## LAW AND THE FAMILY

Social Security, Disability Benefits and Child Support

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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).

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