Supreme Court No. 90436-7
Appellate Court No. 700570-1

SUPREME COURT
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE MARRIAGE OF

ROBERT E. ANDERSON, Petitioner

v.

BEVERLY L. ANDERSON, Respondent

ANSWER TO PETITION FOR REVIEW

Ginger Edwards Buetow, WSBA#31099
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APPENDIX TO ANSWER TO PETITION FOR REVIEW

I. IDENTITY OF RESPONDENT

Respondent is Beverly L. Anderson ("Beverly"), a Washington resident who was married to the Petitioner, Robert Anderson ("Robert").[1]

II. INTRODUCTION

Beverly and Robert were married for 39 years. They divorced in May 1997. Robert was the financial provider for the entire marriage. Beverly was a provider at home, taking care of the children and the family. Beverly's full attention to duties and tasks at home with the family facilitated Robert's ability to work and to provide, so his income-earning ability was a community asset that was built up during the course of the marriage. CP 92.[2]

At the time of the divorce, the parties were near traditional retirement age. However, in 1996, Robert's earnings were $301,000, his 1997 estimated earnings were $250-300,000; and his 1998 potential earnings were $200,000. CP 93 and CP 149. Robert's earnings were in a range twenty times that of Beverly's earnings. CP 93. The Andersons had no retirement funds beyond real estate profits. CP 92. They had acquired real estate holdings consisting of a 1.65 million dollar home in Kirkland, WA on Lake Washington; 83 acres of land in Centralia, WA; land/trailer at

[1] For purposes of maintaining the distinction between the parties, they are referred to by their first names.

[2] "CP" refers to the Clerk's Papers filed in the Court of Appeals.

Crescent Bar, WA; and, a one-half interest in 20,000 acres of undeveloped property in Eastern Washington. CP 89-90.

Under Sections 3.2, 3.3 and 3.13 of the Decree of Dissolution dated May 19, 1997 ("Decree") (CP 1-10), the real property was divided between the parties and/or sold. Under Sections 3.2 and 3.3 of the Decree, each party was awarded "all government entitlements." Emphasis added. Section 3.13 was titled "Other" and was a catch all of provisions relating to real estate, income taxes, life insurance. Also included was a financial provision titled "Social Security" obligating Robert to pay Beverly, once he began collecting social security benefits, an amount equal to ½ of the gross amount of social security benefits to be received. CP 9. Prior to that time, Beverly received maintenance, varying from $3,000 to $1,500 or the greater of ½ of Robert's net income, from April 1997 to April 1999. The duration of maintenance was reserved based on several variables, including Robert's employment. CP 3-5 and CP 34.

Post dissolution, in September 1997, Robert brought a Motion for Modification of Maintenance and For Clarification of Decree. CP 97-103. The motion to modify maintenance was denied. CP 20-21. However, the Decree was amended and an Amended Decree of Dissolution ("Amended

Decree") was entered on October 7, 1997 nunc pro tunc to July 3, 1997.[3] CP 137-145. In June 1998, Robert brought another motion, this time requesting the Court to terminate maintenance and terminate a provision relating to reserves. CP 104-108. The motion was denied.

In September 1998, Robert brought a CR60 motion requesting the Court to correct a clerical error/mistake. CP 114-116. Robert never appealed the Decree or Amended Decree asserting Section 3.13 titled Social Security was void under Federal law.

On April 19, 1999, the parties executed a CR2A Settlement Agreement which was approved and entered with the Court in September 1999. As set forth in the CR2A, the parties agreed that the provision titled "Social Security" was related to maintenance and not solely a distribution of property:

> 4. The husband shall pay immediately $70,000 to the wife from his impound account in full and final payment of any and all liability owed to the wife for property distribution and/or maintenance. Other than as set forth in paragraph 5, neither party shall have any claim against the other for property distribution and/or maintenance.
> 5. The provision in the decree entitled Social Security shall be given its full effect.

Emphasis added. CP 165. The support provision, under Section 3.13 titled Social Security, of the Amended Decree states as follows:

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[3] The changes in the Amended Decree related to payment on a Key Bank Signature loan. Section 3.13 titled Social Security was not affected.

> 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 he 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 144.

In January 2001, less than four years after the Amended Decree was entered; and less than two years after the CR2A Settlement Agreement was entered, Robert commenced receiving social security benefits. In accordance with the Orders, he began making support payments to Beverly. Although Robert was sporadic in his payments to Beverly, in 2012, Robert ceased making payments to Beverly. It was not until after August 2012[4], when Beverly commenced a contempt motion, did Robert file a motion in October 2012 claiming that the provision requiring these support payments violated Federal law and therefore void.

On August 22, 2013, Robert was found in contempt of court and a judgment of $22,102.10, for unpaid support and attorney's fees, was entered with a review ordered for January 2014. App. Tab 1.[5] The Court found that Robert:

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[4] Beverly continued her motion for contempt after Robert filed his motion to vacate. After Robert filed his appeal, Beverly re-noted her contempt motion.

[5] "App Tab #" refers to the Appendix attached hereto.

> failed to make some of his monthly equalization payments and/or did not pay the full monthly amount to Petitioner. Statute of limitations not applicable because payments are family support in the nature of financial support. Emphasis added.
>
> . . .
>
> has the ability to comply with the order as follows: Respondent does receive social security and other income; however, Respondent did not provide financial records for the court to determine other resources. He has not shown the burden of not being able to pay.

Robert sought revision, which was denied. The Honorable Judge Michael Hayden found that "Mr. Anderson did not meet his burden to show that he does not have the means to comply with the order or that the provision sought to be enforced has no reasonable relation to his duty to support his spouse." App. Tab 2. Emphasis added.

Post August 2013, Robert did not make any payments to Beverly. On January 15, 2014, Robert was found in contempt of court for the second time and a judgment of $25,883.70, for unpaid support, interest and attorney's fees, was entered. The Court found under Paragraph 2.6, "Other Unpaid Obligations/Maintenance," that Robert "has unpaid financial obligations pursuant to Paragraph 3.13 of the Amended Decree of Dissolution and the parties' CR2A Settlement Agreement." App. Tab 3.

Three judges, two court commissioners and the parties' initial experienced family law attorneys all recognized that the provision under Section 3.13 of the Amended Decree titled "Social Security" was a

provision related to financial support and used to calculate an amount of future support to Beverly after a marriage of 39 years.

Robert's appeal and this subsequent petition are frivolous and brought in bad faith to avoid the financial obligations under a valid Amended Decree and CR2A Settlement Agreement. Robert is successfully avoiding the consequences of contempt orders by living as a resident of Nevada – not a resident of Washington as stated in the petition filed with this Court.

III. RESTATEMENT OF THE CASE

The Amended Decree spells out the property to be awarded to each party, including that each party was entitled to "all government entitlements." CP 138. Spousal support was awarded, but also reserved based on a number of factors including the sale of the parties' real property and Robert's income. CP 140. Pursuant to CR2A Settlement Agreement dated April 19, 1999, the parties had sold their residence and the property in Eastern Washington; and, agreed the financial support "provision in the decree entitled Social Security" continued, including future claims against the other for property distribution and/or maintenance as related to the provision. CP 34. Emphasis added.

Robert clearly understood the provision to be related to an overall methodology to ensure Beverly received financial support. Three post

dissolution motions were brought by Robert and none of them claimed that the financial provision under Section 3.13 of the Decree/Amended Decree, requiring support payments to Beverly predicated on an amount relating to social security benefits received by Robert, was void under Federal law. Emphasis added.

Robert's understanding that the financial provision is valid is also supported by the fact Robert never appealed the provision after entry of the May 1997 Decree; nor, after entry of the October 1997 Amended Decree. Both parties recognized in the CR2A Settlement Agreement, that the provision of payments under Section 3.13 Social Security qualified as spousal support whether classified as a property distribution or classified as maintenance, so that the parties were roughly in equal financial positions for the rest of their lives after being married for 39 years.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Robert asserts review should be granted because the petition involves an issue of substantial public interest so that the citizens of this state can be ensured (1) that the courts avoid violating federal law or otherwise acting outside their inherent power when distributing marital property upon divorce, especially regarding citizens' rights under the anti-alienation provision of the Social Security Act; and, (2) that litigants' right

to challenge void orders by means of CR 60(b)(5) is preserved. Neither argument has merit, therefore the Petition for Review should be denied.

A. The Trial Court Did Not Violate Federal Law or Otherwise Act Outside It's Inherent Power When Distributing the Anderson's Marital Property

Under Section 3.13 of the Amended Decree, the trial court did not value or distribute Robert's social security benefits in violation of Federal law. Section 3.13 orders Robert to make financial support payments to Beverly whereby the amount of the payment was to be calculated based on the amount of social security benefits received by each party. The Amended Decree is not void and is within the jurisdiction of the court.

(1) The Trial Court Did Not Distribute Social Security Benefits from Robert to Beverly

The Court of Appeals, in addition to three family law trial judges, recognized that the provision under Section 3.13 titled Social Security was a methodology to establish an amount of financial spousal support for Beverly as part of an overall award in the Anderson's dissolution. The provision took into account that at some point in time, Beverly would receive social security benefits and that Robert's support obligation would then be reduced.

Pursuant to Section 407(a) of the Social Security Act, there was not a distribution of social security benefits or a violation of federal law.

App. Tab 4. In addition, Section 659(a), is an exception to Section 407(a) of the Social Security Act. Section 659(a) permits a purported division of social security benefits valid only if the parties intended the transfer to be alimony rather than a property division. Section 659(a)(i)(3)(A) defines as "alimony" as follows:

> The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual, and (subject to and in accordance with state law) includes separate maintenance, alimony pendente lite, maintenance, and spousal support, and includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Emphasis added.

App. Tab 5. In this case the provision titled "Social Security" was an exception to Section 407(a) under Section 659(a).

In an unpublished case, the Court of Appeals of Washington, Division 3 had an opportunity to apply Section 659(a) to In re the Marriage of Triggs, No. 28469-1-III, Court of Appeals of Washington, Division 3, (August 25, 2011). App. Tab 6. In Triggs, the parties had been married almost 34 years prior to separation. In the divorce, the husband was order to pay $1,700 per month in maintenance until he retires, and also ordered to pay as maintenance one half of the difference between his Social Security income and the wife's Social Security income once he

began to receive it. In applying 42 U.S.C. 659(a), the Court found that the trial court's order "does not purport to make a direct award to Judith of Michael's Social Security benefits. It merely calculates the amount of maintenance with reference to his future Social Security entitlement." This is exactly what occurred in the instant matter.

Division III relied on rulings from other states which applied 659(a) to 407(a). See Evans v. Evans, 111 N.C.App. 792, 798-99, 434 S.E.2d 856 (1993) (concluding that 42 U.S.C. § 407(a) does not bar a maintenance award of Social Security benefits because of the exception provided in § 659(a)); In re Marriage of Mikesell, 276 Mont. 403, 406, 916 P.2d 740 (1996) (recognizing that "legal process brought for the enforcement of a party's legal obligations to provide child support or make maintenance payments is a specific exception to the broad exemption from garnishment provided to social security benefits by 42 U.S.C. § 407"); *c.f.* Lanier v. Lanier, 278 Ga. 881, 882-83, 608 S.E.2d 213 (2005) (holding that Railroad Retirement Act benefits may constitute the source of alimony payments under federal law); In re Marriage of Flory, 171 Ill.App. 3d 822, 121 Ill. Dec. 701, 525 N.E.2d 1008 (1988) (recognizing that 42 U.S.C. § 659(a) contains an exception to the Railroad Retirement Act's anti-assignability clause with regard to a legal obligation to make alimony payments).

Additionally, an analysis of the cases cited by Robert, as well as rulings from other courts outside of the State of Washington, support the trial court's inherent power in that the provision titled "Social Security", Section 3.13 of the Amended Decree does not violate Section 407(a) of the Social Security Act.

The State of Washington's case, In re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999) and the Federal case, Hisquierdo v. Hisquirdo, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979) are distinguishable from this case. At issue in Hisquierdo was whether the wife was entitled to a share of the railroad retirement benefits that would be due to her husband upon his retirement. The wife requested the court provide her with "an offsetting award of presently available community property to compensate her for her interest in petitioner's expected Railroad Retirement Act's benefits." The Supreme Court found the proposed arrangement tantamount to the prohibited reassignment of federal benefits. Hisquierdo, 439 U.S. at 588. In contrast, Judge Alsdorf did not conduct the kind of evaluation of social security benefits or offset prohibited in Hisquierdo. Robert's award of property was not affected by the support payments to be received by Beverly.

In Zahm, the husband's social benefits were characterized as community property and included in the distribution of community

property. The Court went so far as to issue a finding stating that 61% of the husband's social security was earned during marriage; however, the Court did not apportion the benefits. Zahm, 138 Wn.2d at 219. In contrast, Judge Alsdorf did not characterize Robert's social security benefits as community. Rather, both parties were awarded their "government entitlements."

Robert cites In re the Marriage of Anderson, 252 P.3d 490 (Colo.App.Div. 2 2010), Dapp v. Dapp, 211 Md. App. 323,, 65 A.3d 214 (2013). and In Re Marriage of Hulstrom, 342 Ill.App.3d 262, 794 N.E.2d 980 (Ill.App.2 Dist. 2003) in his brief. These cases are also distinguishable from this matter. In Anderson, the parties dissolved their marriage in 1994. A separation agreement, which the court incorporated into the decree, provided, in relevant part:

> [a]s a provision of property settlement and not as spousal support, when the parties begin to receive benefits from Social Security after age sixty-five (65), [husband] shall pay to [wife] a monthly sum of Two Hundred Twenty-Five and no/100 Dollars ($225.00) from his Social Security benefits. In the future, this amount will be increased or decreased by an amount equal to fifty percent (50%) of any increase or decrease in [husband's] Social Security benefits. [Husband] will file to begin receiving Social Security benefits on or before March 1, 1994.

Anderson, 252 P.3d at 492-493. The Anderson court ordered a specific amount to be taken from the husband's Social Security benefits, as well as ordered the amount be taken "from his Social Security benefits" to begin

the same year the parties divorced. Emphasis added. In contrast, Judge Alsdorf calculated an amount based Social Security benefits received, but he did not order that the support payment was to be paid from the actual benefits received by Robert.

In Dapp, the wife waived her right to "alimony and other spousal support" and was entitled to "one-half (1/2) of the all pension accrued by the Husband with Amtrak...." Dapp, 211 Md. App. at 325. The trial court lumped the husband's Tier 1 and Tier 2 pension benefits despite the fact that Tier 1 benefits are the equivalent of social security benefits. Dapp clearly violates Section 407(b) of the Social Security Act in that the husband's Tier 1 benefits were actually transferred when they were lumped with the Tier 2 benefits. In contrast, Judge Alsdorf did not characterize Robert's social security benefits as community; nor, did he mix community with separate property.

In Hulstrom, at the time the decree of dissolution was entered the parties were already 65 and 67 and each were receiving social security benefits. Under the decree, which incorporated a marital settlement agreement, the Court ordered

> 1. The Social Security paid on behalf of [petitioner] and [respondent] shall be combined monthly and paid to [respondent], where, on the tenth of each month, one-half of the combined Social Security payment shall be deposited by direct deposit from [respondent's] account into an account designated by [petitioner].

> To the extent that such Social Security payments to either party are income, and to such an extent that the party who receives the greater amount of Social Security receives income from the party to whom the greatest amount of Social Security is paid, that amount of Social Security shall be income to the receiving party to the extent that it was income to the paying party...
> 8. To the fullest extent provided by law, each party waives maintenance now and all times in the future."

Hulstrom, 794 N.E.2d at 982. Ordering the parties to combine their benefits and then split the amount via a direct deposit violates Section 407(b) of the Social Security Act. The court found that the language of the settlement agreement indicates that the parties intended the social security benefits to be marital property rather than maintenance. Hulstrom, 794 N.E.2d at 986. In contrast, Judge Alsdorf did not order the parties to combine their incomes or set a time when the support payment be made each month. Further, unlike the language in Hulstrom, maintenance was not specifically waived by Beverly.

The Court of Appeals in the Hulstrom matter cited Boulter v Boulter, 113 Nev. 74, 930 P.2d 112 (1997) to support its decision. See, Hulstrom, 794 N.E.2d at 984-985. Boulter is also distinguishable from this matter. In Boulter, the trial court dissolved the parties' 37-year marriage and incorporated a property settlement agreement into the decree of dissolution. The following paragraph in the decree was found to violate the Social Security Act:

> Each party is eligible to receive Social Security Benefits at normal retirement age. The parties have agreed to equalize Social Security Benefits as they are received during their joint lifetimes. Husband agrees to pay to wife one-half of each monthly Social Security check he receives. Wife agrees likewise to split equally with husband each Social Security check she receives. The parties will arrange with Social Security to have the Social Security checks deposited directly into their respective bank accounts, and shall arrange with their banks for an automatic transfer of the other party's share as set forth herein. Emphasis added.

Boulter, 930 P.2d at 112, Notes [1]. In contrast, Judge Alsdorf did not order the Andersons to pool and then split their social security benefits equally. Robert was ordered to make a spousal support payment to Beverly based on an amount he was to receive in social security benefits and it did not matter where the money came from to make the payment.

The parties agreed under the CR2A Settlement Agreement that under Section 3.13 titled Social Security, spousal support would continue. Section 3.13 is a financial provision for the payment of support for a marriage of 39 years in which the parties lacked retirement funds.

(2) The Trial Court had inherent authority and jurisdiction because the Decree did not award Social Security benefits and therefore is not void.

It is well established that in a dissolution action, all property, community and separate, including social security benefits, is before the court for consideration. In re Marriage of Stachofsky, 90 Wn.App. 135, 142, 951 P.2d 346 (1998), In re Marriage of Zahm, 138 Wn.2d at 219. The

applicable statutes for maintenance and property distribution are RCW 26.09.080 and .090. In determining spousal maintenance, the court is governed strongly by the need of one party and the ability of the other party to pay an award. In re Marriage of Washburn, 101 Wn.2d 168, 182, 677 P.2d 152 (1984) (RCW 26.09.090 places emphasis on the justness of an award, not its method of calculation).

The trial court's paramount concern is the economic condition of the parties. In re Marriage of Crosetto, 82 Wn.App. 545, 556, 918 P.2d 954 (1996). In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. Washington Family Law Deskbook, § 32.3(3) at 17 (2d. ed. 2000); see also, Sullivan v. Sullivan, 52 Wash. 160, 164, 100 P. 321 (1909).

The Court of Appeals revises a maintenance award for abuse of discretion. Zahm, 138 Wn.2d at 226-27. The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just. In re Marriage of Luckey, 73 Wn.App. 201, 209, 868 P.2d 189 (1994). In addition, the Court of Appeals will seldom modify a trial court's division of property and assets on appeal, and the spouse who challenges such a decision bears a heavy burden to show a manifest abuse of discretion on the part of the trial court.

This deferential standard of review exists because the trial court is "in the best position to assess the assets and liabilities of the parties" in order to determine what constitutes an equitable outcome. In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

Robert failed to show a manifest abuse of discretion on the party of the trial court. Had Robert raised the issue by appealing the Decree/Amended Decree pursuant to RAP 5.2, or had he brought a CR 60(b)(5) motion when he began making support payments, his argument that his support payments violated Federal law would be a little more believable. However, the fact remains that this was a long term marriage in which Beverly required financial support and that support was calculated on an amount Robert would eventually receive as Social Security benefits. It was only after Beverly sought enforcement by the Court for Robert's unpaid financial obligations did he assert the Decree was void.

The trial court did not require Robert's social security benefits to be subject to execution, levy, attachment, garnishment, or other legal process. There was no process ordered to ensure that once Robert received his social security benefits that the funds were immediately attached or garnished. The amount of social security benefits received by Robert was merely a methodology to provide an amount to be paid as

financial support to Beverly for a 39 year marriage in which the parties did not have retirement savings.

Under RCW 26.09, the trial court had the inherent authority to award spousal support and to make an overall just and equitable division of the parties' assets. In doing so, Judge Alsdorf could consider the social security benefits to be received by the Andersons.

B. Robert Did Not Properly Invoke CR 60(b)

The Court of Appeals was correct in finding that the trial court has subject matter jurisdiction in this matter. In re Marriage of Buecking, 179 Wn.2d 438, 449-50, 316 P.3d 999 (2013) citing WASH. CONST. art. 4, § 6. Robert clearly is avoiding his spousal support obligations by claiming the provision is void and that he can modify the decree pursuant to a CR 60(b)(5) motion.

A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should be overturned on appeal only if it plainly appears that it has abused that discretion. Martin v. Pickering, 85 Wash.2d 241, 533 P.2d 380 (1975). The Court of Appeals rightly found that the trial court did not abuse that discretion and did not need to take the next step to address Robert's allegations of erroneous distribution.

If a decree is not void, then a party has a certain time limit under CR60(b)(5) in which to attach a judgment. Since the trial court found that the judgment in this matter was not void, then under CR60(b), the motion was also not timely. Any motion under Rule 60(b) must be brought within a "reasonable" time. State v. Ward , 125 Wn. App. 374,380, 104 P.3d 751 (2005). In Ward, the defendant moved to withdraw a stipulation/judgment under CR 60(b)(5) and (11) because of a court decision issued two years after his stipulation that interpreted a statute which constituted a significant change in the law.

The defendant in Ward was unable to establish that the court lacked jurisdiction of the parties or of the subject matter, or lacked the inherent power to make or enter the particular order involved and was not entitled to relief from judgment under CR 60(b)(5). Ward, 125 Wn. App. at 379. In addition, because the Court accepted Ward's stipulation, the judgment could not be void under CR 60(b)(5). Ward, at 375-376. Ten years was also found to be an unreasonable amount of time to bring a CR 60(b)(11) motion and the defendant also failed to provide a good reason for failing to take appropriate action sooner. Ward, at 380-381.

Similarly, the trial court in this matter had both personal and subject matter jurisdiction and also accepted the Anderson's CR2A Settlement Agreement regarding spousal support. And, just as in Ward, Robert also

has not stated any good reason to why he never claimed the support provision under Section 3.13 to void prior to filing his motion to vacate in October 2012. Emphasis added.

C. Redistribution of Marital Assets and Receipt of Maintenance

If the provision titled "Social Security" under Section 3.13 of the Amended Decree is considered to violate Section 407(a) of the Social Security Act, and found to be a division of property rather than an exclusion under Section 659 then a new hearing is necessary for the redistribution of marital assets. In Hulstrom, the Court suggested the parties renegotiate the division of prospective social security benefits by characterizing them as maintenance. Hulstrom, 794 N.E.2d at 989.

D. Attorney Fees

Beverly requests attorney fees and expenses under RAP 18.1.

V. CONCLUSION

Petitioner Robert Anderson has failed to demonstrate that his petition satisfies the criteria for this Court's review established in RAP 13.4(b). Therefore, the petition should be denied.

RESPECTFULLY SUBMITTED this 25th day of July, 2014.

Ginger Edwards Buetow, WSBA No. 31099
Attorney for Respondent Beverly Anderson

Supreme Court No. 90436-7
Appellate Court No. 700570-1

SUPREME COURT
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE MARRIAGE OF

ROBERT E. ANDERSON, Petitioner

v.

BEVERLY L. ANDERSON, Respondent

APPENDIX TO ANSWER TO PETITION FOR REVIEW

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APPENDIX TO ANSWER TO PETITION FOR REVIEW

TAB	DESCRIPTION
1	Anderson v. Anderson, King County Superior Court for the State of Washington, Cause No. 96-3-04342-1 SEA, Order on Show Cause re Contempt/Judgment dated August 22, 2013
2	Anderson v. Anderson, King County Superior Court for the State of Washington, Cause No. 96-3-04342-1 SEA, Order on Respondent's Motion for Revision of Court Commissioner Ruling dated October 4, 2013
3	Anderson v. Anderson, King County Superior Court for the State of Washington, Cause No. 96-3-04342-1 SEA, Order on Show Cause re Contempt/Judgment dated January 15, 2014
4	42 U.S.C. §407(a)
5	42 U.S.C. §659(a)
6	In re Marriage of Anderson, 252 P.3d 490 (Colo.App.Div. 2 2010)
7	Boulter v. Boulter, 113 Nev. 74, 930 P.2d 112 (1997)
8	Dapp v. Dapp, 211 Md. App. 323, 65 A.3d 214 (2013)
9	Evans v. Evans, 111 N.C. App. 792, 434 S.E. 2d 856 (1993)
10	In re Marriage of Flory, 171 Ill.App. 3d 822, 525 N.E. 2d 1008 (1988)
11	In Re Marriage of Hulstrom, 342 Ill.App.3d 262, 794 N.E. 2d 980 (2003)
12	Lanier v. Lanier, 278 Ga. 881, 608 S.E. 2d 213 (2005)
13	In re Marriage of Mikesell, 276 Mont. 403, 916 P.2d 740 (1996)
14	In Re Marriage of Triggs, No. 28469-1-III, Court of Appeals Div. 3, (2011)

TAB 1

Anderson v. Anderson
King County Superior Court for the State of Washington,
Cause No. 96-3-04342-1 SEA

Order on Show Cause re Contempt/Judgment dated August 22, 2013

FAM 01

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re:

BEVERLY L. ANDERSON,

Petitioner,

and

ROBERT E. ANDERSON,

Respondent.

No. 96-3-04342-1 SEA

Order on Show Cause re Contempt/Judgment (ORCN)
Next Hearing Date: Review Hearing > Jan 15, 2014
[X] **Clerk's Action Required, ¶ 3.8**

I. JUDGMENT SUMMARY

Applies as follows:

A.	Judgment creditor	Beverly L. Anderson
B.	Judgment debtor	Robert L. Anderson
C.	Principal judgment amount from 2001	$ 19,462.10
D.	Interest to date of judgment	$
E.	Attorney fees	$ 2,640.00
F.	Costs	$
G.	Other recovery amount	$
H.	Principal judgment shall bear interest at 12% per annum	
I.	Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum	
J.	Attorney for judgment creditor	Ginger E. Buetow
K.	Attorney for judgment debtor	Stephen A. Buetow
L.	Other:	
	Total:	$22,102.10

JEB SAB

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II. FINDINGS AND CONCLUSIONS

This Court Finds:

2.1 Compliance With Court Order

ROBERT E. ANDERSON intentionally failed to comply with a lawful order of the court filed October 7, 1997, and order approving Settlement Filed Sept. 9, 1999.

2.2 Nature of Order

The order is related to a financial provision in the Amended Decree of Dissolution (10/7/97) and in a CR2A ~~agreement~~ Settlement Agreement entered 9/9/99.

2.3 How the Order was Violated

Since 2001 to the present, Respondent Robert E. Anderson has either failed to make some of his monthly equalization payment and/or did not pay the full monthly amount to Petitioner. Statute of limitations not applicable because payments are family support in the nature of financial support.

2.4 Past Ability to Comply With Order

ROBERT E. ANDERSON has the ability to comply with the order as follows: ~~He works and is married with a working wife.~~ Respondent does receive social security and other income; however, Respondent did not provide financial records for the court to determine other resources. He has not shown the burden of not being able to pay.

2.5 Present Ability and Willingness to Comply With Order

ROBERT E. ANDERSON has the present ability to comply with the order as follows: ~~He works and is married with a working wife.~~ Respondent does receive social security benefits and other income; however, Respondent did not provide financial records for the Court to determine other resources. He has not shown the burden of not being able to pay.

2.6 Medical Support/Other Unpaid Obligations/Maintenance

ROBERT E. ANDERSON has unpaid financial obligations pursuant to Paragraph 3.13 of the Amended Decree of Dissolution and the CR2A Settlement Agreement, Social Security requiring the husband "pay to the wife one-half of the difference between his [social security] benefit and her [social security] benefit on a monthly basis," in the amount of $19,462.10

2.7 Compliance With Parenting Plan

Does not apply.

2.8 Attorney Fees and Costs

The attorney fees and costs awarded in paragraph 3.9 below have been incurred and are reasonable.

BUETOW LAW OFFICE, PLLC
520 Kirkland Way, Suite 400
P.O. Box 3268
Kirkland, WA 98083-3268
Phone: 425-889-5388, Fax: 425-827-8725

III. ORDER AND JUDGMENT

It is Ordered:

3.1 Contempt Ruling

in the amount of $19,462.10,

ROBERT E. ANDERSON is in contempt of court. ~~The Court sanctions respondent $2,500.00 for contempt. The $2,500.00 shall be paid within five(5) days of this Order. If not paid, the Court imposes a forfeiture of $_____/day until the amount is paid, pursuant to RCW 7.21.030(2)(b).~~ This matter is substantively different than In Re Young, 26 Wn App 843 (1980). The financial obligation terminates and by nature, a form of maintenance, to equalize future income and meet future needs.

3.2 Imprisonment

Does not apply.

3.3 Additional Residential Time

Does not apply.

3.4 Judgment for Past Child Support

Does not apply.

3.5 Judgment for Past Medical Support

Does not apply.

3.6 Judgment for Other Unpaid Obligations

$_____ for delinquent equalization payments

3.7 Judgment for Past Maintenance

Does not apply.

3.8 Conditions for Purging the Contempt - Respondent must pay current monthly ~~payments~~ amount, required by Paragraph 3.13 and $100/month for back payments of the judgment entered herein.

~~Payment in full within _____ months of entry of Order.~~

3.9 Attorney Fees and Costs

BEVERLY L. ANDERSON shall have judgment against **ROBERT E. ANDERSON** in the amount of $2640.00 for attorney fees incurred in bringing this motion for contempt.

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3.10 Review Date

The Court shall review this matter on Thursday, Jan. 16, 2014, ~~2013~~ to see if Respondent has complied with this Order, ~~The~~ whether additional review is necessary and/or other remedies by the Court and respondent may present

3.11 Other evidence of his ability to comply with this order.

The attorney fees ordered under paragraph 3.9 shall be ~~paid within ten (10) days of this Order~~ or shall be reduced to judgment.

~~The Court orders Respondent to post a bond in the amount of $ _____ until _____, 2013 or sooner if a satisfaction of judgment is entered herein.~~

~~The Court orders Respondent to pay every monthly to DSHS, via bank withdrawal, the amount due to Petitioner.~~

The Court denies Petitioner's request for wire transfer payments. This Order does not restrict Petitioner from pursuing other enforcement remedies.

3.12 Summary of RCW 26.09.430 - .480, Regarding Relocation of a Child

Does not apply.

Dated: August 22, 2013

~~Judge/Commissioner~~ Pro Tem Michael Loudon

Presented by:
BUETOW LAW OFFICE, PLLC

GE Buetow
Ginger E. Buetow, WSBA#31099
Attorney for Petitioner

Approved: as to Form
CAMPBELL, DILLE, BARNETT, & SMITH, PLLC

Daniel Smith, WSBA#15206
Attorney for Respondent

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TAB 2

Anderson v. Anderson
King County Superior Court for the State of Washington,
Cause No. 96-3-04342-1 SEA

Order on Respondent's Motion for Revision
of Court Commissioner Ruling dated October 4, 2013

~~PROPOSED~~ SAB Mod

Superior Court of Washington
County of King

In re the Marriage of:	
BEVERLY L. ANDERSON **Petitioner,**	No. 96-3-04342-1SEA
and	**ORDER ON RESPONDENT'S MOTION FOR REVISION OF COURT COMMISSIONER RULING**
ROBERT E. ANDERSON **Respondent.**	

THIS MATTER having come before the Court on the Respondent, Robert E. Anderson's Motion For Revision of Pro Tem Court Commissioner Michael Louden's decision entered August 23, 2013, by and through his attorney of record, Daniel W. Smith; the petitioner, Beverly L. Anderson being represented by Ginger Buetow; and the court having reviewed the files and records herein an being fully advised in the premises, it is therefore

ORDERED, ADJUDGED, and DECREED that the Respondent's motion for revision is ~~granted~~ denied in part and granted in part, and it is further

ORDERED, ADJUDGED, and DECREED

1.) That ~~Petitioner is not in Contempt of Court~~ the Order on Show Cause re Contempt/Judgment entered on August 22, 2013 stands insofar as the Court has inherent powers to enforce Contempts. Mr. Anderson was and is in contempt of the Court's orders; Mr. Anderson did not meet his burden to show that he does not have the means to comply with the order

SAB

CAMPBELL, DILLE, BARNETT, & SMITH, P.L.L.C.
Attorneys at Law
317 South Meridian
Puyallup, Washington 98371
253-848-3513
253-845-4941 facsimile

2.) ~~That any Judgment should not be entered until the Court of Appeals has issued a ruling in the Respondent's Appeal.~~

DONE IN OPEN COURT this 4 day of October, 2013.

JUDGE Michael Hayden

Presented by:

~~Daniel W. Smith~~, Stephen A. Burnham
WSBA # ~~15206~~ 13270
Attorney for Respondent

Approved for entry:

Ginger Beutow
WSBA #31099
Attorney for Petitioner

1) or that the provision sought to be enforced has no reasonable relation to his duty to support his spouse SAB

2) ~~If~~ The judgment entered shall be for any amounts in arrearages ~~since~~ for 10 years from August 2012, ~~unless Petitioner~~ If the Petitioner can provide proper authority extending the time period for collection the parties may stipulate to a modified order. If not, the judgment shall be reduced by #2,266.50. SAB

CAMPBELL, DILLE, BARNETT, & SMITH, P.L.L.C.
Attorneys at Law
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Puyallup, Washington 98371
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TAB 3

Anderson v. Anderson
King County Superior Court for the State of Washington,
Cause No. 96-3-04342-1 SEA

Order on Show Cause re Contempt/Judgment dated January 15, 2014

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re:

BEVERLY L. ANDERSON,

Petitioner,

and

ROBERT E. ANDERSON,

Respondent.

No. 96-3-04342-1 SEA

Order re Contempt/Judgment (ORCN)
Next Hearing Date:

☒ **Clerk's Action Required, ¶ 3.8**

I. JUDGMENT SUMMARY

Applies as follows:

A.	Judgment creditor	Beverly L. Anderson
B.	Judgment debtor	Robert L. Anderson
C.	Principal judgment amount from ~~[illegible]~~	$21,075.90
D.	Interest to date of judgment, 03/2002 to present →	$ 1,167.80
E.	Attorney fees ~~[illegible]~~, 08/2013 to present →	$ ~~4,000.00~~ 3,640.00
F.	Costs	$ ~~3,640~~
G.	Other recovery amount	$
H.	Principal judgment shall bear interest at 12% per annum	
I.	Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum	
J.	Attorney for judgment creditor	Ginger E. Buetow
K.	Attorney for judgment debtor	Daniel Smith
L.	~~Other~~: Total Judgment	$ 25,883.70

This judgment replaces all prior judgments

II. FINDINGS AND CONCLUSIONS

BUETOW LAW OFFICE, PLLC
P.O. Box 1968
Issaquah, WA 98027
Phone: 425-394-4174, Fax: 425-557-3605

This Court Finds:

2.1 Compliance With Court Order

ROBERT E. ANDERSON intentionally failed to comply with a lawful order of the court filed October 7, 1997 and August 23, 2013.

2.2 Nature of Order

The order is related to a financial provision in the Amended Decree of Dissolution and in a CR2A Settlement Agreement, and the Order re Show Cause on Contempt/Judgment.

2.3 How the Order was Violated

Since 2001 to the present, Respondent Robert E. Anderson has either failed to make his monthly support payment and/or did not pay the full monthly amount to Petitioner. Since August 23, 2013, Respondent Anderson has continued not to make the monthly support payment to Petitioner and also did not make a $100/month payment for back support owed to Petitioner, as ordered by the Court on August 23, 2013.

2.4 Past Ability to Comply With Order

ROBERT E. ANDERSON has the ability to comply with the order as follows: He is employed.

2.5 Present Ability and Willingness to Comply With Order

ROBERT E. ANDERSON has the present ability to comply with the order as follows: He is employed.

2.6 Medical Support/Other Unpaid Obligations/Maintenance

ROBERT E. ANDERSON has unpaid financial obligations pursuant to Paragraph 3.13 of the Amended Decree of Dissolution and the parties' CR2A Settlement Agreement.

2.7 Compliance With Parenting Plan

Does not apply.

2.8 Attorney Fees and Costs

The attorney fees and costs awarded in paragraph 3.9 below have been incurred and are reasonable.

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III. ORDER AND JUDGMENT

It is Ordered:

3.1 Contempt Ruling

pursuant to the Order on Show Cause re Contempt/Judgment entered August 22, 2018.

ROBERT E. ANDERSON is in contempt of court. ~~The Court sanctions respondent $2,500.00 for contempt. The $2,500.00 shall be paid within five(5) days of this Order. If not paid, the Court imposes a forfeiture of $_____/day until the amount is paid, pursuant to RCW 7.21.030(2)(b).~~

3.2 Imprisonment

Does not apply.

3.3 Additional Residential Time

Does not apply.

3.4 Judgment for Past Child Support

Does not apply.

3.5 Judgment for Past Medical Support

Does not apply.

3.6 Judgment for Other Unpaid Obligations

Does not apply.

3.7 Judgment for Past Maintenance

$3,870.30 for financial support payments not made from August 2013 through Jan. 2014.

3.8 Conditions for Purging the Contempt

Respondent must pay current monthly amount, as required by Paragraph 3.13 of the Amended Decree of Dissolution.

3.9 Attorney Fees and Costs

BEVERLY L. ANDERSON shall have judgment against **ROBERT E. ANDERSON** in the amount of ~~$1,500.00~~ $1,000.00 for attorney fees incurred in bringing this motion for contempt. pursuant to RCW 26.19.160

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3.10 Review Date

~~The Court shall review this matter on _____, 2014.~~
A review hearing ~~will~~ is not set.

3.11 Other

The attorney fees ordered under paragraph 3.9 shall be paid within ten (10) days of this Order or shall be reduced to judgment.

The Court orders Respondent to post a bond in the amount of $ 15,481.20 (w/i 30 days of this Order and provide proof of his efforts) ($645.05 x 24 mo) until _____, 2014 ~~or sooner if a satisfaction of judgment is entered herein.~~ pursuant to RCW 26.18.150

The Court orders Respondent to pay his monthly support payment ~~and $100/month back~~ payment to Petitioner via wire transfer. Proof of such transfer shall be provided to the Court on or before ~~January~~ Feb 14, 2014.

3.12 Summary of RCW 26.09.430 - .480, Regarding Relocation of a Child

Does not apply.

Dated: January 15, 2014

~~Judge~~/Commissioner
LEONID PONOMARCHUK

Presented by:
BUETOW LAW OFFICE, PLLC

Ginger E. Buetow, WSBA#31099
Attorney for Petitioner

Approved:
CAMPBELL, DILLE, BARNETT, & SMITH, PLLC

Daniel Smith, WSBA#15206
Attorney for Respondent

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TAB 4

42 U.S.C. §407

42 U.S.C.
United States Code, 2012 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER II - FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE BENEFITS
Sec. 407 - Assignment of benefits
From the U.S. Government Printing Office, www.gpo.gov

§407. Assignment of benefits

(a) In general

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 moneys 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.

(b) Amendment of section

No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

(c) Withholding of taxes

Nothing in this section shall be construed to prohibit withholding taxes from any benefit under this subchapter, if such withholding is done pursuant to a request made in accordance with section 3402 (p)(1) of the Internal Revenue Code of 1986 by the person entitled to such benefit or such person's representative payee.

(Aug. 14, 1935, ch. 531, title II, §207, 49 Stat. 624; Aug. 10, 1939, ch. 666, title II, §201, 53 Stat. 1362, 1372; Pub. L. 98–21, title III, §335(a), Apr. 20, 1983, 97 Stat. 130; Pub. L. 105–277, div. J, title IV, §4005(a), Oct. 21, 1998, 112 Stat. 2681–911.)

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (c), is classified generally to Title 26, Internal Revenue Code.

CODIFICATION

In subsec. (b), "April 20, 1983" substituted for "the date of the enactment of this section", which was translated as meaning the date of enactment of this subsection, as the probable intent of Congress.

AMENDMENTS

1998—Subsec. (c). Pub. L. 105–277 added subsec. (c).

1983—Pub. L. 98–21 designated existing provisions as subsec. (a) and added subsec. (b).

1939—Act Aug. 10, 1939, amended section generally, incorporating provisions of former section 408 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Pub. L. 98–21, title III, §335(c), Apr. 20, 1983, 97 Stat. 130, provided that: "The amendments made by subsection (a) [amending this section] shall apply only with respect to benefits payable or rights existing under the Social Security Act [this chapter] on or after the date of the enactment of this Act [Apr. 20, 1983]."

EFFECTI 15 ENT

TAB 5

42 U.S.C. §659

42 U.S.C.
United States Code, 2010 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER IV - GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD-WELFARE SERVICES
Part D - Child Support and Establishment of Paternity
Sec. 659 - Consent by United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations
From the U.S. Government Printing Office, www.gpo.gov

§659. Consent by United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations

(a) Consent to support enforcement

Notwithstanding any other provision of law (including section 407 of this title and section 5301 of title 38), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 666 of this title and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.

(b) Consent to requirements applicable to private person

With respect to notice to withhold income pursuant to subsection (a)(1) or (b) of section 666 of this title, or any other order or process to enforce support obligations against an individual (if the order or process contains or is accompanied by sufficient data to permit prompt identification of the individual and the moneys involved), each governmental entity specified in subsection (a) of this section shall be subject to the same requirements as would apply if the entity were a private person, except as otherwise provided in this section.

(c) Designation of agent; response to notice or process

(1) Designation of agent

The head of each agency subject to this section shall—

(A) designate an agent or agents to receive orders and accept service of process in matters relating to child support or alimony; and

(B) annually publish in the Federal Register the designation of the agent or agents, identified by title or position, mailing address, and telephone number.

(2) Response to notice or process

If an agent designated pursuant to paragraph (1) of this subsection receives notice pursuant to State procedures in effect pursuant to subsection (a)(1) or (b) of section 666 of this title, or is effectively served with any order, process, or interrogatory, with respect to an individual's child support or alimony payment obligations, the agent shall—

(A) as soon as possible (but not later than 15 days) thereafter, send written notice of the notice or service (together with a copy of the notice or service) to the individual at the duty station or last-known home address of the individual;

(B) within 30 days (or such longer period as may be prescribed by applicable State law) after receipt of a notice pursuant to such State procedures, comply with all applicable provisions of section 666 of this title; and

(C) within 30 days (or such longer period as may be prescribed by applicable State law) after effective service of any other such order, process, or interrogatory, withhold available sums in response to the order or process, or answer the interrogatory.

(d) Priority of claims

If a governmental entity specified in subsection (a) of this section receives notice or is served with process, as provided in this section, concerning amounts owed by an individual to more than 1 person—

(1) support collection under section 666(b) of this title must be given priority over any other process, as provided in section 666(b)(7) of this title;

(2) allocation of moneys due or payable to an individual among claimants under section 666(b) of this title shall be governed by section 666(b) of this title and the regulations prescribed under such section; and

(3) such moneys as remain after compliance with paragraphs (1) and (2) shall be available to satisfy any other such processes on a first-come, first-served basis, with any such process being satisfied out of such moneys as remain after the satisfaction of all such processes which have been previously served.

(e) No requirement to vary pay cycles

A governmental entity that is affected by legal process served for the enforcement of an individual's child support or alimony payment obligations shall not be required to vary its normal pay and disbursement cycle in order to comply with the legal process.

(f) Relief from liability

(1) Neither the United States, nor the government of the District of Columbia, nor any disbursing officer shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if the payment is made in accordance with this section and the regulations issued to carry out this section.

(2) No Federal employee whose duties include taking actions necessary to comply with the requirements of subsection (a) of this section with regard to any individual shall be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or on account of, any disclosure of information made by the employee in connection with the carrying out of such actions.

(g) Regulations

Authority to promulgate regulations for the implementation of this section shall, insofar as this section applies to moneys due from (or payable by)—

(1) the United States (other than the legislative or judicial branches of the Federal Government) or the government of the District of Columbia, be vested in the President (or the designee of the President);

(2) the legislative branch of the Federal Government, be vested jointly in the President pro tempore of the Senate and the Speaker of the House of Representatives (or their designees),[1] and

(3) the judicial branch of the Federal Government, be vested in the Chief Justice of the United States (or the designee of the Chief Justice).

(h) Moneys subject to process

(1) In general

Subject to paragraph (2), moneys payable to an individual which are considered to be based upon remuneration for employment, for purposes of this section—

(A) consist of—

(i) compensation payable for personal services of the individual, whether the compensation is denominated as wages, salary, commission, bonus, pay, allowances, or otherwise (including severance pay, sick pay, and incentive pay);

(ii) periodic benefits (including a periodic benefit as defined in section 428(h)(3) of this title) or other payments—

(I) under the insurance system established by subchapter II of this chapter;

(II) under any other system or fund established by the United States which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by the individual or any other individual;

(III) as compensation for death under any Federal program;

(IV) under any Federal program established to provide "black lung" benefits; or

(V) by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation;

(iii) worker's compensation benefits paid or payable under Federal or State law;

(iv) benefits paid or payable under the Railroad Retirement System,[1] and

(v) special benefits for certain World War II veterans payable under subchapter VIII of this chapter; but

(B) do not include any payment—

(i) by way of reimbursement or otherwise, to defray expenses incurred by the individual in carrying out duties associated with the employment of the individual;

(ii) as allowances for members of the uniformed services payable pursuant to chapter 7 of title 37, as prescribed by the Secretaries concerned (defined by section 101(5) of title 37) as necessary for the efficient performance of duty; or

(iii) of periodic benefits under title 38, except as provided in subparagraph (A)(ii)(V).

(2) Certain amounts excluded

In determining the amount of any moneys due from, or payable by, the United States to any individual, there shall be excluded amounts which—

(A) are owed by the individual to the United States;

(B) are required by law to be, and are, deducted from the remuneration or other payment involved, including Federal employment taxes, and fines and forfeitures ordered by court-martial;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of the amounts is authorized or required by law and if amounts withheld are not greater than would be the case if the individual claimed all dependents to which he was entitled (the withholding of additional amounts pursuant to section 3402(i) of the Internal Revenue Code of 1986 may be permitted only when the individual presents evidence of a tax obligation which supports the additional withholding);

(D) are deducted as health insurance premiums;

(E) are deducted as normal retirement contributions (not including amounts deducted for supplementary coverage); or

(F) are deducted as normal life insurance premiums from salary or other remuneration for employment (not including amounts deducted for supplementary coverage).

(i) Definitions

For purposes of this section—

(1) United States

The term "United States" includes any department, agency, or instrumentality of the legislative, judicial, or executive branch of the Federal Government, the United States Postal Service, the Postal Regulatory Commission, any Federal corporation created by an Act of Congress that is wholly owned by the Federal Government, and the governments of the territories and possessions of the United States.

(2) Child support

The term "child support", when used in reference to the legal obligations of an individual to provide such support, means amounts required to be paid under a judgment, decree, or order, whether temporary, final, or subject to modification, issued by a court or an administrative agency of competent jurisdiction, for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing State, or a child and the parent with whom the child is living, which provides for monetary support, health care, arrearages or reimbursement, and which may include other related costs and fees, interest and penalties, income withholding, attorney's fees, and other relief.

(3) Alimony

(A) In general

The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual, and (subject to and in accordance with State law) includes separate maintenance, alimony pendente lite, maintenance, and spousal support, and includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

(B) Exceptions

Such term does not include—

(i) any child support; or

(ii) any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

(4) Private person

The term "private person" means a person who does not have sovereign or other special immunity or privilege which causes the person not to be subject to legal process.

(5) Legal process

The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment—

(A) which is issued by—

(i) a court or an administrative agency of competent jurisdiction in any State, territory, or possession of the United States;

(ii) a court or an administrative agency of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor the process; or

(iii) an authorized official pursuant to an order of such a court or an administrative agency of competent jurisdiction or pursuant to State or local law; and

(B) which is directed to, and the purpose of which is to compel, a governmental entity which holds moneys which are otherwise payable to an individual to make a payment from the moneys to another party in order to satisfy a legal obligation of the individual to provide child support or make alimony payments.

(Aug. 14, 1935, ch. 531, title IV, §459, as added Pub. L. 93–647, §101(a), Jan. 4, 1975, 88 Stat. 2357; amended Pub. L. 95–30, title V, §501(a), (b), May 23, 1977, 91 Stat. 157; Pub. L. 98–21, title III, §335(b)(1), Apr. 20, 1983, 97 Stat. 130; Pub. L. 104–193, title III, §362(a), Aug. 22, 1996, 110 Stat. 2242; Pub. L. 105–33, title V, §5542(a), (b), Aug. 5, 1997, 111 Stat. 631; Pub. L. 106–169, title II, §251(b)(3), Dec. 14, 1999, 113 Stat. 1855; Pub. L. 109–435, title VI, §604(f), Dec. 20, 2006, 120 Stat. 3242.)

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (h)(2)(C), is classified generally to Title 26, Internal Revenue Code.

AMENDMENTS

2006—Subsec. (i)(1). Pub. L. 109–435 substituted "Postal Regulatory Commission" for "Postal Rate Commission".

1999—Subsec. (h)(1)(A)(v). Pub. L. 106–169 added cl. (v).

1997—Subsec. (c)(2)(C). Pub. L. 105–33, §5542(a), substituted "withhold available sums in response to the order or process, or answer the interrogatory" for "respond to the order, process, or interrogatory".

Subsec. (h)(1). Pub. L. 105–33, §5542(b)(1), struck out "paid or" after "moneys" in introductory provisions.

Subsec. (h)(1)(A)(i). Pub. L. 105–33, §5542(b)(1), struck out "paid or" before "payable".

Subsec. (h)(1)(A)(iii). Pub. L. 105–33, §5542(b)(2)(B)(i), inserted "or payable" after "paid".

Subsec. (h)(1)(A)(iv). Pub. L. 105–33, §5542(b)(2)(A), (B)(ii), (C), added cl. (iv).

Subsec. (h)(1)(B)(iii). Pub. L. 105–33, §5542(b)(3), added cl. (iii).

1996—Pub. L. 104–193 amended section catchline and text generally. Prior to amendment, text consisted of subsecs. (a) to (f) relating to use of legal process to collect money payable to an individual as remuneration for employment by the United States or the District of Columbia for purposes of enforcing individual's legal obligation to provide child support or make alimony payments.

1983—Subsec. (a). Pub. L. 98–21 inserted reference to section 407 of this title.

1977—Subsec. (a). Pub. L. 95–30, §501(a), (b)(1), designated existing provisions as subsec. (a) and substituted "or the District of Columbia (including any agency, subdivision, or instrumentality thereof)" for "(including any agency or instrumentality thereof and any wholly owned Federal Corporation)" and "as if the United States or the District of Columbia were a private person" for "as if the United States were a private person".

Subsecs. (b) to (f). Pub. L. 95–30, §501(b)(2), added subsecs. (b) to (f).

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–33 effective as if included in the enactment of title III of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, see section 5557 of Pub. L. 105–33, set out as a note under section 608 of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

TAB 6

In re Marriage of Anderson, 252 P.3d 490 (Colo.App Div. 2 2010)

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252 P.3d 490 (Colo.App.Div. 2 2010)

In re the MARRIAGE OF Herbert L. ANDERSON, Appellant,

and

Marilyn D. Anderson, Appellee.

No. 09CA2592.

Court of Appeals of Colorado, Second Division.

December 23, 2010

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Antolinez Miller, LLC, Joseph H. Antolinez, Melissa E. Miller, Littleton, Colorado, for Appellant.

Paul A. Frederiksen, Englewood, Colorado, for Appellee.

OPINION

GABRIEL, Judge.

In this post-dissolution of marriage matter, Herbert L. Anderson (husband) appeals from the district court's order denying his motion to set aside or modify certain property division provisions of the decree entered in conjunction with the dissolution of his marriage to Marilyn D. Anderson (wife). As a matter of first impression in Colorado, we hold, consistently with the decisions of apparently all other state courts to have addressed this issue, that the settlement agreement provision that was incorporated into the decree and required husband to pay part of his future Social Security benefits to wife was void. We further hold that, because of the Supremacy Clause implications, husband was not barred by the principles of equitable estoppel from challenging the void judgment. We reject, however, husband's contention that the district court erred in affirming the magistrate's ruling that his periodic payments to wife for health insurance or health care were part of the property division, rather than maintenance. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

The parties dissolved their marriage in 1994. Their separation agreement, which the court incorporated into the decree, provided, in relevant part:

As a provision of property settlement and not as spousal support, when the parties begin to receive benefits from Social Security

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after age sixty-five (65), [husband] shall pay to [wife] a monthly sum of Two Hundred Twenty-Five and no/ 100 Dollars ($225.00) from his Social Security benefits. In the future, this amount will be increased or decreased by an amount equal to fifty percent (50%) of any increase or decrease in [husband's] Social Security benefits. [Husband] will file to begin receiving Social Security benefits on or before March 1, 1994.

....

As a provision of property settlement and not as spousal support, [husband] will pay a monthly sum not to exceed, nor less than, One Hundred Fifty Dollars ($150.00) for [wife] to provide for her own health insurance and/or health care.

In 2008, husband moved to set aside these provisions pursuant to C.R.C.P. 60(b), or in the alternative to modify them pursuant to section 14-10-122(1)(a), C.R.S.2010. A district court magistrate denied C.R.C.P. 60(b) relief but set a hearing concerning the alternative motion for modification. Thereafter, the magistrate denied that motion. Husband then petitioned for review of the magistrate's orders pursuant to C.R.M. 7(a), and the district court affirmed.

Husband now appeals.

II. Social Security Benefits

Husband first contends that the district court erred in denying him relief under C.R.C.P. 60(b) from the provision of the decree requiring him to pay part of his future Social Security benefits to wife. We agree.

We review the district court's decision as to whether to grant relief under C.R.C.P. 60(b) for an abuse of discretion. *See SR Condos., LLC v. K.C. Constr., Inc.*, 176 P.3d 866, 868 (Colo.App.2007). We review de novo, however, whether the decree provision requiring husband to pay part of his future Social Security benefits to wife conflicts with the Social Security Act and thereby violates the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. *See Kohn v. Burlington N. & Santa Fe R.R.*, 77 P.3d 809, 811 (Colo.App.2003) ("Federal preemption is a question of law subject to de novo review by this court.").

A. Violation of the Social Security Act

The anti-assignment clause of the Social Security Act provides:

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 moneys 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 U.S.C. § 407(a) (2010).

This provision " imposes a broad bar against the use of any legal process to reach all social security benefits." *Philpott v. Essex Cnty. Welfare Bd.*, 409 U.S. 413, 417, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973). Thus, a state court in a dissolution proceeding cannot distribute or divide a spouse's future Social Security benefits as marital property. *In re Marriage of Morehouse*, 121 P.3d 264, 265 (Colo.App.2005); *In re Marriage of James*, 950 P.2d 624, 628-29 (Colo.App.1997). Nor may a court employ an indirect offset, as a part of the overall marital property distribution, to account for the value of a spouse's Social Security benefits. *See Morehouse*, 121 P.3d at 266; *James*, 950 P.2d at 629. An exception to this rule is set forth in 42 U.S.C. § 659(a) (2010), which allows Social Security benefits to be taken for the payment of child support or maintenance.

The issue presented here, namely, whether spouses may contract between themselves as part of the property division in a marriage dissolution to require payment of one spouse's future Social Security benefits to the other, is an issue of first impression in Colorado. Other jurisdictions that have considered this issue, however, appear to have held uniformly that a settlement agreement provision that distributes future Social Security benefits as marital property is void because it violates the anti-assignment provision of the Social Security Act. *See, e.g., Gentry v. Gentry*, 327 Ark. 266, 938 S.W.2d 231, 232-33 (1997);

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In re Marriage of Hulstrom, 342 Ill.App.3d 262, 276 Ill.Dec. 730, 794 N.E.2d 980, 986 (2003); *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112, 114 (1997); *Simmons v. Simmons*, 370 S.C. 109, 634 S.E.2d 1, 4 (S.C.Ct.App.2006); *see also United Student Aid Funds, Inc. v. Espinosa*, __ U.S. __, ___, 130 S.Ct. 1367, 1377, 176 L.Ed.2d 158 (2010) (judgment void when, among other things, court lacked jurisdiction to enter it); *Osband v. United Airlines, Inc.*, 981 P.2d 616, 619 (Colo.App.1998) (" If federal law preempts state law, the state trial court lacks subject matter jurisdiction to hear a claim."). For the reasons that follow, we view these authorities as persuasive and thus hold that the separation agreement provision requiring husband to pay part of his future Social Security benefits to wife is void.

Applying the Supremacy Clause, state courts have consistently held that the Social Security Act precludes them from treating Social Security benefits as property. *See, e.g., Simmons*, 634 S.E.2d at 3-4 (collecting cases). Thus, state courts lack subject matter jurisdiction to divide parties' Social Security benefits in a property distribution. *See James*, 950 P.2d at 629; *accord Gentry*, 938 S.W.2d at 232-33; *Boulter*, 930 P.2d at 114; *Simmons*, 634 S.E.2d at 4. Moreover, as various courts have observed, and we agree, the thrust of those cases holding that the Social Security Act preempts state courts from transferring benefits as property is that state courts are without power to enforce private agreements dividing future payments of Social Security benefits when those agreements violate the prohibition against transfer or assignment of future benefits. *Simmons*, 634 S.E.2d at 4; *accord Gentry*, 938 S.W.2d at 232.

B. Wife's Contentions

Notwithstanding the foregoing, wife contends that (1) the division of benefits here was a voluntary agreement to divide the benefits once they were received, and not an agreement dividing future Social Security benefits; (2) once such benefits were paid to husband, he was entitled to do with them as he pleased; (3) the magistrate here did not directly or indirectly distribute the Social Security benefits as part of the overall property distribution but merely considered them as a relevant economic circumstance; and (4) principles of equitable estoppel bar husband from challenging the decree. We reject each of these contentions in turn.

First, contrary to wife's assertion, the parties' agreement clearly and unambiguously provided for the transfer of *future* and *as yet unpaid* Social Security benefits from husband to wife. Thus, the agreement constituted a transfer of husband's rights to future benefits in violation of 42 U.S.C. § 407(a), and the district court lacked jurisdiction to enforce it. *See Boulter*, 930 P.2d at 114-15 (rejecting a wife's argument that a division of Social Security benefits was an enforceable agreement between two private individuals to divide the benefits once they were received, as opposed to an agreement dividing future benefits); *accord Gentry*, 938 S.W.2d at 232-33; *Simmons*, 634 S.E.2d at 4-5.

Second, the fact that the parties' agreement was entered into voluntarily is immaterial. " Congress' clear and stringent interpretation of the prohibition on transfer or assignment of benefits in [42 U.S.C. § 407(b)] ... compels us to strictly interpret that clause to prohibit voluntary as well as involuntary transfers or assignments." *Ellender v. Schweiker*, 575 F.Supp. 590, 599 (S.D.N.Y.1983); *accord Boulter*, 930 P.2d at 114-15; *Simmons*, 634 S.E.2d at 5.

Third, contrary to wife's assertions, the magistrate here did not merely consider husband's future Social Security benefits as a financial circumstance when

dividing the marital property.

[W]hile a trial court may not distribute marital property to offset the computed value of Social Security benefits, it may premise an unequal distribution of property— using, for example, a 60-40 formula instead of 50-50— on the fact that one party is more likely to enjoy a secure retirement. We will not presume that an unequal distribution reflects an impermissible offset of Social Security benefits, especially

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when the distribution is justified by a combination of factors.

Morehouse, 121 P.3d at 267.

Here, however, the decree required husband to pay " from" his future Social Security benefits a particular amount to wife, and the amount was subject to future increases or decreases as husband's benefits increased or decreased. Such a direct payment from future Social Security benefits is precisely what the Social Security Act prohibits, and we reject wife's characterization of the decree as reflecting only the magistrate's consideration of husband's future benefits as a " relevant economic circumstance." *Id.*

Finally, with respect to wife's assertion that principles of equitable estoppel bar husband's challenge here, we initially note that under C.R.C.P. 60(b)(3), a court may relieve a party from a void judgment. *See SR Condos.*, 176 P.3d at 869. Although a C.R.C.P. 60(b) motion generally must be made " within a reasonable time," a void judgment can be attacked at any time. *See Flavell v. Dep't of Welfare,* 144 Colo. 203, 206, 355 P.2d 941, 943 (1960); *Hancock v. Boulder Cnty. Pub. Tr.*, 920 P.2d 854, 858 (Colo.App.1995).

Notwithstanding the foregoing, our supreme court has held that the doctrine of estoppel may apply in certain circumstances to prevent a party from challenging a judgment as void based on the issuing court's lack of jurisdiction. Thus, in *Estate of Lee v. Graber,* 170 Colo. 419, 426-27, 462 P.2d 492, 495-96 (1969), *abrogated on other grounds by Taylor v. Canterbury,* 92 P.3d 961 (Colo.2004), the court refused to allow a petitioner to challenge a county court's judgment for lack of jurisdiction when the petitioner not only acquiesced in that court's jurisdiction but also sought out and invoked it. In these circumstances, the court held that the petitioner could not be heard, years later when he became dissatisfied with the result, to attack the county court's judgment on the grounds of lack of jurisdiction. *Id.* at 427, 462 P.2d at 496. *But see Menzel v. Niles Co.,* 86 Colo. 320, 324, 281 P. 364, 365 (1929) (" A contract which is contrary to public policy is void because it *is contrary* to public policy, and neither party to the contract is estopped from questioning it merely because the other party has parted with a property right or rendered service in reliance upon it."); *Harding v. Heritage Health Prods. Co.,* 98 P.3d 945, 949 (Colo.App.2004) (" [E]quitable doctrines may not be used to enforce an illegal or void agreement.").

Estate of Lee, however, is distinguishable from the instant case, because that case did not involve a judgment that was void under the Supremacy Clause. Cases addressing the question of whether equitable estoppel principles can be applied to bar a challenge to a judgment that is void under the Supremacy Clause appear to be uniform in holding that such principles cannot be so applied. *See, e.g., Allen v. State,* 203 P.3d 1155, 1164 (Alaska 2009) (in a case in which a state agency sought to recoup an overpayment of food stamp benefits, the court rejected the recipient's equitable estoppel argument, holding that applying estoppel principles would conflict with federal food stamp law, which expressly allowed states to recoup overpayments); *see also Ridgway v. Ridgway,* 454 U.S. 46, 60, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981) (refusing to impose a constructive trust on certain insurance proceeds when that equitable remedy would conflict with the anti-attachment provision of the Servicemen's Group Life Insurance Act); *cf. Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 376 n. 14, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (" Representations in state proceedings, even ones that were false when made, cannot subvert the operation of the Supremacy Clause.").

In this regard, *Hulstrom,* 276 Ill.Dec. 730, 794 N.E.2d at 982-89, is directly on point. In that case, a husband and wife agreed in a dissolution proceeding to pool and then divide equally their Social Security benefits. *Id.* at 982. The husband there, like husband here, later sought to modify the agreement because of his declining health and financial circumstances. *Id.* The wife responded, as does wife here, that the husband's petition was barred on equitable estoppel grounds, because she had relied on the agreement for many years. *See id.* at 988. The court

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rejected this argument, holding that although the parties had performed under their agreement for eight years, estoppel principles did not bar the husband from attacking the validity of the marital property division as void. *Id.* In so holding, the court distinguished a prior case that had precluded on equitable estoppel grounds a challenge to a trial court's jurisdiction, noting that the case before it, unlike the prior case, involved the division of Social Security benefits and thus implicated the Social Security Act and, in turn, the Supremacy Clause. *Id.*

Although we are sympathetic to wife's position here, we agree with those cases holding that state law equitable estoppel principles cannot be applied to bar a party from challenging a judgment rendered void by the

Supremacy Clause. To apply such principles in that context would itself violate the Supremacy Clause. *See Allen*, 203 P.3d at 1164.

For these reasons, we conclude that the district court erred in denying husband relief from the provision of the decree requiring him to pay part of his future Social Security benefits to wife. Accordingly, we are constrained to remand this case with directions that the district court reconsider the entire 1994 property division, recognizing that the passage of time and the parties' long adherence to the decree will undoubtedly, and unfortunately, present the district court with a difficult task. *See In re Marriage of Casias*, 962 P.2d 999, 1002 (Colo.App.1998) (stating that an error in the division of one asset requires reconsideration of the entire property division); *see also Hulstrom*, 276 Ill.Dec. 730, 794 N.E.2d at 989 (" We acknowledge that the passage of time and the parties' adherence to the original defective judgment will complicate an equitable division of the marital property, but we conclude that a remand is nevertheless necessary because the original property division is void and an affirmance would perpetuate the error contrary to the mandate of the Social Security Act."). In reconsidering the property division, the court must consider the parties' economic circumstances at the time of the remand hearing. *See In re Marriage of Wells*, 850 P.2d 694, 696-99 (Colo.1993).

III. Periodic Payments Toward Wife's Health Care Expenses

Husband next contends that the district court erred in affirming the magistrate's finding that the monthly payment to wife for her health insurance or health care was in the nature of property division, which is modifiable only if the court finds that conditions exist to justify reopening a judgment, rather than maintenance, which is modifiable under section 14-10-122(1)(a). We disagree.

The characterization of periodic payments in a separation agreement as maintenance or property division for purposes of modification should be based on the purpose of the payments as determined by the totality of the circumstances. *Sinn v. Sinn*, 696 P.2d 333, 336 (Colo.1985). " If the payments are specified to accomplish a just apportionment of marital property over time, they are in the nature of property division. If they are for spousal support, they constitute maintenance." *Id.* The parties' designation of an obligation as either maintenance or property division is not alone dispositive, and in determining the intent of the parties and the substance of the obligation, the court must look beyond the language used and may consider extrinsic evidence. *In re Marriage of Wilson*, 888 P.2d 365, 366-67 (Colo.App.1994); *In re Marriage of Wisdom*, 833 P.2d 884, 889 (Colo.App.1992). Nonetheless, the language that the parties use is ordinarily the best indication of their intent. *Hulstrom*, 276 Ill.Dec. 730, 794 N.E.2d at 985.

Here, the parties unequivocally stated in the agreement that the payments were to be characterized as property settlement and not maintenance. Moreover, our review of the record has revealed no evidence demonstrating that the parties or the court, in approving the agreement, intended this obligation as maintenance, particularly when, as here, both parties expressly waived maintenance in their agreement. *See Wilson*, 888 P.2d at 367 (reversing district court's characterization of an obligation to pay a particular debt as maintenance, rather than property division, when there was no evidence in the record that the parties intended the obligation to be in the nature of maintenance).

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Indeed, husband testified that at the time the agreement was drafted, he thought it was " okay" to characterize the payments as property division rather than maintenance.

Accordingly, we conclude that the district court did not err in affirming the magistrate's ruling that these payments were part of the property division, as opposed to maintenance.

IV. Conclusion

For these reasons, the portion of the district court's order denying husband relief from the decree provision requiring him to pay part of his future Social Security benefits to wife is reversed, and the case is remanded for reconsideration of the marital property division as provided herein. In all other respects, the order is affirmed.

Judge ROY and Judge HAWTHORNE concur.

TAB 7

Boulter v. Boulter, 113 Nev. 74, 930 P.2d 112 (1997)

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113 Nev. 74 (Nev. 1997)

930 P.2d 112

Ronald O. BOULTER, Appellant,

v.

Noleen BOULTER, Respondent.

No. 27228.

Supreme Court of Nevada.

January 3, 1997.

Allison, MacKenzie, Hartman, Soumbeniotis & Russell and Karen A. Peterson, Carson City, for Appellant.

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Leslie J. Shaw, Stateline, for Respondent.

OPINION

PER CURIAM:

After a thirty-seven year marriage, appellant Ronald Boulter filed a complaint for divorce against his wife, respondent Noleen Boulter, on April 18, 1990. Subsequently, Ronald and Noleen executed a property settlement agreement. The district court entered a decree of divorce which, by its terms, ratified, merged and incorporated the property settlement agreement. Eight months later, Noleen filed a motion for an order compelling enforcement of the divorce decree. Specifically, she asked for enforcement of paragraph 4(E) of the property settlement agreement. [1]

[930 P.2d 113]

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When Ronald turned 65, he refused to apply for social security benefits, and refused to directly deposit the equivalent of one-half of his benefits (as if he were receiving them), into Noleen's bank account. Noleen contends that paragraph 4(E) required Ronald, upon reaching age 65, to pay her a sum equal to one-half of his monthly social security entitlement earned prior to the end of 1990. Pursuant to the agreement, Noleen sought attorney's fees and costs for filing the motion. [2]

Ronald opposed the motion, arguing that federal law prohibits the division of social security benefits in a marital dissolution proceeding. Alternatively, he argued that Noleen's motion should be denied because the language of the property settlement agreement neither required Ronald to apply for benefits at a certain age nor required him to pay Noleen one-half of his benefits at a certain age, and only required the equalization and payment of benefits actually received by the parties.

The district court granted Noleen's motion because the property settlement agreement equalizing social security benefits was not in violation of federal social security statutes. Moreover, the district court held that since Ronald's former attorney prepared the agreement, any ambiguity should be resolved against Ronald. Finally, the district court determined that Noleen was entitled to an award of attorney's fees and costs under the agreement as prevailing party. This appeal ensued.

DISCUSSION

In pertinent part, the federal Social Security Act provides that:

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 moneys 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 U.S.C. § 407(a) (1983).

Ronald contends that his right to future social security payments is being subjected to legal process in violation of § 407(a) because the district court incorporated the property settlement agreement into the divorce decree and because this court is now employed to enforce that decree. We agree.

Any state action is preempted by a conflicting federal law, such as the Social Security Act, under the Supremacy Clause of the

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United States Constitution, Article VI, Clause 2. *Kirk v. Kirk*, 577 A.2d 976, 979 (R.I.1990).

The [Social Security Act], consistent with its remedial purpose, provides for the various contingencies of life including the dissolution of marriage. Since the statute itself provides for an equitable distribution of its benefits to ... divorced spouses, ... we will not disturb the statutory scheme by suggesting any award of any part of the actual social security retirement benefits to which respondent may be entitled upon his reaching retirement age.

In re Marriage of Hawkins, 160 Ill.App.3d 71, 111 Ill.Dec. 897, 901, 513 N.E.2d 143, 147 (1987) (citations omitted) (emphasis added); see also *Olson v. Olson*, 445

N.W.2d 1, 11 (N.D.1989) (social security is immune to adjustment by state courts in dividing marital property); *Umber v. Umber*, 591 P.2d 299, 301-02 (Ok.1979) (Congress intended to provide distribution of social security benefits between spouses at time of divorce, thus placing the subject beyond state control); *Matter of Marriage of Swan*, 301 Or. 167, 720 P.2d 747, 751-52 (1986) (Congress intended to preempt state property division law as applied to social security benefits of a **[930 P.2d 114]** spouse upon divorce); *Richard v. Richard*, 659 S.W.2d 746, 749 (Tex.App.Ct.1983) (Congress exempted social security benefits from state law regarding property division since divorced spouse is provided social security benefits).

The United States Supreme Court has construed § 407(a) to impose "a broad bar against the use of any legal process to reach all social security benefits." *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417, 93 S.Ct. 590, 592, 34 L.Ed.2d 608 (1973). In enacting such anti-assignment statutes, "Congress has afforded recipients [protection] from creditors, taxgatherers, and all those who would 'anticipate' the receipt of benefits...." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575-76, 99 S.Ct. 802, 805, 59 L.Ed.2d 1 (1979), superseded in part by 45 U.S.C. § 231m (1986). [3]

In the instant case, the district court merged the property settlement agreement that equalized social security benefits into

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the divorce decree. We hold that under Philpott, the district court's decree constitutes state action that has been preempted by the federal Social Security Act. Philpott, 409 U.S. at 417, 93 S.Ct. at 592-93. Because the court was without power to take any action regarding the parties' social security benefits, paragraph 4E was not properly incorporated into the divorce decree. Accordingly, this court may not sustain the district court order enforcing paragraph 4(E) of the decree. We must therefore determine whether the lower court may nevertheless order enforcement of a private agreement dividing future payments of social security.

In *U.S. v. Eggen*, 984 F.2d 848 (7th Cir.1993), the court held that once social security benefits "are paid over to the recipient, ... he can use them to satisfy his preexisting obligations." Id. at 850 (citing *Ponath v. Hedrick*, 22 Wis.2d 382, 126 N.W.2d 28, 31 (1964)). In Ponath the court stated that,

Federal cases construing 42 U.S.C.A. § 407, hold that the provision seeks to prevent transfer of benefits prior to receipt.... The section is intended to preclude a person entitled to benefits ... from transferring his right before, but not after the Administrator has recognized it. The provisions of section 407 apply to the assignment of future receipts, not to received benefits.

Ponath 126 N.W.2d at 31 (quoting *Beers v. Federal Security Administrator*, 172 F.2d 34, 36 (2d Cir.1949)).

Noleen contends that the division of social security benefits was a voluntary agreement between two private individuals to divide the benefits once they were received, and not an agreement dividing future social security benefits.

Although social security recipients may use the proceeds of their social security, after their receipt, to satisfy preexisting obligations, they may not contract to transfer their unpaid social security benefits. Thus, in contracting to give Noleen one-half of his benefits before he was eligible to receive them, Ronald ineffectually "transferred his right" to the benefits. Because Ronald and Noleen attempted to transfer their rights to future benefits in violation of 42 U.S.C. § 407(a), the agreement was invalid and neither this court nor the district court may order its enforcement.

Moreover, the fact that the property settlement agreement was entered into voluntarily by the parties is without relevance. As another court correctly ruled, "Congress' clear and stringent interpretation of the prohibition on transfer or assignment of benefits in section 207(b) ... compels us to strictly interpret that clause to prohibit voluntary as well as involuntary transfers or assignments."

[930 P.2d 115] *Ellender v. Schweiker*, 575 F.Supp. 590, 599 (S.D.N.Y.1983), appeal dismissed, 781 F.2d 314 (2nd Cir.1986). If voluntary assignments and transfers of future benefits were allowed, the "security" aspect of the social security program would frequently be jeopardized. Moreover, as discussed above, the agreement in this case is prohibited by federal statute.

Even if the benefits were received by Ronald and directly deposited in his account, the court is not empowered to compel Ronald to pay those benefits to Noleen. "It is clear from the U.S. Supreme Court's opinion in Philpott v. Essex County Welfare Board, ... that if a bank account contains social security funds, the funds are exempt from legal process." *Hatfield v. Cristopher*, 841 S.W.2d 761, 767 (Mo.App.Ct.1992).

Noleen cites *Owens v. Owens*, 591 S.W.2d 57 (Mo.App.Ct.1980), in support of her position that the court can compel Ronald to transfer one-half of his social security benefits to Noleen once they are paid to Ronald. Owens held that "once social security funds have been paid to the recipient, the funds are his personal property and no longer exempt from execution on the sole ground that the government was the source of those payments." Id. at 58. The Owens case was followed in *Fraser v. Deppe*, 770 S.W.2d 479 (Mo.App.Ct.1989).

However, in *Collins, Webster and Rouse v. Coleman*, 776 S.W.2d 930 (Mo.App.Ct.1989), without overruling either Owens or Fraser, the same court held

that social security benefits deposited in a bank account were exempt from process by a creditor under Philpott. The court held that Philpott was controlling and "was apparently not considered in Owens, nor cited in Fraser ... which follows Owens." Thus, Noleen's reliance on Owens is unavailing. In any event, we agree with Hatfield's interpretation of Philpott, concluding that if a bank account contains social security funds, the funds are exempt from legal process. Hatfield, 841 S.W.2d at 767.

In view of our ruling that the contested paragraph of the property settlement agreement was neither enforceable nor properly incorporated into the divorce decree, we need not consider Ronald's contention that the district court improperly interpreted the agreement.

Finally, Ronald notes that paragraph 8(D) of the agreement provides for an award of reasonable attorney's fees and costs to the prevailing party in an action that challenges or seeks to enforce the property settlement agreement. The district court awarded attorney's fees and costs to Noleen as the prevailing party. However, as a result of our reversal of the order entered by the district court, that award will have to be vacated.

CONCLUSION

Under 42 U.S.C. § 407(a), the district court was without jurisdiction to enforce an award of Ronald's social security benefits to Noleen pursuant to paragraph 4(E) of the property settlement agreement. Although the agreement was the product of the voluntary negotiations of the parties, the enforcement of the contested paragraph is nevertheless prohibited by the federal statute.

For the reasons expressed above, we reverse the order entered below, including the district court's ruling with regard to the property settlement agreement, vacate the award of attorney's fees and costs to Noleen, and remand this matter to the district court with instructions to reconsider the property distribution to the parties, and the issue of attorney's fees and costs.

Notes:

[1] Paragraph 4E states:

Each party is eligible to receive Social Security Benefits at normal retirement age. The parties have agreed to equalize Social Security Benefits as they are received during their joint lifetimes. Husband agrees to pay to wife one-half of each monthly Social Security check he receives. Wife agrees likewise to split equally with husband each Social Security check she receives. The parties will arrange with Social Security to have the Social Security checks deposited directly into their respective bank accounts, and shall arrange with their banks for an automatic transfer of the other party's share as set forth herein.

It is the parties' intention that Social Security benefits be divided, if possible, only to the extent that they were earned prior to the end of 1990. Accordingly, if the parties can obtain from Social Security within one hundred and eighty days of the date hereof, sufficient information to ascertain the benefits derived solely from earning prior to December 31, 1990, the parties specifically agree to amend this portion of this Agreement to include such specific monthly amounts.

[2] The agreement provides for an award of attorney's fees to the prevailing party in any action by which the court's assistance is sought to enforce the agreement.

[3] In *Hisquierdo,* the United States Supreme Court considered whether benefits provided under the Federal Railroad Retirement Act of 1974 could be divided upon divorce. The anti-assignment statute in that case, 45 U.S.C. § 231m(a), is virtually identical to the Social Security Act's anti-assignment clause, 42 U.S.C. § 407(a). That statute provides:

[N]otwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or to other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

45 U.S.C. 231m(a).

TAB 8

Dapp v. Dapp, 211 Md. App. 323, 65 A.3d 214 (2013)

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211 Md.App. 323 (Md.App. 2013)

65 A.3d 214

Robert B. DAPP

v.

Linda C. DAPP.

No. 0500-2011.

Court of Special Appeals of Maryland.

May 1, 2013

[65 A.3d 215] Andrew M. Hermann, (Levy, Mann, Caplan, Hermann & Polashuk, LLP, on the brief), Owings Mills, MD, for Appellant.

Colleen A. Cavanaugh, (Cavanaugh & Warshaw, PA, on the brief), Towson, MD, for Appellee.

Panel: ZARNOCH, KEHOE, W. MICHEL PIERSON, (Specially Assigned).

PIERSON, J.

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Appellant, Robert B. Dapp, appeals an order of the Circuit Court for Baltimore County requiring him to pay appellee, Linda C. Dapp, certain amounts based upon his past and future receipt of retirement benefits under the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.*, in accordance with the terms of the parties' Marital Separation and Property Settlement Agreement. He asserts that the division of so-called Tier I benefits pursuant to a marital settlement agreement is prohibited by the Railroad Retirement Act, and that, therefore, the Supremacy Clause of the United States Constitution precludes the circuit court from enforcing that portion of the Agreement. We agree, and reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. and Mrs. Dapp were married on September 7, 1968. Mr. Dapp became employed by Amtrak [1] on January 1, 1981. The parties separated on February 26, 1986. On April 4, 1988, Mrs. Dapp was granted a judgment of absolute divorce by the Circuit Court for Baltimore County. The judgment incorporated the parties' Marital Separation and Property Settlement Agreement dated December 2, 1987. Paragraph 8 of the Agreement contained a mutual waiver of alimony and other spousal support. Paragraph 12 stipulated that " [t]he Wife shall be entitled to one-half (1/2) of all pension accrued by the Husband with Amtrak if she does not remarry within five (5) years from the date of final divorce."

Mrs. Dapp has remained unmarried since the divorce. Mr. Dapp, who had worked for Amtrak for 88 months before the divorce, continued to work there for another 243 months after

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the divorce, until he retired in February 2009. Upon his retirement, Mr. Dapp began to receive monthly retirement benefits totaling $3,113.13 pursuant to the Railroad Retirement Act of 1974. Of this amount, $1,950.00 constitutes so-called Tier I benefits, and $1,163.13 constitutes so-called Tier II benefits and supplemental annuity **[65 A.3d 216]** payments.[2] Mr. Dapp did not inform Mrs. Dapp of his retirement at the time, and she received no portion of the retirement benefits.

On February 3, 2010, after learning of Mr. Dapp's retirement, Mrs. Dapp filed a complaint to enforce the Agreement in the Circuit Court for Baltimore County, seeking one-half of the entirety of Mr. Dapp's railroad retirement benefits under the authority of Paragraph 12. Mr. Dapp responded that Mrs. Dapp was entitled only to one-half of the " marital portion" of his Tier II benefits and supplemental annuity payments, and that she was not entitled to any portion of his Tier I benefits. The parties filed cross motions for summary judgment, which were denied in a written opinion. The court found that the language of Paragraph 12 of the Agreement was susceptible of more than one meaning. It reasoned that the word " accrued" was ambiguous because of the absence of any language relating to the timing of the accrual. It determined that a hearing should be held to take evidence on the meaning of the Agreement. As the opinion framed the issues to be resolved, they included (1) whether Paragraph 12 included only that portion of the retirement benefits attributable to Mr. Dapp's employment during the parties' marriage, or all

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retirement benefits that accrued during Mr. Dapp's employment with Amtrak, and (2) whether Paragraph 12 encompassed Tier I benefits as well as other benefits.

At the hearing, testimony was received from the drafter of the agreement, and from Mrs. Dapp and Mr. Dapp. Upon its conclusion, the court rendered an oral opinion. It found that the bargain made by Mr. and Mrs. Dapp was that the entirety of Mr. Dapp's retirement benefits, not simply those benefits resulting from employment during marriage, would be divided with Mrs. Dapp. It also found that the parties made no

distinction between Tier I and Tier II benefits. In consequence, the meaning of the agreement was that Mrs. Dapp would receive one-half of all retirement benefits to which Mr. Dapp was entitled when he retired, including the Tier I benefits.

Based on these findings, the judge concluded that Mrs. Dapp was entitled to a qualified domestic relations order (QDRO) that divided Tier II benefits payable after the trial, as well as an award of one-half of the previously paid Tier II benefits, reduced by one half of the taxes that had been paid by Mr. Dapp based on their receipt. Recognizing that federal law precluded the court from directly dividing the Tier I benefits, the judge stated that he could " enforce in equity the parties' agreement to divide those benefits." He determined to require that Mr. Dapp pay Mrs. Dapp one-half of the Tier I benefits received by him in the future, with a deduction for taxes paid by Mr. Dapp, and to award Mrs. Dapp an amount equal to one-half of the Tier I benefits previously paid, reduced by one-half of the taxes that had **[65 A.3d 217]** been paid by Mr. Dapp as a result of his receipt of those benefits.

The court's final order of April 28, 2011, therefore, had four components. The first was a judgment for $12,642.83, representing one-half of the Tier II benefits already received by Mr. Dapp between March 2009 and March 2011, less half of the taxes paid by him on those benefits. The second was a direction for the entry of a QDRO for Mr. Dapp's future Tier II benefits. The third was a judgment for $21,197.07, representing one-half of the Tier I benefits received between March

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2009 and March 2011, less half of Mr. Dapp's tax burden. Finally, the court ordered Mr. Dapp to pay to Mrs. Dapp on the fifteenth of every month, beginning April 15, 2011, a sum equal to one-half of all Tier I benefits received by him, less half of his tax burden on those benefits. The court stayed the orders regarding the Tier I benefit liability pending appeal.

Mr. Dapp timely appealed those portions of the circuit court's order requiring payments to Mrs. Dapp based upon his Tier I benefits. He does not question the court's orders regarding his Tier II benefits; Mrs. Dapp currently receives $581.57 monthly pursuant to the QDRO dividing Mr. Dapp's Tier II benefits, and Mr. Dapp has satisfied the $12,642.83 judgment for past Tier II benefits.

DISCUSSION

Mr. Dapp argues that the circuit court erred as a matter of law by ordering him to pay Mrs. Dapp a portion of his Tier I retirement benefits because it was precluded from doing so by federal law. He does not question the circuit court's finding that the parties' agreement encompassed the Tier I benefits, but asserts that the court could not enforce this agreement because it contravenes the provisions of the Railroad Retirement Act. Neither party disagrees with the proposition that the court could not directly order the payment of Tier I benefits to Mrs. Dapp, through a QDRO or otherwise. Mrs. Dapp asserts that nonetheless the court had the power to enforce Paragraph 12 of the parties' Agreement, which stipulated that Mrs. Dapp would receive one-half of the benefits that Mr. Dapp would receive in the future, through an order requiring Mr. Dapp to make payments from his " general assets" that correspond to the Tier I benefits that he receives.

The basis of Mr. Dapp's argument is section 14(a) of the Railroad Retirement Act of 1974, which contains a broad provision against assignment of benefits. It states, in pertinent part:

Except as provided in subsection (b) of this section ... notwithstanding any other law of the United States, or of

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any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated[.]

45 U.S.C. § 231m(a).

The United States Supreme Court applied a prior version of this statute [3] in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). There, the Court reversed a California Supreme Court decision that provided a remedy to a wife upon dissolution of marriage based on her husband's expectation of receiving railroad retirement benefits. The California court decided that the benefits **[65 A.3d 218]** were subject to the state's community property regime, and held that because the benefits flowed in part from the husband's employment during the parties' marriage they were community property. The Supreme Court held that the Supremacy Clause of the United States Constitution required reversal because the award conflicted with the Railroad Retirement Act. It reasoned that the right granted to the wife by state law conflicted with the express terms of federal law, and that the consequences of this grant injured the objectives of the federal program sufficiently to require nonrecognition of the right. The Court held that the critical terms of the federal scheme to which the Supremacy Clause required California to defer " include a specified beneficiary protected by a flat prohibition against attachment and anticipation." *Hisquierdo*, 439 U.S. at 582, 99 S.Ct. 802. It rejected the argument that the right would not conflict with the statute because it could be effectuated by a remedy under which the husband would be required to pay a portion of his benefit or its monetary equivalent as he received it, stating that the anti-assignment provision " protects

Congress's decision about how to allocate the benefits provided by the Act, and any automatic diminution of that amount frustrates the

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congressional objective." *Hisquierdo*, 439 U.S. at 583, 99 S.Ct. 802. The Court also rejected the contention that the wife's interest could be vindicated by an offsetting award of currently available community property, reasoning that an offsetting award " would upset the statutory balance and impair [the husband's] economic security just as surely as would a regular deduction from his benefit check." *Hisquierdo*, 439 U.S. at 588, 99 S.Ct. 802.

Congress responded to *Hisquierdo* in 1983 by amending the Act to allow certain benefits, including those in Tier II, to be divisible. See 45 U.S.C. § 231m(b)(2). Tier I benefits, however, remain subject to the Act's broad prohibition against division or assignment. The only exception is in cases of delinquent alimony and/or child support. *See Hisquierdo*, 439 U.S. at 576, 99 S.Ct. 802; citing 42 U.S.C. § 659.[4] It is undisputed that Mr. and Mrs. Dapp waived all rights to alimony and other spousal support in Paragraph 8 of the Agreement. Accordingly, that exception does not apply here.

From *Hisquierdo*, it is clear that Tier I benefits are not subject to division by a court under the authority of state community property laws or other laws relating to division of marital assets. Mrs. Dapp seeks to distinguish this case because it involves the court's enforcement of an agreement, not a court order directly dividing the benefits. She reasons that the trial court's action requires Mr. Dapp to make payments from his general assets, and therefore does not operate directly on the benefits in violation of section 231m(a).

It is true that this case involves a private agreement between the parties to divide benefits, whereas *Hisquierdo* involved a court-ordered division of benefits under a provision of state law. But this is a distinction that makes no difference

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under the terms of the statute. We conclude that the agreement made by Mr. Dapp was void when it was made because the unambiguous terms of section 231m(a)

[65 A.3d 219] prohibit " assignment" of the benefits. That is exactly what Mr. Dapp attempted to do when he made an agreement that Mrs. Dapp would receive a portion of those benefits; an agreement to divide the benefits, i.e., to transfer a portion of the benefits, is plainly an assignment of those benefits. Because Mr. Dapp could not legally make such an agreement, his promise was simply ineffective. Therefore, the agreement is not subject to enforcement in any manner, whether by an order directly affecting the benefits or otherwise. Just as the Supremacy Clause of Article VI of the U.S. Constitution— which states that the laws of the United States are the supreme law of the land— precluded the California court in *Hisquierdo* from dividing Tier I benefits under state community property laws, so too does it preclude courts of this state from enforcing a private agreement that purports to divide those benefits.

While there appears to be no reported precedent that decides this precise issue, our conclusion is supported by the case law treating the nearly identical issue of the assignability of retirement benefits under the Social Security Act in the context of marital property settlement agreements. As we discussed above, Tier I benefits are a substitute for and commensurate with social security benefits. The Social Security Act contains a provision shielding those benefits from attachment, assignment, and other division, in language not unlike that of section 231m(a). The Social Security Act provides:

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

42 U.S.C. § 407(a).

It is well settled that the effect of this provision is to preclude states " from intervening in the allocation of social

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security benefits. Consequently, social security benefits may not be considered marital property or be subject to distribution in any manner in a divorce proceeding." *Pleasant v. Pleasant*, 97 Md.App. 711, 719, 632 A.2d 202 (1993). In that regard, the operation of the Social Security Act provision is precisely the same as that of the Railroad Retirement Act. In addition, courts of other states have held that section 407 bars enforcement of provisions in marital property settlement agreements that purport to divide future social security benefits between spouses. *See, e.g., In re Marriage of Anderson*, 252 P.3d 490, 494 (Colo.App.2010) (" the transfer of future and as yet unpaid Social Security benefits from husband to wife ... constituted a transfer of husband's rights to future benefits in violation of 42 U.S.C. § 407(a), and the district court lacked jurisdiction to enforce it.")(italics omitted); *Simmons v. Simmons*, 370 S.C. 109, 634 S.E.2d 1, 4 (2006) (" state courts are without power to take any action to enforce a private agreement dividing future payments of Social Security when such an agreement violates the statutory prohibition against transfer or assignment of future benefits."); *In re Marriage of Hulstrom*, 342 Ill.App.3d 262, 276 Ill.Dec. 730, 794

N.E.2d 980 (2003).

State courts cannot enforce such agreements precisely because such agreements are not valid in the first place. In *Gentry v. Gentry*, 327 Ark. 266, 938 S.W.2d 231 (1997), the Supreme Court of Arkansas concluded that while social security benefits, once received, " become the recipient's personal property, and he can do whatever **[65 A.3d 220]** he wishes with them," the transfer or assignment of future benefits is invalid and unenforceable. 938 S.W.2d at 233; citing *United States v. Eggen*, 984 F.2d 848, 850 (7th Cir.1993). Similarly, the Supreme Court of Nevada, in *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997), held that " [a]lthough social security recipients may use the proceeds of their social security, after their receipt, to satisfy preexisting obligations, they may not contract to transfer their unpaid social security benefits." 930 P.2d at 114. The reasoning of these courts supports our conclusion that the Railroad Retirement Act's anti-assignment provision, like that

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of the Social Security Act, prohibits the assignment of future Tier I benefits in a marital settlement agreement or other contract, and therefore precludes courts from enforcing such contracts.

Mrs. Dapp claims that although she is barred from receiving a portion of those benefits directly, she can nevertheless receive the equivalent out of Mr. Dapp's general assets. She notes that there is no provision of law that precludes Mr. Dapp from distributing to a former spouse a portion of his Tier I benefits after he has received them. She contends that the court has the power to prevent him from avoiding the consequences of an agreement that he made voluntarily (and for valid consideration) by an order that applies not to the benefits themselves but to his general assets.

In support of this argument, Mrs. Dapp cites *Allen v. Allen*, 178 Md.App. 145, 941 A.2d 510 (2008), and *Dexter v. Dexter*, 105 Md.App. 678, 661 A.2d 171 (1995). In each of those cases, this Court upheld an order that required a former spouse to make payments from general assets based on his receipt of benefits that were not divisible by court order. In both cases, the spouses, upon divorce, agreed to split the husband's future military retirement benefits which, at the time of the agreement, were divisible. However, upon retirement, each of the husbands ended up receiving disability retirement benefits that were not divisible, thereby frustrating the terms of the agreement. In each case, this Court sustained an order that required the husband to pay sums from general assets based on receipt of the disability benefits, in order to prevent the frustration of the original agreement. We concluded in both cases that the order did not contravene federal law because the order did not directly award to the wife a portion of the benefits that were not subject to division.

Those cases do not provide authority to sustain the trial court's action here. Unlike the agreement that is the subject of this case, the agreements enforced in *Allen* and *Dexter* were valid when they were made; the anticipated military retirement benefits were divisible and assignable at the time

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of contract. The Tier I benefits at issue here, however, were not. Because Mr. Dapp was barred by the anti-assignment clause from anticipating or assigning his future Tier I benefits, he has no pre-existing obligation to make payments based upon the amount he now receives, and there is no valid agreement for the circuit court to enforce. The fact that the order does not directly affect his benefits is irrelevant.

Mrs. Dapp also cites several federal cases involving social security benefits in which courts have approved remedies similar to that fashioned by the circuit court in this case, i.e., requiring a social security recipient to pay from general assets amounts equal to benefits received. *See Fortelney v. Liberty Life Assurance Co.*, 790 F.Supp.2d 1322, 1344-45 (W.D.Okla.2011), and cases cited therein; *Poisson v. Allstate Life Ins. Co.*, 640 F.Supp. 147 (D.Me.1986). In those cases, courts did **[65 A.3d 221]** hold that an order requiring payment of amounts from general assets based on receipt of non-assignable benefits did not violate the anti-assignment provision of the Social Security Act. But none of those cases involved an underlying agreement that directly contravened the statute. For example, *Fortelney* and *Poisson* each involved long term disability policies with a social security offset, and the issue was whether the insurers could recover an overpayment based on the policyholders' receipt of lump sum social security benefits. In each case, the court held that the underlying agreement was valid, en route to a holding that the recovery of the overpayment from the policyholders' assets did not directly affect the benefits in violation of the statute. Therefore, those cases, like *Allen* and *Dexter*, are simply beside the point. The issue here is not whether the remedy itself is precluded by the statute, but whether the agreement can support the remedy. Because the agreement was prohibited, and is accordingly void, we find that it cannot.

For the foregoing reasons, we conclude that the circuit court erred in requiring Mr. Dapp to pay Mrs. Dapp any amount based upon his past or future receipt of Tier I railroad retirement benefits. The judgment for $21,197.67 based on Tier I benefits paid to him prior to trial must be reversed, as

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must the order requiring him to make payments in the

future based on his receipt of such benefits.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED IN PART. CASE REMANDED TO THAT COURT WITH DIRECTION TO VACATE THAT PORTION OF ITS ORDER ENTERING JUDGMENT FOR ONE-HALF OF TIER I BENEFITS AND REQUIRING PAYMENT OF FUTURE TIER I BENEFITS. COSTS TO BE PAID BY APPELLEE.

Notes:

[1] Amtrak, a private for-profit corporation created by federal statute, is a railroad carrier (49 U.S.C. § 24301(a)), and hence an employer within the Railroad Retirement Act. 45 U.S.C. § 231(a)(1)(I).

[2] The Railroad Retirement Act replaces the Social Security Act for rail industry employees and provides monthly annuities for employees upon retirement or disability. Benefits available to retired railroad workers under the Act include multiple components. The Tier I component is a substitute for Social Security benefits, and " corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act." *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 575, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), citing 45 U.S.C.. § 231b(a)(1). The Tier II component is similar to a private pension plan in that it is tied to a worker's earnings and career service. *See* 45 U.S.C. § 231b(b). An employee who completes 25 years of railroad service and who had service before October 1981 may also receive a supplemental annuity. 45 U.S.C. § 231a(b).

[3] As discussed below, section 231m was amended in 1983 to except Tier II benefits from its terms. The pertinent statutory language quoted above is unchanged from that before the Court in *Hisquierdo.*

[4] In this exception, Congress limited " alimony" to its traditional common-law meaning of spousal support, and specifically stated that alimony does not include " any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. § 659(i)(3)(B)(ii).

TAB 9

Evans v. Evans, 111 N.C. App. 792, 434 S.E. 2d 856 (1993)

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111 N.C.App. 792 (N.C.App. 1993)

434 S.E.2d 856

Unempl.Ins.Rep. (CCH) P 17723A

Robert L. EVANS, Plaintiff,

v.

Peggy Shoaf EVANS, Defendant.

No. 9221DC810.

Court of Appeals of North Carolina.

September 7, 1993

[434 S.E.2d 857] [Copyrighted Material Omitted]

[434 S.E.2d 858]

White & Crumpler by Fred G. Crumpler, Jr. and Clyde C. Randolph, Jr., Winston-Salem, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice by Jimmy H. Barnhill, Winston-Salem, for defendant-appellee.

ARNOLD, Chief Judge.

The basis for plaintiff's appeal concerns Paragraph A.2. of the Agreement, which fixed the rights of the parties upon plaintiff's retirement from Piedmont. Paragraph A.2. of the Agreement states:

If the Husband retires from his employment with Piedmont at normal retirement age, the Wife will receive as alimony thirty percent (30%) of all income from his pension or retirement plan less income taxes attributable to said retirement income plus thirty percent (30%) of any Social Security payments he receives, payable monthly. The Husband will furnish the Wife satisfactory evidence of his income from these sources.

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Based on the triggering of Paragraph A.2. by plaintiff's retirement from Piedmont at normal retirement age, the district court ordered that under the terms of the Agreement, defendant was entitled to $138,259.18 (thirty percent of plaintiff's retirement income less taxes) plus interest accruing at the rate of eight percent per annum from 19 September 1990 until paid. Plaintiff was also ordered to pay to defendant, when received, thirty percent of such Social Security benefits as he receives monthly. The court also ordered that plaintiff pay defendant $11,000 on account of attorneys' fees. Plaintiff assigns as error the court's order regarding these three payments.

RETIREMENT BENEFITS

The district court ordered that plaintiff "within ten days, pay to defendant the sum of $138,259.18, plus interest accruing at the rate of eight percent per annum from September 19, 1990, until paid." The court found plaintiff's retirement effective 4 August 1989, thereby triggering Paragraph A.2. and entitling defendant to thirty percent of plaintiff's retirement benefits. Plaintiff contends that the purported assignment of pension benefits was void on the date it was made, 30 July 1981, under [434 S.E.2d 859] the Employee Retirement Income Security Act (ERISA) of 1974. We disagree.

In 1974, Congress passed ERISA "in order to provide better protection for beneficiaries of employee pension and welfare benefit plans" in the private workplace. *Rohrbeck v. Rohrbeck*, 318 Md. 28, 30, 566 A.2d 767, 768 (1989). ERISA contained a series of amendments relating to requirements including reporting and disclosure, vesting, discontinuance, and payment of benefits. Id. One of the provisions added to ERISA was an anti-alienation requirement or "spendthrift" provision which required that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1985).

Another amendment which became part of the labor code was a preemption provision that stated "[ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [subject to ERISA requirements]." 29 U.S.C. § 1144(a) (1985). Therefore, under the 1974 ERISA, a beneficiary could not assign or alienate his retirement benefits to anyone under any State law relating to employment benefit plans. It is under this strict construction of ERISA plaintiff would

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have the Court conclude that pursuant to §§ 1056(d)(1) and 1144(a) of the Code, the assignment of thirty percent of his retirement benefits was void from the date of the Consent Judgment. We are not persuaded by plaintiff's narrow reading of these two ERISA provisions.

Plaintiff ignores significant case law regarding the 1974 ERISA provisions at issue. The combination of the anti-alienation provision and the preemption provision eventually raised questions, evidently not anticipated by Congress, as to the validity of orders entered in State domestic relations proceedings whereby pension benefits were required to be paid to a person other than the plan beneficiary, i.e., spouse or child. Rohrbeck, 318 Md. 28, 566 A.2d 767. The majority of jurisdictions confronting this issue concluded that an implied exemption to the

anti-assignment provision existed for domestic relation decrees authorizing the transfer of retirement benefits in satisfaction of support obligations. See *Tenneco Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688 (4th Cir.1983) (employee's interest in benefit plan is subject to garnishment where debt is support obligation); *Cody v. Riecker*, 594 F.2d 314 (2d Cir.1979) (garnishment of pension fund benefits under plan subject to ERISA due to arrearages in wife and child support obligations was not in conflict with anti-alienation clause of ERISA); *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir.1979) (garnishment order may be used to satisfy court ordered family support payments out of pension benefits because such an order is impliedly excepted from the anti-alienation and preemption clauses of ERISA); see also *Ball v. Revised Retirement Plan, Etc.*, 522 F.Supp. 718 (1981); *Ward v. Ward*, 164 N.J.Super. 354, 396 A.2d 365 (1978). For example, in Cody, 594 F.2d 314, the Second Circuit court relied on Merry, 592 F.2d 118, which upheld a garnishment of an ERISA regulated pension plan to enforce a post-divorce judgment for alimony and child support payments. The Cody court stated that "it may not be necessary to distinguish, in the ERISA context, between garnishments to enforce family support orders and spousal property settlements." Cody, 594 F.2d at 316.

Since the 1981 judgment in the case at bar and the implied exception followed by the majority of jurisdictions, Congress has amended the anti-alienation clause of ERISA. Known as the Retirement Equity Act of 1984, Pub.L. No. 98-397, Congress amended § 1056(d) by creating an exception for certain domestic relations orders. In short, § 1056(d)(3)(A) excepted from anti-alienation domestic

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relations orders which were determined to be qualified domestic relations orders (QDRO). 29 U.S.C. § 1056(d)(3)(A) (1985). The House Education and Labor Committee's intent was to remove the confusion then existing in this area and to remove ERISA as a barrier to recovery of alimony, child support and property settlements under **[434 S.E.2d 860]** certain conditions. Rohrbeck, 318 Md. 28, 566 A.2d 767. The 1984 amendment, however, has no retroactive effect on the 1981 judgment at issue. See 29 U.S.C. § 1001, Pub.L. No. 98-397, § 303(d) (1985) (plan administrator must have been actually paying out the benefits in 1985 to qualify for retroactivity). Thus, we are guided by the law that existed at the time of the 1981 judgment and recognize Congressional intent to create an exception for domestic orders relating to the assignment or alienation of retirement benefits pursuant to spouse or child support obligations. We hold that the trial court's order pursuant to the 1981 Consent Judgment for plaintiff to pay defendant $138,259.18 plus interest was not error.

SOCIAL SECURITY BENEFITS

Plaintiff's next assignment of error is that the court erred by ordering that "[p]laintiff shall pay to defendant, when received, thirty percent of such social security benefits as he receives. Such payments shall be paid monthly." Plaintiff contends that insofar as the order attempts to enforce the assignment of Social Security benefits, it is void. He bases his argument on provisions of the Social Security Act which prohibit assignments of Social Security benefits. We disagree with plaintiff's contention.

Like ERISA, the Social Security Act provides an exhaustive benefit plan. Although the Social Security Act provides a scheme by which divorced spouses may be entitled to portions of their former spouse's benefits, see 42 U.S.C. § 402(b)(1) (1991), the Act also has an anti-alienation clause and preemption clause similar in nature to the ones in ERISA:

(a) 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 moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process....

(b) No other provision of law, enacted before, on, or after [the date of the enactment of this section] April 20, 1983, may

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be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S.C. §§ 407(a) and (b) (1991). In 1975, Congress created an exception to the anti-alienation clause by enacting 42 U.S.C. § 659(a), which provides:

Notwithstanding any other provision of law (including section 407 [anti-assignment and preemption clauses] of this title) ..., [Social Security benefits] payable ... to any individual ... shall be subject ... to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 659(a) (1991).

The purpose of the anti-assignment clause, as recognized by the majority of jurisdictions, is to protect the Social Security benefit recipient and those dependent upon him from claims of creditors. *Kirk v. Kirk*, 577 A.2d 976 (1990); *Sharlot v. Sharlot*, 494 N.Y.S.2d 238, 110 A.D.2d 299 (1985); *Meadows v. Meadows*, 619 P.2d 598 (1980); *Brown v. Brown*, 32 Ohio App.2d 139, 288 N.E.2d 852 (1972). But where a wife seeks her husband's Social Security benefits in the form of alimony, she is not

a creditor as such; and the statute should not apply, therefore, to defeat her claim for alimony. Brown, 32 Ohio App.2d 139, 288 N.E.2d 852.

It would be inconsistent to hold that a wife could not reach Social Security benefits under § 407(a) because the statute allowing benefits to be subject to legal process for a claim of alimony, § 659(a), was enacted partially to protect her as a dependent. Id. It is true that this Court in Cruise v. Cruise, 92 N.C.App. 586, 374 S.E.2d 882 (1989) reversed a trial court's order awarding the wife a percentage of defendant's Social Security benefits, but that case involved a distribution of benefits under North Carolina's Equitable Distribution statute. Federal law precludes Social Security benefits from being treated by state courts as property. Id.; 42 U.S.C.

[434 S.E.2d 861] § 662(c) (1984). This case involves alimony payments pursuant to a Separation Agreement and Property Settlement Agreement. Unlike Cruise, the payments at issue in the case at bar are subject to the anti-alienation exception, § 659(a).

Clearly Congress has expressly recognized an exception to the general bar against assignments in the case of Social Security

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benefits paid to individuals obligated to pay alimony. See *Brevard v. Brevard*, 74 N.C.App. 484, 328 S.E.2d 789 (1985). Future Social Security benefits payable to plaintiff are subject to Judge Sharpe's order enforcing plaintiff's obligation under the Consent Judgment to make alimony payments in the form of a percentage of Social Security benefits. Plaintiff's requests for this Court to void the order based on the anti-alienation and preemption clauses of §§ 407(a) and (b) is rejected.

ATTORNEYS' FEES

Finally, plaintiff contends that the court was without authority to make an award of attorneys' fees pursuant to N.C.Gen.Stat. § 50-16.4 (1987) because at the time the order was entered, defendant was not the "spouse" of plaintiff as defined by statute and Webster's Dictionary. We disagree.

This Court has held that attorneys' fees are only allowed in alimony cases that come within the ambit of G.S. §§ 50-16.4 and 50-16.3. *Upchurch v. Upchurch*, 34 N.C.App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978). G.S. § 50-16.4 provides:

At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C.Gen.Stat. § 50-16.4 (1987). The effect of this section is not to limit attorneys' fees only to alimony pendente lite proceedings. Upchurch, 34 N.C.App. 658, 239 S.E.2d 701. Rather, anytime a dependent spouse can show grounds for alimony pendente lite under G.S. § 50-16.3, the court can award attorneys' fees. "Anytime" includes time subsequent to the determination of the issues in the dependent spouse's favor at the trial of his or her cause on the merits. Id. To recover attorneys' fees pursuant to G.S. § 50-16.3, the spouse must show he or she (1) is entitled to the relief demanded, (2) is a dependent spouse, and (3) has insufficient means to subsist during prosecution or defense of the suit and to defray the expenses thereof. *Caldwell v. Caldwell*, 86 N.C.App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987). Plaintiff does not argue that defendant fails to meet the three requirements

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set forth above; he merely contends that defendant does not meet the definition of a "spouse" by virtue of the divorce decree rendered in 1981. He contends that a spouse means a husband or wife, and that defendant was no longer a wife at the time of the 13 April 1992 order awarding attorneys' fees.

Plaintiff's argument is without merit. We do not believe that a spouse loses her status for purposes of the relevant provisions of § 50-16.3 by obtaining a divorce decree. If we were to hold that defendant cannot be awarded attorneys' fees only because she is no longer the per se wife of plaintiff, the purpose of allowance for attorneys' fees would be defeated. An award of attorneys' fees is meant to enable the dependent spouse to employ counsel to meet her supporting spouse on an equal level at trial, or subsequent to trial, while still maintaining herself according to her station in life. See *Little v. Little*, 12 N.C.App. 353, 183 S.E.2d 278 (1971). In order to award attorneys' fees in an alimony case, the trial court must make findings of facts showing that the fees are allowable and that the amount awarded is reasonable. Upchurch, 34 N.C.App. 658, 239 S.E.2d 701. The trial court made findings of fact as to these factors, and thus, we conclude that attorneys' fees were properly awarded.

Affirmed.

COZORT and MARTIN, JJ., concur.

TAB 10

In re Marriage of Flory, 171 Ill.App. 3d 822, 525 N.E. 2d 1008 (1988)

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171 Ill.App.3d 822 (Ill.App. 1 Dist. 1988)

525 N.E.2d 1008, 121 Ill.Dec. 701

In re the MARRIAGE OF Judith M. FLORY, Petitioner-Appellee,

and

James C. Flory, Sr., Respondent-Appellant.

No. 87-0730.

Court of Appeals of Illinois, First District, Third Division.

June 8, 1988.

[525 N.E.2d 1009]

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[121 Ill.Dec. 702] Ronda D. Taylor, Glenn Jennings, Novick, Eggan & Ostling, Bloomington, for respondent-appellant.

Rappaport and Meyer, Chicago

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(Merrill B. Meyer, of counsel), for petitioner-appellee.

Presiding Justice WHITE delivered the opinion of the court.

Judith Flory petitioned for the dissolution of her marriage to respondent James Flory. The trial court granted the petition, ordered the division of the marital property, and awarded petitioner maintenance, health insurance, and $2,500 for attorney fees. Respondent appeals.

Petitioner married respondent on December 26, 1958. The parties had two children, and petitioner also helped respondent raise his three children from an earlier marriage.

[525 N.E.2d 1010] [121 Ill.Dec. 703] All of the children were emancipated before petitioner filed for divorce in September, 1985. Petitioner works as a substitute teacher. During 1986 she earned a net income of approximately $6,250. Respondent worked for Illinois Central Gulf Railroad until October, 1986, when he resigned and accepted an early retirement benefit of $38,055.80 after taxes. On his sixtieth birthday, in November, 1987, respondent began to receive his benefits under the Railroad Retirement Act. (45 U.S.C.A. par. 231 et seq. (West, 1986).) His benefits are approximately $1,250 per month. Petitioner, who is about 53 years of age, will receive a pension of $40 to $50 per month when she retires, and she will receive $368 per month in divorced spouse benefits under the Railroad Retirement Act. According to petitioner's affidavit, her expenses are approximately $2,000 per month, while respondent stated in his affidavit that his monthly expenses were approximately $1,100.

Respondent moved out of the marital home in September, 1985, and he moved into Phyllis Macesich's home. Respondent purchased a Titan motor home in November, 1985, for $15,000, making a down payment of $3,000. He testified at trial that Macesich supplied the $3,000, although her name does not appear on either the bill of sale or the purchase money security agreement. On October 1, 1986, respondent traded the Titan motor home for a Pace Arrow motor home. The dealer gave respondent a credit of $22,000 for the Titan against the $60,000 purchase price of the Pace Arrow. Respondent and Macesich purchased a Plymouth automobile in May, 1986, for $14,000. Titles to both the Plymouth and the Pace Arrow are in both respondent's name and Macesich's name. On October 16, 1986, respondent gave Macesich a check for $3,900, which, according to his affidavit, was payment of past due housing and auto costs, based on rents of $200 per month for his part of the home and $100 per month for use of the Plymouth. Macesich made the final payment for the Plymouth shortly

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after she received this check.

Petitioner testified that she had about $10,000 worth of health insurance coverage through her employment, but she was unable to obtain additional health insurance. Respondent's attorney admitted that petitioner could be covered under respondent's group policy through his former employer.

Petitioner inherited $17,700 from the estate of Garnett Stewart, and she inherited from her father a one-third interest in a trust valued at nearly $240,000. She spent more than $7,000 of the inheritance on living expenses prior to trial. At trial respondent agreed to pay $2,500 of petitioner's attorney fees.

The trial court dissolved the marriage on February 11, 1987. The court ordered:

B. That the respondent shall make arrangements to have the petitioner covered by the Illinois Central Gulf Hospital Association, or other comparable insurance.

C. That non-marital property shall be disposed of as follows:

TO: Petitioner, JUDITH M. FLORY Legacy from the Estate of G. Stewar[t] ..... $10,000.00 One-third (1/3) interest as beneficiary under trust of her late father ..... 79,963.00 ---------- $89,963.00 TO: Respondent, JAMES C. FLORY, SR. Starcraft boat (1955) ..... $ 200.00 Premarital allocation of severance pay ..... 6,570.00 ---------- $ 6,770.00 Chest (cabinet) ..... No Value

D. That the division of marital property shall be as follows:

Item Petitioner Respondent * Marital Home $30,000.00 $ " Balance of Severance Pay 10,000.00 12,995.00 1983 Chrysler 9,000.00 " Household Furniture 350.00 " U.S. Savings Bonds 150.00 " Federal Tax Refund 1,538.00 " State Tax Refund 126.00 " Burial Crypt " 1,500.00 * 1974 Concord Motor Home " 5,000.00 IRA (Hers) 1,500.00 " IRA (His) 1,911.00 1,912.00 * 1985 Plymouth " 11,000.00 Woodworking tools " no monetary value Jewelry no determined value " Fishing equipment " no ascertainable value 1 Fishing Rod & Reel no value " * $22,000 Interest in Pace " 22,000.00 Arrow Motor Home ---------- ---------- $54,575.00 $54,407.00

[525 N.E.2d 1011]

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[121 Ill.Dec. 704] I. That the respondent, JAMES C. FLORY, SR., shall pay the petitioner, JUDITH M. FLORY, as and for maintenance the sum of $269.00 monthly for a period of seventy-two (72) months beginning January 1, 1994 (out of his Tier II RRR entitlement. * * *.)

J. That the respondent, JAMES C. FLORY, SR., shall pay as and for attorneys' fees the sum of $2500.00 to petitioner's attorneys, as part of her attorneys' fees * * *.

On appeal respondent argues that the trial court awarded petitioner an excessive proportion of the marital assets. Respondent does not contest the valuations of any of the properties, but he contends that the court improperly decided that the Pace Arrow motor home and the Plymouth were marital assets rather than Macesich's property. Both vehicles were purchased while the parties were married. Respondent and Macesich hold title to both vehicles jointly. Respondent testified that his name appeared on the titles only because he could obtain credit and Macesich could not because she was unemployed. Respondent gave Macesich a check for $3,900 shortly before she paid off the remaining debt on the Plymouth; he testified that the check was payment for past due rent. The trial court found this testimony incredible, as it noted that respondent earned more than $2,000 after taxes each month while his debt to Macesich mounted at the rate of $300 per month, and his affidavit did not show expenses sufficient to explain his failure to pay Macesich. The evaluation of the credibility of witnesses is primarily a matter for the trial court. (*In re Marriage of Malters (1985)*, 133 Ill.App.3d 168, 178, 88 Ill.Dec. 460, 478 N.E.2d 1068.) We cannot say that the trial court acted contrary to the manifest weight of the evidence when it found that respondent's $3,900 payment to Macesich was not in fact a payment for living expenses.

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Since respondent earned that money during the marriage, and he used it to purchase the Plymouth, the trial court appropriately found that the Plymouth was a marital asset. (Ill.Rev.Stat.1985, ch. 40, par. 503(a).) Similarly, we cannot say that the trial court's finding that the Pace Arrow motor home was a marital asset is contrary to the manifest weight of the evidence, since respondent's name appeared alone on the documents surrounding the purchase of the Titan motor home which became the entire down payment for the Pace Arrow.

The trial court, after determining that the Plymouth and the Pace Arrow were marital assets, divided the marital property into approximately equal portions. The court considered the 28 year marriage, petitioner's role in raising the five children, and her limited ability to acquire income in rendering its decision. "If a property distribution results in substantially equal shares for both parties and it is apparent from the record that the court thoughtfully and carefully applied the rationale of the statute to the facts before it, then the court did not abuse its discretion and the award will not be disturbed on review." (*In re Marriage of Reed (1981)*, 100 Ill.App.3d 873, 875, 56 Ill.Dec. 202, 427 N.E.2d 282.) Accordingly, we affirm the trial court's distribution of the marital assets. *In re Marriage*

[525 N.E.2d 1012] [121 Ill.Dec. 705] of Smith (1982), 105 Ill.App.3d 980, 983, 61 Ill.Dec. 554, 434 N.E.2d 1151.

Respondent next argues that the trial court erred in awarding petitioner maintenance. The award of maintenance is within the sound discretion of the trial court, and we will not reverse decisions concerning maintenance unless the court has abused its discretion. (*In re Marriage of Holman (1984)*, 122 Ill.App.3d 1001, 1013, 78 Ill.Dec. 314, 462 N.E.2d 30.) Under the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat.1985, ch. 40, par. 101 et seq.), the court is encouraged to provide for each party's needs through an equitable property distribution, instead of awarding maintenance. (*In re Marriage of Sevon (1983)*, 117 Ill.App.3d 313, 318, 73 Ill.Dec. 41, 453 N.E.2d 866.) "Where the property available to [each] spouse is sufficient to satisfy that spouse's needs and entitlements, the use of maintenance should be limited. * * * If there is not sufficient marital property, however, maintenance

should be considered." *In re Marriage of Aschwanden (1980)*, 82 Ill.2d 31, 38, 44 Ill.Dec. 269, 411 N.E.2d 238.

The evidence at trial indicated that petitioner's pension benefits will be approximately $50 per month if she retires on her sixtieth birthday, and her benefits under the Railroad Retirement Act will be $368 per month. She has also inherited approximately $90,000, which at eight per cent annual interest would provide her additional income of $600 per month. She received liquid assets worth about $15,600 in the distribution

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of marital property. However, petitioner had already used a substantial portion of her inheritances to meet her living expenses, and it appeared that she would need to spend her liquid marital assets and part of her inheritances prior to her retirement. Thus, the trial court heard evidence from which it could infer that petitioner's income after her retirement, apart from maintenance, will be around $800 or $900 per month, while her expenses will remain near $2,000 per month. We agree with the trial court's conclusion that petitioner will lack sufficient property to provide for her reasonable needs after she retires. (Ill.Rev.Stat.1985, ch. 40, par. 504(a) (1)), and she will not be able to work or in any other way acquire the needed income. Ill.Rev.Stat.1985, ch. 40, par. 504(a) (2) and (3).

Respondent, by contrast, will continue to receive his pension of $1,250 per month, and he has liquid assets which will provide another $170 per month in interest income. As long as his expenses remain near $1,100 per month, his income will be ample for his needs, and he will be able to help petitioner meet her needs. On the basis of this evidence the trial court awarded petitioner maintenance of $269 per month, to begin the year that she will turn sixty. This award should leave respondent with sufficient income to meet his expenses, and it will significantly assist petitioner in her efforts to meet her expenses. Under the circumstances of this case, we find that the trial court did not abuse its discretion in awarding maintenance. If Congress chooses to eliminate respondent's retirement benefits (See *Hisquierdo v. Hisquierdo (1979)*, 439 U.S. 572, 575, 99 S.Ct. 802, 805, 59 L.Ed.2d 1), or if for any other reason respondent is unable to make the maintenance payments, or if petitioner no longer needs the payments, respondent may petition the court to change the maintenance award.

Respondent argues that the trial court violated the anti-assignment provisions of the Railroad Retirement Act in awarding petitioner maintenance. The Act provides:

[N]o annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated * * *. (45 U.S.C.A. par. 231m. (West, 1986).)

Respondent, relying on Hisquierdo, contends that the trial court impermissibly assigned part of his annuity when it ordered respondent to pay petitioner "$269.00 monthly for a period of seventy-two (72) months beginning January 1, 1994 (out of his Tier II RRR entitlement. * * *.)"

[525 N.E.2d 1013] [121 Ill.Dec. 706] The Social Security Act contains an express exception to the Railroad

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Retirement Act's anti-assignability clause which states:

"Notwithstanding any other provision of law * * *, moneys * * * due from, or payable by, the United States * * * to any individual * * * shall be subject * * * to legal process brought for the enforcement, against such individual of his legal obligations to * * * make alimony payments." (42 U.S.C.A. par. 659(a) (West, 1983).)

The payments which the court ordered respondent to make to petitioner clearly fall within the statute's definition of alimony. (42 U.S.C.A. par. 662(c) (West, 1983).) Therefore, the statute entitles petitioner to bring suit for the amounts stated in the maintenance order, despite the provisions of the Railroad Retirement Act.

In Hisquierdo, the Supreme Court held that the Railroad Retirement Act barred state courts from dividing railroad retirement benefits as property in marital dissolution cases. (439 U.S. at 590.) However, the Court expressly distinguished alimony from the division of property, and it noted that "Congress amended the Social Security Act by adding a new provision, § 459, to the effect that, notwithstanding any contrary law, federal benefits may be reached to satisfy a legal obligation for child support or alimony." (439 U.S. at 576, 99 S.Ct. at 805.) The "amendments * * * both permit and encourage garnishment of Railroad Retirement Act benefits for the purposes of spousal support * * *." (439 U.S. at 590, 99 S.Ct. at 812.) The Court held that property division in marriage dissolution is not a form of alimony for purposes of the Social Security Act (439 U.S. at 577, 99 S.Ct. at 806), and therefore the trial court was barred from dividing the retirement benefits. (439 U.S. at 590, 99 S.Ct. at 812.) The Court did not hold that the statute barred trial courts from ordering maintenance which could only be paid out of railroad retirement benefits. We hold that the trial court's parenthetical remark, observing that the maintenance would come out of respondent's railroad retirement benefits, is surplus language which does not affect the court's authority to make the maintenance award. We conclude that the award of $269 monthly maintenance, payable to petitioner from 1994 until 2,000, was not improper.

Respondent further objects to the awards of health

insurance and $2,500 in attorney fees to the petitioner. Both parties agreed in open court that respondent would pay $2,500 of petitioner's attorney fees, and respondent never attempted to rescind that agreement in the trial court. We find that respondent has waived this issue for purposes

of appeal. *Shell Oil Co. v. Dept. of Revenue (1983)* 95 Ill.2d 541, 550, 70 Ill.Dec. 191, 449 N.E.2d 65.

Respondent relies on *In re Marriage of Fairchild (1982)*, 110 Ill.App.3d 470, 66 Ill.Dec. 131, 442 N.E.2d 557, to support his contention that the trial court exceeded its authority when it ordered respondent to obtain health insurance for petitioner. In Fairchild, the trial court refused to consider the husband's health and life insurance benefits as marital property for purposes of property division. (110 Ill.App.3d at 472, 66 Ill.Dec. 131, 442 N.E.2d 557.) The appellate court affirmed, holding that the benefits were not property within the meaning of section 503 of the Marriage and Dissolution of Marriage Act. (Ill.Rev.Stat.1981, ch. 40, par. 503; Fairchild, 110 Ill.App.3d at 472, 66 Ill.Dec. 131, 442 N.E.2d 557.) In the case at bar, the trial court did not attempt to evaluate the insurance as property. When petitioner convinced the court that she was unable to obtain adequate health insurance for herself, and respondent admitted that he could obtain coverage for her under his policy, the trial court ordered him to obtain that insurance. We hold that the order was a legitimate exercise of the court's power to award maintenance under section 504 of the Marriage and Dissolution of Marriage Act, Ill.Rev.Stat.1985, ch. 40, par. 504(b).

For the reasons stated above, the judgment of the trial court is affirmed.

AFFIRMED.

McNAMARA and FREEMAN, JJ., concur.

TAB 11

In Re Marriage of Hulstrom, 342 Ill.App.3d 262, 794 N.E. 2d 980 (2003)

342 Ill.App.3d 262 (Ill.App. 2 Dist. 2003)

794 N.E.2d 980, 276 Ill.Dec. 730

In re MARRIAGE OF Everett E. HULSTROM, Petitioner-Appellant,

and

Ila J. Hulstrom, Respondent-Appellee.

No. 2-02-0960.

Court of Appeals of Illinois, Second District.

July 29, 2003.

[794 N.E.2d 981]

Henry S. Dixon, Dixon & Dixon Law Offices, Dixon, for Everett E. Hulstrom.

Louis F. Pignatelli, Patrick J. Liston, Pignatelli, Liston & Mertes, P.C., Rock Falls, for Ila J. Hulstrom.

[794 N.E.2d 982] OPINION

BYRNE, Justice

Petitioner, Everett E. Hulstrom, appeals from the order of the circuit court denying his petition to modify the judgment dissolving the parties' marriage. We reverse as void the portion of the dissolution judgment dividing the marital property, and we remand the cause with directions.

FACTS

On August 19, 1994, the trial court dissolved the parties' 46-year marriage and incorporated their marital settlement agreement into the judgment. At the time of the dissolution, petitioner and respondent, Ila J. Hulstrom, were 67 and 65 years old, respectively, and each was receiving social security benefits. The marital settlement agreement provides in relevant part:

"1. The Social Security paid on behalf of [petitioner] and [respondent] shall be combined monthly and paid to [respondent], where, on the tenth of each month, one-half of the combined Social Security payment shall be deposited by direct deposit from [respondent's] account into an account designated by [petitioner]. To the extent that such Social Security payments to either party are income, and to such an extent that the party who receives the greater amount of Social Security receives income from the party to whom the greatest amount of Social Security is paid, that amount of Social Security shall be income to the receiving party to the extent that it was income to the paying party.

* * *

8. To the fullest extent provided by law, each party waives maintenance now and all times in the future."

On May 24, 2002, petitioner petitioned to modify the portion of the judgment allocating the social security benefits. Petitioner alleged that paragraph 1 of the settlement agreement "purports to distribute a Social Security benefit as a property right when, in fact and in law, it is a support matter." Petitioner alleged that the parties should no longer share their social security benefits because (1) petitioner's income had decreased significantly; (2) his medical expenses had increased due to his failing health; (3) respondent had remarried and was financially secure; and (4) paragraphs 1 and 8 of the settlement agreement were inconsistent.

At a hearing on the petition, petitioner testified to his declining income and deteriorating health, including a form of Parkinson's disease from which he suffers. Petitioner and respondent had each remarried, but respondent did not notify petitioner of her remarriage.

On July 25, 2002, the trial court denied the petition to modify the judgment, finding that the parties had followed the settlement agreement for eight years and had never treated the equal division of social security benefits as maintenance. The court concluded that respondent's remarriage would not end her right to one-half of the couple's benefits because the parties had viewed them as marital property. The court emphasized that the parties considered the equal division of benefits when dividing the remaining marital assets. The court denied petitioner's subsequent motion to reconsider on August 30, 2002, and petitioner timely appealed on September 4, 2002.

ANALYSIS

On appeal, petitioner argues that the trial court erroneously determined that the equal division of the parties' social security benefits was an unmodifiable distribution of marital property, rather than a modifiable **[794 N.E.2d 983]** maintenance obligation that terminated automatically upon respondent's remarriage. Petitioner presents two theories on appeal: (1) because state trial courts lack jurisdiction to order the division of social security benefits in marriage dissolution cases, the marital settlement agreement disposing of the parties' social security benefits may not be enforced; and (2) even if the circuit court had jurisdiction over the issue, the social security benefits qualify as "" rather than " marital property" under the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (see 750 ILCS 5/503(a), 504(a) (West 2000)).

Respondent alternatively contends that (1) the agreement's social

security provision is a valid allocation of marital property rather than a description of petitioner's prospective maintenance obligation and (2) if this court decides that the provision is invalid, a new hearing is necessary for the redistribution of the marital assets.

The issue of whether a state trial court lacks jurisdiction to enforce the provision of a marital settlement agreement dividing social security benefits is a question of first impression in Illinois. However, two other jurisdictions have ruled that a settlement agreement dividing such benefits as marital property is void for violating the anti-alienation provision of the Social Security Act (42 U.S.C. § 407(a) (2000)). *Gentry v. Gentry*, 327 Ark. 266, 938 S.W.2d 231 (1997); *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997). We find these cases to be persuasive and directly on point.

It is well settled that, under the supremacy clause of the United States Constitution, a federal law preempts a conflicting state law and the state law is nullified to the extent that it actually conflicts with federal law. U.S. Const., art. VI; *In re Marriage of Wiseman*, 316 Ill.App.3d 631, 637, 249 Ill.Dec. 935, 737 N.E.2d 325 (2000).

Section 407(a) of the Social Security Act provides as follows:

"(a) The right of any person to any future payment under this subchapter shall not be transferrable or assignable, at law or in equity, and none of the moneys 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 U.S.C. § 407(a) (2000).

The Supreme Court has stated that section 407(a) imposes "a broad bar against the use of any legal process to reach all social security benefits." *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417, 93 S.Ct. 590, 592, 34 L.Ed.2d 608, 612 (1973). In *Philpott*, the Court held that section 407(a) of the Social Security Act, which prohibits the use of "any legal process" to reach "social security benefits," bars all claimants, including a state. *Philpott*, 409 U.S. at 417, 93 S.Ct. at 592, 34 L.Ed.2d at 612.

In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), the Court interpreted section 231m(a) of the Railroad Retirement Act of 1974 (45 U.S.C. § 231m(a) (1976)), which is virtually identical to section 407(a) of the Social Security Act. The statute at issue in *Hisquierdo* provided that, "notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or to other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 45 U.S.C. § 231m(a) (1976). The Court stated that,

[794 N.E.2d 984] by enacting such anti-assignment statutes, Congress has "afforded recipients [protection] from creditors, taxgatherers, and all those who would 'anticipate' the receipt of benefits." *Hisquierdo*, 439 U.S. at 575-76, 99 S.Ct. at 805, 59 L.Ed.2d at 7.

In *Boulter*, the trial court dissolved the parties' 37-year marriage and incorporated a property settlement agreement into the judgment of dissolution. Pursuant to paragraph 4E of the agreement, the parties agreed to pool and divide equally the social security benefits accrued during the marriage. *Boulter*, 113 Nev. at 75, 930 P.2d at 113. When the husband turned 65 years old, he refused to apply for social security benefits, and the wife moved to enforce the agreement. The trial court granted the wife's motion, and the husband appealed.

Relying upon *Philpott* and *Hisquierdo*, the Nevada Supreme Court held that the trial court's incorporation of the property settlement agreement into the divorce decree qualified as state action that had been preempted by section 407(a) of the Social Security Act. The *Boulter* court also quoted with approval the Illinois Appellate Court, which had stated that " ' "[t]he [Social Security Act], consistent with its remedial purpose, provides for the various contingencies of life including the dissolution of marriage. Since the statute itself provides for the equitable distribution of its benefits to * * * divorced spouses, * * * we will not disturb the statutory scheme by suggesting *any* award of *any* part of the actual social security retirement benefits to which respondent may be entitled upon his reaching retirement age." ' " (Emphasis added.) *Boulter*, 113 Nev. at 77, 930 P.2d at 113 quoting, *In re Marriage of Hawkins*, 160 Ill.App.3d 71, 77-78, 111 Ill.Dec. 897, 513 N.E.2d 143 (1987), quoting *In re Marriage of Evans*, 85 Ill.App.3d 260, 263, 40 Ill.Dec. 713, 406 N.E.2d 916 (1980), *rev'd on other grounds*, 85 Ill.2d 523, 55 Ill.Dec. 529, 426 N.E.2d 854 (1981).

The *Boulter* court then ruled that, "[b]ecause the [trial] court was without power to take any action regarding the parties' social security benefits, paragraph 4E [the settlement provision dividing the accrued but unpaid social security benefits] was not properly incorporated into the divorce decree. Accordingly, this court may not sustain the district court order enforcing paragraph 4E of the decree." *Boulter*, 113 Nev. at 78, 930 P.2d at 114.

The wife alternatively asserted that the voluntary nature of the settlement agreement obligated the husband to pay one-half of his social security benefits. In rejecting the wife's argument, the *Boulter* court held that

Congress's clear intent in enacting section 407(a) required the court to "strictly interpret that clause to prohibit voluntary as well as involuntary transfers or assignments." *Boulter*, 113 Nev. at 78, 930 P.2d at 114-15. The court noted:

"Although social security recipients may use the proceeds of

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their social security, after their receipt, to satisfy preexisting obligations [(*United States v. Eggen*, 984 F.2d 848 (7th Cir. 1993))], they may not contract to transfer their unpaid social security benefits. Thus, in contracting to give [the wife] one-half of his benefits before he was eligible to receive them, [the husband] ineffectually 'transferred his right' to the benefits. Because [the husband] and [the wife] attempted to transfer their rights to future benefits in violation of [section 407(a)], the agreement was invalid and neither this court nor the district court may order its enforcement." *Boulter*, 113 Nev. at 78, 930 P.2d at 114.

Under similar facts, the Arkansas Supreme Court reached the same result in *Gentry*. In that case, the parties entered **[794 N.E.2d 985]** into a marital settlement agreement that provided, "[i]n the event that the husband is entitled to Social Security payments, the wife shall be entitled and shall receive one-half of all payments that are made to him." *Gentry*, 327 Ark. at 267, 938 S.W.2d at 232. The husband declined to pay one-half of his benefits when he began receiving them, and the wife filed a petition for a citation of contempt to enforce the agreement. The trial court granted the petition, ruling that the husband owed one-half of both his paid and unpaid benefits.

Citing *Philpott*, *Hisquierdo*, and *Boulter*, the Arkansas Supreme Court held that "state courts are without power to take any action to enforce a private agreement dividing future payments of Social Security when such an agreement violates the [section 407(a)] statutory prohibition against transfer or assignment of future benefits." *Gentry*, 327 Ark. at 269, 938 S.W.2d at 232.

The *Gentry* court noted that Congress had created a statutory exception to the anti-alienation provision of section 407(a) when it enacted section 659(a) of the Social Security Act in 1975. *Gentry*, 327 Ark. at 270, 938 S.W.2d at 233. Section 659(a) makes benefits subject "to legal process * * * to provide child support or make alimony payments." 42 U.S.C. § 659(a) (2000). However, Congress specifically excluded from its definition of alimony any community-property settlement, equitable distribution of property, or other division of property between spouses. 42 U.S.C. § 662(c) (2000). *Gentry* adopted the Rhode Island Supreme Court's interpretation of these sections in stating, " 'Social Security benefits may be reached by a former spouse for alimony or child support but not for property division.' " *Gentry*, 327 Ark. at 270, 938 S.W.2d at 233, quoting *Kirk v. Kirk*, 577 A.2d 976, 980 (R.I.1990). We agree with the Arkansas and Rhode Island courts' interpretation of these sections of the Act.

Therefore, in this case, the section 659(a) alimony exception to the anti-alienation rule of section 407(a) would render the settlement agreement's purported division of social security

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benefits valid only if the parties intended the transfer to be maintenance rather than a property division. See *Gentry*, 327 Ark. at 270, 938 S.W.2d at 233; *Kirk*, 577 A.2d at 980. The child support exception does not apply here because the parties' children are emancipated. Therefore, we must next determine the meaning of paragraph 1 of the agreement.

Interpreting a marital settlement agreement is a matter of contract construction; the court seeks to effectuate the parties' intent. *In re Marriage of Agustsson*, 223 Ill.App.3d 510, 518, 165 Ill.Dec. 811, 585 N.E.2d 207 (1992). Ordinarily, the language the parties use is the best indication of their intent. *In re Marriage of Frain*, 258 Ill.App.3d 475, 478, 196 Ill.Dec. 588, 630 N.E.2d 523 (1994). When contract terminology is unambiguous, it must be given its plain and ordinary meaning. *Frain*, 258 Ill.App.3d at 478, 196 Ill.Dec. 588, 630 N.E.2d 523. However, where the language is ambiguous, the trial court may receive parol evidence to decide what the parties intended. *Pepper Construction Co. v. Transcontinental Insurance Co.*, 285 Ill.App.3d 573, 576, 220 Ill.Dec. 707, 673 N.E.2d 1128 (1996). Whether an agreement is ambiguous is a question of law. *In re Marriage of Wenc*, 294 Ill.App.3d 239, 243, 228 Ill.Dec. 552, 689 N.E.2d 424 (1998); *Pepper Construction Co.*, 285 Ill.App.3d at 575-76, 220 Ill.Dec. 707, 673 N.E.2d 1128.

We agree with the trial court that the parties treated the social security benefits as marital property rather than maintenance..

[794 N.E.2d 986] Paragraph 1 of the settlement agreement sets forth a procedure for pooling and dividing the benefits, and paragraphs 2 through 7 allocate assets that undisputedly qualify as marital property, including the marital residence, rental property, lawn mowers, automobiles, bicycles, tools, and checking and savings accounts. 8 provides that the parties waive any claims to prospective maintenance. If we were to conclude that the division of the social security benefits qualified as maintenance, paragraph 1 would directly contradict paragraph 8. The parties did not expressly identify the social security benefits as marital property, but such an interpretation reconciles paragraphs 1 and 8.

We conclude that the plain meaning of the unambiguous language of the settlement agreement indicates that the parties intended the social security benefits to be marital property rather than maintenance. Therefore, we conclude that the anti-alienation rule of section 407(a) of the Social Security Act invalidates the agreement provision purporting to pool and divide equally the parties' future social security payments. Parenthetically, we note that section 407(a) prohibits the transfer of the right of any person to future payment of social security benefits, including "moneys paid or payable" under the Act. Therefore, section 407(a) applies equally to cases like *Boulter* and *Gentry*, where fewer than both parties had begun receiving benefits at the time of the dissolution, and this case, where both parties were receiving benefits when they entered into the agreement.

Respondent next contends that, even if the settlement agreement was incorporated into the judgment in error, we should nevertheless enforce it because it is merely voidable and not void, and therefore not subject to petitioner's collateral attack. We disagree.

The doctrine of *res judicata*, or estoppel by judgment, holds that " 'a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, it constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.' " *Miller v. Balfour*, 303 Ill.App.3d 209, 214-15, 236 Ill.Dec. 632, 707 N.E.2d 759 (1999), quoting *Sobina v. Busby*, 62 Ill.App.2d 1, 17, 210 N.E.2d 769 (1965).

However, the doctrine of *res judicata* does not apply where a judgment is void, and void judgments are subject to collateral attack for lack of jurisdiction or fraud. Jurisdiction involves not only the power to hear and determine a given case but also the power to grant the particular relief requested, and every act of the court beyond its jurisdiction is void. *Miller*, 303 Ill.App.3d at 215, 236 Ill.Dec. 632, 707 N.E.2d 759. A voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack. *People v. Davis*, 156 Ill.2d 149, 155-56, 189 Ill.Dec. 49, 619 N.E.2d 750 (1993). Petitioner's action is a collateral attack on the judgment because it is an attempt to impeach the judgment in an action other than that in which the judgment was entered. See *Juszczyk v. Flores*, 334 Ill.App.3d 122, 126, 267 Ill.Dec. 651, 777 N.E.2d 454 (2002).

Our supreme court discussed the legal distinction between void and voidable judgments in *In re Marriage of Mitchell*, 181 Ill.2d 169, 229 Ill.Dec. 508, 692 N.E.2d 281 (1998). In *Mitchell*, the parties entered into a marital settlement agreement, which set forth the husband's child support obligation in terms of a percentage of income, rather than an exact dollar amount as required by the applicable statute. Pursuant **[794 N.E.2d 987]** to the agreement, the parties revisited the child support issue annually. *Mitchell*, 181 Ill.2d at 171, 229 Ill.Dec. 508, 692 N.E.2d 281. Six years later, at a hearing on another issue, the trial court *sua sponte* modified the child support award after concluding that it was void and unenforceable for violating the statute. The wife appealed.

On appeal, the husband argued that the trial court lost its jurisdiction by entering the judgment and subsequent orders that expressed the child support award in terms of a percentage of his income. The supreme court agreed that the trial court had erred. However, the supreme court cited the traditional rule that "[o]nce a court has acquired jurisdiction, an order will not be rendered void merely because of an error or impropriety in the issuing court's determination of the law." *Mitchell*, 181 Ill.2d at 174, 229 Ill.Dec. 508, 692 N.E.2d 281. Acknowledging that a judgment may be attacked collaterally as void if there is a total lack of

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jurisdiction, the *Mitchell* court held that the erroneous child support determination was merely voidable, and not void, because the trial court had subject matter jurisdiction over the parties, the dissolution proceedings, and the child support award. *Mitchell*, 181 Ill.2d at 175, 229 Ill.Dec. 508, 692 N.E.2d 281.

The *Mitchell* court also addressed the related issue of whether the trial court's subject matter jurisdiction was defective under the Restatement (Second) of Judgments. *Mitchell*, 181 Ill.2d at 175, 229 Ill.Dec. 508, 692 N.E.2d 281. Section 12 of the Restatement addresses the *res judicata* effect of a judgment on an alleged defect in the subject matter jurisdiction of the court rendering the judgment. Section 12 of the Restatement provides as follows:

"When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction." (Emphasis added.) Restatement (Second) of Judgments § 12 (1982).

Applying these criteria, the *Mitchell* court again

concluded that the contested child support order was voidable rather than void, and hence not subject to collateral attack. The court thus decided that, even if the defect in the child support order pertained to subject matter jurisdiction, section 12 of the Restatement would preclude a collateral attack on the order. *Mitchell,* 181 Ill.2d at 176, 229 Ill.Dec. 508, 692 N.E.2d 281.

As in *Mitchell,* the parties in this case had the opportunity to bargain for, and to benefit from, the terms of the settlement agreement, including the division of prospective social security benefits. The trial court had jurisdiction over the parties and the dissolution proceeding in general, and the court also had the authority to incorporate a marital settlement agreement into the judgment. However,

[794 N.E.2d 988] this case is otherwise distinguishable from *Mitchell.*

In *Mitchell,* the Marriage Act authorized the trial court to enter the child support order; but in this case, the property division section of the Marriage Act is preempted by the Social Security Act, which bars the transfer of social

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security benefits. Because the trial court in this case lacked jurisdiction to divide the parties' social security benefits, the traditional rule governing void and voidable judgments, as restated in *Mitchell,* indicates that the portion of the judgment allocating the marital property is void.

This conclusion is supported by an analysis of section 12 of the Restatement, which the *Mitchell* court cited with approval but declined to adopt expressly. *Mitchell,* 181 Ill.2d at 177, 229 Ill.Dec. 508, 692 N.E.2d 281. The marital property division " 'substantially infringe[s] the authority of another tribunal or agency of government,' " in this case, the federal government. *Mitchell,* 181 Ill.2d at 176, 229 Ill.Dec. 508, 692 N.E.2d 281, quoting Restatement (Second) of Judgments § 12 (1982). We conclude that the portion of the judgment incorporating the settlement agreement is void rather than voidable. We emphasize that the remainder of the judgment is valid.

After concluding that the trial courts lacked jurisdiction to enforce the agreements dividing the parties' social security benefits, the supreme courts in *Boulter* and *Gentry* reversed the judgments and remanded the causes for further proceedings. *Gentry,* 327 Ark. at 271, 938 S.W.2d at 233; *Boulter,* 113 Nev. at 80, 930 P.2d at 115. In *Boulter,* the Nevada Supreme Court expressly directed the trial court to reconsider the property distribution. *Boulter,* 113 Nev. at 80, 930 P.2d at 115. We conclude that a similar reversal and remand is appropriate here.

We reject respondent's argument that we must enforce the erroneous property division because the parties have relied upon it since the marriage was dissolved in August 1994. The doctrine of equitable estoppel does not preclude petitioner from attacking the validity of the marital property division because it is void. Equitable estoppel arises when a party, by his words or conduct, intentionally or through culpable negligence, induces reasonable reliance by another on his representations and thus leads the other, as a result of that reliance, to change his position to his detriment. *In re Marriage of Schlam,* 271 Ill.App.3d 788, 794, 207 Ill.Dec. 889, 648 N.E.2d 345 (1995). In *Schlam,* this court held that the wife was equitably estopped from asserting that the trial court lacked subject matter jurisdiction to enter a settlement agreement regarding child support. However, *Schlam* is distinguishable from this case, where the division of social security benefits implicates the supremacy clause and the Social Security Act.

We note that the related doctrine of estoppel by remarriage also does not apply here. The rule provides that parties to a dissolution proceeding may be estopped from asserting that the trial court lacked either personal or subject matter jurisdiction. It has long been held in Illinois that the acceptance of benefits of a dissolution judgment may "estop" a party from subsequently challenging the validity of that judgment. See, *e.g.,Schlam,* 271 Ill.App.3d at 793, 207 Ill.Dec. 889, 648 N.E.2d 345. Estoppel by remarriage is distinct from traditional notions of

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equitable estoppel, and the party supporting the enforcement of the dissolution judgment need not prove his or her detrimental reliance upon the judgment. *Schlam,* 271 Ill.App.3d at 793, 207 Ill.Dec. 889, 648 N.E.2d 345. The rule does not apply here because (1) petitioner does not assert that the *entire*

[794 N.E.2d 989] dissolution judgment is void and (2) the of the parties' marriage does not draw its validity from the property division. See *Schlam,* 271 Ill.App.3d at 794, 207 Ill.Dec. 889, 648 N.E.2d 345.

In conclusion, we hold, in agreement with *Boulter* and *Gentry,* that a state court lacks jurisdiction to enforce a marital settlement agreement that divides future payments of social security when such an agreement violates section 407(a) of the Social Security Act, which statutorily prohibits the transfer or assignment of future benefits. Because the marital settlement agreement in this case transferred the parties' future social security payments as marital property rather than as maintenance or child support, the portion of the judgment dividing the marital assets is void for violating section 407(a) of the Social Security Act and the trial court lacked jurisdiction

to enforce it.

The trial court generally had jurisdiction over the parties and the dissolution proceedings, but the trial court's incorporation of the defective settlement agreement into the judgment is void for lack of subject matter jurisdiction over the social security benefits. In this case, the doctrines of *res judicata,* equitable estoppel, and estoppel by remarriage do not bar petitioner's challenge to the marital property division.

On remand, we direct the trial court to reconsider all of the marital settlement issues consistent with the Marriage Act and this opinion. We acknowledge that the passage of time and the parties' adherence to the original defective judgment will complicate an equitable division of the marital property, but we conclude that a remand is nevertheless necessary because the original property division is void and an affirmance would perpetuate the error contrary to the mandate of the Social Security Act.

Finally, the parties' use and consumption of the marital property during the past eight years would make a redistribution of the entire marital estate nearly unworkable. To avoid this dilemma, the parties may decide to renegotiate the division of prospective social security benefits by characterizing them as maintenance (see *Gentry,* 327 Ark. at 270, 938 S.W.2d at 233) and leaving the remainder of the judgment undisturbed. However, the parties have remarried, and section 510(c) of the Marriage Act provides that the obligation to pay maintenance ordinarily terminates upon the remarriage of the party receiving maintenance. See 750 ILCS 5/510(c) (West 2000). Therefore, the parties would be required to draft "a written agreement set forth in the

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judgment or otherwise approved by the court" if they wish to devise a prospective maintenance schedule regarding the benefits. See 750 ILCS 5/510(c) (West 2000). Such an agreement should also consider the tax implications raised by an award of maintenance. See 750 ILCS 5/504(a)(9) (West 2000).

We further note that, if the parties cannot reach agreement on remand, the trial court may consider the parties' accrued but unpaid social security benefits when redistributing all of the marital assets equitably. See generally *In re Marriage of Crook,* 334 Ill.App.3d 377, 384-85, 268 Ill.Dec. 323, 778 N.E.2d 309 (2002), citing *In re Marriage of Boyer,* 538 N.W.2d 293, 296 (Iowa 1995).

For the preceding reasons, the portion of the judgment dividing the parties' marital property is reversed and the cause is remanded with directions.

Reversed and remanded with directions.

HUTCHINSON, P.J., and KAPALA, J., concur.

TAB 12

Lanier v. Lanier, 278 Ga. 881, 608 S.E. 2d 213 (2005)

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278 Ga. 881 (Ga. 2005)

608 S.E.2d 213

LANIER

v.

LANIER.

No. S04F1710.

Supreme Court of Georgia.

January 24, 2005

Kenneth Paul Johnson, Savannah, for Appellant.

Gilbert Laird Stacy, Savannah, for Appellee.

THOMPSON, Justice.

After a bench trial, the trial court entered a final judgment and decree of divorce, terminating the 31-year marriage between appellee Sylvia Lanier and appellant Oscar Lanier, and awarding alimony to Ms. Lanier. In this appeal we are called upon to decide an issue of first impression in Georgia: whether certain retirement benefits Mr. Lanier expects to receive under the Railroad Retirement Act of 1974, 45 USC § 231 et seq., as amended in 1983 ("the Act"), may be considered as income to the recipient, and thus a source of alimony payments. We hold that they may, and we affirm the judgment below.

1. The trial court awarded Ms. Lanier a lump sum alimony payment of $25,000, plus $400 per month as permanent alimony, until she "dies, remarries, or cohabits with another person as contemplated by OCGA § 19-6-19(b), or [Mr. Lanier] begins to receive retirement benefits under either the [608 S.E.2d 214] ILA [International Longshoremen's] Pension and Welfare Plan [1] or the Railroad Retirement Act, whichever first occurs." Another provision relating to Mr. Lanier's railroad retirement benefits awarded Ms. Lanier the sum of $869.50 per month "in the form of alimony" based on Mr. Lanier's eligibility for benefits under the Act, "which payments would not commence until the sixteenth month after Mr. Lanier's initial receipt of such benefits." (Half of Mr. Lanier's expected monthly benefits under the Act amounts to $877.50.)

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The evidence established that at age 62, Mr. Lanier will be eligible to receive railroad retirement benefits under the Act. The Act provides for two tiers of benefits which resemble both a private pension program and a social welfare plan. Tier I benefits are equivalent to those the employee would receive if covered by the Social Security Act, 42 USC § 401 et seq. These benefits are not considered marital property subject to division in a divorce action. See 45 USC § 231m (a). Tier II benefits are supplemental annuities which, like a private pension plan, are tied to earnings and career service, and which are subject to distribution as marital property. See 45 USC § 231m (b)(2); *Pearson v. Pearson*, 200 W.Va. 139(C), 488 S.E.2d 414 (1997). Mr. Lanier expects to receive $1,469 per month in Tier I benefits, and $286 per month in Tier II benefits; a monthly total of $1,755.

Mr. Lanier asserts that under *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), the trial court was without authority to consider his Tier I benefits when calculating alimony. *Hisquierdo*, however, does not preclude such an award. In that case, the parties "waived their claims to spousal support," 439 U.S. at 579, 99 S.Ct. 802, and the sole issue before the Court was whether a state court could consider an interest in Tier I benefits under the Act for purposes of dividing community property in a divorce proceeding. [2] Although the Court ruled that distribution of Tier I benefits cannot be considered marital property subject to equitable division, it made a distinction between consideration of those benefits for purposes of spousal support. In so doing, *Hisquierdo* recognized that a 1977 amendment to the Social Security Act expressly overrides § 231m, in that the amendment "permit[s] and encourage[s] garnishment of Railroad Retirement Act benefits for the purposes of spousal support, and those benefits will be claimed by those who are in need." Id. at 590(IV), 99 S.Ct. 802. In contrast, the retirement benefits may not be reached for community property claims. Id. at 587 (IIIA), 99 S.Ct. 802.

Other courts have interpreted the Act in a similar manner. In *In re Marriage of Zappanti*, 80 P.3d 889 (Colo.App.2003), the court followed *Hisquierdo* by holding that Tier I benefits cannot be classified as marital property subject to equitable distribution, but further ruled that the same funds can be "an income source to be considered in determining [the payee's] child support obligation." Id. at 895(III). See also *Talutto v. Talutto*, 375 Pa.Super. 302, 544 A.2d 482 (1988) (while payee's railroad retirement benefits were specifically excluded

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by the Act for purposes of property division upon divorce, the trial court considered the benefits as income for alimony purposes); *Pearson v. Pearson*, supra (*Hisquierdo* only precludes Tier I benefits from being considered as divisible marital property; it does not preclude the use of Tier I benefits to pay alimony); *In re Marriage of Flory*, 171 Ill.App.3d 822, 121 Ill.Dec. 701, 525 N.E.2d 1008 (1988) (the Social Security Act contains

an express exception to the Railroad Retirement Act's anti-assignability clause with regard to a legal obligation to make alimony payments, 42 USC § 659(a)); *Frost v. Frost,* 581 S.W.2d 582, 583 (Ky.Ct.App.1979)

[608 S.E.2d 215]*(Hisquierdo* "made clear that while a pensioner's rights cannot be directly assigned, it is permissible to make awards of maintenance and child support which take account of those funds as constituting all or part of the obligor's ability to pay").

In the context of state family law, the Supremacy Clause demands that state law be overridden only when it does "major damage to clear and substantial federal interests.... The pertinent questions are whether the right conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." (Punctuation omitted.) *McCarty v. McCarty,* 453 U.S. 210, 220, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). As the foregoing authority illustrates, Mr. Lanier's railroad retirement funds may be considered as a source of income for purposes of assessing alimony, and such ruling does not contravene federal law.

2. We also reject Mr. Lanier's assertion that the trial court circumvented the nondivisible nature of his Tier I benefits by awarding alimony in an amount essentially equivalent to half his anticipated future compensation. Here, the trial court expressly acknowledged that Tier I benefits are nondivisible as marital property, and it did not consider those funds in equitably dividing the marital assets. Instead, it considered Mr. Lanier's expectation in receiving his railroad retirement benefits as a future source of income in calculating his alimony obligation. The court carefully considered Ms. Lanier's needs and Mr. Lanier's ability to pay, finding that $400 per month in permanent alimony was appropriate until such time as Mr. Lanier would receive his ILA pension, or 16 months after he begins receiving his railroad retirement benefits. It is of no consequence that the court did not set an event (such as death) to terminate the alimony derived from the income from railroad retirement benefits. The termination of alimony is controlled by OCGA § 19-6-5(b), which provides: "All obligations for permanent alimony, however created, the time for performance of which has not arrived, shall terminate upon remarriage of the party to whom the obligations are owed unless otherwise provided." "This statute applies to alimony obligations created by verdict." *Metzler v. Metzler,* 267 Ga. 892(1), 485 S.E.2d 459 (1997). For the foregoing reasons, we reject the

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argument that the trial court circumvented federal law in calculating the award of alimony.

3. Ms. Lanier filed a pretrial motion seeking permission to cross-examine two of her own witnesses to show that Mr. Lanier fraudulently conveyed marital assets to his close friend, Tommie Blackshear, and to his sister, Judy Mincey, in anticipation of the divorce. The trial court allowed the cross-examination.

Trial courts are clothed with discretion to permit cross-examination of one's own witness "when, from the conduct of the witness or other reason, justice shall require it." OCGA § 24-9-63; *Spencer v. State,* 260 Ga. 640(8), 398 S.E.2d 179 (1990) (a trial court retains discretion to allow leading questions on direct examination). Reversible error only occurs when trial courts abuse that discretion to the extent that there is prejudice and injury. *Blue Cross of Ga. v. Whatley,* 180 Ga.App. 93(7), 348 S.E.2d 459 (1986). Moreover, such an abuse of discretion will not constitute reversible error " 'unless palpably unfair and prejudicial to the complaining party.' [Cits.]" *Clary Appliance &c. Center v. Butler,* 139 Ga.App. 233, 235(2), 228 S.E.2d 211 (1976).

The trial court allowed Ms. Lanier to cross-examine Blackshear and Mincey to show that certain financial transactions (repayment of a $50,000 loan to Blackshear on the day the complaint was filed, and what appeared to be a sham sale of a time-share to Mincey) in anticipation of the divorce were done to liquidate marital assets and to defeat the equitable distribution of those assets. This is exactly the type of situation that OCGA § 24-9-63 contemplates. In fact, the trial court as the trier of fact concluded that the financial transactions with Blackshear and Mincey were "a sham and fraud upon the court and the plaintiff." Under the circumstances, we agree that deviation from the **[608 S.E.2d 216]** usual rules of evidence was authorized to achieve the ends of justice.

4. At trial, Ms. Lanier offered Mr. Lanier's tax returns for 1997 and 1998 into evidence. [3] Mr. Lanier objected on the ground that the evidence impermissibly placed his character in evidence because the information contained in the returns may tend to impeach his trial testimony. The court allowed the questioning, noting that the tax returns may bear on Ms. Lanier's entitlement to alimony and Mr. Lanier's ability to pay; however, Mr. Lanier invoked the Fifth Amendment and refused to answer any questions relating to those returns. We find neither harm, nor an abuse of the trial court's discretion in admitting the tax returns. See generally *Clifton v. Clifton,* 249 Ga.

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831(1), 294 S.E.2d 518 (1982) (evidence which shows that disbursements by husband exceeded the amount he claimed as income on his tax return is admissible to aid the jury in determining the amount of alimony to be awarded); *Heidt v. Heidt,* 225 Ga. 719, 171 S.E.2d 270 (1969) (tax returns may support a jury's finding of substantial increase in ability to pay alimony); *Kitchin v. Kitchin,* 219 Ga. 417, 133 S.E.2d 880 (1) (1963) (jury

chose to believe income tax returns of one of the parties in opposition to conflicting sworn testimony); *Seagraves v. Seagraves*, 193 Ga. 280(1), 18 S.E.2d 460 (1942) (tax returns admissible to show amount and value of property admitted by taxpayer to be his).

Judgment affirmed.

All the Justices concur.

Notes:

[1] Mr. Lanier is eligible to receive retirement benefits as a result of his former employment with CSX Railroad, as well as from his present work as a longshoreman. His ILA pension will amount to $729 per month; upon his receipt of those benefits, Ms. Lanier will be entitled to receive $546.50 from that fund in the nature of a property division.

[2] The *Hisquierdo* Court explained the distinction between the two tiers of benefits provided under the Act: Tier I benefits are equivalent to those the employee would receive if covered by the Social Security Act, while Tier II benefits are supplemental annuities which are tied to earnings and career service.

[3] Mr. Lanier's tax returns for those years show that the parties were "married but filing separate returns."

TAB 13

In re Marriage of Mikesell, 276 Mont. 403, 916 P.2d 740 (1996)

Page 403

276 Mont. 403 (Mont. 1996)

916 P.2d 740

In re the MARRIAGE OF Carol L. MIKESELL, Petitioner and Respondent, and Laurence R. Mikesell, Respondent and Appellant.

No. 95-393.

Supreme Court of Montana.

May 6, 1996

Submitted on Briefs Jan. 25, 1996.

APPEAL FROM: District Court of the Fourth Judicial District,In and for the County of Missoula,The Honorable John S. Henson, Judge presiding.

[916 P.2d 741]

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Terry G. Sehestedt, Missoula, for Appellant.

Clinton H. Kammerer, Missoula, for Respondent.

GRAY, Justice.

Laurence Mikesell (Laurence) appeals from the opinion and order entered by the Fourth Judicial District Court, Missoula County, empowering the Social Security Administration (SSA) to garnish his social security benefits for delinquent child support and maintenance payments due Carol Mikesell (Carol) pursuant to their dissolution decree. Addressing only a portion of the order, we reverse.

The sole issue on appeal is whether the District Court erred in concluding that social security benefits may be garnished for unpaid maintenance accruing after a corresponding child support obligation terminates, but remains unpaid.

Laurence and Carol married on December 17, 1965, in Missoula, Montana. Their one child, Teddi, was born in 1973. In 1991, Carol petitioned for dissolution of the marriage and, after Laurence failed to appear or answer, the District Court entered his default and a final

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dissolution decree. Laurence moved to set aside the decree entered [916 P.2d 742] on his default, the District Court denied the motion and Laurence appealed. We affirmed in *In re Marriage of Mikesell (1993)*, 257 Mont. 482, 850 P.2d 294.

The final decree designated Carol as Teddi's primary residential parent while Teddi completed high school and required Laurence to pay $250 per month child support for that seven-month period. It also required him to pay Carol $500 per month maintenance for five years. Laurence did not make any of the child support or maintenance payments.

In 1995, Carol moved the District Court for an order determining child support and maintenance arrearages. Laurence responded by admitting that Carol's calculations of the arrearage amounts were correct. The District Court entered an order determining child support arrearages of $1,750 and maintenance arrearages of $21,000 through March of 1995, for a total amount due Carol of $22,750, plus interest.

Carol subsequently requested the District Court to issue an order directing the SSA to withhold the total delinquent child support and maintenance amounts from Laurence's social security benefits. Laurence contended that his benefits could be garnished only for maintenance which accrued during the seven months of court-ordered child support while Carol was Teddi's custodial parent. The District Court granted Carol's request and empowered the SSA to withhold the total amount of unpaid child support and maintenance. Laurence appeals.

Did the District Court err in concluding that social security benefits may be garnished for unpaid maintenance accruing after a corresponding child support obligation terminates, but remains unpaid?

We clarify at the outset that Laurence does not challenge the District Court's order insofar as it relates to garnishment of his social security benefits for the seven months of child support and for the seven months of maintenance which became due during the time Carol was Teddi's residential custodian. Thus, we do not address that portion of the District Court's order authorizing garnishment of Laurence's social security benefits for child support in the amount of $1,750 ($250 X 7) and maintenance in the amount of $3,500 ($500 X 7).

Generally, social security benefits are exempt from "execution, levy, attachment, garnishment, or other legal process...." 42 U.S.C. § 407(a). The statute "imposes a broad bar against the use of any legal

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process to reach all social security benefits." *Dean v. Fred's Towing (1990)*, 245 Mont. 366, 371, 801 P.2d 579, 582 (citing *Philpott v. Essex County Welfare Bd. (1973)*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608). However,

legal process brought for the enforcement of a party's legal obligations to provide child support or make maintenance payments is a specific exception to the broad exemption from garnishment provided to social security benefits by 42 U.S.C. § 407. 42 U.S.C. § 659. Section 659 does not create a statutory right to relief via garnishment; it merely removes the obstruction of sovereign immunity from a garnishment proceeding otherwise authorized by state law. See *Williamson v. Williamson (1981)*, 247 Ga. 260, 275 S.E.2d 42, 45, cert. denied, 454 U.S. 1097, 102 S.Ct. 669, 70 L.Ed.2d 638.

In Montana, both property exempt from execution and specific exceptions to those exemptions are contained in § 25-13-608, MCA. Subsection (1) of the statute exempts federal social security benefits to which the judgment debtor is entitled from execution; subsection (2) provides in pertinent part:

(2) Veterans' and social security legislation benefits based upon remuneration for employment, as defined in 42 U.S.C. 662(f), are not exempt from execution if the debt for which execution is levied is for:

(a) child support; or

(b) maintenance to be paid to a spouse or former spouse if the spouse or former spouse is the custodial parent of a child for whom child support is owed or owing and the judgment debtor is the parent of the child.

Section 25-13-608, MCA.

The District Court concluded that § 25-13-608(2)(b), MCA, permits social security benefits to be garnished for all unpaid maintenance if child support amounts remain **[916 P.2d 743]** owing. In doing so, the court rejected Laurence's argument that the statute does not authorize garnishment for maintenance which became owing after Carol ceased to be Teddi's custodian. We review a district court's conclusion of law to determine whether it is correct. *Carbon County v. Union Reserve Coal Co. (1995)*, 271 Mont. 459, 469, 898 P.2d 680, 686 (citation omitted).

The resolution of the issue before us rests on the proper interpretation of § 25-13-608(2)(b), MCA. In construing a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been

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omitted or to omit what has been inserted." Section 1-2-101, MCA. The intention of the legislature must be pursued. Section 1-2-102, MCA. If the language of the statute is clear and unambiguous, it requires no further interpretation; we will not resort to other means of interpretation unless the legislature's intent cannot be determined from the plain words of the statute. *Clarke v. Massey (1995)*, 271 Mont. 412, 416, 897 P.2d 1085, 1088 (citation omitted).

Under § 25-13-608(2)(b), MCA, social security benefits can be garnished for maintenance to be paid to a spouse or former spouse under the following three conditions: 1) the spouse or former spouse is the custodial parent of a child; 2) child support is owed or owing for that child; and 3) the judgment debtor is the parent of the child for whom child support is owed or owing. We address the conditions in reverse order.

The third condition, that the judgment debtor be the parent, is clear and unambiguous. Moreover, that Laurence satisfies this condition is not in dispute.

The second condition, that child support is owed or owing, provided the basis for the District Court's conclusion that Laurence's social security benefits could be garnished for the entire amount of unpaid maintenance. "Owed" is defined as "[t]o be bound to do ... something, especially to pay a debt;" "owing" means "[u]npaid." Black's Law Dictionary 1105 (6th ed. 1990). This clear and unambiguous condition also is satisfied here by the $1,750 in court-ordered child support which Laurence concedes remains unpaid.

The first condition contained in § 25-13-608(2)(b), MCA, limits garnishment of social security benefits for maintenance to maintenance to be paid to a former spouse who "is" the custodial parent of the child for whom child support is owed. The language of the statute clearly and unambiguously requires the former spouse to be the custodial parent during the period the maintenance to be paid, and for which social security benefits can be garnished, accrues.

In interpreting statutes, we must give language its plain meaning. *Stansbury v. Lin (1993)*, 257 Mont. 245, 249, 848 P.2d 509, 511 (citation omitted). Moreover, we cannot properly interpret a statute so as to omit any portion thereof. See § 1-2-101, MCA. Reading all portions of the statute at issue together, we conclude that § 25-13-608(2)(b), MCA, authorizes garnishment of a parent judgment debtor's social security benefits for maintenance to the extent that the maintenance is or was to be paid to the former spouse while the

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former spouse was the custodial parent of the child to whom child support is due and owing.

In this case, child support for Teddi from Laurence was ordered in 1991 for a seven-month period. None of that child support was paid and it remains owed and owing under § 25-13-608(2)(b), MCA. Maintenance from Laurence to Carol also was ordered in 1991, but for a period of five years; like the child support, none of the maintenance was paid. However, Carol was Teddi's custodial parent for only seven months of the period during which maintenance was to be paid to her. Thus,

the three conditions under which social security benefits may be garnished for maintenance pursuant to § 25-13-608(2)(b), MCA, were satisfied only during the seven-month period for which Carol was Teddi's custodial parent. After Carol was no longer Teddi's custodial parent, the first condition of § 25-13-608(2)(b), MCA, for garnishment of social security benefits for maintenance--that the maintenance accrue while the former spouse is the custodial parent--was no longer satisfied.

]916 P.2d 744[We conclude that Laurence's social security benefits can be garnished for maintenance only for the amount of maintenance which accrued during the period that Carol was Teddi's custodial parent. We hold, therefore, that the District Court erred in concluding that social security benefits are subject to garnishment for all maintenance that accrues while an unpaid child support obligation exists.

Reversed and remanded for the entry of an order consistent with this opinion.

TURNAGE, C.J., and HUNT, ERDMANN and NELSON, JJ., concur.

TAB 14

In Re Marriage of Triggs, No. 28469-1-III, Court of Appeals Div. 3, (2011)

In re the Marriage of: JUDITH KAY TRIGGS, Respondent,

v.

MICHAEL KEVIN TRIGGS, Appellant.

No. 28489-1-III

Court of Appeals of Washington, Division 3

August 25, 2011

UNPUBLISHED OPINION

Siddoway, J.

Michael Triggs appeals the division of assets, order of maintenance, and award of attorney fees determined in the dissolution of his 34-year marriage to Judith Triggs. He identifies two small errors in the trial court's property distribution decision that are too inconsequential to require reversal. We agree with his contention that the trial court's award of attorney fees, on the existing record, was unsupported. We reject his other assignments of error.

We vacate the award of fees to Judith Triggs, otherwise affirm, and remand for the trial court's further consideration of any award of trial fees and costs.

FACTS AND PROCEDURAL BACKGROUND

Michael Triggs and Judith Triggs separated in January 2008 after almost 34 years of marriage. Judith[1] petitioned for dissolution in February 2008 and the trial took place 17 months later, in July 2009.

At the time of trial, Judith was 63 and Michael was 57. Both were working full time and had worked full time for most of the marriage; Judith had given up outside employment for 12 years, to be at home with her children until they entered grade school. Judith's earned income at the time of the dissolution proceedings ($3, 600 gross per month) was less than half the income then earned by Michael ($7, 700 gross per month). The parties acquired significant assets during their marriage including the family home, several retirement accounts, and bank accounts at issue on appeal.

Judith was represented by counsel at the dissolution trial and Michael appeared pro se. At the outset of proceedings, many exhibits were admitted without objection, including most of the contents of a binder of 38 financial exhibits offered by Judith that was marked in its entirety as exhibit 2; the account statements, tax returns, and other records contained in the exhibit were referred to as exhibits 2.1 through 2.38. Also offered by Judith were her exhibits 3 and 13: spreadsheets setting forth her summary of the parties' community assets and their values. Exhibits 3 and 13 were offered "for illustrative purposes only" and were admitted on that basis. Report of Proceedings (RP) at 6, 74. The trial court explained the purpose of the spreadsheets to Michael, who had not offered any corresponding summary:

[T]ypically one or the other attorney or both of them will prepare spreadsheets like this just so we have something to work from. And then people go through and they say, well, this number should be something different. It[ ] just gives me something to work with, rather than trying to write it down.

RP at 9-10. Following admission of the agreed exhibits, Judith's lawyer told the trial court that Michael had provided updated numbers for four assets included on the spreadsheets (three retirement accounts, referred to on the spreadsheets as Vanguard, Novations, and Tradewind; and a stock, Nuvotec). The following colloquy occurred:

[TRIAL COURT]: Well, before you read anything, Mr. Kennedy, [2] this is the husband's position or are you agreeing that these are the correct numbers you're about to give?

MR. KENNEDY: We're agreeing it's the correct number provided we get documentation.

Vanguard as of July 9th—and we'll make these number changes at noon—is 281, 477.

[TRIAL COURT]: Okay.

MR. KENNEDY: Novations is $102, 054.

Tradewind 401K is $28, 207.

And the last item we have is [Nuvotec] stock, which evidently is a penny stock, worth just a little under $20.

[MICHAEL]: I have a certificate here for the stock if you want to see it.

[TRIAL COURT]: You mean, however many shares, total value $20?

MR. KENNEDY: Correct.

[MICHAEL]: Penny stock.

[TRIAL COURT]: Okay. So three is admitted for illustrative purposes.

Any other preliminary matters, Mr. Kennedy?

MR. KENNEDY: I don't believe so, Your Honor.

RP at 10-11. Michael did not agree or disagree, on the

Even accepting Michael's position that the foregoing trial proceedings fall short of substantive evidence of the higher values reflected on the illustrative exhibits, answers given by Michael when later questioned by the court provide the evidence needed to support the values found by the court. With exhibits 3 and 13 in evidence, Michael responded to questions from the court as follows:

[THE COURT:] . . . [A]re there any other assets that you believe that exist that have not been somehow accounted for in this process?

[MICHAEL]: No, Your Honor.

RP at 163, and thereafter,

[THE COURT]: . . . .

So is there anything else that goes to the issue of either what things are worth or how they should be divided, factual information that you feel I should have that has not previously been supplied to me?

[MICHAEL]: Would that be like her saying the Ford Contour is worth $1, 430 and I sold it for 1, 000?

[THE COURT]: That would be exactly like that.

[MICHAEL]: Then the loan that I forgave with my daughter, it was 9, 000, it wasn't 10, 000, it was a $9, 000 a balance, it was an agreement that she's basically free and clear of that.

. . . .

[THE COURT]: Any other values that she has on any of the items that you think should be something different, other than what you've already—I mean, we've already talked about household goods.

[MICHAEL]: We've already discounted that $3, 000 IRA [individual retirement account] that I supposedly had, correct?

[THE COURT]: Right. That was one that she had.

[MICHAEL]: No. Well, they said that I had one.

[THE COURT]: So that's—.

[MICHAEL]: Husband's IRA. I didn't have one. I don't have one.

[THE COURT]: It's not on their latest sheet here.

[MICHAEL]: Is that the one we moved out? Okay, I'm done, Your Honor.

[THE COURT]: Okay.

RP at 163-66. Viewing this testimony in the light most favorable to Judith, substantial evidence supported accepting the retirement accounts' values reflected on her exhibits 3 and 13.

In addition, with respect to the Vanguard account, even if the $281, 000 value was in error, there was no resulting inequity because the court ordered the account to be divided equally. If the 50 percent of its value placed on Michael's side of the trial court's ledger was inflated, then so was the 50 percent of its value placed on Judith's side of the ledger. Even Michael concedes that he has not suffered any prejudice from the valuation and award of this asset. Br. of Appellant at 18.

Michael also complains that $425 of the community liabilities assigned to Judith—a $75 liability to Sears and $350 to Valencia Yard—are unsubstantiated in the record. He is correct as to the Sears liability; Judith admitted that she "[didn't] really owe anything at Sears. I don't know where that came from." RP at 140. Apart from exhibits 3 and 13, the record contains no evidence of a $350 debt to Valencia Yard.

Even if the trial court erroneously valued these small liabilities assumed by Judith, this de minimis error does not require reversal of an otherwise fair and equitable distribution of a marital estate worth over $600, 000. *In re Marriage of Pilant*, 42 Wn.App. 173, 181, 709 P.2d 1241 (1985).

II

Michael next argues that the trial court improperly used different dates to value the parties' assets, and that its inconsistent valuation timing operated to Michael's detriment to the tune of approximately $30, 000. Br. of Appellant at 23. The assets about which he complains present distinct issues.

Novations account.

Michael complains that there was no evidence of the value of the Novations retirement account as of July 9, 2009. Br. of Appellant at 20. We have already rejected this argument in light of Michael's testimony that his only quarrel with Judith's asset values was with her valuation of his Ford Contour, a small IRA erroneously included in his assets, and her $9, 000 valuation of the loan made to their daughter Emma.

Community characterization of bank accounts.

Michael argues that the trial court valued his bank accounts with Key Bank and the Catholic Credit Union at "quite divergent times" and should instead have looked at them in early 2008, at the time he and Judith separated, both for valuation purposes and to properly distinguish between preseparation community property and postseparation separate property. Br. of Appellant at 22-23. He challenges the court's characterization of the two accounts at later times as entirely community property, inasmuch as he made $6, 000 in deposits to the

credit union account and approximately $4, 500 in deposits to the bank account more than a year after the parties separated.

"When spouses . . . are living separate and apart, their respective earnings and accumulations shall be the separate property of each." RCW 26.16.140; *In re Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002), *review denied*, 148 Wn.2d 1023 (2003). As long as separate property can be traced and identified, the court will not characterize it as community property unless the separate property is commingled to the extent that the court cannot distinguish or apportion it from the community property. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5-6, 74 P.3d 129 (2003).

In Washington all property acquired during marriage is presumptively community property. *Dean v. Lehman*, 143 Wn.2d 12, 19, 18 P.3d 523 (2001). The burden of rebutting the presumption is on the party challenging the asset's community property status and can be overcome only by clear and convincing proof that the transaction falls within the scope of a separate property exception. *Id.* at 19-20. Physical separation of the spouses, without more, does not alter the basic community property presumption. *Id.* at 20 (citing *Rustad v. Rustad*, 61 Wn.2d 176, 180, 377 P.2d 414 (1963)).

Michael did not argue at trial that the court should characterize all or even part of the credit union and bank accounts as his separate property, while Judith characterized the accounts (statements for which she included in her exhibit 2) as entirely community funds. We realize that the distinction between community and separate property is not obvious to laypersons and it was not entirely clear to Michael. *See, e.g.*, RP at 152. Nonetheless, the trial court explained to Michael that the difference between community and separate funds and obligations could be important to a favorable distribution, and encouraged Michael to bring any information in his favor to the court's attention:

[Michael], just so you understand here, what I'm interested in, so that I can make a decision here, is I want to know how much was in these various accounts as of the date of separation, how much you've added to them since then, how much you've taken out of those accounts, and whether any of that money went to pay community debts or expenses, so I can kind of sort out—you know, if you're using money that was community money, but you're using it to pay community debt, that's fine. If you're using it to pay for your separate expenses, that's another matter. If you're using your separate money to pay community debts, those are all things that need to be sorted out. But unless I have that information, I can't, I can't do that.

RP at 69. Despite the admonition, Michael did not provide the trial court with evidence of the separate property character of any deposits to the credit union and bank accounts, with one exception: under questioning from Judith's lawyer, Michael testified that approximately $4, 500 in deposits to the Key Bank account was a postseparation payroll deposit. The record reveals no testimony or documentary evidence tracing the $6, 000 deposited in the Catholic Credit Union account to postseparation efforts of Michael.

Out of fairness to the trial court and the opposing party, theories advanced for the first time on appeal generally will not be considered. *Espinoza v. City of Everett*, 87 Wn.App. 857, 872-73, 943 P.2d 387 (1997), *review denied*, 134 Wn.2d 1016 (1998); RAP 2.5(a). Even though we have a bright-line date for the parties' separation, the tracing issue in this case was not simple. Michael took early distribution nine months before the commencement of the dissolution proceeding of an $89, 000 IRA, funded with community earnings, for which he could not entirely account. For this reason and others, it is possible that postseparation deposits to Michael's bank and credit union accounts were community funds. Judith, who characterized the accounts as entirely community, was entitled to respond if Michael disputed her characterization—and at trial, not for the first time on appeal. The fact that Michael represented himself does not warrant indulging his late assertion of a separate property claim. It is well settled that courts are under no obligation to grant special favors to a party who chooses to represent himself of herself in a dissolution proceeding. *In re Marriage of Olson*, 69 Wn.App. 621, 626, 850 P.2d 527 (1993) (quoting *In re Marriage of Wherley*, 34 Wn.App. 344, 349, 661 P.2d 155, *review denied*, 100 Wn.2d 1013 (1983)).

It appears doubtful that Michael could meet his burden of demonstrating error by the trial court with respect to most of the deposits to the accounts. Doubtful or not, we decline to consider this theory for the first time on appeal.

Judith's retirement accounts.

Michael contends that the trial court valued two of Judith's retirement accounts at a combined value of $80, 618, disregarding evidence that on June 30, 2009 they had a value of $83, 402.28. Br. of Appellant at 20. We disagree with his characterization of the evidence.

Judith's exhibit 13 reflected values for her four retirement accounts, three of which are germane to Michael's claim of error. The three relevant accounts were a 403(b) account valued at $50, 501 as of June 8, 2009, a 401(k) account valued (net of a postseparation contribution) at $26, 517 as of March 31, 2009, and a TSA (tax sheltered annuity) account valued at $9, 548, for a total of $86, 566. But Judith testified that in the months leading up to the dissolution trial, she consolidated the TSA, 403(b), and 401(k) assets into the 401(k) account maintained with American Funds. RP at 136-39. She testified that the consolidated value of all

three accounts was reflected on her June 30, 2009 statement for the 401(k), offered and admitted as exhibit 2.38. That statement reflects a June 8, 2009 $50, 501.89 rollover of the 403(b) assets, and a June 1, 2009 "Employer Contribution" of $9, 419.12, which Judith testified reflected the deposit into the account of her TSA assets. RP at 139. She asked the trial court to use this most recent, consolidated value ($83, 402.48) as the value for the three retirement accounts, rather than the earlier, higher, values reflected on exhibit 13. RP at 158-60.

Inexplicably, the court did not; it used the earlier values instead. By doing so, it treated Judith as if she received more value, not less. Michael overlooks this, because he fails to recognize that the consolidated account value included the TSA. If anyone was prejudiced by the trial court's using earlier values for Judith's accounts, it was Judith, not Michael.

Loan to daughter.

Michael's last argument of a valuation timing error concerns a $9, 000 loan that he and his wife made to their daughter, Emma, approximately four years before the dissolution trial, which the trial court valued as a $9, 000 asset and allocated to him. He argues that collection of the loan was time barred by the time of trial; therefore the court's crediting $9, 000 to Michael in allocating the loan to him implicitly depends on an unspecified valuation date before trial, when Emma's obligation to repay the loan was enforceable. Once again, Michael raises this basis for challenging the loan's valuation for the first time on appeal.

At trial, Michael objected to a $9, 000 valuation of the loan and to its being allocated entirely to him, but for only two reasons: because Judith shared responsibility for the decision to make the loan and because, as both could have anticipated, Emma was not in a financial position to repay it. It is undisputed that Judith was present when Michael and Emma agreed, verbally, to the loan, and undisputed that Judith raised no concerns or objections; indeed, Judith testified that Michael had not wanted to loan the money to Emma and "I talked you into it because I felt she needed a car." RP at 153. Michael forgave the loan sometime after the parties' separation, testifying at trial, "She's unable to pay for it." RP at 68. Judith did not know that Michael forgave the loan to their daughter until trial.

The issue of a possible time bar came up at trial, but not until closing argument—and it was raised only by the trial court, which posed the academic question whether an oral loan would be time barred if not repaid in three years. Judith's lawyer answered, "[I]t's an interesting question. That would make a nice bar exam issue. But the bottom line, marital communities do this all the time and it has to be taken into account." RP at 167. Michael did not address the court's question in his closing.

The trial court treated the loan as a $9, 000 asset and allocated it to Michael. Michael now asks us to reverse the disposition based on the issue raised by the trial court; he argues that the loan *was* worthless at the time of trial because the three-year statute of limitations to enforce the loan had already run. RCW 4.16.080(3).

An oral loan agreement that does not provide a specific time or period for repayment is a demand loan. *Nilson v. Castle Rock Sch. Dist.*, 88 Wn.App. 627, 630, 945 P.2d 765 (1997). Ordinarily the three-year statute of limitations for demand loans begins to run on the date the loan is made. *Hopper v. Hemphill*, 19 Wn.App. 334, 336-38, 575 P.2d 746 (1978). *Barer v. Goldberg*, 20 Wn.App. 472, 476, 582 P.2d 868, *review denied*, 90 Wn.2d 1025 (1978) recognized an exception where parties contemplate a delay in making payments on a loan and speedy demand would violate the spirit of the contract; in such cases, the *Barer* exception delays the running of the statute of limitations.

In this case, Michael did not contend that collection of the loan from Emma was time barred, so there was never any reason for Judith to present evidence as to whether the verbal agreement between Michael and Emma provided a specific time or period for repayment, or, if it did not, whether circumstances supporting the *Barer* exception existed. The record is silent on both matters. Neither the trial court nor we have any way of knowing when the statute of limitations would have begun to run.

Abuse of discretion does not exist unless it can be held that no reasonable person would have ruled as the trial court did on the facts before it. *In re Marriage of Young*, 18 Wn.App. 462, 465, 569 P.2d 70 (1977). The facts before the court were that $9, 000 had been loaned to Emma and remained outstanding. While Michael testified he had forgiven the loan, applicable law provides that unilateral forgiveness by him of a community loan would have been void. RCW 26.16.030(2) (requiring consent of both parties for gift of community property); *deElche v. Jacobsen*, 95 Wn.2d 237, 250, 622 P.2d 835 (1980). Michael testified to his belief that Emma was unable to pay the loan, but he presented no evidence of Emma's financial situation or of a decline in value of the car that might warrant discounting the value of Emma's obligation. The trial court's valuation was within the range of the evidence and therefore a proper exercise of its discretion.

III

Michael next challenges the trial court's allocation of 46 percent of the value of the family home as Judith's separate property. Michael and Judith purchased the family home in 1981 for $65, 000. Judith paid approximately $30, 000 of the $65, 000 total out of her

separate property funds at the time of purchase. The balance was paid over time with community funds. The parties agreed at trial on an appraised value of $165, 000 for the home. The trial court maintained Judith's percentage of separate property interest in the home thereby characterizing $75, 900 (46 percent of $165, 000) in value of the home as her separate property.

Michael concedes that Judith paid 46 percent of the original purchase price of the home with separate funds but argues that she should not have been awarded an aliquot portion of its appreciated value because the community made payments toward improvements, taxes, and maintenance that should have been, but were not, considered by the court.[3] Br. of Appellant at 26-29. Michael offered no evidence of the extent, if any, that improvements or maintenance contributed to the home's appreciation, so the persuasiveness of Michael's argument depends upon which of the parties is correct about presumptions and burdens of proof. Michael argues that property acquired during marriage is presumed to be community property unless the presumption is rebutted by clear and convincing evidence, citing *In re Marriage of Olivares*, 69 Wn.App. 324, 331, 848 P.2d 1281, *review denied*, 122 Wn.2d 1009 (1993). Br. of Appellant at 28. Judith contends that any increase in the value of separate property is presumed to be separate property, a presumption that may be rebutted only by direct and positive evidence that the increase is attributable to community funds or labors, citing *In re Marriage of Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982) and *In re Marriage of Pearson-Maines*, 70 Wn.App. 860, 869, 855 P.2d 1210 (1993) (any increase due to inflation is divided consistently with the proportion of community and separate contributions; in arriving at any proportion earned by improvements to the property, increased value should be the measure). Br. of Resp't at 25.

The characterization of property as community or separate is a question of law, reviewed de novo. *In re Marriage of Zier*, 136 Wn.App. 40, 45, 147 P.3d 624 (2006), *review denied*, 162 Wn.2d 1008 (2007). In this case, the underlying facts relevant to characterization of the home are undisputed and are therefore verities on appeal. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

Presumptions play a significant role in determining the character of property as separate or community. *In re Estate of Borghi*, 167 Wn.2d 480, 483, 219 P.3d 932 (2009). The character of property as separate or community is determined at the date of acquisition, and "'the right of the spouses in their separate property is as sacred as is the right in their community property . . . [W]hen it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.'" *Id.* at 484 (quoting *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911)). "Direct and positive evidence" corresponds to the "clear and convincing" standard applied to presumptions in modern community property cases. *Id.* at 484 & n.4. These authorities support Judith's position. At the time the home was purchased, Judith paid all or virtually all of the down payment; at the inception of ownership, the home was almost entirely her separate property. The presumption of her separate ownership is overcome to the extent of Judith's agreement that 54 percent of the purchase cost was later paid with community funds, but Judith does not concede that any improvements contributed to the home's appreciation. While Michael presented evidence that, at best, $9, 000 of community funds went to improvements of the home, he failed to present evidence that the $100, 000 increase in value of the home was due in whole or in part to these improvements.

Olivares, relied upon by Michael (and disapproved of on other grounds in *Estate of Borghi*), does not support his contrary position. *Olivares* simply tells us that because the home was purchased during the marriage it is presumed to be community property absent clear and convincing evidence that it was purchased with separate property. The evidence is undisputed that the down payment was made with Judith's separate funds. The trial court correctly concluded that Judith's 46 percent separate property interest carried forward into the appreciated value of the home.

IV

Michael next contests the trial court's award of maintenance. The trial court ordered Michael to pay monthly maintenance of $1, 700 initially, to be adjusted on Michael's 66th birthday to an amount equal to one-half the difference between Michael's and Judith's Social Security payments, and to terminate upon the death of either party or Judith's remarriage. The court's written finding in support of the award was that "[m]aintenance should be ordered because: Wife has the need and Husband has the ability to pay." CP at 19.

We review a maintenance award for abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just. *In re Marriage of Luckey*, 73 Wn.App. 201, 209, 868 P.2d 189 (1994).

Failure to consider statutory factors.

Michael first contends that the trial court failed to consider the statutory factors relevant to a just maintenance order. RCW 26.09.090(1)[4] provides that a maintenance order "shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors, " including:

(a) The financial resources of the party seeking

record, with this characterization of the values.

In later announcing its property distribution decision, the trial court provided the parties with a spreadsheet reflecting the assets at issue, its finding as to their values, and its allocation of the assets and associated values to the parties. RP at 189; Clerk's Papers (CP) at 107. Most of the values conformed to those included in exhibits 3 and 13. The court divided the approximately $600, 000 that it determined to be community property virtually 50/50. It awarded each party their respective separate property. It ordered Michael to pay $1, 700 per month in maintenance until he retires, and also ordered Michael to pay as maintenance half of the difference between his Social Security income and Judith's Social Security income once he begins receiving it. Finally, it ordered Michael to pay $6, 000 toward Judith's attorney fees.

Michael, represented by counsel in this appeal, assigns error to the trial court's (1) valuation of several assets and debts, which he contends were based solely on Judith's illustrative exhibits; (2) use of different dates for valuing several items of property; (3) allocation of the burden of proof in determining the portion of the value of the family home constituting Judith's separate property; (4) alleged failure to consider the statutory factors provided at RCW 26.09.090 in awarding maintenance to Judith, an award he argues is not supported by substantial evidence; (5) alleged improper division of his Social Security benefits beginning on his 66th birthday; and (6) award to Judith of an amount to be applied to her attorney fees, without considering the substantial assets awarded her by its decree.

ANALYSIS

I

Michael first assigns error to the trial court's valuation of his Vanguard retirement account, his Novations retirement account, and two small debts to Sears and Valencia Yard that were allocated to Judith. He argues that no substantive evidence was offered to support the values for these assets and liabilities included in Judith's illustrative exhibits and that the court abused its discretion by relying on values from those exhibits to divide the marital property.

In entering a decree of dissolution, a trial court is to make a "just and equitable" division of marital property after considering all relevant factors, including (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of property is to become effective. RCW 26.09.080. It enjoys broad discretion. *In re Marriage of Gillespie*, 89 Wn.App. 390, 399, 948 P.2d 1338 (1997). We do not hold the trial court to a standard of mathematical precision. *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); *see also In re Marriage of White*, 105 Wn.App. 545, 549, 20 P.3d 481 (2001) (recognizing that the trial court is not required to divide community property equally).

We will seldom modify a trial court's distribution decisions upon appeal; the spouse who challenges such a decision bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Id.* at 47. If substantial evidence supports the court's findings of value, it will be affirmed. *Gillespie*, 89 Wn.App. at 403-04. To determine whether substantial evidence exists to support a court's finding of fact, we review the record in the light most favorable to the party in whose favor the findings are entered. *Id.*

Much in the trial proceedings suggests that the July 2009 Vanguard and Novations retirement account values were reliable figures, provided by Michael. Evidence offered by Judith included statements for the Vanguard and Novations retirement accounts through March 31, 2009 that reflected lesser values: $89, 925.65 for the Novations account and $263, 054.92 for the Vanguard account. But at trial, Judith's lawyer told the court that he had tried to secure current values for all of the parties' retirement accounts and, in the exchange recounted above, he characterized the now-disputed July 2009 values for Michael's retirement accounts included in Judith's exhibits 3 and 13 as updated values provided by Michael that were agreeable to Judith. Michael neither objected to, nor agreed with, this characterization of the values by Judith's lawyer. Judith does not contend that Michael's silent acquiescence was enough to qualify the colloquy as a stipulation under CR 2A.

When later examined, Michael was asked questions that explicitly assumed that the Vanguard and Novations accounts had, respectively, the disputed $281, 000 and $102, 000 values. He did not object to the questions as assuming facts not in evidence nor did he take issue with any premise of the questions. In offering exhibit 13 following a lunch break, Judith's lawyer explained that he had redone the exhibit at noon, which now included the $281, 477 and $102, 054 values, "taking [Michael's] word" for the current values. RP at 158. Again, Michael did not take issue with this representation. When it came time to present his case, Michael did not offer evidence of different values for the two accounts.

maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

An award of maintenance that is not evidenced by a fair consideration of the statutory factors constitutes an abuse of discretion. *In re Marriage of Mathews*, 70 Wn.App. 116, 123, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993). Appellate courts have found that an award does not evidence a fair consideration of the statutory factors when it deems the award substantively irreconcilable with fair consideration of the factors, *e.g.*, *Matthews*; when the record reveals unwarranted reliance on other, nonstatutory factors, *e.g.*, *In re Marriage of Spreen*, 107 Wn.App. 341, 349-50, 28 P.3d 769 (2001); and when the trial court substitutes a disproportionate property award for a duly-considered maintenance award, *see In re Marriage of Crosetto*, 82 Wn.App. 545, 558, 918 P.2d 954 (1996) (dicta).

Michael urges us to more readily find abuse of discretion, relying on *In re Marriage of Horner*, 151 Wn.2d 884, 895-96, 93 P.3d 124 (2004). *Horner* involved a divorced parent's request to relocate a child and held that a trial court denying such a request must clearly document its consideration of all 11 statutory factors on which any denial must be based, either by specific findings or by other oral statements reflecting its clear consideration of each factor. Notably, *Horner* concerned parties who had failed to present evidence or argument on many of the 11 factors. And of course, a child relocation decision substantially affects the interest of the child, who is unrepresented in the matter. Michael would have us reverse any maintenance award under RCW 26.09.090 that does not comply with the stringent *Horner* documentation requirements even where, as here, the substance of the maintenance factors was almost entirely uncontroverted, [5] both affected parties were before the court, Michael cannot demonstrate that he requested more detailed findings or otherwise objected to the findings when presented, and he enjoys the opportunity to challenge the court's findings on the ultimate, material matters.

Nothing in RCW 26.09.090 requires the trial court to make specific factual findings on the given factors. *In re Marriage of Mansour*, 126 Wn.App. 1, 16, 106 P.3d 768 (2004) (finding no basis for reversing the maintenance award where the trial court failed to list the influence of each factor in its findings). Generally, "[a] trial court is not obligated to make findings of fact on every contention of the parties. Rather, it is required to find only the material facts of the case, that is, findings sufficient to inform us, on material issues, what questions the trial court decided and the manner in which it did so." *City of Tacoma v. Fiberchem, Inc.*, 44 Wn.App. 538, 541, 722 P.2d 1357 (citing *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979)), *review denied*, 107 Wn.2d 1008 (1986). A trial court is not required to make findings on stipulated or uncontroverted matters. *Swanson v. May*, 40 Wn.App. 148, 158, 697 P.2d 1013 (1985). The trial court need only find the ultimate facts on the material issues. *Whitney v. McKay*, 54 Wn.2d 672, 678-79, 344 P.2d 497 (1959). We see nothing in *Horner* that overrules longstanding case law holding that findings need be made only on matters in contention.

In determining spousal maintenance, the court is governed strongly by the need of one party and the ability of the other party to pay an award. *In re Marriage of Foley*, 84 Wn.App. 839, 845-46, 930 P.2d 929 (1997) (citing *Endres v. Endres*, 62 Wn.2d 55, 56, 380 P.2d 873 (1963)); *cf. In re Marriage of Washburn*, 101 Wn.2d 168, 182, 677 P.2d 152 (1984) (RCW 26.09.090 places emphasis on the justness of an award, not its method of calculation). In this case, only this ultimate issue is truly in dispute. Where, as here, the trial court's findings on material controverted matters are sufficient for our review of its maintenance award, we will not read *Horner* to require its reversal simply because it did not make findings on uncontroverted or immaterial matters.

Unsupported finding.

We turn next to Michael's assignment of error to the trial court's finding that Judith has a need for maintenance and Michael has the ability to pay. Br. of Appellant at 32-33. The economic position in which the former spouses are left is the paramount concern in property distribution. *Pilant*, 42 Wn.App. at 178 (citing *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 408, 433 P.2d 209 (1967)). Maintenance is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time. *Washburn*, 101 Wn.2d at 179. "In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives." *In reMarriage of Rockwell*, 141 Wn.App. 235, 243, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008). Judith's request

for maintenance was with a view to achieving that equality, taking into consideration Michael's greater earning power and that she was much nearer to retirement.

At the time the trial court announced its decision, the trial court stated, with respect to its maintenance award:

With regard to maintenance, I found that the husband's gross monthly income is $7, 700, the wife's gross monthly income is $3, 600. I'm ordering the husband pay the wife maintenance of $1, 700 a month until he retires.

When the husband begins collecting Social Security, he will pay the wife one half of the difference between the Social Security she receives, or what she's eligible to receive if she's not collecting it, and what he receives. And I want to make note of the fact that if for some reason the husband starts collecting Social Security before he retires, then he would have to pay both the $1, 700 and the Social Security difference.

RP at 195-96. The effect of the award at the parties' stated earned incomes is to leave Michael with net income of $6, 000 per month and Judith with net income of $5, 300 per month; this, in conjunction with a substantially equal division of the parties' community property.

The distribution and maintenance decisions are well within the range of the evidence, given the trial court's objective in a dissolution action.

Perpetual lien contention.

Michael next argues that the trial court's maintenance award acts as a perpetual lien on his future earnings, requiring him to keep working in his current capacity until at least age 66. The only authority he relies upon for the asserted impropriety of awarding maintenance payable until retirement is *In re Marriage of Sheffer*, 60 Wn.App. 51, 802 P.2d 817 (1990). Br. of Appellant at 34-35. In *Sheffer*, the wife was awarded maintenance for 36 months and appealed, arguing that in light of the parties' long-term marriage and the postdissolution disparity in their economic circumstances, she should have been awarded indefinite maintenance. The sole reference to a perpetual lien in the decision states, "Traditionally, Washington cases have emphasized that alimony is not a matter of right and that one spouse should not be given a perpetual lien on the other spouse's future income." 60 Wn.App. at 54. Following that statement, the decision discusses other reported decisions that recognize maintenance as a flexible tool to more nearly equalize the postdissolution living standard of the parties, the appellate court announces its reversal of the 36-month maintenance award, and it suggests that on remand the trial court consider an award tailored to the commencement of receipt of retirement benefits. 60 Wn.App. at 55-58 & n.2. Michael's argument is, at best, underdeveloped and need not be considered. RAP 10.3(a)(6). It is not persuasive.

Improper redistribution of Social Security benefits.

Michael's last attack on the maintenance award is that it impermissibly divides and redistributes his Social Security benefits.

Federal law and the supremacy clause prevent Washington courts from dividing and distributing Social Security benefits in a dissolution proceeding. *Rockwell*, 141 Wn.App. at 244-45; *Zahm*, 138 Wn.2d at 219 (citing 42 U.S.C. § 407(a) of the Social Security Act and its interpretation under *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979)). In particular, a trial court cannot make an offsetting award of presently available community property in order to compensate a party for her spouse's expected Social Security benefits. *Zahm*, 138 Wn.2d at 221. But 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. *Id.* The *Zahm* court also noted that "social security benefits were an appropriate element for the court to factor into its consideration of respondent's maintenance award for the same reasons contained in the analysis of petitioner's [property allocation] claim regarding social security benefits." *Id.* at 227.

Michael argues that the trial court went beyond merely considering his Social Security entitlement in awarding maintenance and actually divided his benefits, "albeit via a calculation rather than a [sic] through a percentage order." Br. of Appellant at 38. Initially, we note that Michael cites no authority for his implicit proposition that a trial court cannot order *future* payment of a portion of a recipient's Social Security benefits as maintenance, as opposed to the anticipatory property adjustment for their future value prohibited by *Zahm*, applying *Hisquierdo*. Other states reviewing the issue have relied upon 42 U.S.C. § 659(a)—an exception to the anti-assignment clause of the Social Security Act (42 U.S.C. § 407(a)), which allows benefits to be garnished for the payment of child support or maintenance obligations—as permitting maintenance awards from federal benefit payments, including Social Security benefits. *See Evans v. Evans*, 111 N.C.App. 792, 798-99, 434 S.E.2d 856 (1993) (concluding that 42 U.S.C. § 407(a) does not bar a maintenance award of Social Security benefits because of the exception provided in § 659(a)); *In re Marriage of Mikesell*, 276 Mont. 403, 406, 916 P.2d 740 (1996) (recognizing that "legal process brought for the enforcement of a party's legal obligations to provide child support or make maintenance payments is a specific exception to the broad exemption from garnishment provided to social security benefits by 42 U.S.C. § 407"); *c.f. Lanier v. Lanier*, 278 Ga. 881, 882-83, 608 S.E.2d 213 (2005) (holding that Railroad Retirement Act benefits may constitute the source of alimony payments

under federal law); *In re Marriage of Flory*, 171 Ill.App.. 3d 822, 121 Ill. Dec. 701, 525 N.E.2d 1008 (1988) (recognizing that 42 U.S.C. § 659(a) contains an exception to the Railroad Retirement Act's anti-assignability clause with regard to a legal obligation to make alimony payments).

We need not decide whether future Social Security benefits can be awarded because we reject Michael's characterization of the maintenance order. The trial court's order does not purport to make a direct award to Judith of Michael's Social Security benefits. It merely calculates the amount of maintenance with reference to his future Social Security entitlement.

V

Finally, Michael argues that substantial evidence does not support the trial court's award to Judith of a portion of her attorney fees, inasmuch as she was awarded nearly $400, 000 in assets as a result of the dissolution. On a related matter, both parties argue that they are entitled to costs on appeal and Judith argues that she should recover an award of sanctions under RAP 18.9 and RCW 4.84.185 because Michael's appeal was advanced without reasonable cause.

RCW 26.09.140 permits the trial court to award reasonable attorney fees in a dissolution action "after considering the financial resources of both parties." An award of fees under RCW 26.09.140 is reviewed for an abuse of discretion. *Spreen*, 107 Wn.App. at 351.

When considering an award of attorney fees under the statute, the trial court generally must balance the needs of the party requesting the fees against the ability of the opposing party to pay. *Bay v. Jensen*, 147 Wn.App. 641, 660, 196 P.3d 753 (2008). If the trial court grants attorney fees under RCW 26.09.140, it must state on the record the method used to calculate the award. *In re Marriage of Obaidi*, 154 Wn.App. 609, 617, 226 P.3d 787 (citing *In re Marriage of Knight*, 75 Wn.App. 721, 729, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995)), *review denied*, 169 Wn.2d 1024 (2010). In calculating a fee award a court should consider: (1) the factual and legal questions involved, (2) the time necessary for preparation and presentation of the case, and (3) the amount and character of the property involved. *In re Marriage of Van Camp*, 82 Wn.App. 339, 342, 918 P.2d 509, *review denied*, 130 Wn.2d 1019 (1996).

Here, the trial court awarded Judith $6, 000, an amount less than the total fees she had incurred. Its only finding relevant to this award was that "[t]he wife has the need for the payment of fees and costs and the other spouse has the ability to pay these fees and costs." CP at 19 (Finding of Fact 2.15). Nothing in the record indicates how the $6, 000 figure was arrived at, either by applying the three factors to determine a reasonable fee or in allocating the expense based on the parties' relative need and ability to pay. We therefore vacate the $6, 000 award. Whether to award trial fees, and in what amount, will abide a more-fully explained decision on remand.

RCW 26.09.140 provides that "the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." When determining whether an award of fees is appropriate in a dissolution case, we consider the parties' "relative ability to pay" and the "arguable merit of the issues raised on appeal." *In re Marriage of Leslie*, 90 Wn.App. 796, 807, 954 P.2d 330 (1998), *review denied*, 137 Wn.2d 1003 (1999). Both parties here have sufficient assets to pay their own attorney fees and costs on appeal. Michael's issues raised on appeal were not meritless.

We vacate the award of attorney fees, otherwise affirm, and remand for proceedings consistent with this opinion.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: Kulik, C.J., Korsmo, J.

Notes:

[1] We refer to the parties by their first names for clarity. We intend no disrespect.

[2] We refer to counsel by name in order to be clear about whom the court addresses in this exchange.

[3] Michael also argues for the first time on appeal that a home equity loan taken out to cover the cost of a wedding reception for Judith's daughter (his stepdaughter) is an additional basis for increasing the community's interest in the home. We can readily dismiss this argument, not only because the theory was not advanced below, but also because the fact that community funds were used to retire a loan for wedding costs secured by the home reflects the community's investment in the wedding, but does not increase its investment in the home.

[4] We quote the current version of RCW 26.09.090, which was amended by Laws of 2008, chapter 6, section 1012 to make the language gender neutral and to include domestic partners.

[5] The parties presented the trial court with evidence of Judith's working history and health, Michael's working history and health, the future income outlook for both, their retirement plans and projected Social Security entitlement, their separate and community assets and obligations, and their expenses and cash flow situations

during the period of their separation. The duration of the marriage and the emancipated status of the parties' children were clear. The trial court was attentive and asked questions. The evidence was almost entirely uncontroverted. There is no argument by Michael that Judith urged improper factors, or that the trial court was distracted by nonstatutory factors.

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Sent: Friday, July 25, 2014 3:46 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Anderson, Supreme Ct No. 90436-7

Dear Clerk of the Court:

Attached please find Respondent Beverly L. Anderson's Answer to Petition for Review. Also attached to this email is Ms. Anderson's Declaration of Service.
Ms. Anderson's Appendix to Answer to Petition for Review will be sent in three separate emails to conform with the 25 page limit -- I was unclear if they could be sent in one email.

I have numbered the documents in the appendix to help the Court in assembling. The first email will include the Appendix cover sheet and index, and pages 1-23. The second email will include pages 24-48 and the third email will include pages 49-71.

Please confirm that you have received this email and attachments, and/or if you have any questions.
Thank you for your assistance.

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To: Ginger Edwards Buetow
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Dear Clerk of the Court:

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From: Ginger Edwards Buetow [mailto:ginger@buetowlaw.com]
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To: 'supreme@courts.wa.gov'
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To: OFFICE RECEPTIONIST, CLERK
Subject: Anderson, Supreme Ct No. 90436-7 (Email No. 2-Appendix)

Dear Clerk of the Court:

Pursuant to the email below, please find attached the pages 24-48 to the Appendix.

Ginger

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Dear Clerk of the Court:

Pursuant to the email below, please find attached the pages 49-71 to the Appendix. This is the last email.

Have a nice weekend.

Ginger

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