ORIGINAL

Appellate Court No. 70057-0-1
Supreme Court No. 90436-7

SUPREME COURT
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE MARRIAGE OF

ROBERT E. ANDERSON, Petitioner,

v.

BEVERLY L. ANDERSON, Respondent.

PETITION FOR REVIEW

Daniel W. Smith,
Attorney for Petitioner

Campbell, Dille, Barnett & Smith, PLLC
317 South Meridian
Puyallup, Washington 98371-0164
P: (253) 848-3513
WSBA #15206

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1. Opinion or the Court of Appeals dated April 28, 2014.

2. Order of the Court of Appeals Denying Motion for Reconsideration dated May 23, 2014.

3. 42 U.S.C. §407(a)

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

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

6. *In Re Marriage of Anderson*, 252 P.3d 490, , (Ct. App. Colo. 2010).

7. *Biondo v. Biondo*, 291 Mich. App. 720, 727, 809 N.W.2d 397, (Ct. App. Mich. 2011).

I. IDENTITY OF PETITIONER

Petitioner is Robert Anderson, a Washington resident whose Social Security benefits have been awarded to his former wife, Beverly Anderson, CP 11-19,[1] even though federal law precludes such division as part of a marital property distribution. *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999).

II. COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of Appeals dated April 28, 2014, App. Tab 1,[2] ("the Opinion") and its subsequent denial of Petitioner's motion for reconsideration by its order dated May 23, 2014, App. Tab. 2.

III. ISSUES PRESENTED FOR REVIEW

1. Is review of this case required to address the public's substantial interest in protecting divorcing citizens from losing their rights under the anti-alienation clause of the Social Security Act by stopping state courts from acting beyond their inherent authority in distributing Social Security Benefits through orders that are void under state and federal law?

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[1] "CP" refers to the Clerk's Papers filed in the Court of Appeals.
[2] "App. Tab #" refers to the Appendix attached hereto.

2. Is review of this case required to address the public's substantial interest in protecting litigants' right under CR 60(b)(5) to seek relief from void orders that violate federal and state law and, therefore, are beyond a court's inherent authority or jurisdiction to issue?

IV. STATEMENT OF THE CASE

The Andersons were divorced by an Amended Decree of Dissolution entered on October 7, 1997, nunc pro tunc to July 3, 1997 ("the Decree"). CP 11-19. The Decree specifically awarded fifty percent of Mr. Anderson's Social Security benefits to his former wife each month until she commenced receiving her own Social Security benefits under her own claim. CP 18. At that time, Mr. Anderson's payment to Ms. Anderson would be reduced so that the overall payment from both Social Security benefit awards was divided equally between the two parties. CP 18. Paragraph 3.13 of the Decree states as follows:

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

CP 18. On September 9, 1999, the court entered an order by agreement that reaffirmed the court's order dividing the Social Security award. CP 20-21.

On October 12th, 2012, Mr. Anderson moved for relief from judgment pursuant to CR 60(b)(5). CP 44-46. He asserted the trial court had no authority to order the division of the Social Security income in the dissolution proceeding. CP 49-72, 73-76. The trial court denied Mr. Anderson's motion to vacate and denied his subsequent Motion for Reconsideration. CP 77-78, 83-87. Mr. Anderson appealed those decisions to Division I of the Court of Appeals.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Under Rule 13.4(b), the Supreme Court will accept review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The citizens of this state have a substantial interest in ensuring 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. Marital property distribution orders are commonplace and impact a broad

cross-section of this state's citizenry. The practical effect of the decision of the Court of Appeals in this case could be widespread, even though it is an unpublished opinion, because it will signal to trial judges that it is permissible for them to distribute Social Security benefits, even though doing so is contrary to law. Likewise, the public has a substantial interest in preserving litigants' right to challenge void orders by means of CR 60(b)(5). Therefore, the Supreme Court should accept review in this case.

A. The Trial Court Lacked the Inherent Power to Distribute Social Security Benefits, so its Decree Awarding Such Benefits to Ms. Anderson is Void.

The Decree orders Mr. Anderson to pay Ms. Anderson a portion of the gross amount of his Social Security benefits each month until one of them dies. CP 18. The trial court lacked the inherent authority to take this action. Therefore, that portion of the order is void and was taken outside the jurisdiction of the court.

(1) The Decree Illegally Distributes Social Security Benefits.

Although the Court of Appeals reserved its opinion on the matter, it is clear that courts are not permitted to value and distribute Social Security benefits as the Superior Court did in its Decree regarding the Andersons. *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999), *citing* 42 U.S.C. § 407(a) of the Social Security Act, attached

hereto as App. Tab 3, and its interpretation under *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979);[3] *see also In re Marriage of Rockwell*, 141 Wn. App. 235, 244, 170 P.3d 572 (2007) (the trial court cannot calculate a future value of Social Security monies and award that value as an offset, but it can consider the receipt of such benefits as a factor in its decision on the distribution of property). The relevant federal statute is Chapter 7 of Title 42, which deals with Social Security. Section 407(a) states,

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

42 USC § 407(a), App. Tab 3.

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

> In 1979, the United States Supreme Court held the Federal Constitution's Supremacy Clause pre-empted California's community property laws. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L. Ed.2d 1 (1979). The

[3] "Congress responded to *Hisquierdo* in 1983 by amending the Railroad Retirement 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." *Dapp v. Dapp*, 211 Md. App. 323, 65 A.3d 214 (2013), App. Tab 4.

> judicial application of California's community property laws, therefore, could not supplant the terms of the Federal Railroad Retirement Act benefits and Federal Social Security benefits holding, in as much as both benefits are the products of non-contractual agreements, they are fundamentally similar. *Hisquierdo*, 439 U.S. at 574-75. The Supreme Court ultimately held Railroad Retirement Act benefits are not subject to distribution as property in a dissolution proceeding. *Hisquierdo*, 439 U.S. at 590. Given the Supreme Court's assertion of an affinity between Railroad Retirement Act benefits and Federal Social Security benefits in *Hisquierdo,* we conclude Social Security benefits themselves are not subject to division in a marital property distribution case.

Zahm, 138 Wn.2d 213 at p. 219. The *Zahm* court also recognized that the benefits are separate and indivisible:

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

Id. at 220, *citing Hisquierdo*, 439 U.S. at 584. 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. *Rockwell*, 141 Wn. App. at 239. However, the court may not distribute Social Security benefits from one party to the other. *Id.* at 244.

In the instant case, the trial court actually divided Mr. Anderson's Social Security benefits by awarding a portion of his share to Ms. Anderson. CP 18. Nonetheless, in the trial court, Ms. Anderson argued

that the Decree does not violate the law, because it purportedly does not transfer, assign, or subject to execution, levy, attachment, garnishment or any legal process Mr. Anderson's Social Security benefits. This argument is irreconcilable with *Hisquierdo*, in which the Supreme Court held that an offsetting property award in a specific amount after determining the value of a husband's retirement account to violate federal law. See *Hisquierdo*, 439 U.S. at 588 ("An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check.").

Additionally, the fact that the parties entered into an agreed order does not render the division of Social Security benefits legal. *See Dapp*, 211 Md. App. at 330-31, App. Tab 4 ("It is true that this case involves a private agreement between the parties to divide benefits, whereas Hisquerado involved a court-ordered division of benefits under state law. But this is a distinction that makes no difference under the terms of the statute."). Thus, it is indisputable that the Superior Court awarded a portion of Mr. Anderson's monthly Social Security benefits to Ms. Anderson. CP 18. CP 18. This is a clear violation of 42 USC 407(a). The trial court erred when it upheld an illegal distribution of Social Security benefits based on a conclusion that the parties stipulated to the division.

Stipulated or otherwise, such an act is expressly forbidden by federal and state law and is void.

(2) The Decree's Award of Social Security Benefits is Void and Beyond the Court's Inherent Authority and Jurisdiction.

A judgment is void if "the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved." *Bresolin v. Morris*, 86 Wn. 2d 241, 245, 543 P.2d 325 (1975), *Supplemental Op., Bresolin v. Morris,* 88 Wn.2d 167, 558 P.2d 1350 (1977). In this instance, the Decree's award of Mr. Anderson's Social Security benefits was outside the court's inherent power and void.

Rather than inquire into whether the trial court acted beyond its inherent authority and issued a void order, the appeals court erroneously stopped its inquiry at whether the trial court had general subject matter jurisdiction over the type of proceeding, a divorce case. As the appeals court reasoned,

> The Washington Constitution specifically grants superior courts original jurisdiction in divorce matters. . . . Therefore, it was within the trial court's subject matter jurisdiction to enter a decree of dissolution. The provision distributing Social Security benefits may be erroneous—a possibility about which we express no opinion—but that is irrelevant to the subject matter jurisdiction inquiry."

Opinion, App. Tab 1 at 2-3.This approach is ill-advised and erroneous, however, because it permits courts to take illegal actions, as long as they do so as part of a proceeding over which they generally have subject matter jurisdiction. Indeed, courts from other jurisdictions have addressed this issue by asking whether the specific award was void and, therefore, beyond the scope of the lower court's subject matter jurisdiction and its inherent authority to act.

For example, an Illinois court facing the same situation presented here determined that the trial court lacked jurisdiction to render the same kind of void order. *See In Re Marriage of Hulstrom*, 342 Ill. App. 3d 262, 271-73, 794 N.E.2d 980, 987-89 (Ct. App. Ill. 2003), App. Tab 5 (reversing as void the portion of the dissolution judgment incorporating the parties' settlement agreement to divide Social Security benefits and remanding). The Hulstrom's dissolution judgment incorporated the parties' settlement agreement that the parties would equally share Social Security benefits. *Id.* at 265. In a matter of first impression, the Illinois court followed two other jurisdictions—Arkansas and Nevada—in holding that a settlement agreement dividing Social Security benefits is void for violating the Social Security Act. *Id.* As the Illinois held,

> 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.

Id. at 273. The *Hulstrom* court reasoned that, although the trial court had jurisdiction over the parties and the dissolution proceedings in general, and the court had authority to incorporate a marital agreement into its judgment, the portion of the judgment incorporating the settlement agreement was void because it is preempted by the Social Security Act. *Id.* at 271-72.

Similarly, a Colorado court determined that a settlement agreement provision that was incorporated into the divorce decree and required the husband to pay part of his future Social Security benefits to his former wife was void, because it violated the anti-assignment provision of the Social Security Act, 42 U.S.C.S. § 407(a), and the district court lacked jurisdiction to enforce it. *See In Re Marriage of Anderson*, 252 P.3d 490, 494 (Ct. App. Colo. 2010), App. Tab 6 (no relation to this case). In the Colorado case, the issue was whether spouses could contract between themselves to divide their property in a marriage dissolution in a way that requires one spouse to pay his future Social Security benefits to the other. *Id.* The Colorado court followed other courts in finding that the lower

court lacked the power to issue its decree dividing Social Security benefits:

> Applying the Supremacy Clause, state courts have consistently held that the Social Security Act precludes them from treating Social Security benefits as property. Thus, state courts lack subject matter jurisdiction to divide parties' Social Security benefits in a property distribution. 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.

Id. (internal citations omitted); *but see Biondo v. Biondo,* 291 Mich. App. 720, 727, 809 N.W.2d 397, 401-02 (Ct. App. Mich. 2011), App. Tab 7, (the lower court erred by enforcing the provision dividing the Social Security benefits, but this error did not deprive the court of subject matter jurisdiction).

Washington should follow the well-reasoned and pragmatic lead of the courts of Illinois, Colorado, Arkansas, and Nevada, and this Court should accept review of this case to prevent the lower courts of this state from issuing void orders that are contrary to federal law and beyond the scope of their inherent authority.

B. Mr. Anderson Properly Invoked CR 60(b)(5) to Attack the Void Judgment.

In the present case, the trial court did not have jurisdiction or inherent power over the parties' Social Security Benefits. *See* 42 USC Section 407. Yet, the trial court specifically divided the Social Security benefits of the husband/respondent. CP 18. In order to get relief from this void order that was beyond the authority of the trial court to issue, Mr. Anderson moved to vacate the provision of his Decree involving the division of his Social Security Benefits. CP 44-72. The trial court denied his motion, finding that it was not brought within a reasonable time under Court Rule 60, and that in any event the Decree does not actually divide his Social Security Benefits. CP 77-78.

CR 60(b)(5) provides "the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . the judgment is void." As the Court of Appeals recognized in its Opinion, "[a] court may relieve a party from a void judgment regardless of the passage of time." Opinion, Tab 1, at 1; *see also Chai v. Kong*, 122 Wn. App. 247, 254, 93 P.3d 936 (2004). Nonetheless, the appeals court concluded that

> Robert [Anderson] could have brought a direct appeal to challenge the Social Security provision of the dissolution decree within 30 days of its entry. . . . But he did

> not. He cannot avoid the consequences of that failure by resort to CR 60(b)(5).

Opinion, App. Tab 1 at 3. This conclusion turns the rule on its head. Of course, any litigant facing a void judgment could always challenge that order within thirty days of its entry. The entire point of CR 60(b)(5) is that such litigants are not limited to doing so; rather, as the Court of Appeals readily acknowledged, there is no time limit on the right of a citizen to challenge a void order.

The Decree violated the anti-alienation provision of the Social Security Act and acted beyond its authority by dividing Mr. Anderson's Social Security benefits. *See, supra.* The lack of legal authority to make the division of Social Security Benefits makes the order void. *Id.* A void order is void from the inception and a Motion to Vacate is not limited by any passing of time and the reasonableness requirement in CR 60(b) does not apply. This Court should accept review of this case to protect litigants' right to seek relief under CR 60(b), without which litigants are vulnerable to the effects of void judgments.

VI. CONCLUSION

This case presents the rare circumstance in which this Court should accept review over an unpublished opinion. Every married person who receives Social Security benefits has an interest in ensuring that their right

under the anti-alienation provision of the Social Security Act remains in force. Additionally, every litigant subject to a void order has a substantial interest in preserving their ability to challenge them by means of CR 60(b)(5). Therefore, the Supreme Court should accept review in this case.

Respectfully submitted,

Dated: 6/23/14

Daniel W. Smith, WSBA No. 15206
Attorney for Petitioner

Appellate Court No. 70057-0-1
Supreme Court No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE MARRIAGE OF

BEVERLY L. ANDERSON, Respondent,

v.

ROBERT E. ANDERSON, Petitioner.

APPENDIX TO PETITION FOR REVIEW

Daniel W. Smith,
Attorney for Petitioner

Campbell, Dille, Barnett & Smith, PLLC
317 South Meridian
Puyallup, Washington 98371-0164
P: (253) 848-3513
WSBA #15206

Tab 1: Opinion of the Court of Appeals dated April 28, 2014;

Tab 2: Order of the Court of Appeals Denying Motion for Reconsideration dated May 23, 2014;

Tab 3: 42 U.S.C. § 407(a);

Tab 4: *Dapp v. Dapp*, 211 Md. App. 323, 65 A.3d 214 (2013);

Tab 5: *In Re Marriage of Hulstrom*, 342 Ill. App. 3d 262, 794 N.E.2d 980 (Ct. App. Ill. 2003);

Tab 6: *In Re Marriage of Anderson*, 252 P.3d 490 (Ct. App. Colo. 2010);

Tab 7: *Biondo v. Biondo,* 291 Mich. App. 720, 809 N.W.2d 397 (Ct. App. Mich. 2011).

TAB 1

Opinion of the Court of Appeals dated April 28, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of BEVERLY L. ANDERSON, Respondent, v. ROBERT E. ANDERSON, Appellant.	No. 70057-0-I DIVISION ONE UNPUBLISHED OPINION FILED: April 28, 2014

BECKER, J. — A court may relieve a party from a void judgment regardless of the passage of time. Because the entering court had subject matter jurisdiction over this dispute, the decree is not void. We affirm the order denying the motion to vacate.

On October 7, 1997, a King County Superior Court judge entered an amended decree of dissolution dissolving Robert and Beverly Anderson's marriage. The decree contained a section providing that Robert was to pay Beverly a percentage of the gross amount of his social security benefits:

> Social Security
>
> When the husband commences receiving his social security benefits, he shall pay 50% of the gross amount to the wife, each month, until the wife commences receiving social security benefits under her own claim. When she commences receiving her own

> social security benefits, the gross amount received by the wife shall be subtracted from the gross amount received by the husband, and the husband shall pay to the wife one-half of the difference between his benefit and her benefit on a monthly basis. Said payments shall be adjusted for income tax payable on such social security. Said transfer shall continue to be made until the first death of a party.

On October 12, 2012, Robert moved for relief from the dissolution decree under CR 60(b)(5). The basis for his motion was that Social Security benefits are not subject to distribution as property in a dissolution proceeding. See Hisquierdo v. Hisquierdo, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979); In re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999). The trial court denied Robert's motion to vacate and his subsequent motion for reconsideration. Robert appeals.

Robert argues that, under Hisquierdo and Zahm, the trial court lacked the "inherent power" to distribute his Social Security benefits to Beverly, rendering the decree void.

A court may relieve a party from a final judgment at any time if the judgment is void. CR 60(b)(5). A judgment is void if the entering court lacked subject matter jurisdiction. In re Marriage of Buecking, 179 Wn.2d 438, 446, 316 P.3d 999 (2013); Cole v. Harveyland, LLC, 163 Wn. App. 199, 205, 258 P.3d 70 (2011). Superior courts in Washington State have subject matter jurisdiction over all types of cases unless jurisdiction is vested exclusively in another court. WASH. CONST. art. 4, § 6.

The subject matter at issue is divorce. The Washington Constitution specifically grants superior courts original jurisdiction in divorce matters. Buecking, 179 Wn.2d at 449-50, citing WASH. CONST. art. 4, § 6. Therefore, it

was within the trial court's subject matter jurisdiction to enter a decree of dissolution. The provision distributing Social Security benefits may be erroneous—a possibility about which we express no opinion—but that is irrelevant to the subject matter jurisdiction inquiry.

Robert could have brought a direct appeal to challenge the Social Security provision of the dissolution decree within 30 days of its entry. RAP 5.2. But he did not. He cannot avoid the consequences of that failure by resort to CR 60(b)(5).

Affirmed.

Becker, J.

WE CONCUR:

was within the trial court's subject matter jurisdiction to enter a decree of dissolution. The provision distributing Social Security benefits may be erroneous—a possibility about which we express no opinion—but that is irrelevant to the subject matter jurisdiction inquiry.

Robert could have brought a direct appeal to challenge the Social Security provision of the dissolution decree within 30 days of its entry. RAP 5.2. But he did not. He cannot avoid the consequences of that failure by resort to CR 60(b)(5).

Affirmed.

Becker, J.

WE CONCUR:

TAB 2

Order of the Court of Appeals Denying Motion for Reconsideration dated May 23, 2014

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

May 23, 2014

Ginger Edwards-Buetow
Buetow Law Office PLLC
PO Box 1968
Issaquah, WA, 98027-0084
GINGER@BUETOWLAW.COM

Daniel W. Smith
Campbell Dille Barnett & Smith PLLC
317 S Meridian
Puyallup, WA, 98371-5913
dsmith@cdb-law.com

CASE #: 70057-0-I
Beverly L. Anderson, Respondent v. Robert E. Anderson, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Hon. Deborah Fleck

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Marriage of BEVERLY L. ANDERSON, Respondent, v. ROBERT E. ANDERSON, Appellant.	No. 70057-0-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Robert E. Anderson, has filed a motion for reconsideration of the opinion filed April 28, 2014, and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DONE this 23rd day of May, 2014.

FOR THE COURT:

Becker, J.

Judge

TAB 3

42 U.S.C. § 407(a)

42 USCS § 407

Current through PL 113-120, approved 6/10/14

United States Code Service - Titles 1 through 51 > *TITLE 42. THE PUBLIC HEALTH AND WELFARE* > *CHAPTER 7. SOCIAL SECURITY ACT* > *TITLE II. FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE BENEFITS*

§ 407. Assignment of benefits

(a) In general. The right of any person to any future payment under this *title [42 USCS §§ 401* et seq.] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this *title [42 USCS §§ 401* et seq.] 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 the date of the enactment of this section [enacted 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 title, if such withholding is done pursuant to a request made in accordance with *section 3402(p)(1) of the Internal Revenue Code of 1986* [*26 USCS § 3402(p)(1)*] by the person entitled to such benefit or such person's representative payee.

History

(Aug. 14, 1935, ch 531, Title II, § 207,49 Stat. 624; Aug. 10, 1939, ch 666, Title II, § 201, 53 Stat. 1372; April 20, 1983, *P.L. 98-21, Title III, Part C, § 335(a), 97 Stat. 130; Oct. 21, 1998, P.L. 105-277*, Div J, Title IV, § 4005(a), *112 Stat. 2681*-911.)

Annotations

Notes

Explanatory notes:

Prior to amendment by Act Aug. 10, 1939, the provisions of this section appeared as § 208 of Act Aug. 14, 1935. The former provisions of § 207 of Act Aug. 14, 1935 now appear as *42 USCS § 405(i)*.

Effective date of section:

Act Aug. 10, 1939, ch 666, Title II, § 201, 53 Stat. 1362, provided that this section is effective Jan. 1, 1940.

Amendments:

1939 . Act Aug. 10, 1939 (effective 1/1/40 as provided by § 201 of such Act) substituted this section for one which read: "The Board shall from time to time certify to the Secretary of the Treasury the name and address of each person entitled to receive a payment under this title, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursement of the Treasury Department, and prior to audit or settlement by the General Accounting Office, shall make payment in accordance with the certification by the Board.".

1983 . Act April 20, 1983 (applicable as provided by § 335(c) of such Act, which appears as a note to this section), designated the existing provisions as subsec. (a); and added subsec. (b).

1998 . Act Oct. 21, 1998, added subsec. (c).

Other provisions:

Application of April 20, 1983 amendment. Act April 20, 1983, *P.L. 98-21*, Title III, Part C, § 335(c), 97 Stat. 130, provided: "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 [*42 USCS §§ 301* et seq.] on or after the date of the enactment of this Act.".

Case Notes

TAB 4

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

Dapp v. Dapp

Court of Special Appeals of Maryland
May 1, 2013, Filed
No. 0500, September Term, 2011

Reporter: 211 Md. App. 323; 65 A.3d 214; 2013 Md. App. LEXIS 43; 2013 WL 1829112

ROBERT B. DAPP v. LINDA C. DAPP

Prior History: Appeal from the Circuit Court for Baltimore County, Timothy J. Martin, JUDGE.

Disposition: [***1] 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.

Core Terms

benefits, railroad retirement, parties', one-half, divide, retirement benefits, social security, circuit court, cases, social security benefits, marital, courts, settlement agreement, general assets, retirement, spouse, assignable, alimony, divorce, order requiring, divisible, marriage, annuity, private agreement, former husband, make payment, enforcing, amounts, terms

Case Summary

Procedural Posture

Appellee former wife filed a complaint against appellant former husband, seeking to enforce the parties' property settlement agreement. The Circuit Court for Baltimore County (Maryland) entered an order requiring the former husband to pay the former wife certain amounts based upon his past and future receipt of retirement benefits under the Railroad Retirement Act of 1974 (Act), *45 U.S.C.S. § 231 et seq.* The former husband appealed.

Overview

The former husband asserted that the division of his Tier I benefits pursuant to the parties' marital settlement agreement was prohibited by the Act, and that the Supremacy Clause precluded the trial court from enforcing that portion of the agreement. The appellate court agreed. Tier I benefits remained subject to the broad prohibition of *45 U.S.C.S. § 231m(a)* against division or assignment of benefits under the Act. The only exception was in cases of delinquent alimony and/or child support which did not apply here. The fact that this case involved a private agreement between the parties to divide benefits made no difference under the statute. The parties' agreement was void when it was made because the unambiguous terms of *§ 231m(a)* prohibited "assignment" of the benefits and an agreement to divide benefits was plainly an assignment. State courts were not permitted to enforce such agreements precisely because such agreements were not valid in the first place. The Tier I benefits here were not divisible and assignable at the time of contract. The fact that the order did not directly affect the benefits was irrelevant.

Outcome

The judgment was reversed in part. The case was remanded with direction to vacate that portion of the order entering judgment for one-half of the Tier I benefits and requiring payment of future Tier I benefits.

LexisNexis® Headnotes

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > General Overview

Transportation Law > Rail Transportation > Amtrak

HN1 Amtrak , a private for-profit corporation created by federal statute, is a railroad carrier, *49 U.S.C.S. § 24301(a)*, and hence an employer within the Railroad Retirement Act. *45 U.S.C.S. § 231(a)(1)(I)*.

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > General Overview

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > Assignability

HN2 See *45 U.S.C.S. § 231m(a)*.

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > General Overview

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > Assignability

HN3 Tier I benefits remain subject to the broad prohibition of the Railroad Retirement Act of 1974, *45 U.S.C.S. § 231 et seq.*, against division or assignment. The only exception is in cases of delinquent alimony and/or child support.

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > General Overview

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > Assignability

HN4 An agreement to divide benefits under the Railroad Retirement Act of 1974, *45 U.S.C.S. § 231 et seq.*, i.e., to transfer a portion of the benefits, is plainly an assignment of those benefits.

Constitutional Law > Supremacy Clause > Federal Preemption

Constitutional Law > Supremacy Clause > Supreme Law of the Land

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > General Overview

Pensions & Benefits Law > ... > Railroad Workers > Railroad Retirement Act of 1974 > Assignability

HN5 The Supremacy Clause of U.S. Const. art. VI-which states that the laws of the United States are the supreme law of the land-precludes courts of Maryland from enforcing a private agreement that purports to divide those benefits under the Railroad Retirement Act of 1974, *45 U.S.C.S. § 231 et seq.*

Counsel: ARGUED BY: Andrew M. Hermann, (Levy, Mann, Caplan, Hermann & Polashuk, LLP on the brief) of Owings Mills, MD FOR APPELLANT.

ARGUED BY: Colleen A. Cavanaugh (Cavanaugh & Warshaw, PA on the brief) of Towson, MD FOR APPELLEE.

Judges: ARGUED BEFORE: Zarnoch, Kehoe, Pierson, W. Michel (Specially Assigned), JJ. Opinion by Pierson, J.

Opinion by: Pierson

Opinion

[*325] [215]** Opinion by Pierson, J.

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. **[***2]** 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 **[*326]** 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 **[***3]** amount, $1,950.00 constitutes so-called Tier I benefits, and $1,163.13 constitutes so-called Tier II benefits and supplemental annuity **[**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 **[***4]** 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 **[*327]** 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 **[***5]** 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

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[1] ***HN1*** 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).

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. **[***6]** 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 **[**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 **[*328]** 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 **[***7]** 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. **[***8]** 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:

> ***HN2*** Except as provided in subsection (b) of this section . . . notwithstanding any other law of the United States, or of **[*329]** 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 **[**218]** were subject to the state's community property regime, and held that because the benefits flowed in part from the husband's employment **[***9]** 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*. 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 **[*330]** congressional objective." *Hisquierdo, 439 U.S. at 583*. **[***10]** 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*.

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)*. ***HN3*** 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*; 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 *Hisquerdo* involved a court-ordered division of benefits under a provision of state law. But this is a distinction that makes no difference **[*331]** under the terms of the statute. We **[***12]** conclude that the agreement made by Mr. Dapp was void when it was made because

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[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 **[***11]** 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).

the unambiguous terms of section 231m(a) **[**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; ***HN4*** 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 ***HN5*** 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 *Hisquerdo* 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 **[***13]** 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 **[*332]** 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 **[***14]** 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, 794 N.E.2d 980, 276 Ill. Dec. 730 (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 **[***15]** benefits, once received, "become the recipient's personal property, and he can do whatever **[**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 **[*333]** 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 **[***16]** 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 (2005)*. 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 **[***17]** 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 **[*334]** 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)*, **[***18]** and cases cited therein; *Poisson v. Allstate Life Ins. Co., 640 F. Supp. 147 (D. Me.1986)*. In those cases, courts did **[**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 **[***19]** 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 **[*335]** 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.

TAB 5

In Re Marriage of Hulstrom, 342 Ill. App. 3d 262, 271-73, 794 N.E.2d 980, 987-89

(Ct. App. Ill. 2003)

In re Marriage of Hulstrom

Appellate Court of Illinois, Second District
July 29, 2003, Decided
No. 2-02-0960

Reporter: 342 Ill. App. 3d 262; 794 N.E.2d 980; 2003 Ill. App. LEXIS 978; 276 Ill. Dec. 730

In re MARRIAGE OF EVERETT E. HULSTROM, Petitioner-Appellant, and ILA J. HULSTROM, Respondent-Appellee.

Subsequent History: [***1] Released for Publication September 5, 2003.

Prior History: Appeal from the Circuit Court of Lee County. No. 94--D--90. Honorable David T. Fritts, Judge, Presiding.

Disposition: Judgment reversed in part, cause remanded with directions.

Core Terms

parties, social security benefits, trial court, social security, void, Marriage, marital property, benefits, dividing, settlement agreement, marital settlement agreement, subject matter jurisdiction, remarriage, property division, child support, provides, lack of jurisdiction, social security payments, legal process, Restatement, settlement, judgments, estoppel, voidable, alimony, dissolution judgment, equitable estoppel, future payments, one-half, violates

Case Summary

Procedural Posture

Petitioner husband asked the Circuit Court of Lee County (Illinois) to modify its previous judgment dissolving his marriage to respondent wife. The trial court denied the husband's petition, and he appealed.

Overview

The parties' marital settlement agreement, incorporated by the trial court into the dissolution of marriage judgment, required, as part of its property distribution provisions, the combination and redistribution of their social security payments. The appellate court held, under the Supremacy Clause, U.S. Const. art. VI, the trial court had no jurisdiction to enforce this part of the agreement because it violated *42 U.S.C.S. § 407(a)*, precluding the assignment of social security payments. While *42 U.S.C.S. § 659(a)* provided an exception to this rule for alimony and child support, the parties intended this provision to be part of their property settlement. Because the trial court had no jurisdiction to divide the parties' social security benefits, the part of the judgment allocating marital property was void. Equitable estoppel did not bar the husband from attacking the validity of the marital property division because it was void. The doctrine of estoppel by remarriage did not apply as (1) the husband did not say the entire judgment was void and (2) the dissolution of the parties' marriage did not draw its validity from the property division.

Outcome

That part of the trial court's judgment which divided the parties' marital property was reversed as void, and the matter was remanded to redetermine a division of marital property.

LexisNexis® Headnotes

Constitutional Law > Supremacy Clause > General Overview

HN1 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.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN2 See 42 U.S.C.S § 407(a).

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN3 42 U.S.C.S. § 407(a) imposes a broad bar against the use of any legal process to reach all social security benefits. Section 407(a) prohibits the use of any legal process to reach social security benefits and bars all claimants, including a state.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN4 By enacting anti-assignment statutes regarding government benefits, Congress affords recipients protection from creditors, taxgatherers, and all those who would "anticipate" the receipt of benefits.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN5 Congress 's clear intent in enacting 42 U.S.C.S. § 407(a), precluding the transfer or assignment of future payments of social security benefits, requires a court to strictly interpret that clause to prohibit voluntary as well as involuntary transfers or assignments.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN6 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.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN7 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 of 42 U.S.C.S. § 407(a) against transfer or assignment of future benefits.

Family Law > Child Support > Support Obligations > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN8 Congress created a statutory exception to the anti-alienation provision of 42 U.S.C.S. § 407(a) when it enacted 42 U.S.C.S. § 659(a) of the Social Security Act in 1975. Section 659(a) makes benefits subject to legal process to provide child support or make alimony payments. 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.S. § 662(c). Social security benefits may be reached by a former spouse for alimony or child support but not for property division.

Contracts Law > Contract Interpretation > General Overview

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > General Overview

HN9 Interpreting a marital settlement agreement is a matter of contract construction; the court seeks to effectuate the parties' intent. Ordinarily, the language the parties use is the best indication of their intent. When contract terminology is unambiguous, it must be given its plain and ordinary meaning. However, where the language is ambiguous, a trial court may receive parol evidence to decide what the parties intended. Whether an agreement is ambiguous is a question of law.

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN10 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. 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. A voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack.

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN11 Once 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.

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN12 A judgment may be attacked collaterally as void if there is a total lack of jurisdiction.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN13 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.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN14 The property division section of the Illinois Marriage and Dissolution of Marriage Act, *750 Ill. Comp. Stat. Ann. 5/503(a), 504(a)*, is preempted by *42 U.S.C.S. § 407(a)* of the Social Security Act, *42 U.S.C.S. § 301 et seq.*, which bars the transfer of social security benefits.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN15 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.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Family Law > ... > Dissolution & Divorce > Jurisdiction > General Overview

HN16 The doctrine of estoppel by remarriage provides that parties to a dissolution proceeding may be estopped from asserting that a 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. Estoppel by remarriage is distinct from traditional notions of equitable estoppel, and a party supporting the enforcement of a dissolution judgment need not prove his or her detrimental reliance upon the judgment.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN17 A state court lacks jurisdiction to enforce a marital settlement agreement that divides future payments of social security when such an agreement violates *42 U.S.C.S. § 407(a)* of the

Social Security Act, which statutorily prohibits the transfer or assignment of future benefits.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

HN18 *750 Ill. Comp. Stat. Ann. 5/510(c)* (2000) of the Illinois Marriage and Dissolution of Marriage Act, *750 Ill. Comp. Stat. Ann. 5/101 et seq.*, provides that the obligation to pay maintenance ordinarily terminates upon the remarriage of the party receiving maintenance.

Counsel: For Everett E. Hulstrom, Appellant: Henry S. Dixon, Dixon & Dixon Law Offices, Dixon, IL.

For Ila J. Hulstrom, Appellee: Louis F. Pignatelli and Patrick J. Liston, Pignatelli, Liston & Mertes, P.C., Rock Falls, IL.

Judges: JUSTICE BYRNE delivered the opinion of the court. HUTCHINSON, P.J., and KAPALA, J., concur.

Opinion by: BYRNE

Opinion

[982]** **[*264]** JUSTICE BYRNE delivered the opinion of the court:

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, **[***2]** 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.

[*265] * * *

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 **[***3]** 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 **[***4]** unmodifiable distribution of marital property, rather than a modifiable **[**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 "maintenance" 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 **[*266]** 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 **[***5]** 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.

HN1 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:

HN2 "(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, **[***6]** 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 ***HN3*** *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, 34 L. Ed. 2d 608, 612, 93 S. Ct. 590, 592 (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, 34 L. Ed. 2d at 612, 93 S. Ct. at 592*.

In *Hisquierdo v. Hisquierdo, 439 U.S. 572, 59 L. Ed. 2d 1, 99 S. Ct. 802 (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 **[***7]** 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 **[*267]** that, ***HN4*** **[**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, 59 L. Ed. 2d at 7, 99 S. Ct. at 805*.

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 **[***8]** 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 " ' "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 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, **[***9]** "because 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 ***HN5*** 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:

HN6 "Although social security recipients may use the proceeds of **[*268]** 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. **[***10]** 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 **[**985]** into a martial settlement agreement that provided, "in 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* **[***11]** , the Arkansas Supreme Court held that ***HN7*** "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 ***HN8*** 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 **[***12]** 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 **[*269]** agreement's purported division of social security 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.

HN9 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)*. **[***13]** When contract terminology is unambiguous, it must be given its plain and ordinary meaning. *Frain, 258 Ill. App. 3d at 478*. 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*.

We agree with the trial court that the parties treated the social security benefits as marital property rather than maintenance. **[**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. Paragraph 8 provides that the parties waive any claims to prospective maintenance. If we were to

conclude **[***14]** 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.

[*270] Respondent next contends that, even if **[***15]** 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.

HN10 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*. A voidable judgment is **[***16]** 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 **[**987]** to the agreement, the parties revisited the child support issue annually. *Mitchell, 181 Ill. 2d at 171*. 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 **[***17]** 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 ***HN11*** "once 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*. Acknowledging that ***HN12*** a judgment may be attacked collaterally as void if there is a total lack of **[*271]** 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*.

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*. *Section 12 of the Restatement* **[***18]** 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:

HN13 "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 **[***19]** 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*.

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, **[**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, ***HN14*** the property division section of the Marriage Act is preempted by the Social Security Act, which bars the transfer of social security benefits. Because the trial court in this case lacked jurisdiction to divide the parties' social **[*272]** security benefits, the traditional rule governing void and voidable judgments, **[***20]** 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*. The marital property division " 'substantially infringes the authority of another tribunal or agency of government,' " in this case, the federal government. *Mitchell, 181 Ill. 2d at 176*, 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 **[***21]** 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. ***HN15*** 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 **[***22]** and the Social Security Act.

We note that the related doctrine of estoppel by remarriage also does not apply here. ***HN16*** 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*. Estoppel by remarriage **[*273]** is distinct from traditional notions of 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*. The rule does not apply here because (1) petitioner does not assert that the *entire* **[**989]** dissolution judgment is void and (2) the dissolution of the parties' marriage does not draw its validity from the property division. See *Schlam, 271 Ill. App. 3d at 794*.

In conclusion, we hold, in agreement with *Boulter* and *Gentry*, that ***HN17*** a state court lacks jurisdiction to enforce a marital settlement **[***23]** 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 **[***24]** 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 ***HN18*** *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 **[*274]** judgment or otherwise approved by the court" if they wish to devise a prospective maintenance schedule regarding **[***25]** 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 6

In Re Marriage of Anderson, 252 P.3d 490, 494 (Ct. App. Colo. 2010)

In re Marriage of Anderson

Court of Appeals of Colorado, Division Two
December 23, 2010, Decided
Court of Appeals No. 09CA2592

Reporter: 252 P.3d 490; 2010 Colo. App. LEXIS 1919

In re the Marriage of Herbert L. Anderson, Appellant, and Marilyn D. Anderson, Appellee.

Prior History: [**1] Jefferson County District Court No. 93DR2232. Honorable Randall C. Arp, Judge.

Disposition: ORDER AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS.

Core Terms

social security benefits, parties, void, district court, decree, property division, marital property, Marriage, divide, state court, benefits, lack of jurisdiction, pay part, circumstances, modifiable, equitable estoppel principle, periodic payments, future benefits, void judgment, healthcare, magistrate's, challenging, distribute, spouse's, part of the property, settlement agreement, health insurance, anti-assignment, dissolution, affirming

Case Summary

Procedural Posture

In a post-dissolution of marriage matter, appellant former husband appealed the order of the Jefferson County District Court, Colorado, denying his motion to set aside or modify certain property division provisions of his divorce decree.

Overview

The settlement agreement provision that was incorporated into the divorce decree and required the husband to pay part of his future Social Security benefits to appellee wife was void. The agreement constituted a transfer of husband's rights to future benefits in violation of the anti-assignment provision of the Social Security Act, *42 U.S.C.S. § 407(a)*, and the district court lacked jurisdiction to enforce it. Because of the Supremacy Clause implications under U.S. Const. art. VI, cl. 2, the husband was not barred by principles of equitable estoppel from challenging the void judgment. The district court did not err in affirming the magistrate's ruling that the husband's periodic payments to his wife for health insurance or health care were part of the property division, as opposed to maintenance.

Outcome

The portion of the judgment enforcing the transfer of the husband's future Social Security benefits to his wife was reversed; the ruling that the husband's periodic payments to wife for health insurance or health care were part of the property division was affirmed. The case was remanded to the district court to reconsider the property division and the parties' economic circumstances at the time of the remand hearing.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1 The appellate court reviews a district court's decision as to whether to grant relief under *Colo. R. Civ. P. 60(b)* for an abuse of discretion.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > Supremacy Clause > Federal Preemption

HN2 Federal preemption is a question of law subject to de novo review by the appellate court.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN3 See *42 U.S.C.S. § 407(a)*.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN4 *42 U.S.C.S. § 407(a)* imposes a broad bar against the use of any legal process to reach all social security benefits. Thus, a state court in a dissolution proceeding cannot distribute or divide a spouse's future Social Security benefits as marital property. 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. An exception to this rule is set forth in *42 U.S.C.S. § 659(a)*, which allows Social Security benefits to be taken for the payment of child support or maintenance.

Civil Procedure > ... > Settlement Agreements > Enforcement > General Overview

Family Law > ... > Property Distribution > Characterization > Marital Property

Family Law > ... > Classification > Retirement Benefits > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN5 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, *42 U.S.C.S. § 407(a)*.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN6 A judgment is void when the court lacks jurisdiction to enter it.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

HN7 If federal law preempts state law, the state trial court lacks subject matter jurisdiction to hear a claim.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > Supremacy Clause > General Overview

Family Law > ... > Classification > Retirement Benefits > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > Administrative Proceedings & Judicial Review

HN8 Applying the Supremacy Clause, state courts have consistently held that the Social Security Act precludes them from treating Social Security benefits as property. Thus, state courts lack subject matter jurisdiction to divide parties' Social Security benefits in a property distribution. The Social Security Act preempts state courts from transferring benefits as property.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Settlement Agreements > Enforcement > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > Administrative Proceedings & Judicial Review

HN9 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.

Governments > Legislation > Interpretation

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN10 Congress ' clear and stringent interpretation of the prohibition on transfer or assignment of Social Security benefits in *42 U.S.C.S. § 407(b)* compels the court to strictly

interpret that clause to prohibit voluntary as well as involuntary transfers or assignments.

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN11 Under *Colo. R. Civ. P. 60(b)(3)*, a court may relieve a party from a void judgment. Although a *Colo. R. Civ. P. 60(b)* motion generally must be made within a reasonable time, a void judgment can be attacked at any time.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN12 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.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Contracts Law > Defenses > Public Policy Violations

HN13 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.

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > ... > Settlement Agreements > Enforcement > General Overview

Contracts Law > Defenses > Illegal Bargains

HN14 Equitable doctrines may not be used to enforce an illegal or void agreement.

Civil Procedure > Preliminary Considerations > Equity > General Overview

Constitutional Law > Supremacy Clause > General Overview

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN15 Equitable estoppel principles cannot be applied to bar a challenge to a judgment that is void under the Supremacy Clause.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

HN16 An error in the division of one asset requires reconsideration of the entire property division.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

HN17 A property division is modifiable only if the court finds that conditions exist to justify reopening a judgment; rather than maintenance, which is modifiable under *Colo. Rev. Stat. § 14-10-122(1)(a)*.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > General Overview

Family Law > ... > Property Distribution > Equitable Distribution > Property Settlements

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Spousal Support > Obligations > Periodic Support

HN18 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. 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. 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. Nonetheless, the language that the parties use is ordinarily the best indication of their intent.

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

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

Judges: Opinion by JUDGE GABRIEL. Roy and Hawthorne, JJ., concur.

Opinion by: GABRIEL

Opinion

[*492] 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 **[**2]** 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 **[*493]** 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 **[**3]** 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.

HN1 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. **[**4]** *See Kohn v. Burlington N. & Santa Fe R.R., 77 P.3d 809, 811 (Colo. App. 2003)* (*"HN2* 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:

> *HN3* 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).

HN4 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 **[**5]** 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*HN5* 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 (Ark. 1997)*; *In re Marriage of Hulstrom,* **[*494]** 342 Ill. App. 3d 262, 794 N.E.2d 980, 986, 276 Ill. Dec. 730 (Ill. App. Ct. 2003); *Boulter v. Boulter, 113 Nev. 74, 930 P.2d 112, 114 (Nev. 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)* (*HN6* judgment void when, among **[**6]** other things, court lacked jurisdiction to enter it); *Osband v. United Airlines, Inc., 981 P.2d 616, 619 (Colo. App. 1998)* (*"HN7* 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.

HN8 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 ***HN9*** state courts are without power to enforce private agreements dividing future payments of Social Security **[**7]** 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* **[**8]** (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. ***HN10*** "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 **[**9]** 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 **[*495]** 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***HN11*** 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)*; **[**10]** *Hancock v. Boulder Cnty. Pub. Tr., 920 P.2d 854, 858 (Colo. App. 1995)*.

Notwithstanding the foregoing, our supreme court has held that ***HN12*** 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)* ("***HN13*** 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 **[**11]** right or rendered service in reliance upon it."); *Harding v. Heritage Health Prods. Co., 98 P.3d 945, 949 (Colo. App. 2004)* ("***HN14*** [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 ***HN15*** 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.* **[**12]** *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, 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 **[*496]** 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 **[**13]** 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 ***HN16*** an error in the division of one asset requires reconsideration of the entire property division); *see also Hulstrom, 794 N.E.2d at 989* ("We acknowledge **[**14]** 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 ***HN17*** 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.

HN18 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 **[**15]** 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, 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 **[**16]** 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). **[*497]** 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

Biondo v. Biondo, 291 Mich. App. 720, 727, 809 N.W.2d 397, 401-02 (Ct. App. Mich. 2011)

Neutral
As of: June 23, 2014 1:49 PM EDT

Biondo v. Biondo

Court of Appeals of Michigan
March 15, 2011, Decided
No. 294694

Reporter: 291 Mich. App. 720; 809 N.W.2d 397; 2011 Mich. App. LEXIS 475

JAMES FRANKLIN BIONDO, Plaintiff-Appellant, v MARY LYNNE BIONDO, Defendant-Appellee.

Subsequent History: As Amended December 4, 2011

Prior History: [***1] Oakland Circuit Court. LC No. 2007-730012-DO.
Biondo v. Biondo, 2010 Mich. App. LEXIS 2555 (Mich. Ct. App., Feb. 23, 2010)

Core Terms

parties, social security benefits, circuit court, divorce, social security, preempts, benefits, marital property, federal law, spouse, retirement, consent judgment, marital estates, equalization, anticipated, state law, property division, mutual mistake, legal process, circumstances, attachment, factors, subject matter jurisdiction, property settlement, divorce judgment, state court, garnishment, relations, divide, subject-matter

Case Summary

Procedural Posture

Appellant former husband sought review of a consent judgment of divorce entered by the Oakland Circuit Court (Michigan), which divided the parties' marital estate equally and required them to equalize their Social Security (SS) benefits. When appellee former wife sought to compel performance of the SS term, over the husband's objection, the circuit court declined to strike the term.

Overview

One of the consent judgment provisions obligated the parties to equalize their SS benefits, and the parties stipulated to the entry of a qualified domestic relations order (QDRO), which allocated to the wife 50% of the husband's accrued retirement benefits as of the date of the divorce. When the wife sought compliance with the SS term, the husband asserted that federal law preempted its enforcement. On appeal, the court agreed and reversed, finding that *42 U.S.C.S. § 407(a)* did not allow the transfer of the husband's SS benefits to anyone other than himself. A specific exemption had been enacted in *42 U.S.C.S. § 659(a)*, which permitted the states to employ SS benefits for the enforcement of child support and alimony obligations. However, the exemption did not apply to a property distribution. The federal preemption did not mean that the circuit court exceeded its subject matter jurisdiction under *Mich. Const. art. VI, § 13* and *MCL 552.6(1)*; because inclusion of the SS term was a mutual mistake by the parties, the circuit court could modify the property settlement provisions on remand and consider the SS benefits when formulating an equitable division of the property.

Outcome

The court reversed the circuit court's decision and remanded for modification of the consent judgment's property settlement provisions.

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 Whether a trial court has subject matter jurisdiction is a question of law that the appellate court reviews de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > Supremacy Clause > Federal Preemption

HN2 The appellate court reviews de novo whether federal law preempts state law.

Constitutional Law > Supremacy Clause > Federal Preemption

Family Law > General Overview

HN3 Under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, federal law preempts state law where Congress so intends. Generally, federal law does not preempt laws governing divorce or domestic relations, a legal arena belonging to the states rather than the United States . Thus, state family and family property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN4 See *42 U.S.C.S. § 407(a)*.

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN5 *42 U.S.C.S. § 407(a)* prohibits the assignment of Social Security benefits and removes Social Security benefits from the reach of attachment, garnishment, or other legal process.

Family Law > ... > Support Obligations > Computation of Child Support > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN6 *42 U.S.C.S. § 659(a)* permits the states to employ Social Security benefits for the enforcement of child support and alimony obligations.

Constitutional Law > Supremacy Clause > Federal Preemption

Family Law > ... > Dissolution & Divorce > Jurisdiction > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN7 That federal law has preempted a portion of parties' consent judgment of divorce in no manner deprives the circuit court of subject matter jurisdiction. The Social Security Act simply does not divest state courts of subject matter jurisdiction in divorce cases. Rather, the Supremacy Clause, U.S. Const. art. VI, cl. 2, preempts state laws regarding the division of marital property only to the extent they are inconsistent with *42 U.S.C.S. § 407(a)*.

Contracts Law > Defenses > Ambiguities & Mistakes > Mutual Mistake

Family Law > ... > Property Distribution > Equitable Distribution > Property Settlements

HN8 Courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged. The court has described a mutual mistake as a situation where the parties have a common intention, but the resulting judgment rests on a common error.

Family Law > ... > Equitable Distribution > Factors > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN9 The Michigan Supreme Court set forth the following relevant factors for consideration when dividing marital property: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties,

(6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. The amount of a spouse's anticipated or received Social Security benefits qualifies as relevant to several of the Sparks factors, including the contributions each made to the marital estate, their necessities and circumstances, and general principles of equity.

Family Law > ... > Equitable Distribution > Factors > General Overview

Public Health & Welfare Law > Social Security > Retirement & Survivor Benefits > General Overview

HN10 The circuit court may consider the parties' anticipated Social Security benefits as one factor, among others, to be considered when devising an equitable distribution of marital property. In endeavoring to divide the marital estate, the court may not treat Social Security benefits as tantamount to a marital asset. Instead, the circuit court may take into account, in a general sense, the extent to which Social Security benefits received by the parties affect the Sparks factors.

Judges: Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

Opinion by: Elizabeth L. Gleicher

Opinion

[398]** **[*722]** GLEICHER, J.

James Franklin Biondo and Mary Lynne Biondo were married for more than 40 years. Their consent judgment of divorce equally divided the marital estate and required them to "equalize their social security benefits." When Mary Biondo sought a court order compelling performance of the judgment's social security provision, **[**399]** James Biondo asserted that federal law preempted its enforcement. The circuit court ruled that "[a] deal is a deal," and declined to strike the social security provision from the divorce judgment. We granted leave to appeal to consider whether federal law preempts the consent judgment's social security formula. We hold that it does, reverse the circuit court ruling to the contrary, and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

The parties married in 1964, and in July 2007 consented to the entry of a divorce judgment. During the marriage, James Biondo worked for Ford Motor Company, while Mary Biondo cared for the parties' two children, who are now adults. The marital property included a home in Birmingham, two vehicles, and several bank accounts. The consent **[***2]** judgment "reserved **[*723]** for future adjudication" the issue of spousal support derived from "earned income," and forever barred spousal support based on nonearned income. A specific provision, entitled "Social Security Benefits," obligated the parties to "equalize their social security benefits." After entry of the divorce judgment, the parties stipulated to the entry of a qualified domestic relations order (QDRO), which allocated to Mary Biondo 50 percent of James Biondo's accrued retirement benefits as of the date of the divorce. The parties agree that they intended the consent judgment's property division to equally divide the marital estate.

In July 2009, Mary Biondo filed in the circuit court a motion seeking "compliance" with the judgment's "Social Security Benefits provision." Mary Biondo averred that James Biondo had failed to make timely and full social security equalization payments. James Biondo responded that the judgment's social security formula violated federal law, and that any order enforcing the social security benefits term would be invalid. After a motion hearing, the circuit court entered an order announcing in relevant part that "the Court will enforce the property settlement **[***3]** provision regarding Social Security Benefits contained in the July 10, 2007 consent judgment of divorce." We granted James Biondo's application for leave to appeal. *Biondo v Biondo, 2010 Mich. App. LEXIS 2555,*

unpublished order of the Court of Appeals, entered February 23, 2010 (Docket No. 294694).

II. ANALYSIS

James Biondo contends that the circuit court "lack[ed] subject matter jurisdiction to enforce the social security property provision of the parties' . . . judgment of divorce." According to James Biondo, *42 USC 407* preempts state courts from transferring any of an individual's social **[*724]** security benefits "by any legal process to any . . . person other than that person whom the Federal Government intended to be the recipient of those benefits." ***HN1*** "Whether a trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo." *Etefia v Credit Technologies, Inc, 245 Mich App 466, 472; 628 NW2d 577 (2001).* ***HN2*** We also review de novo whether federal law preempts state law. *People v Kanaan, 278 Mich App 594, 601; 751 NW2d 57 (2008).*

HN3 "Under the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, federal law preempts state law where Congress so intends." *Konynenbelt v Flagstar Bank, FSB, 242 Mich App 21, 25; 617 NW2d 706 (2000).* **[***4]** Generally, federal law does not preempt laws governing divorce or domestic relations, a legal arena belonging to the states rather than the United States. *Hisquierdo* **[**400]** *v Hisquierdo, 439 U.S. 572, 581; 99 S Ct 802; 59 L Ed 2d 1 (1979).* Thus, "[s]tate family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden." *Id.* (quotation marks and citation omitted). Here, we consider whether the federal interest in social security benefits preempts enforcement of the parties' agreement to equalize their social security benefits.

We begin our analysis by consulting the specific federal statute at issue, *§ 407(a)* of the Social Security Act:

> ***HN4*** 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 USC § 407(a)*].

[*725] James Biondo's preemption argument rests on the language of this statute prohibiting transfer, assignment, **[***5]** "execution, levy, attachment, garnishment," or application of "other legal process" to a beneficiary's right to collect social security benefits. In *Hisquierdo, 439 U.S. 572; 99 S. Ct. 802; 59 L. Ed. 2d 1*, the United States Supreme Court construed strikingly similar language in the Railroad Retirement Act of 1974 (RRA), *45 USC 231 et seq.*[1] The parties in *Hisquierdo* divorced in California. *Id. at 573.* The California Supreme Court ruled that the husband's railroad retirement benefits constituted community property subject to division in the divorce judgment. *Id.* The United States Supreme Court reversed the California Supreme Court, holding that *45 USC 231m* preempted California's community-property law. *Id. at 590.* The United States Supreme Court explained that the statutory language comprising *45 USC 231m* reflected congressional intent that a "specified beneficiary" would receive benefits undiminished by "attachment and

[1] The **[***6]** statutory language at issue in *Hisquierdo*, 45 USC 231m(a), directs 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 other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated[.]

anticipation." Id. at 582. The statute's "critical terms" prohibiting assignment, garnishment, attachment or subjection to legal process "prevent[] the vagaries of state law from disrupting the national scheme, and guarantee[] a national uniformity that enhances the effectiveness of congressional policy." Id. at 582, 584.

[*726] Notably, in *Hisquierdo* the Supreme Court interpreted § 231m as not only barring automatic, direct payments of RRA benefits from one spouse to another, but as also prohibiting "offsetting award[s]" intended to compensate one spouse for the value of the benefit expected by the other. Id. at 588. The Supreme Court reasoned that because § 231m contemplates that payments are not to be "anticipated," an award intended to offset future payments would permit a divorcing spouse to receive a beneficial interest in retirement payments that had not yet accrued to the other spouse. *Id.* The Court further observed that a counterbalancing award of RRA benefits "would upset the statutory balance and impair [the retiree's] economic security just as surely as would a regular deduction from his benefit check." **[***7]** *Id.* Consequently, the Court concluded **[**401]** that state marital-property laws must yield to Congress's determination that RRA benefits "should go to the retired worker alone . . . ." Id. at 590.

Like 45 USC 231m of the RRA, ***HN5*** 42 USC 407(a) prohibits the assignment of social security benefits and removes social security benefits from the reach of "attachment, garnishment, or other legal process . . . ." That virtually identical language appears in both statutes compels us to apply Hisquierdo, and to declare that § 407(a) preempts the social security equalization provision in the Biondos' consent judgment. We find additional support for our holding in *Hisquierdo* itself, where the Supreme Court specifically analogized the RRA to the Social Security Act, observing that the former RRA "was amended several times to make it conform more closely to the existing Social Security Act." Hisquierdo, 439 U.S. at 575 n 3.[2]

[*727] Furthermore, **[***8]** we find it significant that Congress created an exception to 42 USC 407(a) when it enacted ***HN6*** 42 USC 659(a), which permits the states to employ social security benefits for the enforcement of child support and alimony obligations. Application of social security benefits for marital property purposes remains specifically excluded from this exception, because Congress declared in 42 USC 659(i)(3)(B)(ii) that the term "alimony" does not encompass "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." Therefore, we conclude that the circuit court erred by enforcing the consent judgment's social security provision.

In reaching this conclusion, we specifically reject James Biondo's suggestion that the circuit court did not possess subject-matter jurisdiction to enter the terms of the parties' consent judgment of divorce. ***HN7*** That federal law has preempted a portion of the parties' consent judgment of divorce in no manner deprives the circuit court of subject-matter jurisdiction in this **[***9]** divorce matter. The Social Security Act simply does not divest state courts of subject-matter jurisdiction in divorce cases. Rather, the Supremacy Clause preempts state laws regarding the division of marital property only to the extent they are inconsistent with 42 USC 407(a). The Michigan Supreme Court has explained this distinction as follows:

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[2] The Supreme Court in *Hisquierdo* also identified another similarity shared by the RRA and the Social Security Act: "Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time." Id. at 575.

> court had no "jurisdiction" to take certain **[*728]** legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. [Buczkowski v Buczkowski, 351 Mich 216, 222; 88 NW2d 416 (1958).]

Although the circuit court erred by ordering the social security equalization, it did not exceed its subject-matter jurisdiction in doing so. Const 1963, art VI, § 13; MCL 552.6(1).

Having determined that federal law preempts the social security equalization formula in the Biondos' divorce judgment, **[**402]** we now address the consequences of this decision.

> *HN8* It **[***10]** is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged. [Keyser v Keyser, 182 Mich App 268, 269-270; 451 NW2d 587 (1990).]

This Court has described a mutual mistake as a situation "where the parties have a common intention," but the resulting judgment rests on a common error. Villadsen v Villadsen, 123 Mich App 472, 477; 333 NW2d 311 (1983) (quotation marks and citation omitted). In drafting the consent judgment, the parties incorrectly deemed their social security benefits marital property, to be equally divided along with the rest of the marital estate. Because no prior published Michigan caselaw removed social security benefits from the realm of marital property, we view the consent judgment's inclusion of the social security equalization term as a mutual **[*729]** mistake. Accordingly, on remand the circuit court may modify the judgment's property-settlement provisions.

We anticipate that on remand the Biondos will contest whether the amount **[***11]** of the parties' anticipated social security benefits may play any part in a modified judgment reallocating marital property. We consider this important question to offer guidance to the parties and the circuit court. In Sparks v Sparks, 440 Mich 141, 159-160; 485 NW2d 893 (1992), *HN9* our Supreme Court set forth the following relevant f:tors for consideration when dividing marital p/perty: "(1) duration of the marriage, (2) contr/utions of the parties to the marital estate, (:age of the parties, (4) health of the parties,) life status of the parties, (6) necessiti and circumstances of the parties, (7) earning ities of the parties, (8) past relations and con of the parties, and (9) general principle quity." The amount of a spouse's anticipate received social security benefits qualifies evant to several of the Sparks factors, in the contributions each made to the mari ate, their "necessities and circumstan nd "general principles of equity." Id.

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> that one party, far more than the other, can reasonably expect to enjoy a secure retirement. It should not invalidate a property division if a disproportionate expectation regarding social security benefits **[*730]** is acknowledged in the court's assessment of the equities. [*In re Marriage of Boyer, 538 NW2d 293, 296 (Iowa, 1995)*.]

In *Boyer*, the Iowa Supreme Court rejected the notion that "the federal preemption legislation requires state courts under these circumstances to purge so obvious an economic reality" as disproportionate anticipated social security benefits. *Id.* Similarly, the Maine Supreme Court has reasoned:

> The court's role in property division is to accomplish a just division that takes into account "all relevant factors." Just **[**403]** as few married couples engaged in a serious assessment of their retirement resources would ignore the availability of Social Security benefits, courts should not be required to ignore reality **[***13]** and fashion a distributive award of the parties' retirement and other marital assets divorced from the actual "economic circumstances of each spouse at the time the division of property is to become effective." *19-A MRS § 953(1)(C)*; *see also In re Boyer, 538 NW2d [at] 293-94* . . . (stating that "a state court is not required to pretend to be oblivious of the fact that one party expects benefits that will not be enjoyed by the other"). Failing to consider Social Security benefit payments a spouse can reasonably be expected to receive in the near future may result in a distorted picture of that spouse's financial needs, and, in turn, an inequitable division of the marital property. [*Depot v Depot, 2006 ME 25, ¶ 17; 893 A2d 995 (Me, 2006)*).]

And the Colorado Court of Appeals has expressed: "[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." *In re Marriage of Morehouse, 121 P3d 264, 267 (Colo App, 2005)*.

[*731] We join the majority of state courts **[***14]** that have considered this question, and hold that ***HN10*** the circuit court may consider the parties' anticipated social security benefits as one factor, among others, to be considered when devising an equitable distribution of marital property. We caution that in endeavoring to divide the marital estate, the court may not treat social security benefits as tantamount to a marital asset. Instead, the circuit court may take into account, in a general sense, the extent to which social security benefits received by the parties affect the *Sparks* factors.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth A. Gleicher

/s/ Kirsten Frank Kelly

/s/ Cynthia Diane Stephens

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A number of state courts have addressed the extent to which a divorce court may consider social security benefits when formulating an equitable division of property. The Iowa Supreme Court has held **[***12]** that social security benefits may generally inform a property division:

> We see a crucial distinction between: (1) adjusting property division so as to indirectly allow invasion of benefits; and (2) making a general adjustment in dividing marital property on the basis

> that one party, far more than the other, can reasonably expect to enjoy a secure retirement. It should not invalidate a property division if a disproportionate expectation regarding social security benefits **[*730]** is acknowledged in the court's assessment of the equities. [*In re Marriage of Boyer, 538 NW2d 293, 296 (Iowa, 1995).*]

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