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NO. 53340-5-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

MICHAEL LEE TUPPER,

Appellant,

v.

DONNA LYNN TUPPER (N/K/A DONNA LYNN HAGAR),

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal arises from orders enforcing the division of appellant Michael Tupper's social security benefit (including disability pay) set forth in the property division of the September 21, 2006 Decree of Dissolution. The trial court held that the division of Mr. Tupper's social security benefit was proper and not preempted by federal law. The trial court further held that by ordering Mr. Tupper to pay a portion of his social security benefit (including disability pay) directly to his former wife, Donna Tupper (n/k/a Donna Hagar), the court did not impermissibly assign Mr. Tupper's social security benefits to Ms. Hagar.

The division of Mr. Tupper's social security benefits as set forth in the Decree of Dissolution is prohibited under both state and federal law, and is void due to the federal preemption of the division of the social security benefits. The trial court erred in enforcing the explicit property division of Mr. Tupper's social security benefits, and this Court should reverse the February 12, 2019 and March 8, 2019 orders enforcing the property division of Mr. Tupper's social security benefits.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in concluding that the provision in the Decree of Dissolution entered on September 21, 2006, ordering

respondent husband to pay petitioner wife fifty percent of his social security benefits (including disability benefits) was not a violation of 42 U.S.C. § 407(a). 2/12/2019 VRP at 27-29; 3/8/2019 VRP at 10-11; CP 10, 129-130, 142-143.

2. The trial court erred when it did not interpret or construe the settlement from 2006 as an unlawful transfer of a future payment of the federal social security benefits. 2/12/2019 VRP at 27-29; 3/8/2019 VRP at 10-11; CP 10, 129-130, 142-143.

3. The trial court erred in concluding that the court had authority to divide the social security benefits, requiring the respondent husband to pay the petitioner wife a fixed percentage of his monthly social security benefits for the rest of his life, because the parties contemplated that division and wanted that division to happen. 3/8/2019 VRP at 10-11; CP 10, 129-130, 142-143.

4. The trial court erred in concluding that ordering the respondent husband to pay a percentage of his social security benefits directly to the petitioner wife is not pre-empted by federal law preventing the division of social security benefits. 2/12/2019 VRP at 27-29; 3/8/2019 VRP at 10-11; CP 10, 129-130, 142-143.

5. The trial court erred when it concluded that the division of federal social security benefits is different than the division of disability benefits. 2/12/2019 VRP at 27-29; CP 10, 129-130, 142-143.

6. The trial court erred in concluding that the provisions of the Decree of Dissolution entered on September 21, 2006, ordering respondent husband to pay petitioner wife fifty percent of his social security benefits (including disability benefits) were not void. 2/12/2019 VRP at 27-29; 3/8/2019 VRP at 10-11; CP 10, 129-130, 142-143.

B. Issues Pertaining to Assignments of Error

1. Whether the trial court erred in ordering Mr. Tupper to comply with the provision of the Decree of Dissolution that requires him to pay fifty percent (50%) of his social security benefits (including disability benefits) to Ms. Hagar every month.

2. Whether a trial court has subject matter jurisdiction over the parties' rights to payments of money from their social security benefits (including disability benefits) that are subject to 42 U.S.C. § 407(a).

3. Whether a trial court order requiring Mr. Tupper to pay fifty percent (50%) of his social security benefits (including disability benefits) to Ms. Hagar is a violation of 42 U.S.C. § 407(a).

4. Whether a trial court order requiring Mr. Tupper to pay fifty percent (50%) of his social security benefits (including disability

benefits) to Ms. Hagar is void as a violation of 42 U.S.C. § 407(a).

5. Whether an award of future social security benefits (and disability benefits) is an unlawful transfer of a future payment of Federal Social Security benefits.

6. Whether an order requiring Mr. Tupper to pay fifty percent (50%) of his social security benefits (including disability benefits) to Ms. Hagar is pre-empted by federal law preventing the division of social security benefits.

7. Whether the trial court erred in concluding that the division of federal social security benefits is different than the division of disability benefits.

8. Whether the trial court erred in concluding that the court could divide the social security benefits (including disability benefits) based on the agreement of the parties in violation of 42 U.S.C. § 407(a).

III. STATEMENT OF THE CASE

Michael Lee Tupper and his former wife, Donna Lynne Tupper (nka Donna Hagar), were divorced by a Decree of Dissolution on September 21, 2006. CP 7-13. Mr. Tupper was *pro se* at the time the Decree was entered; Ms. Hagar was represented by counsel who prepared the Decree. CP 13.

The Decree specifically awarded fifty percent (50%) of Mr. Tupper's social security benefits (including disability benefits) to his former wife upon Mr. Tupper's retiring or collecting social security benefits due to disability. CP 10. Specifically, in paragraph 10 of Section 3.3 of the Decree ("PROPERTY TO BE AWARDED TO THE WIFE"), the Decree provides that Ms. Hagar is awarded:

Fifty percent (50%) of husband's social security benefits (including disability benefits) upon the husband retiring or collecting them due to disability. These benefits shall be the net social security benefits which shall be calculated as the amount received by the husband less any deduction for the husband's medicare coverage. No other deductions shall be allowed. The husband shall provide a copy of his annual social security statement each year to wife. The husband shall make direct payment to the wife, via an electronic funds transfer to her bank account, within five days of the date husband receives payment from social security.

CP 10. In paragraph 11 of Section 3.3 of the Decree, Ms. Hagar is also awarded her social security benefits. CP 10. In paragraph 9 of Section 3.2 of the Decree, Mr. Tupper is awarded his social security benefits not otherwise awarded to Ms. Hagar. CP 9. The social security benefits were not identified as either community property or separate property in the

Findings of Fact and Conclusions of Law entered with the Decree of Dissolution. CP 1-6.

In Section 3.7 of the Decree, Mr. Tupper was ordered to pay his former wife non-modifiable spousal maintenance terminating only upon the remarriage of Ms. Hagar or the retirement of Mr. Tupper “(which retirement shall mean the ability of the husband to immediately collect social security benefits or social security disability benefits).” CP 11-12.

Subsequent to the Decree of Dissolution, on October 3, 2018, Ms. Hagar filed a Motion and Declaration for an Order to Show Cause re: Enforcement of Decree of Dissolution requesting that the trial court order Mr. Tupper to pay to Ms. Hagar one half of his social security benefit and to produce his social security benefit statements from January 1, 2012 to the present.¹ CP 14-25. On February 12, 2019, the trial court commissioner ordered Mr. Tupper to pay to Ms. Hagar his social security benefit pursuant to the Decree, as well as to produce and provide Mr. Tupper’s social security benefit statements from January 1, 2012 to the present. CP 129-130.

On February 21, 2019, Mr. Tupper moved for revision of the trial court commissioner’s order for payment of Mr. Tupper’s social security

¹ Ms. Hagar made additional requests for relief as part of her motion, which are not part of this appeal.

benefits to Ms. Hagar and the award of fees to Ms. Hagar. CP 131-141. Mr. Tupper asserted that the trial court lacked the authority to award social security benefits and such award should be stricken as void due to inability of the state court to divide social security benefits. CP 132. The trial court denied Mr. Tupper's Motion for Revision. CP 142-143. This appeal follows.

IV. SUMMARY OF ARGUMENT

A. Social Security Benefits. Ms. Hagar is not entitled to a share of Mr. Tupper's social security benefits under federal law. 42 U.S.C. § 407; In re the Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999); In re the Marriage of Rockwell, 141 Wn. App. 235, 170 P.3d 572 (2007). The federal prohibition of dividing social security benefits involves a complete pre-emption that cannot be varied by the parties' agreement or by the judgment of the court. *See* Howell v. Howell, 137 S.Ct. 1400 (2017). Preemption requires that, "Any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield". Free v. Bland, 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L. Ed. 2d 180 (1962). Accordingly, judgments in state court that rely on state law that have been preempted by federal law are void and cannot be enforced.

B. Void Judgment. A judgment is void if the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved. Bresolin v. Morris, 86 Wn.2d 241, 245, 543 P.2d 325 (1975).

C. Stipulation to Jurisdiction. If a court has no jurisdiction of an action, the parties cannot by stipulation confer jurisdiction upon the court. Washington Local Lodge No. 104 v. International Bhd. of Boilermakers, 28 Wn.2d 536, 183 P.2d 504 (1947).

V. ARGUMENT

A. Standard of Review

This case involves only a question of law. Where the trial court's decision is predicated on a question of law, the standard of review on appeal is de novo. In re M.B., 101 Wn. App. 425, 454, 3 P.3d 780 (2000).

B. The trial court's division of Mr. Tupper's social security benefits is barred and unenforceable under both Washington and federal law.

Both federal and state laws prohibit the court from valuing and distributing social security benefits. In re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999); In re Marriage of Rockwell, 141 Wn. App. 235, 239, 170 P.3d 572 (2007). See, also, In re Marriage of Kelley, 64 Cal. App.3d 82, 134 Cal. Rptr. 259 (1976); In re Marriage of Nizenkoff, 65 Cal. App.3d 136, 135 Cal. Rptr. 189 (1976).

The Social Security Act (Act), 42 U.S.C. § 407(a) forbids transferring or reassignment of “[t]he right of any person to any future payment under this subchapter. . . .” While the Act does permit reassignment of social security benefits to pay for alimony or child support, it categorically excludes any similar payment obligation in conformity with a community property settlement, equitable distribution of property, or other division between spouses or former spouses. 42 U.S.C. § 659(i)(3)(B)(ii).

When addressing specifically the Railroad Retirement Act 45 U.S.C. Ch.9 Subch. IV, the U.S. Supreme Court held in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979), that the federal constitution’s supremacy clause preempted California’s community property laws and confirmed that railroad retirement benefits and, under the federal Social Security Act, social security benefits are the separate and indivisible property of the person entitled to receive them. As such, while the Act does permit reassignment of social security benefits to pay for alimony or child support (by way of garnishment under 42 U.S.C. § 659), it categorically excludes any similar payment obligation in conformity with a community property settlement, equitable distribution of property or other division between spouses or former spouses.

The U.S. Congress recognized and preserved the protections for social security benefits when in the subsequent amendment of the Railroad Retirement Act in 1983, Tier I benefits serving as a replacement for traditional social security benefits were excluded from the purview of 45 U.S.C. § 231m(b)(2) which allowed division of Tier II benefits acting as a traditional, personal retirement account.²

However, in discussing Hisquierdo, our State Supreme Court declared in In re Marriage of Zahm, 138 Wn.2d 213, 219, 978 P.2d 498 (1999), “. . . [T]hat it is permissible for a trial court to consider . . . social security benefits. A trial court could not properly evaluate the economic circumstances of the spouses unless it could also consider the amount of social security benefits currently received.” The court viewed such a result as consistent with the statutory goals of just and equitable division and adopted that result as its holding.

These decisions were further discussed by the Court of Appeals in In re Marriage of Rockwell, 141 Wn. App. 235, 170 P.3d 572 (2007), *review denied* 163 Wn.2d 1055 (2008), to explain that the courts “cannot calculate a future value of social security monies and award that value as a precise property offset as part of its property distribution” (citing Zahm,

² It should be noted that no amendments encroaching into protections afforded under the Social Security Act have been enacted by Congress.

138 Wn.2d at 217), but the Rockwell Court did apply the Zahm holding that the court may consider the fact that one or both parties receives social security benefits in making its distribution of property.

These Washington State cases stand for the proposition that a court can account for a recipient's social security benefits when setting maintenance but cannot divide the benefits as an anticipatory property adjustment for their future value.

However, in the present case, the court explicitly divided Mr. Tupper's social security benefits (including disability benefits) within the division of property set forth in Sections 3.2 and 3.3 of the Decree of Dissolution. CP 9, 10; 3/8/2019 VRP at 10. Further, Mr. Tupper's spousal maintenance obligation to Ms. Hagar terminated pursuant to the Decree of Dissolution upon his retirement or receipt of social security benefits. 2/12/2019 VRP at 27-29; 3/8/2019 VRP at 10-11; CP 11-12. The division of Mr. Tupper's social security benefits is not made based upon any consideration of the factors for an award of spousal maintenance under RCW 26.09.090, and there can be no direct award of Mr. Tupper's social security benefits to Ms. Hagar. The division of Mr. Tupper's social security benefits is barred and unenforceable.

C. The federal preemption of the division of social security benefits in a property distribution applies even where the court orders the receiving spouse to pay the awarded benefits to the other spouse.

Federal pre-emption requires that, “Any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield”. Free v. Bland, 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L. Ed. 2d 180 (1962). Accordingly, judgments in state court that rely on state law that have been preempted by federal law are void and cannot be enforced.

The U.S. Supreme Court recently reviewed the federal preemption of the state court's division of federal benefits relating to Veterans Disability Benefits, addressing the question of whether reimbursement for waiver as relates to the receipt of disability benefits can be abrogated even by the agreement of the parties. Howell v. Howell, 137 S.Ct. 1400 (2017). In Howell, the parties were divorced in 1991 while the husband still served in the military. In expectation of the husband's future retirement, the parties divided his retired pay with half going to the wife each month once he retired. Id. The husband retired in 1992, and the wife began receiving her share of his retired pay each month without reduction. Id. After 13 years, however, the husband's disability increased, which cut the wife's pay in half. Id. The wife took the matter to court in Arizona and

obtained an order which required the husband to make up the difference by paying the wife directly each month. Id. The Arizona Supreme Court affirmed the lower court's decision, noting that the decision did not contravene federal laws against dividing disability pay because the husband was neither required to rescind his election to receive disability funds nor was he required to pay his wife directly from his disability funds. Id.

In Howell, the U.S. Supreme Court's primary emphasis on review was that the Uniformed Services Former Spouse Protection Act, which gives the state courts the power to divide military retirement in divorces, only allows state courts to divide "disposable retired pay" as part of a divorce, and retired pay waived to receive VA disability is expressly excluded from the definition of "disposable retired pay". Id.; 10 U.S.C. § 1408(a)(4)(B). Therefore, state courts are preempted by federal law from dividing disability pay. Id. at 1402.

Even though the trial court's order in Howell did not expressly divide the disability benefits, but rather allowed the husband to pay from any source he chose, the Supreme Court held that this was just "semantics and nothing more." Id. at 1406. Of specific concern to the Court was that the husband's direct payments "mirror[ed] the waived retirement pay, dollar for dollar." Id. The Court held that, "[r]egardless of their form, such

reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted.” Id. (emphasis added). Consequently, state courts are not allowed to require a service member who receives disability pay to make up lost funds to the former spouse as a work-around to the prohibition of a division of VA disability pay.

In sum, the Supreme Court takes the position that the federal law exempting disability pay from division is not just a prohibition but involves a complete pre-emption that cannot be varied by the parties’ agreement or by the judgment of the court. Howell, 137 S.Ct. at 1403. Congress has its own interests (apart from the interests of individual military members and their spouses and any agreements they may make in a given case) in seeing that military disability pay not be subject to direct or indirect division in a divorce case. This is analogous to the complete preemption that ERISA has over state law and state court decisions that relate to “any employee benefit plan”. 29 U.S.C. § 1144(a); see Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004) and Dishman v. Unum Life Ins. Co. of Am., 269 F.3d 974, 981 (2004).

The U.S. Supreme Court has not changed its view of preemption. In fact, that previously common ‘work around’ solutions have been judged

to be “semantics and nothing more” reinforces the bar to division of indivisible federal benefits. Just as the federal preemption relating to VA Benefits precluded invasion, even by agreement, federal preemption precludes direct division of social security benefits, even by agreement. As explained in Howell the, “State Courts cannot vest that which (under governing federal law) they lack the authority to give.” Howell, 137 S.Ct. at page 1405. The direct division of Mr. Tupper’s social security benefits – set forth in the property division of the Decree of Dissolution – is void, regardless of whether Mr. Tupper is ordered to pay the benefits directly to Ms. Hagar or the Social Security Administration is ordered to pay the benefits to Ms. Hagar. The court simply cannot circumvent the federal preemption of the division of social security benefits by ordering Mr. Tupper to pay fifty percent of his social security benefits (including disability benefits) directly to Ms. Hagar. This is an award of property in violation of 42 U.S.C. § 407(a), and such a result is erroneous as a matter of law. Social security benefits are not subject to division in a marital property distribution case. 42 U.S.C. § 407(a); Hisquierdo v. Hisquierdo, 439 U.S. 572, 590, 99 S.Ct 802, 59 L.Ed.2d 1 (1979).

D. The trial court's order dividing the social security benefit is void.

A judgment is void if the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved. Bresolin v. Morris, 86 Wn.2d 241, 245, 543 P.2d 325 (1975). Where a court lacks jurisdiction over the parties or the subject matter, or lacks the inherent power to make or enter the particular order, its judgment is void, and a void judgment may be vacated at any time. See Chai v. Kong, 122 Wn. App. 247, 93 P.3d 936 (2004). The court must vacate a void judgment as soon as the defect comes to light. Id.

At the time that Mr. Tupper asked that the trial court declare the property division of Mr. Tupper's social security benefits void, the impermissible division of social security benefits had not been enforced for years when Ms. Hagar knew that Mr. Tupper was collecting social security as her spousal support terminated. CP 11-12, 29, 31, 33, 34. The Howell decision was issued by the U.S. Supreme Court shortly after Mr. Tupper began collecting social security benefits.

In the present case, the trial court did not and does not have subject matter jurisdiction or inherent power over Mr. Tupper's social security benefits to divide those benefits in the property division set forth in the Decree. See 42 U.S.C. § 407(a); Howell, 137 S.Ct. 1400 (2017). The trial

court explicitly divided Mr. Tupper's social security benefits (including disability benefits) in the property distribution of the Decree, ordering Mr. Tupper to pay fifty percent (50%) of Mr. Tupper's social security benefits (including disability benefits) to Ms. Hagar upon his retiring pursuant to the Decree. CP 10, 129-30, 142-43. This is a specific division of the social security benefits, not a specific award of spousal maintenance or a division of another asset. The Decree of Dissolution explicitly cites and directs that the social security benefits of Mr. Tupper be divided. This direct order of the division of social security benefits was made without legal authority, and that lack of legal authority to make the division of social security benefits makes the order void. A void order is void from its inception, and this void division of social security benefits should not be enforced by this Court.

Notably, Ms. Hagar does have the right to collect her own derivative social security benefits as Mr. Tupper's ex-spouse. A divorced spouse is entitled to derivative benefits equal to one-half of their ex-spouse's monthly benefit without regard to whether the former spouse has remarried. 42 U.S.C. § 402(b)-(c). For the claimant ex-spouse to qualify for derivative benefits, several criteria must be met: (1) the marriage to the covered worker must have lasted a minimum of ten years; (2) the claimant ex-spouse must be at least sixty-two years old; (3) the claimant ex-spouse

must be unmarried; and (4) the divorce must have been final for at least two years. 42 U.S.C. § 402(b)-(c). Additionally, the covered worker must be entitled to social security retirement or disability benefits; and the benefit claimant ex-spouse is entitled to receive on her own work must be less than the benefit available based on the covered ex-spouse's work. 42 U.S.C. § 402(b)-(c).

E. The stipulation of the parties to the Decree of Dissolution does not cure the error of the illegal division of Mr. Tupper's social security benefits.

The trial court noted that the parties contemplated the division of social security benefits under the property division of the Decree of Dissolution and "this is exactly what they wanted to have happen" with respect to the division of social security benefits. 3/8/2019 VRP at 10.

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

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

VI. CONCLUSION

The trial court was without authority to approve of or enforce the property division of Mr. Tupper's social security benefits (including disability benefits) as provided in the Decree of Dissolution. The judgment is void if entered by the court without jurisdiction over the subject matter, and where the property division of social security benefits is preempted by federal law. The judgment and order enforcing the division of Mr. Tupper's social security benefits should be reversed, and the provision of the Decree of Dissolution that requires Mr. Tupper to pay a portion of his social security benefits to Ms. Hagar as a property distribution should be held to be unenforceable.

RESPECTFULLY SUBMITTED this 18th day of July, 2019.

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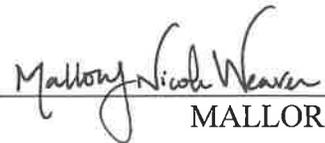
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CERTIFICATE OF SERVICE

I certify that on July 17, 2019, I caused to be served a true and correct copy of the foregoing Appellant's Opening Brief to Division II of the Court of Appeals on the following parties via electronic service:

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