## LAW AND THE FAMILY

Social Security, Disability Benefits and Child Support

By Joel R. Brandes and Carole L. Weidman

[New York Law Journal](http://www.nylj.com/) (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.