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Through the Establishment Clause:  
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*Eric G. Andersen*

College of Law, University of Iowa

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# Protecting Religious Liberty Through the Establishment Clause: The Case of the United Effort Plan Trust Litigation

Eric G. Andersen\*

## *Abstract*

*The Fundamentalist Church of Jesus Christ of Latter Day Saints is best known for its open practice of polygamy, long abandoned by the church from which it broke away generations ago. Less notorious is its communitarian economic program involving the centralized ownership and management of the real estate assets of the church and its members. Their houses, farms, and businesses, located in a remote community straddling the Utah-Arizona border, are owned by the United Effort Plan Trust, a public charitable trust. The terms of the trust have obligated the trustees to administer its assets in accordance with religious principles. The Trustees have historically been leaders of the church.*

*In 2005 the Utah Attorney General alleged that the trustees were committing serious breaches of their fiduciary duty, putting its assets at risk. In response to the Attorney General's petition, a state trial court placed control of the trust in the hands of a "special fiduciary." The court then reformed the trust extensively, converting it into an essentially secular instrument. For example, trustees selected and controlled by the church president are to be replaced with a board approved by the court. They are to accept only non-binding advice from ecclesiastical leaders. The "needs and just wants" of beneficiaries are no longer to be gauged by religious purpose and the mandates of scripture, but by the new trustees' assessment of their need for adequate housing and education. The changes wrought by the court impose deeply upon the religious character of the trust.*

*The reformation of the trust raises challenging issues under the religion clauses of the First Amendment. The reformation may pass muster under the Free Exercise Clause, but the court did trespass the bounds of the Establishment Clause, which constrains the state from intruding into the functioning of a religious community.*

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In 1890 the Church of Jesus Christ of Latter-day Saints formally announced that it would abandon the practice of polygamy.<sup>1</sup> After a half century of defending the practice in the face of increasing persecution and, eventually, prosecution, it was not an easy change to make. Some Mormons refused to accept it. Over time, a number of polygamous groups formed, sometimes living in geographical seclusion. They became organizationally and doctrinally distinct from, and often antagonistic toward, the church with which they had been historically connected. One of the better known groups, eventually named the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS Church or Church) settled in a remote area straddling the Arizona-Utah border originally known, and still often referred to, as Short Creek. It now officially consists of the adjacent municipalities of Colorado City, Arizona and Hildale, Utah.

An element of the Church's communal life much less known than polygamy is an economic arrangement that came to be known as the "United Effort Plan" (UEP). It involves the common ownership of assets, especially real property, eventually held under a formally organized charitable trust (UEP Trust or Trust). The residents of Short Creek live in houses, and many work on farms and in businesses, owned by the Trust. These properties are built or improved through communally organized efforts. As discussed below,<sup>2</sup> the rights to their occupancy and use have sometimes been the subject of internal dispute.

On May 26, 2005, the Utah Attorney General (AG) petitioned a state trial court in Salt Lake City, Utah to take over the control and administration of the Trust. Over many years, Church members had transferred real and personal property to the Trust and contributed labor to increase its value. At the time of the AG's petition, the beneficiaries of the Trust – essentially the present (and some former) members of the Church who had contributed to the Trust and who lived or had lived in the Short Creek area – were probably between 6,000 and 8,000 in number. The value of the Trust estate was estimated to be over \$100,000,000, consisting primarily of improved and unimproved real estate.<sup>3</sup>

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<sup>1</sup> WILFORD WOODRUFF, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, DOCTRINE AND COVENANTS, OFFICIAL DECLARATION—1 291-92 (1983 ed.).

<sup>2</sup> See *infra* note \_\_\_\_.

<sup>3</sup> In an early report filed in the case, the court-appointed "special fiduciary" stated that, according to tax records, the value of the Trust's real estate assets in the community totaled \$91,633,846. In the Matter of the United Effort Plan Trust, No. 053900848, ¶¶ 48, 50 (Utah 3rd Dist. August 2, 2005). Assessed values on the tax rolls are not necessarily accurate gauges of genuine market values, however, and those values may be especially elusive given the unusual ownership and social arrangements that characterize this particular community. The special fiduciary later stated informally that the true market value of Trust assets could be in the range of \$150 to 200 million. Telephone Interview with Bruce Wisan, Special Fiduciary, United Effort Plan Trust, in Iowa City Iowa (May 24, 2007) [hereinafter Wisan Interview].

The Trust's stated purpose was "to preserve and advance the religious doctrines and goals" of the FLDS Church.<sup>4</sup> The trustees were obligated to administer the Trust's assets on behalf of a beneficiary class consisting of FLDS Church members "according to their wants and their needs, insofar as their wants are just."<sup>5</sup> The AG claimed that the trustees had been derelict in their fiduciary obligations by failing to defend the Trust against tort claims brought against it, by taking actions that endangered the Trust's charitable status, and by transferring Trust assets to FLDS Church "insiders" for consideration far below their fair market value.

For reasons that are not entirely clear,<sup>6</sup> Church leaders declined to participate in the litigation, just as they had refused to defend the tort actions that prompted the AG's intervention in the first place. Although untested in a true adversary proceeding, the evidence presented by the AG appears to have been very strong. The court appointed a "special fiduciary" to take over the management of the Trust and, during the next several months, proceeded to supervise its administration and reform the Trust so as to alter its character dramatically.

The court's actions, taken in response to what appear to be grave threats to the viability of the Trust, raise interesting and important questions under both charitable trust law and the religion clauses of the First Amendment. This article examines the First Amendment questions.

## I. Background

Understanding the legal issues raised by the UEP Trust litigation requires some familiarity with the history of both the FLDS Church in general and the Trust in particular.

### *A. Origins of the FLDS Church and the UEP Trust*

Early in the 20<sup>th</sup> Century, the families settling the Short Creek area acquired tracts of land. They organized themselves under the name of the "Work" or the "Priesthood Work" and contributed their land to that organization. Eventually, the group was formally organized as a religious corporation named the Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter Day Saints and has since been known as the FLDS Church.

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<sup>4</sup>Amended and Restated Declaration of Trust of the United Effort Plan Trust 1 (November 2, 1998) (on file at Mohave County, Arizona Recorder's Office) [hereinafter 1998 Trust].

<sup>5</sup>*Id.* at 3.

<sup>6</sup>Throughout the litigation described here, as well as the criminal proceedings against Church President Warren Jeffs, *see* notes \_\_\_\_, *infra* and accompanying text, the FLDS community, as instructed by its leaders, has consistently refused to cooperate with state officials and agents. Wisan Interview.

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The legal status of the group's earliest communitarian economic arrangements is unclear. At some point a trust was formed, but then discontinued. In 1942, documents were filed in Mohave County, Arizona, establishing the United Effort Plan Trust. The group's property, then held by the group in the name of the "Work," was transferred to the Trust.<sup>7</sup> The Trust has continued to the present, although it has been subject to a series of changes,<sup>8</sup>. In this article, the Trust will be referred to generally as the Trust or the UEP Trust. As discussed below, a critical "restatement" of the Trust was made by the trustees in 1998, followed by the court's "reformation" of the Trust in 2006. When required in the interests of clarity, the versions of the Trust as it existed before 1998 are referred to collectively as the Original Trust, and the instruments making the changes described above are referred to as the 1998 Trust and the 2006 Trust, respectively.

During the second half of the 20<sup>th</sup> Century, as the Trust continued to acquire land from Church members, the history of the FLDS Church was part of a complex and often tumultuous series of events involving various polygamous sects located in the western United States and Canada. Individual groups splintered and recombined. Denominations in addition to the FLDS Church continue to function today.<sup>9</sup> Of relevance to this article was a schism in the late 1970s and early 1980s, during which some of those who had contributed land to the Trust were expelled from the Priesthood Work.<sup>10</sup>

### *B. Disputes Over the Use of Trust Properties*

In 1986, Rulon Jeffs, the president of the FLDS Church and the individual with de facto control over the administration of the Trust, declared that all those residing on Trust lands were tenants at will. Those residents included some former Church members and members who had fallen out of favor with Church leaders. They were expelled, or threatened with expulsion, from their Trust-owned residences. At least some of them had contributed lands to the Trust. They alleged that they had been assured that they could continue to reside in their houses for the

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<sup>7</sup>See generally *Jeffs v. Stubbs*, 970 P.2d 1234, 1239 (Utah 1998) (summarizing the facts of the creation of the UEP).

<sup>8</sup>In 1946, the Trust was amended in ways insignificant to this article. See Certificate of Amendments to Declaration of Trust of Trust of the United Effort Plan (April 10, 1946) (on file at Mohave County, Arizona Recorder's Office).

<sup>9</sup>See generally RICHARD S. VAN WAGONER, *MORMON POLYGAMY* 177-217 (Signature Books 2d ed. 1989) (summarizing the history of the copious fundamentalist Mormon polygamists) [hereinafter VAN WAGONER].

<sup>10</sup>See Brian C. Hales, *Centennial Park and the Second Ward available at <http://www.mormonfundamentalism.com/ChartLinks/CentennialPark.htm>; see also Brooke Adams, Polygamy Leadership Tree: Religious Ideal Grows, Branches Out, SALT LAKE TRIBUNE available at <http://extras.sltrib.com/specials/polygamy/PolygamyLeaders.pdf>; Benjamin Bistine, *Colorado City Polygamists* \_\_ (2004).*

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remainder of their lives. In 1987, they brought an action in the Federal District Court for the District of Utah seeking, among other things, to establish their rights to certain Trust properties.

Over the next 11 years, litigation between the FLDS Church, the Trust, its leaders, and the claimants in the original federal court action took place in federal and state courts. The federal court eventually dismissed for lack of subject matter jurisdiction, and the litigation culminated in the Utah Supreme Court's 1998 decision in *Jefferis v. Stubbs*.<sup>11</sup>

The Utah Supreme Court concluded that the original claimants against the Trust had established a right to recover in unjust enrichment for the improvements made to the land they had occupied. It remanded for further proceedings under Utah's Occupying Claimants Act,<sup>12</sup> which grants rights to claimants who occupy land under "color of title" (which the court said could include a life estate), and who have made valuable improvements to the land in good faith.

Contrary to the stated intention of the Trust instrument itself, the position taken by Church leaders, and the decision of the trial court, the Utah Supreme Court also decided that the UEP Trust was not a "public charitable" trust at all, but a "private" trust. A public charitable trust must, among other requirements, serve a "definite class and indefinite beneficiaries within that definite class."<sup>13</sup> The Original Trust failed that test because its beneficiaries were a specifically identified group of persons: members of the Trust who had contributed property to its estate.

That ruling was significant. Had the Trust been classified as "charitable," the claimants against it might have found it difficult to establish standing to assert their specific, trust-related claims:<sup>14</sup> that the trustees had breached their fiduciary duty, and that they were obligated to

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<sup>11</sup>970 P.3d 1234 (Utah 1998).

<sup>12</sup>UTAH CODE ANN. §57-6-1 (1994).

<sup>13</sup> *Jefferis v. Stubbs*, 970 P.2d at 1251. The court also stated that a charitable trust must have a "purpose beneficial to the community."

<sup>14</sup>The trial court in *Jefferis v. Stubbs* relied upon Restatement (Second) of Trusts as its authority to reject the claimants' standing. See *Jefferis v. Stubbs*, 970 P.2d 1234, 1251 (Utah 1998) (citing § 391 as authority for the trial court's conclusion that the claimants had no standing if the UEP was a public charitable trust); Restatement (Second) of Trusts § 391 (1959) ("A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust..."); see also *Stone v. Salt Lake County*, 356 P.2d 631, 634 n.2 (Utah 1960) (citing § 391 as authority for rejecting the claims of a contributor to a charitable religious organization for alleged misuse of the complainant's funds). (The Utah Supreme Court erroneously referred to § 391 of the Restatement of Restitution, which was published in 1937 and contains no § 391. The Restatement (Second) of Trusts § 391 is precisely germane to the issue being addressed by the court, making it clear that the court had that source in mind.) Thus, the plaintiffs apparently would have lacked standing to bring their claims unless they could prove they had the requisite "special interest," a concept not developed in Utah law. After *Jefferis v.*

perform an accounting and distribution of the Trust. The Utah Supreme Court directed the trial court on remand to proceed consistent with its holding that the Trust was private and not charitable.<sup>15</sup>

### C. The Restatement of the Trust

Following the decision in *Jeffer v. Stubbs*, the trustees moved promptly to convert the Trust from a private to a public charitable one. On November 3, 1998, they filed an "Amended and Restated Declaration of Trust of the United Effort Plan Trust" in Mohave County, Arizona. The class of beneficiaries under the 1998 Trust instrument was broadened substantially. Instead of being limited to those who had contributed property to the Trust, it consisted of FLDS Church members who "consecrate their lives, times, talents and resources to the building and establishment of the Kingdom of God on Earth under the direction of the President of the [FLDS] Church."<sup>16</sup> The attempt to convert the Trust from a "private" to a "public charitable" one succeeded. As noted below, in the litigation brought by the AG the court concluded that the 1998 UEP Trust should now be classified under the latter heading.<sup>17</sup>

The restated UEP Trust made other changes designed to consolidate control of the Trust in the Church President. The Original Trust called for the election and removal of trustees by a majority vote of the board.<sup>18</sup> By contrast, the 1998 Trust gave the President of the FLDS Church the authority to appoint the members of the Trust's board of trustees, all of whom "shall serve at [his] pleasure . . . and may be removed or replaced at any time by the President."<sup>19</sup> The 1998 Trust also made clear that those residing on its properties did so at the sufferance of the presidency of the church, who could order their removal for failure to "live their lives according to the principles of the United Effort Plan and the Church."<sup>20</sup> Moreover, "[t]he Board of

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Stubbs was decided, the Utah Legislature enacted the Uniform Trust Code [hereinafter UTC]. The comment to UTC § 1001 states: "In the case of a charitable trust, those with standing include the state attorney general, a charitable organization expressly entitled to receive benefits under the terms of the trust, and other persons with a special interest." Uniform Trust Code § 1001, cmt. (2005). See also, UTAH CODE ANN. § 75-7-1001 (2006). Although the legislature did not formally adopt the official comments to the UTC, the comment to § 1001 suggests that the standing rule referred to in *Jeffer v. Stubbs* remains in effect.

<sup>15</sup>On remand, the Utah District Court concluded that some of the plaintiffs had rights under Utah's Occupying Claimants Act, and that the plaintiffs had no beneficial interests in the Trust. *United Effort Plan v. David Stubbs*, No. 89-2850 (Utah 5th Dist. Jan. 21, 2000).

<sup>16</sup>1998 Trust, *supra* note \_\_, at 3.

<sup>17</sup>In the Matter of the United Effort Plan Trust, No. 053900848 ¶¶ 26-30 (Utah 3rd Dist. December 13, 2005) (mem.) [hereinafter Memorandum Opinion].

<sup>18</sup>Declaration of Trust of the United Effort Plan 3 (Nov. 9, 1942) (on file at Mohave County Arizona Recorder's Office) [hereinafter Original Trust].

<sup>19</sup>1998 Trust, *supra* note \_\_, at 4.

<sup>20</sup>*Id.* at 3.

Trustees shall have no obligation whatsoever to return all or any part of the consecrated property back to a consecrator or to his or her descendants."<sup>21</sup>

#### *D. The UEP Trust Litigation*

The UEP Trust litigation brought by the AG is not what has attracted widespread public attention to the FLDS Church. The Church has made headlines over the years because of its practice of polygamy, as have the various attempts by state authorities to deal with that illegal practice. The largest, and most notorious, official action against the Church was the "Short Creek Raid" in 1953.<sup>22</sup> More recently, criminal charges were brought against current Church President Warren Jeffs and others for sexual abuse against minors. It is alleged that under his direction, girls in their mid-teens have been pressured into polygamous marriages. Jeffs went underground to avoid the law, but was later apprehended. As this article goes to press, Jeffs has been convicted on two counts of rape by accomplice. Other charges are pending. [Update to provide the latest information on the status of the criminal proceedings].

It was in the context of these broader legal troubles that the actions of which the AG complained occurred. Two tort actions were brought against current Church President Warren Jeffs and other Church leaders individually, and against the Trust as Jeff's alter ego. The first alleged child sexual abuse, assault, and fraud.<sup>23</sup> The other claimed civil conspiracy, fraud, breach of fiduciary duties, and various negligent and intentional torts.<sup>24</sup> When the defendants declined to enter a defense in these actions, their attorney recognized that failure to defend could result in expensive default judgments against the Trust to the detriment of its beneficiaries. He successfully moved that he be permitted to withdraw as counsel, and to require the plaintiffs in those cases to notify the AG prior to the entry of default judgments.<sup>25</sup> The plaintiffs in the tort actions filed an additional action in state court<sup>26</sup> alleging that Church leaders had begun to make transfers of Trust real estate holdings for insufficient or illusory consideration, thus dissipating its assets.

Recognizing that the Trust was in danger of losing its assets to the serious detriment of its beneficiaries, the AG petitioned the Utah District Court to suspend immediately the authority of the existing trustees and appoint a "special fiduciary" to manage and protect the Trust pending

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<sup>21</sup>*Id.*

<sup>22</sup>See VAN WAGONER, *supra* note \_\_, at 194-96.

<sup>23</sup>Jeffs v. Jeffs, No. 040915857 (Utah 3rd Dist. July 29, 2004).

<sup>24</sup>Ream v. Jeffs, No. 040918237 (Utah 3rd Dist. August 27, 2004).

<sup>25</sup>Motion to Withdraw as Counsel, Ream v. Jeffs, No. 040918237 (Utah 3<sup>rd</sup> Dist. Dec. 16, 2005). [Need citation to order granting the motions.]

<sup>26</sup>[Citation needed; the exhibit to the AG's complaint appears to be a draft.]



consideration of a request to remove the existing trustees and appoint new ones.<sup>27</sup> The court granted the AG's *ex parte* motion for temporary relief and set the matter for a hearing.<sup>28</sup>

After making a number of preliminary rulings, the court issued a detailed Memorandum Decision on December 13, 2005.<sup>29</sup> It resolved some critical issues in the case and established a framework for the reformation of the Trust. The court decided that the 1998 UEP Trust fully superceded the Original Trust and qualified as a "charitable" trust. The Utah AG and Arizona AG therefore had standing to seek relief. Moreover, the court concluded that the 1998 Trust needed to be "reformed," and that it had the power to reform it.

The court invited the parties to make proposals for the reformation of the 1998 Trust consistent with the following general principles:

- a. The Trust must continue to satisfy the requirements of a "charitable trust," including that its beneficiaries "constitute a definite class, but the beneficiaries within that class are indefinite," and the Trust's purpose is "beneficial to the community."<sup>30</sup> The "beneficial purpose" requirement could not include the promotion of the FLDS Church's religious doctrines and goals, but may include providing for the "needs" and "just wants" of the beneficiaries.<sup>31</sup>

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<sup>27</sup>Memorandum Opinion, *supra* note \_\_. The AG was joined by a number of private petitioners who were present or former members of the FLDS Church and had contributed to the Trust, or who were plaintiffs in the separate tort actions against the Trust. The issue of the standing of the private petitioners is problematic. In general, private parties, including beneficiaries, lack standing to enforce a public, charitable trust. [citation] The AG alleged that the Trust was a "mixed" private and charitable trust, and that the private plaintiffs had standing in relation to its "private" character. [citation] The court concluded, however, that the Trust was entirely charitable. In principle, that should have resulted in a finding of no standing for the private plaintiffs. The court discusses the standing issue inconclusively. Memorandum Opinion, *supra* note \_\_, at ¶16 & 5 n.14, 8; In the Matter of the United Effort Plan Trust, No. 053900848 (Utah 3rd Dist. July 19, 2005) (minute entry). Had the action been defended, that issue might have been raised. It was not raised, however, and the court permitted the private parties to remain in the case. The private plaintiffs apparently did not seek any relief inconsistent with that requested by the AG, so their presence in the case may not have been significant.

<sup>28</sup>In the Matter of the United Effort Plan Trust, No. 053900848, Ex Parte Temporary Restraining Order Appointing a Special Fiduciary and Suspending the Trustees (Utah 3d dist. May 27, 2005).

<sup>29</sup>Memorandum Decision, *supra* note \_\_.

<sup>30</sup>*Id.* at ¶¶ 26-27.

<sup>31</sup>*Id.* at ¶¶ 31-32.