



FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (FL-2007-08)
***SURVIVOR'S BENEFITS: OFFSET CHILD SUPPORT OBLIGATION OF
NONCUSTODIAL PARENT'S ESTATE***

TO: State Bar Office of Governmental Affairs

FROM: Diane Wasznicky

DATE: April 19, 2006

RE: Survivor's Benefits: Offset Child Support Obligation Of Noncustodial Parent's Estate. Amend Family Code §4504 by adding two subdivisions (d) and (e).

SECTION ACTION AND CONTACTS:

Date of Approval by Family Law Section Executive Committee: April 8, 2006
Approval vote: 8-4, with two abstaining

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DIGEST:

This Resolution amends the Family Code by adding two subdivisions to Family Code §4504, which would allow federally derived disability and retirement survivor payments, received on behalf of the minor child, to be offset against the deceased noncustodial parent's estate child support obligation.

PURPOSE:

- 1) Existing Law: Permits federally derived disability and retirement benefits to be credited towards the living non-custodial parent's child support obligation, assuming the benefits were not considered in calculating income when the child support obligation was ordered.
- 2) The Problem: Proponents are concerned by the holding in *In re Marriage of Bertrand*, 33 Cal.App.4th 437, 39 Cal.Rptr.2d 151 (1995), whereby social security payments received on behalf of a minor child on account of a decedent's death may not be credited against decedent's support obligation because Family Code §4504 allows credit against a support obligation only for social security retirement or disability benefits.
- 3) The Remedy: Proponents indicate that this decision does not go far enough, and argue the same reasoning applied to benefits received during the noncustodial parent's life to off-set the noncustodial parent's child support obligation should be applied to the derivative survivorship benefits received after the non-custodial parent's death.

Proponents recognize that in the case where death benefits are greater than or equal to the child support obligation, the executor of the noncustodial parent's estate will be not be required to file a motion to modify child support, thereby minimizing the need for court intervention. Proponents indicate this statutory modification does not impact the holding in *Bertrand* allowing the trial court to consider death benefits on the executor's motion to modify the support obligation whereby modifications would apply prospectively from the date of the executor's motion. (Id. at p. 441).

In practical application, where derivative disability or retirement benefits were taken into consideration as income at the time of child support obligation order, either the custodial parent or the executor of the estate of the deceased non-custodial parent will need to file a motion to modify child support to take into consideration the lost derivative benefits and the gained survivor benefits. In the interim, survivorship benefits would be credited to offset the estate of the deceased noncustodial parent's child support obligation. Any under-payment would be accrued as arrearages payable by the deceased noncustodial parent's estate retroactively to the time the motion to modify child support was filed.

ILLUSTRATIONS:

When a noncustodial parent dies with an active child support order in place, several family law and probate/estate planning attorneys have reported difficulty resolving issues arising from an existing child support obligation which then becomes the obligation of the deceased noncustodial parent's estate.

Currently, the executor of the noncustodial parent's estate is required to satisfy the existing child support obligation out of the estate irrespective of whether or not the child is receiving, or is eligible to receive, federally based derivative survivor benefits. In essence, this results in a windfall to the custodial parent who receives both the survivor benefits and the child support obligation on behalf of the minor child.

The existing law does not allow for the survivor benefit to be offset against the estate's child support obligation as it can be during the noncustodial parents' life. Therefore, unless the custodial parent is willing to settle the matter, the noncustodial parent's estate must satisfy the child support obligation until the minor child meets the statutory age of majority requirements.

DOCUMENTATION:

To the author's knowledge, there are no formal studies, reports, or statistics which support the conclusion that there is a problem. The recent real life examples as described in the ILLUSTRATIONS section above form the factual basis that this is a common problem where a noncustodial parent dies with an existing child support obligation and benefits that will be received by the child at that parent's death.

HISTORY: None

PENDING LITIGATION: None

LIKELY SUPPORT & OPPOSITION:

Support

Family law attorneys
Probate/estate planning attorneys

Why?

- Certainty of law.
- Ease of estate administration
- Minimizes attorney fees & costs associated with estate administration and child support modification after the noncustodial parent's death.

Oppose

None

Why?

This survivor offset is symmetric with the offset allowed during the noncustodial parent's life. Therefore, it is logical to allow the same offset once the noncustodial parent is deceased. No person or entity is disadvantaged by this offset provision.

FISCAL IMPACT: None

GERMANENESS:

The Family Law Section of the State Bar of California is made up of family law practitioners representing both parents and children. Issues relating to the protection of children, as well as the impact on parents, are within the specialized expertise and training of the members of the Family Law Section.

TEXT OF PROPOSAL:

SECTION 1. Section 4504 of the Family Code is amended to read:

4504. (a) If the noncustodial parent is receiving payments from the federal government pursuant to the Social Security Act or Railroad Retirement Act, or from the Department of Veterans Affairs because of the retirement or disability of the noncustodial parent and the noncustodial parent notifies the custodial person, or notifies the local child support agency in a case being enforced by the local child support agency pursuant to Title IV-D of the Social Security Act, then the custodial parent or other child support obligee shall contact the appropriate federal agency within 30 days of receiving notification that the noncustodial parent is receiving those payments to verify eligibility for each child to receive payments from the federal government because of the disability of the noncustodial parent. If the child is potentially eligible for those payments, the custodial parent or other child support obligee shall apply for and cooperate with the appropriate federal agency for the receipt of those benefits on behalf of each child. The noncustodial parent shall provide any information necessary to complete the application.

(b) If the court has ordered a noncustodial parent to pay for the support of a child, payments for the support of the child made by federal government pursuant to the Social Security Act or Railroad Retirement Act, or by the Department of Veteran Affairs because of the retirement or disability of the noncustodial parent and received by the custodial parent or other child support obligee shall be credited toward the amount ordered by the court to be paid by the noncustodial parent for support of the child unless the payments made by the federal government were taken into consideration by the court in determining the amount of support to be paid. Any payments shall be credited in the order set forth in Section 695.221 of the Code of Civil Procedure.

(c) If the custodial parent or other child support obligee refuses to apply for those benefits or fails to cooperate with the appropriate federal agency in completing the application but the child or children otherwise are eligible to receive those benefits, the noncustodial parent shall be credited toward the amount ordered by the court to be paid for that month by the noncustodial parent for support of the child or children in the amount of payment that the child or children would have received that month had the custodial parent or other child support obligee completed an application for the benefits if the noncustodial parent provides evidence to the local child support agency indicating the amount of the child or children would have received. The credit for those payments shall continue until the child or children would no longer be eligible for those benefits or the order for child support for the child or children is no longer in effect, whichever occurs first. (Am Stats 2004, C305)

(d) If the surviving dependent minor child of the deceased noncustodial parent is receiving survivor benefit payments from the federal government pursuant to the Social Security Act or Railroad Retirement Act, or from the Department of Veterans Affairs, or military retirement survivor benefits because of the death of the non-custodial parent, and the court has ordered the noncustodial parent to pay for the support of a child, survivor benefit payments received by the custodial parent or other child support obligee, on behalf of the minor child, shall be credited toward the amount ordered by the court to be paid by the estate of the deceased noncustodial parent for the support of the child. The credit for those payments shall continue until the child or children would no longer be eligible for those benefits or the order for child support for the child or children is no longer in effect, whichever occurs first.

(e) If the surviving dependent minor child of the deceased noncustodial parent was receiving derivative benefit payments from the federal government pursuant to the Social

Security Act or Railroad Retirement Act, or from the Department of Veterans Affairs or military retirement survivor benefits because of the non-custodial parent's disability or retirement, prior to the death of the noncustodial parent, and these derivative benefits were taken into consideration when the court ordered the child support obligation, then either the custodial parent or the executor of the estate of the deceased noncustodial parent may bring a motion to modify the child support obligation due to the potential change in circumstances precipitated by the lost derivative federal or retirement benefits and the gain of the federal survivorship benefits. Until such time as a child support modification motion is brought, the federal survivor benefit payments received by the custodial parent or other child support obligee, on behalf of the minor child, shall be credited toward the amount ordered by the court to be paid by the estate of the deceased noncustodial parent for the support of the child. The credit for those payments shall continue until the child or children would no longer be eligible for those benefits or the order for child support for the child or children is no longer in effect, whichever occurs first.