

P E N N S Y L V A N I A LAW WEEKLY

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PENSIONS REVISITED

The making of a remedy: the Social Security offset

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When the Divorce Code of 1980 became law, pensions were included as assets subject to equitable distribution. Prior to 1978, benefits under the Civil Service Retirement Act (CSRA) were excluded from equitable distribution; in 1978, that law was amended to permit a Civil Service Retirement System (CSRS) pension to be subject to equitable distribution. 5 U.S.C. Section 8345(j)(1).

As the law on pensions evolved, a CSRS pension came to be treated differently than a private pension with regard to equitable distribution of marital property because a person receiving a CSRS pension does not fund a future Social Security benefit. Simply put, the CSRS pension substitutes for the receipt of Social Security benefits upon retirement.

The contributions to Social Security are mandated by the Internal Revenue Code. 26 U.S.C.S Section 3101 and most individuals, who are not participants in CSRS or a state pension, must contribute to Social Security. The essential difference between the two types of benefits (Social Security benefits vs. CSRS pension benefits) is that under Federal Law, Social Security benefits cannot be considered for equitable distribution while CSRS benefits can. Presently, 6.2 percent of a worker's income is collected by an employer and paid over to the Social Security Administration up to a certain annual maximum.

The recent Superior Court case of *Rimel v. Rimel*, 913 A.2d 289 (Pa. Super. 2006) reversed the Court of Common Pleas of Dauphin County in a divorce matter dealing with the CSRS pension of a party who had also worked in the private sector whereas the other party had been employed solely by private industry and had contributed to the Social Security system. The Superior Court held that the trial court was obligated to deduct a Social Security setoff from the CSRS pension and make further factual findings. The *Rimel* Court stated that there had been no published opinion concerning the situation where one party has a CSRS Pension and has also participated in the Social Security program and the other party has worked totally in the private sector.

In *Rimel*, Dianne Rimel had been employed during the marriage by the Pennsylvania America Water Company. James Rimel, the husband, had been primarily employed during the marriage by the United States Department of Defense and he had also served in the Pennsylvania Air

P E N N S Y L V A N I A LAW WEEKLY

National Guard. During the early years of marriage, James also served as a municipal police officer. As a civil service employee of the federal government, James did not participate in the Social Security program. In his employment as a police officer and in the Air National Guard, James did contribute to the Social Security benefit system.

In 1990, the Superior Court had occasion to examine the issue of a Civil Service Retirement System pension on the part of one spouse and Social Security benefit contributions with regard to the other spouse. *Cornbleth v. Cornbleth*, 580 A. 2d 369 (Pa. Super. 1990).

In that matter, the couple had been married for 24 years and each had a substantial retirement account. The husband had a CSRS pension and the wife had a private pension.

Social Security Offset

In *Cornbleth*, the court held that there had to be a Social Security offset with regard to the CSRS pension because the offset was the only way to correct the imbalance created by the fact that Social Security benefits were excluded from the marital estate. The Social Security offset is determined by computing the present value of the Social Security benefits of the one party and then deducting that value from the value of the CSRS pension of the other party. The rationale behind the Social Security offset of the CSRS pension is that the parties both contributed monies for future purposes, which would have otherwise been used for marital purposes. Because the Social Security benefit cannot be included in equitable distribution, equity demands that a Social Security offset be deducted from the value of a CSRS pension.

The doctrine of the Social Security offset was further refined in *Ende v. Ende*, 602 A.2d 641 (Pa. Super. 1992), whereby Howard Ende had been employed by the Pennsylvania State Police and Emilie Ende was employed in the private sector. In the case of Howard Ende, his employment as a state police officer afforded him no Social Security benefits. The Ende Court extended the rationale under *Cornbleth* to State employees who also had no Social Security benefit. Therefore, in the situation where a spouse is subject to a pension system which does not afford a Social Security benefit, the Social Security benefit will also be offset.

Later in 1992, the Superior Court held in *Schneeman v. Schneeman*, 615 A.2d 1369 (Pa. Super. 1995) that the rationale of *Cornbleth* and *Ende* be extended to a situation involving a state trooper who contributed to the State Employee Retirement System (SERS) and therefore did not contribute to the Social Security system. As with a CSRS pension, there had to be a Social Security offset with regard to an SERS Pension. Also see *Twillia v. Twilla*, 664 A.2d 1020 (Pa. Super. 1995) and *Cohenour v. Cohenour*, 696 A.2d 201 (Pa. Super. 1997).

In *Rimel*, the wife argued that where a CSRS participant had also participated in the Social Security program, there should be no offset, citing *Elhadj v. Elhadj*, 605 A.2d 1268 (Pa. Super. 1992) and *McClain v. McClain*, 693 A.2d 1355 (Pa. Super. 1997). In *Elhadj*, both parties to the divorce were CSRS employees and therefore neither paid Social Security taxes and neither was entitled to Social Security benefits. The Superior Court held that because neither was entitled to

P E N N S Y L V A N I A LAW WEEKLY

Social Security benefits and because both were CSRS employees, no Social Security offset was required. In McClain, the husband was a Federal employee who participated in a pension plan but not in the Social Security system. Husband had a CSRS pension and complained that said pension should not have been distributed as a marital asset because there was not a Social Security benefit offset. In this case, wife had worked less than a year during the marriage as a sales clerk in the retail field and therefore had minuscule benefits in the Social Security system; the wife had no pension. The McClain court found that the distribution of the CSRS pension without any Social Security offset was appropriate under the facts.

In Rimel, the Superior Court held that neither Elhadj nor McClain were applicable. In Rimel, the wife was employed and participated in the Social Security program throughout the marriage. The court therefore found that the Social Security benefits were comparable to an asset generated by marital efforts, which asset was shielded from equitable distribution. Thus, the offset must be considered a benefit to the wife and a detriment to the husband. The Rimel court agreed with the husband that he was entitled to a setoff against his CSRS pension and reversed the trial court finding that the court below had erred in failing to utilize a Social Security setoff when calculating the value of James Rimel's CSRS pension.

Fact Sensitive Setoff

The court also remanded for a determination of the calculation of the exact amount of the setoff based on factual findings, which were not included on the record, specifically the amount of time each party had earned Social Security benefits during the marriage. Thus, the setoff for Social Security must be fact sensitive in a case where one party has earned some Social Security benefits but primarily a CSRS pension and the other has solely contributed Social Security benefits.

The law concerning pensions as they relate to equitable distribution of marital property in a divorce matter is constantly evolving. For the first time, the court considered in Rimel a situation where one party participated during the marriage only in the Social Security system and the other party also contributed Social Security benefits but was primarily a government worker participating in the Civil Service Retirement System without making contributions to the Social Security system. This "hybrid" combines the marital contributions of the Civil Service System and the Social Security System by using the Social Security offset for the appropriate period of time. In giving up civil benefits, a spouse is not inclined to be very social when the other spouse gets to exclude those marital benefits contributed over the years. Thus the equitable remedy of the Social Security offset was judicially created. •