

VALUATION OBSERVATIONS

*Some practical observations from a practicing
business appraiser.*

VLC

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SOCIAL SECURITY BENEFITS INCOME VERSUS ASSETS

No, this is not a *Neville* discussion. We are all pretty familiar with the federal law prohibiting social security retirement benefits from being divided in a property distribution pursuant to divorce. Section 407(a), Title 42, U.S. Code provides that Social Security retirement benefits "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."

But the Clermont County Court of Common Pleas took this federal law one step too far, says the 12th District Court of Appeals. *Simpson v. Simpson, 2007-Ohio-224*. Although the parties agreed to a distribution of property, they needed court intervention to determine whether Teresa was entitled to spousal support.

Ronald's sole source of income consists of Social Security retirement benefits amounting to \$1,209.80 per month, while Teresa's income is comprised of Supplemental Security Income benefits amounting to \$386 per month, plus minimal additional sums earned from sewing jobs. The trial court determined that federal law prohibits an order of spousal support where the prospective obligor's only source of income is that of Social Security retirement benefits. As a result, the trial court summarily denied Teresa's request for spousal support.

In determining whether to award a claimant spousal support, a trial court must consider all of the factors in R.C. 3105.18(C)(1), "and not base its determination upon any one taken in isolation." See *Kaechele v. Kaechele (1988)*, 35 Ohio St.3d 93, 96. Notably, with respect to the first factor concerning the parties' income, Ohio courts have found that a trial court may consider pension and retirement benefits such as Social Security retirement benefits in considering the propriety and amount of spousal support. See *Cardone v. Cardone (May 6, 1998)*, *Summit App. No. 18349*.

Rather than make a determination of whether spousal support was appropriate and reasonable based on the factors, the trial court simply cited to federal law that it was prohibited from even considering the request for spousal support because Ronald's sole source of income was Social Security retirement benefits. While federal law may prohibit a trial court from attaching Social Security retirement benefits incident to a divorce proceeding for property division, a trial court may still consider such benefits as part

of a party's income in determining whether spousal support is appropriate and reasonable in light of all other statutory factors.

And consider this with respect to spousal support arrearages – the United States Congress has expressed that federal benefits, such as Social Security retirement benefits, may be subject to legal process to enforce spousal support obligations. See Section 659(a), Title 42, U.S. Code ("Notwithstanding any other provision of law (including section 407 of this title), moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia to any individual, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought by an individual obligee, to enforce the legal obligation of the individual to provide alimony").

So – the lesson of the day? When computing income for your divorce clients that are of retirement age, don't forget to include their Social Security retirement benefits. It may not be an asset subject to property division, but it is up for grabs when considering spousal support.

If you would like additional information, or have a question, please do not hesitate to call.

Very truly yours,

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Terri Lastovka is the founder of Valuation & Litigation Consulting, LLC. Her practice focuses on business valuations and litigation consulting in the areas of domestic relations, gift and estate tax, probate, shareholder disputes, economic damages, and forensic accounting. She draws from a wide range of experiences, including public accounting, law, banking, and CFO. She has received extensive training from the American Society of Appraisers in the area of business valuation and works closely with members of the bar to effectuate practical settlements. Terri also serves as the Director of Legal & Finance for Journey of Hope, a grass roots non-profit organization providing financial support to cancer survivors.