

1993

In the Matter of the Estate of Donald Chad Husband v. Husband : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 930291-CA

IN THE UTAH COURT OF APPEALS

In the Matter of the Estate

of

DONALD CHAD HUSBAND

Deceased.

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Case No. 930291-CA

Priority No. 15

BRIEF OF APPELLANT

Appeal from Order Approving Payment of Attorney's Fees
and from the Estate Closing Order.

Honorable John A. Rokich, Judge

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FILED

Utah Court of Appeals

OCT 19 1993


Mary T. Noonan
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

In the Matter of the Estate :
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DONALD CHAD HUSBAND :
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Deceased. :

Case No. 930291-CA

BRIEF OF APPELLANT

JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2)(k).

ISSUES ON APPEAL AND STANDARD OF REVIEW

I.

Whether the Conder & Wangsgard claim for attorney's fees in the sum of \$37,820.81 was legally sufficient under Utah Code Ann. §75-3-804 and timely presented to the Personal Representative in compliance with Utah Code Ann. §75-3-803.

This is an issue involving a question of law which should be reviewed for its correctness with no particular deference to said ruling. Sims v. Utah State Tax Comm., 198 UAR 5 (1992). Any findings of fact upon which the said conclusions of law is based is to be determined by the clearly erroneous standard. State v. Sterger, 155 UAR 30 (1992).

II.

Whether the Court erred in allowing the re-redirect examination of Personal Representative Conder at the June 14, 1991 hearing.

This is an issue involving the mode and order of interrogation under Rule 611, Utah Rules of Evidence, and is reviewed on an abuse of discretion standard. State v. Holmes, 495 P.2d 312 (1972).

III.

Whether the Court erred in determining that only \$5,000.00 instead of \$11,550.00 in attorney's fees were incurred in prosecuting the claim of Conder & Wangsgard for attorney's fees in the sum of \$37,820.81.

This is an issue involving a question of law which should be reviewed for its correctness with no particular deference to said ruling. Sims v. Utah State Tax Comm., 198 UAR 5 (1992). Any findings of facts upon which the said conclusion of law is based is to be determined by the clearly erroneous standard. State v. Sterger, 155 UAR 30 (1992).

IV.

Whether the Court erred in failing to surcharge Personal Representative Conder for the interest not earned by his failure to deposit estate funds in an interest bearing account.

This is an issue involving a question of law which should be reviewed for its correctness with no particular deference to said ruling. Sims v. Utah State Tax Comm., 198 UAR 5 (1992). Any findings of fact upon which the said conclusion of law is based is to be determined by the clearly erroneous standard. State v. Sterger, 155 UAR 30 (1992).

CONSTITUTION, STATUTORY AND RULE CONSTRUCTION
THOUGHT TO BE DETERMINATIVE OF ISSUES

Utah Code Ann. Sections 75-3-803 and 804.
Rule 611(a), Utah Rules of Evidence

STATEMENT OF THE CASE

Ethyl Ashworth and Karen E. Husband, ex-wives of decedent and the parents and natural guardians, respectively, of Dylon C. Husband and Lindsey Husband, filed a petition for the minor children and heirs of Decedent for the informal appointment of Jerrald D. Conder as Personal Representative and for the informal probate of the intestate estate of Donald Chad Husband. (R.2-6) After approximately three months, Ethyl Ashworth, for Appellant, filed a petition to remove Jerrald D. Conder as Personal Representative for, among other things, the large claim for attorney's fees by Conder & Wangsgard incurred by Decedent prior to his death. (R.23-28) A hearing on the Petition to Remove was held on January 15, 1991 during the course of which a Stipulation was entered into relating to the handling of the case thereafter including the claim of Conder & Wangsgard for attorney's fees incurred by Decedent prior to his death. (R.184;190-194) Conder & Wangsgard filed a Petition to Approve Claim in the sum of \$33,248.75 for attorney's fees incurred by Decedent prior to his death together with interest thereon in the sum of \$4,572.06 for a total claim of \$37,820.81. (R.250-252) Appellant filed a Response to Petition for Attorney's Fees (R.269-272) and a Memorandum and an Amended Memorandum in Opposition to Petition for Approval of Claim for Attorney's Fees. (R.309-332;388-394)

Thereafter, an evidentiary hearing was held on the issue of the claim of Conder & Wangsgard for attorney's fees on June 14, 1991 (R.275;936-1059) and arguments of counsel were heard on July 29, 1991 (R.325), November 25, 1991 (R.366;1234-1406), and on January 21, 1992 (R.429;1307-1333) which resulted in Findings of Fact, Conclusions of Law and Order dated February 7, 1992, wherein Conder & Wangsgard was awarded \$34,038.81 on their claim. (R.431-438) Co-Personal Representatives filed a Petition for Approval of Final Settlement and Distribution (R.439-443) together with a Schedule of Distribution and a Stipulation for Approval for Final Settlement Distribution (R.444-446) to which was attached Exhibit A setting forth the attorney's fees of Conder & Wangsgard incurred during the probate of the estate. (R.447-452) Co-Personal Representatives also filed an Inventory and Final Accounting (R.456-460) and an Estate Recapitulation. (R.461-462) Appellant then filed a Petition to Surcharge Personal Representative Conder (R.464-479) and filed an Objection and an Amended Objection to the Petition for Approval of Final Settlement and Distribution. (R.484-488;527-528) Evidentiary hearings were held on June 23, 1992 (R.611-612;699-887) and on July 22, 1992 (R.628-629;1158-1223) and arguments of counsel were heard on August 20, 1992 (R.638;1542-1571) resulting in Findings of Fact, Conclusions of Law and Estate Closing Order. (R.672-688)

STATEMENT OF FACTS

On or about April 21, 1985 (Exh. 2, 6-14-91), Decedent and Jerrald D. Conder of Conder & Wangsgard, hereafter Conder, entered into an oral agreement whereby Conder and Wangsgard would

provide legal services to Decedent for \$105 per hour. (R.967,968;1024,1025) After legal services were commenced for Decedent on April 21, 1985, it became obvious that Decedent could not pay for the legal services on a regular basis and Decedent, who owned a construction company, would provide construction and remodeling services to the Conder & Wangsgard office as payment for legal services rendered. (R.970,971;975, 976)

On May 27, 1990, the date of Decedent's death, plans had been drawn for him to remodel the Conder & Wangsgard law offices which would provide cancellation of the amount incurred for legal services (R.970,971;975,976). The remodeling was never done due to the death of the Decedent.

On the night of the funeral, Conder organized a party for Decedent at the Hidden Valley Country Club which cost \$1,722.71 which Conder thought would be paid for by the estate of Decedent. (R.790-795; Exh. 9, 6-23-92) Conder thought so much of the service at the party that he left an additional \$50.00 tip. (R.792)

On June 11, 1990, four days before he was appointed Personal Representative, Conder entered into an agreement with Richard Marshall and Andy Johnson whereby they would continue to work for Decedent's construction company on behalf of the estate for an increased salary of \$700.00 per week each and one-half of all net profits earned until the final disposition of the business. (Exh. 5, 6-14-91; R.971-973)

Decedent died intestate and his heirs were two minor children, Appellant Dylon C. Husband, age 17, and Lindsey

Husband, age 9. (R.2-5) Ethyl Ashworth and Karen E. Husband, divorced wives of Decedent, were the parents and natural guardians of Dylan C. Husband and Lindsey Husband, respectively, and they petitioned the court on June 15, 1990 to have Conder informally appointed Personal Representative of the Estate of Decedent. (R.2-5)

Conder failed to disclose to Ethyl Ashworth prior to the execution of Renunciation of Right to Act as Personal Representative and Waiver of Bond (R.8) and Waiver of Notice (R.9) that Conder & Wangsgard had a claim against the estate for \$20,000.00 in attorney's fees. (R.910-912;1050,1051) Conder was informally appointed Personal Representative on June 15, 1990 (R.12-16) and published notice to creditors, the first publication being June 22, 1990 which set September 24, 1990 as the last day for filing claims against the Decedent's estate. (R-17)

Thereafter, among other things, Conder as Personal Representative, deposited the estate funds in the non-interest bearing Conder & Wangsgard Attorney Trust Account (R.898-904) which the trial court ordered at the hearing on January 15, 1991 placed in a separate interest bearing account (R.933); allowed Decedent's girlfriend, a client of Conder's (1) to live in Decedent's house rent free until it was sold (R.797-801), (2) use Decedent's Camareo IROC-Z from the date of his death for three months putting 8,000 miles on the vehicle until it was turned over to Appellant (R.801-804;840-842; Exh. 14, 6-23-92), (3) to keep furniture, which in all probability belonged to Decedent (R.804-808), to keep a raft (R.808) and various items of camping

equipment (R.808-809-814); and gave a naugahyde couch and a set of golf clubs to Decedent's brother (R.814).

On September 25, 1990, Appellant filed a petition to remove Conder as Personal Representative and for an inventory and accounting pursuant to Utah Code Ann. §75-3-611 based on the foregoing and additional claims of mismanagement contained in the petition (R.23-28) to which Conder filed an answer on October 10, 1990. (R.32-44)

Conder filed an inventory and accounting on November 16, 1990 (R.72-164) and on December 5, 1990 Appellant filed a motion requiring Conder to (1) to provide an inventory and accounting, P&L statements, and balance sheets on Decedent's construction business and (2) a schedule of claims approved but not paid and particularly the claim of Conder & Wangsgard for attorney's fees. (R.165-167) A hearing was set for December 17, 1990 which was attended by all counsel and documents were delivered. (R.920,921)

The hearing on the Petition to Remove Conder as the Personal Representative was held on January 15, 1991 (R.185) which resulted in a Stipulation between Conder and his attorney, the attorneys for Appellant and Lindsey Husband. (R.190-193) The Stipulation provided in part for the appointment of a Co-Personal Representative along with Conder for among other things to approve or disapprove of the Conder & Wangsgard claim for attorney's fees which claim for attorney's fees had to be further approved by the court. (R.191)

On May 16, 1991, Conder and his Co-Personal Representative petitioned the court to sell Decedent's business, Chad Husband Construction, Inc., to Richard Marshall and Andy Johnson (R.199-247), which sale was approved by the trial court on June 14, 1991. (R.273,274) The sale was made and order entered over the objection of Appellant's attorney "that the attorney's fees claimed by Conder & Wangsgard should have been paid for by construction and remodeling services on the Conder & Wangsgard offices by Chad Husband Construction, Inc." (R.273)

The claims of Conder & Wangsgard for attorney's fees incurred by Decedent prior to his death in the sum of \$33,248.75 plus interest of \$4,572.06 for a total of \$37,820.81 was presented to the court by the Petition of K. C. Bennett of Conder & Wangsgard, attorney for Personal Representative, on May 6, 1990. (R.250-252) Appellant filed a response to the Petition for Attorney's Fees. (R.269-272)

An evidentiary hearing was held on the issue of the claim of Conder & Wangsgard for attorney's fees on June 14, 1991 (R.275; 936-1059) after which the trial court directed that memoranda by the parties be filed.

Conder, as Personal Representative, filed a Memorandum in Support of Petition for Claim which is the claim of Conder & Wangsgard against the estate for attorney's fees incurred prior to Decedent's death. (R.279-308) Appellant filed a Memorandum and Amended Memorandum in Opposition to Petition for Approval of Claim for Attorney's Fees. (R.309-333;388-394)

A hearing was held on July 29, 1991 on the claim of attorney's fees by Conder & Wangsgard but was continued in order to obtain an expedited transcript of Conder's testimony on June 14, 1991 and a further hearing was to be held. (R.335)

After the transcript of Conder's testimony on June 14, 1991 had been obtained (R.1060-1157), a hearing was held on November 25, 1991. (R.366;1234-1406) This resulted in the first Findings of Fact, Conclusions of Law and Order dated December 17, 1990 approving the claim of Conder & Wangsgard for \$34,038.81. (R.409-416) A ten percent (10%) reduction (\$3,781.90) off the original claim for attorney's fees was allowed by the trial court as the contractor's (Decedent's) profit for the construction and remodel job to have been done at the Conder & Wangsgard offices. (R.396-408)

Appellant filed a Motion for a New Trial (R.419) and a Motion to Make New Findings of Fact and Conclusions of Law and altering or amending the Order accordingly (R.420) and a Memorandum in Support of the Motion. (R.421-424) Conder filed a Memorandum in Opposition to said motions (R.425-428) and a hearing held on these on January 21, 1992. (R.429;1307-1333)

The second Findings of Fact, Conclusions of Law and Order were entered on February 7, 1992 awarding Conder and Wangsgard \$34,038.81 on its claim. (R.431-438) Co-Personal Representatives filed a Petition for Approval of Final Settlement and Distribution (R.439-443) together with a Schedule of Distribution and a Stipulation for Approval for Final Settlement Distribution (R.444-446) to which was attached Exhibit A setting

forth the attorney's fees of Conder & Wangsgard incurred during the probate of the estate. (R.447-452)

Co-Personal Representatives also filed an Inventory and Final Accounting (R.456-460) and an Estate Recapitulation. (R.461-462) Appellant then filed a Petition to Surcharge Personal Representative Conder (R.464-479) and filed an Objection and an Amended Objection to the Petition for Approval of Final Settlement and Distribution. (R.484-488;527-528)

Evidentiary hearings were held on June 23, 1992 (R.611-612;699-887) and on July 22, 1992 (R.628-629;1158-1223) and arguments of counsel were heard on August 20, 1992 (R.638;1542-1571) resulting in Findings of Fact, Conclusions of Law and Estate Closing Order. (R.672-688)

The original Schedule of Distribution proposed the distribution to Conder & Wangsgard of attorney's fees and Personal Representative fees in the sum of \$23,992.50 (R.445) plus \$5,734.75 for paralegal fees (R.450). Appellant challenged the attorney's fees and Personal Representative fees on the grounds that \$11,500.00 of these said fees were incurred in prosecuting the Conder & Wangsgard claim for attorney's fees incurred by Decedent prior to his death. (R.486,487;521)

The court finally ordered a reduction of \$5,000.00 in attorney's fees due Conder & Wangsgard that was incurred in connection with a probate of the estate that was attributable to the prosecution of the Conder & Wangsgard claim for attorney's fees incurred by Decedent prior to his death. (R.664;676,677)

Appellant's attorney filed his own claim and amended claim for attorney's fees (R.582-610) and was awarded \$1,000.00 as attorney's fees and \$213.60 as costs. (R.680,685) The law firm of Conder & Wangsgard received a total of \$68,409.96 representing the claim, attorney's and Personal Representative fees (which were allowed at the same rate as attorney's fees) and paralegal costs out of an estate with a total value of \$155,784.83. (R.437,438;459;683-688)

Appellant filed a Notice of Appeal (R.691-692) and Appellee Co-Personal Representatives filed a Cross-Appeal. (R.696-697) Lindsey Husband, one of the heirs of decedent, filed a Cross-Appeal. (R.694-695)

SUMMARY OF ARGUMENT

POINT I

The claim of Conder & Wangsgard for \$37,820.81 against the estate for attorney's fees incurred by Decedent prior to his death must be (1) in writing, (2) show the basis therefor, (3) the name and address of the claimant, (4) the amount claimed and (5) must have been presented prior to September 24, 1990.

Conder and claimant on behalf of Conder and Wangsgard must present a claim to Conder and Personal Representative to comply with the Probate Code and, moreover, must approve the same. It is not sufficient that Conder as Personal Representative has knowledge of the claim of his law firm--it must be presented.

There was no formal claim presented but certain time records were "put in the file." The time records did not show

the full basis for the agreement between Decedent and Conder. The name and address of Conder & Wangsgard are not on the writings put in the "file" and the clear weight of the evidence was that the writings were not totaled until after September 24, 1990. The claim of Conder & Wangsgard for the aforesaid attorney's fees was not legally sufficient and was not timely filed.

POINT II

After Conder's direct and cross-examination covered the issues of the legal sufficiency of the Conder & Wangsgard claim for attorney's fees and its timely filing and Conder further testified on redirect covering the reasonableness of the fee and a \$15,000.00 credit and Appellant's attorney did not re-cross-examine it was abuse of discretion on the part of the trial court to allow Conder to testify on re-redirect about the same issues he testified to on direct and cross examination.

POINT III

Conder's evidence was that \$3,500.00 in attorney's fees was incurred in presenting the claim of Conder & Wangsgard for the attorney's fees incurred prior to Decedent's death. Appellant's evidence was that \$11,550.00 was incurred in prosecuting the said claim. The trial court mysteriously found that \$5,000 was the correct figure.

The clear weight of the evidence was that \$11,550.00 was incurred by Conder as Personal Representative and he should be surcharged \$6,505.00 for this improper payment of attorney's fees.

POINT IV

Conder as Personal Representative kept estate funds in a non-interest bearing account, thereby costing the estate \$1,357.30 in interest accumulations. When this was called to the attention of the trial court, it immediately ordered the estate funds deposited in an interest bearing account. Conder breached his fiduciary duty to the estate and he should be surcharged for the \$1,357.30 interest not earned.

ARGUMENT

POINT I

THE COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT THE CONDER & WANGSGARD CLAIM FOR ATTORNEY'S FEES AGAINST THE ESTATE IN THE SUM OF \$37,820.81 WAS LEGALLY SUFFICIENT (75-3-804) AND TIMELY FILED (75-3-803).

Utah Code Ann. § 75-3-803 (1975) provides in part as follows:

75-3-803. Limitation on presentation of claims.--(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) Within three months after the date of the first publication of notice to creditors if notice is given in compliance with section 75-3-801; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state.

The case of Estate of Wickham vs. Wickham, 670 P.2d 452 (Colo.Ct.App. 1983) held that:

As provided in § 15-12-803, C.R.S. 1973 (1982 CumSupp. [78-3-803]), claims are barred unless presented within the time sent in a proper notice of creditors.

This is the law, without exception, in all jurisdictions that have adopted the Uniform Probate Code. Strong Bros. Enters. vs. Estate of Strong, 666 P.2d 1109 (Colo.Ct.App. 1983).

It is submitted that this is the law in the State of Utah based on the former Probate Code as set forth in Jones vs. State Tax Comm., 99 Utah 373, 104 P.2d 210 (1940) at 104 P.2d 212:

In Clayton v. Dinwoodey, 33 Utah 251, 93 P. 723, 14 Ann.Cas. 926, we used this language: "Mere knowledge on the part of the executor or administration of the existence of a debt * * * is not sufficient to dispense with the necessity of presentation. * * * the defense that the claim is barred by the statute of limitations (nonclaim statute and not general statutes of limitation) cannot be waived by the executor or administrator."

The cases of Harris v. Turner, 96 Utah 342, 85 P.2d 44 P.2d 699, by implication support this view. There is no conflict in the Utah cases and our ruling that, after proper notice, claims must be filed against an estate within the time limited by statute or said claims are forever barred is settled and clear.

A Notice to Creditors was first published on June 22, 1990, which set September 24, 1990 as the last day for filing claims against Decedent's estate. (R.17) Thus, all claims must be presented to Conder or his attorney or the Court on or before September 24, 1990.

Utah Code Ann. § 75-3-804 (1988) provides in part as follows:

(1) Claims against a decedent's estate may be presented as follows:

(a) The claimant may deliver or mail to the personal representative, or the personal representative's attorney of record, a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule with the clerk of the court. The claim is deemed presented on either the receipt of the written statement of claim by the personal representative or the personal representative's attorney of record, or the filing of the claim with the court, whichever occurs first.

When the claimant and the Personal Representative are one and the same person, the claimant must still present a claim to himself as Personal Representative. In Estate of Wickham v. Wickham, supra, the personal representative of the Wickham Estate, acting individually, prepared a claim against the estate for reimbursement of property taxes, funeral and last illness expenses and statutory allowances. The claim was in writing and was presented by the claimant individually to himself as Personal Representative of the Estate for approval. The claim was "allowed and approved" by the claimant acting as Personal Representative. The trial court held that this did not constitute presentation of the claim under Colorado's 3-804(1) of the Uniform Probate Code. The Colorado Court of appeals reversed the trial court and held that 670 P.2d 453 as follows:

Had the framers of the Colorado Probate Code intended to provide a different method for presentation of claims when the claimant and

the personal representative are one and the same person, they could have done so. They did not. As written, § 15-12-804(1), C.R.S. 1973, provides that "a claimant ... may deliver ... to the personal representative a written statement of the claim ... The claim is deemed presented on ... receipt of the written statement of claim by the personal representative ...". This provision was timely complied with here. Any exception for the "two hat" situation at issue here must be made by the general assembly and not the courts.

In the case of Dementes v. Estate of Tallas 764 P.2d 628 (UtahCt.App. 1988), Dementes presented a timely written claim against the Estate of Tallas which recited:

'...[t]he estate of the above named decedent is indebted to the claimant in the amount of \$50,000.00. Such indebtedness is based upon services rendered and acknowledgment by deceased, that the \$50,000.00 is due and owing dated December 18, 1982.' Moreover, a complete copy of the memorandum, in both Greek and English, was attached to and incorporated by reference in the claim.

The Court of Appeals held at 764 P.2nd 630:

If a claim acquaints a personal representative with a specific amount allegedly due and the general nature of the obligation, the purpose of the statute has been satisfied. Here, the claim was for \$50,000.00 pursuant to a document executed by the deceased, which document was appended to the claim. The personal representative had all the information it needed to investigate the claim and decide whether to pay it, fight it, or settle it. (Emphasis added)

In Quinn v. Quinn 772 P.2nd 979 (UtahCt.App. 1989), the claimant presented a timely written claim against the estate for \$650,000.00 and stated in detail the basis therefor. The Utah Court of Appeals ruled as follows at 772 P.2nd 981:

We hold that Kip's claim was sufficient for purposes of section 75-3-803 and section 75-3-804(1)(a) insofar as it gave Fenton fair notice that the estate was facing a sizeable tort claim, that the basis of the \$650,000 claim was the death of Dawana at the hands of Fenton Glade....

Thus, the claim of Conger & Wangsgard against Decedent's estate must (1) be in writing, (2) showing the basis therefor, (3) the name and address of Conger & Wangsgard, (4) the amount claimed, and (5) filed on or before September 24, 1990.

Findings of Fact by the Court

7. On June 19, 1990 Jerrald D. Conder of Conder & Wangsgard had in his possession the time records of Jerrald D. Conder, Exhibit 3, and Scott Wangsgard, Exhibit 1, showing the date of service, the service performed and the time required to perform the service. Jerrald D. Conder placed Exhibits 1 and 3 in the estate file of Decedent. Exhibits 1 and 3 were not totaled at this time. (R.433)

13. Conder & Wangsgard did not file a formal claim against the estate showing the name and address of the firm, the basis for the claim and the amount claimed in accordance with Utah Code Ann. § 78-3-804. (R.435)

Appellant does not dispute Findings of Fact 7 and 13 as they are amply supported by the record.

9. On August 31, 1991 Jerrald D. Conder removed Exhibit 3 and had Exhibit 3 totaled by his accounting staff and placed back in the estate file. Exhibit 1 was not totaled. The last seven pages of Exhibit 12 were pulled from the Conder & Wangsgard files by Jerrald D. Conder and placed in the estate file. Jerrald D. Conder reviewed the files and was satisfied that the work had been performed as per the said exhibits. (R.434)

Finding of Fact 9 is important in that it showed the totaling of Exhibits 3 and 12 prior to September 24, 1990 which

it is submitted is a sine qua non to the legal sufficiency of any claim filed against an estate under Utah Code Ann. § 75-3-804 (1988).

Evidence adduced to support Finding of Fact 9
up to and including the morning session of June 14, 1991.

A. Conder considered the claim filed on August 31, 1990. (R.951)

B. Conder did not have the Conder and Wangsgard claim totaled on August 31, 1990 but was aware of the "general sum of money" "in rough form." (R.953)

C. Conder reviewed Exhibit 1 and other records and probably asked "the girl" to prepare some kind of total but whether she did or not he wasn't clear. He didn't know. (R.958) When Conder was asked about anything being totaled on August 31, 1990 he was "not exactly" sure and didn't remember. (R.959).

At the close of the morning session, the trial court summed up the evidence on the claim by saying, "There's no question that there's no claim filed, formal claim filed, on the date that the last claims were to be filed. No question about it. Does anybody have any issues about that, formal claim as such being filed? Anybody have question about that?" (R. 1029)

Evidence adduced to support Finding of Fact 9
in the afternoon session of June 14, 1991.

Conder had completed his redirect examination at the end of the morning session (R.1028) and Appellant had no recross examination (R.1030) and Conder was then allowed to testify on re-redirect examination over the objection of Appellant. (R.1031)

D. Conder specifically remembered giving Exhibit 3 to the accounting staff and the totals were entered on August 31, 1990 and Exhibit 3 was placed back in the file. (R.1032)

E. Conder took the last seven pages of Exhibit 12, which apparently had already been prepared prior to August 31, 1990 and inserted them in the "file" along with Exhibit 3. (R.1033,1034)

F. Conder knew the totals of the Conder & Wangsgard claim against Decedent's estate to be \$33,275.00 based on these documents as of August 31, 1990. (R.1034)

Evidence adduced by Appellant showing Findings of Fact 9 to be against the clear weight of the evidence.

(A) When Conder talked about putting the records in the "file" to substantiate the claim for Conder & Wangsgard's claim for attorney's fees on August 31, 1990, he was referring to the time records, Exhibits 1 and 3, hearing of 6-14-91. (R.950; 952;956)

(B) No exhibits were totaled on August 31, 1990. (R.953)

(C) No actual billing was ever totaled or sent to Appellant until after September 25, 1990, the date the Petition to Remove was filed. (R.956,957)

(D) Exhibit 2, which is a typed version of Exhibit 3, was not prepared until after the Petition to Remove was filed on September 25, 1990. (R.963)

(E) The last seven pages of Exhibit 12 which is identical in format to Exhibit 2, and is the typed version of Exhibit

1, was somehow in existence on August 31, 1990 and placed into the file. (R.1003)

(F) The last seven pages of Exhibit 12 were not delivered to Appellant's attorney until December 18, 1990. (R.999,1000;1033)

(G) On September 25, 1990, Appellant filed a Petition to remove Conder as Personal Representative for among other things the Decedent owed Conger & Wangsgard \$20,000.00 in attorney's fees and had no documentation therefor. (R.23-28)

(H) On October 8, 1990, Conder as Personal Representative filed an Answer to the Petition to Remove alleging among other things:

Personal Representative specifically states that he has disclosed to numerous parties including Peter Guyon, Attorney for Conservator of decedent's other minor child, that decedent was indebted to Personal Representative's Law Firm in the amount of approximately \$20,000.00. Personal Representative at no time concealed or withheld any information from petitioner and sets forth affirmatively that Personal Representative does have documentation including time slips, work product and other evidence of the \$20,000.00 debt. Personal Representative sets forth affirmatively that he has not made any arrangement for decedent's construction company to perform work at his personal home in partial satisfaction of the \$20,000.00 debt. (emphasis added) (R.33)

(I) On December 5, 1990, Appellant filed a Motion and Notice of Hearing to be held on December 17, 1990, which Motion among other things moved for an Order:

Requiring the Personal Representative to file a complete schedule of all claims that have been approved through the present time and a schedule of all claims that have been

approved but not paid and any and all claims filed against the estate of Donald Chad Husband and particularly the claim of the Personal Representative and/or his law firm for legal services rendered prior to the death of the Decedent in the approximate sum of \$20,000.00. (R.165-167)

(J) Conder's affidavit stated that Exhibit 3 was not prepared until shortly after his appointment as Personal Representative and that Exhibit 3 was not totaled until after the Petition to Remove was filed on September 25, 1990. (R.383,384; 1044-1048)

(K) The claim of Conder & Wangsgard for attorney's fees allegedly presented and approved for payment on August 31, 1990 (R.1041,1042), was not paid by Conder at this time (R.1043) because there was too much money involved and he felt like someone might want to review it. (R.1044)

(L) On August 31, 1990, there was \$67,763.09 on deposit in the Conder & Wangsgard trust account (Exh. 11, 6-14-91).

After the morning session and the "ruling" of the trial court that no formal claim had been filed prior to September 24, 1990, Conder resumed the stand in the afternoon session and changed his testimony to show the totaling of Exhibit 3 and the last seven pages of Exhibit 12 on August 31, 1990. He knew on August 31, 1990 that the total Conder & Wangsgard claim according to these documents was \$33,275.00.

However, in Conder's Answer to the Petition to Remove him as Personal Representative filed on October 10, 1990, he responded only as if the total claim for attorney's fees was \$20,000.00. The Answer claimed several times that Decedent owed

Conder & Wangsgard \$20,000.00 (Conder & Wangsgard had time slips and other documentation showing the \$20,000.00 debt; and denied agreeing to the remodel of Conger's residence as payment of the \$20,000.00 in attorney's fee.)

Conder, as Personal Representative, with a fiduciary duty to the estate and to Appellant should have disclosed in his Answer that the claim was for \$33,275.00 and had been approved but not paid.

Also, if Conder had the accounting staff total Exhibit 3 on August 31, 1990, then why didn't he give Exhibit 1, which was also in the file, to the accounting staff for totaling instead of filing the last seven pages of Exhibit 12?

The clear weight of the evidence is that Exhibit 3 and the last seven pages of Exhibit 12 of the June 14, 1991 hearing were not totaled on August 31, 1990 and there was no totaling until at least after October 10, 1990.

This is not the only flaw in the Conder & Wangsgard claim for attorney's fees. The only place on either Exhibit 3 or the last seven pages of Exhibit 12 which show a basis for the claim is page two of Exhibit 3 where there is a notation, "\$105 per hr. per JDC." Conder directed "someone" to put this on Exhibit 3 which was not prepared until after June 19, 1990 or totaled until after September 25, 1990 but he doesn't remember when it was done. (R.383,384;967,968) There is not one scintilla or iota of evidence to support Finding of Fact No. 8 (R.434) and it is against the clear weight of the evidence. The \$105 per hour is not the only basis for the claim. A modifica-

tion was made whereby the fee was to be paid by construction and remodeling services on the Conder & Wangsgard law office and this does not appear either on Exhibit 3 or the last seven pages of Exhibit 12.

Exhibit 3 and the last seven pages of Exhibits 12 also failed to have the name and address of Conder & Wangsgard as further required by 75-3-804(1). Conclusions of Law 2 and 3 (R.435,436) are primarily based on Findings of Fact No. 9, which has been shown, it is submitted, is against the clear weight of the evidence. The Conclusion of Law based on Findings of Fact 9 must also fall and the order awarding Conder & Wangsgard must also fall. The claim of Conder & Wangsgard for attorney's fees incurred by Decedent prior to his death is not legally sufficient under Utah Code Ann. § 75-3-804 nor timely filed under Utah Code Ann. § 75-3-803 and the order awarding Conder & Wangsgard \$34,038.81 should be reversed.

POINT II

THE COURT ERRED IN ALLOWING THE RE-REDIRECT EXAMINATION OF PERSONAL REPRESENTATIVE CONDER AT THE JUNE 14, 1991 HEARING.

At the hearing on June 14, 1993 Conder testified on his direct and cross-examination generally about the sufficiency and timeliness of the filing of the claim of Conder & Wangsgard against the Estate for \$37,820.81. (R. 949-1010)

Co-personal Representative was then called to testify generally as to the reasonableness of the fees and an alleged credit in the sum of \$15,000.00. (R. 1010-1019)

Conder's attorney then proceeded with redirect examination of Conder covering the reasonableness of the fees claimed and the \$15,000.00 credit that had been brought up in the direct examination of the Co-personal Representative. (R. 1021-1028) Conder's attorney concluded his direct, cross-examination and redirect examination by saying, "Submit it, your Honor." (R. 1028)

The trial court then ruled at (R. 1029):

The Court: There's no question that there was no claim filed, formal claim filed, on the date that the last claims were to be filed. No question about it.

Does anybody have any issue about that, formal claim as such being filed? Anybody have any question about that?

Mr. Ables: No.

The Court: Okay. You may be excused.

(Noon recess taken.)

SALT LAKE CITY, UTAH; FRIDAY, JUNE 14, 1993;
P.M.

P R O C E E D I N G S

The Court: Mr. Conder, you may resume the stand.

Mr. Ables, you can proceed with your cross-examination.

Mr. Ables: No questions.

The Court: Okay.

Mr. Ables: No cross.

The Court: You may call your next witness.

Mr. Bennett: You Honor, that's the only witness we have.

The Court: Okay. So, you may step down.

The witness: May I speak with counsel for a moment?

The Court: You may.

Mr. Bennett: May I see Exhibits 3 and 4.

Mr. Ables: You Honor, I object to any further examination. There were no questions asked. There's no basis for him to redirect.

The Court: Well, I'll allow it.

Mr. Ables: Your Honor, I object.

The Court: You may object, but I'll got ahead and allow it.

The trial court then allowed Conder to testify on re-redirect covering the sufficiency and timeliness of filing of the claim by Conder & Wangsgard for fees (R. 1030-1034) which had already been covered in his direct and cross-examination. At the

conclusion of Conder's re-redirect examination, the following occurred at (R. 1034):

Mr. Bennett: That's all, your Honor.

The Court: Mr. Ables.

Mr. Ables: I object to that again and move to strike. He's just trying to correct his testimony.

The Court: He has the right to do that on redirect.

Rule 611(a), Utah Rules of Evidence, provides as follows:

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

There are no Utah cases decided under this Rule of Evidence relating to redirect or re-redirect examination, but there are older Utah cases in point.

In State v Cooper, 201 P.2d 764 (1949) the Utah Supreme Court states as follows at 201 P.2d 768:

The real issue before us is whether the testimony was properly admitted to rebut the inference raised on cross-examination. It involves simply the question of the extent to which counsel may be permitted to go in redirect examination. It is the general rule, of course, that the scope of redirect examination is limited to the field covered in cross-examination. As a general rule any evidence logically tending to rebut the inferences raised in cross-examination is admissible.

The case of State v Holmes, 495 P.2d 312 (1972) held that, "....admission of testimony on redirect examination ordinarily is within the sound discretion of the trial court."

Conder's testimony on direct and cross-examination was extensive and addressed the issues of the sufficiency of the claim and the timeliness of filing in considerable detail. The Court concluded and made a ruling at the conclusion of the morning session which was part of Finding of Fact 13 (R. 435) that there was no formal claim filed. (R. 1029)

Appellant's attorney did not recross-examine Conder on the issue of the reasonableness of the fees or the \$15,000.00 credit allegedly received. It is submitted that this would have been the limited of any recross-examination by Appellant's attorney.

Nevertheless, the trial court over the objection and motion to strike by Appellant's attorney allowed Conder to change his testimony on Exhibit 3 and the last seven pages of Exhibit 12 to show they had been totaled on August 31, 1990.

This is a clear abuse of discretion and a violation of Rule 611(a)(1) and (2) in that it allowed Conder to change his testimony after the court's ruling and was a needless waste of time.

The case of Seaton v Wyo. Highway Com'n. Dist. 1, 784 P.2d 197 (1989) is in point. Seaton was examined on direct, cross-examination, redirect examination and recross-examination. Seaton's attorney then tried to have Seaton testify on re-redirect

examination in order "to correct the misleading impression created during cross-examination (emphasis added) that Riekens needed to move three feet to avoid the curb." The trial court would not allow the re-redirect examination and Seaton appealed on the grounds the trial court abused its discretion.

The Wyoming Supreme Court ruled as follows at 784 P.2d 202:

The usual function of redirect examination is to allow a party to explain testimony elicited by an adversary's cross-examination. (citing case)...Furthermore, W.R.E. 611(a) (U.R.E. 611(a) requires the trial court to exercise reasonable control over the presentation of evidence to avoid needless consumption of time and to maintain efficiency and order in the proceedings. In conjunction with W.R.E. 403 (U.R.E. 403), which permits the court to exclude evidence for reasons of undue delay or waste of time, or because the evidence is cumulative or might confuse the jury, W.R.E. 611(a) vests the trial court with considerable discretion. (citing case)...A trial court does not abuse its discretion with respect to a decision concerning the manner of examining witnesses if that decision was reasonable; that is, if the trial court could reasonably conclude as it did. (citing case)...Nor were any new issues raised as to which she was denied the opportunity for response....Even in the second round, redirect examination is discretionary. (citing authority) The unusual circumstance where re-redirect examination could be justified or even required within the exercise of discretion by the trial court is not presented here.

There was no recross-examination of Conder and his redirect had been limited to reasonableness of the fees and the \$15,000.00 credit.

To allow him to testify on the sufficiency of the claim and the timeliness of its filing was an abuse of discretion and a

violation of the spirit and meaning of Rules 403 and 611, Utah Rules of Evidence and the testimony of Conder on re-redirect examination should be stricken and Point I of Appellant's argument modified accordingly.

POINT III

THE COURT ERRED IN DETERMINING THAT ONLY \$5,000.00 INSTEAD OF \$11,550.00 IN ATTORNEY'S FEES WERE INCURRED IN PROSECUTING THE CLAIM OF CONDER & WANGSGARD FOR ATTORNEY'S FEES IN THE SUM OF \$37,820.81.

Findings of Fact 10, 11 and 12 and Conclusion of Law 5 deal with the amount of attorney's fees Conder & Wangsgard claimed as part of the administration of the Estate in prosecuting their own claim for \$37,820.81. (R. 676, 677; 680)

Finding of Fact 11 contains the factual finding that Appellant objects to. Finding of Fact 11 provides:

11. The personal representatives and estate incurred attorney's fees in the sum of \$5,000.00 in defending the recommendation of the personal representatives that these fees be paid. (R. 676)

Evidence adduced to support Finding of Fact 11.

A. Conder filed an affidavit stating that the total attorney's fees charged to the estate attributable to the prosecution of the claim for attorney's fees owed Conder & Wangsgard as approximately \$3,500.00. (R. 622)

B. No testimony was adduced as to the amount of the Conder & Wangsgard estate fees attributable to the claim for attorney's fees incurred prior to Decedent's death.

Evidence adduced by Appellant that Finding of Fact 11 is against the clear weight of the evidence.

(A) Appellant filed and argued memoranda and documentation to the trial court at the hearing on August 20, 1992 (R. 1548) relating to Appellant's attorney's claim for attorney's fees and the amount of time Appellant's attorneys spent defending against the Conder & Wangsgard claim for attorney's fees (R. 582-594) showing 95.3 hours (R. 1548).

(B) Conder & Wangsgard spent a total of 110 hours at \$105.00 an hour or a total of \$11,550.00 which was charged against the estate for prosecuting their claim of \$37,820.81. (Exhibit 1 and 2, 8-20-92; R. 649-663; 1548-1549; 1564-1565)

(C) Appendix III sets for the date, service and time involved in Appellant's attorney opposing the claim of Conder & Wangsgard for attorney's fees.

(D) Appendix IV sets forth the date, service and time involved for the four attorneys of Conder & Wangsgard who prosecuted their claim for attorney's fees.

(E) Appendix IV is tied to the docket of the case. (R. 656)

(F) The Conder & Wangsgard time is totaled and extending showing 110 hours at \$150.00 per hour or a total of \$11,550.00 incurred in prosecuting the claim for \$37,820.81. (R. 657)

On September 24, 1992 the court made a minute entry relating to these fees and ruled, "The court has concluded from the

examination of records, affidavits, and from hearing testimony, that the firm of Conder & Wangsgard had charged the estate \$5,000.00 for fees, which were not chargeable for the probate of the Chad Husband Estate." (R. 664)

This was the basis for Finding of Fact 11 and there is no clue as to the mental or reasoning process the trial court went through in making its determination that \$5,000.00 should be deducted when a range was presented of \$3,500.00 to \$11,550.00.

This finding is against the clear weight of the evidence which is amply shown by Appendices III and IV, and (R. 656, 657).

Conder as personal representative should be surcharged \$6,550.00 for fees improperly incurred and paid by the Estate.

POINT IV

THE COURT ERRED IN FAILING TO SURCHARGE PERSONAL REPRESENTATIVE CONDER FOR THE INTEREST NOT EARNED BY HIS FAILURE TO DEPOSIT ESTATE FUNDS IN AN INTEREST BEARING ACCOUNT.

Finding of Fact 20 supporting the Estate Closing Order found as follows:

20. In conjunction with the administration of the estate, between May 24, 1990 and January 17, 1991, personal representative caused funds of the estate to be placed in a non-interest bearing account. Thereafter, by Court order, the funds were deposited in an account bearing interest at the rate of 5.25% per annum. (R. 678)

Finding of Fact 21 found as follows:

21. The deposits into trust by the personal representative between the date of May 24, 1990 and January 17, 1991, was consistent with personal representative's duties toward the estate and a fair and reasonable disposition

of those funds. It was not necessary to deposit these funds in an interest bearing account. (R. 678)

Finding of Fact 21 is actually a Conclusion of Law in that Conder fulfilled his duty to the estate by depositing the estate funds in a non-interest bearing account. It should be noted that there was no conclusion of Law relating to this issue. (R. 679-681)

Conder as personal representative of decedent's estate had a fiduciary duty as set forth in Utah code Ann. §75-3-703 which provides as follows:

(1) A personal representative is a fiduciary who has observe the standard of care applicable to trustees as described by § 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 the successors to the estate. (emphasis added)

The actual fiduciary duty is described in Utah Code Ann. § 75-7-302 as follows:

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills. (emphasis added)

Thus, Conder as personal representative is supposed to deal with the assets of the estate in the same manner as would be

observed by a prudent man dealing with the property of another.

It is seriously doubted that a prudent man holding funds for another in the approximate sum \$67,000.00 would leave it in a non-interest account when it could be put in an account drawing 5.25% interest. Conder's failure to do this was a breach of his fiduciary duty and not in the best interest of the estate as set forth above.

This cost the estate the sum of \$1,337.30 (Exhibit 11, 6-23-92) until the trial court, without any argument or objection from Conder, ordered the immediate placement of estate funds in an interest bearing account. (R. 903, 904; 796-798)

In In Re. Listman's Estate, 197 P. 596 (1921) the Supreme Court ruled at 197 P. 602:

The general rule, however, is that interest is not chargeable, as a matter of course, against an executor, but may be so charged if the circumstances of a particular case require it.

To the same effect see In Re. Raleigh's Estate, 158 P. 705 (1915).

The Listman case was decided in the days of bank failures where there was no FDIC or other agency or means to protect depositors. There was also no probate code imposing a fiduciary duty to do what is in the "best interest of the estate" and defining the fiduciary duty insofar as dealing with the property of the estate as a prudent man dealing with the property of another.

Moreover, Conder is liable to the estate for the interest accrued from May 27, 1990 until the estate funds were deposited in the interest bearing account based on the Utah Uniform Revised

Principal and Income Act, Utah Code Ann. § 22-3-1 et seq. at 22-3-6(2)(b).

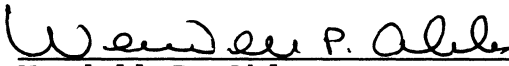
This issue is of significant public interest and should be decided by the Court as a guide to personal representatives, bench and bar.

Conder should be surcharged \$1,337.30.

CONCLUSION

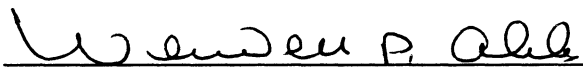
The award of \$34,038.81 made to Conder & Wangsgard for their claim should be reversed. Personal Representative Conder should be surcharged \$6,550.00 for improper attorney's fees and \$1,337.30 for interest not earned.

Respectfully submitted,


Wendell P. Ables
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 1993, two (2) true and correct copies of the foregoing Appellant's Brief were mailed, postage prepaid, to Scott R. Wangsgard, Attorney for Appellee and Cross-Appellant Personal Representatives, 4059 South 4000 West, West Valley City, Utah 84120-4099 and to Peter W. Guyon, Attorney for Cross-Appellant Lindsey Husband, 10 Exchange Place, #614, Salt Lake City, Utah 84111.



APPENDIX I

Wendell P. Ables, #11
Attorney for Dylan Husband
536 East 400 South
Salt Lake City, Utah 84102
Telephone: (801) 532-7424

THE THIRD JUDICIAL DISTRICT COURT

FEB 07 1992

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In The Matter of the Estate :

of :

DONALD CHAD HUSBAND :

Deceased. :

ORDER

Probate No. 903900669 ES

2172091

2-1892-8.15am

The Petition of Jerrald D. Conder, Personal Representative of the Estate of Donald Chad Husband, for approval of a payment of attorney's fees to Conder & Wangsgard was heard by the Honorable John A. Rokich, District Judge, on June 14, 1991, the Personal Representative appearing and being represented by his attorney, K.C. Bennett, and Objector Ethel Ashworth and Dylan Husband, an heir, appearing and being represented by their attorney, Wendell P. Ables and Karen Husband, Conservator for Lindsay Husband, an heir of Decedent, being represented by her attorney Peter W. Guyon and the court having heard the testimony of the witnesses and having received the exhibits into evidence, and having considered the memoranda submitted by the parties and having heard the arguments of counsel and after consideration and review of the foregoing and having made a ruling from bench on December 4, 1991 and the court being fully advised in the premises, and having made and entered its Findings of Fact and Conclusions of Law;


000437

WHEREFORE, it it hereby ORDERED as follows:

1. That Personal Representative is authorized to pay the claim of Conder & Wangsgard in the sum of \$34,038.81.

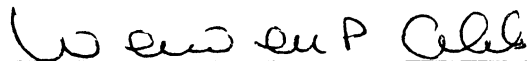
2. The defenses raised by Objector Ethel Ashworth of the Statute of Limitations, the new claim limitation set forth in Utah Code Ann. § 78-3-803(2)(b), breach of contract, waiver, forfeiture, failure of consideration, conflict of interest, breach of fiduciary duty and statute of frauds are without merit and are hereby denied.

Dated this 2 day of ^{February}~~January~~, 1992.


JOHN A. ROKICH
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of January, 1992, a true and correct copy of the foregoing Order was mailed, postage prepaid, to K.C. Bennett, Attorney for Personal Representative, 4059 South 4000 West, West Valley City, Utah 84120-4099.



FILED DISTRICT COURT
Third Judicial District

OCT 19 1992

SALT LAKE COUNTY

By J. R. [Signature]
DEPUTY CLERK

Scott Ross Wangsgard #3376
of and for CONDER & WANGSGARD
4059 South 4000 West
West Valley City, Utah 84120
Telephone: (801) 967-5500

Attorneys for Personal Representatives

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|-----------------------------|---|--------------------------|
| IN THE MATTER OF THE ESTATE |) | |
| OF: |) | ESTATE CLOSING ORDER |
| DONALD CHAD HUSBAND, |) | |
| Deceased. |) | Probate No. 903900669 ES |
| |) | Judge John A. Rokich |

Upon consideration of the Petition for Approval of Final Settlement and Distribution filed by Jerrald D. Conder and John Spencer Snow dated April 6, 1992, and the Petition to Surcharge the Personal Representative, [REDACTED] Objections ^{and} [REDACTED] Amended Objections to Petition for Approval of Final Settlement and Distribution, having made and entered Findings of Fact and Conclusions of Law and having considered the Supplement to Inventory and Final Accounting filed by the Personal Representative, the Court determines and finds that all required notices have been given or waived and the estate has been administered according to the laws of this state and the orders of this Court and should be closed.

THEREFORE,

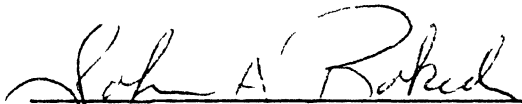
000683

1. The final account of the personal representatives is hereby approved; the personal representatives are hereby authorized and directed to deliver and distribute title and possession of the assets of the estate to the distributees in the amount and the manner set forth in the annexed Schedule of Distribution; upon making such delivery and distribution, and duly filing receipts with this Court, the personal representatives shall be fully and finally released and discharged from their trust, and together with any surety, shall be released and discharged from any bond and any and all liability arising in connection with the performance of their duties as personal representatives; and the administration of this estate shall be closed.

2. The decedent died intestate. The heirs of the decedent and their respective interests in the decedent's estate are set forth in the attached Determination of Heirship.

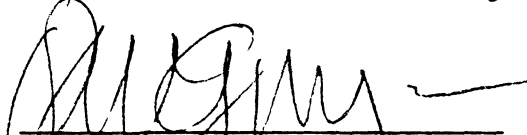
DATED this 19 day of October, 1992.

BY THE COURT:


JOHN A. ROKICH
Third District Court Judge

APPROVED AS TO FORM:


Wendell Ables


Peter W. Guyon

SCHEDULE OF DISTRIBUTION ANNEXED TO ESTATE CLOSING ORDER

| <u>Name of Distributee</u> | <u>Description of Property Distributed</u> | <u>Distribution Value</u> |
|---|--|-------------------------------|
| <u>PRIOR DISBURSEMENTS</u> | | |
| Dylon Husband | 1988 Camaro | \$12,500.00 |
| | debt | (\$ 8,559.71) |
| | net | \$ 3,940.29 |
| Dylon Husband | misc items of personalty | \$ 750.00 |
| Dylon Husband | 1950 Harley Davidson | \$ 6,000.00 |
| Dylon Husband | Cash | \$ 5,600.00 |
| Total Dylon Husband | | \$16,290.29 ===== |
| Lindsay Husband | ‡ Hidden Valley wake | \$ 886.10 |
| Lindsay Husband | misc items of personalty | \$ 750.00 |
| Lindsay Husband | 1975 Corvette | \$ 6,000.00 |
| Total Lindsay Husband | | \$ 7,636.10 ===== |
| <u>DISTRIBUTION</u> | | |
| <u>ASSETS</u> | | |
| Cash in trust account | | \$63,796.97 |
| <u>FINAL DISTRIBUTION</u> | | |
| Dylon Husband | | \$ 9,973.99 |
| Lindsay Husband | | \$18,628.18 |
| Atty. fees/PR fees due Conder & Wangsgard * | | \$27,136.40 |
| PR fees due John S. Snow | | \$ 795.00 |
| Atty. fees & costs awarded Wendell Ables | | \$ 1,213.40 |
| Karen/Lindsay Husband support claim | | \$ 4,550.00 |
| Estimated final estate closing costs ** | | \$ 1,500.00 |
| Total | | \$63,796.97 |

000685

Misc items including tools, furnishings, sports equipment held in storage:

Lindsay Husband

1/2 undivided
interest

Dylon Husband

1/2 undivided
interest

* This amount is equal to the billings of Conder & Wangsgard less a \$5,000.00 deduction ordered regarding the claim of prior attorney's fees due Conder & Wangsgard less \$886.10 representing 1/2 of the cost of decedent's wake held at Hidden Valley Country Club.

** Personal Representative and attorney's fees for drafting of closing documents, misc. estate expenses, e.g. billings for storage, will be paid from this amount; income by way of interest accumulations and any remaining sums will be divided equally between Dylon and Lindsay Husband.

APPENDIX III

| <u>Date</u> | <u>Service</u> | <u>Time</u> |
|----------------------|---|-------------|
| (R. 587) 03-08-91 | Travel to West Valley City Building Permits Department. Travel to the Salt Lake County Building Permits Department. Assessment made to see if construction performed on Conder & Wangsgard office. Telephone to Bob Maxfield regarding the 12-31-90 financial condition of Chad Husband Construction. | 2.0 |
| (R. 588) 05-06-91 | Preparation and dictation of Ables Affidavit. Travel to court to get orders from the court. Preparation and dictation of Objections to Hearing on May 9, 1991 and FAXED notice to attorneys and travel to court to file. | 2.0 |
| 05-06-91 | Research and dictation of the balance of the Dylan Husband Affidavit, Ethel Ashworth Affidavit and Objection to Hearing. | 1.2 |
| 05-07-91 | Preparation and dictation of the balance of the Ables Affidavit. | 1.5 |
| 05-07-91 | Telephone to Dylan Husband. Telephone to K.C. Bennett. Telephone to Melba. Proof the deposition notes and rough in argument. | 1.0 |
| (R. 589) 05-08-91 | Telephone to Ethel Ashworth and Dylan. Preparation of affidavits, preparation and dictation of Request for Production of Documents and Objections and send the same. Travel to court. Telephone to Melba. Conference with Dylan and Ethel and telephone conference with Melba regarding hearing in June. | 1.6 |
| 05-09-91 | Telephone conference with John Spencer Snow and with Kirk Bennett. Telephone conference with Melba. Telephone conference with K.C. Bennett and John Spencer Snow and left message for John Spencer Snow. Preparation and dictation of notice of hearing. Telephone to Guyon. Telephone to John Spencer Snow | |

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| | and travel to Guyon's office to deliver papers. | 1.4 |
| 05-10-91 | Prepare for conference call. Conference call between Judge, K.C. Bennett, Ables, Guyon and possibly Conder. Preparation and dictation of Notice and preparation of Order. Travel to Conder office and conference with Kirk Bennett. Telephone conference with Kirk Bennett regarding Wangsgard time slips. Telephone to _____. | 2.3 |
| 05-15-91 | Preparation and dictation of Objections and FAX to parties. | .4 |
| 05-16-91 | Preparation for hearing and preparation of exhibits. Travel to court, appearance in chambers, telephone to reporter and telephone to Conder's secretary. | 2.0 |
| 05-17-91 | Telephone to Linda, telephone to Wendy and preparation and dictation of Notice of Deposition. | .4 |
| 05-20-91 | Preparation for deposition and second deposition of Conder. | 3.0 |
| 05-21-91 | Telephone conference with Kirk Bennett and Kathy Schultz. Research on law at U law library. Research on law in office. Preparation and dictation of objections to the payment of attorney's fees to Conder & Wangsgard. | 2.0 |
| (R. 590) 05-22-91 | Telephone conference with Peter Guyon, he remembers the delivery of the claim of fees to me on December 17, 1990. There was no mention of Wangsgard fees for \$10,000. | .3 |
| 05-23-91 | Preparation and dictation of Response and correction to Order. | 2.0 |
| 05-24-91 | Subpoena for Conder. Prepare Subpoena for Marshall. | .4 |
| 06-05-91 | Telephone conference with Joe Rhodes, a licensed contractor and a licensed engineer, \$700 per week and one-half of net profit, excessive. Telephone call from K.C. Bennett. Preparation and dictation of Subpoenas. | .7 |

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| 06-10-91 | Assemble Subpoenas, travel to court to have delivered to constable for service. | .5 |
| 06-11-91 | Research on law and cases of statutory provisions and go through file and separate and prepare for trial. | 2.0 |
| 06-12-91 | Travel to law library and research. Travel to Secretary of State for writ and proprietorship information. | 2.0 |
| 06-12-91 | Travel to Secretary of State's office to do research on the law. | 2.5 |
| 06-13-91 | Research and preparation for trial, telephone conference with K.C. Bennett. | 8.0 |
| 06-14-91 | Preparation for trial, conference with clients and presentation of trial, research and conclusion of trial. | 8.7 |
| 07-01-91 | Preparation and dictation of letter and hand deliver the same. | .4 |
| 07-11-91 | Travel to court to get copies of exhibits and dates from the record. | .6 |
| (R. 591) | | |
| 07-12-91 | Research, preparation and dictation of facts and into Point I of brief. | 3.5 |
| 07-12-91 | Travel to court, research, preparation and dictation of the balance of Point I of brief and read deposition. | 1.0 |
| 07-14-91 | Research and hand draft the entire memorandum after the factual statement. | 10.0 |
| 07-15-91 | Preparation and dictation of brief on machine. Mailed to counsel. | 2.0 |
| 07-29-91 | Preparation, travel and appearance before the court. Hearing held from 11:05 to 11:30 and hearing stopped by the court. Transcript of Conder's testimony to be prepared by reporter. | 2.5 |
| 11-14-91 | Telephone conference with Kirk Bennett. Preparation and dictation of Objection. | .5 |
| 11-21-91 | Review the deposition in detail. Only consists of the AM testimony. Telephone conference with Kathy Schultz and she said she would check. Telephone to Kathy | |

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| | Schultz, she will do the current project and pull up the Conder testimony and if it is short, she will complete it. | 2.8 |
| 11-22-91 | Telephone call from Kathy Schultz is getting the transcript ready and will call me. | .1 |
| 11-24-91 | Review the deposition in its entirety. Travel to obtain a second copy. Continue on the deposition. | 4.0 |
| 11-25-91 | Check deposition and preparation of memorandums based on the deposition. | .8 |
| 11-25-91 | Preparation for hearing, research, a conference with clients and attendance at hearing before the court. | 5.0 |
| (R. 592) 11-26-91 | Check depositions and transcript for reference to exhibits therein. Preparation and dictation of letter to Judge Rokich and delivered to Judge and FAXED to Conder and Snow. | 1.5 |
| 12-04-91 | Travel to court for hearing and back to office. | .4 |
| 12-10-91 | Check Conder Affidavit and telephone to several contractors. Telephone with Hogan, Brubaker, Lee and Bowmann. Preparation and dictation of documentation. | 1.6 |
| 12-12-91 | Telephone calls to the various affiants, preparation and dictation of three affidavits and letter to Judge and deliver letters and affidavits to court. | 2.0 |
| 12-13-91 | Preparation and dictation of letter. | .2 |
| 12-16-91 | Make copies of affidavits and travel to court for Judge Rokich's box. Mail to Conder. | .4 |
| 12-27-91 | Preparation and dictation of Notices, memo and travel to court to file and mail for service. | 2.0 |
| 01-15-92 | Conference with Ethel Ashworth, Steve Ashworth and Dylan Husband regarding the problem of the attorney's fees and the surcharge and the final accounting. | .7 |

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| 01-17-92 | Preparation for hearing and travel to court and wait for small conference with Judge Rokich. | 1.5 |
| 01-21-92 | Research and preparation for hearing, travel to court. Court orders to file, proposed Findings of Fact and Conclusions of Law and Order. | 1.8 |
| 01-31-92 | Preparation and dictation of Findings of Fact and Conclusions of Law by Ables. | 2.0 |

APPENDIX IV

| <u>Date</u> | <u>Service</u> | <u>Time</u> |
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| (R. 651) | Conder | |
| 02-23-91 | t/c w/Rick Cuatto re: Ables Phone call re: attorney's fees | .25 |
| 05-20-91 | Deposition of Jerry Conder | 1.0 |
| 06-06-91 | Review motion re: Wendell; meet with Kirk | .75 |
| 06-13-91 | Prepare for hearing | 1.5 |
| 06-14-91 | Trial Time | 6.0 |
| 11-25-91 | Hearing | 5.0 |
| 12-5-91 | Conference w/KCB | 1.0 |
| (R. 652) | Wangsgard | |
| 06-11-91 | Prepare documents for hearing; court K.B. and Marshall | 1.5 |
| 06-13-91 | Draft Affidavit | .5 |
| 12-06-91 | Draft Findings of Fact & Conclusions of Law; conference w/P.R. | 2.0 |
| (R. 653) | Bennett | |
| 05-09-91 | Hearing, t/c w/Opposing counsel; review documents | 1.75 |
| 05-10-91 | Prepare Documents; Review Documents; legal research; phone conference | 3.0 |
| 05-15-91 | Phone Conference; preparation for hearing; t/c w/counsel | 3.0 |
| 05-16-91 | Hearing & Travel | 2.5 |
| 05-17-91 | Prepare Order; phone conference | 1.75 |
| 06-06-91 | Prepare for hearing & prepare affidavits | 4.0 |
| 06-07-91 | Prepare documents; prepare hearing | 2.5 |
| 06-10-91 | Review documents; prepare hearing | .5 |
| 06-11-91 | Prepare documents for hearing; office conference w/witness | 2.0 |

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| 06-12-91 | Deliver documents; prepare hearing | 3.0 |
| 06-13-91 | Prepare for hearing; legal research prepare documents | 5.0 |
| 06-14-91 | Trial | 6.0 |
| 06-17-91 | Legal Research | 3.0 |
| 06-18-91 | Legal Research | 2.0 |
| 06-20-91 | Legal Research | 1.0 |
| 06-21-91 | Legal Research | 2.5 |
| 06-22-91 | Legal Research & Draft Memorandum | 1.0 |
| 06-22-91 | Legal Research & Draft Documents | 2.0 |
| 06-24-91 | Legal Research | 3.0 |
| (R. 654) | | |
| 07-23-91 | Draft Findings | 1.0 |
| 07-25-91 | Legal Research | 1.0 |
| 07-26-91 | Prepare findings & Legal Research | 1.0 |
| 07-29-91 | Prepare for hearing | 3.5 |
| 11-12-91 | Review Transcript | 2.5 |
| 01-06-92 | Review & draft response | 1.0 |
| 01-19-92 | Travel & conf w/Judge | 2.0 |
| 01-21-92 | Travel & conference & Hearing | 2.5 |
| (R. 654) | | |
| 06-19-91 | Rognlie Research at Library | 1.0 |
| 06-28-91 | Edit and proofread memorandum re: claim for attorney's fees | 2.0 |
| (R. 655) | | .25 |
| 01-03-92 | Research | |