

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 130918-U

No. 4-13-0918

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**  
May 19, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

In re: MARRIAGE OF	)	Appeal from
SHELLEY L. MUELLER,	)	Circuit Court of
Petitioner-Appellee,	)	Sangamon County
and	)	No. 12D590
CHRISTOPHER MUELLER,	)	
Respondent-Appellant.	)	Honorable
	)	John Madonia,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.  
Justice Knecht concurred in the judgment.  
Presiding Justice Appleton dissented.

**ORDER**

¶ 1 *Held:* The Appellate Court affirmed the trial court's judgment, concluding that the court did not err by (1) refusing to offset the value of the respondent's pension in lieu of Social Security benefits by the value of Social Security benefits he would have received had he participated in Social Security, and (2) excluding respondent's expert from testifying about the value of respondent's pension benefits.

¶ 2 In August 2012, petitioner, Shelley L. Mueller, filed a petition for dissolution of marriage from respondent, Christopher Mueller. In September 2013, following a hearing, the trial court entered judgment of dissolution of marriage, which awarded Shelley a portion of Christopher's police pension benefits. Pursuant to section 407(a) of the Social Security Act (42 U.S.C. § 407(a) (2012)) and the supreme court's holding in *In re Marriage of Crook*, 211 Ill. 2d 437, 449, 813 N.E.2d 198, 204 (2004), the court made its determination of the portion of Christopher's pension benefits to award Shelley without (1) considering the value of Shelley's anti-

pated Social Security benefits or (2) offsetting the value of Christopher's pension benefits by the value of Social Security benefits he would have received had he participated in Social Security instead of the pension in lieu of Social Security.

¶ 3 Christopher appeals, arguing that (1) because the trial court could not consider Shelley's Social Security benefits in determining the equitable distribution of marital property, fairness required the court to offset its valuation of Christopher's pension by the value of Social Security benefits that he would have received, had he participated; and (2) the court erred by excluding Christopher's expert's report and testimony about her calculation of Christopher's pension. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The following facts were gleaned from evidence presented at the hearing on Shelley's petition for dissolution of marriage. We recite only the facts pertinent to the issues presented in this appeal.

¶ 6 Shelley and Christopher married in May 1992 and had two children. Shelley is employed in the insurance industry, and she has Social Security tax withheld from her pay. Christopher is a police officer who, in lieu of participating in Social Security or having Social Security tax withheld from his pay, participates in the Springfield Police Pension Fund for his retirement and disability.

¶ 7 At the hearing on Shelley's petition for dissolution of marriage, Christopher presented testimony and a report from Sheila Mack, owner of "Equitable Solutions," a "pre-divorce financial consulting business." Without objection, the trial court qualified Mack to give an expert opinion as to the value of Christopher's pension. Mack's report and testimony addressed, among other things, the effect of the cost of living adjustment (COLA) on the value of Chris-

topher's pension, as well as the appropriate interest rate to use in calculating the actual value of the pension. Mack valued Christopher's pension at \$639,720.74.

¶ 8 Mack further testified that in arriving at her final calculation, she factored in an "offset" to compensate for the fact that Shelley's Social Security benefits would be shielded from the trial court's equitable consideration but Christopher's pension benefits in lieu of Social Security would not be. Had she not factored in that offset, the value of Christopher's pension would be \$991,830.

¶ 9 Given our disposition of this appeal, it is unnecessary to recite in detail the method Mack used to calculate the Social Security benefit offset-value of Christopher's pension. Suffice it to say, Mack more or less used the Social Security Administration's website to determine the value of Social Security benefits Christopher would have received had he participated, then subtracted that figure from the present value of Christopher's pension. The purpose of this method of valuation was to remove from the trial court's equitable consideration the true value of Christopher's pension, which he earned in lieu of Social Security, but which—unlike Shelley's Social Security benefits—was not statutorily exempted from consideration or distribution. Because Christopher's pension benefits were more lucrative than his Social Security benefits would have been, Mack offset the value of Christopher's pension only by an amount equivalent to the benefits Christopher would have earned had he participated in Social Security.

¶ 10 Citing *Crook*, Shelley objected to Mack's testimony and report as to the value of Christopher's pension because Mack applied the Social Security benefit offset. Christopher—apparently anticipating this objection—provided the trial court with a copy of *Crook* and argued that the supreme court explicitly left open the question of whether a court could, in the interests of equity, offset the value of a spouse's pension to put him or her "in a position similar to that of

the other spouse whose Social Security benefits will be statutorily exempt from equitable distribution." *Crook*, 211 Ill. 2d at 452, 813 N.E.2d at 206. After taking a brief recess to review *Crook*, the court sustained Shelley's objection to Mack's report and testimony, but allowed Christopher to make an offer of proof for the record. At the close of the hearing, the court reiterated that it would not consider the Social Security benefit offset.

¶ 11 The trial court later granted Christopher leave to file a revised report prepared by Mack as to the value of his pension *without* the Social Security offset applied, which reached a figure of \$991,830. The court adopted that figure in its final findings and judgment, which it entered in September 2013.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Christopher argues that (1) because the trial court could not consider Shelley's Social Security benefits in determining the equitable distribution of marital property, fairness required the court to offset its valuation of Christopher's pension by the value of Social Security benefits that he would have received had he participated; and (2) the court erred by excluding Mack's report and testimony about her calculation of Christopher's pension.

¶ 15 A. The Supreme Court's Decision in *Crook*

¶ 16 In *Crook*, 211 Ill. 2d at 442, 813 N.E.2d at 200, the supreme court addressed "whether a court may offset a perceived disparity in Social Security benefits by awarding one party to a divorce a greater share of marital pension benefits."

¶ 17 In addressing this question, the supreme court first turned to the statutory framework of the federal Social Security Act, which "imposes a broad bar against the use of any legal process to reach all [S]ocial [S]ecurity benefits." *Crook*, 211 Ill. 2d at 443, 813 N.E.2d at 201

(quoting *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973)). Specifically, section 407(a) of the Act provides as follows:

"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 U.S.C. § 407(a) (2012).

The Act also "explicitly exclude[s] any similar payment obligation arising from a 'community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.'" *Crook*, 211 Ill. 2d at 444, 813 N.E.2d at 201 (quoting 42 U.S.C. § 659(i)(3)(B)(ii) (2000)).

¶ 18 The supreme court in *Crook* noted that although the United States Supreme Court had never addressed the question presented, it had addressed a similar question in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). In *Hisquierdo*, the question was "whether retirement benefits awarded to an ex-spouse under the federal Railroad Retirement Act of 1974 (45 U.S.C. § 231 *et seq.* (2000)) could be subject to attachment or an offsetting award during state divorce proceedings." *Crook*, 211 Ill. 2d at 444, 813 N.E.2d at 201. The *Hisquierdo* Court answered that question in the negative based upon principles of federalism and the doctrine of preemption. The *Crook* court summarized the *Hisquierdo* Court's holding as follows:

"*Hisquierdo* held that ordering a direct beneficiary to pay a portion of the benefit to an ex-spouse would 'run[] contrary to the language and purpose' of the statutes enacted by Congress and would

'mechanically deprive' the direct beneficiary of a portion of the benefit that Congress indicated was solely for that beneficiary. *Hisquierdo*, 439 U.S. at 583, 59 L. Ed. 2d at 12, 99 S. Ct. at 809. Applying the preemption doctrine to the facts in *Hisquierdo* 'prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.' *Hisquierdo*, 439 U.S. at 584, 59 L. Ed. 2d at 12, 99 S. Ct. at 8[09-]10." *Crook*, 211 Ill. 2d at 446-47, 813 N.E.2d at 202-03.

¶ 19 The *Hisquierdo* Court, after holding that a direct division of Social Security benefits violated the federal statutory scheme, next considered whether the state court could indirectly reach an equitable result by granting the ex-wife an offset award of available community property to make up for the ex-husband's expected retirement benefits, which the Railroad Retirement Act shielded from direct distribution. The *Hisquierdo* Court rejected that argument, explaining that "[a]n offsetting award, however, would upset the statutory balance and impair [the ex-husband's] economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater." *Hisquierdo*, 439 U.S. at 588.

¶ 20 The *Crook* court, noting that courts in other jurisdictions have applied the reasoning of *Hisquierdo* to the division or offsetting of Social Security benefits in divorce proceedings, concluded that "*Hisquierdo* establishes two important points: Social Security benefits may not be divided directly or used as a basis for an offset during state dissolution proceedings." *Crook*, 211 Ill. 2d at 449, 813 N.E.2d at 204. In so concluding, the *Crook* court rejected the decisions of courts in other jurisdictions that approved of the trial court's consideration of Social Security

benefits for purposes of equitable distribution of marital property. *Crook*, 211 Ill. 2d at 449-51, 813 N.E.2d at 204-05. However, the court specifically noted that the issue of whether *Hisquierdo* prohibits awarding an offset to a spouse participating in a pension system in lieu of Social Security—the issue Christopher presents in this case—was not before it in *Crook*:

"Other state courts facing the issue of inequity have held that a spouse who participates in a pension system in lieu of Social Security must be placed in a position similar to that of the other spouse whose Social Security benefits will be statutorily exempt from equitable distribution. See *Cornbleth v. Cornbleth*, 397 Pa. Super. 421, [425,] 580 A.2d 369[, 371] (1990) [("[T]o the extent part of the pension might figuratively be considered 'in lieu of' a Social Security benefit we believe that portion should be exempted from the marital estate."); *Walker v. Walker*, 112 Ohio App. 3d 90, [93,] 677 N.E.2d 1252[,1253] (1996) [(holding that the trial court properly "reduced [the ex-husband's] pension plan value by the value of the benefits that would have accrued under Social Security if he had been a participant during the marriage."); *In re Marriage of Kelly*, 198 Ariz. 307, [309,] 9 P.3d 1046[, 1048] (2000) [(agreeing with the holding in *Cornbleth*)]. In this case, however, the parties have not argued the applicability of these cases or cited their rationale. Thus, we leave the resolution of that issue for another day." *Crook*, 211 Ill. 2d at 452, 813 N.E.2d at 206.

¶ 21

B. Decisions From Other Jurisdictions  
Regarding the Issue in This Case

¶ 22

Christopher has argued in the trial court and this court that Illinois should follow *Cornbleth, Walker, Kelly*, and the recent Oregon Supreme Court case of *In re Marriage of Herald and Steadman*, 355 Or. 104, \_\_\_ P.3d \_\_\_ (Mar. 20, 2014). Each of those cases held that the trial court may offset the value of a pension in lieu of Social Security to put the spouse participating in a pension program in a similar position as the spouse participating in Social Security. Although we find these cases well reasoned, we decline to follow them because they seem to us incompatible with the supreme court's holdings in *Crook*.

¶ 23

In its thoughtful decision in *Herald*, the Oregon Supreme Court noted that Illinois, along with Nebraska (*Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006)), Alaska (*Cox v. Cox*, 882 P.2d 909 (1994)), Nevada (*Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996)), and North Dakota (*Olson v. Olson*, 445 N.W.2d 1 (1989)), make up a minority of jurisdictions that "appear to have prohibited without exception any consideration of Social Security benefits that might or might not be available to either party in a marital property division." *Herald*, 355 Or. at 119, \_\_\_ P.3d \_\_\_. Among all of the aforementioned cases from the five minority jurisdictions, the *Herald* court singled out the following passage from *Crook*:

" 'Instructing a trial court to "consider" Social Security benefits  
\*\*\* either causes an actual difference in the asset distribution or it  
does not. If it does not, then the "consideration" is essentially  
without meaning. If it does, then the monetary value of the Social  
Security benefits the spouse would have received is taken away  
from that spouse and given to the other spouse to compensate for  
the anticipated difference. This works as an offset meant to equal-

ize the property distribution.' " *Herald*, 355 Or. At 119, \_\_\_ P.3d\_\_\_ (quoting *Crook*, 211 Ill. 2d at 451, 813 N.E.2d at 205).

The remainder of that passage reads as follows:

"That this type of 'consideration' amounts to an offset is recognized in the well-reasoned decisions from other state jurisdictions holding that under *Hisquierdo*, it is improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution." *Crook*, 211 Ill. 2d at 451, 813 N.E.2d at 205.

¶ 24 Based upon the *Crook* holdings that (1) "it is improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution" (*Crook*, 211 Ill. 2d at 451, 813 N.E.2d at 205) and (2) Social Security benefits "may not be divided directly or used as a basis for an offset during state dissolution proceedings" (*Crook*, 211 Ill. 2d at 449, 813 N.E.2d at 204), we decline to reverse the trial court's judgment for failing to apply the Social Security benefit offset to the value of Christopher's pension. Although the offset proposed by Christopher would (1) not require the court to consider the value of *Shelley's* Social Security benefits and (2) achieve a more equitable result, the offset would nonetheless "cause[] an actual difference in the asset distribution." *Crook*, 211 Ill. 2d at 451, 813 N.E.2d at 205. We read *Crook* to prohibit such an outcome. Although the supreme court stated in *Crook* that it was leaving resolution of the specific issue presented in this case for another day, we defer to the supreme court to determine whether that day has arrived and, if so, how to resolve the issue.

¶ 25 Because we conclude that the trial court did not err by refusing to offset the value of Christopher's pension by the value of Social Security benefits he would have received had he participated in Social Security, we likewise conclude that the court did not err by excluding

Mack's testimony and report regarding her calculation of the offset value of Christopher's pension.

¶ 26

### III. CONCLUSION

¶ 27

For the foregoing reasons, we affirm the trial court's judgment.

¶ 28

Affirmed.

¶ 29 JUSTICE APPLETON, dissenting.

¶ 30 I respectfully dissent. I recognize that our supreme court in *Crook*, 211 Ill. 2d at 451-52, while acknowledging the inequity of reserving Social Security benefits to the spouse who earned them without any offset to the other spouse, determined to leave the resolution of this issue for another day. I believe that day has arrived.

¶ 31 The Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/101 *et seq.* (West 2012)) is predicated on principles of equity. Without considering fault of the cause of the dissolution, the mandate of the Dissolution Act is to allocate the marital estate in just proportions. To completely ignore a substantial asset earned during the marriage is at cross-purposes with that mandate. Consider a dissolution action between an ex-husband who worked in a well-paying job, and who has retired and now receives his Social Security benefits, and his former spouse who has never worked outside the home. Would any trial court deny the ex-wife maintenance, even if the only income of the ex-husband is his Social Security benefit? I think not.

¶ 32 The division of the marital estate between spouses does not require the alienation of one party's Social Security benefits. As in this case, expert witnesses can readily analyze the present value of both Social Security and pension benefits, establishing cash values for each based upon life expectancy. The former spouse entitled to Social Security can determine his or her present monthly benefit amount and then offset that benefit against the present earned benefit of the other former spouse's pension.

¶ 33 I would reverse the property division made in this case and remand it to the trial court for a division of the marital property that reserves to the ex-wife her Social Security benefits but grants a corresponding offset of those benefits against the ex-husband's police pension.

