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CHILD SUPPORT AND SOCIAL SECURITY DEPENDENT BENEFITS: A COMPREHENSIVE ANALYSIS AND PROPOSAL FOR WYOMING

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Mr. John Doe and Ms. Jane Doe are married, live in Wyoming, and have a child, Jennifer Doe. They are, in essence, a "typical" modern American family. This American family experiences difficulties, and the Does are granted a divorce, with custody being awarded to Ms. Doe.[1] As a result, Mr. Doe is ordered to pay child support based on the family's income and the Wyoming child support statutes. Subsequently, Mr. Doe is injured or retires and becomes eligible for social security disability or social security retirement payments, respectively.[2] As a result, his daughter, Jennifer Doe, a minor and under the care of her mother, becomes eligible to receive dependent benefits. How should Jennifer's receipt of dependent benefits affect Mr. Doe's child support obligation? Should this money be included in Mr. Doe's "gross income" for purposes of re-calculating his child support? Is a modification required or even appropriate? Should he receive a credit against his child support obligation in the amount of the benefits Jennifer receives? What should be done with any excess? These are questions yet to be answered by the Wyoming Legislature or the Wyoming Supreme Court.

1. The author acknowledges that either parent could receive primary custody of the child or children in a divorce and custody action. However, for purposes of simplicity, the non-custodial parent generally will be presumed to be the father and referred to as "he" throughout this article.

2. As explained later, there is little, if any, difference between Social Security disability (SSDI) benefits and Social Security retirement benefits as they apply to this article. Thus, in general, SSDI benefits will be discussed, but the reader should read the analysis and discussion to apply equally to retirement benefits in the applicable situation. However, some argument might be made for distinguishing between the two based on a theory that disability benefits are generally the result of an involuntary occurrence while retirement is generally a voluntary choice. This difference could develop a case-by-case theory as to the non-custodial parent's "motives" for his financial position and control over the income levels he receives.

Now picture Mr. Sam Smith and Ms. Susan Scott. They too have a child, Samantha Scott, but were never married. Prior to establishing paternity, Mr. Smith is injured or retires and becomes eligible for social security disability or social security retirement benefits. Likewise, Samantha becomes eligible for dependent benefits. How should Samantha's receipt of dependent benefits affect Mr. Smith's child support obligation? Should this money be included in Mr. Smith's "gross income" for purposes of initially calculating his child support? Should he receive a credit against his support obligation in the amount of the benefits Samantha receives? What should be done with any excess? These, too, are questions yet to be answered by the Wyoming Legislature or the Wyoming Supreme Court.

In a time when social security is the talk of the most recent presidential election, its presence also is felt in the realm of family law. However, many states, including Wyoming, have yet to recognize the increased importance of social security retirement and social security disability dependent payments as they apply to child support. This article attempts to analyze the role of such social security payments in the calculation and modification of child support in Wyoming.

I. DEFINITIONS & BACKGROUND

Before the above questions can be answered accurately and thoroughly, one must understand the social security system and the social security benefits discussed. This is not an easy task and appears to be subject to some confusion by district courts throughout the state and the country.

A. The Social Security System

By the Social Security Administration's (SSA) own words, "Social security is based on a simple concept. When you work, you pay taxes into the system, and when you retire or you become disabled, your spouse and your dependent children receive monthly benefits that are based on your earnings. And, your survivors collect benefits when you die."[3] Of course, it is a little more complicated than that; in essence social security is a mandated insurance program.

The United States Congress has seen fit to place the fed-

3. Social Security Administration, *Understanding the Benefits*, Publication No. 05-10024, ICN 454930 (Feb. 2001), *available at* http://www/ssa/gov/pubs/10024.html (last visited Nov. 1, 2001).

> eral government in the role of insurer in order to afford members of the work force the protection and security of insurance against future disability. The fundamental nature of the Social Security system is a form of insurance in every sense of that word. Benefits paid out by a governmental insurer, under a policy of insurance for which the insured has paid premiums, are no more gratuitous than benefits paid out by a private insurance company.
>
> . . . [P]ersons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present productive work force will in turn become beneficiaries rather than supporters of the program . . . .
>
> The "right" to Social Security benefits is in one sense "earned," for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection . . . .[4]

Indeed, social security is in the nature of insurance and, in fact, the terms "insured," "insurance," and "beneficiary" are used throughout the act.[5] Additionally, 42 U.S.C.A. § 402(d) is entitled "Child's insurance benefits," and uses that term throughout.[6]

As a general point of understanding, the payments prescribed by the Social Security Act are not

> gratuities or matters of grace; they are not public assistance; they are not welfare payments. On the contrary, the law created a contributory insurance system, under which what in effect constitute premiums are shared by employees and employers. Consequently, in spirit at least, if not strictly and technically, the employee, who throughout his working life has contributed part of the premiums in the form of deductions from his wages or salary, should be deemed to have a vested right to the

4. Andler v. Andler, 538 P.2d 649, 653 (Kan. 1975) (quoting Flemming v. Nestor, 363 U.S. 603, 609-10 (1960)).

5. Roston v. Folsom, 158 F.Supp. 112, 121 (D.C.N.Y. 1957).

6. *See* 42 U.S.C.A. § 402(d) (2000).

> payments prescribed by the statutory scheme, which in effect comprises the terms of his insurance policy. He has earned the benefits; he is not receiving a gift.[7]

The general opinion is that the social security system is one of public insurance. Those who pay the "premiums" are entitled to disability benefits and/or retirement benefits when appropriate.

B. Retirement, Disability, and Supplemental Security Income (SSI) Benefits Under the Social Security System

Essentially, when an individual becomes disabled, he may apply for social security benefits.[8] Disability benefits sometimes are referred to as Social Security Disability Insurance (SSDI). Upon approval of such social security disability benefits,[9] "other members of your family also may be eligible for payments . . . . Each family member may be eligible for a monthly benefit that is up to 50 percent of your retirement or disability rate."[10] Thus, a dependent generally receives an amount equal to a certain percentage of the benefit attributed to the disabled or deceased individual. More specifically,

> [t]he Social Security Administration provides benefits for minor children whose parent(s) is (are) disabled. The minor children are considered beneficiaries of the benefits earned and paid for by their parents under the Social Security Act. The money given under this program is an unqualified grant of money to be used as the minor's guardian determines.[11]

Therefore, the child, not the disabled parent, is deemed the beneficiary of the dependent benefit. For younger children, often the payments are made to a "representative payee" who uses the money for the benefit of the child, in accordance with SSA guidelines.[12] Although the

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7. Schmiedigen v. Celebrezze, 245 F.Supp. 825, 827 (D.D.C. 1965).

8. In general, a Social Security benefit is based on an individual's earnings averaged over his working lifetime. This is different from many private pension plans that usually are based on a relatively small number of years of earnings. Social Security Administration, *supra* note 3.

9. The application and approval process are beyond the scope of this article, and for purposes hereafter, the reader simply should assume that the individual has been "approved" for the receipt of these benefits.

10. Social Security Administration, *supra* note 3.

11. Andler v. Andler, 538 P.2d 649, 651 (Kan. 1975); 42 U.S.C.A. § 402(d)(1) (2001).

12. 20 C.F.R. § 416.640 (2000).

child is deemed the beneficiary, the amount received is based on the disabled parent's past income.

The same scenario applies to social security retirement benefits. In this situation, an applicant must reach the requisite "retirement" age before receiving benefits. Thereafter, the process is much the same as outlined above. Certainly, no dependent benefits are provided for retirees, but retirement benefits are distributed to dependents when the individual worker dies. These benefits are termed "survivors' benefits." For all intents and purposes, retirement and disability benefits are identical in funding and payment, except that the qualifications for each vary.

For those who have not worked long enough to qualify for Social Security disability and/or retirement benefits, or for those eligible for only a small benefit amount, Supplemental Security Income (SSI) may apply.[13] SSI payments are available to those who have low incomes and few assets. Although the SSI program is "funded" directly by Social Security taxes or Social Security trust funds, SSI payments are financed by the general revenue funds of the U.S. Treasury.[14] Further, SSI is a means-tested source of income in that individuals who receive above a specified amount of income are barred from receiving this benefit.

C. *Calculating the Benefits: More Details*

In arguing whether social security is a type of mandated insurance program as opposed to a mandated savings account, one must look at how such benefits are determined. First, for every dollar an individual pays in social security taxes, eighty-five cents is deposited into a trust fund that pays monthly benefits to retirees and their families as well as to about eight million widows, widowers, and children of workers who have died.[15] The other fifteen cents is deposited into a trust find that pays benefits to disabled individuals and their families.[16] From these trust funds, the Social Security Administration first pays the costs of administering the programs. Finally, any funds not used to pay benefits or administrative expenses are invested in U.S. government bonds.[17]

To become eligible for social security benefits an individual must work and pay Social Security taxes to earn "credits."[18] If one re-

13. Social Security Administration, *supra* note 3.
14. *Id.*
15. *Id.* at 4.
16. *Id.*
17. *Id.*
18. *Id.* at 9.

ceives dependent or retirement benefits based on taxes paid by a deceased spouse, the "credits" claimed are those of the disabled or deceased individual, not the recipient. Credits are earned by income. For example, in the year 2000, a worker earned one credit for each $780 in earnings, but with a maximum cap of four credits per year.[19] Most individuals need forty credits, or ten years of work, to qualify for benefits, but there is an exception for younger individuals who become disabled or for their family members to receive survivors' benefits.[20]

Most workers will earn more than the required forty credits during their lifetimes, but these "extra" credits do not increase the Social Security benefits they may receive. Instead, the income an individual earns may increase that benefit.[21] In short, the amount of Social Security benefits for which an individual qualifies is based on date of birth, the type of benefit requested, and the individual's earnings. A Social Security benefit is based on one's earning averaged over his working lifetime.[22] The following chart explains this in more detail:

Step 1	Determine the number of years of earnings to use as a base. For retirement benefits, everyone born after 1928 and retiring in 1991 or later, that base is the thirty-five highest years. Fewer years are used for workers born in 1928 or earlier. For disability and survivors' benefits, most of the years of earnings posted to an individual's record are used.
Step 2	Adjust the individual's earnings for wage inflation.
Step 3	Determine the average adjusted monthly earnings based on the number of years figured in Step 1.
Step 4	Multiply the average adjusted earnings by a percentage(s) specified by law, with an end result of benefits that replace about forty-two percent of an individual's earnings.[23]

Although one's benefits are considerably less than the entire amount of a previous paycheck, a benefit recipient easily may draw more Social Security benefits than he invested in the system. For example, a

19. *Id.*
20. *Id.* at 9-10.
21. *Id.* at 10.
22. *Id.*
23. *Id.* at 8. The forty-two percent figure applies to persons who had "average" earnings during their working lifetime. Those in the upper income bracket see a lower percentage; those in the lower income bracket see a higher percentage. The rationale, here, is that Social Security is weighted to favor the low-income worker who had less opportunity to save and invest his earnings during his working years. Social Security Administration, *Social Security: Basic Facts*, Publication No. 05-10080 (Jan. 2001), *available at* http://www.ssa.gov/pubs/10080.html (last visited Nov. 1, 2001).

disabled individual is eligible to receive benefits until his condition improves or he returns to performing "substantial work."[24] For an individual disabled early in life, his benefits easily could extend over decades. There is, however, a limit to the amount family members can receive as dependents or survivors.

> Each family member may be eligible for a monthly benefit that is up to 50 percent of your retirement or disability rate. However, there's a limit to the total amount of money that can be paid to a family on your Social Security record. The limit varies, but is generally equal to about 150 to 180 percent of your retirement benefit. (It may be less for disability benefits).[25]

The potential that an individual and/or his family may collect more than he paid into the Social Security system supports the mandated insurance theory.

D. Child Support in General

In some states, the calculation of child support is entirely within the discretion of the trial court. Such discretion involves the balancing of the various factors reliant upon the particular parties.[26] In most states, statutory formulas dictate a presumptive support amount based on the parents' income, at least up to a certain level of income. Courts may deviate from the presumptive amount in a given case only upon a finding that the presumptive amount would be clearly unfair. In Wyoming, that finding must rest explicitly on statutorily enumerated factors.

Under the Wyoming statutes, guidelines require a tabulation of the net monthly income of both parents and fixed amounts of support on the basis of the amount of income.

> After the combined net income of both parents is determined it shall be used in the first column of the tables to find the appropriate line from which the total child support obligation of both parents can be computed from the third column. The child support obligation computed from the third column of the tables shall be divided between the parents in proportion to the net income of each. The noncustodial parent's share of the joint child

24. *Id.* at 13.
25. *Id.* at 15.
26. 24 AM. JUR. 2D *Divorce and Separation* §§ 1027, 1035 (1983).

> support obligation shall be paid to the custodial parent through the clerk of court.[27]

The statute further provides that "the presumptive child support established by W.S. § 20-2-304 shall be rebuttably presumed to be the correct amount of child support to be awarded in any proceeding to establish or modify temporary or permanent child support amount."[28] Thus, a Wyoming court is restrained to some extent by the presumptive child support guidelines.

However, Wyoming trial courts also have the discretion to deviate from the presumptive child support amount "upon a specific finding that the application of the presumptive child support would be unjust or inappropriate in that particular case."[29] In determining whether to deviate from the presumptive amount, the trial court shall consider following factors:

> (i) The age of the child;
> (ii) The necessary child day care;
> (iii) Any special health care and educational needs of the child;
> (iv) The responsibility of either parent for the support of other children, whether court ordered or otherwise;
> (v) The value of services contributed by either parent;
> (vi) Any expenses reasonably related to the mother's pregnancy and confinement for that child, if the parents were never married or if the parents were divorced prior to the birth of the child;
> (vii) The cost of transportation of the child to and from visitation;
> (viii) The ability of either or both parents to furnish health, dental and vision insurance through employment benefits;
> (ix) The amount of time the child spends with each parent;
> (x) Any other necessary expenses for the benefit of the child;
> (xi) Whether either parent is voluntarily unemployed or under employed . . . ;
> (xii) Whether or not either parent has violated any provision of the divorce decree, including visitation provisions, if deemed relevant by the court; and
> (xiii) Other factors deemed relevant by the court.[30]

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27. WYO. STAT. ANN. § 20-2-304(a) (LEXIS 2000).
28. WYO. STAT. ANN. § 20-2-307(a) (LEXIS 2000).
29. WYO. STAT. ANN. § 20-2-307(b) (LEXIS 2000).
30. *Id.*

While most of these factors appear irrelevant to the issues herein, the last consideration may be the deciding factor. A court very well may include a child's "separate resources" in this "catch-all" category. This would allow a consideration of dependent benefits regardless of their consideration as parental income or elsewhere. Thus, although the guidelines provide a firm base for the calculation of child support, trial courts can deviate from guideline amounts when necessary and appropriate. While the discretion vested in the trial courts allows for equitable considerations on a case-by-case basis, it also breeds uncertainty and confusion among attorneys, judges, and clients. This article analyzes some of the considerations presented to Wyoming courts so as to suggest a more uniform decision-making process and more consistent results.

II. THE ISSUES: CONSIDERING THE IMPACT OF SOCIAL SECURITY BENEFITS UPON CHILD SUPPORT

The initial discussion laid the groundwork of an understanding of social security benefits as well as the determination of child support. It is in combining the two distinct systems that confusion and contemplation arise. A consideration of the effects of social security benefits, particularly dependent benefits, on child support calculation or modification has not gone unnoticed. However, the issues are unresolved in numerous states, including Wyoming.

It is not uncommon for a non-custodial parent to become disabled, either before or after the imposition of the child support obligation. From the social security perspective, the individual is qualified for and begins to receive disability benefits. Additionally, his children receive dependent benefits equal to a percentage of his disability benefits. The legal system still is grappling with questions as to how the benefits paid to the children should affect support, if at all. Should dependent benefits (received by the child, or the representative payee on behalf of the child) be included as "income" of the disabled parent?

Frequently, a non-custodial parent subject to a court-ordered child support obligation seeks credit against that obligation for some government benefit paid to the children. Some issues arise: Should a disabled non-custodial parent receive credit against his child support obligation for amounts received by the child as a dependent beneficiary? In the case where credit is allowed, what should be done with any excess of the dependent benefits over the current support award? Is it feasible to allow a credit against arrearages or future obligations? Is this fair? If a credit is allowed, should it be immediately granted upon unilateral acts of the obligor or must that parent return to court to request a modification via court intervention? Is a modification in which a parent receives

credit for dependent benefits optional or mandated in these cases?

These issues have been most widely litigated, at least in recent years, with respect to various social security benefits. The answers may lie in a resolution of the overriding aim of both social security benefits as well as child support guidelines. Where the two commingle, the interests of the child and the interests of the non-custodial parent may clash. Thus, if the goal is that of maximizing the financial benefits to the child, likely an approach that would yield the highest sum of dependent benefits and support is appropriate. On the other hand, if the aim is fairness to the non-custodial parent, one might consider whether the sum of disability benefits to the non-custodial parent and to the child exceeds the payoff of a private insurance policy purchased with equivalent premiums. Perhaps, too, the portion of the benefit allotted the child should be compared either to the portion of income that a parent of an intact family ordinarily devotes to a child or to the portion of a non-custodial parent's income that statutory support guidelines ordinarily allot. State courts appear to consider all these options, and the result is widespread deviation among states as to the results as well as the initial approach to the topics.

A. The Dispute Regarding Inclusion of Dependent Payments in a Disabled Parent's Income

The basis for all child support is the income of the parents. Therefore, what is and is not included in the definition of "income" significantly impacts a parent's child support obligations. Where the state statutory definition of "income" does not address dependent benefits, courts are faced with a quandary:

> Neither the guidelines nor any other relevant statute or regulation explicitly states whether dependency benefits paid directly to minor children are to be treated as an element of the non-custodial parent's gross income . . . . Although the definition of gross income contained in the guidelines does not list dependency benefits among the items specifically included, it does provide that the list is not exclusive . . . . It is also significant that the list of specifically enumerated inclusions identifies 'social security (excluding Supplemental Security Income [SSI])' as an item that is expressly included in gross income, with the named exception . . . . In light of the inclusion of this provision, we conclude that if social security dependency benefits had been intended to be excluded from the definition of gross income, they would have been ex-

> cluded within this same parenthetical. The fact that dependency benefits are not mentioned further supports the notion that the commission did not intend to exclude them.[31]

In *Jenkins*, the Connecticut court was faced with mandatory child support guidelines as a basis for its child support determinations.[32] However, the Connecticut court opined that, although its guidelines established a rebuttable presumption of support, that presumption could be rebutted by a "specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case."[33] Thus, the court had leeway to consider dependent benefits as a factor requiring a deviation from the support guidelines. Interestingly it chose instead to include those sums in the non-custodial parent's income calculation.[34]

Likewise, Utah's support statutes provide that the guidelines shall be applied as a rebuttable presumption establishing or modifying the amount of temporary or permanent child support.[35] However,

> [a] written finding or specific finding on the record supporting the conclusion that complying with a provision of the guidelines or ordering an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of a child in a particular case is sufficient to rebut the presumption in that case.[36]

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31. Jenkins v. Jenkins, 704 A.2d 231, 233-34 (Conn. 1998).

32. *Id.* at 231. *See* CONN. GEN. STAT. § 46b-215b (2001). CONN. GEN. STAT. § 46b-215b(a) provides:

> The child support guidelines and arrearage promulgated pursuant to section 8 of public act 85-548 and any updated guidelines issued pursuant to section 46b-215a shall be considered in all determination of child support amounts within the state. In all such determinations there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount of support to be ordered. A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under criteria established by the commission under section 46b-215a, shall be sufficient to rebut the presumption in such case.

Id. See McHugh v. McHugh, 609 A.2d 250 (Conn. App. 1992).

33. *McHugh*, 609 A.2d at 253 (quoting CONN. GEN. STAT. § 46b-215b (1998)).

34. *Jenkins*, 704 A.2d at 236.

35. UTAH CODE ANN. § 78-45-7.2 (2001).

36. *Id.*

With this statutory guidance, in *In re Marriage of Maples*, the Washington Supreme Court determined that the state statutes were ambiguous regarding the inclusion of dependent disability benefits in a parent's income calculation for purposes of child support.[37] After a thorough analysis of state legislative history, the court stated:

> We conclude from this legislative history that the disability payments to the children should be considered part of [non-custodial parent's] income for purposes of setting his support obligation. The clear legislative intent in establishing the child support schedule was to set an adequate level of support commensurate with the parents' income, resources, and standard of living.[38]

Again, a state court chose not to modify or deviate from the presumptive guidelines but to include dependent benefits as parental income. If statutory analysis is insufficient to establish the inclusion of dependent benefits, perhaps logic and public policy will suffice. Dependent benefits are paid to dependent children as a replacement for the parent's lost income, and, therefore, from an economic standpoint, are most appropriately characterized as income to the parent, rather than as income to the child.[39] Further,

> [B]oth the disability income received by the plaintiff [parent] and the dependency benefits received by the children would have been available to support the children if the family had remained intact. The failure to include these benefits in the plaintiff's gross income leads to a determination of child support based upon an income figure that does not accurately reflect the income available to the family unit.[40]

As a result, common sense dictates that dependent disability payments be considered income of the disabled parent. Disability payments substitute for earned income. Were the parent not disabled, that parent would continue to earn income that would be included as parental income. The "substitutionary" dependent disability payments similarly should be counted as parental income. The payments are made directly

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37. 899 P.2d 1 (Wash. Ct. App. 1995).

38. *Maples*, 899 P.2d at 4.

39. *Jenkins*, 704 A.2d at 233. *See* Matter of Marriage of Pagano, 935 P.2d 1246, 1250 (Or. Ct. App. 1997). Whether dependent death benefits should be viewed as income of a decedent's estate proposes another perplexing question, but such a discussion is beyond the scope of this article.

40. *Jenkins*, 704 A.2d at 236.

to the child to protect the child and insure that the payments are used for the child's benefit, but paying the child directly does not transform this substitute for the parent's earning into income for the child.[41] However, "income" means property received, and it is difficult to justify how such money is the property of the non-custodial parent if he has neither control over either the funds nor the right to use them. The former position of maximizing the financial benefit to the child might not square with the notion that the child support payments belong to the child, not the custodial parent, hence the proponents of different results.[42]

Some courts reach the same result via a "back door" of sorts. They first address the second issue of this article, namely whether the non-custodial parent should receive a credit toward his child support obligation from the dependent disability benefits. After answering the question in the affirmative, these courts then conclude that the same amount must be included in that parent's income calculation.

> Our decision that the social security benefits Holly received through Sonny must be credited toward Sonny's child support obligation requires us to consider the subsidiary issue of whether such payments should be included as income in calculating Sonny's child support obligation. Civil Rule 90.3 Commentary III(A) defines "income" as "total income from all sources. This phrase should be interpreted broadly to include benefits which would have been available for support if the family has remained intact.
>
> In deciding that the social security benefits Holly receives as Sonny's dependent child should be credited as child support payments by Sonny, we reasoned that those benefits are essentially earnings derived by Sonny from his past social security contributions. By parallel reasoning, the benefits should be counted as income to Sonny. Given the broad definition of income under Civil Rule 90.3, and, in order to avoid granting a windfall to Sonny, we find it necessary to include social security benefits payable to Holly on his behalf as income for purposes of the Rule 90.3 calculation of income.[43]

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41. *Maples*, 899 P.2d at 5.

42. *See* discussion *infra* Section II(A) notes 49-55. *See also* Wood v. Wood, 964 P.2d 1259, 1264 (Wyo. 1998). "The social security benefits belonged to the two girls and, therefore, were not income to the mother." *Id.*

43. Miller v. Miller, 890 P.2d 574, 578 (Alaska 1995) (citations omitted).

Many courts reach the conclusion that dependent disability benefits must be included in the disabled parent's income, whether based on statute, common law, common sense, or public policy.[44] When faced with the unique position of attributing the dependent disability benefit to parental income versus "extraordinary income" of the child, a Washington court determined the answer really did not matter.[45] In the former situation, the father's higher income would lead to a higher child support calculation whereas in the latter situation, the court could simply deviate to reach the same obligation.[46]

The difference is that if the benefits are included in parental income, it would likely lead to an *increase* in child support, whereas a consideration of the benefits as extraordinary income to the child would likely serve to *decrease* the support obligation of the non-custodial parent by means of a deviation. An increase in support will not be discretionary on the part of the judge, while a deviation and decrease in support will be discretionary, giving judges the ability to give the child more than he otherwise would receive.

Finally, many courts appear to "assume" the inclusion of dependent disability benefits in the disabled parent's income without really considering alternatives. Such assumptions appear to be based on a common-sense approach that "money received must be income." For example:

> James has two sources available to him to pay child support—James's disability payments of $1,680 and the disability payments to the children in the amount of $567, for a total of $2,247. Since both resources are available to satisfy his child support obligation, both resources should be considered as income to him for purposes of

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44. Lopez v. Lopez, 609 P.2d 579, 580-81 (Ariz. Ct. App. 1980); *Jenkins*, 704 A.2d at 233; Nazworth v. Nazworth, 931 P.2d 86, 89 (Okla. Ct. App. 1996); *Pagano*, 935 P.2d at 1250; *In re* Marriage of Briscoe, 949 P.2d 1388, 1390-91 (Wash. 1998); *Maples*, 899 P.2d at 3.

45. *Maples*, 899 P.2d at 3.

46. *Id.*

> The Social Security Administration makes payment directly to the minor, dependent child of a person entitled to disability insurance benefits. 42 U.S.C. § 402(d)(1). *See* Clayborn v. Califano, 603 F.2d 373 (2nd Cir. 1979). The disability payments to the children can be interpreted to be income to [the husband], or else income to the children themselves. If income to the children themselves, then the payments are not counted in computing [the husband's] standard child support, but they would be "extraordinary income" of a child which could be a basis for the trial court to deviate from the standard child support obligation.

Id.

> calculating his child support obligation. Otherwise, the direct disability payments to the children would result in a windfall to the disabled parent, whose obligation would be unfairly reduced at the expense of the custodial parent.[47]

On the other hand, a few courts hold that dependent disability benefits cannot and should not be included in the parent's income calculation. An Oregon court determined that, where the children receive dependent disability benefits and those benefits are used only for the benefit of the child, that money is considered the "resources and earning ability" of the child as opposed to parental income.[48]

Although the minority view, such a conclusion is persuasive. After all, the children are the beneficiaries, and the SSA guidelines provide fairly strict instructions regarding how dependent benefits should be spent. The federal tax codes treat the dependent benefits as income to the minor children who receive them.[49] However, the federal tax codes are not controlling regarding state child support guidelines. "Because the guidelines contain their own definition of gross income, it is that definition that is determinative."[50]

Further, if the overarching aim is fairness to the non-custodial parent, consider the case where that disabled parent's sole source of income is his social security disability benefits, a sum equivalent to approximately forty-two percent of his prior income.[51] His child is slated to receive dependent benefits of approximately one-half that received by the father, or twenty-one percent of the father's previous pay.[52] Under state support guidelines, a single child generally is allocated somewhere

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47. *Id.* at 4.

48. Lawhorn v. Lawhorn, 850 P.2d 1126, 1127-28 (Or. Ct. App. 1993).

> The guidelines do not provide that "gross income" include the financial resources and earning ability of the child. Here, the children receive benefits pursuant to 42 U.S.C. section 402(d), because they are dependents of a disabled person. Benefits under that statute may be paid either directly to the child beneficiary or to another individual as "representative payee" to administer the funds for the child's use and benefit. 42 U.S.C. § 405(j); 20 C.F.R. § 404.2040. The representative payee must use the money exclusively for the child in accordance with federal guidelines and must hold any excess in trust for the child's later use. 20 C.F.R. § 404.2045. Thus, the benefits the parties receive for their children are financial assets or income of the children, not "gross income" of the parents . . . .

Id.

49. Jenkins, 704 A.2d at 235. *See* 26 U.S.C. § 86 (1998).

50. *Id.*

51. *See infra* Section I(C).

52. *Id.*

between sixteen percent and twenty-three percent of the income of *both* parents.[53] That percentage is further reduced by the non-custodial parent's "proportion" of income to that of both parents, leaving the allocation to the child closer to ten percent of the non-custodial parent's income. [54] Thus, the dependent benefits appear to award the child a sum higher than that normally determined, even without including it in income or considering the impact of any credit. Why, then, should the non-custodial parent be "penalized" with the inclusion of dependent benefits in his income when his child already sees considerably more "income" as well?

Considering the positions discussed above, an analysis of Wyoming's statutes and case law might assist the reader. The Wyoming statutory definition of income is as follows:

> "Income" means any form of payment or return in money or in kind to an individual, regardless of source. Income includes, but is not limited to wages, earnings, salary, commission, compensation as an independent contractor, temporary total disability, permanent partial disability and permanent total disability worker's compensation payments, unemployment compensation, disability, annuity and retirement benefits, and any other payments made by any payor . . . . Means tested sources of income such as Pell grants, aid under the personal opportunities with employment responsibilities (POWER) program, food stamps and supplemental security income (SSI) shall not be considered as income. Gross income also means potential income of parents who are voluntarily unemployed or underemployed.[55]

Since the definition includes workers compensation payments, disability benefits, and retirement benefits, it is clear that SSDI or retirement benefits received by a *parent* are income. In addition, the statute specifically *excludes* "means tested" sources of income, such as SSI. A "means test" is defined as: An investigation into the financial well-being of a person to determine the person's eligibility for financial assistance;[56] any examination of the financial state of a person as a condition precedent to receiving social insurance, public assistance benefits, or other payments from public funds.[57] Therefore, public assistance, such as

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53. *See, e.g.*, WYO. STAT. ANN. § 20-2-304 (a)(i) (LEXISNEXIS 2001).

54. *Id.*

55. WYO. STAT. ANN. § 20-2-303(a)(ii) (LEXIS 2000).

56. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 2074 (4th.ed. 2000).

57. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1399 (Ed. 1993).

SSI, that "caps" one's ability to receive benefits at a certain income level is "means tested" and is excluded from "income" under the Wyoming statutes. As a result, SSI is excluded, and to the extent a parent receives SSI, it *cannot* be included as income when calculating child support.

However, neither retirement benefits nor disability benefits are "capped;" there is no point at which the SSA will deny disability or retirement benefits due to an individual's prior income level. Neither disability nor retirement benefits are "means tested." This conclusion further resolves any confusion as to whether the *parent's* benefits may be included as income.

The statutory definition of income is purposefully broad so as to encompass all potential resources for a family. However, the definition does not clearly address dependent benefits received by a *child* as a result of the parent's disability. While the Wyoming definition does not specifically include "social security," it does specifically include "disability" and "retirement" benefits.[58] These are akin to the inclusion of "social security," especially considering the precise statutory exclusion of SSI. It seems safe to conclude, as did the *Jenkins* court, that had the Wyoming Legislature wanted to exclude dependent benefits from the definition of income, it would have listed them among the exclusions.[59]

The statute does define income as "payment or return in money or in kind to an individual, regardless of source."[60] Strict constructionists focus on this language and argue that dependent benefits are payments to the child, not to the parent and simply cannot be included in that parent's income. Since the statutory definition fails to address an item, a court must look to statutory interpretation, case law, and public policy. Thus, consider *Wood v. Wood*, in which the Wyoming Supreme Court may very well have suggested a result akin to that found under a strict constructionist approach, whether or not intended by the Wyoming Legislature.[61]

In *Wood*, the wife had two daughters from a previous marriage.[62] She received monthly social security benefits on behalf of the two daughters because their biological father was deceased.[63] After the wife remarried, her second husband adopted the girls, and the couple had two

58. WYO. STAT. ANN. § 20-2-303(a)(ii) (LEXIS 2000).
59. *Jenkins v. Jenkins*, 704 A.2d 231 (Conn. 1998).
60. WYO. STAT. ANN. § 20-2-303(a)(ii) (LEXIS 2000).
61. 964 P.2d 1259 (Wyo. 1998).
62. *Id.* at 1262.
63. *Id.* at 1263.

more children during their marriage. When the parties divorced, the district court was faced with attributing the social security benefits to the wife as income. In response, the Wyoming Supreme Court summarily stated:

> The district court calculated the mother's net monthly income in two ways because it was uncertain as to whether or not the social security benefits, which the mother received on behalf of her two oldest daughters, should be considered as being a part of her monthly net income. In one calculation, the district court included the social security benefits, and, in the other calculation, the district court excluded these payments. *The social security benefits belonged to the two girls and, therefore, were not income for the mother. Accordingly, they cannot be included as a part of the mother's monthly net income.*[64]

Obviously, here the Wyoming Supreme Court was not presented with attributing the income to the daughters' biological father or non-custodial parent. Instead, the social security benefits could be viewed more along the lines of "outside" income that benefited the children. The court chose not attribute it as income to the wife. Unfortunately, the court does not explain its position, nor does it cite authority or public policy as its basis.

If one can glean anything from *Wood*,[65] it might be a tendency of the Wyoming Supreme Court to adopt the view that Social Security dependent benefits are *not* to be considered in calculating the net income of the disabled, non-custodial parent.[66] The court seems resolved in its position that such benefits belong to the children and, consequently, cannot be attributed to income of the custodial parent.

This position may conflict with the court's position and the results suggested in *Hinckley v. Hinckley*.[67] In *Hinckley*, while married, the father suffered serious back injuries while on active duty with the United States Air Force.[68] The father then retired and began receiving Veterans Administration (VA) benefits. In a subsequent divorce, the father was required to pay a total of $300 per month child support. At the time of the divorce, the father's only income was his disability pension from the

64. *Id.* at 1264 (emphasis added).
65. *Id.* at 1259.
66. *See supra* Section II(A) and text accompanying notes 49-55.
67. 812 P.2d 907 (Wyo. 1991).
68. *Id.* at 909.

VA.[69]

Subsequently, the father received Social Security disability payments, and his children collected monthly SSDI dependent benefits in the amount of $584 per month.[70] As a result, the father requested that the Social Security disability "benefits paid on his account to the children be set off against any arrearages in child support that might be due from him and also be credited against his future child support obligation."[71] While the *Hinckley* court leaves open the possibility that dependent disability benefits can modify a child support amount, perhaps to the extent of "replacing" the non-custodial parent's obligation entirely, it reiterates that:

> The fact that *children become entitled to receive Social Security benefits* is not the exclusive factor for the trial court to consider in ruling upon the petition for modification. A determination of the amounts of child support that are appropriate in an instance in which modification is sought due to a change in circumstances requires a consideration of the needs of the children, the ability of the father to contribute to those needs and his responsibility to do so, the ability of the mother to contribute to those needs and her responsibility to do so.[72]

The Wyoming Supreme Court emphasizes that the benefits belong to the *children* and, perhaps, suggests that any modification of child support is based upon a consideration of such benefits as a means for "deviation" from the standard established by W.S. § 20-2-304. In determining whether to deviate from this standard, the trial court shall consider "[o]ther factors deemed relevant to the court,"[73] including, potentially, the consideration of additional sources of income to the children.

It is notable that the *Hinckley* court discusses the father's income:

> Not only that, but the father's income has increased since the time of the divorce because he also now received benefits from Social Security. At the time of this proceeding, the father had an income of $2,300 per month, upon which no federal taxes could be collected. It is true that the children now receive more than the support awarded at the time of the divorce decree, but the fa-

69. *Id.*
70. *Id.*
71. *Id.* at 910.
72. *Id.* at 912 (emphasis added) (citations omitted).
73. WYO. STAT. ANN. § 20-2-307(b)(xiii) (LEXISNEXIS 2001) (emphasis added).

ther's income has been enhanced as well.[74]

Here, the court discusses the father's receipt of his own social security disability benefits but does not include any reference to the dependent benefits received by the children. It appears that the court recognizes the possibility of "deviating" from the presumptive child support amounts via a consideration of these benefits. Interestingly, this would generally suggest a departure downward as opposed to an upward deviation caused by the inclusion of benefits in parental income. Whether the court will refuse to "credit" the child support obligation remains to be seen. Yet, the *Hinckley* court dealt with a situation in which the SSDI dependent payments arose *after* the imposition of a child support order, not prior to the order.[75] This timing issue may affect the court's willingness to include the benefits within a "net income" determination. Whether dependent benefits should be considered when calculating child support initially remains unresolved in Wyoming.

Speculation about Wyoming aside, the majority view supports the idea that dependent disability benefits should be included as income when calculating child support. The benefits are received as a result of the disabled parent's work history and contributions to social security. In a sense, these earnings can be considered either "deferred income" or an insurance policy payout. Either way, there is no avoiding the fact that the money is income attributed to that parent. Further, based on public policy considerations of seeking the greatest financial aid to the child, if a credit is allowed to the non-custodial parent on the basis of the dependent benefits,[76] only through such an inclusion in income can the child benefit fully from all resources available to his parents. Based on many state statutes, the majority view, common sense, and public policy, dependent disability benefits should be included in the disabled, non-custodial parent's income for purposes of initially calculating child support.

B. Considerations Surrounding Dependent Benefits as a Credit Toward A Parent's Child Support Obligation

Courts confronted with a request for credit must weigh the best interest of the children with fairness to the obligor parent and the intent of the particular government program at issue.[77] On the whole, the courts have shown a willingness to allow such a credit against a child support

74. *Hinckley*, 812 P.2d at 912.

75. *Id.* at 907.

76. *See infra* Section II(B).

77. Michael A. DiSabatino, 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).

obligation for various government benefits paid for the support of the child, albeit with varying degrees of procedural difficulty, if the benefits to the child were generated by the efforts or qualifications of the obligor parent seeking the credit, but averse to allowing a credit to the obligor parent for a benefit that is not attributable to that parent.[78]

To some extent, the answers to the first and second issues in this article are circular. If dependent disability benefits are included in income for purposes of calculating child support, they probably should be allowed as a credit toward the same support obligation. Likewise, if dependent disability benefits are allowed as a credit against a current child support obligation, then they probably ought to be included in that parent's income. Either way, courts often reach the same result: "Are the Social Security payments received by the wife and children to be credited against [the father's child] support obligation? We answer this in the affirmative."[79] After all,

> Under 42 U.S.C.A. § 402(d), the children of parents who have become disabled, or have retired or died, can be eligible for dependent social security benefits, and receipt of such benefits by children, or their representative payees, has frequently given rise to claims of credit by parents, or their estates, who have been ordered to support these children. Where the claim of credit is asserted by the parent, or the representative of the deceased parent, whose disability, retirement, or death have given rise to the benefit payment, courts have been receptive to the claim of credit, at least where credit is sought against support obligations contemporaneous with benefit payments."[80]

But, in reaching this conclusion, courts take many different approaches.

i. Insurance Policy and "Earnings" View

Many courts take the view that a parent is entitled to a credit against his child support obligation for dependent benefits that resulted from the parent's own disability, retirement, or death. These courts generally deem that such benefits were generated, in a sense, by the obligor

78. *Id.* at 463.

79. Lopez v. Lopez, 609 P.2d 579, 581 (Ariz. 1980). *See* Cash v. Cash, 353 S.W.2d 348 (Ark. 1962); McClaskey v. McClaskey, 543 S.W.2d 832 (Mo. App. 1976); Bruce I. McDaniel, Annotation, *Right to Credit on Child Support Payments for Social Security or Other Government Dependency Payments Made for Benefit of Child*, 77 A.L.R. 3d 1315 (1977); 24 AM. JUR. 2d *Divorce and Separation* § 873 (1966).

80. *See* DiSabatino, *supra* note 77, at 463-64.

parent's own earnings, with the attendant payment of social security taxes. Hence, the payments properly should be regarded as a substitute for support payments from the obligor's own earnings. If allowance of such a credit produces an undesired result, these courts frequently reason the custodial parent can seek a modification of the support order. It should be noted, however, that even some courts that allow a credit for dependent benefits qualify their holdings by saying that a credit will not be available if the result is clearly inequitable.[81]

Most states adopting this view rely on the conclusion that dependent disability benefits are benefits paid to the child on that parent's behalf:

> Courts have been careful to point out 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 . . . . The majority view thus regards social security benefits as earnings of the contributing parent and, for this reason, allows benefits paid to the child on the parent's behalf to be credited toward child support obligations.[82]

The court found this view persuasive. "Although the benefits are payable directly to the child rather than through the contributing parent, the child's entitlement to payments derives from the parent, and the payments themselves represent earnings from the parent's past contributions."[83] In theory, the actual *source* of the payments is of no concern to the party having custody as long as the payments are made.[84] Again, the "insurance policy" description of Social Security appears to dictate the result. The Kansas Supreme Court determined that Social Security dependent benefits are paid to the children as beneficiaries of an insurance policy, the premiums having been paid by the obligor-parent. The benefits were in no way gratuitous.[85]

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81. *Id.*
82. Miller v. Miller, 890 P.2d 574, 576-77 (Alaska 1995) (citations omitted).
83. *Id.* at 577.
84. *Id.* (quoting Davis v. Davis, 449 A.2d 947, 948 (Vt. 1982)).
85. Andler v. Andler, 538 P.2d 649, 653 (Kan. 1975). The court held that:

> Social Security benefits paid to the appellee for the benefit of the parties' minor children as the result of the appellant's disability may not, however, be regarded as gratuitous. On the contrary, the payments received by the appellee are for the children as beneficiaries of an insurance policy. The premiums for such policy were paid by the appellant for the children's benefit. The pur-

Indeed, the majority of the states that have addressed the issue of social security dependent disability benefits for children have recognized that the obligor parent normally is entitled to a credit against a child support obligation for the social security dependent benefits received by the children as a result of the obligor parent's disability. This is true at least to the extent that such payments are contemporaneous with the obligor-parent's support obligation.[86] This majority view regards social security benefits as "earnings" of the contributing parent that have been

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> pose of Social Security is the same as that of an insurance policy with a private carrier, wherein a father insures against his possible future disability and loss of gainful employment by providing for the fulfillment of his moral and legal obligations to his children. This tragedy having occurred, the insurer has paid out benefits to the beneficiaries under its contract of insurance with the appellant, and the purpose has been accomplished.

Id.

86. Those states include: Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Mexico, New York, Ohio, South Dakota, Tennessee, and Washington. Michael A. DiSabatino, *supra* note 77, at 469-70. Additionally, West Virginia, Pennsylvania, and North Dakota have determined that there is a rebuttable presumption that credit should be given against a child support obligation. *Id.* at 480-82. *See* Nazworth v. Nazworth, 931 P.2d 86 (Okla. Ct. App. 1996); Baker v. Baker, 923 P.2d 1198 (Okla. Ct. App. 1996).

For additional cases, *see* Brewer v. Brewer, 613 So.2d 1292 (Ala. Civ. App. 1992); Crawford v. Bullock, 587 So.2d 363 (Ala. Civ. App. 1991); Windham v. State, 574 So.2d 853 (Ala. Civ. App. 1990); Binns v. Maddox, 327 So.2d 726 (Ala. Civ. App. 1976); Pacana v. State, 941 P.2d 1263 (Alaska 1997); *In re* Marriage of Bertrand, 39 Cal.Rptr.2d 151 (Cal. Ct. App. 1995); County of Napa v. Combs, 272 Cal.Rptr 282 (Cal. Ct. App. 1990); *In re* Marriage of Denny, 171 Cal.Rptr 440 (Cal. Ct. App. 1981); State, Dep't of Health & Rehabilitative Serv. v. Linden, 584 So.2d 207 (Fla. Dist. Ct. App. 1991); Perteet v. Sumner, 269 S.E.2d 453 (Ga. 1980); Horton v. Horton, 132 S.E.2d 200 (Ga. 1963); *In re* Marriage of Henry, 622 N.E.2d 803 (Ill. 1993);); Stultz v. Stultz, 644 N.E.2d 589 (Ind. Ct. App. 1994); Poynter v. Poynter, 590 N.E.2d 150 (Ind. Ct. App. 1992); Newman v. Newman, 451 N.W.2d 843 (Iowa 1990); Potts v. Potts, 240 N.W.2d 680 (Iowa 1976); *In re* Marriage of Beacham, 867 P.2d 1071 (Kan. Ct. App. 1994); Andler v. Andler, 538 P.2d 649 (Kan. 1975); Faul v. Faul, 548 So.2d 957 (La. Ct. App. 1989); McCloud v. McCloud, 544 So.2d 764 (La. Ct. App. 1989); Folds v. Lebert, 420 So.2d 715 (La. Ct. App. 1982); Rosenberg v. Merida, 697 N.E.2d 987 (Mass. 1998); Cohen v. Murphy, 330 N.E.2d 473 (Mass. 1975); Frens v. Frens, 478 N.W.2d 750 (Mich. 1991); Homberg v. Homberg, 578 N.W.2d 817 (Minn. Ct. App. 1998); Mooneyham v. Mooneyham, 420 So.2d 1072 (Miss. 1982); Weaks v. Weaks, 821 S.W.2d 503 (Mo. 1991); Newton v. Newton, 622 S.W.2d 23 (Mo. Ct. App. 1981); Brewer v. Brewer, 509 N.W.2d 10 (Neb. 1993); Hanthorn v. Hanthorn, 460 N.W.2d 650 (Neb. 1990); Schulze v. Jensen, 214 N.W.2d 591 (Neb. 1974); Mask v. Mask, 620 P.2d 883 (N.M. 1980); Romero v. Romero, 682 P.2d 201 (N.M. Ct. App. 1984); Williams v. Williams, 727 N.E.2d 895 (Ohio 2000); Previte v. Previte, 650 N.E.2d 919 (Ohio Ct. App. 1994); Gilford v. Wurster, 493 N.E.2d 258 (Ohio Ct. App. 1983); Nazworth v. Nazworth, 931 P.2d 86 (Okla. Ct. App. 1996); Pontbriand v. Pontbriand, 622 A.2d 482 (R.I. 1993); Grunewaldt v. Bisson, 494 N.W.2d 193 (S.D. 1992); Hawkins v. Peterson, 474 N.W.2d 90 (S.D. 1991); *In re* Marriage of Hughes, 850 P.2d 555 (Wash. Ct. App. 1993).

"invested" in an insurance-type system. For this reason, benefits paid to a child on the parent's behalf should be credited toward child support obligations as would be an insurance payout.[87]

The unconditional nature of these benefits also influences courts' decisions. Courts have held that benefits constitute satisfaction of a child support order when paid to the divorced mother for the benefit of the minor children.[88]

> We hold where a father who has been ordered to make child support payments becomes totally and permanently disabled, and unconditional Social Security payments for the benefit of the minor children are paid to the divorced mother, the father is entitled to credit for such payments by the government against his liability for child support under the divorce decree. The father is entitled to credit, however, only up to the extent of his obligation for monthly payments of child support, but not exceeding it. Here the excess of $61.10 paid each month must be regarded under the divorce decree as a gratuity to the children. While the $61.10 is not a gratuity in the sense that it represents the children's vested right under the insurance concept of the Social Security system, it nevertheless is a gratuity under the divorce decree to the extent it exceeds the amount ordered in the divorce decree.[89]

Further, some courts have allowed a credit based on the "earned" character of such federal benefits. These courts have reasoned that such a credit is equitable because the benefits were earned during employment by the parent obligated to pay support and, in effect, constitute the payments received on an insurance policy where the parent paid the premiums for the children as beneficiaries.[90] Accordingly, crediting the benefits against the obligor's child support obligation is fair and just since the benefits are the fruits of the obligor's labors.

Finally, other courts permit a credit on the ground that the federal benefits received on behalf of the children are merely a substitute for the wages the obligor would have received but for the disability or the retirement and from which the support payments would otherwise

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87. *Miller*, 890 P.2d at 577; *Pontbriand*, 622 A.2d at 484-85.

88. *Cash v. Cash*, 353 S.W.2d 348 (Ark. 1962); *Horton*, 132 S.E.2d at 200-01; *Andler*, 538 P.2d at 654.

89. *Andler*, 538 P.2d at 654.

90. *See* Guthmiller v. Guthmiller, 448 N.W.2d 643, 647 (N.D. 1989); *Andler*, 538 P.2d at 653; *Horton*, 132 S.E.2d at 200-01; *Mooneyham*, 420 So.2d at 1074; *Cash*, 353 S.W.2d at 348-50; *Mask*, 620 P.2d at 886.

have been made.[91] A Georgia court observed that social security disability payments represent money an employee earned during his employment and which his employer paid into a common trust fund for the employee's benefit. The court surmised the purpose of this process was to "replace" lost income because of an employee's inability to work upon becoming disabled; thus, these payments substitute for income. As a result, the court concluded that since the amount of child support is determined largely by income, no reason existed why the social security disability benefits should not be credited.[92]

Similarly, a Nebraska court held that crediting the social security dependent payments was appropriate, as the payments resulted from the father's accidental disability and were a substitute for his loss of earning power and his obligation to pay for the support of his dependents.[93] Whether the court phrases its justification in terms of deferred earnings, an insurance-policy payout, or an unconditional social security payment, the results are the same: The non-custodial parent is granted the benefit of a credit for the dependent benefits.

ii. Statutory View

Other states face a much less daunting task. In those states, state statutes and adopted legislation provide a relatively clean and simple answer. In *Coulan v. Coulan*,[94] the Colorado court stated the statutory provisions. "Section 78-45-7.5(8)(b) provides: Social security benefits received by a child due to the earnings of a parent *may* 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."[95] Similarly, a Colorado court reiterated that C.R.S. § 14-10-115 (16.5) requires that "the child support obligation of the non-custodial parent must be reduced by the amount of any social security benefits paid to or for the benefit of the child."[96] Section 14-1-115(16.5) of the Colorado Revised Statutes states:

> In cases where the custodial parent received periodic disability benefits granted by the federal 'Old-age, Survivors, and Disability Insurance Act' on behalf of dependent children to the disability of the noncustodial parent or

91. *Davis*, 449 A.2d at 948; *Binns*, 327 So.2d at 728; Matter of Estate of Patterson, 805 P.2d 401, 405-7 (Ariz. 1991).

92. *Horton*, 132 SE2d at 201. *See* Bruce I. McDaniel, *supra* note 79, at 1329-30.

93. *Schulze v. Jensen*, 214 N.W.2d 591 (Neb. 1974). *See* McDaniel, *supra* note 79, at 1329.

94. 915 P.2d 1069, 1071 (Utah App. 1996).

95. *Id.* (emphasis added). *See* Brooks v. Brooks, 881 P.2d 955, 961 (Utah App. 1994).

96. *In re* Marriage of Wright, 924 P.2d 1207, 1209 (Colo. Ct. App. 1996).

> receives employer-paid retirement benefits from the federal government on behalf of dependent children due to the retirement of the noncustodial parent, the noncustodial parent's share of the total child support obligation as determined pursuant to subsection (14) of this section *shall* be reduced in an amount equal to the amount of such benefits.[97]

Thus, this statute requires that the child support obligation of the noncustodial parent be reduced by the amount of any social security benefits paid to or for the benefit of the child.[98]

Similarly, Washington's relevant state statute provides:

> When the social security administration pays social security disability dependency benefits on behalf of or on account of the child or children of the disabled person, the amount of compensation paid for the children shall be treated for all purposes as if the disabled person paid the compensation toward satisfaction of the disabled person's child support obligation.[99]

As a result, Washington courts have held that "[RCW 26.18.190(2)] is unambiguous: Disability benefits paid directly to the children are in partial satisfaction of the disabled parent's support obligation."[100] When the Washington Legislature enacted this statute, it specifically provided that such payments "*shall* be offset" against the disabled parent's child support obligation. Washington courts "will not alter the plain meaning of statutory language through construction."[101]

Many states are not provided the benefit of legislative guidance in making their decisions regarding this issue. An Alaska court, for example, was faced with the situation in which its state had not provided guidance by way of statutory authority. Instead, the court looked to the majority rule in deciding whether to allow a credit.[102] In states such as

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97. COLO. REV. STAT. § 14-1-115(16.5) (WEST 1992) (emphasis added).
98. *Wright*, 924 P.2d at 1209.
99. WASH. REV. CODE. ANN. § 26.18.190(2) (WEST 1997).
100. *In re* Marriage of Briscoe, 949 P.2d 1388, 1390 (Wash. 1998).
101. *Id.*
102. Pacana v. State, 941 P.2d 1263, 1265 (Alaska 1997).

> Unlike some other states, Alaska has no statute that gives credit to the obligor parent for Social Security benefits paid directly to the children. A court rule provides that child support arrearages may not be modified retroactively, except when paternity is disestablished . . . . Henry argues in favor of the majority rule, which is that CIB [children's insurance benefits] payments made

Alaska, courts must address this question of law independently. As a result, the majority view that SSDI payments be credited against child support obligations generally prevails. On the other hand, a legislative resolution may be the most efficient and uniform answer, yet may leave room for ambiguity and/or error in interpreting the statutory language. Discretionary language, such as "may," as seen in the Utah statute, provides little, if any, assistance to courts. In Wyoming, where these issues remain unresolved, any potential legislation must be clear and concise.

iii. Economic View

Third, several courts appear to base their decisions on the economics of the situation: "Since the child will still receive the same amount of support which the court has decided he should have, it does not matter to that party that the obligor is given credit."[103]

To some extent, from a purely economic perspective, the actual *source* of the payments is of no concern to the party having custody so long as the payments are made.[104] In theory, as long as the child receives the benefit, the details come out in the wash. Along this line, an Alabama court explained that a support order is for the benefit of the child, even though the custodial parent receives the payment, and that, if the sum directed to be paid by the non-custodial parent is paid by the government through social security benefits, the real purpose of the child support order has been accomplished.[105] This court reasoned that the father was entitled to credit against his child support obligation as the father was "discharging" his obligations of court-ordered payment through the payment of the social security.[106]

Unfortunately, these courts seem to overlook the accompanying factors. The *amount* of benefit to the child can vary drastically depending upon whether the dependent benefits are included in parental income and depending on whether the credit is allowed. Even ignoring the obvious flaws in the purely economic perspective, these courts agree that the amount of disability benefits a husband/father receives on behalf of his children should be included within his income for purposes of determin-

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prior to a motion to modify are credited against child support obligations . . . . More than ten states follow this rule in some form.

Id.

103. Children & Youth Services v. Chorgo, 491 A.2d 1374, 1377 (Pa. Super. Ct. 1985).

104. Miller v. Miller, 890 P.2d 574, 577 (Alaska 1995) (quoting Davis v. Davis, 449 A.2d 947, 948 (Vt. 1982)).

105. Binns v. Maddox, 327 So.2d 726 (Ala. 1976). *See* McDaniel, *supra* note 79, at 1329.

106. *Binns*, 327 So. 2d at 726.

ing his share of child support.[107]

iv. Equitable View

Next, many courts address this issue in terms of equity and fairness. These courts recognize that a non-custodial parent ordinarily cannot receive credit for support payments made other than: 1) To the custodial parent; 2) consented to by that custodial parent, and 3) as to which the non-custodial parent is a volunteer.[108] However, these courts also agree that this rule is subject to an equitable exception under the particular circumstances involved, provided such an allowance would not do an injustice to the custodial parent.[109]

For example, in granting a set-off against the father's support obligation in the amount of his Social Security retirement dependent benefits, an Arkansas court noted: 1) The small monthly income which would remain for the father should he continue to make additional child support payments; 2) the probability that he would be forced to seek employment in order to meet his obligations; 3) the lack of bitterness and showing of good faith on the part of the father; and 4) his earnest attempts to meet what he considered a moral obligation to his son and ex-wife.[110] Indeed, the ultimate consideration really may be whether it is fair and just that the support obligor be given credit for these benefits.[111]

Although basing its decision in the "earnings" view stated above, a Nebraska court also found that, in equity, it saw no difference between applying a credit for social security dependent payments and the situation in which the father received a gift and applied it to the payment of child support.[112] After all, many courts initiate their analysis and comparison with case law from other states by examining the equitable considerations involved in "the different rationales adopted by other courts that have addressed the question whether receipt of federal benefits will reduce a child support obligation."[113] However, most courts leave the equitable considerations to decisions regarding the extent of credit to be

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107. *In re* Marriage of Briscoe, 949 P.2d 1388, 1390 (Wash. 1998).

108. Lopez v. Lopez, 609 P.2d 579, 581 (Ariz. Ct. App. 1980). *See* Baures v. Baures, 478 P.2d 130 (Ariz. Ct. App. 1970); Robert A. Brazener, Annotation, *Right to Credit on Accrued Support Payments for Time Child is in Father's Custody or for Other Voluntary Expenditures*, 47 A.L.R. 3d 1031 (1971).

109. *Lopez*, 609 P.2d at 581. *See* Cole v. Cole, 420 P.2d 167 (Ariz. 1966); Badertscher v. Badertscher, 460 P.2d 37 (Ariz. Ct. App. 1969).

110. Cash v. Cash, 353 S.W.2d 348 (Ark. 1962). *See* McDaniel, *supra* note 79, at 1329.

111. Children & Youth Srvs. v. Chorgo, 491 A.2d 1374, 1377 (Pa. Super. Ct. 1985).

112. Schulze v. Jensen, 214 N.W.2d 591 (Neb. 1974). *See also* McDaniel, *supra* note 79, at 1329.

113. *In re* Estate of Patterson, 805 P.2d at 405. *See* McDaniel, *supra* note 79.

given.[114]

v. Comparison View

Many courts find guidance for the issues surrounding social security dependent disability benefits via an analysis of similar scenarios. For example, case law often addresses only dependent disability benefits *or* dependent retirement benefits. The two are very much intertwined in terms of their relationship to child support. Although most relevant cases address the issues in the context of social security disability benefits rather than retirement benefits, there appears to be no theoretical basis for distinguishing between the two payment types. The handful of cases considering retirement benefits decline to find any distinction between disability and retirement benefits, and they adhere to the majority view.[115]

Likewise, military benefits to dependents of divorced servicemen provide a persuasive analogy. "It has repeatedly been held monthly benefits received by the divorced wife pursuant to an allotment for the benefit of dependents authorized by her former husband who is in the military service discharges his accruing liability under a divorce decree."[116] Therefore, many courts look to the case law on these alternative subjects for direction. The vast majority of states allow a credit for dependent disability benefits. However, this "allowance" only begs the next question: What is the *extent* of such allowance? Based on the majority rule against retroactive modification, most courts are loathe to allow a credit for arrearages. Courts recognize that an obligor parent normally is entitled to a credit against a child support obligation for Social Security dependent disability benefits received by the children, or their representative payee, as a result of the obligor parent's disability.[117] Courts allow a credit at least to the extent that such dependent disability payments are contemporaneous with the obligor parent's support obligation.[118] The rationale and implications of allowing credit for arrearages, contemporaneous support obligations, and/or future support obligations opens another realm of issues, to be discussed hereafter.[119]

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114. *See infra* Section II(C).

115. Miller v. Miller, 890 P.2d 574, 577 (Alaska 1995). *See* Lopez v. Lopez, 609 P.2d 579, 581 (Ariz. 1980); Cash v. Cash, 353 S.W.2d 348 (Ark. 1962); Childerson v. Hess, 555 N.E.2d 1070, 1073 (Ill. 1990).

116. *Andler*, 538 P.2d at 654.

117. Loomis v. Loomis, 255 S.W.2d 671 (Ark. 1953); Hinton v. Hinton, 199 S.W.2d 591 (Ark. 1947); Brooks v. Brooks. 49 S.E.2d 881 (Ga. 1948); Palow v. Kitchin, 99 A.2d 305 (Me. 1953); Hopwood v. Hopwood, 100 N.W.2d 833 (Neb. 1953); Kipping v. Kipping, 209 S.W.2d 27 (Tenn. 1948).

118. DiSabatino, *supra* note 77, at 469.

119. *See infra* Section II(C).

Before the issue is resolved, one must understand that a determination regarding credit is not always "automatic." Many states prefer to leave it to a trial court's discretion, in conformance with the trend in family law. The concern that the results may be inequitable leads other courts to decide it is a matter of discretion whether to allow a credit for social security disability, retirement, or death benefits to dependent children. The courts reason that such a rule allows for the balancing of the equities on a case-by-case basis before the decision to allow a credit is made.[120]

Some jurisdictions apparently allow the trial judge's discretion to apply the credit on a case-by-case basis.[121] These courts have discretion to credit social security payments to an obligor's ongoing child support.[122] Interestingly, the same jurisdictions that allow for judicial discretion on this issue still adhere to the general philosophies of those courts that provide for a definite grant of credit:

> Social security benefits are paid from a trust fund maintained and managed by the United States Government, but the right thereto depends largely upon payments made into the fund by employer and employee. The defendant husband's social security benefits, therefore, were, insofar as he was legally capable of providing for his minor child through social security, a substitute for his earnings. 42 U.S.C. § 402(c). With the husband's disability and consequent loss of employment, the court could, in its discretion, properly treat the social security benefits paid to the wife for the minor child's support as a contribution by the father toward and deductible from the court-decree support payments. 42 U.S.C. § 402. But this is discretionary and not automatic.[123]

The key is fairness and equity. Social Security payments made to a child on account of the parent's disability should be considered "credits" toward the parent's court-ordered support obligation "in the absence of circumstances making the allowance of such a credit inequitable."[124] Generally, those courts that implement the discretionary system agree

120. DiSabatino, *supra* note 77, at 463.

121. Matter of Estate of Patterson v. Quaintance, 805 P.2d 401, 405 (Ariz. 1991); *Chase v. Chase*, 444 P.2d 145, 149 (Wash. 1968). *See* Nibs v. Nibs, 625 P.2d 1256, 1257 (Okla. 1981) ("The trial court granting the divorce decree was *within its discretion* to consider the social security payments as a credit against the child support obligation, and from the evidence before us we believe it decided the credit should not be granted.") (emphasis added).

122. Brooks v. Brooks, 881 P.2d 955, 962 (Utah Ct. App. 1994).

123. *Chase*, 444 P.2d at 149.

124. Gress v. Gress, 596 N.W.2d 8, 12 (Neb. 1999).

that Social Security disability benefit payments and Social Security retirement benefit payments for minor children may be credited toward the father's obligation to pay support. However, those courts frame the issue as whether the "disability and resulting entitlement to Social Security are changes in condition of the parties to be considered in modification proceedings . . . ."[125] As a result, these decisions are not predictable.

A similar approach allows for a rebuttable presumption that a credit should be allowed. Employing comparable reasoning, courts in cases addressing credits for disability and retirement benefits express the view that there is a presumption that a credit will be allowed but that this presumption is rebuttable upon a showing that it will produce an undesirable result.[126]

Essentially, the presumption may be rebutted by a showing of unfairness or injustice. Appellate courts have held that a trial court erred in simply assuming that the social security benefits automatically offset the parents' child support obligations. Rather, the "proper procedure is for the trial court to consider the effect of the receipt of the social security benefits on the needs of the child."[127]

Whether a court is allowed discretion entirely or granted similar latitude through a rebuttable presumption, the burden falls upon the courts. Courts have the opportunity to analyze results on a case-by-case basis and grant the most equitable decision. For example, if a court allows a credit for dependent benefits, it may be fair also to include that amount in the non-custodial parent's income so as to maximize the benefit to the child. Likewise, a credit may appear most equitable where a totally disabled parent has few resources and little or no additional income as opposed to the partially disabled parent who is independently wealthy. Yet, this scenario allows for wide variance in decisions and some confusion. A parent's child support obligations may differ drastically simply as a result of which court presides over the case. This smacks of unfairness and inequity.

Of course, a third option remains of refusing credit entirely and unconditionally. Although the minority view, some courts adhere to it for various reasons. Some courts, citing what they believe is controlling language of the governing state statute or concern for the welfare of the child or both, hold that no credit for social security disability, retirement, or death benefits is available against the existing support obligation. Rather the obligor parent must seek a modification of the support order, asserting the social security payments as a factor justifying such a modi-

125. *In re* Marriage of Robinson, 651 P.2d 454, 455 (Colo. App. 1982).
126. DiSabatino, *supra* note 77, at 464.
127. Lawhorn v. Lawhorn, 850 P.2d 1126, 1128 (Or. App. 1993).

fication. Courts in some jurisdictions hold that a credit for social security death benefits would not be allowed in the absence of evidence that such a credit was intended by the parties, or that such a credit was not authorized by statute.[128]

Even more than simply holding the parties must seek a modification, still other courts refuse to credit the dependent benefits when a father has not made a good-faith attempt to meet his support obligation or when parents making a support agreement had not included a provision for such a credit on the father's support obligations. For example, a father was refused a credit for his social security dependent benefits when the father had never made any court-ordered support payments from his personal funds from the date of divorce.[129] The court noted that, after divorce, the obligation to support a minor child rests upon both parents according to their respective abilities and that the amount of a support award is within the sound discretion of the trial court, not to be disturbed unless discretion is abused.[130] The court distinguished earlier cases granting such credit on their facts. Although the court refused to credit the social security payments against the father's arrearage, it noted that, in appropriate cases such payments may properly be considered. The court also noted other factors such as the estate of the husband, his income, age, health, and earning capacity and the age, health, station, and separate estate of the wife.[131]

As to the second type of denial, in which the parties execute a voluntary property settlement agreement for child support, a Florida court held that support payments made by the Social Security Administration did not constitute a partial discharge of the support obligation.[132] The court distinguished cases supporting the credit of social security benefits and observed that the case involved a property settlement agreement in which the Social Security benefits were or should have been known to the father at the time he executed the agreement and when it was incorporated into the final divorce decree.[133] The court held it was incumbent upon him to have made a provision for such credit in the settlement agreement.[134] Whether adopted by a majority of courts or not, this case certainly serves as a warning to practitioners.

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128. DiSabatino, *supra* note 77, at 464.

129. Fowler v. Fowler, 244 A.2d. 375 (Conn. 1968). *See* McDaniel, *supra* note 79, at 1334.

130. *Fowler*, 244 A.2d at 377. *See* McDaniel, *supra* note 79, at 1334.

131. *Fowler*, 244 A.2d at 377. *See* McDaniel, *supra* note 79, at 1335.

132. Cohen v. Cohen, 246 So.2d 581 (Fla. Dist. Ct. App. 1971). *See* McDaniel, *supra* note 79, at 1335.

133. *Id.*

134. *Id.*

Some courts rationalize that social security should not be manipulated so as to evade child support:

> A third reason advanced by the district court for its decision [not to allow a credit for social security disability payments] was that the Social Security Administration would have paid the $221.10 per month disability benefits to Appellee for the benefit of the minor children without regard to any divorce decree provision ordering the appellant to make child support payments. It is axiomatic that even a divorced father has a continuing obligation to support his minor children . . . . [G]ratuitous contributions from relatives, friends, charities, governmental agencies or a stepfather will not reduce or diminish the father's obligation to pay child support. It is apparent the trial court considered the Social Security benefits as gratuitous payments not satisfying the appellant's child support obligations . . . .[135]

Other courts simply refuse to permit a disabled or retired non-custodial parent to receive credit against child support obligations for social security and V.A. dependent benefits.[136] Such courts note that the Social Security benefit paid to or for a child based on the eligibility of a parent is the child's benefit.[137] Yet, they confirm that "[w]hile the child's eligibility is dependent upon the eligibility of the parent and the amount of the child's benefit is based on the amount of the parent's benefit, the payment of the child's benefit does not reduce or otherwise affect the benefit payable to the eligible parent."[138]

These courts provide an additional rationale for the refusal: The child is entitled to these benefits as a matter of law whether or not the parents are divorced.[139] Allowing such payments to be credited against child support arrearages would be, "in effect, ordering the children to pay the accrued arrearages for their own support."[140] In New Mexico, the court opined that the Social Security Act dictates that a child's dependent benefits inure directly to that child. Where there are no indices of the obligor-parent's ownership, a credit actually requires the child to assume

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135. Andler v. Andler, 538 P.2d 649, 652-53 (Kan. 1975) (citation omitted).

136. Craver v. Craver, 649 S.W.2d 440 (Mo. 1983); Nibs v. Nibs, 625 P.2d 1256 (Okla. 1981); Fuller v. Fuller, 360 N.E.2d 357 (Ohio 1976).

137. *In re* Marriage of Wright, 924 P.2d 1207, 1209 (Colo. Ct. App. 1996). *See* 42 U.S.C. § 402(b) (1994).

138. *Wright*, 924 P.2d at 1209.

139. *See, e.g.*, 42 U.S.C. § 402(d)(1) (2000) (outlining social security benefits); Rose v. Rose, 481 U.S. 619, 630-31 (1987) (noting that Congress intended veteran's disability benefits to be used in part for the support of a veteran's dependents).

140. *Fuller*, 360 N.E.2d at 358.

his own financial responsibility.[141]

Interestingly, some appellate courts simply assume that dependent disability benefits already were considered when initially establishing child support, without addressing *how* such benefits properly should be considered. An Arizona court discussed the situation and likened the child's representative payee to a creditor and the Social Security Administration to a third party who pays the obligor-parent's obligation.

> In analyzing these approaches, we reject the "earned benefits" and "substitute for wages" theories that allow a credit as a matter of law. First, if the disability benefits decedent was receiving at the time of the divorce were "earned," or "wages," the trial court already took that equitable factor into consideration in ordering support payments from that income . . . .
>
> If, however, decedent's income from his personal disability benefits decreased in proportion to the benefits that the creditor later received on behalf of the children, then equity might allow an offset. There is no difference between having a third party satisfy an obligation owed to the decedent's creditor and having the decedent pay the creditor directly. However, if decedent's income remained unchanged when the creditor started receiving the children's benefits, then the children's benefits were not a substitute for "lost" income and cannot equitably be considered as fulfilling the court order that decedent pay $450.00 per month from his disability income toward the children's support. We thus agree with those courts that have rejected crediting the noncustodial parent for benefits the children would have been entitled to receive regardless of the divorce and that did not decrease the noncustodial parent's own income.[142]

Certainly, this excerpt provides a less-than-clear view of the court's

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141. Mask v. Mask, 620 P.2d 883, 886 (N.M. 1980).

> The Social Security Act, Title 42, U.S. Code, Section 401 *et seq.*, provides that every dependent child of an individual who is entitled to Social Security benefits shall be entitled to a child's insurance benefit . . . . We determine from this that the benefit inures directly to the child, notwithstanding the prerequisite status of the parent. No indices of the father's ownership ever attached to these funds. Thus, the court is, in effect, ordering the children to pay the accrued arrearages for their own support.

Id.

142. Matter of Estate of Patterson, 805 P.2d 401, 406-7 (Ariz. 1991).

opinion. It seems as if no clear answer exists. As circumstances change, so does the answer. This ambiguity may support the discretionary view.

Considering all these approaches, an analysis of Wyoming's position is in order. To date, the Wyoming Legislature has failed to produce legislation that directly addresses the issues, and the Wyoming Supreme Court has addressed them only in *Hinckley v. Hinckley*[143] and, to some extent, *Wood v. Wood.*[144] In *Hinckley*, the father requested that the social security disability "benefits paid on his account to the children be set off against any arrearages in child support that might be due from him and also be credited against his future child support obligation."[145] The district court found "that the husband had not demonstrated a substantial or material change in circumstances; [and] denied his request for modification of the amount of child support . . . ."[146] In response, after first considering the father's argument that the social security benefit payments to his ex-wife should qualify as child support, the Wyoming Supreme Court opined:

> We acknowledge that, in an instance in which the obligor has become disabled after the entry of an order for child support and is unable to work, the receipt of Social Security benefits by the children of the obligor may render the previous support order inequitable. The question is whether we should allow the obligor to unilaterally apply Social Security benefits that are received by his children to fulfill his obligation . . . . *We adopt the rule that the receipt of payments from Social Security by the children of one obligated to pay child support may constitute a change of circumstances giving rise to justification for a petition for modification of the decree* . . . .
>
> . . .
>
> We hold that the receipt of Social Security benefits by the children is one factor to be considered by the district court in making its determination as to whether a significant, material change of circumstances has occurred that is sufficient to justify modification of a non-custodial parent's obligation for support. In order to receive credit against the child support obligation for the Social Security payments, the party obligated to make those payments has an affirmative duty to seek modification of the

143. 812 P.2d 907 (Wyo. 1991). *See Wood, supra* note 61, at 17.
144. 954 P.2d 1259 (Wyo. 1998). *See supra* text accompanying notes 62-78.
145. *Hinckley*, 812 P.2d at 910.
146. *Id.*

support order.[147]

Although mostly dicta, the above-quoted excerpt implies that the Wyoming Supreme Court is open to the idea of "crediting" the SSDI dependent payments against the non-custodial parent's support obligation. However, rather than characterize it as a "credit," the court seems to define such a revision as a modification of the child support obligation and leaves this determination within the sound discretion of the trial courts. The "rule is that the determination of whether to modify an obligation for child support lies within the sound discretion of the trial court, and that court's determination will not be disturbed except for grave abuse of discretion or for the violation of some legal principle."[148] The court, perhaps intelligently, commits the decision of modification to the discretion of the trial courts based upon the plethora of factual information relevant to such a decision. After all,

> [t]he fact that children become entitled to receive Social Security benefits is not the exclusive factor for the trial court to consider in ruling upon the petition for modification. A determination of the amounts of child support that are appropriate in an instance in which modification is sought due to a change in circumstances requires a consideration of the needs of the children, the ability of the father to contribute to those needs and his responsibility to do so, the ability of the mother to contribute to those needs and her responsibility to do so.[149]

Wyoming appears to be a state in which credit, although termed a "modification," is allowed at the discretion of the trial court. Such a modification may well lead to a downward deviation in the non-custodial parent's child support obligations. Is this decrease in support truly the intended result? Should children be penalized for their receipt of dependent benefits by allowing the non-custodial parent a lesser support obligation? Perhaps the court hopes the discretion allowed the trial courts will result in a just determination on a case-by-case basis. It also may lead to confusion among Wyoming judges.

Several cases from other states hold that credit should be allowed.[150] Different courts consider various factors important, such as the financial position of the individual seeking the credit, retirement and

147. *Id.* at 911-12 (emphasis added) (citations omitted).

148. *Id.* at 912.

149. *Id.* (citations omitted).

150. *See* Cash v. Cash, 353 S.W.2d 348 (Ark. 1962); Potts v. Potts, 240 N.W.2d 680 (Iowa 1976); Andler v. Andler, 538 P.2d 649 (Kan. 1975); McClaskey v. McClaskey, 543 S.W.2d 832 (Mo. Ct. App. 1976).

earnings of that individual, and the harshness or inequity that would result in not permitting the credit. Likewise, some states refuse to permit credit. The cases refusing to allow credit generally do so on the ground that it would improperly modify the divorce decree retroactively. [151] For the cases that refuse credit, courts simply may require the non-custodial parent return to court to seek a modification, as appears to be the Wyoming approach. At that point, some of these "no credit" courts grant the modification, therein addressing the situation via alternative means. These courts eventually must face the next issue as well.

C. *Proposed Treatments of Excess Social Security Dependent Benefit (Over and Above Medical Support, Statutory Child Support, and Other Mandated Support)*

Most courts allow dependent disability benefits to serve as a credit against the non-custodial parent's child support obligations. At that point, some courts feel the issue is resolved. "Since the payments made by the Social Security Administration by reason of the appellant's disability for the benefit of the minor children were in excess of the amount specified in the divorce decree for child support, they constitute satisfaction of child support obligations under the divorce decree."[152] However, in many cases, the amount received by the child as dependent disability benefits *exceeds* the amount ordered for child support. Courts address this excess in several possible ways.

i. Credit Toward Contemporaneous Support

As a general rule, most courts believe the entire amount should be credited first toward any current child support obligations. Courts are far less willing to accept claims of credit against child support obligations for social security dependent benefits where credit is sought against past or future support obligations as opposed to contemporaneous obligations. Generally, courts are amenable to allowing credit for past arrearages that arose because the obligor parent had become disabled or retired, but social security benefits had not yet begun. They generally are not receptive to allowing credit for any arrearages accruing before the start of the disability or retirement. Some courts refuse any credit beyond that for obligations contemporaneous with the social security payments.[153]

ii. Credit Toward Arrears

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151. Hennagin v. County of Yolo, 481 F.Supp. 923 (E.D. Cal. 1979); Fowler v. Fowler, 244 A.2d 375 (Conn. 1968); Joachim v. Joachim, 57 A.D.2d 546, 547 (N.Y. App. Div. 1977); Chase v. Chase, 444 P.2d 145 (Wash. 1968).

152. *Andler*, 538 P.2d at 655.

153. DiSabatino, *supra* note 77, at 464.

Courts rarely grant a credit for arrearages, because this would allow the obligor to avoid providing for the current needs of the minor child.[154] After all, if a court were to allow such credits, the non-custodial parent would receive a windfall, "since the delinquent support payments would be made with the funds of the social security administration and not with his own."[155] If a court disallows the credits, the child would receive the benefit of the "extra" payments, since the child would receive not only the support arrearages but also the monthly social security checks. As between the two parties, many courts feel that "[w]hen the windfall comes, equitably it should inure not to the defaulting husband's benefit, but to his bereft children."[156] So, too, courts rationalize that:

> [T]he child's need is current, and must be met monthly, not some time in the future. . . . '[A] child's needs for food, clothing, lodging and other necessary expenses is current—today, this week, this month—and the expectation of a future payment does not meet these needs.' To allow such credits would be to encourage fathers to put off making their support payments in the hope that some future collateral source would satisfy their arrearages.[157]

As a result of these policy considerations, most courts simply conclude that those amounts, which exceed the court-ordered child support for the same period may not be credited toward previously accrued child support arrearages.[158]

Some courts allow benefits in excess of support to be credited toward arrearages. In *Hern v. Erhardt*, the court allowed such a credit with limitations.[159] There, the obligor was entitled to a credit against arrearages that arose *after the disability* due to the lapse of time between the onset of the disability and the date on which the benefits were first

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154. Coulon v. Coulon, 915 P.2d 1069, 1071 (Utah Ct. App. 1996). *See* Brooks v. Brooks, 881 P.2d 955, 961 (Utah App. 1994). *See also* Mask v. Mask, 620 P.2d 883, 885-86 (N.M. 1980); *In re* Marriage of Robinson, 651 P.2d 454, 455-56 (Colo. Ct. App. 1982); Kirwan v. Kirwan, 606 So.2d 771, 772-73 (Fla. Dist. Ct. App. 1992); McClaskey v. McClaskey, 543 S.W.2d 832, 834-35 (Mo. Ct. App. 1976).

155. *Mask v. Mask*, 620 P.2d 883, 886 (N.M. 1980).

156. *Id.* (quoting McClaskey v. McClaskey, 543 S.W. 832, 835 (Mo. Ct. App. 1976)).

157. *Id.* (quoting McClaskey v. McClaskey, 543 S.W. 832, 835 (Mo. Ct. App. 1976) (citation omitted)).

158. *Coulon*, 915 P.2d at 1071. (Social Security benefits received by child as result of non-custodial parent's disability, to the extent they exceeded the parent's monthly support obligation, could not be credited against parent's support arrearages) (Citing Social Security Act § 202(d), 42 U.S.C.A. § 402(d) (2000)). *See In re* Marriage of Robinson, 76 Cal.Rptr.2d 134 (Cal. Ct. App. 1998).

159. 948 P.2d 1195 (Nev. 1997).

received on behalf of the child.[160] The excess could not be applied to arrearages incurred *prior to the disability* or after its termination. Yet, in *Coulan v. Coulan* the court denied the father a credit on back support in the amount that the monthly social security payments exceeded his court-ordered support obligation. [161] Instead, the court implied that the child should keep the excess money.

The discrepancy between the date of the disability and the date from which any credit is allowed often results from the lag-time of at least six months between the onset of a disability and the receipt of dependent disability benefits. Where social security payments to the children of a disabled, divorced man began months after the disability occurred, and the payments were greater than the man's support obligation, an Iowa court determined that the father was entitled not only to credit for the period during which the benefits were paid but also to have the excess of payments over obligations during the benefit period credited against the arrearage which occurred between the time of the disabling injury and the time at which the payments commenced.[162] This same court declared that ordinarily a disabled parent should be credited only to the extent of his child support obligation during the period the benefits are paid.[163] But, in an exceptional case in which a child support arrearage occurred because of a lapse of time between the occurrence of the disability and the commencement of benefit payments, any excess of payments over obligation during the benefit period may be fairly credited against that arrearage since such credit does not unreasonably vary the decree or divert the social security benefits from their purpose.[164] Often courts that allow a credit for arrearages allow the credit after the date of the disability; they consider the "lag time" unavoidable. Few, if any, can justify a credit for arrearages prior to the onset of the disability.

iii. Credit Toward Future Support Obligations

Whether the excess credit on current disability benefits should apply to future child support obligations is another matter. Obviously the current disability benefits will continue indefinitely or until such time as the disability terminates. Faced with this uncertainty, a court may be speculating when addressing this topic. While a trial court certainly may modify a child support order, most courts differentiate between "crediting an obligation with payment made from another source and increas-

160. *Id.*

161. 915 P.2d 1069 (Utah Ct. App. 1996).

162. Potts v. Potts, 240 N.W.2d 680 (Iowa 1976). *See* McDaniel, *supra* note 79, at 1329.

163. *Potts*, 240 N.W.2d at 682.

164. *Id. See also* McDaniel, *supra* note 79, at 1329 (discussing cases that have held that a father is entitled to credit for such payments).

ing, decreasing or terminating, or otherwise modifying a specific dollar amount."[165] As a result, some courts feel open to "crediting" the presently paid social security disability amounts toward future child support payments. However, the equity arguments are pertinent. At least one court felt no credit equitably could be given against the parent's obligation after his disability ended.[166] A majority of courts take the position that "excess" payments are gratuities and meant to benefit the child.[167]

iv. Excess Viewed as Gratuitous or No Credit Allowed

"[P]ayments made in excess of amounts required to be made for child support are considered gratuitous."[168] Indeed, this statement aptly summarizes the majority view regarding benefit payments that exceed the order child support amounts. Many courts determine that excess payments first may be credited against other child support obligations, such as non-covered medical expenses and other court-ordered obligations that may exist in addition to the basic child support award. However, any amounts still remaining are then considered a "gift" to the child. In *Pacana v. State*, the court stated: "Nonetheless, most courts following the majority rule [allowing credit for social security payment] treat the excess payment during the obligor's disability as a gratuity to the children, so that the custodial parent does not owe the obligor."[169]

Thus, to the extent the child support obligor's payments and the amount of social security dependent disability benefits paid to or on behalf of child exceed the obligor's child support obligation, the excess is deemed a gratuity and not recoverable by the obligor.[170] Even those courts that allow current credit for the social security payments hesitate to extend the credit due to the excess of the disability payments over the support obligation, considering the excess a gratuity.[171]

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165. DiSabatino, *supra* note 77, § 3.

166. Potts v. Potts, 240 N.W.2d 680 (Iowa 1976). *See* McDaniel, *supra* note 79, at 1329.

167. *See* McDaniel, *supra* note 79, at 1329.

168. Andler v. Andler, 538 P.2d 649, 652 (Kan. 1975) (citation omitted).

169. 941 P.2d 1263, 1267 (Alaska 1997) (citations omitted). *See e.g., Weaks*, 821 S.W.2d at 507 (stating that any excess is deemed a gratuity to the extent that it exceeds the amount of support mandated by the decree); Andler, 538 P.2d at 654; *Chorgo*, 419 P.2d at 1379.

170. Casper v. Casper, 593 N.W.2d 709 (Minn. Ct. App. 1999).

171. Mask v. Mask, 620 P.2d 883, 885 (N.M. 1980).

> While affirming the trial court's allowance of credits while the social security payments were received, we reverse as to the allowance of credit for months prior to the receipt of the social security benefits. As stated in *McClaskey*: We hold the father is entitled to credit against support payments falling due after social security payments have begun, but is not necessarily entitled to a

In large part, courts that consider the excess a gratuity again rely on equitable considerations. Those courts believe the initial credit received by the obligor is "just and fair," but, to the extent the disability payments exceed the current support obligation, the equitable course is to allow the child the benefit of the excess as opposed to "reducing" the actual out-of-pocket amount to be paid by the obligor. Further, federal regulations prohibit the custodial parent from recovering support arrearages from social security payments. This prohibition should apply equally to the non-custodial parent who seeks to satisfy his support obligation by way of social security payments made directly from the Social Security Administration to the child. These funds are the child's, not the non-custodial parent's, and cannot be used to meet his obligations.[172]

v. Wyoming's Position

Given the lack of other authority, Wyoming's stance again appears dictated by *Hinckley v. Hinckley*.[173] Although Wyoming has not specifically addressed a situation in which disability payments are in excess of the child support obligation, in *Hinckley*, the Wyoming Supreme Court made it clear that any "credit" for back child support or past due amounts would require *retrospective* modification of the decree/order.[174] "[R]etrospective modification of the decree would be required in order to receive credit for such a payment against past-due child support."[175] Further, retrospective modification of a decree is not allowed in Wyoming.[176] Thus, it appears that a "credit" for excess disability payments, whether against past, current, or future obligations could be accomplished *only* through a formal modification of the child support order. The court further clarifies that a "past" credit is prohibited. Other courts both agree and disagree.

D. Whether Modification of the Existing Child Support Order is Mandatory, Recommended, or an Unnecessary Burden

If a credit or modification of a support obligation is allowed, the

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> carry-back credit against support payments that were delinquent when the social security payments began . . . . *[T]he amount by which the monthly social security benefits exceed the amount required under the support decree are considered gratuitous.*

Mask, 620 P.2d at 885 (quoting *McClaskey v. McClaskey*, 543 S.W.2d 832, 833-34 (Mo. Ct. App. 1976) (emphasis added)).

172. *See* Fuller v. Fuller, 360 N.E.2d 357, 358 (Ohio 1976).

173. 812 P.2d 907 (Wyo. 1991).

174. *Id.*

175. *Id.* at 912.

176. *Id.* at 913 ("Our state incorporates a rule of no retrospective modification of child support.").

issue arises as to whether a hearing should be *required* when the child of a non-custodial spouse becomes eligible for social security benefits after a child support award. Only a minority of jurisdictions so hold.[177]

In support of the majority view against a required hearing, some courts contend the credit "against a disabled parent's child support obligation for social security disability benefits paid on account of the parent to the child or a representative payee does not retroactively modify the disabled parent's monthly child support obligation, but rather merely changes the source of the payments."[178] These courts feel that forcing the disabled parent to formally modify the support award is harsh and unjust. They surmise that allowing the obligor-parent the husband a credit against child support payments does not retroactively modify those obligations but, instead, changes the identity of the payer.[179] When viewing it as a change in the source of payments, those courts rationally conclude that a formal modification is not warranted. Such courts view a formal modification hearing as an unnecessary and unjustified barrier to the credit.[180]

Further, many courts again invoke their equitable powers in negating the need for a formal modification before any credits can occur. "Plaintiff argues that allowing the defendant credit toward his support obligation for the social security payments is a modification of a vested and accrued obligation. Generally a court cannot retroactively modify a support order that has accrued and become vested."[181] "However, here the case arises in the context of a contempt proceeding and so equitable principles are applicable."[182] Although applying a credit to child support arrearages in the absence of modification proceedings is not allowed as a matter of law in many states, those state courts that recognize the majority rule against formal modification realize that equitable considerations may justify an offset against a past support obligation.[183]

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177. Miller v. Miller, 890 P.2d 574, 578, n. 5 (Alaska 1995). *See Hinckley*, 812 P.2d at 911-12; Matter of Estate of Patterson, 805 P.2d 410, 405 (Ariz. Ct. App. 1991); Arnoldt v. Arnoldt, 554 N.Y.S.2d 396, 398 (1990); *Chase*, 444 P.2d at 149. *See* Weaks v. Weaks, 821 S.W.2d 503, 506 (Mo. 1991).

178. DiSabatino, *supra* note 77, § 3. *See, e.g.*, Child Support Enforcement Agency v. Doe, 990 P.2d 1158 (Haw. Ct. App. 1999).

179. DiSabatino, *supra* note 77, § 3; Weaks v. Weaks, 821 S.W.2d 503 (Mo. 1991).

180. *See* J. Eric Smithburn, *Removing Nonconforming Child Support Payments from the Shadow of the Rule Against Retroactive Modification*, 28 J. FAM. L. 43 (1990).

181. Mask v. Mask, 620 P.2d 883, 885 (N.M. 1980).

182. *Id.*

183. Matter of Estate of Patterson, 805 P.2d 401, 404-5 (Ariz. 1991). After all:

> To impose the requirement of a court proceeding, i.e., modification hearing, on a party seeking to credit disability payments received by the custodial par-

The disability and resulting entitlement to social security are changes in circumstances of the parties to be considered in modification proceedings, although they do not necessarily give rise to a modification or deduction without affirmative action by the court. Many considerations affect whether a modification and/or a credit are proper:

> The father may be independently wealthy; or he may, in the interim, have inherited property. Benefits from private or public retirement systems may have accrued and become payable to him. In short, many developments affecting the economic condition of the parties may have occurred which would not permit or warrant a modification of the decree to the extent of deducting the social security benefits for dependent children from the child support ordered in a decree of divorce.[184]

As to those courts that conform to the minority rule that a hearing is required, many simply view the modification as an unavoidable part of the process. Indeed, such courts struggle not over whether modification is necessary, but over *when* the modification takes effect.[185]

> ent for the benefit of the parties' children is overly harsh. 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.

Weaks, 821 S.W.2d at 506-07. *But see Patterson*, 805 P.2d at 404-05:

> [By] allowing the estate to credit the disability benefits received by the creditor on behalf of the children against decedent's support obligation, the trial court in effect allowed a retroactive modification of the decree. We agree. Arizona recognizes the rule that child support orders may not be altered retroactively. (citations omitted). . . . In the absence of a court order modifying the decree, a custodial parent's receipt of federal benefits on behalf of the children should not *automatically* reduce the amount of the noncustodial parent's court-ordered child support obligation. We agree with those jurisdictions that have held, as a general rule, that a noncustodial parent may not reduce or eliminate his child support obligation because of federal benefits paid to the custodial parent without requesting that the court modify the decree. (citations omitted).

Id. See Pacana v. State, 941 P.2d 1263, 1265 (Alaska 1997); Newman v. Newman, 451 N.W.2d 843, 845 (Iowa 1990); *In re* Marriage of Malquist, 880 P.2d 1357, 1360 (Mont. 1994) (ruling that a court cannot credit CIB payments until the obligor parent moves to modify); Burnham v. Burnham, 743 S.W.2d 568 (Mo. Ct. App. 1987); Guthmiller v. Guthmiller, 448 N.W.2d 643 (N.D. 1989); Chase v. Chase, 444 P.2d 145, 149 (Wash. 1968); Hinckley v. Hinckley, 812 P.2d 907, 913 (Wyo. 1991).

184. *Chase*, 444 P.2d at 149.

185. *Id.*

These courts contend that the initiation of social security payments to an ex-spouse for child support because of the father's disability or retirement does not justify the reduction of support payments by the amount of the social security benefits in the absence of affirmative action by the court to modify the support obligation under the divorce decree.[186] A Washington court deemed a father not entitled to a credit on child support payments for social security benefits paid to his child on account of his disability without modification of the original decree.[187] In that case, the father immediately began deducting the amount of the benefits from his child support obligation. The court later awarded the mother the entire retrospective deductions made because of the social security benefits but allowed the father to make such deductions prospectively.[188] The court held that a credit on the child support obligation was discretionary rather than automatic, and the child support obligation was not subject to retrospective modification.[189]

While certainly the modification requirement imposes a higher burden on the parent seeking modification, those in the family law arena may recognize this as necessary. It is not uncommon for parents to debate even the most minute provisions of court orders, or, rather, their understandings of court orders. Where a parent is seeking to credit hun-

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> In a situation warranting modification of child support or alimony, the court may make the modification effective either as of the time of the filing of the petition or as of the date of the decree of modification, or as of a time in between, but it may not modify the decree retroactively. This is in keeping with the general rule widely held in this country and prevailing in this state that provisions for alimony, support and child support on a decree of divorce are not subject to retrospective modification and that any modification allowed must be prospective.

Id. See Wilburn v. Wilburn, 370 P.2d 968 (Wash. 1962); Koon v. Koon, 313 P.2d 369 (Wash. 1957); Sanges v. Sanges, 265 P.2d 278 (Wash. 1953); Pishue v. Pishue, 203 P.2d 1070 (Wash. 1949). *But see In re* Marriage of Wright, 924 P.2d 1207, 1209 (Colo. App. 1996).

> The child support obligation of a noncustodial parent can only be reduced prospectively from the date the motion for modification of child support is filed. Therefore, in those cases in which a child support obligation has been ordered and the obligated parent becomes eligible for social security benefits, a motion to modify child support is required before the child support obligation of the parent may be reduced by the amount of social security benefits paid for the benefit of the child.

Id.

186. *See* McDaniel, *supra* note 79, at 1329.

187. Chase v. Chase, 444 P.2d 145 (Wash. 1968). *See* McDaniel, *supra* note 79, at 1334.

188. *Chase*, 444 P.2d 145 (Wash. 1968).

189. *Id. See* McDaniel, *supra* note 79, at 1334.

dreds of dollars against his child support obligation, it is unrealistic to expect the custodial parent to agree.

The modification decision may be the best resolved of the issues from a Wyoming perspective. While the *Hinckley* court makes it clear that social security disability dependent payments *may* warrant a modification,[190] the court seems most concerned about preventing unilateral modifications by any party. Thus, Wyoming, in its limited discussion of the issue, also apparently adopts the minority view that a modification hearing is required. "In order to receive credit against the child support obligation for the social security payments, the party obligated to make those payments has an affirmative duty to seek modification of the support order."[191]

This is expected, given Wyoming's tendency to protect the need for judicial intervention. Other courts, under other circumstances, also have rejected any idea of unilateral modification without a hearing or judicial intervention. For example, in cases involving the emancipation of a child and its effects upon a multi-child support order, most states require judicial modification in the case of undivided support orders. [192] The prevailing opinion is that, after one or more children becomes ineligible for further support, the obligor-parent is not automatically entitled to a pro rata reduction in the amount of an undivided award that had been granted for the support of more than one child.[193]

The general rule is clear that the reduction of an *undivided* support order based on the emancipation of any child, other than the youngest, requires modification via court order. However, Wyoming has gone further and apparently requires judicial modification even in the case of a *divided* support order. In *Phifer v. Phifer*, the Wyoming Supreme Court reviewed a case in which a divorce decree required the husband to make child support payments until "the minor children reach the age of majority, marry, or become otherwise emancipated."[194] Subsequently, the par-

190. Hinckley v. Hinckley, 812 P.2d 907, 911-912 (Wyo. 1991).

191. *Id. See* Burnham v. Burnham, 743 S.W.2d 568 (Mo. Ct. App. 1987); Newman v. Newman, 451 N.W.2d 843 (Iowa 1990).

192. "Nondivided" or "undivided" means the situation in which the support order requires payment of one lump sum as support for more than one child but does not "itemize" the amount attributed to each child. S. R. Shapiro, Annotation, *Propriety and Effect of Undivided Award for Support of More Than One Person*, 2 A.L.R. 3d 596, 597-99 (1965).

193. Dillon v. Dillon, 2 Va. Cir. 13 (1980); Shapiro, *supra* note 192, at 612. *See* Shoup v. Shoup, 542 S.E.2d 9, 12 (Va. Ct. App. 2001): "When an undivided child support award has been made for multiple minor children, the emancipation of a child, except the last remaining in custody, does not permit automatic termination or modification of support." *Id.*

194. 845 P.2d 384, 385 (Wyo. 1993).

ties agreed to an alteration of the child support amount, which was reduced to an order to increase the child support obligation from $225 a month per child to $275 a month *per child.* The husband subsequently stopped making child support payments and "contended that he should not have to pay past or future child support payments for the parties' eighteen-year-old daughter because she was 'emancipated' as contemplated by the divorce decree."[195] The Wyoming Supreme Court opined the following principle:

> [A] party who seeks to reduce an indivisible order of child support because of the fact that some of the children had been emancipated should petition the court for modification rather than unilaterally reducing his payments. We think it a high-risk adventure for a party to the action to take it upon himself to interpret a decree of court, particularly in view of the continuing accessibility of the court. The same rationale pertains in this instance . . . .[196]

In *Phifer*, the Wyoming Supreme Court, citing *Hinckley*, disallowed a unilateral reduction of child support upon the emancipation of the older child even in the case of a divided support order.[197] Similarly, in *Hinckley*, the Court stated: "If we were to permit the obligor to make a unilateral modification of the support requirements in the divorce decree, that would divest the trial court of its discretion to determine whether its previous order of support should be modified in accordance with the particular circumstances of the case."[198] Essentially, the court makes clear that, while modification *may* be appropriate given the circumstances, any modification requires affirmative action by the court.

III. CONCLUSION

Wyoming courts and practitioners are not without any authority regarding the treatment of social security dependent benefits. The *Hinckley*[199] case provides some insight into the Wyoming Supreme Court's views on mandatory modification of support orders as well as the "potential" for a set-off of the non-custodial parent's support obligation in the amount of dependent benefits. Yet, *Hinckley* leaves many issues un-

195. *Id.* at 386.
196. *Id. See* Redman v. Redman, 521 P.2d 584, 587-88 (Wyo. 1974).
197. Phifer v. Phifer 845 P.2d 384, 386 (Wyo. 1993). *See, e.g.*, Hinckley v. Hinckley, 812 P.2d 907 (Wyo. 1991).
198. *Hinckley,* 812 P.2d, at 907, 911.
199. *Id.* at 907.

addressed and unresolved.[200] These issues include: 1) The inclusion of dependent benefits in a non-custodial parent's "income" for purposes of determining child support; 2) consideration of SSDI benefits as a factor deviating from the child support guidelines; 3) the ability and/or appropriateness of a credit against child support arrearages, contemporary obligations, and futures; and 4) the treatment of "excess" benefits. These issues are ripe for consideration by both the Wyoming Supreme Court and the Wyoming Legislature.

As a result, *Hinckley* may leave the Wyoming practitioner and judge with little guidance.[201] It appears a "credit" of benefits "may" be appropriate for initial child support determinations. But, whether this logically leads to the inclusion of that sum in the disabled, non-custodial parent's income is unresolved. The child support guidelines do not address the inclusion of dependent benefits in income and, while the *Hinckley* court repeatedly suggests that such benefits "belong to the children," it has not directly addressed the appropriateness of its consideration as parental income. Likewise, subsequent modification of child support "may" be appropriate and most certainly resides in the discretion of the trial court, given the specific circumstances of the case. Even with these assumptions, the Wyoming Supreme Court has yet to address the specific application of excess benefits to current, past, or future support obligations. The only certainty is that the non-custodial parent must actively seek court involvement rather than unilaterally implement any modification to his child support obligations. The end result seems to remain soundly in the discretion of the trial court.

This approach allows trial judges leeway in their child support determinations. Given the rigidity of the Wyoming Child Support Guidelines, some flexibility may not be a bad option. However, the only Wyoming Supreme Court opinion provides very little guidance for courts and practitioners in terms of what to expect. Where there is so little guidance, inconsistencies are bound to surface, which may adversely affect the children. Either the Wyoming legislature or the Wyoming Supreme Court has every incentive to clarify the correct rule of law.

While some courts determine that a parent's income should include social security dependent benefits for purposes of child support calculation, others find to the contrary.[202] Both results are based in the statutory definitions of income, comparisons to insurance and retirement benefits, differentiations from SSI benefits, statutory history, legislative

200. *Id.*
201. *Id.*
202. *See infra* Section II(A).

intent, Social Security rules and regulations, and equity.

Courts take virtually every approach to determining whether those same dependent benefits should be credited toward a parent's current child support obligation.[203] Most courts justify a current set-off of some amount. However, other courts find it most appropriate to leave the decision to the trial court based on equity determinations and the facts of each case, and, still others believe dependent benefits should not be credited against the obligor-parent's support obligations. These courts, too, base their decisions in equity, the "facts" of each case, and the logical rationale that the child is entitled to these benefits regardless of the divorced state of the parents.

Once a court determines that a credit should apply, that court must address any excess in the dependent benefit over the current support obligations.[204] While most courts allow contemporaneous credit, they disagree as to the appropriateness of credit on arrearages. The application toward future credit is largely unaddressed, due to its speculative nature. And, finally, some courts deem any payments in excess of current support obligations a "gratuity" for the benefit of the child.

Finally, courts must consider the judicial impact of these decisions in determining the necessity and appropriateness of formal modification proceedings.[205] While the majority views formal modification as unnecessary and allow an "automatic credit," the minority of courts, of which Wyoming appears to be a member, requires affirmative court action before any credit or modification can proceed.

Frankly, Wyoming appears to be headed down two different paths, either of which could be equitable and efficient. Wyoming must make a choice. First, if the Wyoming courts are determined to earmark social security dependent benefits as "belonging to the child," as opposed to parental income, that must be clarified. Under such terms, these benefits would not be considered in calculating the obligor-parent's income and should not be used to deviate downward from his support obligations. Nor should the SSDI payments be used as a credit against his obligations in any sense of the word. Instead, district courts should be directed to deviate upward as appropriate, on a case-by-case basis, considering the factors of the case. While this approach would lead to more uncertainty, it also could result in a more equitable consideration of individual cases.

Wyoming courts also appear inclined to follow a second path and to allow some consideration of SSDI benefits in modification proceed-

203. *See infra* Section II(B).
204. *See infra* Section II(C).
205. *See infra* Section II(D).

ings. This is the better approach; 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, noncustodial parent's obligations be calculated justly.

Although allowing a credit to offset support obligations, in no event should any benefits "excess" be allowed as a credit against arrearages prior to the date of disability; the excess is a gratuity to the child. Finally, Wyoming courts, although in the minority, have taken the safe and proper route in requiring formal modification proceedings. There is no one best answer here, and what appears most needed in Wyoming is a clear answer of some kind. In any event, the field appears wide open in Wyoming. For the sake of the best interests of Wyoming's children, not to mention the sanity of its judges and practitioners, some clarification of these issues is in order.