

1992

June Larson AKA June Beckman v. Orlo Larson : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

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DOCKET NO. 920864

IN THE UTAH COURT OF APPEALS

JUNE LARSON aka JUNE BECKMAN,
Plaintiff/Appellee,

vs.

Case No. 920864-CA

ORLO LARSON,
Defendant/Appellant.

BRIEF OF APPELLEE

Appeal arising from a final judgment in the Fourth
Judicial District Court in and for Utah County, State
of Utah, the Honorable Lynn B. Davis presiding.

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Priority Number ¹⁵~~16~~ (Rule 29)

Utah Court of Appeals

JUN 25 1993

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Priority Number 16 (Rule 29)

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IN THE UTAH COURT OF APPEALS

JUNE LARSON aka JUNE BECKMAN,
Plaintiff/Appellee,

Case No. 920864-CA

vs.

Priority No. 16

ORLO LARSON,
Defendant/Appellant.

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a final judgment in the Fourth Judicial District Court of Utah County, State of Utah, the Honorable Lynn B. Davis presiding, affirming Commissioner Howard H. Maetani's Order on Order to Show Cause.

This Court has jurisdiction to hear the appeal under Section 78-2a-3(2)(h), Utah Code Annotated (1992 as amended). This appeal is taken pursuant to Rule 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Did the trial court correctly rule that the provision in the Order to Modify Decree of Divorce relating to the payment of the children's Social Security benefits is illegal?

II. Did the trial court err by refusing to enforce the provision even though it is illegal, or in the alternative to modify the Decree of Divorce to insure justice?

III. Did the trial court properly deny Defendant's request for attorney's fees, and should this Court award Plaintiff attorney's fees on appeal?

STANDARDS OF REVIEW

A trial court's determination that the provision at issue is illegal and consequently unenforceable is a question of law which should be reviewed under a correction of error standard. Fauver v. Hansen, 803 P.2d 1275, 1276 (Utah App. 1990).

A trial court's decision to strike an Order to Show Cause and its refusal to modify a Decree of Divorce is a question of law which is reviewed for correctness. Grover v. Grover, 839 P.2d 871, 873 (Utah App. 1992).

The decision to award attorney's fees is within the sound discretion of the trial court. Whitehead v. Whitehead, 836 P.2d 814 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes, or rules pertinent to the resolution of the issues presented on appeal is contained in the body of the brief.

STATEMENT OF THE CASE

The parties to this appeal were divorced on July 18, 1985. On January 7, 1987, the Decree of Divorce was modified based on a stipulation between the parties. (R. 403-410).

Defendant brought an Order to Show Cause in June of 1992 to enforce a provision relating to the payment of the children's Social Security benefits as contained in the Order to Modify Decree of Divorce. At the Order to Show Cause hearing, Plaintiff pled that the provision was illegal. (R. 479-484). The court commissioner refused to enforce the provision and struck the Order to Show Cause. (R. 504-506).

Defendant objected to the court commissioner's ruling and filed a motion to enforce the Order to Modify Decree of Divorce and set aside the commissioner's ruling in the district court. The Honorable Lynn B. Davis affirmed the commissioner's ruling. He refused to rule on Defendant's motion to enforce the decree of modification and to set aside commissioner's ruling on the grounds that the motions were not properly before the court. (R. 548).

STATEMENT OF THE FACTS

In the original Decree of Divorce, Defendant was ordered to pay Plaintiff \$35,000.00, with interest, in monthly payments as a property settlement. As a further property settlement, Defendant was ordered to pay Plaintiff an additional \$10,000.00 with a maturity date of September 30, 1999. Both obligations were to be secured by a deed of trust on real property.

Defendant was also ordered to pay child support in the

amount of \$250.00 per month for the use and benefit of the two minor children.

The Decree of Divorce was modified in January of 1987. A provision in the Order to Modify Decree of Divorce stated that in the event Defendant retired or died Plaintiff was required to place the minor children's Social Security benefits in a trust account. The children's Social Security benefits would then be used to satisfy, among other things, Defendant's child support obligation as well as his \$10,000.00 property settlement obligation to Plaintiff.¹ (R. 469). (A copy of the Order to Modify Decree of Divorce is contained in Appellant's Brief at 24).

Defendant retired in July of 1992 at age 62. Plaintiff began receiving Social Security checks on behalf of the children. Subsequently, Plaintiff learned from the Social Security Administration that the provision may be illegal and that any misuse or misappropriation of the children's Social Security benefits may constitute a federal felony. (A copy of a letter sent by the Social Security Administration is contained in Appendix A). Plaintiff refused to place the children's Social Security benefits in the trust account.

¹ Paragraph 3 of the original divorce decree, dated July 18, 1985, also provides that the children's excess Social Security benefits would be used to reduce the amount of indebtedness on the property settlement between the parties.

Defendant brought an Order to Show Cause but did not bring a Petition to Modify. The court commissioner ruled that the above-stated provision was illegal and struck the Order to Show Cause. Defendant objected to the commissioner's ruling and made various other motions. (R. 548).

SUMMARY OF THE ARGUMENT

Illegality of Stipulation

Paragraph 3c(1) of the Order to Modify Decree of Divorce is illegal. It requires the minor children's excess Social Security benefits be used to pay off Defendant's property settlement obligation to Plaintiff. This provision violates the relevant Social Security statutes and regulations which make clear that children's Social Security benefits may only be used for the support and maintenance of the children. Any other or improper use may constitute conversion, which is a federal felony.

Enforcement of the Illegal Stipulation

If a stipulation is found to be illegal, the court has no choice but to declare the provision null and void. There is no necessity for a party to file a motion for relief from judgment.

Modification

A party seeking modification must file a Petition to Modify and that party must prove a permanent and substantial change of circumstances necessitating the modification. Defendant filed an Order to Show Cause but failed to file a Petition to Modify. He

also failed to present any evidence of permanent and substantial change of circumstances, which is required to obtain a modification. The proper course for Defendant to have obtained a modification is to file a Petition to Modify.

Attorney's Fees

Defendant presented no evidence on any of the factors relevant in awarding attorney's fees. His claim for attorney's fees is without merit. Plaintiff should be awarded attorney's fees on appeal as a result of having to defend this frivolous appeal.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY RULED THAT THE PROVISION IN THE ORDER TO MODIFY DECREE OF DIVORCE WHICH ALLOWS THE MINOR CHILDREN'S SOCIAL SECURITY BENEFITS BE USED TO PAY OFF DEFENDANT'S PROPERTY SETTLEMENT IS ILLEGAL.

Paragraph 3c(1) of the Order to Modify Decree of Divorce states:

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

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.

The Social Security Act, Title 42, United States Code Section 401 et seq., provides that every dependent child of an individual who is entitled to Social Security benefits shall be entitled to a child's insurance benefit. Social Security Regulations require that such payments to a representative payee on behalf of a beneficiary must be used for current maintenance of the beneficiary. Any benefits not needed for current maintenance must be conserved or invested on the beneficiary's behalf. Social Security Administration Regulations No. 4-Subpart Q, Sections 404.1604, 404.1605. See also, Meeks v. Mutual of Omaha Insurance Company, 388 N.E.2d 1362, 1363 (Ill. App. 1979).

20 C.F.R. Chapter III Section 404.2035 unequivocally states that a representative payee, the Plaintiff in this case, may only use the children's Social Security benefits for the use,

maintenance, and care of the children themselves. This section provides:

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 the 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.

The core essence of Title II of the Social Security Act benefit scheme is that those benefits are to be used only on behalf of the minor beneficiary. Frazier v. Pingree, 612 F.Supp 345, 347 (D.C. Fla. 1985).

The children's Social Security benefits are to be used exclusively for their current maintenance. Current maintenance includes costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items. 20 C.F.R. Chapter III Section 404.2040.

Paragraph 3c(1) of the Order to Modify Decree of Divorce, if enforceable, would require that Defendant's \$10,000.00 property settlement obligation to Plaintiff be paid out of the proceeds of the minor children's Social Security benefits. Defendant's

property settlement obligation is unrelated to Defendant's duty of support or to the children's maintenance. This paragraph is illegal because it violates both Sections 404.2035 and 404.2040.

The parties in this case had no authority, power or right to bargain away the Social Security benefits of the minor children. The children's right to receive Social Security benefits belongs to them. A child's right to support is an "unalienable right, belonging to the child, and cannot be bartered away by the child's parent or parents." Fauver v. Hansen, 803 P.2d 1275, 1278-79 (Utah App. 1990) (citations omitted).

The facts in Fuller v. Fuller, 360 N.E.2d 357 (Ohio App.2d 1976) are similar to the case at bar. In Fuller, the Defendant was substantially in arrears in his child support when he became disabled. Because of his disability, the minor children were awarded \$268.00 per month in Social Security benefits. This amount was \$68.00 more than the child support order. Id. at 358.

In a judgment order, the trial court found that the Defendant was in arrears in child support. The court ordered that the excess Social Security benefits could be credited toward Defendant's arrearage in child support. Ibid.

In reversing the trial court's holding, the appellate court stated:

[T]he benefit inures directly to the child, notwithstanding the prerequisite status of

the parent. No indices of the father's ownership ever attach to these funds. Thus the court is, in effect, ordering the children to pay the accrued arrearages for their own support. Ibid.

It should be noted that even though in Fuller the excess Social Security benefits were used to pay off past due child support obligations, which are related to the children's maintenance, the appellate court nevertheless reversed the trial court's ruling. See also, Smith v. Smith, 651 P.2d 1209, 1210 (Ariz. App. 1982) (child's excess Social Security benefits cannot be used to satisfy Defendant's obligation to pay the medical and dental bills of the children); Meeks v. Mutual of Omaha Insurance Company, 388 N.E.2d 1362, 1363 (Ill. App. 1979) (payments made to representative payee are not income to the payee but are income to and the exclusive property of the minor child). In the case at bar, the excess Social Security benefits were to be used to pay off Defendant's property settlement obligation, which is not remotely related to the children's maintenance.

20 C.F.R. Chapter III Section 404.2035 and 404.2040, Title II of the Social Security Act Section 202(d)(1), Social Security Regulations, and case law make clear that paragraph 3c(1) of the Order to Modify Decree of Divorce is illegal and consequently unenforceable. This court should uphold the trial court's finding that the paragraph is illegal and unenforceable as a matter of law.

POINT II

A COURT MAY NOT ENFORCE AN ILLEGAL PROVISION IN A DECREE OF DIVORCE OR MODIFY IT ABSENT A PETITION TO MODIFY.

Defendant in his brief apparently argues that even if the provision is illegal, the trial court abused its discretion by failing to either enforce the decree or modify it despite its illegality because of Defendant's alleged reliance on it.

Defendant's reasoning is that even if the stipulation is illegal, the parties are bound by their stipulations unless relieved from them by motion to the court and in the interests of justice and fair play. In order to withdraw a stipulation, the party must file a timely motion pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, which must be done within three months. (Brief of Appellant at 8-11).

Defendant concludes that because Plaintiff failed to file a Rule 60(b) motion and because Defendant relied upon the stipulation, the court should enforce it. Defendant cites Maxwell v. Maxwell, 796 P.2d 403 (Utah 1990), in support of this reasoning.

A. Maxwell v. Maxwell.

The facts and holding in Maxwell are easily distinguishable from the case at bar. Consequently, Maxwell provides little, if any, help in resolving the issues in this appeal. In Maxwell, the parties were divorced pursuant to a stipulated divorce

decree. The parties stipulated that the wife would receive one-half of the husband's total monthly retirement benefit. The husband began paying the wife one-half of his gross retirement benefits. Subsequently, the husband received an increase in these benefits, but failed to account or pay the wife her one-half share of the increase. The wife filed an Order to Show Cause seeking her one-half share of the total retirement benefits as provided in the stipulated decree.

On appeal, the husband argued that the trial court's order violated the Uniform Services Former Spouses Protection Act, 10 U.S.C.A. Section 1408 (1983)(hereinafter USFSPA). Under the USFSPA, state courts are allowed to treat disposable retirement pay as community property divisible upon divorce. They are not authorized to treat total retirement pay as community or marital property divisible upon divorce.

The husband alleged mistake in entering the stipulation in order to avoid the stipulation and avoid liability for the payments he failed to make. This Court held that the stipulation was binding upon the husband and that he could not avoid liability by claiming mistake. This Court also refused to modify the Decree of Divorce.

It should be noted that in Maxwell, the stipulated provision at issue was not illegal nor did it violate the USFSPA. The USFSPA merely provides that a state court does not have authority

to treat total retirement pay as community property. There is no provision in the USFSPA that prevents a party from voluntarily stipulating to pay his or her retirement benefits to his or her former spouse. This situation is entirely analogous to a situation in which one spouse stipulates to giving the other spouse his or her separate property as part of a division of the parties' marital property. Upon becoming disenchanted with the property distribution, the spouse then claims mistake of fact in entering the stipulation to avoid his or her stipulations on the grounds that the trial court does not have authority to award separate property.

In short, the husband in Maxwell was claiming mistake of fact to avoid liability. He had voluntarily entered an agreement to pay his ex-wife one-half of his total retirement benefits. These total retirement benefits were his own property and even though the court did not have authority to award these benefits to the wife, the husband was certainly free to do with them as he pleased. To avoid the stipulation, the proper course would have been to file a Rule 60(b) motion.

The case at bar is entirely different. The parties are bargaining away the children's benefits.

[T]he 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. Fauver v. Hansen, 803 P.2d at 1278.

Neither party in the case at bar had the power or authority to enter any stipulation or agreement to barter away property that belongs exclusively to the minor children. A child's Social Security benefits may not be used to discharge a parent's personal debt not related to the support of the child. 20 C.F.R. Chapter III Section 404.2035 and 404.2040.

In the case at bar, Plaintiff is not claiming mistake of fact as in Maxwell. The provision is illegal and is unenforceable as matter of law. In fact, if the provision is enforced, Plaintiff could be subject to being charged with a federal felony. (See letter from Social Security Administration contained in Appendix A, warning Plaintiff that misuse of Security Social funds is a federal felony).

B. Enforcement of the Illegal Stipulation.

Defendant also alleges in his brief that parties are unconditionally bound by their stipulations unless they file the proper motions for relief from judgment. Although courts ordinarily pay strong attention and enforce stipulations between parties, courts are not bound by parties' stipulations when points of law requiring judicial determinations are involved. A court has the power to set aside a stipulation entered into inadvertently or for justifiable cause. First of Denver Mortgage Investors v. C.N. Zundel, 600 P.2d 521, 527 (Utah 1979)(citations omitted).

The above language illustrates that a court may set aside a judgment, order, or proceeding for any justifiable cause. There is no requirement that a party must file a Rule 60(b) motion as Defendant incorrectly contends.

The justifiable cause language in First of Denver certainly contemplates and encompasses the setting aside of any provision which is illegal. Otherwise, parties could circumvent any statutory or case law by merely stipulating to agreements that are illegal or contrary to legal principles.

Contrary to Defendant's argument that a court should enforce a provision despite its illegality to insure justice, case law unequivocally establishes that the effect of an illegal contract or agreement is that it is null and void and a court has no other choice but to declare the contract provision unenforceable.

No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out;...the law in short will not aid either party to an illegal agreement; it leaves the parties where it finds them.

17 C.J.S. Section 272 p. 1188.

Every contract in violation of law is void and the courts will not lend their aid to the enforcement of, nor permit a recovery under contracts made in violation of law prohibiting them or declaring them unlawful. Baker v. Latses, 206 P. 553, 555 (Utah 1922). See also Neil v. Utah Wholesale Grocery

Company, 210 P. 201, 203 (Utah 1922) (contract made in contravention of a statute is void and unenforceable).

For the court to enter a finding in contravention of statutory requirements is in direct violation of the statutory duty of that court to provide for the support of the minor children of the parties to a divorce action. Bingham v. Bingham, 629 P.2d 1297, 1300 (Okla. App. 1981).

C. Modification of Decree.

Defendant argues that the trial court abused its discretion by not modifying the Decree of Divorce to insure justice. In order to modify a decree, a party must file a petition to modify pursuant to Rule 6-404 of the Utah Code of Judicial Administration. That rule provides:

(1) Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action. No request for a modification of an existing decree shall be raised by way of an order to show cause (emphasis added).

A party may not proceed by means of an Order to Show Cause, but is required to file a Petition to Modify the child support order and demonstrate therein that there has been a material change of circumstances since the entry of the order that warrants modification under Section 78-45-7(10), Utah Code Annotated (1992 as amended). Grover v. Grover, 839 P.2d 871, 873 (Utah App. 1992).

If there is no service pursuant to Rule 6-404 of the Utah Code of Judicial Administration and Rule 4 of the Utah Rules of Civil Procedure, nor a finding of changed circumstances, a court does not have jurisdiction to modify or amend a decree. Adelman v. Adelman, 815 P.2d 741, 745 (Utah App. 1991).

A party seeking modification must not only file a Petition to Modify but must prove a substantial and permanent change of circumstances necessitating the modification. Kiesel v. Kiesel, 619 P.2d 1374, 1376 (Utah 1980); Stettler v. Stettler, 713 P.2d 699, 701 (Utah 1985).

In the case at bar, Defendant filed an Order to Show Cause instead of a Petition to Modify pursuant to Rule 6-404 of the Utah Code of Judicial Administration. Furthermore, there was no showing of changed circumstances. Therefore, the court is without jurisdiction to modify or amend the decree, which is why the trial court ruled that Defendant's motions were not properly before it. (See page 4 of the Ruling on Defendant' Objection to Ruling of Court Commissioner, Defendant's Motion to Enforce Decree of Modification, to Set Aside Commissioner's Ruling and For Other Relief). (Brief of Appellant at 35).

POINT III

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR ATTORNEY'S FEES. THIS COURT SHOULD AWARD PLAINTIFF ATTORNEY'S FEES ON APPEAL.

Defendant argues that the trial court abused its discretion by refusing to award Defendant his attorney's fees. (Brief of Appellant at 15). The decision to award attorney's fees is within the sound discretion of the trial court. The award must be based on evidence of the financial need of the other spouse to pay and the reasonableness of the requested fees. Whitehead v. Whitehead, 836 P.2d 814, 817 (Utah App. 1992). The party seeking the award of attorney's fees must offer sufficient evidence regarding attorney's fees at trial. The award must be supported by evidence of the financial need of the recipient and the reasonableness of the award. Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989). Defendant proffered no evidence at the hearing in the trial court on Defendant's objection to the court commissioner's ruling as to any of the factors relevant in awarding attorney's fees.

On appeal Defendant has failed to show that the trial court's denial of attorney's fees manifests a clear abuse of discretion. Defendant's argument for attorney's fees is without merit.

Plaintiff should be awarded her attorney's fees on appeal pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

That rule provides that if the court determines that:

[An] appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include...reasonable attorney's fees, to the prevailing party.

Rule 33 defines a frivolous appeal as one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law.

Plaintiff's posture on appeal is that of Appellee. She was forced to spend considerable attorney's fees to defend this action both on behalf of herself and the minor children because of Defendant's actions.

The legality of the provision in question, the effect of an illegal provision, and a trial court's lack of jurisdiction to modify a decree absent a Petition to Modify are all issues of settled law. Defendant's appeal is not grounded in fact, not warranted by existing law, and is not based on a good faith argument to extend, modify, or reverse existing law.

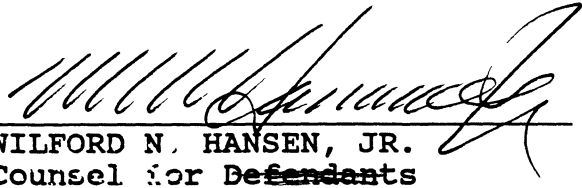
Pursuant to the foregoing, Plaintiff would respectfully request that she be awarded a reasonable amount for defending this appeal.

CONCLUSION

The provision in question is illegal because it violates Federal Social Security Regulations and relevant case law. Since

it is illegal, it cannot be enforced as Defendant contends because courts do not have the power or authority to enforce illegal stipulations. The trial court did not abuse its discretion by refusing to modify the Decree of Divorce due to Defendant's failure to file a Petition to Modify. Defendant's claim for attorney's fees is without merit. Plaintiff should be awarded attorney's fees for defending this frivolous appeal.

Respectfully submitted,


WILFORD N. HANSEN, JR.
Counsel for ~~Defendants~~
Plaintiff

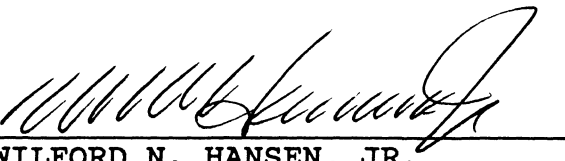
I HEREBY CERTIFY that I personally mailed or hand-delivered true and correct copies of the foregoing on the 25 day of June, 1993, by first-class United States mail, postage prepaid, to the following:

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American Fork, Utah 84003

Original and seven copies to:

Utah Court of Appeals
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WILFORD N. HANSEN, JR.
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Plaintiff

APPENDIX A

DEPARTMENT OF HEALTH AND HUMAN SERVICES Social Security Administration

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July 23, 1992

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Payson, UT 84651

Dear Mr. Hansen:

June Buckman has asked me to write you concerning the receipt of Social Security benefits by her daughters. Her two daughters have been receiving \$470.00 each per month on the account of Orlo Larson. They would have received \$312.00 each on the account of Leonard Buckman. Part of the reason that they received \$470.00 per month, however, is that they were eligible on both records. The computation involved is a complex one called a "combined family maximum." There is no way to "allocate" part of the payment to each of the wage earners.

Mrs. Bukman also raised the issue of use of Social Security benefits. CFR Sections 404 and 416 cover the responsibilities of representative payees under the Social Security Act, as amended. It is mandated that a representative payee (Ms. Buckman has been the representative payee for her daughters) use the Social Security funds to first of all provide for the current needs of the beneficiary. After all current needs have been met, funds may be conserved for foreseeable future needs. Any use of Social Security funds other than these may constitute "conversion of benefits" a crime considered to be a federal felony.


J. Randall Marchant
District Manager