, in the first instance, with ensuring that billing for work performed on behalf of the Trust is submitted in accordance with standard industry practice, and that the contracted amounts are not excessive. Because the Fiduciary is entrusted by the Court to exercise his business judgment on these matters, the Court's review of the billings for work performed by non-attorneys is more of a supervisory review to ensure that the Special Fiduciary has properly exercised his discretion. Additionally, in many instances the Court lacks the expertise to determine, for example, whether the rate charged by non-attorneys is reasonable or how much work is necessary for a particular job. Therefore, so long as the Special Fiduciary has demonstrated a reasonable basis for employing non-attorney professionals, and that the rates charged for the work of those professionals is reasonable under the circumstances, the Court will not second-guess the Special Fiduciary's judgment.

In the case of the Exoro Group, the Special Fiduciary has shown to the Court's satisfaction that it was reasonable and appropriate for him to seek expert assistance in communicating with the various audiences relevant to this case. Based on its nearly six years of overseeing the case, the Court is aware that the former trustees and many of the beneficiaries have been unwilling to

communicate with the Court or its representatives about the case. Indeed, one of the Court's primary concerns from the outset has been the difficulty in communicating with potential Trust beneficiaries because of the unwillingness of many to receive or respond to communications from the Court. Additionally, the Court recognizes that this particular case has attracted a significant amount of media attention and the Special Fiduciary needed assistance in communicating effectively with, and through, the media in order to respond to unfounded allegations and outright misinformation from those opposed to the Court's oversight over the Trust.

Unfortunately, the billing records that were initially submitted to the Court did not provide sufficient detail to allow the Court to determine if the rate charged by the Exoro Group was appropriate for the type and amount of work performed. Once that issue was raised by the State, the Special Fiduciary provided a more complete accounting of those expenditures directly to the State (attached to the State's Response and Objections as Exhibit J). As stated previously, the Court does not expect the Exoro Group to provide a complete breakdown of costs and fees as attorneys are required to provide, but the billing statements before the Court provide no detail. The Special Fiduciary has represented that the level of detail provided by the Exoro Group in its billing is standard for the industry. However, that argument is belied by the fact that the Exoro Group did provide more specific invoices for a period of time. The invoices dated 11/1/2010, 12/2/2010, and 1/3/2011 are sufficiently detailed for the Court to determine what work was performed on the Trust's behalf, and that the billing rates for such work were reasonable.

Given that it was proper to hire the Exoro Group and receive their assistance, as well as the fact that Special Fiduciary, in his discretion, believes that the Exoro Group provided valuable assistance, the Court finds that it is appropriate to authorize the Special Fiduciary to pay the Exoro Group a majority of their fees. That said, the Court must also take into account the fact that a portion of the Exoro Group's billing was too vague to allow the Court to ensure that the amounts requested were reasonable under the circumstances. Presently the Exoro Group has submitted bills totaling \$133,095.96, of which \$120,970.96 remains unpaid. Because of the lack of specificity in the billing, and after balancing the above considerations, the Court finds that it is appropriate reduce the amount that the Special Fiduciary is authorized to pay the Exoro Group by 5%. Thus, the Special Fiduciary is authorized to pay the Exoro Group \$114,922.41 for services rendered.

2. Custom Design & Consulting

The State has objected to Custom Design & Consulting bills for "time printing out the firm's bills to be submitted to the Special Fiduciary's law firm, for writing a cover letter to the Court, and for filing papers with the Court." The State's objections to Custom Design & Consulting's fees are overruled.

The Special Fiduciary has explained that the "bills" are not bills submitted for payment. Rather, Custom Design & Consulting was hired to process, prepare and serve the occupancy fee statements to the residence of Trust land on a monthly basis. The "bills" referenced in the invoices are the occupancy fee statements. Although the description of services provided by Custom Design & Consulting is not a model of clarity, the Court accepts the Special Fiduciary's description of the work provided by Custom Design & Consulting and finds that it was "properly incurred" in the administration of the Trust. Accordingly, those fees are to be paid in full.

3. Defense of Criminal Cases Filed Against Isaac Wyler, Jethro Barlow, and Wisan

The State has no objection to the Trust paying for the defense of the Special Fiduciary in the criminal case brought against him, "so long as the criminal charges arose out of the Fiduciary's management of the Trust." State's Response, at 10. The State does, however, object to the Trust/State being required to pay for the criminal defense of Isaac Wyler and Jethro Barlow. The State also objects to the fees the Trust's lead attorneys charged for work on the criminal case that was brought against the Special Fiduciary.

The first question is whether the criminal charges arose out of the Fiduciary's management of the Trust. The Court finds that they did. The Special Fiduciary was charged by Colorado City with criminal trespass. His defense was that the premises in question was abandoned Trust property, and that he was performing his duties as Trust administrator when he was charged with trespassing. There is no evidence that the Special Fiduciary's defense is being raised in bad faith. Indeed, given his charge to administer Trust property, the Court *expects* the Fiduciary to assert authority and control over Trust property that has been abandoned or the occupancy of which is not subject to the Occupancy Agreements mandated by the Court. The State has no basis to question whether the charges brought somehow reflect *ultra vires* action by the Fiduciary. There is no question in the Court's mind that the Fiduciary is entitled to reimbursement for all the reasonable attorney's fees incurred in defending against these charges.

The second question is whether the criminal charges against Isaac Wyler and Jethro Barlow also arose out of the Fiduciary's management of the Trust. The Court finds that they did. Isaac Wyler and Jethro Barlow are employees of the Trust, having been hired by the Special Fiduciary to perform work on behalf of the Trust. In fact, Mr. Wyler and Mr. Barlow have performed invaluable work as the "boots on the ground" carrying out directives of the Special Fiduciary and the Court. There is no evidence that at the time of the events giving rise to these charges, either of these individuals were doing anything other than work they were specifically directed to do by the Special Fiduciary. In short, because Mr. Wyler and Mr. Barlow have acted at the direction of the Special Fiduciary and for the benefit of the Trust, they are also agents of the Court and are entitled to the same protections to which the Special Fiduciary is entitled. For that reason, Mr. Wyler and Mr.

Barlow are entitled to have the costs of their defense fully covered.

The final question is whether the attorney's fees incurred in defending these three individuals are reasonable. The Court first overrules the objection that the Trust's lead counsel should not have assisted in the defense(s) of these individuals. Although the Trust's counsel may not have any particular experience in criminal matter, they have expertise in the particular facts of this case and could offer valuable insights and information to counsel in the criminal cases. Additionally, the criminal matter is inescapably intertwined with the Special Fiduciary's management of the Trust and it was reasonable for Trust counsel to be fully informed of the issues, procedural posture, etc., in the criminal matters.

The Court notes that there is no specific objection to the reasonableness of the fees incurred by attorney Cathy Johnstone in defense of Isaac Wyler. Thus, the Court finds that Johnstone's \$6,627.50 fee is reasonable and must be paid.

The remainder of the legal fees incurred in this case were incurred by attorney D-Arcy Downs-Vollbracht. The Court agrees with the State that the description of services rendered by Downs-Vollbracht is inadequate. In fact, there is no description of the work that Downs-Vollbracht performed. There is also no affidavit describing the attorney's hourly rate or representation as to the reasonableness of the rates billed. The Court is not even given information regarding how many hours Downs-Vollbracht expended in working on the case. The Special Fiduciary has explained that the billing statements represent a substantial reduction in the attorney's fees as a result of negotiations between the Special Fiduciary and Downs-Vollbracht.

The Court understands that the Special Fiduciary will be placed in a difficult position if payment for Downs-Vollbracht's fees is not authorized. However, the Court can only award reasonable attorney's fees and the Court is unable to determine that Downs-Vollbracht's fees were reasonable based upon the submissions presently before the Court. As the Court has already stated, it was reasonable for the Special Fiduciary, Isaac Wyler, and Jethro Barlow to incur attorney's fees in defending against the criminal charges brought by Colorado City. The only question that remains is what the proper amount to be paid for the services rendered.

The Court could determine a fee amount that would be defensible by applying at least some of the attorney fee guidelines found in Utah law, the length of the Downs-Vollbracht representation, and the fact that Downs-Vollbracht represented all three defendants for a time while Johnstone only represented one defendant. However, such a determination would be only an approximation based on assumptions that might, or might not, reflect reality. The Court concludes that a more defensible approach is to require that Downs-Vollbracht and the Special Fiduciary resubmit appropriate billings that fully satisfy the *Dixie* requirements. Any re-submission must be made by no later than **ten (10)**

business days from the entry of this Ruling. Once the Court receives the requested documentation, it will examine the billing records in accord with the governing standards for evaluating attorney fee requests. The Court will then promptly issue a separate ruling on the appropriate amount to be paid to Downs-Vollbracht. Failure to comply with the time-line provided herein will result in the Court denying recovery of the fee request by (or on behalf of) Downs-Vollbracht.

4. Fees Incurred During the Litigation Stand Down

The State asserts that the costs and fees incurred during the litigation stand down, beginning in November, 2008, should have been substantially lower than at other periods of time. The State specifically objects the work related to subdividing the property since that was called into question in the stand down order.

The Court construes the stand down differently than does the State. In the Court's June 1, 2009 Ruling and Order, the Court explained that in order to facilitate settlement of the case, the parties and the Court, on November 14, 2008, agreed to a stay of the litigation. Although a number of actions were proceeding at that time, the primary aim of the stand-down was to halt the Berry Knoll sale for a period of time so that the parties could try to reach an overall settlement. The Court outlined the parameters of the stand-down and the settlement negotiations in its March 9, 2009 Settlement Conference Order. As part of that order the Court detailed which proceedings would be stayed. However, the Court also emphasized that nothing in the Settlement Conference Order should be considered to "in any way limit or impair the authorities and responsibilities of the Special Fiduciary, Mr. Wisan, as detailed in the Court's prior rulings in this matter." *Id.*, at 7-8, ¶ 9. Thus, the Court made it clear that the stand-down pertained to litigation only. It was not a stand-down of administration or management of the Trust. The Special Fiduciary remained obligated to perform all the functions he had been previously assigned. Because the litigation stand-down did not alter or limit the Special Fiduciary's obligation to otherwise manage the Trust, the Court rejects the suggestion that his fees and costs should have been substantially reduced during the stand-down.

The Court also finds it was appropriate for the Special Fiduciary to continue working to subdivide the Trust property during the litigation stand-down. Not only did the stand-down not affect the general administration of the Trust, the record does not support the A.G.'s assertion that the subdivision was called into question by the stand down order. None of the Court's prior rulings or orders disapprove of the Fiduciary's efforts to subdivide the Trust property, nor do they suggest that such efforts should cease. Indeed, the Court has repeatedly expressed its view that resolution of this case will be facilitated by completion of the subdivision process, and that doing so is in the best long-term interest of Trust beneficiaries. While the Court will not force anyone (who does not desire it) to receive title to a particular lot and its improvements, the Court firmly believes that it must ensure that means are available to fulfill the requests of those who wish to apply for such

benefits. In short, the Court stands firmly behind continuation and finalization of the subdivision process. It will ultimately be up to the individual beneficiaries of the Trust, acting through the mechanisms that the Court has put in place, to determine whether they want to continue participating in a communal Trust. If they wish to do so, nothing in the subdivision process will stand in their way. On the other hand, if Trust beneficiaries request to an award of title to the land and homes they occupy, the subdivision process will ensure that such requests can be fulfilled.

For the foregoing reasons, the Court finds that the fees and costs incurred in pursuit of subdivision efforts during the litigation stand-down were "properly incurred" by the Special Fiduciary. The Court overrules the State's objections thereto.

5. General Request for Reduction of Fees

As a final matter, the State argues that in the interest of being conservative and protecting the State's interest, the Court should cut all of the requested fees by 25%. The State argues that such a reduction is further supported by the lack of results obtained in this case. The Court finds no justification for such a reduction.

First, the Court has no quarrel with the State's request that it be "conservative" in assessing fees and costs against the State. That is exactly what the Court has done in considering all of the State's objections and taking action to reduce certain charges where appropriate. However, there is no legal justification for the State's request that the Court make a blanket cut of 25% to the proposed fees and costs. Indeed, Utah law is to the contrary. *See Brown v. David K. Richards & Co.*, 978 P.2d at 474 ("this court has been critical of judges who simply reduce a fee award 'ad hoc'"). *See also Dixie State Bank*, 764 P.2d at 991 (a court "commits legal error if it awards less than the reasonable fee to which the successful litigant is entitled"); *Enrody v. Enrody*, 914 P.2d 1166, 1171 (Utah Ct. App 1996)("[T]he court abuses its discretion in awarding less than the amount [of attorney fees] requested *unless* the reduction is warranted")(emphasis in original). Absent a factual basis for finding that the fees and costs were unreasonable, not incurred in the administration of the Trust, or were otherwise unwarranted, it would be an abuse of discretion by this Court to accept the State's invitation.

Second, the Court does not agree that it is more practical to only charge a portion of the fees to the State and then require the Special Fiduciary to seek payment directly from the Trust for the unpaid expenses. The Court will not reexamine its prior determination that justice and equity weigh heavily in favor of having the State advance the funds necessary to pay all of the reasonable expenses that have been incurred on behalf of the Trust. Although the Court acknowledges that its order has *temporarily* shifted the risk of non-payment onto the State, the Court has explained at length the reasons why it determined that this allocation of risk was appropriate. The Court stands by that

determination.

Finally, the Court declines the State's invitation for a significant downward adjustment to the fees incurred on behalf of the Trust based on what results have or have not been achieved to date. There is simply no statutory or other basis for requiring the Fiduciary to achieve a certain result in order to be entitled to his fees and costs, nor was there an agreement with the Fiduciary that his fees would be paid on a "results" basis. Moreover, although the Utah Attorney General has never acknowledged it, he cannot dispute the fact that as a direct result of the Special Fiduciary's efforts, the Trust has *gained assets significantly in excess* of the fees that have been incurred. Therefore, were this Court to adjust fees based on "results," under the logic put forward by the State the Court should, if anything, adjust *upward* the fee award.


The Special Fiduciary has worked diligently and in good faith to fulfill his responsibilities and to achieve beneficial results for the Trust. The Court specifically finds that the Special Fiduciary has managed the Trust fully in accord with the direction given by this Court. Any lack of progress in this case has *not* been due to any failing on his part. Instead, the difficulties in this case have arisen largely from circumstances beyond the Special Fiduciary's control including, but not limited to, the concerted efforts of the FLDS community (and the cities they control) to frustrate the Special Fiduciary's administration of the Trust, their refusal to accept and acknowledge the Court's authority (and by extension, that of the Special Fiduciary), and to inundate the Trust with needless litigation.

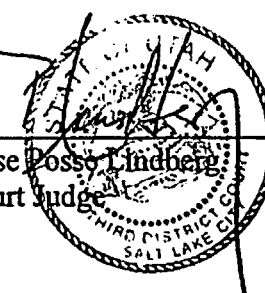
ORDER

Based on the foregoing, the Special Fiduciary's Motion to Approve Expenditures in Accountings is GRANTED in significant part. As detailed above, the Court will reduce the requested fees by a total of \$65,097.15⁵ as those fees were not "properly incurred" or were not "necessary," pursuant to the above-discussed standards. Therefore, the Special Fiduciary is awarded \$5,575.392.25 . The State of Utah, through its Attorney General, is hereby ordered to pay the awarded amount within 90 (ninety) days of the entry of this Ruling.

Subject to timely submission of an amended fee request, the Court reserves for further determination the amount of fees payable to Downs-Vollbracht for services rendered in representing the Special Fiduciary and other Trust employees in defending against criminal charges brought against them for actions taken in the course and scope of their duties to the Trust. Once the Court has made a final determination on the reserved fees, the Attorney General will be required to forward timely payment of those additional fees as may be ordered by the Court.

DATED this 10th day of February, 2012.


Judge Denise Posse Lindberg
District Court Judge



⁵This amount includes a reduction reflecting the full amount of Downs-Vollbracht's fees. The Court anticipates that with timely submission of proper billing records to support these fees, the total reduction will ultimate be less.

Addendum F

FEB 22 2012

SALT LAKE COUNTY

By: _____

Deputy Clerk

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

**IN THE MATTER OF THE UNITED
EFFORT PLAN TRUST**

**RULING AND ORDER ON STATE OF
UTAH'S MOTION FOR
CONTRIBUTION FROM THE STATE
OF ARIZONA FOR THE PAYMENT OF
THE FIDUCIARY'S FEES**

Case No. 053900848

Judge Denise P. Lindberg

Date: February 22, 2012

This matter is before the Court on the State of Utah's Motion for Contribution from the State of Arizona for the Payment of the Fiduciary's Fees. Having fully considered the memoranda submitted by the parties, the Court **DENIES** the State of Utah's motion. As the Court has noted previously, the Order directing the State to advance payment for fees and expenses incurred by the Special Fiduciary will not leave the State without recourse for repayment. Any and all payments by the State of Utah will be secured with one or more liens on Trust property, ensuring that the State will be fully reimbursed from Trust assets at a later date. Additionally, once the State of Utah has paid the Special Fiduciary the amount owed, thereby ripening the claim, it may pursue contribution claim(s) against the State of Arizona and/or any others the State determines should also be held liable for the costs of the UEP Trust ("Trust").

On May 27, 2011, the Special Fiduciary filed a motion pursuant to Utah Code section 75-7-1004(1) requesting that the Court order the State of Utah to pay the Special Fiduciary's accrued fees and expenses. On August 1, 2011, the Court issued its Ruling and Order, finding that it was "just and equitable to require the State of Utah [to] pay costs and expenses of the Fiduciary, including the reasonable attorneys' fees he has incurred." Ruling and Order on Motion to Award Costs and Expenses Chargeable to the State of Utah at 1.

On November 17, 2011, the Special Fiduciary served his Motion to Approve Expenditures in Accountings, asking the Court to approve the accountings previously filed on October 12, October 20, October 26, November 3, November 4, November 8, November 10,

November 14, and November 16, 2011. The Special Fiduciary sought approval for fees totaling \$5,640,489.40 and an authorization for payment from the State of Utah. The State of Utah, through its Attorney General, filed a number of objections. On February 10, 2012, the Court issued its Ruling Re: Special Fiduciary's Motion to Approve Expenditures in Accounting (the "February 10, 2012 Ruling"), largely approving the Special Fiduciary's request and awarding the Special Fiduciary \$5,575,392.25. The State of Utah was ordered to pay the awarded amount within 90 (ninety) days of the entry of the Court's Ruling.

On January 18, 2012, the Utah Attorney General filed the present motion, requesting "an order requiring Arizona to contribute to the Special Fiduciary's fees and costs on a pro-rata basis equivalent to the percentage of residents residing on Trust lands within its borders." Memorandum in Support of Motion for Contribution from the State of Arizona for the Payment of the Fiduciary's Fees at 3. The State of Arizona issued a Response to the State of Utah's motion on February 6, 2012, and the State of Utah filed a Reply on February 8, 2012.

In its Response, the State of Arizona argued that this Court lacks jurisdiction to consider the State of Utah's Motion for Contribution; that the State of Utah's contribution motion is not ripe; and that the Court should not have awarded the Special Fiduciary his fees and expenses payable by the State of Utah. In its Reply, the State of Utah sought to re-construe its motion for contribution as a motion for the Court to equitably allocate to the State of Arizona a pro-rata share of the Special Fiduciary's fees and costs. The Court finds the State of Utah's arguments unpersuasive for two reasons. First, the State of Utah did not raise its "equitable allocation" argument until its Reply memorandum, which is problematic because the State of Arizona never had a chance to respond to this argument. Second, the State of Utah's "equitable allocation" argument comes too late and it would be inequitable to the State of Arizona for the Court to reconsider the issue of liability for the Special Fiduciary's fees and expenses almost six months after the issue was decided.

I. The State of Utah's "equitable allocation" argument is barred because it was not raised until the Reply memorandum

As a preliminary matter, the Court notes that the State of Utah's "equitable allocation" argument was not raised until its Reply memorandum. Rule 7(c)(1) of the Utah Rules of Civil Procedure limits the contents of a party's Reply memorandum to "rebuttal of matters raised in the memorandum in opposition." "The principal reason we do not allow an issue to be first raised in a reply memorandum is because it is unfair to the opposing party to have no opportunity to respond." *Trillium U.S. v. Bd. of Cnty. Comm'rs*, 2001 UT 101, ¶ 17 n.3, 37 P.3d 1093. Although the Court has discretion to consider other memoranda, "such memoranda will not be considered without leave of court." *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 31, 183 P.3d 1059.

Here, the State of Utah did not raise its equitable allocation argument until its Reply memorandum. Although the State attempts to re-cast its original motion as a request for equitable allocation of the Special Fiduciary's fees and expenses, the State's motion was clearly a request for contribution from the State of Arizona. The filing was entitled "State of Utah's *Motion for Contribution from the State of Arizona for the Payment of the Fiduciary's Fees.*" The relief requested was an "order requiring Arizona to *contribute* to the Special Fiduciary's fees and costs on a pro-rata basis equivalent to the percentage of residents residing on Trust lands located within its borders." Memorandum in Support of Motion for Contribution from the State of Arizona for the Payment of the Fiduciary's Fees at 3 (emphasis added).

The issue of responsibility for the Special Fiduciary's fees and expenses was adjudicated in the Court's August 1, 2011, Ruling. Any attempt to argue, at this late date, that the State of Arizona should be equitably required to pay toward the outstanding judgment is at heart an argument that Arizona should pay a "proportionate share of an obligation paid by the first [obligator] but for which both are liable." *DLB Collection Trust v. Harris*, 893 P.2d 593, 597 (Utah Ct. App. 1995) (quoting *Gardner v. Bean*, 677 P.2d 1116, 1118 (Utah 1984)). This type of claim is classically one for contribution. As such, notwithstanding the State's efforts in the Reply to recast its request, the motion was clearly one for contribution rather than for equitable allocation. Given that fact, Utah's motion is also not yet ripe for resolution.¹

Subject to due process considerations, the Court has discretion to permit the filing of a Reply memorandum that raises issues beyond "rebuttal of matters raised in the memorandum in opposition," but only if the party first seeks leave from the Court to raise a new argument. Utah R. Civ. P. 7(c)(1). The State of Utah did not request leave from the Court to raise a new argument in its Reply memorandum. Moreover, promptly after filing the Reply the State moved to submit the matter for decision, thereby foreclosing any attempt by the State of Arizona to respond to the newly-raised argument for equitable allocation. It would be manifestly unfair to the State of Arizona for the Court to consider the State of Utah's newly-raised argument when Arizona has had no chance to reply. Because the State of Utah's Reply raised new arguments

¹Under Utah law, "[c]ontribution . . . presumes payment and extinguishment of the debt by one for the benefit of all." *Gardner v. Bean*, 677 P.2d at 1118. In this case, the State of Utah has paid \$275,193.44 towards Court-approved costs and expenses totaling \$5,575,392.25. While Utah has made one substantial payment (of \$275,193.44) towards the obligation, it comes nowhere near "extinguishing" the obligations incurred in administering and defending the Trust. Neither has Utah's payment exceeded its "proportionate share" of the entire obligation. Utah's claim for contribution will only become ripe for resolution once it has paid in accordance with the Court's Order. It will then be free to seek contribution from the State of Arizona and/or any other individuals or entities who the State believes should contribute.

without leave to do so, the Court exercises its discretion and declines to consider Utah's new "equitable allocation" argument.

II. The State of Utah's "equitable allocation" argument comes too late and it would be inequitable to the State of Arizona to reconsider the Court's earlier determination that the State of Utah be held responsible to pay the Special Fiduciary's fees and expenses

As a general proposition, the Court recognizes that the State of Utah's "equitable allocation" argument is not unreasonable. The Court has previously noted that others have benefitted from the Special Fiduciary's efforts, and should rightly bear some of its associated costs. *See* August 1, 2011 Ruling and Order on Motion to Award Costs and Expenses Chargeable to the State of Utah at 6. Unfortunately, the State of Utah's motion comes too late in the decisional process. It would not be fair to the State of Arizona to reconsider, at this late date, the issue of liability for the Special Fiduciary's fees and expenses.

On May 27, 2011, the Special Fiduciary filed his motion requesting that the State of Utah pay the fees and expenses incurred since 2008 in administering and defending the Trust. The State of Arizona was not named in the Special Fiduciary's motion and thus was never on notice that it would need to respond to or defend against the Special Fiduciary's motion. If the State of Utah intended to request an equitable allocation (with the State of Arizona) of the Special Fiduciary's fees and expenses, its motion should have been filed at that time. Because the State of Utah did not timely bring that issue to the Court, the State of Arizona had no opportunity to respond to the Special Fiduciary's motion nor to argue against being held liable for any of the Special Fiduciary's fees and expenses.

Once the briefing on the Special Fiduciary's motion was complete, the Court considered all the arguments before it and, on August 1, 2011, held that the State of Utah was responsible for paying the costs and expenses of the Special Fiduciary, including his reasonable attorneys' fees.² The Court acknowledged in that Ruling that the State of Utah was "free to seek indemnification or contribution for other parties and non-parties as it sees fit," but ultimately, the State of Utah was adjudicated as the sole party responsible for those fees and costs.³

²The Court recognizes that the State of Arizona has also raised objections to the Court's August 1, 2011, Order directing the State of Utah to pay the Special Fiduciary's fees and expenses. In so doing, the State of Arizona raises substantially the same objections as the State of Utah. Because the Court has already addressed these objections, it will not do so again.

³The State of Utah filed a motion for reconsideration on November 23, 2011, wherein it did not attempt to argue that the State of Arizona or any other party should contribute to the Special Fiduciary's fees and expenses. The Court duly considered the State's motion for

Were the Court to consider the State of Utah's equitable allocation argument at this late date, it would be manifestly unfair to the State of Arizona. The State of Arizona was not given the chance to challenge its liability to pay the Special Fiduciary's fees and expenses as Utah was given. Nor was the State of Arizona given the chance to review and object to any of the Special Fiduciary's expenditures as Utah was. To subject the State of Arizona to liability without first giving it sufficient opportunity to respond would, at a minimum, raise due process concerns. The Court declines to take such a step.

The State of Utah had ample opportunity to move the Court to allocate some of the Special Fiduciary's fees and expenses to the State of Arizona when that issue was being considered during the May-July, 2011 period. For unknown reasons, Utah did not do so. To now raise the issue, long after entry of the Court's Ruling and Order directing that Utah be responsible for that payment obligation, is simply an attempt to relitigate a matter that is no longer open for reconsideration or appeal. The State of Utah's liability is now beyond dispute. The only issue that remained to be determined was the exact amount that the State of Utah would be required to advance as payment for services rendered to the UEP Trust. In its February 10, 2012 Ruling, the Court for the most part answered that question when it ordered the State of Utah to pay \$5,575,392.25 to the Special Fiduciary.⁴ Although the Court has discretion to reconsider its prior orders, the equities of this situation preclude the Court from reconsidering the State of Utah's liability for the Special Fiduciary's fees if doing so would be unduly prejudicial to the State of Arizona.

In sum, the Court recognizes that the State of Utah's desire to require others who have benefitted from the Special Fiduciary's efforts to also contribute towards the costs incurred is understandable and reasonable. However, for the reasons stated, the Court declines to reconsider the question of liability for the Special Fiduciary's fees and expenses. Doing so at this point would be manifestly unfair to the State of Arizona. That said, the fact remains that the State of Utah retains the ability to seek contribution from the State of Arizona in another forum. In that event, *both* States will have a full opportunity to present their respective arguments and receive a ruling on that issue by the appropriate Court.

reconsideration and denied that motion on December 2, 2011.

⁴The Court did grant a brief, ten-day period within which the Fiduciary could re-submit for consideration his request for payment of certain attorney fees that had not been properly documented in the initial submission. The State of Utah will, of course, have opportunity to review and comment on that fee request, should it be forthcoming. The Court will then determine whether (and if appropriate, how much) to authorize for payment by the State of Utah.

III. The Court lacks jurisdiction to consider the State of Utah's contribution claim

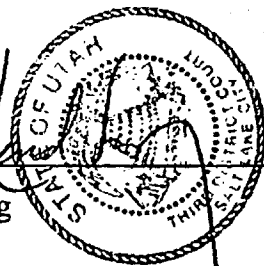
For the above stated reasons, the State of Utah's "equitable allocation" argument fails. As a result, the Court lacks jurisdiction to hear the State's claim for contribution from the State of Arizona. Pursuant to 28 U.S.C. § 1251(a), the United States Supreme Court has "original and exclusive jurisdiction of all controversies between two or more States." A controversy between two or more states exists if one state "is asserting a right against the other State which is susceptible of judicial enforcement." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939); *see also South Dakota v. Ubbelohde*, 330 F.3d 1014, 1026 (8th Cir. 2003) ("The Supreme Court's exclusive jurisdiction under 28 U.S.C. § 1251(a) applies only when one state seeks relief from another state."). A contribution action brought by the State of Utah against the State of Arizona, seeking an order requiring Arizona to pay a share of the Special Fiduciary's fees and expenses, would qualify as a controversy between two states and would trigger the Supreme Court's exclusive jurisdiction under 28 U.S.C. § 1251(a).

ORDER

For the reasons discussed above, the Court DENIES the State of Utah's motion for contribution from the State of Arizona. The Court emphasizes that the State of Utah is not left without remedies under this Order. The amount to be paid to the Special Fiduciary will be secured with a lien on Trust property. Once payment is received, the Court orders representatives of the Special Fiduciary and the Utah Attorney General to meet, draft, and submit to the Court, within 60 days, a proposal for how best to implement the State's lien on Trust property. Additionally, once the State of Utah has paid the Special Fiduciary the amounts owed, it may pursue its contribution claims against the State of Arizona and/or any other individuals, associations or entities it believes should be held responsible for the costs incurred in administering and defending the Trust.⁵

SO ORDERED this 22nd day of February, 2012.


Judge Denise P. Lindberg
District Court Judge



⁵Of course, while contribution actions against others (e.g., Warren Jeffs) may be brought in state court, as explained above, an action for contribution against the State of Arizona, that matter would have to be brought in the United States Supreme Court—the exclusive forum with jurisdiction over controversies between states.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 053900848 by the method and on the date specified.

MAIL: MARK PHILLIP BOOKHOLDER 1275 WEST WASHINGTON PHOENIX, AZ 85007

MAIL: JIM C BRADSHAW 10 W BROADWAY STE 210 SALT LAKE CITY UT 84101-1525

MAIL: STEPHEN C CLARK 170 SOUTH MAIN ST STE 1500 SALT LAKE CITY UT 84101-1020

MAIL: GREGORY N HOOLE 4276 HIGHLAND DR SALT LAKE CITY UT 84124-2210

MAIL: ROGER H HOOLE 4276 S HIGHLAND DR SALT LAKE CITY UT 84124

MAIL: JONI J JONES 160 E 300 S 6TH FLR POB 140856 SALT LAKE CITY UT 84114-0856

MAIL: KENNETH A OKAZAKI 170 S MAIN ST STE 1500 SALT LAKE CITY UT 84101

MAIL: JEFFREY L SHIELDS 10 E S TEMPLE STE 900 SALT LAKE CITY UT 84133

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MAIL: MICHAEL HINSON AZ OFFICE OF THE ATTORNEY GENERAL 177 N CHURCH AVE, STE 1105 TUCSON AZ 85701-1114

MAIL: MARK R. MOFFAT BROWN BRADSHAW & MOFFAT 10 W BROADWAY, STE 210 SALT LAKE CITY UT 84101

MAIL: RODNEY R. PARKER SNOW CHRISTENSEN & MARTINEAU PO BOX 45000 SALT LAKE CITY UT 84145

MAIL: RICHARD A VAN WAGONER SNOW CHRISTENSEN & MARTINEAU PO BOX 45000 SALT LAKE CITY UT 84145

MAIL: BRET W RAWSON STIRBA & ASSOCIATES PO BOX 810 SALT LAKE CITY UT 84110-0810

MAIL: R. BLAKE HAMILTON STIRBA & ASSOCIATES PO BOX 810 SALT LAKE CITY UT 84110-0810

Date: 02/22/2012

/s/ KRISTIN FERGUSON

Deputy Court Clerk

Addendum G

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

MAR 12 2012

SALT LAKE COUNTY

KF

IN THE MATTER OF THE UNITED
EFFORT PLAN TRUST

RULING AND ORDER RE: RE-
SUBMISSION OF D'ARCY DOWNS-
VOLLBRACHT'S BILLINGS

Case No. 053900848

Judge Denise P. Lindberg

Date: March 12, 2012

This matter is before the Court on the Special Fiduciary's Re-submission of D'Arcy Downs-Vollbracht's Billings. In its February 10, 2012, Ruling, the Court determined that the description of Downs-Vollbracht's work was "inadequate" and the Court was unable to determine a reasonable fee for her legal services. The Court directed the Special Fiduciary to resubmit appropriate billings within ten (10) business days of the Court's Ruling. The Special Fiduciary has now provided a more detailed affidavit from Ms. Downs-Vollbracht regarding her billings.¹

The Court has reviewed Ms. Downs-Vollbracht's new affidavit. While the information provided still lacks the amount of detail the Court generally expects to see in a request for attorney fees, the Court will accept the affidavit as sufficient for two reasons. First, the Utah Attorney General has affirmatively represented in his Response that he is "satisfied, based upon Ms. Downs-Vollbracht's detailed affidavit, that the work was reasonable and necessary." Second, it is clear that Ms. Downs-Vollbracht has not charged the UEP Trust for the majority of her work. Instead, she and the Special Fiduciary negotiated a significantly discounted flat fee for her work. Although the affidavit submitted by Ms. Downs-Vollbracht does not support an award of \$145,000, which she says she would have charged for all of her work, the information provided is sufficient to support the requested amount of \$44,541.00. Specifically, the affidavit demonstrates that it was reasonable for Ms. Downs-Vollbracht to charge \$250 per hour for her services, and that she worked in excess of 580 hours on these cases. While there is no specific breakdown of how those hours were spent, her negotiated agreement with the Special Fiduciary results in her actually billing for approximately 178.2 of the total hours spent. Given the complexity of the cases, the number of motions required to be filed, and the extensive amount of time that Ms. Downs-Vollbracht had to spend working with officials in Colorado City, the Court finds that 178.2 hours was a reasonable amount of time to work on these cases. Accordingly, the Court concludes that the negotiated fee of \$44,541.00 is fair and reasonable under the circumstances.

¹ The Ruling was signed and date stamped on February 10, 2012, but it was not mailed to the parties until February 13. To avoid an inequitable result, the Court clarifies that the Special Fiduciary's re-submission was due within ten business days of February 13. Thus, it was timely filed.

Pursuant to the Court's rulings dated August 1, 2011, and February 10, 2012, the Utah Attorney General is hereby ordered to pay \$44,541.00 to satisfy the legal fees submitted by Ms. Downs-Vollbracht. This fee award shall be added to the amount awarded in the February 10, 2012, Ruling. In all, the Utah Attorney General is hereby ordered to advance \$5,619,933.25 to satisfy the outstanding obligations attendant to the UEP Trust administration. The Utah Attorney General has affirmed under oath that he is not able to comply with the Court's order within the 90-day time line the Court had previously given. In order to allow the Attorney General adequate time to meet his obligation under this Ruling and Order, the Court hereby extends the deadline for payment to August 1, 2012.

The decision to hold the Utah Attorney General responsible for advancing these payments was not reached lightly. Courts exist to make difficult decisions, based on law and equity, that impose burdens and liabilities on parties. Here, as between the Utah Attorney General's Office on the one hand, and a small handful of individuals or businesses who (at the Attorney General's request) in good faith rendered services to the UEP Trust on the other, the Court has found that the balance of equities justify holding the Attorney General's Office responsible for these payments until such time as the pending litigation is finally resolved in the appellate courts. At that point, the Trust will be able to repay those advances. In the meantime, liens against UEP Trust property will secure the advances.

To be sure, the 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.


Finally, Ms. Downs-Vollbracht's fees was the only issue remaining to be decided in connection with the payment of UEP Trust's fees and costs. Therefore, this Ruling and Order shall stand as the final order of the Court on (1) the Special Fiduciary's Motion to Award Costs and Expenses from the State of Utah; (2) the Special Fiduciary's Motion to Approve Expenditures in Accountings; and (3) the Special Fiduciary's Re-submission of D'Arcy Downs-Vollbracht's Billings. No further order need be prepared by the parties on these Motions.

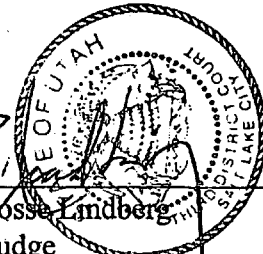
ORDER AND JUDGMENT

Judgment will enter in favor of the Special Fiduciary of the UEP Trust, and against the Utah Attorney General in his official capacity, in the amount of five million, six hundred nineteen thousand, nine hundred thirty three dollars and twenty five cents (\$5,619,933.25).

The Attorney General and the Special Fiduciary are directed to confer and recommend to the Court what liens on UEP property should enter to ensure repayment from Trust assets. The Court certifies that there is no just reason for delay and the judgment herein should enter as a final judgment pursuant to Utah R. Civ. P. 54(b) as this judgment fully disposes of the outstanding claims for fees and expenses of the UEP Trust through 2011.

DATED this 12th day of March, 2012.


Judge Denise Posse-Lindberg
Third District Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 053900848 by the method and on the date specified.

MAIL: MARK PHILLIP BOOKHOLDER 1275 WEST WASHINGTON PHOENIX, AZ 85007

MAIL: JIM C BRADSHAW 10 W BROADWAY STE 210 SALT LAKE CITY UT 84101-1525

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Date: 03/13/2012

/s/ KRISTIN FERGUSON

Deputy Court Clerk

Addendum H

FILED
UTAH APPELLATE COURTS

MAR - 5 2012

BRIDGET K. ROMANO # 6979

Utah Solicitor General

JONI A. JONES # 7562

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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.

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 of the Utah Rules of Appellate Procedure and Rule 65B(d)(2)(A) of the Rules of Civil Procedure, seek an extraordinary writ of mandamus declaring that Judge Lindberg's February 10, 2012 ruling that directs "[t]he State of Utah,

through its Attorney General,” to pay and therefore advance to the Special Fiduciary the sum of \$5,575,392.25 “within 90 (ninety) days of the entry” of that ruling, constitutes an invalid exercise of Judge Lindberg’s judicial authority. Namely, that ruling violates state constitutional separation of powers principles, and demands payment in a time and under terms that make it impossible for Utah’s Attorney General to comply. Further, consistent with appellate rules 8A and 19(b)(9), given the time-sensitive nature of the district court’s ruling, Petitioners similarly seek expedited consideration by and relief from this Court.

Interested Entities and Persons

According to Rule 19(b)(1), other persons or entities whose interests may be substantially affected by this Petition include: 1) the beneficiaries and participants of the Reformed UEP Trust; 2) the Special Fiduciary; 3) the Arizona Attorney General; 4) the Corporation of the President of the FLDS Church; and 5) other participants of the underlying case, *In the Matter of the United Effort Plan Trust*, Third District Court Probate No. 053900848.

Issues Presented

1. Whether the district court’s ruling that the State of Utah, through its Attorney General, advance and pay to the Special Fiduciary the substantial sum of \$5,575,392.25 on or before May 10, 2012, violates the constitutional separation of powers between the executive, legislative and judicial branches of Utah’s government.

2. Also, whether the district court's demand that within ninety days, Utah's Attorney General remit funds to Bruce Wisan that have not been appropriated to him under his current budget (FY 2011-2012) and that require a supplemental appropriation that the Utah State Legislature has not approved, constitutes an illegal order to which the Attorney General cannot comply.

Relief Sought

Without waiving their ability to directly challenge the basis for Judge Lindberg's several rulings once they are entered as final and conform to the rules, *see* discussion at pp. 10-14, *supra*, Petitioners ask this Court (1) to declare that the part of Judge Lindberg's ruling that directs the Attorney General to seek and the State of Utah to make a supplemental appropriation and substantial loan to the Special Fiduciary by a date certain violates Section I, Article 5 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 comply.

Statement of Facts Necessary to Understanding the Relief Sought.¹

Many of the facts underlying this matter are, by now, well-known to this Court. Petitioners therefore, only recite those facts necessary to the Court's decision here.

¹ For the convenience of this Court and related parties, Petitioners have attached in a separate Addenda all of the pleadings and orders referred to herein.

Pertinent facts can be summarized as follows:

In May 2005, the Utah Attorney General filed a petition in the Third District Court to protect the beneficiaries of a charitable trust and that sought (1) to remove trustees of the United Effort Plan (UEP) Trust based on breaches of their fiduciary duty; (2) to compel Warren Jeffs and the other trustees to appear and to file an inventory, report, and accounting of the Trust, and (3) to appoint a special fiduciary pending the appointment of successor trustees. *See Addendum A, Petition in the Matter of the United Effort Plan Trust.*

On June 22, 2005, Third District Court Judge Denise Lindberg appointed Bruce Wisan as the Special Fiduciary of the UEP Trust, pending later appointment of successor trustees. Also by that order – and a subsequent order entered in September 2005 – the district court directed that Mr. Wisan’s authority be “subject to and limited by the availability of funds in the Trust estate to reimburse the special fiduciary for costs, fees and other approved expenses incurred by the special fiduciary and his attorneys.” *See Addendum B, Memorandum Decision and Order Appointing Special Fiduciary, dated June 22, 2005.*

Mr. Wisan first reported to the Court on August 2, 2005, and detailed that apart from real property, the Trust had no liquid assets; namely, the Trust held no cash, personal property, or income, and also, the Trust had no source of income. In his report,

Mr. Wisan recommended that the district court delay its appointment of successor trustees, and appoint an advisory board instead. *See Addendum C*, Report and Recommendation of Bruce Wisan, dated August 2, 2005.

Three weeks later, on August 18, Mr. Wisan recommended that the district court reform the UEP Trust. His reasons were several, but centered on the fact the former trustees, comprised of FLDS Church leaders, had ignored all previous court orders and appeared to have abandoned the Trust, and on the fact that 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.

The Attorney General did not oppose that request, but recommended that the Court set a briefing schedule so other, interested parties could be heard. The Court declined to do so, and instead issued a memorandum decision and ruling that the Trust be reformed and set out a framework to accomplish that task. Accordingly, Mr. Wisan submitted a response and proposed form of the reformed trust that the Court approved by memorandum decision dated December 13, 2005. *See Addendum E*, Memorandum Decision and Order, dated December 13, 2005.

Throughout, 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. Those fees have ebbed over time, and Mr. Wisan has been paid, in part, a portion of the fees directly from Trust proceeds. But since July 2008 – when the FLDS Church began to defend its positions in court – and spurred on by multiple actions in Utah’s state and federal courts, the cost of administering the Trust has grown significantly.²

Despite that escalation, the Special Fiduciary did not submit regular accountings or seek interim orders directing payment from the Trust. But for more than three years, Mr. Wisan submitted no bills, no accountings, and no requests for payment.³

Then, on May 27, 2011, through counsel and under Utah Code Ann. § 75-7-1004(1) (West 2004), Mr. Wisan moved the district court for an order directing the State of Utah to advance an estimated \$4.6 million to the Special Fiduciary as a loan secured by a lien on the 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*,

² Many of those actions have been filed in this Court. *See e.g., Snow, Christensen & Martineau, et al. v. Lindberg*, Case No. 20080928-SC; *In the Matter of the United Effort Plan Trust*, Case No., 20090691-SC; and petition for extraordinary writ filed by Hildale and Colorado cities, Case No. 20090781-SC.

³ Prior to May 2011, Wisan last-submitted a fee application in July 2008, which covered his fees for the months of February, March and April 2008. The Attorney General directly questioned that practice in email correspondence sent to the Special Fiduciary’s counsel that requested that the Fiduciary submit his fee applications.. *See Add. O*, at Ex. A, attached thereto.

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**.

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. In sum, the district court ruled:

The Special Fiduciary's Motion is GRANTED. As to those fees previously approved by the Court⁴ 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.

⁴ The fees the Fiduciary last submitted to the court in July 2008 and that detailed his expenses through April of that year. *See supra*, n. 3.

Add. I at p. 7.

On receipt of this ruling and to resolve the pending controversy, the State, through its Attorney General and the AAG's assigned to this matter, undertook discussions with the Special Fiduciary and his counsel, and with counsel for FLDS Church.⁵ Those efforts proved fruitless and 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.

A week later, on November 23, 2011, Petitioners filed a motion and supporting memorandum asking Judge Lindberg to reconsider her August 1 ruling. *See Addendum K*. Without calling for a response from the Special Fiduciary, the district court elected "not to entertain" the State's motion and therefore denied it. *See Addendum L*, Ruling Denying State's Motion to Reconsider Ruling Awarding Costs and Expenses Against the State and Denying Motion for Over-length Memorandum in Support of Reconsideration Motion, dated December 2, 2011.

And despite their request that Judge Lindberg reconsider her ruling in the first

⁵ Assistant Utah AG's also contacted their counterparts in the State of Arizona to seek a resolution; however, at a later date.

instance, Petitioners began to review Mr. Wisan's several accountings, which spanned more than 2000 pages, included the work of more than 70 individuals, and delineated thousands of individual time entries. Accordingly, on November 28, Petitioners moved for a 90-day extension of time to complete their review of those accountings, and also, to conduct discovery and retain an expert as necessary to aid Petitioners' response to the Special Fiduciary's motion to approve his expenditures. *See Addendum M.* The Fiduciary opposed the request and the district court denied it. *See Addendum N and P,* Special Fiduciary's opposition memorandum, and January 4, 2012 Ruling re: motion, respectively.

In its January 4 ruling, the district court called for Petitioners' objections 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. Thereafter, Petitioners submitted their objections and the Fiduciary his reply. *See Addendum Q and R,* respectively.

As signaled by her prior ruling, 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. S at p. 19 (emphasis in original).⁶

This Writ Should Issue Because No Plain, Speedy or Adequate Remedy Now Exists

Petitioners do not take this step lightly, but they seek extraordinary relief now and on a limited basis, because none of Judge Lindberg's rulings comply with Rule 7(f)(2) of the Utah Rules of Civil Procedure and this Court's several decisions thereunder; and too, because those rulings fail this Court's final judgment rule. Accordingly, those rulings have not yet been entered as final and are therefore insufficient to invoke this Court's subject matter jurisdiction.

Utah Civil Rule 7(f)(2) states

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

⁶ The district court did reject \$65,097.15 in fees that Wisan requested, but the court indicated in a footnote that that reduction included the full amount of fees the Fiduciary claimed were owed to an attorney that Mr. Wisan retained to represent himself and others in an Arizona criminal matter. In her February 10 Order, the district court granted the Special Fiduciary leave to resubmit a full accounting of those fees, together with proper support, indicating the court would enter *another and further* order directing the Attorney General to forward timely payment as subsequently determined by the court.

On February 28, 2012, Mr. Wisan filed an additional accounting and request for those fees, which total more than \$49,000. The time for Petitioners to review and object to that request has not yet run.

days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision.

Id. Interpreting that rule, this Court has held “whenever” a district court “intends any ‘document’ to constitute its final action, the court must explicitly direct that no additional order is necessary.” *Guisti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶ 32, 201 P.3d 966; *see also Code v. Utah Dep’t of Health*, 2007 UT 43, 162 P.3d 1097. Otherwise, when a district court does not expressly direct that its order is the final order of the court, rule 7(f)(2) requires the “prevailing party” to prepare and file a final order to trigger finality for purposes of appeal. *See Guisti*, 2009 UT 2, ¶ 30.

The rule is clear. A prevailing party *shall* prepare for entry a proposed order in conformity with the court's decision. There are only two exceptions to this mandate. First, if the court approved a proposed order that is submitted with an initial memorandum, then no additional order is necessary. Second, if the court directs that no additional order is necessary, then none is.

Id. ¶ 27. This case satisfies neither condition. First, at no time did the Special Fiduciary submit the form of a proposed order with his several motions. Nor has he submitted a proposed order within 15 days of Judge Lindberg's several rulings in his favor. Too, Judge Lindberg did not direct, as rule 7 and this Court's pronouncements clearly require, that no further order is required. Nor could she; because just as the district court's several orders fail the requirements of rule 7 and this Court's decisions in *Code* and *Guisti*, they fail this Court's final judgment rule.

In general application, that rule provides

For an order or judgment to be final, it must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case. In other words, it must ‘end the controversy between the litigants, leav[ing] nothing for the court to do but execute the judgment.

Powell v. Cannon, 2008 UT 19, ¶ 11, 179 P.3d 799 (internal quotation marks and citations omitted) (alteration in original); see e.g., *Loffredo v. Holt*, 2001 UT 97, ¶ 11, 37 P.3d 1070. And, where as here, a trial court has entered its ruling, and ordered a party to pay an as-yet-to-be determined amount as costs or fees, this Court has stated that the trial court “must determine the amount of attorney fees awardable to a party before the judgment becomes final for purposes of an appeal.” *ProMax Dev. Corp. v. Railes*, 2000 UT 4, ¶ 15, 998 P.2d 254. But,

[w]here attorney fees are awarded to a party whether denominated as an item of ‘costs’ or not, and the amount is not stated in the judgment rendered on the merits of the case, and evidence must be taken afterwards by the trial court whether by affidavit or live testimony, there is no final judgment for the purposes of appeal until the amount of the fees has been ascertained and granted.

Id. at ¶ 12; see *In re. S.M., et al.*, 2006 UT 75, ¶ 7, 154 P.3d 787 (“[u]nquestionably” finding order non-final where fees were to be determined on trial court’s consideration of later-filed affidavits and objections thereto).

By their own terms, the district court’s several orders fail this maxim. To date,

none of Judge Lindberg's orders have extinguished the controversy surrounding Mr. Wisan's fees. But each order has failed to denominate a final fee award, because each order has reserved for another day the calculation of additional costs and fees.⁷ See Add I, Ruling at 7 ("As to the expenditures incurred after the Court's last review of fee request, 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 those fees."); also Add. S, Ruling at 19 ("Subject to timely submission of an amended fee request, the Court reserves for further determination the amount of fees payable to Downs-Vollbracht for services rendered in representing the Special Fiduciary and other Trust employees in defending against criminal charges brought against them . . . Once the Court has made a final determination on the reserved fees, the Attorney General will be required to forward timely payment of those additional fees as may be ordered by the Court.")

The final judgment rule is jurisdictional. See, e.g., *Loffredo*, 2001 UT 97, ¶ 11; *Bradbury v. Valencia*, 2000 UT 50, ¶ 9, 5 P.3d 649; *A.J. Mackay Co. v. Okland Constr.*

⁷ In *DFI Properties, LLC v. GR 2 Enterprises, LLC*, 2010 UT 61, ¶ 18, 242 P.3d 781, this Court underscored that to deviate from the final judgment would permit piecemeal appeals, and "place an unmanageable strain on the judicial system, because every case involving attorney fees could potentially be the genesis of two [and here, perhaps, four] separate appeals – one related to the merits and one appeal related to the attorney fee award."

Co., 817 P.2d 323, 325 (Utah 1991).⁸ Petitioners may not waive it. Because, in the absence of a final judgment this Court lacks jurisdiction to consider a direct appeal under Rule 4 of the Utah Rule of Appellate Procedure, Petitioners possess no other plain, speedy or adequate remedy as a matter of law.

The Facts Justify this Court's Expedited Consideration.

Finally, in accordance with appellate rule 8A(b)(5), Petitioners submit that in addition to the foregoing, the time constraints imbedded in the district court's orders – directing payment within 90 days (i.e., on or before May 10, 2012) and therefore demanding a supplemental appropriation by close of the 2012 legislative session (i.e., on or before midnight, March 9, 2012), compel this Court's expedited handling of the present matter.

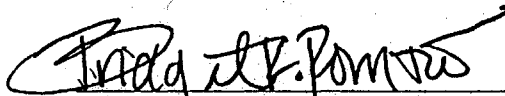
CONCLUSION

For the foregoing and based also on the memorandum of points and authorities filed herewith, the State of Utah and its Attorney General, Mark L. Shurtleff, request that this Court grants them an extraordinary writ that declares that the part of the district court's order that commands payment within ninety days by means of a specific appropriation violates Utah's constitutional separation of powers clause, and also, that

⁸ The rule also promotes judicial economy because it "saves this [C]ourt from having to deal with 'piecemeal appeals in the same litigation.'" *Loffredo*, 2001 UT 97, ¶11 (quoting *Kennedy v. New Era Indus., Inc.*, 600 P.2d 534, 535 (Utah 1979)).

restrains and enjoins further action in the district court based on the Attorney General's actual inability to comply with district court's mandate.

Respectfully submitted this 5th day of March, 2012.

A handwritten signature in black ink, appearing to read "Bridget K. Romano", written over a horizontal line.

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 PETITION FOR EXTRAORDINARY WRIT and EXPEDITED RELIEF, with its ADDENDA, to be sent by overnight mail to:

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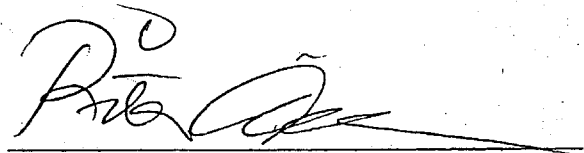
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Addendum I

IN THE UTAH SUPREME COURT

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FILED
UTAH APPELLATE COURTS

APR 19 2012

State of Utah and Mark L.
Shurtleff, Utah Attorney General,

Petitioner,

v.

Case No. 20120161-SC

Honorable Denise P. Lindberg,
Third District Court Judge,

Respondent.

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

Respondent.

ORDER

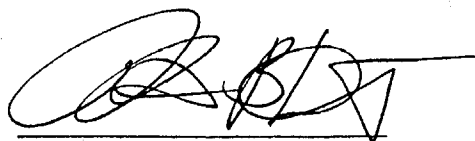
This matter is before the court upon a Petition for Extraordinary Writ, filed on March 5, 2012.

The Court having determined, pursuant to URCP 65B, that a "plain, speedy and adequate remedy" is available in this matter, the Petition for Extraordinary Relief is dismissed.

For The Court:

4-19-12

Date



Matthew B. Durrant
Chief Justice

Addendum J

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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The Fundamentalist Church
of Jesus Christ of Latter-Day
Saints, an association of
individuals,
Petitioner,

No. 20090859

v.

The Honorable Denise P. Lindberg,
Third District Court Judge,
Respondent.

F I L E D

August 27, 2010

Original Proceeding in this Court

Attorneys: Kenneth A. Okazaki, Stephen C. Clark, Richard A. Van
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Brent M. Johnson, Salt Lake City, for respondent
Mark L. Shurtleff, Att'y Gen., Annina M. Mitchell,
Randy S. Hunter, Timothy A. Bodily, Asst. Att'ys
Gen., Salt Lake City, for State of Utah
Mark L. Callister, Jeffrey L. Shields, Michael D.
Stanger, Spencer E. Austin, Mark W. Dykes, Brandon J.
Mark, Salt Lake City, for United Effort Plan Trust by
Bruce R. Wisan
Roger H. Hoole, Gregory N. Hoole, Salt Lake City, for
Richard Jessop Ream, et al.
Michael D. Zimmerman, Salt Lake City, for Dan
Johnson, Merlin Jessop, and William E. Jessop
Peter Stirba, Meb W. Anderson, R. Blake Hamilton,
Salt Lake City, for Hilldale City, Colorado City, and
Helaman Barlow
J. Ryan Mitchell, Salt Lake City, for Harker Dairy,
LLC
Terry Goddard, Att'y Gen., William A. Richards, Chad
B. Sampson, Asst. Att'ys Gen., Phoenix, AZ, for State
of Arizona

INTRODUCTION

¶1 This case concerns the United Effort Plan Trust ("UEP Trust" or "Trust")--a trust originally formed in 1942 by what petitioners characterize as a fundamentalist religious group that was the predecessor of the Fundamentalist Church of Jesus Christ of Latter-Day Saints. The Trust was modified in 1998 so that it qualified as a charitable trust under Utah law. In 2006, the Utah Third District Court issued an order that modified the Trust again. This order was not appealed or otherwise challenged for nearly three years. In a petition for extraordinary writ, an association of members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (the "FLDS Association")¹ challenges the district court's modification and subsequent administration of this Trust as unconstitutional and in violation of Utah law. We hold that because the FLDS Association has delayed this challenge for nearly three years, and because during this time, many parties have engaged in numerous transactions in reliance on the Trust's modification, the FLDS Association's trust modification claims are barred by the equitable doctrine of laches. We also hold that all of the FLDS Association's remaining claims regarding trust administration, except one, are also barred by laches because they involve the same delay and prejudice as the modification claim. The claim that is not barred by laches is barred because it is not ripe for adjudication.

BACKGROUND

¶2 In 1942, the spiritual leadership of a fundamentalist religious movement called the "Priesthood Work" formed the United Effort Plan Trust. The UEP Trust stated that its purpose was "charitable and philanthropic," but conditioned membership in the Trust upon "consecration" of real and mixed property to the Trust. For this fundamentalist group--predecessors of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (the "FLDS Church" or "Church")--consecration was an act of faith whereby members deeded their property to the UEP Trust to be managed by Church leaders. Church leaders, who were also

¹ The FLDS Association currently petitioning is not the FLDS Church, nor the corporation of that church's president. Rather, the association describes itself as "The Fundamentalist Church of Jesus Christ of Latter-Day Saints, an association of individuals."

trustees, then used this property to minister to the needs of the members.

¶3 In 1986, some Trust property residents sued the UEP trustees for breach of fiduciary duty. The district court rejected those claims, finding that since the UEP Trust was charitable rather than private, the plaintiffs lacked standing to sue. In 1998, we reversed the district court's holding that the Trust was charitable.² We first noted that charitable trusts differ from private trusts because "'in a private trust[,] property is devoted to the use of specified persons who are designated as beneficiaries of the trust; whereas a charitable trust has as a beneficiary a definite class and indefinite beneficiaries within the definite class, and the purpose is beneficial to the community.'" ³ We then found that the UEP Trust was not a charitable trust because it was intended, from its inception, to benefit specified persons, namely the Trust's founders.⁴

¶4 In response to our decision, Rulon Jeffs, the sole surviving founder and beneficiary of the 1942 Trust, acting for himself and also in his capacity as president and Corporation Sole of the FLDS Church, along with the other trustees, executed the "Amended and Restated Declaration of Trust of the United Effort Plan" (the "1998 Restatement"). It is not disputed that the 1998 Restatement of the 1942 UEP Trust qualifies as a charitable trust. It broadened the class of beneficiaries beyond the founders of the Trust to all of those who "consecrate their lives, time[,], talents, and resources to the building and establishment of the Kingdom of God on Earth under the direction of the President of the [FLDS] church." The 1998 Restatement provided that "in the event of termination of this Trust, whether by the Board of Trustees or by reason of law, the assets of the Trust Estate at that time shall become the property of the Corporation of the President of the [FLDS Church]."

¶5 In 2004, then-FLDS Church president, Warren Jeffs, the Trust, and the FLDS Church were sued in two separate tort actions: the first action alleged child sexual abuse, assault, and fraud primarily against Warren Jeffs; the second alleged

² Jeffs v. Stubbs, 970 P.2d 1234, 1239 (Utah 1998).

³ Id. at 1252 (emphasis added) (quoting Olivas v. Bd. of Nat'l Missions of Presbyterian Church, 405 P.2d 481, 485 (Ariz. Ct. App. 1965)).

⁴ Id. at 1252-53.

civil conspiracy, fraud, breach of fiduciary duties, and other torts against Warren Jeffs, the FLDS Church, and the Trust. Rodney Parker of the law firm of Snow, Christensen & Martineau served as attorney for the Trust and the FLDS Church in these actions until he withdrew because his clients insisted upon a course of conduct with which he fundamentally disagreed, and because his clients had discharged him. Warren Jeffs, as controlling trustee, did not appoint a substitute attorney to defend the Trust in the litigation, leaving the Trust vulnerable to default judgments against it.

¶6 With this concern in mind, Mr. Parker filed motions in the district court asking the court to give notice to the Utah Attorney General ("Utah AG") and the Trust land residents before entering a default judgment against the Trust. In response, the Utah AG petitioned the district court for (1) removal of the trustees for breach of fiduciary duty; (2) an order compelling Warren Jeffs and the other trustees to appear and file an inventory, final report, and accounting of the administration of the Trust; and (3) appointment of a special fiduciary to serve until new trustees were appointed. The Utah AG's petition was filed in May 2005. Personal service was made on those trustees who could be found. Trustees who could not be served personally were served via substitute service. Publications were made where Trust participants resided.

¶7 In a June 2005 preliminary injunction, the district court suspended the trustees and appointed a special fiduciary for the Trust. The special fiduciary's powers and authority were outlined in various district court orders. The district court gave the special fiduciary authority to act on behalf of the Trust. The district court also ordered the suspended trustees to prepare an accounting, deliver records, and cooperate with the fiduciary, but the suspended trustees failed to comply with this order. The district court asked the special fiduciary to prepare a memorandum identifying issues the court needed to address before appointing new trustees. Ultimately, the special fiduciary expressed concern in a memorandum filed with the district court that the Trust needed to be reformed if new trustees were to be appointed.

¶8 On December 13, 2005, the district court entered an order that concluded the Trust could be reformed so that the special fiduciary could administer the Trust to meet the "just wants and needs" of the beneficiaries according to neutral, nonreligious principles. The district court cited Utah Code section 75-7-413 as its authority to use the doctrine of cy pres to modify the Trust. Cy pres is a common-law doctrine, now

adopted by statute in Utah Code section 75-7-413, that courts may apply when a charitable purpose of a trust "becomes unlawful, impracticable, impossible to achieve, or wasteful."⁵ Rather than allowing the Trust to fail in these situations, under the common law, courts would apply the trust "'to other charitable objects lawful in their character, but corresponding, as near as may be to the original intention of the [settlor].'"⁶ The Utah Code's similar language allows a court faced with a trust whose purpose has become "unlawful, impracticable, impossible to achieve, or wasteful . . . to modify or terminate the trust by directing that the trust property be applied or distributed . . . in a manner consistent with the settlor's charitable purposes."⁷

¶9 The district court listed two reasons for using cy pres to reform the Trust. First, the court found that the trustees had breached their fiduciary duties of loyalty and prudent trust administration. Second, it found several Trust provisions to be "fundamentally flawed and unworkable."

¶10 The following three principles guided the district court's reformation of the Trust: First, the court would attempt to preserve the Trust's charitable intent. Second, the court would only give effect to the Trust's legitimate and legal purposes. Finally, the court would employ "neutral principles of law."

¶11 To meet its first goal of preserving the Trust's charitable intent, the district court had to first identify that intent. It characterized the 1998 Restatement as having at least two purposes: first, the Trust was to advance the religious doctrines and goals of the FLDS Church; and second, the Trust was to provide for the just wants and needs of the FLDS Church members. The FLDS Association characterizes each of these goals as religious because participation in the Trust was conditioned upon living according to Church principles, with the president of the FLDS Church being the ultimate arbiter of individual righteousness.

⁵ Utah Code Ann. § 75-7-413(1) (Supp. 2010); see also In re Gerber, 652 P.2d 937, 939-40 & n.4 (Utah 1982) (explaining the history of the common-law cy pres doctrine).

⁶ Gerber, 652 P.2d at 939 (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56 (1890)).

⁷ Utah Code Ann. § 75-7-413(1)(c).

¶12 Using the second of its principles--to give effect only to the Trust's legitimate and legal purposes--the district court held that it could reform the Trust by excising the purpose of advancing the religious doctrines and goals of the FLDS Church to the degree that any of these were illegal. As examples of illegal doctrines it could not sanction, the district court listed "polygamy, bigamy, [and] sexual activity between adults and minors." The court instead focused its reformation on preserving the Trust's goal of providing for the just wants and needs of Trust participants, which it held was a "lawful religious purpose[]."

¶13 Despite finding a "lawful religious purpose," the third of the district court's principles mandated that the court reform the Trust using "neutral principles." The court understood this to mean that it could not resolve property disputes on the basis of religious doctrine. The district court's memorandum decision states,

[C]ourts are prohibited by the First Amendment from resolving "rights to the use and control of church property on the basis of a judicial determination that one group of claimants has adhered faithfully to the fundamental faiths, doctrines and practices of the church . . . while the other group of claimants has departed substantially therefrom." In short, courts must separate that which is primarily ecclesiastical from that which is primarily secular, and must defer to ecclesiastical authority for ecclesiastical determinations.

But the district court felt that if FLDS ecclesiastical leaders were able to make ecclesiastical determinations about who participated in the Trust, many former or disaffected members of the FLDS Church who consecrated property to the Trust "could be excluded from consideration notwithstanding their prior consecrations to the Trust." The district court found this unacceptable. It resolved that the Trust needed to be modified so that the role of ecclesiastical leaders would be to provide "non-binding input" to future trustees. These trustees would then use a neutral set of criteria and their own "good judgment"--informed but not bound by FLDS ecclesiastical advice--to determine the "just wants and needs" of the beneficiaries.

¶14 Ultimately, the district court concluded that implementation of these principles would require modifying each

section of the Trust. These modifications included the following: stating that Trust property would only be used in furtherance of "legitimate Trust purposes" as identified by the court; allowing FLDS leaders to offer their nonbinding input, but granting the Board of Trustees the ultimate authority to determine who would be allowed to live on Trust property and what the Trust property residents' just wants and needs were; limiting the Board's power to order relocation or property sharing among Trust property residents to situations where the relocation arrangement was "necessary for legitimate Trust administration reasons"; and deleting or modifying the Trust's requirement that occupants of Trust land live according to Church doctrine. The goal of the district court was unambiguous: "A clear division must exist between the authority of the Board to act with respect to the Trust, and the authority of the priesthood to act with respect to the [FLDS Church] Plan."

¶15 The district court decided that the Trust's third section would also need to be modified to strip the FLDS Church president of several powers under the Trust. First, the district court would remove any requirement that the president of the FLDS Church approve any Board action. Since the 1998 Restatement gave the FLDS Church president power to appoint and remove trustees, the district court invited interested parties to suggest Trust modifications that would allow for a different method of appointing and removing trustees. Second, the district court modified the Trust to remove the president of the Church as trustee and as president of the Board of Trustees. The court felt this modification was necessary because it had just suspended Warren Jeffs, the FLDS president, as a trustee and because it wanted to keep the Church and the Church Plan separate from the Trust. Finally, the district court found that a reversionary clause that would cause the Trust to revert to the FLDS president in the event of termination needed to be altered because the court had just suspended the FLDS president's trusteeship for violation of his fiduciary duties to Trust beneficiaries, and because, in the event of reversion, the Trust assets might be used to further illegal FLDS practices.

¶16 In its order, the district court invited suggestions for reformation of the 1998 Restatement. It also formed an advisory board to aid the special fiduciary in administration of the Trust until trustees could be appointed. It was understood that the court would consider the members of the advisory board as candidates to become trustees. There were no active FLDS members on the advisory board. On October 25, 2006, the court entered an order reforming the Trust (the "2006 Reformed Trust"). This order was not appealed.

¶17 The 2006 Reformed Trust contains over 175 paragraphs compared to seventeen in the 1998 Restatement. The FLDS Association complains that those who had sued the UEP Trust took the "laboring oar" in drafting the 2006 Reformed Trust, and that their goal was to transform the FLDS culture and to liberate a people they felt belonged to a dangerous cult. The FLDS Association also complains that the religious mission and purpose of the Trust have been removed--that what was "fundamentally a religious institution guided by divine inspiration" is now its "wholly secular mirror image." The FLDS Association feels that the 2006 Reformation suppresses the FLDS Church's role "as the spiritual and economic center of life in the communit[y]."

¶18 The district court has retained jurisdiction over the administration of the Trust. It has instituted a process that allows Trust participants to petition to have the houses they live in distributed to them. The district court has expressed in a hearing that FLDS Church members are free to deed their houses over to any religious leader of their choice following distribution. Over the four-and-a-half years of the special fiduciary's administration, he has filed numerous reports with the district court. Some of the challenges the special fiduciary has faced in administering the Trust include the fact that Trust property has not been subdivided and multiple residents often live on one tax parcel. These conditions have complicated liquidation and distribution of Trust property. For instance, because the Trust's real property consists of several large parcels of land often containing several residences, if one of a parcel's residents fails to pay taxes, the parcel's other residents could face tax liens even if they have paid their fair share. The special fiduciary also complains that the suspended trustees' failure to cooperate with him has caused the fiduciary to expend significant time and effort to obtain information and records about the Trust and its property and that he has incurred significant costs and expense in discovering this information. He further asserts that the suspended trustees have actively interfered with his administration of the Trust.

¶19 But the FLDS Association, in turn, alleges that the district court and special fiduciary have engaged in religiously discriminatory behavior. The FLDS Association alleges that the special fiduciary has made numerous offensive and religiously discriminatory remarks, including characterizing FLDS Church leaders' determination of "just wants and needs" pursuant to scripture and revelation as the "whim of leadership," and "discriminating on the basis of religion"; referring to himself as the "State-Ordained Bishop" or "SOB" as a way of mocking the

FLDS faith; and describing the process of Trust administration as a "sociological and psychological war" with the FLDS Association. The FLDS Association also alleges that, despite claims to the contrary and due to a fear of creating a "UEP II," the district court and the special fiduciary plan to implement a religious test to distribute Trust assets that would award outright deeds to non-FLDS Trust participants, but would impose a spendthrift trust on any Trust participant likely to donate Trust distributions to the FLDS Church.

¶20 On October 20, 2009, the FLDS Association brought these allegations to this court in a petition for extraordinary writ, filed under Utah Rule of Civil Procedure 65B. The petition asks this court to do the following: find that the district court's actions have violated FLDS Church members' First Amendment rights and their rights under Utah's constitution, declare that certain sections of Utah's Uniform Trust Code are unconstitutional as applied to the FLDS Association, enjoin the district court from taking further action in the underlying UEP Trust litigation, declare the district court's reformation of the Trust unconstitutional, terminate the reformed Trust, overturn the district court's authorization to sell certain Trust property deemed sacred by the FLDS Association, terminate the appointment of the special fiduciary, and provide any other appropriate relief. Willie Jessop, a representative of the FLDS Association and a member of the FLDS Church, filed an affidavit with this petition outlining FLDS religious beliefs and what are in his view intrusions by the district court and the special fiduciary into Mr. Jessop's practice of these beliefs. The FLDS Association has also filed a substantially similar lawsuit along with a substantially similar affidavit by Willie Jessop in federal district court.

¶21 The original interested individuals who sued the Trust in 2004 (the "Original Interested Individuals"), the Utah AG, the Arizona Attorney General (the "Arizona AG"), and the UEP Trust through the special fiduciary all filed oppositions to the FLDS Association's Petition for Extraordinary Writ. Among other things, they have alleged that the FLDS Association lacks standing, that it has other plain, speedy, and adequate remedies available, and that laches bar the FLDS Association's claims.

¶22 The FLDS Association then filed a rule 8A petition with this court for emergency relief. This petition centered around three separate actions taken by the district court and the special fiduciary. First, the district court had allowed the special fiduciary to begin seeking buyers for certain Trust property the FLDS Association claimed was sacred. Second, the

special fiduciary had sold some of the Trust's dairy cows subject to a right to repurchase that was set to expire. Third, the district court had entered an order that asked the Utah AG and the special fiduciary to submit suggestions under seal regarding how the Trust could be administered in such a way that might avoid the kind of extensive litigation that continued to ensue. The FLDS Association's petition asked us to stop the sale of the Trust property they deemed sacred, extend the time for repurchase of the dairy cows, and reverse the district court's order that sealed the submissions by the Utah AG and the special fiduciary. The petition for emergency relief drew responses from the special fiduciary on behalf of the UEP Trust, Harker Dairy (the purchaser of the cows), the "Twin Cities" (Hilldale and Colorado City), and the Arizona AG. We denied the FLDS Association's Petition for Emergency Relief.⁸

¶23 We now address the FLDS Association's rule 65B Petition for Extraordinary Writ. We have jurisdiction pursuant to Utah Code section 78A-3-102(2) (Supp. 2010).

STANDARD OF REVIEW

¶24 The FLDS Association bases its petition on rule 65B, which states that, so long as "no other plain, speedy and adequate remedy is available, . . . relief may be granted . . . where an inferior court . . . has exceeded its jurisdiction or

⁸ The FLDS Association's petitions and the responses thereto have spawned additional litigation. The Utah AG has moved to strike the response of the Twin Cities, which we granted to the degree that the Twin Cities brought new claims, and otherwise deferred. The Utah AG also moved to strike a supplement that added Lyle Jeffs and Willie Jessop as named petitioners in this action. We have deferred this motion. The FLDS Association has moved to strike exhibits and related arguments in the Utah AG's and special fiduciary's responses. We have deferred this motion. The Original Interested Individuals have moved to transmit the record of proceedings below. The FLDS Association has opposed this motion, and we have deferred it. Because of our resolution in this case, we find it unnecessary to rule on any of these deferred motions. Additionally, on August 19, 2010, the FLDS Association filed a Petition for Emergency Relief asking this court to enjoin the Third District Court from administering the UEP Trust until we render our decision in this case. The Utah AG, the Arizona AG, and the UEP Trust through the Special Fiduciary opposed this petition. The issuance of this opinion renders ruling on that petition unnecessary.

abused its discretion.”⁹ Specifically, the FLDS Association alleges that the district court “committed an unprecedented abuse of discretion” when it reformed the UEP Trust. But parties who file petitions for extraordinary writ under Utah Rule of Civil Procedure 65B have “no right to receive a remedy that corrects a lower court’s mishandling of a particular case.”¹⁰ So even if the FLDS Association shows that the district court abused its discretion, extraordinary “[r]elief under rule 65B(d)(2) is completely at the discretion of [this court].”¹¹ Several factors inform our discretion to grant extraordinary relief, including the “egregiousness of the alleged error, the significance of the legal issue presented by the petition, the severity of the consequences occasioned by the alleged error,” and any additional factors that may be regarded as important to the case’s outcome.”¹² While “there is no fixed limitation period governing the time for filing [extraordinary writs],” they “should be filed within a reasonable time after the act complained of has been done or refused,” and “the equitable doctrine of laches is available to dismiss untimely writs.”¹³

ANALYSIS

¶25 The FLDS Association’s claims fall into two broad categories: first, that the district court’s modification of the UEP Trust violated Utah law and the FLDS Association’s members’ constitutional rights; and second, that during the district court’s ongoing administration of the Trust, the district court and the special fiduciary have engaged in conduct that also violates the FLDS Association’s members’ constitutional rights. In Part I, we hold that the FLDS Association’s claims regarding the district court’s modification of the Trust are barred by the equitable doctrine of laches. In Part II, we hold that all of the FLDS Association’s remaining claims regarding the Trust’s administration, except one, are also barred by laches. The claim that is not barred by laches is not ripe for our consideration.

⁹ Utah R. Civ. P. 65B(a), (d)(2) (emphasis added).

¹⁰ State v. Laycock, 2009 UT 53, ¶ 7, 214 P.3d 104 (quoting State v. Barrett, 2005 UT 88, ¶ 23, 127 P.3d 682).

¹¹ Id. ¶ 8.

¹² Id. ¶ 9 (quoting Barrett, 2005 UT 88, ¶ 24).

¹³ Renn v. Utah State Bd. of Pardons, 904 P.2d 677, 684 (Utah 1995).

I. THE FLDS ASSOCIATION'S CLAIMS REGARDING TRUST MODIFICATION
ARE BARRED BY LACHES BECAUSE OF THE FLDS ASSOCIATION'S DELAY IN
FILING THE CLAIMS AND THE PREJUDICE THAT HAS RESULTED

¶26 Because the FLDS Association has waited nearly three years from the date the district court modified the UEP Trust to challenge its modification and, in the interim, transactions have occurred and other parties have acted in reliance on the Trust's modification, the FLDS Association's claims are barred by the equitable doctrine of laches. The FLDS Association asserts that the district court modified the Trust in violation of Utah law and the federal and state constitutions, and that the continued administration of the Trust violates their constitutional rights. Despite the potential merit of these claims, the district court's order was never appealed, and the FLDS Association has waited nearly three years from the date of the Trust's modification to bring its case to this court. During this time, countless transactions have taken place in reliance on the Trust's modification. Accordingly, we dismiss these claims pursuant to the doctrine of laches.

¶27 There is no statute of limitations for bringing a rule 65B claim, but such claims "should be filed within a reasonable time after the act complained of has been done or refused."¹⁴ And although laches is most often thought of as an affirmative defense to untimely claims brought by a plaintiff, we have held that "the equitable doctrine of laches is available to dismiss untimely writs."¹⁵ We have called laches "'delay that works a disadvantage to another.'"¹⁶ So, laches has two elements: (1) a party's lack of diligence and (2) an injury resulting from that lack of diligence.¹⁷

¶28 The length of time that constitutes a lack of diligence "depend[s] on the circumstances of each case," because "the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered . . . and the length of [the]

¹⁴ Renn v. Utah State Bd. of Pardons, 904 P.2d 677, 684 (Utah 1995).

¹⁵ Id.

¹⁶ Angelos v. First Interstate Bank, 671 P.2d 772, 777 (Utah 1983) (quoting Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1260 (Utah 1975)).

¹⁷ Id.

delay."¹⁸ In determining whether to apply the doctrine of laches, we consider the relative harm caused by the petitioner's delay, the relative harm to the petitioner, and whether or not the respondent acted in good faith.¹⁹ Further, "reasonable delay caused by an effort to settle a dispute does not invoke the doctrine of laches."²⁰

¶29 In our 1975 case, Papanikolas Bros. Enterprises v. Sugarhouse Shopping Center Associates, we thoroughly explored the way Utah courts apply the doctrine of laches. There we held that a district court did not abuse its discretion in finding that the plaintiffs' claims were not barred by laches.²¹ In that case, the defendants built a structure that encroached on a parking easement owned by the plaintiffs.²² When the plaintiffs noticed the defendants building the structure, they promptly contacted the defendants to object.²³ The parties' lawyers exchanged letters, and significantly, over the next few months, the defendants attempted to negotiate a purchase of the plaintiffs' interest.²⁴ Eighteen months after first noticing the building of the structure, the plaintiffs sued to enforce the restrictive covenant that created the easement.²⁵ The defendants urged laches as a bar to enforcement.²⁶ We held that there was "not the same imminent necessity for early enforcement of demands" as might have existed before the conditions became fixed because the defendants had "openly defie[d] [the plaintiffs'] known rights," without any indication of "assent or abandonment of intent to oppose on the part of [the plaintiffs]," and because the

¹⁸ Papanikolas Bros., 535 P.2d at 1260.

¹⁹ See id.

²⁰ Id.

²¹ Id. at 1261.

²² Id. at 1258, 1260.

²³ Id. at 1260.

²⁴ Id.

²⁵ Id.

²⁶ Id.

plaintiffs' delay caused "no substantial harm" to the defendants.²⁷

¶30 The facts of the case now before us could not be more starkly different. The district court finalized its modification of the UEP Trust in October 2006 after nearly a year of discussion and an invitation to interested parties to make suggestions for modification.²⁸ The order reforming the Trust was never appealed. The FLDS Association filed this petition over four years after the Utah AG had intervened, over four years after the special fiduciary had been appointed, and nearly three years after the district court had modified the Trust. This amounts to at least twice the length of time that the plaintiffs in Papanikolas Bros. waited. The FLDS Association's brief does not explain why the Association waited so long to challenge the Trust's reformation. But the FLDS Association's numerous complaints about the special fiduciary's administration of the Trust make clear it was not because the Association was unaware of the modification. Although the opposition briefs cite the FLDS Association's delay as a reason for this court to dismiss the petition, the FLDS Association does not respond with explanations as to why this delay is reasonable. Where in Papanikolas Bros. it was clear that the plaintiffs' negotiations with the defendants might have given them reason to delay litigation, here there were no discussions held with the district court until November 2008--nearly two years after the Trust had been modified and over three years after the litigation began--despite assurances by the court that participation was welcome. This delayed first contact with the district court spawned negotiations between the interested parties, who agreed to stay litigation in an effort to avoid the sale of certain Trust property. But these negotiations do not make the case for applying the doctrine of laches any less compelling. Unlike the prompt negotiations in Papanikolas Bros., these discussions came nearly two years after the act now complained of by the FLDS Association--the district court's reformation of the Trust. Negotiations entered into nearly two years after events that formed the basis of a complaint do not excuse a nearly three-year delay in petitioning this court for extraordinary relief.

²⁷ Id. at 1260-61 (internal quotation marks omitted).

²⁸ The district court's memorandum decision stated, "In accord with the order and timetable discussed at the November 7th hearing, all parties in interest are invited to provide the Court with their specific suggestions for reforming the Trust within the framework and principles provided by this Memorandum Decision."

¶31 Additionally, the FLDS Association's silence during the Trust reformation process and the Trust's subsequent administration gave the district court every reason to believe that the reformation had occurred without opposition. Indeed, while the FLDS Association disagrees with the district court's application of the law, the court's motive appears to be protection of the beneficiaries' charitable interests, not defiance of FLDS Association members' rights under the Trust.

¶32 Because of the three-year delay in the face of invitations by the district court to participate, and because this delay did not occur under circumstances that might excuse it, such as prompt negotiations aimed at avoiding litigation, or under circumstances that might make us otherwise hesitant to apply the doctrine of laches, the FLDS Association has demonstrated a lack of diligence in filing this petition.

¶33 This lack of diligence has caused injury to those who relied on the Trust's modification during the FLDS Association's delay. The Utah AG aptly describes how the FLDS Association's delay has worked to the disadvantage of others:

In the meantime, the Special Fiduciary reasonably relied on the presumptively valid appointment and reformation orders. He has made choices over the years, many expressly approved by Judge Lindberg, that cannot be undone. He has incurred irrevocable obligations and expenses for the Trust during the last four years. Other interested persons, including Trust Participants who are not members of the Petitioner association, have also made irreversible decisions and changed their positions based on these unappealed and heretofore unchallenged final orders.

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

operate against the interests of the Original Interested Individuals.

¶35 In sum, many individuals have relied upon the district court's final order from over three years ago, and the FLDS Association has given no adequate explanation for its delay in appealing or otherwise petitioning for relief. The FLDS Association has shown a lack of diligence in challenging the modification of the Trust, and this lack of diligence has operated to the detriment of others. The FLDS Association offers no adequate explanation for its delay and no other circumstances exist that might make us otherwise hesitant to apply laches. Accordingly, we dismiss the FLDS Association's Trust modification claims pursuant to the doctrine of laches.

II. THE FLDS ASSOCIATION'S TRUST ADMINISTRATION CLAIMS ARE ALSO BARRED BY LACHES, EXCEPT ONE THAT IS NOT RIPE FOR OUR CONSIDERATION

¶36 The FLDS Association's remaining claims, many of which merely recharacterize its first claim, either suffer from the same lack of diligence as its Trust modification claims and are also barred by laches, except one claim that is barred because it is not ripe for our consideration. The FLDS Association claims that the continuing administration of the Trust violates its members' constitutional rights. The FLDS Association cites Colorado Christian University v. Weaver--a case that held unconstitutional publicly funded scholarships for students attending public, private, and sectarian, but not pervasively sectarian universities²⁹--for the propositions that the Establishment Clause forbids discrimination within and among religions, intrusive inquiry into religious matters, and forcing people to choose between their religious beliefs and government benefits. The FLDS Association complains of five actions taken by the district court--characterized as pertaining to the administration of the Trust--that the Association feels are constitutionally infirm.

¶37 But the first four of these actions either occurred before or as part of the district court's modification of the Trust and, just as the modification claims discussed in Part I, could have been and should have been brought three years ago. For instance, the FLDS Association first claims that the district court did not properly consider the special fiduciary's background and qualifications before selecting him. But the special fiduciary was selected before the Trust was modified.

²⁹ 534 F.3d 1245, 1250, 1269 (10th Cir. 2008).

The FLDS Association next claims that the court improperly allowed FLDS detractors to take the "laboring oar" in drafting the reformed Trust. But this claim is really a recharacterization of the claim discussed in Part I, because it goes to the Trust's modification and not its subsequent administration. The FLDS Association's third claim--that the Special Fiduciary and the individuals who sued the Trust openly shared with the court that their purpose in reforming the Trust was to transform FLDS culture and liberate the FLDS people--also goes to the modification of the Trust rather than its administration. The fourth claim complains that the advisory board that the district court selected consisted of enemies of the FLDS Church. But the advisory board was created by the district court's December 2005 order, issued ten months before the Trust was modified.

¶38 To the degree that any of these claims actually go to Trust administration and are not merely recharacterizations of the modification claims, any claims arising out of events that occurred during or before Trust modification suffer from the same defects as the FLDS Association's first claims: a lack of diligence and prejudice resulting from that lack of diligence. Here again, the FLDS Association could have brought these claims at least three years earlier. In the interim, parties have changed their positions, Trust participants have made irreversible decisions, and the special fiduciary has entered into irrevocable transactions and obligations. For the same reasons as discussed in Part I, these claims are barred by the equitable doctrine of laches.

¶39 Only the FLDS Association's fifth claim arises from facts that occurred after the Trust was modified. Here the FLDS Association alleges that the district court endorsed a religious test that would give former FLDS members outright deeds to Trust property but would relegate current and practicing FLDS members to receiving spendthrift trusts based on the concern that they might deed their property back to FLDS Church leaders. It alleges that taking FLDS members' religion into consideration when determining eligibility for transfers of property from the Trust violates the members' First Amendment rights by forcing them to choose between their religion and a government benefit.

¶40 But even on its face, the FLDS Association's last claim is not ripe. The ripeness doctrine "serves to prevent courts

from issuing advisory opinions" on issues that are not ripe for adjudication.³⁰

A dispute is ripe when a conflict over the application of a legal provision has sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto. An issue is not ripe for appeal if there exists no more than a difference of opinion regarding the hypothetical application of a provision to a situation in which the parties might, at some future time, find themselves.³¹

An issue is not ripe, for instance, in a situation where even if we agree with the petitioner's legal analysis of an issue, such an analysis would have no application to the facts the petitioner alleges.³² Even if we were to agree with the FLDS Association's assertion that district court relegation of FLDS Church members to receiving spendthrift trusts on the basis of their religion would violate the state and federal constitutions, that analysis would not apply to the facts the FLDS Association has alleged.

¶41 The FLDS Association does not allege that either the district court or special fiduciary has actually used religion as a factor in determining how to parse out property. It does not cite any instance where an active FLDS member received a lesser delegation of property because of his or her religious beliefs. So, the FLDS Association does not assert an "actual" clash of legal rights. And given the district court's and the special fiduciary's assertions both in district court hearings and at oral argument in this case that a religious test would not be imposed--a position the FLDS Association acknowledges the special

³⁰ State v. Ortiz, 1999 UT 84, ¶ 2, 987 P.2d 39; see also Clegg v. Wasatch Cnty., 2010 UT 5, ¶ 26, 227 P.3d 1243.

³¹ Bodell Constr. Co. v. Robbins, 2009 UT 52, ¶ 29, 215 P.3d 933 (emphasis added) (internal quotation marks omitted); see also Utah Safe to Learn-Safe to Worship Coal., Inc. v. State, 2004 UT 32, ¶ 20, 94 P.3d 217 ("[A]n issue is not ripe for review where there is no actual or imminent clash between the parties." (internal quotation marks omitted)).

³² See Bd. of Trs. v. Keystone Conversions, LLC, 2004 UT 84, ¶ 32, 103 P.3d 686 (declining to reach the merits of the appellant's argument because the appellant's claim of harm was purely hypothetical and not yet realized).

fiduciary has taken--such a clash does not seem "imminent," but rather merely "hypothetical." At most, the discussions the FLDS Association cites evince a concern shared by the district court and the special fiduciary that, without careful planning, Trust distributions could lead to the creation of a new trust containing many of the same attributes that have, on more than one occasion, landed the UEP Trust in Utah courts. But this does not mean that the district court "actually" has or "imminently" will use religion to discriminate against FLDS members, so this last claim is not ripe for our review.

¶42 Because most of the FLDS Association's Trust administration claims suffer from the same lack of diligence and resultant prejudice as its modification claims, those claims are also barred by the equitable doctrine of laches. The FLDS Association's claim that the district court might use religion as a basis for determining property distributions is not ripe because the FLDS Association does not allege that such discriminatory distributions have actually occurred or are imminent.

CONCLUSION

¶43 The FLDS Association was not diligent in challenging the district court's modification of the UEP Trust, and that lack of diligence has resulted in prejudice to numerous parties. Therefore, the FLDS Association's Trust modification claims are barred by the equitable doctrine of laches. The FLDS Association's remaining Trust administration claims suffer from the same lack of diligence and resultant prejudice and are similarly barred by laches, except for one claim that is barred because it is unripe for adjudication. Accordingly, we decline to reach the merits of these claims and dismiss the FLDS Association's Petition for Extraordinary Writ.

¶44 Chief Justice Durham, Justice Parrish, Justice Nehring, and Judge Thorne concur in Associate Chief Justice Durrant's opinion.

¶45 Court of Appeals Judge William A. Thorne sat.

Addendum K

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

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

Plaintiffs,

vs.

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

Defendants.

**MEMORANDUM OPINION AND
ORDER**

Case No. 2:08-cv-772

Judge Dee Benson

Before the court is the plaintiffs' Renewed Motion for Temporary Restraining Order and Preliminary Injunction. The issue presented by the motion and the case itself is straightforward: Are the defendants' actions in reforming and administering the United Effort Plan Trust ("UEP Trust" or the "Trust") in violation of the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution?

HISTORY

The plaintiffs are approximately 5,000 members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS"). The FLDS church has its origins in the teachings of Joseph Smith, Jr. who, after publishing The Book of Mormon in 1829, organized the Church of Christ with 6 original members in upstate New York in 1830. The Church of Christ later became known as The Church of Jesus Christ of Latter-day Saints, often identified as the Mormon church. The church left New York shortly after its founding, and after failed efforts at settlements in Kirtland, Ohio, Jackson County, Missouri, and Nauvoo, Illinois, eventually established itself in Salt Lake City, Utah Territory, in 1847.

Among the Mormon church's earliest tenets was a belief in the commingling of assets. This practice is described in a book of revelations received by Joseph Smith called The Doctrine and Covenants, which the Mormons regard as holy scripture. Section 42, verses 30-34 of The Doctrine and Covenants read as follows:

30 And behold, thou wilt remember the poor, and consecrate of thy properties for their support that which thou has to impart unto them, with a covenant and a deed which cannot be broken.

31 And inasmuch as ye impart of your substance unto the poor, ye will do it unto me; and they shall be laid before the bishop of my church and his counselors, two of the elders, or high priests, such as he shall appoint or has appointed and set apart for that purpose.

32 And it shall come to pass, that after they are laid before the bishop of my church, and after that he has received these testimonies concerning the consecration of the properties of my church, that they cannot be taken from the church, agreeable to my commandments, every man shall be made accountable unto me, a steward over his own property, or that which he has received by consecration, as much as is sufficient for himself and family.

33 And again, if there shall be properties in the hands of the church, or any individuals of it, more than is necessary for their support after this first consecration, which is a residue to be consecrated unto the bishop, it shall be kept to administer to

those who have not, from time to time, that every man who has need may be amply supplied and receive according to his wants.

34 Therefore, the residue shall be kept in my storehouse, to administer to the poor and the needy, as shall be appointed by the high council of the church, and the bishop and his council;

This practice of community property sharing was generally referred to as the United Order or the Law of Consecration and was attempted with various amounts of sporadic success by the early Mormons in Ohio, Missouri, Illinois, and Utah. The southern Utah city of Orderville was originally settled by Mormon pioneers for the purpose of practicing strict adherence to the United Order. Orderville (population 608) is still a functioning city but any efforts to practice the United Order there were abandoned long ago.

One of the other 19th century characteristics of the Mormon church was the practice of polygamy. Much has been written about this aspect of early Mormonism and how it influenced the political and social aspects of the growth and development of the Territory of Utah in the second half of the 19th century. See Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101 (2006); Rex Sears, *Punishing the Saints for their "Peculiar Institution": Congress on the Constitutional Dilemmas*, 2001 UTAH L. REV. 581 (2001). Polygamy was, and remains, against federal law. Eventually, the Mormon church eliminated polygamy from its practices and in 1890 officially declared that its members were to no longer engage in polygamous relationships. Utah was thereafter granted statehood in 1896. Polygamy has been against the law in Utah ever since. The abandonment of the practice of polygamy by the mainstream Mormon church did not rest well with all people, leading some to continue the practice of polygamy, even though it was in violation of both federal and state law,

and in some instances to form splinter groups of like-minded practitioners. The FLDS church is one of these.

According to the plaintiffs, they and their church have always believed in and attempted to practice the United Order or the Law of Consecration, as outlined in The Doctrine and Covenants. The fundamentalist movement that led to the creation of the FLDS church was formerly known as the “Priesthood Work.” Its leaders (called the “Priesthood Council”) formed a trust in 1942 in order to live the United Order. The trust was called the United Effort Plan and declared that its “purpose and object . . . shall first be charitable and philanthropic” and its operations were to be “governed by the true spirit of brotherhood.” Declaration of Trust, dated November 9, 1942, at 4. Membership in the 1942 trust was based on “the consecration of such property, real, personal or mixed, to the trust in such amounts as shall be deemed sufficient by the Board of Trustees.” *Id.* at 7.

In the early 1990s, the trustees of the 1942 trust were sued by a group of trust residents who alleged breach of fiduciary duties and other claims. The state district court found the trust to be charitable in nature, which ruling was reversed by the Utah Supreme Court on Sept. 1, 1998. The Utah Supreme Court held that the 1942 trust was not “charitable” because it “benefitted specific individuals” and because “beneficiaries must consecrate property to benefit from the trust.” *Jeffs v. Stubbs*, 970 P.2d 1234, 1252 (Utah 1998). At the time of this pronouncement in 1998, there was apparently only one remaining founder of the 1942 trust, Rulon T. Jeffs, who was at that time also serving as the President of the FLDS church.

In response to the 1998 decision of the Utah Supreme Court, Rulon Jeffs took steps to

amend the trust to “ensure that his beneficial interest in the [trust] property be devoted to its intended charitable purpose.” *FLDS v. Lindberg*, Memorandum of Points and Authorities in Support of Petition for Extraordinary Writ at 9. Hence, on November 3, 1998, Rulon T. Jeffs, Fred M. Jessop, LeRoy S. Jeffs, Warren S. Jeffs, Truman I. Barlow, Winston K. Blackmore, James K. Zitting, as Trustees, and Rulon T. Jeffs, President and Corporation Sole, for the FLDS church, executed the “Amended and Restated Declaration of Trust and the United Effort Plan.”

The purpose for amending the trust was to make sure it qualified as a charitable trust under Utah law. Accordingly, its beneficiary class was expanded to include not just those who founded the trust, but all FLDS church members who “consecrate their lives, times, talents, and resources to the building and establishment of the Kingdom of God on Earth under the direction of the President of the [FLDS] church.” Amended and Restated Declaration of Trust of the United Effort Plan Trust, dated November 3, 1998, at 3. The “Declaration of Trust” of the 1998 Restated Trust states that it “is a religious and charitable trust” and “a spiritual (Doctrine and Covenants 29:34) step toward living the Holy United Order.” *Id.* at 1.

Prior to 1942, and continually to 1998, the Priesthood Work (the FLDS church) was headquartered in a community straddling the border of Utah and Arizona known originally as Short Creek. Today, although it still operates generally as one community, the section located in Arizona is known as Colorado City, Arizona and the section located in Utah is known as Hildale, Utah. The community presently consists of some 5,000 acres of land, comprising approximately 700 houses, and various farms, dairies, and other businesses and operations. Virtually all of this property is within the UEP Trust. By some estimates, it has a value of \$100,000,000.00. Eric G.

Andersen, *Protecting Religious Liberty Through the Establishment Clause: The Case of the United Effort Plan Trust Litigation*, 2008 UTAH L. REV. 739, 742 (2008).

The 1998 Amended UEP Trust is a relatively brief (4 page) document. The Trust specifically declares that it “exists to preserve and advance the religious doctrine and goals of the Fundamentalist Church of Jesus Christ of Latter Day Saints, previously known as ‘The Priesthood Work’ and refers to the Holy United Order as a ‘central principle of the church.’” It further states that “the doctrines and laws of the Priesthood and the [FLDS] Church . . . are the guiding tenets by which the Trustees of the United Effort Plan Trust shall act.” *Id.* The Trust also declares that the trustees are to “administer the Trust consistent with its religious purpose to provide for Church members, according to their wants and needs, insofar as their wants are just (Doctrine and Covenants 82:17-21).” *Id.* at 3.

The plaintiffs claim in this lawsuit that the Trust is an important part of their religion and that all decisions regarding their “just wants and needs” are fundamentally religious determinations. (Willie Jessop Aff. ¶ 23.) They cite to the Trust itself as evidence that continued enjoyment of Trust participation is conditioned on living in accordance with the principles of the United Order as determined by those in ecclesiastical leadership. In the event of termination of the Trust, the Trust provides that “the assets of the Trust Estate at that time shall become the property of the Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, corporation sole.” Amended and Restated Declaration of Trust at 4.

Warren Jeffs and State Action

In 2002, Rulon Jeffs died. His son, Warren, replaced him as prophet and president of the FLDS church and as president of the board of trustees of the UEP Trust. Under its new leader, the FLDS church began moving some of its followers to a new site near Eldorado, Texas. As the first decade of the 21st century progressed, the church, its president and its members became embroiled in many legal disputes, both civil and criminal. In one of the most publicized of these, Warren Jeffs was charged with aiding and abetting rape, a first-degree felony, in Utah's Fifth District Court in 2005. This criminal charge stemmed from Jeffs' involvement in an arranged marriage between two members of the FLDS church, one of whom was a 14-year-old girl at the time, and who has since left the church.

In July and August of 2004, two tort lawsuits were filed against Warren Jeffs, the Trust, the FLDS church, and other defendants in Utah's Third District Court in Salt Lake County. The claims included allegations of child sexual abuse. Jeffs and the other trustees failed to defend these lawsuits, which exposed the Trust to possible default judgments. During this time, there is evidence to suggest Jeffs' decision to do nothing in defense of the lawsuits against the Trust was deliberate, possibly motivated by his belief that his followers should leave the Short Creek area and relocate to Texas. Whatever his motivation, however, it appears undisputed that he instructed his followers to "answer them (the state authorities) nothing and don't give them any testimony or witness." (Def. Wisan's Mem. Opp. at 10.)

In May, 2005, as a result of Mr. Jeffs' and the other trustees' actions in failing to defend against the tort lawsuits, the Utah and Arizona Attorneys General filed a petition in Utah's Third

District Court seeking the removal or suspension of the trustees of the Trust. The Attorneys General based their decision to file the action on the belief that the trustees of the Trust, particularly Warren Jeffs, were violating their fiduciary duties by not appropriately responding to the tort lawsuits, which placed the beneficiaries of the charitable Trust at risk of being evicted from the Trust's homes and property. The petition was in the nature of a probate action pursuant to the Utah Uniform Trust Code and requested "an immediate order suspending the authority and power of the current trustees pending a final decision by the Court on their removal and appointing an interim special fiduciary for the limited purpose of preserving the assets of the trust," along with other relief. *In the Matter of the United Effort Plan Trust*, Case No. 053900848, Utah Attorney General's Petition at 2.

Just as with the tort lawsuits, the trustees did not respond in any fashion to the probate action. Thereafter, the Third District Court granted relief. First, on June 16, 2005, Judge Deno Himonas entered an order suspending the trustees and appointing Mr. Bruce Wisan as a Special Fiduciary, as requested by the Utah Attorney General. Then, on September 2, 2005, Judge Denise Lindberg entered an "order on Procedure to Appoint Trustees and Expansion of Special Fiduciary's Authority." This order generally authorized Mr. Wisan to do what he deemed prudent and reasonable to manage the Trust property, to defend against the tort lawsuits and to see that property and other taxes were paid. *See In the Matter of the United Effort Plan Trust*, Case No. 053900848, Order on Procedure to Appoint Trustees and Expansion of Special Fiduciary's Authority at 2-4.

During the next three months, various proposals were made to the state court seeking the

appointment of substitute trustees and reformation of the Trust. These proposals came exclusively from persons who had sued the Trust, including former members of the FLDS church.

As these activities were taking place, and after having been criminally charged with aiding and abetting rape, Warren Jeffs' whereabouts were unknown. He was eventually found on August 28, 2006, in a Cadillac Escalade which was stopped on a Nevada highway for a traffic violation. He has been incarcerated on one charge or another ever since. During 2005 and throughout 2006, his followers, including the plaintiffs here, continued to do nothing to respond to either the tort lawsuits against the Trust or the probate action because that was what their prophet told them to do. As a result, it appears the only people the court was hearing from were the state Attorneys General and those who opposed the regime of Warren Jeffs.

After considering the various reform proposals, Judge Lindberg issued a rather lengthy Memorandum Decision on December 13, 2005, in which she determined that because of the malfeasance of its trustees, the UEP Trust should be reformed. At this point, the court clearly had three options pursuant to the Utah Uniform Trust Code. The district judge could (1) do nothing, (2) allow the Trust to be terminated pursuant to its own terms, or (3) reform the Trust and appoint new leadership to administer the Trust. She chose the last of these, apparently in an effort to protect the property and its beneficiaries.

In her Memorandum Decision, Judge Lindberg concluded that the 1998 Trust document is the "operative instrument" for the court to consider, and that it qualifies as a charitable trust. She further determined that the Trust should be modified "in a manner consistent with the

settlor's charitable purposes.”

The court also determined, consistent with its understanding of the United States Constitution, that it could not reform the Trust on the basis of religious doctrine or principles. The judge therefore stated that the reformation would avoid constitutional problems by applying “neutral principles of law” as explained in *Jones v. Wolf*, 443 U.S. 595 (1979), and other United States Supreme court precedent. She stated: “courts must separate that which is primarily ecclesiastical from that which is primarily secular,” and not enter the discussion of the former. *In the Matter of the United Effort Plan Trust*, Case No. 053900848, dated December 13, 2005 at ¶ 35. She read the 1998 Trust as having a religious part (she called it “the Plan,” which was essentially a reference to the United Order concept) and a secular part (which she called “the Trust”), and declared that the goal of the reformation process was to “create a clear division between the two.” *Id.* at ¶ 39. Finally, in her Memorandum Decision, Judge Lindberg invited proposals for the final reformation of the Trust. *Id.* at ¶ 56.

On October 25, 2006, nearly a year later, the court created the Reformed Trust, replacing the original 4-page document, with its 17 paragraphs, with a new version of 175 paragraphs. The reformation significantly expanded the powers of the Special Fiduciary. Under his new authority, Mr. Wisan was to implement a “strategic plan to subdivide Trust property so that it can be conveyed to members of the beneficiary class in a religiously neutral manner in furtherance of the Reformed Trust’s purpose to serve the ‘just wants and needs’ (primarily housing) of all persons who consecrated to the Trust.” (Def. Wisan’s Reply Memorandum in Support of Motion for Approval of Sale of Trust Property dated October 27, 2008 at 2.)

Under the Reformed Trust, it became the responsibility of the state appointed Special Fiduciary to determine the “just wants and needs” of the people who live and depend on the Trust property. It is up to the Special Fiduciary and the “Advisory Board” of the Reformed Trust to decide who is entitled to live in which homes and when they need to move. Apparently in an attempt at humor, the Special Fiduciary initially introduced himself to the members of the FLDS church as the “State-ordained Bishop.” (Willie Jessop Aff. ¶¶ 26-27.) What the members of the FLDS church formerly took to their church leaders regarding administration of Trust assets they are now supposed to take to the Special Fiduciary who is under order of the state court to decide such matters by “neutral principles” and may not rely on matters of faith or religion.

After the state court’s reformation of the UEP Trust in December 2006, the Special Fiduciary assembled a team of people, including accountants, lawyers, and other professionals to administer the Trust property and determine the wants and needs of the people. With dozens, if not hundreds, of properties to manage, and a considerable number of disputes over who was entitled to what, the Special Fiduciary’s expenses mounted. During 2007 and into 2008, the former trustees, and the members of the FLDS church, including the present plaintiffs, continued to remain largely uninvolved in the probate action in state court. In mid-2008, however, that changed for what appear to be 2 reasons. First, Warren Jeffs apparently had a change of opinion about asserting his and his church members’ legal rights in court, and second, the Special Fiduciary announced an intention to sell certain Trust property that held special economic, historical and spiritual significance to the FLDS community, including, notably, the Berry Knoll Farm, which, according to the plaintiffs, is “a part of the prophetic vision and divine command

that the Short Creek area will become a garden spot of the west, and is the location of a temple site as divinely revealed to church leaders.” (Willie Jessop Aff. ¶ 39.)

The Special Fiduciary told the state court he needed to sell Trust property, including specifically the Berry Knoll Farm, to “resolve the current cash crunch problems,” which referred to the multimillion dollar obligations owed to the Special Fiduciary’s legal, accounting, and other functionaries.

This request by the Special Fiduciary caused the plaintiffs to do two things. First, they sought to intervene in the probate action for the purpose of asserting their rights. This was denied by Judge Lindberg on the ground that the plaintiffs did not have standing as parties in the probate action. Second, they filed this federal lawsuit on October 6, 2008, seeking a declaration that the state actors’ conduct violates the United States Constitution.

At the outset of this federal case, the plaintiffs sought a Temporary Restraining Order halting the sale of the Berry Knoll Farm and all other actions of the Special Fiduciary. A hearing on the matter was held on November 12, 2008, with all parties present and represented. After a lengthy hearing, it was determined that the parties were willing to mutually agree that nothing would be done to proceed with the property sale or to otherwise affect the Trust property until the parties either reached a settlement or resumed the matter in court. Accordingly, this action was stayed pending further action of the parties.

During 2009, while this action was stayed, the parties engaged in extensive settlement efforts with former United States District Judge Paul Cassel, but were unable to reach a final settlement. Thereafter, the state court issued a decision authorizing the sale of the Berry Knoll

Farm to the highest bidder. This caused the plaintiffs to file an action in the Utah Supreme Court, styled as a Petition for Extraordinary Writ, in which they sought virtually the same relief sought in this action: a declaration that the state district court's reformation and administration of the UEP Trust is a violation of the Constitution.

The Utah Supreme Court issued its decision on August 27, 2010, finding the action barred by laches. At that point, the plaintiffs renewed their motion for injunctive relief before this court. After briefing, a hearing was held on December 3, 2010, with Rodney Parker, Frederick Gedicks, and Stephen Clark representing the plaintiffs and Jeffrey Shields, William Richards, and Jerrold Jensen representing the defendants. At the conclusion of the hearing, the court asked the parties to attempt to mutually agree on a preservation of the status quo pending a decision on the motion. They later reported to the court that they could not agree. Accordingly, this court entered a Temporary Restraining Order as of December 13, 2010, generally preserving the status quo until a decision can be rendered on the motion. Among other things, the Order prohibits any action on the sale of the Berry Knoll Farm and stays further action on any plans to subdivide the Trust property.

DISCUSSION

The Establishment Clause

The First Amendment declares that "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I. From its passage by the First Congress in 1791, this clause, popularly known as the Establishment Clause, has been consistently interpreted as prohibiting the federal government from establishing a national church and, in

more general terms, as keeping separate the spheres of church and state. The framers of the Constitution sought to keep the government out of the affairs of the churches of America, and vice versa. After the passage of the Fourteenth Amendment following the Civil War, the United States Supreme Court determined that the Establishment Clause is applicable to the states. *See Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

Everson v. Board of Education was the first major Establishment Clause case. It involved a New Jersey state law that provided for the parents of students who attended private and Catholic schools in Ewing, New Jersey to be repaid for the bus fares they paid to get their children to and from school. A taxpayer challenged the law as unconstitutional because it benefitted the Catholic Church.

In an 18-page opinion for the 5-justice majority, Justice Hugo Black took considerable effort to explain the historical underpinnings of the Establishment Clause. After quoting from a letter Thomas Jefferson wrote to the Danbury Baptist Church, he wrote: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18.

After such strict wording, one may have thought the New Jersey bus fare law was doomed, but it was deemed not to violate the Constitution because the state involvement was so minimal. The Court found that "the State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 19.

The next year in *McColum v. Board of Education*, 333 U.S. 203 (1948), the Supreme Court repeated its *Everson* Establishment Clause analysis in a case involving a program in the public schools of Illinois that allowed for release time for students to receive religious instruction. The Court, this time unanimously, found the Illinois practice in violation of the Establishment Clause, stating:

This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the states by the Fourteenth) as we interpreted it in *Everson v. Board of Education*. There we said: 'Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.'

Id. at 6.

The Supreme Court's Establishment Clause caseload increased significantly after *McColum*, and as those two pioneering cases illustrated, the result depended on the unique facts of each case. Notable Establishment Clause cases followed including: *Engel v. Vitale*, 370 U.S. 421 (1962), where the Court struck down as unconstitutional a state-written prayer required to be said at the beginning of the school day in the public schools in the state of New York; *Lynch v. Donnelly*, 465 U.S. 668 (1984), in which a creche display was found to violate the Establishment Clause because of its primarily religious nature; and *Wolman v. Walter*, 433 U.S. 229 (1977), in which the Court found that it was constitutionally permissible for a state to provide, among other things, funds to nonpublic schools including those operated by religious institutions to purchase secular textbooks for use by their students.¹

¹Other important Establishment Clause cases include: *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that mandatory moment of silence in schools for the purpose of private prayer violated the Establishment Clause); *Allegheny County v. American Civil Liberties Union Greater*

After a number of these fact-intensive inquiries, the United States Supreme Court announced a three-part test in what has become perhaps the most cited Supreme Court Establishment Clause case, *Lemon v. Kurtzman*, 403 U.S. 602 (1971). There the Court stated that for state action to pass constitutional muster it must meet each of the following three requirements:

- (1) it must have a secular purpose,
- (2) its principal or primary effect must be one that neither advances nor inhibits religion,
- and
- (3) it must not foster excessive government entanglement with religion.

Lemon, 403 U.S. at 612-13.

The Tenth Circuit Court of Appeals recently confirmed that the “purpose and effect prongs” of *Lemon* are to be interpreted “in light of Justice O’Connor’s endorsement test.”

Pittsburgh Chapter, 492 U.S. 573 (1989) (striking down a creche display in a county courthouse which contained the phrase Gloria in Excelsis Deo while upholding the display of a nearby menorah, which appeared with a Christmas tree and a sign saluting liberty); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that offering of prayer before a voluntarily attended graduation was unconstitutional); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (holding that a vote of the student body could not authorize student-led prayer prior to school events); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding the constitutionality of private school vouchers); *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that a Ten Commandments display at the Texas state capital capitol did not violate the Establishment Clause because of its secular purpose); *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (striking down a Ten Commandments display in several courthouses because it was not integrated with a secular purpose); *O’Connor v. Washburn University*, 416 F.3d 1216 (10th Cir. 2005) (recognizing that the Tenth Circuit uses Justice O’Connor’s endorsement test to interpret the purpose and effect prongs of *Lemon* for Establishment Clause analysis); *American Atheists, Inc. v. Davenport*, 2010 WL 5151630 (10th Cir. 2010) (striking down the use of memorial crosses to commemorate fallen highway troopers in Utah); *Trunk v. City of San Diego*, — F.3d —, 2011 WL 9636 (9th Cir. 2011) (holding that a large Latin cross located on city property on top of Mount Soledad in San Diego violates the Establishment Clause).

Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 1030 (10th Cir. 2008). “Under the ‘endorsement test,’ the ‘government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred.’” *Id.* (quoting *Bauchman v. West High School*, 132 F.3d 542, 551 (10th Cir. 1997)).

Against this established Supreme Court and Tenth Circuit precedent, we turn to the question whether the states’ actions in this case violate the Establishment Clause. The answer is an unqualified “yes.” A better question would be how do they not? Virtually from its first step after it decided to reform the Trust, the state court was in forbidden territory. It not only had no authority to determine the “just wants and needs” of the members of the FLDS church, but it had no authority to interpret or reform the Trust at all.

In fairness to the state district court, it did not have anyone initially presenting an Establishment Clause challenge, but it is still difficult with the benefit of hindsight to see how the court that was in one respect so mindful of using “neutral principles” to avoid unconstitutional behavior could at the same time fail to recognize that in reforming the Trust as it did it was essentially taking over one of the central tenets of the FLDS religion. In so doing it violated the Establishment Clause. By reforming a religious trust and managing it without regard to religion, the state actors became impermissibly entangled with religion. While it is accurate to say the states’ actions did not establish a religion, their actions certainly went a long way toward disestablishing one. No matter how one analyzes the states’ action against the second and third prongs of the *Lemon* test, they come up lacking. The primary effect of the state

court's decision to rewrite the Trust and administer it as a secular instrument was to inhibit religion. The resulting intrusion into the everyday life of the FLDS church and its members fostered not only "excessive government entanglement with religion," but was a virtual takeover by the state.

The court finds it interesting, and somewhat telling, that the defendants' responses to the plaintiffs' constitutional challenges are so tepid as to be nearly nonexistent. In extensive briefing in this case, the defendants cite no case that is even suggested to be remotely similar enough to the instant case to support their defense. This is because there isn't one. The defense amounts to nothing more than a repeat of why the state actors felt it was so important for them to take the action they took, as opposed to why it was constitutionally justified. The defendants speak at long length about how bad—even criminal—Warren Jeffs' behavior was, but they say little that is relevant to defend their own wholesale interference with an established church. The Arizona Attorney General's response to the plaintiffs' constitutional arguments is less than one-half of one page (*see* Arizona Attorney General's Opp. Mem. at p.24-25) and cites no cases or other authority in support of its position.

The plainness of the state court's breaching of the wall of separation between church and state is found in an objective reading of the 4-page 1998 UEP Trust itself. One simply cannot read that document and fail to see that it is a religious document. As stated earlier, this document consists of only 17 paragraphs. It is straightforward and uncomplicated. Because a correct understanding of what it says is so important to a full appreciation of its religious nature, representative sections are reprinted below:

The United Effort Plan Trust is a religious and charitable trust. It is the legal entity of the United effort Plan. The Trust was created by Declaration of trust dated November 9, 1942, and was amended April 10, 1946.

The United Effort Plan Trust is a spiritual (Doctrine & Covenants 29:34) step toward living the Holy United Order. It exists to preserve and advance the religious doctrines and goals of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, previously known as "The Priesthood Work," or "The Work" (the "Church"). The United Effort Plan is under the direction of the President of the Church, who holds the keys of Priesthood authority (which keys have continued from Joseph Smith, Jr. To Brigham Young, John Taylor, John W. Woolley, Lorin c. Woolley, John Y. Barlow, Leroy S. Johnson, and Rulon T. Jeffs). The doctrines and laws of the Priesthood and the Church are found in the Book of Mormon, the Doctrine and Covenants, the Pearl of Great Price, the Holy Bible, the sermons of the holders of the keys of Priesthood authority, and present and future revelations received through the holder of those keys; and are the guiding tenets by which the Trustees of the United Effort Plan Trust shall act.

Rulon T. Jeffs holds the keys of Priesthood authority and so serves as the President of the Church. President Jeffs is also the sole remaining original Trustee and subscriber of the United Effort Plan Trust, and President of the Board of Trustees of the United Effort Plan Trust. In those capacities he, and Fred M. Jessop, LeRoy S. Jeffs, Warren S. Jeffs, Truman I. Barlow, Winston K. Blackmore and James K. Zitting, as Trustees, hereby amend and restate the Declaration of Trust to more clearly set out its purposes and manner of operation. This document is a total restatement and amendment of the Declaration of Trust. It supersedes all previous documents, including all documents filed of public record in Utah and Arizona and with various courts. The Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, a corporation sole, hereby ratifies this amendment. This Amended and restated Declaration of Trust has also been approved by the Priesthood and sustained by the Church membership. Because the Trust is a charitable trust, this Amended and Restated Declaration of Trust will be recorded in the public record but no future affidavits of disclosure will be recorded.

Since the original conveyance substantial additional real estate has been added as consecrations to the Trust Estate, and parcels have been purchased, traded, subjected to rights-of-way, and dedicated as roads and streets. It is anticipated that property will continue to be added as consecrations to the Trust Estate. Property has

been conveyed as consecrations to the United Effort Plan Trust in the name of the United Effort Plan; as well as in the names of Trustees or of a single Trustee such as in the name of Fred M. Jessop, as Trustee. All properties now included or hereafter added to the Trust Estate are consecrated and sacred lands, dedicated to the United Effort Plan's religious purpose.

The United Effort Plan is the effort and striving on the part of Church members toward the Holy United Order. This central principle of the church requires the gathering together of faithful Church members on consecrated and sacred lands to establish as one pure people the Kingdom of God on Earth under the guidance of Priesthood leadership. The Board of Trustees, in their sole discretion, shall administer the Trust consistent with its religious purpose to provide for Church members according to their wants and their needs, insofar as their wants are just (Doctrine and Covenants, Section 82:17-21).

A consecration is an unconditional dedication to a sacred purpose. Consecration of real estate to the United Effort Plan Trust is accomplished by a deed of conveyance. Church members also consecrate their time, talents, money, and materials to the Lord's storehouse, to become the property of the Church and, where appropriate, the United Effort Plan Trust. All consecrations made to or for the benefit of the United Effort Plan Trust are dedicated to the sacred purpose of the United Effort Plan and without any reservation or claim of right and/or ownership. Improvements made by persons living on United Effort Plan Trust property become the property of the Trust and are consecrations to the Trust.

The privilege to participate in the united Effort Plan and live upon the lands and in the buildings of the United Effort Plan Trust is granted, and may be revoked, by the Board of Trustees. Those who seek that privilege commit themselves and their families to live their lives according to the principles of the United Effort Plan and the Church, and they and their families consent to be governed by the Priesthood leadership and the Board of Trustees. They must consecrate their lives, times, talents and resources to the building and establishment of the Kingdom of God on Earth under the direction of the President of the Church and his appointed officers. All participants living on United Effort Plan Trust property must act in the spirit of charity (Moroni 7:6-10, 45-48). They must live in the true spirit of brotherhood (Matthew 22:36-40) and there shall be no disputations among them (3 Nephi 18:34). The Trust is most firmly committed to these goals. People who are granted the privilege to live on United Effort Plan Trust property acknowledge by their presence upon the land their acceptance of the terms of this Trust.

Participation in the United Effort Plan and use of property owned by the United Effort Plan Trust is not and does not become a right or claim of anyone who

may benefit in any way from the Trust. Use of Trust property must be within rules and standards set by the Board of Trustees. The Board of Trustees may require individuals and their families to relocate to different locations on United Effort Plan Trust property or to share a location with others. Participants who, in the opinion of the Presidency of the Church, do not honor their commitments to live their lives according to the principles of the United Effort Plan and the Church shall remove themselves from the Trust property and, if they do not, the Board of Trustees may in its discretion cause their removal. At such time as they reform their lives and the lives of their family members and are again approved by the Priesthood and the Board of Trustees they may again be permitted to participate in the United Effort Plan. The Board of Trustees shall have no obligation whatsoever to return all or any part of consecrated property back to a consecrator or to his or her descendants.

To carry out its religious mission and charitable purpose, the Trust shall be administered by a Board of Trustees consisting of not less than three nor more than nine Trustees appointed in writing by the President of the Church. Trustees shall serve at the pleasure of the President of the Church and may be removed or replaced at any time by the President. Dismissal of a Trustee shall be by a written notice, effective on the date the notice is executed. A trustee may resign by written notice to the President of the Church. Each successor Trustee shall have the same powers and authority, and shall be subject to the same duties and restrictions, as predecessor Trustees.

This Declaration of Trust may be amended at any time and from time to time by the President of the Church and a majority of the Trustees. The Trust is intended to be a charitable trust of perpetual duration; however, in the event of termination of this Trust, whether by the board of Trustees or by reason of law, the assets of the Trust Estate at that time shall become the property of the Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, corporation sole.

Amended and Restated Declaration of Trust at 1-4.

As noted above, the state court found this 1998 Trust to be the “governing instrument” and that it constitutes a charitable trust. The state court judge then decided that in order to “protect and maintain the charitable nature of the trust,” that the Trust needed to be reformed employing “neutral principles of law.” The problem with this approach at the outset is that it

involved the state court in the business of interpreting (that is, defining) a self-styled “religious” and “spiritual” Trust that by its own language “exists to preserve and advance the religious doctrines and goals of the Fundamentalist Church of Jesus Christ of Latter-Day Saints” *Id.* at 1. This is forbidden by the Establishment Clause. *See Everson*, 330 U.S. at 16. To put it plainly, once the state court read the 1998 Trust it should have recognized that it is a religious document and done nothing further with it. Pursuant to the Establishment Clause, the court had no business doing anything at all with or to the 1998 Trust once it was recognized as a religious trust that is based on a fundamental tenet of the FLDS church. After reading it, the only thing the court could do with this Trust was to leave it alone. Due to the malfeasance of the trustees in not responding to the tort lawsuits, the court could revoke the Trust (as would be the case with any failed charitable trust, religious or otherwise) and allow the trust property to be distributed in accordance with the Trust’s own terms, but the court was barred by the First Amendment from doing anything more than that.

Nevertheless, the state court judge decided she could reform the document by separating the religious parts of the text from the secular parts of the text, an act which, even if it wasn’t forbidden, this court finds to be impossible. One may as well attempt to make Deuteronomy secular, or the Koran, or to eliminate football from the Super Bowl. The religious nature of the Trust is plain and obvious. To the extent there are aspects of the Trust that can be called secular, they are unquestionably inextricably intertwined with the religious.

Next, after the court’s impermissible behavior in construing and reforming the Trust, the court continued its unconstitutional march into the realm of the religious by appointing a non-

religious state functionary to manage and administer the newly interpreted trust in a new secular way which forbids any religious reasons from informing his decisions. This activity goes far beyond a government sponsored prayer (*Engel*), a state textbook program for religious-school students (*Wolman*), a graduation prayer at a public school (*Lee*), a stand-alone creche on government property (*Lynch*), or any other example of impermissible state behavior found in the growing body of Establishment Clause precedents.

Looking at this situation through the eyes of the plaintiffs, it is not difficult to see what happened and its obvious enormous impact on the religious lives of the members of the FLDS church. Before the court's reformation of the 1998 UEP Trust, before the appointment of the Special Fiduciary, the plaintiffs, 5,000 or so in number, resided in homes belonging to the Trust, worked in fields and factories and dairies belonging to the Trust, and had many of their personal wants and needs involving food and shelter provided by the Trust; and all decisions about these matters were made by their FLDS church leaders. And all of these decisions were based, consistent with the Trust's language, on a large number of factors including whether they had "commit[ted] themselves and their families to live" the United Order and the extent to which they "act[ed] in the spirit of charity," "live[d] in the true spirit of brotherhood," and had "no disputations among them." Amended and Restated Declaration of Trust at 3. In other words, factors based on their religion and their faithfulness to it.

For bad or good, anyone who had agreed to the plan was subject to these same rules and was bound to accept the decisions made by his or her religious leaders. There is no question plaintiffs' religious faithfulness played a significant role in the administration of the Trust.

The day the Special Fiduciary began his job, however, that was gone, replaced by a secular authority who decided the same matters of Trust property distribution not only based on an entirely new regime of secular criteria, but also on the express condition that religious reasons could not be controlling. One's faithfulness to the principles of the church was replaced by purely secular criteria such as caloric intake needs and whether more heat was needed for warmth in the winter.

The state court's reliance on *Jones v. Wolf*, 443 U.S. 595 (1979), is wholly misplaced. *Jones* followed *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1968), which recognized that neutral principles of law may be employed by courts to resolve church property disputes without running afoul of the Establishment Clause if such principles are the type "for use in all property disputes" and do not in any way require the court to interpret ecclesiastical questions. *Id.* at 449.

Indeed, as plaintiffs point out, in *Jones* the Supreme Court actually gave guidance to religious organizations about how to structure their property documents to cover otherwise non-justiciable contingencies:

Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of its members.

Jones, 443 U.S. at 603.

The 1998 Trust was structured in just this fashion by providing that in the event the Trust failed, the Trust property would revert to the FLDS church. This would avoid the possibility of a

non-justiciable contingency. But, rather than allow such a result, the state actors sought and obtained a reformation of the Trust, which required disregarding all religious aspects of the Trust and inventing what they called a secular instrument. Nothing about that process employed the neutral principles referred to in *Jones v. Wolf*. First of all, the case before the state court did not present a property dispute at all; it was occasioned by an alleged breach of fiduciary duty by its trustees, not because of any property dispute over the property itself. Furthermore, even if the case involved that type of internal church property dispute and neutral principles were applicable, the practice did not give the state court the authority to revise or alter religious church documents. Yet that is precisely what the state court did.

No matter how much the state court attempts to label its actions as applying neutral principles and thereby avoid constitutional problems, what it did was an impermissible rewriting of the Trust document, where the religious and secular are inextricably intertwined. There was no proper use of the so-called “neutral principles.”

In sum, from the unique facts of this case and consistent with the Establishment Clause and its interpretation by the United States Supreme Court and the Tenth Circuit Court of Appeals, the state actors had no authority to act as they did. Under the circumstances, given the trustees’ failure to defend the trust against the tort lawsuits and their failure to defend against the claims of malfeasance against them in the probate court, the state court could have allowed the Trust to be revoked, but they had no authority, consistent with the United States Constitution, to redefine the Trust, reform the Trust, or administer the Trust. Such state action constitutes excessive involvement with religion in violation of the First Amendment. Accordingly, the

plaintiffs have established that they are substantially likely to succeed on their Establishment Clause claims for purposes of the requested preliminary injunction.

Free Exercise Clause

In addition to declaring that “Congress shall make no law respecting an establishment of religion,” the First Amendment forbids Congress from “prohibiting the free exercise thereof.” Through the Fourteenth Amendment, the Free Exercise Clause is applicable to the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940).

The plaintiffs claim the defendants’ actions violate their free exercise rights as well as the Establishment Clause. This aspect of their case has not been the plaintiffs’ primary focus either in the written briefs or during oral argument. For purposes of the present motion for preliminary injunctive relief, the plaintiffs’ emphasis has in the main rested on their claim that the Establishment Clause’s structural bar has been violated.

The history of the Free Exercise Clause differs significantly from the Establishment Clause. The most recent seismic shift in Free Exercise jurisprudence occurred in 1990 with *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which the United States Supreme Court held that state laws of general application may be applied to churches and their members even if the consequences of such application interferes to some extent with a persons’ exercise of religion. The *Smith* case dealt with the state of Oregon’s law against the use of peyote. Several members of the Native American Church claimed that peyote use was a necessary part of their religious ceremonies and that enforcement of the peyote law against them would prevent their freedom to fully practice their religion. The Court disagreed

and announced the holding stated above.

In accordance with *Smith*, in the instant case it appears that the state Attorneys Generals' petitions to the Third District Court alleging malfeasance on the part of the UEP Trust's trustees was a proper application of a Utah law. The trustees had chosen not to respond to two tort lawsuits which put the Trust property in jeopardy. But that state action was not directed at the plaintiffs. Quite to the contrary, the state action was designed to protect the Trust property for the benefit of its beneficiaries, which included the plaintiffs.

The state action that did affect the plaintiffs was the decision to reform the Trust and turn over management of the Trust property to the state's Special Fiduciary. As explained above, this change in management completely altered the former way of dealing with the property, stripping away any and all matters of religion and faith, which had previously been an important and essential aspect of the property management system. The court recognizes there are differences between the two religion clauses and there may be defenses available to the state actors in relation to the plaintiffs' Free Exercise claims that are not available with respect to the Establishment Clause claims. Because the Free Exercise clause has not yet received the detailed attention of the parties, the court will at this point find only that under the present state of the record the plaintiffs' Free Exercise claims appear substantially likely to succeed, and therefore serve as additional support for preliminary injunctive relief to the plaintiffs. On the present state of the record it is difficult for this court to see how the states' action is not as violative of the plaintiffs' Free Exercise rights as it is of the Establishment Clause. Simply put, the plaintiffs' freedom to practice an important tenet of their religion (i.e. the sharing of their property on

religious grounds under the direction of their religious leaders) was not only eliminated but was replaced by a state-run secular program. If desired, however, the parties will be afforded an opportunity to further develop the Free Exercise issues pending a final resolution of this case.

Jurisdictional and Preclusive Defenses

The defendants' primary defense is that this federal court either lacks jurisdiction or is precluded from exercising its jurisdiction because of any or all of a wide-ranging variety of legal doctrines that include (1) waiver, (2) res judicata, (3) the Full Faith and Credit Clause, (4) laches, (5) unclean hands, (6) in custodia legis, (7) the Barton-Porter doctrine, (8) *Younger* abstention, (9) absolute immunity, (10) qualified immunity, (11) standing and (12) the Rooker-Feldman doctrine. The court finds each of these to be either entirely inapplicable to the present case or sufficiently lacking as a defense to provide merit for defendants' position and to prevent this court from granting the plaintiffs' requested injunctive relief.

Most importantly, the majority of these doctrines are inapplicable because they depend upon an underlying activity by the state where the state had jurisdiction and the authority to act. As explained above, the plaintiffs' Establishment Clause claim is simply that the state court had no authority to reform the 1998 Trust and thereafter take over its management. This court agrees. The Constitution does not allow the state court of Utah or any other state into the realm of religion. Once that boundary is crossed, the court is in forbidden territory and must leave. Viewed in this way it is obvious the various preclusive doctrines mentioned above are not applicable here. Waiver is not at issue because the structural limitation set by the Establishment Clause cannot be waived. Such structural limitations cannot be waived by the government or

private litigants. *See e.g., INS v. Chadha*, 462 U.S. 919 (1985) (re: legislative veto); *Lee v. Weisman*, 505 U.S. 577 (1992).

The In Custodia Legis, Barton-Porter, and Rooker-Feldman doctrines are inapplicable because each presupposes that the state court in a civil lawsuit has jurisdiction and authority over the matter at issue, including trusts (in custodia legis), the behavior of a fiduciary (Barton-Porter), or some other aspect of state court litigation (Rooker-Feldman). As explained above, due to its religious character, the state had no authority over the Trust, other than to allow it to be terminated. Furthermore, the Rooker-Feldman doctrine is inapplicable here because the plaintiffs were not parties to the state proceedings and because this action was commenced prior to the resolution of the state cases.

Younger abstention does not pertain to this case because the state court action in question not only was without authority but also because it could hardly be said that the state courts of Utah have an important state interest in enforcing their orders and judgments that are in violation of the United States Constitution. *Younger* abstention is not applicable to a federal court injunction suit involving allegations of state court proceedings in violation of the Bill of Rights. *Walck v. Edmondson*, 472 F.3d 1227 (10th Cir. 2007).

With the exception of the state court judge's immunity, the immunity doctrines presented by the defendants have no relevance at this stage of the case where only declaratory and injunctive relief are sought. Under *Ex Parte Young*, all of the defendants are subject to such prospective relief.

As for standing, the plaintiffs have the right to bring and prosecute this action pursuant to

Article III of the United States Constitution and, more specifically, Rule 17(b)(3)(A) of the Federal Rules of Civil Procedure. The plaintiffs clearly have presented facts sufficient to present a justifiable controversy that directly affects them in the conduct of their daily lives.

Laches and Res Judicata

With regard to laches and res judicata, the defendants claim the recent opinion of the Utah Supreme Court which dismissed plaintiffs' case on the ground of laches bars this court from further action. As an alternative, they claim that even if this court is not barred from addressing plaintiffs' case by the doctrine of res judicata, this court should nonetheless dismiss the case on the basis of its own independent finding of laches.

The court will first address whether it finds, independently, whether this action should be dismissed on the basis of laches. Laches is an equitable doctrine that essentially focuses on a party's untimeliness in bringing a claim and any injury that the delay caused to the other side. *Angelos v. First Interstate Bank*, 671 P.2d 772, 777 (Utah 1983). By its very nature, the inquiry is fact intensive and depends on the unique circumstance of each case. The doctrine is invoked relatively seldomly, primarily because of the existence of codified statutes of limitation, statutes of repose, and the like, all of which also deal in large part with the issues of timeliness and prejudice. In the end, basic fairness is the goal. If too many plans, decisions, contracts, adjustments, and changes have been reasonably made on a party's failure to challenge a certain action, at some point in time it is only fair and equitable to disallow the claim.

Although the doctrine focuses on lack of diligence, and the prejudice it causes, it is apparent that the nature and quality of the alleged violation of law also play a part in the laches

analysis. The gravity of the offense, and the extent to which it was obvious or should have been obvious, to the alleged wrongdoer, are also considerations. As a practical matter a lesser slight may be dismissed more easily on laches than a greater one even if the delay and prejudice to others are the same in both cases. This is only right because the inquiry is one in equity, seeking to balance the various consequences felt by the affected parties. As the Utah Supreme Court stated in *FLDS v. Lindberg*, 2010 UT 51, ¶ 28, 238 P.3d 1054: “In determining whether to apply the doctrine of laches, we consider the relative harm caused by the petitioner’s delay, the relative harm to the petitioner, and whether or not the respondent acted in good faith.”

In the instant case, when these three factors are fully considered, there is on the present state of the record no basis for a finding of laches, especially with respect to the state’s continuing administration of the Trust. As for the first consideration, the length of the delay, the plaintiffs’ first filing asserting their constitutional claims was in October, 2008 before this court. That was shortly after the plaintiffs had been denied standing to intervene in the state probate action, approximately four years after the Utah Attorney General petitioned the state court and three years after the district court reformed the Trust. All of the reasons for the plaintiffs’ delay until 2008 to assert their constitutional rights are not known but some of them have been asserted as part of the record in this case. They include: (1) after Warren Jeffs declared in 2004 “to answer them nothing,” the members of his church (the plaintiffs here) took no legal action in response to the Attorney General’s petition; (2) a belief at some point in that earlier period that the FLDS members, again following their prophet, might be abandoning their homes and property in Southern Utah and relocating to Texas or some other location; (3) a general lack of

communication from the FLDS church leaders among themselves and their followers, and a good deal of confusion about how to deal with the unfolding situation, which included the fact that their prophet was facing serious criminal charges in Utah state court and that he and the Trust had been sued in two tort lawsuits in Utah state courts; (4) a belief based on the first two orders granted by the Utah court that the Special Fiduciary had relatively limited authority that focused primarily on seeing that taxes were paid and that the tort lawsuits were properly defended; and (5) the fact that the plaintiffs themselves were not parties in the proceedings and therefore under no obligation to do anything.

During the first three years after the state case was commenced, then, on the current state of the record, it appears the plaintiffs' failure to seek legal redress was based on following the counsel of their religious leaders and on the belief, or hope, that the actions of the state would not be sufficiently violative of their rights as to necessitate legal action in the courts. During this time it is also significant to recognize that the plaintiffs did not leave their homes or property. They did not relocate to Texas. They stayed on the Trust property in Hildale and Colorado City, while they watched the actions of the Special Fiduciary become a reality in their everyday lives.

When this case was filed in 2008, the circumstances had changed significantly for at least two interrelated reasons: (1) Warren Jeffs changed his position and apparently instructed his followers to get legally involved and (2) the Special Fiduciary had taken steps in administering the Trust to do things that the FLDS members felt could not be tolerated. These included the decision to sell the Berry Knoll Farm property, which many of the FLDS community felt had special spiritual importance, and the planned final subdivision of their homes and property. In

addition, there were a variety of smaller actions that if allowed to happen would cause irreparable harm to the FLDS members.

Accordingly, the plaintiffs altered their course in 2008 by filing this lawsuit. Thereafter, this court is well aware of the details that have caused the case to proceed without any final action by the court on the motion for injunctive relief. The main reasons have been (1) an extensive effort at reaching a mediated settlement, and (2) a stay of this action while the plaintiffs' Petition for Extraordinary Writ was dealt with by the Utah Supreme Court.

These circumstances do not amount to the type of inexcusable delay that supports the dismissal of plaintiffs' claims of serious constitutional violations on the basis of laches. This is particularly the case with respect to the state's continuation of its administration of the Trust. While it is true the plaintiffs could have acted sooner, their reasons and actions under all the circumstances have not been sufficiently unreasonable to warrant a finding of laches.

Turning to the injury caused to the state actors and others by the plaintiffs' waiting until 2008 to file this case, the injury, if any, is also not sufficient to serve as a basis for applying laches, even if the plaintiffs failed to bring their case with appropriate diligence. The injury caused by the plaintiffs' delay in bringing their claims falls into three categories: (1) the Special Fiduciary's own unpaid bills; (2) the settlements that were reached in the two tort lawsuits; and (3) other (mostly unidentified) decisions made and positions taken based on the Special Fiduciary's actions. None of these equal the kind of obligations, expectations, and dependencies that warrant the extraordinary remedy of laches, a remedy which would place the payment of the Special Fiduciary's accountants and lawyers (from money earned from the sale of plaintiffs' own

property) ahead of the plaintiffs' rights to receive a fair hearing on their constitutional claims.

The tort lawsuit settlements certainly can be dealt with by the same legal system that one would expect to be able to allow these plaintiffs to somewhere obtain a ruling on the merits of their constitutional claims.

If the plaintiffs had abandoned their property and moved to Texas, or if they had waited a considerably longer period of time before seeking redress of their constitutional rights, or even if the damages and injury to the state and third parties was irreparable or more extensive, laches may be an appropriate remedy, but on the current state of the record the case for laches is not made. This is especially true given this court's view, as expressed above, that the defendants' actions were, and continue to be, in clear violation of the Establishment Clause and most likely in violation of the Free Exercise rights of the plaintiffs. On the present state of the record, it would be inequitable in the extreme to dismiss this case in its entirety on the basis of laches and thereby allow these serious constitutional violations to multiply and get worse.

This court is aware of no case where laches has been found under circumstances similar to the instant case. This includes the critical fact that the unconstitutional violation is an everyday ongoing reality. Every passing day, the thousands of FLDS members who brought this case are experiencing the actions and decisions of a state appointed fiduciary regarding the property in which they live. The 1998 Trust may have been reformed three years ago but its illegal administration by the state is happening with every passing day. To apply laches in this situation would be to place the violation of the First Amendment behind the fees and expenses of the very state actors, and those of the (mostly) former, and now disaffected, members of the

FLDS church who have encouraged the state actors to take over the Trust. If the defendants are in territory where they are constitutionally not permitted to be, the law should require their eviction, not sanction their continued presence just so they can be paid for the invasion.

Res Judicata

Regarding res judicata, the defendants claim this court is bound by the Utah Supreme Court's finding of laches and must dismiss the case. The plaintiffs agree that this remedy is required if the Utah Supreme Court's ruling is considered to be on the merits for res judicata purposes, but they contend it was not. Defendants, obviously, disagree. Both sides, however, agree that the law of the state of Utah on this point is not settled.

Nor do the parties agree on the general state of the law in other federal or state jurisdictions. They both claim support in a proper application of Rule 41(b) of the Federal and Utah Rules of Civil Procedure. They both insist that the cases cited by their opponent(s) are misrepresented and inapposite. They both contend the cases from other jurisdictions are strongly in their favor, and they insist a ruling not in their favor would be a serious miscarriage of justice.

Currently, there is no clear precedent from the Utah Supreme Court or any other Utah state court regarding whether laches always constitutes a "judgment on the merits" for res judicata purposes. Plaintiffs argue that Utah would not find laches to provide a basis for res judicata in the circumstances of this case because to do so would be inconsistent with Utah law that holds that dismissal of a claim on the basis of a statute of limitations violation is not a judgment on the merits. They also assert that Utah has "drawn its descriptions of Utah preclusion law from California," which has held that judgments on the basis of laches are not on

the merits for res judicata purposes. *See Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978); Plaintiffs' Opening Mem. at 43.

Furthermore, plaintiffs point to the Utah Supreme Court's decision in the recent *FLDS* case where the court stated "[w]e decline to reach the merits of these claims," 239 P.3d at 1066, as evidence that the decision was not on the merits for res judicata purposes.

Moreover, in supplemental briefing, the plaintiffs assert that because of the unique nature of the action before the Utah Supreme Court—a Petition for Extraordinary Writ, which is discretionary in nature, as apposed to an appeal as of right—a finding of res judicata would be improper. And, finally the plaintiffs argue that "the overwhelming majority of courts and commentators hold that a laches or limitations dismissal in state court does not preclude a subsequent action in a federal court or a different state court." (Plaintiffs' Supp. Reply Brief Regarding Res Judicata Issue at 3.)

Defendants, on the other hand, contend that the Utah Supreme Court's ruling is preclusive under the Full Faith and Credit statute, that it is "on the merits" for res judicata purposes pursuant to controlling Utah law, and they cite many policy reasons which should prevent this court from considering the instant case. The defendants recognize that there is no direct guidance from the Utah Supreme Court on this issue, but assert that Utah would be inclined to follow the law of Arizona in this area, citing *Day v. Wiswall's Estate*, 381 P.2d 217 (Arizona 1963), in which the Arizona Supreme Court held that laches constitutes a judgment on the merits for res judicata purposes.

A close inspection of the arguments of the parties and the underlying reasons supporting

the doctrines of laches and res judicata leads this court to the opinion that in the circumstances of this case, the Utah Supreme Court's finding of laches was not a judgment on the merits for res judicata purposes. Accordingly, this court is not precluded from further action in this case.

To begin with, it is well to remember that general notions of fairness provide the basis for both the doctrines of res judicata and laches. They both recognize the essential fairness in the view that at some point litigation over a particular controversy must come to an end. The law recognizes that while every person is entitled to his day in court, that is, a full and fair opportunity to be heard, that person is not necessarily entitled to a second day, or a third. As one court aptly put it, "there is justice too in an end to conflict and the quiet of peace."

Environmental Defense Fund, Inc. v. Alexander, 614 F.2d 474, 481 (5th Cir. 1980).

Accordingly, the common law of equity developed to deny opportunities to mount additional or collateral attacks on legal issues which already had an opportunity to be presented for resolution in a court with jurisdiction. This is the essence of the doctrines of res judicata and collateral estoppel. Initially, each of these doctrines strictly required a final judgment on the merits. Over time, however, "the meaning of the term 'judgment on the merits' has gradually undergone change and has come to be applied to some judgments that do not pass entirely upon the substantive merits of a claim," 47 Am. Jur. 2d Judgments § 540 (2010), and pursuant to various statutes and court decisions, some "judgments not passing directly on the substance of the claim" have nevertheless operated as a bar under res judicata and collateral estoppel rationales. *Id.*

The Arizona Supreme Court opinion in *Day v. Wiswall's Estate*, 381 P.2d 217 (Ariz. 1963), is an example of one of these court decisions that recognized preclusive effect even when

the earlier proceeding was technically not decided on the merits but rather on the basis of laches. The California Supreme Court's decision in *Johnson v. City of Loma Linda*, 5 P.3d 874 (Cal. 2000), also a case where the underlying litigation was dismissed on the basis of laches, comes to a different conclusion, finding that the laches ruling was not on the merits for res judicata purposes. Under the current state of the law, then, it is apparent there are times when laches is deemed to support the application of res judicata and there are also times when it is not. While all of the reasons for such different results are not entirely clear, and may vary from court to court, it appears that one common element, and one that makes the Arizona and California decisions consistent with each other, is whether the underlying case in which laches was found included a fair examination of the circumstances and merits of the suit. This principle was clearly an important factor in both the Arizona and California cases.

Day, the Arizona case, involved an action brought by a plaintiff seeking a declaration that portions of her stepmother's estate should be held in constructive trust for her benefit. 381 P.2d at 218-19. The plaintiff claimed to be an heir to 1/22nd of her father's California estate, and to one-half of her mother's California-based community property. The mother died in 1899 and the father in 1911. Some 50 years after the distribution of this property to her stepmother, the plaintiff claimed she could still trace the property.

The plaintiff brought suits against the same parties in both Arizona and California. While the Arizona case was pending appeal, a judgment was rendered in the Superior Court of Los Angeles County, California dealing with the same property, issues, and parties as those brought by the plaintiff in Arizona. At the conclusion of a trial "upon the facts," the California

court made a finding of laches against the plaintiff, in pertinent part, as follows:

The separate and community interests [which plaintiff seeks to reach] * * * have been so intermingled over the period of approximately 56 years that it would now be inequitable to segregate and evaluate such interest separately, and for such delay plaintiff is guilty of laches insofar as she seeks relief under actions * * * No. 666,006 * * * [and] No. 714,004.

Id. at 220.

The plaintiff claimed that the Arizona court should not give preclusive effect to the California decision because it was on the basis of laches and therefore not “on the merits.” In disagreeing with her, the Arizona Supreme Court stated, “the doctrine of laches is properly applied only after a consideration of the circumstances and merits of a suit,” and that “[t]he judgment in the California suit was not one of dismissal, but, after a full hearing and consideration of evidence and a finding of laches as a fact, was that the plaintiff *take nothing* by reason of the actions. It was therefore a judgment on the merits.” *Id.* at 220 (emphasis in original).

The California case, *Johnson v. City of Loma Linda*, stated that “a judgment denying a petition for writ of administrative mandate because of the defense of laches is not a judgment on the merits for purposes of res judicata.” 5 P.3d at 884. The court explained that “[a] judgment is on the merits for purposes of res judicata if the substance of the case is tried and determined,” and that under California law “[t]he defense of laches has nothing to do with the merits of the cause against which it is asserted The telling consideration must be that laches constitutes an affirmative defense *which does not reach the merits of the cause.*” *Id.* (internal quotations and citations omitted) (emphasis in original). The court concluded its opinion with the

following:

The City notes that the doctrine of res judicata promotes the public policies of giving certainty to legal proceedings, preventing parties from being unfairly subjected to repetitive litigation, and preserving judicial resources. These public policies, the City argues, would be promoted if we were to hold that a trial court's ruling on the basis of laches is a judgment on the merits. What the City overlooks, however, is that the doctrine of res judicata also requires that the prior dispute be resolved on its merits. That requirement would not be satisfied if we were to adopt the City's argument.

Id. at 884 (internal citations omitted).

In the recent *FLDS* case, the Utah Supreme Court identifies the doctrine of laches in Utah as follows:

The length of what constitutes a lack of diligence depend[s] on the circumstances of each case, because the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered . . . and the length of [the] delay. In determining whether to apply the doctrine of laches, we consider the relative harm caused by the petitioner's delay, the relative harm to the petitioner, and whether or not the respondent acted in good faith. Further, reasonable delay caused by an effort to settle a dispute does not invoke the doctrine of laches.

FLDS v. Lindberg, 2010 UT 51, ¶ 28 (internal quotations and footnotes omitted).

Under this definition, the court recognizes an obligation to perform an assessment of the merits of the plaintiffs' case in addition to the factors of delay and prejudice to others. In this regard, the Utah Supreme Court takes the same view of the definition of laches as the Arizona Supreme Court, that is, laches requires the consideration of the circumstances and merits of a suit. In the *FLDS* case, however, aside from the Utah Supreme Court's bare statement that laches entails a consideration of "the relative harm to the petitioner," the court undertakes no assessment of any kind whatsoever as to whether the plaintiffs' claims of serious constitutional violations had any merit at all. There is no attention given to whether the state district court's

reformation of the Trust was in violation of the First Amendment or whether the day-to-day administration and management of the Trust property constituted the ongoing serious constitutional violations on which the plaintiffs' case was based. Attention was devoted solely to discussing the delay and the alleged prejudice caused by the delay. Under these circumstances, the "merits" of plaintiffs' case were not considered. The "relative harm to the petitioner" (the plaintiffs) was not even mentioned. As a result, the plaintiffs have not yet had a forum in which their claims of serious constitutional violations have been entertained or addressed sufficiently to earn a finding that they were on the merits.

In the final analysis, it appears from the case law, and in particular the cases from Arizona and California cited by the parties, that laches is entitled to preclusive effect in some cases, namely where there is some appropriate attention paid to the merits, and not in others. In this regard Utah law is in accordance with both the Arizona and California decisions. The Utah Supreme Court announced in *FLDS* a definition of laches that is the same as the Arizona high court. (Compare Utah's "In determining laches . . . we consider the relative harm caused by the petitioner's delay, the relative harm to the petitioner, and whether or not the respondent acted in good faith," with Arizona's "The doctrine of laches is properly applied only after a consideration of the circumstances and merits of a suit."). Accordingly, it would be expected that the Utah court would take a similar approach to finding laches as having preclusive effect only when, as in the *Day* case, there was a "full hearing and consideration of evidence" in the underlying action. If there is no such consideration of the merits, laches would not have preclusive effect.²

²The defendants' brief supports this court's view that the merits of the claim must receive some consideration by a court before a laches finding will have preclusive effect. The Arizona

That is unquestionably what happened in *FLDS*. Therefore, consistent with the *Day* case, there is no res judicata effect from Utah's decision in *FLDS*.

On the other hand, Utah law is also consistent with California's law, announced in the *Johnson* case, if a finding of laches is based only on a consideration of (1) delay by the plaintiff and (2) prejudice to the defendant (and third parties), and does not consider the merits of the plaintiff's suit. If that is the definition of laches, or if that is the way the doctrine is applied, then the result is a finding of no preclusive res judicata effect, as was the California court's holding in *Johnson*. Any reading of the *FLDS* case shows that the Utah Supreme Court focused solely on delay and prejudice (to the defendants) and nothing more.

Furthermore, the court finds merit in the plaintiffs' argument that the discretionary nature of the relief available under the Petition for Extraordinary Writ makes a finding of res judicata inappropriate here. See Plaintiffs' Supp. Brief Regarding Res Judicata Issue at pp.4-9. In *State v. Barrett*, 2005 UT 88, 127 P.3d 682, the Utah Supreme Court recognized that a party seeking relief under such a Petition "has no right to receive a remedy that corrects a lower court's mishandling of a particular case. Rather, whether relief is ultimately granted is left to the sound discretion of the court hearing the petition." *Id.* at ¶ 23.

The *Barrett* court compared the decision whether to grant relief pursuant to a petition for extraordinary writ to a decision whether to grant a petition for a writ of certiorari. "The exercise

Attorney General explains to the court on page 20 of his brief that "A statute of limitations bar looks only to the timing of the filing of the earlier action, whereas laches requires inquiry into the merits of the claim." He also refers the court to the Utah Supreme Court's definition of laches as requiring consideration of "the relative harm to the petitioner," (page 15 and again on page 20), to emphasize why this court should give res judicata effect to the Utah Supreme Court's opinion in the instant case.

of the court's discretion when deciding whether to grant rule 65B(d) extraordinary relief is akin to this court's exercise of its certiorari review powers. Rule 46 of the Utah Rules of Appellate Procedure states that "[r]eview by a writ of certiorari is not a matter of right, but of judicial discretion and will be granted only for special and important reasons." *Id.* at ¶ 24 (quoting Utah R. App. P. 46(a)). It was under these circumstances in which the Utah Supreme Court decided in its sole discretion not to grant the Writ in the FLDS petition. In doing so, the court specifically stated that "we decline to reach the merits of these claims." *FLDS*, 2010 UT 51, ¶ 43. In this regard, pursuant to Fed. R. Civ. Proc. 41(b), it appears the Utah Supreme Court in its dismissal order was signaling that the decision was not operating "as an adjudication on the merits."³

For the above reasons and based on the other authorities cited in the plaintiffs' supplemental briefing, the court finds the Utah Supreme Court's decision in *FLDS* was not on the merits for the purposes of res judicata.

Other Issues/Defenses

As addressed above, the defendants have asserted many defenses arguing that this court lacks jurisdiction, or that even if this court has jurisdiction, it should not exercise it. And, as stated, the defendants also address, albeit sparingly and unconvincingly, the substance of the plaintiffs' constitutional claims. But, in addition to these assertions in defense of their actions, the defendants also devote large amounts of their briefs, and attention in oral argument, to

³Rule 41(b) of the Utah Rules of Civil Procedure provides: "*Unless the court in its order for dismissal otherwise specifies*, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits." (emphasis added). Rule 41(b) of the Federal Rules of Civil Procedure is virtually identical to the Utah rule.

addressing the bad character and alleged criminal wrongdoing of Warren Jeffs. The purpose of these pronouncements, as best the court can make of them, is to persuade this court that it should find the state action constitutionally proper because to find otherwise would allow Warren Jeffs (and presumably his followers) to obtain the Trust property and use it to carry out wrongful and criminal acts. The defendants point, in particular, to Mr. Jeffs' alleged sexual abuse of minors through illegal arranged marriages of young girls to older men and by other means.

The defendants assert that if the state court were to terminate the Trust, as opposed to reforming and managing it, and thereby allow it to be revoked according to its own terms, the Trust property would revert to Warren Jeffs, as president and corporation sole of the FLDS church. This result, they claim, cannot be allowed to happen because Jeffs would simply continue to use the Trust property for nefarious purposes. They point out that he and the Trust were sued in the tort lawsuits on claims of illegal sexual abuse of minors, and that he was prosecuted criminally for such activity in Utah and is currently facing similar charges in Texas. They also cite instances where Mr. Jeffs has made statements that show he is manipulating the Trust property to assist him in his illegal behavior.

The tort lawsuit claimants have sought to intervene in this case with similar rhetoric. They refer to Mr. Jeffs' criminal acts as "the elephant in the room" and argue that the Special Fiduciary must be allowed to continue his work in order to restrict Mr. Jeffs' ability to utilize the Trust and its property in aid of his criminal abuses against minors and other wrongful behavior.

All of these accusations and pronouncements are not lost on the court. But they lack relevance to the question whether the state actors violated the constitutionally established

boundaries between church and state by their virtual remake and takeover of the 1998 Trust. The fact of the matter is that the state court based its decision to reform the Trust, and turn its administration over to the Special Fiduciary, on the malfeasance of Warren Jeffs and the other trustees in failing to defend the tort lawsuits and thereby subject the Trust property to possible default judgments. Although the defendants asserted in oral argument, and suggest in their briefs, that part of the reason for reforming the Trust was because of a legal determination by the state court that it was being used to facilitate illegal activity, there is no support for that assertion.

While it is true the state court judge in reforming the Trust recognized that the FLDS church practiced polygamy, which is illegal, and that the Special Fiduciary would not in any manner be allowed to make Trust administration decisions on the basis of polygamist practices, the state judge nowhere based her decision to reform or administer the Trust on a finding that it was being used to commit or support criminal activity. The state-judge's Memorandum Decision states:

The reasons for reformation are multiple. Earlier in these proceedings the Court determined that the suspended trustees had "committed [] serious breach[es] of trust," and demonstrated "unfitness, unwillingness, or persistent failure . . . to administer the trust effectively" on behalf of the beneficiaries of the Trust. Specifically, the suspended trustees and, in particular, Warren Jeffs in his capacity as FLDS President and President of the Board of Trustees, violated various duties including the duties of loyalty and 'prudent administration' of the Trust. To be sure, the Restatement granted the suspended trustees great discretion in managing the Trust. Nevertheless, the Code provides that even when the controlling trust instrument uses such terms as "'absolute,' 'sole,' or 'uncontrolled' [discretion,] the trustee shall exercise discretionary power in good faith in accordance with the terms and purposes of the trust and the interests of the beneficiaries."

While certain specific claims against the suspended trustees may be in

dispute, there is no question that the suspended trustees failed to defend the Trust against various lawsuits to which the Trust is a party. By failing to defend the Trust, the suspended trustees violated the Utah Code, and allowed the Trust to be exposed to entry of default judgments against it. Entry of judgment in those cases would permit prevailing parties to seize Trust assets in satisfaction of the judgment. Additionally, the suspended trustees knowingly and willfully failed to comply with two Court orders: First, they failed to provide an accounting of Trust assets. Second, they failed to assist the Special Fiduciary by collecting and providing information about how the Trust has been administered.

... [I]n addition to the problems that have resulted from the trustees' administrative defaults, the Court's review of the Restatement has led it to conclude that various dispositive (*i.e.*, substantive) provisions of that instrument are fundamentally flawed and unworkable. Accordingly, the Court—with the help of interested parties—will need to address both types of issues as part of the Trust's reformation.

In the Matter of the United Effort Plan Trust, Case No. 053900848, at ¶¶ 21-23.

If there is a case to be made by the states that the property within the FLDS Trust is being managed and distributed to facilitate sex crimes against minors, or to facilitate polygamy, or to discriminate against young males within the Church, then the state may wish to make such a case in the appropriate place and consistent with due process, and seek the appropriate remedies, which may include forfeiture and confiscation of the Trust property by the state, but there is no support in the record before the court that such a case was ever made in either Utah or Arizona.

Furthermore, even if such a proceeding had been held, and a decision had been reached that the Trust property was being used to facilitate crimes, the remedy cannot be one of remaking the Trust and administering it in the manner employed by the state actors in this case. Such action, even if it followed a finding of impropriety or criminality in the use of the Trust property, would still run afoul of the Establishment Clause. It would still improperly involve the state in taking over a religiously-based program and turning it into a secular one based on new non-

religious rules recognized by the state. It would constitute the type of excessive entanglement between the state and religion not permitted under the Constitution. It is one thing for a state to tell a church and its members that they, just like all other residents of the state, may not smoke peyote, or commit child sexual abuse, or violate any other law of general application. And it is proper to prosecute the offenders and to seek all available legal remedies, such as property forfeiture. But it is quite another thing, altogether, to reorganize the religious activities of such churches and their members to make them conform to the states' version of appropriate secular behavior.

In sum, it is the method the states chose to utilize in dealing with the Trust that this court finds to offend the Constitution and to support preliminary injunctive relief. There may be other methods that could reach many of the goals the states seem to be pursuing, but they are of course not at issue here. The court has listened to the many complaints about Warren Jeffs and the allegations of his and some of his followers' criminal and tortious misconduct, but finds that these allegations as a matter of law do not justify the constitutional infirmities of the state action.

CONCLUSION

For the foregoing reasons, the court GRANTS the plaintiffs' motion for a preliminary injunction, effective immediately, on terms identical to the present Temporary Restraining Order. A separate order will hereafter be entered further identifying the precise extent of the preliminary injunction. Defendant Utah Attorney General Mark Shurtleff's, defendant Arizona Attorney General Thomas C. Horne's, and defendant Denise Posse Lindberg's motions to dismiss are DENIED. The tort lawsuit claimants' motion to intervene is GRANTED.

IT IS SO ORDERED.

DATED this 24th day of February, 2011.

A handwritten signature in black ink, reading "Dee Benson". The signature is written in a cursive style with a long horizontal flourish at the end.

Dee Benson
United States District Judge

Addendum L

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
UTAH APPELLATE COURTS

MAR 13 2012

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Fundamentalist Church of Jesus
Christ of Latter-Day Saints,

Plaintiff and Appellee,

v.

Case No. 20120158-SC

Thomas C. Horne; Bruce R. Wisan;
Mark Shurtleff; and Hon. Denise Posse
Lindberg; et al.,

Defendants and Appellants.

ORDER OF ACCEPTANCE

This matter is before the court upon the Certification of Question of State Law to this court by the United States Court of Appeals for the Tenth Circuit.

IT IS HEREBY ORDERED that the Utah Supreme Court accepts the following question certified to it:

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

The certifying court has filed copies of the briefs and appendices filed their court, with the Utah Supreme Court, however, no other parts of a record have been filed with the Utah Supreme Court.

Within ten (10) days of the date of this order, counsel for the parties may advise

this court as to what additional items of the record they believe necessary for consideration of the certified question. Following the expiration of the ten days, this court, if necessary, may request additional pieces of the record from the United States Court of Appeals for the Tenth Circuit.

This Court plans to set an expedited briefing schedule and hear oral arguments as soon as possible in this case.

FOR THE COURT:

3-13-12

Date



Matthew B. Durrant
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2012, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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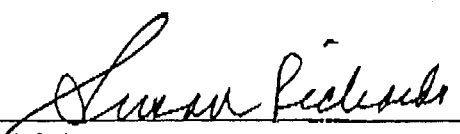
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Dated this March 13, 2012.

By 
Judicial Assistant

Case No. 20120158
U.S. COURT OF APPEALS, 11-4049