

1992

June Larson v. Orlo Larson : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

920864

IN THE UTAH COURT OF APPEALS

JUNE LARSON,

Plaintiff and Appellee.

vs.

ORLO LARSON,

Defendant and Appellant.

Case No. 920864-CA

BRIEF OF APPELLANT
(Appeal)

APPEAL FROM THE FOURTH DISTRICT COURT - JUDGE LYNN DAVIS

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FILED
Utah Court of Appeals

Priority Pursuant to Utah R. App. P. 29 (b)

Category 16 (All Other Appeals) MAY 27 1993

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

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JURISDICTION & NATURE OF PROCEEDINGS BELOW

This is an appeal from a final judgment of the Fourth District Court in Utah County related to a refusal of the trial court to enforce a stipulation and order of the Court entered and filed more than five (5) years before. The refusal to enforce the stipulation occurred when it was to be performed which was in July 1992. The trial court was of the opinion that the stipulation was illegal and thus unenforceable, notwithstanding that the stipulation was approved by the Court. (Record 551-548)

The Court of Appeals has appellant jurisdiction in this matter pursuant to Utah Code 78-2a-3(2)(h). Notice of Appeal was filed with the trial court on December 14, 1992. (Record 559)

ISSUES PRESENTED FOR REVIEW

This appeal addresses the following issues:

1. Is the stipulation at issue illegal?

Standard of Review: See below.

2. Even if the stipulation is illegal, should the District Court enforce the stipulation and order since it was made more than five (5) years ago?

Standard of Review: See below

3. If the stipulation is invalid, should the Court revise or modify the stipulation to insure justice?

Standard of Review: See below

4. Should Defendant be awarded costs and attorney's fees?

Standard of Review: See below

STANDARD OF REVIEW

The first three (3) issues have the same standard of review. A motion on the pleadings is reviewed as a motion for summary judgment and the standard for review is that the facts are to be viewed in a light most favorable to the party against whom judgment was granted with all reasonable inference from the facts in favor of the non-prevailing party. Review is de novo with no deference to the findings or ruling of the trial court. Wingegar v. Froerer Corp., 813 P.2d 104 (Utah 1991) and Daniel v. Deseret Fed. Sav. & Loan Ass'n, 771 P.2d 1100 (Utah Ct App. 1989) cert denied 783 P.2d 53.

The standard of review on the issue of attorney's fees is a matter of discretion with this court under Utah Code Title 30.

STATUTES INVOLVED

Both state and federal statutes are involved in this case. Copies of the following statutes and regulations are found in the addendum to this brief:

20 C.F.R. §404.2035 and 2040
Utah R. Civil P. 60(b)

Utah Code §78-45-4 is cited and states:

"Every woman shall support her child; and she shall support her husband when he is in need."

STATEMENT OF THE CASE

The parties to this appeal were divorced July 18, 1985, by stipulation and without a trial. (Record 403-410) On January 7, 1987, a modification of the original decree was ordered based on a second stipulation between the parties drafted by Plaintiff's attorney and approved by the Court, but for some reason not approved as to form by Defendant's attorney. (Record 469-473) In July 1992, Defendant complied with his part of the stipulation, but Plaintiff refused. (Record 477)

Defendant brought an order to show cause to enforce the Court's order and the stipulation. (Record 479) Plaintiff plead that the stipulation and order were illegal (Record 482-484) and the Court refused to enforce either. (Record 504-506) The Court Commissioner struck the order to show cause.

Defendant objected and moved the Court to enforce the stipulation. (Record 500-501) The trial judge affirmed the commissioner, refused to enforce its order and refused to decide other issues related to the stipulation and modification on the grounds that the issues were not before the court. (Record 548-541 and Addendum)

In the January 7, 1987, order, the court required Defendant to retire on social security retirement at the age of 62 so that Plaintiff could receive social security for the children at a rate higher than Defendant was required to pay under the Child Support

Guidelines. If Defendant did not retire at age 62, he was required to place sufficient money into an interest bearing trust account to equal \$10,000 in 1999, which was to be paid to Plaintiff in 1999. (Record 469-463)

The Social security benefits are sufficient to pay both Plaintiff and Defendant's support obligations under the Utah State Support Guidelines. (Record 509-516)

If Defendant retired at age 62, Plaintiff was ordered to place the social security into an interest bearing trust account and withdraw each month only an amount equal to Defendant's court ordered support. The balance of the funds were to be left to accumulate interest until the funds had a present value equal to \$10,000 in 1999 dollars. When this value was reached, Plaintiff was to be allowed to removed \$10,000 with any access to be paid to Defendant. Plaintiff was relieved of her support obligation under this arrangement. (Record 469-473)

Defendant complied with the Court's order and retired on social security at age 62 in July 1992, however, Plaintiff refused to comply with the agreement and Court order and took the position that she had been informed by the Social Security Administration that the stipulation was illegal since the social security benefit for the minor children was being utilized to pay property obligation of the parents. (Record 527-532)

Defendant requested the Court to either require Plaintiff to

comply with the Court's order or to enter an order that would deem the \$10,000 obligation discharged. (Record 489-490) The trial court simply refused to do either and informed the parties that they could re-litigate these issues. (Record 504-506)

PROVISION INVOLVED

The provision of the stipulation and order which is at issue in this appeal is contained in the Addendum to this brief in the document entitled Order to Modify Decree of Divorce at pages 2 and 3 and in paragraph 3(c)(1-6).

FINDINGS OF THE COURT

The Honorable Judge Lynn Davis issued a written ruling in this matter in which he sustained the decision of the court commissioner. A copy of the ruling is included in the Addendum and is found in the record at pages 548 through 551, but is not reproduced in the brief since the Court of Appeals must review this matter de novo with no deference to the decisions of the trial court. See Wingegar v. Froerer Corp., supra, and Daniel v. Deseret Fed. Sav. & Loan Ass'n, supra.

DISPOSITION AT TRIAL COURT

The trial court refused to enforce its order of January 7, 1987, struck a portion of its 1987 order and directed that the parties re-litigate certain issues. (Record 504-506) The Court Commissioner's order stated in pertinent part:

- "8. Paragraph 3c(1) of the Order to Modify Decree of Divorce dated January 7, 1987, is hereby stricken.

9. Any further modification of the Order to Modify Decree of Divorce with regard to the payment provisions of the \$10,000.00 obligation set forth in paragraph 3c must be agreed to by the parties or re-litigated."

In fact, the trial court was of the opinion that certain issues related to equitable relief was not before it and refused to take any action. (Record 548-551 and Addendum). Since this appeal addresses legal issues and not the equitable issues of whether or not the 1987 agreement should be modified at this time in equity, a petition to modify was filed in the trial court after the filing of this appeal so that facts could be obtained through discovery. (Record 562-566)

The petition has not be set for trial and the trial court has entered an order that reserves whether or not the petition to modify should be stayed pending decision of this court. A copy of this order is also found in the Addendum to this brief, but is not a part of the record since the record was certified prior to entry of the order. (See index filed February 17, 1993)

SUMMARY OF ARGUMENT

Appellant's argument is that the stipulation of the parties in 1987 which was approved by the Court should be enforced at this time because of justifiable reliance on the trial court's order by the Appellant and because if Appellee intended to seek relief from the stipulation, she had to do so within three (3) months of its entry on January 7, 1987. Finally, Appellant argues that the

stipulation was not illegal when entered and that justice now requires its enforcement.

ANALYSIS/DETAILS OF ARGUMENT

Stipulations/Contracts

Parties are bound by their stipulations unless they are timely relieved from them by motion to the Court and in the interest of justice and fair play. First of Denver Mortgage Investors v. C.N. Zundel and Associates, 600 P.2d 521 (Utah 1979) and Klein v. Klein, 544 P.2d 472 (1975) When a stipulation is clear, the trial court should enforce it. Higbey v. McDonald, 685 P.2d 496 (Utah 1984)

Appellee's position is that notwithstanding she freely and voluntarily entered into an unambiguous agreement, she is not bound by it because of the policy and regulations of the Social Security Administration. Appellee takes a similar position to that set forth in Maxwell v. Maxwell, 796 P.2d 403 (Utah 1990).

The Maxwell case was a stipulated divorce where the parties agreed that the wife would be paid one-half (1/2) of the husband's military retirement benefits. The husband paid his former spouse benefits for awhile, but then discovered that the stipulation and order of the divorce court was contrary to the federal Uniformed Services Former Spouses Protection Act (USFSPA) found in 10 U.S.C. §1408 (1983). The dispute involved whether or not the wife was entitled to gross or net benefits.

The husband in Maxwell argued on appeal that the USFSPA

prohibits state courts from treating total or gross retired pay as marital property. The Maxwell Court reviewed this argument under the correction of error standard. The court held:

"We determine that Otis cannot avoid the decree by now claiming mistake in entering into the stipulation. While a property settlement agreement is not binding upon a trial court in a divorce action, such agreement should be respected and given considerable weight in the trial court's determination of an equitable division of property.....

"Further, stipulations are conclusive and binding on the parties, unless, upon timely notice and for good cause shown, relief is granted therefrom..... (Emphasis added.)

"The appropriate procedure to provide such notice and obtain such relief from a judgment based on a mistakenly executed stipulation is to file a motion pursuant to Utah Rules of Civil Procedure 60(b)(1) seeking relief because of 'mistake, inadvertence, surprise or excusable neglect within three months after the judgement, order of proceeding entered...

"We reject Otis' attempt on appeal of the trial court's orders to show cause, which enforces the stipulated divorce decree, to bootstrap himself to a 'mistake' argument that should have been raised within three months after the original order was entered...."

More than three (3) months has past since the entry of the court's order approving the stipulation in this case. For almost five (5) years, the parties relied on the stipulation. Appellant acted based on the stipulation and retired early so as to avoid the penalty contained in the stipulation and court order.

The reasoning of the Maxwell case is clearly applicable to the facts of this case. Appellant should be entitled to rely on the orders of the court, especially when compliance with such orders profoundly affects Appellant's life and retirement plans.

Rule 60(b) is aimed at the very problem which now faces Appellant. If Appellee felt that the stipulation was a mistake because of the status of the law or the policies and regulations of the Social Security Administration, she should have complied with Rule 60(b) and brought a motion to set aside her agreement within three (3) months of its entry, not five (5) years. To wait until Appellant performs under the stipulation is neither just nor fair and therefore not proper grounds to set the stipulation aside.

Appellee has argued that this is a mixed issue of support and property. However, this mix of issues was considered by the Utah Supreme court in Stetler v. Stetler, 713 P.2d 699 (Utah 1985) and held to be a valid mixture since both property and child support are matters subject to modification. This same argument was made in Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856 (Utah 1978)

The Defendant in Holmgren attempted to avoid liability by claiming that the contracts which were sought to be enforced were void because they violated both public policy and statutory prohibitions. The Court, however, rejected this argument and held the Defendant to its various contracts.

Setting Aside/ Relief from Stipulations

Courts should look long and hard at a stipulation before deciding to set it aside. In Dove v. Cude, 710 P.2d 170 (Utah 1985), the Supreme Court held:

"It is unlikely that a stipulation signed by counsel and filed with the court was entered into inadvertently. Further,

although the trial court has certain discretion in providing relief from a stipulation, if timely requested, see Klein v. Klein, 544 P.2d 472, 'ordinarily courts are bound by stipulations between parties.....' Emphasis added.

The Dove court went on to say that a trial court must find that the party seeking to withdraw the stipulation did not understand or agree to the stipulation. In this case, the Plaintiff understood the stipulation and agreed to it. The stipulation is clear and was drafted by Plaintiff's attorney. Any questions about the drafting of the stipulation must be construed against Plaintiff. See Parks Enterprises Inc. v. New Century Realty, 652 P.2d 918 (Utah 1982)

In the Klein case cited in Dove, the Supreme Court held:

"If there is any justification in law or equity for avoiding or repudiating a stipulation, and he timely does so, he is entitled to be relieved from it, otherwise, not." Emphasis added.

In order for a party to withdraw a stipulation or for the court to grant relief from a stipulation, Rule 60(b) of the Utah Rules of Civil Procedure must be followed. The rules stated:

"On motion and upon such terms as are just, the court may in the furtherance of justice, relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered.....(3) fraud.....The motion shall be made within a reasonable time and for reasons (1),(2),(3) or (4), not more than 3 months after the judgment, order or proceeding was entered or taken.."

Even if the Court could set aside the judgment based in the stipulation, it must be done within three (3) months and upon such

terms as are just. It is not just to force Appellant into retirement, reduce his income and take from him the benefit of the stipulation without some just compensation.

Mistake of Fact/Rescission

A mistake of fact may be sufficient grounds to set aside a stipulation so long as the mistake of fact was not due to a lack or a failure to exercise due diligence and it could not have been avoided by the exercise of ordinary care. United Factors v. T.C. Associates Inc, 445 P.2d 766 (Utah 1968) Even then, it must be done within three (3) months of entry of the judgment or order.

In order to claim avoidance of a stipulation and/or a contract for mutual mistake, the mistake must be as to a material factual matter which existed at the time of the making of the agreement. Mooney v. GR and Associates, 746 P.2d 1174 (Utah App. 1987) The Mooney court held:

"A party may rescind a contract when, at the time the contract is made, the parties made a mutual mistake about a material fact, the existence of which is a basic assumption of the contract. If the parties harbor only mistaken expectations as to the course of future events and their assumptions as to the facts existing at the time of the contract are correct, rescission is not proper."

Even if there was a mutual mistake as to a material fact, the stipulation is only voidable and not void and the court would be required to place the parties in their pre-contract positions rather than simply refuse to enforce the agreement. Robert Langston, LTD. v. McQuarrie, 741 P.2d 554 (Utah App. 1987)

Social Security Act

Plaintiff claims that the agreement between the parties is unenforceable because the regulations of the Social Security Administration. (see 20 C.F.R. §404.2035 and 2040) Copies of these regulations are attached in the addendum for the court's review.

C.R.F. §404.2035 provides that a person who receives benefits on behalf of another person must use the benefits solely for the beneficiary and not for any other reason. This does not make the stipulation of the parties illegal. Under Utah Code §78-45-4, a woman has an obligation to support their minor children. This means that Plaintiff has an obligation to support these minor children as well as does Defendant. Under C.F.R. 404.2035, however, Plaintiff receives 100% of the necessary care expenses of the children; this includes Plaintiff's share as well as Defendant's share of the total cost of caring for the children.

The stipulation is legal so long as the Plaintiff takes the Social Security funds and expends them totally for the use and benefit of the children. She must then take her share of the children's support and place it in a trust account pursuant to the stipulation of the parties.

Social Security benefits can be legally used for the needs of the children while relieving Plaintiff of her duty to support the children. The stipulation simply provides that Plaintiff's share of the children's support is used to retire Defendant's lien

obligation, not the social security.

Modification of the Stipulation

Appellant requested the trial court to reform the stipulation and order so as to do equity between the parties. Divorce proceedings are matters of equity and the appellate court is free to consider the law and the facts when determining if an equitable order should be entered by the Court. Stetler v. Stetler, 713 P.2d 699 (Utah 1985) A trial court has considerable discretion in adjusting the financial interests of parties in divorce. Cook v. Cook, 739 P.2d 90 (Utah App. 1987) Rule 60(b) requires the court to set aside its order "upon such terms as are just".

In Hansen V. Hansen, 537 P.2d 491 (Utah 1975), the Supreme Court held that it has jurisdiction to modify property distributions upon proof of changed circumstances and conditions.

The changed circumstances or conditions must be shown, however, prior to modification. Dixon v. Dixon, 240 P.2d 1211 (1954). Property settlements are not "sacrosanct" and are within the power of the court to modify. Chandler v. West, 610 P.2d 1299 (1980).

The court has the equitable jurisdiction necessary to modify the decree in this case and to discharge the lien which was established in the 1985 decree and modified by agreement as to the method of payment in 1987.

ATTORNEY'S FEES

Appellant should be reimbursed for his costs and attorney's fees since Appellee's refusal to comply with her agreement caused Appellant's costs and attorney's fees. Title 30 of Utah Code and Rule 60(b) of the Utah Rules of Civil Procedure provide the legal basis for an award of fees.

CONCLUSIONS

The trial court should have enforced the stipulation of the parties which it approved in 1987. Defendant relied on the order of the court. It is not now just or fair to simply refuse to enforce the order of the court. There is sufficient legal basis to enforce the stipulation or to do what justice requires.

Appellant requests this court to enforce the stipulation and award him his attorney's fees and cost. Alternatively, Appellant requests that this court enter an order deeming the \$10,000.00 property award to Appellee satisfied with an award of attorney's fees. The award of attorney's fees is equitable because under the 1987 order of the trial court, Appellant would have received additional money from the trust account when Appellee was paid.

Respectfully Submitted



C. ROBERT COLLINS
Attorney for Appellant/Defendant

CERTIFICATE OF MAILING

This is to certify that on this 25th day of May, 1993, four (4) true and correct copies of the foregoing was mailed, postage prepaid to the following:

WILFORD N. HANSEN JR.
Attorney for Appellee
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P.O. Box 67
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A handwritten signature in cursive script, reading "C. Robert Collins", written in dark ink.

C. ROBERT COLLINS

ADDENDUM

This addendum contains copies of the following documents:

- A. Findings of Fact (January 7, 1987)
- B. Order Modifying Decree (January 7, 1987)
- C. Order on Order to Show Cause (August 13, 1992)
- D. Ruling on Defendant's Objection (November 5, 1992)
- E. Order on Defendant's Objection (November 30, 1992)
- F. Notice of Appeal (December 14, 1992)
- F. Trial Court Order on Petition to Modify
(Entitled Order on Cross-Motions Related to Discovery)
- G. 20 C.F.R. §404.2035 & 2040
- H. Rule 60(b) of the Utah Rules of Civil Procedure

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JUNE LARSON,
Plaintiff,

vs.

ORLO B. LARSON,
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. 68,661

COPY

This matter came before Howard Maetani, Domestic Relations Commissioner of the above-entitled Court, for trial pursuant to Defendant's Petition to Modify Decree of Divorce and for contempt, on Thursday, November 6, 1986, at 2 p.m. Both Plaintiff and Defendant were present and were represented by their respective counsel of record. The Stipulation of the parties was entered into the record and approved by both parties. Based thereon and good cause appearing therefore, the Court now makes and enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The parties were divorced by decree of the above-entitled Court on July 18, 1985.
2. Defendant is presently in arrears pursuant to the property settlement portion of the Decree of Divorce, paragraph 4, for the August, September, and October, 1986 payments of \$350 each, a total to date of \$1,050. Said arrearages shall be paid by the property settlement agreement below if fully performed.

3. Plaintiff has recorded her Trust Deed against the Defendant's property pursuant to paragraph 4 of the Decree of Divorce.

4. Plaintiff agrees to deposit with Provo Abstract Company the documents necessary to release her Trust Deed and Notice of Interest to Defendant's real property in or near Springlake, Utah within three (3) days of the entry of the Order, to be delivered conditioned upon the Defendant's paying \$31,500 to Plaintiff, the \$350 due November 30, 1986, and the \$350 due December 31, 1986 under the original Decree and \$350 monthly until the \$31,500 is paid in full.

5. Defendant agrees, in order to obtain Plaintiff's release of Trust Deed and Notice of Interest,

a. To pay to the Plaintiff the sum of \$31,500.00 cash on or before January 5, 1987.

b. To pay the regular property settlement payments of \$350 beginning November 30, 1986 and monthly thereafter as required pursuant to the original Decree of Divorce until Plaintiff shall receive the \$31,500.00 set forth above.

c. To pay to the Plaintiff the sum of \$10,000.00 on or before September 30, 1999 as follows:

(1) The benefits which the children of the parties may receive as a result of Defendant's death or retirement shall be escrowed in a trust account at Zion's Bank, Spanish Fork Branch, and shall be disbursed to pay:

(a) To the bank to pay fees of administering the account

(b) To Plaintiff to pay \$125 per month per child, child support when due

(c) The balance to be held in an interest-bearing trust account, in the name of June Larson and credited for the payment of

the property settlement payment of \$10,000.00 until such time as the balance held equals the then-present value of \$10,000.00 due October 1, 1999, when calculated using Zion's Bank's prime rate at the time of the calculation. At the time the balance reaches the specified amount to satisfy the requirements set forth in this paragraph it shall be immediately disbursed to Plaintiff in satisfaction of the \$10,000.00 property settlement obligation, the account will be closed and all of the benefits which the children are entitled to receive as a result of Defendant's death or retirement will be paid to Defendant or Defendant's estate. From that amount, Defendant will continue to pay his child support obligation of \$125.00 per month per child.

(2) It is Defendant's stated intent to retire on or before July, 1992. If Defendant has not retired by that time or the Social Security payment is not available for any reason, Defendant will ~~immediately~~ contribute to said escrow account an amount that will generate \$10,000 by 1999.

on a monthly basis the same amount would have been deducted

(3) Defendant agrees to waive all rights to personally receive said Social Security payments intended for the benefit of the children until such time as the \$10,000.00 obligation has been satisfied. Defendant shall timely sign any documents and perform any act that may be required to protect the above-described fund.

(4) Defendant may pre-pay the present-day value of the said \$10,000.00 obligation without penalty at any time prior to the due date or the date for performing any part of said obligation.

(5) Default shall occur if the above-described account is not established by July, 1992, or if for any reason any monthly payment to

said account is not made during the month when due or, if in any month, a contribution is not made toward the property settlement.

(6) In the event of failure to abide by provisions, Plaintiff may accelerate the balance then due and owing on the property settlement and proceed to collect the same, together with reasonable costs and attorney's fees.

6. Defendant's action with respect to child custody is hereby dismissed. ~~The~~ children shall remain in the custody of the Plaintiff.

7. This Stipulation and Modification is entered into upon the representation of Defendant that he is in severe financial difficulty and is on the verge of bankruptcy if this agreement is not entered into.

8. Each party claims to be entitled to various items of personal property awarded under the original Decree of Divorce which have not been delivered.

9. Each party is to present to the other within five days of the date of signing and entry of the Order to Modify Decree, a list of those items of personal property claimed to have been awarded under the original Decree of Divorce which have not been delivered. Each party is ordered not to dispose of any personal property of the other or in which the other party claims an interest and within ten days after receiving the list requested American Towing will pick up said items at each parties residence and will transport the items to each parties residence. The parties will split the cost of towing.

10. Plaintiff agrees to waive any right to hay which she has under paragraph 6 of the original Decree of Divorce.

11. Defendant shall be in default under the Agreement of the parties if any condition is not performed when required or any of the obligations set forth above are not paid when due. In the event of a default, the Agreement of the parties shall be

null and void and the parties shall revert to the provisions set forth in the original Decree of Divorce regarding the property settlement.

12. Each party is to bear his or her own costs and attorney's fees in this particular matter.

13. Neither party presented evidence as to other matters contained in Defendant's Petition or Plaintiff's Answer thereto, the parties appearing to have resolved ^{them} ~~between themselves the other matters including child custody, visitation, children's property, record, taxes, and hay.~~

The Court having made and entered its Findings of Fact, now makes and enters its

CONCLUSIONS OF LAW

1. The Court has jurisdiction in the above-entitled matter.

2. The Defendant's severe financial circumstances constitute a material change of circumstances which justify a modification in the property settlement portion of the Decree of Divorce.

~~3. The children shall remain in the custody of the Plaintiff.~~

3. The provisions of the Stipulation of the parties as entered into the record and as set forth in the Findings of Fact above are hereby approved as being reasonable and are to be incorporated in an Order to Modify Decree of Divorce. All other matters are hereby dismissed.

DATED this _____ day of December, 1986.

BY THE COURT:

DOMESTIC RELATIONS COMMISSIONER

Approved as to form:

MARK ROBINSON
Attorney for Defendant

Bill Hansen, #1352
CHRISTENSEN & HANSEN
Attorneys for Plaintiff
Mountain View East Professional Plaza
1172 East Highway 6, Nos. 7 & 19
P.O. Box 67
Payson, Utah 84651-0067
Telephone: (801) 465-9288

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY STATE OF UTAH

1997 JAN -7 PM 2:21

WILLIAM E. HUGHES, CLERK
DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JUNE LARSON,
Plaintiff,

vs.

ORLO B. LARSON,
Defendant.

ORDER TO MODIFY
DECREE OF DIVORCE

Civil No. 68,661

This matter came before Howard Mactani, Domestic Relations Commissioner of the above-entitled Court, for trial pursuant to Defendant's Petition to Modify Decree of Divorce and for contempt, on Thursday, November 6, 1986, at 2 p.m. Both Plaintiff and Defendant were present and were represented by their respective counsel of record. The Stipulation of the parties was entered into the record and approved by both parties. The Court has made and entered its Findings of Fact and Conclusions of Law. Based thereon and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Decree of Divorce entered in the above-entitled Court on July 18, 1985 is modified as set forth herein.
2. Plaintiff is ordered to deposit with Provo Abstract Company the documents necessary to release her Trust Deed and Notice of Interest to Defendant's real property in or near Springlake, Utah, within three (3) days of the entry of this Order, to be delivered conditioned upon the Defendant's paying \$31,500 to Plaintiff, the \$350

due November 30, 1986, and the \$350 due December 31, 1986 under the original Decree and \$350 monthly until the \$31,500 is paid in full.

3. It is ordered that Defendant, in order to obtain Plaintiff's release of Trust Deed and Notice of Interest,

a. Pay to the Plaintiff the sum of \$31,500.00 cash on or before January 5, 1987.

b. Pay the regular property settlement payments of \$350 beginning November 30, 1986 and monthly thereafter as required pursuant to the original Decree of Divorce until Plaintiff shall receive the \$31,500.00 set forth above.

c. Pay to the Plaintiff the sum of \$10,000.00 on or before September 30, 1999 as follows:

(1) The benefits which the children of the parties may receive as a result of Defendant's death or retirement are ordered escrowed in a trust account at Zion's Bank, Spanish Fork Branch, and are ordered disbursed to pay:

(a) To the bank to pay fees of administering the account

(b) To Plaintiff to pay \$125 per month per child, child support when due

(c) The balance is ordered held in an interest-bearing trust account, in the name of June Larson and credited for the payment of the property settlement payment of \$10,000.00 until such time as the balance held equals the then-present value of \$10,000.00 due October 1, 1999, when calculated using Zion's Bank's prime rate at the time of the calculation. At the time the balance reaches the specified amount to satisfy the requirements set forth in this paragraph it is ordered

immediately disbursed to Plaintiff in satisfaction of the \$10,000.00 property settlement obligation, the account will be closed and all of the benefits which the children are entitled to receive as a result of Defendant's death or retirement will be paid to Defendant or Defendant's estate. From that amount, Defendant will continue to pay his child support obligation of \$125.00 per month per child.

(2) If Defendant has not retired by July, 1992, or the Social Security payment is not available for any reason, Defendant is ordered to immediately contribute to said escrow account an amount that will generate \$10,000 by 1999.

(3) Defendant shall waive all rights to personally receive said Social Security payments intended for the benefit of the children until such time as the \$10,000.00 obligation has been satisfied. Defendant shall timely sign any documents and perform any act that may be required to protect the above-described fund.

(4) Defendant may pre-pay the present-day value of the said \$10,000.00 obligation without penalty at any time prior to the due date or the date for performing any part of said obligation.

(5) Default shall occur if the above-described account is not established by July, 1992, or if for any reason any monthly payment to said account is not made during the month when due or, if in any month, a contribution is not made toward the property settlement.

(6) In the event of failure to abide by provisions, Plaintiff may accelerate the balance then due and owing on the property settlement and

proceed to collect the same, together with reasonable costs and attorney's fees.

4. It is ordered that Plaintiff retain custody of the minor children of the parties, subject to Defendant's rights of visitation as specified in the original Decree of Divorce.

5. Each party is ordered to present to the other within five days of the date of signing and entry of this Order to Modify Decree, a list of those items of personal property claimed to have been awarded under the original Decree of Divorce which have not been delivered. Each party is ordered not to dispose of any personal property of the other or in which the other party claims an interest and within ten days after receiving the list requested American Towing will pick up said items at each party's residence and will transport the items to each party's residence. The parties will split the cost of towing.

6. Paragraph 6 of the original Decree of Divorce is hereby modified to eliminate the requirement that Defendant provide Plaintiff any further hay.

7. Defendant shall be in default under the Agreement of the parties if any condition is not performed when required or any of the obligations set forth above are not paid when due. In the event of a default, the Agreement of the parties shall be null and void and the parties shall revert to the provisions set forth in the original Decree of Divorce regarding the property settlement.

8. Each party is to bear his or her own costs and attorney's fees in this particular matter.

9. All other matters contained in Defendant's Petition or Plaintiff's answer thereto, including child custody, visitation, children's property, records, taxes, and hay are hereby dismissed, the parties appearing to have resolved said matters between themselves.

DATED this 7 day of ~~December~~ ^{JANUARY}, 1987.

BY THE COURT:


DOMESTIC RELATIONS COMMISSIONER
JUDGE PRO TEMORE

Approved as to form:

MARK F. ROBINSON

WILFORD N. HANSEN, JR., P.C.
Bill Hansen, #1352
Attorney for Plaintiff
Mountain View East Professional Plaza
1172 East Highway 6, Suite 7
Post Office Box 67
Payson, Utah 84651-0067
Telephone: (801) 465-9288

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JUNE LARSON, nka JUNE BECKMAN,
Plaintiff,

vs.

ORLO B. LARSON,
Defendant.

ORDER ON ORDER TO SHOW CAUSE

Howard H. Maetani, Commissioner

Civil No. 68,661

This matter came before the Honorable Howard H. Maetani, Domestic Relations Commissioner of the above-entitled Court pursuant to Defendant's Order to Show Cause and Plaintiff's Counter Order to Show Cause this 28th day of July, 1992, at the hour of 1:30 p.m. Plaintiff was present and was represented by Bill Hansen. Defendant was present and was represented by Marilyn Moody Brown. Counsel conferred with Commissioner Maetani in chambers regarding the applicable law pertaining to trust accounts for child support and the use of the minor childrens' social security monies to discharge personal obligations of the Defendant. Based thereon, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. An Order modifying the Decree of Divorce was entered on January 7, 1987.
2. Pursuant to said Order, upon Defendant's retirement, any social security

benefits to be received by the parties' minor children would be credited towards Defendant's child support obligation.

3. The children, Karalee Larson and Oralea Larson, receive social security benefits of \$312.00 each per month on the account of Leonard Beckman, their step-father.

4. Said children received \$470.00 each per month for the months of June and July, 1992, on the combined account of Mr. Beckman and Defendant, a difference of \$158.00 per month ~~per~~ child.

5. It is ordered that said sum is the exclusive property of each of the children, and that Defendant's child support obligation for said children during those months is satisfied.

6. It is further ordered that the childrens' social security benefits are not required to be placed in a trust account, but may be paid directly to the children.

7. Furthermore, it is ordered that said funds are not lawfully available to discharge Defendant's personal indebtedness to the Plaintiff.

8. Paragraph 3c(1) of the Order to Modify Decree of Divorce dated January 7, 1987, is hereby stricken.

9. Any further modification of the Order to Modify Decree of Divorce with regard to the payment provisions of the \$10,000.00 obligation set forth in paragraph 3c must be agreed to by the parties or re-litigated.

DATED this 13 day of August, 1992.

BY THE COURT:

HS/
HOWARD H. MAETANI
DOMESTIC RELATIONS COMMISSIONER

APPROVED AS TO FORM:

Marilyn Brown
MARILYN MOODY BROWN
Attorney for Defendant

IN THE FOURTH JUDICIAL DISTRICT COURT
STATE OF UTAH, COUNTY OF UTAH

JUNE LARSON,	:	RULING ON DEFENDANT'S
	:	OBJECTION TO RULING OF
Plaintiff,	:	COURT COMMISSIONER,
	:	DEFENDANT'S MOTION TO
v.	:	ENFORCE DECREE OF
	:	MODIFICATION, TO SET ASIDE
ORLO LARSON,	:	COMMISSIONER'S RULING & FOR
	:	OTHER RELIEF
	:	
	:	CASE NO. 68661
Defendant.	:	Judge Lynn W. Davis

This matter came before the Court on September 30th, 1992 for oral argument on Defendant's Objection to the Ruling of the Court Commissioner. Plaintiff was present and was represented by Bill Hansen, Esq. Defendant was present and was represented by C. Robert Collins, Esq.

The Court took the matter under advisement. The Court having been fully advised in the premises now enters its decision:

I.

COMMISSIONER'S RULING

At issue before the Court is a provision in the Order to Modify Decree of Divorce. The Modification order provides that upon retirement or death of the defendant, the social security benefits which would accrue the minor children of the parties be held in an escrow account. Defendant was to be relieved of additional child support obligation. It was

anticipated that plaintiff would be able to withdraw from the escrow account the amount of defendant's child support obligation. The remaining funds were to be left in the escrow account to accumulate over a seven year period. At the end of the seven year period, the plaintiff would be paid \$10,000.00 out of the escrow account and the remaining funds were to be the defendants. The above provision was to go into effect by July, 1992, or defendant was foreclosed from availing himself of this provision.¹

On or about June 24, 1992, defendant filed with the Court an Order to Show Cause against the plaintiff seeking enforcement of the above described provision in the modification decree. On July 28, 1992, this matter came before the Court Commissioner for a hearing on the Order to Show Cause. The Court Commissioner ruled 1) that the Court would not approve of the provision at that time due to additional information concerning the use of social security benefits, 2) that the order to show cause was stricken, and 3) that the social security payments would be subtracted from defendant's support obligation. All other issues were left for the parties to either work out or relitigate in the future. The Court Commissioner did not rule on the payment of the \$10,000.00 dollars.

On or around August 7, 1992, Defendant filed an Objection to Ruling of Court

¹The Court also notes that the original divorce decree also provides that social security payments for the support of the minor children in excess of the child support award would reduce the amount of indebtedness on the property settlement between the parties. See Decree of Divorce, ¶ 3, Dated July 18, 1985.

Commissioner Defendant's objection was supported by a Motion to Enforce Decree of Modification, Set Aside Commissioner's Ruling, and for Other Relief.

II.

OBJECTION TO COMMISSIONER'S RULING

The Court affirms the Ruling of the Court Commissioner. At the July 28th hearing, the Court Commissioner refused to approve or give effect to the provision in question due to federal restrictions on the use of social security support funds. This Court agrees with the Commissioner's reasoning. A child's Social Security benefit may not be used to discharge a parent's personal debt not related to the support of the child. Fauver v. Hansen, 803 P.2d 1275, 1278 (Utah App. 1990). "Utah Courts have long held that the right to receive child support is an unalienable right, belonging to the child, and cannot be bartered away by the child's parent or parents." Id.

The Social Security regulations dealing with payments made to minor children of retired employees is in line with Utah's approach to child support. 20 CFR Ch. III § 404.2035 states that a representative payee, (i.e. guardian or parent of minor child in this case) "has the responsibility to use the payments he or she receives only for the use and benefit of the beneficiary" Use of social security benefits to retire a debt of defendant does not meet the mandate of this section and will not be enforced by this court. Additionally, neither party has the power to bargain away a right belonging exclusively to the children. For these reasons, the Court affirms the Commissioner's ruling.

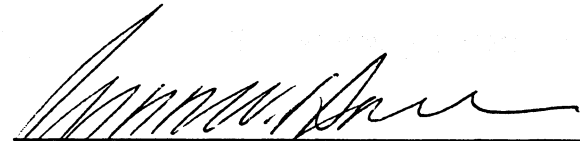
II.

OTHER MOTIONS OF DEFENDANT

In addition to filing an objection to the Court Commissioner's ruling, defendant also filed a motion to enforce the modification decree, to set aside the Court Commissioner's ruling and other relief. These motions are not properly before the Court. The Court has already considered defendant's objection to the Court Commissioner's ruling. The Court will not entertain any matter outside the scope of an objection to the Court Commissioner's ruling. Defendant's motions to enforce the modification decree and to set aside the Court Commissioner's ruling are hereby denied.

Dated, at Provo, this 5 day of November, 1992.

BY THE COURT



Judge Lynn W. Davis

FILED
Fourth Judicial District Court
of Utah County, State of Utah
11-30-92
CARMA B. SMITH, Clerk

COPY

Deputy

C. ROBERT COLLINS
Attorney for Defendant
Utah State Bar #5455
405 East State Road
P.O. Box 243
American Fork, UT 84003
(801) 756-0554
=====

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH
=====

JUNE LARSON,)	
	)	ORDER ON DEFENDANT'S MOTION
Plaintiff,	)	AND OBJECTION TO COMMISSIONER'S
	)	RULING
vs.)	
	)	Case No. 68661
ORLO LASON,)	
	)	Judge Lynn W. Davis
Defendant.)	

=====

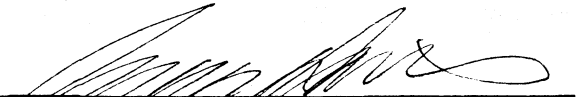
THIS MATTER having come on regularly before the undersigned judge of the above entitled Court for oral argument on September 30, 1992, Plaintiff appearing with her attorney, Bill Hansen, Defendant appearing with his attorney, C. ROBERT COLLINS, the Court having taken this matter under advisement, having reviewed the files and records herein, having made its ruling under date of November 5, 1992, and deeming itself fully advised,

NOW THEREFORE, IT IS HEREBY ORDERED that the Commissioner's ruling and subsequent Order on Order to Show Cause filed on or about August 13, 1992, shall be and is hereby confirmed.

IT IS FURTHER ORDERED that the court declines to rule on balance of Defendant's motions for and upon the grounds that the

court believes that the other matters are not properly before the court.

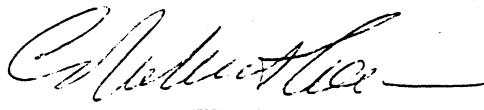
Dated and signed this 30th day of ~~November~~, 1992.


JUDGE LYNN DAVIS

CERTIFICATE OF MAILING

This is to certify that on this 19th day of November 1992, a true and correct copy of the foregoing document was mailed, postage prepaid to the following:

Bill Hansen
Attorney at Law
P.O. Box 67
Payson, UT 84651


C. ROBERT COLLINS
Attorney for Defendant

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

DEC 14 2 29 PM 1992

COPY

C. ROBERT COLLINS
Attorney for Defendant
Utah State Bar #5455
405 East State Road
P.O. Box 243
American Fork, UT 84003
(801) 756-0554

=====

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

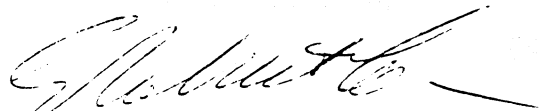
=====

JUNE LARSON,)	
)	
Plaintiff & Appellee,	)	Case No. 68,661
)	
vs.	)	NOTICE OF APPEAL
)	
ORLO LARSON,)	
)	
Defendant & Appellant.	)	Judge Lynn Davis

=====

NOTICE IS HEREBY GIVEN that Defendant and Appellant Orlo Larson, appeals to the Utah Court of Appeals the final judgment of the Honorable Judge Lynn Davis, entered in this matter on November 30, 1992, and entitled Order on Defendant's Motion and Objection to Commissioner's Ruling. The appeal is taken from the entire order.

Dated this 9th day of December, 1992.

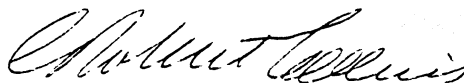


C. ROBERT COLLINS
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

This hereby certifies that on the 14th day of December, 1992,
the undersigned mailed a true and correct copy of the foregoing to:

Bill Hansen
Attorney at Law
P.O. Box 67
Payson, Utah, 84651



C. ROBERT COLLINS
Attorney for Defendant

COPY

Filed
5-17-93

C. ROBERT COLLINS
Attorney for Defendant
Utah State Bar #5455
405 East State Road
P.O. Box 243
American Fork, UT 84003
(801) 756-0554

=====

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

=====

JUNE LARSON, nka BEKMAN,)	
	)	ORDER ON CROSS-MOTIONS
Plaintiff,	)	RELATED TO DISCOVERY ISSUES
)	
vs.	)	Case No. 68661
)	
ORLO LARSON,	)	Commissioner Howard Maetani
)	
Defendant.)	

=====

THIS MATTER having come on regular before the undersigned commissioner of the above entitled Court on May 4, 1993, for oral arguments on Defendant's Motion to Compel and upon Plaintiff's Motion for Protective Order, Defendant appearing with his attorney of record, Plaintiff not appearing, but being represented by her attorney of record, the Court having heard the arguments of counsel, having reviewed the files and records herein and deeming itself fully advised, makes the following:

1. There is currently pending in the Court of Appeals an appeal related to whether or not the Court should enforcement a prior stipulation of the parties related to a \$10,000 property lien and social security. The Court has previously ruled that the provision is illegal and has refused to enforce it. Defendant has

appealed the enforceability of the stipulation.

2. The Defendant has also filed a petition to modify the original order of this court related to the \$10,000 property lien based on equity and his position that the Court would not consider his equitable arguments when the issue of the enforceability of the lien provision was before the Court because of statements by the court that this issue was not properly before the court at that time.

3. The subject matter of the appeal and the petition for modification is the same, however, the issues are difference; i.e. illegality of the provision verse equitable relief to deem the \$10,000 satisfied though not paid. The Court of Appeals has jurisdiction over the first issue and this court has jurisdiction over the second.

4. In connection with the petition to modify, Defendant has served interrogatories and requests for documents on Plaintiff.

5. When Plaintiff did not answered Defendant's discovery, he filed a motion to compel. Plaintiff responded by answering a few of the interrogatories, but objected to most as burdensome and irrelevant.

6. The Court's inclination is to stay the petition to modify until a decision from the Court of Appeals is made, however, Plaintiff requested the Court not to do so and that the petition to modify proceed.

7. The Court reviewed the interrogatories and requests for documents and finds that they are not burdensome and are relevant

to the petition to modify which is before this court.

8. The parties stipulated that Plaintiff may have an additional 30 days to respond to the requested discovery.

NOW, THEREFORE, IT IS ORDERED:

1. Plaintiff shall answer the requested interrogatories and produce the requested documents on or before June 4, 1993.

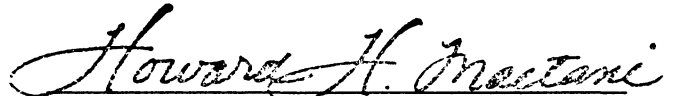
2. The Court reserves the right on its own motion to stay the petition to modify at the time of pre-trial hearing after review of the status of the appeal at that time.

3. The issues of attorney shall be reserved.

4. The motion for protective order is denied

5. The motion to compel is granted.


Dated this 17 day of May, 1993.


Commissioner Howard Maetani

CERTIFICATE OF MAILING

This is to certify that on this 6th day of May, 1993 a true and correct copy of the foregoing document was mailed, postage prepaid, to the following:

Wilford N. Hansen, Jr.
Attorney at Law
Mountain View East Professional Plaza
1172 East Hwy. 6, Suite 7
P.O. Box 67
Payson, UT 84651-0067


C. ROBERT COLLINS

If he or she objects to either proposed action, the person may—

- (1) Review the evidence upon which the proposed actions will be based; and
- (2) Submit any additional evidence regarding the proposed actions.

(b) If the person objects to the proposed actions, we will review our proposed determinations and consider any additional information given to us. We will then issue our determinations. If the person is dissatisfied with either determination, he or she may request reconsideration.

(c) If the person does not object to the proposed actions, we will issue our determinations. If the person is dissatisfied with either determination, he or she may request a reconsideration.

47 FR 30472, July 14, 1982; 47 FR 32936, July 30, 1982]

404.2035 Responsibilities of a representative payee.

A representative payee has a responsibility to—

(a) Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary;

(b) Notify us of any event that will affect the amount of benefits the beneficiary receives or the right of the beneficiary to receive benefits;

(c) Submit to us, upon our request, a written report accounting for the benefits received; and

(d) Notify us of any change in his or her circumstances that would affect performance of the payee responsibilities.

404.2040 Use of benefit payments.

(a) *Current maintenance.* (1) We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.

Example: An aged beneficiary is entitled to a monthly Social Security benefit of \$60. Her son, who is her payee, disburses her benefits in the following manner:

Rent and utilities	\$200
Medical	25
Food	60
Clothing (coat)	55
Savings	30
Miscellaneous	30

The above expenditures would represent proper disbursements on behalf of the beneficiary.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, if a beneficiary is a member of an Aid to Families With Dependent Children (AFDC) assistance unit, we do not consider it inappropriate for a representative payee to make the benefit payments available to the AFDC assistance unit.

(b) *Institutional care.* If a beneficiary is receiving care in a Federal, State, or private institution because of mental or physical incapacity, current maintenance includes the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's conditions while in the institution.

Example: An institutionalized beneficiary is entitled to a monthly Social Security benefit of \$320. The institution charges \$700 a month for room and board. The beneficiary's brother, who is the payee, learns the beneficiary needs new shoes and does not have any funds to purchase miscellaneous items at the institution's canteen.

The payee takes his brother to town and buys him a pair of shoes for \$29. He also takes the beneficiary to see a movie which costs \$3. When they return to the institution, the payee gives his brother \$3 to be used at the canteen.

Although the payee normally withholds only \$25 a month from Social Security benefit for the beneficiary's personal needs, this month the payee deducted the above expenditures and paid the institution \$10 less than he usually pays.

The above expenditures represent what we would consider to be proper expenditures for current maintenance.

(c) *Support of legal dependents.* If the current maintenance needs of the beneficiary are met, the payee may use part of the payments for the support

of the beneficiary's legally dependent spouse, child, and/or parent.

Example: A disabled beneficiary receives a Veterans Administration (VA) benefit of \$325 and a Social Security benefit of \$525. The beneficiary resides in a VA hospital and his VA benefits are sufficient to provide for all of his needs; i.e., cost of care and personal needs. The beneficiary's legal dependents—his wife and two children—have a total income of \$250 per month in Social Security benefits. However, they have expenses of approximately \$450 per month.

Because the VA benefits are sufficient to meet the beneficiary's needs, it would be appropriate to use part of his Social Security benefits to support his dependents.

(d) *Claims of creditors.* A payee may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee. If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably foreseeable needs of the beneficiary are met.

Example: A retroactive Social Security check in the amount of \$1,640, representing benefits due for July 1980 through January 1981, was issued on behalf of the beneficiary to the beneficiary's aunt who is the representative payee. The check was certified in February 1981.

The nursing home, where the beneficiary resides, submitted a bill for \$1,139 to the payee for maintenance expenses the beneficiary incurred during the period from June 1980 through November 1980. (Maintenance charges for December 1980 through February 1981 had previously been paid.)

Because the benefits were not required for the beneficiary's current maintenance, the payee had previously saved over \$500 for the beneficiary and the beneficiary had no foreseeable needs which would require large disbursements, the expenditure for the maintenance charges would be consistent with our guidelines.

[47 FR 30472, July 14, 1982, as amended at 54 FR 35483, Aug. 28, 1989]

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion

under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.