

Comment,
USING SOCIAL SECURITY BENEFITS AS A
CREDIT TOWARDS A CHILD
SUPPORT OBLIGATION

I. Introduction

Should Social Security benefits be credited against a court-ordered child support obligation? This question is one that courts increasingly have faced in recent years. In many different situations Social Security benefits may be credited against a parent's child support obligation. The view a number of courts have taken is that a parent or a parent's estate should be entitled to a credit against his or her child support obligation for the payment of Social Security benefits to a dependent child. The rationale for this view is that such benefits have been generated by the obligor parent's own earnings. If Social Security benefits are viewed as a parent's own earnings, the payments should be properly applied as a substitute for support payments from the obligor's wage earnings.¹

Other courts recognize that while equity usually favors Social Security benefits being used as a credit towards a child support obligation, in certain situations allowing the credit may be inequitable. Because of this, some courts allow for a presumption that a credit towards child support will be allowed, although this presumption is rebuttable upon a showing that allowing the credit will produce an undesirable or inequitable result.² Other courts have held that using Social Security benefits as a credit against an existing child support obligation is not allowed unless it can be shown that such credit was intended by the parties. These courts take the position that the obligor parent may only use Social Security benefits as a factor which may justify modification if a parent seeks modification of the support order.³

¹ Michael A. Sabatino, Annotation, *Right to Credit on Child Support Payments for Social Security or Other Government Dependency Payments Made for Benefit of Child*, 34 A.L.R.5th 447 (1995).

² *Id.* at 19.

³ *Id.*

In determining whether Social Security benefits should be used as a credit against a child support obligation, timing is also an important issue which the court may consider. In general, courts have been more reluctant to credit Social Security benefits against a child support payment when the credit is sought against future or past support obligations, as opposed to the current obligation, unless the credit is for past arrearage that built up during a time when the obligor parent had become disabled or retired, but his or her Social Security benefits had not yet begun.⁴

In this article I will give an overview of how different states have dealt with the issue of whether, and in what circumstances, Social Security benefits should be applied as a credit on a child support obligation. I will also discuss a plan which has been proposed that would use Social Security more expansively as a tool to help support children who do not receive child support payments due to the fact that a parent has not followed through with his or her support responsibility.

II. Social Security Disability Benefits as a Credit Towards a Child Support Obligation

A. The Obligor Parent is Entitled To a Credit Towards a Child Support Obligation for Disability Payments Which Are Made Contemporaneous with the Support Obligation

Missouri is one state which takes the position that the parent obligated to pay child support is entitled to a credit towards that obligation for disability payments which are made contemporaneous with the support obligation. In *Weeks v. Weeks*,⁵ the Supreme Court of Missouri was faced with the question of whether the non-custodial parent's Social Security disability benefits could be credited toward his child support obligation. The parties in the *Weeks* case were divorced in 1977. The wife was granted custody of the two minor children and the husband was ordered to pay \$100.00 per month per child to the wife as support for the children. In 1993, the non-custodial father was declared totally disabled for purposes of receiving Social Security disabil-

⁴ *Id.*

⁵ 821 S.W.2d 503 (Mo. 1991).

ity benefits. Beginning in 1984, the custodial mother received social security benefits in excess of the court-ordered child support amount of \$200.00 per month. In 1988 the father filed a motion for contempt arising out of the garnishment of his Social Security.

Citing the Georgia case of *Horton v. Horton*,⁶ the *Weeks* court overruled Missouri's previous position that Social Security disability payments made through the account of a non-custodial parent did not constitute payments made by the party himself, and therefore, the non-custodial parent was not entitled to a credit for Social Security benefits received by the custodial parent.⁷ The previous view in Missouri was that Social Security disability benefits of a contributor do not really belong to the person against whose account they are charged, and that therefore, payments made through that account could not be considered payments made by the party himself.

The *Weeks* court, in overruling Missouri's previous position in *Craver v. Craver*,⁸ noted that the rationale in *Craver* is contrary to the clear majority of jurisdictions, which do permit a credit against support obligations for Social Security disability benefits paid through the account of the obligor. The *Weeks* court summarized the rationale such jurisdictions use for allowing the credit:

Although a recipient of disability benefits might have independent sources of income, commonly the disabled person is deprived of the only means of support upon becoming disabled. Therefore, it is inequitable to withhold a credit against the child support obligation. The parent charged with the support obligation may have no ability to satisfy that obligation other than through the governmental disability payments, which were effectively generated by contributions from wages while working.⁹

The position the majority of states and Missouri take after the *Weeks* case seems to make a tremendous amount of sense. If a custodial parent is receiving her monthly child support, why should she care that it is coming from the obligor's Social Security disability benefit account as long as she is receiving the sup-

⁶ 132 S.E.2d 200 (Ga. 1963).

⁷ See *Craver v. Craver*, 649 S.W.2d 440 (Mo. 1993); *Burnham v. Burnham*, 743 S.W.2d 568 (Mo. Ct. App. 1987).

⁸ *Id.*

⁹ *Weeks*, 821 S.W.2d. at 506-07.

port; especially in the case of disability benefits where the obligor may have no other source of income. As the *Weaks* court pointed out, “there has only been a change in the entity making the payment, not in the method.”¹⁰ The custodial parent still exercises complete control over how the support payments are spent.¹¹

The facts in *Weaks* made an extremely convincing case for the obligor to argue that his disability benefits should be credited towards his child support obligation. The parties stipulated that since the date of his disability, the non-custodial parent received no income from any source other than his Social Security disability benefits. The only way he could satisfy his support obligation was through such a credit. The *Weaks* court, however, pointed out that the facts of the case presented an additional crucial issue not raised by either party: Can excess Social Security benefits be used to satisfy any future support obligation or any arrearage accumulated prior to the disability? Without explanation, the court answered this question in the negative. Any amount paid to the custodial parent from the disability benefits which exceeds the amount of child support mandated by the divorce decree cannot be credited towards past or future support, and therefore is deemed a gratuity.¹²

B. *Credit Towards a Child Support Obligation for Disability Payments Is a Matter of Discretion for the Trial Court*

Some states take the position that a determination whether a parent should receive a credit against his or her child support obligation for Social Security disability benefits is a matter of discretion for the trial court. In these states, it is within the trial court’s discretion to determine whether the obligor parent should receive credit not only for the current support obligation, but also for past and future child support obligations.

1. *Credit Allowed*

In *Griffin v. Avery*,¹³ the Supreme Court of New Hampshire ruled that the trial court did not err in allowing credit toward the

¹⁰ *Id.* at 507.

¹¹ *Id.*

¹² *Id.*

¹³ 424 A.2d 175 (N.H. 1980).

defendant's overdue support obligation for Social Security payments made to the custodial parent. Following the same rationale as Missouri in *Weeks v. Weeks*,¹⁴ the court stated that the reason for permitting a trial court discretion to allow a credit are that Social Security disability benefits are a substitute for the defendant's earnings, and are not gratuities from the federal government. Contrary to the Missouri approach, though, New Hampshire allowed credit not only for the obligor's current child support obligation, but also for the obligor's past due child support obligation.

2. Credit Disallowed

While a trial court may take the position that credit for Social Security benefits should be allowed, a trial court may also refuse to allow credit toward child support for Social Security disability benefits in certain circumstances. The Supreme Court of Connecticut found that the circumstances in *Fowler v. Fowler*¹⁵ justified the trial court's decision not to allow a credit toward the defendant's child support obligation for Social Security disability benefits paid to the custodial parent. The defendant argued that the payments to the plaintiff for the support of the minor children which were received from Social Security disability should be credited toward his obligation on the theory that the Social Security payments displaced the court-ordered payments. Taking into consideration the fact that the defendant had completely ignored the court-ordered child support for more than five years, had never made a payment from his personal funds, and that the children never received any support from the defendant until he began to receive disability benefits, the Supreme Court said that the trial court did not abuse its discretion in disallowing a credit against the defendant's arrearage, and that under the circumstances the trial court was correct in declining to credit the defendant. The Supreme Court made it clear, however, that the conclusion that disallowance of credit was related only to the factual situation in that case.¹⁶

¹⁴ 821 S.W.2d 503.

¹⁵ 244 A.2d 375 (Conn. 1968).

¹⁶ *Id.* at 377.

C. *Rebuttable Presumption that a Credit Will Be Allowed
Towards a Current Child Support Obligation*

Contrary to the view of some states that it is within the discretion of the trial court to determine whether a credit will be allowed towards a child support obligation for Social Security disability payments made to the noncustodial parent, other states have taken the position that a rebuttable presumption exists that a credit will be allowed in such circumstances. West Virginia, in the case of *Farley v. Farley*,¹⁷ stated that Social Security disability payments made to the custodial parent for current child support are presumptively a credit against child support obligations. In the *Farley* case, Mr. Farley, the non-custodial obligor, received a lump sum payment of \$12,705.00 on November 16, 1989, when he became totally disabled, \$7,871.25 of which went to Mrs. Farley as support for the minor children. In 1990, Mr. Farley then began receiving \$821.90 per month, \$411.00 of which went to Mrs. Farley. The court, in holding that the allowance of such a credit for current support should be presumed, stated, "The great weight of authority throughout the states is that social security is similar to a private insurance contract and benefits paid to dependents directly by Social Security are credits against the insured's support obligation."¹⁸

The tougher question was whether the \$7,871.00 lump sum payment to Mrs. Farley should be credited against Mr. Farley's child support arrearage of \$3,283.00. Regarding credit for the child support arrearage, the court stated, "When the Social Security Administration awards a lump sum payment to the caretaker of dependent children, a court may credit the amount received to any accrued arrearage, but is not required to do so."¹⁹ The court held that in the instance of a single lump sum Social Security disability payment, a debtor spouse may be given retroactive credit when:

- (1) the debtor spouse has acted in good faith and has promptly sought court approval of the credit of social security against child support;

¹⁷ 412 S.E.2d 261 (W.Va. 1991).

¹⁸ *Id.* at 263.

¹⁹ *Id.* at 264.

(2) in the discretion of the trial court, there were no other assets reasonably available from which child support payments could have been paid; and

(3) there were no other changes in circumstances that, in their totality, mitigate against awarding credit.²⁰

In allowing the credit, the *Farley* court stressed the fact that absolutely no evidence existed of Mr. Farley ever acting in bad faith, and that Mr. Farley always paid what he could toward his child support obligation before he started to receive disability benefits.

D. *A Credit Is Available Only After a Modification by the Trial Court*

A minority of states follow the rule that a parent is not automatically entitled to a credit for Social Security disability benefits received by the non-custodial parent as a result of the obligor parent's disability, but that such a credit is available only after a modification of the child support by the trial court. This approach has been criticized by some states, such as Missouri in *Weeks v. Weeks*²¹ as harsh and unjust: "In situations involving disability benefits, the party seeking credit most likely faces a reduction of income, financial uncertainty, physical or mental impairment and other attendant consequences of the disability. The additional burden of petitioning the court for a modification typically wastes time and money and helps no one."²²

For reasons such as those stated by the *Weeks* court, the majority of jurisdictions have rejected the approach that a modification must be entered by the trial court before a credit for Social Security disability benefits will be given. But it does seem that the reasoning behind the modification approach is sound, and that the benefits of seeking a modification are worthwhile to the non-custodial obligor. The Supreme Judicial Court of Massachusetts, in *Rosenberg v. Merida*,²³ adopted the minority position that the non-custodial parent may apply a credit against a child support obligation only after seeking modification and receiving an appropriate modification judgment. The court in *Rosenberg* dismissed the concerns the *Weeks* court had that requiring such a

²⁰ *Id.* at 265.

²¹ 821 S.W.2d 503.

²² *Id.* at 506-507.

²³ 697 N.E.2d 987 (Mass. 1998).

230 *Journal of the American Academy of Matrimonial Lawyers*

modification was unjust or harsh. The court stated that these concerns were overblown, and that the situation in which a non-custodial parent begins to receive Social Security disability benefits is precisely the type of situation in which the non-custodial parent would be most likely to seek a modification, because the parent has undergone a substantial change of circumstances that would warrant such a modification in child support.²⁴

According to this minority view, the proper approach for dealing with the Social Security disability benefits is to treat them as if they are a part of the gross income of the non-custodial parent for purposes of applying the child support guidelines, and then give that parent a dollar-for-dollar credit against the support obligation as determined by the guidelines.²⁵ The modification approach in the *Rosenberg* case seems to have a fair result. Although the non-custodial obligor parent is required to seek a modification, once this modification is sought, the parent is given a credit against his obligation.

The minority position of requiring a non-custodial parent to seek a modification does not always produce such a just result, however. The unpublished Minnesota case of *Kerrigan v. Ames*²⁶ is a perfect example of how requiring a modification can result in a harsh result. In *Kerrigan*, the non-custodial parent began receiving Social Security disability benefits in the amount of \$432.00 per month. Each of his three minor children received a monthly dependent benefit of \$72.00 per month. The non-custodial parent moved for an order crediting the Social Security disability benefit received by the children against his monthly support obligation. The trial court denied this motion, stating that although the receipt of Social Security disability benefits by the non-custodial parent and his children did constitute a change of circumstances, this change did not warrant a credit. The appellate court upheld the decision of the trial court, refusing to overrule the decision *In re Marriage of Haynes*,²⁷ which held that in a motion to modify a child support order the court may consider the child's receipt of benefits as "a factor in determining the needs of the child and financial circumstances of the parties," but

²⁴ *Id.* at 992.

²⁵ *Id.* at 990.

²⁶ 1993 WL 165688 (Minn. Ct. App. 1993).

²⁷ 343 N.W.2d 679 (Minn. Ct. App. 1984).

that “[a] child’s receipt of social security benefits from the account of a parent charged with support does not constitute payments from that parent.”²⁸

Apparently, the Minnesota Court of Appeals thought the result in *Kerrigan* was rather harsh too. In 1998, the court had an opportunity to revisit the *Haynes* decision, which the *Kerrigan* court refused to overrule. In the case of *Holmberg v. Holmberg*,²⁹ the Court of Appeals of Minnesota overruled the *Haynes* decision citing several reasons why Minnesota should adopt the majority rule allowing child support to be offset by Social Security benefits during the period in which the benefits are received:

- (1) child support and social security benefits paid on behalf of a child due to a support obligor’s disability have almost identical purposes;
- (2) *Haynes* is at odds with the majority rule that has now emerged; and
- (3) a case critical to our ruling in *Haynes* has been overruled.³⁰

The case which the court cited to in *Haynes* which was overruled is the *Craver v. Craver*³¹ decision, which Missouri overruled in the *Weeks* case.

E. Refusal to Allow a Credit as a Per Se Rule

New York is the only state which seems to refuse to allow a credit to the non-custodial parent for Social Security disability benefits paid to the minor children. Most recently, in the 1996 decision of *Graby v. Graby*,³² the Court of Appeals of New York decided that a non-custodial parent who was totally disabled, and whose children received \$518.00 per month in Social Security disability because of his disability, was not entitled to a credit against his child support obligation for this amount. The court of appeals stated that benefits received by children under certain government welfare programs should not be considered income of that parent, but that instead, disability payments to children could only be credited against a child support obligation that is found to be “unjust or inappropriate.” In the case at hand, the

²⁸ *Id.* at 682-683.

²⁹ 578 N.W.2d 817 (Minn. Ct. App. 1998).

³⁰ *Id.* at 826.

³¹ 649 S.W.2d 440.

³² 664 N.E.2d 488 (N.Y. 1996).

232 *Journal of the American Academy of Matrimonial Lawyers*

court decided that the obligation was not unjust or inappropriate, and therefore the non-custodial parent could not receive a credit against his support obligation for the Social Security disability benefits the children received. In support of its position, the court said that granting the non-custodial parent a credit for the disability benefits might effectively abolish the child support obligation of the non-custodial parent and that a credit would interfere with the goal of protecting children from the decline in living standards that results from parents maintaining two households.³³

F. Legislation Specifying that a Credit Is Allowed

A few states have passed legislation that specifically provides that Social Security disability benefits which are paid to children should be credited against the non-custodial parent's support obligation. One such state is California. The California statute specifies as follows:

If the court has ordered a noncustodial parent to pay for the support of a child, payments for the support of the child made by the federal government pursuant to the Social Security Act or Railroad Retirement Act because of the disability of the noncustodial parent and transmitted to the custodial parent or other child support obligee each month shall be credited toward the amount ordered by the court to be paid for that month by the noncustodial parent for support of the child unless the payments made by the federal government were taken into consideration by the court in determining the amount of support to be paid. If a lump-sum payment which represents payments for more than one month is transmitted to the custodial parent or other child support obligee, credit shall be given for each month for which the lump-sum payment was made.³⁴

Another state which statutorily allows for such a credit is Utah. The Utah statute specifies that "Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent."³⁵

³³ *Id.* at 491.

³⁴ CAL. FAM. CODE § 4504 (West 1998).

³⁵ UTAH CODE ANN. § 78-45-7.5(8)(b) (1998).

III. Social Security Retirement Benefits as a Credit Towards a Child Support Obligation

Should Social Security retirement benefits be treated any differently than Social Security disability benefits in determining whether those benefits that are paid to support a child can be offset against a non-custodial parent's obligation? These benefits are generally treated in the same way as disability benefits; and the states disagree among themselves just as much as they do in the instance of disability benefits.

A. *The Obligor Parent Is Entitled to a Credit Towards a Child Support Obligation for Retirement Benefit Payments which Are Made Contemporaneous With the Support Obligation*

In *Miller v. Miller*,³⁶ the Supreme Court of Alaska decided that a non-custodial parent who is required to pay support to a child is entitled to a child support credit for Social Security payments the child receives on the parent's behalf. This was the first opportunity the Alaska court had to address whether Social Security benefits received by a child should be credited against the parent's support obligation. The court noted that, "Unlike welfare and other forms of public assistance, Social Security benefits represent contributions that a worker has made throughout the course of employment; in this sense, benefits represent earnings in much the same way as do annuities paid by an insurance policy."³⁷ While the court was addressing Social Security benefits in general, this idea seems to be especially true in the case of retirement benefits. An employee contributes to Social Security throughout his working lifetime and has earned those benefits that he receives.

The court also pointed out that even though benefits are paid directly to the child rather than through the contributing parent, the child's entitlement to payments derives from the parent, and the actual source of the payments "is of no concern to the party having custody as long as they are in fact made."³⁸ This reasoning seems to be in harmony with Missouri's view in the

³⁶ 890 P.2d 574 (Alaska 1995).

³⁷ *Id.* at 576.

³⁸ *Id.* at 577 *citing* Davis v. Davis, 449 A.2d 947 (Vt. 1982).

*Weeks*³⁹ case that there has only been a change in the entity making the payment, not in the method. The custodial parent is still receiving payments every month, and still has complete discretion to determine how those payments should be spent. The Supreme Court of Alaska, while recognizing that most of the relevant case law addressed the issue of Social Security disability benefits, found no reason to distinguish between disability and retirement benefits in allowing the credit.⁴⁰

B. *Credit Towards a Child Support Obligation for Retirement Benefit Payments Is a Matter of Discretion for the Trial Court*

It is within the proper exercise of the trial court's discretion to offset a child support obligation by Social Security retirement benefit payments a child receives, according to the Washington Court of Appeals.⁴¹ In the majority of cases, just as disability results in a reduction of income, so too does retirement, the court recognized. Allowing the trial court to decide, based on the particular facts and circumstances of each individual case whether a credit for Social Security retirement benefits should be allowed will achieve fairness, while insuring that the reasonable support is provided for the minor children.⁴² In the instant case, it was easy for the trial court to allow the credit, since the custodial parent had received all support due under the divorce decree, and in fact had received sums in excess of the required amount. The court noted that a decision disallowing a credit would result in an undeserved windfall to the custodial parent, especially since the minor child at issue had turned 18 and become emancipated.⁴³

It is also important to note that in 1993, at the time of the *Hugues*⁴⁴ decision, the Washington legislature adopted a statute which grants an automatic offset to support payments where a child receives Social Security disability payments due to the non-custodial parent's disability.⁴⁵ The decision of the appellate court

³⁹ 821 S.W.2d 503.

⁴⁰ 890 P.2d at 577.

⁴¹ *In re Marriage of Hughes*, 850 P.2d 555 (Wash. Ct. App. 1993).

⁴² *Id.* at 558.

⁴³ *Id.* at 557.

⁴⁴ *Id.*

⁴⁵ *See* WASH. REV. CODE § 26.18.190(1) (1990).

that it is within the trial court's discretion to allow such an offset where Social Security retirement benefits are made to the child was supported by logic and what seemed to be legislative intent. Apparently, the appellate court was correct to allow the credit, because in 1995, the legislature rewrote the statute to include Social Security retirement benefits:

[W]hen the Social Security Administration pays social security disability dependency benefits, retirement benefits, or survivors insurance on behalf of or on account of the child or children of a disabled person, a retired person, or a deceased person, the amount of benefits paid for the child or children shall be treated for all purposes as if the disabled person, the retired person, or the deceased person paid the benefits toward the satisfaction of that person's child support obligation for that period for which benefits are paid.⁴⁶

C. *Rebuttable Presumption that a Credit Will Be Allowed Towards a Current Child Support Obligation*

The Superior Court of Pennsylvania, in *Preston v. Preston*,⁴⁷ adopted the rule that in the situation where a non-custodial parent is asking for his Social Security retirement benefits to be offset against his child support obligation, a rebuttable presumption exists that such a credit is appropriate. This rule allows a party who is opposing the credit to persuade the court that it is inappropriate under the specific circumstances of the case at hand. If the court then determines that no credit should be awarded, the court must articulate the reasons for its findings on the record. *Preston* expanded Pennsylvania's holding in *Children and Youth Services of Allegheny County v. Chorgo*,⁴⁸ in which the court concluded that there is a rebuttable presumption that credit will be given for Social Security disability benefits paid directly to the child. The *Preston* court found that there should also be a presumption where Social Security retirement, as opposed to disability benefits were at issue.

⁴⁶ WASH. REV. CODE § 26.18.190(2) (1995).

⁴⁷ 646 A.2d 1186 (Pa. Super. Ct. 1994).

⁴⁸ 491 A.2d 1374 (Pa. Super. Ct. 1985).

236 *Journal of the American Academy of Matrimonial Lawyers*

D. *A Credit Is Available Only After a Modification by the Trial Court*

Although the Minnesota *Haynes* decision dealt with retirement benefits, in deciding that a modification was necessary to have a credit applied towards child support for Social Security benefits paid to a child, this decision has been overruled by the *Holmberg* decision.⁴⁹ The only state which appears to still espouse the view that Social Security retirement benefit payments for minor children may be credited toward the father's child support obligation only after a modification is sought is Colorado. In the decision of *In re Marriage of Wright*,⁵⁰ the Colorado Court of Appeals explicitly ruled that Social Security disability and Social Security retirement benefit payments for minor children may be credited toward the non-custodial parent's child support obligation only in a modification proceeding where changes in the conditions of the parties are considered; and this credit is discretionary, not automatic.

E. *Credit Not Contemporaneous with Benefit Payments*

The majority of states seem to follow the rule that a credit toward a non-custodial parent's child support obligation for retirement benefits payments should be given only to the current child support payment, and that no credit against any arrearage, or for any future obligation should be given. In *Mask v. Mask*,⁵¹ for example, the New Mexico Supreme Court held that principles of equity required that a credit be allowed only up to the amount of the obligation for each month after the child began receiving benefits due to the non-custodial parent's retirement. The court held that to grant "carry back" credits would result in a windfall to the defendant because delinquent support payments would be met with Social Security administration funds, and not with his own. Future credits must also be disallowed, the court reasoned, because a child's need is current, not sometime in the future, and to allow credits for future payments would be to encourage non-custodial parents to put off making support payments in the hope that some future source might satisfy their arrearage.

⁴⁹ 578 N.W.2d 817 (Minn. Ct. App. 1998).

⁵⁰ 924 P.2d 1207 (Colo. Ct. App. 1996).

⁵¹ 620 P.2d 883 (N.M. 1980).

F. Legislation Specifying that a Credit Is Allowed

Just as some states have legislation specifying that Social Security disability retirement benefits are automatically offset against child support payments, some states that have these statutes have included Social Security retirement benefits in the legislation as well. One example of such a statute is that of the state of Washington.⁵² Another state which statutorily specifies that retirement benefits are to be automatically offset against a child support obligation is the state of California.⁵³

G. Refusal to Allow a Credit as a Per Se Rule

Some states have made it clear that unless a statute specifically allows retirement benefits to be offset, the court will not allow such an offset. This view was adopted by the Iowa Court of Appeals in *State ex rel. Pfister v. Larson*.⁵⁴ In this case, the non-custodial parent was seeking an offset of his child support because Social Security retirement benefits were being paid to his children. Whereas most states have not distinguished between Social Security disability and retirement benefits, the Iowa Court of Appeals did distinguish between the two types of benefits. The court discussed Social Security disability benefits as a substitute for income, stating that it was equitable to treat disability benefits as a substitute for child support because it is often unforeseeable at the time child support obligations are established that a parent will become disabled. Conversely, the court said, retirement is not an unforeseeable fact, and retirement benefits are a supplement to income, not a replacement.⁵⁵ In refusing to allow the credit, the court also observed that while the Iowa statute provides that disability benefits may be used to offset a child support obligation, the statute does not specifically include retirement benefits, and therefore the legislature did not intend for retirement benefits to be used to offset one's child support obligation.⁵⁶

⁵² See *infra* discussion at Part III.B.

⁵³ See *infra* discussion at Part II.F.

⁵⁴ 569 N.W.2d 512 (Iowa Ct. App. 1997).

⁵⁵ *Id.* at 515-516.

⁵⁶ See IOWA CODE § 598.22 (1997).

IV. Social Security Death Benefits as a Credit Towards a Child Support Obligation

A. The Obligor Parent Is Entitled to a Credit Towards A Child Support Obligation for Death Benefit Payments Which Are Made Contemporaneous with the Support Obligation

Similar to the way Social Security disability and retirement benefits are treated, many courts have found that the estate or other representative of a deceased parent is generally entitled to credit against the parent's child support obligation for social security death benefits paid to the children of their representative as a result of the obligor's death.⁵⁷ One such example is the case of *Brewer v. Brewer*,⁵⁸ where the court held that Social Security payments made to an obligor's child on account of the obligor's death are to be considered credits toward the child support obligation, unless circumstances exist that make the allowance of the credit inequitable. The court's reasoning was extremely similar to that which has been given for the allowance of Social Security disability and retirement benefits. Social Security death benefits, the court noted, just like disability and retirement benefits, are earned in part through the employee's payment of Social Security taxes. The court also reasoned that it should not matter to the custodial parent that the non-custodial parent is given credit, because the money is still being received, and there has only been a change in the source of the payment. The result in this case was affirmed, because the trial court gave the custodial parent an opportunity to present evidence that allowing the credit would result in an inequity, but the custodial parent failed to present any such evidence.

B. Credit Towards a Child Support Obligation for Death Benefit Payments Is a Matter of Discretion for the Trial Court

The Supreme Court of Kentucky, in *Board v. Board*,⁵⁹ found that it was within the discretion of the trial court to allow the

⁵⁷ DiSabatino, *supra* note 1.

⁵⁸ 509 N.W.2d 10 (Neb. 1993).

⁵⁹ 690 S.W.2d 380 (Ky. 1985).

estate of a deceased father a credit towards his child support obligation for Social Security death benefits paid to the children as a result of his death. Following the decision of many states which have allowed such a credit for Social Security disability and retirement benefits, the *Board* court found that the benefits were not gratuitous, but that the husband paid Social Security taxes and now those payments are generating the replacement of some of the support obligation. The court also stressed the fact that to disallow the credit would result in an unreasonable windfall to the wife, because she would be permitted to receive both child support and Social Security benefits from the father's estate.⁶⁰

C. A Credit Is Available Only After a Modification Proceeding by the Trial Court

Just as with Social Security disability and retirement benefits, some states take the position that a credit towards child support for Social Security death benefits is not available to the deceased parent's estate unless such a credit is deemed appropriate in a modification proceeding. Unlike with Social Security disability or retirement benefits, however, the fact that Social Security death benefits are being paid to a dependent as a result of the obligor's death is a relevant circumstance which must be considered in deciding whether to modify the support order, according to the Colorado Court of Appeals in *In re Marriage of Meek*.⁶¹ The requirement that the court consider this does not divest the trial court of its discretion, said the Court of Appeals. Rather, it simply requires the court to presume that the survivor's benefits are in lieu of the decedent's support obligation unless there are other factors that mitigate against that presumption.⁶²

D. Credit Is Not Allowed Unless Specifically Intended by the Parties in Dissolution Decree

Recognizing the fact that many states addressing whether Social Security death benefits should be credited against the court-ordered child support obligations have allowed such credit,

⁶⁰ *Id.* at 382.

⁶¹ 669 P.2d 628 (Colo. Ct. App. 1983).

⁶² *Id.* at 630.

240 *Journal of the American Academy of Matrimonial Lawyers*

the Court of Appeals of Washington, in *Pessein v. Pessein*,⁶³ decided that credit for Social Security death benefits will be allowed against an estate's child support obligation only when such credit is specifically provided for in the dissolution decree, therefore making the parties' intent clear. In the *Pessein* case, the parties did not make it clear whether death benefits should be used to offset the obligation, but because the parties had made specific provisions for child support obligations surviving the non-custodial parent's death, the court stated that in the absence of a provision for offset of death benefits, such an offset was not allowed. The result in the *Pessein* case then, was that the children of the deceased non-custodial parent received both Social Security death benefits and the original child support obligation. Although the court did not distinguish Social Security death benefits from disability or retirement benefits, obviously it found some kind of distinction, to require that the dissolution decree have a provision for offset to allow one.

E. *Credit Not Authorized by Statute*

Stressing that the California statute authorizes offset of Social Security disability and retirement benefits, but mentions nothing about disability benefits,⁶⁴ the Court of Appeals for the Third District of California in *In re Marriage of Bertrand*,⁶⁵ ruled that the trial court erred in deciding that Social Security benefits being paid by reason of the death of the non-custodial parent satisfied his obligation of support. The estate of the deceased obligor asserted that death was the "ultimate disability," and therefore was meant to be included in the statute, but the court of appeals did not accept this argument. Because the statute is silent as to death benefits, the legislature did not intend these benefits to be included in those which can offset a support obligation, the court said. The court also made it clear, however, that the executor of the estate was not without a remedy, since he could move to modify the support obligation, citing the husband's death and the wife's subsequent remarriage as reasons to support the modification.

⁶³ 846 P.2d 1385 (Wash. Ct. App. 1993).

⁶⁴ See *infra* discussion at Part II.F.

⁶⁵ 33 Cal. App. 4th 437 (Cal. Ct. App. 1995).

V. Supplemental Security Income Benefits

Generally, courts will not allow a credit towards a child support obligation, or a reduction in the amount of support based on the parent's receipt of Supplemental Security Income benefits on behalf of a disabled child. The reasoning behind this view is a very sound one, and was clearly stated by the court in *Bennet v. Commonwealth of Virginia*.⁶⁶ In *Bennet*, the father argued that he was entitled to a credit or reduction in his child support obligation for the Social Security benefits which the mother received on behalf of their child, Isaac, who suffered from Down's Syndrome. The father, in support of his position, relied on the case of *Whitaker v. Colbert*,⁶⁷ which held that Social Security benefits received by children are not gratuities, but are a substitute for the parent's lost ability to provide for the children through employment, and should therefore be offset against the non-custodial parent's child support obligation. The *Bennet* court stated that the father's reliance on the *Whitaker* case was misplaced, however, because the *parent* in the *Whitaker* case was the disabled party, not the *child*: "Isaac's benefits are not based upon the father's future employment and they do not substitute for the father's loss of earnings or support."⁶⁸ The court stressed that the primary purpose of Supplemental Security Income benefits is to provide special assistance to disabled children in low-income households, and therefore the non-custodial parent's child support obligation is not impacted by the child's receipt of the benefits.⁶⁹

VI. The Proposed "Absent Parent" Social Security Benefit

With Social Security benefits increasingly being used to support children who may not otherwise receive any support from the non-custodial obligor parent, is it possible to expand the use of Social Security even more broadly to help support children who are not receiving any support from a non-custodial parent?

⁶⁶ 472 S.E.2d 668 (Va. Ct. App. 1996).

⁶⁷ See 442 S.E.2d 429 (Va. Ct. App. 1994).

⁶⁸ 472 S.E.2d at 673.

⁶⁹ *Id.*

Stephen D. Sugarman, a Law Professor at the University of California, Berkeley, has proposed the idea of an expanded Social Security system which would provide benefits to children of “absent parents.”⁷⁰ Sugarman envisions a system that would allow a custodial parent and her child who have been effectively abandoned by the non-custodial parent to receive the same type of Social Security benefits she would have received had the non-custodial parent died.⁷¹ A non-custodial parent would only be eligible for the benefits after paternity of the child is proved. The Social Security Administration then would be able to pay the benefit from the account of the absent non-custodial parent’s Social Security account.

VII. Conclusion

More and more jurisdictions have adopted the majority position that Social Security benefits can be used to offset a non-custodial obligor parent’s child support obligation. However, as the cases discussed in this article demonstrate, the states differ in their views concerning which types of Social Security benefits can be credited towards a child support obligation. The states also differ as to whether a credit for Social Security benefits should be applied to a past, current, or future child support obligation. Because the rules vary depending on the state one is in, and the circumstances of the particular case, it is important to thoroughly research the statutory and case law in your particular jurisdiction before advising your client whether he can receive a credit towards his child support obligation for Social Security benefits being paid to his children.

Rebecca Spencer

⁷⁰ Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523 (1995).

⁷¹ *Id.* at 2559.