What every practitioner needs to know about social security and child support - you can't go back

By Elizabeth A. Silverman

While I originally set out to write an article for publication in the Worker's Compensation Newsletter, I realized that the information I wanted to impart affects any lawyer who has clients paying child or spousal support in the state of Michigan. If your client has filed for disability, can't work, can't find work or suffers any type of financial set back, you need to file a motion to reduce their support immediately. If your client has become primarily responsible for his minor children, you need to file a motion to reduce their support immediately. If the other parent consistently refuses to exercise their parenting time, file a motion to increase their support immediately. There is an ironclad rule against retroactive modification, MCL 552.603. Even if the child changes residences and lives with the payor, support is still owed until a motion is filed. Waple v Waple, 446 NW2d 536, 179 Mich App 673 (1989). The rule has a particularly harsh effect on people who apply for Social Security Disability Income (SSDI) and Social Security Income (SSI). SSDI is funded by Social Security taxes and provides cash benefits based upon the person's earning history. A disabled person qualifies for SSDI if they've worked long enough and paid Social Security taxes. Social Security Income (SSI) is a Federal Income Supplement Program funded by general tax revenues (not Social Security taxes) designed to help aged, blind and disabled people who have little or no income. About 4.4 million children receive approximately 2.4 billion each month because one or both of their parents are disabled, retired or deceased.

Within a family, a child may receive up to 50% of the parents's full retirement or disability benefit. The maximum payment to a family can be from 150% to 180% of the parent's full benefit amount. Michigan Child Support Manual ("MCSF") excludes from income any means tested sources including Supplemental Security Income (SSI). 2008 MCSF 2.01(I) states that the Friend of the Court should attribute all SSDI Benefits to the parent whose earning record is the source of the benefit. Based upon the current child support guidelines, if the payor had $1,000.00 of Social Security Disability Benefits, his children would each receive one-half (½) of his benefit ($500.00) up to a maximum benefit to the family of between $1,600.00 and $1,800.00 per month. Except in the case where the payor has four (4) or more children, the marginal rate for child support will always be less than the amount of the SSDI benefit paid to the children.

Since there is a delay between the time for applying for SSDI or SSI, and the time it is granted, there is normally a substantial retroactive payment to be made both to the parent as well as to the child. 2008 MCSF 3.07 provides a credit for any SSDI benefit paid to a child against that parent's child support obligation. Arrearages are another matter. The current state of the law is that Social Security benefits received by a mother on behalf of the minor child because of the father's disability are credited towards his child support arrearage as long as the arrearage accumulated after his

disability. Even if there is an excess of funds, the payor will not be entitled to any credit for SSDI or SSI benefits for an arrearage which accumulated before he or she was disabled. ***Frens vs. Frens,*** 478 NW2d 750; 191 MichApp 654 (1992).

In ***Jenerou vs. Jenerou***, 503 NW2d 744, 200 Mich App 265(1993), the amount of the payor's child support arrearage was more than the amount of the Social Security lump sum payment to his daughter. All of the arrearage was incurred after the Defendant payor became disabled. The Court based its decision to deny the Defendant any credit on the basis that the moneys were paid to his daughter (who had reached the age of majority) and not to the daughter's mother to whom the Defendant owed support. The Court noted that the Defendant previously filed a petition to modify his support order but "abandoned his claim" before the trial court rendered its decision finding that no petition for modification of the order was pending, hence retroactive modification of the order was not possible citing MCL 552.603. The Court in ***Jenerou*** did acknowledge that the Federal Government sometimes takes years to make a decision on whether an individual is entitled to SSDI benefits, and this can lead to a retroactive award of benefits. The Court stated the only way to avoid an unjust result would be for the party applying for Federal benefits to petition the trial court for modification of a support order based on the "apparent inability to work" caused by the disability and "alert" the Court to the pending application for benefits. This would negate the effect of MCL 552.603 and provide notice to the other parent that modification is a possibility.

The Court of Appeals suggests that the trial court can defer its ruling on the petition for years to see if the Federal Government decides to award benefits. As a practical matter, it is difficult to keep a file open in any court for more than a year from the commencement of the action. It is unrealistic to expect that the trial court will defer ruling on the petition for modification for years unless counsel for the payor attaches a copy of the ***Jenerou*** case and reads the last paragraph into the record. Even then, whether it will be properly administered, is questionable.

There is also the issue that the child must be supported by both parents on a daily and immediate basis. What happens when a parent continues to make child support payments while his disability claim is pending? In ***Fisher vs Fisher***, 741 NW2d 68; 276 Mich App 424 (2007), the FOC withheld $510.00 a month from the payor's SSDI payment. The child's mother began receiving SSDI benefits on the child's behalf and those benefits exceeded the amount of support ordered by the Court. The trial court determined the direct payments could be credited to his child support obligation and the excess applied to any arrearage accumulating after his disability. The funds withheld by FOC could be used to satisfy any pre-disability arrearages. Even with these two adjustments, there was still an overpayment of approximately $24,000.00. The trial court ruled that MCL 552.603 prohibited the

payor from receiving any refund for the overpayment as there was no pending petition to modify support. "This Court explained that a party seeking benefits (SSDI or SSI) should petition for modification on the basis of the "anticipated" change of circumstances, and the trial court could then defer ruling on the petition until the change occurs or until it becomes clear that the change will not occur." ***Fisher***, Id at 428.

What happens when the client's claim for disability is pending and he/she is denied any modification of support? The case which prompted me to write this article to warn my fellow attorneys involved a client who suffered injuries involving his knees and spine. He hadn't worked steadily since 2004 and did not have a significant work history and hence did not qualify for SSDI benefits. He applied for SSI benefits in May 2009. He filed a motion to reduce his support in 2009 in Wayne County. As is the custom, the motion was first heard by a Referee, who denied his request to reduce support. At the time, he was in pro per and did not exercise his option to appeal the referee's ruling to the Circuit Judge believing it would be futile. In June, 2011 he finally received a ruling from the Social Security Administration that he qualified as totally disabled and unable to work retroactive to July 1, 2009. He is currently denied disability benefit payments as his current wife earns in excess of the allowed amount of income for his household.

He files another motion, this time represented by the author of this article. The Court accepts the Social Security Administration's determination that the petitioner is totally disabled and abates support. The Court refuses to make the abatement retroactive to the date of disability on the basis it would violate the rule against retroactive modification, MCL 552.603. Further, the Court requires that the petitioner make payments of $50.00 a week toward the arrearage. Was the trial court correct?

SSI benefits are a means tested source of income and may not be counted as income. 2008 MCSF 2.04(A). ***Ghidotti vs. Barber***, 459 Mich 189 (1998), established that the Court cannot impute income where the payor's sole source of income is means tested. SSI benefits are also exempt from alienation pursuant to 42 USC 1383(d)(1). Under Michigan law, means-tested income is inalienable pursuant to MCL 400.63. In the above case, the payor's sole source of income was SSI benefits which he was ineligible to receive, despite being totally disabled, as his wife earned in excess of the maximum allowed. The client has no available source of income to satisfy the Court's ruling. The Court should not have ordered on going payments towards the arrearage as the payor has no source of income and was totally disabled.

If the client doesn't pay $50.00 a week, what happens? Likely, the FOC will periodically issue show cause orders against the client. Can the Court force him to beg, borrow or steal to comply? The answer is no. The trial court is not allowed to use the contempt power to require a party to pay child support from inalienable government benefits. ***Proudfit vs O'Neal***, 193 MichApp 608 (1992). In my case, the Defendant continued to pay $50.00 per week towards his prior arrearage by "borrowing" the funds from his current wife. However, this ruling is inconsistent with the Court's finding the Defendant to be totally disabled and without any income. Although the trial court did not doubt the finding of the Social Security Administration, that the Defendant was disabled since July 1, 2009, the statute on retroactive modification, MCL 552.603, prohibited providing any relief. I think it is very important for every practitioner to understand the impact of filing a request to modify child support at the commencement of any Social Security filing. Hopefully, with the very specific language of ***Jenerou***, the trial court can be persuaded to defer their decision until the Social Security Administration determines if disability benefits are warranted and modify support retroactive to the date of filing in compliance with MCL 552.603.

Reprinted in the Michigan Family Law Journal, February 2012; General Practice Solo and Small Firm Newsletter, February 2012 and Michigan Worker's Compensation Newsletter, January 2012.

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