

## Social Security, and Child Support Revisited

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**W**ORKING WITH the Child Support Standards Act (CSSA) has a propensity to intimidate even the most courageous practitioner. Previously we applauded the consistency among the Departments in four cases concerning Social Security disability payments and child support.<sup>1</sup>

This was reflected in *Passaro v. Passaro*,<sup>2</sup> 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. A similar credit was given in *Matter of Graby v. Graby*<sup>3</sup> where the Fourth Department also included the payments in the father's income. In *Patten v. Patten*,<sup>4</sup> the Second Department approved of the *Graby* rationale.

And in *Matter of Lago v. Trabucco*,<sup>5</sup> where 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, it concluded 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. There, the Court reasoned that under federal law, Social Security benefits paid for the benefit of a child pursuant to 42 USC §402 are to be used 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. The Fourth Department determined respondent was not entitled to any credit or offset for the Social Security benefits received on behalf of the youngest son against the 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, and the court held that 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.

## **'Graby' Part II**

But that was then. As we have sometimes remarked, when certainty approaches us in handling some aspect of the CSSA, it is very welcome. Perhaps it was inevitable that the Court of Appeals would, once again, change all the rules just when we mastered the old ones.

In *Matter of Graby v. Graby* [6](#) Judge Titone, writing for a unanimous Court of Appeals, concluded that "under the precise guidelines of Family Court Act [FCA] §413," Social Security disability benefits paid to the parties' children on the basis of the non-custodial parent's disability should not be included as income of that parent or credited toward the support obligation. Those "benefit payments are more properly characterized as resources of the child to be considered in determining whether the support obligation is 'unjust or inappropriate.'" (see FCA §413[1][f][i].")

Petitioner and respondent were 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.

In September 1992, Family Court reduced petitioner's child support payments to \$112.50 a week, plus \$27.50 a week toward arrears. Just prior to that decision, the Social Security Administration notified petitioner that based on his disability he was eligible for Social Security disability benefits of \$1,037 a month retroactive to February 1992. As a result of his entitlement to the monthly Social Security disability payments, 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. Respondent sought an upward modification of support based upon petitioner's increase in income consisting of the \$1,037 disability payments and a monthly pension of \$1,080.

### **Recalculation of Obligation**

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 \$518

Social Security disability payments paid to the children against the 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."

The Fourth Department modified the determination to be made on remittal, stating that it was adopting the methodology followed in a majority of jurisdictions and would include the Social Security benefits paid to the children in the disabled parent's income and credit it against the parent's support obligation. It also stated that the Social Security payments the children received could be considered again in determining whether the non-custodial parent's obligation was unjust or inappropriate.

The Court of Appeals reversed the order and determination of the Appellate Division. It found merit to the dissent by one of the Justices of the Appellate Division that found no authority in the CSSA either to increase a non-custodial parent's income by the amount of Social Security disability payments paid to the children or to credit those benefits against the non-custodial parent's support obligation. It agreed with the respondent's argument on appeal that to treat the payments as resources of the child in determining if the payments are "unjust or inappropriate" fits within and advances the statutory scheme enacted by the Legislature, which is that such payments are not intended to displace the obligation of a parent to support his or her children, but are "designed to supplement existing resources."

In reaching its conclusion, the Court of Appeals reminded listeners of the primary goal of FCA §413, which is to establish equitable support awards that provide a 'fair and reasonable sum' for the child's needs within the parents' means. The Court noted that under the statutory guidelines of the CSSA (FCA §413) the first step is to calculate "combined parental income," which is based upon each parent's "gross income" less certain authorized deductions.

The Court pointed out that in calculating their respective "gross income," Social Security benefits paid to dependent children are not within the definition of income in its subdivision [1][b][5], nor are such payments listed as an authorized deduction in its subdivision [1][b][vii] [A-H]. The next step is to apply the appropriate child support percentage to the combined parental income below \$80,000, to reach an annual child support responsibility and then to ratably apportion that amount between the parents in the same proportion their gross income is to their combined parental income.

### **Basis for Rebuttal**

The non-custodial parent may then be directed to pay that amount to the custodial parent. The statute contains a rebuttable presumption that the amount calculated is

correct. It may only be rebutted and the support obligation adjusted upon the court's finding the non-custodial parent's support obligation is "unjust or inappropriate" under 414 [1][f].

In making that determination the court is guided by the list of 10 factors in subdivision [1][f][1-10], which includes the financial resources of the parents and those of the child. The court emphasized that "it is not until this discretionary assessment of the appropriateness of the support obligation that the statute first authorized the court to consider the financial resources of the child ... This separate treatment of the children's financial resources under §413(1)(f) indicates that they are distinct from parental income and not intended in any way to be counted within the resources available to satisfy the parent's child support obligation."

The Court of Appeals pointed out that granting the non-custodial parent a credit might, in many cases, effectively abolish the child support obligation of that parent who has regular and consistent income and at the same time disproportionately reduce the resources available to the children. And a credit for such payment would run afoul of the goal of protecting children "as much as possible from the overall decline in living standards that results from parent's maintaining two households."

The Court stated that absent such an explicit direction by the Legislature in its child support guidelines it would decline to reduce the resources ultimately available to children by treating Social Security disability payments as income of the disabled parent or as a credit against the parent's support obligation, as has been done by other states such as California and Utah.

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Notes

(1) See Brandes and Weidman, "Social Security Disability Benefits and Child Support," *New York Law Journal*, July 25, 1995, p.3, col. 1.

(2) 92 AD2d 861, 459 NYS2d 839 [2d Dept.,1994].

(3) 196 AD2d 128, 607 NYS2d 988 (4th Dept., 1994).

(4) 203 AD2d 441, 610 NYS2d 575 (2d Dept., 1994).

(5) 207 AD2d 92, 621 NYS2d 824 (4th Dept., 1994).

(6) 196 AD2d 128, 607 NYS2d 988 (4th Dept., 1994) rvd \_\_ NY2d \_\_ , *NYLJ*, Feb. 9, 1996, p. 26, col.2 (1996).

(7) The provisions of Domestic Relations Law §240(1-b) are identical to the provisions of FCA §413.

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