



Post-Benefit Issues & How to Solve

Adriane S. Grace

Attorney at Law

Law Office of Adriane S. Grace, PLLC

Phone: (972) 379-8167

info@gracelawoffice.com

About Adriane S. Grace



- Attorney
 - 14+ years devoted to Social Security law
 - Former Attorney-Advisor to SSA Chief Administrative Appeals Judge
- Practice Areas
 - Estate Planning (Wills & Trusts & POAs, Special Needs Planning)
 - Probate & Estate Administration
 - Social Security Applications & Appeals
 - Guardianship and Counseling on Alternatives, Supports & Services, and Public Benefits

What are we learning today?

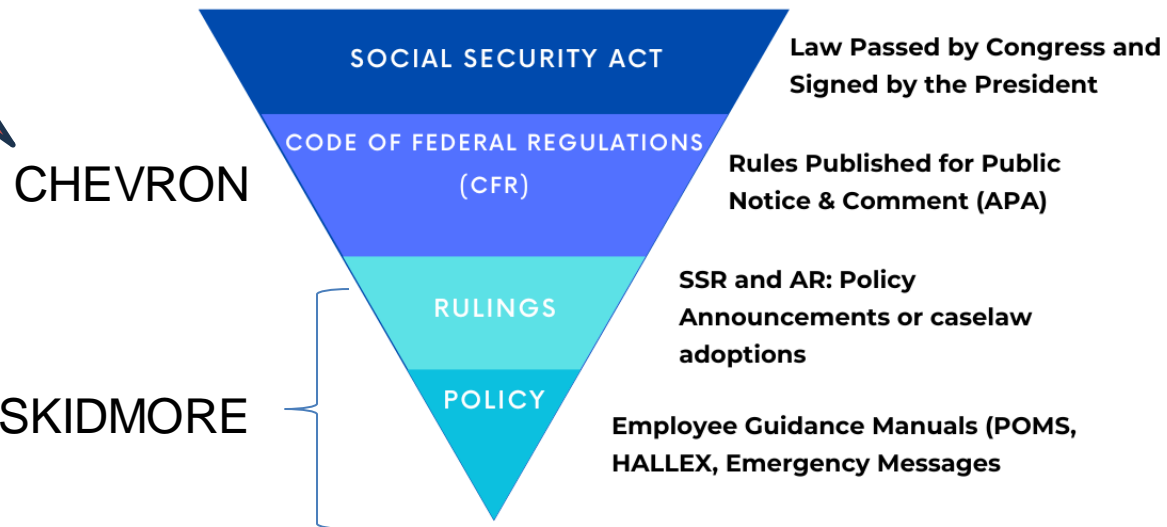
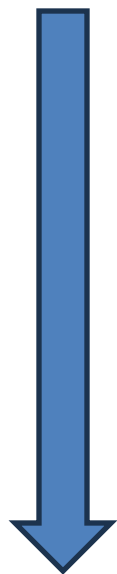
- Administrative Law within the Social Security Administration
- Income & Resource Rules for SSI & Medicaid Eligibility
- Tools for fixing excess income & resource issues and restoring SSI eligibility



Administrative Law: SSA

Loper Bright Enterprises v. Raimondo

SOCIAL SECURITY PROGRAM RULES



Social Security Program: Title 16

- Title XVI of the Social Security Act (T16)
 - Supplemental Security Income (SSI)
 - Disabled children under the age of 18
 - Parent/Step-Parent Income & Resource Deeming Rules Apply
 - Disabled adults with limited or no work history
 - » Child support counts 100%
 - Adult citizens age 65 or older (do not have to prove disability)
 - Limited Income & Resources



Key Differences: SSI v. SSDI/DAC

SSI	SSDI/DAC
Max Benefit is \$943/mo.	Max Benefit >\$3K
Resource Limit is \$2,000	Unlimited Resources
Unearned Income Limits	No Unearned Income Limit
Benefits begin month following application	Retroactive benefits of up to 12 months; 5-month wait from disability onset
Reductions (ISM, Excess Income)	Reductions for Workers' Comp
Medicaid	Medicare

Medicaid and Medicare

- SSI Recipients
 - Medicaid eligible
 - At age 65, can also get Medicare if insured
- SSDI/DAC Recipients
 - Medicare eligible; automatic enrollment in Part A once the disabled individual has been eligible for benefits for 24 months
 - If award notice is past 24 months from onset date and after the new year, option to purchase coverage to the beginning of the year
 - Part A premium is automatically deducted from monthly SSDI benefits
 - Medicare recipients will need to apply for supplemental insurance policies to get additional coverage such as Part D, prescription benefits
 - Must purchase within 6 months of obtaining Medicare
 - Medicare Savings Program in Texas
 - SSDI recipients with limited resources can obtain assistance with paying monthly Medicare premiums (Medicaid waiver program)

Medicaid Waiver Programs (TX)

- Medicaid “Buy-In” for Disabled Workers
 - Earnings must be less than \$2,453/month
 - Worker pays a monthly premium for Medicaid coverage
- Long term care in nursing home
- STAR+PLUS Waiver, limited enrollment, managed care program that covers assisted living, adult foster care, and many in-home supports to help beneficiaries avoid nursing home placement
- Community First Choice (CFC) Program, provides in-home support, such as meal preparation, medical alert services, and chore services
- Day Activity and Health Services (DAHS), adult day care program that helps families care for their loved ones outside of nursing homes by paying for daytime supervision and health services during normal working hours
- Home and Community-based Services (HCS) home support & services to IDD in community settings or group homes

How to Apply: <https://yourtexasbenefits.com>

Who is Eligible for SSI?

- U.S. citizens and permanent residents
- Disabled children and adults with **limited income & resources**
- Income Limitations
 - “Countable Income” both **earned** and **unearned**
 - Earned income only: no more than \$1,913/month for individuals (\$2,827 for couples)
 - Unearned income or mix: no more than the federal benefit rate of \$943 per month for individual (\$1,415 for couples) for 2024
 - Earned income + Unearned income = Unearned income limit
 - Deemed Income that is Countable Income
 - Parent to Child
 - Spouse to Spouse
 - Support Payments
 - < 18: Child support counts (1/3 excluded)
 - >18: Child support counts 100%

Who is Eligible for SSI? (Resource)

- Resource Limits
 - limit of \$2,000 for single individual, \$3,000 if married
- Countable Resources
 - Resources of the individual and their spouse (if married) greater than \$2,000/\$3,000 limits
 - Countable Income that exceeds limits and isn't spent down and carried over into the next month (savings)
- Non-Countable Resources
 - Resources that are not counted against the claimant or are EXCLUDED under Federal Law



Resources that Are NOT Countable

- Home (whether fixed or mobile) and adjacent land
- One vehicle
- Burial plots for the person and their immediate family and burial funds set aside of up to \$1500
- Personal property
- Life insurance policies with face value of \$1500 or less
- Grants, scholarships, fellowships and tuition & fee gifts (9 mos.)
- Assets of any kind that the individual DOES NOT HAVE
 - An ownership interest in; OR
 - The legal right or authority or power to liquidate; OR
 - The legal right to use the asset for their support and maintenance.

What is Earned Income?

- Wages from Jobs (W2 employment)
- Net earnings from self-employment (1099 or other self-employment)
- Royalties
- Honoraria
- Sheltered Workshop Payments
- Reductions for Earned Income
 - \$1 for every \$2 earned over the first \$65 (this is in addition to the \$20 general exclusion for both earned and unearned income)
 - SSI and Earnings Eligibility calculator:
<https://www.ssa.gov/ssi/eligibility#:~:text=SSI%20is%20generally%20for%20individuals,benefits%2C%20unemployment%2C%20and%20pensions.>



SSI Reduction Examples

EXAMPLE B – SSI Federal Benefit with only EARNED INCOME

Total monthly income = \$317 (Gross wages)

1) \$317 (Gross wages)

-20 (Not counted)

\$297

-65 (Not counted)

= \$232 divided by 1/2 = \$116 (Countable income)

2) \$943 (2024 SSI Federal benefit rate)

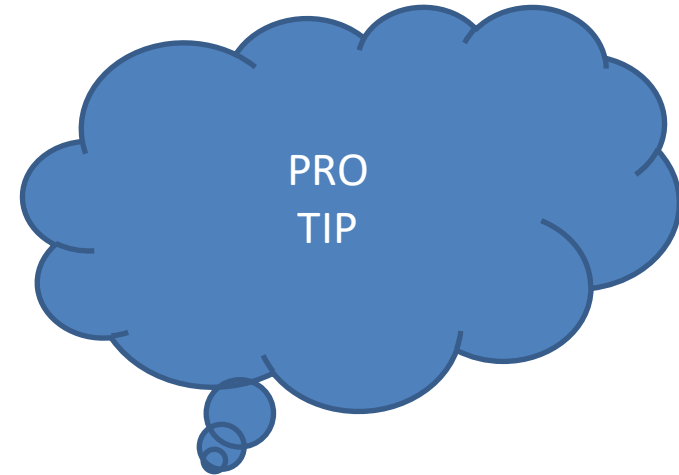
-116 (Countable income)

= **\$827** (SSI Federal benefit)

Earned Income: Work Incentives

SSI

- Earned Income Exclusion
 - Ignore the first \$20 of any month's income
 - Ignore \$65 of *earned* income
 - \$1 reduction in SSI for every \$2 of income after that.
- PASS (Plan to Achieve Self Support)
- IRWE
- Student Earned Income Exclusion



Utilize Work Incentive Planning Assistance (WIPA) such as Imagine Enterprises who can advise beneficiaries on eligibility for these programs

What is Unearned Income?

- Worker's compensation
- Other SS benefits
- Unemployment
- Pensions
- Annuities
- Rent
- Support payments (Child support, alimony)
- Other: Gifts, Inheritances, In-Kind Support & Maintenance (ISM)
- Reductions for Unearned Income
 - General exclusion for the first \$20
 - \$1 for \$1 of unearned income

SSI Reduction Examples

EXAMPLE A – SSI Federal Benefit with only UNEARNED INCOME

Total monthly unearned income = \$300

$$\begin{array}{r} 1) \quad \$300 \text{ (Unearned income)} \\ \quad \underline{-20} \text{ (Not counted)} \\ \quad =\$280 \text{ (Countable income)} \end{array}$$

$$\begin{array}{r} 2) \quad \$943 \text{ (SSI Federal benefit rate)} \\ \quad \underline{-280} \text{ (Countable income)} \\ \quad =\$663 \text{ (SSI Federal benefit)} \end{array}$$

Other Income: The ISM Rule

- ISM is “In Kind Support & Maintenance”
- Applies When: Person Receiving Help with food and/or shelter
 - Automatic 1/3 reduction to SSI monthly benefits when
 - Living in another’s home AND
 - Receiving **FOOD AND HOUSING** assistance
 - Presumed Value Rule
 - Applies to all other living situations
 - 1/3 of Federal Benefit Rate of \$943 (plus \$20)
- Solution: “Business Arrangement”
 - Must be in writing
 - Must be for pro-rata share of household expenses
 - Bona fide rental agreement: If rent is not paid, then landlord will evict tenant.



Other Income: Support Payments

- Child Support
 - Under 18: 2/3 countable income to the disabled child
 - Over 18: 100% countable income to disabled adult child (child support payments paid after disabled child is 18)
 - Solution: support payments court-ordered to a SNT are NOT countable income
- Alimony
 - Alimony payments are considered unearned income and are 100% countable
 - Solution: support payments court-ordered to a SNT are NOT countable income

Income that is NOT Countable

- General Exclusion of \$20 and earned income exclusion of \$65
- SNAP benefits
- Assistance based on need funded by a state or local government or Indian tribe
- Income tax refunds
- Refundable advanced and other tax credits
- Grants, scholarships, fellowships, or gift used for tuition and books (must use within 9 months of receipt)
- Personal Loans received (“I owe you”)
- Expense Payments made by someone else on your behalf that are for things that are NOT food and housing related (e.g. medical bills or cable bills BUT NOT mortgage, rent, utilities, or groceries; BUT ALSO some SS field office may take a different view on this. *See Tools on ABLE accounts—using these accounts to avoid SSA unearned income claims.*)
- Disaster assistance

Example: Child Support Reduction

Box 1.
Current computation for child support payments (in dollars)

This example assumes that the child has no other income.

Monthly federal benefit rate for 2004	564.00
Average child support payment for June 2003	199.00
Minus 1/3 of the child support payment	- 66.33
Minus the \$20 general income exclusion	- 20.00
Total countable income	<u>= 112.67</u>
SSI benefit (564.00 - 112.67)	451.33
Total income available to child (199.00 + 451.33)	<u>650.33</u>

NOTE: This calculation is for the federal Supplemental Security Income payment only. Some states provide supplemental payments to children, enabling them to receive higher benefits.

From SSA website

Other Income Rules: “Deeming”

- Children
 - Applies to Children under the age of 18
 - Income from Parents and Step-Parents **residing in the household with the child** is “Deemed” to the Child
 - Resources are also deemed (except for resources that are generally excluded)
 - Deeming stops the month after the child turns 18
- Spouses
 - Ineligible spouse (non-disabled spouse of the claimant) **who lives in the same household**
 - Spouse’s earned and unearned income is deemed to the disabled spouse because SSA expects spouse’s to take care of each other
 - Allocation for ineligible dependent children living in the household

What is an overpayment



- Someone received more benefits than SSA now thinks he/she/they are eligible for
- **Common causes:**
 - **Work** (SSI and SSDI handle it differently)
 - Excess resources/unearned income/ISM in SSI cases
 - Being out of the US for more than 30 consecutive days
 - Extended hospitalization
 - Period of incarceration/ fleeing felon
 - Medical Improvement
 - Change in marital status (deeming income from wife to husband or parent to child)

Overpayment Options

- **Pay it**

- SSI recoupment: 10% of maximum benefit (\$94)
- \$10/month repayment allowed if requested by full LIS recipient:
<http://policy.ssa.gov/poms.nsf/lnx/0202210030>

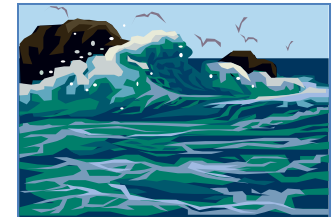


- **Appeal**

- **Request reconsideration** of the amount or existence of the overpayment
- Follow deadlines to keep benefits pending and preserve appeal rights.

- **Request Waiver of the Overpayment**

- The overpayment does exist, but
 - It's not the beneficiary's fault, and
 - The beneficiary cannot afford to repay the overpayment the way SSA wants,
 - Administrative waiver for OPs \$1000 or less, unless "indication of fault"



Tools for SSI Eligibility: Dealing With Excess Resources

1. Transfer
2. Spend down for FMV, especially on “excluded resources”
3. Accounts for SSI Back Payments
4. Special Needs Trust (Medicaid Trust Exception)
5. ABLE Account
6. Reformation of Wills and Trusts



Transfer of Resource Rules

- **RULE:** An invalidly transferred resource remains a resource to the “former” owner and, as such, is subject to being counted
- Resource that is **VALIDLY** transferred is not countable in the month following the **VALID** transfer
- Valid Transfers
 - Sale of property for FMV
 - Spend Down
 - CASH Gifts BUT not transfers of property for less than FMV
 - Adding another person to the deed of property
- **PENALTY** for invalid transfer: SSI ineligibility for up to **36 months**

Eligible Spend Down

- **RULE:** Spending-down cash can be a valid transfer of resources. Generally, when an individual purchases items or pays for services on the open market, he or she receives fair market value in return for the cash. The period of ineligibility does not apply to an individual who spends down cash resources and gets fair market value in return.
- Examples:
 - **Housing Expenses:** Mortgage/Rent, Remodeling of the home, Utilities
 - **Debt Pay off:** Credit cards, Medical Bills
 - Prepaid Funeral/Burial contract (\$1500 limit)
- Ineligible spend down: gifts & transfers of cash where less than FMV received

SSI Back Payments: Rules

- **RULE 1:** SSI Back payments must be spent down within 9 months
 - Often, SSA will “chunk” the back pay so that the claimant receives the back pay in 3 separate payments spread out over a period of time to allow the claimant to spend down over a longer period of time
 - Tip: Use a separate account for the back payment to “track” the spend down
- **RULE 2:** “Dedicated Account” for Children under 18
 - Must be separate from the account used for the regular monthly benefit payment and can only be a checking, savings, or money market account (NO CDs, mutual funds, stocks, bonds, or trust accounts)
 - NO co-mingling with other funds
 - Title must be in child or show that it’s for child’s benefit only

Benefits of a Special Needs Trust

- Conserve income and gifts from all sources while maintaining Medicaid and SSI eligibility
- Maximize Medicaid, SSI, and other public benefits while providing “supplemental” financial assistance
- Protect disabled adults from financial exploitation
- Provide for other family members after the disabled person’s death



SNT: Master Pooled Trust



- Approved by Social Security as a “Supplemental Needs Trust”
- Pooled investing by a professional fiduciary
- Lower management fees than private banks
- Subaccounts can be opened and funded with either the disabled person’s money or money gifted by a parent, guardian, or other relative
- Professional trustee who handles all distributions and insures distributions do not harm the disabled person’s eligibility for Medicaid and SSI benefits
- Does not require an estate plan or an attorney!

What is an ABLE Account?



- Texas Achieving a Better Life Experience Act
- Tax-advantaged savings accounts for disabled people
- Eligibility Rules:
 - Must be disabled under SSA disability rules
 - Disability started prior to age **26** (**NEW RULE as of Dec. 2022 increases age to 46 in the year 2026**)
 - Maximum yearly contributions from all sources tied to gift tax limits (\$18,000 for 2024)
 - Account balance allowed for SSI recipient: < \$100,000.00
 - Additional contributions permitted for working beneficiaries who aren't participating in certain retirement plan contributions (up to fed. poverty line)
- Medicaid Payback Provision

SNT vs. ABLE

Pros of SNT

- Entire balance of trust exempt from resources rules
- No Medicaid payback provision if created and funded by parents and/or grandparents
- Can be created for anyone under 65 years of age

Cons

- Distributions for “shelter” and/or food expenses will result in ISM (1/3) reduction to SSI benefit
- Medicaid payback provision on trust balance if funded by disabled person’s own money
- Costs of administration
- Requires a trustee to make distributions

Benefits of ABLE

- Distributions for housing and food permitted
- Unlimited distributions for “qualified disability expenses” (education, housing, food, transportation, employment training, personal support, healthcare, legal fees, funeral & burial)
- No trustee or rep payee required
- Funds can be loaded on pre-paid debit card
- Low Account Fees

Cons

- Must be disabled prior to age 26 (increases to 46 in 2026)
- Medicaid payback on account balances after disabled person dies
- Balance must stay under \$100,000.00 for SSI eligibility
- Annual contribution limited to \$17,000.00 in 2023

Reformation of Wills & Trusts

Wills	Trusts
Section 255.451(a)(2) of the Texas Estates Code	Section 112.054 of the Texas Trust Code
Retroactive to Testator's death	Retroactive to date of Trust Agreement
Does not require Medicaid Payback	Does not require Medicaid Payback
Executor or Administrator Petitions	Trustee OR Beneficiary Petitions
	Statutory Attorneys' Fees

Duties of a Representative Payee

- Expend benefits for the best interest of the beneficiary and within program rules
- Open a separate account to receive and manage the benefits and not comingle funds (spouse exempt)
- Report change in circumstances affecting benefits (e.g. SSI recipient's change in income and/or resources or marriage)
- Report change in circumstances affecting ability to serve
- Prepare and submit annual report of spending to SSA or as requested
- Save and invest any unused benefits (accruing more than \$2,000 in the account will cause eligibility issues for Title XVI recipients and trigger an overpayment claim, but can save in ABLE)

Liability of a Representative Payee

- Misuse of Benefits occurs when rep payee uses SS benefits for purposes other than for the benefit of the beneficiary or their legal dependent (after beneficiary's needs are met)
- The representative payee is personally liable for paying back any misused funds to the beneficiary or SSA will seek restitution from payee through overpayment proceeding
- Rep Payee responsible when SSI claimant can't understand reporting requirements
- SSA could refer the matter of misuse for criminal prosecution
 - Fine of up to \$250,000 and/or prison sentence of up to 10 years [DOJ has an overall 93% conviction rate for cases prosecuted!]
 - Practice tip: be ready to refer clients for a criminal defense consult if you learn of misuse of SS benefits
- If not referred for criminal, SSA could impose a civil penalty of \$5,000 for each payment or partial payment that was misused plus an assessment of up to 2x the amount of the misused benefit

Representing the Fiduciary

- Assume a disabled person on SSI is also the beneficiary of a special needs trust. What if they failed to report to Social Security the fact they had been working for 2 years and had earned income and SSA issues an overpayment and cessation? Can the attorney represent both the disabled person and their trustee?
 - **Texas Rules of Disciplinary Procedure § 1.06, Attorneys must avoid a conflict of interest because they owe a duty of loyalty to their individual client.**
 - **Special Needs Trusts include a spendthrift provision.**
- What if, further, the same SSI claimant is legally incapacitated and their guardian is also the Representative Payee and Trustee of the special needs trust?
 - **Texas Rules of Disciplinary Procedure § 1.02(c), An attorney should not get involved in an ongoing criminal transaction; however, they may make recommendations to take corrective action should they discover the client is engaged in fraud.**



Questions?



Adriane S. Grace

Attorney at Law

Law Office of Adriane S. Grace, PLLC

Phone: (972) 379-8167

adriane@gracelawoffice.com

