

1998

In the matter of the estate of Welby J. Van Dyke : Brief of Appellee

Utah Court of Appeals

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Michael Gottfredson; Marsden, Cahoon, Gottfredson, and Bell; Leon Van Dyke, Karl Van Dyke, Newell Van Dyke, Neta Topham, Jeanine Poole, Richard Van Dyke, Ronald Van Dyke; Marvin Bagley, Judy LeFevre, Rene Van Dyke, Albert Van Dyke.

Charles A. Schultz; Attorney for Joe Van Dyke .

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF THE)
ESTATE OF WELBY J.) BRIEF OF APPELLEES
VAN DYKE,)
) Priority of Argument: 15
Deceased)
) Case No. 980237-CA

This is an appeal from an order of the Sixth District Court of Wayne County, Judge Louis G. Tervort presiding, denying Joe Van Dyke's Motion to Avoid Transfer of Property to Rene Van Dyke and Albert Van Dyke.

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Albert Van Dyke

PARTIES TO THE APPEAL

Appellant.

Appellant is Joe Van Dyke ("Joe"), a son of decedent Welby J. Van Dyke.

Appellees.

Appellees are Leon Van Dyke ("Leon"), Karl Van Dyke ("Karl"), Newell Van Dyke ("Newell"), Neta Topham ("Neta"), Jeanine Poole ("Jeanine"), Richard Van Dyke ("Richard"), Ronald Van Dyke ("Ronald"), Judy LeFevre ("Judy"), Rene Van Dyke ("Rene") and Albert Van Dyke ("Albert"). Appellees are ten of the eleven children of decedent Welby J. Van Dyke.

Leon, Karl and Richard are the formally appointed Personal Representatives of the Estate.

Judy, Rene and Albert are the previous informally appointed Personal Representatives of the Estate.

Judy, Rene and Albert were not represented by counsel at the time Joe filed his Motion to Set Aside Transfers and did not file an opposing memorandum. They are nevertheless proper parties to this appeal because the motion that is the subject of this appeal is directed at their actions. Indeed, Joe lists them as parties in Appellant's Brief.

Leon, Karl, Newell, Neta, Jeanine, Richard and Ronald are not listed as parties in Appellant's Brief but are nevertheless proper parties to this appeal. They filed an objection memorandum to Joe's motion and were represented by counsel who argued on their behalf at the hearing on the motion.

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IN THE UTAH COURT OF APPEALS

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Appellees respectfully submit the following Brief of Appellees. For the reasons stated herein, Appellees request that the judgment of the Trial Court be affirmed in its entirety.

JURISDICTION OF THE COURT

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Sections 78-2-2 (3) (j), and 78-2-2 (4), Utah Code Annotated, 1953 as amended, and Rule 3, Utah Rules of Appellate Procedure.

NATURE OF THE PROCEEDINGS

This is an appeal by appellant Joe Van Dyke from an order of the Sixth District Court of Wayne County, Judge Louis G. Tervort presiding, denying Joe's Motion to Avoid Transfers of Estate Property to Rene and Albert. Appellant states in the title page to his brief that he is also appealing from the order formally appointing Leon, Richard and Karl as Personal Representatives of the Estate of Welby J. Van Dyke. However, the issue framed in the Brief of Appellant is limited to the refusal of the Trial Court to avoid the transfer of estate property. (Brief of

Appellant, 2, 3, 8).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether the trial court erred by denying Joe's Motion to avoid transfers of estate property to Rene and Albert.

STANDARD OF APPELLANT REVIEW

Issues of Law.

The appellant court decides matters of law for itself and does not defer in any degree to the trial judge's determination of law. (State v. Pena, 869 P.2d 932, 933, (Utah 1994))

**CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCE, RULES AND REGULATIONS**

Section 75-3-701, Utah Code Annotated, 1953, describes the duties and powers of the personal representative in pertinent part as follows:

The duties and powers of a personal representative commence upon his appointment....

Section 75-3-703, Utah Code Annotated, 1953, in pertinent part provides:

(1) A personal representative is a fiduciary who shall observe the standard of care applicable to trustees as described by Section 75-7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

(2) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An

order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administrator proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights or claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent as described elsewhere in this code.

Section 75-3-704, Utah Code Annotated, 1953 provides that a personal representative shall proceed without court order as follows:

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court but may invoke the jurisdiction of the court in proceedings authorized by this code to resolve questions concerning the estate or its administration.

Section 75-3-712, Utah Code Annotated, 1953, as amended provides as follows:

Any sale or encumbrance to the personal representative, his spouse, agent, or attorney or any corporation or Trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate, except one who has consented after fair disclosure, unless:

- (1) The will or a contract entered into by the decedent expressly authorized the transaction; or
- (2) The transaction is approved by the Court after notice to interested persons.

STATEMENT OF THE CASE

Proceedings of the Case.

Rene, Albert and Judy are three of the eleven children of

Decedent and were nominated to be Personal Representatives in Decedent's Last Will and Testament. (Decedent's Will, Section 1; Addendum to Appellee's Brief, 14).

On February 14, 1996, Rene, Albert and Judy were appointed Personal Representatives of the Estate of Welby J. Van Dyke. (Addendum to Appellee's Brief, 27). Letters Testamentary were issued the same day. (Addendum to Appellee's Brief, 29).

In December, 1996, Rene, Albert and Judy transferred Estate real property to the Welby J. Van Dyke Family Trust. (Addendum to Appellee's Brief, 30-35).

On July 25, 1997, Joe filed a Motion to Avoid Transfers of Property and Equipment. (R. 80-81). Joe requested the Court to avoid the sale of 80 acres of real property to Rene and the transfer of property to Albert.

Disposition of Motions By Trial Court.

On November 5, 1997, District Court Judge Louis G. Tervort entered an Order Granting Petition for the Formal Appointment of Will and Formal Appointment of Personal Representative and Order Denying the Motion of Joe Van Dyke to Avoid Transfer. (Addendum to Appellee's Brief, 36).

STATEMENT OF FACTS

1. On February 6, 1980, Welby J. Van Dyke executed his last Will and Testament ("Will"). The Will nominated Rene, Albert and Judy as Personal Representatives. (Decedent's Will, Section 1; Addendum to Appellee's Brief, 14)

2. On February 6, 1980, Welby signed the Welby J. Van Dyke

Family Living Trust Agreement ("Trust Agreement"). The Trust Agreement names Rene, Albert and Judy as Co-Trustees and provides that each of decedent's eleven children are to receive a full equal share of the trust's assets. The Trust Agreement also provides that each share shall be distributed to each child free and clear of trust. Specifically, the Trust Agreement states in relevant part:

Provided, further, however, Settlor's sons RENE VAN DYKE, ALBERT VAN DYKE and JOE VAN DYKE may take their share in the form of agricultural assets including but not limited to real estate, livestock and equipment. If Settlor's sons' shares are not large enough to accommodate all of such agriculture assets, Settlor's sons may purchase said agricultural assets from Settlor's other children for an amount equal to the fair market values determined in the Federal Estate Tax proceeding occurring on Settlor's death.... In the event of such a purchase, Settlor's sons may deliver a promissory note or notes payable to Settlor's other beneficiaries. The note or notes shall be paid in equal annual installments over a period not to exceed thirty (30) years with no interest. In the event of a calf crop failure, draught, disaster, or financial recession, or any other event which might be termed a catastrophe, or beyond the control of Settlor's sons RENE VAN DYKE, ALBERT VAN DYKE and JOE VAN DYKE, he or they may be excused from making said payments and the agreement shall be continued for one (1) additional year so that he or they can proceed with the purchases contemplated by this provision; and while it is contemplated by the terms of this agreement that this special limitation will be invoked only one year at a time, there is no intention to limit the number of times that this provision can be invoked, provided that the operation is at a loss. (Trust Agreement, Section 4.20; Addendum of Appellee's Brief, 20).

3. Rene, Albert and Judy were appointed Informal Personal Representatives on February 14, 1996. (Letters Testamentary; Addendum to Appellee's Brief, 29).

4. On December 13, 1996, Judy, Rene and Albert, as Personal Representatives of the Estate, quit claimed to the Welby

J. Van Dyke Family Trust ("Trust") with Judy, Rene and Albert as co-Trustees, 26.12 acres, 80 acres and 1.2 acres of real estate located in Wayne County, Utah. The three deeds were recorded January 23, 1997. (Addendum to Appellee's Brief, 30-35).

5. Appellant claims that Rene and Albert transferred the property to the Trust and then transferred certain property to themselves. The facts are that Rene, Albert and Judy as Personal Representatives of the estate transferred property to the Trust and the Trust (acting through all three as Trustees) transferred property of the Trust to Rene, Albert and Joe, in accordance with the terms of the Trust. (Addendum to Appellee's Brief, 5, 30-35).

6. On July 25, 1997, Joe filed a Motion to Avoid Transfer of Property and Equipment. Joe's Motion was filed seven months after the Personal Representatives transferred the real estate to the Trust and three months after Joe agreed to pay for the agricultural property he received from the Trust.

SUMMARY OF ARGUMENT

THE TRIAL COURT CORRECTLY REFUSED TO AVOID THE TRANSFER OF PROPERTY TO RENE AND ALBERT

The transfer of property by the Personal Representatives from the estate to the Trust does not violate Section 75-3-712 because the transfer was authorized by the Will and Trust Agreement. The Personal Representatives specifically followed Utah law and Decedent's Will when they transferred the property to the Trust.

The transfer of the property from the Trust to its

beneficiaries is not a matter that was before the trial court. It is not before the appellate court.

The Personal Representatives distributed the property to the Trust. The distribution was not a sale or transaction as is required for Section 75-3-712 to make the transaction voidable.

ARGUMENT

THE TRIAL COURT CORRECTLY REFUSED TO AVOID THE TRANSFER OF PROPERTY TO RENE AND ALBERT

Point 1. The Transfer of property was expressly authorized by the Will and Trust Agreement.

Joe claims the trial court erred by failing to avoid the transfer of property from the decedent's estate to the Trust because the personal representatives of the estate at the time had an interest in the transactions. Joe claims the existence at a "per se conflict of interest" which he asserts violates Section 75-3-712 Utah Code Ann. However, because the terms of the Will and the Trust instructed the personal representatives and trustees to make the transfers, there is no violation of Section 75-3-712. The trial court correctly denied Joe's motion to avoid the transfers.

Under the express terms of Section 75-3-712 a transfer of property to a personal representative is not voidable if "The will or a contract entered into by the decedent expressly authorized the transaction." The decedent's Will in this case directed that his "personal and household effects of a tangible personal property nature" be distributed in equal shares to his eleven children. The Will further provided:

I give the remainder of my residuary estate to RENE VAN DYKE of Lyman, Utah, ALBERT VAN DYKE of Lyman, Utah and JUDY LeFEVRE of Granger, Utah, or their successor, as Co-Trustees of that certain trust designated as the Welby J. Van Dyke Family Living Trust established February 6, 1980, of which I am the settlor and the aforementioned RENE VAN DYKE, ALBERT VAN DYKE and JUDY LeFEVRE are Co-Trustees. I direct that the remainder of my residuary estate shall be held, administered, and distributed as a part of that trust according to the terms of that trust....(will, section 5.20; Addendum to Appellee's Brief, 15; emphasis added).

Because the express terms of the Will instructed Rene, Albert and Judy to transfer the estate's assets to the Trust, the transactions are not voidable. Their duties and powers commenced upon their appointment. (Section 75-3-701, Utah Code Ann.). The Personal Representatives were duty bound to expeditiously and efficiently transfer the estate's assets to the Trust. The Utah Probate Code mandates that personal representatives distribute assets of the estate according to the terms specified in a decedent's will. Section 75-3-703(1), Utah Code Ann., states in pertinent part:

A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interest of the estate. (Emphasis added).

Section 75-3-704, Utah Code Ann., states in pertinent part:

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court....

By transferring the assets to the Trust, the personal representatives simply followed the decedent's instructions in his Will. Had they not done so they would have violated their

statutory duties. The trial court correctly denied Joe's Motion to Avoid Transfers. The appeal of Appellant is without merit.

Likewise, the trustees of the Trust performed as instructed by the terms of the Trust when they distributed trust assets to Rene, Albert and Joe. The Trust instructs an equal division of the Trust assets among the eleven children with the following provision:

Provided, further, however, Settlor's sons RENE VAN DYKE, ALBERT VAN DYKE and JOE VAN DYKE may take their share in the form of agricultural assets including but not limited to real estate, livestock and equipment. If Settlor's sons' shares are not large enough to accommodate all of such agricultural assets, Settlor's sons may purchase said agricultural assets from Settlor's other children for an amount equal to the fair market value determined in the Federal Estate Tax proceeding occurring on Settlor's death....In the event of such a purchase, Settlor's sons may deliver a promissory note or notes payable to Settlor's other beneficiaries. The note or notes shall be paid in equal annual installments over a period not to exceed thirty (30) years with no interest. (Trust Agreement, Section 4.20; Addendum of Appellee's Brief, 20)

The Will and Trust Agreement expressly authorized the transfers of assets from the estate to the Trust and from the Trust to Rene, Albert and to Joe. Because the transfers were expressly authorized by "The Will or a contract entered into by the decedent" there is no "per se conflict of interest". Joe is not entitled to avoid the transfers. Joe does not object to, and did not attempt to avoid, the transfers of agricultural assets from the Trust to himself. Joe's motion was without merit and the trial court did not err when it denied the motion.

Point 2. Appellant's Complaints against the trust are not proper in this action.

Decedent specified in his Will that the Trust not become

subject to the jurisdiction of the probate court. The Will states:

It is my intention not to create a separate Trust by this Will not to subject the Welby J. Van Dyke Family Living Trust nor the property added by this Will to the jurisdiction of the probate court. (Decedent's Will, Section 5.20, Addendum of Appellee's Brief. 15-16).

The Personal Representatives followed the instruction given by Decedent in the Will and distributed the estate's property to the Trust. What happened to the property thereafter is a matter that is not the subject of the probate action. Jurisdiction over the Trust was not invoked at the trial court level and is not properly before the court in this appeal.

Point 3. Section 75-3-712, UCA, 1953 does not apply because there was no sale or transaction made by the Personal Representatives.

Section 75-3-712 provides as follows:

Any sale or encumbrance to the personal representative, his spouse, agent, or attorney or any corporation or Trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate, except one who has consented after fair disclosure, unless:

- (1) The will or contract entered into by the decedent expressly authorized the transaction; or
- (2) The transaction is approved by the Court after notice to interested persons.

Distribution of Decedents Estate property to Decedents Trust in accordance with the provisions of Decedent's Will is not a sale or a transaction. It is a distribution authorized by Decedent's will. Rene, Albert and Judy simply distributed the Trust assets in accordance with the authorization granted to them by the Trust. Joe complains that Rene and Albert were interested

parties with regard to the agricultural assets. Joe fails to acknowledge, however, that Judy had no interest in the agricultural assets and was an independent personal representative and trustee who distributed property from the estate to the Trust and from the Trust to the beneficiaries Rene, Albert and Joe.

CONCLUSION

For reasons set forth above Appellees respectfully request that the Court affirm the order of the Trial Court in its entirety.

Respectfully submitted this 11th day of September, 1998.

MARSDEN CAHOON GOTTFREDSON & BELL, LLC

J. Michael Gottfredson
Attorney for Certain Appellees

Marvin D. Bagley
Attorney for Certain Appellees

CERTIFICATE OF MAILING

I, the undersigned, certify that on 11th day of September, 1998, I served a copy of the attached BRIEF OF APPELLEES, Case #980237-CA, upon Charles A. Schultz, counsel for the Appellant in this matter by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Charles A. Schultz
P.O. Box 526382
Salt Lake City, Utah 84152-5636

ADDENDUM TO BRIEF OF APPELLEES

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LAST WILL AND TESTAMENT

OF

WELBY J. VAN DYKE

I, WELBY J. VAN DYKE, a resident of Lyman, Utah, being of sound and disposing mind, and not acting under duress, menace, fraud or undue influence of any person whatsoever, do make, publish and declare the following to be my Last Will and Testament, and I hereby revoke all previous wills and codicils which I have heretofore made.

1. Appointment. I appoint RENE VAN DYKE of Lyman, Utah, ALBERT VAN DYKE of Lyman, Utah, and Judy LeFevre of Granger, Utah, as personal representatives without bond of this will and my estate. If any of the individuals named as personal representatives fails to serve for any reason at any time, the remaining individuals shall continue to serve.

2. Thirty-Day Survivorship. In determining beneficiaries of this will, a beneficiary shall be deemed to have survived me, any other person, a point in time, or an event, as the case may be, only if such survivorship is for at least thirty (30) days. Provided, however, the preceding sentence shall not apply in any case where its application would cause any otherwise valid provision of this will to be void because of the rule against perpetuities, the rule limiting suspension of the power of alienation, the rule against accumulations, or any similar rule.

3. Gift of Personal Effects. I give all my personal and household effects of a tangible personal property nature, such as jewelry, clothing, furniture, silver, books and pictures, and all insurance policies thereon plus proceeds therefrom in equal shares to my eleven (11) children: LEON VAN DYKE, KARL VAN DYKE, NEWELL VAN DYKE, NETA TOPPHAN, JUDY LEFEVRE, JEANINE POOL, RONALD VAN DYKE, RICHARD VAN DYKE, RENE VAN DYKE, ALBERT VAN DYKE, and JOE VAN DYKE. If any of my children named above shall not be

W. J. V.

then surviving, his or her share shall pass to his or her issue per stirpes and not per capita. But if none of my issue survives me, said property shall be part of my residuary estate.

Any tangible personal property of a business or investment nature, such as office files, cattle, trucks and other such items broadly construed, shall not be governed by this paragraph but shall be part of my residuary estate.

4. Residuary Estate. "My residuary estate" means all my real and personal property, whether community or separate and wherever situated, which I may own at my death (excluding property over which I may have a power of appointment) and which I have not disposed of by other paragraphs of this Will. I give all my residuary estate as follows:

4.10. Debts and Taxes. My debts, administration expenses, funeral expenses, and all taxes payable by reason of my death shall be paid out of my residuary estate. Provided, however, my personal representative shall have the power to determine whether or not any or all of my secured debts shall be paid. Provided, further, however, all of the aforementioned debts, expenses, and taxes payable because of the taxability of any gifts in contemplation of death, retained life estates, transfers taking effect at death, revocable transfers, annuities joint tenancies, powers of appointment, life insurance proceeds, or other nonprobate assets shall be paid proportionately by the recipient of such assets and that any of the said hereinbefore described taxes payable because of the taxability of any part of my probate estate shall be paid out of my residuary estate; subject to one exception: The recipients of life insurance proceeds and power of appointment property shall pay their share of federal estate taxes as provided by federal law.

5.20. Remainder of Residuary Estate Poured Over Into Living Trust. I give the remainder of my residuary estate to REN VAN DYKE of Lyman, Utah, ALBERT VAN DYKE Of Lyman, Utah, and JUDY

W. G. V.

LeFEVRE of Granger, Utah, or their successor, as Co-trustees of that certain trust designated as The Welby J. Van Dyke Family Living Trust established February 6, 1980, of which I am the Settlor and the aforementioned RENE VAN DYKE, ALBERT VAN DYKE and JUDY LeFEVRE are Co-trustees. I direct that the remainder of my residuary estate shall be held, administered, and distributed as a part of that trust according to the terms of that trust and any amendments made to it prior to my death. It is my intention not to create a separate trust by this will nor to subject The Welby J. Van Dyke Family Living Trust nor the property added by this will to the jurisdiction of the probate court.

I, WELBY J. VAN DYKE, the testator, sign my name to this instrument this 6th day of February, 1980, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and that I will sign it willingly, that I execute it as my free and voluntary act for the purposes expressed in it, and that I am eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

Welby J. Van Dyke
 WELBY J. VAN DYKE, Testator

We, GREGORY L. SEN and Stanley J. Morrell

the witnesses, sign our names to this instrument of writing consisting of this and three (3) other pages, being first duly sworn and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his Last Will and that he signs it willingly, and that each of us, in the presence and hearing of the testator and of each other, hereby signs this will as witness to the testator's signing, and that each of us signs this will at the request of the testator, and that to the best of our knowledge the testator is eighteen (18) years of age or older, of sound mind, and under no constraint or undue

W. J. D.

influence.

Gregory L Seal Stanley D. Merrill
Witness Witness

SANDY UTAH Taylorville Utah
Address Address

STATE OF UTAH)
(ss.
COUNTY OF SALT LAKE)

Subscribed and sworn to, and acknowledged before me by
WELBY J. VAN DYKE, the testator, and subscribed and sworn to
before me by Gregory L Seal and Stanley D Merrill
witnesses, this 6 day of FEB 1980.

Gregory L Seal
Notary Public
Residing at: SANDY, UTAH

My commission expires:
SEPT. 29, 1981

W. J. V. D. M.

THE WELBY J. VAN DYKE

FAMILY LIVING TRUST

THIS TRUST AGREEMENT is executed this 6th day of February, 1980, between WELBY J. VAN DYKE of Lyman, Utah, hereinafter called "Settlor", and RENE VAN DYKE of Lyman, Utah, ALBERT VAN DYKE of Lyman, Utah, and JUDY LefEVRE of Granger, Utah, as Co-trustees, sometimes hereinafter referred to by the singular designation "Trustee".

1. Trust Property. Settlor hereby declares that Settlor owns life insurance policies and/or annuity contracts listed in the signed schedule annexed hereto (and constituting a part hereof), that each such policy contemporaneously herewith is being made payable to Trustee as primary or contingent beneficiary, and that, except as might otherwise be provided on the signed schedule, said life insurance policies and/or annuity contracts contemporaneously are being delivered to the possession of the Trustee. All rights received by Trustee as a result of such beneficiary designation, including policy proceeds, shall constitute the trust property and shall be held in trust for the uses and purposes hereinafter expressed and subject to the conditions of the trust hereinafter provided. The trust property also shall include all property received as a beneficiary of Settlor's will; and all other assets presently or later transferred to the trust. Settlor reserves the right to Settlor or to any other person at any time, by deed, will, or otherwise, to add to the principal of the trust estate created herein and any property so added shall be held, administered, and distributed under the terms of this agreement.

2. Basically an Inter Vivos Revocable Unfunded Life Insurance Trust Which Also is Intended as a Pour-Over Will Receptacle. Basically, Settlor intends to create an inter vivos revocable unfunded life insurance trust. Settlor reserves the right (without the permission of trustee, any beneficiary, or any

other person) to revoke this trust in whole or in part by written instrument or other action clearly inconsistent with the continuance of all or a portion of this trust (such as a change of all or a portion of the life insurance policy beneficiary designations to someone other than Trustee). Settlor reserves the right (without the permission of any Trustee, any beneficiary, or any other person) to amend this trust in any manner whatsoever. As a part of the powers to amend or revoke the trust, Settlor, with respect to any life insurance policy, retirement contract or annuity, or similar asset, specifically reserves the power to change the beneficiary, to change the benefit option, to borrow on any cash value, to terminate any policy or contract, to receive dividends or other payments, and to exercise any other rights, powers, privileges, or options. In conjunction with this Trust, Settlor will hereafter or contemporaneously herewith execute a will which pours over certain assets to this Trust.

3. Trustee Resignations, Bond, Etc.

3.10. Trustee Resignations, Successors. If any of the individuals named as Co-trustees fails to serve as a Co-trustee for any reason at any time, the remaining individuals shall serve alone. A Co-trustee may resign by written notice to the income beneficiaries of the effective date, whereupon the remaining individuals shall continue to serve as heretofore declared.

3.20. No Bond or Other Security. No bond or other security shall be required of the original Trustee or any successors thereto. If, despite Settlor's directions, a bond is required by law insofar as it lies within Settlor's power, Settlor directs that no surety be required on such bond.

3.30. Compensation. Trustee or the successor trustee shall be compensated for services as such trustee at the then prevailing rates for similar services to estates and trusts of a similar nature and size.

manage, invest and reinvest the trust assets, and shall collect the income thereof and shall dispose of the net income and principal as follows:

4.10. Income to Settlor. During the lifetime of the Settlor, Trustee shall pay to the Settlor all of the net income at times fixed but at least as often as annually, and, if practicable, in regular monthly or quarterly periodical payments. In addition to the income, Settlor hereby expressly reserves and retains the right, at any time and from time to time, by a notice in writing signed by Settlor and delivered to the Trustee to withdraw such amounts from the principal of the Trust as Settlor may designate. In the event that Settlor becomes incapacitated, Trustee may use as much of the income and principal of the trust for the benefit of Settlor as Trustee determines shall be necessary for the support, care and maintenance of Settlor.

4.20. Family Trust. Upon the death of Settlor, the entire principal of the Family Trust shall pass as follows: Trustee shall divide the trust principal into as many equal shares as there are children of Settlor then living and children of Settlor then deceased having issue then living. The equal shares shall be allocated by Trustee as follows:

- (1) To each living child of Settlor--one (1) full equal share.
- (2) To each group composed of the living issue of a deceased child of Settlor--one (1) full equal share with the allocation to be in per stirpes shares.

Each share so allocated shall be distributed to him, her, or them free and clear of trust. Provided, further, however, Settlor's sons RENE VAN DYKE, ALBERT VAN DYKE and JOE VAN DYKE may take their share in the form of agricultural assets including but not limited to real estate, livestock and equipment. If Settlor's sons' shares are not large enough to accommodate all of such agricultural assets, Settlor's sons may purchase said agricultural

assets from Settlor's other children for an amount equal to the fair market value as determined in the Federal Estate Tax proceeding occurring on Settlor's death. In the event Settlor's sons desire to exercise the option to purchase contained herein, they shall give written notice to the other beneficiaries within ninety (90) days of the death of Settlor. In the event of such a purchase, Settlor's sons may deliver a promissory note or notes payable to Settlor's other beneficiaries. The note or notes shall be paid in equal annual installments over a period not to exceed thirty (30) years with no interest. In the event of a calf crop failure, drought, disaster, or financial recession, or any other event which might be termed a catastrophe, or beyond the control of Settlor's sons RENE VAN DYKE, ALBERT VAN DYKE and JOE VAN DYKE, he or they may be excused from making said payments and the agreement shall be continued for one (1) additional year so that he or they can proceed with the purchase as contemplated by this provision; and while it is contemplated by the terms of this agreement that this special limitation will be invoked only one year at a time, there is no intention to limit the number of times that this provision can be invoked, provided that the operation is at a loss. But if there be no living beneficiaries of the enumerated allocations, the principal of the trust shall be distributed to the person or persons who would be Settlor's heirs at law if Settlor had survived the termination of this trust, and then died, determined as of the date of such termination and according to the laws of Utah then in force respecting intestate succession.

5. Particular Instructions to Trustee.

5.10. Thirty-Day Survivorship. In determining beneficiaries of the trusts created herein, a beneficiary shall be deemed to have survived the Settlor, an insured, any other person, a point in time, or an event, as the case may be, only if such survivorship is for at least thirty (30) days. Provided, however,

this clause shall not apply in any case where its application would cause any provision of this instrument, which would otherwise be valid, to be void under any applicable rule against perpetuities, rule limiting suspension of the power of alienation, or other similar rule.

5.20. Mingling Separate Trusts. Trustee is authorized to mingle the properties of the separate trusts created by this trust, allotting to each separate trust an undivided interest in the mingled funds, which undivided interest always shall be equal to that trust's proportionate contribution (as adjusted from time to time as a result of accumulations of income, payments of principal, additions to principal, etc.) to the mingled funds. It is Settlor's intention that each trust beneficiary shall have a separate and distinct trust, and the provisions of this paragraph 5.20 are merely designed to permit Trustee to avoid a division in kind in accomplishing Settlor's intention.

5.30. Termination of Trusts. If at any time any separate trust has a principal of less than \$5,000 value, then Trustee shall deliver the entire principal to the separate trust beneficiary. If the beneficiary is not able to manage his or her affairs (in Trustee's sole discretion), then Trustee may, in Trustee's sole discretion, deliver the separate trust principal to the legal guardian of said beneficiary.

6. Trustee's Powers. Without regard to any legal restrictions otherwise applicable to trustees, the Trustee is authorized and empowered, in Trustee's sole and absolute discretion, to exercise the following discretionary powers as well as any other powers conferred by law, not inconsistent with other provisions of this trust:

6.10. To retain, whether originally a part of the trust estate or subsequently acquired, and to purchase or otherwise acquire and to retain, any property, whether or not such property is authorized for investment by law, or is unsecured, unproductive, or of a wasting nature, all without diversification as to kind and amount.

6.20. To transfer, sell, exchange, partition, lease, mortgage, create a security interest in, pledge, give options upon, or otherwise dispose of any property

at any time held by Trustee, at public or private sale or otherwise, for cash or other consideration or on credit, and upon such terms and conditions, with or without security, and for such price, as Trustee may determine.

6.30. To hold any part of the trust estate in cash or uninvested for any period deemed advisable.

6.40. To extend, modify, or waive the terms of any note and mortgage at any time forming part of the trust; to foreclose any such mortgage or take title to the property securing it by deed in lieu of foreclosure or otherwise; to protect or redeem any such property from forfeiture for nonpayment of taxes or other liens; and generally to exercise as to such bond and mortgage or such property all powers that an absolute owner might exercise.

6.50. To exercise any option, right, or privilege to convert bonds, notes, corporate shares, or other securities, or to subscribe for additional or other bonds, notes, corporate shares, or other securities; to make such conversions or subscriptions; to make payments therefor, and to advance or borrow money for the purpose of exercising any such option, right or privilege; and to hold as investments such bonds, notes, corporate shares, and other securities so acquired, notwithstanding that they are not of a character authorized for investments by law or by other provisions of this agreement.

6.60. To vote any corporate shares held by Trustee in person, through Trustee's designees, or by proxy, with or without power of substitution, and to execute authority or proxies to one or more designees or nominees.

6.70. To borrow money for any trust purpose and to pledge all or part of the trust estate to secure such borrowing, without incurring any personal liability therefor.

6.80. To pay, extend, renew, modify, or compromise, upon such terms as Trustee may determine, and upon such evidence as Trustee may deem sufficient, any obligation or claim, including taxes, either in favor of or against the trust estate.

6.90. To hold or register any securities or other property of the trust estate in the name of a nominee or in such form as to pass by delivery, with or without indicating the fiduciary character of such securities or other property.

6.91. To divide and distribute the trust estate in kind or in money, or partly in each, or by way of undivided interests, and for such purposes to value any property to be thus divided or distributed at fair market values at the date or dates of distribution.

7. Accounting by Trustee. The Trustee shall keep all accounts and records of the trusts created herein, and annually, or

oftener, shall render to the current income beneficiaries statements showing all receipts, disbursements, and distributions of both principal and income of the trust estate.

8. Spendthrift Clause. No interest of any beneficiary under any trusts created herein either in income or in principal shall be subject to pledge, assignment, sale, or transfer in any manner, nor shall any beneficiary have the power in any manner to anticipate, charge or encumber his interest, either in income or principal, nor shall such interest of any beneficiary be liable or subject in any manner for the debts, contracts, liabilities, engagements, or torts of such beneficiary.

9. Debts, Taxes and Expenses. Upon the death of the Settlor, the Trustee shall pay all debts, taxes and expenses including funeral expenses and last illness expenses resulting from the death of the Settlor, unless Settlor directs otherwise in Settlor's will. If any executor, administrator, or other person acting in a fiduciary capacity shall have paid any estate, inheritance, or succession tax upon or with respect to any or all of the trust estate required to be included in the gross estate of the Settlor, the Trustee shall reimburse such executor, administrator, or other person acting in a fiduciary capacity for the amount of such taxes unless Settlor directs otherwise in Settlor's will.

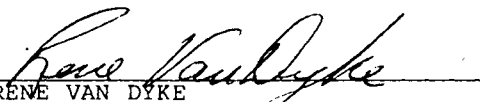
10. Situs. This Trust shall not take effect until the execution of this agreement by both the Settlor and the Trustee, and it shall be governed and construed in all respects according to the laws of the State of Utah.

11. Miscellaneous. The singular shall be interpreted as the plural, and vice versa, if such treatment is necessary to interpret this trust agreement in accord with Settlor's manifest intention. Likewise, if either the feminine, masculine, or neuter

gender should be one of the other genders, it shall be so treated.
The paragraph and subparagraph headings used herein are merely
indices for Settlor's own use and shall not be considered in the
interpretation of this trust agreement.

Signed the day and year first above written.


WELBY J. VAN DYKE
SETTLOR


RENE VAN DYKE


ALBERT VAN DYKE


JUDY LEFEVRE
CO-TRUSTEES

THE WELBY J. VAN DYKE

FAMILY LIVING TRUST

SCHEDULE OF LIFE INSURANCE AND OTHER ASSETS

<u>Company</u>	<u>Policy Number</u>	<u>Face Amount</u>
----------------	--------------------------	------------------------

SIGNED this 10 day of FEB, 1980.

WELBY J. VAN DYKE

SETTLOR

RENE VAN DYKE

ALBERT VAN DYKE

JUDY LeFEVRE

CO-TRUSTEES

Judy Lefevre
3718 Sunnyvale Drive
West Valley City, Utah
Telephone (801) 967-8830

FEB 14 1996

Jawn Nelson DEPUTY
CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY,
STATE OF UTAH

IN THE MATTER OF THE ESTATE)	
)	INFORMAL PROBATE OF WILL
OF)	AND APPOINTMENT OF
)	PERSONAL REPRESENTATIVES
WELBY J. VAN DYKE)	
)	
Deceased)	Probate Number: <u>96360002</u>

Upon consideration of the **Application for Informal Probate of Will and Informal Appointment of Personal Representatives**, filed by Rene Van Dyke, Albert Van Dyke and Judy Lefevre on February 2, 1996, the District Judge finds that:

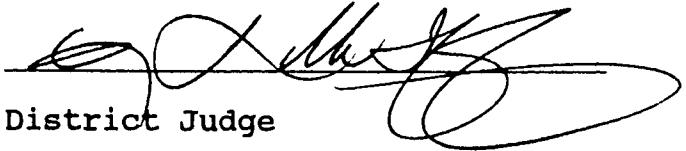
1. Any required notice has been given.
2. The application is complete and complies in all respects with the requirements of the Utah Uniform Probate Code.
3. The applicable time period within which no action on the application can be taken has elapsed.

THEREFORE,

1. The Will of the Decedent, dated February 6, 1980, is hereby informally probated.
2. Rene Van Dyke, Albert Van Dyke and Judy Lefevre are hereby informally appointed as **Personal Representatives** of the Decedent, to act without bond.
3. Upon qualification and acceptance, **Letters Testamentary**

shall be issued to the said Personal Representatives.

DATED this 14th day of February, 1996.


District Judge

Judy Lefevre
3718 Sunnyvale Drive
West Valley City, Utah
Telephone (801) 967-8830

WAYNE COUNTY
NO. 96-1001 FILED
FEB 14 1996
Judy Lefevre CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY,
STATE OF UTAH

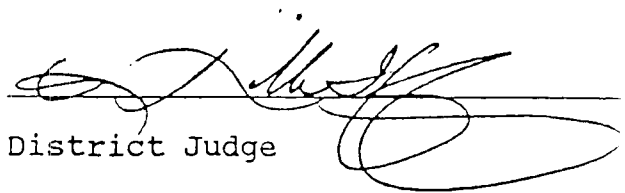
IN THE MATTER OF THE ESTATE)
)
 OF) LETTERS TESTAMENTARY
)
 WELBY J. VAN DYKE)
)
 Deceased) Probate Number: 96-1001

1. Rene Van Dyke, Albert Van Dyke and Judy Lefevre were duly appointed and qualified as Personal Representatives of the above named Decedent on the 14th day of February, 1996, by the District Judge with all authority pertaining thereto.

2. Administration of the estate is unsupervised.

These Letters are issued to evidence the appointment, qualification, and authority of said Personal Representatives.

WITNESS my signature and the Seal of the Court, this 14th day of February, 1996.


District Judge

COUNTY OF WAYNE :
: SS

STATE OF UTAH :
I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF WAYNE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND AND SEAL OF SAID COURT THIS
14th DAY OF February

126314

QUITCLAIM DEED

THIS QUITCLAIM DEED is executed this 13TH day of
DECEMBER, 1996.

KNOW ALL MEN BY THESE PRESENTS: Judy Lefevre, Rene Van Dyke, and Albert Van Dyke, Personal Representatives of the Estate of Welby J. Van Dyke of Wayne County, Utah according to instructions contained in the Last Will and Testament of Welby J. Van Dyke (dated the 6th day of February, 1980) do hereby remise, release and quitclaim unto the Welby J. Van Dyke Family Trust, dated the 6th day of February, 1980, Judy Lefevre, Rene Van Dyke, Albert Van Dyke, Co-Trustees forever all the rights, titles, interests and claims which the first party has in and to the following described parcel of land, and improvements and appurtenances thereto, in the County of Wayne, State of Utah to wit:

Commencing 220 feet north of the southwest corner of the northeast quarter of Section 9, Township 28 south, Range 3 east, Salt Lake Base and Meridian. Thence North 220.30 feet, thence North 89 degrees 28 minutes 58 seconds East 43.63 feet, thence North 0 degrees, 12 minutes, 34 seconds East 237.25 feet, thence North 89 degrees 28 minutes 58 seconds East 156.37 feet, thence North 246.45 feet, thence East 1120 feet, thence South 949 feet, thence West 1320 feet, thence North 14 feet, thence East 220 feet, thence North 220 feet, thence West 220 feet to the beginning. Containing 26.12 acres. (This is identified by Assessor's Parcel Number LY 109).

IN WITNESS WHEREOF, the Personal Representatives of the Estate of Welby J. Van Dyke have signed and sealed these presents.

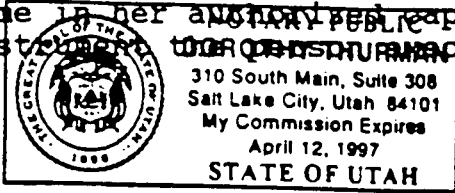
Judy Lefevre
Judy Lefevre, Personal Representative

CERTIFICATE OF ACKNOWLEDGEMENT

State of Utah)
County of Salt Lake)

On Dec 13, 1996 before me appeared Judy Lefevre, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to

the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument she executed the instrument.



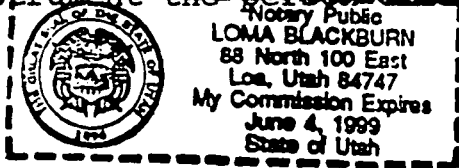
Dorothy Shurman Seal
Notary Public

Rene Van Dyke
Rene Van Dyke, Personal Representative

CERTIFICATE OF ACKNOWLEDGEMENT

State of Utah)
County of Wayne)

On Jan 10 1997, 1996 before me appeared Rene Van Dyke personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person executed the instrument.



Loma Blackburn Seal
Notary Public

Albert Van Dyke
Albert Van Dyke, Personal Representative

CERTIFICATE OF ACKNOWLEDGEMENT

State of Colorado)
County of Conejos)

On December 31, 1996 before me appeared Albert Van Dyke, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person executed the instrument.

Lois A. Weldon Seal
Notary Public

126315

QUITCLAIM DEED

THIS QUITCLAIM DEED is executed this 13TH day of DECEMBER, 1996.

KNOW ALL MEN BY THESE PRESENTS: Judy Lefevre, Rene Van Dyke, and Albert Van Dyke, Personal Representatives of the Estate of Welby J. Van Dyke of Wayne County, Utah according to instructions contained in the Last Will and Testament of Welby J. Van Dyke (dated the 6th day of February, 1980) do hereby remise, release and quitclaim unto the Welby J. Van Dyke Family Trust, dated the 6th day of February, 1980, Judy Lefevre, Rene Van Dyke, Albert Van Dyke, Co-Trustees forever all the rights, titles, interests and claims which the first party has in and to the following described parcel of land, and improvements and appurtenances thereto, in the County of Wayne, State of Utah to wit:

Commencing 68 rods North and 40 rods West of the southeast corner of the southwest quarter of Section 4, Township 28 south, Range 3 east, Salt Lake Base and Meridian. Thence West 16 rods, thence East 16 rods, thence south 12 rods to the beginning. Containing 1.2 acres. (Identified by Assessor's Parcel Number LY14)

IN WITNESS WHEREOF, the Personal Representatives of the Estate of Welby J. Van Dyke have signed and sealed these presents.

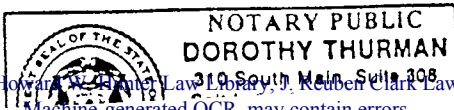
Judy Lefevre
Judy Lefevre, Personal Representative

CERTIFICATE OF ACKNOWLEDGEMENT

State of Utah }
County of Salt Lake }

On Dec 13, 1996 before me appeared Judy Lefevre, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in ****his authorized capacity, and that by her signature on the instrument the person executed the instrument.

Dorothy Thurman
Notary Public



Rene Van Dyke
Rene Van Dyke, Personal Representative

CERTIFICATE OF ACKNOWLEDGEMENT

of Utah)
of Wayne)

On Jan 12 1997, 1996 before me appeared Rene
yke personally known to me (or proved to me on the basis of
actory evidence) to be the person whose name is subscribed to
ithin instrument and acknowledged to me that he executed the
in his authorized capacity, and that by his signature on the
the ~~instrument~~ executed the instrument.



Notary Public
LONA BLACKBURN
88 North 100 East
Loa, Utah 84747
My Commission Expires
June 4, 1999
State of Utah

Lona Blackburn Seal
Notary Public

Albert Van Dyke
Albert Van Dyke, Personal Representative

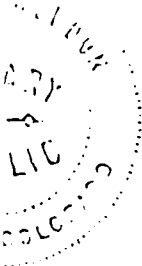
CERTIFICATE OF ACKNOWLEDGEMENT

of Colorado)
y of Conejos)

On December 31, 1996 before me appeared Albert
yke personally known to me (or proved to me on the basis of
actory evidence) to be the person whose name is subscribed to
ithin instrument and acknowledged to me that he executed the
in his authorized capacity, and that by his signature on the
ument the person executed the instrument.

Lois A. Weldon Seal
Notary Public

Commission expires 4/8/99



126316

QUITCLAIM DEED

THIS QUITCLAIM DEED is executed this 13TH day of
DECEMBER, 1996.

KNOW ALL MEN BY THESE PRESENTS: Judy Lefevre, Rene Van Dyke, and Albert Van Dyke, Personal Representatives of the Estate of Welby J. Van Dyke of Wayne County, Utah according to instructions contained in the Last Will and Testament of Welby J. Van Dyke (dated the 6th day of February, 1980) do hereby remise, release and quitclaim unto the Welby J. Van Dyke Family Trust, dated the 6th day of February, 1980, Judy Lefevre, Rene Van Dyke, Albert Van Dyke, Co-Trustees forever all the rights, titles, interests and claims which the first party has in and to the following described parcel of land, and improvements and appurtenances thereto, in the County of Wayne, State of Utah to wit:

The southeast quarter of the northwest quarter and the southwest quarter of the northeast quarter of Section 5, Township 28 South, Range 3 East of the Salt Lake Base Meridian containing eighty acres. (This parcel is identified as Assessor Parcel Number 0-289)

IN WITNESS WHEREOF, the Personal Representatives of the Estate of Welby J. Van Dyke have signed and sealed these presents.

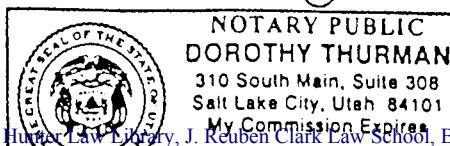
Judy Lefevre
Judy Lefevre, Personal Representative

CERTIFICATE OF ACKNOWLEDGEMENT

State of Utah }
County of Salt Lake }

On Dec 13, 1996 before me appeared Judy Lefevre, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person executed the instrument.

Dorothy Thurman
Notary Public



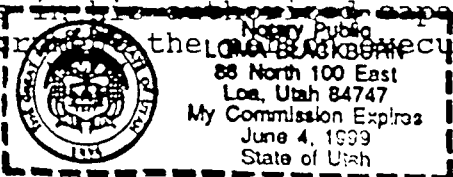
34

Rene Van Dyke
Rene Van Dyke, Personal Representative

CERTIFICATE OF ACKNOWLEDGEMENT

State of Utah)
County of Wayne)

On Jan 10 1997, 1996 before me appeared Rene Van Dyke, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person executed the instrument.



Lona Blackburn Seal
Notary Public

Albert Van Dyke
Albert Van Dyke, Personal Representative

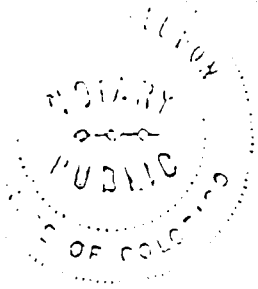
CERTIFICATE OF ACKNOWLEDGEMENT

State of Colorado)
County of Conejos)

On Dec 31, 1996 before me appeared Albert Van Dyke, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person executed the instrument.

Lori A. Weldon Seal
Notary Public

My commission expires 4/9/99



DISTRICT COURT, WAYNE COUNTY, UTAH

Loa, UT 84747

Telephone: 435-836-2731 Fax: 435-836-2479

IN THE MATTER OF THE ESTATE OF
WELBY J. VAN DYKE,

Deceased,

**ORDER GRANTING PETITION FOR
THE FORMAL APPOINTMENT OF
WILL AND FORMAL APPOINTMENT
OF A PERSONAL REPRESENTATIVE
AND ORDER DENYING THE MOTION
OF JOE VAN DYKE TO AVOID
TRANSFER**

Case No. 963600002

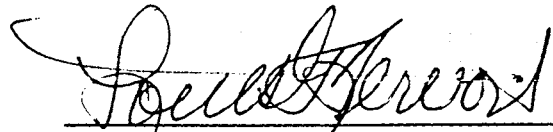
Assigned Judge: Louis G. Tervort

All of the children of Welby J. Van Dyke with the exception of Joe Van Dyke having joined with the petition filed with the Court on the 30th day of June, 1997 for the Formal Probate of Will and Formal Appointment of Personal Representative, and those same children having objected to the appointment of Joe Van Dyke as a personal representative, it is the Order of the Court that Leon Van Dyke, Carl Van Dyke and Richard Van Dyke be formally appointed Personal Representatives of the Estate of Welby J. Van Dyke to act and to serve without bond as provided by will.

It is the further Order of the Court that the Motion of Joe Van Dyke to Avoid Transfer of Property and Equipment is denied and that the Petition of Joe Van Dyke for the Formal Probate of the Will and Personal Representative is likewise denied.

ORDER GRANTING PETITION FOR THE FORMAL APPOINTMENT OF WILL AND
FORMAL APPOINTMENT OF A PERSONAL REPRESENTATIVE AND ORDER
DENYING THE MOTION OF JOE VAN DYKE TO , Case number 963600002, Page -2-

Dated this 5th day of November, 1997.



LOUIS G. TERVORT
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

On November 5, 1997 a copy of the above ORDER GRANTING PETITION FOR
THE FORMAL APPOINTMENT OF WILL AND FORMAL APPOINTMENT OF A
PERSONAL REPRESENTATIVE AND ORDER DENYING THE MOTION OF JOE VAN
DYKE TO was sent to each of the following by the method indicated:

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)	<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
Mr. Michael Gottfredson Attorney at Law 68 South Main - 5th floor Salt Lake City, UT 84101	<i>M</i>	Mr. Charles A. Schultz Attorney at Law P.O. Box 526382 Salt Lake City, UT 84152-6382	<i>M</i>

