2012

The State of Utah and Utah Attorney General, Mark L. Shurtleff v. Bruce Wisan : Reply Brief

Utah Supreme Court

No. 20120300

IN THE UTAH SUPREME COURT

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

Petitioners/Appellants,

v.

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

Respondents/Appellees,

and

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

Other Parties.

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

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This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 6,914 words, excluding sections of the brief not included in the word count by rule 24(f)(1)(B).

Dated this 4th day of June, 2012.

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

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

Summary of Reply

This appeal challenges probate court orders purportedly entered according to that court's discretion and in the interests of justice and equity. But those orders do no equity. Instead, they violate Utah law. Neither the

Fiduciary's (Wisan) nor the State of Arizona's responses quiet those facts, but those appellees fail to appreciate the State's interests in justice and equity.

In his brief, Wisan emphasizes facts that he did not submit to the trial court, but which sole purpose is to paint Appellants in a bad light. Next, he contends the probate court's orders are based on undisputed facts that the State seeks to run from. But Wisan overlooks that Appellants had no reason to know of or to respond to the court's "considerations." Instead those – undisputably unadjudicated allegations – were raised, in part, by Wisan for the first time in his reply, but primarily, by the probate court for the first time in its August 1 fee order.

The fee order also finds no support in the underlying Trust orders or the Utah Code. And despite Wisan's attempt to distinguish it, the order is also not supported by the common law. It should be reversed.

Further, the probate court's several orders that seemingly ignore Wisan's own delay and contributory conduct, but that suggest the State failed to meet an obligation that it never possessed are the core of inequity and the product of an abuse of discretion. Grounded not in justice or fairness, the court's February and March 2012 rulings fail to do equity.

They should be reversed.

Moreover, the State agrees that a court may, on terms both legal and just, award money damages or enter orders against the State. But once made, a court may not enforce an award of damages against the State. To do so, violates Utah statutory and constitutional law. Wisan's response conflates that issue. The Court should not be mislead.

Finally, Arizona's answer brief overlooks the probate court's legal and equitable errors. But those errors are manifest and also compel reversal.

In sum, the probate court's errors are serial and several errors. Appellants therefore ask this Court to reverse those orders to the extent they contravene settled law, and to otherwise reverse and remand the orders as warranted.

Reply

I. This Court Should Strike Wisan's Reliance on Facts He Did Not Submit to the Probate Court Below.

References to the record in a party's brief "shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to rule 11(f) of 11(g)." Utah R. App. P. 24(e). References should

not be made, as here, to an addendum[1] submitted to a court other than the probate court, or that address judicial proceedings other than those now on appeal.

This case questions the propriety of the probate court's several rulings and orders granting Wisan a substantial loan of taxpayer dollars. The appeal challenges orders entered by that court, not orders entered or facts considered, by this Court relative to the State's subsequent petition for extraordinary relief. Material submitted in that proceeding – by affidavit or attachment – was never submitted to the probate court. Consequently, the material contained at pages 13, 16-17, & 22 of Wisan's statement of facts, and at page 3 of his statement of the case, is extra-record and serves no purpose here.[2]

This Court's review is "limited to the evidence contained in the

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[1] For ease of reference, with the exception of its Addendum M, all of the materials attached to Wisan's Supplemental Addenda (Add. N to Add. W) are extra-record.

[2] Telling perhaps, that none of those materials is essential to this Court's review of the probate court's rulings, is the fact – that with one exception on p. 39 – Wisan does not point to his Supplemental Addenda to support any points made in argument. Their inclusion, being relevant not to the substance of Wisan's reply, but to his efforts to paint the State and its AG in a bad light.

record." *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279 (quoting *Wilderness Bldg. Sys., Inc. v. Chapman*, 699 P.2d 766, 768 (Utah 1985)). Justly, the Court should strike portions of Wisan's brief and supplemental addenda that contain or refer to material that was not part of the record on appeal. *Pliego*, 1999 UT at ¶ 7; *Lovendahl v. Jordan Sch. Dist.*, 2002 UT 130, ¶ 51, 63 P.3d 705; *see* Utah R. App. P. 24(k). Wisan's attempt to bolster his position on appeal by setting out material that is nowhere contained in the record, and then arguing from those allegations, is simply not proper. This Court should not sanction that approach, but should instead ignore, and alternatively strike, the portions Wisan's brief that contravene Rule 24 and settled law.

II. Wisan's Marshaling Argument Is Not Well-Taken.

As his first point, Wisan makes the interesting, but ironic argument that Appellants failed to carry their burden to marshal the evidence. Appellants acknowledge Utah's unique and well-established rules governing the duty to marshal evidence. However, because the probate court's findings are based not on any record evidence, but on that court's erroneous, but preconceived misapprehensions about the State and its AG, and on the court's uniquely held beliefs and presumptions about the reasonableness of Wisan's fees, they are based on no evidence.

Curiously, on pp. 25-28 of his brief, Wisan agrees the August 1 order is not based on adjudicated facts; a fact Wisan sanctions by justifying the court's reliance on "numerous facts not subject to dispute." Wisan errs.

Untried allegations leveled by Wisan in his June 2011 reply – to which the State was not permitted a response – or by the probate court for the first time in its August 1 fee order – the reconsideration of which, the court denied – are not "facts of record." *See* Ans. Br. pp. 25-28 (underscoring unadjudicated facts and "considerations," and criticizing the State for failing to respond despite a lack of notice). Because the probate court's several "findings" are based on assumption, not evidence, the State had not duty marshal.

Wisan makes a similar argument at pages 45-46 of his brief. There, Wisan contends the probate court met all of the factors relative to its review of Wisan's costs and fees, when that court presumed those fees were always reasonable. *See* Ans. Br. 45 & n. 40 (acknowledging the court "deemed" his accountings to be "reasonable, proper and in good faith," but challenging the State's failure to marshal or acknowledge the evidence giving rise to that court's presumption). Wisan also makes the incredible claim that this Court should ignore the State's objections to the probate court's use of

unidentified "spot checks," because the State failed to scour every word of Wisan's several accountings in search of evidence to rebut those checks. Such a claim lacks credibility and ignores three essential facts.

First, by not identifying where, in Wisan's accountings the court made its independent review, the court deprived the State of any evidence to marshal. Next, by denying the State's motion for additional time to review Wisan's accountings and to conduct discovery respecting the nature of those fees as necessary, the probate court deprived the State of any reasonable basis to create a record in the first instance. Finally, and perhaps more ironic, is the fact Wisan and the court objected to the State's request ro sufficient time to review fees, that after waiting three years to seek, took took Wisan more than 70 days to compile. Such a comparison is alarming. It is at once evidence of the probate court's inequity and abuse of discretion, and also that if evidence in the record is lacking it is not due to the fault of the State or its AG.[3]

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[3] By contrast, in the probate court and also on appeal, Appellants have clearly identified the evidence that exists to counter the probate court's several misapprehensions. *See* R. 22179-22333, Memo at pp. 27-36, and Shurtleff Aff, *passim*; Appnt Op. Br., pp. 15-26. That court's failure to grant the State reconsideration in light of that evidence was error. *See In the Matter of the Gen. Determination of Water Rights*, 982 P.2d 65 (Utah 1999), *reh'g denied* (abuse of discretion to deny reconsideration in presence of new

This Court should not countenance Wisan's attempt to deprive the State of its own interest in justice and equity. But his marshaling argument is not well-taken. It should be ignored.

III. Wisan's Response Misconstrues the Law.

In answer to Appellants, Wisan clings to the belief that the State single-handedly contributed to his financial crisis.[4] But several factors were at play, including Wisan's own conduct. A full consideration of all of the facts and relevant law compels reversal.

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evidence sufficient to support standard for granting).

[4] Like the probate court, Wisan now believes that even prior to August 1, 2011, the State was obligated to pay Wisan's expenses. Namely, in its February order affixing an amount of fees, the court criticized the State for allowing Wisan's and his creditor's payments to become "long-overdue."

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

Add. E, Feb. 2012 Ruling and Order at 1, n.1 (quoted by Wisan, Ans. Br., p. 21).

A. Wisan ignores the terms of his appointment.

Wisan freely accepted his appointment under terms he requested and the probate court approved. Those terms made clear that Wisan's duties – and therefore his compensation – were limited to funds *available* in the Trust to compensate him. *See* R. 546, 6/22/2005 Order, p. 6, ¶ 8; R. 1995-2001, 9/2/2005 Order, p. 4, ¶ 3. Wisan seeks to distance himself from that term and now argues that nothing in the court's order limits his compensation to Trust assets, or restricts him from seeking funds under Utah Code Ann. § 75-7-1004(1). *See* Ans. Br., p. 30 n. 30. Appellants agree the probate court authorized Wisan to solicit private donations to fund his efforts – something that he did. But the appointment orders say nothing about Section 75-7-1004(1), but are consistent instead with Utah Code Ann. § 75-7-709(1)(a): "(1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for: (a) expenses that were properly incurred in the administration of the trust."

Indeed, prior to May 2011, when Wisan filed his motion seeking a award of costs chargeable to it, the State had no reason to know or to contemplate that Wisan would seek payment of several years' worth of unbilled fees and expenses from the State directly. This Court has

recognized that neither a party nor a court may rewrite history based on buyer's remorse. But under analogous circumstances, this Court has held "[i]t is not for court to rewrite a contract improvidently entered into at arm's length or to change the bargain indirectly on the basis of supposed equitable principles." *Dalton v. Jerico Const.*, 642 P.2d 748 (Utah 1982). The U.S. Supreme Court reached a similar conclusion in *Atlantic Trust Co. v. Chapman*, 208 U.S. 360 (U.S. 1908). There, the Court stated it was unsound and inequitable to require a party to assume a receiver's expenses when it had "[n]o hint or warning" that funds under the court's, not the party's control were insufficient to meet the same. *Id.* at 372.

When Wisan accepted his appointment, he agreed to limit his role to the Trust's ability to repay him. Wisan, therefore, acted at his peril when, voluntarily and with knowledge that while asset-rich, after July 2008 the Trust had no funds "available" to compensate him, he continued to incur fees at the average rate of more than $ 137,000 per month.[5] Justice and equity, under those circumstances, should not permit Wisan to shift to the State – unilaterally, in full, and at once – the entire onus for paying fees,

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[5] The March 2012 fee order awarded Wisan $5,619,933.25 in fees for the period of May 2008 through September 2011, or 41 months.

that he incurred while knowing the Trust lacked sufficient liquid assets to reimburse him. The probate court's failure to consider this fact, was at once unfair and an abuse of discretion.

B. Wisan's statutory argument is contrary to Utah law.

Citing nothing in support, Wisan contends the Utah Legislature enacted Utah Code Ann. § 75-7-1004(1) as an exception to sections 75-7-901(1)(a) and 75-7-1004(2), and to provide "a safety valve to protect trusts and trustee from unfairness in circumstances where the assets of the trust are not available." Ans. Br. P. 29. Applying well-established rules of statutory interpretation, that claim must fail.

When a court interprets a statute, it looks first to the statute's plain language, and gives effect to that language unless it is ambiguous. *Blackner v. Dep't of Transp.*, 2002 UT 44, ¶ 12, 48 P.3d 949. The court's "goal is to give effect to the legislature's intent and purpose." *Grappendorf v. Pleasant Grove City*, 2007 UT 84, ¶ 9, 173 P.3d 166.[6] To that end, a court must

[6] Here, there is no clear expression of legislative intent. But the only history that Appellants have located provides that Utah modeled its Trust Code after the Uniform Trust Code, and that section 75-7-1004 is generally based on a Mass. Gen. L., ch. 215, § 45. *See id.,* Uniform Law Comments and Historical and Statutory Notes. At footnotes 28 and 29 of his answer brief, Wisan acknowledges this legislative history, but again with no citation, offers his own "legislative" purpose. Moreover, the text of

consider the meaning of each word to "avoid interpretations that will render portions of the state statute superfluous or inoperative." *Hall v. Utah State Dept. of Corr.*, 2001 UT 34, ¶ 14, 24 P.3d 958 (Utah 2001). Finally, a court must not infer substantive terms into a statute's text that are not present. *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994). But a court's "interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed." *Id.*

Sections 75-7-709(1)(a) and -1004(2) direct a *trustee* to look to the trust for payment of the costs of trust administration and also, costs incurred in a trustee's good faith prosecution or defense of judicial proceedings. *Id.* §§ 75-7-709(1)(a) and -1004(2). Conversely, section 75-7-1004(1) enables a *party* to look to the trust or another party to pay its costs incurred "in a

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Massachusetts's statute differs greatly from the text at issue here:

> In contested cases before a probate court or before the supreme judicial court on appeal, costs and expenses in the discretion of the court may be awarded to either party, to be paid by the other, or may be awarded to either party or both to be paid out of the estate which is the subject of the controversy, as just an equity may require . . ..

M.G.L.A. 215 § 45. On its own face, the Massachusetts statute refers to litigation costs, incurred in "contested cases." It does not pertain to administration expenses – the bulk of the costs at issue here.

judicial proceeding involving the administration of a trust." *Id.* § 75-7-1004(1). On their face, those sections *differentiate a trustee*, who must look to the trust for his costs and fees, *from a party*, who in the interest of justice and equity, may look to the trust or to another party for its costs incurred in litigation. *See id.* (pemitting a court to award costs incurred in a "judicial proceeding involving the administration of a trust" where the trust "is the subject of the controversy.") Facially, that differentiation evinces not an "exception" or "safety valve," but the Legislature's intent to treat each class of persons and circumstances differently. Wisan has confused that distinction, the probate court ignored it. Each approach is error. Neither should prevail.

C. Wisan's common law response also fails.

Just as Wisan's statutory argument is defective, his common law response also fails. But making no attempt to distinguish the settled law that Appellants have offered, Wisan points to a dicta statement in *Altlantic Trust*, 208 U.S. at 375, to support his categorical belief that "special" or "peculiar" circumstances support the probate court's substantial fee award. *See* Ans. Br. 28. A complete reading of *Atlantic Trust* supports a different conclusion.

There, the Court did nothing more than observe "that cases *may* arise in which, because of their special circumstances,[7] it is equitable to require parties at whose instance a receiver of property was appointed, to meet the expenses . . . when the fund in court is ascertained to be insufficient for that purpose." *Id.* at 375 (emphasis in original).[8] But under analogous circumstances, the Supreme Court declined to find such special

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[7] One such circumstance, the Court noted may arise in cases where the benefits received were several times greater than the amount to be paid. *See id.* at 374. In its August 1 Ruling, the probate court "found" Wisan's efforts to bring assets back into the Trust exceeded "the total amount of the Fiduciary's fees and expenses." That finding, based on nothing more than Wisan's self-serving statement, is wrong. At page 6 of his Answer Brief, Wisan alleges he has recaptured nearly $ 8 million in fraudulently transferred Trust assets. But over the period of June 2005 to September 2011 – the date last reflected in the accountings submitted to the court – Wisan, his counsel, and those who have provided services to him, have generated costs, fees and expenses in excess of $ 8.5 million.

[8] At his footnote 27, Wisan cites three cases that he maintains support the probate court's order. Each case is distinguishable. First, the decision in *Stanton v. Pratt*, 18 Cal. 2d 59 (1941), is based on *Ephraim v. Pac. Bank*, 129 Cal. 589, a case the Supreme Court declined to follow. *See Atlantic Trust*, 208 U.S. at 373. Next, in *Brill v. Southerland*, 14 A.2d 408 (Del. Ch. Ct. 1940), the court directed the complainants to pay the receiver's expenses on "[t]he simple fact . . . the complainants voluntarily and solemnly obligated themselves" to do so. *Id.* at 413. Finally, in *Andrade v. Andrade*, 13 P.2d 676 (Cal. 1932), the California Supreme Court upheld an award of costs to a third party, because it was that party's actions in making a claim to property in which it held no interest, that had occasioned the expenses in the first instance. *Id.* at 677-78. None of those cases are applicable here.

circumstances there. In *Atlantic Trust*, as here, the plaintiff was within his rights to seek the receiver's appointment; the plaintiff's actions mislead no one; the plaintiff gave no assurances of payment, but acted only as a regular litigant; and because on his appointment, the receiver's actions were deemed the court's actions, no reason existed why the plaintiff, who sought the appointment should have to meet the receiver's expenses. *Id.* The Court determined that equity did not support a departure from the general rule. *Id.* Equity, also, supports no departure here.

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

The probate court's February 10 and March 12 rulings are inconsistent and inequitable. They are also at odds with the law. Wisan's effort to resuscitate them fares no better.

A. The State lacked sufficient time to review Wisan's accountings.

Before the probate court approved Wisan's several fee requests, the State moved for additional time to consider those fees, and for an opportunity to conduct discovery or retain an expert to review them. R. Mo and Response. The State's goal was not to delay, but to have a meaningful opportunity to consider the records giving way to a potential loan of $5.5

million in taxpayer funds. With one exception, the court denied that request. It did so, to "allow the A.G. sufficient time to request any necessary funds from the Legislature in the upcoming legislative session," Add. D, p. 3, because, according to the court, it was "unreasonable for the Trust to have to risk going without payment for another full year if the State is unable to secure funds from the legislature." *Id.* p. 2.

That statement is telling, because it illustrates the probate court's refusal to consider, let alone appreciate that it was not the State's delay that had created the financial crisis. It was Wisan who delayed nearly three years in submitting his accountings to the court and seeking the State's assistance in being paid. Too, it was Wisan, who, after the probate court granted his initial request to charge fees to the State, waited nearly three months to submit his first accounting. *Compare* Add. B, August 1, 2008 Ruling and Order, *with* R. 19930, 10/11/2011 initial accounting. On those undisputed facts, if time were running short, it was not the State who contributed to that delay. But it was that State, however, who was made to pay for it. The probate court's order denying the State sufficient leave to

review the accountings was an abuse of discretion.[9]

B. Wisan failed to carry his burden of proof.

When a fee dispute exists, the trial court must make a factual record that supports its reasonableness determination. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). But before doing so, the party seeking payment of its costs and fees bears the burden of proof. Wisan failed to carry that burden below, and on appeal, uses as his excuse the fact the court could presume his fees to be reasonable, and also that because Wisan incurred his fees in equity, he carried a diminished obligation to support them. *See* Ans. Br. p. 42 (claiming, without support, that in probate, a court reviews the expenses of trust administration only to determine they were incurred "properly" and "in good faith.")[10] But respecting attorney fees,

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[9] Of equal note, even after the State submitted its response and the court issued its February ruling and order, the court granted Wisan still more relief. Namely, instead of denying them as unsupported, the court *sua sponte* granted Wisan additional time to resubmit some $49,000 in requested fees that he had failed to adequately support in the first instance.

[10] Wisan's assumption was not a coincidence. But when it denied the State's motion, the court foreshadowed an erroneous standard for review:

> The Court notes that the Special Fiduciary has always provided accountings sufficient for the Court to determine whether the fees were necessary for the administration of the Trust. The Special Fiduciary has

even Utah Code Ann. § 75-7-1004(1) and (2), permit only an award of "reasonable" fees.

C. Wisan's attorney fee accountings fail to comply with Utah law.

Calculation of a reasonable attorney fee award rests with the trial court's sound discretion. To be reasonable, a fee award must find adequate support in the record. *See Dixie State Bank*, 764 P.2d at 988. Where a party fails to submit sufficient evidence to support its fees, a trial court may not simply make a complete award. *Id.* A trial court is not "'compelled to accept [the requesting party's] self-interested testimony whole cloth and

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

Add. D, p. 1-2, n. 1.

make [the requested award].'" *Id.* (quoting *Beckstrom v. Beckstrom*, 578 P.2d 520, 523-24 (Utah 1978)). Instead, a court may reduce the amount requested in the absence of sufficient proof. *Id.*

1. Block Billing

Almost categorically, Wisan's attorneys employed a block-billing format. That format, lacking in detail or separation, precluded first the State's, and then the probate court's ability to conduct any meaningful review. Too, that format precluded the State and probate court the ability to determine "exactly what legal work [Wisan's attorneys] performed, both in terms of the nature of the work and the time spent," doing it. *In re Estate of Quinn*, 830 P.2d 282, 285 (Utah App. 1992) (citing *Dixie State Bank*, 764 P.2d at 990).

As the State made clear below, many of the fees reflect conferences, in which there is no reason given for the same; they detail meetings with no topic set out; and describe work as generic as reading, reviewing and preparing. Absent information to explain the nature, or even the purpose of that conduct, the fee records are not detailed enough to determine if the fees were reasonable. When a fee applicant provides inadequate documentation a "court may reduce the award accordingly." *See Hensley v. Eckerhart*, 461

U.S. 424, 437 (1983); *see, e.g., Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10th Cir. 1998) (court may discount hours where attorney failed to keep "keep meticulous, contemporaneous records that reveal all hours for which compensation is requested and how those hours were allotted to specific tasks."); *Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1995) (affirming 35% reduction based on block bills); *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719, 735 (denying payment for all block-billed entries); *Shula v. Bank of Am.*, 2010 WL 348256, * 2, No. 4-07-cv-00922 (E.D. Ark Jan 22, 2010) (reducing fees by 55% based, in part, on block billing). The probate court's failure to make a reduction – however slight – based on counsel's use of block-billing was error.[11] It should be reversed.

2. Duplicated and unnecessary services.

Wisan's use of block-billing aside, much of the work billed-for is redundant. And in many respects, the billings indicate that Wisan elected to

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[11] Like the probate court, in answer, Wisan criticizes the State's objection, claiming that because the State did not object to Wisan's use of block-billing before, "the State should be estopped from attempting to impose new billing requirements, retroactively." Ans. Br., p. 44, n. 39; *see also* R. Ruling and Order, p. 5. That criticism stands in stark contrast to the probate court's acknowledgment that the State had not waived its right to object to the pending accountings, based on the fact it had not previously done so. Add. D, p. 2, n.3.

employ senior, not associate counsel. While it may have been convenient – and of benefit to Wisan — to employ multiple attorneys to conduct a single task, and also, to enjoy the use of lead *and* junior counsel, it is not reasonable to require the State to pay for that convenience. Likewise, on several, discrete ocassions, Wisan's attorneys billed for work not related to their role in the Trust administration.[12] R. 22525-22107, Response, at pp. 12. The probate court's failure to take those facts into account to reduce Wisan's fees was an abuse of discretion. *See Dixie*, 764 P.2d at 990 (permitting court to award fees necessary to "adequately" conclude the matter). Thus, to the extent it upholds the fee award at all, this Court should remand the court's findings with instruction to conduct a complete review.

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[12] In this regard, the State specifically questioned the use of counsel to perform public relations, *see Utah Int'l, Inc. v. Dep't of the Interior*, 643 F. Supp. 810 (D. Utah 1986) (hours spent on PR not compensable); *accord David C. v. Leavitt*, 900 F. Supp. 1547, 1555 (D. Utah) (same); time spent lobbying or meeting the members of the Legislature; *see Jane L.*, 828 F. Supp. at 1550 (lobbying efforts not compensable); time spent reading books, newspapers, and other sources about polygamy; time spent reviewing trial transcripts from Warren Jeffs criminal trials; and time spent performing clerical tasks such as copying, printing, and writing general correspondence.

V. Wisan Conflates the State's Constitutional Claims.

A. Separation of Powers

Wisan does not seriously acknowledge or make any attempt to rebut the argument the State actually made. Instead, Wisan contends the State claimed only that the probate court could not enter a judgment against it. That claim misstates the State's argument, moreover, it misses the point.

Certainly, a court may enter a judgment[13] or an adverse order against the State as any other party. But consistent with Utah Code Ann. § 63G-30d-603(2) (West 2009) and Article V, section 1 of the Utah Constitution,

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[13] Despite its use of the term "judgment," it is questionable whether the probate court, in fact entered, or possessed the discretion to enter a judgment against Utah's AG. But prior to March 12, 2012, the probate court's orders had merely "awarded" Wisan his costs and fees, on a interim basis (i.e., the court had directed the State to make a loan). Moreover, the court always captioned its prior orders as "rulings." That changed, however, when the State moved this Court for extraordinary relief on March 5. After that time, and with no finding that Wisan had "prevailed" in any action against him, the probate court ordered:

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

Add. G, 3/12/2012 Order and Judgment, p. 3.

once entered, a trial court may not enforce the same.

And though Wisan states that the court's March 2012 Order, entering a judgment against the State, with an extended deadline for payment, intrudes on no legislative authority, *see* Ans. Br, p 34, at footnote 20, Wisan concedes the State's point:

> . . . The court's reference to timing of the legislative session was merely an acknowledgment that the State would likely need an appropriation of fund from the Legislature in order to comply with the court's rulings, and that to delay ruling on the Fee Approval Motion beyond the legislative session could delay the State's ability to comply for up to a year.

Id., p. 19.

Whether requiring the State directly, or indirectly through its AG, the probate court's February 10, 2012 and March 12, 2012 fees orders compel a specific appropriation that a state court lacks the authority to demand. It is error and should be reversed.

B. Extending the State's Credit.

Here too, Wisan misses the point. For if the Legislature may not freely extend the State's credit; it is tautological that a state probate court cannot. But even under circumstances where the constitution permits the making of a loan, the constitution does not permit a state court judge to do

so. That conduct is reserved for the Legislature alone. The probate court's order compelling the State to loan taxpayer money is error. It should be reversed.

VI. The Probate Court Erred as a Matter of Law and Equity When it Denied the Contribution Motion.

A. The probate court had jurisdiction to resolve the State's Motion.

Arizona argues that only the United States Supreme Court has jurisdiction to grant Utah's motion. AZ Br. at 13. That argument suffers two, primary flaws.

First, neither the content nor the State's requested remedy invokes the U.S. Supreme Court's exclusive, original jurisdiction. Congress granted the Supreme Court "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a). That exclusive jurisdiction arises "only when one state seeks relief from another state." *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1026 (8th Cir. 2003) (citing *Mississippi v. Louisiana*, 506 U.S. 73, 78 n.2 (1992) and *United States v. Nevada*, 412 U.S. 534, 537 (1973)). Seeking relief from another state requires more than two states being involved in the same suit or even State litigants having interests adverse to the other on a particular issue.

Ubbelohde, 330 F.3d at 1026.

Arizona's contention to the contrary, Utah did not seek relief *from* Arizona in the probate court below. Utah did not ask Arizona to pay it any money. But in equity, the State requested that Arizona also be required to share Wisan's costs and fees. Utah merely wanted Arizona, and all other liable parties, to pay their fair share to Wisan, not the State.[14]

The State did not sue Arizona nor file a third party complaint against it. And though the states have adverse interests on the fee allocation issue, that, alone, does not create Supreme Court jurisdiction nor eliminate the probate court's discrimination.

On this pont, *Ubbelohde* is instructive. There, South Dakota sued the Corps of Engineers to enjoin the release of water from a South Dakota reservoir into a drought-stricken Missouri River Basin. *Ubbelohde*, 330 F.3d at 1019. The State of Nebraska, a would-be down stream beneficiary of any water release, attempted to intervene in the South Dakota litigation. *Id.* at 1023. But the district court refused on the grounds that allowing

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[14] Arizona complains that Utah's motion does not request any allocation of fees as to the UEP Trust beneficiaries–the FLDS members themselves. However, given the current state of the federal litigation, such a request may violate the pending stay and would therefore be futile.

Nebraska to intervene would create a multi-state controversy destroying its jurisdiction per 28 U.S.C. § 1251(a). *Id.* at 1025-1026. The Eighth Circuit reversed, holding that "the controversy is between each of the states and Corps. Although the states would have had adverse interests, each state would be seeking relief from the Court against the Corps." *Id.* at 1026. In other words, the parties' adverse interests would not have stripped the district court of jurisdiction.

The same reasoning applies here. While both states have adverse interests on the fees issue, they are, overall, aligned on the same side, sharing the same interest in ensuring proper administration of the Trust. The probate court therefore possessed the requisite jurisdiction to resolve the State's motion.

But all the same, even had Utah sought from Arizona for purposes of 28 U.S.C. § 1251(a), the Supreme Court would not exercise jurisdiction over that claim. But that Court invokes its original jurisdiction "sparingly" and only in "appropriate cases." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (internal quotation marks omitted). Even in State versus State lawsuits, the Supreme Court remains cognizant that with the increased complexity of our social system, "'States have increasingly become

enmeshed in a multitude of disputes [. . . .] Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.'" *Id.* at 798 (*quoting Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497 (1971)). In short, not every dispute, even between the States, warrants Supreme Court review.

To determine an "appropriate" case, two factors pertain. First, the Court considers the nature and interest of the complaining State, with a focus on the "seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal quotation marks omitted). Second, the Court considers the availability of other forums to resolve the issue. *Id.* The Court has declined jurisdiction, for example, where it was "persuaded that the pending state-court action provide[d] an appropriate forum in which the issues tendered . . . may be litigated." *Arizona*, 425 U.S. at 797. The Court noted that it could, if necessary, review the issue on direct appeal. *Id.*

Neither factor supports Supreme Court jurisdiction here. Utah's motion raised no issue of significant import to warrant Supreme Court review. Because the Supreme Court does not have and would not exercise exclusive original jurisdiction over the State's motion, the probate court's converse conclusion is error and should be reversed.

B. The State sought allocation not contribution from Arizona.

Although the State labeled its motion as a request for "contribution," in substance, the State did not bring a contribution claim. But at all times, the State urged – and too, the probate court agreed – that equity dictated that if Utah were required to pay Wisan's fees, then Arizona too, where much of the Trust property is located and where most of the Trust beneficiaries reside, should be required to share in that payment. Indeed, it was the court's, not the state's nonmenclature that lead to the caption of the motion itself:

> The Court agrees with the Utah AG that others who have benefitted from the Special Fiduciary's efforts in administering the Trust should also bear some of that cost. Nothing in the court's ruling prohibits the State from seeking such contribution. . . . The State is free to seek indemnification or contribution from other parties and non-parties as it sees fit.

See Add. B, Ruling at 6. The State's motion, grounded in equity, asked the probate court to allocate to Arizona its share of Wisan's fees. It did not seek contribution as matter of law. But like the probate court, Arizona misconstrues the State's request, and unfairly elevates form over substance. *See Frito Lay & Transcontinental Ins. Co. v. Utah Labor Comm'n*, 2009 UT 71, ¶ 44 (courts look to substance of motion, not its caption to ascertain intent).

Furthermore, because the State did not ask the probate court to order that Arizona reimburse it for fees the State had already paid to Wisan, but asked only that Arizona share in the burden of paying Wisan's fees, and to make that payment to Wisan directly, the State's motion sought allocation, not contribution. Arizona's argument that the State's efforts are not ripe must therefore fail.

C. Arizona had an opportunity to be heard.

Arizona contends the probate court's order was sound, because it lacked an adequate opportunity to be heard. That argument overlooks a pivotal point. First, through its opposition to the State's motion, Arizona was heard. There, Arizona raised arguments, in addition to the ones that it now makes on appeal, that spoke to the propriety of the August 1 fee order

in the first instance. Arizona has not pointed to any new, or additional arguments that it would have raised had Wisan moved for payment against it, instead of or in addition to the State of Utah. But those arguments, raised at R. 22806-22811, were substantive and complete. They were Arizona's opportunity to be heard. The probate court's converse conclusion is error.

The probate court's order is ironic. For in denying the State's contribution motion, the court stated that Arizona "was never on notice that it would need to respond to or defend against" the fee request. The probate court failed to show the same concern to Utah, when it denied the State an opportunity "to respond to or defend against" the court's several "considerations." That difference, however, is not surprising. For after July 2009, when on the probate court's request, the State submitted a settlement proposal that the court rejected, the court viewed the State as working against, not with it:

> [T]he actions of the Utah AG over the past two years stand in marked contrast to the support that the Arizona AG continues to offer to this Court and to the Special Fiduciary. The Court does not view this as a shift in the Special Fiduciary's or Arizona's position. Rather, for reasons of his own, in recent years the Utah AG has substantially altered the State's position with respect to this Court's administration of the Trust. Certainly the Utah AG has the right to alter his position in any way he

> finds to be legally defensible. However, this shift in position has left the Special Fiduciary without Utah's support, thereby substantially increasing the fees the Special Fiduciary has had to incur.

Add. B., p. 4, n.3. This passage illustrates that the probate court entered the August 1 fee order, and also its February 23 order denying contribution, not based on a desire to do equity, but instead out of a need to punish.

The probate court deprived the State of equity when it denied the contribution motion. That denial was entered as an abuse of discretion. This Court should reverse it.

Conclusion

In the interest of justice and equity, the State of Utah and its Attorney General asks this Court to reverse the probate court's August 2011 Ruling and Order charging costs and fees to the State of Utah based on its legal error. Alternatively, they ask the Court to reverse that ruling as a violation the Utah Constitution. But to the extent, this Court upholds the same, it should reverse and to remand for further proceedings as required.

Respectfully submitted this 4th day of June, 2012.

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Certificate of Service

I hereby certify that I sent two true and correct copies of **THE STATE OF UTAH AND UTAH ATTORNEY GENERAL MARK L. SHURTLEFF'S REPLY BRIEF ON APPEAL OF FEE ORDERS OF THE THIRD JUDICIAL DISTRICT COURT, JUDGE DENISE P. LINDBERG, PRESIDING** to the following by electronic and United States Mail, postage prepaid, this 4th day of June, 2012:

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