NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 6, 2018

LETTER OPINION

Mr. Donald E. Shay
1532 Lincoln Way, #102
McLean, VA 22102
Defendant / Petitioner Pro Se

Mr. Richard J. Colten
Ms. Mary C. Huff
Ms. Virginia F. Shevlin
Blankingship & Keith, P.C.
4020 University Drive, Suite 300
Fairfax, VA 22030
Counsel for Plaintiff / Respondent (Ms. Olivia Byrne)

Re: *Olivia Byrne v. Donald Shay*
Case No. CL-2010-8541

Dear Mr. Shay and Counsel:

This matter comes before the Court on the Motion to Modify Child Support of Petitioner ("Father"), respecting the two children he has in common with Respondent

OPINION LETTER

("Mother"). At this interim juncture in the proceedings,[1] the Court is called upon to decide the novel questions of whether a child support escalator clause in place since 2008 remains prospectively enforceable, and whether Social Security benefits the children receive derivative of their Father's *retirement* may be credited towards his child support obligations. This Court holds applicability of the escalator clause must be evaluated anew in light of current circumstances, and that the retirement benefits of the children may be *considered* in determining the proper level of parental support due.

This Court finds the child support escalator clause was valid as incorporated from the parties' 2008 Property Settlement and Support Agreement ("PSSA") in their final decree of divorce of 2010. That accord was executed with benefit of counsel and not under then-procedurally or substantively unconscionable terms. The clause met the legal prerequisite that it be the product of a court order with a rational basis, for it was part of a

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[1] The Court, by its first Letter Opinion, previously overruled Mother's motion to strike Father's petition, holding evidence of the current needs of the children and of the court order sought to be modified, need not be formally admitted at trial for the Petitioner to sustain his burden of proving a material change in circumstances as a prerequisite for the Court to consider an alteration of child support obligations. *Byrne v. Shay*, No. CL-2010-8541, 2018 Va. Cir. Lexis 131 (August 8, 2018). Mother asserts that, because the Court availed the parties of a briefing schedule to address the herein matters, that Father's failure to file a brief constitutes a waiver of the arguments he has made, as *pro se* litigants are obligated to comply with the Court's rules much in the same manner as those represented by counsel. *Francis v. Francis,* 30 Va. App. 584, 591, 518 S.E.2d 842, 846 (1999). Mother further avers that "the 'right of self-representation is not license' to fail 'to comply with the relevant rules of procedural or substantive law.'" *Townes v. Commonwealth*, 234 Va. 307, 319, 362 S.E.2d 650, 656-57 (1987), *cert. denied,* 485 U.S. 971 (1988). Mother suggests that thus, by dint of consideration of the merits of the issues in this Letter Opinion, the Court may be advantaging the *pro se* Father with an "accommodation to compensate for his *pro se* status." (Pl.'s Br. at 3-4). Mother's assertion relies on a false premise, namely, that the Court *ordered* the parties to file briefs. While Mother's counsel expressed intense interest in briefing these issues, Father was instructed in turn he *could,* but was not required to supplement his citation of cases with an *optional* brief. Mother's counsel has expressed frustrations with Father's past conduct, but such averred conduct alone is not a basis for this Court to decline to rule on important questions of law which have at their heart, both in this and in the first Letter Opinion, the question of litigants' access to judicial decision-making on the merits, not unduly diverted by a misapplication of existing law. Whether Father is entitled to a merits hearing on the questions he raises does not thereby imply an ultimate resolution of his claim for modification of child support in his favor. The Court's focus, rather, is on a just and fair adjudication of the cause free from impermissibly advantaging either side.

larger bargain settling the financial affairs of the parties, wherein by way of example, but not limitation, Father literally got the plane and Mother the car. Irrespective, the Court also finds implicit in such agreement, as colored by the parties' statutory right to seek future modifications of child support, the escalator clause is binding only until there is a material change in circumstances and a review pursued resultant thereto. The escalator clause must then be considered anew within the framework of the Child Support Guidelines under Virginia Code § 20-108.1(B)(14), as just another factor in contemplation of potential deviation from the presumptively set amount. The statutory scheme does not defer determination of modification of parental support to agreements preexisting changed circumstances, but instead limits the Court to consider whether such pacts make the amount set by the Guidelines "unjust" or "inappropriate."

The Court further finds the income the children receive from Social Security derivative of Father's retirement, while not subject to explicit credit under the statutory scheme, is, however, not as a general proposition excluded from consideration in setting the amount of the support obligation of Father. The General Assembly mandates application of credit towards child support of Social Security *disability* payments, because they are replacement income to the parents, but the statute is silent as to affording the same treatment to derivative retirement benefits. This does not, however, thereby exclude consideration of such income of the children in determining the support obligations of Father. To the contrary, Virginia Code § 20-108.1(B)(9) specifically allows this Court to review whether the "independent financial resources" of the children make it just to deviate from the presumptive amount set by the Child Support Guidelines. The Court holds Social Security retirement benefits of the children are their independent financial

resources. Consequently, such resources may, by statute, be considered as a factor in determining whether a deviation from the presumptive amount prescribed by the Guidelines is appropriate.[2]

BACKGROUND

Father, appearing *pro se*, has petitioned this Court modify his current child support obligation, because it has risen by almost half due to an automatic escalator clause in the parties' 2008 PSSA, incorporated in their 2010 decree of divorce. Father further seeks relief in contemplation of the cost of a life insurance policy in favor of his children,[3] maintenance of which is required by the parties' PSSA, and to be credited with dependent Social Security retirement payments his children receive derivative from his status as a retiree. Mother objects to the Court reaching the merits of these arguments, maintaining consideration thereof is foreclosed as a matter of law.

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[2] The statutory scheme enacted by the General Assembly cannot be viewed constitutionally in isolation from its intended rational basis purpose. The General Assembly thus wisely built in the ability of the Courts to consider when application of the Guidelines would be "unjust" or "inappropriate," which infers the Guidelines are to be applied in a manner which enacts the General Assembly's intent for parents properly to support their children according to their means but not to thereby to be thrown into destitution through circumstances not of their own making, when such needs are otherwise partially met from the children's own resources. Thus, in rare circumstances doubtfully here existing, it is foreseeable parental support obligations could be greatly reduced by the wealth of their children, such as if the children are beneficiaries of a large trust, and their parents have great needs themselves not their fault, as for example, related to an ongoing medical condition necessitating expenditure of most of their income. It is a long-rooted tradition in Virginia, however, that the wealth of children does not automatically excuse the duty of parental support. *See Griffith v. Bird*, 63 Va. 73, 80 (1872) ("It is a well settled principle of law, governing the relation of parent and child, that a father, if of ability, is bound to maintain his infant children, even though they may have property of their own."). The Virginia statutory child support scheme, in a continuum of such tradition, merely allows discretionary consideration of the wealth of children in the setting of just support obligations.

[3] The Court has addressed in its previous Letter Opinion how the life insurance term of the PSSA requiring Father to maintain a policy in favor of his children is a matter of contract which may not be set aside absent unconscionability, yet is a statutory factor that may be considered in whether a deviation from the presumptive Guidelines is just and appropriate. *Byrne v. Shay*, No. CL-2010-8541, 2018 Va. Cir. Lexis 131 (August 8, 2018). This issue of the effect of the approximately tenfold increase in the cost of the insurance since 2008 is thus not further addressed herein, but rather is left for final determination on the merits in this cause.

ANALYSIS

I. The child support escalator clause agreed to by the parties in their 2008 PSSA, as incorporated in this Court's decree of 2010, was valid as it was contained in a court order founded on the rational basis that the term was part of a larger financial bargain, not unconscionable in nature, but is only implicitly enforceable until there is a material change in circumstances, at which time the Court can make a new determination of the propriety of such clause under current circumstances.

Father proffered argument that the automatic child support escalator clause in this Court's decree of 2010 is unfair, for it increasingly restricts the resources available for his own support. He asserted that up to two-thirds of his pre-tax income is encumbered by child support and life insurance obligations in favor of his children, as required by the PSSA. Mother, while acknowledging Father is to some extent struggling financially, counters that this is largely a circumstance of his own making.

In addressing the legality of the automatic child support escalator clause, the first determination the Court must thus make is whether the term is unconscionable.

> "Unconscionability is concerned with the intrinsic fairness of the terms of the agreement in relation to all attendant circumstances." *Philyaw v. Platinum Enters.*, 54 Va. Cir. 364, 367 (2001). A contract is said to be unconscionable "if no person in his senses would make it on the one hand and no fair and honest person would accept it on the other." Id. (citing *Hume v. United States*, 132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1889)). In practice, this means a court will not enforce a contract or contract provision if [...] it is both procedurally and substantively unconscionable. *See, e.g., Boatright v. Aegis Def. Servs., LLC,* 938 F. Supp. 2d 602, 608 (E. D. Va. 2013) (applying Delaware law); *Dan Ryan Builders, Inc. v. Nelson et al.*, 230 W. Va. 281, 289, 737 S.E.2d 550 (2012). "Procedural unconscionability arises from inequities, improprieties, or unfairness in the bargaining process and the formation of the contract . . . . Substantive unconscionability involves unfairness in the terms of the contract itself . . . ." *Dan Ryan Builders*, 230 W. Va. at 289.

Sanders v. Certified Car Ctr., Inc., 93 Va. Cir. 404, 405-06 (2016). Here, there is an insufficient factual basis from which the Court can conclude the escalator clause is *per se*

unconscionable. In reviewing the 2010 decree, which the Court in its first Letter Opinion of August 8, 2018, deemed may be subject to judicial notice and be otherwise admitted, it appears the parties were both represented by counsel, were of means, were well-educated and capable of understanding that which they signed, and had significant assets and obligations subject to settlement in their bargain. While the term of the escalator clause agreed to by Father may in isolation seem unfair, in the context of the exchange of contract terms it is inferred to result from the value of promises he received in return. As such, the agreement in general and this particular term specifically, do not meet the requirements of procedural or substantive unconscionability.

Although the child support escalator clause in the PSSA may escape the bar of unconscionability, this does not mean it is otherwise valid or lawful. The outcome of the analysis of the enforceability of child support escalator clauses is dependent on their terms and whether they impermissibly anticipate the happening of a circumstance in application of the increase in amount, or instead have some other rational basis justifying their implementation.

> Any change in the amount of the husband's child support obligation should result from a change in the parties' circumstances and be based upon a consideration of the factors set forth in Code § 20-107.2. As the needs of the child change and the father has the capacity to respond to those needs, the award can be modified in light of the changed circumstances. The statutory scheme provided by the General Assembly does not contemplate automatic changes or escalator clauses.

Keyser v. Keyser, 2 Va. App. 459, 461-462, 345 S.E.2d 12, 14 (1986). Here, the escalator clause appears at first blush to be invalid under *Keyser*, since as each increase comes into fruition, the factors in Virginia Code § 20-107.2 are not considered anew. The Court

of Appeals of Virginia, however, subsequently further qualified the meaning of its *Keyser* holding:

> *Keyser* and the cases that preceded it dealt primarily with anticipated increases in the obligor's income. The courts, relying on these anticipated changes, created support awards which allowed for automatic upward adjustment after a certain period of time. Such action by the trial court was deemed to be improper because "changes are not fairly predictable, and . . . support awards must be determined in light of contemporary circumstances and . . . redetermined in light of new circumstances." *Jacobs v. Jacobs*, 219 Va. 993, 995, 254 S.E.2d 56, 58 (1979).
>
> Here, we are faced with a support award in which the trial court has allowed for a future *decrease* in support payments. This decrease is based not upon an *anticipated* change in circumstance, but upon a change in circumstance which the trial court has itself imposed. Thus, the trial court is not relying upon a speculative change in circumstances, but upon a change by order of the court. In such a circumstance, we will uphold the modification so long as there exists a rational basis for the trial court's award.
>
> As a result of the monetary award granted to the wife and the final disposition of the marital property, the husband will need time to rearrange his finances to be in a position to comply with the court's order. At the same time, however, the wife and children are entitled to support. It is clear that the trial court considered both of these interests by allowing the husband time to arrange his finances while making provision for the wife and children in the interim. The trial court simply bridged the gap between the time of the decree and the time at which the husband could reasonably be expected to comply with the court's order. In such a case, we find no error in the court's reasoning.

Stainback v. Stainback, 11 Va. App. 13, 24-25, 396 S.E.2d 686, 693 (1990) (emphasis in original). While the holding in *Stainback* applied in the context of a decrease in child support, the rationale for the validity of automatic support clauses appears no less applicable when an escalator clause calls for an increase in the amount due.

Stainback thus imposes the requirement that a court's order including a child support escalator clause is only valid if supported by a "rational basis." In the instant case, for the automatic child support escalator clause incorporated in the Court's 2010 decree

to be binding, there must therefore be such basis for imposing the provision. The language in the PSSA detracts from a finding of such foundation, for the agreement states the purpose of the escalator term is "so as to reflect/offset the increase in cost of living." (PSSA at 11). It is not rational on in its face to assume the cost of living would increase every year by exactly the five percent projected in the PSSA. Moreover, the escalation of payments under the clause does not, as the Court in *Keyser* put it, "result from a change in the parties' circumstances," and thus appears to run afoul of Virginia Code § 20-107.2. *Keyser,* 2 Va. App. at 461, 345 S.E.2d at 14. Mother posits in response the Court should cast aside the language in the 2010 order as mere "boilerplate," and instead consider the terms of the PSSA, as a whole, supply a rational basis for the escalator clause. Mother, points out the term was part of a larger financial bargain in which Father literally got the plane and Mother the car, thereby supplying the rational basis for its validity. The Court finds the language in the agreement in this instance, to be of mere aspirational purpose which does not control its validity if the Court can otherwise discern a rational basis therefor.

In the narrow context of the accord of the parties, not unconscionable in terms or process, which supplied reasonable support of the children's needs, this Court holds the automatic escalator clause was valid at the time it was incorporated in the 2010 decree, the fair bargain of the contract supplying the rational basis for the Court's order. The Court observes, however, that such agreements are largely, as a practical matter, illusory in terms of long-term enforceability. The "primary consideration" in modification of child support is a material change in "the financial circumstances of both parties," and thus a viable claim for modification can ensue when factors conspire to make payor parents

increasingly unable to meet their escalating financial obligations. *Yohay v. Ryan*, 4 Va. App. 559, 567, 359 S.E.2d 320, 325 (1987). The escalator clause must then be considered anew within the framework of the Child Support Guidelines as just another factor in contemplation of potential deviation from the presumptively set amount. This is because the statutory scheme does not defer determination of modification of parental support to agreements preexisting changed circumstances, but instead limits the Court to consider whether such pacts make the amount set by the Guidelines "unjust" or "inappropriate." Va. Code Ann. § 20-108.1(B)(14). Thus, the terms of any such escalator clause survive unscathed only until the next material change in circumstances, whereupon either parent may procedurally seek a modification of those terms. In the instant case, the clause is therefore no longer of automatic binding application upon this Court in determining the child support obligations now appropriate, which must be determined under current circumstances with the escalator clause at most of influence as a potential ground for a deviation from the Guidelines.

II. Social Security benefits received by the children derivative of Father's retirement constitute their "independent financial resources," and may thus be considered by the Court as a factor in determining whether to deviate from the presumptive child support amount set by the Guidelines.

Father asserts his support obligations should be credited with the Social Security benefits his children receive consequent to his retirement. He states those are benefits *he* earned through his labor for his children, and therefore it is only fair for him to be credited with such payments, particularly when he avers he is in increasing financial distress. He initially cited *Whitaker v. Colbert*, 18 Va. App. 202, 442 S.E.2d 429 (1994) in support of his claim. *Whitaker,* however, is not of direct application in this cause, for the

case discussed credit for *disability* benefits provided to children, their credit statutorily mandated pursuant to Virginia Code § 20-108.2(C). As Mother points out, the *Whitaker* Court explained the rationale for crediting a payor parent with the amount of such benefits as they "substitute income for lost ability to provide for the children through the fruits of future employment." *Id.* at 205, 442 S.E.2d at 431. Mother further maintains that credit for Social Security retirement benefits cannot be available to Father, as they "are not based upon the father's future employment and they do not substitute for the father's loss of earnings or support." *See Bennett v. Va. Dep't of Soc. Servs., Div. of Child Support Enf't ex rel. Bennett*,, 22 Va. App. 684, 695, 472 S.E.2d 668, 673 (1996). She further avers "SSI benefits received by a disabled child are intended to supplement other income, not substitute for it . . . [and] the noncustodial parent's child support obligation is not impacted by the receipt of SSI on the behalf of a disabled child." *Id.* at 694-95, 472 S.E.2d at 673. Further citing *Rinaldi v. Dumsick*, 32 Va. App. 330, 335, 528 S.E.2d 134, 137 (2000), Mother continues the children's Social Security retirement benefits are akin to Supplemental Security Income, which she asserts is statutorily excluded from being considered in the setting of parental support obligations under Virginia Code § 20-108.2(C).

In response to Mother's arguments, Father cites as persuasive authority the case of *C.D.G. v. N.J.S.*, 469 S.W.3d 413 (Ky. 2015), wherein the Kentucky Supreme Court analyzed the very question of parental child support credit for Social Security retirement benefits of their children in the context of a statutory scheme similar to that in Virginia. Mother in turn points to the following Virginia statutory provision:

> If a parent's gross income includes *disability* insurance benefits, it shall also include any amounts paid to or for the child who is the subject of the order and derived by the child from the parent's entitlement to disability insurance benefits. To the extent that such derivative benefits are included in a parent's gross income, that parent shall be entitled to a credit against his or her ongoing basic child support obligation for any such amounts, and, if the amount of the credit exceeds the parent's basic child support obligations, the credit may be used to reduce arrearages.

Va. Code Ann. § 20-108.2(C) (emphasis added). Mother invokes the maxim *expressio unius est exclusio alterius*, that "mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute." *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992) (citing *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496, 499 (1938)). She argues Virginia's statutory scheme's failure to mention credit for retirement benefits means the General Assembly intended their exclusion from any credit towards child support obligations. The Kentucky Supreme Court considered similar argument:

> [T]he mother's claim is better understood as one based on the canon of statutory interpretation known as *expressio unius* (short for *expressio unius est exclusio alterius* or "the expression of one thing is the exclusion of another"). Though not named as such, this is the rule applied by the Supreme Judicial Court of Maine in *Wong v. Hawk*, 2012 ME 125, 55 A.3d 425 (Me. 2012), on which the Court of Appeals relied heavily in this case. *Expressio unius* is the "familiar and general rule ... that the mention of one thing implies the exclusion of another." *Fox v. Grayson*, 317 S.W.3d 1, 8 (Ky. 2010) (quoting *Jefferson County v. Gray*, 198 Ky. 600, 249 S.W. 771, 772 (1923)). If this rule controls this case, then the legislature's choice to mention disability benefits, but not retirement benefits, would imply an intention to exclude retirement benefits and set a limit on a trial court's discretion in this area.

But as the Kentucky Supreme Court pointedly noted:

> [T]his "doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of all that shares in the grant or prohibition involved." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). *The*

> *credit provision* in KRS 403.211(15) *is not an expression of all that a trial court may or must do in deciding the amount of child support owed or the source of payments.*

C.D.G., 469 S.W.3d at 418-19 (emphasis added). The doctrine might invite exclusion of mandatory or automatic child support credit to Father for his children's derivative retirement benefits, but in application cannot be reasonably thought to prevent consideration of such benefits in the context of the wider statutory scheme. Courts have repeatedly cautioned "the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Healey v. Perfectly Female Women's Health Care, P.C.,* No. CL-2017-17132, 2018 Va. Cir. LEXIS 121, at *5 (July 12, 2018) (quoting *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337 (1983)). Further, when the effect of a statute may be narrowly read, the trial court should not succumb to the temptation of reading it expansively beyond what the Virginia General Assembly intended. *E.g., Alipio v. Fairridge OBGYN Assocs., P.C.*, 93 Va. Cir. 244, 248 (2016). Here, it would be a strained and unduly expansive interpretation for this Court to conclude the statutory child support scheme automatically excludes any consideration of the children's derivative retirement benefits in determining the support obligations of their parents.

As in Kentucky, the Virginia General Assembly's

> decision to codify the disability credit reflects a policy decision that the credit is mandatory, because the statute uses the word "shall," and therefore is no longer subject to a trial court's discretion. This [is] a narrow limit on a trial court's power when addressing retirement benefits (removing the option of not granting a credit), not a bar on giving a credit in other situations.

See C.D.G., 469 S.W.3d at 419-20.

> It is understandable that the General Assembly did not specifically address retirement dependent benefits. The reality, at least in the past, is that a person entitled to receive Social Security retirement benefits is far less likely to have dependent children than a person receiving disability benefits. Obviously, it is not impossible, as illustrated by this case. And it is becoming far more common for children to be born to older parents, who may divorce or may never be married at all and thus face support issues.

Id. at 420. The failure of the Virginia General Assembly specifically to enumerate retirement benefits of the children for credit towards child support obligations in the statute is, just as analyzed by the Kentucky Supreme Court, not itself a bar to consideration of such benefits in the setting of parental support obligations.

The next question though is whether retirement benefits may be treated in the same manner as disability benefits. The Kentucky Supreme Court discerned

> no significant distinction between disability and retirement benefits . . . . [D]isability benefits are a substitute for lost income, but the important thing is that they are a type of income, albeit indirect income paid to the child. Retirement benefits are also a type of income. And they are not gratuitous; they are instead a type of delayed income based on a history of paying into the Social Security system over a life's work. (In a sense, they are for "lost" income, in that the money that was paid (as required by law) into the Social Security system was not available for use by the person at the time or as an investment.)

Id. The opinion of the Kentucky Court minimized the significance of the difference of the two types of payments in its analysis. That Court stated:

> [T]he principle is the same for both retirement and disability benefits. Both are sufficiently analogous to other third-party payments to the child, such as 'an insurance policy or a private trust' to allow them to be treated as coming indirectly from the parent. *Id.* 'There is no difference in the amount of payment for child support. The only change is the source of those payments.' *Board*, 690 S.W.2d at 382.

Id. As already noted, under Virginia law, Social Security disability payments are deemed replacement income of the payor parent. *Whitaker*, 18 Va. App. at 205, 442 S.E.2d 431.

Derivative retirement benefits are not replacement income of Father, but an ancillary additional benefit to the children, and are their funds. As a matter of policy, the Virginia General Assembly has distinguished the two types of benefits, automatically crediting a payor parent for disability but not for derivative retirement benefits.

In application of its ruling, the Kentucky Supreme Court noted the distinction that credit for retirement benefits could at most be considered as a matter of discretion rather than statutory mandate. Like in Kentucky, Virginia's statutory scheme permits the Court to consider whether the presumptive child support amount called for by the statutory Guidelines is "unjust" or "inappropriate" based upon a number of factors, including consideration of the "independent financial resources" of the children. Va. Code Ann. § 20-108.1; *Cf.* Ky. Rev. Stat. § 403.211(3)(d).

A consideration not before the Kentucky Supreme Court as it pertains to Social Security benefits, was the Federal restriction that "[t]he right of any person to any future payment under this [applicable] chapter shall not be transferable or assignable, at law or in equity." 42 U.S.C.A. § 407(a). A "credit" to Father of any such payments received by his children, Mother asserts, is tantamount to an unlawful assignment of the children's benefits to Father. However, the plain language of the U.S. Code merely prohibits the direct transfer or usurpation of the children's benefits by Father, but does not touch on consideration by this Court of how such benefits influence his obligation to meet their needs under Virginia state law.

The Court finds the focus of the parties on whether Father is to be afforded *credit* for his children's derivative Social Security retirement benefits is misplaced. Mother is correct that automatic credit is not conferred by statute. Father is thus mistaken in

asserting he is entitled to such credit as a matter of law. Mother is, however, in error in maintaining the Court may not at least consider the children's derivative retirement benefits in determining the proper level of support due from Father. The statutory scheme makes clear this Court may weigh the children's Social Security retirement benefits in determining whether to deviate from the presumptive Guideline amounts. Mother misapprehends the difference between a bar to automatic credit for benefits and the permitted consideration of such benefits as a basis for deviation from the Guidelines. The *Rinaldi* case Mother cites for her contention that credit to Father of such benefits is foreclosed by analogy to Supplemental Security Income, actually instead delineates the distinction to be drawn by the Court that such benefits may be considered in the setting of support as may be proper depending upon the factual circumstances of the case.

> In determining whether application of the guidelines would be unjust or inappropriate, . . . *the trial court properly could consider as an independent financial resource of the child both his SSI* and his wages from part-time employment. *See* Code § 20-108.1(B)(9); *Barker v. Hill*, 949 S.W.2d 896, 897-98 (Ky. Ct. App. 1997) (*rejecting an automatic credit* or offset to the noncustodial parent's support obligation, *but stating that it would be appropriate to view the disabled child's SSI benefits as independent financial resources of the child*).

32 Va. App. at 336, 528 S.E.2d at 138 (emphasis added).

It may prove inappropriate on the merits, as Mother asserts, to reduce Father's support obligation based on the retirement benefits of his children, particularly since those payments do not involve funds he has available for his sustenance. Nevertheless, Virginia Code § 20-108.1(B)(9) specifically allows this Court to contemplate whether the "independent financial resources" of the children make it just to deviate from the Child Support Guidelines. The derivative Social Security retirement benefits of the children are

their independent financial resources, and as such, may by statute be considered in determining whether a deviation from the presumptive Guidelines amount is appropriate.

CONCLUSION

The Court has considered Father's Motion to Modify Child Support respecting the two children he has in common with Mother. At this interim juncture in the proceedings, the Court is called upon to decide the novel questions of whether a child support escalator clause in place since 2008 remains prospectively enforceable, and whether Social Security benefits the children receive derivative of their Father's *retirement* may be credited towards his child support obligations. This Court holds applicability of the escalator clause must be evaluated anew in light of current circumstances, and that the retirement benefits of the children may be *considered* in determining the proper level of parental support due.

This Court finds the child support escalator clause was valid as incorporated from the parties' 2008 PSSA in their final decree of divorce of 2010. That accord was executed with benefit of counsel and not under then-procedurally or substantively unconscionable terms. The clause met the legal prerequisite that it be the product of a court order with a rational basis, for it was part of a larger bargain settling the financial affairs of the parties, wherein by way of example, but not limitation, Father literally got the plane and Mother the car. Irrespective, the Court also finds implicit in such agreement, as colored by the parties' statutory right to seek future modifications of child support, the escalator clause is binding only until there is a material change in circumstances and a review pursued resultant thereto. The escalator clause must then be considered anew within the

framework of the Child Support Guidelines under Virginia Code § 20-108.1(B)(14), as just another factor in contemplation of potential deviation from the presumptively set amount. The statutory scheme does not defer determination of modification of parental support to agreements preexisting changed circumstances, but instead limits the Court to consider whether such pacts make the amount set by the Guidelines "unjust" or "inappropriate."

The Court further finds the income the children receive from Social Security derivative of Father's retirement, while not subject to explicit credit under the statutory scheme, is, however, not as a general proposition excluded from consideration in setting the amount of the support obligation of Father. The General Assembly mandates application of credit towards child support of Social Security *disability* payments, because they are replacement income to the parents, but the statute is silent as to affording the same treatment to derivative retirement benefits. This does not, however, thereby exclude consideration of such income of the children in determining the support obligations of Father. To the contrary, Virginia Code § 20-108.1(B)(9) specifically allows this Court to review whether the "independent financial resources" of the children make it just to deviate from the presumptive amount set by the Child Support Guidelines. The Court holds Social Security retirement benefits of the children are their independent financial resources. Consequently, such resources may, by statute, be considered as a factor in determining whether a deviation from the presumptive amount prescribed by the Guidelines is appropriate.

AND THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER