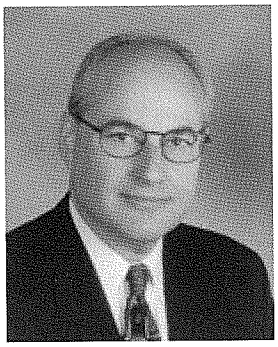

PROFESSOR LEX

BY HARVEY I. HAUER

Dear Professor Lex:

In speaking to a colleague, he advises me that there are new developments in family law pertaining to social security benefits. As I have never been clear as to how I should be handling social security entitlements, I would appreciate your thoughts on this subject.

Practitioner

Dear Practitioner:

I have received other inquiries regarding social security. The Court of Appeals, in *Biondo v Biondo*, ---NW2d ---, 2011 WL 891006 (Mich App, March 15, 2011) (No. 294694), deals with this issue. In *Biondo*, the parties agreed in their Judgment of Divorce to equalize their social security benefits. Mr. Biondo subsequently argued that federal law preempted the trial court from enforcing this provision.

The *Biondo* court stated:

> *"Under the Supremacy Clause of the United States Constitution, U.S. Const, art VI, cl 2, federal law preempts state law where Congress so intends." Konynenbelt v. Flagstar Bank, FSB, 242 Mich App 21, 25; 617 NW2d 706 (2000). Generally, federal law does not preempt laws governing divorce or domestic relations, a legal arena belonging to the states rather than the United States. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581; 99 S Ct 802; 59 L.Ed.2d 1 (1979). Thus, "[s]tate family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden." Id. (internal quotation omitted). Here, we consider whether the federal interest in social security benefits preempts enforcement of the parties' agreement to equalize their social security benefits.*

...federal statute at issue, § 407(a) of the Social Security Act:

> *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 USC § 407(a)].*

James Biondo's preemption argument rests on the language of this statute prohibiting transfer, assignment, "execution, levy, attachment, garnishment," or application of "other legal process" to a beneficiary's right to collect social security benefits. In Hisquierdo, 439 U.S. 572, the United States Supreme Court construed strikingly similar language in the railroad retirement act of 1974(RRA), 45 USC 231 et seq.FN1 The parties in Hisquierdo divorced in California. Id. at 573. The California Supreme Court ruled that the husband's railroad retirement benefits constituted community property subject to division in the divorce judgment. Id. The United States Supreme Court reversed the California Supreme Court, holding that 45 USC 231m preempted California's community property law. Id. at 590. The Supreme Court explained that the statutory language comprising 45 USC 231m reflected congressional intent that a "specified beneficiary" would receive benefits undiminished by "attachment and anticipation." Id. at 582. The statute's "critical terms" prohibiting assignment, garnishment, attachment or subjection to legal process "prevent[ ] the vagaries of state law from disrupting the national scheme, and guarantee [ ] a national uniformity that enhances the

effectiveness of congressional policy." Id. at 582, 584.

> *FN1. The statutory language at issue in Hisquierdo, 45 USC 231m(a), directs that notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated....*

Notably, in Hisquierdo the Supreme Court interpreted § 231m as not only barring automatic, direct payments of RRA benefits from one spouse to another, but as also prohibiting "offsetting award[s]" intended to compensate one spouse for the value of the benefit expected by the other. Id. at 588. The Supreme Court reasoned that because § 231m contemplates that payments are not to be "anticipated," an award intended to offset future payments would permit a divorcing spouse to receive a beneficial interest in retirement payments that had not yet accrued to the other spouse. Id. The Court further observed that a counterbalancing award of RRA benefits "would upset the statutory balance and impair [the retiree's] economic security just as surely as would a regular deduction from his benefit check." Id. Consequently, the Court concluded that state marital property laws must yield to Congress's determination that RRA benefits "should go to the retired worker alone." Id. at 590.

Like 45 USC 231m, in the RRA 42 USC 407(a) prohibits the assignment of social security benefits and removes social security benefits from the reach of "attachment, garnishment, or other legal process...." That virtually identical language appears in both statutes compels us to apply Hisquierdo, and to declare that § 407(a) preempts the social security equalization provision in the Biondos' consent judgment. We find additional support for our holding in Hisquierdo itself, where the Supreme Court specifically analogized the RRA to the Social Security Act, observing that the former RRA "was amended several times to make it conform more closely to the existing Social Security Act." Hisquierdo, 439 U.S. at 575 n 3.FN2

> *FN2. The Supreme Court in Hisquierdo also identified another similarity shared by the RRA and the Social Security Act: "Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time." Id. at 575.*

Furthermore, we find it significant that Congress created an exception to 42 USC 407(a) when it enacted 42 USC 659(a), which permits the states to employ social security benefits for the enforcement of child support and alimony obligations. Application of social security benefits for marital property purposes remains specifically excluded from this exception, as Congress declared in 42 USC 659(i)(3)(B)(ii) that the term "alimony" does not encompass "any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Therefore, we conclude that the circuit court erred by enforcing the consent judgment's social security provision.

In reaching this conclusion, we specifically reject James Biondo's suggestion that the circuit court did not possess subject-matter jurisdiction to enter the terms of the parties' consent judgment of divorce. That federal law has preempted a portion of the parties' consent judgment of divorce in no manner deprives the circuit court of subject-matter jurisdiction in this divorce matter. The Social Security Act simply does not divest state courts of subject-matter jurisdiction in divorce cases. Rather, the Supremacy Clause preempts state laws regarding the division of marital property only to the extent they are inconsistent with 42 USC 407(a). The Michigan Supreme Court has explained this distinction as follows:

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Although the circuit court erred in ordering the social security equalization, it did not exceed its subject-matter jurisdiction in doing so. Const 1963, art VI, § 13; MCL 552.6(1).

Having determined that federal law preempts the social security equalization formula in the Biondos' divorce judgment, we now address the consequences of this decision.

It is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud,

duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged. [Keyser v. Keyser, 182 Mich App 268, 269–270; 451 NW2d 587 (1990).]

This Court has described a mutual mistake as a situation "where the parties have a common intention," but the resulting judgment rests on a common error. Villadsen v. Villadsen, 123 Mich App 472, 477; 333 NW2d 311 (1983). In drafting the consent judgment, the parties incorrectly deemed their social security benefits marital property, to be equally divided along with the rest of the marital estate. Because no prior published Michigan case law removed social security benefits from the realm of marital property, we view the consent judgment's inclusion of the social security equalization term as a mutual mistake. Accordingly, on remand the circuit court may modify the judgment's property settlement provisions.

We anticipate that on remand the Biondos will contest whether the amount of the parties' anticipated social security benefits may play any part in a modified judgment reallocating marital property. We consider this important question to offer guidance to the parties and the circuit court. In Sparks v. Sparks, 440 Mich. 141, 159–160; 485 NW2d 893 (1992), our Supreme Court set forth the following relevant factors for consideration when dividing marital property: "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." The amount of a spouse's anticipated or received social security benefits qualifies as relevant to several of the Sparks factors, including the contributions each made to the marital estate, their "necessities and circumstances," and "general principles of equity." Id.

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We join the majority of state courts that have considered this question, and hold that the circuit court may consider the parties' anticipated social security benefits as one factor, among others, to be considered when devising an equitable distribution of marital property. We caution that in endeavoring to divide the marital estate, the court may not treat social security benefits as tantamount to a marital asset. Instead, the circuit court may take into account, in a general sense, the extent to which social security benefits received by the parties affect the Sparks factors.

The *Biondo* case was a case of first impression because, as the court stated, there was no prior published Michigan case law removing social security benefits from the realm of marital property. Therefore, the court found that the social security provision in the judgment was the result of a mutual mistake. As there now is a soon to be published opinion, it is my belief that judgments drafted hereafter, containing a provision for division of social security benefits, will not be set aside as a result of mutual mistake and will be deemed unenforceable. As to those judgments entered prior to *Biondo*, counsel should be aware of MCR 2.612(C)(1)(a), which provides that one may obtain relief from a judgment entered into by mistake. However, such a motion must be made within one year after the judgment, order or proceeding was entered or taken. MCR 2.612(C)(2).

Answer respectfully submitted by Harvey I. Hauer, Hauer & Snover.

Please send questions for Professor Lex to Hhauer@hauersnover.com. Include "Professor Lex" in the e-mail's subject line.

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.