

Equitable Division of Retirement Plans
that by Participation Exempt the Contributor from Contribution to Social
Security: To Impute or Not

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The Georgia Supreme Court decision of Rabek v. Kellum left for future litigation the determination of whether a federal pension plan contributed to by a party in lieu of social security benefits should be reduced for purposes of equitable division by the amount the party would have contributed to social security benefits (“imputed social security benefits”).¹

In Rabek, the Husband, a federal air traffic controller, contributed to a federal civil service retirement system pension plan, and not social security. Wife, employed in the private sector, contributed to a pension plan but also paid into social security as mandated by federal law.² The Georgia Supreme Court did not reach the issue of first impression, finding that since Husband provided no evidence of what his imputed social security benefits would have been, the trial court could not have reduced the value before determining equitable division thereof.³

While we recognize that whether to allow a portion of a civil service pension benefit plan to be exempted from marital property as imputed social security benefits is an issue of first impression, we pretermitt whether this Court is inclined to adopt the Cornbleth analysis because the

¹ Rabek v. Kellum, 279 Ga. 709 (2005).

² Id. at 710.

³ Id. at 711.

record in this case is devoid of any evidence of the value or amount of the portion of the CSRS pension Rabek claims constitutes the imputed social security benefits. Absent evidence of a specified value of the marital portion of these benefits Rabek claims, the trial court was not in a position to make a determination whether the value of Rabek's pension should be reduced before making the equitable award of the retirement assets.⁴

Although the Georgia Supreme Court did not reach whether federal employees who are exempt from participation in social security should be “credited” imputed social security benefits for determination of equitable division, the Georgia Supreme Court did note (1) that jurisdictions are split on this issue,⁵ and (2) that the federal bar on division of social security benefits does not prevent the divorced spouse from obtaining old age benefits “piggy backed” to the previous spouses social security benefits.⁶

Jurisdictions allowing for imputed social security benefits, reducing the marital portion of the a civil service retirement account rationalize fairness in that a stream of income at “old age” is not provided to the civil servant by virtue of his or her not being a contributor to social security, and that the income in lieu of social security benefits would be substantially reduced (ie. by fifty percent) as a result of equitable division.⁷ Colorado, Kansas, Iowa, Maine, Massachusetts, Missouri, Ohio South Dakota, Washington, and

⁴ Id. at 710-711.

⁵ The Court states: “Jurisdictions are divided on the issue of whether any portion of a pension that is considered a replacement for social security benefits should be exempted from the marital estate. See *Jefferies v. Jefferies*, 895 P.2d 835 (Utah App.1995); *Loudermilk v. Loudermilk*, 183 W.Va. 616, 397 S.E.2d 905(III) (1990) as examples of jurisdictions that hold that retirement plans that are “in lieu” of social security benefits are included in marital estate. Jurisdictions that allow social security replacement plans to be exempted from marital property include *Walker v. Walker*, 112 Ohio App.3d 90, 677 N.E.2d 1252 (1996) and *Cornbleth v. Cornbleth*, supra.” *Rabek v. Kellum*, 279 Ga. 709, FN2 (2005).

⁶ The Court states: “The anti-assignment clause of the Federal Social Security Act, 42 U.S.C. § 407(a), bars payments received as social security benefits from distribution in marital property division. However, § 402 of the Act specifically contemplates old-age and disability social security benefits for a divorced spouse. See *Bell v. Bell*, 257 Ga. 172, 356 S.E.2d 869 (1987).” *Rabek v. Kellum*, 279 Ga. 709, FN1 (2005).

⁷ *Cornbleth v. Cornbleth*, 397 Pa. Super. 421, 424-426 (1990).

Utah allow for consideration of imputed social security in determining equitable division.⁸ The computation of the reduction varies, however.

In Pennsylvania, pursuant to Cornbleth, “[t]o facilitate a process of equating [public pension participants] and Social Security participants we believe it will be necessary to compute the present value of a Social Security benefit had the [public plan] participant been participating in the Social Security system. This present value should then be deducted from the present value of the [public pension] at which time a figure for the marital portion of the pension could be derived and included in the marital estate for distribution purposes. This process should result in equating, as near as possible, the two classes of individuals for equitable distribution purposes.”⁹

While the Ohio Supreme Court has not ruled specifically on whether an imputed reduction should occur, it held: “any given pension or retirement fund is not necessarily subject to direct division but is subject to evaluation and consideration in making an equitable distribution of both parties’ marital assets.”¹⁰ This led to a division on the appellate level of how to compute a reduction in the Ohio courts, some divisions attempting to determine present value of the pension and to what amount that value exceeds the social security actually earned by the other spouse, while other divisions either adopt the Cornbleth computation, or instead seek to determine the potential monthly social security benefit of both parties and then provide an offset.¹¹

The Supreme Court of South Dakota in Johnson v. Johnson, 734 N.W. 2d 801 (2006) provides a thorough overview of the jurisdictional split, and resolves “social

⁸ See Olsen v. Olsen, 169 P.3d 765 (2007).

⁹ Cornbleth v. Cornbleth, 397 Pa. Super. 421, 427 (1990).

¹⁰ Neel v. Neel, 113 Ohio App. 3d 24, (1996), quoting Hoyt v. Hoyt, 53 Ohio St3d 177 (1990).

¹¹ See Harshberger v. Harshberger, 158 Ohio App.3d 121 (2004); Neel v. Neel, 113 Ohio App. 3d 24, 30-31 (1996).

security benefits may be considered as a factor, among others, when dividing marital property” relying on the reasoning:

While the anti-reassignment clause of the Social Security Act precludes a trial court from directly dividing social security income in a divorce action, a trial court may still properly consider a spouse's social security income within the more elastic parameters of the court's power to formulate a just and equitable division of the parties' marital property. . . [There is] 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. . . . Therefore. . . while 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.¹²

To the contrary, a number of states provide that pursuant to the United States Supreme Court’s decision in Hisquierdo v. Hisquierdo, the United States Supreme Court clearly holds that courts are not to offset equitable division due to social security benefits, whether imputed or not.¹³ Arkansas, Nebraska, Florida, Illinois, Nevada, North Dakota and Tennessee follow this line of reasoning.¹⁴ Hisquierdo specifically analogized railroad benefits and social security benefits finding both contractual, able to be altered or eliminated by Congress at any time, and similarly subject to anti-assignment provisions.¹⁵ The Hisquierdo Court states: “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. This vulnerability to congressional edict contrasts strongly with the protection Congress has afforded

¹² Johnson v. Johnson, 734 N.W. 2d 801, 808-809 (2006) (citations omitted).

¹³ Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

¹⁴ See Olsen v. Olsen, 169 P.3d 765 (2007); Skelton v. Skelton, 339 Ark. 227 (1999); Reymann v. Raymann, 919 S.W.2d 615 (1996); Johnson v. Johnson, 726 So.2d 393 (1999).

¹⁵ Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

recipients from creditors, tax gatherers, and all those who would ‘anticipate’ the receipt of benefits.”¹⁶

The line of cases refusing to consider imputed social security benefits strictly construe federal statutory law.

Congress has excluded from its definition of marital property any benefits from social security. The Social Security Act provides:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. 42 U.S.C. § 407(a) (1994). The United States Supreme Court has adopted the position that this section imposes “a broad bar against the use of any legal process to reach all social security benefits.” *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973). We held that the attempt to make future assignment of one spouse's social security benefits was preempted by the provisions of 42 U.S.C. § 407(a) in *Gentry v. Gentry*, 327 Ark. 266, 938 S.W.2d 231 (1997).¹⁷

Courts rationalize that the pension contribution in lieu of social security (and which by contributing actually prohibits participation in social security) “was not designed to replace noncontractual social security benefits; rather, [pension contribution] provided a pension benefit which exceeded that of the social security system Because the purposes of social security and the retirement plan are fundamentally different, they are not interchangeable.”¹⁸

Not imputing social security benefits seems to be in strict accordance with federal law. Further, it may be noted in reviewing the statutory history of federal law with respect to Civil Service Retirement System (CSRS) participation, the participation at

¹⁶ Id.

¹⁷ Skelton v. Skelton, 339 Ark. 227 (1999); see also Johnson v. Johnson, 726 So.2d 393, 395 (1999); Reymann v. Reymann, 919 S.W. 2d 615 (1996).

¹⁸ Id. at 233-234.

direct issue in Rabek, benefits under CSRA, were excluded from equitable division until amendment to the federal law in 1978.¹⁹ A statutory review of the federal law regarding Social Security and CSRS seems to resolve the specific issue in Rabek not to impute social security benefits. The determination of whether a federal pension plan contributed to by a party in lieu of social security benefits should be reduced for purposes of equitable division by the amount the party would have contributed to social security benefits seems to be an issue that will present itself again to the Georgia Supreme Court, and hopefully the evidence will be complete to allow the Court to provide direction.

¹⁹ 5 U.S.C. § 8345(j)(1).