70057-0 70057-0 ORIGINAL

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

ROBERT E. ANDERSON,

APPELLANT,

V.

BEVERLY L. ANDERSON,

RESPONDENT.

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

I. SUMMARY OF REPLY

Respondent concedes in her brief that the Decree requires Mr. Anderson to pay 50% of his Social Security Benefits each month, and then requires Mr. Anderson to pay a specific lesser amount from his Social Security Benefits each month to Ms. Anderson in such amount as is necessary to give her 50% of the parties' combined Social Security Benefits. Paragraph 3.13 of the Decree states as follows:

> **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 transfer shall continue to be made until the death of a party. CP 18.

Specific divisions of Social Security Benefits are prohibited under federal and state law. The division of Mr. Anderson's Social Security Benefit is prohibited under the Supremacy Clause and the applicable federal statute, 42 USC § 407, which states that

> "None of the monies paid or payable under the subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process. . . "

The separate and indivisible nature of Social Security Benefits has

been confirmed by the Washington Supreme Court. In re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999). A Decree of dissolution dividing Social Security Benefits as part of a property settlement in a marriage dissolution violates federal and state law.

A state court order made in derogation of law is void because the state court lacks the inherent jurisdictional power to enter the order. In re Marriage of Leslie, 112 Wn.2d 612, 618, 772 P.2d 1013 (1989) citing In re Marriage of Hardt, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985). A void judgment must be vacated whenever the lack of jurisdiction comes to light regardless of the passage of time, acquiescence, or stipulation. Therefore, the trial court's denial of Appellant's motion to vacate must be reversed.

II. ARGUMENT

Federal and state laws prohibit the state courts from dividing Social Security Benefits. In re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999); In re Marriage of Rockwell, 141 Wn. App. 235 239, 170 P.3d 572 (2007). The relevant federal statute is Chapter 7 of Title 42, which deals with Social Security. Section 407(a) states:

> "The right of any person to any future payment under this subchapter shall not be transferable or assignable at law or in equity, and none of the monies paid or payable or rights

> existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

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

The Washington Supreme Court recognizes the separate indivisible character of Social Security Benefits as follows:

> At issue here is the interplay between RCW 26.09.080 and 42 U.S.C. § 407(a) of the Social Security Act (Act), the latter of which forbids transfer or reassignment of "the 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.A. § 659(i)(3)(B)(ii). In re Zahm at 219 (Emphasis supplied).

Courts throughout the United States when faced with the question of whether Social Security Benefits may be divided by a divorce court have held that they may not. For example:

1. The Supremacy Clause of the United States Constitution (Article 6, Clause 2) pre-empts the division by a state court of spouse's Social Security Disability Benefits upon the divorce of the spouse. Richard v Richard, (1983, Tex App Tyler) 659 SW2d 746.

2. The Anti-assignment Clause of The Social Security Act and the Supremacy Clause of the U.S. Constitution prohibited a direct offset to adjust for disproportionate Social Security Benefits in

property division of the dissolution Decree. Webster v Webster (2006) 271 Neb 788, 716 NW2d 47 (criticized in Olsen v Olsen (2007, Utah App) 2007 UT App 296, 169 P3d 765, 586 Utah Adv Rep 6).

3. The former wife of a wage earner, who was denied alimony and maintenance of any kind or nature by the state divorce court, was improperly awarded a portion of the wage earner's social security disability benefits as part a division of marital property; The Anti-Assignment Provision of Social Security Act at 42 USCS § 407(a), precludes the state court from awarding one spouse's Social Security Benefits to the other as marital property, although the Act excepts from anti-assignment clause legal process that is designed to collect alimony and child support. Frazier v Frazier, (1991, Tenn App) CCH Unemployment Ins Rep P 15930A.

4. 42 USCS § 659(i)(3)(A) and (B)(ii) prevent state courts from assigning Social Security Benefits in a property division judgment; thus, any assignment or division of Social Security Disability benefits to satisfy a marital property settlement under state law is barred by 42 USCS § 407. Severs v Severs (2005, Ind) 837 NE2d 498.

5. A Delaware family court, in dividing marital property, may not grant an offset for Social Security Benefits, but may still properly consider a spouse's Social Security within more elastic parameters of the court's power to formulate just and equitable division of the parties' marital property. Stanley v Stanley, (2008, Del) 956 A2d 1.

6. The distribution of the parties' marital property properly took into consideration all factors under Me. Rev. Stat. Ann. tit. 19-A, § 953(1), when the former wife was awarded her Nevada teaching pension acquired during marriage and her former husband was accordingly granted the greater share of value of the marital residence; because 42 USCS § 407(a) prohibited transfer or assignment of Social Security Benefits, the husband's benefits could not be treated as marital property, but were

properly considered in division of marital property, Skibinski v Skibinski (2009) 2009 ME 13, 964 A2d 641.

7. Social Security Benefits received during marriage are recipient's separate property and are not to be treated as community property divisible upon divorce. Bowlden v Bowlden (1989, App) 118 Idaho 89, 794 P2d 1145, CCH Unemployment Ins Rep P 15453A, remanded (1990) 118 Idaho 84, 794 P2d 1140.

The United States Supreme Court has also ruled that the Anti-Attachment clause of the Social Security Act at 42 USCS § 407(a) preempts any state law governing domestic relationships under the Supremacy Clause of the United States Constitution. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979), quoting Wetmore v. Markoe, 196 U.S. 68, 77, 25 S.Ct. 172, 175, 49 L.Ed. 390 (1904).

In 1973, the United States Supreme Court interpreted 42 U.S.C. § 407 in Philpott et al. v. Essex County Welfare Board, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973). The Court was faced with the issue of whether Social Security Disability Benefits that should be paid retroactively to a beneficiary were subject to attachment by, and reimbursement to, the State of New Jersey. In an opinion by Justice Douglas, expressing the unanimous view of the Court, it was held that the Social Security Act in § 407, bars the State of New Jersey from reaching the

federal disability payments paid to Wilkes. The Court further stated that § 407 "imposes a ***broad bar against the use of any legal process*** to reach all Social Security Benefits." Philpott, 409 U.S. at 417, 93 S.Ct. at 592. (Emphasis supplied).

The Idaho Supreme Court in Bowlden, supra, in analyzing an improper division of Social Security Benefits under its domestic relationship laws stated as follows:

> "This court considers the holding in Philpott significant and analogous to the case under consideration. Both situations deal with Social Security Benefits paid to a recipient. The fact that Philpott dealt with Social Security Disability benefits and not OSADI benefits is not important for our analysis. The critical point is that the Philpott case rests its decision on the interpretation of the Anti-attachment Clause of the Social Security Act."

The Anti-attachment Clause of § 407 of the Social Security Act is similar to the Anti-attachment Clause of the Railroad Retirement Act. 45 U.S.C. § 231m (Supp.1987). The latter statute was interpreted by the United States Supreme Court in Hisquierdo, supra. In the Hisquierdo case, the Court was faced with determining whether Congress intended to prevent a community property state from recognizing a spouse's community interest in a Railroad Retirement Act retirement plan. The Court determined that these benefits are protected from all legal process notwithstanding any other

law of any state. The Court concluded by saying that 45 U.S.C. § 231m (the anti-attachment provisions) preempts all state law that stands in its way.

Effective January 1, 1975, Congress adopted an exception to § 231m of the Railroad Retirement Act and similar provisions in all other federal benefit plans. The Social Security Act was also amended by adding a new provision, 42 U.S.C. § 659(a) to the effect that, notwithstanding any contrary law, federal benefits may be attached to satisfy a legal obligation for child support or alimony. In 1977, Congress added to the Social Security Act a definitional statute, 42 U.S.C. § 662(c), which relates to § 659(a) and defines the term alimony. Section 662(c) states specifically that " "alimony":

> does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

Hisquierdo, 439 U.S. at 577, 99 S.Ct. at 806.

The United States Supreme Court observed it was "logical to conclude that Congress, in adopting § 462(c) [42 U.S.C. § 662(c)], thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that

community property claims, which are not based on need, could not do so." Hisquierdo, 439 U.S. at 587, 99 S.Ct. at 811 (Emphasis supplied). The Court concluded that treating railroad retirement benefits as community property would conflict with § 231m of the Railroad Retirement Act, thus causing the kind of injury to federal interests that the Supremacy Clause forbids.

In the present case Ms. Anderson admitted in her declaration that Mr. Anderson's only source of income is his Social Security Benefit. CP 74. Mr. Anderson's Chapter 7 bankruptcy in 2012 confirms his limited income and assets. CP 41-42. In this case the division of Mr. Anderson's Social Security Benefits under the Decree prevents Mr. Anderson from receiving his benefits.

The rationale of the holding in Hisquierdo has been confirmed by the Washington Supreme Court as preempting state community property law as follows:

> "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". In re Zahm at 219.

In the present case the Decree clearly and specifically, through direct order, divides Mr. Anderson's Social Security Benefits in violation of

federal and state law. The Decree states: "When the husband commences receiving his Social Security Benefits he shall pay 50% of the gross amount to the wife, each month...". There can be no doubt that the trial court in this case divided Mr. Anderson's Social Security Benefits as part of the property settlement between the parties. This is a violation of federal and state law and therefore is void and unenforceable.[1]

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. CR60(6)(5) provides as follows:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (5) The judgment is void;"

In In re Marriage of Markowski, 50 Wn. App. 633, 635, 749 P.2d 754 (1988), the Court of Appeals confirmed a trial order vacating a dissolution Decree citing authorities under the decisions in In re Marriage of Hardt, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985) and In re Marriage of Maxfield, 47 Wn. App. 699, 703, 737 P.2d 671 (1987), which hold that motions to

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1 Appellant acknowledges that under current Washington law if one or both parties receive Social Security Benefits the court may consider that fact in making its distribution of property. In re Marriage of Rockwell, 141 Wn.App. 235 239, 170 P.3d 572 (2007). However, the court may not divide and distribute Social Security Benefits from one party to the other. Rockwell, 141 Wn.App. at 244.

vacate under CR 60(b)(5) on grounds that the judgment is void may be brought at any time after entry of judgment.

In Hardt the husband brought an action to vacate a five-year-old dissolution Decree which included a child support obligation not requested in the dissolution petition. The Court of Appeals confirmed the trial court's order vacating the Decree and requiring reimbursement for child support paid to the state support enforcement office holding that a motion to vacate a void judgment may be brought at any time. Hardt at 496 citing John Hancock Mut. Life Ins. Co. v. Gooley, 196 Wash. 357, 370, 83 P.2d 221, 118 A.L.R. 1484 (1938); accord, Restatement (Second) of Judgments § 74, comment a, at 203 (1982).

In Markowski, the trial court vacated a dissolution Decree obtained by default and without personal jurisdiction against the out-of-state appellant husband despite the fact that the husband for one year had paid court ordered child support and attempted to visit his children pursuant to court ordered visitation under the void Decree. The court held that the husband's actions during the one year following entry of the default dissolution Decree could not be construed as his consent to entry of the Decree nor as a waiver of jurisdiction. Markowski at 637.

The Hardt and Markowski decisions were confirmed by the

Washington Supreme Court in In re Marriage of Leslie, 112 Wn.2d 612, 772 P.2d 1013 (1989).

> We agree with the decisions of the Court of Appeals in Hardt and Markowski. Petitioner Leslie has not waived his right to challenge the default dissolution Decree merely because of time lapse or because he may have complied with other of its provisions which were inconsistent with the relief originally sought. In re Leslie at 619.

In the present case the trial court did not have subject matter or any inherent jurisdiction to divide the Social Security Benefits of Mr. Anderson. Therefore, the Decree is void, and the passage of time and Mr. Anderson's obedience to the void order are not grounds to deny his motion to vacate.

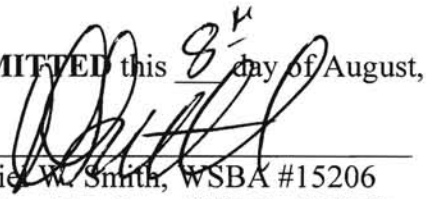
III. CONCLUSION

The Decree very specifically orders Appellant Robert E. Anderson to pay Respondent Beverly Anderson fifty-percent of the gross amount of his Social Security Benefits each month. CP 18. This very clearly is an illegal taking of Appellant Robert E. Anderson's Social Security Benefits and is an award of a portion of his Social Security Benefits to Respondent Beverly Anderson made outside the jurisdiction of the trial court. Such a result is void as a matter of law.

The Appellant, Robert E. Anderson, respectfully asks this Court to

reverse the judgment of the Superior Court and vacate the provisions in the dissolution Decree that divide Appellant Robert E. Anderson's Social Security Benefits. In addition, he asks that this Court confirm his reasonable fees on appeal.

RESPECTFULLY SUBMITTED this 8th day of August, 2013.



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