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THE FLDS CIVIL LITIGATION – A PLAINTIFF'S (PETITIONER) PERSPECTIVE

The First Amendment and Religious Rights

I. First Amendment

> *Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

II. Free Exercise Clause

A. *Employment Div. v. Smith*, 496 U.S. 872 (1990) (employee could be fired for ingesting peyote). *Smith* reversed the strict scrutiny test of a "compelling governmental interest." *See Sherbert v. Verner*, 374 U.S. 398 (1963). The strict scrutiny test was replaced with a "neutrality" and "general applicability" test. *Smith*, 496 U.S. at 879-880. Strict scrutiny can still be applied in two cases: (i) where a hybrid right is involved (free exercise combined with another constitutional principle); and (ii) individual circumstances. Individual circumstances arises when the law in question allows exceptions based upon individual circumstances. In that situation, a religious basis must be allowed as an exception. *See "Protecting Religious Liberty Through the Establishment Clause: The case of the United Effort Plan Trust Litigation*, 2008 Utah L. Rev 739, 757.

B. Religious Freedom Restoration Act of 1993 (RFRA). RFRA prohibits the "'Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from rule of general applicability' unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *See Burwell v Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2754 (2014) *quoting* 42 U.S.C.A. §§ 2000bb–1(a), (b).

1. RFRA only applies to the federal government. *City of Boerne v. Flores*, 521 U.S. 507 (1997).
2. The RFRA test is more restrictive that even the pre- *Smith* tests. *Burwell*, 134 S.Ct. 2751, 2756
3. A for-profit organization has standing under RFRA. *Burwell*, 134 S.Ct. 2751, 2756

C. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C.A. §2000cc. Same standards as RFRA, but applied primarily in land use (i.e. zoning)

issues within reach of the federal government's constitutional Spending and Commerce Clause powers.

III. Establishment Clause

Lemon v. Kurtzman, 403 U.S. 602 (1971). *Lemon* established a three part test that a law does not violate the Establishment Clause if: (1) it has a secular purpose; (2) its principal effect neither advances nor inhibits religion; and (3) it does not excessively entangle church and state. This has gone through a variety of reviews and alternative tests have been voiced, but not by a majority of the Court.

IV. Church Autonomy Cases

A. Church autonomy cases generally mix the two clauses together.

B. *Jones v. Wolf*, 433 U.S. 595, 604 (1979) ("a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.") "Neutral principles" usually means reading from a secular perspective church administrative documents without reference to doctrine.

C. *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998) (rejecting religious first amendment and state Constitution claims in part based upon the open courts clause.)

> We conclude that the state's interest here revolves around the judicial system, not the specific results of the judicial action. This is because the UEP contends that no remedy could be returned by the trial court on these claims without violating the state constitution. The state has a compelling interest in ensuring that all parties are able to resolve legal disputes before a neutral tribunal. Utah's open courts provision states: "All courts shall be open, and every person, for any injury done to him in his person, property or reputation shall have a remedy by due course of law." Utah Const. art. I, § 11. This provision ensures that courts are to be accessible to all for the resolution of their disputes and makes clear that this right to come into court is a fundamental value of our governmental compact. See Berry ex rel. *Berry v. Beech Aircraft Corp*., 717 P.2d 670, 675 (Utah 1985) ("The clear language of the section guarantees access to the courts and a judicial procedure that is based on fairness and equality."); *Bracken v. Dahle*, 68 Utah 486, 251 P. 16, 20 (1926) ("The right to apply to the courts for relief for the perpetration of a wrong is a substantial right."). While this clause may not guarantee any specific remedy, it certainly guarantees access to the courts. *See* generally *Berry*, 717 P.2d at 675."

V. Interesting Issues

A. Balancing free speech and other constitutional rights with religious clauses.

1. *American Athiests, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (holding that the crosses on public roadsides were "government speech" not "private speech" so the Establishment Clause applied rather than the Free Speech Clause). The Court held that 12 foot crosses had the primary effect of endorsing Christianity.

2. *Utah Gospel Mission v. Salt Lake City Corp*., 425 F.3d 1249 (10th Cir. 2005) (holding the complete sale of Main Street from Salt Lake City to the LDS Church did not violate the Establishment Clause and the plaza was no longer a public forum so speech could be restricted).

B The role of state constitutional law.

Legal Principles Established from the UEP Litigation

I. *Snow Christensen & Martineau v. Lindberg*, 2009 UT 72 (Court denied emergency relief under Appellate Rule 8A because it was not accompanied by a separate pleading). FLDS Association members petitioned the Utah Supreme Court to prevent the sale of property and the Harker Dairy.

A. The petition was made under Appellate Rules 8A and 19 asking the Court to stay a district court hearing related to the sale of property and the enforcement of a district court order.

B. The Court clarified that Rule 8A emergency relief was intended to shorten procedural mechanisms when those mechanisms are not "sufficiently expeditious" and not to provide an independent action.

C. Rule 8A does not independently confer jurisdiction with the Court and mere reference to Rule 19 is insufficient to invoke jurisdiction.

II. *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Lindberg*, 2010 UT 51 (Court denied extraordinary writ on basis of latches). FLDS Association members petitioned the Court under Appellate Rule 19 and U.R.Civ.P. Rule 65B for extraordinary relief from the District Court's reformation of the UEP Trust.

A. There are no statute of limitations in bringing a Rule 65B claim, but such a claim should be filed within a reasonable time.

B. Complaints against the Trust reformation and court rulings related thereto were barred by the doctrine of latches. Future constitutional violations were not ripe.

C. The doctrine of latches has two elements: (1) a party's lack of diligence and (2) an injury resulting from that lack of diligence.

III. *Fundamentalist Church of Jesus Christ of Latter-day Saints an Association v. Wisan*, 773 F. Supp.2d 1217 (Utah Dist. Ct. 2011), *reversed* 693 F.3d 1295 (10th Cir. 2012) (granting a preliminary injunction for a 1983 claim against the State District Court's administration of the Trust).

A. Utah State District Court's reformation violated the Establishment and Free Exercise Clauses of the First Amendment.

B. The Federal District Court rejected a waiver argument on the basis that the establishment clause cannot be waived.

C. The Federal District Court rejected In Custodia Legis, Barton-Port, and Rooker-Feldman doctrines because the State Court had no authority to over the matter at issue.

D. The Federal District Court rejected the *Younger* abstention claim because the State of Utah did not have an important state interest in enforcing its orders and judgments.

E. *Ex-parte Young* did not apply because only prospective relief is granted by the order.

F. Latches does not apply because the delay was excusable given the importance of the issue.

G. Res Judicata does not apply because the Utah Supreme Court's decision dismissing the extraordinary writ on the basis of latches was not a decision on the merits.

IV. *Fundamentalist Church of Jesus Christ of Latter-day Saints Association v. Horne*, 2012 UT 66 (holding that its decision on latches would have preclusive effect to subsequent actions). This decision was certified from the 10th Circuit to answer the question of whether a decision on an extraordinary writ based upon latches has preclusive effect on subsequent claims.

A. The decision to dismiss the Rule 65B Extraordinary Writ based upon latches was a decision on the merits and it has preclusive effect upon future claims.

B. A latches analysis does not require a court to consider the strengths and weaknesses of the plaintiff's underlying claims.

C. The Utah Supreme Court rejected the suggestion that its factual analysis was incomplete by contrasting it with the federal district court's decision.

> That the FLDSA now insists that the Lindberg court's factual analysis was faulty is suspect, particularly given its reliance on the federal district court's contrary resolution of the laches question. The federal district court held no evidentiary hearing and made no findings of fact. Yet the FLDSA has no dispute with that court's determination that there was no basis for application of the doctrine of laches, a determination the FLDSA lauds as "appropriate, legally correct, and within that court's jurisdiction to decide." In context, it appears that the FLDSA's real complaint is not that Lindberg was factually flawed, but that it didn't go its way. But of course the preclusive effect of our decision in Lindberg does not depend on the FLDSA's satisfaction with it." *Id*. ¶ 44

V. *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Horne*, 698 F.2d 1295 (10th Cir. 2012) (reversing the Utah federal district court decision by finding that the federal district court abused its discretion in failing to give preclusive effect to the prior Utah Supreme Court decision dismissing the same claims based upon latches).

A. 28 U.S.C. § 1738 requires that "judicial proceedings . . . [of any State] shall have the same full faith and credit in every court within the United States . . . . as they have by law or usage in the courts of such State."

B. The Utah Supreme Court's decision that the extraordinary writ dismissed by latches would bar subsequent actions based upon res judicata requires the federal district court to honor that decision.

VI. *Town of Colorado City v. United Effort Plan Trust*, F. Supp.2d (D. AZ 2013). The Town of Colorado City sued for declaratory relief that the Reformed Trust was unconstitutional and the actions of the receiver, Bruce Wisan, in leasing property to the Cooke's was void. The Town was currently being sued for religious discrimination by the Cookes and the subject lawsuit was an attempt to provide a defense that the Town was not requried to provide water and electrical hook-ups because the Cookes were not lawfully tenants. The Town also sought a declaration that Robert Black had a possessory interest superior to the Cookes.

A. Court dismissed most of the Town's substantive arguments on latches.

B. The Court rejected Robert Black's arguments of a possessory interest.

VII. *Shurtleff v. United effort Plan Trust*, 2012 UT 47 (holding that District Court was within its discretion to require the State to advance fees).

A. Utah Code Ann. § 75-7-1004(1) allows the court discretion to require other parties to pay trustee (fiduciary) fees in unusual circumstances.

B. The court did not abuse its discretion because the Utah AG took positions that "undermine[d] the Special Fiduciary in this and the federal litigation."

C. The judgment did not violate the separation of powers between the legislature and the judicial, although enforcement of the judgment may cross the line.

D. The Utah AG failed to preserve the argument that the interim payment of fees violated the constitutional prohibition against the state lending credit.

E. The State's claim for contribution from Arizona was too late and in any event was not ripe since nothing has been paid. Additionally, the State should have sought equitable allocation instead of contribution.

VIII. *United Effort Plan Trust v. Jessop*, 296 P.3d 742 (denying standing to private parties to intervene and contest the administration of the trust).

A. Motions for intervention were filed by two groups. One group of plaintiffs claimed an interest in Trust property because they were granted a religious stewardship over the property. A second group of plaintiffs claimed an interest in the property based upon their ecclesiastical positions to ascertain the just wants and needs of their followers.

B. The standard of review under Rule 24(a) involves questions of fact and law.

C. The Court denied intervention under Rule 24(a)(1) as a matter of right. The interveners argument that Utah Code Ann. § 75-7-405(3) which allows "others" to maintain an action against the trust or trustee does not satisfy Rule 24(a)(1)'s requirement that a statute "confers the unconditional right to intervene."

D. The Court recognized the general rule that private parties do not have standing to contest the administration of a charitable trust. The Court further ruled that the common law exception for a "special interest" was not satisfied here because the interveners were not a part of sharp class which was distinctly defined and the issue, the sale of property, was not a fundamental act by the trustees.

E. Because of the finding above, the Court also found that permissive intervention under Rule 24(a)(2) was not required.

IX. *Wisan v. City of Hildale*, 2014 UT 20. The Court appointed fiduciary had obtained a default judgment against the City of Hildale compelling it to subdivide certain parcels. The City complained that the default should be set-aside.

A. The Court made this finding that explains the reason behind the litigation tactics of the FLDS Church and its followers:

> Mr. Jeffs sent a letter to his followers instructing them to cease passively ignoring the appointed fiduciary and to instead retain legal counsel and demand "protection of their rights." Such action, he said, would appear to be the work of individuals rather than the authorities of the Church, creating the impression that "the Priesthood is answering them nothing, but at the same time individuals are demanding their rights of protection."

B. The Court held that "[t]he circumstances warranting a direct appeal from a default judgment are very limited. A party challenging a default judgment on direct appeal may raise only grounds that were necessarily decided by the district court in the entry of default judgment." *Id.* at ¶ 19.

C. Possible grounds under Rule 55(c) are whether: (i) default was properly entered under Rule 55(a); (ii) whether the facts pled in the complaint demonstrate a judgment as a matter of law; and (iii) whether the relief is consistent with the kind and amount with the complaint's prayer and within the court's authority.

D. Hildale and the Water Authority failed to appeal from the district court's denial of the Rule 60(b) motion so Rule 60(b) was not subject to the appeal.

X. *Snow, Christensen & Martineau v. Lindberg*, 2013 UT 15. The district court disqualified Rodney Parker from representing individuals in actions against the UEP Trust because he had previously represented the Trust and also ordered that he provide privileged documents to the Trust's current counsel. Mr. Parker and his law firm appealed through Rule 65B.

A. A trust is an entity capable of forming an attorney-client relationship. The Reformed Trust is not the same entity as the prior Trust because its purpose was different.

B. The district court should have terminated the Trust since the doctrine cy pres does not permit a reformation in the manner conducted by the Court. Hence, the district court's reformation is like a sale-purchase of trust assets. However, this ruling on cy pres is for this appeal only and does not impact the Court's previous ruling on the lawfulness of the Reformed Trust.

C. Because the Reformed Trust was fundamentally different because of the Court's erroneous application of the doctrine of cy pres, there is no conflict and Snow, Christensen, and Martineau did not have to disclose privileged documents.

D. The dissent strongly disagreed. The dissent pointed out that regardless of the cy pres argument, there can be no dispute that the district court did not abuse its discretion in appointing the fiduciary and removing the trustees. Hence, the fiduciary could claim the attorney-client privilege on that basis alone. Justice Durrant wrote:

> I would hold that the special fiduciary is entitled to claim the attorney-client privilege on behalf of the trust even though the trust has been modified. Thus, I conclude that the majority errs in three important ways. First, instead of accepting that the trust's purpose was modified—erroneously or not—in an attempt to effectuate the settlor's legitimate and legal charitable purposes, the majority, without foundation in fact, asserts that a terminated trust's assets were purchased by a reformed trust. But this asset-purchase metaphor does not account for the legal and practical ramifications arising from the fact that, in reality, the trust was modified, not terminated. Second, although the majority rejects the special fiduciary's assertion of the attorney-client privilege, the majority fails to explain who holds the privilege on behalf of the old trust. Third, even assuming the majority's legal fiction that, for purposes of the attorney-client privilege, the trust, in effect, terminated and a new trust bought its assets, the special fiduciary, under rule 504, was still the last to manage the old trust and has the best claim to assert the privilege on behalf of the hypothetically nonexistent trust.

Negotiation, Mediation And Conflict Resolution

I. Conflict

A. Steps in the creation of a conflict

1. Identify a problem
2. Blame someone or something
3. Make a demand
4. Reject the demand
5. Decision to pursue a remedy

B. Emotional stages in resolving a conflict

1. Denial
2. Acceptance
3. Willingness to make a sacrifice

4. Leaps of faith
5. Reconciliation

C. Most people are conflict avoiders

II. Negotiation steps

A. Preparation

1. Have the relevant knowledge
2. Understand your sources of power and limitations

a. Legitimate
b. Expert
c. Reward
d. Coercive
e. Referent

B. Define the ground rules

1. Where, when, who is going to speak
2. You usually want someone with decision making authority

C. Clarification and justification

D. Bargaining and problem solving

1. Distributive bargaining v. integrative bargaining:

a. Win-lose v. win-win
b. Get as much as you can v. expand the pie so everyone gets something
c. Positions v. interests
d. Opposed v. congruent interests
e. No sharing of information v. high sharing of information
f. Relationship duration: short term v. long term

E. Closure and implementation

III. Mediation

A. Jointly select the mediator
B. Consider Utah Code Ann. § 78-10-103, which deals with disclosures in mediation and conflicts. It has broad application.