

1991

In the Matter of the Estate of Clarence I. Justheim : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

J. Richard Bell; Bell & Bell; attorney for appellants.

Joseph J. Palmer, Jeffrey Robinson; Moyle & Draper, P.C.; attorneys for appellee.

Recommended Citation

Brief of Appellee, *Justheim*, No. 910244.00 (Utah Supreme Court, 1991).

https://digitalcommons.law.byu.edu/byu_sc1/3560

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50

.A10

DOCKET NO. _____ IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF
CLARENCE I. JUSTHEIM

Deceased.

:
:
:
:
:
:

Supreme Court No. [REDACTED]

Priority 16

91-0244-CA

BRIEF OF APPELLEE

Appeal from Decree and Judgment on Verdict of
Third Judicial District Court, Probate
Division, Salt Lake County, State of Utah,
Honorable Michael R. Murphy, District Judge

J. Richard Bell
BELL & BELL
303 East 2100 South
Salt Lake City, UT 84115

Attorney for:
Priscilla Knight as
Personal Representative
of the Estate of Charles
Justheim, Madelaine L.
Harris, Patricia J. Brown,
St. Mark's Episcopal
Cathedral Parish and Dean
of St. Mark's Episcopal
Cathedral, Appellants

Joseph J. Palmer
Jeffrey Robinson
MOYLE & DRAPER, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, UT 84111-1901

Attorneys for:
Raymond A. Ebert, Appellee

FILED

DEC 17 1990

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF
CLARENCE I. JUSTHEIM

Deceased.

:
:
:
:
:
:

Supreme Court No. 890419

Priority 16

BRIEF OF APPELLEE

Appeal from Decree and Judgment on Verdict of
Third Judicial District Court, Probate
Division, Salt Lake County, State of Utah,
Honorable Michael R. Murphy, District Judge

J. Richard Bell
BELL & BELL
303 East 2100 South
Salt Lake City, UT 84115

Attorney for:

Priscilla Knight as
Personal Representative
of the Estate of Charles
Justheim, Madelaine L.
Harris, Patricia J. Brown,
St. Mark's Episcopal
Cathedral Parish and Dean
of St. Mark's Episcopal
Cathedral, Appellants

Joseph J. Palmer
Jeffrey Robinson
MOYLE & DRAPER, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, UT 84111-1901

Attorneys for:

Raymond A. Ebert, Appellee

PARTIES TO THE PROCEEDING

Parties on Appeal:

Appellants:

Priscilla Knight, as Personal Representative of the
Estate of Charles Justheim, Madelaine L. Harris,
Patricia J. Brown, St. Mark's Episcopal Cathedral and
The Very Reverend Dean Maxwell.

Represented by J. Richard Bell

Appellee:

Raymond Ebert

Represented by Joseph J. Palmer, Jeffrey Robinson

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION.....	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....	1
STANDARD OF REVIEW.....	2
DETERMINATIVE RULES.....	2
STATEMENT OF THE CASE.....	3
A. Nature of the Case.....	3
B. The Course of Proceedings.....	3
C. Disposition in the Court Below.....	4
STATEMENT OF FACTS.....	4
A. The Gifts.....	4
B. Clarence's Regard for Ray.....	5
C. Corroboration for the Gifts.....	8
D. Clarence's Relationship with John Morgan Jr.....	10
E. Clarence's Family.....	12
F. Ray's Disclosure to Allen.....	12
G. John Morgan Jr.'s Animosity Toward Ray.....	13
SUMMARY OF ARGUMENTS.....	14
ARGUMENT.....	16
POINT I: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING BENEFICIARIES A NEW TRIAL BASED ON THE ALLEGED IMPROPER ADMISSION OF PAROL EVIDENCE.....	16
A. The Beneficiaries Have Waived Any Alleged Error..	16
B . The Parol Evidence Rule is Inapplicable.....	20
C. The Parol Evidence Rule Does Not Apply to Factual Recitals.....	23

	<u>Page</u>
D. The Beneficiaries Offered No Evidence of Integration.....	25
POINT II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED BENEFICIARIES A NEW TRIAL BECAUSE ESTOPPEL WAS INAPPLICABLE.....	26
A. The Beneficiaries Have Waived Any Alleged Error..	26
B. The Estoppel Theory Was Precluded By the Pretrial Order and Pretrial Motions.....	27
C. Estoppel is Inapplicable.....	27
1. No Standing.....	28
2. Without Knowledge.....	28
3. Intent to induce is required.....	29
4. Must prove detrimental reliance.....	29
POINT III: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EXHIBITS A, B, C AND D.....	29
A. Probative Value v. Dangers of Unfair Prejudice, Confusion, Delay and Undue Repetition.....	30
B. The Letters Had No Probative Value.....	31
C. The Letters Did Not Support The Theory For Which They Were Proffered.....	33
1. The excluded portions do not show a change of position.....	33
2. The admitted portions do not show a change of position.....	34
3. The evidence belied the Beneficiaries proffered theory.....	35
4. No duty to disclose.....	35
D. The Beneficiaries Have Not Suffered Any Harm....	36
1. The trial court considered the entire letters.....	36

	<u>Page</u>
2. Substance of the entire letters admitted to jury.....	36
3. The letters were cumulative.....	37
E. Morgan Jr.'s Speculative Accusations of Collateral Misconduct Would Have Seriously Prejudiced Ray.....	37
CONCLUSION.....	38
ADDENDUM	
Petition.....	A
Supplemental Pretrial Order.....	B
Stipulation.....	C
Order.....	D
Trial Exhibit A.....	E
Trial Exhibit B.....	F
Trial Exhibit C.....	G
Trial Exhibit D.....	H
Trial Exhibit 2.....	I

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Beehive Medical Electronics, Inc. v. Square D Co.</u> , 669 P.2d 859 (Utah 1983).....	14,17
<u>Colman v. Colman</u> , 743 P.2d 782 (Utah Ct. App. 1987).....	15,28
<u>Co-Vest Corp. v. Corbett</u> , 735 P.2d 1308 (Utah 1987).....	14,18
<u>Coursen v. A.H. Robbins Co., Inc.</u> , 764 F.2d 1329 (9th Cir. 1985).....	38
<u>Doelle v. Ireco Chemicals</u> , 391 F.2d 6 (10th Cir. 1968)....	22
<u>Edmonds v. Galey</u> , 458 P.2d 650 (Wyo. 1969).....	21-23
<u>FMA Financial Corp v. Hansen Dairy, Inc.</u> , 617 P.2d 327 (Utah 1980).....	28
<u>Fullmer v. Morrill</u> , 2 Utah 2d 347, 273 P.2d 885 (1954)....	15,24
<u>Furniture Manufacturers Sales, Inc. v. Deamer</u> , 680 P.2d 398 (Utah 1984).....	19
<u>Garrett v. Ellison</u> , 72 P.2d 449 (Utah 1937).....	24-25
<u>Godesky v. Provo City Corp.</u> , 690 P.2d 541 (Utah 1984).....	37
<u>Hyland v. St. Mark's Hospital</u> , 19 Utah 2d 134, 427 P.2d 736 (1967).....	2
<u>Lee v. Howes</u> , 548 P.2d 619 (Utah 1976).....	16
<u>Lee v. Kimura</u> , 634 P.2d 1043 (Haw. Ct. App. 1981).....	22
<u>Lembach v. Cox</u> , 639 P.2d 197 (Utah 1981).....	2,16
<u>Manger v. Davis</u> , 619 P.2d 687 (Utah 1980).....	26
<u>Moe v. Avions Marcel Dassault-Brequet Aviation</u> , 727 F.2d 917 (10th Cir. 1984).....	38

	<u>Page</u>
<u>Noel Shows, Inc. v. United States</u> , 721 F.2d 327 (11th Cir. 1983).....	31
<u>Petersen v. Hansen-Niederhauser, Inc.</u> , 13 Utah 2d 355, 374 P.2d 513 (1962).....	14,16- 17,19
<u>Pollesche v. Transamerican Insurance Co.</u> , 27 Utah 2d 430, 497 P.2d 236 (1972).....	2
<u>Stagmeyer v. Latham Bros., Inc.</u> , 20 Utah 2d 421, 439 P.2d 279 (1968).....	18
<u>State v. Larsen</u> , 775 P.2d 415 (Utah 1989).....	2
<u>State v. Malmrose</u> , 649 P.2d 56 (Utah 1982).....	18
<u>State v. Maurer</u> , 770 P.2d 981 (Utah 1989).....	31,38
<u>State v. Schreuder</u> , 726 P.2d 1215 (Utah 1986).....	18
<u>State v. Stephens</u> , 667 P.2d 586 (Utah 1983).....	36
<u>Terry v. Zions Cooperative Mercantile Institution</u> , 605 P.2d 314 (Utah 1979).....	38
<u>Tribble v. Reely</u> , 557 P.2d 813 (Mt. 1976).....	27
<u>Triple I Supply, Inc. v. Sunset Rail, Inc.</u> , 652 P.2d 1298 (Utah 1982).....	28-29
<u>Union Bank v. Swenson</u> , 707 P.2d 663 (Utah 1985).....	15,21, 25-26
<u>University of Colorado v. Silverman</u> , 555 P.2d 1155 (Colo. 1976).....	27
<u>Weaver v. Modula</u> , 557 P.2d 152 (Utah 1976).....	15,21
 <u>CONSTITUTIONAL PROVISIONS</u>	
Utah Const. Art. VIII.....	1
 <u>STATUTES</u>	
Utah Code Ann. § 78-2-2 (1990 Supp.).....	1

	<u>Page</u>
 <u>RULES</u>	
Utah R. Evid. 103.....	2,18
Utah R. Evid. 401.....	2,31
Utah R. Evid. 403.....	1,3, 16,30
Utah R. App. P. 3.....	1

OTHER AUTHORITIES

Annotation, <u>Modern Status of Rules Governing Legal Effect of Failure to Object to Admission of Extrinsic Evidence Violative of Parol Evidence Rule</u> , 81 A.L.R. 3d 249 (1977 & 1990 supp.).....	17,18
--	-------

REFERENCES TO THE RECORD

All references to the Record will be abbreviated as follows:

1. the Record on appeal, as paginated by the court clerk, is designated as "R.";
2. the parties' trial exhibits are designated as "Tr. Ex."; and
3. There are six volumes of transcribed testimony. The entire transcripts are not paginated consistent with the Record. Only the first page of each volume bears a Record paginated number. The transcript of the trial is designated as "Tr." followed by the Record paginated number to identify the volume referred to and the specific page number of that volume. For example, "Tr. 2907.18" refers to the transcript volume with the first page paginated by the Court Clerk as 2907 at page 18.

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF	:	
CLARENCE I. JUSTHEIM,	:	SUPREME COURT NO. 890419
	:	
Deceased.	:	Priority 16
	:	

JURISDICTION

This is an appeal from a final judgment pursuant to Rule 3 of the Utah Rules of Appellate Procedure. The Utah Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2 (1990 Supp.) and Article VIII of the Utah Constitution.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in denying Beneficiaries a new trial?¹
2. Did the trial court abuse its discretion when it excluded Exhibits A, B, C and D pursuant to Rule 403 of the Utah Rules of Evidence, but admitted into evidence a written stipulation conceding the relevant portions of Exhibits A, B, C and D?

STANDARD OF REVIEW

This Court will not reverse a trial court's evidentiary ruling, including those pursuant to Rule 403 of the Utah Rules of

¹ Although the Beneficiaries asserted additional bases for a new trial, they have only appealed two: (1) the parol evidence rule, infra at 16-26; and (2) estoppel, infra at 26-29.

Evidence, unless the trial court has abused its discretion. State v. Larsen, 775 P.2d 415, 419 (Utah 1989). "[T]he error must have been harmful" to constitute an abuse of discretion. Larsen, 775 P.2d at 419. See also Utah R. Evid. 103.

A trial court's denial of a motion for a new trial will not be reversed absent an abuse of discretion. Lembach v. Cox, 639 P.2d 197, 201 (Utah 1981), *overruled on other grounds*, 728 P.2d 117 (1986). The trial court's abuse must be "clearly shown." Pollesche v. Transamerican Insurance Co., 27 Utah 2d 430, 497 P.2d 236, 238 (1972). It must appear that "[its] action was arbitrary, or that it clearly transgressed any reasonable bounds of discretion." Lembach, 639 P.2d at 201 (quoting from Hyland v. St. Mark's Hospital, 19 Utah 2d 134, 427 P.2d 736 (1967)).

DETERMINATIVE RULES

Utah R. Evid. 103(a)(1):

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

Utah R. Evid. 401:

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Utah R. Evid. 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. Nature of the Case.

This was an action by some beneficiaries ("Beneficiaries") of Clarence I. Justheim ("Clarence") to recover certain stock given by Clarence to Raymond A. Ebert ("Ray").

B. The Course of Proceedings.

On June 29, 1984, St. Mark's Episcopal Cathedral Parish (the "Parish") filed a petition to remove Ray as personal representative of the Estate of Clarence I. Justheim (the "Estate") and as trustee of a trust created by Clarence (the "Removal Issue") and to recover stock in Wyoming Petroleum Company given to Ray by Clarence before his death (the "Gift Issue"). (R. 61-66). Other beneficiaries subsequently joined in the Parish's petition. Trial was scheduled for May 27, 1986. At trial, the parties agreed to try just the Removal Issue and reserve the Gift Issue for later resolution. (R. 1004).

The Removal Issue was tried on various days in May, June and July, 1986. On August 5, 1986, the trial court entered a Decree denying the petitions to remove Ray. (R. 1154-58). On August 25, 1986, the trial court entered an Order of Certification that the Decree was a final order under Rule 54(b)

of the Utah Rules of Civil Procedure. (R. 1159-61). The Beneficiaries appealed the Decree. (R. 1171-72). On July 18, 1989, the Utah Court of Appeals affirmed the Decree. (R. 2775-78).

C. Disposition in the Court Below.

The Gift Issue was tried by the Third Judicial District Court, the Honorable Michael R. Murphy presiding, in June, 1989. The jury returned a verdict in Ray's favor. (R. 2655). Judge Murphy, acting independently as a factfinder, also found in Ray's favor. (Tr. 2905.186-88). On July 7, 1989, Judge Murphy entered Findings of Fact, Conclusions of Law and a Decree and Judgment on Verdict upholding the intervivos gifts to Ray. (R. 2677-81). The Beneficiaries filed a Motion for New Trial which Judge Murphy denied. (R. 2718-24, 55). This appeal followed.

STATEMENT OF FACTS

Originally, Clarence owned 127,743 shares in Wyoming Petroleum Company ("Wyoco") which represented 50% control. (Tr. 2907.80-82, 87-94; Tr. Exs. 3, 15). Subsequently, Clarence bought another 23,400 shares of Wyoco stock which represented majority control. (Tr. 2907.89-93; Tr. Ex. 15). Clarence gave all his Wyoco stock to Ray. (Tr. 2907.80-82, 93-95).

A. The Gifts

In May 1981, Ray visited Clarence at home. (Tr. 2907.80, 85; Tr. Ex. 2). Clarence handed some stock to Ray and said "Here, Ray. I want you to have these." (Tr. 2907.81). The

stock represented 120,431 shares in Wyoco.² (Tr. 2907.129; Tr. Ex. 1). Ray took the stock home where he kept it until after Clarence's death. (Tr. 2907.84-85).

In Spring 1982, Clarence bought another 23,400 shares of Wyoco stock. (Tr. 2907.89-93). In May 1982, while Ray was visiting, Clarence handed some more stock to Ray and said "Here, this is all my stock in Wyoming Petroleum, and I want you to have it." (Tr. 2907.93-94). The stock represented 30,712 shares.³ (Tr. Ex. 3). Ray took the stock home and kept it with the other stock until after Clarence's death. (Tr. 2907.94-95).

B. Clarence's Regard For Ray

Ray and Clarence met in 1945 as co-employees of the United States Postal Service. (Tr. 2907.57-58). In approximately 1948, Clarence resigned from the postal service to conduct his own business interests. (Tr. 2907.58). From about 1947 until his death, Ray participated in several of Clarence's business ventures. (Tr. 2907.59-62). Beginning in 1953, Ray purchased shares on the public market in Justheim Petroleum Company ("Justco"), another of Clarence's business interests. (Tr. 2907.61). Ray ultimately owned or controlled 180,000 shares in Justco. (Tr. 2907.61-62).

² Clarence kept one certificate which represented 7,312 shares. (Tr. Ex. 3).

³ The second gift included the newly acquired 23,400 shares plus the 7,312 shares originally possessed by Clarence but kept by him when he made the first gift of 120,431 shares.

Prior to retiring, Clarence had asked Ray to work for him on three or four occasions, but Ray had declined.

(Tr. 2907.61). In 1971, Ray retired from the postal service.

(Tr. 2907.59). In 1973, Clarence asked and Ray agreed to serve as a director of Justco. (Tr. 2907.62).

In 1978, Clarence asked Frank Allen ("Allen"), his attorney, to prepare an estate plan. (Tr. 2908.76, 78-79). Ray still owned stock in Justco, and was still a director.

(Tr. 2907.61-62). Clarence asked Ray to be his personal representative and trustee. (Tr. 2907.62). On June 22, 1978, Clarence executed his Will designating Ray personal representative⁴ and an inter vivos trust appointing Ray trustee.⁵ (Tr. Exs. 8, 9).

Clarence amended his inter vivos trust on five occasions: March 22, 1979, June 7, 1979, January 17, 1980, January 21, 1980, and January 1981. (Tr. Exs. 10-14). None of the amendments changed Clarence's original appointment of Ray. The January 1981 amendment added Ray as a .005 percent residuary beneficiary. (Tr. Ex. 14). Clarence orally reaffirmed his confidence in Ray when he discussed the amendments with Allen. (Tr. 2904.11).

⁴ The Will also designated Allen to act as the Estate's attorney. (Tr. Ex. 8).

⁵ Clarence's wife, Margaret, also executed a will and inter vivos trust designating and appointing Ray her personal representative and trustee. (R. 1649-50).

In November 1978, Clarence was seriously injured in an automobile accident. (Tr. 2907.64). For two or three weeks after the accident, Clarence was incoherent. (Tr. 2907.64-65). During that time, Ray frequently visited or checked on Clarence. (Tr. 2907.64). After Clarence became coherent, he told Ray "I am going to need some help." (Tr. 2907.68). Ray said he would help.

Clarence remained in the hospital until February 1979. During that time, Ray visited Clarence three to five times a week. Among other things, Ray picked up Clarence's mail, delivered the mail and other items to Clarence at the hospital and returned materials and Clarence's instructions to the office. (Tr. 2907.69).

After Clarence was released and until his death, he was substantially confined to his home. (Tr. 2907.70-74, 2906.148). For some five years, Ray spent six days a week, twenty minutes to five hours a day helping Clarence and Chickie. (Tr. 2907.70). Ray visited Clarence, typed his personal correspondence, delivered his personal and corporate mail for him, assisted him in his personal affairs, shopped for him, help him care for his invalid wife, and generally provided him the kind of comfort and companionship a confined person craves. (Tr. 2907.70-74). Ray did whatever Clarence wanted. Ray acted purely out of friendship and affection and was not motivated by expectation of compensation. (Tr. 2907.75). In fact, Ray never asked to be

compensated.⁶ Clarence's relationship with Mrs. Ebert was also a source of comfort for him in his last years; Clarence called her almost nightly, and they ended their conversations with common prayer. (Tr. 2906.130-32).

C. Corroboration For The Gifts.

In 1979, Clarence asked Allen to amend his trust. (Tr. 2908.83-85). Clarence wanted to include the Parish and its Dean as beneficiaries. (Tr. 2908.85). Although Allen had not yet met Ray, Clarence had often expressed to Allen affection for Ray. (Tr. 2904.26-27, 29-31). Allen asked Clarence, "If you're going to take care of people other than your family, what about Ray Ebert?" (Tr. 2904.30, 2908.84). Clarence replied "I'm taking care of Ray." (Tr. 2904.31).

In early 1981, Clarence told Allen he wanted to give Ray (whom Allen still had not met) Wyoco stock. (Tr. 2908.90-93). Clarence asked if he could make the gift without transferring the stock on Wyoco's books. (Tr. 2908.90-91). Allen said formal transfer was not necessary, and that a gift could be made by delivering endorsed certificates with a declaration of present donative intent. (Tr. 2908.91).

Ray told his wife, Grace, about the first and second gifts immediately after each had been made. After receiving the first gift, Ray went home. (Tr. 2907.84). As Ray entered his home, he "waved" the stock at Grace. (Id.; Tr. 2907.136). Ray

⁶ Clarence periodically reimbursed Ray for small out of pocket expenses. (Tr. 2907.75).

said to Grace "Mr. Clarence Justheim has given me over \$100,000 -
- I mean 100,000 shares of Wyoming Petroleum." (Tr. 2906.136).
After receiving the second gift, Ray took the stock home.
(Tr. 2907.94-95; 2906.137-39). The stock was contained in a
brown envelope. (Tr. 2907.94-95). When Ray arrived home, Grace
noticed a "big brown envelope" in his hands. (Tr. 2906.139).
Ray told Grace "Clarence had gotten the stock that he [Ebert] had
gotten, and that was all the stock in Wyoming Petroleum that he
owned, and gave it to Ray as a gift."

On May 28, 1981, Clarence asked Ray to type up a
document from several handwritten notes. (Tr. 2907.85-86). Ray
typed the document and took it to Clarence the following day.
(Tr. 2907.86). On May 29, 1981, Clarence signed the document in
Ray's presence. That document is the Codicil to Clarence's Will.
(Tr. Ex. 2). The Codicil states in pertinent part:

I hereby give, bequeath, and devise to Raymond A.
Ebert, to be his absolutely, without accountability in
the distribution provided for in the residuary of my
said will, all of my interest and stock holdings in the
Wyoming Petroleum Corp., if he is living

(Tr. Ex. 2). Although the Codicil was not properly witnessed for
probate purposes,⁷ it is direct evidence of Clarence's desire
that Ray receive the Wyoco stock.

⁷ The Beneficiaries claim that the Application For Informal
Probate of Will and Informal Appointment of Personal
Representative filed with the trial court did not disclose the
Codicil's invalid testamentary effect. (Appellants' Brief, at
5). Not so. The Application referred to the Will and the
Codicil. The Application represented that the Will was validly
executed, but made no such representation about the Codicil.
(Tr. Ex. 17, ¶¶ 8-9). Furthermore, a copy of the Codicil was
attached which clearly disclosed the lack of requisite witnesses.
Ebert never asserted the Codicil was valid as a testamentary
instrument.

D. Clarence's Relationship With John Morgan Jr.

During his life, Clarence associated professionally with John H. Morgan, Sr. ("Morgan Sr."). (Tr. 2907.83, 2906.143-44). For more than thirty years, they and their businesses shared offices, used the same secretarial staff and often did business together. (Tr. 2907.83, 2906.144-45). In 1953, Morgan Sr. and Clarence agreed to share and maintain equal control of Wyoco. (Tr. 2907.89-90, 2906.150). In 1950, John H. Morgan, Jr. ("Morgan, Jr.") became associated professionally with Morgan Sr. and Clarence. (Tr. 2906.145).

By at least 1978, Clarence's relationship with the Morgans had begun to deteriorate. In 1978, when Clarence asked Allen to prepare an estate plan, he expressed resentment toward Morgan Jr. interfering in his affairs. (Tr. 2908.94-95). Clarence told Allen that Morgan Jr. had been urging him to establish an estate plan because of the effect his death would have on Morgan Jr.'s business. On several occasions, Clarence expressed to Allen his resentment toward, fear of and his inability to resist Morgan Jr. (Tr. 2908.93-95, 98-99, 2904.3-10).

In 1980, Clarence told Allen that Morgan Jr. had demanded that Clarence make Morgan Jr. a co-trustee under his Trust. (Tr. 2908.96, 98-99). Clarence asked Allen to prepare an amendment appointing Morgan Jr. co-trustee to avoid additional harassment, but also asked Allen to prepare an amendment which would revoke that appointment. (Tr. 2908.99-105). Clarence

asked Ray to type the amendment revoking Morgan Jr.'s appointment from a handwritten draft prepared by Allen (Tr. Ex. 27).

(Tr. 2906.68-73). Clarence refused to sign the amendment appointing Morgan Jr. (Tr. Ex. 12) until another had been prepared revoking the appointment (Tr. Ex. 13).

(Tr. 2907.145-46, 2908.104-05). Clarence executed the amendment appointing Morgan Jr. on January 17, 1980. (Tr. Ex. 12). On January 21, 1980, Clarence executed the amendment revoking Morgan Jr.'s appointment. (Tr. Ex. 13).

In 1981, when Clarence asked Allen about giving Wyoco stock to Ray, Clarence said he did not want to transfer the gift on Wyoco's books. (Tr. 2908.90-91). Clarence was concerned that Morgan Jr. would discover the gift, if transferred, because Morgan Jr. had access to Wyoco's books. (Tr. 2907.82-83). Clarence wanted to avoid further harassment from Morgan Jr. (Tr. 2904.7). At the time of the first gift, Clarence asked Ray to not disclose the gift to the Morgans. (Tr. 2907.119). Ray understood he was not to transfer the stock until after Clarence's death. (Tr. 2907.82-83, 119).

In February 1982, Morgan Sr. died. (Tr. 2907.83). Subsequently, Clarence set out to buy additional Wyoco stock to gain control of Wyoco and to keep control away from Morgan Jr. (Tr. 2907.89-93, 95, 2904.5-10). Shortly after Morgan Sr.'s death, Clarence bought 23,400 additional shares of Wyoco stock. (Tr. 2907.90-93). At the time of the second gift, Clarence told Ray again "Be damn sure you don't let Bud [Morgan Jr.] know

nothing about them." (Tr. 2906.5). Clarence further remarked that he "wanted to show these Morgans he wasn't -- he wasn't as dumb as they thought he was." (Tr. 2907.95). Clarence repeated his request that Ray not transfer the stock until after his death. (Tr. 2907.119, 2906.63-66).

E. Clarence's Family

Clarence died on July 3, 1983. (Tr. 2907.77). Clarence's wife was an invalid. (Tr. 2906.130, 2907.73, 78-80). Clarence had no children. (Tr. 2906.130). Clarence had no close relatives. (Tr. 2907.75-77, 2904.34-35).

F. Ray's Disclosure to Allen

Approximately a week after Clarence's death, Ray delivered Clarence's Will, Codicil, Trust and its amendments to Allen. (Tr. 2907.101). Prior to July 22, 1983, Ray met with Allen and discussed the Codicil and both gifts. (Tr. 2907.102-04, 106-08, 2904.13-19). Allen advised Ray the Codicil had no testamentary effect because it lacked the requisite witnesses. (Tr. 2904.18). Allen explained, however, that the Codicil was written evidence of Clarence's intent to give Ray the stock. (Tr. 2907.114). After thoroughly questioning Ray about the gifts, Allen was convinced Ray was telling the truth. (Tr. 2904.21). Based on that, Allen advised Ray that the stock would not be included as property of the Estate initially and the issue would be submitted to the probate court for final determination. (Tr. 2904.22-23).

G. John Morgan Jr.'s Animosity Toward Ray

Immediately after Clarence's funeral, Ray informed Morgan Jr. that Clarence had revoked Morgan Jr.'s appointment as co-trustee. (Tr. 2907.227). Morgan Jr. became visibly angry and demanded proof. (Id.; Tr. 2906.99-100). Ray referred Morgan Jr. to Allen. That incident sparked Morgan Jr.'s hostility toward Ray. (Tr. Ex. 19).

Morgan Jr. believed he was entitled to succeed to his father's agreement with Clarence to share and maintain equal control of Wyoco. (Tr. 2906.173-74). After Clarence acquired majority control of Wyoco, Morgan Jr. pestered Clarence to sell him 50% of the control stock. (Tr. 2906.113). Clarence refused. (Tr. 2906.174). Shortly after Clarence's death, Ray told Morgan Jr. he owned the Wyoco stock. (Tr. 2906.98-101). Thereafter, Morgan Jr. requested that Ray sell him 50% of the control stock. (Tr. 2906.174). Ray also refused. (Tr. 2906.175).

Prior to his death, Justheim, Justco and Wyoco had made substantial investments in certain projects sponsored by Morgan Jr. (Tr. 2906.168-69). After Clarence's death, Morgan Jr. besieged Ray to get Justco, Wyoco and the Estate to continue their investments. (Tr. 2906.171-73). Justco, Wyoco and the Estate stopped making investments. (Tr. 2906.173).

Morgan Jr. blamed Ray for the revocation of his appointment as co-trustee, Clarence's acquisition of the control stock, his subsequent refusal to sell Morgan Jr. 50% of that

stock and the discontinuance of investments in Morgan Jr.'s projects. (Tr. 2906.173, 176-84). Morgan Jr. was bothered by Ray's control of Wyoco. (Tr. 2906.180-84, 191). Morgan Jr. was so bothered, he ultimately sued Ray in four separate actions relating to Ray's control of Wyoco. (Tr. 2906.176-84). In fact, this action was originated with and financed by Morgan Jr. in an attempt to oust Ray and gain control of Wyoco. (Tr. 2906.180-84).

In the heat of those emotions, Morgan Jr. wrote Ray on October 10, 1983, November 21, 1983, December 4, 1983 and January 21, 1984.⁸ (Tr. Exs. A, B, C and D). Among other irrelevant things, Morgan Jr. initially inquired about and later challenged Ray's claim to the Wyoco stock through the Codicil. Ray never responded to Morgan Jr. (Tr. 2906.152, 154).

SUMMARY OF ARGUMENTS

The Beneficiaries have waived their parol evidence rule and estoppel objections. The Beneficiaries first complained after a verdict and judgment had been rendered. The Beneficiaries have never specified the evidence which should have been excluded. They are too late. Co-Vest Corp. v. Corbett, 735 P.2d 1308 (Utah 1987); Beehive Medical Electronics, Inc. v. Square D Co., 669 P.2d 859 (Utah 1983); Peterson v. Hansen-Niederhauser, Inc., 13 Utah 2d 355, 374 P.2d 513 (1962).

⁸ Exhibit D is incorrectly dated January 21, 1983. All parties stipulated that the correct date was January 21, 1984. (Tr. 2898.31-32).

The parol evidence rule violation relates to the Codicil which Ray offered as collateral evidence to the ultimate issue of whether or not the gifts were valid. The parol evidence contradicted a factual recital in the Codicil, not its terms. No evidence of integration was offered. Therefore, the parol evidence rule was inapplicable. Weaver v. Modula, 557 P.2d 152 (Utah 1976); Union Bank v. Swenson, 707 P.2d 663 (Utah 1985); Fullmer v. Morrill, 2 Utah 2d 347, 273 P.2d 885 (1954).

The Beneficiaries did not offer any evidence at trial and do not assert on appeal that: (1) Ray made a false representation to or concealed any material facts from them; (2) they were without knowledge or the means of knowledge of the true facts; (3) Ray intended to induce them to detrimentally change their position; and (4) they relied on Ray's conduct or silence to their detriment. Absent that evidence, estoppel is inapplicable. Colman v. Colman, 743 P.2d 782 (Utah Ct. App. 1987).

The Beneficiaries have failed to demonstrate that the trial court abused its discretion in excluding Exhibits A, B, C and D pursuant to Rule 403 of the Utah Rules of Evidence. The exhibits were irrelevant. The exhibits did not support the theory for which they were offered. The testimony of Morgan Jr., the exhibits' author, contradicted the exhibits' content. The trial court considered the entire exhibits and their substance was considered by the jury. The exhibits were cumulative and accused Ray of speculative and collateral misconduct. The danger

of unfair prejudice substantially outweighed the exhibits' probative value. Utah R. Evid. 403.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING BENEFICIARIES A NEW TRIAL BASED ON THE ALLEGED IMPROPER ADMISSION OF PAROL EVIDENCE.

The Beneficiaries assert the trial court improperly admitted certain parol evidence, entitling them to a new trial. To reverse, this Court must determine that the trial court transgressed all reasonable bounds of discretion in finding that the parol evidence rule was inapplicable and therefore, denied Beneficiaries a new trial. Lembach v. Cox, 639 P.2d 197, 201 (Utah 1981), *overruled on other grounds*, 728 P.2d 117 (1986); Lee v. Howes, 548 P.2d 619, 621 (Utah 1976).

A. The Beneficiaries Have Waived Any Alleged Error.

The Beneficiaries did not raise the issue of parol evidence in the pretrial order. (R. 2490-2525). The Beneficiaries made no pretrial motion to exclude any parol evidence. The Beneficiaries concede their failure to object to the admission of any parol evidence during trial. (Appellants' Brief, at 15). The Beneficiaries did not move to strike the parol evidence during trial. The Beneficiaries first raised the issue after the trial court had rendered its decision and the jury had rendered its verdict.⁹ The Beneficiaries have never

⁹ The Beneficiaries imply that they have preserved their objection by raising it in their post-trial motions. (Appellants' Brief, at 15). The Beneficiaries have not cited any law. In Utah, a motion to strike improper evidence made after a verdict has been rendered is untimely. See Peterson v. Hansen-

specified the evidence which they claim should have been excluded.

The Beneficiaries argue their failure to object during trial should not preclude this Court from addressing the parol evidence issue. (Appellants' Brief, at 15-17). The Beneficiaries suggest there is a "modern trend" to address the parol evidence rule on appeal despite a party's failure to object at trial. (Id. at 16-17). The Beneficiaries rely on an annotation at 81 A.L.R. 3d 249. (Id. at 16). That annotation does not show a trend, past or modern. The annotation was published thirteen years ago. The original annotation cites twenty-three states and one federal jurisdiction allegedly supporting the Beneficiaries' position. The cases from those jurisdictions range in dates from 1944 to 1975. 81 A.L.R. 3d, at 257-59, 264-66. The original annotation also cites twenty-two states which preclude the parol evidence issue on appeal. Id. at 254, 256, 260-62. At most, the original annotation shows a split across the country.

The updated annotation shows a greater trend to preclude the parol evidence rule on appeal absent an objection

Niederhauser, Inc., 13 Utah 2d 355, 374 P.2d 513, 515 (1962). "Expansion on non-specific objections in a motion for a new trial or in a brief on appeal . . . does not cure the lack of timeliness in making proper objections to the trial court." Beehive Medical Electronics, Inc. v. Square D Co., 669 P.2d 859, 861 (Utah 1983) (emphasis added). If a motion for a new trial cannot cure an untimely non-specific objection, an entirely new objection raised on a motion for new trial can not preserve the issue for appeal.

during trial. 81 A.L.R. 3d 249 (Supp. 1990). The 1990 Supplement lists twelve jurisdictions precluding the issue on appeal and eight jurisdictions allowing the issue. Two of the jurisdictions precluding the issue (Oklahoma and Michigan) were listed by the original annotation as jurisdictions which did not preclude the issue on appeal.

More significant is that neither the annotation nor the Beneficiaries have referred to Utah's position. Rule 103 of the Utah Rules of Evidence states:

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context

(emphasis added). The objection must be made prior to or during trial and the grounds for the objection must be "clear and specific." State v. Schreuder, 726 P.2d 1215, 1222 (Utah 1986). See also State v. Malmrose, 649 P.2d 56, 58 (Utah 1982); Stagmeyer v. Latham Bros., Inc., 20 Utah 2d 421, 439 P.2d 279, 282 (1968).

Rule 103 applies to the admission of parol evidence. In Co-Vest Corp. v. Corbett, 735 P.2d 1308 (Utah 1987), this Court held that the appellants had waived any claim that extrinsic evidence should have been excluded by their failure to object at the trial level. Id. at 1309. The only issue at trial

was the construction of a written instrument. Both sides offered parol evidence. Neither party objected. The trial court rendered its decision. Appellants first raised the issue on appeal. This Court wrote: "Because defendants did not object to the extrinsic evidence at the trial level, they cannot claim on appeal that the document is clear and unambiguous and is not subject to interpretationn [sic] with extrinsic evidence."

The Beneficiaries argue judicial economy will be served by adopting a rule that parol evidence need not be objected to at trial.¹⁰ (Appellants' Brief, at 17). To the contrary, such a rule would destroy judicial economy and cause considerable waste to the courts and litigants. If the Beneficiaries' position were adopted, Rule 103 ignored and Co-Vest overruled, an element of "risk and advantage" would exist. See Petersen v. Hansen - Niederhauser, Inc., 13 Utah 2d 355, 374 P.2d 513, 515 (1962). A party could remain silent as inadmissible evidence is admitted. If the evidence is favorable, the party could permit it to stand and argue it to the factfinder. Id. After losing, the party could appeal and be guaranteed a reversal and new trial. Id. The opposing party would be subjected to the cost and delay of the appeal and new trial, all of which could be avoided by a timely objection.

¹⁰ The Beneficiaries cite Furniture Manufacturers Sales, Inc. v. Deamer, 680 P.2d 398 (Utah 1984) as an illustration of how judicial economy will be served. (Appellants' Brief, at 17). To the contrary, Deamer does not address judicial economy at all. Deamer does illustrate, however, that if a party does not object at trial, any error is waived. Id. at 400.

This case is a perfect example. The Beneficiaries remained silent as the alleged inadmissible evidence was received. (Appellants' Brief, at 15). On cross-examination, the Beneficiaries elicited from Ray testimony of the alleged inconsistency between the first gift and the factual recital of Clarence's stock ownership in the Codicil. (Tr. 2907.149-50, 165-67). In opening and closing, the Beneficiaries argued the Codicil conclusively established that the first gift was inconsistent and false. (Tr. 2907.33-34, 2905.146). Having taken the risk and lost, the Beneficiaries now want the advantage of a new trial. The Beneficiaries' position creates judicial instability and judges would become advocates. To preserve the reliability of verdicts and judgments, judges would have to take the initiative to object, or remind counsel to object and exclude the evidence. That burden is too onerous. The need for timely objections is as vital for violations of the parol evidence rule as any other evidence. The Beneficiaries should not be allowed to do nothing to exclude the alleged inadmissible evidence, elicit testimony and offer evidence of the alleged inconsistency, argue the alleged inconsistency to the jury and trial judge and after losing the case argue that the evidence should have been excluded.

B. The Parol Evidence Rule is Inapplicable.

The Beneficiaries' attempt to apply the parol evidence rule is misplaced. The parol evidence rule is a "principle of contract interpretation . . . [with] a very narrow application."

Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985). The parol evidence rule applies when the basis of the action is the construction and enforcement of a written document. Edmonds v. Galey, 458 P.2d 650, 652 (Wyo. 1969). In that case, parol evidence is not admissible to contradict or vary the clear and unambiguous terms of the written document. Union Bank v. Swenson, 707 P.2d at 665.

The Beneficiaries assert the trial court improperly admitted parol evidence which varied or contradicted the Codicil. The action, however, was not brought to construe and enforce the terms of the Codicil. It is undisputed that the Codicil lacked the requisite witnesses to create an effective testamentary device. The sole purpose of this action was to determine the validity of two gifts.¹¹ Ray offered the Codicil merely as collateral evidence of his relationship with Clarence and Clarence's intent that Ray ultimately receive the Wyoco stock.

The parol evidence rule is inapplicable where the alleged violation of the rule relates to a document which is offered as collateral evidence to the ultimate issue. Weaver v. Modula, 557 P.2d 152, 153 (Utah 1976). In Weaver, a real estate agent sued to recover commissions from the prospective sellers.

¹¹ The Beneficiaries argue that both gifts should be invalidated. (Appellants' Brief, at 7-8, 21). However, neither the parol evidence rule nor the estoppel theory affect the second gift. Clarence's factual recital in the Codicil is only inconsistent with the first gift.

Id. at 152-53. The agent sought to have his agreement with the sellers construed and enforced. The written agency agreement stated that the sellers would pay the agent a commission if he found "'a party who is ready, able and willing to buy'"

Id. at 153. Parol evidence regarding various agreements between the sellers and a prospective buyer was received. The trial court found that the agent had not found an "able" buyer and, therefore, was not entitled to recover his commissions.

On appeal, the agent asserted the trial court improperly admitted parol evidence. This Court held that the violation of the parol evidence rule related to the terms of the contracts between the sellers and the buyer, not the agency contract between the agent and the sellers. The agency contract was the basis of the lawsuit and therefore, the parol evidence rule was inapplicable. See also Edmonds v. Galey, 458 P.2d 650 (Wyo. 1969) (The Wyoming Supreme Court held that parol evidence was admissible to construe a deed which was offered as collateral evidence to the ultimate issue. It did not vary the terms of the agreement between the plaintiffs and defendants. Id. at 651-52); Lee v. Kimura, 634 P.2d 1043 (Haw. Ct. App. 1981) (The Hawaii Court of Appeals held that parol evidence was admissible to construe a lease which was offered as collateral evidence of the agreement between the parties, as co-lessees. Id. at 1045-46); Doelle v. Ireco Chemicals, 391 F.2d 6, 9 (10th Cir. 1968).

The Wyoming Supreme Court stated the rule as follows:

[T]he parol evidence rule, like most things, has its exceptions. It does not apply where the writing is

collateral to the issue involved, and the action is not based on such writing. To state it another way, the parol evidence rule applies only where the enforcement of an obligation created by the writing is substantially the cause of action. . . .

Edmonds, 458 P.2d at 652. Here, Ray did not seek to enforce the Codicil. Ray offered the Codicil as collateral evidence of Clarence's intent to make the gifts. The parol evidence rule was inapplicable.

C. The Parol Evidence Rule Does Not Apply to Factual Recitals.

The Codicil in its entirety states:

I, Clarence I. Justheim, being of sound and disposing mind and memory and free from all menace, fraud, duress, undue influence or restraint whatsoever, do hereby make this Codicil to my Last Will and Testament which was signed by me, June 22, 1978.

Prior Disposition I hereby revoke all prior bequests and testamentary dispositions made by me concerning my interest and stockholdings in the Wyoming Petroleum Corp., of which I own approximately Fifty percent (50%).

I hereby give, bequeath, and devise to Raymond A. Ray, to be his absolutely, without accountability in the distribution provided for in the residuary of my said Will, all of my interest and stockholdings in the Wyoming Petroleum Corp., if he is living, otherwise to his children, if any are living, children of deceased children to take by right of representation.

I have hereunder set my hand, this 29th day of May, 1981.

GRANTOR:

Clarence I. Justheim

(Tr. Ex. 2). The phrase which the Beneficiaries contend has been varied by the admission of certain unidentified parol evidence

is: "of which I own approximately Fifty percent (50%)."

Clarence's declaration of his ownership percentage is a factual recital.

The parol evidence rule does not exclude evidence which contradicts or varies factual recitals. In Fullmer v. Morrill, 2 Utah 2d 347, 273 P.2d 885 (1954), the plaintiffs agreed to sell to defendants 76 head of cattle, among other things. Subsequently, the parties executed an "Agreement" expressing the defendants' promise to return the 76 head of cattle "together with all increase of cattle, consisting in all, 88 (eighty-eight)" Id. at 885-86.

A dispute arose over four cattle. Id. at 886. At trial, plaintiffs unsuccessfully contended that the four cattle were included in the "88" recited in the "Agreement." On appeal, the plaintiffs argued the "Agreement" required defendants to return 88 head of cattle and defendants could not vary that obligation by the admission of parol evidence. Id. at 887. This Court held that the defendants had promised to return the original 76 head of cattle and "all the increase." This Court further held that the words "'consisting in all, 88 (eighty-eight) head'" was not part of the promise, but merely a recital of fact. This Court then held that "parol evidence is admissible to contradict a false recital of fact, the parol evidence rule applying only to the *terms* of the Contract." See also Garrett v.

Ellison, 72 P.2d 449 (Utah 1937)¹² (This Court held that the parol evidence rule prohibits the admission of parol evidence to vary "terms" of a contract, but not factual recitals. Id. at 451-53).

Although the Codicil had no testamentary effect, one of its clear and unambiguous "terms" was that Ray receive all Clarence's Wyoco stock. The Beneficiaries do not claim evidence varying that term was improperly admitted.¹³ The Beneficiaries' only claim is that evidence contradicting Clarence's factual recital was improperly admitted. The parol evidence rule does not prohibit extrinsic evidence which varies factual recitals.

D. The Beneficiaries Offered No Evidence of Integration.

The parol evidence rule is only applicable where the parties intended that the written document constitute the sole and entire agreement between the parties. Union Bank v. Swenson,

¹² The Beneficiaries rely on Garrett for the general proposition that Utah considers the parol evidence rule a substantive rule rather than a rule of evidence. (Appellants' Brief, at 14). The Beneficiaries recognize that this Court did not apply the parol evidence rule in Garrett. (Id. at 15). The Beneficiaries, however, fail to explain why. Although Garrett is cited here for the proposition that the parol evidence rule does not apply to factual recitals, it is another excellent example that parol evidence may be admitted to vary an instrument which is collateral to the primary issue.

¹³ The gift is not inconsistent with the Codicil's term that Ray receive all the Wyoco stock. The gift fulfills that term. The gift is only inconsistent with Clarence's factual recital. That inconsistency may be more apparent than real. For instance, Clarence might have made the Codicil as a precaution against the possibility, in his mind, that the first gift might be invalid because the stock was not transferred into Ray's name during Clarence's life.

707 P.2d 663, 665 (Utah 1985). There is no expression of integration in the Codicil. (Tr. Ex. 2). The Beneficiaries offered no evidence of integration. Thus, the parol evidence rule is not applicable.

POINT II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN
IT DENIED BENEFICIARIES A NEW TRIAL BECAUSE
ESTOPPEL WAS INAPPLICABLE

The Beneficiaries assert Ray should have been estopped from claiming any gifts. The Beneficiaries assert the trial court erred in finding that estoppel was inapplicable and therefore, they are entitled to a new trial. To reverse, this Court must determine that the trial court transgressed all reasonable bounds of discretion in denying Beneficiaries a new trial.

A. The Beneficiaries Have Waived Any Alleged Error.

Estoppel must be pleaded or it is waived. See Manger v. Davis, 619 P.2d 687, 692 (Utah 1980). The Beneficiaries did not plead estoppel in their petition. (R. 61-66). The Beneficiaries did not assert estoppel in the pretrial order. (R. 2490-2525). Prior to trial, the Beneficiaries did not move to exclude any evidence based on an estoppel theory. The Beneficiaries did not object to the admission of or move to strike any evidence during trial pursuant to their estoppel theory. The Beneficiaries did not move for a directed verdict based on their estoppel theory. The Beneficiaries first raised the estoppel theory in their "Motion for Judgment Notwithstanding

the Verdict and Oral Judgment of the Court"¹⁴ after the jury had rendered its verdict and the trial court had rendered its decision. The Beneficiaries are too late.

B. Estoppel Was Precluded By the Pretrial Order and Pretrial Motions.

The parties' Supplemental Pretrial Order excluded certain issues. (Id.) At most, Beneficiaries could argue that the estoppel theory is included in the issues precluded by the Supplemental Pretrial Order. The Beneficiaries agreed to the exclude those issues. In addition, the trial court granted two pretrial motions in limine. (R. 2526-33, 65-67, 84-88; Tr. 2898.4-10, 2907.4-6. Those motions were granted because the issues had been tried during the trial on the Removal Issue and the Beneficiaries had been unable to proffer any additional evidence. (Tr. 2898.4-10, 2907.4-6). The Beneficiaries have not appealed those rulings.

C. Estoppel is Inapplicable.

Estoppel is not favored. University of Colorado v. Silverman, 555 P.2d 1155, 1158 (Colo. 1976); Tribble v. Reely, 557 P.2d 813, 818 (Mont. 1976). The purpose of equitable estoppel is "'to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss.'"

¹⁴ Although the estoppel theory was initially asserted in this motion, it was incorporated by reference into the Motion for New Trial. The Beneficiaries have appealed the trial court's denial of the new trial. (Docketing Statement, dated September 27, 1989, at 5).

FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d 327, 330

(Utah 1980) (footnote omitted). The elements of estoppel are:

(1) A false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of the facts; (3) made to a party who is without knowledge or the means of knowledge of the real facts; (4) made with the intention that the representation be acted upon; and (5) the party to whom the representation was made relied or acted upon it to his prejudice.

Colman v. Colman, 743 P.2d 782, 790 (Utah Ct. App. 1987). See also Triple I Supply, Inc. v. Sunset Rail, Inc., 652 P.2d 1298, 1301-02 (Utah 1982). Each element must be proven or there can be no estoppel. Colman, 743 P.2d at 790.

1. No Standing -- The Beneficiaries do not have standing to assert estoppel against Ray. The Beneficiaries do not assert that Ray made a false representation to or concealed material facts from them. Evidence of any such claim was excluded. (R. 2565-67, 84-88; Tr. 2907.4-6). The Beneficiaries have not appealed that order. The Beneficiaries contend Ray failed to remind Clarence of the first gift when Clarence executed the Codicil. Thus, it is Clarence who possessed any claim of estoppel against Ray, not the Beneficiaries.

2. Without Knowledge -- The material facts must be concealed from a person "without knowledge or the means of knowledge of the real facts." Colman, 743 P.2d at 790. The Beneficiaries offered no evidence of their knowledge of the true facts. Clarence had knowledge of the true facts. Clarence was the donor. Thus, when Clarence executed the Codicil, he knew or

should have known that the factual recital of his ownership percentage was incorrect.

3. Intent to induce is required -- Any concealment of material fact must be intended to induce the other's detrimental change in position. Triple I, 652 P.2d at 1301. The Beneficiaries offered no evidence that Ray intended to induce them to change their position. In fact, the Beneficiaries have not asserted that Ray communicated with them in any manner regarding the gift. Absent some communication, Ray could not have induced the Beneficiaries into any type of detrimental conduct. Id. at 1302. The Beneficiaries also offered no proof that Ray intended to induce Clarence to change his position.

4. Must prove detrimental reliance -- There was no detrimental reliance. The Beneficiaries offered no evidence that Clarence relied on Ray's silence to his prejudice. Furthermore, the Beneficiaries offered no evidence that they relied on Ray's silence to their prejudice. The Beneficiaries have implicitly acknowledged the lack of any detrimental reliance. (Appellants' Brief, at 18-19).

POINT III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EXHIBITS A, B, C AND D

At the beginning of trial, the Beneficiaries expressed their intent to call Morgan Jr. as a witness, to use in opening statement four letters written by Morgan Jr. to Ray, marked as Exhibits A, B, C and D, and to offer those letters as evidence

during trial. (Tr. 2898.10, 16-19). Ray moved to exclude Morgan Jr.'s testimony and the letters because they were irrelevant and unfairly prejudicial. (Tr. 2989.13, 16-17). After substantial discussion, the trial court refused to exclude Morgan Jr.'s testimony on the subject, but excluded the letters pursuant to Rule 403 of the Utah Rules of Evidence. (Tr. 2989.43, 46, 48, 52-54, 60). Exclusion of the letters was contingent on Ray's written stipulation admitting certain portions of the letters which the trial court decided were relevant.¹⁵ (Tr. 2898.43-46, 48, 60). Over his objection, Ray entered into the written stipulation. (Id.; R. 2594-95) The written stipulation was to be admitted as evidence to the jury. (Tr. 2898.45). The Beneficiaries contend the letters should have been admitted in their entirety.

A. Probative Value v. Dangers of Unfair Prejudice, Confusion, Delay and Undue Repetition.

Rule 403 of the Utah Rules of Evidence states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

By the Rule's express language, the trial judge must balance the probative value of the evidence against the danger of certain

¹⁵ The trial court excluded Exhibit C in its entirety because the relevant portion was cumulative. (Tr. 2898.52-53). Exhibit C merely repeated what was written in Exhibits A and B and the Beneficiaries conceded that no change of position had occurred between the dates of Exhibits B and C. (Id.)

factors which may improperly influence the jury. State v. Maurer, 770 P.2d 981, 984 (Utah 1989). After balancing those interests, if the improper factors outweigh the probative value of the proffered evidence, it may be excluded.

B. The Letters Had No Probative Value.

Rule 403 only applies to evidence "which is of unquestioned relevance." Id. If the proffered evidence is not relevant, it is not probative and cannot be admitted. "A precondition to exclusion of evidence under Rule 403 is that it be otherwise relevant If it is not relevant, the evidence is inadmissible under FRE 402, and Rule 403 never comes into play." Noel Shows, Inc. v. United States, 721 F.2d 327, 329 (11th Cir. 1983) (application of Rule 403 of the Federal Rules of Evidence which is identical to Rule 403 of the Utah Rules of Evidence).

The issue at trial was whether or not Clarence had made valid intervivos gifts of the Wyoco stock to Ray. The elements of an intervivos gift are: (1) the donor's present intent to make the intervivos gift, and (2) the passing of possession and control of the property to the donee. Rule 401 of the Utah Rules of Evidence defines "relevant evidence" as any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The letters do not bear on the issues of Clarence's intent and Ray's possession and control. The letters are not written by Ray or

Clarence. The letters do not contain any expressions attributed to Clarence or Ray regarding the gifts. The letters merely contain Morgan Jr.'s:

1. hearsay recitation of his interpretation of Clarence's past business relationship with Morgan Sr.;
2. hearsay and unsupported conclusory opinions regarding what Clarence and Morgan Sr. intended to do with Wyoco;
3. hearsay and speculative conclusory opinions regarding how Clarence intended to dispose of his Wyoco stock;
4. unsupported belief that Clarence would not have given Ray the Wyoco stock by his Will and deprived others of that stock;
5. speculative conclusory opinions regarding how Allen would have conducted himself as a lawyer;
6. legal conclusions regarding the effect of Clarence's Will;
7. claim that Morgan Jr. should have equal control of the Wyoco stock;
8. attempts to convince Ray to associate professionally with Morgan Jr. as Clarence did with Morgan Sr. in all of Clarence's continuing business ventures, including Wyoco;
9. discussions of various business disputes between Ray and Morgan Jr., but unrelated to Wyoco; and
10. hearsay and unsupported accusations of collateral misconduct by Ray and Allen.

None of those matters had any tendency to make Clarence's present intent or Ray's possession and control more or less probable than it would have been without the evidence.

C. The Letters Did Not Support The Theory For Which They Were Proffered.

The Beneficiaries did not offer the letters to directly defeat the elements of valid gifts. The Beneficiaries offered the letters to allegedly impeach Ray. The Beneficiaries alleged that Ray had changed his position. (Tr. 2898.113-14, 19-20). The Beneficiaries proffered that shortly after Clarence's death, Ray declared he had received the Wyoco stock through Clarence's Codicil exclusively and did not assert ownership through intervivos gifts. The Beneficiaries proffered that after Morgan Jr. discovered that the Codicil was not witnessed and challenged Ray's position, Ray claimed to have received the Wyoco stock through two intervivos gifts. The Beneficiaries offered the letters to show that alleged change in position.

1. The excluded portions of the letters do not show a change of position -- After explaining the theory for which the letters were allegedly offered, the trial court asked the Beneficiaries to specify those portions of the letters which supported their theory. (Tr. 2898.26-27). The Beneficiaries identified the following:

In my recent discussions with you, you have indicated to me that Clarence, by his Will, had given you all of his stock of Wyoming Petroleum Corporation. You mentioned that this was contained in one of the Amendments or Codicil to Clarence's Will. I have not read it, but I assume what you say is the case.

(Tr. Ex. A).

I have a copy of Clarence's Will which Frank Allen gave to me. It doesn't mention Wyoming Petroleum Corporation stock. . . . There was never any mention

that he was giving all of that stock to you. Yet you tell me that you have an Amendment to the Will which gives you all of the stock.

(Tr. Ex. B).

As I explained in my November 21 letter to you, a copy of the Will that Frank gave to me never once mentions Wyoming Petroleum Corporation. . . .

Yet, you have told me many times that Clarence gave all of that Wyoming Petroleum Corporation stock to you by an Amendment to the Will; and that Frank had the Amendment.

(Tr. Ex. C). Exhibit C also enclosed a copy of Exhibit B.

But we have found that the Will, or the Codicil to the Will, has some major defects, including the fact that it was not witnessed. Frank Allen has one of the best legal minds that I know; and no one knows better than Frank that it requires two witnesses for the Will to be legal. Therefore, I am certain that Frank did not prepare the Will, even though Frank was Clarence's lawyer. But I have to ask the question: Who did prepare the Will, or the Codicil to the Will?

(Tr. Ex. D). Having identified those portions, the Beneficiaries tacitly admitted that the remaining portions were not relevant. The excluded portions do not address the gifts or the Codicil in any way. The excluded portions do not show a change of position.

2. The admitted portions do not show a change of position -- The portions identified by the Beneficiaries to support their theory were admitted by the stipulation, either verbatim or in substance. (Tr. 2906.152-54). The admitted portions cannot show a change of position by Ray. The letters were written by Morgan Jr. The admitted portions do not contain any admissions made by Ray. The admitted portions do not contain any inconsistent statements made by Ray. The admitted portions

do not say Ray relied exclusively on the Codicil. The letters, including the admitted portions, simply show Morgan Jr.'s state of mind, not Ray's.

3. The evidence belied the Beneficiaries' proffered theory -- Ray disclosed the gifts to Allen immediately after Clarence's death. (Tr. 2907.101-04, 106-07). Allen confirmed Ray's testimony. (Tr. 2904.13-25). The Beneficiaries did not offer any evidence to contradict that testimony.

To prove their proffered theory, the Beneficiaries relied exclusively on the testimony of Morgan Jr. On direct examination, Morgan Jr. testified he spoke with Ray shortly before October 10, 1983 and that Ray claimed ownership of the Wyoco stock by the Codicil and did not mention a gift. (Tr. 2906.151-52, 154). On cross-examination, Morgan Jr. finally admitted he spoke with Ray shortly after Clarence's death in July 1983. (Tr. 2906.156-67). Morgan Jr. further admitted that he may have forgotten that Ray told him about the gifts. (Tr. 2906.167-68). Without evidence contradicting Ray's disclosure of the gifts prior to Morgan Jr.'s letters, the letters cannot show a change in position.

4. No duty to disclose -- Even assuming Ray failed to mention the gifts to Morgan Jr., Ray had no duty to disclose the gifts to him. Morgan Jr. was not Clarence's heir. Morgan Jr. was not a beneficiary. Ray, not Morgan Jr., was the personal representative of the Estate and Trustee of the Trust. Morgan

Jr. did not represent any of Clarence's heirs or beneficiaries. Ray had no duty to disclose the gifts to Morgan Jr.

D. The Beneficiaries Have Not Suffered Any Harm.

1. The trial court considered the entire letters -- Prior to trial, Ray moved to strike the Beneficiaries' demand for a jury. (R. 2385-89). The Beneficiaries opposed that motion. (R. 2408-12). The trial court denied the motion. (R. 2415). To avoid error, the trial court acted as an independent factfinder, in addition to the jury. (Tr. 2905.187). Although the letters were not admitted to the jury in their entirety, the trial court did consider them. (Tr. 2905.188). Despite the letters, the trial court ruled in Ray's favor. (Tr. 2905.187-88).

2. Substance of the entire letters admitted to jury -- Any alleged error was subsequently cured through the admission of other evidence. This Court has held that: "Where evidence is excluded by the trial court, any error which may have resulted from such exclusion is cured where the substance of the evidence is later admitted through some other means." State v. Stephens, 667 P.2d 586, 588 (Utah 1983). The substance of the letters in their entirety was admitted to the jury.

The trial court compelled Ray to stipulate to the substance of the alleged relevant portions of the letters. (Tr. 2898.43-46, 48, 60). The written stipulation was admitted as evidence to the jury. (Tr. 2906.152-54). Furthermore, Morgan Jr. testified and Ray was thoroughly cross-examined about the letters and the stipulated admissions. (Tr. 2907.83, 89-90,

2906.98-101, 113, 143-45, 150, 156-84). Thus, the substance of the excluded evidence was admitted through other means and any alleged error has been cured.

3. The letters were cumulative -- The Beneficiaries did not suffer any prejudice because the letters were cumulative. In Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984), this Court held that the trial court had not abused its discretion in excluding certain photos because they were cumulative. Id. at 548. Morgan Jr.'s letters were cumulative. The content of Exhibits B, C and D simply repeats the content of Exhibit A. In addition, the writing and receipt of the letters were admitted. Ray was compelled to admit the substance of the alleged relevant portions. The written stipulation was admitted. Ray admitted his failure to respond. Morgan Jr. and Ray testified regarding the letters, their content and Ray's failure to respond. (Tr. 2907.83, 89-90, 2906.98-101, 113, 143-45, 150, 156-84). The letters could not have added anything to the Beneficiaries' case.

E. Morgan Jr.'s Speculative Accusations of Collateral Misconduct Would Have Seriously Prejudiced Ray.

The admission of the letters would have unfairly prejudiced Ray.

Evidence is unfairly prejudicial . . . if it has a tendency to influence the outcome of the trial by improper means, or if it appeals to the jury's sympathies, or arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions of the case.

Terry v. Zions Cooperative Mercantile Institution, 605 P.2d 314, 323, n. 31 (Utah 1979), *overruled on other grounds*, 678 P.2d 298 (1984).

See also State v. Maurer, 770 P.2d 981, 984 (Utah 1989).

Speculative accusations and innuendoes of collateral misconduct have no probative value and should not be admitted. Coursen v. A. H. Robbins Co., Inc., 764 F.2d 1329, 1335 (9th Cir. 1985); Moe v. Avions, Mareel Dassault-Brequet Aviation, 727 F.2d 917, 934 (10th Cir. 1984).

Morgan Jr.'s letters accused Ray of two acts of misconduct. First, Morgan Jr. accused Ray of misconduct in a business transaction unrelated to the gifts. Morgan Jr. had challenged an oil deal of Justco's, in which Ray and others had personally invested while acting as directors of Justco. (Tr. Exs. B, C and D). Second, Morgan Jr. implied that Ray unduly influenced Clarence to obtain the control stock and to prepare the Codicil giving Ray the Wyoco stock. (Tr. Exs. B and D). All issues regarding undue influence had been tried with the Removal Issue and were excluded from the trial on the Gift Issue. (Tr. 2898.4-9). Morgan Jr.'s speculative accusations and innuendos of collateral misconduct created a grave danger of prejudice and confusion and were properly excluded.

CONCLUSION

The Beneficiaries have not demonstrated that the trial court clearly transgressed all reasonable bounds of discretion in denying them a new trial. The Beneficiaries are too late to

assert the parol evidence rule and estoppel. Neither theory is applicable. Ray did not seek enforcement of the Codicil's terms and the evidence did not contradict those terms, only a factual recital. The Beneficiaries failed to offer any evidence that Ray concealed material facts from them to induce them to take a course of action which resulted in their detriment.


The Beneficiaries have not demonstrated that the trial court's application of Rule 403 was clearly unreasonable. The letters had no probative value. The trial court admitted the portions which were allegedly relevant. Morgan Jr.'s testimony contradicted the change of position allegedly established by his letters. The trial court considered the entire letters and the substance of the letters was admitted to the jury through other means. The letters were cumulative and dangerously accused Ray of unfounded misconduct unrelated to the gifts.

The Decree and Judgment on Verdict should be affirmed and Appellee should be awarded his costs pursuant to Rule 34 of the Utah Rules of Appellate Procedure.

DATED: December 14, 1990.

MOYLE & DRAPER, P.C.

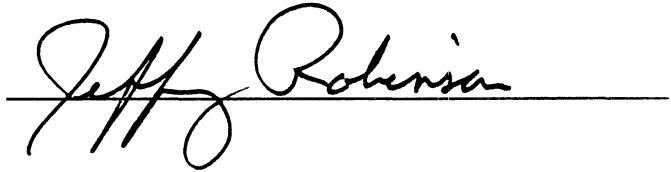
By


Joseph J. Palmer
Jeffrey Robinson
Attorneys for Appellee,
Raymond A. Ebert

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of December,
1990, a copy of the Brief of Appellee was hand-delivered to:

J. Richard Bell
BELL & BELL
303 East 2100 South
Salt Lake City, UT 84115

A handwritten signature in cursive script, reading "Jeff Roberson", is written over a horizontal line.

Tab A

Jay B. Bell, #A0277
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Petitioner
800 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: (801) 531-8900

FILED IN CLERK'S OFFICE

SALT LAKE COUNTY, UTAH

THIRD JUDICIAL DISTRICT COURT

CLARENCE I. JUSTHEIM

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

In the Matter of the Estate of)
CLARENCE I. JUSTHEIM,)
Deceased.)
PETITION FOR
AND REMOVAL OF
PERSONAL REPRESENTATIVE AND
TRUSTEE AND APPOINTMENT OF
SUCCESSOR
Probate No. P-83-695

PETITIONER, The Saint Mark's Episcopal Cathedral Parish,
states and represents to the Court that:

1. Clarence I. Justheim, deceased, as Grantor, and
Raymond A. Ebert, as Trustee, entered into a trust agreement on
June 22, 1978 (the "Trust"), the Trustee of which Trust is the
sole beneficiary of the estate. Attached hereto and incorporated
herein is a copy of what is believed to be such trust and all of
the amendments thereto.

2. Petitioner believes that it is a residuary
beneficiary of the Trust, and as such, is a person interested in
the estate and Trust.

3. Raymond A. Ebert was appointed personal
representative of the decedent on July 22, 1983, by the Court in
informal proceedings.

LAW OFFICES

FABIAN & CLENDENIN

A PROFESSIONAL CORPORATION

EIGHTH FLOOR CONTINENTAL BANK BUILDING

SALT LAKE CITY UTAH 84101

000001

4. Raymond A. Ebert is the named and acting Trustee of the Trust.

5. Cause for removal of Raymond A. Ebert as personal representative and Trustee of the Trust exists because the best interests of the estate and Trust would be served by such removal in that Raymond A. Ebert, as personal representative and/or Trustee, has apparently misappropriated valuable assets of the estate and trust by causing such assets to be wrongfully distributed to himself, and his wife and children.

6. The following individuals, as heirs, designees and beneficiaries of the Trust, are interested persons of the estate and Trust, entitled to notice of the requested hearing:

NAME	RELATIONSHIP	ADDRESS
Margaret L. Justheim	Wife	123 2nd Avenue Salt Lake City, UT 84103
Raymond A. Ebert, Trustee	Residuary Beneficiary of the Estate	2338 East 3740 South Salt Lake City, UT
Wendi Nicodemus	Residuary Beneficiary of the Trust	Unknown
Susie Nicodemus	Residuary Beneficiary of the Trust	Unknown
David Nicodemus	Residuary Beneficiary of the Trust	Unknown
Genie H. Nicodemus	Residuary Beneficiary of the Trust	20 Chanell Lake Tiburon, CA 94920

Robert Mattison	Residuary Beneficiary of the Trust	Unknown
Randy Mattison	Residuary Beneficiary of the Trust	Unknown
Scott Mattison	Residuary Beneficiary of the Trust	Unknown
Margaret Mattison	Residuary Beneficiary of the Trust	Unknown
Raymond E. Ebert	Residuary Beneficiary of the Trust	2338 East 3740 South Salt Lake City, UT
Charles Justheim	Residuary Beneficiary of the Trust	c/o J. Richard Bell, Esq. 303 East 2100 South
Madeline Harris	Residuary Beneficiary of the Trust	Unknown
Patricia Justin	Residuary Beneficiary of the Trust	Unknown
Barbara Stottern	Residuary Beneficiary of the Trust	3507 Wrangler Way Park City, UT 84060
Saint Mark's Episcopal Cathedral Parish	Residuary Beneficiary of the Trust	231 East 100 South Salt Lake City, UT
Dean of Saint Mark's Episcopal Cathedral Parish	Residuary Beneficiary of the Trust	231 East 100 South Salt Lake City, UT

7. The statements in the application or petition for appointment of informal probate are hereby adopted except to the extent that they relate to the qualification and priority of

Raymond A. Ebert and except to the partial list of individuals entitled to notice.

8. First Interstate Bank of Utah, N.A., formerly Walker Bank and Trust, is qualified to succeed as personal representative and has priority because there is no other person with a prior or equal right. Walker Bank and Trust is nominated in the decedent's will as successor personal representative.

9. First Interstate Bank of Utah, N.A. is qualified to succeed as Trustee and has equal priority because no successor Trustee has been named in the Trust.

10. Petitioner has been informed that other beneficiaries of the Trust will consent and join in this petition.

WHEREFORE, petitioner requests that:

1. The Court fix a time and place for hearing.
2. The Court designate what persons, if any, are to be given notice of the petition and hearing in addition to Raymond A. Ebert, personal representative.
3. Raymond A. Ebert be removed as personal representative and as Trustee.
4. First Interstate Bank of Utah, N.A. be appointed as successor personal representative and, upon qualification and acceptance, be issued letters.
5. First Interstate Bank of Utah, N.A. be appointed as successor Trustee.
6. Raymond A. Ebert be required to prepare and submit an accounting and to deliver all of the assets and records of the

estate and Trust respectively to First Interstate Bank of Utah,
N.A. and petitioner.

DATED this 5th day of JUNE, 1984.

FABIAN & CLENDENIN
a Professional Corporation

THE SAINT MARK'S EPISCOPAL
CATHEDRAL PARISH

By Jay B. Bell
Attorneys for Petitioner

By William Z. Muford

VERIFICATION

STATE OF UTAH)
COUNTY OF Salt Lake) ss.

The petitioner, being sworn, says that the facts set
forth in the foregoing petition are accurate and complete to the
best of the petitioner's knowledge and belief.

THE SAINT MARK'S EPISCOPAL
CATHEDRAL PARISH

By William Z. Muford

SUBSCRIBED AND SWORN to before me on the 5th day
of June, 1984.

My Commission Expires:

5/23/87

Jay B. Bell
Notary Public
Residing at Sandy, Utah

ORDER SETTING DATE FOR HEARING AND FOR NOTICE

IT IS ORDERED that the hearing requested in the foregoing petition be held on the ____ day of _____, 1984, at _____.m., in this Court, and that notice of such hearing be given to all interested persons in the manner required by the Utah Uniform Probate Code.

DATED this ____ day of _____, 1984.

BY THE COURT

District Judge

Tab B

Joseph J. Palmer (#2505),
Jeffrey Robinson (#4129), of
MOYLE & DRAPER, P.C.
Attorneys for Raymond A. Ebert
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111-1915
Telephone: (801) 521-0250

FILED DISTRICT COURT
Third Judicial District

JUN 9 1989

By

W. J. B. Bitts
CLERK

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

In the Matter of the Estate	:	
of	:	SUPPLEMENTAL PRETRIAL ORDER
	:	
CLARENCE I. JUSTHEIM,	:	
	:	
Deceased.	:	Probate No. 83-695
	:	
	:	Judge Michael R. Murphy
	:	

On Thursday, June 8, 1989, a pretrial conference was held before the Honorable Michael R. Murphy pursuant to Rule 16 of the Utah Rules of Civil Procedure. Joseph J. Palmer and Jeffrey Robinson appeared as counsel for Raymond A. Ebert, personal representative. J. Richard Bell appeared as legal counsel for respondents, Priscilla Knight, as personal representative of the Estate of Charles Justheim, Madelaine L. Harris, Patricia J. Brown, St. Mark's Episcopal Cathedral Parish and Dean of St. Mark's Episcopal Cathedral Parish. The following action was taken:

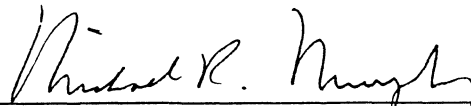
This matter arises by reason of the heirs' Removal Petition and Mr. Ebert's Objections thereto. Notice thereof was given all interested parties and they were thereafter placed on this Court's trial calendar. To assist the Court in framing the applicable issues for trial before the Court, the parties submitted a Pretrial Order on October 30, 1984. A copy is attached as Exhibit A. On May 26, 1986, the heirs submitted and all parties agreed to a proposed amendment to the Pretrial Order. A copy is attached as Exhibit B. The Removal Petition and the Pretrial Orders framed two issues: (1) the removal of Mr. Ebert as personal representative of the Estate of Clarence I. Justheim; and (2) the challenge to two intervivos gifts to Mr. Ebert of 151,143 shares of stock in Wyoming Petroleum Company. Mr. Ebert's objections to the Removal Petition prayed for confirmation of the Wyoco stock gifts to him.

Prior to trial in 1986, the parties stipulated that the Court might reserve for later determination the issue of whether Mr. Justheim made valid intervivos gifts of the Wyoming Petroleum Company common stock to Mr. Ebert, and that the parties might offer further evidence on that issue, and the court so ordered (see pg. 3 of Findings of Fact of 7/31/86). On May 27, 28, 29, 30, June 3, 23, 25, July 21 and 28, 1986, this Court tried the issue of Mr. Ebert's removal as personal representative based on the issues as framed by the amended Pretrial Order. On July 31, 1986, Findings of Fact and Conclusions of Law were entered which resolved the issues relating to Mr. Ebert's removal as personal

representative. A copy is attached as Exhibit C. Based on the October 30, 1984 Pretrial Order, the May 26, 1986 Amendment and the Findings of Fact and Conclusions of Law entered by this Court on July 31, 1986, the only issues of fact now before this Court are paragraphs A through H of Section IV and the only issues of law now before the Court are paragraphs A through D and F of Section V of the Pretrial Order of October 30, 1984.


DATED: June 9, 1989.

BY THE COURT:



The Honorable Michael R. Murphy
District Court Judge

APPROVED BY:

MOYLE & DRAPER, P.C.

By 
Joseph J. Palmer
Jeffrey Robinson
Attorneys for Raymond A. Ebert,
Personal Representative

BELL & BELL

By 
J. Richard Bell
Attorney for Heirs and
Beneficiaries

CERTIFICATE OF SERVICE

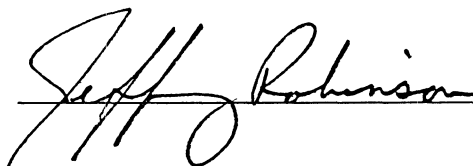
I certify that on June 8, 1989, a copy of the
Supplemental Pretrial Order was hand-delivered to:

J. Richard Bell
BELL & BELL
303 East 2100 South
Salt Lake City, UT 84115
Attorneys for Heirs and
Beneficiaries

Kent M. Kasting
DART, ADAMSON AND KASTING
310 South Main Street
Suite 1330
Salt Lake City, UT 84101

Douglas C. Mortensen
MATHESON, JEPPSON, MORTENSEN & OLSEN
648 East First South
Salt Lake City, UT 84102

Clark P. Giles
RAY, QUINNEY & NEBEKER
400 Deseret Building
Salt Lake City, UT 84111



IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

In the Matter of	:	
	:	
CLARENCE I. JUSTHEIM,	:	PRETRIAL ORDER
	:	
Deceased.	:	Civil No. P-83-695
	:	(Judge Fishler)

IT IS ORDERED:

I. Petitioners seek in this Action to:

A. Recover from respondent Raymond A. Ebert (hereinafter "Ebert") and his donees, for the benefit of the Estate of Clarence I. Justheim, 151,143 shares of Wyoming Petroleum stock claimed to have been the subject of a gift from Clarence I. Justheim (hereinafter "Justheim") to Ebert.

B. Remove Ebert as Trustee of each of the Trusts created or to be created pursuant to the Justheim intervivos trust, dated June 22, 1978, as amended (hereinafter collectively the "Justheim Trust").

C. Remove Ebert as personal representative of the Estate of Clarence I. Justheim (hereinafter the "Justheim Estate").

II. Contentions of the Parties:

A. Petitioners claim: (1) that Ebert improperly caused 151,143 shares of Wyoming Petroleum Corporation, assets of either

the Justheim Estate or the Justheim Trust, to be transferred into his and his donees' names; (2) that said stock was never given to Ebert by Justheim either during Justheim's life or by a valid testamentary transfer; (3) that Ebert obtained possession of the stock certificates either in his capacity as trustee to the Justheim Trust, as confidential advisor or fiduciary to Justheim, as conservator to Justheim, or as personal representative to the Justheim Estate; (4) that in the event Justheim did give all or part of said stock to Ebert, such gift or gift were made as a result of undue influence by Ebert in his position as trustee, confidential advisor or fiduciary to Justheim, or that said gift or gifts were given to Ebert not in his individual capacity, but as trustee of the Justheim Trust, or that such gift or gifts were not intended by Justheim to take effect until after Justheim's death; (5) that Ebert, as personal representative of the Justheim Estate, should have sought court approval of the alleged gifts prior to the transfer of said shares into Ebert's and his donees' names; (6) that Ebert, as personal representative, has committed misfeasance in his untimely filing of a federal gift tax return reporting the alleged gift or gifts and in the valuation of said stock contained in said gift tax return; (7) that Ebert has otherwise misrepresented the value of said stock in documents filed with the Court; and (8) that Ebert should be removed as personal representative of the Justheim Estate as trustee of the Justheim Trust as a result of the above actions.

B. Respondent claims:

This proceeding is instigated by John H. Morgan, Jr. ("Morgan") who directly or through his attorneys, solicited the Petitioners to file the Petition and is paying all costs and attorneys' fees. Morgan did so because Ebert is unwilling to invest Justheim funds he controls in fiduciary capacities in Morgan dominated enterprises as decedent did during his life. Morgan considers it to be in his business interest to effect the removal of Ebert from all fiduciary capacities in which he makes or will make investment decisions with respect to assets owned by decedent at the time of his death. In particular, respondent claims:

1. That he had known Justheim and been associated in business ventures with him for approximately 40 years before Justheim's death.

2. During the last 5 years of Justheim's life (after Justheim was injured in a 1978 car accident), respondent voluntarily, without compensation, went to Justheim's home on a daily basis and assisted him in business and personal affairs including care for Justheim's invalid and incompetent wife, and respondent considered himself to be Justheim's closest personal friend.

3. Justheim had no children and for many years had had no significant contact or continuing relationship with any members of his immediate family, except his wife. Justheim adequately provided for his wife in his will and respondent promised Justheim

he would watch over Justheim's wife. Hence, respondent was a natural object of Justheim's bounty.

4. Justheim, on his own account, for that of Justheim Petroleum Company, in which he had a controlling stock position and as a director of Wyoming Petroleum Company ("Wyco"), had invested hundreds of thousands of dollars in Morgan dominated enterprises between 1975 and 1983; and none of those investments had been the source of any return by the time of Justheim's death. Morgan frequently visited Justheim after the 1978 car accident when Justheim was confined to his home. Morgan was the dominant person in a confidential relationship with Justheim; he intimidated and bullied Justheim and influenced him unfairly to take actions favorable to Morgan. Justheim was afraid and resentful of Morgan, recognized he was being manipulated by Morgan, and planned to assure that Morgan's domination of Justheim's estate did not continue beyond Justheim's death.

5. Justheim and John Morgan, Sr., Morgan's father, had each owned or controlled the same number of Wyco shares and together held about 90% of its outstanding stock. After Morgan Sr.'s death in February of 1982, Justheim purchased additional Wyco stock to control it, and thereafter Morgan hounded Justheim to sell him one-half the additional stock. Justheim acquired the stock to prevent Morgan from raiding Wyco's treasury for Morgan's limited partnerships, and his desire to assure that result as well as his desire to show appreciation for Ebert's friendship motivated Justheim to make the gifts here in question.

6. Justheim gave his Wyco stock to Ebert by handing him 120,431 shares around May 15, 1981 and 30,712 shares about May 4, 1982 (the former were endorsed off, the latter were not) and expressed donative intent in each case, and he directed Ebert not to have the shares transferred into his name until after Justheim's death, but to keep the gift secret so that Justheim would not have to endure repeated confrontation with Morgan, Jr. The transfer of the stock was not a matter of practical consequence because Wyco had not held shareholders meetings, paid dividends or held formal directors meetings for many years. The Wyco stock was only a small portion of Justheim's estate.

7. Justheim discussed his intent to make such gifts and his motives with his attorney, Frank J. Allen, and they seemed perfectly appropriate to Allen. Allen had such a relationship with Justheim that Allen would have spoken up if the gifts had not seemed appropriate.

8. The 5/29/81 codicil to Justheim's will, which gave to Ebert all of Justheim's Wyco stock, while invalid as a codicil because it is not witnessed, further evidences the gifts, and when Justheim made the second gift in 1982, he told Ebert that endorsement was not necessary because of the codicil.

9. Ebert was not a fiduciary of Justheim's until April, 1983 when he was appointed conservator of Justheim's estate, though Ebert in 1978 signed Justheim's Trust Agreement to establish, for \$25.00, a "pourover" trust to receive the residue of Justheim's estate on his death.

10. Shortly after Justheim's death, Ebert discussed the facts surrounding the Wyco stock gifts with Allen, and concurred with Allen's advice that those facts would be submitted to the Probate Court for a determination as to the validity of the gifts when the Inventory was filed. The Inventory was complicated, appraisals of the inventoried assets were difficult to obtain, delaying the filing of the Inventory until November, 1984.

11. The Inventory, and the estate and gift tax returns, while signed by Ebert, were prepared under the direction and advice of Clyde, Pratt, Gibbs and Cahoon, Frank J. Allen and Richard C. Cahoon in particular as counsel, and DeNiro & Thorne, Certified Public Accountants, and the valuations stated therein represent their advice and are reasonable valuations for the purposes intended thereby.

12. Morgan, Jr., upon learning of the gift of the Wyco stock to Ebert went to Jay B. Bell of Fabian & Clendenin, his longstanding counsel, to see about attacking it with the object being to create a claim to remove Ebert as trustee, which would result in Ebert's removal as President of Wyco and of Justheim Petroleum, in which Morgan was an investor and director until Ebert caused him to be removed, that Morgan, Jr. is in fact paying the fees of Fabian & Clendenin in prosecuting this demand petition in the name of Fabian's longstanding client, ST. Mark's Cathedral; and the other petitioners are represented by J.R. Bell, father of Jay B. Bell.

13. Justheim intended and desired that Ebert be his personal representative and trustee at the time he made gifts of the Wyco stock, and that regardless of the validity of the gifts, no grounds exist for removal of Ebert because Justheim, having been fully aware of the potential conflict between Morgan, Jr. and Ebert as to the ownership and control of Wyco, nevertheless appointed him trustee and therefore Ebert may be removed only for demonstrated abuse of power detrimental to the trust, and not merely because he claims the gift. Respondent claims that in answering ownership of the stock, he is carrying out the intent of Justheim in keeping the stock from the influence and control of Morgan.

III. Uncontested Facts:

A. On June 22, 1978, Clarence I. Justheim, as trustor, and Ebert as trustee, created a \$25.00 "pour-over" trust, identified above as the "Justheim Trust".

B. On June 22, 1978, Justheim also executed a Last Will and Testament (hereinafter the "Justheim Will"), under which Ebert was named to serve as personal representative of the Justheim Estate upon Justheim's death.

C. Under the Justheim Will, all of Justheim's property, except his personal effects and property previously transferred to the Justheim Trust during Justheim's life, was bequeathed to Ebert as Trustee of the Justheim Trust, to be administered and distributed by Ebert according to the terms of said Trust.

D. Petitioners are beneficiaries under the Justheim Trust.

E. On June 22, 1978, Justheim owned 127,743 shares of Wyoming Petroleum Corporation stock represented by the following certificates:

CERTIFICATE NO.	NO. OF SHARES
139	1
207	15,000
233	730
271	22,500
273	9,712
279	8,963
138	30,000
219	8,025
231	25,000
245	500
297	7,312
	<hr/>
	127,743

F. In the spring of 1982, Justheim acquired an additional 23,400 shares of Wyoming Petroleum stock as follows:

CERTIFICATE NO.	NO. OF SHARES
301	3,400
302	20,000
	<hr/>
	23,400

G. On April 13, 1983, Ebert was appointed Guardian of the Person and Conservator of the Estate of Clarence I. Justheim, a protected person.

H. Justheim died on July 3, 1983.

I. Following the death of Clarence Justheim the Justheim Will was informally probated and Ebert informally appointed as personal representative of the Justheim Estate.

J. At such time, a typewritten document purporting to be a codicil to the Justheim Will (hereinafter the "codicil") was given to the Court but was not informally probated. The codicil is dated May 29, 1981, is unwitnessed and purports to bequeath to Ebert all of Justheim's stock in Wyoming Petroleum Corporation.

K. On or about October 24, 1983, Ebert delivered all of the above-described certificates of Wyoming Petroleum Corporation stock to the transfer agent and asked that they be, and they were, transferred into Ebert's name and into the names of various members of his family. Ebert now claims that he and his family own the stock.

L. On October 3, 1984, Ebert as Personal Representative of the Estate of Clarence I. Justheim signed and caused to be filed with the IRS a Federal Gift Tax Return prepared by Clyde & Pratt, and John Deniro, pertaining to the alleged 1981 gift of 120,431 shares of Wyoming Petroleum Corporation stock, which return valued said stock at \$30,108.

M. On October 16, 1984, Ebert as Personal Representative of the Estate of Clarence I. Justheim filed with the Court an Inventory of the property of said Estate, prepared by Clyde & Pratt, and John DeNiro which says Ebert claims that Justheim gave to Ebert 120,431 shares of Wyoming Petroleum Corporation stock in the Spring of 1981, and an additional 30,712 shares in the Spring of 1982. Said stock is valued at \$37,826.00 in said Inventory.

IV. Contested Issues of Fact:

A. Did Justheim deliver to Ebert any of the stock certificates in controversy with the present intent to make a gift of such stock to Ebert?

B. Did Justheim intend that any gift or gifts not take effect until Justheim's death?

C. Was Ebert a person to whom Justheim would naturally give such stock; does any evidence, independent of Ebert's possession of the certificates, exist to corroborate the gift?

D. Did Ebert accept dominion and control over said stock at the time any gift or gifts were made or attempted?

E. If Justheim gave any of the stock certificates to Ebert, was Justheim intending to make a gift to Ebert individually or to Ebert as trustee of the Justheim Trust?

F. Did Ebert procure any transfer of stock by exercising undue influence over Justheim?

G. Was Ebert a fiduciary to, a confidential advisor to, or in a confidential relationship with Justheim?

H. If there were any gift or gifts of stock from Justheim to Ebert, were the gifts fair in all respects?

I. Did Ebert fail to exercise reasonable care as a fiduciary in administering Justheim's estate?

J. Did Ebert act in conflict of interest in administering Justheim's estate?

K. Has Ebert misstated the value of the stock in the Inventory filed with the Court and in the Federal Gift Tax Return?

L. Has Ebert acted improperly in his untimely filing of the gift tax return reporting said alleged gift?

M. Is this removal petition in fact processed by John H. Morgan, Jr. to further his own business interest?

V. Contested Issues of Law:

A. Were there any effective inter vivos gifts of stock of Wyoming Petroleum Corporation from Justheim to Ebert.

B. At the times the alleged gifts were made, did Ebert owe a fiduciary duty of loyalty and care to Clarence Justheim and to the Justheim Trust?

C. Are the claimed gifts of stock presumptively invalid by reason of Ebert's relationship with Justheim.

D. Are the claimed gifts of stock presumed to be a transfer to Ebert as trustee rather than a gift to Ebert individually?

E. Does reasonable cause exist for Ebert's removal as Trustee of the Justheim Trust and as Personal Representative of the Justheim Estate.

F. Are the gifts presumptively valid from Ebert's possession of the certificates and other surrounding circumstances?

VI. Exhibits:

All exhibits shall be exchanged by the parties prior to trial.

VII. Witnesses:

A. Petitioners

1. Petitioners will call the following witnesses:

- a. Raymond A. Ebert
- b. Frank Allen
- c. Michael Bennion

2. Petitioners may call the following witnesses:

- a. John Morgan
- b. Richard Cahoon
- c. John DeNiro
- d. Steven White
- e. Wayne Elggren
- f. Dr. John Henrie

3. Petitioners may use the following depositions:

- a. Dr. John Henrie

B. Respondent may call any of the above, and

- a. Florence Tierney
- b. Fran Albreicht

VIII. Discovery is complete.

IX. Trial Briefs are to be filed with the Clerk and copies furnished to opposing counsel by _____.

This matter is set for pretrial conference on _____.

Estimated time of trial is four days.

X. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this case, unless modified to prevent manifest injustice.

DATED this _____ day of _____, 1984.

BY THE COURT:

District Judge

APPROVED:

W. Cullen Battle

J. Richard Bell

Joseph J. Palmer

Frank J. Allen

J. RICHARD BELL
JACQUE B. BELL
BELL & BELL
303 East 2100 South
Salt Lake City, Utah 84115
Telephone 487-7756

Attorneys for Heirs and Beneficiaries

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

IN THE MATTER OF THE ESTATE OF)
CLARENCE I. JUSTHEIM,) NOTICE OF AMENDMENT TO
Deceased.) PRE-TRIAL ORDER
Probate No. P-83-695
The Honorable Philip R. Fishler

Notice is hereby given that the attorneys for Priscilla Knight as Personal Representative of the Estate of Charles Justheim, Madelaine L. Harris, Patricia J. Brown; and two of the beneficiaries under the trust: Dean of St. Marks Episcopal Cathedral Parish and St. Marks Episcopal Cathedral Parish, move to amend the Pre-Trial Order entered by this Court on the 30th day of October, 1984, at page 2 by adding the following:

(9) Ebert has misrepresented the size of the estate to the heirs and beneficiaries;

(10) Ebert failed to give notice to heirs and beneficiaries as required by law.

(11) Ebert has been deceptive and secretive and has followed a course of conduct in his capacity as Personal Representative as above set forth which is not in the best interests of the Estate.

(12) Ebert's many positions as Personal Representative

and Trustee under the Trust of the Estate of Clarence I. Justheim, Personal Representative and Trustee under the Trust of the Estate of Margaret Justheim; Conservator and Guardian of Margaret Justheim; stockholder, President and Director of Wyoming Petroleum Corporation; stockholder, President and Director of Justheim Petroleum Corporation; causes him, Ebert, to be in so many potentially conflicting interests situations as to require his removal as being in the best interests of the Estate.

Oral notice of this proposed Amendment has been given to adverse party in keeping with the Court's oral Order to respond to oral Interrogatories.

Dated this 26th day of May, 1986.

BELL & BELL, by

J. Richard Bell-----

MAILING CERTIFICATE

A true and correct copy of the foregoing was mailed this 26th day of May, 1986, postage prepaid, to the following:

Joseph J. Palmer, Esq.
Moyle & Draper
600 Deseret Plaza
15 East First South
Salt Lake City, Utah 84111
and

W. Cullen Battle Esq.
Fabian and Clendenin
12th Floor
215 South State Street
Salt Lake City, Utah 84111-2309

and

Frank J. Allen, Esq.
Clyde, Pratt, Gibbs & Cahoon
77 West 72nd South, No. 200
Salt Lake City, Utah 84101

FILMED

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY

JUL 31 1986

Joseph J. Palmer (#2505) of
MOYLE & DRAPER, P.C.
Attorneys for Raymond A. Ebert
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111-1901
Telephone (801) 521-0250

H. Dixon
By *[Signature]*

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

IN THE MATTER OF THE ESTATE)	
OF CLARENCE I. JUSTHEIM,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
)	
Deceased.)	
)	Probate No. P-83-695
)	(The Honorable Philip R.
)	Fishler)

* * * * *

This action came on regularly for trial before the Honorable Philip R. Fishler, sitting without a jury, on May 27, 28, 29, 30, and June 3, for closing argument on June 23, for the Court's initial ruling on June 25, and for further argument and the Court's final ruling on July 21 and 28, 1986. J. Richard Bell appeared for certain Beneficiaries: Priscilla Knight as Personal Representative of the Estate of Charles Justheim, Madelaine L. Harris, Patricia J. Brown, St. Mark's

EXHIBIT C
001002

Episcopal Cathedral Parish and Dean of St. Mark's Episcopal Cathedral (hereafter "Knight-Church"). Kent M. Kasting appeared for himself as Guardian Ad Litem for Margaret L. Justheim, a Beneficiary. Clark P. Giles appeared for Massachusetts Institute of Technology, a Beneficiary. Frank J. Allen appeared for Raymond A. Ebert, as Personal Representative of the Estate of Clarence I. Justheim. Joseph J. Palmer appeared for Raymond A. Ebert, as Personal Representative and as an individual (hereafter "Ebert").

The action came on based upon the Petition of Knight-Church for Removal of Raymond A. Ebert as Personal Representative of the Estate of Clarence I. Justheim (hereafter "Estate") and as Trustee of the inter vivos trusts created or to be created pursuant to the Justheim Trust dated June 22, 1978, as amended (hereafter "Trust"), and further based upon the Pretrial Order of October 30, 1984 as supplemented by the Knight-Church Notice of Amendment, dated May 26, 1986.

At the inception of trial, Charles M. Bennett appeared for John M. Morgan, Jr. ("Morgan"). Ebert objected to the standing of Morgan to appear. Based upon the oral stipulation of all parties in open court, the issue of Morgan's standing was

reserved, and he was permitted to appear for the limited purpose of joining in the Knight-Church Removal Petitions. The latter and Morgan are hereafter referred to as "Petitioners".

The parties stipulated that the Court would reserve and not now determine the issue of whether Clarence I. Justheim made valid inter vivos gifts of 151,143 shares of Wyoming Petroleum Company ("Wyoco") common stock to Ebert and that the parties might offer further evidence on that issue. These Findings and Conclusions are not intended to be the findings and conclusions on that issue. Petitioners did, however, offer evidence on their claims that one reason, among others, Ebert should be removed is because the gifts of the Wyoco stock were invalid.

Based upon the evidence, and the parties having rested and submitted memoranda and closing argument, and the Court being fully advised, the Court now makes and enters these:

FINDINGS OF FACT

1. The Parties established the following facts by a preponderance of the evidence:

A. Ebert was Clarence's closest personal friend for many years. Ebert began working for Clarence as "an administrative assistant, courier, confidant and general right hand man'" (Exhibit 32) in late 1978 following an automobile accident involving Clarence. Mr. Ebert continued in that capacity until Clarence's death in July 1983.

B. In helping Clarence, Ebert assumed a position of some trust and confidential responsibility. Clarence depended on Ebert for many business and personal matters and trusted him without reservation. Ebert did not have a position of superiority or dominance over Clarence.

C. Clarence's foremost concern in the last few years of his life was the care of his wife Margaret. Margaret was substantially incapable of taking care of her affairs during the relevant time period.

D. Clarence was concerned that he could not take care of Margaret. Clarence sought the help of friends and associates.

E. Clarence was a demanding and dominating person. As he grew older, he became increasingly difficult to work

with. As a result, several nurses hired after his accident in November 1978 quit their jobs.

F. In order to induce people to help him, Clarence began to make promises to his friends and associates in order to obtain their cooperation.

G. With regard to Ebert, Clarence stated on several occasions that he would take care of Ebert.

H. On May 29, 1981, Clarence executed a document purported to be a codicil which he had asked Ebert to type. The purported codicil devised all of Clarence's Wyoming Petroleum stock to Ebert. However, the codicil was not witnessed.

I. The Wyoming Petroleum stock was a valuable asset to Clarence. Early in 1981, Clarence asked his attorney, Frank Allen, if he could make a gift of Wyoco stock to Ebert without transferring it on the corporate books because Clarence did not want Morgan to know of it. Allen told Clarence he could make a valid gift of stock by handing Ebert the certificates and declaring that he was giving it to him, and that the certificates should be endorsed or a stock power should be given. Clarence never again discussed a gift of Wyoco Stock with Allen.

J. After Clarence died, Ebert learned from Frank Allen, who was appointed as his attorney as personal representative of the estate, that the codicil was invalid for lack of witnesses.

K. Ebert claimed that Clarence gave him 120,431 shares of Wyoco stock on May 15, 1981, which left Clarence with 6,312 shares. Ebert claimed Clarence told him not to transfer the certificates into his name until after his death and to keep the fact of the gifts secret because Clarence did not want Morgan to find out about the gifts.

L. John Morgan, Sr. ("Morgan Sr.") died in February 1982; then he, family members and others and Clarence, his family members and others, each owned approximately the same number of shares of Wyoco.

M. Immediately following Morgan Sr.'s death, Clarence determined that the agreement between him and Morgan Sr. to keep an equal number of shares was no longer valid, and Clarence further determined to obtain additional stock of Wyoco in order to obtain control of the corporation.

N. Ebert assisted Clarence in this endeavor by checking shareholder lists and by making several trips to Wyoming to obtain 20,000 shares of stock and an additional 3,400 shares from New Jersey which represented the "control stock".

O. Shortly after the "control stock" was obtained by Clarence, Ebert claimed Clarence gave Ebert an additional 30,712 shares of Wyoco. These shares represented the "control stock" and the remaining 6,312 shares of the stock remaining with Clarence after the claimed first gift. Ebert claimed Clarence again told him not to transfer the certificates into his name and to keep the fact of the gifts secret because Clarence did not want Morgan to find out about the gifts.

P. Both Ebert and Allen testified that, in July or August 1983, Ebert told Allen the facts about the purported gifts. Allen told Ebert that in his opinion, if the Court determined the facts to be as Ebert claimed, each of the gifts was probably valid even if unendorsed and that the codicil had some probative value to prove the gifts. Allen told Ebert, however, that all of the facts would have to be disclosed to the Court and the Court would have to determine if the gifts were valid. Neither Ebert nor Allen disclosed the facts surrounding the alleged gifts to either the court or the ultimate beneficiaries of the estate until after a petition was brought by St. Mark's Church in June 1984, seeking the recovery of the stock and Ebert's removal as personal representative of the estate.

Q. Without approval of the Court or notice to his attorney or the estate's ultimate beneficiaries, Ebert transferred the disputed stock to himself and members of his family on October 24, 1983. When he did so, Ebert believed that he and Allen would cause all of the facts supporting Ebert's gift claims to be submitted to and determined by the Court. In October 1984, Ebert and his family caused all of the stock to be deposited with Allen pending this Court's final determination of the gift claims.

R. To transfer the stock to himself and his family, Ebert delivered the disputed stock certificates to the transfer agent for Wyoming Petroleum with two letters dated October 24, 1983. Some of the stock certificates presented for transfer had not been endorsed. Ebert included a copy of the codicil which Ebert knew was invalid. Ebert referred to the codicil in the letter that accompanied the unsigned stock certificates and stated that: "The Codicil bequeathed to me all of Clarence I. Justheim's interest in Wyoming Petroleum Corp." Ebert intended that the transfer agent rely upon the codicil in transferring the stock to Ebert. Ebert was relying on the advice Allen had given him in July or August 1983 in so doing.

S. Ebert is currently the personal representative of the estate, the conservator of Margaret Justheim's estate, the

largest individual shareholder in Justheim Petroleum (other than the estate), the president and a director of Justheim Petroleum, and the president and a director of Wyoming Petroleum. Clarence anticipated and intended Ebert would be the personal representative of his estate.

T. Allen is currently the secretary, a director and a shareholder of Justheim Petroleum, the attorney for Justheim Petroleum, the attorney for Ebert as personal representative of the estate, and the attorney for Ebert as the conservator of Margaret Justheim. Allen was secretary, a director and a shareholder of Justheim Petroleum during Clarence's life, and was Clarence's personal attorney.

2. The Petitioners failed to prove the following allegations by a preponderance of the evidence:

A. That Ebert improperly caused 151,143 shares of Wyoco common stock to be transferred into his and his donees' names.

B. That Wyoco stock was never given to Ebert by Clarence during Clarence's life, that the Wyoco stock was given to Ebert in his capacity as trustee of the Trust, or that these

gifts were intended by Clarence to take effect after Clarence's death.

C. That these gifts were made as a result of undue influence by Ebert in his position as trustee, confidential advisor or fiduciary to Clarence.

D. That Ebert, as Personal Representative of the Justheim Estate, should have sought court approval of the alleged gifts prior to the transfer of the Wyoco shares into Ebert's and his donees' names.

E. That the Petitioners were damaged by Ebert's transfer of the Wyoco stock to himself and his donees.

F. That Ebert, as Personal Representative, committed misfeasance with regard to the time of filing of a federal gift tax return reporting the alleged gift or gifts and in the valuation of the Wyoco stock in the gift tax return.

G. That Ebert otherwise misrepresented the value of the Wyoco stock in documents filed with the Court.

H. That Ebert misrepresented the size of the estate to the heirs and beneficiaries.

I. That Ebert failed to give notice to heirs and beneficiaries as required by law.

J. That Ebert has been deceptive, misleading, secretive, or has followed a course of conduct in his capacity

a Personal Representative which is not in the best interests of the Estate.

K. That Ebert's positions as Personal Representative and Trustee of the Estate and the Trust of Clarence I. Justheim, Personal Representative and Trustee of the Estate and the Trust of Margaret Justheim, Conservator and Guardian of Margaret Justheim, stockholder, president and director of Wyoming Petroleum Corporation, stockholder, president and director of Justheim Petroleum Corporation, are such potentially conflicting interests as to require his removal in the best interests of the Estate.

L. That Ebert has failed to timely pursue and discover assets and potential assets of the Estate.

M. That Ebert has failed to account for assets or potential assets of the Estate.

N. That Ebert has attempted to conceal or cover up the basis of his claim to the gifts of Wyoco stock.

Based upon the foregoing Findings of Fact, the Court now makes and enters these:

CONCLUSIONS OF LAW

~~E~~ Ebert ^{had} ~~did not have~~ a confidential relationship with Clarence. *HC*

E 1. The Court concludes that the Petitioners have failed to show by a preponderance of the evidence:

A. that Ebert has breached any duty to the estate; or

B. that it is in the best interests of the Estate of Clarence I. Justheim that Ebert be removed as Personal Representative of the Estate or as Trustee of the Trusts created by Clarence I. Justheim under Trust Agreement dated June 22, 1978, as amended.

C. A
Therefore, the Petition to remove Ebert should be denied.

Dated: July 31, 1986

BY THE COURT

Philip R. Fishler
The Honorable Philip R. Fishler

CDN3660B

ATTEST
H. DIXON HINDLEY
CLERK
By *[Signature]*
Deputy Clerk

- 12 -

001013

~~CERTIFICATE OF SERVICE~~

~~I hereby certify that a true and correct copy of the
foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW was hand
delivered _____ day of July, 1986, to the following:~~

Approved as to form:

Joseph J. Palmer
MOYLE & DRAPER
600 Deseret Plaza
#15 East First South
Salt Lake City, Utah 84111

J. J. Palmer
7/31/86

Frank J. Allen
CLYDE & PRATT
77 West 200 South, Suite 200
Salt Lake City, Utah 84101

Frank J. Allen

Kent M. Kasting
GUSTIN, ADAMS, KASTING & LIAPIS
48 Post Office Place, Third Floor
Salt Lake City, Utah 84101

Kent M. Kasting

J. Richard Bell
303 East 2100 South
Salt Lake City, Utah 84115

J. Richard Bell

Clark P. Giles
RAY, QUINNEY & NEBEKER
400 Deseret Building
Salt Lake City, Utah 84111

Clark P. Giles
7/31/86

Dale F. Gardiner
1325 South Main
Salt Lake City, Utah 84115

Carmen E. Kipp
KIPP & CHRISTIAN
32 Exchange Place, #600
Salt Lake City, Utah 84111

Charles M. Bennett
7/31/86

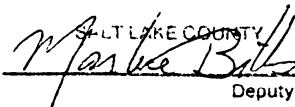
Tab C

 **COURTESY COPY**

Joseph J. Palmer (#2505), and
Jeffrey Robinson (#4129), of
MOYLE & DRAPER, P.C.
Attorneys for Raymond A. Ebert
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111-1915
Telephone: (801) 521-0250

FILED DISTRICT COURT
Third Judicial District

JUN 15 1989

By  **SALT LAKE COUNTY**
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

IN THE MATTER OF THE ESTATE OF	:	
	:	STIPULATION
	:	
CLARENCE I. JUSTHEIM,	:	
	:	Probate No. 83-695
	:	(Gift Issue)
Deceased.	:	Judge Michael R. Murphy
	:	

Reserving objections as to relevancy, hearsay, unfair prejudice, confusion of issues, misleading to the jury and waste of time, Raymond A. Ebert stipulates that John H. Morgan, Jr. wrote to Raymond A. Ebert in substance as follows:

10/10/83: In my recent discussions with you, you have indicated to me that Clarence, by his Will or a Codicil, had given you all of his stock of Wyoming Petroleum Corporation.

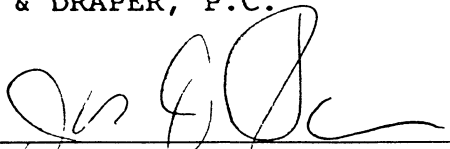
11/21/83: I have a copy of Clarence's Will, which Frank Allen gave me; it doesn't mention Wyoming Petroleum stock. Yet you tell me you have an Amendment to the Will which gives you all of the stock.

1/8/84: The Codicil is not witnessed; a Codicil requires two witnesses to be valid, so I doubt Frank Allen prepared it. Who prepared the Codicil?

DATED: June 13, 1989.

MOYLE & DRAPER, P.C.

By


Joseph J. Palmer
Jeffrey Robinson
Attorneys for Raymond A.
Ebert

Accepted:

BELL & BELL

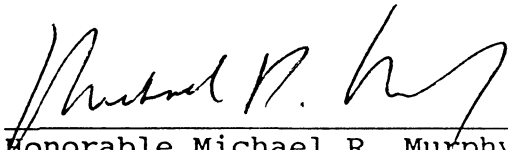
J. Richard Bell
Attorneys for Certain
Beneficiaries

STIPULATION ACCEPTED.

DATED: June 15, 1989.

BY THE COURT:

By


Honorable Michael R. Murphy
District Court Judge

Tab D

FILED DISTRICT COURT
Third Judicial District

AUG 9 1989

By /S/ SALT LAKE COUNTY
Deputy Clerk

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

IN THE MATTER OF THE ESTATE OF : ORDER
CLARENCE I. JUSTHEIM, : CASE NO. P-83-695
Deceased. :

The motion for a new trial on the gift issue is denied.

Dated this 8th day of August, 1989.

/S/
MICHAEL R. MURPHY
DISTRICT COURT JUDGE

JUSTHEIM ESTATE

PAGE TWO

ORDER

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order, to the following, this 9th day of August, 1989:

Joseph J. Palmer
Attorney for Raymond A. Ebert
15 East 100 South, Suite 600
Salt Lake City, Utah 84111-1915

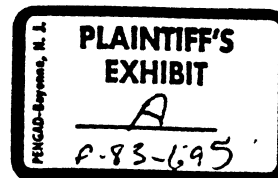
J. Richard Bell
Attorney for Beneficiaries
303 East 2100 South
Salt Lake City, Utah 84115

15/_____

Tab E

Utah Resources International, Inc.

Walker Building Salt Lake City Utah 84111
phone (801) 363-4391 or 363-6176 or 531-9264



October 10, 1983

Mr. Raymond A. Ebert
Director
Justheim Petroleum Company
2338 East 3740 South
Salt Lake City, Utah 84109

Dear Ray:

Following up on our communication regarding Wyoming Petroleum Corporation, I want merely to state the facts and suggestions as I see them. If I am incorrect in my facts, please let me know.

For more than thirty-three years, I have been associated with C.I. and my father in the oil and gas business in southwestern Wyoming and in Utah. A good part of this association, of course, is in the Big Piney and southwestern Wyoming development, as well as in the Uintah Basin development of eastern Utah.

An important part of the Wyoming development, of course, was the Wyoming Petroleum Corporation. This project was a fifty/fifty division of interest with my dad and C.I., with each of them agreeing with each other that they would retain the fifty/fifty control of Wyoming Petroleum Corporation and in any stock acquired or purchased would be owned 50% by one and 50% by the other. Again I have enclosed a copy of the Wyoming Petroleum Corporation agreement entered into September 11, 1953.

We both know the history of this situation. Clarence purchased additional stock after dad's death, contrary to the spirit, as well as the letter of the agreement.

I have suggested from the beginning that you and I work together on Wyoming Petroleum Corporation on a 50/50 basis according to the way that Dad and C.I. had it worked out from the beginning, and I still think this is a good approach and continue to suggest that this is the best way to work together and to build the company.

In my recent discussions with you, you have indicated to me that Clarence, by his Will, had given you all of his stock of Wyoming Petroleum Corporation. You mentioned that this was contained in one of the Amendments or Codicil to Clarence's Will. I have not

EBERT
EXHIBIT
E-16



176

Mr. Raymond A. Ebert - 2

read it, but I assume what you say is the case.

Under all of the circumstances, you are obviously in control of Wyoming Petroleum Corporation. This, of course, is not the way that Clarence or my father envisioned that it would take place when they were working together to put Wyoming Petroleum Corporation together.

If you want to work on a fifty/fifty basis, I believe we can build the company and make it a great success. This would be my choice, but this is up to you.

I would suggest that you and I and perhaps Mike Bennion, if Mike is willing to do so, serve as Directors of the company. You can be the President, if you want, and I will be the Vice President and perhaps Mike will be the Secretary and Treasurer. But it is pretty much up to you as to what you want to do.

Let me know of your decision.

Thank you, and with all best wishes.

Sincerely,

A handwritten signature in dark ink, appearing to read "John", written over a horizontal line.

John H. Morgan, Jr.
President

JHM/lrb

cc: Mr. Frank J. Allen
Mr. J. Michael Bennion

P.S. As to regard the signing of the checks, it is my suggestion that both your and my signatures should be required.

Tab F

November 21, 1983

Mr. Raymond A. Ebert
President
Justheim Petroleum Company
2339 East 3740 South
Salt Lake City, Utah 84109



Dear Ray:

Once again I have enclosed a copy of the Agreement which C I. and Dad entered into on September 11, 1953 regarding Wyoming Petroleum Corporation and their promise to each other that if one of them acquired any stock of Wyoming Petroleum Corporation, that the other one would own it on a fifty-fifty basis.

Including the preceding fourteen years which they had made this a practice, as recited in the Agreement itself, it was a total of almost forty-four years that they continued to keep this promise to each other, because of their mutual appreciation and respect for each other.

Following Dad's death in February, 1982, I suggested to Clarence and even urged him to continue to work along on that same basis - that any stock purchased or acquired by the other would be owned one-half by the other partner. In other words, that it would continue to be a fifty-fifty deal on Wyoming Petroleum Corporation.

But for some reason Clarence purchased a block of stock sufficient to give him control of Wyoming Petroleum Corporation. Keep in mind that Dad and C I. had worked together for some forty-four years in trying to build that company, in which I helped them for thirty-three of those years. I just can't believe that C.I., after forty-four years of working together, would suddenly turn on his old partner who never one time broke a promise to him in all those years and deprive him and his family of what they are entitled to under the Agreement.

Somebody must have talked C.I. into violating that Agreement. I understand you actually went up to Evanston, Wyoming and paid for the Wyoming Petroleum Corporation stock which gave C.I. control of the company.

I have a copy of Clarence's Will which Frank Allen gave to me. It doesn't mention Wyoming Petroleum Corporation stock. In this case, it would be treated like any other personal property. It would go to Margaret (Chickie), and after Chickie's death, it would go to C.I.'s heirs, as well as to Kathryn Bradford and others named in Clarence's Will. There was never any mention

43A-

Mr. Raymond A. Ebert
11/21/83
Page 2

that he was giving all of that stock to you. Yet you tell me that you have an Amendment to the Will which gives you all of the stock. On this basis you have gone in as head and President of Wyoming Petroleum Corporation and in full charge and control of Wyoming Petroleum Corporation.

I just can't believe that Clarence intended to deprive Chickie and Kay and all his heirs of that stock and give it to you.

Ray, you never lifted your finger in helping to build Wyoming Petroleum Corporation. It seems incredible to me that Clarence would change his mind and give all of that stock to you.

On the Drilling Proposition, Ray, once again your credibility would be greatly enhanced if you would produce a copy of your canceled check (both sides) for the \$6,000 which you said you put up on October 26, proving your 2% investment in the Drilling Deal. You have everything to gain and nothing to loose by sending copies of your canceled check to the Directors of Justheim Petroleum Company.

You claim that there is now a new oil well, better than the others, but, Ray, even according to Frank's figures, you never raised anywhere near enough money to drill one well. No one has still heard about Dominion Oil Company who was supposed to invest a total of \$93,750 for a 15.625% interest in the total drilling project. Long Petroleum Company, so far as I know, never has put up their \$40,000 for their 25% interest in the first well compared to Justheim Petroleum Company's 20% for a \$60,000 investment.

There is one other matter which I would like to bring to your attention. According to the copy of the Will which I have, Massachusetts Institute of Technology was actually given the 1.5 million shares of stock of Justheim Petroleum Company. Of course, there were certain conditions attached, etc. But the stock was actually given to them. Yet you tell me now that according to an Amendment to Justheim's Will, M.I.T. doesn't get the stock until Chickie's death.

The M.I.T. representative, Mr. D. Hugh Darden, has written several times asking that the Personal Representative and Trustee furnish additional information regarding the Estate, and I have enclosed a copy of his latest letter.

Ray, I would like to ask you a question: Can you see any way that a fairness and equity and justice can be done to Justheim Petroleum Company, to Wyoming Petroleum Corporation, to the

Mr. Raymond A Ebert
11/21/83
Page 3

Massachusetts Institute of Technology, to me and my family, to Chickie, to Kay and to Clarence's heirs? If you do, I would sure like to hear from you.

Thanks very much.

Sincerely.

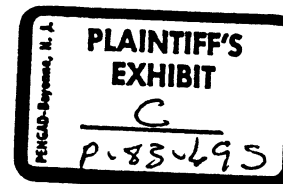
John H. Morgan, Jr.
President

JHM/mb
Enclosures

Tab G

an Resources International, Inc.

Walker Building Salt Lake City Utah 84111
none (801) 363-4391 or 363-6176 or 531-9264



December 4, 1983

Mr. Raymond A. Ebert
President
Justheim Petroleum Company
2338 East 3740 South
Salt Lake City, Utah 84109

Dear Ray:

You continue to suggest that I resign as a member of the Board of Justheim Petroleum Company, and you tell me that I will surely be removed from the Board at the next Annual Meeting of the Stockholders. You also continue to mention that I have completely destroyed the harmony and unity of the Board.

Ray, let me tell you how you can achieve perfect harmony and unity with the Board of Directors. And you can also have my resignation immediately.

You can furnish us evidence that you and the companies listed in Frank's letter to the Board of Directors of October 18, a copy enclosed, invested their money right along with Justheim Petroleum Company, and on the same terms, as proposed in Frank's letter of the 18th.

Now, it may be a little difficult to get copies of the cancelled checks from these companies. But you certainly have your cancelled checks, and this would be a good faith beginning.

Then, surely there was a bank account established for the drilling fund. (The agreement requires this.) It would be most helpful, and it would not be difficult at all, to send a copy of the bank statement, showing the deposits, not only of Justheim Petroleum Company; but also your deposits and the deposits of the companies listed in Frank's letter of October 18.

However, even if you got all the money listed in Frank's letter, and your money as well, it only amounts to \$141,000, according to the information these companies gave me concerning their investment. This isn't enough to drill a well, Ray. Frank tells us and CKM tells us it takes \$300,000 to drill and complete a well to the Codell formation.

Now, it wouldn't really be that bad if Frank and CKM got other people and companies than those listed in Frank's letter, to make the investment along with Justheim Petroleum Company, although it would not be as represented.

EBERT
EXHIBIT
E-19..

(Dec 4 1983)

Mr. Raymond A. Ebert
Page 2, Cont.

But as Directors and Officers in Justheim Petroleum Company, we are entitled to know that other companies and individuals are investing right along with Justheim Petroleum, and on the same terms; because this is the way it was represented to us; and this was the basis on which the money was invested by Justheim Petroleum Company.

So, Ray, you have my resignation; and you can assure harmony and unity with the Board. All you have to do is furnish us some important information, which shouldn't be hard to get at all.

Ray, in your letter to me of November 21, a copy of which went to all the Directors, you mention that my personal animosity to you can be explained by the fact that I was not appointed as Co-Personal Representative in Clarence's Will.

No, Ray, that doesn't bother me at all. But there are things about Clarence's Will which bother me very much. In my letter to you of November 21, I explained how I felt, and enclose a copy of my letter of November 21.

The other Directors of Justheim Petroleum Company know very little about Wyoming Petroleum Corporation. But I think they should have the background. It is a company which my Dad and Clarence put together more than 44 years ago, and it is growing in value every day. Dad and Clarence agreed to a 50-50 control of Wyoming Petroleum Corporation, pursuant to their Agreement of September 11, 1953, a copy of which is enclosed.

By Agreement of September 11, 1953, they "re-affirmed their understanding and agreement of the previous fourteen years," that they should control Wyoming Petroleum Corporation on a 50-50 basis, and that any stock purchased or acquired by one of them, would be owned 50% by the other one.

I am sending a copy of this Agreement to all the Directors, together with a copy of my letter of November 21 to all the Directors, so that they can understand a little of the background, and perhaps why I am concerned about certain aspects of Clarence's Will; and why it really does bother me.

You see, if there was one thing that Clarence Justheim was certain about in his life, it was that he was going to take care of Margaret (Chickie). Nothing was as important to Clarence as this—not even Justheim Petroleum Company. C.I. was going to make certain that Chickie would never go to a rest home. And that she would get all the attention and care that she needed for the rest of her life.

As I explained in my November 21 letter to you, a copy of the Will that Frank gave to me never once mentions Wyoming Petroleum Corporation. Under these circumstances, all the stock of Wyoming Petroleum Corporation owned by Clarence would normally and naturally go to Chickie. This is important, because Wyoming Petroleum Corporation was and is becoming a very valuable Company, with its oil and gas royalties from the Big Piney Field.

(Dec 4 1983)

Mr. Raymond A Ebel
Page 3, Cont.

Yet, you have told me many times that Clarence gave all of that Wyoming Petroleum Corporation stock to you by an Amendment to the Will; and that Frank had the Amendment.

It just seems incredible to me that Clarence would change his Will, and deprive Chickie of this valuable stock; and also deprive his other heirs of their portion of the Stock, after Chickie passes away. One of Clarence's heirs, I understand, is a parapalegic who will never live a normal life, and who needs all the help he can get. But we would have to believe that Clarence changed his mind, and wanted you to have all the stock, and his parapalegic relative would get none.

We would also have to believe that Clarence changed his mind, and decided to deprive Kathryn Bradford of her share of the stock, because Kathryn is listed in the Will to receive a portion of Clarence's assets. Kathryn has been Clarence's devoted secretary for more than 35 years.

We would have to believe that he changed his mind, and gave it all to you, Ray. Somehow, it doesn't all add up. And yet, you have gone in as President of Wyoming Petroleum Corporation, in full control of the Company. I am a Director and Vice President. But you could kick me out any time you wanted to do so, because you have absolute control of the Company. Yet, I spent 33 years in trying to help Clarence and my Dad build that Company. You didn't lift your little finger to build Wyoming Petroleum Corporation. Can you understand why I am bothered?

Also, the copy of the Will which I have actually gives the 1.5 million shares of Justheim Petroleum Company to the Massachusetts Institute of Technology, with you as Trustee. Yet, you tell me that according to the Amendment to Clarence's Will, that MIT doesn't get that stock until after Chickie passes away.

Why should Clarence want to change the Will to prevent MIT from getting that stock until after Chickie dies. It doesn't make sense to me. The MIT people have been waiting for a long time to get the information on the Estate. You are the Trustee and the Personal Representative, Ray. You have the responsibility of sending the information to the MIT.

Finally, Ray, in my letter to you of November 21, I ask you if you can see any way that fairness and justice and equity can be done to Chickie, to Justheim Petroleum, to Wyoming Petroleum, to the Massachusetts Institute of Technology, to Kay Bradford, to Clarence's heirs and to me and my family? The one I really should have included above anyone else is Clarence Justheim himself.

I haven't heard anything from you, Ray. And I continue to ask you the same question. Can you see how fairness and justice and equity can be done in this case?

Mr. Raymond A. Ebert
Page 4, Cont.

I recently wrote you a letter concerning the Salt Lake Area Chamber of Commerce, because I really believe that Clarence was 100% behind the Chamber of Commerce and its objectives, in his desire to help build the Community and make it a better place to live and to work. You mentioned that Justheim Petroleum had already made its contribution to the Chamber. I don't know what it was. Maybe it was \$100. But I think Clarence would want more than just a token contribution to the Chamber. Clarence loved this Community, and wanted to be an important part of its success and growth. Besides, it is an investment—not a contribution to a Charity.

One of the things I would ask you to do is to consider a real investment in the Chamber of Commerce—to really be a part of the growth and development and success of Salt Lake City, and the State of Utah.

There are other ways, Ray, that you can bring fairness and justice and equity to those people and companies mentioned above. But that is pretty much up to you to decide.

Sincerely,



John H. Morgan, Jr.

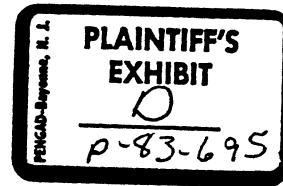
Enclosures: Wyoming Petroleum Corporation Agreement (Copy)
Copy of Letter of November 21
Copy of Letter of October 18
Copy of Letter of November 22.
Copy of MIT Letter

cc: Mr. Frank J. Allen
Mr. Kenneth E. Smith
Mr. Calvin P. Gaddis

Tab H

Utah Resources International, Inc.

604 Walker Building, Salt Lake City, Utah 84111
telephone (801) 363-4391 or 363-6176 or 531-9264



January 21, 1983

Mr. Ray Ebert
President
Justheim Petroleum Company
2338 East 3740 South
Salt Lake City, Utah

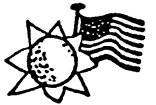
Dear Ray:

I have an apology to make to you.

In my letter of January 12, in which I sent copies to the other Directors, I referred to the two checks for \$20,000 each which were written to you from Justheim Petroleum Company. Now, you may have the impression I was trying to connect you with some illegal activity. This is not the case. I don't want to leave that impression. At the Directors' meeting, as I recall, you said you did it that way in order to bait me. If this is the case, it is not a very mature way to conduct corporate business. I thought there might be some other explanation for this. If I left the wrong impression, I apology for this.

Also, I want to clarify, if possible, the Will situation. I don't want to leave the wrong impression with you or the other Directors. I don't want to leave the impression that you were engaged in illegal activities. But we have found that the Will, or the Codicil to the Will, has some major defects, including the fact that it was not witnessed. Frank Allen has one of the best legal minds that I know; and no one knows better than Frank that it requires two witnesses for the Will to be legal. Therefore, I am certain that Frank did not prepare the Will, even though Frank was Clarence's lawyer. But I have to ask the question: Who did prepare the Will, or the Codicil to the Will? Clarence didn't know how to type. Ray, I don't know who put the Codicil to the Will together. Perhaps you know. Once again, I don't think there is any illegal activity, and I don't want to leave the impression with the other Directors that there is illegal activity. No doubt there is an explanation for this. If so, and if you feel you would like to explain it, I would appreciate hearing the explanation.

Would you please consider my situation for a minute, Ray? I worked with C.I. and Dad for 33 years in trying to build something worthwhile in the oil and gas business. Justheim Petroleum Co., Wyoming



Mr. Ray Ebert
Page 2, Cont.

Petroleum Corporation and the other Companies are the results of this effort, in my judgment. Therefore, when I see you come in with really no background in trying to help build these Companies and gain absolute control of Wyoming Petroleum Corporation, contrary to an agreement of 44 years which C.I. and Dad had honored all this time; and insisting that you own all of that Wyoming Petroleum Corporation stock, it really gets to me. Also, I am really upset with the possibilities that neither Chickie nor Jack Bradford nor any of Chickie's heirs or C.I.'s heirs would get any of that stock. It isn't fair.

But these are the facts, Ray, as I see them. I don't want to leave a wrong impression with anyone, and I make more mistakes than most people, and no doubt I have given the wrong impression to you and the other Board Members. I want to leave the right impression, and give the facts, as I see them. Therefore, if I have given the wrong impression, I apologize. But I invite you, if you so desire, to give the facts, as you see them.

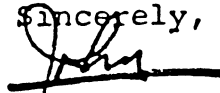
But let me tell you something, Ray: Clarence and I had some fantastic battles. We really did a lot of fighting. But we always came up friends. We always shook hands at the end of the day. This was the only basis on which we could, and did, stay together. And of course, this was the basis on which Dad and C.I. stayed together for 44 years.

I have made a lot of mistakes, Ray, much more than my share. I apologize for them, and hope I can do a lot better. And I hope you and the other Directors accept my apology. But you know, every day we can start out with a clean slate. I hope we can do it. As far as I am concerned, I would like to try.

But whether I resign, or whether you kick me out as a Director, I still want to be your friend. Why don't you give me a chance?

With best wishes,

Sincerely,



John H. Morgan, Jr.

cc: Justheim Petroleum Co. Directors

Tab I


I, Clarence I. Justheim, being of sound and ~~disposing~~ ^{sound} mind and memory and free from all menace, fraud, duress, undue influence or restraint whatsoever, do hereby make this codicil to my Last Will and Testament which was signed by me, June 22, 1978.

Prior Disposition I hereby revoke all prior bequests and testamentary dispositions made by me concerning my interest and stock holdings in the Wyoming Petroleum Corp., of which I own approximately Fifty percent (50%).

I hereby give, bequeath, and devise to Raymond A. Ebert, to be his absolutely, without accountability in the distribution provided for in the residuary of my said will, all of my interest and stock holdings in the Wyoming Petroleum Corp., if he is living, otherwise to his children, if any are living, children of deceased children to take by right of representation.

I have hereunto set my hand, this 29th day of May, 1981.

Grantor



Clarence I. Justheim

