

1991

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

Utah Supreme Court

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UTAH COURT OF APPEALS
BRIEF

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IN THE SUPREME COURT
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF)

CLARENCE I. JUSTHEIM,)

Deceased.)

Case No. [REDACTED]

) 91-0244-CA

APPELLANTS' AMENDED REPLY BRIEF

This Appellants' Amended Reply Brief responds to the Appellee's Brief relative to the Appeal from the DECREE AND JUDGMENT ON VERDICT DENYING APPELLANTS' PETITION on behalf of the Estate to recover 120,431 shares of Wyoming Petroleum Company stock from the Respondent, In The Third Judicial District Court of Salt Lake County, State of Utah. This case was heard before the Honorable Michael R. Murphy, District Judge.

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FILED

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF)
CLARENCE I. JUSTHEIM,) Case No. 890419
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NOTE RE REPLY BRIEF

The first eight pages of this Reply Brief are identical with the Reply Brief as originally filed. The additional pages of 9 through 19 are based on the Court's Order permitting the amending of the Reply Brief limited to ten pages relative to Utah Supreme Court Rule 24(c) and the Res Judicata Ruling.

REFERENCES TO THE RECORD - ABBREVIATIONS

There are five volumes of testimony. They are not paginated. Only the first page of each volume bears a Record paginated page number.

R123 - R followed by numbers designates the court file

R1209-49 - R followed by four numbers, a dash and additional numbers designates the volume of the transcript followed by the page number.

Exhibit R1 - R followed by a number designates the Trial Exhibit number

Exhibit B1 - B followed by a number designates a copy of a Trial Exhibit which is attached to the Brief.

OPENING STATEMENT OF ISSUES IN REPLY BRIEF

This Brief is in reply to the Appellee's Brief, sometimes hereinafter called Ebert's Brief, and is limited basically in its response to the three points of argument advanced by Ebert in his brief.

ARGUMENT

POINT I

THE TRIAL COURT DID ABUSE ITS DISCRETION IN
DENYING BENEFICIARIES A NEW TRIAL BASED ON THE ALLEGED
IMPROPER ADMISSION OF PAROL EVIDENCE.

The parol evidence rule is a substantive rule of law. It is not a rule of evidence. The cases which hold evidence violative of the parol evidence rule must be excluded, even though admitted without objection, and these cases emphasize the substantiveness of the rule. Because it is a rule of substantive law, the time at which the rule may be invoked differs markedly from the time at which a rule of evidence must be invoked. In fact, the time element of invoking the rule is the hallmark and is the only difference between the two rules. If there is no time difference in which the rules must be invoked, then it is difficult to perceive that any effect has been given to the words that the parol evidence rule is a "substantive rule of law".

The Utah cases provided in Ebert's Brief appear to set the same time standard for invoking the two rules, requiring that each must be invoked timely during trial. But, it does not appear from the cases that the substantiveness of the parol evidence rule has ever been addressed by the Court. Ebert's

brief does not meet the issue raised by the beneficiaries that the parol evidence rule is one of substantive law. The beneficiaries lay before the Court the question of whether the substantiveness of the rule enlarges the time in which it may be invoked, and requires that evidence violative of the parol evidence rule, even though admitted without objection, must be excluded when the rule is invoked in a post-trial motion, at least under the facts of this case. The cases cited by the beneficiaries are from those jurisdictions which have acknowledged the substantiveness of the rule and given affect to it with the result being it is not necessary to object to the admission of the evidence which is in violation of the parol evidence rule during the trial. The objection may be first raised following the trial and some cases permit the raising of the objection even at a later date. The beneficiaries invoked the parol evidence rule following trial in a connection with several motions including the motion for a new trial.

The beneficiaries have no argument with Rule 103 of the Utah Rules of Evidence. Those rules are just what the title states--rules of evidence. Parol evidence rule is not the rule of evidence but a substantive rule of law, and therefore distinguishable from and not subject to the Rules of Evidence.

The appellees cite the case of Edmonds v. Galey, 458 P.2d 650 (Wyo. 1969) in which the Court said:

[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. . . .

Justheim's Codicil is the "writing" and is substantially the cause of action in this case. It is the Codicil which Respondent Ebert's attorney states "would be submitted to the Probate Court for final determination"; and further informed Ebert "that the Codicil was written evidence of Clarence's intent to give Ray the stock" (Ebert's brief, Page 12). It was the Codicil upon which Ebert relied to transfer Justheim's stock as his letter to the transfer agent, in which Ebert enclosed a copy of the Codicil, states "the Codicil bequeathed to me all of Clarence I. Justheim's interest in Wyoming Petroleum Corp." (emphasis added, Exhibit I, Beneficiaries' Brief). In May 1984, Ebert wrote to the accountant, John Dinero, who was working on the Inventory for the Estate:

"In May, 1981, C.I.J. signed a Codicil to his Will giving me all of his holdings in Wyo. Pet. He also handed me certificates (120,431 shares) stating "don't let Bud (J. H. Morgan, Jr.) know anything about these" (Exhibit 1, Appellant's Brief) (emphasis added).

Ebert relied on the Codicil as a valid testamentary instrument in which he was "bequeathed" all of Justheim's stock in Wyoming Petroleum, in his dealings with John Morgan resulting in Ebert's control and becoming President of Wyoming Petroleum three months after Justheim's death. Trial Exhibits A, B, C and D which are subject matter of POINT III hereof and which are letters of Morgan to Ebert and show the assertion by Ebert of the validity of the Codicil and his reliance thereon as well as the acceptance of that representation by Morgan.

Without the Codicil, Ebert's claim to the stock is reduced to a naked oral claim or statement that the stock is his

by virtue of two inter vivos gifts from the deceased. Ebert needs and must have the Codicil in order to support his claim, particularly as he is the Trustee for the beneficiaries and Executor of the estate, and his claim as an individual is diametrically opposed to the interests of the estate and the beneficiaries of the Trust. The Codicil is the very heart of Ebert's position as well as the basis of the claims of the beneficiaries. This is a proper case in which to give effect to the substantiveness of the parol evidence rule and apply it to the evidence of this case particularly as a result of Ebert's close and unique relationship with Justheim, combined with his duty and loyalty as Trustee and Executor. Pepper v. Zions First National Bank, 147 Utah Adv. Rep. 5, 9 (Utah 1990) imposed upon Ebert the highest duty of care and loyalty:

Executors and trustees are charged as
fiduciaries with one of the highest duties
of care and loyalty known in the law. . . .

POINT II

THE TRIAL COURT DID ABUSE ITS DISCRETION WHEN IT DENIED BENEFICIARIES A NEW TRIAL BASED ON ESTOPPEL

All of the cases cited by Ebert are cases in which the parties are alive and before the Court, but the main party and actor involved in this case, Clarence Justheim, is deceased and on that basis alone, those cases are distinguishable from the present case. As noted in Ebert's brief, he had a long relationship with Justheim. However, it wasn't until Justheim was elderly and became incapacitated as a result of an automobile accident that the uniqueness of the relationship ripened into an unusual one where Ebert was

almost his sole contact with the outside world as stated in

Appellant's Brief:

. . . For some five years, Ray spent six days a week, twenty minutes to five hours a day helping Clarence and Chickie. Ray visited Clarence, typed his personal correspondence, delivered his personal and corporate mail for him, assisted him in his personal affairs, shopped for him, helped him care for his invalid wife, and generally provided him the kind of comfort and companionship a confined person craves. . . . (Appellant's Brief, Page 7) (reference to transcript omitted)

Further, as noted, Justheim amended his Trust on five occasions, the last being January 1981, two months prior to preparation of the Codicil. In the last Amendment, Justheim added Ebert as a .005% residuary beneficiary of the trust. Amendments were made with the assistance of an attorney. There are frequent contacts with Justheim's attorney. Obviously, there was availability of an attorney to assist in the estate planning at every stage. The Will and the Amendments to the Trust are evidence of the particularity and thoroughness with which Justheim acted in matters of his estate. Ebert, as Trustee, had signed the Trust and the Amendments thereto and was aware of Justheim's estate planning. Notwithstanding Ebert's knowledge of the foregoing, his duty and loyalty to the beneficiaries as Trustee, his appointment as Executor of the estate, he prepared a Codicil which conflicted with his claim of inter vivos gifts asserted after the death of Justheim. He prepared a Codicil in which Ebert has Justheim's say that Justheim owns 50% of the stock of Wyoming Petroleum, but if the 120,000 shares of the first gift are taken into account, Justheim owned less than 5% of the stock at the time Ebert prepared

the Codicil. Ebert had the control and power to disclose the ownership to be 5% and not 50% as to the amount of stock ownership by Justheim. He drafted and typed the Codicil. He authored or co-authored and created the Codicil. He, as any individual in society, owed the duty not to knowingly misrepresent a fact and certainly not to misrepresent the fact when the fact is designed to come to life or be published only when the other co-author is deceased. Ebert had an active hand in the misrepresentation set forth in the Codicil. Even if it be assumed that Ebert's role is only one of silence, the Pepper case (P. 7) holds the silence as equivalent to fraudulent misrepresentation when there is a duty to speak. Ebert had such a duty to speak. He should have told or reminded Justheim something to the effect "you just recently made me a beneficiary of your Trust and the Wyoming stock is a substantial asset of your estate and I suggest we get your attorney to draw up some papers so that this matter can be handled by him as I am the Trustee and I do not want to have to explain to the beneficiaries. I would prefer the attorney do that." Ebert chose silence and that silence should be continued by the application of estoppel.

POINT III

THE TRIAL COURT DID ABUSE ITS DISCRETION BY EXCLUDING EXHIBIT A, B, C AND D (EBERT'S BRIEF E, F, G AND H)

Exhibits A, B, C and D flush out the relationship between the parties and give background as to how Justheim ran his affairs. They explain why Justheim said: "...Be damn sure to don't let Bud" Morgan know about the Wyoming stock, and why

Ebert never responded to the letters. Exhibits 1 and 3, Beneficiaries Brief. As already noted, they show the representation and reliance of Ebert on the Codicil. Exhibit A (Exhibit E of Ebert's brief) dated October 10, 1983, three months after Justheim's death, discloses that "you have indicated to me that Clarence, by his Will, had given you all of his stock in Wyoming Petroleum Corporation. You mentioned that this was contained in one of the Amendments or Codicil to Clarence's Will." (emphasis added) Although Morgan is not pleased with the estimentary disposition, he accepts the representation without qualification as Morgan states further "you are obviously in control of Wyoming Petroleum Corporation."

Exhibit B shows the receipt by Morgan of a copy of the Will but no Codicil is furnished. It points out that the Will does not deal with the stock and reiterates that the Codicil is the basis of Ebert's claim to the stock. It throws light on how the control stock was obtained in a few short sentences and shows how the Will and the Trust operate. It does, particularly in retrospect, attack the credibility of Ebert in his statements.

Exhibit C, dated December 4, 1983, does cover some of the same territory and points out that the change in the Will deprives beneficiaries of the stock. More importantly, Morgan is still not informed at this time of the claim of gifts and has not been furnished a copy of the Codicil. Although Ebert is not under duty to furnish Morgan with a copy, Ebert's claim of having received the stock under the Codicil had had great impact on their relationship and the management of Wyoming Petroleum and

vividly demonstrates the silence and unwillingness of Ebert to disclose the circumstances surrounding the stock.

Exhibit D, dated January 21, 1983, acknowledges receipt of a copy of the Codicil and discloses the defectiveness of it and then goes on to ask a series of questions which anyone knowing the thoroughness of Justheim would raise and want answers to including the beneficiaries.

These letters further show the strength and the assurance with which Ebert informed and convinced Morgan that he received the stock by virtue of the Codicil. It is demonstrative of an attitude and course of conduct which again affects his credibility and shows the relationship of the parties. They bear on the issues of loyalty to the beneficiaries and the credibility of Ebert and impeachment of Ebert.

CONCLUSION

It is respectfully submitted that the Lower Court did commit error and the beneficiaries should be awarded a new trial and such other relief as the Court may deem proper.

Dated this 14th day of January, 1991.

BELL & BELL by


J. Richard Bell

POINT IV

AMENDMENT OF BENEFICIARIES' REPLY BRIEF UNDER RULE UTAH SUPREME COURT 24(c) IS PERMISSIBLE AND TIMELY MADE

The Appellant-Beneficiaries for the first time in this Amended Reply Brief raise the issue of the trial court order invoking the rule of res judicata which excluded all evidence regarding the beneficiaries claims of Ebert's undue influence and confidential relationship with the deceased, Clarence I. Justheim, as well as Ebert's fiduciary duty of loyalty and care to the Justheim Trust, and that the claimed gifts of stock by Ebert, the Trustee and Executor, are presumptively invalid. Rule 24(c) provides:

...Reply Brief shall be limited to answering any new matter set forth in the opposing brief....

Does this rule prohibit the appellants from raising the res judicata ruling in this Amended Reply Brief. We submit it does not, although it is acknowledged that to do so is neither the preferred nor the best procedure. This court first examined the predecessor of Rule 24(c) in Romrell v. Zions First Nat. Bank, N. A., 611 P.2d 392, 395, (Utah 1980):

...As a general rule, an issue raised initially in a reply brief will not be considered on appeal since a reply brief as stated in Rule 75(p)(2), "shall be limited to answering any new matter set forth in respondent's brief...." Nevertheless, the Court, in its discretion, may decide a case upon any points that its proper disposition may require, even if first raised in a reply brief. (Citation omitted)

Whether the court will act on a "first raised" issue is clearly discretionary with the court. "Proper disposition" of the case

is the standard by which the discretion is invoked. Romrell is the only case in which relief has been granted on a "first raised" issue. However, in two other cases in which Rule 24(c) has been raised, the court, after enforcing the rule, has pointed out the footnote in each case which indicates that the court has examined the first raised issue and found it to be meritless. Due process did not give the appellant a jury trial on a contempt charge. Von Hake v. Thomas, 759 P.2d, 1162, 1169 (Utah 1988). In the case of Thomas A. Paulsen Co. vs. Indus. Com'n, 770 P.2d, 125, 129 (Utah 1989) the footnote points out that the issue was not raised in the motion for review before the Commission, and the footnote further provides:

...Further, our review of the entire record persuades us that Paulsen has, in fact, had ample opportunity to contest every significant issue in the case....

The Court of Appeals of Utah in Rekward v. Industrial Com'n of Utah, 755 P.2d, 166 (Utah App. 1988) followed the rule but, in the spirit of the Romrell case, noted that:

...Rekward did not request a hearing at the administrative proceeding, nor did he raise the issue in his motion for review before the Commission....

In the present case, the question of res judicata was squarely before the trial court, but the trial court's ruling denied the beneficiaries not only the ample opportunity but any opportunity to lay before the jury the significant issue of Ebert's confidential relationship with Justheim, Ebert's fiduciary duty of loyalty to the Justheim trust and the presumptive invalidity of the claimed gifts of stock.

POINT V

THE COURT ERRED IN GRANTING EBERT'S MOTION INVOKING THE RULE
OF RES JUDICATA

In 1984 the beneficiaries brought a petition to remove Ray Ebert from his capacity as Personal Representative (Executor) of the estate and to recover from Ebert, as an individual, on behalf of the estate shares of corporate stock which Ebert claimed to have received as an individual by virtue of an intervivos gift from Justheim. Ebert is and at all times has been the trustee of the Clarence I. Justheim Trust, Exhibit 9(d), signed in 1978, into which all the assets of Justheim's estate are to be poured pursuant to Justheim's Will still being probated. The appellants are beneficiaries of the trust.

In 1984 the Court entered a Pretrial Order bifurcating the removal of Ebert as Executor from the claimed gifts of stock. The removal trial was heard in 1986. The gift trial was tried in 1989, following which this appeal was filed.

On the first day of trial, June 13, 1989, there was filed and the court granted Ebert's Motion in Limine, excluding all evidence regarding the heirs' and beneficiaries' claims:

"1. that Ebert obtained the Wyoming Petroleum Company stock by exercising undue influence over Clarence I. Justheim as framed by the October 30, 1984 Pretrial Order, Section IV, Paragraph F.

2. that Ebert was a fiduciary to, a confidential advisor to, or in a confidential relationship with Justheim as framed by the October 30, 1984 Pretrial Order, Section IV, Paragraph G.

3. that Ebert owed a fiduciary duty of loyalty and care to Justheim and to the Justheim trust when the

alleged Wyoming Petroleum Company stock gifts were made as framed by the October 30, 1984 Pretrial Order, Section V, Paragraph B.

4. that the Wyoming Petroleum Company stock gifts are presumptively invalid because of Ebert's relationship with Justheim as framed by the October 30, 1984 Pretrial Order, Section V, Paragraph C." (emphasis added)

The Memorandum filed in support of the Motion maintained the Findings of Fact entered in the removal trial held that the appellants had failed in their burden of proof to prove each of the above items. Copies of the Motion in Limine, R2526 and Memorandum in Support thereof, R2529 are attached hereto as Exhibits 1 and 2, respectively and the Minute Entry at R2563. The Order prohibited the presentation of any evidence regarding beneficiaries' claims as above set forth. Trial proceeded and the jury decided six to two in favor of Ebert.

The trial court was very clear in its granting of the Order:

"THE COURT: All right. Well, based on that, then, the Motion in Limine will be granted. I think the record is clear as to what the nature of your motion is and what the nature of my order is on that, so there will not be any evidence allowed in the trial that the relevance is premised solely upon undue influence, fiduciary obligation, or confidential relationship.

Nor will any reference be allowed to such evidence or to such theories in opening statements or in closing statement or in anything else that comes before this Jury." (R2898-7 and 8)

Neither the 1984 Pre Trial Order nor the Findings of Fact, or the Conclusions of Law of the Removal Trial justify the Res Judicata Order. This is clearly shown in the Supplemental Pretrial Order approved by respective counsel and signed by the court on June 9, 1989, just four days prior to granting the Res Judicata

Order. The Supplemental Pretrial Order has attached to it three exhibits which are:

Exhibit A--1984 Pretrial Order

Exhibit B--Notice of Amendment to Pretrial Order

Exhibit C--Findings of Fact and Conclusions of Law in the Removal Trial

All of the foregoing are marked R2490 through R2525.

The Amended Order and Exhibits provide:

1. The four issues of fact and law were excluded in the Res Judicata Order. Amended Order, R2492.
2. The Amended Order provides that "On May 26, 1986, the heirs submitted and all parties agreed to proposed amendment to the Pretrial Order. A copy of which is attached hereto as Exhibit B." which raised issues that Ebert failed to give notice to the beneficiaries, misrepresented the size of the estate, and had been deceptive and secretive. R2509.
3. The Findings, after noting that the parties had stipulated that the court would reserve and not then determine the gift issue provided:

". . . These Findings and Conclusions are not intended to be the findings and conclusions on that issue." R2515.

Ebert's Memorandum in support of his Motion discloses the same to the court. Exhibit 2, Page 3, R2531.

The record does not disclose that the reason for bifurcation was that the beneficiaries maintained that they were entitled to a jury to try the gift issue. There is no other reason for bifurcation.

The Amended Pretrial Order demonstrates that the parties intended a full hearing on the merits on the gift issue. It enlarged the issues to be tried. The trial court in the Removal Case did not intend that the Findings would apply to the gift issue and so stated.

A jury trial on the gift issue required a full hearing on the merits as also required by law. The right of a jury trial in a civil case is guaranteed by the Constitution of Utah, Art. I Section 10, Inter. Harvester Credit vs. Pioneer Tractor, 826 P2d. 418, 419 (Utah 1981). The foregoing authority appears in the beneficiaries' Memorandum in Opposition to Strike Jury Demand. R2409. The restriction of the evidence by the Res Judicata ruling is contrary to the intention of the parties and the court to have a separate and distinct trial on the gift issue and violates the constitutional guarantee as well. The Amended Pretrial Order was not attached, no motion was made to amend the same. Nothing changed in the four days between the time the Order was entered and the filing and granting of the Motion in Limine except the position by Ebert and the Court's acquiescence therein.

In the same hearing the matter of the failure of Ebert to give notice to the beneficiaries was before the court. The beneficiaries claimed that in addition to his duty as Executor he had the fiduciary duty as Trustee to keep the beneficiaries informed, and that he did, in fact, have the addresses, contrary to his claim that he did not have the addresses, R2898-61-63, a copy of which is attached hereto as Exhibit ² 4. At page 63, there is the following:

"MR. BELL: All I'm claiming for that is the fact that he-- first of all, he doesn't tell them there is anything going on. It is hush-hush, so to speak. Nobody except him knows what is going on, and he is trying to keep the whole thing quiet.

THE COURT: It sounds like undue influence to me. (emphasis added)

Undue influence was neither the issue nor the thrust of the thrust of the beneficiaries' position, for these acts of omission took place after Justheim's death and had nothing to do with undue influence. There was no assertion of undue influence on Mr. Justheim. What was being urged upon the court were the separateness and single identity or capacity of the trustee as opposed to the executor or Ebert as an individual, and his duty as trustee. These are two important elements the court failed to apparently perceive, which are the subject matter and are dealt with by the court in its recent case of Pepper vs. Zions First National Bank, 147 Adv. Rep. 5. The element of the duty of a trustee is clearly spelled out by the court:

"Executors and Trustees are charged as fiduciaries with one of the highest duties of care and loyalty known in the law." P9.

The other element of separateness of capacities or entities runs to the issue of res judicata and the Pepper case spoke directly on that issue:

"A party appearing in an action in on capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." P10.

The notice given by Ebert under the probate code referred to by Attorney Palmer R62 is of great importance. The only person receiving notice under the Probate Code in this case was Mrs. Justheim, there being no children. Ebert had been appointed her Conservator. Ebert received notice from Ebert. So in fact, there was no notice given.

CONFIDENTIAL RELATIONSHIP

The reason, obviously, Ebert wanted to invoke the Res Judicata rule was that the evidence being excluded was materially damaging to his position and in favor of the beneficiaries. Limitation of the size of this brief does not permit setting forth the evidence, but the element of confidential relationship is very important.

Ebert admitted in the removal trial that he had a confidential relationship with Justheim. This evidence was in connection with Exhibit 32 which was an Affidavit filed in a collateral estate matter in which Mr. Ebert stated that he was the "Administrative Assistant, courier, confidante and general 'right-hand man'." The following took place in the transcript of that trial at pages 7 and 8:

"Q (By Mr. Bell) And I hand you what has been marked as Exhibit 32. You've already seen it. You signed the document?

A That is correct.

Q When did you sign it?

A It states that I signed it on May 16, 1984.

Q And you went to work for him as Administrative Assistant. Would you tell the court what your meaning of "Administrative Assistant" is.

A Helping Clarence Justheim do whatever he wanted done.

Q And you also say you went to work for him as a courier.

A That was part of the things he wanted done.

Q And as a confidant.

A That's correct.

Q What does the term "confidant" mean to you?

A Takes me into his confidence on matters that he wants to.

Q As a general right-hand man; what do you mean by "general right-hand man"?

A Once again, do anything that Mr. Justheim wanted me to do.

Q Did you think you had a confidential relationship with him?

A That is correct.

Q Now, you went to work in 1978; and what were your daily obligations or duties or things that you did routinely?

A Routinely I'd stop at the office and pick up the mail for Clarence Justheim and Justheim Petroleum and Wyoming Petroleum and any of his personal mail, take it up to him at the condominium.

Q So you brought him the corporate mail as well as his personal mail?

A That is correct.

Q Did he tell you what to do with that mail?

A That is correct.

Q And did you do that?

A Yes.

Q And about how many hours -- was this five days a week?

A Six days a week."

The court implemented its ruling on confidential relationship by asking:

"Mr. Robinson, over the evening, prepare for me a Jury instruction--not to be given yet--with the Jury instructions themselves at the end of the case, but one that I can use during the trial in the event something happens that the Jury needs to be told right out of the chute that that's not an issue they need to worry about. And perhaps it may be drafted in such a way that Mr. Bell will even agree with it."

This resulted in Instruction Number 18 to the Jury which sweepingly

enforced the court's res judicata ruling. R2646.

The record shows that the foregoing matters were discussed thoroughly in chambers, R2898-5, and that the court had decided to grant Ebert's Motion, the court stating:

This matter was discussed in Chambers among counsel, and my inquiry to Mr. Bell was whether or not there was any further evidence regarding undue influence, fiduciary relationship, and the like, which he intends to put on as evidence, which was not previously presented at the removal trial.

. . .

Based upon what you indicated to me and that that is there was no additional evidence that had not previously been presented, it would be my intent at this time to grant the Motion in Limine insofar as that matter, then the matter becomes res judicata, having previously been decided on identical evidence in a different context by Judge Fishler.

Now is your opportunity to persuade me otherwise.

The Appellants did not persuade the court to do "otherwise", and unfortunately the proceedings in chambers on the motion which led the court to its conclusion was not put of record and to comment thereon would be pure speculation except for the highlight that only additional evidence, of which there was none, could to be submitted and become part of the record. But those unreported proceedings led the court to its conclusion. Ebert had the burden of sustaining his motion but the chamber proceedings switched the burden from him to the beneficiaries.

CONCLUSION

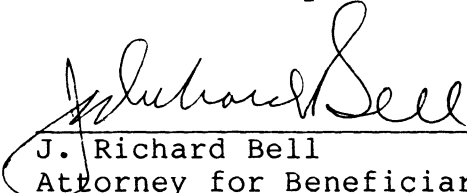
Under the case law, the raising for the first time on appeal the issue of res judicata in this Reply Brief, is reasonable and timely. The difference between this and the Romrell case (ID) is that

the beneficiaries raised the issue by Motion to Amend their Reply Brief rather than including it in the Reply Brief and in deference to Rule 24(c), filed their Motion to Amend the Reply Brief, rather than to assume the new material could be presented without permission of the court. The difference between this case and the Romrell case is one of procedure resulting in a few additional days of time which is not damaging to Ebert, but does respect Rule 24(c) as written, absent the court's interpretation in the case law.

The court erred in invoking the rule of res judicata, and the beneficiaries should be awarded a new trial so that the matter of the gift issue is fully and properly presented to the jury.

RESPECTFULLY SUBMITTED, this 25th day of February, 1991.

BELL & BELL, by

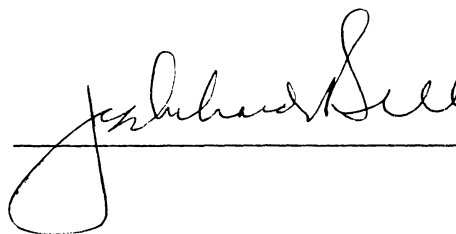


J. Richard Bell
Attorney for Beneficiaries

MAILING CERTIFICATE

Mailed three true and correct copies of the foregoing Amended Reply Brief of Appellants, postage prepaid, this 25th day of February, 1991, to the following:

Joseph J. Palmer, Esq.
Jeffrey Robinson
Moyle & Draper
600 Deseret Plaza
#15 East First South
Salt Lake City, UT 84111



Tab 1

Joseph J. Palmer (#2505),
Jeffrey Robinson (#4129), of
MOYLE & DRAPER, P.C.
Attorneys for Raymond A. Ebert
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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 *[Signature]*
SALT LAKE COUNTY
Deputy 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:

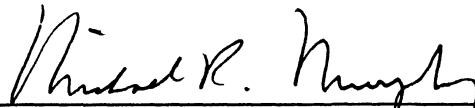
This matter arises by reason of the heirs' Removal Petition and Mr. Ebert's Objections thereto. Notice thereof was given all interested parties and they were thereafter placed on this Court's trial calendar. To assist the Court in framing the applicable issues for trial before the Court, the parties 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:

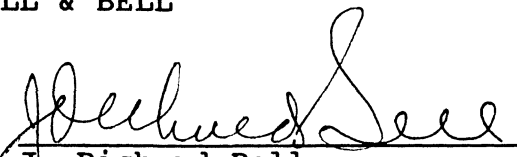

The Honorable Michael R. Murphy
District Court Judge

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

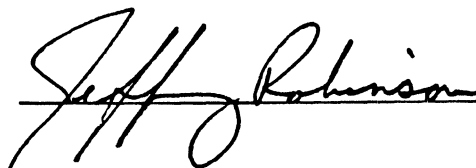
I certify that on June 8, 1989, a copy of the
Supplemental Pretrial Order was hand-delivered to:

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

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Douglas C. Mortensen
MATHESON, JEPPSON, MORTENSEN & OLSEN
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Clark P. Giles
RAY, QUINNEY & NEBEKER
400 Deseret Building
Salt Lake City, UT 84111



Tab A

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

Exhibit A

002435

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

Tab B

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

Exhibit B

002509

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

Tab C

FILMED

FILED IN CLERK'S OFFICE
Salt Lake County

JUL 21 1986

Joseph J. Palmer (#2505) of
MOYLE & DRAPER, P.C.
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600 Deseret Plaza
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Salt Lake City, Utah 84111-1901
Telephone (801) 521-0250

H. Dixon
By *[Signature]*
D. J. [unclear]

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

001002
Exhibit C

ADDENDUM - A

002513

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. *HA*

¶ 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

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By *[Signature]*
Deputy Clerk

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:

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Tab 2

[Attorney ROBINSON]

1 And I haven't really articulated it in my own mind very well,
2 but I think we need to raise it.

3 Mr. Bell raised some issues, for example, notice
4 to the heirs by Mr. Ebert as part of his case. As part of
5 his theory. And the problem I have with that is that I see
6 this as a very narrow question. Was there a gift? That is,
7 did Mr. Justheim have the intent to make a gift, and was
8 there delivery. The issue of whether or not Mr. Ebert gave
9 proper notice to the heirs under the laws of Utah has been
10 resolved and finally determined by Judge Fishler in the
removal hearing.

11 And to bring up the idea that he may have given
12 improper notice, I think, is res judicata. And I think that
13 should be excluded. And I think also that would relate to
14 the removal position, and all of those issues were outlined
15 in the supplementary pretrial order, and issues of improper
16 notice, improper valuation of stock, those types of things
were excluded by the pretrial order.

17 MR. PALMER: And ruled upon.

18 THE COURT: Mr. Bell?

19 MR. BELL: Mr. Ebert has several hats,
20 Your Honor, and the first hat, of course, is the petition
21 for probate. But in addition to that he is the trustee of
22 a trust or a pour-over Will that he is going to administer.
23 He has a duty to those beneficiaries, or ultimate beneficiaries,
24 and when Mr. Justheim died, he made no attempt to contact
25 those beneficiaries who have an interest in this case, aside
from what the statute says, and he has a duty to keep them

Exhibit 2

1 informed. And he didn't. The evidence will show that he
2 didn't attempt to contact because he says, "I didn't know
3 their addresses."

4 I have evidence that he did know the addresses,
5 and--

6 THE COURT: Was he obligated to notify
7 them?

8 MR. BELL: I think I want to try to
9 establish that he didn't notify them. He is trustee. And
10 let the Jury determine if that would have been the right
11 thing to do. I'm not claiming that the statute says that
12 you shall do it.

13 MR. PALMER: It specifically says he
14 didn't have to do it.

15 MR. BELL: That's--the statute you are
16 talking about is the notice of the Will. I'm talking about
17 his duty as trustee.

18 THE COURT: Did he have any duty as a
19 trustee to notify them?

20 MR. BELL: Sure. I think he did.

21 THE COURT: Where in the trust or in the
22 statutes or in the case law does it indicate he has such a
23 duty?

24 MR. BELL: He has a fiduciary duty.

25 THE COURT: What interest did they have
in the Wyoco stock?

MR. BELL: People that would eventually--
it would eventually come to them. I'm not arguing about

1 the stock. I'm talking about the fact that he never notified
2 them at all.

3 THE COURT: Of what?

4 MR. BELL: About the death of Justheim,
5 and there is a trust under which they will receive a benefit,
6 or could receive a benefit. They have an interest in that
7 and they ought to have been notified by him as trustee.

8 THE COURT: What does that have to do
9 with a gift?

10 MR. BELL: All I'm claiming for that
11 is the fact that he--first of all, he doesn't tell them
12 there is anything going on. It is hush-hush, so to speak.
13 Nobody except him knows what is going on, and he is trying
14 to keep the whole thing quiet.

15 THE COURT: It sounds like undue
16 influence to me.

17 MR. BELL: No.

18 THE COURT: Or after the fact--

19 MR. BELL: That's ripping off the
20 estate and not telling anybody. Claiming stock by gift
21 that nobody knows about because there is no notice to anybody
22 generally about the estate or generally about what they are
23 going to do.

24 THE COURT: Are you claiming that there
25 is fraud here?

MR. BELL: I'm claiming--claiming that--
yes, sure. I'm claiming that there is fraud. He claims
this as a gift, and it is nothing more than a ripoff of the
(emphasis Added)