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Garnishment of Social Security Benefits

Proactive measures must be taken to prevent loss of benefits to the creditor

By William P. Isele

"My mother has had a stroke and is in a nursing home. I was totally unaware of the credit card debt she had run up before her stroke. The only income she has is from Social Security. Now, the credit card companies have obtained judgments against her, and garnished her bank account. The only money going in the account is her Social Security. Can they do that?"

The caller's question raised several questions in my own mind: Is the caller's mother eligible for Medicaid? If not, how is the nursing home being paid? If so, has application been made? Is she in the nursing home only for short-term rehabilitation, or is she likely to remain there long-term? Each of these questions affects how I will advise the caller to proceed, going forward.

But back to the original question: "Can they legally do that?" From the earliest days of Social Security (officially known as the Old Age, Survivors, Disability and Health Insurance or "OASDHI") Act, Congress evidenced intent that Social Security benefits could not be garnished. Section 207(a) of the Act [42 U.S.C. Section 407(a)] states plainly:

> The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The provision seems iron-clad, and it remained unchanged for four decades. As part of the Child Support Enforcement Act of 1975, Congress enacted a limited waiver of the Section 207 protection to allow garnishment of certain payments or benefits under the Social Security Act to enforce child support and alimony obligations. See 42 U.S.C. Section 659(a); See also 20 C.F.R. Section 404.1820.

It is also notable that, over the years, Congress has carved out at least four exceptions that allow the Federal government itself to levy on Social Security benefits: (1) The Internal Revenue Service can levy against benefits to collect unpaid federal taxes (I.R.C. Section 6334(c)); (2) The Internal Revenue Service can collect taxes due by levying up to 15 percent of your monthly benefit until the debt is paid (Taxpayer Relief Act of 1997, Public Law 105-34); (3) The Internal Revenue Service allows beneficiaries to have a percentage of their check withheld to satisfy a current year federal income tax liability (I.R.C. Section 3402 (p)); and (4) Other Federal agencies can collect money from your benefits to pay a nontax debt you owe to that Agency — Debt Collection Act of 1996 (Public Law 104-134).

Except for these specific exceptions, it remains clear that no one, including credit card creditors, can legally garnish

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Social Security benefits. As a practical matter, however, a problem occurs once those benefits are received by the beneficiary and deposited into the beneficiary's checking or savings account. The Social Security Administration's "customer service" Web site contains the following less-than-reassuring statement: "Section 207 bars garnishment of your benefits. It can also be used as a defense if your benefits are incorrectly garnished. Our responsibility for protecting benefits against garnishment, assignments and other legal processes usually ends when the beneficiary is paid. However, once paid, benefits continue to be protected under section 207 of Act as long as they are identifiable as Social Security benefits."

Note that the SSA considers its responsibility to have ended once benefits are paid. Feel free to use Section 207 "as a defense," but as a practical matter, beneficiaries, much less their next-of-kin, can anticipate little help from the SSA in opposing a garnishment of a bank account. Nevertheless, money in a bank account, where the only payments into the account are from direct deposit of Social Security benefits, are deemed by the Social Security Administration to be protected.

In New Jersey, the courts have provided some assistance. Appendix VI to the Rules Governing the Courts of the State of New Jersey, which is a form of notice that must be given pursuant to Rule 4:59-1(g), specifically informs a judgment debtor that Social Security benefits, inter alia, are exempt "even if the funds have been deposited in a bank account." The notice gives the judgment debtor 10 days to claim the exemption, by notifying the clerk of the court, in writing. This notice is of little practical value in the case presented: that of a stroke victim who is confined to a nursing home, unless the garnishee (the bank), recognizes that the deposits are Social Security benefits, and files its own objection to the process.

A better approach is to avoid having Social Security benefits deposited into an account in the beneficiary's name, if there is any inkling that creditors may be circling. Social Security payments may be directed to a representative payee, i.e., a trusted family member, friend, or the facility where the beneficiary resides. Practitioners should be aware, however, that general durable powers of attorney will not suffice. The Social Security Administration will only recognize a representative payee in accordance with its own procedures. 42 U.S.C. Section 405(j); 20 C.F.R. Section 404.2001-404.2065. Those most favored are a guardian, spouse, parent, relative or friend. As of 2000, organizations may serve as representative payees. If the beneficiary is expected to be a long-term resident of a facility, it makes sense for the facility to be named representative payee of his or her Social Security benefits.

Furthermore, if the beneficiary is Medicaid eligible, his or her income, including Social Security, must be paid to the facility, to offset the costs of care. See N.J.A.C. 8:85-1.16. Upon determination of Medicaid eligibility, the County Board of Social Services issues a form PA-3L, which details the amount of a beneficiary's income which must be paid to the facility. If a creditor seizes that income, albeit wrongfully, the resident's continued stay at the facility may be jeopardized. It is far better to designate the facility as representative payee, to be assured that the income is properly accounted for.

In conclusion, the answer to the caller is "No, they can't [legally] do that." That being said, proactive measures must be taken to prevent loss of those benefits to the creditor, and potentially more severe consequences. ■