

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
Case No. 70057-0-1**

ROBERT E. ANDERSON,

APPELLANT,

V.

BEVERLY L. ANDERSON,

RESPONDENT.

SD
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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that the provision in the Amended Decree of Dissolution entered on October 7, 1997, and in the subsequent court order of September 9, 1999 ordering respondent husband to pay petitioner wife fifty percent of his gross Social Security benefit payment was not a violation of 42 U.S.C. §407(a). CP 83-87.

2. The trial court erred in ruling that the respondent husband's motion to vacate the provisions of the Amended Decree of Dissolution entered on October 7, 1997, and in the subsequent court order of September 9, 1999 ordering respondent husband to pay petitioner wife fifty percent of his gross Social Security benefit payment, was not filed within a reasonable time under CR 60. CP 83-87.

3. The trial court did not interpret or construe a settlement from fifteen years ago as an unlawful transfer of a future payment of the Federal Social Security benefits. CP 83-87.

4. The trial court erred in concluding that the court had jurisdiction over the subject matter of the division of Social Security benefits and had the inherent power to require the respondent husband to pay the petitioner wife a fixed percentage of his monthly Social Security benefits for the rest of his life. CP77-88, 83-87.

5. The trial court erred in ruling that even if the provisions of the Amended Decree of Dissolution entered on October 7, 1997, and in the subsequent court order of September 9, 1999, ordering respondent husband to pay petitioner wife fifty percent of his gross Social Security benefit payment were void or voidable, the parties execution of a CR 2A agreement created a separately enforceable contract right in favor of the petitioner wife. CP 83-87.

II. ISSUES

1. Whether trial court erred in ordering Mr. Anderson to comply with the provision of the Decree of Dissolution that requires him to pay Ms. Anderson a specific percentage of his Social Security income every month.

2. Whether a motion to vacate a void judgment under CR60(b)(5) may be barred by the passage of time between the date the judgment is entered and the motion to vacate is filed.

3. Whether a CR2A agreement that confirms the division of the respondent husband's gross Social Security payment creates a separately enforceable contract right to the benefit of the petitioner wife, even if the trial court did not have subject matter jurisdiction over the moneys payable to the respondent husband from his Social Security benefit.

4. Whether a trial court has subject matter jurisdiction over the parties rights to payments of money from their Social Security benefits that are subject to 42 USC §407(a).

5. Whether a trial court order requiring the respondent husband to pay fifty percent of his gross monthly Social Security payment to the petitioner wife is a violation of 42 USC § 407(a).

6. Whether a trial court order requiring a respondent husband to pay the petitioner wife one half of the difference between his gross monthly Social Security payment and her gross monthly Social Security payment is a violation of 42 USC §407(a).

III. STATEMENT OF THE CASE

Robert Anderson and his former wife, Beverly Anderson, were divorced by an Amended Decree of Dissolution entered on October 7, 1997, nunc pro tunc to July 3, 1997. CP11-19. The Decree specifically awarded fifty percent of Mr. Anderson's Social Security benefits to his former wife each month until she commenced receiving her own Social Security benefits under her own claim. CP 18. At that time, Mr. Anderson's payment to her would be reduced so that the overall payment from both Social Security benefit awards was divided equally between the two parties. CP 18. In the decree, paragraph 3.13, Other, the decree states as follows:

Social Security. When the husband commences receiving his Social Security benefits he shall pay fifty percent of the gross amount to the wife, each month, until the wife commences receiving Social Security benefits under her own claim. When she commences receiving her own Social Security benefits, the gross amount received by the wife shall be subtracted from the gross amount received by the husband, and the husband shall pay to the wife, one half of the difference between his benefit and her benefit on a monthly basis..... said transfer shall continue to be made until the death of a party.

CP 18.

Subsequently a court order was entered by agreement on September 9, 1999, which reaffirmed the court's order dividing the Social Security award. CP 20-21.

On October 12th, 2012, Mr. Anderson moved for relief from judgment pursuant to CR60(b)(5). CP 44-46. He asserted the trial court had no authority to order the division of the Social Security income in the dissolution proceeding. CP 49-72, 73-76. The court denied Mr. Anderson's motion to vacate and denied Mr. Anderson's Motion for Reconsideration. CP 77-78, 83-87. This appeal follows.

IV. STANDARD OF REVIEW

A decision on a motion for reconsideration is generally reviewed for an abuse of discretion. Davies v. Holy Family Hosp., 144 Wn. App. 483,

497, 183 P.3d 283 (2008) (quoting Kleyer v. Harborview Med. Ctr. of Univ. of Wash., 76 Wn. App. 542, 545, 887 P.2d 468 (1995)). A trial court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. DeYoung v. Cenex Ltd., 100 Wn. App. 885, 897, 1 P.3d 587 (2000). This deference does not apply, however, when the decision is predicated on a question of law, where review is de novo. In re M.B., 101 Wn. App. 425, 454, 3 P.3d 780 (2000). This case involves only a question of law and therefore review is de novo.

V. SUMMARY OF ARGUMENT

A. Social Security Benefits. Petitioner is not entitled to a share of Respondent's Social Security Benefits under Federal Law. 42 U.S.C § 407; In re the Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999); In re the Marriage of Rockwell, 141 Wn.App. 235, 170 P.3d 572 (2007).

B. Void Judgment. A judgment is void if the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved. CR 60(b)(5); Bresolin v. Morris, 86 Wn.2d 241, 245, 543 P.2d 325 (1975). A motion to vacate a void judgment may be brought at any time. In re Marriage of Leslie, 112 Wn.2d 612, 772 P.2d 1013 (1989).

C. Stipulation to Jurisdiction. If a court has no jurisdiction of an

action, the parties cannot by stipulation confer jurisdiction upon the court. Washington Local Lodge No. 104 v. International Bhd. of Boilermakers, 28 Wn.2d 536, 183 P.2d 504 (1947).

VI. ARGUMENT

A. The trial court committed legal error by illegally dividing Social Security benefits.

Federal and state laws do not permit the court to value and distribute Social Security benefits. In re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999); In re Marriage of Rockwell, 141 Wn. App. 235 239, 170 P.3d 572 (2007).

The relevant Federal statute is Chapter 7 of Title 42, which deals with Social Security. Section 407(a) states,

the right of any person to any future payment under this subchapter shall not be transferable or assignable at law or in equity, and none of the monies paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 USC § 407(a). Therefore, the Court may not divide Social Security benefits.

In the Zahm case, the Washington Supreme Court followed the United States Supreme Court and held that Social Security benefits are not subject to division in a dissolution proceeding:

In 1979, the United States Supreme Court held the Federal

Constitution's Supremacy Clause pre-empted California's community property laws. Hisquierdo v. Hisquierdo, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L. Ed.2d 1 (1979). The judicial application of California's community property laws, therefore, could not supplant the terms of the Federal Railroad Retirement Act benefits and Federal Social Security benefits holding, in as much as both benefits are the products of non-contractual agreements, they are fundamentally similar. Hisquierdo, 439 U.S. at 574-75. The Supreme Court ultimately held Railroad Retirement Act benefits are not subject to distribution as property in a dissolution proceeding. Hisquierdo, 439 U.S. at 590. Given the Supreme Court's assertion of an affinity between Railroad Retirement Act benefits and Federal Social Security benefits in Hisquierdo, we conclude Social Security benefits themselves are not subject to division in a marital property distribution case.

Zahm, 138 Wn.2d 213 at p. 219.

The Zahm Court recognized that the benefits are separate and indivisible:

We conclude that federal statutes secure Social Security benefits as the separate indivisible property of the spouse who earned them. This approach ensures that the benefits intended for the beneficiary reach that party and that the benefits are insulated from the occasional unpredictable fortunes of legal dispute.

Zahm, 138 Wn.2d 213 at p. 220, citing Hisquierdo v. Hisquierdo, 439 U.S. 572, 584, 99 S. Ct. 802, 59 L. Ed.2d 1 (1979);

The possibility that one or both parties may receive Social Security benefits is a factor the court may consider in making its distribution of

property. In re Marriage of Rockwell, 141 Wn.App. 235 239, 170 P.3d 572 (2007). However, the court may not distribute Social Security benefits from one party to the other. Rockwell, 141 Wn.App. at 244.

The Decree orders Mr. Anderson to pay Ms. Anderson fifty percent of the gross amount of Mr. Anderson's Social Security benefits each month. CP 18. This very clearly is a taking of Mr. Anderson's Social Security benefits and is an award of a portion of his Social Security benefits to Ms. Anderson. Such a result is erroneous as a matter of law.

Ms. Anderson argued before the trial court that though the Decree orders Mr. Anderson to pay Ms. Anderson fifty percent of his Social Security benefits it does not violate 42 USC 407(a) because it does not transfer or assign the Social Security benefits or subject the Social Security benefits to execution, levy, attachment, garnishment or any legal process. This argument is without merit. The court awarded a portion of Mr. Anderson's monthly Social Security benefits to Ms. Anderson. CP 18. This is an award of property and is in violation of 42 USC 407(a). Social Security benefits are not subject to division in a marital property distribution case. 42 USC 407(a); Hisquierdo v. Hisquierdo, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L. Ed.2d 1 (1979).

The Zahm court holds that a trial court may properly consider a spouse's Social Security income when formulating a just and equitable division of the parties' marital property. However, the Zahm court specifically holds that Social Security benefits may not be divided. The Zahm court states that although Social Security benefits may not be divided or reassigned in a marriage dissolution proceeding, or valued for purposes of an offsetting award, they may properly be considered by a court in evaluating the relative economic circumstances of divorcing spouses for purposes of making a just and equitable division of their property under RCW 26.09.080. See Marriage of Zahm, supra.

The trial court's ruling is contrary to the holdings of the U.S. Supreme Court in Hisquierdo, and the State Supreme court in Zahm, supra; under Hisquierdo, Social Security benefits themselves are not subject to division in a marital property distribution case. The Washington State Supreme Court in Zahm, reaffirmed the rule, but found that the Social Security benefits were not actually divided. Zahm, 138 Wn.2d 213 at page 220. In the instant case the court did actually divide Mr. Anderson's Social Security benefits, awarding a portion of his share to Ms. Anderson. CP 18. This is a clear violation of 42 USC 407(a) and Hisquierdo. In Hisquierdo the trial court made an offsetting property award in a specific amount after

determining the value of the husband's retirement account and the court found this a violation of Federal Law. In the instant case the Court made an actual division of the Social Security benefits from Mr. Anderson to Ms. Anderson which applies for the duration of Mr. Anderson's life. CP 18. This is a clear violation of 42 USC 407(a).

B. The trial court erred when it denied the motion to vacate under Court Rule 60.

Mr. Anderson filed his motion to vacate the provision of his Decree involving the division of his Social Security Benefits. CP 44-72. The court denied his motion, finding that the motion was not brought within a reasonable time under Court Rule 60, and that in any event the Decree does not actually divide his Social Security Benefits. CP 77-78.

Where a court lacks jurisdiction over the parties or the subject matter, or lacks the inherent power to make or enter the particular order, its judgment is void. A motion to vacate a void judgment may be brought at any time, and the court must vacate the judgment as soon as the defect comes to light. Chai v. Kong, 122 Wn.App. 247, 93 P.3d 936 (2004).

CR 60(b)(5) provides "the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following

reasons: . . . the judgment is void." A judgment is void if "the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved." Bresolin v. Morris, 86 Wash. 2d 241, 245, 543 P.2d 325 (1975), Supplemental Op., Bresolin v. Morris, 88 Wn.2d 167, 558 P.2d 1350 (1977). A motion to vacate a void judgment may be brought at any time. In re Marriage of Leslie, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989); State ex rel. Campbell v. Cook, 86 Wash. App. 761, 767, 938 P.2d 345, review denied, 133 Wn.2d 1019, 948 P.2d 387 (1997). Mr. Anderson's motion to vacate based upon lack of jurisdiction is not barred by the passage of time.

In the present case the trial court did not and does not have subject matter jurisdiction or inherent power over the parties' Social Security Benefits. See 42 USC Section 407. The trial court specifically divided the Social Security benefits of the husband/respondent. CP 18. The Court ordered: "When the husband commences receiving his Social Security benefits, he shall pay fifty percent of the gross amount to the wife, each month...." CP 18. This is a division of the Social Security Benefits, not a specific award of spousal maintenance or a division of another asset. The Decree of Dissolution specifically cites and directs that the Social Security benefits of Mr. Anderson be divided. This direct order for division of the

Social Security benefits was made without legal authority. The lack of legal authority to make the division of Social Security Benefits makes the order void. A void order is void from the inception and a Motion to Vacate is not limited by any passing of time and the reasonableness requirement in CR 60(b) does not apply.

C. The trial court erred by ruling that the illegal division was property stipulated to by the parties.

The trial court found that Mr. Anderson's Motion to Vacate was not appropriate in part because the parties stipulated to the entry of the judgment and executed a written agreement. CP 77-78.

A stipulation disposing of property in a dissolution case is subject to court approval. Munroe v. Munroe, 27 Wn.2d 556, 561, 178 P.2d 983 (1947). A stipulation that has been approved by the court will not be disturbed unless there is a clear and manifest abuse of discretion. Mayo v. Mayo, 75 Wn. 2d 36, 38, 448 P.2d 926 (1968). A judgment by consent may be reviewed on appeal where there is a mistake or in lack of jurisdiction. Washington Asphalt Co. v. Harold Kaeser Co., 51 Wn.2d 89, 91, 316 P.2d 126, 69 A.L.R.2d 752 (1957).


If a court has no jurisdiction of an action, the parties cannot by stipulation confer it upon the court. Washington Local Lodge No. 104 v. International Bhd. of Boilermakers, 28 Wn.2d 536, 544, 183 P.2d 504 (1947), adhered to, 28 Wn.2d 546, 189 P.2d 648 (1948); Miles v. Chinto Mining Co., 21 Wn.2d 902, 903, 153 P.2d 856 (1944), adhered to, 21 Wn.2d 907, 156 P.2d 235 (1945). The trial court erred when it upheld an illegal distribution of Social Security benefits based on a conclusion that the parties stipulated to the division. Stipulated or otherwise, such an act is expressly forbidden by federal and state law and is void.

VII. CONCLUSION


In conclusion, the Superior Court was without authority to approve the consent judgment awarding Ms. Anderson any portion of Mr. Anderson's Social Security benefits. The judgment is void if entered by the court without jurisdiction over the subject matter. Under CR 60(b)(5), a court may vacate a void judgment at any time. The judgment of the Superior Court should be reversed, and the provision of the dissolution decree that

requires Mr. Anderson to pay a percentage of the gross sum of his Social Security Benefit to Ms. Anderson should be vacated.

RESPECTFULLY SUBMITTED this 31st day of May, 2013.



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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Robert E. Anderson,

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v.

Beverly L. Anderson,

Respondent,

No.70057-0-1

DECLARATION OF SERVICE

THE UNDERSIGNED, hereby declares as follows:

1. That I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, an employee of Campbell, Dille, Barnett and Smith, over the age of 18 years, not a party to the above-entitled action and competent to be a witness therein.

2. That on the 31st day of May, 2013, she caused an original and one copy of the following documents to be delivered:

(1) Appellant's Brief, Declaration of Service:

Richard D. Johnson, Clerk
Court of Appeals, Division 1
600 University St
One Union Square

Declaration of Service -- Page1

Seattle, WA 98101-1176

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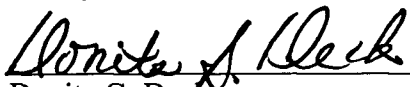
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DATED this 31st day of May, 2013.



Donita G. Deck