To Pay or Not to Pay, That is the Question: Should SSI Recipients Be Exempt From Child Support Obligations?

Angela F. Epps

Follow this and additional works at: http://commons.law.famu.edu/faculty-research
Part of the Family Law Commons, and the Social Welfare Law Commons

Recommended Citation
Angela F. Epps, To Pay or Not to Pay, That is the Question: Should SSI Recipients Be Exempt From Child Support Obligations? 34 Rutgers L.J. 63 (2002)
TO PAY OR NOT TO PAY, THAT IS THE QUESTION: SHOULD SSI RECEPIENTS BE EXEMPT FROM CHILD SUPPORT OBLIGATIONS?

Angela. F. Epps*

I. INTRODUCTION

Nobody likes a deadbeat—it is that simple. Efforts to avoid payment of child support conjure up images of a “deadbeat dad” in the minds of most people. Some who do not support their children clearly deserve the negative image. Others are unable to pay child support due to disability and poverty. Yet they are all treated as “deadbeat dads” by a system that has little sympathy for those who do not pay child support. This system, in large part mandated by and implemented pursuant to federal regulations, is focused on collecting child support by whatever means necessary. It provides substantial incentives to the states for collection of child support and penalizes them, by loss of substantial funding, for failing to follow the rules set out by the federal government. The federal government is therefore partially responsible for zealous pursuit of child support payments by the states. The child support system—from state administrative agencies, to prosecutors, to judges—has a mindset that all must pay regardless of income or situation. This theory has many proponents.

The system in many cases has no sympathy for those who, because of disability and lack of resources, have no means to support themselves other than Supplemental Security Income, commonly referred to as SSI. SSI is a federal needs-based public assistance program administered through the Social Security Administration (SSA). It provides monthly benefits to those who have limited resources and are disabled.

* Assistant Professor of Law, University of Arkansas at Little Rock, William H. Bowen School of Law. This article was made possible by a grant from the UALR William H. Bowen School of Law. Special thanks to Professors Theresa Beiner and Eugene Mullins, of the UALR William H. Bowen School of Law, Phyllis Turner-Brim Esq., and John Williams who assisted in the completion of this article.

Is a person receiving SSI properly labeled a "deadbeat dad" if he fails to pay court ordered support? Can the enforcement mechanisms available in the child support enforcement system be used against him to the same extent they are used against those who can work and pay child support, but refuse?

This article will explore whether it is legally permissible for state courts to order SSI recipients to pay child support. As background, the history of the SSI program, showing its genesis in a perceived need for uniformity, will be reviewed along with its current requirements. A discussion of federal child support laws will provide additional background. Determining how SSI should be treated for child support purposes has required state courts to decide whether federal law preempts states from treating it as income available for child support calculations. Cases illustrating how courts have analyzed the preemption issue in light of state and federal child support laws will be explored. Comparison of these cases reveals that, rather than meeting the overall system goal of uniformity, the current system has led to a variety of approaches. A way to ensure that SSI recipients and their children are treated uniformly and fairly will be proposed.

Although many feel that every parent should be required to pay child support or argue against further federal subsidies, this article proposes an alternate solution. First, SSI recipients should be exempt from payment of child support. Next, the federal government, through the Child Support Enforcement Program, should make this exemption mandatory. Finally, a program should be created to provide a monthly benefit to the children involved, to ensure that they have a minimum level of income.

II. WHAT IS SUPPLEMENTAL SECURITY INCOME (“SSI”) AND HOW DO YOU GET IT?

A. The History of SSI

The Social Security Act of 1935 created an old-age social insurance program. The Act included a disability insurance program, Social Security Disability ("SSD"), which provided benefits for disabled workers. This program was administered by the federal government through block grants made to states. Eligibility was based in part on contributions the worker had
made into the program. SSD did not address the needs of those who were unable to work and lacked a work history. Later, other programs, such as Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled, were created to assist aged, blind or disabled individuals based on their need. These programs were funded by matching grants given to the states by the federal government. 7

The states were required to follow very broad guidelines in using this federal grant. Each had the freedom to establish its own eligibility criteria and set its own payment amounts. This flexibility led to criticism of the program because it lacked uniformity. 8 For example, a citizen could be eligible for benefits in one state and not eligible in another. He could receive $50 in benefits in one state and $100 in another. Congress saw a need to provide for aged, blind, or disabled individuals in an adequate and uniform way. 9 Therefore, Congress created the SSI program to meet their needs. 10

The objective of the SSI program is the same today as it was at the program’s inception: to provide basic cash support for needy aged, blind or disabled individuals. 11 Several basic principles were at the heart of the program’s design. First, there was the desire for nationally uniform standards and an objective way to apply the standards. 12 Eligibility criteria, benefit amounts, and resource limits were to be the same in every state. 13 Second, SSI was to be a last resort for those in need. 14 Those who received SSI were to have exhausted other sources of support before turning to SSI. 15

7. ANNUAL REPORT, supra note 6, at 6. The creation of SSI to replace prior state administered programs is discussed in Finnegan v. Matthews, 641 F.2d 1340, 1342 (9th Cir. 1981), Saurino v. Weinberger, 396 F. Supp. 992, 994 (D.R.I. 1975), and the implementing regulations found in 20 C.F.R. § 416.110.

8. ANNUAL REPORT, supra note 6, at 6.

9. The legislative history of the Act creating SSI notes that there were fifty-four different programs with different tests of needs and different income exclusions. Under state old-age assistance programs the amount available to a couple with no other source of income ranged from $97 a month to $350 a month. H.R. REP. NO. 92-231, pt. III.D.3 (1972), reprinted in 1972 U.S.C.C.A.N. 4989, 5136.

10. ANNUAL REPORT, supra note 6, at 6; see 20 C.F.R. § 416.110(d) (2002). The legislative history indicates that the program was created to provide nationally uniform requirements and to bring the recipients’ incomes up to $130 per month in 1973, $140 per month in 1974, and $150 per month thereafter. H.R. REP. NO. 92-231, pt. I. (1972), reprinted in 1972 U.S.C.C.A.N. 4989, 4992.

11. ANNUAL REPORT, supra note 6, at 6.

12. Id.

13. See id. at 7-9.

14. Id. at 6.

For instance, if they were eligible for workers compensation, they would have to seek that income first. Next, although they would not be required to work, there would be incentives to encourage those who could work to do so as well as to encourage rehabilitation. Self-sufficiency, if possible, was the goal. Administration of the program was to be efficient, ensuring that those in need got benefits promptly. States were encouraged to provide supplements to improve the financial situations of their citizens. The program was to be coordinated with other programs serving the same population.

B. Current Program Guidelines

Currently, to be eligible for SSI, an individual must “have a medically determinable physical or mental impairment which is expected to last or has lasted at least twelve continuous months or to result in death” and be unable to engage in “substantial gainful activity” (“SGA”). SGA is defined as the ability to perform significant physical and/or mental duties that are productive for payment. Generally, if a person can earn more than $700 per month, she can engage in SGA. To be eligible, an individual can have no more than $2,000 in financial resources.

To obtain SSI, individuals must go through a process that can be long and arduous. SSA’s goal is to ensure that those receiving SSI benefits actually meet the definition above. The process starts when the individual applies for benefits. The individual is interviewed and asked for documentation and other information to support his application. SSA considers whether the non-medical factors are met. SSA or the state, at the

16. See id. at 11.
17. Id. at 7.
18. See id. at 13.
19. Id. at 7.
20. Id. at 7.
21. Id. at 6. These basic principles remain applicable today. Id.
23. Id.
24. Id. § 416.910.
25. Id. § 416.974(b)(2)(ii) (containing the formula to calculate the amount of income that is considered SGA).
26. Id. § 416.1205(c).
27. Id. §§ 416.1400-.1499 (providing the procedures followed in reviewing applications for SSI).
28. Id. § 416.203(a).
29. Id. § 416.1100.
state’s option, will determine medical eligibility.30 This may require additional medical evaluations31 or referral to a vocational rehabilitation agency for further assistance.32

If the individual fails to meet the eligibility criteria, the application is denied. He has the right to appeal the determination.33 The appeal process includes having his application reconsidered by the agency, requesting a hearing before an administrative law judge, asking that his case be reviewed by the Appeals Council, and finally taking the case to federal court once the administrative process is completed.34

After evaluation, if the individual fits the program criteria, she begins to receive monthly benefits. At present, the maximum amount available to an individual applicant is $552 per month.35 It may be reduced by one-third if the individual receives cash or in-kind help with room and board.36 It may also be reduced if the individual earns more than $65 per month.37

SSA will periodically review an individual’s status to determine if they remain eligible. Medical and non-medical reviews are periodically conducted.38 If an individual is no longer needy and aged, blind, or disabled, he will no longer be eligible for benefits. SSA will notify him of its decision to terminate benefits. He will have an opportunity to challenge the termination using the appeals process discussed above.39

Benefits received through the SSI program are exempt from attachment, garnishment, levy, execution or any other legal process.40 This means that creditors cannot obtain payment of debts directly from these benefits. Even if the benefits are placed in a bank account, they are still protected from the claims of creditors.41 In addition, unlike other federal benefits received

30. Id. §§ 416.1010-.1018.
31. Id. § 416.919-.919a.
32. Id. § 416.213.
33. Id. § 416.1400.
34. Id. § 416.1400(a)(2)-.1400(a)(5).
36. 20 C.F.R. § 416.1131(a).
37. Id. § 416.1112(c)(ii)(5). Sections 416.1111 and 416.1112 describe how income is calculated and considered in setting a benefit amount. See id. §§ 416.111, .112.
38. Id. §§ 416.989-.990 (governing medical reviews); id. § 416.204 (governing non-medical reviews).
39. Id. § 416.1336.
based on remuneration for employment, SSI cannot be garnished or attached for child support or alimony.\textsuperscript{42} This is consistent with the idea that such benefits are reserved for the support of the eligible individual.

SSA regulations have set up an extensive process to evaluate the validity of individuals’ claims that they are low-income and aged, blind, or disabled. It is often difficult for applicants to meet the requirements of the regulations. Once they meet the requirements, there is an official determination that they are not able to engage in meaningful work and are in need of the financial assistance provided by SSI. Individuals eligible for SSI are frequently eligible for other public benefits such as Medicaid, food stamps, and public housing.\textsuperscript{43} Together these benefits may be sufficient to allow the individual to keep “food on the table” and a “roof over his head.”\textsuperscript{44}

C. Social Security Disability

The Social Security Disability (“SSD”) program is a federal insurance program that provides assistance to disabled individuals.\textsuperscript{45} The eligibility criteria, in terms of ability to work, are the same as those for SSI. The major difference is that those eligible for SSD have a work history. They have paid into the system over the years and as a result, when they become disabled, are able to access some of what they paid.\textsuperscript{46} The amount of the monthly benefit is based on the amount the individual paid into the system. Thus, payment amounts will vary between individuals. In some cases, the amount the individual is due will be so low that he will also be eligible for SSI.

When a parent receives SSD, his spouse and children may also be eligible for a monthly benefit. The spouse’s benefit lasts until death or

---

\textsuperscript{41} Bank, 397 N.Y.S.2d 564, 564 (N.Y. 1977).
\textsuperscript{42} 42 U.S.C. § 659(a) (2002).
\textsuperscript{43} The 2002 Department of Health and Human Services Guidelines set the poverty level for a family of one at $8,860 per year. Annual Update of the HHS Poverty Guidelines, 67 Fed. Reg. 6931 (Feb. 14, 2002). An SSI recipient could receive a maximum of $6,624 in SSI benefits per year. \textit{Id}.
\textsuperscript{44} On average, 6.3 million aged, blind, or disabled individuals received SSI during calendar year 2000. The cost to the government was $28.8 billion. \textit{Annual Report, supra} note 6, at 3. By 2025 the cost of the program is expected to be $39.7 billion. \textit{Id}. at 5.
\textsuperscript{46} To be entitled to disability benefits an individual must have enough social security earnings to be insured for disability. 20 C.F.R. § 404.315(a)(1). Put simply, this means he has a recent history of employment that resulted in contributions into the social security trust fund. The details on how SSA determines disability insured status can be found at 20 C.F.R. § 404.130.
2002] TO PAY OR NOT TO PAY 69

divorce and remarriage. The children’s benefits last until they turn eighteen years old. If they remain in school, benefits last until they are nineteen. The payment received by the custodial parent on behalf of the child due to the non-custodial parent’s disability is counted toward the child support obligation in many jurisdictions.

Like SSI, SSD is “not transferable or assignable, at law or in equity, and none of the moneys paid or payable . . . shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.” Efforts to collect debts, whether by attachment, garnishment, or levy, involve some type of legal action against the person or entity holding property of the debtor. In the case of federal benefits, that entity is the United States government. In order to allow collection of alimony and support, a waiver of sovereign immunity was necessary. Congress made such a waiver with regard to SSD and some other benefits in 1975. Congress allowed any moneys, the entitlement to which

47. 20 C.F.R. §§ 404.330-.331.
48. Id. § 404.350.
49. For example, Arkansas Supreme Court Administrative Order No. 10, Section III, requires that the court consider the amount of any separate benefits received by the spouse and/or children as a result of the payor’s disability in setting the amount of child support to be paid.


A summary of how states treat separate benefits is found in 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). Courts in twenty-one states have held that the payor is entitled to credit. Id. at 469-70.

51. The relevant provision states:

Notwithstanding any other provision of law (including section 407 of Title 42) and section 5301 of Title 38 [of the] United States Code, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) . . . shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with state law enacted pursuant to subsections (a)(1), (b) of section [666] and regulations of the Secretary under such subsections . . . and to any other legal process brought, by a State agency administering a program under a State plan approved under this part [42 USCS 651
is based on remuneration for employment due and payable from the United States Government, to be subject to legal process seeking the payment of support or alimony. SSD still cannot be reached by creditors for debts.

III. HISTORY OF FEDERAL INTERVENTION INTO CHILD SUPPORT LAW

A. The Policies Underlying Child Support

Our society has an idealized concept of the perfect parent. Our attitude is that a parent should be willing to sacrifice personal well being and comfort for the sake of the child. Courts, similarly, share this attitude. In Dunbar v. Dunbar, the United States Supreme Court rejected efforts by a divorced father to escape child support payments by declaring bankruptcy. The Court cited with approval the following language used by another court in rejecting a similar claim:

In the case of In re Hubbard, 98 Fed. Rep. 710... Kohlsaat, District Judge, said: ‘The bankruptcy act... was not intended to, nor does it, subvert the higher rule, which casts upon a parent the care and maintenance of his offspring. The welfare of the State, as also every principle of law, statutory, natural, and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors, as well as all citizens, are interested in the enforcement of this rule.

State courts in many jurisdictions have likewise concluded that parents have an obligation to support their children. A parent’s failure to fulfill this obligation can be treated as a criminal offense in most states.

et. seq.] or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.


52. 190 U.S. 340 (1903).

53. Id. at 353.

54. Id. at 352 (quoting In re Hubbard, 98 F. 710, 710 (1899)).


56. State v. Oakley, 629 N.W.2d 200 (Wis. 2001) (involving a violation of the Wisconsin non-support statute). For a discussion of Oakley, see infra notes 124-129 and accompanying text. States having a similar statute include: Alabama, ALA. CODE § 13A-13-4 (1994); Alaska, ALASKA STAT. § 11.51.120 (Michie 2000); Arizona, ARIZ. REV. STAT. § 25-511 (2000); Arkansas, ARK. CODE ANN. § 5-25-401 (Michie 2001); California, CAL. PENAL
Several of the cases discussed below illustrate the special significance courts place on parents’ duty to support their children. In *Rose v. Rose*,\(^57\) two of the Justices based their conclusion, that veterans disability benefits could be treated as income for child support purposes, solely on the special sanctity accorded to child support.\(^58\) The court in *Ex Parte Griggs*\(^59\) put child support in a category above other debts, characterizing it as an obligation rather than a debt.\(^60\) Even though the court, in *Tennessee Department of Human Services ex. rel. Young v. Young*,\(^61\) concluded that SSI was exempt from consideration for child support purposes, it seemed reluctant to do so, stating that, “We take no pleasure in reaching the conclusion that a father need not share at least some part of his income, however meager, with his minor child, especially one whose current level of public assistance is even more impoverished than her father’s.”\(^62\) Justice Arnold, dissenting in *Davis v. Office of Child Support Enforcement*,\(^63\) argued that, “If this court felt that $70.00 per month was too much for her to pay, why not seventy cents, at the very least? A mother and father should pay something.”\(^64\) Like Justice Arnold, many feel that, even if an individual can only contribute a token amount, he should be ordered to pay it because, as a parent, he has a moral obligation to provide financial support. Courts simply do not like the idea that a parent should be exempt from a support obligation. The law and public policy have supported this position. Should this policy override the fact that a parent is disabled and being supported by a federal needs-based public assistance program?

\(^58\) Id. at 637.
\(^60\) Id. at 104.
\(^61\) 802 S.W.2d 594 (Tenn. 1990).
\(^62\) Id. at 600.
\(^63\) 20 S.W.3d 273 (Ark. 2000).
\(^64\) Id. at 279 (Arnold, J., dissenting). The Court in *Davis* concluded that SSI was not subject to state court jurisdiction for child support purposes. Id. at 278.
B. Current Federal Child Support Law

Although domestic relations are normally considered to be within the purview of the states,65 the issue of child support is extensively, though indirectly, regulated by the federal government. In 1975 Congress created the Child Support Enforcement Program ("CSP").66 The goals of this program were to increase payment and collection of child support. In 1996 efforts to accomplish these goals intensified with the passage of the Personal Responsibility and Work Opportunities Reconciliation Act ("PRWORA").67 PRWORA created a new program known as Temporary Assistance for Needy Families ("TANF") to replace Aid to Families with Dependant Children ("AFDC"). TANF is funded by a block grant given to the state. It is not an entitlement program as AFDC had been. It provides a monthly benefit to families but also requires various work related activities.68 The goal of TANF is to get families off public assistance and to help them to become self-sufficient.69 Eligibility lasts a maximum of five years.70

The number of families on welfare was viewed as a direct consequence of the non-custodial parent’s failure to pay child support. Therefore, PRWORA included amendments to the CSP geared toward increasing the effectiveness of child support collection efforts. To be eligible for TANF, a recipient must assist the state in efforts to collect support from the non-custodial parent.71 Some of the other requirements imposed on the states are discussed below.72 The state must comply with the requirements or risk losing the federal block grant that supports TANF and the federal funding

65. The Court emphasized this as a prelude to its discussion of the child support issue raised in Rose v. Rose, 481 U.S. 619, 625 (1987). State courts analyzing family law issues have also acknowledged this principle. See, e.g., Davis, 20 S.W.3d at 275, Young, 802 S.W.2d at 597-98.
68. Id. § 601.
69. Id. at (a)(2).
70. Id. § 608(a)(7).
71. Id. at (a)(2).
72. The extensive requirements imposed on the state by the PRWORA were unsuccessfully challenged in State v. United States, 24 F. Supp. 2d 1192 (D. Kan. 1998), aff’d sub nom., Kansas v. United States, 214 F.3d 1196 (10th Cir. 2000), cert. denied, 531 U.S. 1035 (2000). For a discussion of this case, see infra notes 284-289 and accompanying text.
used to assist in child support collection efforts. There is also a financial incentive for states related to the amount of support they collect.

Each state is required to have a plan for child support collection. The plan must include strong measures to collect child support from the non-custodial parent. For example:

(1) provisions for automatic wage withholding of child support payments;

(2) expedited procedures for the administrative collection of child support;

(3) procedures to intercept state tax refunds;

(4) procedures to place liens on the real and personal property owned by the non-custodial parent for overdue support;

(5) procedures to establish paternity;

(6) procedures to require non-custodial parents to post bond for overdue child support;

(7) procedures for review of orders every three years upon the request of a party;

(8) procedures to ensure that persons owing overdue support have a plan to pay; and

(9) procedures to withhold, suspend, restrict the use of drivers license, professional and occupational licenses, recreational and sporting licenses of those owing overdue support.

74. Id. § 658a.
77. Id. at (a)(2).
78. Id. at (a)(3)(A).
79. Id. at (a)(4).
80. Id. at (a)(5).
81. Id. at (a)(6).
82. Id. at (a)(10)(A)(i).
83. Id. at (a)(15).
The state plan must also provide for the establishment of child support guidelines that "[t]ake into consideration all earnings and income of the non-custodial parent." State adherence to these guidelines creates a rebuttable presumption that the amount of support awarded is appropriate. Additionally, the plan must provide that any judge who deviates from the guidelines enter written findings of fact to justify the deviation. To ensure that the guidelines result in the appropriate amount of support being awarded, the guidelines must be reviewed every four years.

C. How Child Support Orders Are Entered Through the Enforcement Agency

States are required by the CSP and implementing regulations to have a system for establishment of support orders and for collection of support. Every state has an administrative agency set up for this purpose. State enforcement agencies must be staffed and organized in a manner that will effectively accomplish their mission. The agency staff must include those who will investigate cases, establish support obligations, and enforce payment of support. The staff normally includes case workers, who perform a wide range of duties, and attorneys, who represent the agency in administrative and judicial proceedings. Funding to support the agency comes in part from the federal government.

The entire collection process can be handled by the state administrative agency. The process normally starts with an application by someone seeking help collecting child support. If the individual is receiving TANF or Medicaid assistance, the case is automatically referred to the agency. Assistance is provided at no cost to the applicant. If the individual is not

84. Id. at (a)(16).
85. Id. § 667(a).
86. 45 C.F.R. § 302.56(c)(1) (2002).
88. Id.
89. Id. at (a).
90. See id. § 602 (outlining the provisions of a state family assistance program and the state certifications required); id. § 654 (detailing what must be included in the state plan for child and spousal support).
92. Id. at (c)(5).
93. Id. at (c)(1).
94. Id. at (f)(1).
receiving such assistance, she can be charged no more than $25.00.96 Applicants who receive TANF or Medicaid are required to assign their right to collect support to the enforcement agency.97

The agency begins whatever steps are necessary to collect support. It may need to take steps to enforce an existing order, or to establish paternity and obtain a support order. The agency has procedures for the acknowledgment of paternity as well as to arrange blood tests to establish paternity.98 Once the need to set up child support payments is established, the agency uses the state child support guidelines to determine how much support is appropriate. All income of the non-custodial parent must be considered in determining the amount of child support he should pay.99 The order must provide for collection by wage assignment, unless there is a good reason for alternate payment arrangements.100

The due process rights of each parent must be observed.101 Consequently, each has a right to notice of the proceedings and a right to be heard.102 The state may provide either an administrative or judicial hearing.103 The child support agency has lawyers to assist it in the collection effort. Although these lawyers represent the state, normally the state's interest is the same as those of the custodial parent and the child(ren). The lawyer is actually working on behalf of all three. Each parent may obtain their own attorney.

D. Consequences of Failing to Pay Child Support

Failure to pay child support as it comes due results in a non-modifiable arrearage and can also lead to the initiation of collection procedures.104 As noted above, the state must ensure that those with overdue child support are

96. Id. § 654(6)(B).
97. Id. § 608(a)(3)(A).
98. Id. § 666(a)(5)(B) & (C).
99. 45 C.F.R. § 302.56 (c)(1). Income is defined as "any periodic form of payment due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers compensation, disability, payments pursuant to a pension or retirement program, and interest." Id. § 666(b)(8).
100. Id. at (a)(8)(B). The parties can agree in writing to an alternate payment arrangement. Id. at (a)(8)(B)(i)(II).
101. 45 C.F.R. § 303.101(c)(2).
102. See id.
104. Id. at (a)(9)(C).
subject to a payment plan. The amount ordered may or may not be reviewed and modified during the collection procedure. The payor will, however, be stuck with paying whatever has accrued to the point a request for modification is made. This amount will be reduced to a judgment that the individual will be required to pay.

The child support agency will have case workers involved on its behalf in the administrative part of the collection process. The non-custodial parent may represent himself or may retain an attorney to represent him in the process. A low-income individual may not have the resources to retain an attorney and may very well represent himself. It is unlikely that he will possess the same level of legal sophistication as an agency representative charged with negotiating a payment plan. If the non-custodial parent is receiving SSI due to a mental disability, he may agree to a payment plan even though logic and a budget would indicate that he will not be able to comply with the plan in the long run. The issue of modification and reduction may not even be considered in this process.

Although the non-custodial parent has a right not to agree to the plan proposed by the agency and have the matter addressed at an administrative or judicial hearing, he may not understand this right or be able to exercise it without the help of an attorney. He may also not view going to a hearing as a viable option. It is fair to say that if he does not have money to pay child support, he probably does not have money to pay a lawyer. Legal aid offices, charged with helping the poor, may not view the case as a priority matter. As a result, he may not get assistance and the arrears could continue to grow.

Individuals who fail to pay child support after being ordered to do so face a wide range of penalties. Failure to pay can result in suspension of a driver's license and certain other licenses unless and until the individual works out a payment plan with the state agency. In addition, the individual could be held in contempt of court or subject to state criminal charges for failure to support their dependents. Another option is presented by the Child Support Recovery Act ("CSRA") enacted by

105. See supra note 84 and accompanying text.
107. 45 C.F.R. § 303.20(e)(1).
108. Legal services entities have limited resources and are required to annually establish case priorities to determine how the resources will be used. 45 C.F.R. § 1620.1 (2001). To set priorities, they must obtain input from the community served, the local bar, and other interested persons. Id. § 1620.3(c). It is possible, but not likely, that this process will result in priority being given to cases seeking to reduce support payments to needy children.
110. See supra note 58.
Congress in 1992.\textsuperscript{111} This Act is aimed at improving payment of support when the child and the non-custodial parent live in different states.\textsuperscript{112} The CSRA provides a criminal penalty for anyone, in this interstate situation, who fails to pay support for over one year or accumulates more than $5,000 in unpaid support. Consequently, failure to pay support when the child lives in another state can be treated as a federal crime.\textsuperscript{113}

E. What Happens if the Payor Becomes Disabled While Subject to a Child Support Order?

An individual may become disabled and unable to work while subject to a child support order issued years before. Normally, this will not in and of itself change anything. Until the order is modified to reduce or terminate the support obligation, support will continue to accrue at the ordered amount. The amount can only be retroactively modified back to the date a request to modify was filed.\textsuperscript{114} There may be a substantial gap between the time the person becomes disabled, suffering a reduction of income, and the time a request to modify is submitted. During this gap, an inescapable arrearage may accrue.\textsuperscript{115}

\begin{itemize}
\item \textsuperscript{111} 18 U.S.C. § 228 (2001).
\item \textsuperscript{112} United States v. Bongiorno, 106 F.3d 1027, 1030 (1st Cir. 1997).
\item \textsuperscript{113} 18 U.S.C. § 228 (2001). The CSRA has been unsuccessfully challenged as exceeding the power of Congress. In United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997), the court rejected defendant’s arguments that the statute violated the Tenth Amendment by usurping the state’s power in an area traditionally left to its discretion. \textit{Id.} at 1033. The court concluded that the statute actually helped the state by complementing its laws in an interstate situation beyond the state’s reach. \textit{Id.} at 1034. Likewise, the court rejected the argument that the statute exceeded Congress’ Commerce Clause power. \textit{Id.} at 1032. The exercise of the Commerce Clause power was permissible because the statute applied only to interstate situations; the child must live in one state and the parent in another. \textit{Id.} Child support payments would normally be made using an instrumentality of interstate commerce. The Ninth Circuit has reached the same conclusion. \textit{See, e.g.,} United States v. Mussari, 95 F.3d 787 (9th Cir. 1996).
\item \textsuperscript{114} 42 U.S.C. § 666(a)(9)(C).
\item \textsuperscript{115} There is another possible alternative for those who receive SSD. The benefit received by the custodial parent on behalf of the child, due to the non-custodial parent’s disability, may be counted against the arrearage in months that the benefit was received and support was not paid. In Osborne v. Benefield, No. CA01-128, 2001 Ark. App. LEXIS 783 (Ark. Ct. App. Nov. 14, 2001), Benefield became eligible for SSD in 1994 and as a result, his child became eligible for separate benefits. \textit{Id.} at *2. Benefield stopped paying support. \textit{Id.} The separate benefits were paid to Osborne as the child’s custodial parent for six years before she sought payment of what she characterized as arrears. \textit{Id.} The trial court gave Benefield retroactive credit for the amount of separate benefits paid to Osborne for the child due to
\end{itemize}
A child support order may be reviewed and modified through an administrative procedure established by the state. The requirement for reviews could be helpful to anyone who experiences a change in income or status after the child support order is entered. Under the CSP, states must provide for a review at any time on the request of a party upon showing of some substantial change. For example, a state could set up minimum criteria that must be met, such as a 25% change in income, before a review is granted. This would be helpful to the individual subject to the order because the individual can make the request when he is aware of the change in income due to disability. It would be important that those subject to child support orders be aware of this right.

States have alternatives in setting up additional procedures to review child support orders. At a minimum, states must provide for a review every three years at the request of a party. If the request is never made, the review will never be conducted. Should the state choose this type of review provision, it is required to notify the individual every three years of his right to request a review. Unfortunately, despite the notice requirement, some will not know of this right or be able to exercise it. The consequence for an individual facing changed circumstances would be that the arrears would continue to accrue.

A state may provide for automatic reviews every three years or at shorter intervals. If the state provides for automatic reviews of orders every three years regardless of a request by either party, each party must be notified of the review and given a chance to object to any modifications proposed as a result of the review. This is helpful to a person who becomes disabled while subject to a child support order because at the review point his new

Benefield’s disability. Id. at *5. The Arkansas Court of Appeals rejected the argument that this was an impermissible retroactive modification. Id. at *6.

The issue of how to address accumulation of arrears in cases involving low-income non-custodial parents is a matter of current concern. It is addressed in Paula Roberts, An Ounce of Prevention and A Pound of Cure: Developing State Policy on the Payment of Child Support Arrears By Low Income Parents, available at http://www.clasp.org/DMS/Documents/99721161l.561/view_html (May 2001). Ms. Roberts suggests developing an arrears forgiveness program at the state level. Id. at 29. A forgiveness policy would aid those who become disabled and suffered a loss of income while subject to a child support order based on employment income.

117. Id. at (a)(10)(A)(i).
118. Id. at (a)(10)(C).
119. Id. at (a)(10)(A)(i).
120. Id. at (a)(10)(A)(iii).
income/status could be the basis for a downward modification of the order. The problem is that a substantial arrearage can accumulate between reviews. By the time a modification is made, the disabled individual already could have an arrearage he will not be able to pay. According to the current federal law, the arrearage cannot be retroactively modified. The individual would not be able to alleviate the arrearage and its consequences.

IV. THE CONUNDRUM OF SSI AND INCOME FOR CHILD SUPPORT

A. Why Treat SSI as Income for Child Support Purposes?

The maximum SSI benefit available is $552.00 per month. Child support based on that amount, even if paid, will not be enough to have a significant impact on the child’s status. Why would a state or a trial court want to force someone whose only income is a federal subsidy for poor disabled people to pay child support from that income?

The answer could be in the TANF program. Its centerpiece is a mandatory extensive child support collection system. The state gets financial incentives for collecting child support and reducing the TANF rolls. Every extra dollar the state is able to bring into a family brings that family a step closer to no longer being on TANF. The state can thus improve both its collection rates and reduce its TANF rolls.

A possible ideological reason for trial courts to treat SSI as income for child support purposes is suggested by the case of State v. Oakley. Mr. Oakley personifies the “deadbeat dad”—the one the system was set up to catch and force to pay. He fathered nine children by four different women. Unlike an SSI recipient, Mr. Oakley was able to work. He

121. For example, under the Arkansas guidelines, the amount an individual with $140 per week income would pay, as support for one child is $34 per week. In re Administrative Order No. 10: Arkansas Child Support Guidelines (Ark. Jan. 31, 2002) (per curiam), available at http://courts.state.ar.us/rules/admord10.html. The amount in Georgia would be between $92.65 and $125.35 per month. GA. CODE ANN. § 19-6-15(b) (1999). In Illinois, $109 per month would be paid. 750 ILL. COMP. STAT. ANN. 5/505(a)(1) (West 1999). Application of the New Hampshire guidelines, N.H. REV. STAT. ANN. § 458-C:3(1) (1992), results in $136.25 in child support per month. In Washington, those with less than $600 per month income must pay at least $25 per month per child. WASH. REV. CODE ANN. § 26.19.065(2) (West 1997). It is possible that the cost involved in collecting these amounts would exceed the amount collected making the economic benefit of initiating collection procedures questionable.
123. 629 N.W.2d 200 (Wis. 2001).
124. Id. at 202.
worked in the past, yet he refused to pay his court ordered child support.\textsuperscript{125} Mr. Oakley was convicted several times of criminal nonsupport.\textsuperscript{126} He was put in jail and fined, in an effort to get him to pay.\textsuperscript{127} Still Mr. Oakley did not pay. The Supreme Court of Wisconsin, upheld a trial court judges’ decision to condition Mr. Oakley’s probation on his not fathering other children until he can show that he is supporting his nine children and can support additional child(ren).\textsuperscript{128}

No one would argue that Mr. Oakley—a true “deadbeat dad”—should be exempt from the responsibility of providing for his nine children.\textsuperscript{129} Trial courts faced with a decision of whether to require payment of child support could envision Mr. Oakley—the “deadbeat dad”—even when presented with a legitimate legal reason not to require the payment of child support.

Another ideological issue that may concern courts is what could be described as “procreation out of control.” How many children should an SSI recipient be allowed to have with the knowledge that he will not have to support them? An individual who has neither the responsibility to raise nor support children has no financial incentive to stop having them. Requiring SSI recipients to pay support, at least in theory, supplies some incentive to voluntarily stop having children. If a person knows that no matter how little he has, he will be forced to give a portion of it to his children, he may decide not to have children until he has the means to support them.\textsuperscript{130}

\begin{footnotesize}
\begin{enumerate}
\item[125] Id.
\item[126] Id.
\item[127] Id. at 202-03.
\item[128] Id. at 203. Mr. Oakley plead no-contest to three counts of intentionally refusing to support his children in violation of Wisconsin Statute section § 948.22(2). Id. at 202. The judge rejected the state’s request that Oakley be sentenced to six years in prison, choosing instead to place him on probation to allow him the opportunity to work and support his children. Id. at 203. On appeal, the Wisconsin Supreme Court concluded that this condition passed constitutional muster because of Mr. Oakley’s status as a convicted felon, rejecting his argument that the condition violated his right to procreate. Id. at 208. Declining to apply the strict scrutiny test, traditionally applied in cases involving fundamental rights, the court instead considered whether the condition was overly broad and whether it was reasonably related to the goal of rehabilitating Mr. Oakley. Id. at 210. The condition was not overbroad because it did not eliminate Oakley’s right to procreate. Id. at 212. It was reasonably related to his rehabilitation because it prevented him from violating the law by failing to support additional children. Id. at 213.
\item[129] For a list of other states that have statues criminalizing the failure to support one’s children consult, see supra note 58.
\item[130] The right to have children has never been conditioned on the ability or desire to support them. The United States Supreme Court has found a constitutional right to have children and to raise them. See Troxel v. Granville, 530 U.S. 57, 65 (2000); Carey v.
\end{enumerate}
\end{footnotesize}
Additional reasons to require SSI recipients to pay child support come from the realm of social science. Research indicates that payment of child support benefits children in non-economic ways.\textsuperscript{131} Receipt of support can have a positive impact on children's academic achievement.\textsuperscript{132} In addition, fathers who pay support are likely to be involved in the lives of their children, thereby providing emotional support.\textsuperscript{133}


It could be argued that society has no other way to exert control over procreation out of control. Forced sterilization or mandatory use of other birth control methods are not options. In\textsuperscript{132} Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court rejected an Oklahoma law that allowed for the involuntary sterilization of habitual criminals. The Court concluded that the statute violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because of the distinctions it made among those convicted of similar offenses.\textsuperscript{133} Id. at 578. For example, someone who committed larceny could be sterilized; those who embezzled, regardless of the amount involved could not be sterilized.\textsuperscript{134} Id. at 539. The Court applied strict scrutiny to the classification made by the statute because of the basic civil right involved.\textsuperscript{135} Id. at 541.

The Court upheld a state sterilization procedure that applied to those committed to state institutions. Buck v. Bell, 274 U.S. 200 (1927). In\textsuperscript{136} Buck, Carrie Buck, a feeble-minded white woman, was committed to a state institution for the feeble-minded.\textsuperscript{137} Id. at 205. Her mother was also feeble minded.\textsuperscript{138} Id. Ms. Buck was the mother of a feeble minded child born out of wedlock.\textsuperscript{139} Id. The director of the institution initiated procedures to have Ms. Buck sterilized.\textsuperscript{140} Id. Virginia had a procedure for sterilization of inmates of state institutions who were afflicted with an hereditary form of insanity or imbecility.\textsuperscript{141} Id. at 205-06. The procedure included notice, hearing, and appeal to the State Supreme Court of Appeals of the State of Virginia.\textsuperscript{142} Id. at 206. The United States Supreme Court held that this procedure complied with due process requirements, concluding that it was a permissible means for the state to protect the public welfare.\textsuperscript{143} Id. at 207. The Court used harsh language in reaching its ultimate conclusion stating, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough."\textsuperscript{144} Id. This decision has not been overruled.

An in-depth discussion of the circumstances under which involuntary sterilization can be allowed is beyond the scope of this article. It appears, however, that under\textsuperscript{145} Bell those with severe mental defects can be involuntarily sterilized in certain circumstances, while under\textsuperscript{146} Skinner others are protected from such treatment.


\textsuperscript{132} Id.

\textsuperscript{133} Id.

\textsuperscript{134} Id.
B. Treatment of SSI Under State Laws

Several state courts have considered the propriety of considering SSI as income for child support purposes. These courts have been forced to address the issue of whether states are preempted by federal law from considering SSI as income on which child support can be based. The majority of courts have held state law preempted. The analysis followed by courts reaching differing conclusions demonstrates that reasonable minds can differ on the proper resolution of this issue. Consequently, there is a need for clarification by Congress or the United States Supreme Court.

A recent Arkansas case illustrates how uncertain the path to an exemption can be for those who receive SSI benefits. Davis v. Office of Child Support Enforcement was first heard in the Arkansas Court of Appeals. The court of appeals affirmed a lower court decision requiring payment of child support from Ms. Davis' $484 SSI check. The Arkansas Supreme Court, finding that the state's action was preempted, reversed the


Many of the statutes however do not specify how SSI recipients are to be treated. Questions, such as whether a court can disregard the SSA determination and independently evaluate a person's disability and whether a person can be ordered to pay some mandatory minimum amount of support despite their status, still remain. The use of mandatory minimum amounts has been successfully challenged on the grounds that they violate the federal requirement for a rebuttable presumption that the guideline amount is correct. See, e.g., In re Marriage of Gilbert, 945 P.2d 238 (Wash. Ct. App. 1997); Rose ex rel. Clancy v. Moody, 83 N.Y.2d 65 (N.Y. 1993).

135. This situation is similar to the one faced with regard to military retirement. In McCarty v. McCarty, 453 U.S. 210 (1981), the Court held that states were preempted from dividing military retired pay because of the grave danger this would pose to important federal interests. Id. at 232. Prior to McCarty, state courts were divided on the issue. After McCarty, Congress enacted the Uniform Services Former Spouse Protection Act ("USFSQA"), 10 U.S.C. § 1408 (2002), which allows the division of military retired pay pursuant to state law. USFSQA overruled McCarty and made Congressional intent clear.


137. Id. at 60.
The analysis conducted by each court highlights the conflicting methods used to evaluate this issue.

Ms. Davis and her husband divorced in 1989. They entered a settlement agreement, which did not require Ms. Davis to pay support for her two children who were in the custody of their father. At the time of the divorce, Ms. Davis was unemployed. Some years later, Mr. Davis assigned his right to child support to the state. The Office of Child Support Enforcement ("OCSE") began efforts to collect support from Ms. Davis. By this time, Ms. Davis was receiving SSI due to a mental disability. The trial court ordered Ms. Davis to pay $70.00 per month of her $484 SSI check as support for her two children. The court ordered this $70.00 payment even though her expenses exceeded her income and gave no consideration to the custodial parent's income.

The Arkansas Court of Appeals affirmed the trial court's decision. It concluded that under the Arkansas Child Support Guidelines "income is any form of payments . . . due to an individual, regardless of source." Consequently, SSI payments are income. The court rejected Ms. Davis' argument that the trial court's action was preempted by the Congressional purpose in creating SSI and the regulations governing the program. First, the court noted that domestic relations matters have traditionally been left to the state. Secondly, the court stated that preemption occurs only when Congress has positively required it by direct enactment. Finally, before a state law governing domestic relations could be overridden "it must do major damage to a clear and substantial federal interest."

139. Id. at 274.
140. Id.
141. Id.
142. Id.
143. Id.
144. Id.
145. Id.
146. Id.
148. Davis, 5 S.W.3d at 62 (internal quotations and citations omitted).
The court evaluated these factors and concluded that SSI could be used as a basis to award child support. The state of federal law was ambiguous. This area of law was normally left to the states. The federal government's interest in providing income for poor disabled individuals was adequately protected by the chancellor's broad discretion to depart from the normal child support guidelines.\(^{149}\) A passionate dissent pointed out that adopting the position of the majority would in effect mean that "[w]hat a recipient may actually use to subsist varies depending on the judicial discretion of family court judges throughout the nation."\(^{150}\)

The Arkansas Supreme Court reversed the lower court's decision on appeal, holding that SSI is not subject to state court jurisdiction for purposes of setting child support.\(^{151}\) The court relied on the anti-garnishment provision applicable to SSI,\(^{152}\) which states that SSI cannot be assigned, garnished, subject to levy execution or other legal process.\(^{153}\) The court also discussed the waiver of sovereign immunity provision,\(^{154}\) which allows garnishment of certain federal benefits for payment of child support and alimony.\(^{155}\) Next, it noted that the purpose of SSI is to assure a minimum level of income for people who are age sixty-five, blind, or disabled, and lack the income to maintain a minimum level of subsistence.\(^{156}\) The court compared SSI to SSD and Veteran's Administration ("VA") benefits.\(^{157}\) These latter benefits are related to work history and can be attached for family support pursuant to federal regulations.\(^{158}\) The court concluded by holding that SSI is not subject to state court jurisdiction.\(^{159}\)

\(^{149}\) Id. at 62-63.
\(^{150}\) Id. at 67 (Griffen, J., dissenting).
\(^{152}\) Id. at 276.
\(^{154}\) Davis, 20 S.W.3d at 276.
\(^{156}\) Davis, 20 S.W.3d at 277.
\(^{157}\) Id.
\(^{158}\) Id.
\(^{159}\) Id. at 277-78. The Arkansas Supreme Court addressed a similar issue in a subsequent case, Davie v. Office of Child Support Enforcement, 76 S.W.3d 873 (Ark. 2002). In Davie, despite the holding in Davis, the trial court judge refused to suspend a child support order entered at a time that the SSI recipient had been employed. Id. at 875. Based on its Davis analysis, the Arkansas Supreme Court reversed the trial court's decision. Id. at 876-77.

Lozada involved an SSI recipient who was ordered to pay $94 per month child support even though his only income was SSI. Lozada, 755 N.E.2d at 549. On appeal, the court found preemption and vacated the child support order.

In Cox, an SSI recipient was held in contempt for failure to pay child support. Cox, 654 N.E.2d at 277. The trial court held that Mr. Cox had the potential to earn $170.00 per week if he worked full time at a minimum wage job, despite SSA's determination that he was disabled. Id. Reversing this decision, the appellate court concluded that the trial court's actions were an "impermissible collateral attack" on the SSA's determination that Cox was disabled. Id. It held that "an SSI recipient, as a matter of law, lacks the money or means to satisfy his child support obligation." Id.

The Esteb court ruled that Mr. Enright, whose only income was $386 per month SSI, could not be held in contempt for failing to pay child support because he had no money with which to pay. Esteb, 563 N.E.2d at 141-42. SSI was excluded from his income for child support purposes. Id.

The SSI recipient in Peppel was a disabled alcoholic whose sole income was her monthly SSI payment. Peppel, 493 N.W.2d at 574. Peppel's two minor children had been placed in foster care, due to her inability to care for them. Id. The trial court ordered her to pay $69 per month as child support, and later held her in contempt when she failed to pay. Id. On appeal, the court considered whether federal law precluded the state from requiring SSI recipients to use SSI benefits to pay child support and whether state law allowed SSI to be counted as income for purposes of determining child support. Id. The court held that SSI benefits were exempt from this type of "legal process" by federal law and exempt from consideration under state law. Id. at 576.

Peppel was followed in Buhl v. Stark. Mr. Stark had two children by two different women. Buhl, 2000 Minn. App. LEXIS 1057, at *2. He subsequently became disabled and moved to modify the child support orders claiming that he could contribute nothing to the support of his children. Id. Mr. Stark's income consisted of $332.50 in Old Age Survivors Disability Income and $188.50 in SSI. Id. Although the court agreed with the general principle that both parents should help to support their children, it determined that due process requires an individual to have some means to pay before the law places such a support obligation on them. Id. at *6. The court reduced Stark's obligation to $0. Id. at *10. Under Minnesota law, the court retroactively modified the obligation back to the time Stark first began to receive public benefits. Id. at *9.

In Thomas T., a hearing examiner ordered the father to pay $25 per week as child support. Thomas T., 710 N.Y.S.2d at 746. His only income was $517 per month SSI. Id. The court concluded that because the father was receiving SSI and below the poverty level, it was inappropriate to order him to pay $25 per week even with his agreement. Id.

In Burns v. Webb, Ms. Webb became disabled and began to receive SSI following her divorce. Burns, 1998 Ohio App. LEXIS 4896, at *10. She was not able to pay child support as ordered in the divorce decree. Id. However, child support continued to accrue. Id. Although, the trial court terminated her obligation for future support, it could not modify the amount that had already accrued. Id. Instead, the court gave her ex-husband a judgment for the amount
In contrast, the dissenting justice felt that, as a parent, Ms. Davis should be required to support her children. However, the dissent provided no detailed legal rationale for this conclusion.

Kentucky took a different approach. Prior to 1994, Kentucky law excluded SSI from income for child support purposes. In 1994, Kentucky amended the state law to include SSI within the types of income subject to child support. This new provision was challenged in Commonwealth ex rel. Morris v. Morris. Mr. Morris divorced his wife in 1993. His wife was awarded custody of their four children and he was ordered to pay $31.50 per week as child support. Later that year he began receiving

that had accrued. The judgment was satisfied by her interest in the marital residence. The court terminated her child support obligation because she was disabled and receiving SSI, yet she lost her interest in the house.

In Reyes v. Gonzales, Reyes' income consisted of $470 per month SSI. He sought to modify his support obligation. Thus, he filed a motion to exclude his SSI from the net resources, which the court considered in setting child support. The trial court reduced the amount to $82.25 a month, but denied the motion to exclude SSI. On appeal, the court held that SSI benefits should not have been included as net resources for child support purposes.

Finally, in Langlois, the trial court ordered Mr. Langlois to pay 25% of his SSI benefits as child support. The Wisconsin Court of Appeals held that as a matter of state and federal law, SSI is exempt from child support calculations.


161. Id. (Arnold, J., dissenting).


164. Id. The current Kentucky statute provides that:

"Gross income" includes income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received. Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to public assistance as defined under Title IV-A of the Federal Social Security Act, and food stamps.

KY. REV. STAT. ANN. § 403.212(b) (Michie 2001).

165. 984 S.W.2d 840 (Ky. 1998).

166. Id.

167. Id.
SSI. In March 1994, a few months after his SSI began, Mr. Morris filed a motion to reduce the child support, claiming that SSI was excluded from income under the existing Kentucky statute. Mr. Morris later agreed to payments of $31.50 per week and $29.90 per month on the arrearage of $200. In December 1994, after the statute was amended to include SSI in income that could be considered in child support calculations, Mr. Morris filed another motion to reduce his child support payment. This motion was denied on the basis of the new statute. Mr. Morris appealed to the Kentucky Court of Appeals, and the court of appeals unanimously agreed with his contention that the new provision conflicted with the federal anti-garnishment provision and consequently violated the Supremacy Clause. The State appealed to the Kentucky Supreme Court, which reversed the lower court decision by a four to three vote.

The Kentucky Supreme Court reasoned that the anti-garnishment provision applied only to execution, levy, attachment, garnishment or any similar involuntary transfer. The "legal process" prohibited by the anti-garnishment provision meant some kind of collection effort against the federal government. The court read the waiver of sovereign immunity to support its conclusion that SSI can be included in child support calculations. It is important to note that the court emphasized that the only issue before it was whether the state statute that included SSI benefits for purposes of determining the amount of child support payments conflicted with the federal provisions regarding SSI. The court found that there was no conflict between the provisions because subjecting child support

168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
174. Morris, 984 S.W.2d at 841.
175. Id. at 842.
176. Id. at 841-42.
177. Id. at 841.
179. Morris, 984 S.W.2d at 841.
180. Id. at 842.
payments to inclusion did not subject them to assignment, levy, execution, attachment, garnishment, or any other similar transfer. 181

The dissenting justices felt that the majority had ignored one important fact: SSI was Mr. Morris’ only income. 182 He had no choice but to use it to pay the support or face a contempt action. 183 Requiring such use was clearly contrary to the purpose of SSI, which was to provide a minimum level of income for low income disabled people. 184 Congressional intent conflicted with ordering child support payments out of SSI benefits. 185 Consequently, in the opinion of the dissenters, the Kentucky statute was unconstitutional. 186

In *Ex parte Griggs*, 187 the Alabama Supreme Court was faced with the question of whether a mentally retarded man receiving SSI payments of $215 per month could be held in contempt for failure to pay court ordered child support. 188 The trial court ordered that he be arrested and jailed if he failed to pay. 189 Griggs argued that the anti-garnishment provision prevented the court from considering his SSI when setting child support and from holding him in contempt. 190 The court rejected this argument, holding that the provision was targeted at collection efforts by creditors. 191 Griggs’ family members were not creditors, but, rather, the ones the anti-garnishment provision was meant to protect. 192 The court stated that “child

---

181. *Id.* at 841. For cases reaching similar conclusions, see *Ex parte Griggs*, 435 So.2d 103 (Ala. 1983) and *Whitmore v. Kenney*, 626 A.2d 1180 (Pa. Super. Ct. 1993). *Griggs* is discussed infra at notes 188 to 196 and the accompanying text.

In *Kenney*, Ms. Kenney was ordered to pay $20 per week as child support out of her monthly SSI benefits. *Kenney*, 626 A.2d at 1181. The total income of those in her household was $910. *Id.* at 1185. She admitted to the trial court judge that she could pay if she could do so on a monthly rather than weekly basis. *Id.* On appeal, Ms. Kenney argued that SSI benefits were exempt from consideration for purposes of child support. *Id.* The court held that Ms. Kenney’s benefits were not exempt because she admitted she could pay and did not object to paying on a monthly basis. *Id.* The court did not find preemption. *Id.*

182. *Morris*, 984 S.W.2d at 842 (Stephens, J., dissenting).
183. *Id.* at 845 (Stephens, J., dissenting).
184. *Id.* at 847 (Stephens, J., dissenting).
185. *Id.* (Stephens, J., dissenting).
186. *Id.* (Stephens, J., dissenting).
188. *Id.* at 103.
189. *Id.*
190. *Id.* at 104.
191. *Id.*
192. *Id.*
support [is] not a debt . . . [it is] a duty of a higher obligation.”193 The contempt however was thrown out on other grounds.194 The court found that Griggs was “impecunious, not contumacious.”195

Courts in Tennessee have reached what could be seen as different conclusions on this issue. In Tennessee Department of Human Services ex. rel. Young v. Young,196 Mr. Young received SSI of $386 per month.197 His child’s mother received AFDC and had assigned her right to support to the state.198 Young was ordered to pay child support of $100 per month.199 When he got behind, the trial court ordered garnishment of his SSI benefit.200 The Tennessee Supreme Court discussed the purpose of the SSI program, noting that it is not based on remuneration for employment.201 The court held that the state’s action was preempted by the anti-garnishment provision that protects SSI.202 Issuance of legal process of any sort would frustrate the primary purpose of the program: to provide minimum income for disabled low-income people.203 The court stated, “We take no pleasure in reaching the conclusion that a father need not share at least some part of his income, however meager, with his minor child, especially one whose

193. Id. (quoting Schlaefer v. Schlaefer, 112 F.2d 177 (D.C. Cir. 1940)).
194. Id. at 105.
195. Id. (quoting Sewell v. Buter, 375 So. 2d 800 (Ala. Civ. App. 1979)). The conclusion that Griggs could not be held in contempt raises another interesting issue. In order to be liable in a contempt action an individual must normally be willfully disobedient to a court order rather than merely unable to comply. Whether the person is willfully disobedient is a question of fact. See HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA THE LEGAL PERSPECTIVE 61-74 (1981) (discussing the use of contempt actions to collect child support). If a court concludes that the individual is merely unable to pay, as the Griggs’ court apparently did, it may have no alternative method to collect the support. SSI cannot be garnished and recipients have limited resources. The court’s decision to order child support may only serve to force the accumulation of arrears that will never be paid.

196. 802 S.W.2d 594 (Tenn. 1990).
197. Id. at 595.
198. Id.
199. Id.
200. Id.
201. Id. at 597.
202. Id. at 599-600.
203. Id.
current level of public assistance is even more impoverished than her father's.\(^\text{204}\)

Another Tennessee court in *Norfleet v. Dobbs*\(^\text{205}\) came to a slightly different conclusion. Ms. Norfleet and her husband divorced in 1995.\(^\text{206}\) Mr. Dobbs was awarded custody of the couple's two children.\(^\text{207}\) Norfleet was ordered to pay child support.\(^\text{208}\) In 1996 Norfleet began receiving SSI for a mental disability.\(^\text{209}\) She unsuccessfully tried three times to have her child support obligation reduced or eliminated.\(^\text{210}\) In response to her third attempt, the trial court determined that Ms. Norfleet was not disabled and could work.\(^\text{211}\) It directed the state to investigate Ms. Norfleet's eligibility for disability benefits.\(^\text{212}\) The state appealed on Ms. Norfleet's behalf.\(^\text{213}\) The court upheld the trial court's decision.\(^\text{214}\) Although the state's child support guidelines exempted "means tested public assistance" from inclusion as income, the guidelines also allowed the court to consider whether the obligor was willfully or voluntarily unemployed or underemployed.\(^\text{215}\) Consequently, the trial court could order support even though Ms. Norfleet was receiving SSI.\(^\text{216}\)

In *Norfleet*, the state child support agency was assisting the non-custodial parent seeking a reduction.\(^\text{217}\) The custodial parent did not seek counsel or participate in the appeal.\(^\text{218}\) The court discussed at length the propriety of the state child support agency assisting the non-custodial parent.\(^\text{219}\) The court was concerned that such action may not be in the best

\(^{204}\) *Id.* at 600.


\(^{206}\) *Id.* at *2.

\(^{207}\) *Id.*

\(^{208}\) *Id.*

\(^{209}\) *Id.* at *4-*5.

\(^{210}\) *Id.* at *6.*

\(^{211}\) *Id.*

\(^{212}\) *Id.*

\(^{213}\) *Id.* at *17.*

\(^{214}\) *Id.* at *16-*17.

\(^{215}\) *Id.* at *17.*

\(^{216}\) *Id.* at *6.*

\(^{217}\) *Id.* at *6-*7.

\(^{218}\) *Id.* at *7-*12.
interest of the child involved. Ultimately, the court concluded that the representation was appropriate.

C. Possible Supreme Court Analysis

The United States Supreme Court has not considered whether a state is preempted from using SSI in child support calculations. However, in *Rose v. Rose*, a case involving Veteran's Disability Benefits, the appellant made an argument similar to one that can be made on behalf of SSI recipients. Mr. Rose was a disabled veteran. The trial court included a $1,211 veteran's disability benefit in his income for purposes of determining the amount of support he should be ordered to pay. The court held Mr. Rose in contempt for failing to pay the court-ordered support. Mr. Rose objected, arguing that the state was preempted from including his veteran's disability benefits in its calculations. Therefore, he could not be held in contempt for failing to pay the amount ordered by the court.

In reviewing the case, the Court first noted that domestic relations issues are normally a matter of state rather than federal law. Further, in order to find that a state domestic relations law is preempted, it must do major damage to clear and substantial federal interests.

Next, the Court analyzed the anti-garnishment provision that applies to veteran's disability benefits. It exempts payments under any VA program

220. *Id.* at *7.
221. *Id.* at *12-*13.
222. Although the Court had the opportunity in *Reyes v. Gonzales*, 22 S.W.3d 516 (Tex. App. 2000), in which the Texas Court of Appeals concluded that such action was preempted, the Supreme Court denied the state's petition for certiorari. *Texas v. Reyes*, 533 U.S. 929 (2001).
224. *Id.* Mr. Rose presented other arguments against treating his VA disability benefit as income for child support purposes. *Id.* at 628-35. These arguments are not relevant to the issue being discussed. *Id.* They were also rejected by the Court. *Id.* at 636.
225. *Id.* at 622.
226. *Id.* at 622. Mr. Rose also received $1,806 in veterans' aid and attendance, $90 in veterans' dependents' benefits, and $281 in Social Security Disability children's insurance benefits. *Id.*
227. *Id.* at 623.
228. *Id.*
229. *Id.*
230. *Id.* at 625.
231. *Id.*
232. *Id.* at 630.
from attachment, levy, seizure or any legal or equitable process both before and after the beneficiary receives them.\textsuperscript{233} The Court found that the purpose of this provision was twofold. First, Congress did not want the VA to become a collection agency.\textsuperscript{234} Second, Congress wanted to protect the veteran's means of subsistence.\textsuperscript{235} According to the Court, allowing Mr. Rose to be held in contempt for failing to comply with a child support order did not frustrate either purpose.\textsuperscript{236} The VA would not be involved in any collection attempt.\textsuperscript{237} It was Mr. Rose, not the VA, who must pay the support.\textsuperscript{238}

The Court concluded from legislative history that Congress intended the benefits at issue to aid both the veteran and his family.\textsuperscript{239} Thus, the anti-garnishment provision was meant to protect the veteran and his family from outside creditors, not to protect the veteran from legitimate child support claims.\textsuperscript{240} Holding Mr. Rose in contempt actually helped to further the intent of Congress by requiring Mr. Rose to use the benefit to help support his family.\textsuperscript{241} The Court determined that the anti-garnishment provision did not apply to this type of seizure and thus had no application in this case.\textsuperscript{242}

The Court rejected the argument that Congress' intent to preempt was indicated by its failure to extend the waiver of sovereign immunity to VA disability benefits.\textsuperscript{243} The waiver allowed collection of child support from government benefits based on remuneration for employment. VA disability benefits are based on having a service-related disability, not on remuneration for services. The Court found that the waiver was not relevant to this case.

\textsuperscript{233} The Veterans' Benefits Act states, in part:
\begin{quote}
Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.
\end{quote}
\begin{footnote}
\end{footnote}

\textsuperscript{234} \textit{Rose}, 481 U.S. at 630.
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{Id.} at 631-32.
\textsuperscript{240} \textit{Id.} at 634.
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{Id.} at 636.
\textsuperscript{243} \textit{Id.} at 634-35. Chief Justice Rehnquist and Justices Marshall, Brennan, Blackmun, and Powell joined in the opinion.
because the contempt action against Mr. Rose did not involve the federal government. Once the money was delivered to a veteran, a state court could order that it be used to pay support.

Justices O'Connor and Stevens concurred in part with the analysis and in the judgment. Their rationale rested solely on the distinction between family support obligations and other debts. Child support obligations have a special sanctity. Unlike other obligations, they can be enforced by contempt and are not discharged in bankruptcy. In their opinion, the anti-attachment provision did not express an unequivocal intent to prevent the veteran’s family from enforcing a support obligation. Accordingly, it was appropriate to find that the state’s action was not preempted.

Justice Scalia concurred in the decision but took a simpler approach. Justice Scalia chided the majority for finding that the statute’s intent was to benefit the family and then finding no preemption based on this intent. He questioned whether the legislative history supported the conclusion that Congress intended to benefit the family. Justice Scalia stated, “Neither an order basing the amount of a veteran’s child support obligation in part on his disability benefits nor an order that he satisfy that obligation on pain of being held in contempt is an attachment, garnishment or seizure.” The contempt, rather, was a permissible action against the veteran, not against the benefit.

The sole dissenting opinion, presented by Justice White, took the view that the contempt action was a seizure and therefore prohibited.

There are similarities and distinctions between SSI and VA disability benefits. VA disability benefits, like SSI, are not based on remuneration for employment. They are based on disability. Although not based on remuneration for employment, an individual does have to be on active duty in the United States military at the time he became disabled to be eligible for the benefit. The length of service does not matter; the nature of the disability determines the benefit. Recipients of VA disability benefits are not

244. Id. at 635.
245. Id.
246. Id. at 636-40 (O'Connor, J., concurring).
247. Id. at 637 (O'Connor, J., concurring).
248. Id. at 639 (O'Connor, J., concurring).
249. Id. at 640-44 (Scalia, J., concurring).
250. Id. at 642-43 (Scalia, J., concurring).
251. Id. (Scalia, J., concurring).
252. Id. at 644 (Scalia, J., concurring).
253. Id. at 645-47 (White, J., dissenting).
required to be low-income or have no resources. In many cases, like that of Mr. Rose, a VA disability benefit is received in addition to other benefits. The recipient is likely to have other resources available to support him. Finally, if the majority’s position is accepted, VA benefits were meant to help the veteran and his family. They were not meant to be a source of income solely for the veteran. SSI, on the other hand, is meant to provide a minimum level of subsistence for the recipient.

The question becomes one of how the intent of Congress in creating SSI would affect the Court’s analysis. A review of the legislation, its history, the implementing regulations, and earlier court decisions indicates that the intent is to provide a federal guaranteed minimum level of income for those eligible. The Supreme Court in *Schweiker v. Wilson* a case challenging the denial of SSI benefits to certain residents of public mental institutions, has acknowledged that this is the purpose of SSI, stating:

In October 1972, Congress amended the Social Security Act (Act) to create the federal Supplemental Security Income (SSI) program. This program was intended "[to] assist those who cannot work because of age, blindness, or disability," S. Rep. No. 92-1230, p. 4 (1972), by "[setting] a Federal guaranteed minimum income level for aged, blind, and disabled

---

256. See supra Part II.A. The legislative history notes that most aged, blind, or disabled individuals have enough income from other sources to keep them from falling below the poverty line. Some received such a small benefit that there was a need to supplement that benefit. Therefore "[t]he new program has been designed with a view to providing: 1. An income source for the aged, blind, and disabled whose income and resources are below a specified level." H.R. REP. No. 92-231, pt. III.D.1. (1972), reprinted in 1972 U.S.C.C.A.N. 4989, 5132.
257. "The basic purpose underlying the supplemental security income program is to assure a minimum level of income for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level." 20 C.F.R. § 416.110 (2002).
258. In addition to the child support cases discussed above, courts have routinely acknowledged the purpose of SSI. See Dept. of Health & Human Servs. v. Chater, 163 F.3d 1129, 1133 (9th Cir. 1998); Doyle v. Shalala, 62 F.3d 740, 744 (5th Cir. 1995); Martin v. Sullivan, 932 F.2d 1273, 1275 (9th Cir. 1990); Lyon v. Bowen, 802 F.2d 794, 796 (5th Cir. 1986); Zambardino v. Schweiker, 668 F.2d 194, 197 (3rd Cir. 1981); Woods v. Shalala, 884 F. Supp. 156, 160 (D.N.J. 1995). The purpose of SSI, however, was not the central issue in any of these cases.
259. 450 U.S. 221 (1981)
persons .... ” The SSI program provides a subsistence allowance, under federal standards, to the Nation’s needy aged, blind, and disabled.260

There are at least three approaches illustrated by the Rose decision that the Court could adopt. The first approach would be to base a decision on the purpose of the benefit. If the purpose of the program controls, it appears that the state would be preempted from considering SSI as income for child support purposes. Another approach would be to emphasize the special nature of child support. This would likely result in the benefits being treated as income for child support purposes. The final approach would be to apply the anti-garnishment provision literally. Regardless of the purpose of the program, the provision does not literally state that SSI cannot be considered as income for child support or that the recipient cannot be held in contempt for failing to pay support. Thus, an action against the recipient is not characterized as being an action against the benefit. The last two approaches appear to ignore the purpose of the SSI program.

Important points that may be applicable to this analysis can be gleaned from other United States Supreme Court cases dealing with preemption issues. Geier v. American Honda Motor Co., Inc.261 illustrates the importance of Congress' intent to create a uniform scheme in the preemption analysis. In Geier, the Court was called upon to determine whether a tort action against Honda for failure to install airbags in a 1987 Honda Accord was preempted by a 1984 federal safety standard promulgated under the National Traffic and Motor Vehicle Safety Act of 1966.262 The Act provides that states cannot adopt regulations that conflict with federal safety standards covering the same aspect of performance, but the Act includes a “saving” clause.263 This clause purports to save state common law actions from preemption by the federal regulations.264 The Court determined that allowing Ms. Geier's tort action to proceed would interfere with Congress' intent to create a uniform scheme for implementation of the airbag requirement.265 The tort action was therefore preempted.266

260. Id. at 223 (citations omitted).
263. Id. at 865. The “saving” clause can be found in 15 U.S.C. § 1397(k) (2002).
265. Id. at 881, 883-84.
266. Id. at 865, 881.
Along the same lines, Congress intended to uniformly provide for impoverished disabled individuals. Allowing a state to order child support payments that are drawn from SSI benefits jeopardizes this uniformity. The goal of uniformity works in favor of a finding that states are preempted from including SSI benefits in child support calculations.

V. THE WORLD AS IT SHOULD BE

Although the Supreme Court’s approach to this issue may not be clear, there is a way to ensure that disabled recipients receive the benefits they are entitled to. The state could be required, as part of its plan, to have child support guidelines that specifically state that SSI is not to be considered as income for purposes of determining child support. State child support regulations could also prohibit all collection efforts against individuals receiving SSI. In order to ensure this protection of benefits, several other changes could also be mandated.

A determination by the SSA that an individual is disabled should be conclusive and binding on a state court responsible for setting child support. This determination, made after a thorough evaluation of the facts relating to disability and income should be given conclusive status by all courts. To ignore this determination in an effort to force payment of child support is a waste of resources. There is a strong argument that such action is preempted by the SSA’s action in response to the claim for benefits. More significant, SSI is a federal program with extensive federal regulations. A federal determination that an individual is unable to work should not be contradicted by a state determination that the individual should work to support his children. Ordering such an individual to pay child support is simply a reallocation of money supplied by the federal government to the eligible individual for his own support. Thus, a child supported in part by SSI is being supported by the federal government—not by the SSI recipient.

If a trial judge suspects, as he apparently did in Norfleet,268 that an individual is not actually disabled, he should be required to refer the case to SSA for re-evaluation. In the mean time, the individual’s obligation to pay

267. ANNUAL REPORT, supra note 6, at 6. The Code of Federal Regulations provides in relevant part: “(d) Nationwide uniformity of standards. The eligibility requirements and the Federal minimum income level are identical throughout the 50 States and the District of Columbia. This provides assurance of a minimum income base on which States may build Supplementary payments.” 20 C.F.R. § 416.110(d) (2002).

support should be suspended pending completion of the review. SSA is in a better position to review claims of disability than a trial court. SSA routinely reviews medical records, doctor’s reports, reports from vocational rehabilitation experts, and many other documents in determining whether someone is disabled. The trial court is not as well equipped to handle such an extensive review; it is best left to the agency that evaluates daily claims for disability benefits. This is especially so when mental disabilities are involved. Some disabilities, particularly mental illnesses, will not be readily apparent. Those with mental illnesses can look like anyone else, present themselves well, and yet have a disability that prevents them from working.

If an individual begins to receive SSI while subject to a child support order, his obligation should end immediately with little required action on his part. The sole requirement should be to provide the child support enforcement agency with a copy of a letter from SSA indicating eligibility for benefits. Once eligibility is confirmed, no collection efforts should be launched against him. The individual’s obligation should be retroactively terminated or suspended as of the date of disability onset. This will avoid the accumulation of overdue support. The individual should also be required to notify the child support enforcement agency if and when his eligibility for SSI ends. The agency should conduct periodic reviews only to confirm that the person is still receiving SSI.

A. What is the Effect of Not Having a Mandatory Exemption?

As will be discussed in this section, the lack of a mandatory exemption for SSI benefit recipients has several adverse consequences. Lack of an exemption results in unnecessary obstacles for individuals already determined by the Social Security Administration to be disabled, leads to inconsistent results between states and between appellate courts in the same state, and most importantly, allows states to ignore the purpose of SSI.

Several states, by statute or case law, have excluded SSI from a recipient’s income with regard to setting child support. This should end the matter in such states. However as illustrated by the cases discussed, this is not always the result.\textsuperscript{269} Even under these provisions a question remains—is

\textsuperscript{269} Consider the treatment of the SSI recipient in two different cases from Tennessee. In \textit{Tennessee Department of Human Services ex rel. Young v. Young}, 802 S.W.2d 594, 599 (Tenn. 1990), the state supreme court held that the benefits were exempted. In \textit{Norfleet}, 1999 Tenn. App. LEXIS 70, at *17-*18, the court upheld a trial court judge’s determination that a SSI recipient was able to work but was voluntarily unemployed. \textit{See supra} notes 220-222 and accompanying text.
demonstrating to the court receipt of SSI enough to establish an exemption or does the recipient need to prove he is disabled by other means? Receipt of benefits could be viewed as merely evidence, as opposed to conclusive proof, of a disability. A trial court might require additional proof of disability rather than strictly adhering to the SSA’s determination.\textsuperscript{270} Lack of an exemption results in unnecessary obstacles for individuals who the Social Security Administration has already determined to be disabled. SSI recipients have already been through an extensive evaluation (that sometimes takes years). This process can require medical evaluations, administrative hearings, and appeals to federal court. Notwithstanding this in-depth evaluation, they are required to go through an extensive and stressful state evaluation required by the child support enforcement agency. That process may include administrative hearings, court hearings, and appeals. They may also face a contempt action if they are unable to pay. Criminal prosecution under the CSRA is also a possibility. Due to the inability to retroactively modify an order, a substantial arrearage can also accumulate.

For example in \textit{Davis v. Office of Child Support Enforcement},\textsuperscript{271} Ms. Davis, a low-income mentally disabled woman, was required to go through three legal battles to obtain what a clear simple statement in the CSP regulations, requiring states to exempt SSI, would have accomplished for her. The trial court had a legitimate legal basis for its decision, as did the Arkansas Court of Appeals. Many feel that a parent ought to be required to support his child regardless of income or physical status. Without a clear limiting provision to the contrary, SSI recipients will be defenseless in trial courts that routinely award support based on income especially where those courts are unreceptive to exempting any parent from their obligations.

\textsuperscript{270} This approach appears to have been used successfully by the trial court in \textit{Norfleet}, 1999 Tenn. App. LEXIS 70, at *17-*18. However, in \textit{Cox v. Cox}, 654 N.E.2d 275, 277 (Ind. Ct. App. 1995), the appellate court concluded that the trial court’s determination, that a SSI recipient had the potential to earn $170.00 per week, was an “impermissible collateral attack” on SSA’s determination that he was entitled to benefits. \textit{Cox}, 654 N.E.2d at 277. The issue of what level of proof should be required was raised in a case decided recently by the Arkansas Supreme Court. In \textit{Davie v. Office of Child Support Enforcement}, 76 S.W.3d 873, 874-75 (Ark. 2002), Mr. Davie presented proof to the trial court that he was currently receiving SSI but he offered no medical evidence to substantiate his disability. \textit{Id.} at 875. The trial court found that this was not sufficient to demonstrate that he is unable to work and pay child support. On appeal, the Arkansas Supreme Court declined to address the level of proof issue, holding that there had been no showing that Mr. Davie was voluntarily unemployed. \textit{Id.} at 877.

\textsuperscript{271} 20 S.W.3d 273 (Ark. 2000).
SSI recipients are low-income, disabled individuals who do not have the resources (and possibly the will) to appeal a trial court decision ordering them to pay support out of their SSI check. Sources of free legal help such as a legal aide program, consider these types of cases a low priority. A pro bono attorney who will take on a system that is unsympathetic to someone perceived to be avoiding an obligation to pay child support is the other alternative. Otherwise recipients will be forced to risk administrative sanctions and will face the possibility of being held in contempt of court.

Failure to have an exemption allows courts to reach inconsistent results. The decisions discussed above demonstrate the inconsistency. Reasonable legal minds can differ about several of the issues surrounding SSI and child support. For example, courts have differed in their views as to whether SSI can legally be counted as income for child support purposes. In addition, whether a trial court judge can make an independent determination of whether someone on SSI is unable to work has engendered differences of opinion. If a disabled person lives in Wisconsin, SSI benefits will not be used to determine child support. However, if that same person lives in Tennessee, he risks having his eligibility for SSI challenged by a trial court judge. In Arkansas, the court of appeals rejected the preemption argument but that argument was later accepted by the Arkansas Supreme Court. A Kentucky Court of Appeals accepted the preemption argument later rejected by the Kentucky Supreme Court.

If there is no exemption states can ignore the purpose of SSI. The Kentucky legislature has done just that. It has specifically included SSI in income to be considered for child support purposes. The state supreme court upheld this statute refusing to look at the purpose of SSI and thereby failing to protect the only source of income for low-income disabled individuals.

272. See supra note 85.
273. The Kentucky Supreme Court concluded that SSI could be counted as income. Commonwealth ex rel. Morris v. Morris, 984 S.W.2d 840, 841-42 (Ky. 1998). The Arkansas Supreme Court, conversely, concluded that SSI could not be counted as income. Davis, 20 S.W.3d at 278.
274. The Indiana Court of Appeals concluded an independent determination of disability amounts to an impermissible collateral attack on SSA's determination that a recipient was disabled. Cox, 654 N.E.2d at 277. In contrast, the Tennessee Court of Appeals concluded that a judge could determine whether an SSI recipient was voluntarily unemployed in Norfleet, 1999 Tenn. App. LEXIS 70, at *18.
277. Davis, 20 S.W.3d at 278.
278. Morris, 984 S.W.2d at 840-42.
It is unfair to each SSI recipient that "what a recipient may actually use to subsist varies depending on the judicial discretion of family court judges throughout the nation."279 A mandatory exemption in the state child support guidelines would reach every agency representative, administrative hearing officer, trial court judge, and appellate court judge. As a result, the right decision would be made at the lowest level, and time could be devoted to other cases. A mandatory exemption would ensure that all recipients are treated equally and fairly.

One legitimate argument against mandating an exemption for SSI recipients is that this could work against one of the program's goals. Self-sufficiency is a goal of the SSI program.280 Those who can work are encouraged to do so. A recipient who is exempt from payment of child support may have little incentive to seek rehabilitation and employment. The maximum payment of $552 per month could provide a sufficient motive for some to remain disabled and unemployed. On the other hand, it is difficult, if not impossible, to live on $552 per month. That amount, as was intended by Congress, is barely enough to meet minimal living expenses for one individual.281

B. The Possible Limits in Federal Power to Force Adoption of the Exemption

Does the federal government have the power to force states to exempt SSI benefits from child support calculations? Many courts dealing with child support issues have pointed out that domestic relations law is normally left to the states. Despite this, as discussed above, the area of child support enforcement has increasingly become a matter of federal concern. As a result of the PRWORA, federal involvement in child support collection efforts has increased. Federal funding for child support collection efforts, as well as TANF, is directly tied to state implementation of federally mandated regulations.282

280. ANNUAL REPORT, supra note 6, at 82-86.
281. This amount results in cash benefits beneath the federal poverty guidelines. See supra note 44.
282. PRWORA, TANF, and federal involvement in child support collection are discussed in supra notes 67 to 74 and accompanying text.
Kansas challenged the mandates of the PRWORA as exceeding the power of Congress. In Kansas v. United States, Kansas argued that it had no choice but to implement the federal regulations because the money provided by the federal government was essential to the operation of the state TANF program and to state child support efforts. In 1996, the federal grant paid for 66% of the cost of state child support enforcement efforts. Kansas also received $101.9 million in TANF funding. In light of the substantial funding involved, the state argued that it could not refuse money needed to aid its citizens, and therefore, was forced to accept regulations beyond normal Congressional power. Thus, Congress was achieving by coercion that which it could not achieve directly. This result, according to Kansas, violated the Spending Clause of Article 1, Section 8 of the Constitution as well as the Tenth Amendment. Both the District Court for the District of Kansas and the Tenth Circuit Court of Appeals rejected Kansas' argument, holding instead that Congress had not impermissibly coerced Kansas into implementing the TANF regulations. States were free to decide to do without the funding. To evaluate the legality of the conditional funding provision, the Court used the criteria adopted by the United States Supreme Court in South Dakota v. Dole.

In Dole, South Dakota challenged a federal law that allowed the Secretary of Transportation to withhold a percentage of federal highway funds from any state that did not increase the drinking age to twenty-one. The drinking age in South Dakota was nineteen. Consequently, it stood to lose 5% of the federal grant it would have received otherwise. The Supreme Court looked at four criteria in evaluating South Dakota's claim that the law was an impermissible use of Congressional power. First, the spending by Congress was to further the general welfare. Next, the condition was clearly stated. South Dakota knew what it must do to qualify for the

284. Kansas, 214 F.3d at 1198.
285. Id.
286. Id.
287. Id.
288. Kansas, 214 F.3d at 1199; Kansas, 214 F.3d at 1202.
290. Id. at 205.
291. Id.
292. Id. at 206.
293. Id. at 207.
294. Id.
funding. Third, the condition was reasonably related to accomplishing a federal purpose. Finally, there was no constitutional provision that served as an independent bar to the conditional grant.

In *Dole* only 5% of a grant was at stake. According to the Court, it was not impermissibly coercive for Congress to condition the grant on state compliance with the drinking age requirement. This was a valid incentive; the state was free to take or leave the money. The Court implied that there could be circumstances in which a conditional grant would be impermissibly coercive. It failed to give an example of such a situation. There have been no cases in which an incentive program under the Spending Clause has been invalidated as impermissibly coercive.

Applying the *Dole* analysis to the Kansas challenge, the Tenth Circuit upheld the PRWORA provisions. It found that the spending was for the general welfare as its purpose was to help needy families across the nation. Kansas knew what would be expected if it accepted the federal grant. The condition was reasonably related to the federal interest in a particular program because the collection of child support was connected to child poverty. Finally, the state would not violate the constitution by complying with the conditions. Kansas' petition for certiorari was denied by the United States Supreme Court.

The extensive child support regulations set out in PRWORA have been upheld by one federal district court and one court of appeals. The Supreme Court has declined to review the case. The addition of a requirement that SSI is not to be considered income is not likely to be the straw that breaks the camel's back. Such a provision would protect the federal interest of providing a minimal level of subsistence to low-income disabled individuals. It would be another clearly defined expectation that the state must meet in order to qualify for funding.

295. *Id.*
296. *Id.* at 208.
297. *Id.* at 211.
298. *Id.*
299. *Id.*
300. Kansas v. United States, 214 F.3d 1196, 1200 (10th Cir. 2000).
301. *Id.*
302. *Id.*
VI. PROPOSAL FOR A NEW BENEFIT FOR CHILDREN

Children whose non-custodial parent is unable to pay support due to a disability that entitles him to SSI should not be left without a source of support. Just as the federal government created SSI to help those who are disabled and have no work history, it should create a program to assist their children. The program should be federally funded and administered by the SSA. Just as SSI is similar to SSD, this program for their children should be similar to the program that provides benefits for children of those on SSD. When a person who has paid into the system becomes disabled and eligible for SSD, their children also become eligible for a monthly benefit. Likewise, children of those receiving SSI should be eligible for a benefit similar to SSI.

The new program should provide a monthly benefit to children until they reach age 18 or their parent is no longer disabled, whichever comes first. There should be a maximum amount set; perhaps 50% of the SSI benefit amount. The income and resources of the household the child resides in would be considered to determine eligibility for this benefit and the appropriate amount to be paid just as is currently done for children and spouses who receive SSI benefits due to their own disability. Income of a parent or spouse is “deemed” to the recipient. A recipient can become ineligible for benefits, despite his disability, if the deemed income or resources exceed a certain amount. This provides an equitable result because this means that someone with a duty to provide support has the income and resources necessary to care for the child.

This proposed program could be administered in a manner similar to the procedure SSA uses for payment of SSI and SSD benefits to recipients who are not able to handle their own financial matters. In such cases, SSA designates a representative payee to receive the benefits on behalf of the

305. See supra notes 48-50 and accompanying text.
306. Children of those receiving SSD benefits are eligible to receive a benefit that is 50% of the amount received by their disabled parent. 20 C.F.R. § 404.353 (2002).
307. The resources of an ineligible parent or spouse are “deemed” to the eligible recipient. This means that the eligible recipient’s resources are deemed to include the resources of an ineligible spouse or parent. Id. § 416.1202. Resources include cash, other liquid assets, or any real or personal property that individual owns and could convert to cash. Id. § 416.1201(a). Generally, a home, household goods, personal effects, and a car needed for transportation are not counted as resources. Id. §§ 416.1212, 416.1216, 416.1218. The resource limitation is $3,000. Id. § 416.1205(a).
eligible person. The person designated on behalf of a minor child is normally the custodial parent. The representative payee is required to use the benefits for the care of the recipient. She is encouraged to keep records showing how the money was spent because she must give an accounting upon request. The goal of these procedures is to ensure that the money is used to support the child.

The major argument against this approach is that it will increase, rather than decrease, federal spending. The budget surplus has disappeared. The September 11, 2001 terrorist attack had an adverse effect on the economy and resulted in increased federal spending. Creating yet another federal program that would consume tax dollars would not be popular. Are children in poverty worth the expenditure? If the goal is to make sure that children are properly cared for, the government should step in to help where the parent is clearly unable to support the child. The welfare of the child and compassion for the disabled person require such intervention.

VII. CONCLUSION

Should someone be exempt from the normal requirement to pay child support because he receives SSI as a result of poverty and disability? Ultimately, the answer should be provided by Congress, rather than judges. Just as Congress ultimately concluded that military retirement was subject to state court jurisdiction for purposes of property division, despite the Court’s contrary conclusion, it will need to decide how SSI recipients’ income

308. For those unable to manage their benefits due to the nature of their disability or their youth, SSA appoints a representative payee. Id. § 416.601. Parents with custody of a minor child will normally be the representative payee for the child. Id. § 416.621(b)(1). The representative payee must use the benefits for the best interest of the beneficiary. Id. § 416.635. The benefits may be used for expenses such as rent, medical bills, food, and clothing. Id. §§ 416.635, 416.640. Similar provisions exist for representative payment of children’s benefits payable to minor children of SSD recipients. Id. §§ 404.2001-2065.

309. Parents who have custody of a minor child receive preference in determining who will act as representative payee. Id. § 416.621(b)(1).

310. SSA may require the payee to account for the benefits to ensure that they are being used properly. Id. § 416.665. SSA may also verify how the money was spent. Id. Representative payees are encouraged to keep records of how the benefits have been spent. Id. These provisions should be made mandatory for the new program.

311. The Office of Management and Budget ("OMB"), projects that the federal government will run a deficit of $165 billion for fiscal year 2002. OMB expects that the deficit will be eliminated by fiscal year 2005. The deficit is attributed to the recession and the war on terror. Office of Mgt. and Budget, Fiscal Year 2003 Mid-Session Review (July 15, 2002).
should be treated. There are important policy considerations that support both views. It is critical that children have adequate financial support. Likewise, it is critical to protect the only source of income of disabled poor people. The interest of the children should not be ignored. Nor should the interest of a disabled person surviving on a federal needs based subsidy be ignored. Balancing these interests is a task best performed by Congress because the funds at issue come from federal tax dollars, not from the recipient’s pocket.

312. See supra note 136.