Social Security Benefits and Their Impact on a Child Support Case

Eastern Regional Interstate Child Support Association
Annual Training Conference and Exposition 2021
Wednesday, May 26, 2021
12:30pm – 2pm ET

Virtual via Whova and Zoom

1. Workshop description: Are there payor parents in your office claiming to be disabled? What to do about children receiving benefits? Are you not sure what this means for your case? This session is for attorneys and their staff to understand the difference between Title II (SSDI) and Title XVI (SSI) benefits and how they differ when establishing and enforcing child support orders. There are some differences between states' laws, and the impact on UIFSA cases will also be discussed. Bring your questions and your experiences!
2. Speakers
    a. Lara Webb Fors, JD, Management Consultant, Public Knowledge®
3. Speaker / Moderator: Tish Keahna Kruzan, JD, Tribal Attorney, Red Cliff Nation
4. Overview of Session
    a. Definitions
    b. The Basics
    c. Establishment
    d. Enforcement
    e. Lump Sums Application to Arrears
    f. Implications in Intergovernmental Cases
5. Definition Section
    a. Common ("CP" = custodial parent; "NCP" = non-custodial parent; "IV-D" = federal child support program, Social Security Act, Part IV-D; "CS" = child support; "IWO" = income withholding order)
    b. "SS/SSA" – Social Security/Social Security Administration
    c. "SSDI" – Social Security Disability benefits (may sometimes allude to or include SS retirement benefits, because both are SS Title II benefits)

d. “SSR” – Social Security Retirement Benefits (Old-Age and Survivor’s), Title II
e. “SSI” – Supplemental Security Income, Title XVI benefits, welfare disability
f. “Disability Period” – period determined by SS; past period where benefits are deemed to be paid and sets the calculation for lump sum benefits; does not include the first five (5) months after the act or diagnosis of disability
g. “Insured” – the person who has worked and paid in FICA to qualify for either SSDI or retirement benefits; the person whose SS report provides for an auxiliary benefit
h. “AB” – auxiliary benefit; SSA’s name for the benefit available for the Insured’s dependents; may also be called “derivative benefits” or “family benefits”

6. The Basics (see www.ssa.gov):
    a. Disability Benefits:
        i. Social Security pays benefits to people who can’t work because they have a medical condition that’s expected to last at least one year or result in death.
        ii. Most people will need to have worked 10 years — earning at least 40 credits of coverage — to be eligible.
        iii. Apply online
        iv. Appealable How We Decide if You Still Have a Qualifying Disability (ssa.gov)
        v. Compassionate allowances and Wounded Warriors
        vi. Determined by state agency
        vii. Disability Benefits | SSA
        viii. Publications | SSA
        ix. What You Need to Know When You Get Social Security Disability Benefits (ssa.gov)
        x. What You Need to Know When You Get Supplemental Security Income (SSI) (ssa.gov)
    b. Domestic violence survivors: if SSA has evidence that one is harassed or abused or life is endangered, upon application, SSA will reassign an SSN if a new identify is desired (including one’s children).
    c. Title II benefits are social security disability insurance (SSDI), retirement benefits, and survivor benefits
        i. Only for adult workers; based on number of quarters worked and amount earned/paid in

    ii. Benefit amount to worker is income for purposes of calculating child support
    iii. At a certain amount (usually around $800), SSA provides for an auxiliary benefit (AB) for the worker's dependents, separate and additional to the worker's benefit
    iv. Title II disability benefits are available for the sixth full month after the date the disability began and paid the month following. (Jan 15 disability diagnosis or injury > July benefits are available > paid July's benefit in August)
    v. Fully attachable for child support
    vi. Paid per month based on the insured's birthday:
        1. Birthday 1-10 > Second Wednesday
        2. Birthday 11-20 > Third Wednesday
        3. Birthday 21-31 > Fourth Wednesday
    vii. Eligible for Medicare in 24th month after disability or 65, whichever is sooner
d. Title XVI benefits are called supplemental security income (SSI)
    i. For either children or adults with little to no recent work wages; it is paid from the federal government's general revenue and is considered welfare disability
    ii. 2021 federal amount is $794/mon individual - $1,191/mon couple (up 1.3% for COLA from 2020)
        1. Most states/territories supplement the federal amount in one or more categories
            a. States that do not: AZ, MS, ND, Northern Mariana Islands, WV
            b. Specific Fact Sheets: RI, DC, PA, NJ, VT, CA, HI, NV
    iii. Title XVI disability benefits are available in the first month the disability began and paid the month following.
    iv. Cannot be attached to pay child support
    v. Does not generate an AB.
    vi. Paid on the 1st of the month
    vii. If receiving both SSI and SSDI, then paid on the 3rd of the month
    viii. Eligible for Medicaid same month as disability (some states—part of the supplement)
e. Title II auxiliary/family benefits
    i. Dependents may be spouses, children, adult disabled children, or parents of the Insured if they meet criteria.

1. Insured's Spouse
    a. If 62 or older
    b. If disabled and 50 or older
    c. If caring for Insured's child younger than 16 or disabled
    d. (divorced spouse if 62 or older, unmarried, and was married to Insured more than 10 years—but these benefit does not reduce the Insured's individual or AB benefits)
2. Insured's children
    a. Unmarried
    b. Biological and adopted
    c. Some cases, stepchild or grandchild
    d. Younger than 18 unless in high school, then can go younger than 19
    e. Disabled before the age of 22
    f. (if a child receiving benefits is adopted by another, the child's benefits do not stop from the Insured's account)
3. SURVIVOR: Insured's parents, 62 or older, who were dependent upon the Insured for at least half of their support
4. https://www.ssa.gov/benefits/survivors/ifyou.html

ii. The number of dependents can be an ever-changing number.
1. Children age off
2. Children are born or adopted
3. Insureds marry and have new spouse/stepchildren which may count.
4. Parents of the Insured become dependent upon the Insured.

iii. Lapse
1. If improvement is expected, your first review generally will be six to 18 months after the date you became disabled.
2. If improvement is possible, but can't be predicted, we'll review your case about every three years.
3. If improvement is not expected, we'll review your case every seven years.

iv. Insured's Title II end:
1. Incarceration- post conviction after 30 days

        2. Warrant for felony flight or escape charges
        3. Violating parole/probation
    f. Role of the obligor
        i. It’s important to understand how Title II benefits provide auxiliary benefits, because the obligors on your case may be eligible to receive as an auxiliary, not just the Insured
            1. Widow/er
            2. Unmarried ex-spouse
            3. Disabled Child
            4. Caretaker of child under 16 on another’s SSA account
            5. Survivor and dependent upon deceased child

7. Establishment
    a. Title II
        i. Benefit amount to worker is income for purposes of calculating child support *Burns v. Edwards*, 367 N.J. Super. 29, 842 A.2d 186 (App. Div. 2004)
        ii. Guideline rules
            1. [Indiana] includes social security benefits, except SSI and survivor benefits received by or for other children residing in either parent’s home
                a. Guidelines also include the AB benefit for the child of the order in the disabled parent’s income, and the disabled parent is entitled to a credit for the amount of AB paid for the child
            2. Missouri does not include the AB benefit amount as part of the income of the insured parent. Disability benefits that are the entitlement of a child rather than a parent in his own right are not to be included in the monthly gross income of the parent for purposes of Mo. Sup. Ct. R. 88.01 and Mo. Civ. P. Form 14. *Gerlach v. Adair*, 211 S.W.3d 663, 665, 2007 Mo. App. LEXIS 135.
                a. While Mo. Sup. Ct. R. 88.01 does not require the income of children to be included in the Mo. Civ. P. Form 14 computation, Mo. Rev. Stat. § 452.340.1(1) states that the financial needs and resources of the child should be considered as a relevant factor when calculating child support, and children's income should be

considered in determining whether to deviate from the presumed correct child support amount. *Gerlach*.

b. Title XVI
    i. Benefit amount is not considered income for purposes of calculating child support
    ii. Federal Supplemental Security Income (SSI) benefits received by a disabled parent may not be utilized as income when calculating a child support obligation when such benefits are the sole source of support of that parent, and income cannot otherwise be imputed to the parent; child support guidelines specifically exempt SSI benefits and other means-tested income from being listed either as "gross income" or as "non-taxable income," and to require SSI benefits to be diverted for child-support purposes would undercut purpose of Congress in enacting the SSI program and hardly satisfy the intent of the Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA) to remove and keep individuals off the welfare rolls in any meaningful way. 45 C.F.R. § 302.56(c)(1)." *Burns v. Edwards*, 367 N.J. Super. 29, 842 A.2d 186 (App. Div. 2004)
    iii. Neither should the court use the child's individual SSI benefits to offset the NCP's presumed correct amount of support to pay per the child support guidelines because it would take away from the child benefits based on her own disability and intended to bring the child's income to a minimum subsistence level. *Gifford v. Benjamin*, 383 N.J. Super. 516, 520, 892 A.2d 738, 740, 2006 N.J. Super. LEXIS 62, *4
    iv. Are states including Title II benefits as income for purposes of calculating child support when Title XVI are also received?
c. Issue: Does the AB received by the CP get added to the support guideline for calculating the current support amount in this modification action?
    i. Pro
        1. Financial circumstances of the family – all the financial resources of the family should be included in the child support guidelines.
            a. The child should be placed in the same financial circumstance as if the family remained intact. In an intact family, the AB would be familial benefit used to pay the child's basic needs and expenses.

b. The benefits, although due to the child, are derived from the earnings and contributions of the obligor.

c. Some states include as income to the obligor and credit against the child support owed. See Iowa §598.22C(a)(3); *Vallardes v. Junco-Vallardes*, 30 So.3d 519 (Fla. 3d DCA 2010).

2. What if the CP gets the benefits due to his/her disability?

a. It should be included as income as the financial resources of the child should be considered in setting child support if it reduces the basic needs of the child. *In re Marriage of Quintana*, 30 P.3d 870 (Colo.App. 2001) ("Here, the trial court considered the children's social security disability payments as an adjustment based upon the fact that those payments were actually diminishing the children's basic needs. Indeed, mother does not dispute that these payments do, in fact, reduce the basic needs of the children." (citations omitted)).

ii. Con

1. The child's AB earned from the NCP Insured's SS account is not included anywhere on the form. Instead, the AB amount reduces the monthly CS order to be paid by that NCP.
2. If the CP in an Insured and an AB is generated off her account, then the same should be true: that AB amount for the children on the form should not be included in her income, but used for her percentage of cs responsibility (income shares model); *see State ex rel. Dep't of Children & Family Servs. v. Peters*, 2014-1800 (La. App. 1 Cir. 6/5/15), 174 So. 3d 1200; AB paid to child from CP's disability are not in the guidelines
3. Other case law goes on *ad nauseum* about how the AB are the property of the children and not for the use of the parents (*see Labrosciano v. Labrosciano,* 426 N.J. Super. 252, 43 A.3d 1260 (Ch. Div. 2011)), so you can't have it both ways.
4. *See In re Marriage of Amos*, 843 S.W.2d 946 (Mo. Ct. App. 1992) that AB received by children from CP's deceased husband (their stepfather)

should not have been included in CP's income on the guideline. (overruled in part by 5 S.W.3d 162 p.165 on different issue)

8. Enforcement
    a. Title II
        i. Fully attachable for child support
            1. "[F]ederal regulations governing federal personnel at 5 C.F.R. 581.103(c)(1) specify that SSDI is attachable for child support purposes. SSDI funds can be attached to satisfy child support obligations even if the support entitlement has been assigned to the State. The assignment does not change the nature of the debt, only the payee. *See, Knickerbocker v. Norman,* 938 F.2d 891 (8th Cir., Iowa,1991), *Shepherd v. Shepherd,* 467 N.W.2d 237 (Iowa 1991)." See Attachment of Social Security Benefits, DCL-00-103, Oct 6, 2000
            2. The plaintiff fails to identify a federal cause of action for challenging the garnishment of his Social Security benefits for child support. See *Trimble v. United States Soc. Sec.*, 369 F. App'x 27, 31 (11th Cir. 2010) (finding no private right of action to dispute child-support garnishment of Social Security benefits under Fifth Amendment, Administrative Procedure Act, Federal Tort Claims Act, or Social Security Act) [*5]; *Colbert v. Roling*, 233 F. App'x 587, 589-90 (8th Cir. 2007) (holding that neither 42 U.S.C. § 1983 nor the Consumer Credit Protection Act provide means to challenge child-support garnishment). The Social Security Act authorizes the garnishment of benefits to fulfill child support obligations. 42 U.S.C. § 659(a). The Supreme Court has held that "the Government cannot be held liable for honoring a writ of garnishment which is 'regular on its face' and has been issued by a court with subject-matter jurisdiction to issue such orders." *United States v. Morton*, 467 U.S. 822, 836, 104 S. Ct. 2769, 81 L. Ed. 2d 680 (1984) (quoting 42 U.S.C. § 659(f)(1)). Federal courts have no power to "look beyond the face of the court order" to assess the propriety of a writ of garnishment. Trimble, 369 F. App'x at 31. Moreover, sovereign immunity would bar such a claim because the United States has not

consented to such suits. See id. at 30. *Blakely v. United States HHS*, 2017 U.S. Dist. LEXIS 106878, *4-5

3. Final Rule Discussion
    a. Concurrent SSI and SSDI or Concurrent SSI and SSR Benefits, PIQ-18-02, June 25, 2018, ARCHIVED, stated that a state is precluded from garnishing concurrent SSDI/SSI benefits under 45 CFR §307.11(c)(3), through IWOs or liens on accounts
    b. States Harmless from Penalties from Failure to Comply with PIQ-18-02, AT-19-01, February 26, 2019 followed PIQ-18-02, and said that States would not be penalized for attaching concurrent SSDI/SSI benefits as prohibited by PIC-18-02; (last reviewed 12/13/19)
    c. June 9, 2020, Final Rule amended at 45 CFR §307.11(c)(3)(i) and (ii) and (iii) to prohibit sending a garnishment to NCP's financial account for Title II portion of benefit when NCP is also receiving SSI and gives States the option to prevent IWOs from going to SSA for Title II portion when NCP receives concurrent SSI benefits. See AT-20-07 for this and other technical corrections to the 2016 "Flexibility, Efficiency, and Modernization in Child Support Final Rule."

b. Title XIV
    i. Cannot be attached to pay child support
    ii. SSI benefits are not attachable, even if they are deposited in a bank account with non-SSI funds if the SSI funds are traceable to Social Security. See Attachment of Social Security Benefits, DCL-00-103, Oct 6, 2000; Garnishment of Supplemental Security Income Benefits, DCL-13-06, February 27, 2013; Garnishment of Federal Payments for Child Support Obligations, PIQ-09-01, August 25, 2009

c. Federal Case Closure Rules, 45 CFR §303.11(b)(9); may close if NCP receives SSI or both SSI and SSDI/SSR benefits
    i. https://ecfr.federalregister.gov/current/title-45/subtitle-B/chapter-III/part-303/section-303.11

9. Lump Sum benefits
   a. Title XVI benefits are not attachable and do not generate AB, so not an issue.
   b. Title II Retirement and Survivor benefits have a known start date, so no real concern with lump sum benefits if all dependents are identified.
      i. Application process can take 18-24 months to complete through hearing (exception: military or compassionate allowance)
      ii. Often, there 1st month of benefits is in the past, so there is a retroactive lump sum available for the Insured and the AB
   c. States vary on how to apply retroactive amounts
   d. Issue: Should the NCP have to file a motion to modify in order to get credit for auxiliary benefits paid directly to the CP for child support?
      i. Yes
         1. Child support is based on the financial circumstances of the family as a whole, including the income of both parents as well as expenses for the child(ren) such as daycare, insurance or extraordinary expenses.
            a. A disability and the resulting receipt of entitlement to Social Security benefits are changes in the condition of the parties and should be considered as part of a modification proceeding. *In re Marriage of Robinson*, 651 P.2d 454 (Colo.App.) 1982. A motion to modify is required before the child support obligation can be reduced by the amount of the AB. *In re Marriage of Wright*, 924 P.2d 1207, 1996 Colo. App. LEXIS 256, 20 BTR 1237
            b. The obligor may have other benefits or sources of income which would also impact the amount of support due.
            c. Some states include the benefits the child receives as income to the obligor in addition to offsetting the AB against the support obligation. *See* Indiana (supra), Iowa Code, §598.22C*; LaMothe v. LeBlanc*, 70 A.3d 977 (Vt. 2013) and affirmed *Lamothe v. Leblanc*, 2015 VT 78, 199 Vt. 448, 124 A.3d 817, 2015 Vt. LEXIS 58.

         2. The obligor is aware of the disability and should be required to file a motion to modify, and put the other party on notice, as the obligor would

be required to do for any other change in circumstances. Otherwise, the obligee may be placed in the position of receiving an overpayment and (in some states) being required to reimburse a portion of the support paid (see discussion below). The burden of seeking modification should lie with the party requesting it.

3. Even if the obligor is required to file a motion to modify child support, obligor may (depending on state law) seek an equitable adjustment on the arrears permitting the Court to review the equities of the situation.

ii. No

1. The AB benefits paid to the CP for the child from NCP's SSDI are just from another source, and absent any other relevant facts, there is no need to modify. Modifications are used to increase, decrease, or terminate the CS amount. *Board. v. Board*., 690 S.W.2d 380, 381 (Ky. 1985). (children's survivor benefits were credited as a set-off toward the parent's liability under the decree, quoting *Hamilton v. Hamilton,* Ky.App., 598 S.W.2d 767 (1980.)
2. "[P]ermitting the wife to receive child support in addition to social security, would result in an unreasonable windfall. The evidence indicates that there are adequate provisions for the children. Allowance of uncredited social security would actually modify the agreement of the parties and result in an unnecessary advantage." *Board. v. Board*, 690 S.W.2d 380, 382 (Ky. 1985)
3. SS benefits are paid because of the Insured's disability and serve as a substitute for the Insured's earnings. A credit for those AB to the child does not retroactively modify the Insured NCP's monthly CS order; it merely changes the source of the payment. *Crago v. Donovan*, 594 N.W.2d 726, (SD.1999); *Child Support Enforcement Agency v. Doe*, 92 Haw. 276, 990 P.2d 1158, 1999 Haw. App. LEXIS 199.

e. Issue: If a modification is required, is the NCP's relief limited to direct payments made after the date of filing, or can it be retroactive to the date the direct payments were received?

i. Only as of the date of the filing

1. [42 U.S.C. §666] Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement:

   (a)(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)-

   (C) not subject to retroactive modification by such State or by any other State; except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

ii. Credit back to date AB benefits began

1. Title II benefits should be an exception to the law that states a modification of a cs order cannot be made retroactive beyond the date of filing the motion to modify. Court's test:
   a. When the NCP insured has acted in good faith and promptly sought court approval of the credit of the AB against the CS order;
   b. There are no other assets reasonably available to pay the CS order; and
   c. There were no other changes in circumstances that would justify not awarding the credit
2. *See Settle v. Settle*, 208 W. Va. 310, 540 S.E.2d 178 (2000) where court found that NCP on a IV-D case filed a motion to modify when the IV-D agency came after him for an arrearage; NCP had stopped paying CS when the AB started and it exceeded his CS order CP did nothing to complain; trial court only credited the AB payments beginning on the date of his motion to modify; Supreme Court reversed and instructed all AB payments to be credited for the month to be paid, not to exceed the amount of current support; ("Nonetheless, whenever a court attempts to

fashion legal rules, it is important to be guided by reality and not by theory. The case of Mr. and Mrs. Farley is instructive because here we have struggling people from the blue-collar class. Mrs. Farley is currently represented by the Child Advocate Office for free, and although Mr. Farley's brief in the case before us was written by a private lawyer, one would suspect that if Mr. Farley is paying full freight, it is only because of his back Social Security award. In any event, Mr. Farley is not the type of person who consults his lawyer on a daily basis to make sure that his life is lived in conformity with the head notes in our latest advance sheets.") quoting *Farley v. Farley*, 412 S.E. 2d 261, at 264 (W.Va. 1991); Followed by *Louko v. McDonald*, 2011 VT 33, 189 Vt. 426, 22 A.3d 433, 2011 Vt. LEXIS 32.

f. Issue: When the IV-D agency learns that there is an AB available and that neither parent has applied, how active of a role can the IV-D agency take to get the AB for the children?
    i. Arguments:
        1. Tell the CP of the award and instruct CP to file for AB
            a. This is a potentially substantial financial resource for the children and the family. The CP does not need to be notified of any specific information other than there are benefits available through Social Security and the CP should apply on behalf of the children.
            b. The CP needs to supply information to Social Security so the CP will need to be included in the process regardless of who applies.
            c. The NCP should also be told to apply.
        2. Tell the NCP of the award and instruct the NCP to file for AB
            a. As the Insured, the NCP would be familiar with the SS process and should quickly be able to make contact and application
            b. NCP may be coerced into making application as part of a civil contempt action or condition of probation on a criminal case
    ii. Sub Issues:
        1. Are the any confidentiality issues with disclosing to the CP the NCP's status of even making the SSA application?

2. CP refuses to apply, either negligently or willfully; is it non-cooperation? Is case closure a consequence? [45 C.F.R. §303.11](#) Case Closure Criteria: (b) In order to be eligible for closure, the case must meet at least one of the following criteria: (16) In a non-IV–A case receiving services under § 302.33(a)(1) (i) or (iii), or under § 302.33(a)(1)(ii) when cooperation with the IV–D agency is not required of the recipient of services, the IV–D agency documents the circumstances of the recipient of service's noncooperation and an action by the recipient of services is essential for the next step in providing IV–D services.
3. The NCP refuses to apply; is it anything other than evidence of contempt or criminal non-support?
4. Should the IV-D agency have standing to apply for AB on the behalf of children on IV-D cases vis-à-vis the CP's assignment of the right to collect child support? Would this be limited to only the cases where the CP is currently receiving TANF?
   a. "In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part…"42 U.S.C.A. § 666

g. How to apply the retroactive amounts
h. Issues:
   i. What amount does the IV-D caseworker request to be paid towards the arrearage? All arrears vs. % of the arrears
   ii. Will SSA disclose to the IV-D agency that SSA sent CP AB lump sum?
   iii. How is NCP credited by the agency on the case when his lump sum is paid to the case?
      1. Agency, absent a court's evidentiary hearing and ruling, will most likely credit the lump sum payment amount towards the arrearages that accrued during the disability period.
      2. Note for when the monthly AB is less than the monthly CS: *Potter v. Potter*, 169 N.J. Super. 140, 404 A.2d 352 (App. Div. 1979) (NJ Supreme

Court ruled that the NCP's AB lump sum paid to children, though the monthly AB amount was less than the court-ordered support, satisfied the monthly cs judgment in full.)

iv. When the IV-D agency finds out about the AB lump sum, how is that credited?

1. The children's auxiliary lump sum award should be applied only to arrears which accrued during the time period for which the benefit was paid (in this case, 19 months from July 2014-January 2016).
    a. Excess over amount due during that time period is a gratuity.
        i. *Swaney v. State of Wyoming, Department of Family Services, Child Support Enforcement*, 256 P.3d 514, 516-517 (Wyo. 2011); *In re Marriage of Hohmann* 274 P.3d 27 (Kan.App. 2012)
        ii. C.R.S. §14-10-115(11)(d) "…. Any lump sum retirement or disability payments due to the retirement or disability of the noncustodial parent, received by the custodial parent as a result of the retirement or disability of the noncustodial parent, paid for a period of time that precedes the date of such benefit date eligibility, or any amount in excess of the established child support order or judgment, must be deemed a gratuity to the child." (Colorado)
    b. Consistency. This tracks the application of the benefit as an offset against current support which is limited to the current support due.
    c. The benefits belong to the child. If the lump sum AB is applied to arrears which accrued prior to the obligor's disability, the child is, in effect, paying the obligor's child support arrears or for their own support. *See Swaney v. State of Wyoming, Department of Family Services, Child Support Enforcement*, 256 P.3d 514, 516-517 (Wyo. 2011); *Windham v. Alabama*, 574 So. 2d. 853 (Ala. Civ. App. 1999).
    d. *In re Marriage of Wright*, 924 P.2d 1207 at 1208-1209: "At the outset, we note that the social security benefit paid to or for a child based on the eligibility of a parent is the child's benefit. 42 U.S.C. §

402(b) (1994). While the child's eligibility is dependent upon the eligibility of the parent and the amount of the child's benefit is based on the amount of the parent's benefit, the payment of the child's benefit does not reduce or otherwise affect the benefit payable to the eligible parent."

2. Equitable argument for dollar for dollar credit
    a. The Title II benefit is the new source of income for the insured. If the Title II benefit would result in an auxiliary benefit, then I think that the NCP's lump sum should be held in escrow until the auxiliary benefit is credited in the disability period. Then the NCP's lump sum money should go to any arrearage accrued on the case.
        i. If there are multiple cases and the AB do not satisfy the arrears that accrued in the disability period of all the cases, then the NCP's lump sum should go to that time period first.
    b. The CP should not benefit from a windfall. The state's support calculation guideline shows what the reasonable and appropriate child support should be. If the AB monies exceed that, the excess should be credited against other debts of the NCP for that family.

v. What if the NCP's lump sum paid off the arrearage that the AB lump sum would have covered?
1. AB lump sum treated as gift
    a. This leads to consistency as excess payments will be treated as a gratuity to the child.
    b. If an overpayment was found, and the CP is required to repay that amount, it could cause financial difficulty for the CP and the children.
2. Equitable argument for recoupment payment, credit against prior accrued arrears, or for future support payment
    a. Or in the case where there are no arrears by the time the AB lump sum is paid, then the insured's lump sum provides for the repayment of current child support due during the disability period;

this way any excess monthly AB payment would still be retained by the CP for the support of the children.

vi. What if NCP was not in arrears during the time pending the disability determination?

1. NCP should not be able to seek reimbursement:

   a. The child support paid was due and owing under a valid support order and the obligee properly used that money to provide for the needs and expenses of the children.

   b. The funds belong to the child, not the NCP, and the child has committed no inequitable conduct nor been unjustly enriched. *See Keith v. Purvis*, 982 So.2d 1033 (Miss. App. 2008): *Steel v. Hardwick*, 551 S.E.2d 42 (WV 2001).

   c. "[d]efendant is not entitled to a retroactive credit for that part of the lump sum social security disability benefit paid to his dependent children which exceeds the amount attributable to the period of his disability ($ 3,284.18). That amount belongs to his dependent children even though it exceeds the amount of child support ordered in the judgment of divorce. *Potts*, supra, 240 N.W.2d at 682; *Children & Youth Servs. v. Chorgo*, supra, 491 A.2d at 1378-79. Allowing a credit to defendant for future support when he is no longer disabled would frustrate the primary purpose of social security disability payments for dependent children which is to meet the "current needs of the dependents" in "regular, periodic installments." *Sheren v. Moseley*, 322 N.J. Super. 338, 344, 731 A.2d 52, 55, 1999 N.J. Super. LEXIS 219, *10

   d. [i]t is proper for the date of disability to be used for the purposes of establishing when Social Security benefits may be utilized as a substitute for income. See *Justice v. Scruggs*, 286 S.C. 165 at 166-67, 332 S.E.2d 106 at 107-08 (finding Social Security payments substitute for a parent's income in satisfying a child support obligation). Requiring a parent to pay pre-disability arrears merely puts the minor child in the financial position they would have been in if the parent paid the proper amount of support prior to becoming disabled. This rule properly focuses "on the importance of meeting the current needs of children, thereby protecting their right to regular and uninterrupted support." *Newman v. Newman*, 451 N.W.2d 843, 844 (Iowa 1990). Further, we agree with the Mississippi Court of Appeals that "[t]o hold otherwise would create an incentive for a non-custodial parent to withhold support payments in the hope or expectation that a future receipt of disability benefits by the child would later satisfy those obligations." *Keith*, 982 So.2d at 1037. *Scott v. Scott*, 422 S.C. 154, 161, 810 S.E.2d 439, 443, 2018 S.C. App. LEXIS 3, *8-9, 2018 WL 443203

e. A custodial parent cannot be expected to appropriately provide for the current needs of his or her children if the parent has to worry that the noncustodial parent may someday collect Social Security disability benefits that entitle the noncustodial parent to reimbursement for support previously paid. With what money is Pamela Gordon Davis expected to pay this judgment? *Davis v. Davis*, 780 N.W. 2d 707 (ND 2010), dissenting opinion.

2. Maybe:
   a. A Court may consider, but is not required to, grant a credit to a child support obligor when the lump sum AB duplicates child support paid. The credit, if granted, may be used to offset other obligations. Alternatively, the court may fashion a remedy including requiring reimbursement from funds that are discrete from the SSA benefits. *Stephenson v. Papineau*, 358 P3d. 86 (Kan. 2015). See *Rosenbaum v. Shaw*, 459 P.3d 467, 2020 Alas. LEXIS 14, 2020 WL 1223505 and *In re Marriage of Allen*, 241 Ariz. 314, 386 P.3d 1287, 2016 Ariz. App. LEXIS 283, 754 Ariz. Adv. Rep. 36 that cite and follow *Stephenson*.
   b. Court is without authority to enter orders re: SSA benefits.
      i. 42 U.S.C. §407(a) “The right of any person to any future payment under this title [42 USCS §§ 401 et seq.] shall not

be transferable or assignable, at law or in equity, and none of the moneys paid … under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

c. Dispute of 2.b.

   i. "Notwithstanding any other provision of law (including section 407 of this title) . . . moneys . . . due from, or payable by, the United States . . . to any individual . . . shall be subject to . . . legal process brought for the enforcement, against such individual of his legal obligations to provide child support. . . . Child support is later defined: the term "child support", when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation. . . .*Knickerbocker v. Norman*, 938 F.2d 891, 893, 1991 U.S. App. LEXIS 14697. (8th Cir. 1991)

      1. (Statute quoted above have different citations now.)
      2. Notwithstanding any other provision of law (including section 207 of this Act [42 USCS § 407] and section 5301 of title 38, United States Code), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the

United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 466 [42 USCS § 666(a)(1), (b)] and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part [42 USCS §§ 651 et seq.] or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony." 42 USCS § 659(a).

ii. "This Court has held, in accordance with the Supreme Court's pronouncements on the subject, that this provision does not shield a person's Social Security payments, once made,[4] because it is aimed largely at preventing the Social Security Administration from becoming a collections agency and to prevent the depletion of a person's whole means of subsistence. *See Commonwealth, Cabinet for Health and Family Services v. Ivy,* 353 S.W.3d 324, 338 (Ky.2011) (applying *Rose v. Rose,* 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987)). The trial court's recoupment order does not attempt to bind the Social Security Administration in any way, aimed as it is only at recouping monies already paid out. Nor would the recoupment order deprive the child of her entire means of support. Chris's support payments are only part of the overall support due to the child; the mother also has a statutory duty to support her child, and she has a substantial income. Moreover, Chris is not seeking to lower the amount of support he owed. That money was properly paid. Nor is he trying to recoup the amount of the Social Security benefits that exceed his support obligation. Instead, he is only seeking to recoup the amount that was effectively paid twice once the Social Security lump-sum payment was made." *C.D.G. v. N.J.S.,* 469 S.W.3d 413, 422 (Ky. 2015).

3. Pay recoupment to NCP:
   a. Courts have discretion to order a credit and even a recoupment to a NCP from the AB lump sum if there were no arrears at the time of the lump sum; moreover, the CP had the money to make the payment (from the AB lump sum); *see C.D.G. v. N.J.S*., 469 S.W.3d 413 (Ky. 2015) (Retirement benefits are, in essence, income from a government-required investment, the benefits of which are realized only after a certain age. And dependent benefits are like the income of an investment trust or an annuity whose benefits are paid to a third party (here, the child). *Van Meter,* 14 S.W.3d at 573. The benefits, regardless of whether they stem from disability or retirement, are an "indirect transfer of income from [Chris] to [the child] for which [Chris] would be entitled to credit." *Id.* Thus, the principle is the same for both retirement and disability benefits. Both are sufficiently analogous to other third-party payments to the child, such as "an insurance policy or a private trust" to allow them to be treated as coming indirectly from the parent. *Id.* "There is no difference in the amount of payment for child support. The only change is the source of those payments." *Board,* 690 S.W.2d at 382. *C.D.G. v. N.J.S.,* 469 S.W.3d 413, 420 (Ky. 2015)

vii. Going forward, how is the AB directly paid to CP treated when it is greater than the current cs monthly amount?

1. Applied as dollar for dollar credit against the child support up to the amount of the support amount due. The excess of is a gratuity to the child. *See CSEA v. Doe*, 990 P.2d 1158 (Hawai'i App. 1998); *In re Marriage of Robinson*, 651 P.2d 454, 455-456 (Colo.App. 1982); *Weaks v. Weaks*, 821 S.W. 2d 503 (Mo. 1991).
2. Could be equitable argument that the excess should be credited against outstanding arrearage;
    a. Look at the means of the NCP
    b. Look at the financial needs of the children
    c. The truth is that the CP is receiving AB from the NCP
    d. Equal protection argument for disabled persons
        i. If this NCP were paying $600/mon through the SDU not from SSDI, it would distribute $500 current and $100 arrearage—why not for disabled NCPS?
        ii. Trial court's findings: "The ADA provides that no qualified individual shall by reason of such disability be denied the benefits of the services of a public entity or subjected to discrimination by such entity (42 U.S.C. 12132). The failure to credit Respondent's child support arrearages with overpayments of his child support, and large lump sum payments, in the same manner as they would credit overpayments by a non-disabled individual, would discriminate against Respondent [.] ... Respondent's $126 per month child support obligation was paid by receipt of the social security benefit paid to [A.J.R.] through Tabitha. When these payments increased above $126, the excess payment should have been credited as payments against the judgment and interest. *Reversed and remanded because TX code did not authorize disability payments as child support. In re A.J.R., 2010 Tex. App. LEXIS 8615, 2010 WL 4262007* (Tex. App. Oct. 28, 2010).

e. "[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman,* 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151, 161 (1973)."

f.]-Fam. Code, § 4504, subd. (b), required that a father receive credit against his already-paid child support obligation based on a lump-sum payment of six years' worth of past-due derivative benefits that were disbursed to the mother on behalf of the daughter; to preclude the father from retroactive credit for the lump-sum benefit would essentially have forced him to overpay child support; [2]-Retroactive credit is permitted under § 4504, notwithstanding an obligor parent's lack of arrears.

g. The general rule is that no credit is given for voluntary overpayments of child support, even if they are made under the mistaken belief that they are legally required. Exceptions to the rule are recognized where the equities of the circumstances so demand and where allowing the credit will not work a hardship. *In re Marriage of Rogers, 670 N.E.2d 1154, 1155, 283 Ill. App. 3d 719, 720, 1996 Ill. App. LEXIS 704, *1, 219 Ill. Dec. 266, 267*

10. Implications in Intergovernmental Cases
    a. Registered for Mod—new state uses its own support calculation and rules, so whether or not benefits are part of the guidelines is appropriate for the registering state's rules
    b. Registered for Enfo—application of lump sum benefits to arrearage is as the original order state would do it
    c. *Moye v. Njie*, 2016 Pa. Super. Unpub. LEXIS 2340, 154 A.3d 842 (filed July 6, 2016)
        i. 2004 PA child support order; obligor father moves to GA; mother and child remain in PA; PA sends referral to GA, and the PA order was registered in GA
        ii. In 2008 GA closes case for PA's failure to cooperate and sets arrears at zero
        iii. 2011, father is shot and is permanently disabled; starts to receive SSDI
        iv. 2012, PA reinstates support order retroactive to date GA terminated order, because it was terminated in error; father appeals
        v. We thus conclude Georgia lacked authority [*11] to modify the support order, and Pennsylvania was not bound to recognize the termination. 23 Pa.C.S.A. § 7612.

For these reasons, we discern no abuse of discretion by the trial court in not revisiting the issue of the April 19, 2012 reinstatement of the underlying support order."

d. Challenges
    i. The state's policy for the application of lump sum benefits to arrearage info is not on the IRG
    ii. Automated System issues

11. Questions/Answers/Discussion
12. Contact Info:
    a. Lara Webb Fors, lfors@pubknow.com
    b. Tish Keahna Kruzan, tish.keahna@redcliff-nsn.gov