LAW AND THE FAMILY

Social Security, Disability Benefits and Child Support

By Joel R. Brandes and Carole L. Weidman

New York Law Journal (p. 3, col. 1)
July 25, 1995

FOR MOST OF US, working with the Child Support Standards Act (CSSA) is a frightening prospect. Perhaps those who think they have completely mastered the ``Art of the Act'' better think again. For this reason and more, when certainty approaches us in handling some aspect of the CSSA it is more welcome than a cool breeze on a hot summer's day. The recent decisions involving Social Security and disability benefits are a grand addition to our developing an arsenal of cases that have interpreted the act since its inception.

Passaro v. Passaro*1 was an enforcement proceeding in which the Second Department reduced the amount of arrears by crediting the father for Social Security disability payments made directly to his children. The parties' 1980 divorce judgment provided for child support payments of $50 per week for each of the parties' two children. At the end of February 1980, the father suffered a severe back injury that resulted in his inability to work. He received his regular salary until April 12, 1980, at which time he became the recipient of disability payments of $276 per week, less a deduction for hospitalization insurance. He was entitled to receive those payments in 1981 as well.

The Appellate Division held that the trial court erred in not crediting the father with the amount of Social Security disability benefits to be received by the children, simply stating that the proceeding was distinguishable from Matter of Sergi v. Sergi,*2 where the Social Security disability benefits and increases for the children were contemplated as part of the total support and that here they were not.

Eleven years later in Matter of Graby v. Graby,*3 the father appealed from a Family Court order that determined that Social Security disability benefits paid to his children may not be credited against his child support obligation absent a finding that his share is ``unjust or inappropriate.'' Because the ``appeal considered for the first time since the enactment of the CSSA the question whether Social Security disability benefits paid to a disabled parent's children are a credit against the disabled parent's child support obligation'' leave to appeal was granted sua sponte.

Credit for Disability Payments

Justice Lawton, in a stunning decision, wrote a comprehensive and well reasoned opinion for the court, holding that Social

Security disability payments received by a child as a result of a noncustodial parent's disability shall be credited against the noncustodial parent's child support obligation. In his analysis he recognized that those payments are to be included in the disabled parent's income under Family Court Act (FCA) Sec.413(1)(b)(5) for the purpose of calculating a child support award under the State guidelines:

In those cases where the court determines that the child support award is ``unjust or inappropriate'' under Sec.413(1)(f), because of the credit received by the disabled parent, the court may alter the child support award. Moreover, because those payments are added to the disabled parent's income, only in the most unusual cases should the court alter the child support award because of the credit.

Petitioner and respondent were married in 1978 and divorced in 1990. The divorce judgment granted custody to respondent and required petitioner to pay child support of $400 per week. In January 1992, respondent petitioned for enforcement of those child support payments, and petitioner cross-petitioned for a downward modification on the basis of a substantial change in circumstance, i.e., his loss of employment on Aug. 22, 1991. At that time, petitioner's income consisted of unemployment benefits of $450 a week.

In September 1992, Family Court reduced petitioner's child support payments to $112.50 a week, plus $27.50 a week toward arrears. In August 1992, the Social Security Administration notified petitioner that based on his total disability he was eligible for benefits. Effective February 1992, petitioner became entitled to Social Security disability payments of $1,037 a month, and his children became entitled to payments totalling $518 per month. In January 1993, those payments were increased to $1,068 per month for respondent and $533 for the children. In October 1992, petitioner sought to modify the prior order of support based on his total disability. His income at that time consisted of the $1,037 disability payments and a monthly pension of $1,080.

The Family Court Hearing Examiner recalculated petitioner's basic child support obligation, based on his pension and Social Security disability benefits, to be $536.80 per month. Based on Passaro, the Hearing Examiner credited the Social Security disability payments paid to the children against his child support obligation. Family Court vacated the order and remitted the matter for a fact-finding hearing, concluding that, under the CSSA, disability payments to the children could be credited against petitioner's child support obligation only if it were determined that the child support award was ``unjust or inappropriate.'' Implicit in the ruling was the holding that the disability payments no longer were to be a credit against a child support obligation.

Credit, Historically

The Fourth Department disagreed, noting that historically a majority of jurisdictions have credited Social Security disability benefits paid on behalf of the children against the child support obligation of the disabled parent, although most jurisdictions that authorized such credit did not do so unconditionally. It also noted that New York courts have followed the majority view and have credited Social Security disability benefits paid for the benefit of

children toward a disabled parent's child support obligation, citing Passaro.*4

The Fourth Department recognized that in 1983, when Passaro was decided, no specific child support guidelinesexisted in New York. It also noted that since the passage of the Family Support Act of 1988, other jurisdictions have readdressed the issue and that a majority of them continue to support the proposition that Social Security disability benefits received by a disabled parent's child are a credit against that obligation.

Justice Lawton concluded that the passage of the Family Support Act of 1988, with the resulting enactment of state support guidelines, has clouded the way that the states have considered Social Security disability payments to the child of a disabled parent. He found that a problem arises in fitting those payments within guidelines that, in most instances, did not address them and that, although New York's CSSA*5 contains a detailed formula for determining child support awards, those payments are not directly addressed.

Defining `Income'

Justice Lawton recognized that FCA Sec.413(1)(b)(5) defines ``income'' and specifies that each parent's income includes the amount of income or compensation voluntarily deferred and income received, if any, from ``disability benefits'' and ``Social Security benefits.'' He noted that Sec.413(1)(b)(5) (vii) of the FCA specifies the deductions allowed from income before applying the CSSA guidelines and that no specific provision authorizes a deduction for Social Security benefits paid on behalf of a disabled parent's children.

Moreover, while Sec.413(1)(f) of the FCA specifies 10 factors, including income to the child, that the court must consider in determining whether to modify the guideline award because such award is ``unjust or inappropriate'' because Sec.413 (1) (f) does not define ``income'' to a child, Social Security disability payments are not expressly included under the statute as part of a child's income.

Although those payments are received by the child, they are not from a source wholly independent of the parents but rather are directly the result of the disabled parent's past efforts. Thus, the question is whether that money constitutes a support payment by the disabled parent, not whether it is one of 10 factors to be considered in determining an award.

To hold that the receipt of that money is one of 10 factors to be considered would place a disabled noncustodial parent in the same position as a noncustodial parent whose children received income from an independent source. That would be inappropriate because Social Security disability payments received by children, unlike other payments, are a federally established conduit of a disabled parent's past earnings to that individual's children.

Justice Lawton stated that the FCA contains no provision authorizing or prohibiting credit for Social Security benefits paid to a disabled parent's children against a disabled parent's child support obligation and concluded that the underlying theory, followed in Passaro and by the majority of other jurisdictions, that Social Security disability benefits paid to a child should be a

credit against the disabled parent's support obligation, is correct and should be followed.

They are analogous to payments received by a child on a parent's insurance policy and compensate for a parent's ``loss of gainful employment by providing for the fulfillment of one's moral and legal obligations to one's children.'' They are income ``earned'' by working and paying into the system and serve as a substitute for the wages that a parent would have earned but for the disability. Thus, the disability benefits received by the child are a form of support payment by the disabled parent.

The court also held that because the CSSA directs the inclusion of both ``disability benefits'' and ``Social Security benefits'' in a parent's income, the most equitable rule to follow is to include the Social Security benefits paid to the children in the disabled parent's income.

Consistency

It is uplifting to see consistency on the subject among the departments. In Patten v. Patten,*6 the Second Department affirmed an order of the Supreme Court that enforced that part of the parties' 1988 stipulation of settlement, that was incorporated in and survived their 1989 divorce judgment, which provided that the mother would accept the father's Social Security disability benefits on behalf of the children in lieu of his child support payments, and that he would be responsible for any deficit, i.e., if the benefits amounted to less than $5,200 per year.

The agreement further provided that if the plaintiff received a lumpsum payment for retroactive benefits on behalf of the children, she was to reimburse the defendant for the child support payments made by him for the period subsumed by the retroactive payment. After the parties were divorced the Social Security Administration approved the application for benefits on behalf of the children, and in October 1991, it remitted a lumpsum check to the plaintiff, as representative payee, of $14,200 to cover ``past benefits due'' and, thereafter, made monthly payments for the children totaling $532 per month.

The former husband moved for enforcement of the stipulation, and the mother countered that the provisions in question were illegal and, accordingly, unenforceable. In addition, she cross-moved for an upward modification of child support.

The Supreme Court granted the defendant's request for enforcement of the child support provisions relating to the Social Security payments, rejected the plaintiff's claim of illegality, and concluded that the parties' unequivocal stipulation should govern. In affirming, the Second Department stated that the principle that Social Security disability payments received by a child by virtue of the parent's disability may be credited toward the disabled parent's child support obligation was expressed by it in Passaro.

The court pointed out that in Graby the Fourth Department reexamined the issue and considered the continued validity of Passaro in light of the guidelines set forth in the CSSA. It determined that ``Social Security disability benefits received by a child as a result of a noncustodial parent's disability shall be credited against the noncustodial parent's child support obligation,'' and it merely stated it agreed with the Fourth

Department's reasoning and conclusion and affirmed the portion of the order appealed from which enforced the provisions of the otherwise uncontroverted stipulation.

More Than One Child

Recently, in Matter of Lago v. Trabucco,*7 the question before the Fourth Department was whether the Family Court properly denied respondent a credit or offset against his total support obligation for his oldest child for Social Security benefits received on behalf of his youngest son. Justice Callahan, writing the opinion, and cognizant of the court's 1994 ruling in Matter of Graby pointed out that the court must now determine `` . . . what happens when a support order covers more than one child and Social Security benefits are not received by all the children subject to the support order.''

This problem arose because, under federal law, a child is entitled to receive Social Security benefits only until he or she reaches the age of 18,*8 whereas under FCA Sec.413(1)(a), a parent is responsible for the support of a child until the child attains the age of 21.

The facts of the case are significant. The parties were divorced. In 1991 when respondent was ordered to pay $145 per week for the support of his two sons, he was employed fulltime earning about $38,000 a year. In April 1993, he filed a petition seeking a downward modification of the order, alleging that he had retired from fulltime employment, was receiving Social Security benefits and that petitioner was receiving Social Security benefits for the children in the amount of $771 per month.

The Hearing Examiner found that respondent had established a substantial change in circumstances and ordered that the prior support order be modified by reducing respondent's obligation to $100 per month effective Feb. 13, 1993, when he began receiving Social Security benefits, and by increasing it to $200 per month effective July 1, 1994, when the oldest son became 18. Respondent filed objections, contending that he was entitled to credit for the full amount of Social Security benefits received for both children, which would result in a zero support order.

In reliance on Graby, Family Court concluded that, because the children received $776 per month in Social Security benefits, which was more than what respondent was obligated to pay under the 1991 order, he was entitled to a credit for those payments, resulting in a zero support order. The court also determined that, when the older boy reached his 18th birthday, the prior support order would be reinstated and respondent would be obligated to pay $72.50 per week for that child because his Social Security benefits would have terminated.

The Fourth Department affirmed. It held that the trial court properly made a bifurcated application of the Graby rule with respect to the child who was no longer receiving Social Security benefits because under federal law, Social Security benefits paid for the benefit of a child pursuant to 42 USC Sec.402 are only for the use and benefit of that child, and the Social Security benefits received by petitioner on behalf of her youngest child were to be used exclusively for his benefit.

Thus, it concluded that respondent was not entitled to any

credit or offset for the Social Security benefits received on behalf of the youngest son against his total child support obligation after the eldest son's entitlement to Social Security benefits terminated. The child support obligation for respondent's eldest son after July 1, 1994, had to be calculated under the CSSA. The court properly calculated the child support obligation for respondent's eldest son under the CSSA. Because the amount that respondent would be required to pay under the CSSA was substantially the same as the amount he was obligated to pay under the prior support order, the Appellate Division held that the Family Court did not err in reinstating the prior support obligation with respect to the child who was not receiving Social Security benefits.

notes

(1) 92 AD2d 861, 459 NYS2d 839 (2d Dept., 1994).
(2) 58 AD2d 692.
(3) 196 AD2d 128, 607 NYS2d 988 (4th Dept., 1994).
(4) Citing Passaro v. Passaro, 92 AD2d 861.
(5) FCA 413 and Domestic Relations Law Sec.240(1-b).
(6) 203 AD2d 441, 610 NYS2d 575 (2d Dept, 1994).
(7) 207 AD2d 92, 621 NYS2d 824 (4th Dept., 1994).
(8) See 42 USC 402 (d)(1)(B).

Joel R. Brandes and Carole L. Weidman have law offices in New York City and Garden City. They co-authored, with the late Doris Jonas Freed and Henry H. Foster, Law and the Family, New York (Lawyers' Co-Operative Publishing Co., Rochester, N.Y.) and co-authored the annual supplements.