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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 12-473

DANNY DALE KELLEY APPELLANT V. CAROLYN FAYE KELLEY (now TAYLOR) APPELLEE	Opinion Delivered November 14, 2012 APPEAL FROM THE CLEVELAND COUNTY CIRCUIT COURT, [NO. E-92-75-2] HONORABLE SEARCY HARRELL, JR., JUDGE REVERSED

JOHN B. ROBBINS, Judge

Appellant Danny Dale Kelley and appellee Carolyn Kelley (now Taylor) were divorced on June 7, 1993. The parties entered into a property settlement agreement that was approved by the trial court and incorporated into the divorce decree. Included among the provisions was paragraph three of the divorce decree, which provides:

> That the pension benefits to be received by [Danny], when eligible, from the Railroad Retirement Board, Tier I and Tier II, shall be divided equally between the parties. [Carolyn] shall be responsible for any tax consequences she may incur for her receipt of one-half (1/2) of said benefits and same is to be paid directly to [Carolyn] by the Railroad Retirement Board, when [Carolyn] is eligible to draw same.
>
> (b) The Court hereby directs and orders both parties to cooperate in the preparation of any Qualified Domestic Relations Order necessary to accomplish this division.

Danny has retired, and the issue in this appeal is the enforceability of the parties' agreement to divide the Tier I Railroad Retirement benefits.[1]

[1]Tier I benefits correspond to those an employee would expect to receive were he covered under Social Security, while Tier II benefits are more akin to a private pension tied

There was a previous round of litigation between these parties initiated by Carolyn in 1994 when Danny was receiving Tier I and Tier II benefits as the result of a temporary disability. Carolyn then filed a petition asking that Danny be ordered to pay her one-half of his disability benefits pursuant to the divorce decree. The trial court entered an order on June 2, 1994, finding that Carolyn was not entitled to receive any portion of these benefits because the decree only contemplated one-half of the Tier I and Tier II benefits received by Danny when he is of retirement age and not one-half of any disability benefits he might receive. Carolyn appealed from that order, and in an unpublished opinion we affirmed, holding that the trial court's decision was not clearly erroneous. *See Kelley v. Kelley*, CA 94-892.

The present round of litigation from which this appeal arises began when Carolyn filed a motion for contempt on September 26, 2011. In her motion, Carolyn asserted that Danny had reached retirement age and was receiving his Tier I and Tier II benefits. Carolyn acknowledged that she was receiving one-half of Danny's Tier II benefits pursuant to the terms of the divorce decree. However, she asserted that Tier I benefits are not divisible by way of a Qualified Domestic Relations Order, and that Danny had refused to remit her portion of the Tier I benefits. Attached to Carolyn's motion was a letter to Danny dated July 15, 2011, wherein she informed him that the Railroad Retirement Board would not divide his Tier I benefits, and she asked him to pay one-half of those benefits to her directly. In her motion, Carolyn requested an order finding Danny in contempt for failing to pay Carolyn her portion of the Tier I benefits, as well as an order directing Danny to pay the same.

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to earnings and career service.

On November 18, 2011, Danny answered Carolyn's contempt motion. In his answer, Danny admitted that the divorce decree purported to divide his Tier I and Tier II benefits upon his retirement. However, Danny asserted that there is no legal authority to divide his Tier I benefits. As such, he maintained that the decree was void and unenforceable as it pertained to the Tier I benefits, and he asked that Carolyn's request to amend the decree and require direct payments of those benefits be denied. Danny also filed a motion to dismiss on January 3, 2012.

The matter was heard on February 23, 2012, and the trial court subsequently found that Danny was not in contempt. However, in a letter opinion incorporated into its final order entered on March 15, 2012, the trial court ordered Danny to pay one-half of his Tier I benefits to Carolyn. The trial court found, in relevant part:

> Nothing could be more clear than the fact that the parties agreed and understood that upon the Defendant's retirement, the Plaintiff would receive one-half of the Tier I benefits. It is obvious that the parties and the Court, at the time of the original 1993 Decree, did not understand that Tier I Railroad Retirement was different from other "retirement" plans and was not subject to a Qualified Domestic Relations Order. If they had been aware, the Order would have undoubtedly been drafted in a different manner. However, the Order itself reads specifically "That the pension benefits to be received by the Defendant, when eligible, from the Railroad Retirement Boards, Tier I and Tier II, shall be divided equally between the parties." The Order attempts to direct the Railroad Retirement Board to pay the proceeds direct[ly] to the Plaintiff. That part of the Order is not effective. However, that does not mean that the first part of the Order is not effective. Therefore, the Court specifically finds that the Order can be enforced as it is written and that the intention of the Court and the parties in 1993 should be enforced by the Court at this time. The Defendant shall pay one-half of the Tier I benefits to the Plaintiff upon receipt.

Danny Kelley now appeals from the March 15, 2012, order of the trial court, arguing that because federal law prohibits the division of Tier I Railroad Retirement benefits, the trial

court lacked the authority to enforce that provision of the divorce decree. Danny is correct, and therefore we must reverse the trial court's order directing Danny to pay Carolyn one-half of his Tier I retirement benefits.

The Railroad Retirement Act provides retirement benefits for railroad employees and, like Social Security, such benefits are not contractual and may be altered by Congress at any time. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). Pursuant to 45 U.S.C. § 213d(c)(3) (2006), which encompasses Tier I retirement benefits, entitlement to benefits for an employee's spouse terminates upon an absolute divorce. Except for satisfying child-support or alimony obligations, "no annuity [under the Act] shall be assignable or subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 45 U.S.C. § 231m(a); *Hisquierdo*, *supra*. When the trial court used legal process to enforce the parties' agreement to divide the Tier I benefits in the case at bar, this was an improper assignment of those benefits in contravention of the above federal law.

In *Hisquierdo*, *supra*, the California Supreme Court ruled that because the husband's railroad benefits under the Act would flow in part from his employment during the marriage, they were community property and subject to division upon divorce. However, the United States Supreme Court reversed, holding that pursuant to federal law the benefits resulting from employment during marriage and payable pursuant to the Railroad Retirement Act are not community property subject to division in the event of dissolution of marriage. The Supreme Court further held that, in a divorce proceeding, an award of presently available

community property to compensate the wife as an offset for her expected interest in her husband's Railroad Retirement benefits was improper. The Supreme Court wrote:

> [T]he community property interest that [the wife] seeks conflicts with § 231m, promises to diminish that portion of the benefit Congress has said should go to the retired worker alone, and threatens to penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck.

Hisquierdo, 439 U.S. at 590.

In the present case, Carolyn Kelley suggests that the Supreme Court's holding in *Hisquierdo* is not controlling here because, in that case, the issue was disputed and the trial court decided whether or not to divide the Tier I benefits. Carolyn does not quarrel with the proposition that Congress has limited the ability to assign Tier I benefits. However, she notes that in the present matter the division of those benefits was reached by a comprehensive property settlement agreement where the parties contracted to do certain things and divide certain property. She cites *Law v. Law*, 248 Ark. 894, 455 S.W.2d 854 (1970), for the well-settled proposition that when parties enter voluntarily into an independent property settlement agreement that is incorporated into a divorce decree, the court lacks authority to modify it.

However, we conclude that Tier I Railroad Retirement benefits cannot be divided even where, as here, the parties agree to such division in a property settlement agreement. This conclusion is compelled by the Arkansas Supreme Court's decision in *Gentry v. Gentry*, 327 Ark. 266, 938 S.W.2d 231 (1997).

In *Gentry*, *supra*, the issue presented was whether an agreement to divide Social Security benefits can be enforced by the courts of Arkansas notwithstanding the provisions of

federal law prohibiting the transfer or assignment of such benefits. In that case, the parties divorced in 1984, and they entered into a property settlement approved by the court that included a provision entitling the wife to one-half of the husband's future Social Security payments. When Mr. Gentry began receiving Social Security benefits in 1995 and refused to pay Ms. Gentry one-half of the benefits, Ms. Gentry filed a contempt petition for his failure to obey the property settlement agreement. Mr. Gentry admitted entering into the agreement, but contended that his Social Security benefits were nonassignable under federal law. The trial court disagreed with Mr. Gentry and found that the property settlement agreement was an enforceable contract.

The Arkansas Supreme Court in *Gentry* reversed the trial court because the parties' agreement violated 42 U.S.C. § 407(a) of the Social Security Act, which 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.

(emphasis in *Gentry*). The United States Supreme Court has adopted the position that § 407(a) imposes, "a broad bar against the use of any legal process to reach all social security benefits." *Philpott v. Essex Cnty. Welfare Bd.*, 409 U.S. 413, 417 (1973). In *Gentry*, our supreme court reasoned:

> It is generally agreed that under the Supremacy Clause, any state action is preempted by a conflicting federal law. *Kirk v. Kirk*, 577 A.2d 976, 979 (R.I. 1990); *see also Swan v. Swan*, 720 P.2d 747, 751–52 (Or. 1986) (stating that Congress intended to preempt state property-division law as applied to Social Security benefits of a spouse upon a divorce) and *Olson v. Olson*, 445 N.W.2d 1, 11 (N.D. 1989) (holding

> that Social Security is immune from adjustment by state courts in dividing marital property).
>
> The thrust of these decisions is that state courts are without power to take any action to enforce a private agreement dividing future payments of Social Security when such an agreement violates the statutory prohibition against transfer or assignment of future benefits. *See also Boulter v. Boulter*, 930 P.2d 112 (Nev. 1997).

327 Ark. at 269, 938 S.W.2d at 232.

In *Gentry*, our supreme court understood the rationale followed by the trial court in ruling that contracts entered into voluntarily must be enforced, and the supreme court recited the rule that a property settlement agreement incorporated into a divorce decree cannot be subsequently modified by the court. Nevertheless, the supreme court determined that the attempted future assignment of whatever benefits Mr. Gentry might receive from Social Security was preempted by the provision of 42 U.S.C. § 407(a), and held that the trial court was without jurisdiction to enforce an award of one-half of his Social Security benefits to Ms. Gentry.

There is little difference in the issue presented in this appeal from that presented in *Gentry*, with the exception that *Gentry* involved Social Security benefits and the instant case involves Tier I Railroad Retirement benefits. However, Tier I benefits are the railroad equivalent of Social Security benefits, and federal laws prohibit either from being assignable or subject to other legal process. *See* 45 U.S.C. § 231 m(a), 42 U.S.C. § 407(a). Therefore, based on our supreme court's disposition of *Gentry*, we hold that the trial court in the instant

matter lacked the authority to enforce the parties' attempted future assignment of Danny's Tier I retirement benefits.[2]

Finally, we address Carolyn's assertion on appeal that Danny is estopped from arguing that she is not entitled to one-half of his Tier I benefits because he took a contrary position during their 1994 litigation, when he stated in a counterpetition that the parties agreed that "she could receive one-half of his Tier I retirement only when he was eligible to draw same (believed to be age 62)." We do not agree that Danny is so estopped. The only issue raised in the 1994 litigation was whether railroad *disability* benefits (as opposed to railroad *retirement* benefits) were subject to division. The trial court held that they were not, and we affirmed that ruling on appeal. The issue raised in the present case regarding Tier I retirement benefits was not argued or decided during the 1994 round of litigation, and that issue is now ripe for decision.

We hold that the trial court did not have the authority to enforce the parties' agreement to divide Danny Kelley's Tier I Railroad Retirement benefits. That agreement was invalid and unenforceable when signed because it was in violation of federal law. Therefore, we reverse the order being appealed.

Reversed.

GLADWIN and HOOFMAN, JJ., agree.

F. Wilson Bynum, Jr., P.A., by: *F. Wilson Bynum, Jr.*, for appellant.

J. Slocum Pickell, for appellee.

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[2]We note that Congress enacted an exception to 45 U.S.C. § 231m(a) and 42 U.S.C. § 407(a) in 1975 when it enacted 42 U.S.C. § 659(a), which makes benefits subject to legal process to provide child support or make alimony payments. However, in neither *Gentry* nor the present case was there any award of child support or alimony, and this exception is inapplicable.