

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 24

WCC No. 9412-7192

DANIELA BLOWERS, individually and on behalf of
GALEN LEE BLOWERS, II, a minor

Petitioner

vs.

MONTANA INSURANCE GUARANTY ASSOCIATION

Respondent/Insurer for

POOL WELL SERVICING COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 34-year old widow sought lump-sum advance of death benefits in the amount of \$655,000 on behalf of herself and her 11 year old son, to pay for a new mobile home, garage, breezeway, furniture, a business, further education for herself, tutors for her son, to pay down the loan on a van, attorneys fees, and other items. The requested amount was modified at trial to \$158,436.71, which represents approximately ten years of benefits. She argued the advance would improve living conditions for herself and her son.

Held: Under *Willoughby v. Arthur G. McKee & Co.*, 187 Mont. 253, 257, 609 P.2d 700, 702 (1980), lump-sum settlements may be granted in cases of outstanding indebtedness or pressing need, or where the best interests of petitioner, her family, and the general public will be served. The best interest component is the "primary criterion." *Sullivan. V. Aetna Life & Cas.*, 271 Mont. 12, 16, 894 P.2d 278, 280 (1995). While the best interests of a claimant are ordinarily served by regular periodic installments, making lump-sums the exception rather than the rule, lump-sum advances are not looked upon with disfavor and will be awarded without hesitancy in appropriate cases. In this case, while the Court has approved the modest advance to which the employer/insurer has already agreed, claimant has not convinced the Court that an additional lump-sum is warranted. Claimant justified her request in part by a desire to purchase the land on which she lives from her parents, but she is already a joint tenant of the property, with rights of survivorship and an equal right to occupy the land. While she argues her present income (\$39, 947.10, net, after-tax) is less

than if her husband has survived, calculation accounting for inflation indicates her present income is greater than if her husband had continued in his position (take home of \$33,306.18). More generally, claimant has not shown that her present situation is not adequate or that the problems of which she complains would be best served by the requested lump-sum advance.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-721(5), MCA (1983). Under section 39-71-721(5), MCA (1983) death benefits must be paid to a widow or widower for life or until remarriage, and in the event of remarriage, two years of benefits must be paid in a lump sum. In case where widow requested lump sum of what would amount to ten years of benefits, WCC held that lump sum, if otherwise appropriate, was not necessarily limited to two years of benefits, though the possibility that claimant might remarry is a significant factor that would be taken into consideration when determining if an advance of more than two years' benefits was justified.

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Benefits: Death Benefits: Remarriage. Under section 39-71-721(5), MCA (1983) death benefits must be paid to a widow or widower for life or until remarriage, and in the event of remarriage, two years of benefits must be paid in a lump sum. In case where widow requested lump sum of what would amount to ten years of benefits, WCC held that lump sum, if otherwise appropriate, was not necessarily limited to two years of benefits, though the possibility that claimant might remarry is a

significant factor that would be taken into consideration when determining if an advance of more than two years' benefits was justified.

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Benefits: Lump Sums: Generally. The petitioner bears the burden of proving that a lump sum is in her best interests. *Phelps v. Hillhaven Corp.*, 231 Mont. 245, 252, 752 P.2d 737, 742 (1988).

Benefits: Lump Sums: Best Interests. Under *Willoughby v. Arthur G. McKee & Co.*, 187 Mont. 253, 257, 609 P.2d 700, 702 (1980), lump-sum settlements may be granted in cases of outstanding indebtedness or pressing need, or where the best interests of petitioner, her family, and the general public will be served. The best interest component is the "primary criterion." *Sullivan. V. Aetna Life & Cas.*, 271 Mont. 12, 16, 894 P.2d 278, 280 (1995). While the best interests of a claimant are ordinarily served by regular periodic installments, making lump-sums the exception rather than the rule, lump-sum advances are not looked upon with disfavor and will be awarded without hesitancy in appropriate cases. In this case, while the Court has approved the modest advance to which the employer/insurer has already agreed, widow with 11-year old child did not convince the Court that an additional lump-sum is warranted where her income is presently more than her family would be receiving if her husband had not been killed and had continued in his same job and where she has not shown that her present situation is not adequate or that the problems of which she complains would be best served by the requested lump-sum advance.

The trial in this matter was held on November 7 and November 8, 1996, in Billings, Montana. Petitioner, Daniela Blowers (petitioner), was present and represented by Mr. Richard R. Martin. Galen Lee Blowers, II, (Galen Jr.) was represented by Mr. Donald D. Sommerfeld, guardian ad litem. Pool Well Servicing Company (Pool Well) was represented by Mr. Geoffrey R. Keller. Respondent, Montana Insurance Guaranty Association (MIGA), was represented by Mr. Barry G. O'Connell. No transcript of the trial has been prepared.

Exhibits: Exhibits 1-3, 6-17, and 19-21 were admitted without objection. Exhibits 4 and 5 were admitted over Pool Well's objection. Exhibit 18 was withdrawn.

Witnesses and Depositions: Petitioner, Lee Oldenburg, Esther G. Bangston, Max Hansonl, and Juanita Hooper were sworn and testified. In addition, the parties submitted the depositions of petitioner and Max Hansonl for the Court's consideration.

Issues Presented: The following issues are presented for resolution by the Court:

- (1) Whether petitioner is entitled to a lump-sum advance of death benefits in addition to the lump sum Pool Well has agreed to pay, and, if so, what amount.
- (2) Whether petitioner is entitled to attorney fees and costs.
- (3) Whether Pool Well should pay the fees and costs of the guardian ad litem.

Bench Ruling: At the close of trial the Court issued a bench ruling denying all of petitioner's lump-sum request except for the amount which Pool Well agreed to advance. The findings and conclusions announced in the bench ruling, as set forth in the relevant portion of the trial transcript on file with the Court, are reaffirmed and adopted. The written findings that follow provide additional details and facts relevant to the decision in this case.

Amended Request: At the time of the bench ruling, I indicated that I would consider a more modest request for an advance if petitioner wished to pursue such request. Counsel for petitioner submitted a Modified Request on November 22, 1996. (Court File.) The request was far more than anticipated by the Court and would require another trial. Thus, after a telephone conference on January 2, 1997, the Court determined that should petitioner wish to pursue her modified request, such request must be refiled as a new petition.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Petitioner is presently 34 years old and in good health.
2. Petitioner married Galen Lee Blowers (Galen Sr.) in 1982.

3. On May 8, 1985, Galen Sr. was killed in an industrial accident arising out of and in the course of his employment with Pool Well while working on an oil rig in North Dakota. At the time of Galen Sr.'s death, petitioner was pregnant. Galen Jr. was born October 31, 1985. He is presently 11 years old.

4. Petitioner and Galen Jr., reside in Shepherd, Montana, next door to petitioner's parents, Max and Lila Hansonl.

5. Pool Well's insurer, Employers' Casualty Company (Employers' Casualty), accepted liability for the accident and initiated death benefits to petitioner. However, Employers' Casualty subsequently became insolvent and Pool Well assumed liability for further benefits.

6. Petitioner graduated from high school in Sidney, Montana, in 1982. She did not work while her husband was alive.

7. Petitioner moved to Billings in 1990. She attended the Billings College of Coiffure Arts and received a certificate in cosmetology.

8. Petitioner remained unemployed until 1991 or 1992 when she went to work as a teacher's and kitchen aide at Miles Avenue School in Billings. Since moving to Shepherd in 1993, she has worked as a teacher's aide at Shepherd Elementary School. She presently works 20 hours a week and earns \$5.25 an hour. She has never worked as a cosmetologist although she has maintained her cosmetologist license.

9. Petitioner receives social security and workers' compensation benefits for both herself and Galen.

10. Petitioner's current monthly income is as follows:

Social Security: Galen Jr.	\$923.00
Social Security: Daniela	\$923.00
Workers' Compensation	\$1,229.80
Daniela's wages	<u>\$337.50</u>
Total	\$3,413.30

(Claimant's Proposed Findings of Fact and Conclusions of Law at 3.) Petitioner's **net** annual, after-tax income is **\$39,947.10.**⁽¹⁾ Her wages, as charted above, are net wages after taxes, and the social security and workers' compensation payments are tax free.

11. Galen Sr.'s average earnings for the five years prior to his death were \$29,979.00. Applying the Consumer Price Index to adjust those earnings to present dollars, his average

earnings were \$43,701.00 before taxes. (Ex. 9.) Using 1996 rates for FICA, medicare tax, federal income tax, and state income tax, Galen's Sr.'s take home pay in 1996 dollars would have been **\$33,306.18**,⁽²⁾ which is \$6,640.92 less than petitioner's net annual income. The Court notes also that petitioner has two individuals to support, whereas if Galen Sr. were alive there would be three. The Court takes note of these facts because petitioner's justification for her lump-sum request is based in large part on her contention that inflation has seriously eroded her income and that she would be far better off financially if Galen Sr. were alive.

12. Petitioner resides in a mobile home which is located on a 6.3 acre lot. Petitioner owns the lot in joint tenancy with her father and mother, who also have a trailer on the land. (Ex. 14; Trial Test. of Petitioner and Max Hansonl.) The Court notes that neither the petitioner nor her father disclosed petitioner's interest in the land during their depositions. Both testified that the land is owned by petitioner's parents. (Petitioner's Dep. at 25-26; Hansonl Dep. at 12.) Petitioner's father responded "yes" when specifically asked to confirm "that [the] land is presently in your name and your wife's name." (Hansonl Dep. at 15.) When petitioner was first asked at trial about where she lived, she replied, "I live in a mobile home right now **on my mom and dad's land**." (Trial Test.) It was at that point that I interrupted her and stated my understanding, which I believed at the time came from my reading of Hansonl's deposition, that her name was on the title of the land as a joint tenant. The petitioner confirmed my understanding. Upon reviewing the depositions and exhibits I have found that the information concerning the joint tenancy was contained in Exhibit 14, which is a copy of a portion of the title insurance policy for the land, and not in Hansonl's deposition.

I find the omission of this information by petitioner in both her deposition and her initial trial testimony, and by Hansonl in his deposition, very disturbing in light of the fact that part of petitioner's lump-sum request is for money to pay her parents for the land. While her parents may have given her the interest in the land, that does not change the fact that she has an ownership interest in the very land for which she asks the Court to advance her money to purchase. Petitioner's counsel surely knew of petitioner's interest in the property, if not at the time of the deposition, then at least by trial since it is disclosed in Exhibit 14. Counsel surely understood that the fact of her ownership interest in the land is a fact of consequence to her request. I am disturbed that he did not point out the fact and that he left me to ferret it out for myself.

13. Petitioner purchased her mobile home approximately four years ago. It is a 1988 Friendship model which is 16 feet wide and 80 feet long, containing approximately 1,280 square feet.

14. Petitioner financed at least part of the purchase price of her mobile home. (Blowers Dep. at 29; Dep. Ex. 1 at 3.) As of September 27, 1996, she owed \$14,023.92 on the mobile home purchase. (Ex. 11.) Her monthly payment is \$249. (Ex. 10 at 2.)

15. Petitioner owns a 1995 Astro Van. She purchased the van new in June 1996, trading in a Toyota 4-Runner. (Blowers Dep. at 26-27.) The purchase price was \$26,527. (Ex. 12.) The trade-in value was \$3,451.18. (*Id.*) She financed the remaining \$23,075.82 over a period of 72 months with monthly payments of \$421.26. (*Id.*)

16. Petitioner also owns a 22 or 23 foot Dutchman fifth-wheel travel trailer. She purchased the used trailer in 1994 for approximately \$12,000. (Blowers Dep. at 28-29.) As of September 27, 1996, she owed \$12,178.38 on the trailer.⁽³⁾ (Ex. 13.) She testified that she financed the trailer over 10 years and that her monthly payment is approximately \$140.00. (Blowers Dep. at 29.)

17. In Claimant's Proposed Findings of Fact and Conclusions of Law, petitioner lists her monthly expenses as follows:

Trailer House	\$249
1995 Astro Van	\$421
Insurance (car and trailer)	\$125
Telephone	\$60-100
Cable	\$40
REA	\$60-100
Lot Rent (not paying)	\$150
Water Drinking	\$25-35
Billings Clinic	\$100
Life Insurance (Galen and Daniela)	\$36
Propane	\$83
Pool Medical Insurance	\$70
Dr. Clark (Galen's braces)	\$58
Property Tax	\$25
Vehicle License	\$25
Prescription varies	
J.C. Penney	\$50
Gas and oil	\$150
Food	\$500

Clothing	\$250
Camper payment	\$140
Lee Oldenburg, Counselor	\$50
Target Charge Account	\$20
Galen - Clarinet	\$30
Total	\$2717-2807

Claimant's Proposed Findings of Fact and Conclusions of Law at 3.)

18. Petitioner's list of expenses, set out above, includes \$150 per month for lot rent payable to her parents. However, petitioner has not paid lot rent for some time and the Court is not persuaded that she ever paid it. Moreover, she is joint owner of the lot and is entitled to equal possession of the lot with her parents. Deleting this amount, her regular monthly expenses prior to trial were between \$2,567 and \$2,657, which is \$756 to \$846 **less** than her monthly income.

19. Prior to trial, Pool Well agreed to advance a lump sum for payment of the following:

Astro Van Payoff	\$23,120.82
Parental Loan Repayment	\$3,000.00
Deaconess Behavior Health Clinic	\$60.62
Pediatric Dental Specialists	\$414.00
Eckroth Music	\$675.00
Billings Clinic	\$470.62
Billings Clinic	<u>\$722.81</u>
Total	\$28,463.87

(November 1, 1996 letter in Court File.) This advance represents approximately two years of petitioner's benefits. The Court orally approved the advance on the day of trial and that approval is restated here.

20. After taking the lump-sum advance into account, petitioner's regular monthly expenses are as follows:

<u>MONTHLY EXPENSES</u>	
Trailer House	\$249
Insurance (car and trailer)	125

Telephone	60-100
Cable	40
REA	60-100
Water Drinking	25-35
Life Insurance (Galen and Daniela)	36
Propane	83
Pool Medical Insurance	70
Property Tax	25
Vehicle License	25
Prescription	Varied
J.C. Penney	50
Gas and oil	150
Food	500
Clothing	250
Camper payment	140
Lee Oldenburg, Counselor	50
Target Charge Account	<u>20</u>
Total	\$1958-\$2048

21. With the lump-sum advance, petitioner's regular monthly income will exceed her expenses by \$1,365 to \$1,455.

22. Petitioner testified that she lives month-to-month and has no savings. She testified that her expenses vary each month. She said, for example, that the cost of prescription medication for Galen Jr. varies, "sometimes it's a hundred, sometimes it's more." (Trial Test.) Petitioner also stated that although Galen Jr. currently has a regular appointment to see a counselor, Lee Oldenburg (Oldenburg), every other week, petitioner allows him to see her as often as he likes, which is sometimes on a weekly basis. Oldenburg charges \$50 per session. She also wishes to have petitioner tutored in the Silvan learning program. Overall petitioner did not provide a good accounting of how she spends the difference between her monthly income and her regular monthly expenses. She did not have a grasp of her financial affairs and I am not persuaded that she is a good money manager.

23. At the time of trial, petitioner was paying \$70 per month for health insurance, but that coverage ended as of January 1, 1997. (Ex. 5.) Petitioner testified that insurance for herself

was going to cost approximately \$132 and that she had been unable to locate insurance for Galen Jr. Other than testifying that her employer's health insurer may be willing to add Galen Jr. as an insured after he has sinus surgery, she did not explain what efforts she has made to obtain alternative insurance for Galen Jr. She also provided no medical documentation showing the need for surgery or the prospective cost of surgery.

24. Petitioner initially demanded a lump-sum settlement of \$655,000 on behalf of herself and Galen Jr. Among other things, petitioner proposed to use the lump sum to pay for a new mobile home, garage, breezeway, and furniture (\$156,500); a business (\$250,000); further education for petitioner (\$7,500); tutors for Galen Jr. (\$13,000); an educational trust fund for Galen (\$100,000); attorney fees (\$30,000); the balance of the loan on her van (\$28,000); and other items. The full demand is set out in Ex. 6 at 13 and is entitled Addendum E.

25. At trial the petitioner modified her request. As finally presented to the Court, she requested the following amounts in a lump sum:

Mobile home	\$75,825.51
Custom Concrete	2,812.00
GMAC payoff on Astro Van	23,120.82
Security Bank Heights (payoff on camper)	12,178.38
Billings Kubota	18,000.00
Land	<u>26,500.00</u>
Total	\$158,436.71

(Pretrial Order at 3.) This amount represents approximately ten years of petitioner's benefits. She also indicated that she would like an unspecified sum to pay for a business plan.

26. As a part of her justification for the advance, the petitioner contends that a new home will improve living conditions for Galen Jr. She presented evidence that Galen Jr. suffers from asthma and sinus problems. He has attention deficit hyperactivity disorder (ADHD), for which he takes Ritalin. He is in the fifth grade but obtains resource room assistance 9½ hours out of the 30-hour school week. Oldenburg, a licensed professional counselor, testified that Galen Jr. suffers from anxiety, depression, and low self-esteem. She sees him weekly for counseling.

27. Oldenburg was asked whether a lump-sum advance to petitioner, which would allow her to purchase a new home, would help "Galen's emotional health." She replied that she hoped it would but when queried by the Court she conceded that she had not been to

petitioner's home and could not say whether there was anything wrong with petitioner's current home and living conditions. When asked by the Court whether it would make a difference to Galen Jr.'s emotional health if he lived in a bigger house, she replied, "I have no idea." (Trial Test.)

28. Petitioner involved Galen Jr. in her request for an advance. She made him aware of the trial, of her request for an advance, and of some of the items she intended to purchase. She specifically asked that he be allowed to talk to the Court. In effect, she has raised his expectations concerning a new home and a tractor.⁽⁴⁾ Her conduct in this regard, along with the testimony regarding Galen Jr.'s emotional health and recent issues arising with regard to his deceased father, raises concerns on my part about the family dynamics between petitioner and Galen Jr. In any event, I am unpersuaded that material goods and a new home are the solution to Galen Jr.'s problems. A family evaluation and counseling seem more appropriate in light of what I heard and observed at trial.

29. Petitioner proposes to replace her current trailer home with a three bedroom, two bath, 1,782 square foot double-wide mobile home. (Ex. 11 at 4.) She has been quoted \$75,825.51 for the modular unit after trade in of her current mobile home. (*Id.* at 3.) She testified at trial that her current trailer is too small and that it is in disrepair. She itemized the things wrong with her current trailer, as follows: the roof leaks, the windows are breaking, and the tub is broken. She testified that when she moved the trailer onto its current site there were cement runners for a trailer but the runners were for a smaller trailer. Nonetheless, she put her larger trailer on the runners, breaking them, which is perhaps the reason her trailer's windows are askew. She has not remedied the problem nor has she sought estimates for necessary repairs.

30. I am not persuaded that the size of the petitioner's current residence (1,280 square feet) is insufficient for two people. The evidence also demonstrates petitioner's inability to properly care for property. She did not take adequate measures to assure a good foundation for her current trailer and has taken no corrective steps to repair the current problems. I am not persuaded that it is in either petitioner's or Galen Jr.'s best interest to replace their current residence.

31. Petitioner's wish to purchase an \$18,000 Kubota tractor to mow the six acres on which she and her parents reside is extravagant beyond belief and is a further indication that petitioner lacks the ability to make sound financial decisions. Moreover, petitioner's father already owns a tractor-mower which is presently used to mow the lawn.

32. Petitioner's request for an advance to put together a business proposal identifying a business for her to purchase is unsupported by any credible evidence indicating that petitioner has the ability, interest, motivation or skills to manage a business.

33. Petitioner failed to show any pressing need for petitioner to pay off her travel trailer. In any event, the trailer is not a necessity and petitioner has sufficient income to make the payments.

34. There is no factual basis for petitioner's request for money to buy land from her parents since she is a joint tenant of the land and has an equal right to possession of the land.

35. By letter dated January 8, 1997, Mr. Donald D. Sommerfeld, the guardian ad litem, made application for payment of interim attorney fees and costs in the amount of \$2,632.11. (Court File.) Pool Well and petitioner have no objection to Mr. Sommerfeld's request and/or the reasonableness of his fees. Since it was in the best interests of Galen Jr. to be separately represented in this matter, an advance for payment of these fees is appropriate.

36. Petitioner presented no evidence indicating that she is under any disability precluding her from remarrying.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). This case is based on sections 39-71-721 and 39-71-741, MCA. Petitioner's husband was fatally injured on May 8, 1985. However, as stated in the Partial Summary Judgment Order dated October 15, 1996, section 39-71-741, MCA, was amended effective April 15, 1985, therefore the 1985 version of the section applies in this case. Section 39-71-721, MCA, was not amended in 1985; therefore, the 1983 version of the section applies in this case.

2. Section 39-71-741, MCA (1985), provides in relevant part:

(1) The biweekly payments provided for in this chapter may be converted, in whole or in part, into a lump-sum payment. . . . (2) . . . It is presumed that biweekly payments are in the best interests of the worker or his beneficiary. The approval or award of a lump-sum conversion by the division or the workers' compensation judge must be the exception, not the rule, and may be given only if the worker or his beneficiary demonstrates that his ability to sustain himself financially is more probable with a whole or partial lump-sum conversion than with the biweekly payments and his other available resources.

3. Section 39-71-721(5), MCA (1983), provides in relevant part:

(5) . . . Death benefits must be paid to a widow or widower for life or until remarriage, and in the event of remarriage, 2 years' benefits must be paid in a lump sum to the widow or widower.

In a Partial Summary Judgment dated October 15, 1996, this Court decided that petitioner is not limited to lump summing of only two years of benefits, but that the possibility that she might remarry is a significant factor that the Court must take into consideration when determining whether a lump sum of more than two years is appropriate. That holding is reaffirmed.

4. In *Willoughby v. Arthur G. McKee & Co.*, 187 Mont. 253, 257, 609 P.2d 700, 702 (1980), the Montana Supreme Court recognized that lump-sum settlements may be granted in cases of outstanding indebtedness or pressing need, or where the best interest of petitioner, her family, and the general public will be served. The best interest component, however, is the "primary criterion." *Sullivan v. Aetna Life & Cas.*, 271 Mont. 12, 16, 894 P.2d 278, 280 (1995).

Generally, the best interests of the claimant are served by compensating the claimant in regular periodic installments; lump-sum settlements are the exception rather than the rule. *Id.* (citing *Landeen v. Toole County Refining Co.*, 85 Mont. 41, 47, 277 P. 615, 617.) However, if the best interests of the parties will be served by a lump-sum advance, it should not be looked upon with disfavor and should be awarded without hesitancy. *Willoughby*, 187 Mont. at 257, 609 P.2d at 702. The burden is on the petitioner to prove that a lump sum is in her best interests. *Phelps v. Hillhaven Corp.*, 231 Mont. 245, 252, 752 P.2d 737, 742 (1988).

5. The Court has already approved the lump-sum advance tendered by Pool Well. As to petitioner's remaining requests, she has failed to sustain her burden of proof. She is already a joint tenant with right of survivorship in the very land she seeks to purchase. *Hennigh v. Hennigh*, 131 Mont. 372, 381, 309 P.2d 1022, 1027 (1987).⁽⁵⁾ As a joint tenant, petitioner has equal right to immediate possession of the property. § 70-1-316, MCA ("A present interest entitles the owner to the immediate possession of the property."); *Estate of Lahren*, 268 Mont. 284, 287-288, 886 P.2d 412, 414 (1994) (a joint tenant has a present interest in jointly owned property). If she survives her parents she will ultimately hold sole title to the land. *Vogele v. Estate of Schock*, 229 Mont. 259, 262, 745 P.2d 1138, 1140 (1987). She has failed to show that purchase of a larger mobile home is in her or Galen Jr.'s best interest and has not persuaded the Court she is capable of caring for a more expensive, larger house. Her proposal to purchase an \$18,000 tractor to mow 6.3 acres of lawn is extravagant beyond belief. She has failed to persuade the Court that she is capable of making sound financial decisions. Her income is more than adequate to meet her present needs, including extraordinary and variable expenses. She failed to provide any good accounting of how or why she is spending all the income she receives.

6. Since a lump-sum advance is merely the whole or partial conversion of petitioner's biweekly payments, the insurer is entitled to recover the advance it has made pursuant to the agreement made by the parties and approved by the Court. *Hedegaard v. Knife River Coal Mining Co.*, 238 Mont. 290, 293, 776 P.2d 1225, 1227 (1989). The parties have agreed to the recoupment of the lump sum in accordance with *Hock v. Lienco Cedar Products*,

194 Mont. 131, 634 P.2d 1174 (1981). Recovery of the amount of advance shall be repayable out of the advance to petitioner in the event of her remarriage, or if she does not remarry, out of her biweekly benefits received after Galen Jr. ceases to be a beneficiary, or in the event that petitioner dies, out of Galen Jr.'s benefits commencing at his sixteenth birthday. *Id.* at 140, 634 P.2d at 1179.

7. Petitioner is entitled to attorney fees and costs with respect to the advance tendered by Pool Well. *Madill v. State Compensation Ins. Fund*, 930 P.2d 665, 54 St. Rep. 4 (Mont. 1997). The amount of such fees and costs shall be determined after the time for appeal has expired or, if an appeal is taken, after appeal. ARM 24.5.343.

8. There is no provision requiring the insurer to pay for a guardian ad litem. Since the guardian was necessitated by petitioner's pursuit of a lump-sum advance and her assertion that it would benefit both herself and her minor child, she must absorb the cost of the guardian. However, it is in petitioner's and Galen Jr.'s best interest that the guardian ad litem's fees in the amount of \$2,632.11 be advanced by Pool Well and recouped by it in the same manner as the other advance as agreed to by the parties.

JUDGMENT

1. Petitioner's request for a lump sum is **denied**.
2. Petitioner is entitled to attorney fees and costs with respect to the advance tendered by Pool Well. The amount of such fees and costs shall be determined after the time for appeal has expired or, if an appeal is taken, after appeal. ARM 24.5.343.
3. The guardian ad litem's fees in the amount of \$2,632.11 shall be paid by Pool Well in the form of a lump-sum advance and recouped in the same manner as the other advance as agreed to by the parties.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 25th day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Richard J. Martin
Mr. Geoffrey Keller
Mr. Donald E. Sommerfeld
Mr. Barry G. O'Connell

Attachment - Net Income Worksheet

Date Submitted: January 2, 1997

NET INCOME WORKSHEET FOR GALEN BLOWERS, SR.

Gross Income in 1996 \$\$	\$43,701.00
Exemptions (3)	(\$6,700.00)
Standard Deduction	(\$7,650.00)
Net Taxable Income -- Federal	\$29,351.00

FICA (6.2% x \$43,701)	\$2,709.46
Medicare tax (1.45% x \$43,701)	\$633.66
Federal Income Tax	\$4,406.00

Gross income -- for State	\$43,701.00
State Exemptions (3)	(\$3,040.00)
State Standard Deduction	(\$4,680.00)
Net Taxable Income -- State	\$35,981.00
State Income Tax	\$2,645.69

Net Take Home Pay **\$33,306.19**

1. This amount takes into account the fact that petitioner does not work in the summer. Thus, it includes only nine months of wages.
2. See attached Net Income Worksheet for Galen Blower, Sr., which was prepared by the Court utilizing 1996 tax rates, standard deductions and exemptions.
3. Exhibit 13 is for the loan. However, it appears from that document that there were two loans, one for \$3,000 due in full on October 20, 1996, and the other for \$9,178.
4. Galen Jr. presently mows the lawn for his mother and grandfather using his grandfather's lawn tractor.
5. The ownership of property by several persons is either joint interests, partnership interests, or interests in common. § 70-1-306, MCA. Section 70-1-307, MCA, provides that if the parties intend to create a joint tenancy in property, they must make an express declaration of that joint tenancy or joint interest. *Matter of Estate of Lahren* 268 Mont. 284, 286, 886 P.2d 412, 413 (1994) (citing *Matter of Estate of Shaw*, 259 Mont. 117, 855 P.2d 105, 111 (1993).) In *Hennigh v. Hennigh*, 131 Mont. 372, 381, 309 P.2d 1022, 1027 (1957), the

Montana Supreme Court held that given the "ordinary significance" of the words "as Joint Tenants," there can be no doubt that their purpose is to create an estate in joint tenancy carrying with it the right of survivorship.