



Judicial Profile

by Parker Douglas

Hon. Dale A. Kimball Senior Judge, U.S. District Court for the District of Utah

“Life is not a final. It’s daily pop quizzes,” Dorothy Parker once quipped. The same thing might be said of a federal district court judge’s daily calendar, and Judge Dale A. Kimball of the District of Utah intimated as much when interviewed for this piece. This judicial profile sums up, to the extent summary is possible, the character of Judge Kimball’s more than 16 years of judicial service. Having practiced enough in Judge Kimball’s court to know that, as the saying goes, “the menu is not the meal,” I stick with facts and stories, some rather well-known to regular practitioners in Utah’s federal court, some less so, to attempt to do justice to Judge Kimball, to offer a flavor of his career, laying out a menu for those who have not had the pleasure of regularly participating in the meals. We begin with a few courses.

One confirmed story that might sound apocryphal in the telling involves a civil matter in which a law firm partner presenting argument in a summary judgment hearing inadvertently handed to Judge Kimball an exhibit that included a note to the partner from an associate that read: “Remember, this is Judge Kimball. Speed is key.” Embarrassed upon realizing the possible faux pas, the partner apologized to Judge Kimball straightaway and stated that he would address the issue immediately with his associate. In short, like many a modern partner may be tempted, he threw the associate under the bus. Without missing a beat, Judge Kimball replied that the partner should consider raising the associate’s salary, as he had given the partner invaluable advice. An avid admirer of Shakespeare, Judge Kimball’s sensibility



and advice is perhaps seasoned by Hamlet’s observations: “Brevity is the soul of wit” and “More matter, with less art,” both surely good pieces of advice to all counsel, especially those who are prone to fancy their own rhetoric (though admittedly somewhat ignored here in the interests of completeness and full accounting).

Another tale, sounding similarly legendary but similarly confirmed, relates to the time soon after another federal judge in Salt Lake, Hon. Clark Waddoups, took the bench. Judge Waddoups approached his more tenured colleague,

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Judge Kimball, and asked him if the judicial duty of sentencing those convicted of federal crimes became easier with time. Always quick in reply, Judge Kimball told his friend and colleague that it was a sure sign that one should leave the bench if the task ever seemed to become easier. Shakespeare again comes to mind: “Forbear to judge, for we are sinners all.” As does Justice Holmes’s famous admonition on sentencing: “Beware how you take away hope from another human being.”

Finally, consider an exchange I witnessed myself. During the prosecution of Brian David Mitchell, a witness on the stand was speaking of Mitchell’s time in Idaho, years before Elizabeth Smart’s abduction, and related that Mitchell had the reputation—believed by some, doubted by others, and fostered by Mitchell himself—of having the power to cure animals of ailments by a laying-on of hands. As I asked the witness if it was well-known in the community that Mitchell believed he had these powers, three of the five prosecutors at counsel table rose to enter a hearsay objection. Judge Kimball called a quick sidebar, and four of us approached. I responded that I was attempting to establish grounds for an insanity defense, not a “divinity” defense, and that the witness’s testimony was directly relevant to the possible state of Mitchell’s mind but was not offered for the truth of the matter asserted—that Mitchell indeed had the ability to heal animals by touch. Customarily quick on evidentiary rulings, Judge Kimball smiled (and seemed to quietly chuckle) and after taking the bench announced the hearsay objection was overruled, and we proceeded, though the testimony was limited to whether Mitchell appeared to operate as if he believed he was divine, not whether he actually possessed divine powers, a point which counsel avoided altogether at the government’s astute insistence.

These three stories—and others could certainly offer many more—demonstrate several things that seem central to Judge Kimball’s approach to his office: a respect for straightforward argument; a generous sense of humor and appreciation for the sometimes entertaining serendipity inherent in every hearing, neither of which takes away from the seriousness or dignity of the proceedings in his court; an even-handed treatment of those who are not frequent practitioners in his court; a generous respect for all lawyers, seasoned or less so; and a similarly egalitarian treatment of all litigants who appear before him. In short, he’s fair to all regardless of station, training, and personal history.

Some might speculate that this democratic quality of his judicial demeanor may have come to him organically. Born Nov. 28, 1939, Judge Kimball grew up on a dairy farm in Draper, Utah, and worked in the fields where his family grew alfalfa, sugar beets, and grain. He continued to work on the family farm throughout his schooling, including his time in law school.

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cows and a house with unhappy parents. In this respect, his attentive work as a youngster appears to have continuing influence on the pragmatics of how he manages the matters in front of him. Judge Kimball has remarked on the importance of working hard, working intelligently, and finishing tasks on time—qualities certainly appreciated by all litigants. Judge Kimball is well-known for making well-reasoned rulings in a timely fashion.

Judge Kimball first became interested in law while taking a commercial law class from E.L. Crawford at Jordan High School. He recalls that the class opened a fascinating new world for him. Inspired by the resolution of conflicts the class covered, he began reading on his own about lawyers and the lives they led. It seemed to him that law practice offered an intellectually challenging career that could also benefit society. That is when he decided to become a lawyer.

After high school, he continued his intellectual distinction in college and graduated magna cum laude from Brigham Young University with a Bachelor of Science in political science and a minor in English. In 1967, he received his Juris Doctor from the University of Utah College of Law, graduating Order of the Coif and second in his class. While attending law school, he was a member of the Phi Kappa Phi fraternity and was the Case Note editor of the *Utah Law Review*.

No profile of Judge Kimball would be complete without mentioning his devotion to, and the support he receives from, his family. He has been married to his wife, Rachel, for more than 52 years, and they have six children, 24 grandchildren, and two great-grandchildren.

After admission to the Utah bar, his practice began quickly, and his reputation for accuracy, fairness, and efficiency also came quickly. He started his formal career at Van Cott, Bagley, Cornwall & McCarthy, then the largest firm in Salt Lake City. After seven years at Van Cott, Judge Kimball became a full-time law professor at BYU’s J. Reuben Clark Law School. Shortly thereafter, he reduced his teaching to part-time and co-founded the law firm now known as Parr Brown Gee & Loveless. While maintaining his private practice at his firm, he continued to teach part-time at BYU from 1976 to 1980. From 1975 until his appointment as a U.S. district judge in 1997, he maintained a full-time legal practice, primarily in commercial litigation. Judge Kimball reports that teaching law and writing articles have helped him as a judge, because the rigors of

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painstaking academic research and analytical thinking he experienced as a law professor are central to his judicial decision-making process. This is clear to litigants before him, as his decisions consistently seem informed by the inherent tension in the law of making sure that general principles are consistently applied to cases involving different facts.

On Sept. 4, 1997, President William J. Clinton nominated Kimball as a U.S. district judge for the District of Utah. Judge Kimball's nomination was confirmed by the U.S. Senate less than one month later, on Oct. 21, 1997. The following month, on Nov. 24, 1997, he was sworn in as a U.S. district judge. After 12 years as a full-time district court judge, Judge Kimball took senior status on Nov. 30, 2009. He maintained a full case load until Nov. 30, 2010, however. He currently maintains a 60 percent case load and has resumed teaching part-time at BYU Law School. It seems fair to say in retrospect that whether he knew so or not, President Clinton appointed in Judge

Kimball a fitting replacement for the beloved, late Judge David K. Winder. Judge Kimball shares Judge Winder's straightforward, pragmatic approach to the cases before him that is sensitive to the individuality of the litigants while dispassionately reaching a just result—the precious and necessary quality of any good judge.

These qualities have been recognized consistently throughout Judge Kimball's career on the bench and off. In 1996, Judge Kimball was honored by the Utah State Bar as the Distinguished Lawyer of the Year. In 2010, the Federal Bar Association, Salt Lake Chapter, named him the Judge of the Year. Judge Kimball is also a Fellow of the American Bar Foundation and has enjoyed serving among fellow lawyers and members of the community on many legal and commu-

nity boards throughout his career. As recognized in the awards and distinctions throughout his career, he brings an even-handed respect to cases, both high-profile and run of the mill. He has remarked often that there is no run-of-the-mill case, and it is clear to any marginally sentient litigant that, though he has come a long way from his rural beginnings, an egalitarian respect for the parties in front of him remains a core of his character. This is so even in cases that have attracted attention beyond the doors of his courtroom.

His judicial tenure has involved high-profile cases. At least two seem to stand out, though many could be added to the list: the Brian David Mitchell criminal trial, and another politically and culturally controversial civil case that

is locally referred to as the Main Street Plaza II case. The Mitchell case gained national attention; the Main Street II, case at least regional attention; both were highly charged cases for the state and local community and so put particular demands on the judge and presumably presented particular challenges. Having been counsel in one case and an interested member of the community in the other, I think it is fair to say that he was clearly up to the task in both.

After Brian David Mitchell was declared incompetent to stand trial in Utah state court for the alleged kidnapping of Elizabeth Smart, he and co-defendant Wanda Barzee were indicted by a federal grand jury for kidnapping and unlawful transportation of a minor. Because Mitchell's competency to stand trial was at issue, the court sent him to a federal medical facility for a mental evaluation. On Oct. 1, 2009, and Dec. 1–11, 2009, the court held an evidentiary hearing to determine whether Mitchell was competent to stand trial. The court heard testimony from several psychologists and psychiatrists, as well as Elizabeth Smart and many other witnesses who had interactions with Mitchell throughout his life. On March 1, 2010, the court issued a memorandum decision and order finding Mitchell competent to stand trial. The court then scheduled trial for Nov. 1, 2010. Because of extensive pretrial publicity of the case, Mitchell's counsel filed a motion to transfer venue to another district. Judge Kimball denied the motion after reviewing juror questionnaires filled out by hundreds of potential jurors. Judge Kimball's approach to empaneling a fair jury ensured that we had the most thoroughly vetted venire to be found in this venue.

After a five-week trial that proceeded on Nov. 1, 2010, and continued until Dec. 10, 2010, a jury found Mitchell guilty of both offenses. The trial focused mainly on Mitchell's insanity defense and required the jury to determine whether Mitchell was legally insane at the time of the offense. The trial also raised several First Amendment media-access issues that required rulings from the court throughout the proceedings. On May 25, 2011, Judge Kimball sentenced Mitchell to life in prison under the federal sentencing authority. Mitchell did not appeal. Although also declared incompetent in the state proceedings against her, Mitchell's co-defendant, Wanda Barzee, was subsequently declared competent to stand trial as a result of forced medication ordered by the state court, and she ultimately entered into a plea agreement with the federal government. Judge Kimball sentenced Barzee on Nov. 17, 2009, to 15 years in prison. Reasonable minds can disagree on difficult questions, but what remains completely clear is that Judge Kimball rendered well-reasoned and thoughtful decisions that deserve respect, as they are models for how a jurist should process difficult questions—and for that, Judge Kimball remained true to form.

At least one of the most contentious, or potentially socially divisive, cases over which Judge Kimball has presided is *Utah Gospel Mission v. Salt Lake City Corp.*, or what is commonly referred to as the Main Street II

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case. The lawsuit was the second round of a long-standing and divisive dispute pertaining to Salt Lake City's sale of a block of Main Street to the Church of Jesus Christ of Latter-day Saints (LDS). The first round of the dispute, which was handled by another judge in the district, involved the city's sale of Main Street Plaza and the city's reservation of a pedestrian easement through the plaza, while allowing the LDS church to control behavior and limit First Amendment activity on the plaza. On appeal, the Tenth Circuit Court of Appeals ultimately determined that the easement itself was a public forum for First Amendment purposes and that the city and church could not prohibit protected speech on the easement.

The Main Street II litigation challenged the constitutionality of the city's subsequent sale of the pedestrian easement to the LDS church. Through the sale, the LDS church secured the right to prohibit First Amendment activity on the Main Street Plaza and, in exchange, the city obtained 2.125 acres of LDS church-owned property in the Glendale neighborhood of the city, payment of half the attorneys' fees awarded against the city in the previous litigation, and \$5 million in cash and land from the Alliance for Unity. In total, the city obtained more than \$5.375 million in land and cash in exchange for the easement, which had been valued at \$500,000.

In the lawsuit, plaintiffs argued that the mayor's decision to sell the easement was brought about by the undue influence of the LDS church. The city and the LDS church, on the other hand, argued that the mayor proposed a compromise that, among other things, would bring many secular benefits to the city, including obtaining land and cash valued at more than \$5.375 million, putting to rest the legal battles between the city and the LDS church and helping to heal the wounds of a city divided along religious lines. The specific issues in this case were whether the sale of the easement: (1) violated plaintiffs' rights to freedom of expression and assembly under the First and 14th amendments to the U.S. Constitution and (2) constituted an improper establishment of religion under the First and 14th amendments to the U.S. Constitution and Article I, Section 4, of the Utah Constitution.

Judge Kimball dismissed both claims, finding that the property at issue had become an entirely private, church-owned plaza devoid of any government property interests that could create a public forum. The court determined that the free-speech guarantees of the First and 14th amendments did not apply to the plaza or to the now-extinguished easement. The court also found that plaintiffs had not stated a claim under the Establishment Clause, finding that the sale of the easement to the LDS church, even assuming that it was partially motivated by the religious purposes of those involved, served a reasonable secular purpose. Given the facts of the case, the court held that plaintiffs had failed to allege that the city's actions had the principle or primary effect of advancing or endorsing religion, because a reasonable observer would not view the decision to sell the easement as communi-

cating a message of government endorsement of the LDS church. In addition, the court determined that plaintiffs had failed to adequately allege that the sale of the easement created excessive entanglement between the city and the LDS church. If anything, the court found, the sale actually eliminated the likelihood of excessive entanglement. Finally, the court held that when the city merely elected one of two choices presented by the Tenth Circuit of Appeals in Main Street I, it could hardly be said that the reason for the city's decision was to promote or endorse the LDS church. The Tenth Circuit Court of Appeals subsequently affirmed Judge Kimball's decision.

Judge Kimball exhibits a common quality in every case before him. No matter how contentious the litigation, Judge Kimball moves decisively and constantly toward providing resolution to the case. Judge Kimball understands the tension between the court as a legal institution and the court as a cultural institution and does what every judge should: brings the dispute to resolution in as just, as efficient, and as equitable a manner as possible.

Any account of Judge Kimball's tenure on the bench would be incomplete if it did not note that Judge Kimball has two very experienced career law clerks who are accomplished lawyers in their own right. Anne Whitehead Morgan has clerked for 15 years with Judge Kimball and plans to continue with the court for the foreseeable future. For almost six years before joining Judge Kimball, Morgan practiced with Parsons Behle & Latimer. Fellow clerk Susie Inskeep Hindley practiced with Holland & Hart for nearly four years before joining Judge Kimball in 2001. Judge Kimball notes that he intentionally hires experienced lawyers as his full-time clerks because, even with his egalitarianism, he pragmatically understands that new lawyers "don't know anything yet."

He has surely learned this from the experiences at least partially covered here. Judge Kimball himself has said that he believes that the best judges are nonideological. In other words, they have no ax to grind. At the same time, he believes that people with strong political views can still be good judges so long as they set aside their political views when making decisions, and he pragmatically leaves the opinions of whether he does so up to others, as he understands the court of public opinion is another venue with standards unpredictable. While Judge Kimball never had trouble making decisions, he does not believe that delaying even a difficult ruling is fair to the parties. He is dedicated to the principle that parties are entitled to a decision within a reasonable time. By issuing prompt decisions, Judge Kimball believes that parties can then decide whether to drop the matter, settle the matter, or pursue an appeal. Judge Kimball also feels that he has no obligation to persuade parties to settle cases. He believes he was hired to hear cases and decide them. Litigants before him understand this all too well, and when they are in his courtroom, they feel the comfort and anxiety of practicing before a lawyer's lawyer and a judge's judge. ☺