IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of JAMES R. HERALD, Petitioner- Appellant, Petitioner on Review, and DIXIE L. STEADMAN, aka Dixie Lee Steadman, Respondent- Respondent. Respondent on Review.	)	Multnomah County Circuit Court # 0906-66375 Court of Appeals # A146603 S061362

RESPONDENT'S BRIEF ON THE MERITS

Opinion Filed: April 24, 2013

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Concurring: Duncan, J. and Rasmussen, J. Pro Tem

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1. Family courts are authorized under ORS 107.105 to make the ultimate equitable determination of a "just and proper" division of the parties' assets. Even though some assets, such as an interest in a trust or social security benefits may not be actually awarded by the trial court, the court may still recognize the financial impact of such assets to one party or the other. Recognizing the economic realities of each party's situation, including as here, wife's lack of social security benefits, is part of the equitable determination of a "just and proper" division. Federal law does not require the trial court to ignore the absence of such benefits as part of the economic reality just because husband has social security benefits which cannot be divided. As several state supreme courts view it, social security benefits may permissibly be viewed as one of the elements of a financial package available to either party.

2. Protecting more of wife's Civil Service Retirement System ("CSRS") benefits for her as the court did here does not violate 42 USC §407 nor run afoul of this court's guidance in Swan. Husband has no absolute right to a 50-50 division of wife's CSRS benefits and the court may properly consider

all economic realities in making a different division. For example, the trial court record reveals wife was being treated for breast cancer between late 2008 and the time of trial and had missed a lot of work in 2009. The trial court is charged with assessing this and all other economic circumstances in making a just and equitable division of property. In its broad discretion, it could have allowed wife to keep all of her CSRS benefits. 42 USC §407 is an anti-alienation statute for social security entitlements which was not violated here where the trial court simply decided to allow wife to keep more than half of her CSRS benefits because she would not also receive social security.

3. The court of appeals' opinion is thorough, thoughtful and within the parameters of this court's opinion in Swan. To the extent Swan suggests a stricter application of 42 USC §407 than the statute mandates, this court should clarify its meaning and limit its application in accord with the court of appeals' opinion and the majority of jurisdictions. This court should align Oregon law with the Supreme Courts of Washington, Arizona, Maine, South Dakota and Delaware to declare that social security benefits may be considered in evaluating the financial circumstances of each party and that doing so does not offend the important protective principle of 42 USC §407.

The trial court's determination of a just and equitable division of the parties' retirement benefits: (1) does not violate the federal statutory prohibition on the division of social security benefits because the court did not value or divide social security benefits; (2) is well supported on the unique facts; and (3) is within the trial court's discretion to determine a fair division of all the parties' assets. The trial court decision should be affirmed.

SUMMARY OF RESPONDENT ON REVIEW'S ARGUMENT

The trial court and court of appeals' rulings should be affirmed because both merely reflect exercise of the trial court's authority to create a just and equitable division of wife's CSRS benefits under all of the facts. The trial court has authority under ORS 107.105 to make an equitable division of the parties' property, including their retirement benefits. Here, the trial court merely determined that husband should receive some share, but not necessarily half, of wife's CSRS benefits. There is no error of law for this court to fix.

Contrary to husband's assertion, the trial court's equitable division of wife's CSRS benefits does not violate federal law nor does it even implicate this court's decision in Swan and Swan, 301 Or 167, 720 P2d 747 (1986). The challenged trial court decision – a fair and less than 50-50 allocation of wife's CSRS benefits – is not prohibited by any federal statute. Thus, Swan does not apply. The trial court was motivated by its desire to protect wife's CSRS benefits because, at retirement,

she would be relying solely on those benefits and would have not social security. Rather than valuing and dividing social security (which is prohibited) the court simply recognized the absence of social security for wife. Trial courts engage in this exercise all the time with homemaker spouses who may not have qualified on their own for benefits.

For husband to establish his claimed error of law, he must establish that he had an absolute right to half of wife's CSRS benefits and that the trial court erred in not awarding him half. He offers no such authority.

Faced with the decision of how much of wife's CSRS benefits husband should receive, the trial court simply determined that he should receive less than half because in retirement he will be eligible for social security benefits earned during the marriage whereas wife would not. The trial court was persuaded by the principle that it would be unjust to permit husband to receive both his full social security benefit and half of wife's CSRS benefits. That determination of what is just and equitable under all of the circumstances should be affirmed because it is supported by the evidence and the Petitioner's Brief has not demonstrated any error of law in the trial court's division of wife's CSRS benefits.

STATEMENT OF FACTS

Petitioner's Brief contains unsupported factual assertions and argument based solely on speculation regarding these parties' relative economic status. The

trial court, the court of appeals and this court must instead address the facts before the trial court.

This appeal concerns the trial court's discretionary award of a share of wife's Civil Service Retirement System ("CSRS") benefits to husband. (ER 23-25) Husband is a practicing attorney with the Army Corps of Engineers. Wife works at the Bonneville Power Administration.

Because wife is eligible for CSRS benefits, she will not receive any social security benefits in her own right. (Tr. 7) The trial court considered it unjust for husband to be awarded half of wife's CSRS pension at her retirement plus enjoy his own full share of social security benefits. (Tr. 7) Thus, the trial court decided it would be fair and equitable to reduce husband's share of wife's CSRS by $391.41 per month. (ER 24-25)

The trial court relied on wife's expert's testimony regarding what wife would have received as a social security benefit had she used marital assets to pay into the social security system during the marriage. (Tr. 7) The trial court then reduced husband's share of wife's CSRS benefits by that amount. (ER 24-25) The trial court was persuaded by cases from Pennsylvania that applied this method of allocating non-social security benefits to achieve a fair division of retirement assets. (Tr. 9: "I'm persuaded by the reasoning in the Pennsylvania cases that were cited to me by Mr. Gazzola.")

Mr. Gazzola, wife's trial counsel, cited McClain v. McClain, 693 A2d 1355 (Pa. Super. 1997) and Schneeman v. Schneeman, 615 A2d 1369 (Pa. Super. 1992). The principle set forth in the Pennsylvania decisions and adopted by Judge Tennyson is as follows:

> "By providing the employee-spouse with sole ownership of that part of the pension which would have otherwise been contributed to Social Security benefits, we have equated, as nearly as possible, employee-spouses who contribute to Social Security benefits and those who contribute to only a separate pension fund which is not statutorily exempt from marital property."
>
> Schneeman, 615 A2d at 1375; McClain, 693 A2d at 1359.

The trial court's decision did not concern any award, valuation of, or equalization of social security benefits between the parties. (ER 23-25) Indeed, the trial court decision recognized that wife is not eligible for social security benefits earned during the marriage due to her participation in CSRS. (Tr. 7)

In its letter opinion of November 8, 2010 denying attorney fees, the trial court confirmed: "It is important to note that this Court did not equalize the Social Security Benefit due each party. This Court simply ensured that Husband would not get his own social security when he retires and also receive half of what substitutes for Wife's social security as well. This decision was grounded in equity." (Letter Opinion set forth at SER 1)

The court of appeals' opinion (Haselton , C.J.) cited the broad authority granted in ORS 107.105(1)(f) to determine a "just and proper" division of property

"in all the circumstances." Herald and Steadman, 256 Or App 354, 355, 303 P3d 341 (2013) Discretion is vested in the trial court to perform this analysis and make the distribution. As the court of appeals acknowledged, an appellate court will only disturb the trial court determination if the trial court "misapplied the statutory and equitable considerations that ORS 107.105(1)(f) requires." Herald, 256 Or App at 355-56, citing Kunze and Kunze, 337 Or 122, 136, 92 P3d 100 (2004).

Correctly noting that 42 USC section § 407(a) is an "antiassignment" provision, the court of appeals proceeded to compare the trial court's methodology here with the offensive approach taken by the trial court in Swan. The court of appeals concluded there were substantive and legally significant differences in the approach taken by Judge Tennyson, especially the obvious fact that this case is not Swan because no valuation of husband's social security benefits even occurred. The court of appeals' rejected husband's argument that he is entitled to half of wife's CSRS, criticizing his approach as: "What is mine is mine, and what is hers is half mine." Herald, 256 Or App at 359.

ARGUMENT

Standard of Review: Under ORS 107.105(1)(f) the trial court is charged with creating a property distribution that is just and proper under all of the circumstances. The trial court's division of property is a matter of discretion and will not be disturbed unless the trial court misapplied the statutory and equitable

considerations. Kunze, 337 Or at 136. Circumstances may suggest an unequal division of marital property. Pierson and Pierson, 294 Or 117, 123, 124, 653 P2d 1258 (1982); Crislip and Crislip, 86 Or App 146, 151, 738 P2d 602 (1987).

ARGUMENT ON MERITS

The trial court's division of marital property under ORS 107.105(1)(f) reflects a proper exercise of its discretion in choosing to award husband less than half of wife's CSRS retirement benefits. This court should not disturb its determination of what is a "just and proper" division under all of the circumstances presented.

"The presumption of equal contribution does not require equal distribution in every case. The court must divide the property 'as may be just and proper in all the circumstances.'" Crislip and Crislip, 86 Or App at 151. The exercise is not "arithmetic". Pierson, 294 Or at 123.

"[T]he treatment of retirement plans in dissolution proceedings is not subject to the application of hard and fast rules that apply in all cases. That is because the parties' circumstances and the varieties of retirement plans 'is almost infinite'." Hester and Hester, 122 Or App 147, 150, 856 P2d 1048 (1993)

It would be error to ignore any aspect of the parties' circumstances relating to their retirement benefit packages. To do so would have a "substantial and inequitable impact on the property distribution [and] would be inconsistent with

[the court's] responsibility under ORS 107.105(f) to divide the marital property in a manner that is 'just and proper under all of the circumstances.'" Colling and Colling, 139 Or App 16, 21, 910 P2d 1165 (1996)(Reversing the trial court's division of retirement accounts which had erroneously ignored husband's PERS account because he was already retired). In accomplishing a just and proper distribution based on the circumstances, "on occasion, an unequal division of the parties' assets is appropriate." Wilson and Wilson, 152 Or App 454, 460, 954 P2d 212 (1998).

Petitioner's Brief asserts an error of law but fails to demonstrate the alleged error where the trial court simply divided wife's CSRS retirement benefits less than 50-50 and made no order implicating the value or the division of his social security benefits. The trial court's division does not offend the rule recited in Swan and Swan where the trial court valued each party's social security benefits and then equalized them.

The fundamental premise in Swan was that federal law, specifically 42 USC § 407 as limited by 42 USC §662, preempted state statutes to the extent state law contradicted § 407's anti-assignment provision. Therefore, according to Swan, the trial court may not value each party's social security benefits and then offset those benefits in dividing property. Swan, 301 Or at 171 ("it was error to consider the value of any social security benefits in making a property division under ORS

107.105(1)(f).") Here, the record contained neither evidence of the value of husband's social security benefits nor any distribution or "alienation" of those benefits. The trial court's discretionary division of property comports with Swan by simply making a less than 50-50 distribution of wife's CSRS and it reflects the ORS 107.105(1)(f) mandate of a "just an proper" division. The trial court and court of appeals should be affirmed. Otherwise, as the court of appeals' opinion noted, husband succeeds in keeping all of what is his in retirement and half of what is wife's CSRS. Nothing in Swan requires the trial court to ignore or uphold that inequity.

Wife argued and the court of appeals agreed that the trial court decision "did not concern any award, valuation of, or equalization of social security benefits between the parties." Herald, 256 Or App at 360.

This case is not controlled by Swan for several reasons. First, unlike in Swan, the trial court here did not value the relative social security benefits and then divide them. Indeed, wife is not eligible for social security benefits. No portion of the trial court's judgment purports to order any allocation or transfer of social security benefits. The trial court judgment merely addresses how much of wife's CSRS benefits husband should receive on her retirement and declares that he should receive less than a 50-50 share. No federal preemption issue is even presented and no error of law occurred.

Swan does not require that this court ignore the existence of social security benefits. Fredenburg v. Mental Health Division, 106 Or App 337, 342, 807 P2d 812 (1991)(Distinguishing Swan and holding that it is lawful to consider social security benefits in evaluating ability to pay for the cost of mental health care.) Swan correctly declared that federal preemption applies only where "Congress has required by direct enactment that state law be preempted." 310 Or at 173, citing Hisquierdo v. Hisquierdo, 439 US 572, 581, 99 S Ct 802, 808, 59 L Ed 2d 1, 11 (1979) Here there is no issue of preemption because the anti-assignment provision for social security benefits from 42 USC § 407 does not dictate the trial court's division of wife's CSRS benefits. The trial court made no ruling relating to husband's social security benefits. That the trial court deemed it appropriate to award husband less than a 50-50 share of wife's CSRS benefits under the particular circumstances is a matter of trial court discretion and not an error of law justifying reversal.

Husband argues that the trial court's approach was error under Swan. However, the facts do not support his argument. The trial court's approach (similar to the Pennsylvania cases of McClain and Schneeman) was to simply consider the absence of social security benefits in wife's retirement years. Thus, the court requested the parties to advise it: "What would be the marital - - what would be wife's Social Security benefit for the years she was earning money and

paying . . .[?] (Tr. 8, lines 11-13) Once the parties provided the trial court with that number ($391.41 per month) the trial court applied it to reduce husband's share of wife's CSRS benefit. (ER 24-25) The trial court identified this as "a hypothetical social security benefit value" for wife. (ER 25)

The rationale of Schneeman was simply to treat fairly CSRS participants and social security participants. Schneeman, 615 A2d at 1375. Accordingly, the Pennsylvania court computed the present value of the social security benefit which the CSRS participant would have earned and excluded that value when dividing the CSRS pension benefit.

Unlike the flawed legal analysis overturned in Swan, the trial court here did not compute each parties' present value for social security and then equalize them. Rather, the trial court simply allocated retirement benefits based on the parties' economic realities and did so in order to accomplish a just and equitable distribution (Tr. 7 - Rejecting a 50-50 distribution of wife's CSRS account on these facts: "I can't see how that's fair or just or equitable.").

Several states, including Pennsylvania as noted, have approved an allocation of non-social security retirement benefits that recognizes the disparity and potential injustice of only one party receiving social security benefits which are protected under federal law. Marriage of Zahm, 138 Wn. 2d 213, 219, 978 P2d 498 (1999); Marriage of Rockwell, 141 Wn App 235, 244-45, 170 P3d 572

(2007) *rev den* 163 Wn 2d 1055 (2008); Olsen and Olsen, 169 P3d 765, 768 (Utah Ct App 2007). In Rockwell, the court performed a similar analysis to the trial court here and upheld the consideration of wife's ineligibility for social security benefits as one "factor" in determining the overall division of property. 141 Wn App at 245.

In Zahm, the Washington Supreme Court explained its approach (using social security benefits as simply one factor in the analysis) does not run afoul of 42 USC§ 407:

> "Here, the trial court did not conduct the kind of valuation of benefits prohibited in Hisquierdo. The trial court neither computed a formal calculation of the value of petitioner's social security benefits nor offset a formal numerical valuation into the court's property division via a specific counterbalancing property award to respondent. Thus, the reasoning in Hisquierdo does not control the result in the case before us."
>
> Zahm, 138 Wn. 2d at 221.

The Washington Supreme Court in Zahm addressed the fact that Swan's analysis was in line with Hisquierdo but concluded that neither case addressed the question of whether the availability of benefits is a factor that can be considered in creating a just and equitable division of property. 138 Wn. 2d at 222 In upholding the trial court's determination in Zahm, the court held: "[T]he trial court here did not impermissibly calculate a specific formal valuation of petitioner's social security benefits and award respondent a precise property offset based on that

valuation but, rather, merely considered those benefits when determining the parties' relative economic circumstances at dissolution." 138 Wn. 2d at 222.

The Arizona Supreme Court directly addressed the very issue presented here and reached an equitable division similar to the trial court here. Kelly v. Kelly, 198 Ariz 307, 9 P3d 1046 (2000). There, as here, one party had CSRS benefits and the other had social security. In Kelly, the trial court excluded wife's social security benefits from division but treated husband's CSRS benefits as community property and divided them equally. The Arizona Supreme Court rejected that approach and instead approved a division that exempted an appropriate portion of husband's CSRS benefits from division. Kelly, 198 Ariz at 309, 9 P3d at 1048. The court declared:

> "Relying on this 'concept of fairness,' we agree that 'to the extent individuals with Social Security benefits enjoy an exemption of that 'asset' from equitable distribution . . .those individuals participating in the CSRS must, likewise, be so positioned."
>
> Kelly, 198 Ariz at 309, 9 P3d at 1048, quoting Cornbleth v. Cornbleth, 398 Pa Super. 421, 580 A.2d 369, 371.

The Arizona Supreme Court observed:

> "Viewed another way, it can be seen that in the absence of social security contributions, the community could have spent, saved, or invested those funds as it saw fit. In each instance the resulting asset, if any, would have been divisible as community property. But, as matters presently stand, community funds have been diverted to the separate benefit of one spouse. We believe this situation compels an equitable response."
>
> Kelly, 198 Ariz at 309, 9 P3d at 1048.

At the end of the day, as the court observed: "we are today neither dividing social security benefits nor providing an offset." Kelly, 198 Ariz at 310, 9P3d at 1049.

The Delaware Supreme Court is in accord:

> "The Family Court is statutorily required to 'equitably' divide the marital property, 'in a way which will mitigate potential harm to the spouses.' Moreover, even though federal law preempts the *direct division* of Social Security proceeds, it does not preempt the Family Court from considering the existence and the amount of Social Security benefits in the course of an equitable property division, even where that consideration might lead the Family Court to alters its division of the marital estate. In short, the Family Court is empowered to equitably divide marital property in cases involving pension plans that are a 'substitute' for Social Security benefits, such as the one at issue here."
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> Forrester v. Forrester, 953 A2d 175, 185 (Delaware Supreme Court 2008), (footnotes omitted)

Forrester, quoting trial court: "rather than subtracting out the hypothetical social security contributions and their anticipated future value, the Court can rectify any imbalance by awarding a lesser or greater portion of the pension to Wife after comparing the respective economic positions of the parties, their employment history, annual income, and assets as required by statute." Forrester, 953 A2d 175 fn 45.

See also Stanley v. Stanley, 956 A2d 1, 4, fn 6 (Delaware Supreme Court 2008) listing the 12 states which permit consideration of Social Security benefits in fashioning an equitable division of property. The Delaware Supreme Court

adopted the rule from Johnson v. Johnson, 734 NW 2d 801, 808 (SD 2007) as follows:

> "Most courts . . . disallow an offset but allow a general consideration of a party's anticipated social security benefits in the overall scheme when making a property division. These courts generally reason: 'While the anti-assignment 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 property to formulate a just and equitable division of the parties' marital property.'
>
> * * * * *
>
> Therefore, these courts conclude that '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.
>
> We agree with the majority approach that social security benefits may be considered as a factor, among others, when dividing marital property. This adheres to the federal restrictions, for it is not a direct division of [Husband's] social security."
>
> Johnson, 734 NW 2d at 808.

In Olsen and Olsen, 169 P3d at 768 the appellate court concluded: "trial courts may consider social security benefits in relation to all joint and separate marital assets in seeking to ensure that 'property be fairly divided between the parties'" and recognized that there is a growing acceptance of viewing social security benefits as a factor in fashioning a just and equitable property division: "Many other state courts agree in limiting the applicability of Hisquierdo. At least nine

states, specifically Colorado, Kansas, Iowa, Maine, Massachusetts, Missouri, Ohio, South Dakota, and Washington, allow consideration of social security benefits when fashioning a property division, although they do not classify and divide the social security benefits as marital property." Olsen, 169 P3d at 770-71, multiple citations omitted.

The Utah appellate court was persuaded by the majority of states and thus concluded: "the Social Security Act does not require us to turn a blind eye to a spouse's anticipated social security income in fashioning an equitable remedy at divorce. We adopt the majority's interpretation of Hisquierdo as not prohibiting this approach." Olsen, 169 P3d at 772.

The trial court here performed the same discretionary analysis and achieved a distribution of wife's CSRS benefits that gave wife slightly more of her own CSRS benefits due to husband's security in having available Social Security at retirement. Not one dollar of husband's Social Security benefits was covered by the court's order and therefore it comports with federal law and with Swan.

Recently, the Michigan Court of Appeals joined the ranks of those jurisdictions specifically endorsing the inclusion of social security benefits as one factor a court may consider in dividing marital assets: "We join the majority of state courts that have considered this question, and hold that 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." Biondo and Biondo, 291 Mich App 720, 731, 809 NW 2d 397 (2011)

The distinction between Swan and what the trial court did here is illustrated well in Depot and Depot, 893 A2d 995 (Maine 2006). Applying Hisquierdo, the Maine Supreme Court reversed a trial court valuation and equalization of social security benefits but held that the trial court may consider the availability of social security benefits as a "relevant factor" under that state's equitable distribution statute. 893 A2d at 1002. In its analysis, the Maine court found persuasive the clarification of 42 USC §407(a) in Washington State Dep't of Soc. & Health Servs. V. Guardianship Estate of Keffeler, 537 US 371, 385, 123 S Ct 1017, 154 L Ed 2d 972 (2003). In Keffeler, the United States Supreme Court clarified its narrower view of Section 407's limitation on use of "other legal process". The court held:

> "Other legal process" should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability."

Applying this narrower interpretation from Keffeler, the Maine Supreme Court in Depot concluded: "A divorce court's treatment of a spouse's anticipated or actual Social Security benefit payments as a factor relevant to the equitable distribution of property is neither a judicial process . . . nor a mechanism by which control over

Social Security benefits 'passes from one person to another'." Depot , 893 A2d at 1001.

CONCLUSION

The trial court decision should be affirmed in all respects. The decision of the court of appeals should be affirmed.

Wife should be awarded her costs and attorney fees under ORS 107.105(1)(j).

Respectfully submitted this 22nd day of October, 2013

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is **4498** words.

I certify that the size of type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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Certificate of Service

I hereby certify that on this date I served two copies of the foregoing RESPONDENT ON REVIEW'S BRIEF on the pro se Petitioner, James R. Herald, OSB # 900675 by first class mail with postage prepaid, addressed as follows:

James R. Herald
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I hereby certify that on this date I filed the foregoing RESPONDENT ON REVIEW'S BRIEF be eFiling addressed as follows:

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Dated this 22nd day of October 2013

_/s/ Helen C. Tompkins_____
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