

Dividing Social Security Benefits After Divorce

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This article seeks to open a dialogue in the context of divorce settlement, on the sharing (via offsetting equitable distribution or via other methods) of Social Security benefits; a critical financial means of existence for many litigants. This is a discussion that has been largely avoided by counsel and courts alike. With the passing of the revised alimony statute (N.J.S.A. 2A:34-23(j)), in which retirement of the payor spouse results in a more imminent cessation of alimony than the previous statute, protection of the former payee spouse is more essential than ever.

Whether crafting a matrimonial settlement agreement or asking the court to decide issues such as alimony and equitable distribution during divorce litigation, it has always been crucial to anticipate the litigant's eventual retirement and the income stream that will be available to each. The attorney must seek to allocate retirement benefits and also consider whether a client will have a sufficient stream of income to financially survive the period from cessation of employment through death. However, it seems to be an accepted principle that Social Security benefits, perhaps the most significant retirement asset for many litigants and the asset which as a married couple both individuals anticipated sharing, will upon divorce belong only to one party, with only limited benefits available to the other party.

It is well settled that retirement assets are considered as assets subject to equitable distribution between spouses during a divorce. *Kikkert v. Kikkert*, 88 N.J. 4 (1981). New Jersey courts have found Defined Benefit Plans such as pensions to be subject to equitable distribution. *Blitt v. Blitt*, 139 N.J. Super. 213 (Ch.Div. 1976). Often, federal government pensions such as military retirement pay are subject to equitable distribution. *Kruger v. Kruger*, 73 N.J. 464 (1977).

The Basics About Social Security Retirement Benefits and Divorce

In order to collect Social Security benefits under her own name, an individual must have made at least 10 years of Social Security contributions. The amount of a person's monthly Social Security benefit depends upon their highest 35 years of earnings during their career. Higher lifetime contributions result in higher benefits. The age at which the person decides to retire and collect benefits also affects the amount of the benefit. If a worker retires at age 62, the earliest possible Social Security retirement age, his or her benefit will be 25 percent lower than if that individual waited until reaching full retirement to collect benefits. Conversely, a worker's benefit will increase automatically by a certain percentage from the time full retirement age is reached (if collecting Social Security is deferred) until the worker starts receiving benefits or until reaching age 70.

For people born before 1938, the full retirement age is 65. The full retirement age gradually rises for people born after 1938. The full retirement age for those born between 1943 and 1954 is 66 years old. For anyone born after 1959, full retirement age is reached at 67 years old.

Collecting Benefits When Married

In the case of a married couple when both spouses work, they can each collect Social Security based on the higher of their two earnings records. At a minimum, each spouse will receive the benefit amount based upon his or her individual record. Even a spouse that has never worked under Social Security may be able to receive limited retirement benefits based on the working spouse's record, if he or she is at least 62 years of age and his or her spouse is eligible to receive retirement or disability benefits. However, the benefit paid to the nonworking spouse (or a person who elects to collect under their spouses record) will be 50 percent of the amount payable to the working spouse.

Collecting Benefits After Divorce

In the event of divorce, divorced spouses may still collect Social Security benefits based on their former spouse's record, if they meet the following conditions: (a) he or she is unmarried; (b) he or she is 62 years or older; (c) the ex-spouse is entitled to Social Security benefits; and (d) the benefit he or she is entitled to receive based on their own work is less than the benefit they would receive based on their ex-spouse's work history.

Social Security Retirement Benefits and the Impact in Divorce Cases

After exploring the basis for accrual of Social Security retirement benefits, it is clear that each person in a marriage will likely accrue a different retirement benefit, unless their work histories are identical. Frequently, a substantial disparity in income (and potential retirement benefit) exists between the higher earner's Social Security benefits and the best case Social Security benefits of the lesser-earning spouse (who may have been a stay-at-home parent for a significant portion of the marriage). This disparate benefit should be expected to be gender-sensitive and most adversely impact women,

as they are more likely to have their earning histories diminished due to temporary or permanent leaves from the work force to raise children than their male counterparts. Notwithstanding this reality, there have been very limited efforts made to equalize or at least minimize the difference between divorcing parties' Social Security benefits (which may have been an asset principally accumulated during the marriage) during the adjudication or settlement of divorce matters.

One key reason for the failure to directly address this issue stems from the view adopted by the courts in most jurisdictions, that federal law pre-empts equitable distribution of Social Security benefits. This viewpoint is based upon 42 U.S.C.A. 407, which provides that the right to Social Security benefits is not assignable, transferable or subject to the legal process in any way. Specifically, 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 moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process or to operation of law.

In 1975, Congress made an exception to the ban against transferability by enacting 42 U.S.C.A. 459(a) of the Social Security Act, which permits enforcement of child support or alimony obligations through execution against Social Security retirement benefits. This exception was discussed in *Hisqueirido v. Hisqueirido*, 439 U.S. 572 (1979). The court noted that by adopting 459, which allows garnishment of the Social Security benefits to facilitate payment of child support and alimony, and 462, which differentiates alimony claims from property claims, Congress recognized the need to help children and divorced spouses, and declined to extend the garnishment exception for property claims. *Id.* at 587. The court further noted that "it is therefore logical to conclude that Congress, in adopting 462 (c), thought the family's need for support could justify garnishment, but a community property claim which was not based on need, could not." *Id.*

New Jersey courts have declined to extend the concept of equitable distribution to the sharing of Social Security benefits, finding that Social Security benefits are non-assignable, pursuant to 42 U.S.C.A. 407, and thus are not considered marital property subject to equitable distribution. See *Hipsley v. Hipsley*, 161 N.J. Super. 119 (Ch. Div. 1978); *Hayden v. Hayden*, 284 N.J. Super. 418, 425 (App. Div. 1995).

While New Jersey courts have declined to divide or equalize Social Security benefits in equitable distribution, the Appellate Division has considered a party's receipt of Social Security in determining the division of retirement assets in a very narrow circumstance. See *White v. White*, 284 N.J. Super. 300 (1995), where the wife was a private employee entitled to Social Security. The husband, a life-long federal employee, was not entitled to Social Security as he did not participate. The court held that since the wife contributed to Social Security during the marriage, the husband was entitled to an offset against her share of his federal pension. *Id.*

Conclusion

While there is no legal authority for direct distribution of Social Security benefits, the *Hisqueirdo* and *White* cases open the door to a matrimonial attorney's favorite mantra: "Your Honor, this is a Court of Equity!" Arguably, equity dictates that upon retirement of the payor spouse (on that spouse's financial timetable) and the likely end to the payee spouse's alimony, without something close to a true equalization of the joint Social Security benefits, the former payee spouse will enjoy a lower post-retirement lifestyle than the former payor spouse.

The post-alimony life of each party, with today's life expectancies, may easily last three decades and result in a financial differential of hundreds of thousands of dollars. Creative lawyering will be required to determine, for example, whether a larger distribution of an IRA should be given to the lower-earning spouse at the time of divorce, to offset the Social Security imbalance that will commence at or near the time of retirement. Alternatively, should additional equity in the marital home be awarded to accomplish that same purpose? The bottom line is that, at the time of settlement or trial, attorneys and judges should not avoid looking carefully at what is certain to be an emotionally charged discussion addressing a highly significant asset accrued during the marriage.

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