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ORIGINAL

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 No. 090666375 Honorable Katherine E. Tennyson, Judge. Case No. A146603 S061362

PETITIONER HUSBAND'S BRIEF ON THE MERITS ON REVIEW

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Concurring Judge(s): Duncan, Presiding Judge, and Rasmussen, Judge pro tempore.

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Is subtracting from a Social Security Act participating spouse's portion of joint retirement assets (in this case, federal employee annuity benefits under the Civil Service Retirement System (CSRS) which Wife accrued during her career in federal service) legally different from adding to the non-Social Security Act participating spouse's share of joint retirement assets to "equalize" for the Social Security Act benefits, where the trial court and the Oregon Court of Appeals[1] acknowledge that adding to the non-Social Security Act participating spouse's share of assets a portion of Social Security Act benefits would clearly violate the Social Security Act's "antiassignment" provision, 42 USC section 407(a)? 1

Is the Court of Appeals' decision that "the trial court's calculation of wife's hypothetical Social Security Act benefits [does not] implicate the fundamental "antiassignment" policies of 42 USC section 407(a)" a fair reading of federal law and of this Court's decision in *In the Matter of the Marriage of Swan and Swan,* which held that "it was error to consider the value of any Social Security Act benefits in making a property division under ORS 107.105(1)(f)"? 2

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Family courts violate the law and disregard the holding in *Swan* and the law behind it when, in making divisions of property in a marital dissolution, they alter the division of property because of the perceived inequity of either one spouse being eligible to receive Social Security Act benefits when the other is not (because of federal law), or one spouse's eligibility to receive significantly larger Social Security Act benefits than is the other spouse. Any alteration at all on account of Social Security Act benefits inherently acts to lessen the Social Security Act benefits to be received by the spouse who is eligible for them, and effectively and impermissibly transfers the value of those Social Security Act benefits to the ineligible spouse, in violation of federal law.

Any consideration of the spouses' disparate eligibilities under the

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[1] 256 Or App 354, 360-61 (2013).

Social Security Act benefits, whether the consideration causes an attempt to directly divide the Social Security Act benefits or causes some other change in the split or transfer of any joint property between the spouses, transfers the value of Social Security Act benefits in violation of the anti-assignment provisions of the Social Security Act. The lower courts' effort to frame the part of the property division that they connected to Social Security Act benefits as imputing to joint property an indivisible portion calculated to match what the spouse who will not receive Social Security Act benefits "would have earned" from Social Security Act benefits, had she been enrolled in the Social Security Act program, fails to meet the lower courts' stated goal of considering the fact of the Social Security Act benefits without considering the value of the Social Security Act benefits. The part of the division that was driven by the disparity in Social Security Act benefits transfers the value of Social Security Act benefits in violation of the anti-assignment provision.

A family court's decision in a division of property under ORS 107.105(f) to subtract from the joint assets given to a Social Security Act participating spouse (in this case, federal employee annuity benefits under the Civil Service Retirement System (CSRS) which Wife accrued during the marriage in her employment in federal service) is legally identical to a decision adding to the non-Social Security Act participating spouse's share of joint assets to "equalize" for the Social Security Act benefits. Assigning to wife $300 a month of joint property in the form of that much of Wife's CSRS annuity, specifically to "equalize" for the disparity in Social Security Act benefits, is legally and economically identical to transferring or assigning to wife $300 a month of Husband's Social Security Act benefits. Both are prohibited by the anti-assignment provision of the Social Security Act, as was explained in *Swan*. (The trial court and the Oregon Court of Appeals acknowledge that adding to the non-Social Security Act participating spouse's share of assets a portion of Social Security Act benefits would clearly violate the Social Security Act's "antiassignment" provision, 42 USC section 407(a).)

This Court will reverse lower court decisions that "the trial court's calculation of wife's hypothetical Social Security Act benefits [does not] implicate the fundamental "antiassignment" policies of 42 USC section 407(a)" since that decision is based entirely on a misreading of federal

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PETITIONER HUSBAND'S BRIEF ON THE MERITS ON REVIEW

The Legal Questions Presented

Can family courts adjudicating asset divisions in a marital dissolution, without effectively and impermissibly transferring the right to receive Social Security Act benefits, consider that one of the spouses will receive Social Security Act benefits, and, without identifying any portion of assets split or transferred between the spouses as being "Social Security Act benefits," impute to joint property an indivisible portion calculated to match what the spouse who will not receive Social Security Act benefits "would have earned" from Social Security Act benefits, had she been enrolled in the Social Security Act program?

Is subtracting from a Social Security Act participating spouse's portion of joint retirement assets (in this case, federal employee annuity benefits under the Civil Service Retirement System (CSRS) which Wife accrued during her career in federal service) legally different from adding to the non-Social Security Act participating spouse's share of joint retirement assets to "equalize" for the Social Security Act benefits, where the trial court and the Oregon Court of Appeals[1] acknowledge that adding to the non-Social Security Act participating spouse's share of assets a portion of Social Security Act

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[1] 256 Or App 354, 360-61 (2013).

benefits would clearly violate the Social Security Act's "antiassignment" provision, 42 USC section 407(a)?

Is the Court of Appeals' decision that "the trial court's calculation of wife's hypothetical Social Security Act benefits [does not] implicate the fundamental "antiassignment" policies of 42 USC section 407(a)" a fair reading of federal law and of this Court's decision in *In the Matter of the Marriage of Swan and Swan,* which held that "it was error to consider the value of any Social Security Act benefits in making a property division under ORS 107.105(1)(f)"?[2]

THE RULES OF LAW THAT PETITIONER HUSBAND PROPOSES BE ESTABLISHED

Husband proposes that this Court hold that family courts violate the law and disregard the holding in *Swan* and the law behind it when, in making divisions of property in a marital dissolution, they alter the division of property because of the perceived inequity of either one spouse being eligible to receive Social Security Act benefits when the other is not (because of federal law), or one spouse's eligibility to receive significantly larger Social Security Act benefits than is the other spouse. Any alteration at all on account of Social Security Act benefits inherently acts to lessen the Social Security Act benefits

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2 301 Or 167, 720 P2d 747 (1986).

to be received by the spouse who is eligible for them, and effectively and impermissibly transfers the value of those Social Security Act benefits to the ineligible spouse, in violation of federal law.

Any consideration of the spouses' disparate eligibilities under the Social Security Act benefits, whether the consideration causes an attempt to directly divide the Social Security Act benefits or causes some other change in the split or transfer of any joint property between the spouses, transfers the value of Social Security Act benefits in violation of the anti-assignment provisions of the Social Security Act. The lower courts' effort to frame the part of the property division that they connected to Social Security Act benefits as imputing to joint property an indivisible portion calculated to match what the spouse who will not receive Social Security Act benefits "would have earned" from Social Security Act benefits, had she been enrolled in the Social Security Act program, fails to meet the lower courts' stated goal of considering the fact of the Social Security Act benefits without considering the value of the Social Security Act benefits. The part of the division that was driven by the disparity in Social Security Act benefits transfers the value of Social Security Act benefits in violation of the anti-assignment provision.

Husband proposes that this Court also hold that a family court's decision in a division of property under ORS 107.105(f) to subtract from the joint assets given to a Social Security Act participating spouse (in this case, federal

employee annuity benefits under the Civil Service Retirement System (CSRS) which Wife accrued during the marriage in her employment in federal service) is legally identical to a decision adding to the non-Social Security Act participating spouse's share of joint assets to "equalize" for the Social Security Act benefits. Assigning to wife $300 a month of joint property in the form of that much of Wife's CSRS annuity, specifically to "equalize" for the disparity in Social Security Act benefits, is legally and economically identical to transferring or assigning to wife $300 a month of Husband's Social Security Act benefits. Both are prohibited by the anti-assignment provision of the Social Security Act, as was explained in *Swan.* (The trial court and the Oregon Court of Appeals acknowledge that adding to the non-Social Security Act participating spouse's share of assets a portion of Social Security Act benefits would clearly violate the Social Security Act's "antiassignment" provision, 42 USC section 407(a).)

And, Husband proposes that this Court reverse the Court of Appeals' decision that "the trial court's calculation of wife's hypothetical Social Security Act benefits [does not] implicate the fundamental "antiassignment" policies of 42 USC section 407(a)" since that decision is based entirely on a misreading of federal law and of this Court's decision in *In the Matter of the Marriage of Swan and Swan:* "it was error to consider the value of any Social Security Act benefits in making a property division under ORS 107.105(1)(f)," and there can

be no consideration of the existence of Social Security Act benefits without considering the value.

Historical and Procedural Facts

As noted in the Court of Appeals briefing, the parties fully anticipated and litigated the legal issue now before the Court. Both parties are beneficiaries of federal retirement benefits. Wife has a CSRS benefit that exempts employees and employers from paying into the Social Security system, or from receiving benefits from that system. CSRS retirement benefits can reach 80% of an employee's highest pay. Husband's civilian federal employment is under the Federal Employees Retirement System (FERS) and pays Social Security taxes, and his FERS retirement benefit is 1% for each year of federal service. Husband will receive a Social Security benefit, and Wife will not.

CSRS was excluded from the Social Security Act because federal employees' retirement benefits were as secure as Social Security Act benefits, and the benefits are substantially higher than Social Security benefits, or than the sum of Social Security and FERS benefits.

CSRS benefits can be as much as 80% of a person's highest annual income. (measured by the 3 consecutive years with the highest income), making Social Security Act benefits unnecessary for income security in

retirement. There was and is none of the retirement income insecurity to protect against that was the purpose of the Social Security Act.[3]

The Trial Court issued a final judgment dividing the joint property. The only issue on review is an adjustment of the division of retirement annuities, effective when the Wife reaches Social Security retirement age (62 years of age). At that time, Husband's portion of Wife's CSRS annuity is reduced by the amount that Wife would have received in Social Security benefits, had CSRS employees been included within the Social Security Act system.[4]

SUMMARY OF THE ARGUMENT

Under controlling federal law, family courts are not allowed to divide or alter in any way the effect of federal law on Social Security Act benefits. That is, Social Security Act benefits are not joint property, and the division of joint property cannot be affected by the presence or absence of Social Security Act benefits. And alteration of the division of joint property to "equalize for"

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[3] The applicable CSRS annuity is set out in footnote 4 of Petitioner's Opening Brief to the Appellate Court. As of the time of the Judgment, the parties made essentially identical annual income, and if the parties both retired at age 62, Wife would have accumulated a CSRS annuity of 80% of her highest pay, and Husband would have accumulated a FERS annuity of 24% of his highest pay.

[4] With a maximum CSRS annuity of 80% of the employee's highest pay, the addition of Social Security benefits would almost certainly bring a retiree's retirement income over 100% of the highest pay. The CSRS annuity has long been one of the more generous defined-benefit retirement plans, which, no doubt, drove the decision to not including CSRS employees in Social Security.

disparate Social Security benefits transfers the economic value of those benefits in violation of the anti-assignment provisions of the Social Security Act.

In its decision here, as in its decision in *Swan*, the Court of Appeals ruled contrary to controlling federal law and supported the trial court's altering the division of property to address the disparity between the spouses' respective Social Security Act benefits. The lower courts' attempts to re-characterize the alteration of a property division, which was expressly identified as a response to the disparity between the spouses' Social Security Act benefits eligibility, as considering "the fact" of Social Security Act benefits but not the "value" of those benefits was rejected in *Swan* and now must be rejected again.

ARGUMENT

The Trial Court Is Not Permitted to Consider the Parties' Relative Social Security Act Benefits (or Lack of Them) in Making a Distribution of Property Pursuant to Divorce

Under controlling federal law, as previously applied by this Court, Oregon courts may not consider relative Social Security Act benefits in dividing the parties' property, whether both parties will collect Social Security Act benefits or not. That conclusion is compelled by a federal statute which this Court interpreted and applied in the controlling case of *Swan and Swan*, 301 Or 167. As described by this Court in *Swan and Swan*, discussed in some

detail, below, the federal Social Security Act contains clauses – sometimes referred to as antiassignment clauses – 42 U.S.C. § 407, that are "legally indistinguishable from the antiassignment provisions" in the Railroad Act, which the U.S. Supreme Court interpreted in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1, 11 (1979). That Court held that, with limited exceptions not applicable to property divisions in family court, Congress's inclusion of an anti-assignability clause intentionally and fully provided "immunity from legal process," including consideration in family court property divisions, for railroad retirement benefits, in the Federal Railroad Retirement Act of 1974 (45 U.S.C. §§ 231 et seq.). As this Court noted in the *Swan* decision, "Although the issue before the court [in *Hisquierdo*] involved [Railroad Retirement benefits], the issue there is identical to the issue here." 301 Or at 172. And so, "we have no hesitancy in concluding that the *Hisquierdo* rule applies here. Family courts, in making divisions of property cannot consider Social Security Act benefits." 301 Or at 176, 720 P2d at 751.

There is no debate that the trial court and the Court of Appeals here did "consider Social Security Act benefits," which this Court clearly ruled was unlawful. Both lower courts attempted to justify that consideration by protesting supposed unfairness in the rule of law that Social Security Act "benefits are not marital property--and, thus, are not subject to equitable

distribution--but that" CSRS benefits, like FERS benefits and the other retirement assets in this care are not set aside by antiassignment provisions, and therefore are joint property, subject to division between the parties. 256 Or App, 359.

According to the Court of Appeals, to ameliorate this supposed unfairness,

> "the trial court here did not evaluate or consider the *value* of husband's social security benefits in any manner. Although the *fact* of husband's entitlement to social security benefits affected the result here, nothing in *Swan* or, as nearly as we can perceive, the intended operation of section 407(a), precludes the consideration of that fact by itself."

256 Or App, 361 (emphasis in original).

> "Indeed, as the trial court here emphasized, it would be manifestly *unjust* for husband to receive his full social security benefits and to share in wife's full CSRS benefits while wife is prohibited from sharing in husband's social security benefits and is entitled to no social security benefits of her own."

256 Or App, 362 (emphasis in original). There should be no doubt that the carving out of some fictionally calculated portion of wife's CSRS benefits as an imputed Social Security Act benefit equivalent arose precisely because the lower courts disagreed with Congress's protection of Social Security Act benefits, since that protection creates the "manifestly *unjust*" situation presented here and in *Swan*. The Court of Appeals characterized the inalienability of Social Security Act benefits as creating

> the conundrum of fashioning a 'just and proper' division in circumstances in which (a) husband's social security benefits could not (because of section 407(a) and *Swan*) be included in the division of marital property, but (b) wife's CSRS benefits were subject to inclusion in the division.

256 Or App, 359-60. The Court of Appeals went so far as to assert that Husband's presenting the federal law and this Court's application of it in *Swan* to be asserting that "in the vernacular: 'What is mine is mine, and what is hers is half mine.'" 256 Or App, 359.[5]

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[5] Part of what is remarkable about the language of the Court of Appeals decision is its implication that Wife had CSRS and Husband had Social Security -- and nothing else, and that the marital estate was somehow disparately accumulated rather than jointly accumulated.

In fact, Wife got half of Husband's FERS annuity accrued during the marriage as well as half of Husband's substantial retirement accounts. The likely FERS annuity alone essentially matches Husband's likely Social Security benefits. The retirement accounts were mostly from out-of-pocket (pre-tax) investments that Husband made during the marriage, and that Wife did not make. She didn't need to. But she got half of those marital investments. (Wife had less than 2% of the retirement investments that Husband had.)

And, to accumulate the Social Security Act benefits he accumulated, Husband paid, every pay period, Social Security taxes, in addition to those pre-tax investments. That is, he (voluntarily and involuntarily) deferred income to retirement when she did not have to do anything remotely similar.

With his Social Security Act benefits, Husband will close some of the gap between the 59% CSRS annuity Wife will receive if she retires at 62 years old (after Husband's share is deducted from the 80% CSRS annuity) and the 23% FERS annuity that Husband will receive if he retires at 62 year old. He will not close it completely.

> "Confronted with that incongruity, the trial court identified and applied a methodology that, ... [reduced] the value of those [CSRS] benefits [for purposes of division, after Wife reached the age of 62] by the value of the social security benefit wife would have earned had she paid into social security during the marriage."

The lower courts appear to have missed the actual incongruity – that their rulings credit Wife with investing in Social Security benefits when she could have been, but wasn't, investing in retirement accounts, while invading an annuity Congress has set aside from property divisions in marital dissolutions.

This Court's conclusion in *Swan* – that "Family courts, in making divisions of property *cannot consider Social Security Act benefits*," 301 Or, 176, is not limited to any specific assessment of the "*value*" of Social Security Act benefits, as compared to the mere "*fact*", a distinction upon which the Court of Appeals and the trial court rulings expressly depend.

Husband acknowledges that in *Swan*, the Court of Appeals used different vocabulary to describe the trial court ruling.

> "Although Social Security benefits can only be awarded to the person to whom they accrue, the value of those benefits can be considered in the equitable distribution by the court."

Swan and Swan, 74 Or.App., 618-20. But in both *Swan* and here, the trial court altered the division of non-Social Security Act joint property, to

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Husband's half of Wife's CSRS annuity accrued during the marriage is reduced to something closer to 42% of that annuity. The judgment transfers 8% of the marital portion of the CSRS benefits (about 16% of Husband's share) from Husband to Wife, precisely because Husband has earned Social Security Act benefits.

accommodate the "conundrum," the "incongruity" and the "manifest" unjustness of one spouse having accrued a larger Social Security Act benefit than the other spouse. The actions of the trial court in the two cases are essentially identical, and the only difference is the vocabulary.

Whether the trial court carves out more of Husband's FERS annuity for Wife, or reserves more of Wife's CSRS annuity, the effect is economically identical. Wife gets more of the joint property, and Husband gets less, precisely because the courts resent the Congress's decision to make Social Security Act benefits indivisible in property divisions in family court.

As, as noted in this Court's *Swan* decision, Congress has acted intentionally differently in addressing Social Security Act benefits and CSRS annuities. And while neither the *Swan* case nor the *Hisquierdo* case was about CSRS annuities, both decisions used the contrast between annuities that Congress has protected from family court divisions and the CSRS annuity, which Congress had only recently opened up to being divided in family court. Quoting the U.S. Supreme Court, this Court noted that Congress amended the Railroad Retirement Act twice in the 1970s to

> "both permit and encourage garnishment of Railroad Retirement Act benefits for the purposes of spousal support, [and that] Congress may find that the distinction it has drawn is undesirable. *Indeed, Congress recently has passed special legislation to allow garnishment of Civil Service Retirement benefits for community property purposes. See Pub L 95-366, 92 Stat 600.*

benefits (without the offset of equal amounts of CSRS benefits making the benefits worth little or nothing) the debate is, clearly, with Congress's decision to

> "preempt state law property division schemes as applied to the social security benefits of a spouse upon divorce [as] also is shown by the fact that 42 U.S.C. § 402(b)(1) expressly provides old-age benefits for divorced spouses so that a divorced spouse need not depend upon a particular state's system of marital property law."

301 Or 176.

The decision to lower Husband's share of the CSRS annuity because he has accrued Social Security Act benefits is exactly what the US Supreme Court in *Hisquierdo* and this Court in *Swan* correctly said was not lawful.

The Court of Appeals Decision Here Repeats the Errors it Made in *Swan*

The legal analysis of both courts and of Respondent has focused on ORS 107.105(f), the state statute that calls for an equitable division of property, and an assertion that the courts can "consider" that one spouse gets more (or any) Social Security Act benefits - and alter the distribution of joint assets on account of that disparity of benefit - without "considering" the value of those benefits. This is trying to split a hair that just won't split. And it was the issue in *Swan*. As soon as a court alters a property division because of something set aside as not marital property, that court invades the value of the non-marital property.

In her Opposition to the Petition for Review, Wife made clear that her argument is that court's can divide marital assets differently exactly because there are assets of benefits protected by law from division in a marriage dissolution case.

> Although husband's social security benefit cannot be subject to division, wife's CSRS benefit is property which the trial court may divide at its discretion. Husband has a protected retirement benefit and wife does not.
>
> Therefore, awarding husband a full half of wife's CSRS benefit as husband advocates would result in wife enjoying a substantially reduced standard of living from that which she would have enjoyed if the marriage continued.
>
> The trial court did not so much consider that husband had Social Security as it emphasized that wife did not. Throughout the marriage, wife effectively contributed to husband's social security but will never share in it. As the court of appeals correctly observed, "it would be manifestly *unjust* for husband to receive his full social security benefits and to share in wife's full CSRS benefits while wife is prohibited from sharing in husband's social security benefits and is entitled to no social security benefits of her own." [Opinion 362] The court correctly exercised its discretion in this case without depriving Husband of *any* of his social security benefits.

Response to Petition for Review, 4.

Under Wife's analysis (which appears to be the analysis of the Court of Appeals), if there is a marital dissolution case in which one spouse has Social Security Act benefits that will pay $2,000 a month, and the only marital asset with any value is a CSRS annuity that will pay $2,000 a month, the court could allocate 100% of the one marital asset to the spouse who is not eligible for

Social Security Act benefits. Such a "division" is clearly dividing the Social Security Act benefits. Any affect that Social Security Act benefits have on the division of marital assetsw is dividing the value of the Social Security Act benefits, which Congress clearly intended to prohibit, and did prohibit.

This Court, in its *Swan* decision, quoted quite extensively from the Court of Appeals decision in *Swan*, apparently to make clear that the Court of Appeals was misapplying federal law and was wrong in concluding that, as long as the court did not transfer Social Security Act money from one spouse to the other, there was no violation of the Social Security Act anti-alienation/anti-assignment provision. And yet, the Court of Appeals makes the same mistake again.

The Court of Appeals in *Swan* acknowledged that 42 USC 407

> "makes the right of any person to future Social Security payments nontransferrable and nonassignable and makes Social Security benefits not subject to 'execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.' 42 USC § 407(a). It precludes a court from awarding one spouse's Social Security benefits to the other; however, it does not preclude a court in a dissolution proceeding from considering Social Security benefits when dividing the parties' real or personal property 'as may be just and proper in all the circumstances.' ORS 107.105(1)(f) directs that a 'retirement plan or pension or an interest therein shall be considered as property.' Although Social Security benefits can only be awarded to the person to whom they accrue, the value of those benefits can be considered in the equitable distribution by the court." *Swan and Swan*, 74 Or App 616, 618-20, 704 P.2d 136, 137-38; clarified 75 OrApp 764, 709 P.2d 245 (1985) (Per Curiam) (footnote omitted; citation omitted; emphasis added).

301 Or at 171, 720 P2d at 749-50.

> Although the Court of Appeals did not transfer or assign the respective Social Security benefits of the parties, it did use the respective values of the benefits in dividing the property. For the reasons that follow, we hold that it was error to consider the value of any Social Security benefits in making a property division under ORS 107.105(1)(f).
>
> The federal Social Security Act ... antiassignment clause--42 U.S.C. § 407, ... provides:
>
> "(a) Inalienability of right to future payments
>
> "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.
>
> "(b) Inamendability of section by inference
>
> "No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section"

301 Or at 171, 720 P2d at 749.

This Court, following the lead of the U.S. Supreme Court and of the Congress, concluded that family courts, in making divisions of property, cannot consider Social Security Act benefits at all. The lower courts in *Swan* erred by concluding otherwise, and the lower courts here made the same error. The error here was expressed in language that unambiguously demonstrates that the lower courts were motivated by the same concern as was present in the

Swan case, and that the motivation drove the courts to the same error the courts had committed in the *Swan* case. The courts changed the division of property because one party expected to receive significantly larger Social Security Act benefits than did the other party, and this strikes the lower courts as a reasonable response to what the Court of Appeals called a "conundrum," an "incongruity" and a "manifest" unjustness. But what the response amounts to is a manifest violation of the clearly expressed federal law as it applies to Social Security Act benefits and CSRS benefits.

In explaining its conclusion that "the trial court's resolution of the matter does not run afoul of 42 USC section 407(a)" or *Swan*, the Court of Appeals necessarily ignored the unqualified substantive language in *Swan* that family courts "cannot consider Social Security Act benefits," 301 Or at 176, 720 P2d at 752, and attempted to drive a large truck through a small hole that appears to exist only because the Court of Appeals decision does not acknowledge the breadth of this Court's admonition, which the Court of Appeals omits in its quotations from *Swan*. Family courts "cannot consider Social Security Act benefits" in property division processes.

Instead, the Court of Appeals wrote:

> The holding in *Swan* is that a court is not to consider "the *value* of any social security benefits" in making a property division. 301 Or at 171 (emphasis added); *see id.* ("[W]e hold that it was error to consider the value of any social security benefits in making a property division under ORS 107.105(1)(f)."); *id.* at 176 ("We hold that the value of social

> security benefits of either spouse may not be considered in the division of property."). *Here, the trial court did not refer to the value of husband's social security benefits. To be sure, the trial court's approach to dividing the parties' retirement assets was triggered by the **fact** that husband is entitled to social security benefits; however, the trial court did not consider or rely on the **value** of those benefits. That approach is qualitatively, and conclusively, different from that of the trial court in **Swan**, which included the actual value of the parties' social security benefits in the property division.* [Footnote omitted.]

[Emphasis in bold was from the Court of Appeals. Emphasis in unbolded italics is added.] 256 Or App 360-61.

In the omitted footnote, the Court of Appeals called the trial court's consideration of Husband's Social Security Act benefits

> dispositively distinguishable from the alternative approach proffered by the wife in *Hisquierdo*, by which an offset in the property division would have been based on the value of the husband's railroad retirement benefits. 439 US at 588.

256 Or App, 361, fn 6.

The Court of Appeals accepts that assigning Social Security Act benefits is not lawful but is explicitly asserting that if courts balance one spouse's Social Security Act benefits by securing from sharing an asset of the other spouse, rather than transferring assets from the spouse receiving Social Security Act benefits, courts are *not* considering the value of the Social Security Act benefits in determining the property division.

The Court of Appeals makes this assertion while acknowledging:

> "*To be sure, the trial court's approach to dividing the parties' retirement assets was triggered by the* ***fact*** *that husband is entitled to social security benefits.*"

256 Or App 361.

> Specifically, the court did not include husband's social security benefits in marital property or refer to the amount of husband's social security benefits, as a putative "offset" or otherwise, in effecting the property distribution. Indeed, the trial court determined that the value of wife's CSRS benefits, for purposes of the property division, should be the value of those benefits reduced by the value of the social security benefit wife would have earned had she paid into social security during the marriage.

256 Or App, 359. Why the court thinks that it can just define away actual activities during the marriage and the choices made by one spouse, while "imputing" an activity to that spouse, to the detriment of the spouse who actually performed that activity, is not clear.

What the Court of Appeals asserts makes the present case not covered by the analysis in *Swan* is clear. And it is shockingly parallel to what this Court reversed in *Swan*, unless one assumes that one dollar from category A, initially held by Spouse 1, is not worth the same in a property division as $1 from category B, held by Spouse 2. This Court's decision in *Swan* was intended to prevent just this sort of analysis.

As noted, the Court of Appeals in *Swan* acknowledged considering the value of Husband's Social Security Act benefits, but since it was not transferring them, the Court thought considering those benefits was OK:

> "Although Social Security benefits can only be awarded to the person to whom they accrue, the value of those benefits can be considered in the equitable distribution by the court." *Swan and Swan*, 74 Or App 616, 618-20, 704 P2d 136, 137-38; clarified 75 Or App 764, 709 P2d 245 (1985) (Per Curiam) (footnote omitted; citation omitted; emphasis added).

301 Or 171, 752 P2d 749.

Here, the Court claims to be threading a needle between considering the fact of one spouse's Social Security Act benefits, without considering the value of those benefits. However, as this Court noted in *Swan*,

> The effect of including the value of either spouse's social security benefits in the property to be divided is to allow the trial court to divide that value between the spouses. This conflicts with 42 U.S.C. §§ 407, 659 and 662(c). We hold that the value of social security benefits of either spouse may not be considered in the division of property.

301 Or 177. The *only* way to not consider something that has apparent value in a division of property is to exclude the thing from all consideration. Inevitably, the Court of Appeals contrary decision here totally ignores this Court's unqualified statement in *Swan* that "Family courts, in making divisions of property, cannot consider Social Security Act benefits." 301 Or 176, 720 P2d 752.

The facts in *Swan* (as do the facts here) well illustrate the problem:

> If the social security benefits are excluded, the value of the property awarded to the husband is reduced from $249,467.02 to $199,467.02. The wife's share is reduced from $238,289.90 to $209,289.90. Where the husband originally was awarded property valued approximately $11,000

> more than that awarded to the wife, the wife now has an advantage of nearly $10,000.
>
> The Court of Appeals' earlier decision was to award the "long half" to the husband, considering the social security benefits of the parties. We ... remand this case to the Court of Appeals for further consideration in light of this opinion.

301 Or at 177, 720 P2d at 752. Extending the "half" of the marital estate for the spouse who would receive lower-Social Security Act benefits is considering the value of the Social Security Act benefits, however that action is framed.

The holding in *Swan* was not limited to precluding consideration of the Social Security Act benefits of the higher-social-security beneficiary spouse. In *Swan*, the trial court had used the value of both parties' Social Security Act benefits in calculating the total value of the property to be divided and in determining how much of the property to award to each spouse. This Court analyzed the provisions of the federal Social Security Act and held that "it was error [for the trial court] to consider the value of *any social security benefits* in making a property division under ORS 107.105(1)f)." [Emphasis added]. 301 Or at 171. [Husband's] Trial Memorandum 7–8.

Husband's briefs to the Court of Appeals describes more of the history of the CSRS and the Social Security Act, which history helps explain why Congress chose to make Social Security Act not assignable, while making

CSRS benefits assignable. And, as discussed above, it is important to understand that CSRS benefits being divisible marital property happened as a result of an affirmative action of Congress, in the late 1970s.

Husband's briefs to the Court of Appeals also explain in more detail the way the trial court articulated its consideration of Social Security Act benefits.

CONCLUSION

The decision of the Court of Appeals should be reversed. Family law courts are not permitted to adjust the division of marital property in order to remedy a perceived "incongruity" arising from federal law excluding Social Security Act benefits from being considered in the evaluation of the division of marital property.

PROOF OF FILING AND SERVICE

I certify that I filed this brief with the State Court Administrator by first class mail on September 25, 2013. I further certify that I served this brief by the stated method upon the following on September 25, 2013:

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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 5,832 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief [illegible] ORAP 5.05(4)(f).

Petitioner James R. Herald