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DISABILITY AND FAMILY RELATIONSHIPS:
MARRIAGE PENALTIES AND SUPPORT
ANOMALIES

Robert E. Rains* 

INTRODUCTION: UNINTENDED CONSEQUENCES

My duties at the Penn State University Dickinson School of Law include supervising students in our Disability Law Clinic as well as our Family Law Clinic. Several years ago, a woman came to the Disability Law Clinic for legal help. She was a widow with a severely mentally disabled daughter. The daughter was receiving cash assistance from the federal government in the form of Supplemental Security Income (SSI).  At that time, the maximum individual benefit rate was probably about $480. The problem was that, before he died, the child’s father had gone to his family lawyer because he naturally wanted to take care of his daughter with special needs. The lawyer set up, and the father signed, a testamentary support trust to pay his daughter $240 per month.

What was the result? SSI is a needs-based program with strict income and resources rules. Any unearned income over $20 per month results in a dollar-for-dollar reduction of SSI.  Every month the trust paid the mentally disabled child $240. Every month the Social Security Administration reduced her SSI by $220. In effect, every month the trust paid $20 to the girl and $220 to the Social Security Administration. The girl’s federal benefits were effectively cut almost in half.

What was to be done? Nothing; the trust was irrevocable.

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Was this result what the father intended? Obviously not. Did the lawyer, no doubt a competent general practitioner, commit malpractice? What is the public policy behind such a harsh result, and is it sound?

This article will look at how federal law and family law treat disability and disabled people in the specific contexts of marriage and child support and will raise questions about the explicit and implicit public policies underlying that treatment.

I. SPECIAL MARRIAGE PENALTIES UNIQUE TO DISABLED PEOPLE

Marriage penalties have been much debated in recent years. The debates have focused on unmarried dual income couples facing significant federal income tax increases should they get married. Almost no one has paid attention to the severe marriage penalties often faced by persons with disabilities under the Social Security Act. Nor, unlike the situation with the Internal Revenue Code, has there been any significant political movement to ameliorate or eliminate those penalties.

A. The Disabled Adult Child

A dependent child of a wage-earner who is disabled, retired or deceased may be eligible for benefits on the wage-earner's account under Title II of the Social Security Act.\(^3\) For most dependent children, these benefits end upon reaching age 18 or, if still in elementary or secondary school, age 19.\(^4\) However, if the child himself is disabled or becomes disabled before age 22, the child can continue to receive such benefits indefinitely as a Disabled Adult Child (DAC).\(^5\)

\(^4\) § 402(d)(1)(B)(i).
\(^5\) § 402(d)(1)(B)(ii). Recently, The Social Security Administration has taken to referring to these benefits as "Childhood Disability Benefits" (CDB). Since the SSA pays these benefits during adulthood, although based on one's becoming disabled in childhood (before age 22), I shall avoid use of the particularly confusing phrase, "Childhood Disability Benefits."
John A. Jobst was a DAC. He applied for benefits on his father’s earnings record in 1956. The Social Security Administration (SSA) awarded John benefits commencing January 1957 based on his cerebral palsy. In October 1970, John married Sandra Lee, who also had cerebral palsy, but was not receiving Social Security benefits. As a result, the SSA terminated John Jobst’s DAC benefits. A DAC beneficiary loses his benefits permanently if he marries someone who is not also receiving Social Security, even if the spouse is totally and permanently disabled.

Jobst appealed the termination of his benefits through the SSA’s administrative processes and the federal court. He argued that the statute, as applied to a recipient who marries a totally disabled person, violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. District Court Judge John W. Oliver agreed. He found no rational basis for the distinction between beneficiaries who marry disabled persons who receive Social Security benefits and beneficiaries who marry disabled persons who do not receive such benefits.

Of course, the Supreme Court unanimously reversed the decision. In an opinion written by Justice Stevens, the Court noted that when Congress established the DAC program in 1956, marriage to anyone terminated DAC benefits. Two years later, in 1958, Congress created the exception allowing a DAC recipient to marry another Social Security beneficiary without losing benefits. Thus, it was

7. Id.
8. Id.
9. Id.
12. Id. at 910.
13. Id. at 911.
14. Id. at 913.
16. Id. at 51.
17. Id.
really an expansion of benefits and partial amelioration of the marriage penalty that Jobst was challenging. The Court found a rational basis for the distinction created by the 1958 amendment:

Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.

The Court reasoned that the exception to the marriage penalty created by the 1958 amendment is simple to administer, as it requires no individual inquiry into degrees of hardship or need. While recognizing the unusual hardship that the general rule had inflicted upon Jobst and that it might have been wiser for Congress to take a larger step, the Court opined “the step Congress did take was in the right direction and had no adverse impact upon the Jobsts.”

Today, almost three decades later, Congress has yet to take even the small extra step of eliminating the permanent loss of DAC benefits for DAC recipients who marry totally disabled persons who do not receive Social Security benefits.

What public policy is served by this restriction? Had John Jobst simply cohabited with his disabled significant other, his DAC benefits would have been unaffected. It was the act of marriage that caused their termination.

18. See id.
19. Id. at 53.
20. Id. at 57.
21. Id. at 57-58.
22. Id. at 51.
23. Id.
One may posit various reasons why Congress has failed to act. Inertia is one of them. At the political level, there are no organized and funded groups seeking repeal of this particular marriage penalty. Moreover, as the Court noted, Congress ameliorated to some extent the harshness of this marriage penalty by the establishment of the SSI program for indigent, disabled persons, which went into effect in 1974 and provided cash benefits to both Mr. and Mrs. Jobst that totaled almost as much as John Jobst had previously been receiving under the DAC program. However, as with all categorical assistance programs, SSI has various rules and limitations which may make it unavailable to other DAC recipients who marry totally disabled nonrecipients of Social Security.

It is difficult to believe that the administrative burden posited by the Court would be significant. In fiscal year 2004, the SSA adjudicated 2,522,826 disability claims at the initial level, 556,243 on reconsideration, 447,268 at administrative law judge hearings, and 89,487 at its Appeals Council. This was in addition to processing 1,677,423 continuing disability reviews. In 2003, there were 752,813 adult children receiving Social Security Disability Insurance benefits out of 6,830,714 disability insurance recipients. Additionally, as of December 2003, there were a total of 5,592,504 disabled recipients of SSI nationally. Thus, recipients of DAC benefits constitute approximately 750,000 out of over 12,400,000 disabled beneficiaries. Disability determinations would only have to be made in the small minority of cases in which: (1) a DAC recipient married, (2) a nonrecipient of Social Security benefits, (3) who claimed to be disabled, and (4) whom the SSA had not already determined to be disabled for purposes of the SSI program. Surely

24. Id. at 57 n.17.
27. Id.
the number of disability claims that would be added by allowing a DAC recipient to continue to receive benefits after marriage to a disabled person not receiving benefits would be infinitesimal in the general Social Security adjudicative system. Indeed, for Mrs. Jobst to receive SSI benefits as she did, SSA had to determine she was disabled.³¹ Therefore, in the case of the Jobsts, no extra determination would have become necessary if the marriage penalty were removed. Yet this particular marriage penalty for DAC recipients remains.

B. The SSI Marriage Penalty

1. Eligible Couples

The Supreme Court accurately perceived in *Jobst* that the draconian effects of the DAC marriage penalty were partially ameliorated for Mr. and Mrs. Jobst by the fact that they both became eligible for SSI as indigent, disabled persons. What the Court never mentioned, and perhaps did not know, was that the Jobsts were financially harmed by a different and severe marriage penalty in the SSI program.

SSI provides federally-funded, modest cash benefits to indigent, disabled persons (as well as blind persons, who are in a different category than other disabled persons, and persons over age 65).³² Most disabled SSI recipients have not worked long enough or contributed enough Federal Insurance Contributions Act (FICA) taxes over a long enough period to be eligible for Social Security Disability Insurance (SSDI) benefits. A minority of SSI recipients are insured for and receive SSDI benefits, but their work history at low paying jobs is so spotty that their SSDI benefits are lower than the modest SSI cash benefits. Such individuals receive an SSI supplement on top of their SSDI to bring them up to the SSI rate.³³

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In 1974, when the SSI program became effective, both Mr. and Mrs. Jobst were determined to be "eligible individuals" for SSI. According to information provided to the Supreme Court by the SSA, the total SSI that the Jobsts received was "only $20 less than the amount they would have been receiving if Mr. Jobst's child's benefits had been restored." But had John Jobst merely cohabited with Sandra Lee rather than marry her, their total SSI benefits would have been a full third greater. This is because of the SSI marriage penalty, which is separate and distinct from the DAC marriage penalty.

The SSA spells out the SSI marriage penalty in its rather complex regulations. For 1996, (the last year listed in the published regulations) an eligible individual could receive the maximum federal rate of $470 per month. Two eligible persons living together and equally sharing expenses could each receive $470 per month, for a total of $940 per month. But if those two eligible cohabiting people marry each other, their total benefits would reduce to $705 per month. In 1996, the act of marriage would therefore cost the cohabiting indigent, disabled couple $235 per month, a huge decrease for a couple previously subsisting on $940 per month.

The current SSI rates, available on the SSA's website, show that the marriage penalty for SSI couples who marry has significantly increased in terms of actual dollars. In 2006, an eligible individual may receive a maximum of $603 per month in SSI. Thus, two cohabiting eligible individuals thus may receive a maximum of $1,206 monthly. But an eligible married couple can only receive a

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34. Califano, 434 U.S. at 58 n.17.
35. Id.
38. § 416.1133.
39. § 416.412.
41. Id. This is exclusive of any state supplementary payment. See supra, note 37.
42. Id.
maximum of $904 per month, thus suffering a full $300 per month marriage penalty.\textsuperscript{43} In annual terms, an eligible unmarried couple in 2006 can receive maximum SSI benefits of $14,472. If the couple marries, their maximum 2006 SSI benefits will be $10,848.

To put this into perspective, the United States Department of Health and Human Services (DHHS) has set the 2006 federal poverty guideline for a two-person family unit in the 48 contiguous states and the District of Columbia at $13,200.\textsuperscript{44} Thus, an unmarried, cohabiting, eligible couple of two indigent, disabled people can receive enough SSI to have income exceeding the federal poverty guideline by $1,272. But if they marry, their income will fall to a level $2,352 below the federal poverty guideline.

2. Individual SSI Applicants

As noted, most recipients of SSDI benefits are disabled workers, that is, persons who worked long enough and paid their FICA taxes long enough to be insured for disability purposes.\textsuperscript{45} But, many people with disabilities have either not worked enough, or not worked recently enough at the time of onset of disability, to be eligible. If such people are both indigent and disabled, they can usually collect SSI.\textsuperscript{46}

Here too, there is a marriage penalty; this penalty is found in SSA’s “deeming rules.” Simply put, if a person who would otherwise be eligible for SSI is married and lives with her ineligible spouse, the ineligible spouse’s income is “deemed” to the otherwise eligible applicant.\textsuperscript{47}

The classic example is the housewife who may have engaged in paid employment for several years before marriage and continued to do so for some time into marriage. She then stays home to raise a family, intending to return to paid employment after the youngest child reaches school age. Often, she is out of the labor market for six

\textsuperscript{43} Id.
\textsuperscript{44} Annual Update of the HHS Poverty Guidelines, 71 Fed. Reg. 3848 (Jan. 24, 2006).
\textsuperscript{45} See 20 C.F.R. §§ 404.130-.133 (2005).
\textsuperscript{47} Id. §§ 416.1160(a)(1), 416.1163.
or more years. If, through illness or injury, she then becomes disabled, she will not be eligible for SSDI benefits because, after five years of not working at a paid job, she simply will no longer be insured under this program.\footnote{48}

SSI benefits for this disabled housewife will be reduced the more income her husband earns. If her husband earns too much income, she will not be eligible for SSI, just as she is not eligible for SSDI benefits. In 2005, in a household with two healthy children, if the ineligible spouse earned $2,403 per month or more, the disabled spouse would not receive SSI benefits.\footnote{49}

Inasmuch as SSI is intended to be an anti-poverty program, in effect a safety net under Social Security's safety net, spouse-to-spouse income deeming may be viewed as perfectly reasonable. The program is funded out of general revenues, not the Social Security trust fund, and taxpayers could hardly be expected to pay SSI to the disabled spouse of, for example, a moderately affluent law professor.\footnote{50}

On the other hand, the marriage penalty for the noninsured disabled person is real and ongoing.\footnote{51} It is real because if the disabled homemaker in our example had not married the father of her children, but simply cohabited with him, his income would not be deemed to her. In that situation, she might well be eligible for SSI and only have the maximum benefits reduced by one-third if she were deemed to be living in another person's household.\footnote{52}

In the alternative, if she were a married housewife, but separated from her husband, she would likely become eligible for SSI because, in that situation, the SSA would only consider the periodic payments she actually receives from her husband—or ex-husband—as income to

In this sense, the SSI marriage penalties operate differently from the DAC marriage penalty. The DAC marriage penalty is permanent and not based on cohabitation. Once a DAC recipient marries a nonrecipient of Social Security benefits, the DAC benefits end. It does not matter whether the DAC beneficiary and spouse later cease cohabitation or divorce; the DAC benefits will not be reinstated. But for both SSI eligible couples and potentially SSI eligible individuals, the marriage penalty can be overcome by separation or divorce. Thus, every month SSI eligible couples and potentially SSI eligible married individuals have a financial incentive from the federal government to separate or divorce. Of course, for the potentially SSI eligible individual married to a reasonably high-earning spouse, this incentive is merely theoretical. The less her spouse earns, through the lower middle income range, the greater the incentive. If her spouse is a low earner, again the incentive will only be theoretical. In 2005, in a four-person household with two healthy children, if the working spouse made less than $1,245 per month, the disabled spouse could receive full SSI benefits.

There is one other significant way in which the marriage penalty operates differently in the DAC program than in the SSI program. The DAC program penalizes the entry into a lawful marriage. The SSI program penalizes cohabitation with a "spouse," which includes not only those who are legally married, but unrelated couples who cohabit and lead people to believe they are married.

C. Favored Couples: More Unintended Consequences

There is one type of married couple or spouses who occupy a special privileged position vis-a-vis the marriage penalty provisions of the Social Security Act discussed above. None of these marriage

53. Id. § 416.1121(b).
54. 20 C.F.R. § 404.352(b)(4).
55. Id.
56. Id. § 404.351.
58. See SSA POMS, supra note 50.
60. Id. § 416.1806.
penalties apply to these particular couples. I refer, of course, to same-sex couples.

When Congress enacted the Defense of Marriage Act (DOMA) in 1996, focused on nonrecognition of same-sex marriages which, at that time, were not legal anywhere in the United States, it specifically provided the following:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.61

While it is highly unlikely that proponents of DOMA intended to specially benefit same-sex couples, one or both of whom is disabled, that is certainly one of DOMA’s effects. Even a legally married same-sex couple in Massachusetts will not face the marriage penalty. Nor in any state, can unmarried same-sex couples be treated as spouses for SSI purposes; the SSI marriage penalties only apply to opposite sex spouses.62

D. Polygamy/Polyandry, or What About Tom Green?

Famous Utah polygamist Tom Green lived in either licensed marriages or other forms of “conjugal-type relationships” simultaneously with Lynda Penman, Beth Cook, Linda Kunz, Shirley Beagley, June Johnson, LeeAnn Beagley, Cari Bjorkman, Hannah Bjorkman, and Julie Dawn McKinley.63 In his spare time, Green appeared on various television shows with these women, consistently referring to them as his wives.64 In 2004, the Utah Supreme Court upheld Green’s conviction on four counts of bigamy.65

64. Id. at 823.
65. Id.
If either Green or any of these women were disabled, how would the SSA treat their relationship for purposes of the marriage penalties? Needless to say, the Social Security Act and regulations probably never contemplated such a situation. After all, since 1878, the United States Supreme Court has upheld the prohibition on polygamy against constitutional attacks based on freedom of religion.\textsuperscript{66}

Some of the answers are clear; some are not. If Green had been receiving DAC benefits, he would have permanently lost them the first time he became legally married to a nonrecipient of Social Security benefits.\textsuperscript{67} Similarly, if wife number one had been a DAC recipient and Green were not a Social Security beneficiary, she would have lost her DAC benefits. But how about wife number two, (or three, or four, or five, etc.)? If she were a DAC recipient and Green not a Social Security beneficiary, she would have a reasonable argument that her DAC benefits should continue. The SSA looks to state law to determine if a person is validly married.\textsuperscript{68} Wife two (or three, or four, or five, etc.) could argue that the same test should apply to her, and that Green's bigamy convictions demonstrate that her marriage to Green was not valid under state law and, hence her DAC benefits should continue.

The results would be more obscure under the SSI marriage penalties. The SSI regulations clearly contemplate that someone will only have one spouse at a time. The regulations consider someone a spouse (and therefore married) if one of the following applies: he or she is legally married under the laws of the state; the SSA has decided that he or she is entitled to husband's or wife's Social Security benefits, or; he or she is cohabiting with a member of the opposite sex, and the couple is holding themselves out as married.\textsuperscript{69} But the SSA adds a caveat: "If more than one person would qualify as your husband or wife under [any of these tests], we will consider

\textsuperscript{66}. Reynolds v. United States, 98 U.S. 145, 166-68 (1878).
\textsuperscript{68}. ld. § 404.345.
\textsuperscript{69}. ld. § 416.1806(a).
the person you are presently living with to be your spouse for SSI purposes."\textsuperscript{70}

Under the SSI regulations, Lynda, Beth, Linda, Shirley, June, LeeAnn, Cari, Hannah, and Julie Dawn each had one spouse while they all lived with Tom Green: only Tom Green. Furthermore, even though Tom regularly referred to Lynda, Beth, Linda, Shirley, June, LeeAnn, Cari, Hannah, and Julie Dawn as his wives, the regulation suggests that only one may be counted as his spouse for SSI purposes.\textsuperscript{71} The regulation is, of course, silent as to how to select Tom's "SSI spouse."\textsuperscript{72} But if the SSA read the regulation broadly to include as spouses each of Lynda, Beth, Linda, Shirley, June, LeeAnn, Cari, Hannah, and Julie Dawn, this could lead to interesting results. Let us suppose that Tom and all of these ladies were disabled and had been individually receiving SSI benefits before they met. When Tom took spouse number one as cohabitant or wife, both of their SSI benefits would have been reduced by one-fourth under the SSI marriage penalty.\textsuperscript{73} In 2006, each would lose over $150 each month.\textsuperscript{74} When spouse number two moved in, her SSI would also be reduced by one-fourth. But what about Tom's SSI? Would it again be reduced by one-fourth? And, if so, would that be one-fourth of his already reduced SSI or one-fourth of his original full SSI benefit? And, if it would be the latter, would Tom start owing the government SSI when he took spouse number five? Fortunately, we need not worry about such philosophical or mathematical problems as Tom Green is now incarcerated, and incarcerated individuals are ineligible for SSI.\textsuperscript{75}

\textbf{E. It's Not All Bad}

The marriage penalties discussed above are very significant and no doubt influence many couples' decisions to marry, cohabit, separate,

\textsuperscript{70} Id. \textsection 418.1806(b).
\textsuperscript{71} See id. \textsection 416.1806(b).
\textsuperscript{72} Id.
\textsuperscript{73} See SOCIAL SECURITY ADMINISTRATION, supra note 41.
\textsuperscript{74} Id.
\textsuperscript{75} State v. Green, 99 P.3d 820, 834 (Utah 2004); 20 C.F.R. \textsection 416.211 (2005).
or divorce. It should not, however, be assumed that the Social Security Act always penalizes disabled persons for marriage; that is certainly not the case. Under the Act, many benefits flow to certain disabled persons from being or having been married. For example, a widow or widower who was married for at least nine months before the death of the wage-earning spouse may receive disability insurance benefits on the deceased spouse’s earnings record if a number of other conditions are met.\textsuperscript{76} In similar circumstances, a surviving divorced spouse can receive benefits if the marriage lasted at least ten years.\textsuperscript{77} Hence, for surviving divorced spouses, there is not only an incentive to marry, but an incentive to stay married for at least a decade.

\section*{II. CHILD SUPPORT}

\subsection*{A. The Disabled Supporting Parent}

Difficult questions arise when a parent under a duty of child support is, or becomes, unable to work. As a general matter, of course, support orders are based in whole or in part on the obligor’s ability to pay.\textsuperscript{78} Indeed, a proven inability to make payments on a support order would be a complete defense to civil or criminal contempt of that order.\textsuperscript{79} In states such as Pennsylvania, which are “income shares model” states, the custodial parent’s income is also a factor in setting support.\textsuperscript{80}

Fortunately, in many cases the disabled parent will be eligible for either SSDI benefits or SSI.\textsuperscript{81} State courts have grappled with how

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{76} 20 C.F.R. § 404.335.\\%\textsuperscript{77} Id. § 404.336.\\%\textsuperscript{78} See generally Hicks v. Feiock, 485 U.S. 624 (1988).\\%\textsuperscript{79} Id. at 637-38.\\%\textsuperscript{80} See Jenkins v. Jenkins, 704 A.2d 231, 235-36 (Conn. 1998).\\%\textsuperscript{81} Obviously, a disabled support obligor may receive income from additional sources, such as: tort settlements, workers’ compensation, state pensions, private pensions, etc. These are beyond the scope of this paper. But see Duke v. Richards, 600 S.E.2d 182 (W. Va. 2004) (discussing veteran’s disability benefits); Navas v. Navas, 599 S.E.2d 479 (Va. Ct. App. 2004) (discussing transit authority disability allowance).
\end{enumerate}
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payments under these programs should be treated for support purposes and have reached inconsistent results.

The problem of the treatment for support purposes of both the disabled worker’s SSDI benefits and the child’s auxiliary benefits has received scant scholarly attention. One problem with trying to address this subject is the differences from state to state in the operation of their child support guidelines, which can be very detailed and complex. Although the federal Family Support Act mandates that each state have child support guidelines which create a rebuttable presumption of the correct amount of child support, the federal law does not dictate the actual state guidelines. Hence, they vary. A second problem is that, to be frank, sometimes a state court will show an appalling lack of understanding of the programs administered by the SSA. For example, in 2004 an appellate court in Connecticut referred to a child receiving dependency benefits based on his mother’s receipt of SSI. Since there are no dependency benefits under the SSI program, one can only deduce that the disabled parent was in fact receiving SSDI benefits rather than SSI.

1. Social Security Disability Insurance Benefits

A worker who has paid into the Social Security trust fund, through FICA taxes, over a sufficient period of time, and who then becomes disabled, may be eligible for SSDI benefits under Title II of the Social Security Act. Significantly, if the disabled worker is granted

84. I do not mean to fault the courts, but rather the lawyers whose job it is to edify them.
SSDI, there may also be "auxiliary" cash benefits for the worker’s spouse and minor children.\(^8\)

The most common scenario dealt with by state courts involves a disabled noncustodial parent (usually the father) who owes a duty of child support to the custodial parent to whom he may or may not be married.

Whether the state looks only at the obligor’s income or at both parents’ income, several interrelated questions arise:

1. Are SSDI benefits paid to the noncustodial parent income to that parent?
2. Are auxiliary benefits paid to the child because of the disability of a non-custodial parent:
   a. income to the child?
   b. income to the custodial parent?
   c. income to the non-custodial parent?
3. Do auxiliary benefits paid to the child because of the noncustodial parent’s disability fulfill that parent’s child support obligation?

The prevailing view is that SSDI benefits paid to a noncustodial parent are income for purposes of computing child support. Many states make this explicit in their child support statute. For example, Pennsylvania’s support law includes as income both "social security benefits" and "temporary and permanent disability benefits."\(^9\) In other states, the courts have readily interpreted their support statutes to include SSDI benefits as income, although remarkably, obligors continue to challenge their inclusion. As recently as 2004, the Supreme Court of Nevada found that the noncustodial mother’s SSDI qualifies as a source of her gross monthly income.\(^0\) The court reasoned that the child support statute has a protective purpose to provide adequate support to children and should be liberally

\(^8\) Id. § 402(b)-(d).
\(^0\) Metz v. Metz, 101 P.3d 779, 784 (Nev. 2004).
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In 2005, in *Groenste in v. Groenste in*, the Supreme Court of Wyoming reached the same result, finding the noncustodial parent’s SSDI analogous to “worker’s compensation payments, disability benefits, and annuity and retirement benefits,” all of which are specifically included in income under that state’s support statute.

Analysis of a child’s receipt of Social Security dependency benefits on account of the disability of the noncustodial parent has proven to be far more difficult. Typically, the SSA pays such auxiliary benefits to a dependent minor through the child’s custodial parent as the child’s “representative payee.” Even though such moneys go directly to the custodial parent for the child and are not reachable by the disabled, noncustodial parent, many state courts have concluded that the payments do constitute income to the noncustodial parent.

In 1994, in *Whitaker v. Colbert*, the Court of Appeals of Virginia found that dependency benefits paid to the custodial parent on account of the disability of the noncustodial father constitute income to him. Following precedent from other jurisdictions, the *Whitaker* court reasoned that since it was crediting the benefits against his support obligation, they were an earned benefit to him.

In 1995, in *Miller v. Miller*, the Alaska Supreme Court likewise found that dependency benefits paid to the custodial parent for the children were income to the noncustodial parent. The court reasoned that the benefits are essentially earnings derived from the disabled parent’s past social security contributions. As in *Whitaker*, the court also credited the dependency benefits against the father’s support obligation. Three years later in 1998, the Supreme Court of

91. *Id.*
92. 104 P.3d 765, 772 (Wyo. 2005).
95. *Id.*
96. 890 P.2d 574, 578 (Alaska 1995). The case involved Social Security retirement benefits rather than disability benefits, but the court indicated that there is “no theoretical basis for distinguishing between the two types of payment.” *Id.* at 577.
97. *Id.* at 577-78.
98. *Id.*
Connecticut in *Jenkins v. Jenkins* explicitly followed *Whitaker* and *Miller*. The same principles were followed in 2005 by the Wyoming Supreme Court in *Groenstein v. Groenstein*.100

However, this approach is neither uniform nor automatic. Taking the contrary position, in 2005, the Indiana Court of Appeals in *Brown v. Brown* upheld the refusal of a trial court to credit the disabled noncustodial father with a back award of dependency benefits paid to the mother for their child.101 The father had not worked for a few years "due to back injuries [and] surgery."102 In May 2003, the trial court found his child support arrearages to be $7,595.04.103 Two weeks later, the SSA sent the mother a check for the child in the amount of $10,377 based on the father’s disability.104 The trial court found that the payment of disability benefits was not child support, and that the father was not entitled to a credit.105 The appellate court found this position was not clearly erroneous.106

It is difficult to credit the rationales in *Brown*. One suspects that the result has more to do with distaste for a "deadbeat dad" (considering his poor record of making support payments or even showing up for court hearings) than a reasoned analysis of the legal situation. The *Brown* court pointed out that the father did not pay any extra premiums for the child’s benefits and his own benefits were not reduced.107 This is true, but how is it relevant? The court opined that the child’s benefits would be more appropriately added into the custodial mother’s income for purposes of recalculating the amount of support, but it did not order a remand for that purpose.108

The court also declared that “giving the custodial parent dollar-for-dollar credit for disability benefits received by the dependent child in this case would result in the child’s household owing money to the

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102. *Id.* at 1225.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1226.
108. *Id.* at 1228.
noncustodial parent on a weekly basis."\(^{109}\) This overlooks two remedies. First, as noted in the prior cases, the same benefits can be added to the father’s income, thus increasing the amount of support he owes. Second, even if the auxiliary benefits end up being greater than the amount of support set under state guidelines, it does not follow that the noncustodial parent in effect gets a refund or rebate. Such a result has been considered and properly rejected by other courts. In 1998, the Supreme Judicial Court of Massachusetts addressed this possibility:

There would be an exception if the amount of the support obligation as calculated by this approach (or as adjusted by the judge) is less than the amount of the SSDI dependency benefits. In such case, the total support obligation is simply equal to the amount of the SSDI dependency benefits, and the noncustodial parent would not owe any additional amount.\(^{110}\)

Likewise, in 2005 the Wyoming Supreme Court stated, “[s]hould the support obligation be less than the dependency benefit, the non-custodial parent owes no additional amount, but he is not entitled to a rebate.”\(^{111}\)

In deciding whether to credit a disabled, noncustodial parent’s child support account with Social Security payments made to a child, some courts focus on whether the payments are made to the custodial parent as representative payee or if they go directly to the child. Last year, this distinction was dispositive for the Appellate Court of Connecticut.\(^{112}\) In *Tarbox v. Tarbox*, the parties were married and had two children.\(^{113}\) In the divorce settlement, the father agreed to pay child support for each child until that child turned 18 or graduated high school, whichever occurred later.\(^{114}\) As it happened, both

\(^{109}\) *Id.*


\(^{111}\) Groenstein v. Groenstein, 104 P.3d 765, 774 n.2 (Wyo. 2005).


\(^{113}\) *Id.* at 616.

\(^{114}\) *Id.*
children graduated high school after age 18 on the same day, June 22, 2001. After the divorce, the father became disabled and applied for what the court, based on the parties' stipulation, referred to as "supplemental security income under the Social Security Act." In February 2001, the younger child, who had turned 18 in October 2000, received a lump sum payment of dependency benefits in the amount of $7,328 for the period of March 2000 through January 2001 based on his father's disability. Thereafter, the son received a monthly benefit check in the amount of $685 until he graduated high school. At all relevant times, this son resided with the mother. As already noted, the court is clearly incorrect in referring to these benefits as supplemental security income (SSI), which does not pay dependency benefits. As the father was in arrears in his child support payments, the mother filed for contempt. The father cross-filed to offset the dependency benefits against his support arrearages. The trial court granted the father a credit against his child support obligation, but the appellate court reversed.

Although the appellate court in *Tarbox* acknowledged the Connecticut Supreme Court's decision in *Jenkins v. Jenkins*, it found that decision not controlling where the dependency benefits are paid directly to an adult child. This is odd because the *Jenkins* court specifically noted that the state support "guidelines were amended by the commission in 1994 in order to grant a credit to non-custodial parents for Social Security dependency benefits paid directly to their dependent children." The appellate court faulted Mr. Tarbox for not having earlier petitioned to modify support and

115. *Id.*
116. *Id.*
117. *Id.*
118. *Tarbox*, 853 A.2d at 616.
119. *Id.* at 616 n.4.
121. *Tarbox*, 853 A.2d at 617.
122. *Id.*
123. *Id.* at 616.
126. *Jenkins*, 704 A.2d at 234.
for failing to notify the court of his pending disability claim, as opposed to letting his arrears accrue.\textsuperscript{127} The court went on to reason that: "[t]he [father's] decision to direct payment of dependency benefits to the younger of the parties' children, who had reached the age of majority, did not relieve him of his obligation to pay child support to the defendant."\textsuperscript{128}

Again the court demonstrates a lack of understanding of the Social Security system. It is the SSA which, in its wisdom, directs that back awards of dependency benefits be paid directly to adult children.\textsuperscript{129} While the father may have appropriately identified the child's bank account for direct payment, neither he nor the mother could have required SSA to pay all or part of the dependency benefits to the mother. SSA's Program Operations Manual System (POMS) clearly requires direct payment to the adult child unless that child is himself mentally incapable and thus in need of a representative payee.\textsuperscript{130} In effect, the Tarbox court punished Mr. Tarbox for a decision that he did not make and over which he had no control whatsoever.

The Tarbox decision, with its misstatements of Social Security law and practice, perhaps illustrates the inherent difficulties of courts' trying to decide these complex and nuanced issues on a case-by-case basis at the mercy of individual litigants or their attorneys who are likely far more knowledgeable about family law than disability law. A better approach, the one followed in Pennsylvania, would be for the agency within the state system charged with adopting and revising the support guidelines to try to draft specific guidelines addressing these issues.\textsuperscript{131}

In 2000, the Pennsylvania Supreme Court in its rule-making capacity, adopted amendments to the state support guidelines on the

\textsuperscript{127} Tarbox, 853 A.2d at 621.

\textsuperscript{128} Id.


\textsuperscript{130} See sources cited supra note 129.

effect of dependency benefits in calculating support. The amendments, in their current form, read as follows:

If a child for whom support is sought is receiving Social Security benefits as a result of a parent’s retirement, death or disability, the benefits the child receives shall be added to the combined monthly net incomes of the obligor and the obligee to calculate the income available for support on the vertical axis of the basic child support schedule. . . . The presumptive amount of support as set forth on the schedule at the combined income of the obligee, obligor and child’s benefits shall then be reduced by the amount of the child’s benefits before apportioning the remaining support obligation between the parties pursuant to Rule 1910.16-4.133

Translated into English, the child’s benefits are not imputed to either parent’s income, but are added to the total family income pool, resulting in a higher figure of presumptive child support against which the dependency benefit is then offset. The court provides the following example of how the rule should operate:

If the obligor has net income of $1200 per month; the obligee has net monthly income of $800; and the child receives Social Security derivative benefits of $300 per month as a result of either the obligor’s or obligee’s retirement or disability, then the total combined monthly net income is $2,300. Using the schedule . . . for one child, the amount of support is $568 per month. From that amount, subtract the amount the child is receiving in Social Security derivative benefits ($568 minus $300 equals $268). Then, apply the formula at Rule 1910.16-4 to apportion the remaining child support amount of $268 between the obligor and the obligee in proportion to their respective incomes. The obligor’s $1200 net income per month is 60% of

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132. Id.
133. Id. at 1910.16-2(b)(2).
the total of the obligor’s and the obligee’s combined net monthly income. Thus, the obligor’s support obligation would be 60% of $268, or $161, per month.\textsuperscript{134}

This approach has the great benefit of providing explicit guidance, not just to the trial level courts, but also, importantly, to the personnel in the Domestic Relations Offices who are not usually lawyers, but who must regularly set and modify child support orders. It also neatly addresses the less common situation, which will be dealt with below, where the child lives with the disabled parent.

In her thoughtful article in the Wyoming Law Review, \textit{Child Support and Social Security Dependent Benefits}, Tori R.A. Kricken concludes that:

\begin{quote}
Wyoming should follow the majority lead of incorporating the benefit payments into the obligor-parent’s income and, subsequently, allowing a set-off of his support obligations. Only through this method can Wyoming courts recognize that, although paid to the child, dependent benefits represent income of the parent. Only through the obligor-parent’s work history has such a benefit accrued. And only by allowing an associated credit can the disabled, non-custodial parent’s obligations be calculated justly.\textsuperscript{135}
\end{quote}

While there is much to be said for both the Pennsylvania rule and Kricken’s majority-based proposal, I suggest a simpler approach based directly on the Social Security Act. Under the Act, the child’s benefit is equal to one-half of the disabled parent’s benefit, subject to a “family maximum” if there are too many auxiliaries (dependents) receiving benefits on the same account.\textsuperscript{136} I propose that where the noncustodial, disabled parent has no other source of income than his or her own SSDI benefits, the amount his or her child receives from

\textsuperscript{134} \textit{Id.} at Example 1.
\textsuperscript{135} Kricken, \textit{supra} note 83, at 88.
SSA as a dependent should automatically become the presumptive amount of child support, and this amount should presumptively govern, even retroactively, for the entire time the child is in payment status. Further, as every court that has addressed the issue (other than Connecticut Court of Appeals in Tarbox) has held, if the child’s benefits exceed a pre-set support figure, the excess would simply be an extra benefit to the child, with no rebate or refund to the obligor parent. My suggested approach, like Pennsylvania’s, would avoid the legal fiction that a parent is receiving benefits which the parent is not in fact receiving and does not control.

2. Supplemental Security Income

Not surprisingly, there is little law on the child support obligations of a noncustodial parent receiving SSI. By definition, that parent is both disabled and indigent, hardly a good candidate from whom to extract any significant amount of support. SSI is a welfare program. Benefits rates are low. As noted, the current maximum federal SSI rate for an individual is $603 per month. Additionally, to be eligible an individual must have very limited countable resources. If the disabled person’s countable resources exceed $2,000, he is simply ineligible for SSI.

In her excellent article on SSI and support obligations, Professor Angela Epps notes that several states’ support laws exclude SSI from the definition of income, either specifically or as need-based public assistance. Other states exclude SSI from income in the regulations setting forth their support guidelines. For example, Pennsylvania’s support regulation provides, “[n]either public assistance nor Supplemental Security Income (SSI) benefits shall be counted as income for purposes of determining support.”

137. See Kricken, supra note 83, at 79-80.
138. See Social Security Administration, supra note 41 and accompanying text.
139. 20 C.F.R. § 416.1205 (2005).
140. See Epps, supra note 83, at 82 n.134; see also Davis v. Office of Child Support Enforcement, 20 S.W.3d 273, 278 n.2 (Ark. 2000) (“[38] states exempt SSI benefits from inclusion in a calculation of gross income for child support purposes.”).
Even in states with a very broad statutory definition of "income," courts are likely to interpret the support law to effectively exclude SSI from a parent's income. In *Davis v. Office of Child Support Enforcement* in 2000, the Arkansas Supreme Court found that "although SSI comes within the definition of income for child-support purposes, it is not subject to state court jurisdiction."\(^{142}\) The majority relied heavily on the facts that the noncustodial parent had no other source of income and the Social Security Act exempts SSI from "execution, levy, attachment, garnishment, or other legal process."\(^{143}\) In an interesting dissent, the Chief Justice noted that the disabled parent paid absolutely nothing in child support while using her SSI, among other things, to smoke a pack of cigarettes a day.\(^{144}\) He suggested that the money spent on cigarettes could more appropriately be used for child support.\(^{145}\)

A fairly recent case expressing the minority view is the Kentucky Supreme Court's 1998 decision in *Commonwealth ex rel. Morris v. Morris*.\(^{146}\) The unusual background of *Morris* is that prior to July 1994, the Kentucky support law excluded SSI benefits from child support calculations, but effective July 1994, the statute was amended to specifically include SSI in the definition of "gross income."\(^{147}\) Oddly, other "means-tested public assistance programs" remain excluded from the definition.\(^{148}\) Mr. Morris was under an order to pay the minimal sum of $31.50 per week for his four minor children.\(^{149}\) He applied for and received SSI as a disabled, indigent person.\(^{150}\) The trial court twice rejected his motions to reduce his child support, but on appeal of the second denial, the Kentucky Court of Appeals reversed, finding that the Kentucky support law regarding SSI was in conflict with the anti-alienation provisions for SSI contained in the

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\(^{142}\) *Davis*, 20 S.W.3d at 278.

\(^{143}\) *Id.*; see 42 U.S.C. §§ 407, 1383(d)(1), 659 (2000).

\(^{144}\) *Davis*, 20 S.W.3d at 278-79.

\(^{145}\) *Id.*

\(^{146}\) 984 S.W.2d 840 (Ky. 1998).

\(^{147}\) *Id.* at 840-41.

\(^{148}\) *Id.* at 841.

\(^{149}\) *Id.* at 840.

\(^{150}\) *Id.*
Social Security Act. The Kentucky Supreme Court, in a 4-3 decision, reversed the court of appeals and reinstated the support order.

The majority viewed the case very narrowly: whether the existence of a child support order based on a parent’s receipt of SSI violates the federal prohibition on subjecting SSI benefits to “execution, levy, attachment, garnishment, or other legal process.” In the absence of any legal process to collect on the support order, the majority found that “in its present posture” the case did not present a conflict with federal law.

The three judge dissent found the majority’s analysis incomplete and unrealistic. Since the father had no other source of income than SSI, and had been ordered to pay child support, the conflict was, in the dissent’s view, real and present.

One can view the minority position taken by the Kentucky legislature and supreme court two ways. Some may think of it as expressing a moral command that all parents owe a duty of child support to their minor children, and they should be ordered to make payments, no matter how small or how unlikely to be collected. Under this view, Kentucky’s position is a statement of principle rather than a realistic effort to obtain child support. In most cases, this is probably all that can be said for Kentucky’s inclusion of SSI as gross income. But it cannot be denied that there may be circumstances in which the Kentucky rule can actually lead to legally obtained child support. Should Mr. Morris, for example, use a dollar of his SSI to purchase a lottery ticket and hit the jackpot, or receive an inheritance from his late Aunt Sally, those moneys would be subject to attachment to pay the accrued child support based on his SSI, in addition to being counted as gross income. It is difficult to see how attachment of other sources of money to pay a support order

151. Id.
152. Morris, 984 S.W.2d at 842.
153. Id. at 841 (emphasis removed) (citing 42 U.S.C. § 407(a), made applicable to SSI through 42 U.S.C. § 1383(d)(1)).
154. Id.
155. Id.
156. Id.
based on SSI would violate the anti-attachment of SSI provisions in the Social Security Act.

3. Concurrent Benefits

There is a relatively small group of disabled persons who have worked and paid FICA taxes long enough to be insured for SSDI but who, because of low earnings, have a "primary insurance amount" (PIA) which is actually less than the SSI benefit rate. If such persons are otherwise eligible for SSI, they will receive "concurrent" benefits under both programs: SSDI at the rate of their PIA, plus an SSI supplement to bring their total benefits up to the SSI level. Thus in 2006, in a state that does not add a supplementary payment, if a disabled person eligible for full SSI were also insured for disability purposes, but his PIA was only $400, his monthly federal benefits would be as follows:

$$400 \text{ (SSDI)} + 203 \text{ (SSI supplement)} = 603 \text{ (total concurrent benefits = maximum SSI)}$$

There is one recent decision dealing with the support implications of the noncustodial parent’s concurrent receipt of SSDI and SSI. In Metz v. Metz, the parents were previously married and had one child who came to live with the father. The trial court concluded that because the mother was receiving concurrent benefits, she could not be ordered to pay child support.

In late 2004, the Nevada Supreme Court reversed in part. It found that both SSDI and SSI are included in "gross monthly income" under the Nevada support statute. As to SSI, however, the

157. Based on the author’s quarter century of disability law practice, it appears that such individuals usually have significant mental impairments.
159. 101 P.3d 779, 781 (Nev. 2004).
160. Id. at 782.
161. Id. at 787.
162. Id. at 783.
court found Nevada law to be preempted by the SSI anti-attachment provisions in the Social Security Act. Including SSI as income would do "’major damage’ to a clear and substantial federal interest,” and thus was barred by the Supremacy Clause of the U.S. Constitution.\footnote{Id. at 785 (citing Davis v. Office of Child Support Enforcement, 20 S.W.3d 273 (2000)).}

The Nevada Supreme Court went on to find that since federal law allows the attachment of Social Security benefits to satisfy a support order, it was an abuse of discretion for the trial court not to consider the mother’s SSDI benefits.\footnote{Id.} Since the trial court had not made findings of fact regarding the amount of SSDI the mother received, the state supreme court remanded the case for further proceedings.\footnote{Metz, 101 P.3d at 787.}

While the court’s reasoning makes statutory sense, since the mother’s SSDI benefits are below even the minimal level of SSI, it is difficult to believe that she would be placed under any but the most minimal, token child support order on remand.

**B. The Disabled Custodial Parent**

As should be expected, there is considerably less law on the child support implications in the situation where the custodial parent, rather than the noncustodial parent, is disabled. This is in part because, where one parent is disabled, it is likely that any children will be raised by the other parent. Particularly in the case of mental disabilities or severe physical disabilities, those disabilities will often be found to impact the best interest of the child in a custody determination.\footnote{See Linda A. Francis, Annotation, Mental Health of Contesting Parent as Factor in Award of Child Custody, 53 A.L.R. 5th 375 (1997).} Additionally, in those states which do not use the income shares model for child support determination, but only look at the income of the noncustodial parent, there is simply no occasion to consider disability benefits received by the custodial parent. Thus, there are few cases dealing with support calculations where a child is receiving dependency benefits based on the disability of her custodial parent.
In 2003, in *Adams v. Adams*, a Missouri appellate court considered various economic arguments in a father's appeal of a marital dissolution and the mother's cross-appeal.\(^\text{167}\) Although the court referred to "joint legal and physical custody of both parties," it appears that one child, Jennifer, lived primarily with her mother.\(^\text{168}\) The mother applied for and received SSDI benefits, for which the SSA paid her $798 per month and Jennifer $398 per month.\(^\text{169}\) The trial court only counted the mother's $798 in calculating monthly child support for Jennifer.\(^\text{170}\) The father also unsuccessfully challenged the mother's need for maintenance, asserting that she was not fully disabled and that she could earn $749 a month and keep those earnings in addition to maintaining her disability benefits.\(^\text{171}\) Clearly his lawyer did not understand that earning money at this level would render the mother ineligible for disability benefits in less than a year and actually result in less income to her than her SSDI.\(^\text{172}\)

The father relied on *Weaks v. Weaks* in which the Missouri Supreme Court had ruled that it would be inequitable to withhold credit for a child's dependency benefits against the child support obligation of a disabled parent.\(^\text{173}\) Since Jennifer's benefits were intended to replace income from her disabled, custodial mother, the court in *Adams* saw "no reason" to give the father a credit and thus reduce his support obligation.\(^\text{174}\)

One must be cautious in interpreting *Adams*. The *Adams* court reviewed the trial court on an "abuse of discretion" standard.\(^\text{175}\) The court stopped short of mandating that there can never be a reduction in the nondisabled, noncustodial parent's child support on account of


\(^{168}\) Id. at 824.

\(^{169}\) Id. at 823.

\(^{170}\) Id. at 824.

\(^{171}\) Id. at 825.

\(^{172}\) See 20 C.F.R. § 404.1592 (2005) (explaining that the mother would use up her "trial work period" in nine months, after which, if she kept working at that level, she would not be entitled to benefits).

\(^{173}\) 832 S.W.2d 503 (Mo. 1991).


\(^{175}\) Id. at 828.
the dependency benefits the child derives from the custodial parent.\textsuperscript{176}

In 2005, in \textit{Holtgrewe v. Holtgrewe}, another Missouri appellate court rejected the crediting of a nondisabled parent with dependency benefits her child received based on the disability of the other parent.\textsuperscript{177} The case is confusing because there were two children born of the marriage, Jamie and Devon, one of which resided with each parent.\textsuperscript{178} The mother worked, and the father received SSDI benefits, as did the children as his dependents.\textsuperscript{179} The two households and their actual incomes were as follows:\textsuperscript{180}

<table>
<thead>
<tr>
<th>Mother's household:</th>
<th>Father's household:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mother $2,158/month (earned)</td>
<td>Father $1,011/month (SSDI)</td>
</tr>
<tr>
<td>Jamie $252/month (SSDI)</td>
<td>Devon $252/month (SSDI)</td>
</tr>
<tr>
<td>Total = $2,410/month.</td>
<td>Total = $1,263/month</td>
</tr>
</tbody>
</table>

The trial court credited each parent with $252 per month for the child in that parent's custody.\textsuperscript{181} Based on the parties' respective incomes and the mutual credits, the trial court ruled that neither parent owed the other child support.\textsuperscript{182}

The father appealed, asserting that the mother should not receive a credit for Jamie's dependency benefits derived from the father's disability.\textsuperscript{183} The court of appeals agreed.\textsuperscript{184} Citing \textit{Weaks} and \textit{Adams}, the court found that it was error for the trial court to have given the mother credit for benefits that were intended to replace income from the father.\textsuperscript{185}

Although the court was not explicit in its remand order, it would appear that the mother will accordingly owe the father $252 per

\begin{verbatim}
176. Id. at 821.
177. 155 S.W.3d 784 (Mo. Ct. App. 2005).
178. Id. at 785.
179. Id.
180. Id.
181. Id.
182. Id.
183. Holtgrewe, 155 S.W.3d at 785.
184. Id. at 787.
185. Id. at 786.
\end{verbatim}
month in child support. If this is a correct assumption, the net income of the mother’s monthly household would then be $2,158 with which to raise one child, while the father’s household income would be $1,505 per month with which to raise the other child. While the income to the mother and one child would still be substantially greater than that for the father and the other child, it would no longer be double.

In 2004, in *Elsenheimer v. Elsenheimer*, a California appellate court grappled with the effect of a custodial parent’s receipt of SSI on a pre-existing child support order. The parents were divorced with two children who resided primarily with the mother. The father was under a child support order of $1,308 per month when the mother applied for and began to receive SSI as a disabled person in the amount of $778 monthly. The father sought a downward modification based in part on the mother’s receipt of SSI. As intervenor on behalf of the mother, the Department of Child Support Services (DCSS) argued that SSI cannot be counted as income. Based on the mother’s receipt of SSI and other factors, the trial court reduced the father’s monthly child support obligation from $1,308 to $465.

In a brief opinion, the appeals court reversed, relying on the statutory definition of gross income which specifically excludes “income derived from any public assistance program, eligibility for which is based on a determination of need.”

While the court was no doubt correct as a pure matter of statutory construction, the result in this case is actually perverse. The DCSS

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187. *Id.* at 449.
189. *Elsenheimer*, 22 Cal. Rptr. 3d at 449.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 449 (quoting CAL. FAM. CODE § 4058(c)).
was able to intervene because the children receive public assistance, and the DCSS is entitled to contribution from the father. Thus the DCSS was the real party in interest, not the mother or the children. By refusing to allow the father to decrease his child support payments, the court benefited DCSS at the expense of the children. Although the mother was their primary custodian, the father had the children 49% of the time. Had he paid less child support ostensibly to the mother, but actually to DCSS, the likely financial beneficiaries would have included the children. While a dollar-for-dollar reduction of his child support would have conflicted with the public policy of having parents contribute to state support of their children, a partial reduction would have maintained some reimbursement to the state while directly benefiting the children during the half of their lives spent with their father. On the other hand, the Elsenheimers could be accused of "gaming the system" by arranging for the children to spend 51% of their time with the mother, so as to make the mother and children eligible for welfare benefits under the Temporary Assistance for Needy Families (TANF) program.

C. The Disabled Child

Disabled minor children may, like adults, become eligible for SSI benefits based on their own disability. As a poverty program, SSI is only available to children from low income households. Similar to spouse-to-spouse income deeming, there is parent-to-child income deeming by which a parent's income will be "deemed" to the child for SSI eligibility purposes where the parent and child reside together.

In 2005, in a single parent household with one disabled child, that child could be eligible for full SSI benefits if the parent earned less than $1,283 per month or had unearned income of less than $619 per

194. Id. at 449.
The child would have become ineligible for SSI if the custodial parent earned $2,441 per month or more, or had unearned income of $1,198 or more.\(^{199}\)

But that is not the complete picture. The figures cited above assume no other countable income to the disabled minor child. If the noncustodial parent pays the custodial parent child support, that child support will also affect SSI eligibility and computation, but under a different formula.

Under the SSI rules, child support is a special kind of "unearned income." In any month in which child support is paid, the SSA will disregard the first $20.\(^{200}\) Further, the SSA will disregard "[o]ne-third of support payments made to or for you by an absent parent if you are a child."\(^{201}\)

Let us suppose that in 2006, the disabled minor child living with his indigent mother is receiving maximum federal SSI of $603 per month.\(^{202}\) If the noncustodial father pays $170 in monthly child support, the disabled child’s SSI will be reduced from $603 per month to $503 per month as follows:

\[
\begin{align*}
$170 & \text{ child support} \\
- 20 & \text{ general monthly disregard} \\
$150 & \\
x 1/3 & \text{ special child support disregard} \\
$100 & \text{ net child support resulting in dollar-for-dollar SSI reduction}
\end{align*}
\]

There is scant decisional authority on how a disabled child’s receipt of SSI should affect a parent’s support obligation. As noted, a majority of states do not consider SSI to be income for support

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198. See SSA POMS, supra note 50 (discussing figures for Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia).
199. Id.
201. Id. § 414.1124(c)(11).
202. This does not take into account any state supplementary payments. See SSA POMS, supra note 37.
purposes. Moreover, the disabled child may have extraordinary needs not covered by SSI or Medical Assistance, which could give rise to an upward deviation from a support guideline. Thus, the noncustodial parent may have the worst of both worlds: no credit for the SSI his child receives, plus increased support based on the child's disability.

In March 2006, in *Gifford v. Benjamin*, the Appellate Division of the Superior Court of New Jersey reversed a lower court that had eliminated a father’s child support obligation on the grounds that the dependent child had begun to receive SSI in an amount greater than the pre-existing support order. The Appellate Court found that there should be no credit against the support order based on the child’s receipt of SSI “because SSI benefits are ‘means tested’ based on the child’s disability and the custodial parent’s financial need.”

As previously noted, in Pennsylvania the support guidelines specifically exclude consideration of SSI as income. In one appellate decision (which actually involved a disabled adult child), the court suggested in a footnote that while the child's SSI could not be considered as income for the support calculation, “we believe that the trial court in its discretion may consider such income as a basis for deviating from the guidelines . . . where application of the guidelines would render an unjust result.” This same reasoning would certainly also apply to the case of a minor child receiving SSI.

The concern about child support payments reducing, or even eliminating, a disabled child’s SSI (and possibly entitlement to Medical Assistance) brings us back to one of the issues posed by the opening vignette in this article. What can a noncustodial parent do for either a minor or adult disabled child to help that child financially while not unnecessarily jeopardizing the child’s means-tested benefits? The not-so-simple answer often involves creation of a special needs or supplemental needs trust, which, if properly drafted,
can directly provide "luxuries" to the child, such as transportation, travel, etc. Had the father in our example created a proper special needs trust instead of a support trust, he could have benefited his daughter more than he benefited the SSA.

III. CONCLUDING THOUGHTS

Too few family lawyers take the time to master the admittedly complex world of disability benefits. As a result, they make mistakes that harm their clients and sometimes their clients' children in ways which are quite avoidable. Also, as a result, courts addressing family law questions may make ill-informed decisions with unfortunate consequences because of a lack of understanding of the disability programs currently or potentially providing benefits to litigants or their children.

Our society must strike a proper balance between the moral imperative that parents support their disabled children and the moral imperative that society ensure that the basic needs of disabled parents and all children, including disabled children, are met.

Finally, all the arguments that were used against marriage penalties in the Internal Revenue Code apply with even more force to the marriage penalties in the Social Security Act. When President George W. Bush declared October 12-18, 2003, to be "Marriage Protection Week," he stated in part:

Marriage is a sacred institution, and its protection is essential to the continued strength of our society.


209. The author is personally familiar with a situation in which a family law practitioner, based on limited research, advised a DAC beneficiary that his impending marriage would not affect his continued receipt of benefits. In the ensuing malpractice action, there was a six-figure settlement. See also ISBA Mutual Risk Management Conference, 4th, Hot Topics in Risk Management, 10 (Chicago 2000).
By supporting responsible child-rearing and strong families, my Administration is seeking to ensure that every child can grow up in a safe and loving home.

We are also working to make sure that the Federal Government does not penalize marriage. My tax relief package eliminated the marriage penalty. And as part of the welfare reform package I have proposed, we will do away with the rules that have made it more difficult for married couples to move out of poverty.210

Almost three decades after Califano v. Jobst, there is no excuse for our government to continue to drastically penalize those disabled persons fully dependent on DAC benefits by permanently taking away those benefits upon marriage, especially when they marry another disabled person who is not receiving Social Security benefits. Likewise, there cannot possibly be a justification for telling two individual SSI recipients that they can live together unmarried with no loss of benefits, but if they marry, they will lose so much of their benefits that they will be reduced to living significantly below the poverty line.