

**PRESENTED AT**

20<sup>th</sup> Annual Changes and Trends Affecting  
Special Needs Trusts

Feb. 15 – 16, 2024  
Austin, TX

**Common Benefit Termination Problems**

**Adriane S. Grace, Esq.**

Author Contact Information:  
Adriane S. Grace, Esq.  
Law Office of Adriane S. Grace, PLLC  
Frisco, TX

[adriane@gracelawoffice.com](mailto:adriane@gracelawoffice.com)

(972) 379-8167

# COMMON BENEFITS TERMINATION PROBLEMS AND HOW TO SOLVE

## Table of Contents

|   |           |
|---|-----------|
| <b>I. A BRIEF HISTORY OF THE SUPPLEMENTAL SECURITY INCOME PROGRAM .....</b> | <b>2</b>  |
| <b>II. INCOME AND RESOURCE RULES FOR SSI AND MEDICAID PROGRAMS.....</b>     | <b>3</b>  |
| <b>A. SUPPLEMENTAL SECURITY INCOME.....</b>                                 | <b>3</b>  |
| 1. COUNTABLE RESOURCES .....  | 3         |
| 2. HOW SSI “COUNTS” INCOME AGAINST SSI .....                                | 5         |
| <b>B. MEDICAID WAIVER PROGRAMS .....</b>                                    | <b>7</b>  |
| <b>III. COMMON BENEFITS TERMINATION PROBLEMS &amp; HOW TO SOLVE .....</b>   | <b>7</b>  |
| <b>A. EXCESS RESOURCES .....</b>  | <b>7</b>  |
| 1. COMMON CAUSES FOR EXCESS RESOURCES .....                                 | 7         |
| 2. SOLUTIONS TO SOLVING OR AVOIDING AN EXCESS RESOURCE PROBLEM .....        | 9         |
| <b>B. EXCESS INCOME.....</b>  | <b>10</b> |
| 1. CAUSES OF EXCESS INCOME .....  | 10        |
| 2. SOLUTIONS TO AVOIDING OR ELIMINATING EXCESS INCOME PROBLEMS .....        | 11        |
| <b>IV. OVERPAYMENTS &amp; CESSATIONS.....</b>                               | <b>12</b> |
| <b>A. RESPONDING TO AN OVERPAYMENT CLAIM.....</b>                           | <b>12</b> |
| <b>B. LIABILITY FOR AN OVERPAYMENT .....</b>                                | <b>13</b> |
| <b>C. RE-ESTABLISHING ELIGIBILITY FOR BENEFITS AFTER TERMINATION .....</b>  | <b>14</b> |
| <b>V. ADVISING THE FIDUCIARY .....</b>                                      | <b>15</b> |
| <b>A. ETHICAL OBLIGATIONS OF THE ATTORNEY .....</b>                         | <b>15</b> |
| <b>B. DEFINING THE REPRESENTATION .....</b>                                 | <b>17</b> |
| 1. IDENTIFY THE CLIENT .....  | 17        |
| 2. LIMIT THE SCOPE OF THE REPRESENTATION .....                              | 18        |

## I. A Brief History of the Supplemental Security Income Program

The Supplemental Security Income (SSI) Program was created in 1972 under Title XVI of the Social Security Act.<sup>1</sup> It is not the same program as the older, more familiar Old-Age, Survivors, and Disability Insurance (OASDI) programs of the 1935 Social Security Act. In fact, it is not even funded by the Social Security Trust or FICA taxes. Instead, SSI is funded by general revenues of the U.S. Treasury, comprised of personal income taxes, corporate taxes, and other taxes.

The current SSI program replaced a patchwork of older programs for adult assistance that was formerly administered by the states, and that had inconsistent requirements for eligibility. SSI was intended to create a “flat” grant approach to adult welfare assistance. Under the SSI program, states have the option to supplement the SSI payment; however, Texas does not.

*“In contrast to the former state programs with their provisions for liens against property and relative support requirements, the SSI program was intended to have minimal barriers to eligibility other than a lack of income and resources. Even here, the new SSI program incorporated more generous provisions for disregarding income, particularly earned income, than was provided under the Old Age Assistance Program.”<sup>2</sup>*

Since its inception in 1972, the SSI program has undergone few *statutory* changes, especially with regard to “countable” income and resources. In 1972, the countable resource limit was \$1,500 for single individuals. Congress increased the limit to \$2,000 in 1989, and this limit has not changed in nearly 25 years.<sup>3</sup> In response to this meager resource rule, people quickly figured out a work-around by creating “special” inter vivos, irrevocable trusts. However, Congress countered this behavior with the Omnibus Budget Reconciliation Act of 1993, creating some guidelines for self-settled trusts; specifically, that the beneficiary be disabled, under age 65, and also requiring a Medicaid payback provision while prohibiting distributions for food and shelter.<sup>4</sup> These trusts were thereafter referred to as “Medicaid Trust Exception” or “Special Needs Trust” by Social Security. In 1999, Congress specifically addressed trusts other than the Medicaid Trust Exception, stating that both irrevocable and revocable trusts would be considered in determining eligibility and payment amounts.<sup>5</sup> However, the Commissioner of Social Security could waive this provision if it would cause “undue hardship” for certain individuals.

Another change that occurred in 1999 was the Ticket to Work and Work Incentives Improvements Act, creating programs to support disabled individuals so that they could work while continuing

---

<sup>1</sup> Social Security Amendments of 1972, PUB. L. NO. 92-603, Title XVI, 86 STAT. 1329 (1972).

<sup>2</sup> HOUSE WAYS AND MEANS COMMITTEE, H.R. REP., Green Book (2018), available at <https://greenbook-waysandmeans.house.gov/>.

<sup>3</sup> Deficit Reduction Act of 1984, PUB. L. NO. 98-369, Title XVI, 98 STAT. 494 (1984).

<sup>4</sup> Omnibus Reconciliation Act of 1993, PUB. L. NO. 103-66, 107 STAT. 312 (1993).

<sup>5</sup> Foster Care Independent Act of 1999, PUB. L. NO. 106-169, § 202, 110 STAT. 2105 and 2236 (1999). See also SOC. SEC. ADMIN. EM-00067 (May 26, 2000), stating “this transmittal provides instructions for developing exceptions to SSA's new trust policy for trusts established under section 1917d(4)(A) of the Social Security Act (commonly called special needs trusts) and pooled trusts established under section 1917d(4)(C) of the Social Security Act. We refer to the exceptions discussed in this message as MEDICAID TRUST EXCEPTIONS.”

to received SSI and Medicaid.<sup>6</sup> Recently, the most impactful legal change to the resource rule occurred in 2014 when ABLE accounts up to \$100,000 were excluded.<sup>7</sup>

The SSI program also brought eligibility for Medicaid coverage for SSI “claimants”.<sup>8</sup> When the law was enacted, states were given the option to offer their own eligibility requirements for Medicaid and thereby the option to expand Medicaid coverage to those who are not eligible for SSI. In Texas, however, Medicaid enrollment is automatic and mostly based on an award of SSI benefits, with few exception (those exceptions are limited to pregnant mothers, children under the CHIP program, and buy-in for the working-disabled).<sup>9</sup> As such, when an SSI benefit terminates, oftentimes Medicaid terminates with the SSI benefit.<sup>10</sup> A termination, or “cessation”, of SSI benefits occurs when Social Security determines that an SSI claimant had medical improvement, or had a period of excess income or resources in violation of the rules. Therefore, SSI claimants who are in need of healthcare coverage, and their legal advocates, must be well-advised about the income and resource rules of the SSI program.

## II. Income and Resource Rules for SSI and Medicaid Programs

### A. Supplemental Security Income

Eligibility for SSI benefits is not just based on a disability determination or old age, but also on financial need.<sup>11</sup> To be eligible for SSI, a claimant must have less than the SSI limits for “countable” income and resources. The income rules differ depending on whether the income is earned from work, or unearned from passive investments or other sources unrelated to work activity. A claimant’s resources are either “counted” toward the SSI limit or are excluded entirely from the limit depending on the rule for that resource. Similarly, there are exclusions for some income. On the other hand, many of the income rules reduce the SSI benefit, and sometimes even total eliminate the benefit.

#### 1. Countable Resources

In general, a single individual cannot have more than \$2,000 in “countable” resources.<sup>12</sup> That is the limit. Some of the more common exceptions to this resource limit—resources that are not “counted” or are “excluded”—include an individual’s home, a car used for essential transportation (or, if not essential, up to \$4,500 of its current value), property essential to income-producing activity, household goods and personal effects, life insurance policies with a combined face value

---

<sup>6</sup> § 202, 110 STAT. 2105.

<sup>7</sup> Tax Increase Prevention Act of 2014, PUB. L. NO. 113-295, 128 STAT. 4010 (2014).

<sup>8</sup> The Social Security Administration uses the word “claimant” to describe a person applying for Social Security benefits.

<sup>9</sup> See Social Security’s explanation of the state-by-state Medicaid enrollment policies at <https://www.ssa.gov/policy/docs/ssb/v76n3/v76n3p17.html>.

<sup>10</sup> One exception to Medicaid dis-enrollment occurs when a former SSI recipient becomes eligible under a Title 2 Social Security benefit such as a Disabled Adult Child benefit and their SSI terminates in favor of the Title 2 benefit. In that case, Medicaid should continue during the 24-month Medicare coverage gap. 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) (2018).

<sup>11</sup> 20 C.F.R. § 416.202 (2021).

<sup>12</sup> 20 C.F.R. § 416.1205 (2021) (\$3,000 for individual and eligible spouse).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Common Benefit Termination Problems

Also available as part of the eCourse

[2024 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the  
20<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts session  
"Common Benefits Termination Problems"