



# Trial Brief

August 21, 2012

**Re: Social Security in Divorce Cases**

---

Social Security benefits, including disability benefits, cannot be considered community property and are not divisible in a divorce because of federal preemption. *Richards v. Richards*, 659 S.W.2d 746, 749 (Tex. App.—Tyler 1983, no writ)(disability benefits); *Jackson v. Jackson*, No. 03-10-00736-CV (Tex. App.—Austin, 8/3/2011, no pet.)(Memorandum Dec.)(social security retirement benefits).

However, eligibility to receive social security or the amount of social security benefits can be considered by the trial court in making a fair and just division of community property.

In *Prague v. Prague*, 190 S.W.3d 31, 41 (Tex. App.—Dallas 2005, no pet.), the fact that the husband's social security retirement benefits were much greater than his wife's was one factor that supported a disproportionate division of community property in favor of the wife.

The trial court properly considered the value of the husband's social security retirement versus the wife's future teacher's retirement in dividing community property in *Phillips v. Phillips*, 75 S.W.3d 564, 573 (Tex. App.—Beaumont 2002, no pet.).

In the 2011 case of *Jackson v. Jackson*, no. 03-10-00736-CV (Tex. App.—Austin, 8/3/2011, no pet.)(memorandum dec.), the Austin Court of Appeals said, "...courts may *consider* a spouse's future social security benefits among the many factors bearing on a just and right division of the community property." (Emphasis in original).

Thus, consideration of social security benefits can be considered in a variety of situations in dividing community property, including when:

- One spouse is eligible for social security but the other is not;
- One spouse receives (or will receive) much more in social security than the other spouse; or
- A spouse's private pension or retirement will be less (or more) than the other spouse's social security.

Particularly in divorces involving older clients, the diligent attorney should obtain both spouse's Social Security Statements, which estimate future benefits. These statements are mailed annually. The statements can now be obtained on-line by the worker. (See <http://www.socialsecurity.gov/mystatement/>).

\* \* \*