Social Security Merits Attention in Matrimonial Cases

By: Lawrence "Skip" Persick
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As the population ages so does the pool of people seeking a divorce. Whereas the divorce client in his or her 60's or 70's was once a rarity, that age group now seems to be more than fairly represented. Reasons for this are myriad; anything from the newly retired wage earner figuring out she and her spouse have grown apart over the years and she does not want to spend the next twenty or so years of her life with someone she only thought she knew, to the same reasons cited by younger clients. I personally have been involved in two instances of personality changes from a stroke being the reason for the breakup. And every practitioner has a story about the effects of Viagra on a marriage.

With that backdrop there is an obvious need for every family law practitioner to have a working knowledge of the basics of social security. The simplest rule to remember is "forty quarters." To qualify for social security benefits a person will have needed to work a total of ten years calculated in quarter year increments. Obviously these forty quarters need not be consecutive but they do have to be from employment that paid into the social security system.

To check or confirm these years of payments the Social Security Administration makes statements available; either a paper copy received in the mail or an on-line printout from the Administration's website, www.ssa.gov. These statements provide a list of the years worked and the wages or salary earned. Incidentally, not only will a social security statement answer questions on whether benefits are available and the amount, but they are also helpful in proving a party of any age's earning capacity in a support or equitable distribution proceeding.

As most of us know, social security benefits are not an asset subject to equitable distribution. That, however, does not mean that one party having full retirement benefits and the other party not qualifying is not relevant in terms of equitable distribution. Certainly raise this issue to any equitable distribution master or judge in that it is a benefit one spouse will receive and the other may not. Relatedly, if spouses are married for a total of ten years a spouse who does not qualify for his or her own social security retirement benefit can collect up to fifty percent of an ex-spouse's benefit. This does not diminish the wage earning spouse's social security retirement benefit, he or she will still receive everything they thought they would receive.

In most cases the social security retirement benefit a person earns through his or her own work history will be better than the one derived from a former spouse, but the derivative benefit is an economic necessity to some people and an emotional safety net

for others. In a situation where a divorced spouse qualifies for his or her own benefit and also a portion of the benefit of a former spouse, the recipient receives the higher of the two. It is also possible to claim both benefits. Divorced spouses may start collecting their divorced spousal benefit at age 66, the current full retirement age, and then switch over to his or her own benefit at age 70 and in so doing take the higher benefit going forward. This is called a restricted filing application since the assumption is that the recipient is seeking the highest consistent benefit, not a highbred of the two. A key consideration in all of this is the ten years of marriage. This may not seem important to a person in their 30's but to someone in their 50's or 60's, the impact can be huge. In cases that are close to this threshold, the practitioner may want to consider deferring the entry of the divorce decree for a few months to get the financially dependent spouse over the ten year mark.

To qualify for a spouse's social security retirement benefit, not only must the parties have been married for ten years but the marriage must have ended. "Ended" can mean either divorce or death. Also, the prospective recipient cannot have remarried. If that person has remarried, however, after a year he or she is eligible to collect a share of the new spouse's benefit assuming that spouse has qualified for their own retirement benefits. If a person has been married more than once and was married to each of those spouses ten years or more, and each of the those marriages has ended, that person may choose the highest of these various spousal retirement benefits.

When to start receiving benefits, either at the earliest possible age, 62, full retirement age, currently 66, or at the latest possible age, 70, can be a complicated and personal decision. Sometimes deferring receipt of benefits to full retirement age is not an acceptable option. Luckily the financial services industry is now very much in tune with the divorce world and trained financial planning professionals are happy to assist you or your clients.

From the equitable distribution prospective there is one other social security issue to have in mind. Although it is becoming increasingly rare, there are still people in the work force who legitimately did not pay into the social security system. This is the basis of the old "Cornbleth offset," named for Cornbleth v Cornbleth, 580 A.2d 369 (Pa. Superior, 1990). The husband in that case was a psychologist at a Veterans' Administration hospital. He participated in the Civil Service Retirement System (CSRS), a defined benefit retirement plan for federal employees where the employee did not pay into the social security system. The Superior Court held that it was appropriate to reduce the value of husband's CSRS pension for equitable distribution purposes to account for the social security benefit he would not be receiving. Although CSRS was replaced by the Federal Employees Retirement System (FERS), effective January 1, 1987, it is still appropriate to ask your present or past government employee client if he or she pays into social security and formulate your position accordingly.

Finally, parents receiving social security is much more common now than it was a generation ago. Social security disability and retirement benefits are included in income for child and spousal support computations under Pa.R.C.P. 1910.16-2(a)(6). A child's social security benefit, received because of a deceased, disabled or retired parent, is added to the parties' combined net incomes and addressed in Pa.R.C.P. 1910.6-2(b)(2). Depending on which parent is retaining the child's social security benefit, a portion of the presumptive amount of support can be backed out to account for the initial inclusion of the child's benefit.

In closing, like most issues involving the federal government, social security is a complicated issue every family law practitioner should at least consider in resolving a matrimonial case. Information is readily available on the Social Security Administration's website, as well as other sites. The trick is to be aware of the issues and know when to pursue the issue further.

Lawrence (Skip) Persick is a partner at Lamb McErlane PC in West Chester, PA and is credited for his ability to resolve complex family law issues. Skip represents clients involved in divorces, custody disputes and adoptions. His experience also includes cases dealing with juvenile dependency and the termination of parental rights.

Skip is a former assistant public defender for Chester County and serves as co-chair of the Chester County Bar Association's Family Law Section. He was recently nominated to serve as member of Council of the PBA Family Law Section. Skip can be reached at 610-430-8000. www.lambmcerlane.com

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