No.

In the Supreme Court of the United States

CHRISTOPHER MUELLER, PETITIONER

v.

SHELLEY L. MUELLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Social Security Act's anti-assignment provision provides as follows:

> 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).

The question presented is whether this provision bars a state court from considering in any manner future Social Security payments in dividing marital property upon divorce. Six state supreme courts hold that it completely bars such consideration; twelve state supreme courts hold that it does not.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App., *infra*, 1a-25a) is reported at 34 N.E.3d 538. The opinion of the Court of Appeals (App., *infra*, 26a-39a) is reported at 2014 IL App 130918-U2014. The memorandum opinion of the Circuit Court of Sangamon County (App., *infra*, 40a-59a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on June 18, 2015. On September 1, 2015, Justice Kagan extended the time for filing a petition for a writ of certiorari to November 2, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution, Art. VI, cl. 2 provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Section 407(a) of Title 42 of the United States Code provides that

> [t]he 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.

Section 503 of Act 5 of Chapter 750 of the Illinois Compiled Statutes is reprinted in the appendix at Pet. App. 76a-86a.

STATEMENT

A. Statutory Background

1. State law governs the division of marital property upon divorce and this Court has long presumed that federal law does not preempt it. In general, states follow one of two systems in dividing marital property. Common law states treat property acquired during the marriage as separately belonging to one spouse or the other. 1 Peter Spero, *Asset Protection: Legal Planning, Strategies and Forms* ¶ 4.02 (Supp. 3d 2015), available at 2001 WL 1585116. Upon divorce, each spouse is entitled to an equitable division of all the property acquired by either spouse during the marriage. *Ibid.* Community property states, by contrast, consider all property acquired during the marriage to be owned by "the marital community," not by either individual spouse. 1 Brett R. Turner, *Equitable Distribution of Property*, § 2:5 (3d ed. 2014). When the marriage ends, these

states divide the marital property equally between the two spouses, *ibid.*, or divide it equitably, as common law states do, *ibid.*

Illinois, like most states, follows the common law approach and requires the equitable distribution of marital property. Specifically, the Illinois Marriage and Dissolution of Marriage Act instructs a court to "divide the marital property * * * in just proportions considering all relevant factors." 750 Ill. Comp. Stat. 5/503(d) (West 2012). That Act broadly defines marital property to include "all property acquired by either spouse subsequent to the marriage," *id.* 5/503(a), but exempts certain specific types of property, such as "property acquired by gift, legacy or descent." *Id.* 5/503(a)(1). It expressly presumes, however, that "*all* property acquired by either spouse after the marriage and before a judgment of dissolution" is marital property, *id.* 5/503(b)(1) (emphasis added), and directs the court to consider in dividing the property "the relevant economic circumstances of each spouse when the division of property is to become effective," *id.* 5/503(d)(5), and "the reasonable opportunity of each spouse for future acquisition of capital assets and income." *Id.* 5/503(d)(11). "[T]he court, in determining the value of the marital and non-marital property for purposes of dividing the property, shall value the property as of the date of trial or some other date as close to the date of trial as is practicable." *Id.* 5/503(f).

2. The Social Security Act, 42 U.S.C. § 401 *et seq.*, establishes a system that provides old age, survivor, and disability benefits to qualifying workers who contribute payroll taxes into the federal system

during their working careers. Some states, including Illinois, do not allow some public employees, like teachers, police, and firefighters, to participate in the federal Social Security system. These states have instead created separate retirement and pension plans to cover them. Petitioner participates in one of these: the Springfield Police Pension Fund, a city-specific program for Illinois municipal police officers. States typically consider these benefits—received in lieu of Social Security—to be marital property. In Illinois, these benefits "are presumed to be marital property, regardless of which spouse participates in the pension plan." 750 Ill. Comp. Stat. 5/503(b)(2).

Federal law does not generally intrude on how states divide marital property. The Social Security Act, however, bans certain transfers of Social Security benefits. Under the Act's anti-assignment provision, Social Security benefits are "not * * * transferable or assignable" or "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) (2012). "Indeed, courts have uniformly recognized that the purpose of § 407 is to protect Social Security beneficiaries and their dependents from the claims of creditors." *E.g.*, *Reames* v. *Oklahoma ex rel. OK Health Care Auth.*, 411 F.3d 1164, 1172 (10th Cir. 2005) (citing cases); cf. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 583-584 (1979) ("[A]nti-atttachment provisions generally * * * ensure[] that the benefits actually reach the beneficiary.").

B. Factual Background and Court Proceedings

1. Shelley and Christopher Mueller married in 1992. Pet. App. 2a. Ms. Mueller, who works for a private company, pays Social Security taxes and expects to receive full Social Security benefits at age 67 in 2033. *Ibid.* Mr. Mueller, by contrast, works for the local police department, which the State does not allow to participate in the federal Social Security program. His time working for the police department thus does not qualify him for Social Security benefits. Instead, he contributes to the local police pension fund, from which he can collect benefits beginning at age 50 in 2017. *Ibid.*

2. In 2012, Ms. Mueller filed for divorce. Pet. App. 2a. At the hearing, Mr. Mueller sought to introduce an expert report that subtracted from the expected value of his pension benefits the portion he would "receive in lieu of Social Security." Pet. App. 2a-3a. This method, the expert explained, would "place Mr. Mueller in a position similar to Mrs. Mueller[,] whose Social Security benefits are exempt from equitable distribution." *Id.* at 3a. As described by the Illinois Supreme Court, the expert

> input [Mr. Mueller's] wages * * * as if they were "covered by Social Security," and determined that his monthly Social Security benefit at age 67 would [have been] $1,778 per month. She then input his wages "for only those years in which he [had been privately employed and had] contributed to Social Security," and determined that his [actual] monthly benefit at age 67 would be $230 per month. The difference of $1,548 per

> month [represented] "the dollar amount Mr. Mueller would receive 'in lieu of' Social Security." And the difference between that amount and the [overall] amount he would receive from his pension was $2,479 per month, which yielded an estimated present value of $639,720.74.

Id. at 3a-4a. The expert, in other words, calculated the hypothetical Social Security benefit Mr. Mueller would have received at age 67 by treating his police earnings through 2012 *as if* they had been covered by Social Security. She then subtracted the present value of this hypothetical Social Security benefit from the present value of his actual expected pension, resulting in the $639,720.74 figure. This, in the expert's view, represented the proper measure of his contribution to the marital property. *Id*. at 4a.

The trial court rejected the report. Pet. App. 4a. It stated that the Illinois Supreme Court, although "acknowledging the unfairness of this process, is pretty intent on keeping this Social Security benefit out of the pension, and basically the overall analysis of the marital estate." *Ibid*. The expert's valuation method, it held, is "an offset by any other language and violates federal law as interpreted by [the Illinois Supreme Court in *In re Marriage of Crook*, 813 N.E.2d 198 (Ill. 2004)]." *Id*. at 5a (quotation omitted). The trial court thus included the full present value of Mr. Mueller's pension benefits—$991,830—in the marital property rather than reducing it by the amount of benefits he would have received in lieu of Social Security. *Id*. at 6a.

3. Mr. Mueller appealed, arguing that the trial court erred (1) in "excluding [the expert's] report and testimony" and (2) in "determining that the proposed valuation method violated federal law." Pet. App. 8a. In support of his position, Mr. Mueller pointed to *Kelly* v. *Kelly,* 9 P.3d 1046 (Ariz. 2000), *Walker* v. *Walker,* 677 N.E.2d 1252 (Ohio Ct. App.1996), *In re Marriage of Herald and Steadman*, 322 P.3d 546 (Or. 2014), and *Cornbleth* v. *Cornbleth,* 580 A.2d 369 (Pa. Super. Ct. 1990), *id*. at 35a, all of which upheld a trial court's "offset [of] the value of a pension in lieu of Social Security" to place the non-participating spouse "in a similar position" to the participating spouse. Pet. App. 35a. Relying on *Crook*, a divided panel of the appellate court affirmed. *Id*. at 37a.

Although the appellate court "f[ou]nd [Mr. Mueller's] cases well-reasoned" and acknowledged that Illinois was among "a minority of jurisdictions that * * * prohibit[] without exception any consideration of Social Security benefits that might or might not be available to either party in a marital property division," the court "decline[d] to follow the[cases] because they seem to us incompatible with the [Illinois] supreme court's holdings in *Crook*," Pet. App. 35a, which it interpreted as holding both that "'it is improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution'" and that "Social Security benefits 'may not be divided directly or used as a basis for an offset during state dissolution proceedings,'" *id*. at 36a (quoting *Crook*, 813 N.E.2d at 204-205)). The court agreed that the valuation method "proposed by [Mr. Mueller] would (1) not require the court to

consider the value of [Ms. Mueller's] Social Security benefits and (2) achieve a more equitable result," but still rejected it because it would "nonetheless cause an actual difference in the asset distribution," an "outcome" that it "read *Crook* to prohibit." *Id.* at 37a (emphasis omitted).

Presiding Justice Appleton dissented. He noted that the Illinois Marriage and Dissolution of Marriage Act "is predicated on principles of equity." Pet. App. 38a. Consequently, he argued, "[t]o completely ignore a substantial asset earned during the marriage," such as Social Security benefits, "is at cross-purposes with [the Act's] mandate" to divide marital property "in just proportions." *Ibid.* Division of the marital estate, he reasoned, "does not require the alienation of one party's Social Security benefits." *Ibid.* He would have remanded the case "for a division of the marital property that reserves to the ex-wife her Social Security benefits but grants a corresponding offset of those benefits against the ex-husband's police pension." *Id.* at 39a.

4. The Illinois Supreme Court allowed Mr. Mueller's petition for leave to appeal. Pet. App. 8a. By a divided vote, it affirmed the lower court's holding that federal law bars a court from "consider[ing] anticipated Social Security benefits as a factor in making an equitable distribution of marital property." *Id.* at 11a. Although it recognized that "[f]ailing to consider Social Security benefits may paint an unrealistic picture of the parties' future finances," the court held that "'it is not the province of this court * * * to interfere with the federal scheme

no matter how unfair it may appear to be.'" *Id*. at 16a (quoting *Crook*, 813 N.E.2d at 205).

The court gave four reasons for affirming. First, while acknowledging that there were two competing lines of state cases addressing how to treat Social Security benefits, Pet. App. 8a, the court viewed itself as bound by *Crook*, *id*. at 11a, which held that § 407(a) "imposes a broad bar against using any legal process to reach Social Security benefits." *Id*. at 10a.

In *Crook*, the husband participated in Social Security, but the wife did not. When the husband filed for divorce, the wife asked the court to consider the value of his Social Security benefits in dividing their marital property. 813 N.E.2d at 200. The *Crook* court held it could not. It looked for guidance to *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572 (1979), in which this Court held that the Railroad Retirement Act of 1974's somewhat different anti-assignment provision, 42 U.S.C. § 659(i)(3)(B)(ii) (2012), preempted state courts from either dividing or directly offsetting railroad retirement benefits in divorce proceedings. *Crook*, 813 N.E.2d at 204. Concluding that the reasoning in *Hisquierdo* should also apply to Social Security benefits, *ibid*., *Crook* held that considering these benefits in any equitable division would constitute an impermissible "offset," *id*. at 205. It stated:

> Instructing a trial court to "consider" Social Security benefits, as the appellate court did in this case, either causes an actual difference in the asset distribution or it does not. If it does not, then the "consideration" is essentially without

> meaning. If it does, then the monetary value of the Social Security benefits the spouse would have received is taken away from that spouse and given to the other spouse to compensate for the anticipated difference. This works as an offset meant to equalize the property distribution.

Ibid.

Although the Illinois Supreme Court recognized that the expert's proposed valuation method "is not strictly speaking an offset," it nonetheless rejected it because it would "consider the existence of [Ms. Mueller's] anticipated Social Security benefits to create parallel benefits for [Mr. Mueller] that would affect the division of marital property" in a manner inconsistent with "the core holding of *Crook*." Pet. App. 12a.

Second, the court held that since federal law barred considering Social Security benefits as part of the marital estate it similarly barred considering hypothetical Social Security benefits as part of the estate. Under federal law, it noted, Social Security benefits do not represent "accrued property rights," but "'noncontractual interests.'" Pet. App. 12a (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 609-610 (1960)). "[B]ecause Congress has reserved the ability to alter, amend, or even repeal parts of the Social Security Act[, those] benefits are not 'owned in any proprietary sense.'" *Id.* at 12a-13a (quoting *Manning* v. *Schultz*, 93 A.3d 566, 570 (Vt. 2014)). Extending this reasoning further, it held that "if Social Security benefits are not marital property, then surely hypothetical Social Security benefits, like those

calculated by [the expert], are not marital property and cannot be used to pare down the value of marital property." *Id*. at 13a.

Third, the court expressed the view that "as a matter of policy[] any rule permitting courts to consider the mere existence of Social Security benefits without considering their value, and thereby violating federal law, is nearly impossible to apply." Pet. App. 13a-14a. "The difficulties stem," the court reasoned, "from the vagueness of the term 'consider' in this context." *Id*. at 14a. "The utility of such an [approach] seems marginal," it concluded, "particularly in light of the real risk of crossing a line drawn by Congress." *Id*. at 15a.

Finally, the court believed that "the uncertainties inherent in Social Security benefits" argued against considering them in dividing marital property. Pet. App. 15a. In particular, it stated, since "placing a present value on Social Security benefits is contrary to the nature of such benefits[, p]lacing a present value on fictional benefits is even worse; it is rank speculation[. T]he amount of Social Security benefits cannot be calculated until the participant collects them." *Id*. at 16a.

Justice Burke, joined by Justice Karmeier, dissented. Mr. Mueller, they noted, had asked only

> that the trial court be permitted to divide his pension in a way that would place him in the same financial position as [Ms. Mueller]. Specifically, [he] proposes that a portion of his pension be retained for his benefit alone, with the remainder then apportioned between the parties.

> * * * Stated otherwise, [his] request is simply that he be treated similarly to [his wife]—no better and no worse.

Pet. App. 18a.

Justice Burke criticised the court's preemption analysis. "Although this is a conflict preemption case," she explained, "the majority does not identify the federal interest at stake or explain why [Mr. Mueller's] method for apportioning his pension would do major damage to that interest." Pet. App. 22a. Starting from first principles, Justice Burke argued that since "[t]here is no contention that federal law expressly prohibits [Mr. Mueller's] proposal or that Congress has preempted the field of dividing marital property[, t]he type of preemption at issue in this case is therefore implied conflict preemption." *Id.* at 19a. "As the Supreme Court has stated," however, "the regulation of domestic relations, including the distribution of marital property during dissolution proceedings, is traditionally the domain of state law." *Ibid.* (citing *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1950 (2013)). "For this reason," she added, "there is a 'presumption against preemption' in the area of domestic relations law," *ibid.* (quoting *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 151 (2001)), and "it follows that the burden to establish conflict preemption in this area is high: it must be shown that the challenged state action does 'major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law will be overridden,'" *id.* at 20a (quoting *Hillman*, 133 S Ct. at 1950)).

In order "[t]o determine what federal interest is at stake and whether it would suffer major damage if the state action were permitted," Justice Burke "look[ed] to the language of [§ 407(a)]" and found that "under the plain language of the statute[] the federal interest * * * is to ensure that Social Security benefits are received by the participant. No other federal interest is at issue." Pet. App. 20a-21a. Mr. Mueller's "proposed division of his pension," she reasoned, "does not threaten [his wife's] receipt of her Social Security benefits." *Id.* at 21a. "Under [his] proposal, [she] receives exactly what she is entitled to. *Ibid.* "Accordingly," Justice Burke would have held, "the proposed apportionment of [Mr. Mueller's] pension is not preempted by section 407(a)." *Ibid.*

The dissent also took exception to the majority's reading of *Crook*. That case, Justice Burke maintained, had held only that "'Social Security benefits may not be divided directly or used as a basis for a[direct] offset during state dissolution proceedings.'" Pet. App. 22a (quoting *Crook*, 813 N.E.2d at 204). Thus, because Mr. Mueller's "proposed apportionment of his pension [would] not result in a direct diversion of [his wife's] Social Security benefits[nor] create an offset, a fact which the majority itself acknowledges[, it] is * * * not at odds with the 'core holding' of *Crook*." *Id.* at 22a-23a.

Lastly, Justice Burke found the "policy reasons" underlying the majority opinion unpersuasive. Pet. App. 23a. First, she described as "clearly incorrect" "the majority['s conclusion] that [Mr. Mueller's] proposal is improper because, if adopted, the trial court would be dividing the amount of the

hypothetical Social Security benefits used to establish how much of [Mr. Mueller's] pension should be retained, rather than dividing actual marital property." *Ibid.* "[T]he only thing the trial court would actually divide," she countered, "would be the pension. The hypothetical Social Security benefits would be used only as a measure to determine *how* the pension should be divided." *Ibid.*

Second, she rejected the majority's belief that Mr. Mueller's proposal "must be rejected as 'rank speculation'" because "the future is unknown and there is always a possibility that Social Security benefits may, at some future time, change." Pet. App. 24a. If "no financial factor may be considered in a dissolution proceeding if that factor may change in the future," she pointed out, "then no pension could ever be divided. Obviously this is not the case." *Ibid.* Since Mr. Mueller had presented uncontradicted expert testimony, "similar calculations are made as a matter of course in financial and retirement planning," and "[t]he Social Security Administration itself provides the means for participants to calculate the amount of future benefits," she found that "it is not speculation but fact: using [Mr. Mueller's] proposed apportionment would place him in the same position as" his wife. *Id.* at 24a-25a.

REASONS FOR GRANTING THE PETITION

I. There Is a Deep, Acknowledged, and Growing Conflict Among the State Supreme Courts over Whether Federal Law Prohibits States from Considering Social Security Benefits When Dividing Marital Assets During Divorce

There is a "deep and persistent division[] among state courts" over whether and to what extent federal law allows state courts to consider future Social Security payments when dividing the marital assets of a divorcing couple. *In re Marriage of Herald & Steadman*, 322 P.3d 546, 568 (Or. 2014) cert. denied sub nom. *Herald* v. *Steadman*, 135 S. Ct. 944 (2015). Courts are "sharply divided" on this question. *Skelton* v. *Skelton*, 5 S.W.3d 2, 4 (Ark. 1999); see also *Stanley* v. *Stanley*, 956 A.2d 1, 4 n.6 (Del. 2008) (similar); *Neville* v. *Neville*, 791 N.E.2d 434, 436 (Ohio 2003) (similar). A minority of six state supreme courts holds that federal law prohibits any such consideration. A majority of twelve state supreme courts holds that federal law does not.

As one leading treatise explains, while "[a] majority of state court decisions holds that state courts may consider Social Security benefits as one relevant factor in dividing other marital assets[, a] minority holds that even this limited step is not permitted." 2 Brett R. Turner, *Equitable Distribution of Property* § 6:17 (3d ed. 2014). Other commentators have observed that while "most jurisdictions have found [that] a 'generalized consideration of Social Security benefits' is permissible," a "minority of

jurisdictions ha[s] gone so far as to find impermissible any consideration of social security disparity in the property division of divorcing parties." Stanley W. Welsh & Franki J. Hargrave, *Social Security Benefits at Divorce: Avoiding Federal Preemption to Allow Equitable Division of Property in Divorce*, 20 J. Am. Acad. of Matrimonial Lawyers 285, 286, 290 (2007); see also Brett R. Turner, *Social Security: A 2005 Update*, 17 No. 4 Divorce Litig. 53 (2005) (same). This Court's review is necessary to resolve this stark, well-recognized, and growing conflict.

A. Six State Supreme Courts Hold That Federal Law Bars Any Consideration of Social Security Benefits in Divorce

A minority of state supreme courts holds that Social Security payments may *never* be "a factor in making an equitable distribution of marital property." Pet. App. 11a. Like the Illinois Supreme Court below, the highest courts of Alaska, Arkansas, Nebraska, Nevada, and North Dakota hold that such benefits cannot be considered in any way at all. See *Cox* v. *Cox*, 882 P.2d 909, 920 (Alaska 1994); *Skelton* v. *Skelton*, 5 S.W.3d 2, 4 (Ark. 1999); *Webster* v. *Webster*, 716 N.W.2d 47, 56 (Neb. 2006); *Wolff* v. *Wolff*, 929 P.2d 916, 921 (Nev. 1996); *Olson* v. *Olson*, 445 N.W.2d 1, 11 (N.D. 1989).[1]

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[1] Intermediate appellate courts in some other states also take this position. See, *e.g.*, *In re Marriage of Hillerman*, 109 Cal. App. 3d 334 (Cal. Ct. App. 1980); *In re Marriage of James*, 950 P.2d 624, 629 (Colo. App. 1997); *Johnson* v. *Johnson*, 726 So. 2d

Although state law generally controls the division of marital property, the minority holds that "Congress preempted state divorce laws" when it enacted the Social Security Act. *Olson* v. *Olson*, 445 N.W.2d 1, 11 (N.D. 1989). These courts have attached considerable significance to this Court's holding in *Hisquierdo* that the then-current anti-assignment provision of the Railroad Retirement Act preempted states from dividing or directly offsetting future benefits in divorce proceedings. *E.g.*, Pet. App. 10a-12a; *Webster* v. *Webster*, 716 N.W.2d at 54. Highlighting similarities between that provision and the Social Security Act's current anti-assignment provision, 42 U.S.C. § 407(a), they extend *Hisquierdo*'s analysis to "appl[y] equally to Social Security benefits." Pet. App. 11a; see also *Wolff* v. *Wolff*, 929 P.2d at 921. Some acknowledge that doing so "may paint an unrealistic picture of the parties' future finances," but feel bound not "to interfere with the federal scheme, no matter how unfair it may appear to be." Pet. App. 16a.

Many of these courts have also held that Social Security payments are too uncertain to be considered when dividing the marital estate. Because Congress retains the "right to alter, amend, or repeal any provision" of the Social Security Act, 42 U.S.C. § 1304, these courts find Social Security payments to be too unreliable "to count * * * as assets of definable value." *Olson*, 445 N.W.2d at 5-6; see also *Cox*, 882 P.2d at 920. Some, like the court below, also note

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393, 395-396 (Fla. Dist. Ct. App. 1999); *Reymann* v. *Reymann*, 919 S.W.2d 615, 617 (Tenn. Ct. App. 1995);.

that Social Security benefits cannot be definitively calculated "until the participant collects them" and that should the participant "die before age 62, there would be no benefits at all." Pet. App. 16a.

B. Twelve State Supreme Courts Hold That Federal Law Does Not Bar States from Considering Social Security Benefits

Twelve state supreme courts permit Social Security benefits to be considered when dividing marital property. *Kelly* v. *Kelly*, 9 P.3d 1046, 1048 (Ariz. 2000); *Stanley* v. *Stanley*, 956 A.2d 1, 4-5 (Del. 2008); *Phipps* v. *Phipps*, 864 P.2d 613, 617 (Idaho 1993); *In re Marriage of Boyer*, 538 N.W.2d 293, 293-94 (Iowa 1995); *Depot* v. *Depot*, 893 A.2d 995, 1002 (Me. 2006); *Mahoney* v. *Mahoney*, 681 N.E.2d 852, 856-57 (Mass. 1997); *Smith* v. *Smith*, 2015 WL 5131989, at *5 (Mont. Sept. 1, 2015); *Neville* v. *Neville*, 791 N.E.2d 434, 437 (Ohio 2003); *In re Marriage of Herald & Steadman*, 322 P.3d 546, 557 (Or. 2014), cert. denied sub nom. *Herald v. Steadman*, 135 S. Ct. 944 (2015); *Schaffner* v. *Schaffner*, 713 A.2d 1245, 1249 (R.I. 1998); *Johnson* v. *Johnson*, 734 N.W.2d 801, 809 (S.D. 2007); *In re Marriage of Zahm*, 978 P.2d 498, 503 (Wash. 1999).[2]

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[2] Many intermediate appellate courts in other states hold likewise. See, *e.g.*, *In re Marriage of Morehouse*, 121 P.3d 264, 267 (Colo. App. 2005); *Matter of Marriage of Brane*, 908 P.2d 625, 627 (Kan. Ct. App. 1995); *Gross* v. *Gross*, 8 S.W.3d 56, 58 (Ky. Ct. App. 1999); *Young* v. *Young*, 931 So. 2d 541, 548 (La. Ct. App. 2006); *Biondo* v. *Biondo*, 809 N.W.2d 397, 403 (Mich. Ct. App. 2011); *Litz* v. *Litz*, 288 S.W.3d 753, 758 (Mo. Ct. App. 2009); *Olsen* v. *Olsen*, 169 P.3d 765, 768 (Utah Ct. App. 2007).

These decisions have upheld various ways of considering Social Security benefits, thereby rejecting preemption claims. Many allow "a general adjustment in dividing marital property" when "one party, far more than the other, can reasonably expect to enjoy a secure retirement." *Boyer*, 538 N.W.2d at 296. "To arrive at an equitable division of property," these courts reason, it is "appropriate to consider *all* assets and resources, including the value of anticipated future Social Security benefits." *Neville*, 791 N.E.2d at 437; see, *e.g.*, *Smith*, 2015 WL at *5 ("[W]e adopt the rule that social security benefits may be considered as a factor, among others, when dividing marital property. * * * [I]n arriving at an equitable distribution of the parties' estate, a court may consider social security benefits generally in determining the economic circumstances of the parties."); *Stanley*, 956 A.2d at 4-5 (similar); *Phipps*, 864 P.2d at 617 (simlar); *Depot*, 893 A.2d at 1001 (similar); *Mahoney*, 681 N.E.2d at 856 (similar); *In re Marriage of Zahm*, 978 P.2d at 502 (similar). In *Johnson* v. *Johnson*, for example, the South Dakota Supreme Court held that federal law does not prevent a court from considering Social Security benefits "as a factor, among others, when dividing marital property" because doing so "adheres to the federal restrictions, for it is not a direct division of [one spouse's] social security[, a]nd, at the same time, * * * recognizes and compensates for the inequity of including all of [one spouse's] benefits in the marital estate while [the other's] social security benefits are entirely excluded." 734 N.W.2d at 808-809.

Courts in other jurisdictions have upheld an indirect offset of expected Social Security benefits. In *Schaffner* v. *Schaffner*, for example, the Rhode Island Supreme Court addressed a divorce in which the husband was retired and already receiving his civil service pension payments but the wife would not receive her Social Security payments for many years. 713 A.2d at 1249. The court found "the only way to provide for equitable distribution of the marital assets" was to divide the husband's pension equally and "to take into account [the wife's] benefits when they commence." *Ibid.* Once the wife began receiving her Social Security benefits, the court held, her portion of her former husband's retirement benefits should be "reduced by one half of her Social Security benefits." *Id.* at 1247; accord *Panetta* v. *Panetta*, 851 A.2d 720, 728-729 (N.J. App. Div. 2004) (holding that the "fairest and most equitable means" to divide the marital property was to offset the wife's share of her former husband's civil service pension by "50% of [her] social security benefit").

Courts in still other states have approved the approach rejected here. In cases where both spouses expect to receive employment retirement benefits but only one is eligible for Social Security, they calculate a hypothetical Social Security benefit to account for any imbalance among the divorcing parties. This method does not "attempt to value [one spouse's] expected social security benefits." *Kelly*, 9 P.3d at 1048. Instead, when one spouse has earned a separate, divisible benefit in lieu of Social Security benefits, courts calculate the present value of what that spouse "would have received had [she]

participated in that system during the marriage." *Ibid.* That hypothetical Social Security benefit is then "deducted from the present value" of the spouse's pension and the "remainder, if any, is what may be divided as community property." *Ibid.* This method allows "pension benefits that are 'in lieu of' social security" to be "set aside as [one spouse's] separate property, just as the value of the [other spouse's] social security benefits are [that spouse's] separate property." *Ibid.* See also *Cornbleth*, 580 A.2d at 372.

These decisions have given different but overlapping explanations for rejecting § 407(a) preemption arguments. First, many echo the reasoning of the Delaware Supreme Court:

> [E]ven though [§ 407(a)] preempts the direct division of Social Security proceeds, it does not preempt the [court] from considering the existence and amount of Social Security benefits in the course of an equitable property division, even where that consideration might lead the [court] to alter its division of the marital estate.

Forrester v. *Forrester*, 953 A.2d 175, 185 (Del. 2008) (emphasis omitted); see *Johnson*, 734 N.W.2d at 808 ("[S]ocial 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 [one spouse's] social security."); *Depot*, 893 A.2d at 1001 (same). These courts reason that "[n]either the letter nor purpose of § 407(a) * * * compel[s] courts to ignore expected Social Security benefit payments when undertaking their

responsibility to equitably divide marital property." *Ibid*. In particular, several note that in *Hisquierdo* this Court did not hold that courts were forbidden entirely from considering railroad retirement benefits in dividing marital property, just that they could not divide them or directly offset anticipated future payments. See, *e.g.*, *Forrester*, 953 A.2d at 185; *Herald & Steadman*, 322 P.3d at 553; *Zahm*, 978 P.2d at 502.

Several also point out that in *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), decided after *Hisquierdo*, this Court interpreted the key phrase of the Social Security Act's anti-assignment provision, "other legal process," narrowly. "[O]ther legal process," this Court held,

> 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 not 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.

Keffeler, 537 U.S. at 385. In *Depot* v. *Depot*, for example, the Maine Supreme Court emphasized that loose arguments based on *Hisquierdo* could not survive this intervening, restrictive decision. The Maine Supreme Court held that the

> 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 "much like the processes of execution, levy, attachment and garnishment," nor a mechanism by which control over Social Security benefits "passes from one person to another."

Depot, 893 A.2d at 1001.

Courts have also attached significance to the textual difference between the language of the Railroad Retirement Act's anti-assignment provision at the time of *Hisquierdo* and that of the Social Security Act's. The Railroad Retirement Act's provision, they emphasize, expressly barred the "anticipation" of payments; the Social Security Act's does not. See, *e.g.*, *Kelly*, 9 P.3d at 1049 ("The *Hisquierdo* court relied on an anti-attachment clause prohibiting the anticipation of benefits. Although the anti-attachment language in the Social Security Act is similar to that of the Railroad Retirement Act, it is not identical."). As some have pointed out, the *Hisquierdo* Court held direct offsets were preempted only because of that language. Since § 407(a) lacks it, its preemption should reach less far. See *ibid.*; *Herald & Steadman*, 322 P.3d at 562 (Walters, J., concurring in the judgment).

Numerous decisions on the majority side of the split have noted two other reasons cautioning limited preemption. First, "[f]ailing to consider Social Security benefit payments a spouse can reasonably be expected to receive in the near future may result in a distorted picture of that spouse's financial needs, and, in turn, an inequitable division of the marital

property." *Depot*, 893 A.2d at 1002; see *Herald & Steadman*, 322 P.3d at 554 ("Social Security benefits typically are an integral part of family financial and retirement planning. Although noncontractual in nature, Social Security benefits can provide a more reliable source of income than some contractually-based retirement plans, the value of which can change with the ebbs and flows of investment markets."). Second, viewed purely as an economic matter, barring consideration of future Social Security payments effectively diverts marital property to the exclusive benefit of one spouse. As the Arizona Supreme Court explained:

> A portion of [the wife's] salary was paid into the social security system. * * * [I]t 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, 9 P.3d at 1048.

II. Holding That Federal Law Bars All Consideration of Social Security Benefits in Divorce Misunderstands Both Federal Preemption Law and Social Security's Anti-Assignment Provision

A. The Minority Approach Ignores the Uniquely Strong Presumption Against Federal Preemption of State Family Law

Domestic relations "has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975). The "whole subject of the domestic relations," including the management of divorce, this Court has held, "belongs to the laws of the states and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Indeed, "the Constitution delegated no authority to the government of the United States on the subject of marriage and divorce." *Haddock* v. *Haddock*, 201 U.S. 562, 575 (1906), overruled on other grounds by *Williams* v. *North Carolina*, 317 U.S. 287 (1942).

"Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *United States* v. *Windsor*, 133 S. Ct. 2675, 2691 (2013). A state law or policy "must do 'major damage' to 'clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden.'" *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *United States* v. *Yazell*, 382 U.S. 341, 352 (1966)). The question, then, is "whether Congress has 'positively

required by direct enactment' that state law be pre-empted." *Ibid.* (quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904)). In answering that question, the court "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted) (citing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)).

B. The Minority Preemption Rule Is Irreconcilable with the Plain Language of § 407(a) and Directly Conflicts with This Court's Leading Decision Construing that Provision

The text of § 407(a) preempts only a small number of specific state actions: those that "transfer[] or assign[]" Social Security benefits, or subject them to "execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy * * * law." 42 U.S.C. § 407(a) (2012). General "consideration" of benefits in dividing marital property is not among the particular legal terms listed. In addition, straightforward application of traditional canons of statutory construction makes clear that it does not fall under the umbrella of the section's catch-all term, "other legal process."

"[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'"

Keffeler, 537 U.S. at 384 (quoting *Circuit City Stores, Inc.* v. *Adams,* 532 U.S. 105, 114-115 (2001)). "Consideration," however, shares no common features or characteristics with execution, levy, attachment, or garnishment, let alone do so "clear[ly] and manifest[ly]" enough to overcome the strong presumption against preemption. *Wyeth*, 555 U.S. at 565 (internal quotation marks omitted).

This Court has, in fact, already applied these precise canons to § 407(a). In *Keffeler*, this Court held that

> other legal process * * * at a minimum[] would seem to require utilization of some judicial or quasi-judicial mechanism * * * 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.

537 U.S. at 385. The method of consideration that the Illinois Supreme Court rejected here does not involve any passing of control over a party's *Social Security income*. Rather, it affects only how much of Mr. Mueller's separate retirement benefits should be included in the marital property. As the Illinois Supreme Court majority acknowledged, what Mr. Mueller proposed was not even "strictly speaking an offset." Pet. App. 12a. The other types of consideration that courts in the majority have upheld likewise do not affect Social Security benefits. Under each approach, the party entitled to Social Security income receives it in full. See *supra*, pp. 19-21. The consideration of Social Security benefits affects only how *other* assets are divided. Under *Keffeler*, then,

considering Social Security benefits in deciding how to divide marital property (of which those benefits represent no part) cannot amount to "other legal process," let alone do so clearly enough to overcome the strong presumption favoring state domestic relations law.

C. The Minority Rule Errs in Holding that § 407(a)'s Purpose Supports Preempting State Courts from Considering Social Security Benefits in Dividing *Other* Property in Divorce

To the extent that a federal statutory purpose could overcome a presumptively valid exercise of States' domestic relations authority, the purposes of § 407(a) do not support preemption here. As the text and history of that provision instead make clear and "[c]ourts have uniformly recognized, * * * the purpose of section 407(a) is to protect social security beneficiaries and their dependents from the claims of *creditors*," *Fetterusso* v. *New York*, 898 F.2d 322, 327 (2d Cir. 1990) (emphasis added), and thereby enjoy unimpaired the amount of income that Congress has determined is necessary for a secure retirement. See *Dionne* v. *Bouley*, 757 F.2d 1344, 1355 (1st Cir. 1985) ("The purpose of the exemption created by Congress in 42 U.S.C. § 407 is to protect social security beneficiaries from creditors' claims."); *Dep't of Health & Rehabilitative Servs.* v. *Davis*, 616 F.2d 828, 831 (5th Cir. 1980) ("The purpose of [§ 407] is to protect social security beneficiaries from creditors' claims."). As the Fifth Circuit has noted, § 407 "evinces a clear legislative purpose of precluding beneficiaries from diverting their social

security payments away from the statute's seminal goal of furnishing financial, medical, rehabilitative and other services to needy individuals." *Ibid.* It was not intended to confer a *federal right* for one spouse in a divorce to take half the marital property when that spouse expects generous Social Security benefits and the other expects none.

The legislative history of § 407(a) is replete with examples indicating an intent to protect Social Security benefits from bankruptcy proceedings and other creditors. See, *e.g.*, H.R. Rep. No. 98-25, at 82-83 (1983) ("[S]ome bankruptcy courts have considered social security and SSI benefits * * * in bankruptcy. Your Committee's bill specifically provides that social security and SSI benefits may not be assigned notwithstanding any other provisions of law, including P.L. 95-598, the "Bankruptcy Reform Act of 1978."); see also, H.R. Rep. No. 98-47, at 153 (1983) (Conf. Rep.). None of the committee reports, congressional testimony, or other legislative history, by contrast, even mentions divorce.

D. The Minority Rule Works Particular Unfairness When the State Does Not Allow One Spouse to Participate in Social Security

Illinois' particular rule creates great inequity when one spouse has been able to pay into Social Security and the other spouse—by dint of state law and the federal coverage exception for public employees—has had to pay into a public employer alternative. The spouse receiving Social Security does not have to share any of those benefits while the

spouse contributing to the public employer substitute will have all his retirement benefits considered part of the marital property subject to division. Thus, not only does the Social Security spouse get to keep all her Social Security benefits to herself, but she also gets an equitable or equal share of the other spouse's non-Social Security benefits. In other words, what's mine is mine and what's yours is ours—and ours will be shared between us. This is a common situation. Almost one quarter of state and local government employees, or 6.6 million people participate in such alternative public employee retirement systems. Dawn Nuschler et al., Cong. Research Serv., R41936, *Social Security: Mandatory Coverage of New State and Local Government Employees* 1 (2011). And federal employees hired before 1984 receive Civil Service Retirement Benefits in lieu of Social Security. Approximately 2.5 million people received these in-lieu benefits in fiscal year 2013 and hundreds of thousands of current federal employees will receive them when they retire. Katelin P. Isaacs, Cong. Research Serv., 98-972, *Federal Employees' Retirement System: Summary of Recent Trends* 3-4 (2015).

E. The Minority Rule Misunderstands This Court's Holding in *Hisquierdo*

The minority of courts that have prohibited consideration of Social Security benefits have ignored the strong presumption against federal preemption of state domestic relation laws, the careful language of 42 U.S.C. § 407(a), and this Court's holding in *Keffeler*. These courts instead rely almost exclusively on *Hisquierdo* to justify their position. See, *e.g.*, Pet.

App. 10a ("The foundation for our decision was *Hisquierdo*.")*.* In *Hisquierdo*, this Court held that state courts could not attach or directly offset expected future retirement benefits under the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq*., in divorce proceedings. See 439 U.S. at 583, 588-589; Pet. App. 11a. The language of the Railroad Retirement Act, however, differs importantly from the language of 42 U.S.C. § 407(a). Overlooking this difference has led the minority of jurisdictions to misinterpret and misapply *Hisquierdo.*

The Railroad Retirement Act's anti-assignment provision contains seven important words that § 407(a) lacks: "nor shall the payment thereof be anticipated." 45 U.S.C. § 231m (2012). The second holding in *Hisquierdo*, which barred the direct offset of expected future benefits, rested entirely on this specific language, particularly the final word. Indeed, the Court ultimately barred direct offsets of future benefits because "offsetting award[s] would improperly *anticipate* payment[s]." 439 U.S. at 589 (emphasis added). Since § 407(a) does not similarly bar "anticipation," its anti-assignment provision cannot extend as far. To hold otherwise would violate this Court's "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993).

Even if *Hisquierdo* did apply, moreover, it would at most prohibit directly offsetting a party's future Social Security benefits, not other methods, particularly the method of consideration Mr. Mueller proposed below. Under that method, no offset, let alone a direct one, occurs. Indeed, the rule does not

depend on (or even consider) the *amount* of federal benefits, and could apply even in a case where the other spouse does not receive Social Security but does receive state benefits that are similarly nonassignable. This approach would reserve a portion of Mr. Mueller's expected retirement benefits that corresponds to what he would have received had the state allowed him to participate in Social Security, just as federal law reserves his wife's Social Security benefits to her individual use. Mr. Mueller's expert, in fact, did not even calculate the value of Ms. Mueller's expected Social Security benefits. Pet. App. 4a-6a. That number was simply irrelevant to this method of placing them on equal footing. This method, moreover, does not in any way divide Ms. Mueller's expected benefits. It divides only Mr. Mueller's pension and in a manner that even the majority agreed would advance the State's core commitment to *equitable* distribution. See Pet. App. 16a. Under the Illinois Supreme Court's reading of *Hisquierdo*, in every divorce distribution like this one, the non-Social Security-eligible spouse must split all his retirement benefits while his wife gets to keep that part of her retirement benefits funded by Social Security. As the court below acknowledged, this approach rests on an "unrealistic picture of the parties' future finances." Pet. App. 16a. Because it misunderstood *Hisquierdo*, however, that court believed it had no choice: "'[I]t is not the province of this court * * * to interfere with the federal scheme, no matter how unfair it may appear to be.'" *Ibid.* (quoting *In re Marriage of Crook*, 813 N.E.2d 198, 205 (Ill. 2004)).

* * *

The court below, like others on the minority side of the split, misinterpreted and misapplied this Court's holding in *Hisquierdo*, ignored this Court's long-standing and strong presumption that federal law does not preempt state domestic relations law, and placed many divorcing spouses in unequal positions when it barred courts from considering future Social Security benefits in any way at all during divorce. The decision of the Illinois Supreme Court should be reversed.

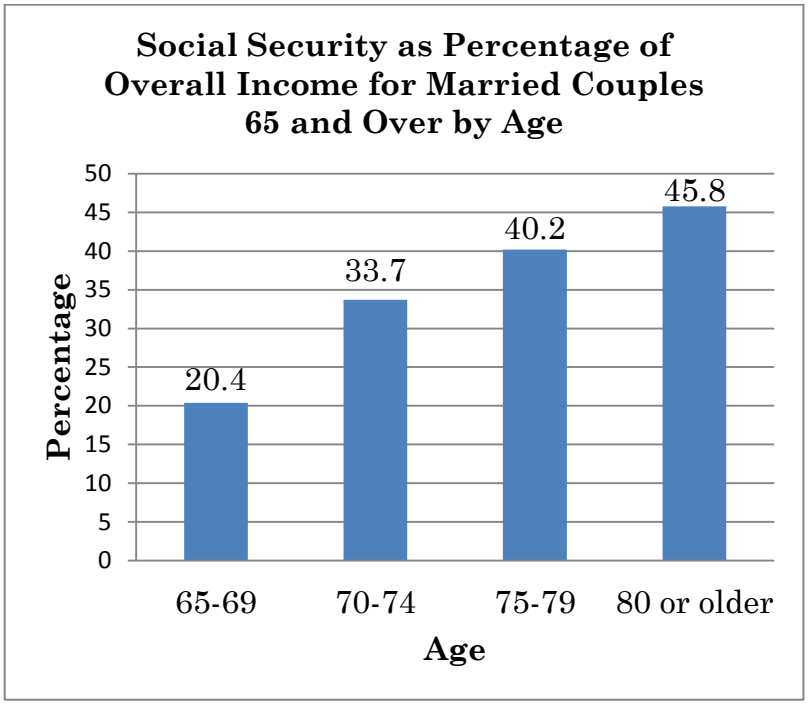
III. This Recurring Issue Is One of National Importance and This Case Is an Ideal Vehicle in Which to Resolve the Conflict

Social Security is a national program with broad reach. In 2013, 58 million Americans received Social Security benefits worth $812.3 billion. Soc. Sec. Admin., *Annual Statistical Supplement to the Social Security Bulletin, 2014*, at 1 (2015). This represented 23.4 percent of overall federal government spending. Office of Mgmt. & Budget, *Fiscal Year 2016 Historical Tables: Budget of the U.S. Government*, Table 8.3 (2015).

Unless this Court reviews this issue, "Social Security * * * will remain * * * one of the big questions facing domestic relations courts" across the country. Gary A. Shulman et al., *Dividing Pensions in Divorce* § 12.01, at 12-4 (3d ed. 2014). Social Security benefits often account for a substantial part of older married couples' assets. In 2012, Social Security represented 30.2 percent of the overall income of married couples 65 and over. Soc. Sec. Admin., *Income of the Population 55 or Older, 2012*,

Table 10.2 (2014). This conflict over whether federal law allows these expected assets to be considered in dividing marital property can thus make a very large difference in how states settle property upon divorce—even when they follow identical state law division rules.

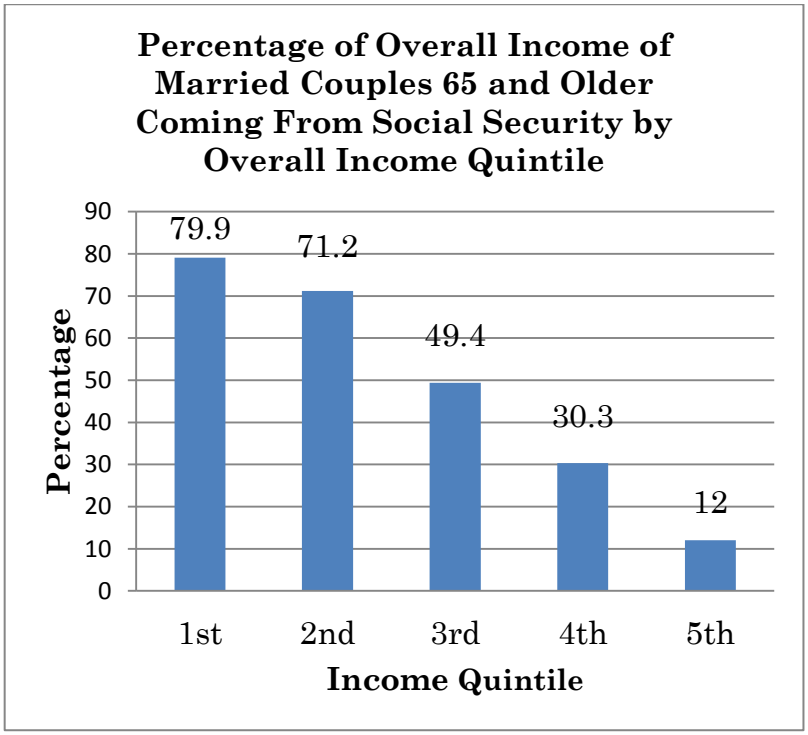
But the 30.2 percent figure masks great differences by age and class. As the first chart below shows,[3] the older a couple is over age 65, the greater the percentage of their income Social Security represents.



[3] The chart is based on figures appearing in Soc. Sec. Admin., *Income of the Population 55 or Older, 2012*, Table 10.2 (2014).

For a couple 65-69 years old, for example, Social Security represents 20.4 percent of their overall income. For a couple 80 years old or more, it represents over twice that: 45.8 percent.

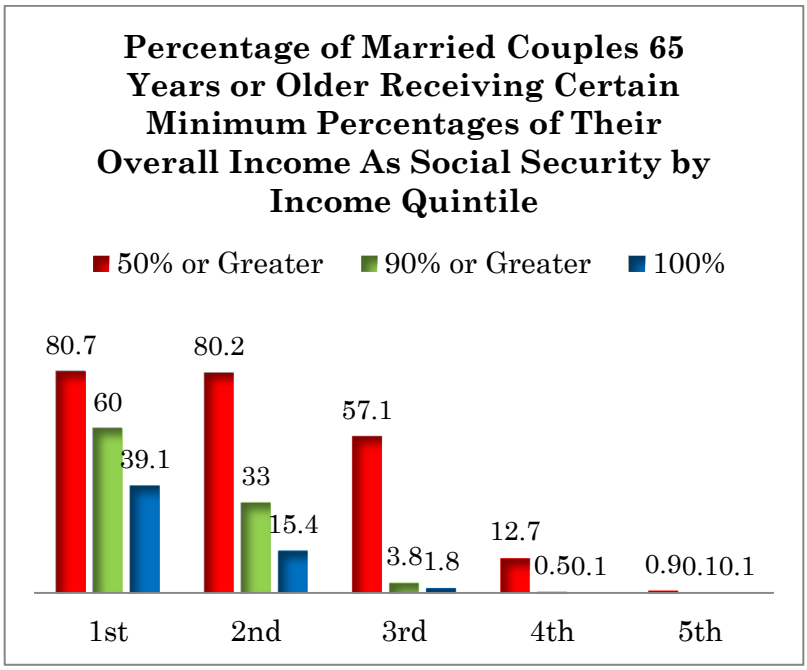
As the second chart shows,[4] Social Security represents a much greater percentage of overall income for the poor.



[4] This chart is based on figures appearing in Soc. Sec. Admin., *Income of the Population 55 or Older, 2012*, Table 10.5 (2014).

For those couples in the poorest quintile, it represents 79.9 percent of overall income. For those in the richest quintile, a mere 12 percent.

The final chart shows even more starkly how much more Social Security matters to the poor.[5]



As it reveals, 80.7 percent of married couples 65 or older in the poorest quintile of overall income receive at least half their income from Social Security while only .9 percent of those in the richest quintile do—a 90-times difference. For those who receive 100 percent of their income from Social Security, the

[5] This chart is based on figures appearing in Soc. Sec. Admin., *Income of the Population 55 or Older, 2012*, Table 8.A5 (2014).

difference is even starker—39.1 percent of the poorest married couples do as compared to only .1 percent of the richest, a 391-times difference. The difference in treatment that the conflicting interpretations of § 407(a) create, in other words, means the most for those living at the margin—the eldest and poorest among us.

The scale of these consequences magnifies the importance of the conflict. States will divide marital property very differently—even when they are following the same state division rules—only because of their different views of what § 407(a), a federal law, requires. If the Muellers had divorced in Oregon, for example, and it had applied a general equitable division rule *identical to* Illinois', Mr. Mueller would have had to contribute only $639,720.74 of his expected pension to the marital property—a difference of $352,109.26. Pet. App. 4a-6a.

This Court should resolve the conflict for an additional reason. In some circumstances, it can encourage opportunism and forum shopping. A couple that lives in Illinois and summers in Idaho, for example, could file for divorce in either state depending on the time of year.[6] If the divorce were filed in Idaho, the court would consider Social Security in dividing the marital property. *Phipps* v. *Phipps*, 864 P.2d 613, 617 (Idaho 1993). If, on the other hand, the suit were filed in Illinois, the court

[6] In order to file for divorce in Idaho, the petitioning spouse must have lived in the state for only six weeks prior to filing. Idaho Code Ann. § 32-701 (West 2015).

would not. Pet. App. 12a, 16a. A spouse contemplating divorce with knowledge of the States' different views of federal preemption could gain much by filing for divorce in the appropriate jurisdiction.

This conflict over how federal law affects states' division of marital property will remain important. The divorce rate has held steady at roughly half the marriage rate since 2001. Ctrs. for Disease Control & Prevention, *National Marriage and Divorce Rate Trends* (Feb. 19, 2015), http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm. Also, the divorce rate is highest for those to whom the conflict matters most—the poor. The probability that a first marriage will break up within ten years for married couples living in a community falling within the poorest income quartile (44 percent) is almost twice that (23 percent) for those who live in communities in the richest quartile. Dep't of Health & Human Servs., *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, Series 23, No. 22, figure 27 (2002).

The conflict, moreover, will only deepen without this Court's intervention. Since the beginning of 2014, three state supreme courts have split on the issue—two of them within the last four months. Compare Pet. App. 16a (Illinois Supreme Court barring consideration of Social Security benefits in dividing marital property) with *Smith* v. *Smith*, 2015 WL 5131989 *5 (Mont. Sept. 1, 2015) (allowing it) and *In re Marriage of Herald & Steadman*, 322 P.3d 546, 568 (Or. 2014) (same), cert. denied sub nom. *Herald* v. *Steadman*, 135 S. Ct. 944 (2015). No consensus will emerge on its own and with nearly half the state

supreme courts having already weighed in on the issue no more percolation is helpful.

This case provides, moreover, an ideal vehicle for this Court to decide the issue. There are no outstanding factual issues bearing on the case's outcome. It presents a pure issue of law and applying the correct legal rule would be dispositive of the whole case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2015

Appendix

2015 IL 117876

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

(Docket No. 117876)

In re MARRIAGE OF SHELLEY L. MUELLER, Appellee, and CHRISTOPHER MUELLER, Appellant.

Opinion filed June 18, 2015.

JUSTICE THEIS delivered the judgment of the court, with opinion.

Chief Justice Garman and Justices Freeman, Thomas, and Kilbride concurred in the judgment and opinion.

Justice Burke dissented, with opinion, joined by Justice Karmeier.

OPINION

¶1 The central issue in this divorce case is one that we declined to answer in *In re Marriage of Crook*, 211 Ill. 2d 437, 452 (2004)—namely, whether a spouse who participates in a

government pension program in lieu of Social Security must be placed in a position similar to the other spouse who participates in Social Security and whose benefits under that program are exempt by federal law from equitable distribution under section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). See 750 ILCS 5/503(d) (West 2012).

¶2 Here, the circuit court of Sangamon County refused to decrease the value of respondent Christopher Mueller's municipal police pension by the value of hypothetical Social Security benefits that he is not entitled to receive as a nonparticipant in that program. The appellate court affirmed the trial court's decision. 2014 IL App (4th) 130918-U. For the reasons that follow, we affirm, as well.

¶3 BACKGROUND

¶4 Shelley and Christopher Mueller were married in 1992. Shelley works for a private sector company, and has Social Security tax withheld from her pay. She expects to receive full Social Security benefits in 2033 at age 67. Christopher works for the Springfield police department as an officer, and does not have Social Security tax withheld from his pay. Instead, he contributes to the Springfield Police Pension Fund, and he can retire with full pension benefits in 2017 at age 50.

¶5 In 2012, Shelley filed a divorce petition. The following year, the trial court held a hearing on

the petition. Christopher offered a report from Sheila Mack, owner of Equitable Solutions, a self-described "pre-divorce planning" business. Mack's report stated that she computed the estimated present value of Christopher's pension benefits, but, in doing so, used a "Windfall Elimination Provision" or WEP. She explained:

> "Participants in the Springfield Police Pension Fund do not pay into Social Security. Because of the ruling by the Illinois Supreme Court regarding Social Security benefits in divorce [presumably, *Crook*], the question becomes how to place Mr. Mueller in a position similar to Mrs. Mueller whose Social Security benefits are exempt from equitable distribution[.] In other words, what portion of Mr. Mueller's monthly benefit would he receive 'in lieu of' Social Security?"

¶6 That portion was derived from figures Mack generated with "Social Security's Online Calculator." She input Christopher's wages through August 2012, as if they were "covered by Social Security," and determined that his monthly Social Security benefit at age 67 would be $1,778 per month. She then input his wages "for only those years in which he contributed to Social Security," and determined that his monthly benefit at age 67 would be $230 per month. The difference of $1,548 per month was what Mack posited as "the dollar amount Mr. Mueller would receive 'in lieu of' Social Security," or his "WEP offset." And the difference between that amount and the amount he would receive from his

pension was $2,479 per month, which yielded an estimated present value of $639,720.74.[7]

¶7 At the hearing, Mack's testimony largely echoed the contents of her report. She stated that Social Security benefits are no longer "divisible in divorce proceedings, pursuant to federal law. According to Mack, the "Social Security Administration has acknowledged that part of the pension for a person who doesn't contribute to Social Security is in lieu of Social Security[] because they instituted two Social Security offsets." Mack did not further describe those offsets, and when Christopher's attorney asked her to describe the goal of an offset, Shelley's attorney made an objection to Mack's report because the valuation method proposed there was contrary to *Crook*. Christopher's attorney discussed that case briefly, and asserted that it left "wide open" the issue of whether that method comported with federal law.

¶8 The trial court reviewed *Crook* and sustained the objection. The court noted that this court, "while acknowledging the unfairness of this process, is pretty intent on keeping this Social Security benefit out of the pension, and basically the overall analysis of the marital estate." Thus,

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[7] Mack's report also outlined another method for calculating the so-called "in lieu of" portion of his pension benefit, in which she compared Christopher to "a regular IMRF employee who pays into Social Security." That method yielded a present value of $732,361.74, but that amount was never addressed at the hearing.

the valuation method proposed by Mack is "an offset by any other language" and violates federal law as interpreted by *Crook*. Although the trial court declined to weigh Mack's report in its decision to divide property, it allowed Christopher's attorney to examine Mack to create an offer of proof for purposes of appeal.

¶9 Mack outlined how she used the Social Security Administration's website to find, based on Christopher's earnings history, what his Social Security benefit would be if he had participated in that program. Mack asserted that the present value of his pension, minus the Social Security benefit that she calculated for him, was the same figure in her report, $639,720.74. The marital portion of that figure was $614,323.83, and the nonmarital portion was $25,396.91.

¶10 On cross-examination, Shelley's attorney asked Mack more about how she arrived at those figures. Mack stated that because Christopher has served as a police officer for 20 years, he could retire with full pension benefits at age 50. The present value was based on that scenario. Shelley's attorney then asked Mack about the effect of Christopher obtaining a subsequent, postretirement job, at which Social Security tax would be withheld, until age 67. Mack conceded that he would be entitled to Social Security benefits, but because he would lack 20 years of what the Internal Revenue Service calls "substantial earnings," there would be an offset. This offset, likely one of the two mentioned by Mack earlier in the hearing, serves to decrease

Social Security benefits for people who have not participated in the program for a large part of their working lives. According to Mack, Christopher had only three years of substantial earnings before joining the Springfield police department, so his Social Security benefit at age 67 would be reduced by 55%, from $517 per month to $230 per month. Mack could offer no opinion on whether Shelley would suffer any detriment because Christopher did not pay into Social Security.

¶11 At the close of evidence, the trial court ruled that Christopher could amend his calculations consistent with its ruling on the objection to Mack's report. Christopher filed a closing written argument, where he stated that Mack recalculated the present value of his pension benefits "without the Social Security offset" as $991,830.[8] The court adopted that figure, and ultimately awarded Shelley slightly more than 35% of Christopher's pension, or $350,000. Christopher appealed.

¶12 A divided panel of the appellate court affirmed the trial court's decision. 2014 IL App (4th) 130918-U. The appellate court majority discussed *Crook*, and the question it left for another day, then discussed *In re Marriage of Herald*, 322 P.3d

[8] Shelley also offered her own present value figure, which she arrived at using software called "FinPlan" and a lower interest rate than Mack. According to Shelley, the present value of Christopher's pension was $1,306,805. The trial court rejected that figure and used the one provided by Mack.

546 (Or. 2014) (*en banc*), where the Oregon Supreme Court approved a similar valuation method to the one proposed by Mack. The majority held:

> "Based upon the *Crook* holdings that (1) 'it is improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution' [citation] and (2) Social Security benefits 'may not be divided directly or used as a basis for an offset during state dissolution proceedings' [citation], we decline to reverse the trial court's judgment for failing to apply the Social Security benefit offset to the value of Christopher's pension. Although the offset proposed by Christopher would (1) not require the court to consider the value of Shelley's Social Security benefits and (2) achieve a more equitable result, the offset would nonetheless 'cause[] an actual difference in the asset distribution.' [Citation.] We read *Crook* to prohibit such an outcome." 2014 IL App (4th) 130918-U, ¶ 24 (quoting *Crook*, 211 Ill. 2d at 449, 451).

Because the trial court did not err by refusing to make the offset in Mack's proposed valuation method, the majority stated that the trial court also did not err in excluding her report and testimony. *Id.* ¶ 25.

¶13 Justice Appleton dissented. He observed that the mandate of the Dissolution Act is to divide marital property in just proportions, and ignoring a substantial asset, like a Social

Security benefit, that was earned during the marriage runs afoul of that mandate. *Id.* ¶ 31 (Appleton, J., dissenting). Justice Appleton would have reversed the trial court's decision and remanded, so the court could "reserve[ ] to the ex-wife her Social Security benefits but grant[ ] a corresponding offset of those benefits against the ex-husband's police pension." *Id.* ¶ 33.

¶14 We allowed Christopher's petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. July 1, 2013).

¶15 ANALYSIS

¶16 Here, as below, Christopher raises two issues: (1) whether the trial court erred in excluding Mack's report and testimony; and (2) whether the trial court erred in determining that the proposed valuation method violated federal law. Because our resolution of the second issue is dispositive, we address it first. Our standard of review is *de novo*. *Crook*, 211 Ill. 2d at 442.

¶17 The parties' arguments are not complex. Christopher argues that we should follow *Herald* and other out-of-state cases that have approved the valuation method proposed by Mack. He insists that that method comports with our holding in *Crook*. Shelley argues that we should reaffirm our holding in *Crook* and follow out-of-state cases that have rejected the valuation method proposed by Mack. While those two lines of cases inform our analysis, we must begin with

a discussion of the Dissolution Act and the Social Security Act.

¶18 Section 503 of the Dissolution Act concerns "Disposition of property." Subsection (d) directs trial courts to "divide the marital property without regard to marital misconduct in just proportions considering all relevant factors." 750 ILCS 5/503(d) (West 2012). Subsection (a) defines marital property broadly as "all property acquired by either spouse subsequent to the marriage" with certain exceptions. 750 ILCS 5/503(a) (West 2012). And subsection (b) echoes that definition by creating a presumption that "all property acquired by either spouse after the marriage and before a judgment of dissolution" is marital property. 750 ILCS 5/503(b)(1) (West 2012). Section 503(b)(2) specifically provides that pension benefits tied to contributions made during the marriage are marital property. See 750 ILCS 5/503(b)(2) (West 2012). Social Security benefits, however, are treated differently pursuant to federal law.

¶19 Section 402(b)(1) of the Social Security Act provides that divorced persons are entitled to specific portions of their former spouses' benefits. 42 U.S.C. § 402(b)(1) (2000). Section 407 provides that Social Security benefits are not otherwise alienable:

> "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) (2000).

¶20 Section 407(a) imposes a broad bar against using any legal process to reach Social Security benefits. See *Crook*, 211 Ill. 2d at 443-44 (quoting *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973)). Congress created an exception to that bar for litigation to enforce child and spousal support obligations (see 42 U.S.C. § 659(a) (2000)), but it explicitly omitted an exception for litigation to enforce obligations arising from the division of property in a divorce (see 42 U.S.C. § 659(i)(3)(B)(ii)(2000)).

¶21 That is the statutory framework we examined in *Crook*. In *Crook*, the husband participated in Social Security, but the wife did not. Instead, she accepted an early retirement incentive from a state college and participated in the State University Retirement System and Illinois Municipal Retirement Fund pension plans. The trial court awarded the husband half of the wife's pension benefits, but did not consider the husband's Social Security benefits. The wife appealed, and the appellate court reversed and remanded, directing the trial court to consider the husband's Social Security benefits in reaching an equitable division of property. The husband appealed to this court, and, on the issue of Social Security, we reversed.

¶22 The foundation for our decision was *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979),

where the Supreme Court held that retirement benefits under the Railroad Retirement Act of 1974 (45 U.S.C. § 231 *et seq.* (2000)) could not be subject to an attachment order or an offset award during state divorce proceedings. We observed that *Hisquierdo*'s preemption analysis applied equally to Social Security benefits. *Crook*, 211 Ill. 2d at 444-45 (citing, *inter alia*, *Olson v. Olson*, 445 N.W.2d 1, 6-7 (N.D. 1989)). We summarized that "*Hisquierdo* establishes two important points: Social Security benefits may not be divided directly or used as a basis for an offset during state dissolution proceedings." *Crook*, 211 Ill. 2d at 449-50. Those points led us to reject analyses from cases in other states permitting trial courts to consider anticipated Social Security benefits as a factor in making an equitable distribution of marital property. *Id.* at 449-51.

> "Instructing a trial court to 'consider' Social Security benefits, as the appellate court did in this case, either causes an actual difference in the asset distribution or it does not. If it does not, then the 'consideration' is essentially without meaning. If it does, then the monetary value of the Social Security benefits the spouse would have received is taken away from that spouse and given to the other spouse to compensate for the anticipated difference. This works as an offset meant to equalize the property distribution." *Id.* at 451. Accord *Wolff v. Wolff*, 929 P.2d 916, 921 (Nev. 1996) ("Calling a duck a horse does not change the fact it is still a duck. 'Considering' [one spouse's] social security benefits does not

change the fact that this is still an offset, and therefore, error.").

¶23 The valuation method proposed by Mack is not strictly speaking an offset, but it does consider the existence of Shelley's anticipated Social Security benefits to create parallel benefits for Christopher that would affect the division of marital property. That method violates the core holding of *Crook*. It is also inappropriate for two additional reasons—one related to the Dissolution Act and one grounded in policy.

¶24 First, "[p]ension benefits attributable to contributions made during the marriage are marital property" (*Crook*, 211 Ill. 2d at 442 (citing 750 ILCS 5/503(b)(2) (West 2000)), but Social Security benefits are not marital property under the Dissolution Act. As we noted in *Crook*, 211 Ill. 2d at 442, participants in the Social Security program do not have accrued property rights to their benefits. They have expectancies, or what the Supreme Court has termed "noncontractual interest[s]" (*Flemming v. Nestor*, 363 U.S. 603, 609-10 (1960)), in their benefits. Although the program is funded by contributions by participants over their working lives, they are never guaranteed to get out what they put into it because Congress has reserved the ability to alter, amend, or even repeal parts of the Social Security Act. See 42 U.S.C. § 1304 (1994); see also *Flemming*, 363 U.S. at 609-10 ("[E]ach worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to

which he was called upon to support the system by taxation."). Unlike pension benefits, Social Security benefits are not "owned in any proprietary sense." *Manning v. Schultz*, 93 A.3d 566, 570 (Vt. 2014); see *Skelton v. Skelton*, 5 S.W.3d 2, 5 (Ark. 1999) ("Because the purposes of social security and [a pension-based] retirement plan are fundamentally different, they are not interchangeable."); *Cox v. Cox*, 882 P.2d 909, 920 (Alaska 1994) ("Social security benefits are not deferred compensation for services rendered but rather a governmental safety net for the retired. The employee has no contractual right to such benefits.").

¶25 If Social Security benefits are not property "acquired by" a spouse (750 ILCS 5/503(a) (West 2012)), then they are not marital property subject to division by the trial court. See *Wolff*, 929 P.2d at 920; *Litz v. Litz*, 288 S.W.3d 753, 758 (Mo. Ct. App. 2009); *Hayden v. Hayden*, 665 A.2d 772, 775 (N.J. Super. Ct. App. Div. 1995). And if Social Security benefits are not marital property, then surely hypothetical Social Security benefits, like those calculated by Mack, are not marital property and cannot be used to pare down the value of marital property. See *Reymann v. Reymann*, 919 S.W.2d 615, 617 (Tenn. Ct. App. 1995) ("If social security cannot be considered a marital asset, then the lack of social security should not be considered in reduction of marital assets."). To hold otherwise would be to ignore section 503(d), which instructs trial courts to divide only marital property. Second, as a matter of policy, any rule permitting trial courts to

consider the mere existence of Social Security benefits without considering their value, and thereby violating federal law, is nearly impossible to apply. The difficulties stem from the vagueness of the term "consider" in this context, and reviewing courts have struggled to provide guidance on how to do so. See, *e.g.*, *Litz*, 288 S.W.3d at 758 (holding that Social Security benefits should be considered when dividing marital property, "but not to such a degree that such consideration would have a material impact on the division of marital property"); *Biondo v. Biondo*, 809 N.W.2d 397, 403 (Mich. Ct. App. 2011) (holding that a trial court "may not treat social security benefits as tantamount to a marital asset," but may "take into account, in a general sense" the extent to which those benefits bear on the factors related to property division); *Johnson v. Johnson*, 734 N.W.2d 801, 808 (S.D. 2007) ("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" (internal quotation marks omitted)). Even the Oregon Supreme Court in *Herald*, which the appellate court here called a "thoughtful decision" (2014 IL App (4th) 130918-U, ¶ 23) attempted to mitigate the consideration problem with still more considerations. After holding that a trial court, "within appropriate limits," may "consider the existence or absence of

anticipated Social Security benefits for either or both spouses," the *Herald* court continued:

> "However, because what is just and proper under [the Oregon counterpart to section 503(d)] must be assessed in light of the prohibition against assignment or transfer of Social Security benefits in 42 USC section 407(a), three considerations merit particular emphasis. The first is whether it is probable that one or both spouses will receive Social Security retirement benefits in the foreseeable future. The second is whether the anticipated benefits are a substantial financial consideration when viewed in relation to the retirement assets and other financial resources that likely will be available to each spouse after the dissolution of their marriage. And, third and last, we reiterate that Social Security benefits are not marital assets, and their anticipated existence or absence therefore should be considered—if at all—only in achieving an overall just and proper division of the parties' property." *Herald*, 322 P.3d at 557-58.

The utility of such an "if at all" rule seems marginal, particularly in light of the real risk of crossing a line drawn by Congress.

¶26 Further difficulties plague the method here due to the uncertainties inherent in Social Security benefits. As we have noted, Congress's retained power to change the Act, and benefits themselves, making it "awkward for the courts to count benefits as assets of definable value." *Olson*,

445 N.W.2d at 6. That is, placing a present value on Social Security benefits is contrary to the nature of such benefits. Placing a present value on fictional benefits is even worse; it is rank speculation. Additionally, placing a present value on such benefits overlooks that the amount of Social Security benefits cannot be calculated until the participant collects them. *White v. White*, 664 A.2d 1297, 1300 (N.J. Super. Ct. 1995). Moreover, if the participant were to die before age 62, there would be no benefits at all. *Id.* Decreasing Shelley's share of Christopher's pension based on the present value of his hypothetical Social Security benefits that, even if he had participated in that program, he may not ever receive is both illogical and inequitable.

¶27 A more coherent approach is to adhere to *Crook*, and *Hisquierdo*, and hold that Congress intended to keep Social Security benefits out of divorce cases. Failing to consider Social Security benefits may paint an unrealistic picture of the parties' future finances, but "it is not the province of this court *** to interfere with the federal scheme, no matter how unfair it may appear to be." *Crook*, 211 Ill. 2d at 452. The decision of the trial court not to consider Shelley's Social Security benefits and reduce Christopher's pension benefits by hypothetical Social Security benefits was correct.

¶28 CONCLUSION

¶29 For the reasons that we have stated, we affirm the decisions of the lower courts and remand for further proceedings.

¶30 Appellate court judgment affirmed;

¶31 Circuit court judgment affirmed;

¶32 Cause remanded.

¶33 JUSTICE BURKE, dissenting:

¶34 Christopher makes a straightforward request in this dissolution of marriage case. Shelley, his former wife, is a participant in Social Security. Federal law mandates that the Social Security benefits to which Shelley is entitled may not be divided during the dissolution proceeding but must remain solely with her. Christopher, however, is not a participant in Social Security. His principal retirement benefit, a municipal pension, is considered marital property and is subject to division.

¶35 Given these facts, Christopher asks that the trial court be permitted to divide his pension in a way that would place him in the same financial position as Shelley. Specifically, Christopher proposes that a portion of his pension be retained for his benefit alone, with the remainder then apportioned between the parties. To establish how much of his pension he should retain, Christopher suggests that the trial court use the amount of Social Security benefits for which he would be eligible, if he had participated in that

program. Stated otherwise, Christopher's request is simply that he be treated similarly to Shelley—no better and no worse—during the dissolution proceeding.

¶36 Christopher's proposed method for determining how to apportion his pension is consistent with section 503(d) of the Dissolution Act (750 ILCS 5/503(d) (West 2012)). That provision requires that marital property be divided "in just proportions considering all relevant factors" (*id.*), and it is difficult to conclude that an apportionment of property which places the divorcing spouses on an equal footing during the dissolution proceeding could be anything other than "just." The appellate court below made the same observation, noting that allowing Christopher's proposed division of his pension would achieve "a more equitable result." 2014 IL App (4th) 130918-U, ¶ 24. See also, *e.g.*, *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 778 (1998) (the touchstone of a just apportionment of property "is whether [the distribution] is equitable").

¶37 Nevertheless, the majority holds that the method proposed by Christopher for apportioning his pension may not, under any circumstances, be considered by a trial court. This is so, the majority concludes, because the proposed apportionment is preempted by section 407 of the Social Security Act (42 U.S.C. § 407(a) (2000)). I disagree.

¶38 The supremacy clause of the federal constitution provides that the laws of the United

States "shall be the supreme Law of the Land; *** any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Under the supremacy clause, federal law will preempt state law in three circumstances: "(1) express preemption—where Congress has expressly preempted state action; (2) implied field preemption—where Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from the state realm; or (3) implied conflict preemption—where state action actually conflicts with federal law." *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 39-40 (2010).

¶39 There is no contention that federal law expressly prohibits Christopher's proposal or that Congress has preempted the field of dividing marital property. The type of preemption at issue in this case is therefore implied conflict preemption. The assertion is that Christopher's proposed division of his pension, if employed by a trial court, would constitute state action that would impermissibly conflict with federal law.

¶40 As the Supreme Court has stated, the regulation of domestic relations, including the distribution of marital property during dissolution proceedings, is traditionally the domain of state law. *Hillman v. Maretta*, 569 U.S. ___, ___, 133 S. Ct. 1943, 1950 (2013). For this reason, there is a "presumption against pre-emption" in the area of domestic relations law. *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001). Because preemption is disfavored in domestic

relations law, it follows that the burden to establish conflict preemption in this area is high: it must be shown that the challenged state action does "major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law will be overridden." (Internal quotation marks omitted.) *Hillman*, 569 U.S. at ___, 133 S. Ct. at 1950. To determine what federal interest is at stake and whether it would suffer major damage if the state action were permitted, we look to the language of the relevant federal statute. *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. ___, ___, 133 S. Ct. 1769, 1778 (2013) (statutory language provides the best evidence of Congress's preemptive intent).

¶41 Section 407(a) of 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) (2000).

¶42 Section 407(a) addresses the rights of participants in Social Security to receive payments under the terms of that program. The section prohibits the transfer or assignment of Social Security benefits and prohibits the use of "legal process" to levy, attach, garnish or execute on those benefits. The section does not identify

any other prohibited actions and does not say anything about how the pension of a nonparticipant in Social Security should be apportioned in a state dissolution proceeding. Thus, under the plain language of the statute, the federal interest established by section 407(a) is to ensure that Social Security benefits are received by the participant. No other federal interest is at issue.

¶43 Christopher's proposed division of his pension does not threaten Shelley's receipt of her Social Security benefits. Under Christopher's proposal, Shelley receives exactly what she is entitled to under the Social Security Act. In short, permitting the trial court to adopt the proposed apportionment would in no way stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, the proposed apportionment of Christopher's pension is not preempted by section 407(a).

¶44 It is important to underscore the nature of the majority's holding to the contrary. The only reason Christopher is asking that he be allowed to retain a portion of his pension in [sic] so that he can be placed in a similar financial position as Shelley. It is this action which the majority finds prohibited by federal law. By finding conflict preemption in this case, the majority has thus concluded that treating divorcing spouses as equals in a state dissolution proceeding does "major damage to clear and substantial federal

interests." There is simply no support for this conclusion in the language of section 407(a).

¶45 Although this is a conflict preemption case, the majority does not identify the federal interest at stake or explain why Christopher's method for apportioning his pension would do major damage to that interest. Instead, the majority's analysis rests solely on the assertion that allowing the apportionment proposed by Christopher would violate the "core holding" of *In re Marriage of Crook*, 211 Ill. 2d 437, 442 (2004). *Supra* ¶ 23. Again, I disagree.

¶46 The "core holding" of *Crook* was twofold. First, *Crook* held that Social Security benefits may not be directly divided in a dissolution proceeding. Second, relying on *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), *Crook* held that a trial court may not consider the amount of a participating spouse's Social Security benefits in order to calculate an offset. That is, the trial court may not take the monetary value of the Social Security benefits to which the participating spouse is entitled and give that amount of money "to the other spouse to compensate for the anticipated difference." *Crook*, 211 Ill. 2d at 451. This "type of 'consideration,' " we held, was impermissible. *Id.* Thus, as we succinctly stated, "Social Security benefits may not be divided directly or used as a basis for an offset during state dissolution proceedings." *Id.* at 449. These two actions are the only actions prohibited under *Crook*.

¶47 Christopher's proposed apportionment of his pension does not result in a direct division of

Shelley's Social Security benefits. Nor does it create an offset, a fact which the majority itself acknowledges. *Supra* ¶ 23 (the proposed apportionment "is not strictly speaking an offset"). Christopher's proposed division of his pension is therefore not at odds with the "core holding" of *Crook*. Indeed, *Crook* expressly left open the question of how to treat a pension in a dissolution proceeding when the other spouse is a participant in Social Security. 211 Ill. 2d at 452; *Supra* ¶ 1.

¶48 The majority also offers two policy reasons why Christopher's proposed method for valuing and apportioning his pension should not be permitted. Neither is persuasive.

¶49 First, the majority states that permitting the proposed apportionment would "ignore section 503(d) [of the Dissolution Act], which instructs trial courts to divide only marital property." *Supra* ¶ 25. With this statement, the majority appears to have concluded that Christopher's proposal is improper because, if adopted, the trial court would be dividing the amount of the hypothetical Social Security benefits used to establish how much of Christopher's pension should be retained, rather than dividing actual marital property. This is clearly incorrect.

¶50 If Christopher's proposal were adopted, the only thing the trial court would actually divide would be the pension. The hypothetical Social Security benefits would be used only as a measure to determine *how* the pension should be divided. Nothing in section 503(d) prohibits this. To the

contrary, section 503(d) requires that marital property be divided "in just proportions considering all relevant factors" (750 ILCS 5/503(d) (West 2012)), in order to achieve an equitable result between the parties. Allowing Christopher to retain a portion of his pension, thereby placing him in a similar position as Shelley, accomplishes this goal.

¶51 The majority also observes that the future is unknown and there is always a possibility that Social Security benefits may, at some future time, change. From this, the majority concludes that Christopher's proposed apportionment, because it uses Social Security benefits as a measure for establishing how his pension should be divided, must be rejected as "rank speculation." *Supra* ¶ 26. This, too, is incorrect. No one can predict or guarantee the future. Pension systems, for example, can and do fail, drastically altering the financial positions of their participants. If the rule were that no financial factor may be considered in a dissolution proceeding if that factor may change in the future, then no pension could ever be divided. Obviously, this is not the case.

¶52 Further, Christopher offered expert testimony explaining how to calculate the amount of benefits for which Christopher would be eligible if he were a participant in Social Security. The majority does not contend that these calculations are mathematically incorrect and similar calculations are made as a matter of course in financial and retirement planning. The Social Security Administration itself provides the means

for participants to calculate the amount of future benefits to which they are entitled in order to plan for retirement. See http://www.ssa.gov (last visited June 11, 2015). On this record, therefore, it is not speculation but fact: using Christopher's proposed apportionment would place him in the same position as Shelley.

¶53 The majority holds that, in dissolution proceedings such as this, Illinois trial courts are precluded from dividing pensions in a way that would clearly achieve "a more equitable result." 2014 IL App (4th) 130918-U, ¶ 24. There is no basis in law or policy for this holding. I must, therefore, respectfully dissent.

¶54 JUSTICE KARMEIER joins in this dissent.

2014 IL App (4th) 130918-U

No. 4-13-0918

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In re: MARRIAGE OF	)	Appeal from
SHELLEY L. MUELLER,	)	Circuit Court
Petitioner–Appellee,	)	of Sangamon
and	)	County
CHRISTOPHER MUELLER,	)	No. 12D590
Respondent-Appellant.	)	
No. 4–13–0918. | May 19, 2014.	)	Honorable
	)	John Madonia,
	)	Judge
	)	Presiding.

Justice STEIGMANN delivered the judgment of the court.
Justice Knecht concurred in the judgment.
Presiding Justice Appleton dissented.

ORDER

¶1 *Held:*

The Appellate Court affirmed the trial court's judgment, concluding that the court did not err

> by (1) refusing to offset the value of the respondent's pension in lieu of Social Security benefits by the value of Social Security benefits he would have received had he participated in Social Security, and (2) excluding respondent's expert from testifying about the value of respondent's pension benefits.

¶2 In August 2012, petitioner, Shelley L. Mueller, filed a petition for dissolution of marriage from respondent, Christopher Mueller. In September 2013, following a hearing, the trial court entered judgment of dissolution of marriage, which awarded Shelley a portion of Christopher's police pension benefits. Pursuant to section 407(a) of the Social Security Act (42 U.S.C. § 407(a) (2012)) and the supreme court's holding in *In re Marriage of Crook,* 211 Ill.2d 437, 449, 813 N.E.2d 198, 204 (2004), the court made its determination of the portion of Christopher's pension benefits to award Shelley without (1) considering the alue of Shelley's anticipated Social Security benefits or (2) offsetting the value of Christopher's pension enefits by the value of Social Security benefits he would have received had he participated in Social Security instead of the pension in lieu of Social Security.

¶3 Christopher appeals, arguing that (1) because the trial court could not consider Shelley's Social Security benefits in determining the equitable distribution of marital property, fairness required the court to offset its valuation of Christopher's pension by the value of Social Security benefits that he would

have received, had he participated; and (2) the court erred by excluding Christopher's expert's report and testimony about her calculation of Christopher's pension. We affirm.

¶4 I. BACKGROUND

¶5 The following facts were gleaned from evidence presented at the hearing on Shelley's petition for dissolution of marriage. We recite only the facts pertinent to the issues presented in this appeal.

¶6 Shelley and Christopher married in May 1992 and had two children. Shelley is employed in the insurance industry, and she has Social Security tax withheld from her pay. Christopher is a police officer who, in lieu of participating in Social Security or having Social Security tax withheld from his pay, participates in the Springfield Police Pension Fund for his retirement and disability.

¶7 At the hearing on Shelley's petition for dissolution of marriage, Christopher presented testimony and a report from Sheila Mack, owner of "Equitable Solutions," a "pre-divorce financial consulting business." Without objection, the trial court qualified Mack to give an expert opinion as to the value of Christopher's pension. Mack's report and testimony addressed, among other things, the effect of the cost of living adjustment (COLA) on the value of Christopher's pension, as well as the appropriate interest rate to use in calculating the actual value of the pension. Mack valued Christopher's pension at $639,720.74.

¶8 Mack further testified that in arriving at her final calculation, she factored in an "offset" to compensate for the fact that Shelley's Social Security benefits would be shielded from the trial court's equitable consideration but Christopher's pension benefits in lieu of Social Security would not be. Had she not factored in that offset, the value of Christopher's pension would be $991,830.

¶9 Given our disposition of this appeal, it is unnecessary to recite in detail the method Mack used to calculate the Social Security benefit offset-value of Christopher's pension. Suffice it to say, Mack more or less used the Social Security Administration's website to determine the value of Social Security benefits Christopher would have received had he participated, then subtracted that figure from the present value of Christopher's pension. The purpose of this method of valuation was to remove from the trial court's equitable consideration the true value of Christopher's pension, which he earned in lieu of Social Security, but which—unlike Shelley's Social Security benefits—was not statutorily exempted from consideration or distribution. Because Christopher's pension benefits were more lucrative than his Social Security benefits would have been, Mack offset the value of Christopher's pension only by an amount equivalent to the benefits Christopher would have earned had he participated in Social Security.

¶10 Citing *Crook,* Shelley objected to Mack's testimony and report as to the value of Christopher's pension because Mack applied the Social Security benefit offset. Christopher—apparently anticipating

this objection—provided the trial court with a copy of *Crook* and argued that the supreme court explicitly left open the question of whether a court could, in the interests of equity, offset the value of a spouse's pension to put him or her "in a position similar to that of the other spouse whose Social Security benefits will be statutorily exempt from equitable distribution." *Crook,* 211 Ill.2d at 452, 813 N.E.2d at 206. After taking a brief recess to review *Crook,* the court sustained Shelley's objection to Mack's report and testimony, but allowed Christopher to make an offer of proof for the record. At the close of the hearing, the court reiterated that it would not consider the Social Security benefit offset.

¶11 The trial court later granted Christopher leave to file a revised report prepared by Mack as to the value of his pension *without* the Social Security offset applied, which reached a figure of $991,830. The court adopted that figure in its final findings and judgment, which it entered in September 2013.

¶12 This appeal followed.

¶13 II. ANALYSIS

¶14 Christopher argues that (1) because the trial court could not consider Shelley's Social Security benefits in determining the equitable distribution of marital property, fairness required the court to offset its valuation of Christopher's pension by the value of Social Security benefits that he would have received had he participated; and (2) the court erred by excluding Mack's report and testimony about her

calculation of Christopher's pension.

¶15 A. The Supreme Court's Decision in *Crook*

¶16 In *Crook,* 211 Ill.2d at 442, 813 N.E.2d at 200, the supreme court addressed "whether a court may offset a perceived disparity in Social Security benefits by awarding one party to a divorce a greater share of marital pension benefits."

¶17 In addressing this question, the supreme court first turned to the statutory frame-work of the federal Social Security Act, which "imposes a broad bar against the use of any legal process to reach all [S]ocial [S]ecurity benefits." *Crook,* 211 Ill.2d at 443, 813 N.E.2d at 201 (quoting *Philpott v. Essex County Welfare Board,* 409 U.S. 413, 417 (1973)). Specifically, section 407(a) of the Act provides as follows:

> "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) (2012).

The Act also "explicitly exclude[s] any similar payment obligation arising from a 'community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.' " *Crook,* 211 Ill.2d at 444,

813 N.E.2d at 201 (quoting 42 U.S.C. § 659(i)(3)(B)(ii) (2000)).

¶18 The supreme court in *Crook* noted that although the United States Supreme Court had never addressed the question presented, it had addressed a similar question in *Hisquierdo v. Hisquierdo,* 439 U.S. 572 (1979). In *Hisquierdo,* the question was "whether retirement benefits awarded to an ex-spouse under the federal Railroad Retirement Act of 1974 (45 U.S.C. § 231 *et seq.* (2000)) could be subject to attachment or an offsetting award during state divorce proceedings." *Crook,* 211 Ill.2d at 444, 813 N.E. 2d at 201. The *Hisquierdo* Court answered that question in the negative based upon principles of federalism and the doctrine of preemption. The *Crook* court summarized the *Hisquierdo* Court's holding as follows:

> "*Hisquierdo* held that ordering a direct beneficiary to pay a portion of the benefit to an ex-spouse would 'run[] contrary to the language and purpose' of the statutes enacted by Congress and would 'mechanically deprive' the direct beneficiary of a portion of the benefit that Congress indicated was solely for that beneficiary. *Hisquierdo*, 439 U.S. at 583, 59 L.Ed.2d at 12, 99 S.Ct. at 809. Applying the preemption doctrine to the facts in *Hisquierdo* 'prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.' *Hisquierdo,* 439 U.S. at 584, 59

> L.Ed.2d at 12, 99 S.Ct. at 8[09–]10." *Crook,* 211 Ill.2d at 446-47, 813 N.E.2d at 202-03.

¶19 The *Hisquierdo* Court, after holding that a direct division of Social Security benefits violated the federal statutory scheme, next considered whether the state court could indirectly reach an equitable result by granting the ex-wife an offset award of available community property to make up for the ex-husband's expected retirement benefits, which the Railroad Retirement Act shielded from direct distribution. The *Hisquierdo* Court rejected that argument, explaining that "[a]n offsetting award, however, would upset the statutory balance and impair [the ex-husband's] economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater." *Hisquierdo,* 439 U.S. at 588.

¶20 The *Crook* court, noting that courts in other jurisdictions have applied the reasoning of *Hisquierdo* to the division or offsetting of Social Security benefits in divorce proceedings, concluded that "*Hisquierdo* establishes two important points: Social Security benefits may not be divided directly or used as a basis for an offset during state dissolution proceedings." *Crook,* 211 Ill.2d at 449, 813 N.E.2d at 204. In so concluding, the *Crook* court rejected the decisions of courts in other jurisdictions that approved of the trial court's consideration of Social Security benefits for purposes of equitable distribution of marital property. *Crook,* 211 Ill.2d at 449-51, 813 N.E.2d at 204-05. However, the court specifically noted that the issue of whether

Hisquierdo prohibits awarding an offset to a spouse participating in a pension system in lieu of Social Security—the issue Christopher presents in this case—was not before it in *Crook:*

> "Other state courts facing the issue of inequity have held that a spouse who participates in a pension system in lieu of Social Security must be placed in a position similar to that of the other spouse whose Social Security benefits will be statutorily exempt from equitable distribution. See *Cornbleth v. Cornbleth,* 397 Pa.Super. 421, [425,] 580 A.2d 369[, 371] (1990) [("[T]o the extent part of the pension might figuratively be considered 'in lieu of' a Social Security benefit we believe that portion should be exempted from the marital estate.")]; *Walker v. Walker,* 112 Ohio App.3d 90, [93,] 677 N.E.2d 1252[,1253] (1996) [(holding that the trial court properly "reduced [the ex-husband's] pension plan value by the value of the benefits that would have accrued under Social Security if he had been a participant during the marriage.")]; *In re Marriage of Kelly,* 198 Ariz. 307, [309,] 9 P.3d 1046 [, 1048] (2000) [(agreeing with the holding in *Cornbleth*)]. In this case, however, the parties have not argued the applicability of these cases or cited their rationale. Thus, we leave the resolution of that issue for another day." *Crook,* 211 Ill.2d at 452, 813 N.E.2d at 206.

¶21 B. Decisions From Other Jurisdictions Regarding the Issue in This Case

¶22 Christopher has argued in the trial court and this court that Illinois should follow *Cornbleth*, *Walker*, *Kelly* and the recent Oregon Supreme Court case of *In re Marriage of Herald and Steadman*, 355 Or. 104, ___ P.3d ___ (Mar. 20, 2014). Each of those cases held that the trial court may offset the value of a pension in lieu of Social Security to put the spouse participating in a pension program in a similar position as the spouse participating in Social Security. Although we find these cases well-reasoned, we decline to follow them because they seem to us incompatible with the supreme court's holdings in *Crook*.

¶23 In its thoughtful decision in *Herald,* the Oregon Supreme Court noted that Illinois, along with Nebraska (*Webster v. Webster,* 271 Neb. 788, 716 N.W.2d 47 (2006)), Alaska (*Cox v. Cox,* 882 P.2d 909 (1994)), Nevada (*Wolff v. Wolff,* 112 Nev. 1355, 929 P.2d 916 (1996)), and North Dakota (*Olson v. Olson,* 445 N.W.2d 1 (1989)), make up a minority of jurisdictions that "appear to have prohibited without exception any consideration of Social Security benefits that might or might not be available to either party in a marital property division." *Herald,* 355 Or. at 119 ,___ P.3d ___. Among all of the aforementioned cases from the five minority jurisdictions, the *Herald* court singled out the following passage from *Crook:*

> "'Instructing a trial court to "consider" Social Security benefits *** either causes an actual difference in the asset distribution or it does not. If it does not, then the "consideration" is essentially without meaning. If it does, then the monetary value of the Social Security benefits the spouse would have received is taken away from that spouse and given to the other spouse to compensate for the anticipated difference. This works as an offset meant to equalize the property distribution.'" *Herald,* 355 Or. At [sic] 119, ___ P.3d ___ (quoting *Crook,* 211 Ill.2d at 451, 813 N.E.2d at 205).

The remainder of that passage reads as follows:

> "That this type of 'consideration' amounts to an offset is recognized in the well-reasoned decisions from other state jurisdictions holding that under *Hisquierdo,* it is improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution." *Crook,* 211 Ill.2d at 451, 813 N.E.2d at 205.

¶24 Based upon the *Crook* holdings that (1) "it is improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution" (*Crook,* 211 Ill.2d at 451, 813 N.E.2d at 205) and (2) Social Security benefits "may not be divided directly or used as a basis for an offset during state dissolution proceedings" (*Crook,* 211 Ill.2d at 449, 813 N.E.2d at 204), we decline to reverse the trial court's judgment for failing to apply

the Social Security benefit offset to the value of Christopher's pension. Although the offset proposed by Christopher would (1) not require the court to consider the value of *Shelley's* Social Security benefits and (2) achieve a more equitable result, the offset would nonetheless "cause[] an actual difference in the asset distribution." *Crook,* 211 Ill.2d at 451, 813 N.E.2d at 205. We read *Crook* to prohibit such an outcome. Although the supreme court stated in *Crook* that it was leaving resolution of the specific issue presented in this case for another day, we defer to the supreme court to determine whether that day has arrived and, if so, how to resolve the issue.

¶25 Because we conclude that the trial court did not err by refusing to offset the value of Christopher's pension by the value of Social Security benefits he would have received had he participated in Social Security, we likewise conclude that the court did not err by excluding Mack's testimony and report regarding her calculation of the offset value of Christopher's pension.

¶26 III. CONCLUSION

¶27 For the foregoing reasons, we affirm the trial court's judgment.

¶28 Affirmed.

¶29 Justice APPLETON, dissenting.

¶30 I respectfully dissent. I recognize that our supreme court in *Crook,* 211 Ill.2d at 451-52, while

acknowledging the inequity of reserving Social Security benefits to the spouse who earned them without any offset to the other spouse, determined to leave the resolution of this issue for another day. I believe that day has arrived.

¶31 The Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/101 *et seq*. (West 2012)) is predicated on principles of equity. Without considering fault of the cause of the dissolution, the mandate of the Dissolution Act is to allocate the marital estate in just proportions. To completely ignore a substantial asset earned during the marriage is at cross-purposes with that mandate. Consider a dissolution action between an ex-husband who worked in a well-paying job, and who has retired and now receives his Social Security benefits, and his former spouse who has never worked outside the home. Would any trial court deny the ex-wife maintenance, even if the only income of the ex-husband is his Social Security benefit? I think not.

¶32 The division of the marital estate between spouses does not require the alienation of one party's Social Security benefits. As in this case, expert witnesses can readily analyze the present value of both Social Security and pension benefits, establishing cash values for each based upon life expectancy. The former spouse entitled to Social Security can determine his or her present monthly benefit amount and then offset that benefit against the present earned benefit of the other former spouse's pension.

¶33 I would reverse the property division made in this case and remand it to the trial court for a division of the marital property that reserves to the ex-wife her Social Security benefits but grants a corresponding offset of those benefits against the ex-husband's police pension.

IN THE CIRCUIT COURT FOR THE
SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

IN RE THE MARRIAGE OF:	)	
	)	
	)	
SHELLEY L. MUELLER,	)	
Petitioner,	)	
v.	)	Case No.
	)	2012-D-590
CHRISTOPHER MUELLER,	)	
Respondent.	)	

MEMORANDUM OF OPINION

Petitioner, SHELLEY MUELLER, (hereafter "Wife") with her counsel, Michelle Blackburn, and Respondent, CHRISTOPHER MUELLER, (hereafter "Husband") with his counsel, William Moran, appeared before this Court for trial on the Petition for Dissolution of Marriage filed August 15, 2012. After carefully considering the testimony received at trial and the arguments submitted by counsel, the Court files the following opinion to govern the Judgment to be entered in this case:

This memorandum sets forth the basis for the Court's finding as to the total value of the marital estate that is subject to an equitable distribution by the Court, and is designed to resolve all the matters that are still in dispute between the parties at the conclusion of the trial. The trial was conducted over two days. Testimony of the parties concluded May 6, 2013 and the parties supplemented the record with

final summations at the end of May. Trial testimony established that the parties were married in excess of 20 years. Two children were born to the marriage, namely Lauren (19 years of age) and Taylor (16 years of age). As a minor, Taylor's custody, care and support are addressed in this memorandum. The agreement of the parties controls the Court's rulings regarding the minor child, specifically, that the parties' are awarded joint legal custody of Taylor, with Wife designated to be the primary residential custodian with Husband having liberal visitation as agreed to between the parties and the minor child. Based upon representations made in the parties' final summations provided to the Court after the conclusion of the evidence, the Court was anticipating that the parties would submit a Joint Parenting Agreement to govern the custodial and visitation arrangements for the minor child; however, failure to provide a predetermined, written Agreement does not preclude the Court from entering its opinion. In addition to joint legal custody, the Court also accepts the parties' agreement to impose a child support obligation upon Husband totaling $1032.00 per month. Husband shall continue to be responsible for maintaining health insurance on the parties' children for as long as they are eligible for such coverage, and the parties will equally be responsible for all out of pocket expenses related to the children's health care for as long they remain covered by Husband. The parties will also split the cost of the minor child's high school education expenses, including the cost of the child's participation in educational and athletic extra-curricular activities. This assignment of

responsibility for covering the costs of athletic activities for Taylor specifically includes the cost for her continued participation on a competitive swim team. It is the Court's hope that each parent will attend an equal number of swim meets such that they should each be responsible for travel costs for the meets that they respectively attend. This should leave the costs of team fees, equipment, and competition entry fees as the major costs to be divided between the parties for Taylor's swimming activities. Based upon the multitude of variables still remaining to be decided for determining financial responsibility for Taylor's college education, the Court shall reserve judgment as to financial assignment for post high school educational support of Taylor. Lastly, in regards to the minor child, the Court declines Wife's's [sic] request to assign one-half of the insurance premiums for Taylor's vehicle to Husband; that cost is solely assigned to Wife as Taylor's primary residential caregiver. The Judgment also eliminates any responsibility for Husband to continue to pay for cell phones for the parties, including those of the children.

As for the parties' child, Lauren, the Court shall reserve ruling on the sole issue affecting the continued relationship between the parties and this child, that issue being the continued financial contributions from the parties to the child's pursuit of a post high school degree. The dominate factor controlling the ultimate ruling on this issue is whether the child will continue to seek a degree. The first year of college was an unmitigated disaster according to the testimony of the parties and neither

party can be convinced that Lauren will continue with any collegiate endeavors. Therefore, assigning financial responsibility for further college expenses is premature and shall require additional petitioning for any party who seeks a court determination as to this issue in the future.

Regarding financial issues for the parties, the Court begins by making the threshold determination that the total value of the marital estate to be equitably divided by the Court and awarded to each party is $1,316,621.00. In arriving at this determination, the Court was largely able to use values of the assets that were agreed to by the parties, although some determinations as to the value of certain assets at issue in this case were estimated by the Court, in its discretion, based on the Court's interpretation of the evidence and weight given to such evidence offered in support of, or in opposition to, a reasonable valuation of the particular asset in question. The breakdown of this assessment, and the award of the specific corresponding assets and debts comprising the marital estate, shall be as follows:

(1) Equity in the marital residence of $56,000.00 shall be awarded to Wife and Value of Time Share Condominium of $2000.00 awarded to Husband. At trial, the parties differed as to the fair value that should be assigned for the marital residence located at 59 Sarah Dr. in Springfield, IL. Petitioner offered testimony from an appraiser who inspected the home and used his inspection to compare the parties' residence to three other comparable homes in the parties' neighborhood that had been listed

and sold in the market. The sale of the most comparable home, located at 15 Sarah Dr, occurred within five days of the final appraisal report introduced as evidence by Petitioner for their marital residence. That comparable home was sold for $147,000.00, which was also the value of the parties' marital residence computed by the appraiser, and the value Petitioner seeks for the Court to assign to the residence as part of the overall marital estate. Respondent, on the other hand, criticized the method and criteria used by the appraiser to arrive at his conclusion, and encouraged the Court to use the tax assessed fair market value for the home, which would assign a value of $159,000.00 to the marital residence for estate distribution purposes.

As it reviewed the evidence, the Court compared the listing information for the comparable home that sold in the neighborhood for $147,000.00, and in doing so, the Court noted that the parties' home at issue in this case has more total square footage, more livable square footage, and one more bathroom then the home at 15 Sarah Dr., which leaves the Court to believe that the marital home would sell for more than $147,000.00 that the sellers received for the 15 Sarah Dr. residence. The Court also acknowledges, based upon Counsel for Husband's cross-examination of the appraiser, that tax assessed market values do not automatically correspond to the expected sale price of a home. Indeed, Husband offered evidence of home sales that were both above, and below, the tax assessed value of the home. Thus, the Court concludes that the

parties' could reasonably expect a sale of the marital residence at a price of $154,312.67. Based on the mortgage liability of $98,312.67, due and owing to Town & Country Bank as of the date of trial, responsibility for which is assigned to Wife, the marital estate value for the residence awarded to Wife is $56,000.00. As to the time share property, the parties agreed as to the value and appropriate distribution for that asset, and thus, Husband is awarded the timeshare property and its $2000.00 assessed value.

(2) The Present Value of the Marital Portion of Husband's City of Springfield Police Pension of $991,830.00, with approximately 65% of value awarded to Husband and approximately 35% of value awarded to Wife. The determination as to the value of this major piece of the parties' marital estate was left largely to the discretion of the Court at the conclusion of trial. Husband presented the testimony of Sheila Mack, who was qualified to give an expert opinion as to the present value of Husband's pension, and she testified as to the methods used in arriving at the specific calculation of Husband's pension. She emphasized the uniqueness associated with valuing Husband's specific plan, especially as it related to the cost of living adjustment that is ultimately affected by the difference in the age at which Husband can retire without penalty (50 years of age) and the age when the COLA starts to impact the payout (55 years of age). The Court considered the testimony of Ms. Mack to be knowledgeable and reasonable in the method used to calculate the present value of the

pension. Wife's cross examination of the expert rightfully focused on the chosen means for selecting the interest rate that she applied when calculating the present value of the pension. Wife challenged Ms. Mack's use of the Composite Corporate Bond rate of 4.01% while suggesting that a significantly lower rate of 2.5% should be used to assess the pension at its current value. The Court understands the significance that assigning the interest rate places on the overall value for present day calculation conversions, and, based on the testimony of the expert witness, concludes that the use of the Composite Corporate Bond, while it applies a rate at the higher end of the options available for the Court to consider, is a reasonable rate to use in determining the present value of the pension at issue in this case. The acceptance of Husband's conclusions as to the present value of the City of Springfield pension also includes the determination that 96% of the total present day value of the pension plan is the marital estate portion of the present pension value.

The corresponding result of these findings is that the present value of Husband's City of Springfield Police Pension that shall be included in the marital estate is $991,830.00. Based upon all of the other awards distributing the remaining marital assets and debts, with an emphasis on achieving a reasonable balance of the distribution of the marital assets between each party, the Court awards nearly 65% of the value, or $641,830.00, to Husband while awarding an even $350,000.00 of the value to Wife,

an award of slightly more than 35% of the total present value of the pension as Wife's portion.

(3) The Value of all other retirement/ IRA/Deferred Compensation Accounts of the parties having an assigned value of $251,338.00, with $5000.00 value in the Shield Investment Club awarded to Husband, and $246,338.00 from all other such accounts awarded to Wife. By way of itemization, Wife is awarded an IRA account and a rollover IRA account, both owned in her name but funded with marital proceeds, having values of $33,700.00 and $42,058.00 respectively. Wife is also awarded an ING deferred compensation account and a Roth IRA, both owned in Husband's name but funded with marital proceeds, having values of $133,408.00 and $37,172.00 respectively. The value of $5,000.00 assessed for the Shield Investment Club awarded to Husband is an estimation by the Court based on the evidence and exhibits presented. Awarding these listed accounts to Wife is calculated by the Court in an effort to provide her financial vessels to invest future proceeds but also to provide her financial portfolio with some liquidity to access cash, should she need or desire to, and to be able to do so without imposition of major financial penalties.

The awarding of these accounts to Wife is also in contemplation of, and in conjunction with, the Court's division of the police pension between the parties with intentions of balancing the ultimate division of the marital estate equally between the Parties. Husband's monthly income will exceed Wife's as they go forward after the entry of the

Judgment for Dissolution thereby leaving the Court with less concern with Husband' s monthly cash flow as compared to Wife's. Thus, awarding Wife more liquid assets grants her greater flexibility to meet her financial needs. This award gives Wife greater freedom to convert funds for immediate use, while still providing a measureable amount of security that the accounts could be preserved and used for future needs as well.

(4) The Value of the Vehicles totaling $26,149.00, with one vehicle valued at $17,140.00 awarded to Wife, and two vehicles having a total value of $9,009.00 awarded to Husband. Wife has possession of a 2012 Kia Sportage with a value of $17,140.00, and Husband has possession of the 2003 GMC Envoy having a value of $7457.00. A third vehicle, a 1997 Honda Civic valued at $1552.00, is currently in possession of the parties' oldest child, who is essentially operating it with the permission and approval of Husband. There are no genuine disputes with respect to the value of the vehicles and their respective distribution set forth in this paragraph meets the expectations of the parties regarding these specific assets.

(5) Marital Debts from two Credit Cards totaling $10,696.00 assigned to Wife for immediate payment and closure of the charge accounts. The parties acquired certain debts on credit cards from charges incurred for the use and benefit of the parties during the course of their marriage. Specifically, Wife is ordered to pay off and close the Discover Card Account having a balance of $9,748.00, unless a method can be employed that allows Wife to keep

the account open while removing Husband's name from the account. Absent such an option, Wife shall close the account within 45 days of the entry of the Judgment. Wife is also assigned responsibility for the Lowe's Credit Account having a balance of $948.00, and is ordered to pay off and close this account in the same 45 day time frame as well, or at least undertake efforts to successfully remove Husband's name from the account if the account is to be kept open. Husband attempted to classify a Capitol One Credit Account, having a balance of $6,125.00, as marital debt subject to assignment in the Judgment; however, the Court heard no testimony that would justify such a finding, and a review of the records in Respondent's Exhibit 14 reveals that the balance was zero on that account in October of 2012, after the parties separated, and that the balance created between then and the trial date was not for the benefit of the parties in their marriage. That Capitol One credit account balance is assigned to Husband as his sole debt separate from the marital debt attributed to the overall functioning of the parties in their marriage. The assignment of this marital debt to Wife is made in recognition of the facts, as elicited from trial testimony, that Wife maintained responsibility for, and access to, both of the credit accounts once the parties separated. Additionally, Wife was awarded several assets as a part of the Judgment that can be liquidated to effectuate the Court's order to immediately close jointly held accounts in an effort to ultimately provide a a complete break between the parties. Ordering the Wife to close the accounts also helps eliminate the possibility of unnecessary

exposure for Husband that would otherwise result from continuing to have open credit accounts in his name that would be accessible to someone else. This is an unhealthy financial consequence for Husband that can best be adequately resolved with Wife's timely satisfaction of her obligations created by these provisions, and the Court believes, based on the totality of the rulings in this opinion, that Wife is best suited to accomplish this portion of order. Wife has access to the billing statements as custodian of the account, and has access to liquid funds to satisfy the remaining balances on the accounts. Responsibility for satisfying this debt properly rests with her.

Those five classifications of assets and debts comprise the totality of property and debts that the Court deems to be supported by the facts and the law for inclusion in the parties' marital estate. The awards to each party that govern the distributions of the marital estate have been itemized and explained in this memorandum and shall be memorialized in a Judgment hereafter prepared. After applying the Court's rulings and awarding the assets and debts as instructed in this opinion, Wife shall receive a slightly greater portion of the total value of the estate divided by the Court. By the Court's calculation, Husband is awarded total value from the marital estate of $657,839.00 and Wife is awarded a total value of $658,732.00 as her portion of the marital estate. This award is made with all consideration given to the statutory factors set forth in Section 503 of the Illinois Marriage and Dissolution of Marriage Act. The Court distinctly

recognizes the advantages afforded to Wife, who was awarded the marital residence, all equity therein, and all the comforts that accompany such an award as she attempts to maintain a similar lifestyle for herself and her daughter in the post-divorce world she now faces. Additionally, she benefitted from Husband's relatively clean departure from the residence, as he left with little more than clothes when he vacated the marital residence, and yet still voluntarily contributed to the overall financial needs of Wife and daughter by depositing $2,167.00 per month as unallocated support for them and their household throughout the separation period. Wife also, as previously pointed out in this memorandum, earns substantial freedom in her finances as the result of the ultimate distributions in this case as evidenced by the liquid nature of a large portion of the marital assets awarded to her as a part of the Judgment.

The Court's final breakdown of the distribution of the marital estate that resulted in a near equalization of the division of assets is also a factor in the Court's determination of the applicability of maintenance, an issue aggressively disputed between the parties. Initially the Court notes that it has given due consideration to all of the statutory factors set forth in 750 ILCS 5/504 in arriving at its maintenance ruling. In consideration of the ultimate distribution of property and debts accumulated over the course of a 20 year marriage, and based on the significant disparity in annual income earned between the parties, the Court finds that the needs of Wife continue to justify an award of maintenance

as she strives to maintain a lifestyle that compares to the quality of life she was accustomed to during the course of the marriage. The award of maintenance in this case is rehabilitative in nature designed to help Wife adjust to the ultimate goal of true financial independence as she begins re-entry into the fulltime work force. The award is also subject to review after 24 months, which is a time frame that should result in many changes impacting Wife's household. The Court considers that, at that time, the youngest child will have graduated high school and may by looking to further her education in college, which could bring new expenses to both parties. The award of child support entered pursuant to the parties' agreement will have been impacted by the child's high school graduation by that time frame as well, which potentially impacts Wife's cash flow depending on how the financial needs of the child are managed over the course of the next 24 months. It's also conceivable that Wife's living expenses will decrease once the review period has passed, and that her income from employment may have increased after two years of devoting fulltime to her employment.

Currently, Wife has accepted fulltime employment with her employer that will pay her $45,000.00, an increase from approximately $38,000.00 that she was earning during the separation period when she worked in a part-time position with the same employer. The Court accepted her testimony that she lost earning potential that was available to her from her previous employment, and that no legitimate openings exist

locally that would allow her to re-enter that field at a substantially increased pay scale. Her ability to advance her salary level past her current anticipated salary of $45,000.00 remains to be seen, and should be a part of any analysis as to the continued need for rehabilitative maintenance after the 24 month review period expires. Still, even with her raise of around $7,000.00 that she experienced by returning to fulltime employment, her annual salary is almost one-half of the annual earnings for Husband, who earned over $88,000.00 according to the latest year's tax filings. [sic], which further justifies continued maintenance contributions from Husband.

This determination to impose an obligation for reviewable rehabilitative maintenance is made with full acknowledgment of Husband's voluntary contributions made since the date of the separation. The Court is convinced that those contributions were essential to the ability of Wife and daughter to remain in their household and continuing to function through difficult times brought on by the parties' separation, and that those contributions served a rehabilitative function for Wife as she began the transition to a single income household. The Court is also convinced that Wife is still engaging in that transition, and continued rehabilitative maintenance is required to complete the transition.

With the Court's entry of the child support obligation of $1032.00 in this order and absent any additional order of maintenance, Wife will experience a decrease of $1135.00 in monthly income

that had been provided routinely by Husband since the parties' separation. As the Court just suggested, that $1135.00 monthly payment of unallocated support was a reasonable amount to assist the Wife in her rehabilitative efforts to achieve the balance of financial security and financial independence. Clearly, those rehabilitative efforts have been effective to some degree as Wife has already made strides in the workforce by obtaining fulltime employment and increased her annual salary. Consequently, the Court considers a continued award of maintenance at a reduced rate as the appropriate means of resolving the maintenance issue for the foreseeable future. An award of monthly maintenance at a reduced rate should serve to continue to support Wife in her adjustment to a single income household, while also encouraging her to seek further advancements in her employment. For these reasons, the Court awards maintenance to Wife in the amount of $600.00 per month to be reviewed at Wife's request after 24 months. Failure of Wife to seek further review of this maintenance award in a timely manner, set by this Court as no later than 60 days after the 24 month review period expires, shall constitute a waiver by Wife of any future request for maintenance, unless good cause can be shown as to Wife's failure to seek timely review, The monthly award of $600.00 is roughly one-half of the maintenance award she benefitted from during the separation, and is sufficient to accomplish the rehabilitative goal during the next 24 month period in light of all of the facts of this case, including the Court's distribution of the marital estate, and also in light of the Court's specific

determination that Wife's remaining inheritance proceeds are to be classified as non-marital property and awarded to her as her sole and separate property in the Judgment for Dissolution prepared in response to this opinion.

The Court makes this finding with respect to maintenance even though it designates approximately $72,000.00 as non-marital funds to be retained by Wife without claim or right thereto by Husband. The funds at issue, which were requested by Husband to be included in the marital estate, were received by Wife in late 2010 while the parties were still married and were obtained as proceeds of an inheritance from the estate of Wife's mother. Husband argued that Wife's actions of depositing the funds into a jointly held account constituted a presumption that the proceeds were a gift to the marriage that were subject to inclusion and disbursement as part of the overall marital estate. However, Wife can rebut the presumption that she intended to gift the proceeds to the marital estate by clear, convincing and unmistakable evidence. The Court believes the facts of this case demonstrate that Wife rebutted the presumption, and that the funds remaining from the proceeds of the inheritance are properly classified as non-marital.

Specifically, Wife testified that she deposited the proceeds from the inheritance in an account that was not in use by the parties at the time of the deposit. It had been created earlier on in the parties' marriage solely as a means for the parties to deposit funds for the ultimate purchase of a family vehicle. Once the vehicle was purchased, the parties did not

utilize the account until some years later when the inheritance was realized by Wife, and then it was used as a matter of convenience since Wife's mother had funds in the same banking institution, CEFCU, that were to be transferred as part of the inheritance. Testimony also suggests that no other funds went into the account such that there was no loss of identity as to the source of the funds. Husband argues that since Wife used some of the money from the account for the benefit of the marriage, then she clearly intended for all of the proceeds to be a gift to a marriage. Such an argument would certainly apply to the funds transferred by Wife from the account that went for unspecified use and benefit of the marriage, but the Court rejects that argument as applied to the remaining funds that Wife kept isolated in that account. The funds voluntarily withdrawn by Wife and used by the parties were unidentifiably comingled with marital assets to the point that Wife makes no attempt to even try and claim those spent proceeds as non-marital funds, or to seek reimbursement of those expenditures as contributions to the marital estate. But as to those funds specifically isolated in that account, the Court is convinced that Wife kept those funds separate and independent for a reason and possessed no intent to gift them to the overall marital estate. This is especially true in light of the numerous liquid accounts that the parties had at their disposal for depositing such funds. Instead of adding them to one of the existing IRA or deferred compensation accounts, Wife maintained those funds independently of the all others, thereby exhibiting,

in this Court's opinion, a clear and convincing intent to keep the funds free from the marital estate unless she specifically chose to withdraw them to use in the course of the marriage. Wife ultimately withdrew $72,083.54 of inheritance proceeds from that CEFCU account, and Wife is awarded the value of that withdraw in the form of the CEFCU savings account in her name that holds the remainder of those funds.

Two factors control the Court's determination that Husband must obtain a life insurance policy that will guarantee a benefit of $400,000.00, payable upon his untimely passing, to Wife, who shall be named the sole beneficiary of said proceeds. The Court finds that Husband is employed in the perilous field of law enforcement, and although Husband has progressed significantly through the ranks of the Springfield Police Department such that he avoids the daily dangers of routine street encounters and traffic stops, he is nevertheless at risk in his job. Also, a large portion of Wife's estate value awarded to her in this opinion is controlled by Husband's continued survival and ultimate receipt of his pension. Husband shall maintain said policy with Wife as an irrevocable beneficiary of the proceeds until such time as she has realized the full value of the marital estate awarded to her in the Judgment for Dissolution.

Finally, the Court declines to accept Wife's invitation to award her a reimbursement of college expenses she paid out on behalf of the parties' oldest daughter as well as relatively minor expenditures for medical and prescription costs uncovered by

medical insurance. This declination to grant this request is based with consideration given to Husband' s contributions since the parties separated and again with an acknowledgement to the circumstances surrounding his departure from the marital residence. He clearly made significant financial sacrifices to the benefit of Wife and daughter that undoubtedly offset the financial reimbursement sought by Wife for Lauren's unproductive first year of college, as well as the approximately $400.00 sought for medical and prescription medicine reimbursements.

This concludes the Court's opinion as to the Judgment that shall be drafted to govern the rulings contained herein. The Court hopes that this addresses all of the pending disputes and issues, but the Court acknowledges that some time has elapsed since the trial concluded and the parties provided their final summations, and the time of this opinion. Should there be any matters that need addressed, it is the Court's desire that the parties consult one another before submitting a final Judgment for entry in this case. To that end, counsel for Husband shall draft the Judgment for Dissolution consistent with this memorandum, and submit same for entry after it has been reviewed by Wife and her counsel. Counsel for Wife shall draft the Joint Parenting Agreement that the parties had intended to enter and said Agreement shall be incorporated into the final Judgment for Dissolution.

Enter: 7-30-13

/s/
John M. Madonia
Associate Circuit Judge

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT SANGAMON COUNTY, ILLINOIS

IN RE THE MARRIAGE OF:	)	
SHELLEY L.MUELLER,	)	
Petitioner,	)	
vs.	)	No.
	)	2012-D-590
CHRISTOPHER MUELLER,	)	
Respondent.	)	

JUDGMENT OF DISSOLUTION OF MARRIAGE

This matter comes on for hearing on the Petition for Dissolution of Marriage filed in this cause by Petitioner, SHELLEY L. MUELLER ("Shelley"), who appears in person and by her attorneys, Sorling Northrup, Michelle L. Blackbum of counsel, Respondent, CHRISTOPHER MUELLER ("Chris"), appears in person and by his attorney, William F. Moran, III; the parties having tried the issues in this case before the Court on April 16, 2013 and May 6, 2013; the Court having filed of record a Memorandum of Opinion on July 30, 2013, after written closing arguments by the parties; the parties approving the form of this judgment, as indicated by their signatures set forth at the conclusion of this document; Petitioner having provided testimony to the Court on the issue of grounds; and being fully advised of the premises; THE COURT FINDS AS FOLLOWS :

1. The court has jurisdiction of the parties and subject matter hereto.

2. The parties have been domiciled in the State of Illinois and Sangamon County in excess of ninety (90) days prior to the entry of this judgment, and were so domiciled at the time this action was commenced.

3. The parties were lawfully joined in marriage to each other in Springfield, Illinois, on May 16, 1992, and the marriage was registered in Sangamon County, Illinois.

4. Shelley is a competent adult employed by Nicoud Insurance, Springfield, Illinois.

5. Chris is a competent adult employed by the Springfield Police Department, Springfield, Illinois.

6. Two (2) children were born to the parties as a result of this marriage, namely, Lauren Mueller, now age 19, born July 5, 1994, who is emancipated, and Taylor Mueller, now age 16, born March 5, 1997. No other children were born to the marriage. Shelley is not now pregnant, and the parties have adopted no children.

7. It is in the best interest of the minor child, Taylor, that the parties be awarded her joint care, custody and control, with Shelley being the custodial parent and Chris having a right to liberal visitation.

8. Chris is employed and able to pay child support to Shelley. Chris has a "net" income of $5,160 per month for the purpose of calculating his child support obligation. There is no basis on this record for the Court to make a departure from the

support guidelines in this case.

9. The Court has included many additional findings concerning the financial issues pending between the parties in its Memorandum of Opinion filed of record in this cause on July 30, 2013. Said findings are incorporated into this judgment by this reference, as if fully set forth herein.

10. Irreconcilable differences have caused the irretrievable breakdown of the marriage, and future attempts at reconciliation would not be in the best interests of the family. The parties have not lived as husband and wife for a period of time in excess of six (6) months, as of the date of this judgment, and have filed affidavits in the appropriate form waiving the statutory requirement that they be separated for a period of two (2) years, in order to obtain a dissolution of their marriage on the grounds of irreconcilable differences.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE Court as follows:

A. Dissolution of Marriage

The bonds of matrimony heretofore existing between Shelley and Chris are hereby dissolved, and the parties are declared divorced.

B. Child Custody

1. Custody

The parties are awarded the joint care, custody and control of the minor child, Taylor, with Shelley being the custodial parent and Chris being entitled to liberal visitation.

2. Joint Parenting Agreement

The parties have filed of [sic] record in this case concurrently with this judgment a Joint Parenting Agreement which they have executed. The terms and provisions of the agreement are incorporated into this judgment by this reference, as if fully set forth herein.

3. Support of the Minor Child

(i) **Child Support**: Commencing upon the entry of this judgment, Chris shall pay to Shelley the sum of $1032 per month, as and for the support and maintenance of the minor child, Taylor. Said payments shall be made by Chris to Shelley through an appropriate order/notice to withhold income for child support served on his employer by Shelley's attorney. Chris shall pay all fees assessed by the Clerk of the Court for processing his support payments in this instance.

(ii) Chris' obligation to support the minor child shall continue until she is emancipated. Emancipation shall be defined as the earliest of the following events:

(1) Finishing high school coupled with the 18th birthday of the child;

(2) The establishment of an independent - residence by the child; or

(3) The marriage of the child.

(iii) **Medical Insurance and Expenses**: Chris shall provide the minor child with medical insurance, including major medical and dental

coverage, through his employer. The parties shall be equally responsible for the payment of any future deductible and medical (including prescription drugs), dental, orthodontia, ophthalmological, psychiatric or psychological expenses not covered by insurance. The party incurring the expense shall forward proof of payment to the other party within thirty (30) days, after which the receiving party shall have fourteen (14) days within which to reimburse the other party for their portion of the expense or invoke the mediation process. Shelley's request that Chris be ordered to reimburse her for past medical expenses is denied.

(iv) **Extracurricular Expenses:** The parties shall be equally responsible for the payment of the minor child's high school education expenses, including the cost of her participation in educational and athletic extracurricular activities. This shared responsibility includes the minor child's participation in competitive swimming. For out-of-town competitions, the Parties shall attempt to split the traveling as evenly as possible, such that they shall each be responsible for travel costs for the meets that they respectively attend. The remaining team fees, equipment and competition entry fees shall be evenly divided by the parties. The party incurring the expense shall forward proof of payment to the other party within thirty (30) days, after which the receiving party shall have fourteen (14) days within which to reimburse the other party for their portion of the expense or invoke the mediation process.

(v) **Taylor's College Education:** The issue of the payment for post-secondary educational expenses for the minor child is expressly reserved.

(vi) **Miscellaneous Expenses:** Shelley's request that Chris be responsible for one-half of the minor child's automobile insurance is denied. In addition, Chris shall not be required to pay the cell phone bills for Shelley and/or the parties' children.

(vii) **Dependency Exemption:** Shelley shall be entitled to claim the minor child as a dependency exemption for tax purposes on her Federal and State Income Tax Returns. Chris shall execute and deliver to Shelley any document required by the taxing authorities for the purpose of assigning said exemptions.

(viii) **Educational Expenses for Lauren:** Shelley's request that Chris reimburse her for past college expenses for Lauren is denied. The issue of payment of any future post-secondary educational expenses for Lauren is reserved until further petition by an appropriate party and order of the Court. In the event that she qualifies, Chris shall be entitled to claim Lauren as a dependency exemption for tax purposes on his Federal and State Income Tax Returns.

C. <u>Distribution of Property</u>

1. The marital property and liabilities of the parties shall be split as set forth in this judgment, while both parties shall be awarded their non-marital property.

2. Shelley is awarded the following marital property:

(i) The personal property that is in her possession and control;

(ii) The 2012 Kia Sportage and 2002 Honda Accord, subject to any liens and encumbrances that may exist;

(iii) The Roth IRA in her name, Account No. 14B-715309, at Money Concepts Capital Corp, Palm Beach Gardens, Florida;

(iv) The Rollover IRA in her name, Account No. 14B-715275, at Money Concepts Capital Corp, Palm Beach Gardens, Florida;

(v) The Roth IRA in Chris' name, Account #202958991, at Janus, Boston, Massachusetts;

(vi) The Deferred Compensation account in Chris' name, Plan Number VK0867, at ING, Hartford, Connecticut;

(vii) The marital portion of Chris' pension with the City of Springfield awarded to her by the Court, as further defined in Paragraph 6 below; and

(viii) Any and all bank accounts, checking accounts, savings accounts, money market accounts, brokerage accounts, pension, retirement accounts and stocks and bonds currently in her

name, which are not specifically identified in this judgment.

3. Shelley is awarded as her separate non-marital property the remaining proceeds she received from her mother's estate in the amount of $72,083.54.

4. Chris is awarded the following marital property:

(i) The personal property that is in his possession and control;

(ii) The 2003 GMC Envoy and 1997 Honda Civic, subject to any liens and encumbrances that may exist;

(iii) The parties' interest in the Shield Investment Club;

(iv) The marital and non-marital portions of his pension with the City of Springfield awarded to him by the Court, as further defined in Paragraph 6 below; and

(v) Any and all bank accounts, checking accounts, saving accounts, money market accounts, brokerage accounts, pensions, retirement accounts and stocks and bonds currently in his name, which are not specifically identified in this judgment.

5. **Real Estate**: The interests in real estate owned by the parties shall be distributed as follows:

(i) The residence purchased during the marriage and located at 59 Sarah Avenue, Springfield, Illinois, shall become the exclusive property of Shelley. Shelley shall be solely responsible for all liens and encumbrances against said real estate, including property taxes, insurance, any mortgage and/or promissory note, utilities and the like, and shall indemnify and hold Chris harmless from any liability that he might have with regard to same. Shelley has refinanced the mortgage obligation on the property into her name alone, prior to the entry of this judgment, so Chris's name has been removed from any financial obligation related to the property. Chris has also executed and delivered to Shelley a Quit Claim Deed transferring all of his interest and title in the real estate to Shelley, so title to this property has effectively passed, as directed by the Court in its Memorandum of Opinion.

(ii) The time share purchased during the marriage and located at Indian Peaks, Fraser, Colorado, shall become the exclusive property of Chris. Chris shall be solely responsible for any liens and encumbrances against said property, including any outstanding loans, taxes, insurance, utilities, maintenance fees

and the like, and shall indemnify and hold Shelley harmless from any liability that she might have with regard to same.

6. **Springfield Police Pension Fund**: Chris has a fully vested interest in the Springfield Police Pension Fund ("Plan"). Chris's interest in the Fund shall be allocated between the parties as follows:

(i) A portion of the benefits earned by Chris in the Plan are and will be non-marital property as a result of his service with the Springfield Police Department prior to the parties' marriage and following the date the parties' divorce is final based upon the entry of this judgment. Shelley shall receive 35% of the marital portion of Chris's benefit in the Plan, as of his actual benefit commencement date. The initial monthly benefit Chris receives from the Plan shall be multiplied by a fraction, in order to determine the marital portion of the benefit. The numerator of the fraction shall be the total number of whole months Chris accrued benefits in the Plan from the date of the parties' marriage until the date of the entry of this judgment. The denominator of the fraction shall be the total number of whole months Chris accrued benefits in the Plan until his actual benefit commencement date. The resulting marital benefit shall then be

multiplied by .35 to determine Shelley's initial benefit amount from the Plan. Thereafter, Shelley's benefit amount will include 35% of the marital portion of any cost of living increase or other benefit enhancement provided to Chris by the Plan. Chris shall then receive the entire remaining balance of his vested accrued benefit under the Plan, including any and all sums not otherwise allocated to Shelley, and all contributions and accruals to his vested benefit which are non-marital in nature, as described above, and the remaining 65% of the marital portion of the benefit and any cost of living increase or other benefit enhancement provided to the Chris by the Plan.

(ii) The foregoing allocation to Shelley shall be implemented pursuant to the terms of a QILDRO under the applicable statutes, to be prepared by Shelley's attorneys.

(iii) The parties shall cooperate and make any amendments necessary to accomplish the pension allocation described above, in the event any applicable statute is interpreted or amended to change the requirements for a QILDRO.

(iv) As no survivor benefits are available to Shelley under the terms and provisions

of the Plan upon the entry of this judgment, Chris shall purchase within 30 days following the date of the entry of this judgment and maintain at his cost a term life insurance policy with a guaranteed benefit of $400,000 on his life, with Shelley being the owner and sole beneficiary of the policy, the death benefit being payable to Shelley upon Chris's untimely death, either prior to or following his actual receipt of benefits under the Plan. Chris shall maintain said of the policy, the death benefit being payable to Shelley upon Chris's untimely death, either prior to or following his actual receipt of benefits under the Plan. Chris shall maintain said insurance policy with Shelley as the irrevocable beneficiary for a period of 30 years following the date of the entry of this judgment, with a reputable company with an AM Best rating of "A" or higher. The policy shall be set up so that Shelley can receive confirmation that the insurance is in effect and promptly paid directly from the relevant insurance company. In the event Shelley predeceases Chris any time during the 30-year period, his obligation to maintain this insurance shall immediately be terminated.

7. Shelley shall be responsible to pay the following debts and liabilities:

(i) The Discover credit card account ending in 2203;

(ii) The Lowes credit card account ending in 1416; and

(iii) Any and all further debts or obligations incurred in her name alone, which are not specifically delineated in this judgment, since the date of the parties' separation on March 6, 2012.

8. Chris shall be responsible to pay the following debts and liabilities:

(i) The Capital One credit card account ending in 6574; and

(ii) Any and all further debts or obligations incurred in his name alone, which are not specifically delineated in this judgment since the date of the parties' separation on March 6, 2012.

9. Shelley shall be responsible for the payment of any debts assigned to her pursuant to the terms of this judgment, and shall indemnify and hold Chris harmless from same, including costs and attorney's fees actually incurred in the defense of any action for said debts, as well as for attorney's fees incurred in seeking indemnification from Shelley.

10. Chris shall be responsible for the payment of any debts assigned to him pursuant to the terms of this judgment, and shall indemnify and hold Shelley harmless from same, including costs and attorney's fees actually incurred in the defense of any action for said debts, as well as for attorney's fees incurred in

seeking indemnification from Chris.

11. Each party shall destroy all joint credit cards and all credit cards in their respective possession that are in the name of the other party, and shall refrain from any conduct which may tend to create liability to third person in the other, following the entry of this judgment. Further, Shelley shall be required to pay off and close the Discover and Lowes credit card accounts identified above, within 45 days of the date of the entry of this judgment, unless a method can be employed that allows her to keep the account open while removing Chris's name and liability from the account.

12. Both parties shall be required to cooperate with each other and execute any and all documents necessary to effectuate the property transfers ordered in this judgment.

13. Except as herein provided, all of the rights, claims and demands of each party against the other growing out of the marital relationship shall be and the same are forever barred, released, extinguished and terminated; that all right, title, claim and interest of each party in and to the property of the other, real, personal and mixed, that he or she now owns, or may hereafter acquire, by way of dower, homestead or otherwise, be and the same are hereby forever barred, released and terminated.

D. <u>Maintenance</u>

Beginning September 1, 2013, Chris shall pay $600 per month of rehabilitative maintenance to Shelley. This award is reviewable by Shelley after 24 months. Failure of Shelley to seek review of this

maintenance award within 60 days following the 24-month period, shall constitute a waiver on her part of any future request for maintenance, unless good cause is shown for her failure to seek timely review. If timely review is not sought by Shelley, Chris's obligation to pay maintenance shall terminate immediately upon the expiration of the 60-day review period. Chris's obligation to make these maintenance payments shall also terminate upon the first to occur of the following events: 1) the death of Chris; 2) the death of Shelley; 3) the remarriage of Shelley; or 4) the cohabitation of Shelley with another person on a resident, continuing, conjugal basis, as found by a court of competent jurisdiction upon proper notice, petition and hearing. The occurrence of the first of the foregoing events shall forever terminate Chris's obligation to pay and Shelley's right to receive maintenance payments due thereafter. Termination shall not apply to any arrearage remaining unpaid on the termination date. The sums paid by Chris shall be included in the gross income of Shelley and deductible from the gross income of Chris for purpose of Federal and State income taxation. Chris shall not be awarded maintenance from Shelley, and shall be forever barred from the receipt of same under the terms and provisions of this judgment.

E. Attorney's Fees

F. Reservation of Jurisdiction

The Court hereby expressly retains jurisdiction of this cause for the purpose of enforcing the terms and conditions of this judgment.

G. Final and Appealable Order

There is no just cause to delay the enforcement or appeal of this judgment.

ENTERED: 9-17-13

/s/_____
Judge

APPROVED AS TO FORM:

/s/_____
Petitioner

/s/_____
Respondent

THIS JUDGMENT PREPARED BY:

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Section 503 of Chapter 750 of the Illinois Compiled Statutes

750 Ill. Comp. Stat. 5/503 (2014)

§ 503. Disposition of property.

(a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent;

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse;

(6) property acquired before the marriage;

(7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

(b)(1) For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.

(2) For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code) acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of the marriage are presumed to be marital property, regardless of which spouse participates in the pension plan. The presumption that these pension benefits are marital property is overcome by a showing that the pension benefits were acquired by a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is

enforceable under Section 1-119 of the Illinois Pension Code.

The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

(3) For purposes of distribution of property under this Section, all stock options granted to either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, whether vested or non-vested or whether their value is ascertainable, are presumed to be marital property. This presumption of marital property is overcome by a showing that the stock options were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock options between the parties at the time of the judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options may not be then determinable and that the actual division of the options may not occur until a future date. In making the allocation between the parties, the

court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

(i) All circumstances underlying the grant of the stock option including but not limited to whether the grant was for past, present, or future efforts, or any combination thereof.

(ii) The length of time from the grant of the option to the time the option is exercisable.

(b-5) As to any policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes marital property, whether whole life, term life, group term life, universal life, or other form of life insurance policy, and whether or not the value is ascertainable, the court shall allocate ownership, death benefits or the right to assign death benefits, and the obligation for premium payments, if any, equitably between the parties at the time of the judgment for dissolution or declaration of invalidity of marriage.

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

(1) When marital and non-marital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution, subject to the provisions of paragraph (2) of this subsection; provided that

if marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection.

(2) When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation; provided, that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence, or was a gift, or, in the case of a contribution of personal effort of a spouse to non-marital property, unless the effort is significant and results in substantial appreciation of the non-marital property. Personal effort of a spouse shall be deemed a contribution by the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the

court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any such decrease attributable to a payment deemed to have been an advance from the parties' marital estate under subsection (c-1)(2) of Section 501 and (ii) the contribution of a spouse as a homemaker or to the family unit;

(2) the dissipation by each party of the marital or non-marital property, provided that a party's claim of dissipation is subject to the following conditions:

(i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;

(ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;

(iii) the notice of intent to claim dissipation shall be filed with the clerk of

the court and be served pursuant to applicable rules;

(iv) no dissipation shall be deemed to have occurred prior to 5 years before the filing of the petition for dissolution of marriage, or 3 years after the party claiming dissipation knew or should have known of the dissipation;

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any antenuptial agreement of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each

spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties.

(e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.

(f) In a proceeding for dissolution of marriage or declaration of invalidity of marriage or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, in determining the value of the marital and non-marital property for purposes of dividing the property, shall value the property as of the date of trial or some other date as close to the date of trial as is practicable.

(g) The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any

minor, dependent, or incompetent child of the parties. In making a determination under this subsection, the court may consider, among other things, the conviction of a party of any of the offenses set forth in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.3, 12-13, 12-14, 12-14.1, 12-15, or 12-16, or Section 12-3.05 except for subdivision (a)(4) or (g)(1), of the Criminal Code of 1961 or the Criminal Code of 2012[3] if the victim is a child of one or both of the parties, and there is a need for, and cost of, care, healing and counseling for the child who is the victim of the crime.

(h) Unless specifically directed by a reviewing court, or upon good cause shown, the court shall not on remand consider any increase or decrease in the value of any "marital" or "non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.

(i) The court may make such judgments affecting the marital property as may be just and may enforce such judgments by ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court.

(j) After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be

heard and decided, in accordance with the following provisions:

(1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 30 days after the closing of proofs in the final hearing or within such other period as the court orders.

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.

(3) The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or former counsel; and such a waiver shall not constitute a prerequisite to a hearing for contribution. If either party's presentation on contribution, however, includes evidence within the scope of the attorney-client privilege, the disclosure or disclosures shall be narrowly construed and shall not be deemed by the court to constitute a general waiver of the privilege as to matters beyond the scope of the presentation.

(4) No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of

Section 508.

(5) A contribution award (payable to either the petitioning party or the party's counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508.

(6) The changes to this Section 503 made by this amendatory Act of 1996 apply to cases pending on or after June 1, 1997, except as otherwise provided in Section 508.

(k) The changes made to this Section by Public Act 97-941 apply only to petitions for dissolution of marriage filed on or after January 1, 2013 (the effective date of Public Act 97-941).