

Academy of Special Needs Planners

7th Annual Conference – Austin, Texas

March 21-23, 2013

SSI Basics Boot Camp - Pre-Session

2:00 pm – 3:15 pm

Understanding the benefit system, eligibility issues, relationship of SSI to Medicaid, how SSI checks are determined, deeming calculations, ISM and other SSI concepts, and sources of SSI law

3:15 pm – 3:30 pm

Break

3:30 pm – 5:00 pm

SNT Trust Drafting and Administration, Trust Protectors, the Eight Steps to the Perfect SNT (chart), the Eight Steps to Analyzing Distribution Requests (chart), special issues (e.g., sole benefit rule), Registering the trust with SSA; and modification of trusts when necessary, and dealing with SSI Overpayments

According to the United States Supreme Court:

“The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act “almost unintelligible to the uninitiated.” *Friedman v. Berger*, 547 F.2d 724, 727, n. 7 (CA2 1976), cert. denied, [430 U.S. 984](#) (1977). “

Schweiker v. Gray Panthers, 453 U.S. 34 (1981).

OUR APPROACH TO A COMPLEX SUBJECT

PART ONE – The Basis of the Rules – A Conceptual Approach

Introduction – breadth and limits, course materials, self help

Understanding the benefit system

Relationship of SSI to Medicaid

Basic SSI Eligibility Issues

SSI Resource Test

SSI Income Test

Special SSI Concepts – The SSI Mantra; Duty to Report; How to Report; Retrospective Monthly Accounting

Determining the Amount of the SSI Benefit

Sources of SSI Law

PART TWO – The Application of the Rules – SNT Trust Drafting and Administration

First Rule – Do NOT Draft an SNT unless and until... Getting from Point A to Point B

Second Rule – Since you’re the one being sued, rely neither on SNT commercial forms nor assume Pooled Trust compliance

Drafting the SNT - The Eight Steps to the Perfect SNT

Registering the SNT with SSA – a Critical Step in Protecting Both You and Your Client

Administering the SNT - The Eight Steps in Analyzing Distribution Requests

Special Issues – Avoiding violations of the Sole Benefit Rule

Modifying the SNT and its effect on SSA Redeterminations

Dealing with SSI Overpayments – the options – including Appeals

Trustee and Attorney Calculations of Parental Deeming

Exhibit A – Matrix of the Four Major Government Programs

Exhibit B – Determining “disability” – the Five-Step Sequential Evaluation Process

Exhibit C – SSA Procedure – application and appeal

Exhibit D – Eight-step Checklist for the Perfect SNT

Exhibit E – Trustee Distribution Checklist

Exhibit F – Lillesand’s One-Page individual d4A Special Needs Trust

PART ONE – The Basis of the Rules – A Conceptual Approach

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Social Security and SSI Benefits – 2013

RIB, SSDI, DAC, SSI and Survivor and Dependent Benefits

These 2013 materials are designed as a review of the four major government benefit programs to assist the elderly and persons with disabilities. This session covers programs contained in the Social Security Act (Social Security Retirement, Survivors and Disability Insurance Benefits under Title II of the Act, also known as Old Age, Survivors and Disability Insurance (OASDI) and the Supplemental Security Income (SSI) old age and disability benefits under Title XVI, a welfare program also administered by the Social Security Administration. These programs impact the lives of almost all Americans. A matrix briefly describing the inter-relationships of these four programs is found in **Appendix 1** of this outline.

I. **Social Security Retirement, Survivors and Disability Benefits.** When first enacted in 1935, the Social Security Insurance program was almost exclusively a retirement program. Since then, disability benefits and payments to dependents of workers (survivors and dependents benefits) were added to the program. As of September 2011, the program is paying over \$58 billion dollars in benefits monthly to over 60 million people. 42 U.S.C. 402 et seq.; 20 C.F.R., Subpart D, §404.301 et seq.

A. **Social Security Retirement Insurance Benefits (RIB).** Workers earn “insured status” by paying self-employment or payroll deduction taxes on earnings. To be “fully insured” a worker must have 40 quarters of contributions (10 years) to be eligible for RIB. The amount of benefit paid is based on the amount of contribution into the Social Security Trust Fund. 42 U.S.C. 402(a); 20 C.F.R. §404.310. The earnings needed to earn one Social Security Credit for a Quarter of Coverage is \$1,160 (2013). Earnings are taxed to a maximum of \$113,700 for OASDI benefits, and an unlimited amount of tax on the Medicare (HI only) portion.

1. **To qualify**, a worker must be:

- a. **old enough** (for those born between 1943 and 1954, full retirement age is 66, and it is rising to age 67 over the next few years; workers can retire at age 62 or anytime between 62 and their normal or Full Retirement Age (FRA), with an early retirement reduction which will continue to be reduced for the rest of their lives.)
- b. **retired** (there is an earnings tests: if a “retired” worker is under Full Retirement Age and continues to work part time, \$1 for every \$2 earnings is subtracted from the RIB for all earnings over an annual exempt amount, currently \$15,120 (2013); and
- c. **have filed an application.** Applications can be filed at any time, but cannot be made more than 6 months retroactive (unlike disability, which can be retroactive to the established onset date or up to 12 months prior to the date of filing).

2. **Retirement benefits are NOT paid to a person who is:**

- a. under full retirement age and earns more than the exempt amount;
- b. over retirement age and works outside the U.S. for more than 45 hours in a month;
- c. is in the U.S. and is neither a citizen nor an alien lawfully present;

- d. has been deported or removed from the U.S.;
- e. is an alien who is outside the U.S. for more than six calendar months in a row;
- f. is an alien living in a country where it is not permitted to mail U.S. Government;
- g. has waived the right to benefits because the person is a member of a recognized religious group that is opposed insurance; or
- h. is confined within the U.S. in a jail, prison, or other penal institution or correctional facility because of a conviction for a felony.

B. Social Security Survivors and Dependents Benefits. Certain dependents and survivors of a worker may also receive Social Security benefits, under certain circumstances, based on the contributions of the worker. The potential survivors and dependents of deceased or disabled workers include:

- 1. a widow or widower, age 60 or over, of a deceased worker, and the disabled widow or widower (age 50 through 59) and disabled surviving divorced spouse (age 50-59) of a deceased worker, 42 U.S.C. 402(b) and (c);
- 2. a surviving dependent child (or stepchild, grandchild or step-grandchild) under age 18 (or in high school to age 19) or age 18 and older under a disability that began prior to age 22, 42 U.S.C. 402(d); 20 C.F.R. §404.350-369;
- 3. a widow or widower of any age and surviving divorced spouse of a deceased worker who has children of that worker in their care (“mother’s and father’s benefits), 42 U.S.C. 402(e) and (f);
- 4. a dependent parent age 62 or over of a deceased worker, 42 U.S.C. 402(h).

C. Social Security Disability Insurance Benefits. A portion of each FICA contribution (deduction for “Social Security” from wage check) is placed in the Disability Trust Fund to pay workers and their dependents if the worker becomes disabled prior to full retirement age. To qualify for Title II disability benefits, also known as DIB (Disability Insurance Benefits) or SSDI (Social Security Disability Insurance) a worker must be fully and currently insured and medically (physically or mentally) disabled. 42 U.S.C. 424(a).

- 1. **Insured.** A disabled worker must be “fully insured” and be “currently insured.” To be fully insured the worker must have worked a minimum of 10 years (40 quarters), or if age 31 or younger, have worked one-half the quarters between age 21 and the claimant’s age at time of becoming disabled. In addition to fully insured, the claimant must be “currently insured.” That is, the disability must have begun during the period the claimant has paid into the system 20 quarters of the past 40 quarters (5 of the last 10 years). Think of the second requirement as requiring that the person be recently connected to the work force.
- 2. **Medically Disabled.** The claimant must be unable to work because of a physical or mental impairment that has lasted or is expected to last for 12 months (the duration requirement), or is expected to result in death. The impairment must prevent substantial gainful activity in the worker’s normal occupation or in any other activity for which the claimant would be qualified by reason of age, education, work experience, when considering the claimant’s residual functional capacity (physical and mental). 42 U.S.C. 424(d); 20 C.F.R., Subpart P, §404.1501-1599.

3. **Sequential Evaluation Process.** The Social Security Administration uses a five step series of questions, in order, each yielding a yes or no answer, which drives the decision maker to a conclusion of disabled or not disabled. 20 C.F.R. §404.1520a. See Appendix 2 attached for a graphic representation of the process.

Step 1. Is the claimant engaging in “substantial gainful activity” now. If yes, claimant is not disabled; if no, proceed to step 2. In 2013, SGA is presumed for all non-blind persons if earning more than \$1,040 per month, and \$1,740 for blind persons.

Step 2. Does the claimant have a non-severe (incredibly minor) medical impairment? If yes, not disabled, if no, proceed to step 3.

Step 3. Does the claimant have a medical condition so severe that it is found in the Listing of Impairments for automatic payment of benefits without further inquiry? If yes, pay the benefits; if no, proceed to Step 4.

Step 4. Can the claimant return to any type of work the claimant has done in the past 15 years? If yes, deny claim. If no, proceed to the one million dollar question at step 5.

Step 5. Given the claimant’s Residual Functional Capacity, and considering the claimant’s age, education, prior work experience and transferable skills, is there any alternative work that the claimant can do on a full time basis? If yes, deny; if no, pay the benefits.

4. **Procedure for processing claims.** See Appendix 3 attached. A disability claim is begun by filing online (preferred) at www.socialsecurity.gov or by calling SSA at 1-800-772-1213. Online applications are possible for SSDI claims but not SSI Claims – at least to this date. Paperwork is then filed at any one of the hundreds of local Social Security district offices. The application is sent to a state Disability Determination Service (DDS) office for them to gather and analyze the medical evidence, and make recommended decision. The DDS office in your state may be called any one of several names. For example, in Florida, the DDS function is performed, under contract with SSA, by the Florida Department of Health, Disability Determinations Division. The medical eligibility decision, favorable or unfavorable, is issued by the federal Social Security Administration, not the State DDS office. If denied, the claimant is notified of the opportunity to request Reconsideration. Another evidentiary review is conducted by medical personnel. If denied again, the claimant may file a Request for Hearing before a federal Administrative Law Judge. No claim may be denied at that level without a full evidentiary hearing. If denied, the claimant may file a Request for Review by the Appeals Council in Falls Church, Virginia (Washington, D.C. suburb). This completes the administrative agency review (“exhaustion of administrative remedies”). If denied by the Appeals Council, the claimant may initiate a civil Complaint in the United States District Court, and proceed through the various levels of appeal to the U.S. Circuit Court of Appeals and the United States Supreme Court.

5. **Attorney Representation and Fees.** A claimant is entitled to have a representative who can file any and all documents except independently initiate a claim for

benefits. Attorney's fees for representing claimants are highly regulated. 42 U.S.C. §406; 20 CFR §§404.1720-1799. To charge and collect a fee a representative must obtain approval from the Social Security Administration. Failure to follow the requirements subjects the attorney to a fine and imprisonment as well as disbarment from Social Security practice. 42 U.S.C. §406(a)(5).

6. **Working while Disabled.** Unlike SSI disability claimants, Title II SSDI recipients are entitled to a 9-month Trial Work Period (TWP) wherein they can receive full disability benefits and work. The months do not have to be consecutive. In addition, to encourage disabled persons to attempt to work, Congress extended Medicare eligibility for up to 84 months after the person is no longer entitled to monthly SSDI payments. However, if the claimant is receiving benefits, but also engaging in work which is less than the TWP threshold of \$750 per month gross in 2013, such minimal work will not affect continued eligibility for SSDI monthly payments nor count as a month of Trial Work Period. 20 C.F.R. §404.1585. SSI claimants who work will have approximately 50% of their wages subtracted from the amount of their SSI check, as will be more fully explained below.
7. **Amount of Benefits Paid.** The benefit paid to an SSDI disabled person is the same check they would receive at Full Retirement Age. In other words, the retirement age is compressed down to the disabled person's age at time of disability. Benefits are augmented by a cost-of-living increment usually annually. There is no such thing as partial disability. A claimant is 100% disabled – or not! 42 U.S.C. 415. Benefits are retroactive to the date of onset of the disability, but no longer than 12 months back from the date of application.
 - a. **Cash.** In 2013, the average monthly benefit amount is \$1,261 to a single retired worker, \$2,048 for a retired couple both receiving benefits, and \$1,919 per month to a disabled worker, with a spouse and one child. The average monthly Social Security benefit paid to a widow with two children is \$2,592 (which equals \$31,104 per year)
 - b. **Dependent benefits.** Dependent benefits are paid to a spouse of a disabled worker who is caring for children age 16 and under, and to the children under age 18, or under age 19 if in school and not yet graduated.
 - c. **Medicare coverage.** Medicare coverage is provided to the disabled worker (but not his dependents) beginning 24 months after the worker was in payment status for disability benefits purposes, not necessarily when the disability began.

II. Supplemental Security Income

A. **Definition.** Supplemental Security Income (SSI) is a cash assistance program funded and administered by the Federal Government. The program is authorized by Title XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the Social Security Act. Beginning in January 1974, SSI replaced the Federal/State matching grant welfare programs of assistance to the aged, blind, and disabled. Under SSI, there is no minimum age limit for establishing eligibility based on blindness or disability. As of September 2011, over 8 million people receive SSI benefits 20 C.F.R. §416.110.

B. **Administration.** The SSI program is administered by the Social Security Administration, an agency formally under the Department of Health and Human Services, but since

March 31, 1995, is an independent agency of the federal government headed by a Commissioner and a Board of Trustees.

C. **Purpose and Principles.** The basic purpose of SSI is to provide a minimum level of monthly income to persons who are aged, blind or disabled. Payments are made based on objective, measurable standards of need taking into account other sources of income and resources. 20 C.F.R. §416.110.

D. **Financing.** SSI payments are made from the funds in the general treasury of the United States, not from the Social Security Retirement, or Disability or Medicare Trust Funds.

E. **Relationship to Medicaid.** Under Section 1634 of the Social Security Act, most states have opted to have the Social Security Administration make eligibility decisions regarding SSI-related Medicaid. POMS SI 0715.020 If a claimant is eligible for at least \$1 of SSI monthly income benefits, the claimant is automatically eligible for Medicaid. This link between receipt of federal SSI and receipt of state Medicaid benefits is usually codified in state statutes and also in the state’s welfare department’s eligibility manual. For example, in Florida we find the statute at Florida Statutes, §409.903; and the welfare department manual reference at DCF ESS Manual §2040.0801.01.

To determine your state’s relationship between SSI and Medicaid, see the following chart from the POMS SI 01715.020, List of State Medicaid Programs for the Aged, Blind and Disabled:

- **“1634 State”** means that the state has opted, under §1634 of the Social Security Act to give authority to the Commissioner of the Social Security Administration to determine eligibility for that state’s Medicaid program by linking the receipt of at least \$1 of SSI to automatic eligibility for Medicaid.
- **“SSI state”** means that the state does not automatically defer to the federal SSA decision on SSI eligibility, but reserves for itself the right to apply SSI rules to persons applying for Medicaid, using the methodology of the SSI portion of the Social Security Act in making that determination.
- **“Section 209(b) state”** means that at the time the SSI program started in 1974, the state reserved for itself, under §209(b) of the Social Security Act, the right to continue to use the state’s standards for eligibility for state Medicaid benefits.

State	Medicaid Determinations	Medically Needy
Alabama	1634	
Alaska	SSI	
Arizona	1634	
Arkansas	1634	X
California	1634	X
Colorado	1634	

State	Medicaid Determinations	Medically Needy
Connecticut	209(b)	X
Delaware	1634	
D. C.	1634	X
Florida	1634	X
Georgia	1634	X
Hawaii	209(b)	X

State	Medicaid Determinations	Medically Needy
Idaho	SSI	
Illinois	209(b)	X
Indiana	209(b)	
Iowa	1634	X
Kansas	SSI	X
Kentucky	1634	X
Louisiana	1634	X
Maine	1634	X
Maryland	1634	X
Massachusetts	1634	X
Michigan	1634	X
Minnesota	209(b)	X
Mississippi	1634	
Missouri	209(b)	
Montana	1634	X
Nebraska	SSI	X
Nevada	SSI	
New Hampshire	209(b)	X
New Jersey	1634	X
New Mexico	1634	

State	Medicaid Determinations	Medically Needy
New York	1634	X
North Carolina	1634	X
North Dakota	209(b)	X
N. M. I.	SSI	X
Ohio	209(b)	
Oklahoma	209(b)	X
Oregon	SSI	X
Pennsylvania	1634	X
Rhode Island	1634	X
South Carolina	1634	
South Dakota	1634	
Tennessee	1634	X
Texas	1634	
Utah	SSI	X
Vermont	1634	X
Virginia	209(b)	X
Washington	1634	X
West Virginia	1634	X
Wisconsin	1634	X
Wyoming	1634	

F. **Categorical eligibility.** In order to be eligible for SSI benefits, a claimant must fit one of the following three categories:

1. **Aged** - An "aged" person is someone who is age 65 or older; however, certain lawfully admitted U.S. Permanent Residents over age 65 are denied benefits unless they are also disabled;
2. **Blind** - A "blind" person is someone whose vision, with use of a correcting lens, is 20/200 or less in the better eye or who has tunnel vision of 20 degrees or less. There is no minimum age limit; or
3. **Disabled** - A "disabled" person is someone who meets the Social Security disability insurance program (SSDI) definition of disability. That is, he or she:
 - a. Must be unable to engage in substantial gainful activity (SGA) due to a medically determinable physical or mental impairment; and
 - b. The impairment can be expected to last for at least 12 months in a row or result in death.
 - c. But unlike Title II SSDI benefits, there is no minimum age limit. A child under age 18 is eligible if he or she meets conditions (a) and (b) above, and if otherwise eligible financially and meets the non-financial eligibility requirements. 20 C.F.R. §416.202.

G. **Other non-financial eligibility requirements.** See 20 C.F.R. §416.210-216. These include meeting all of the following:

1. Be a resident of one of the 50 States, the District of Columbia, or the Northern Mariana Islands, or be a child who is a U.S. citizen and lives outside the U.S. with a parent in the U.S. armed forces;
2. Be a citizen of the U.S., or an alien in an immigration category qualified to receive Federal benefits and meet certain additional requirements;
3. Not be a resident of a public institution throughout a month;
4. Not be absent from the U.S. for a calendar month unless the claimant is:
 - a. a child who is a U.S. citizen and lives outside the U.S. with a parent in the U.S. armed forces; or
 - b. a student who is temporarily abroad for the purpose of conducting studies;
5. Apply for any other benefits for which the claimant is potentially eligible;
6. Not refuse, without good cause, vocational rehabilitation services if the claimant is blind or disabled;
7. Accept appropriate treatment, if available, for drug addiction or alcoholism;
8. Not be a fugitive felon; and
9. Not be violating a condition of parole or probation.

H. **Special alien requirements.** 20 C.F.R., Subpart P, §416.1600-1619. The claimant must be a U.S. Citizen, or one of a select group of aliens who are “qualified aliens” or “Non-qualified aliens” who were lawfully present in the United States prior to August 22, 1996. To be a qualified alien, the claimant must meet one of the categories listed below:

1. A person lawfully admitted for permanent residence (LAPR), **and:**
 - a. Has 40 qualifying quarters of creditable work; or
 - b. Is a veteran, active duty member of the U.S. military or a spouse or dependent child of a veteran or member of the U.S. military; or
 - c. Was lawfully residing in the United States on 8/22/96 and is blind or disabled; or
 - d. Is lawfully residing in the United States and was receiving SSI on 8/22/96; or
 - e. Was granted one of the alien classifications listed below within the last seven years:
 - 1) Refugee under section 207 of the INA;
 - 2) Asylee under section 208 of the INA;
 - 3) Alien whose deportation is being withheld under section 243(h) of the INA or whose removal has been withheld under section 241(b)(3) of the INA;
 - 4) Cuban/Haitian entrant under one of the four categories in Section 501(e) of the Refugee Education and Assistance Act of 1980; or
 - 5) Amerasian immigrants under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988.
2. A refugee under section 207 of the INA **and:**
 - a. Is a veteran, active duty member of the U.S. military, or a spouse or dependent child of a veteran or member of the U.S. military; or
 - b. Was lawfully residing in the United States on 8/22/96 and is blind or disabled; or
 - c. Is lawfully residing in the United States and was receiving SSI on 8/22/96; or
 - d. Was granted refugee status under section 207 of the INA within the last seven years.
3. A person granted asylum under section 208 of the INA **and:**
 - a. Is a veteran, active duty member of the U.S. military or a spouse or dependent child of a veteran or member of the U.S. military; or
 - b. Was lawfully residing in the United States on 8/22/96 and is blind or disabled; or
 - c. Is lawfully residing in the United States and was receiving SSI on 8/22/96; or
 - d. Was granted asylum within the last seven years.
4. A person whose deportation was withheld under section 243(h) of the INA or removal withheld under section 241(h)(3) of the INA **and:**
5. A veteran, active duty member of the U.S. military or a spouse or dependent child of a veteran or member of the U.S. military; **or:**
 - a. Was lawfully residing in the United States on 8/22/96 and is blind or disabled; or
 - b. Is lawfully residing in the United States and was receiving SSI on 8/22/96; or

- c. Deportation or removal was withheld within the last seven years.
6. A conditional entrant under section 203(a)(7) of the INA **and:**
 - a. Is a veteran, active duty member of the U.S. military or a spouse or dependent child of a veteran or member of the U.S. military; or
 - b. Was lawfully residing in the United States on 8/22/96 and is blind or disabled; or
 - c. Is lawfully residing in the United States and was receiving SSI on 8/22/96.
 7. A person paroled into the U.S. for one year or more under section 212(d)(5) of the INA **and:**
 - a. Is a veteran, active duty member of the U.S. military or a spouse or dependent child of a veteran or member of the U. S. military; or
 - b. Was lawfully residing in the United States on 8/22/96 and is blind or disabled; or
 - c. Is lawfully residing in the United States and was receiving SSI on 8/22/96; or
 - d. Was granted Cuban/Haitian entrant status within the last 7 years under 501(e) of the Refugee Education and Assistance Act of 1980.
 8. A Cuban/Haitian entrant under Section 501(e) of the Refugee Education and Assistance Act of 1980 **and:**
 - a. Is a veteran, active duty member of the U.S. military or a spouse or dependent child of a veteran or member of the U.S. military; or
 - b. Was lawfully residing in the United States on 8/22/96 and is blind or disabled; or
 - c. Is lawfully residing in the United States and was receiving SSI on 8/22/96; or
 - d. Was granted Cuban/Haitian entrant status within the last seven years.
 9. A battered spouse or child who petitioned for status as a lawfully admitted permanent resident under section 204(a)(1)(A)(i)-(iv) or 204(a)(1)(B)(i)-(iii) of the INA, or suspension of deportation under section 244(a)(3) or 240A(b)(2) of the INA, **and:**
 - a. Is a veteran, active duty member of the U.S. military or a spouse or dependent child of a veteran or member of the U.S. military; or
 - b. Was lawfully residing in the United States on 8/22/96 and is blind or disabled; or
 - c. Is lawfully residing in the United States and was receiving SSI on 8/22/96.

I. **Financial eligibility requirements.** SSI benefits are paid to those individuals who meet the above medical eligibility requirements and who further meet the financial requirements for low income and resources. 20 C.F.R., Subpart D, §416.401-435.

1. **SSI income requirements.** A claimant must not have monthly “countable” income more than the current Federal Benefit Rate (FBR) which is increased each year by a cost-of-living-adjustment unless Congress also adjusts the FBR as part of the budget process (Congress has done so only once since creating the SSI program in 1974). The FBR for an eligible couple (both qualifying) is 1.5 times the individual rate.

The Federal Benefit Rate, that is, the maximum SSI check for 2013 for an individual is \$710 per month, and for a couple, \$1,066 per month. 20 C.F.R., Subpart K, §416.1100-1182. The Medicaid nursing home income cap for Institutional Care Program (ICP) benefits is always related to the Federal Benefit Rate by a formula of

three times the FBR. Thus in “income cap states”, like Florida, the nursing home income cap is \$2,130 (3 X \$710 – the maximum SSI check). If the client is a penny over the income cap, the client is not eligible for institutional care, unless a Miller Trust under 42 USC 1396p(d)(4)(b) is used.

a. **Definition of income.** Income is anything that “comes in,” that is, anything the claimant receives during a calendar month that can be used to meet their needs for food or shelter. It may be in cash or in-kind. In-kind income is not cash; it is food or shelter, or something the claimant can use to get food or shelter. 20 C.F.R. §416.1102.

b. **Certain things are NOT income.** See 20 C.F.R. §416.1103. These include:

- 1) Medical care and services, including room and board, provided by anyone while the claimant is living in a medical treatment facility such as a hospital or nursing home;
- 2) Social Services;
- 3) Receipts from the sale, exchange, or replacement of a resource.
- 4) Income tax refunds;
- 5) Payments by credit life or credit disability insurance;
- 6) Proceeds of a loan;
- 7) Money paid by someone else directly to a supplier on the claimant’s behalf. However, goods or services you receive as a result of the payments may be in-kind income even if the third-party payments themselves are not;
- 8) Replacement of income already received, e.g., replacement of a stolen paycheck;
- 9) Assistance received to protect the claimant’s residence from bad weather, such as insulation or storm doors; and
- 10) Any item (other than an item of food or shelter) that would be an excluded non-liquid resource.

c. **Countable income.** Countable income, that is, the amount of other income that is subtracted from the Federal Benefit Rate to determine the amount of the claimant’s monthly SSI check, consists of the dollar amount left over after subtracting everything that is “not income” (above) and applying the income “exclusions.” The exclusions are a \$20 general income disregard, and \$65 from earned income, and one-half of the remaining amount of earned income.

d. **Earned income exclusions.** See 20 C.F.R. §416.1112. In figuring countable earned income, certain exclusions are applied in the following order:

1. Exclusions authorized by Federal laws other than Title XVI;
2. The full amount of any earned income tax credit payments;
3. Up to \$10 per month of earned income if received infrequently or irregularly. For example, if the income is received only once during a calendar quarter or if its receipt cannot reasonably be expected;
4. For 2013, up to \$1,730 in a month (but no more than \$6,960 per year) for a blind or disabled child who is a student regularly attending school;
5. Any portion of the \$20 per month general income exclusion that is not used against unearned income in the same month;

6. \$65 of earned income;
 7. Impairment-related work expenses of a disabled (not blind) individual who:
 - a) Is under age 65; or
 - b) Received SSI based on a disability for the month before turning age 65;
 8. One-half of the month's remaining earned income;
 9. Any expenses reasonably typical of the earning of income for a blind (not disabled) individual who:
 - a) Is under age 65; or
 - b) Received SSI because of blindness for the month before turning age 65; and
 10. Any earned income used to fulfill an approved plan for achieving self-support in the case of a blind or disabled individual who:
 - a) Is under age 65; or
 - b) Received SSI based on blindness or disability for the month before turning age 65.
- e. **Unearned income exclusions.** See 20 C.F.R. §416.1124. These include:
- 1) Exclusions authorized by Federal laws other than Title XVI (e.g., food stamps, TANF payments);
 - 2) Any public agency's refund of taxes on real property or food;
 - 3) Assistance based on need and funded wholly by a State and/or one of its political subdivisions (including Indian tribes);
 - 4) Any portion of a grant, scholarship, or fellowship used for paying tuition, fees or other necessary educational expenses. However, any amount set aside or actually used for food, clothing, or shelter is not excluded;
 - 5) Food raised by an individual or by his or her spouse if consumed by the household;
 - 6) Assistance received under the Disaster Relief and Emergency Assistance Act and assistance provided under any Federal statute because of a catastrophe declared by the President to be a major disaster;
 - 7) Up to \$20 per month of unearned income if received infrequently or irregularly; i.e., if received only once during a calendar quarter from a single source or if its receipt cannot reasonably be expected;
 - 8) Payments received by certain recipients under the Alaska Longevity Bonus program;
 - 9) Payments to an individual for providing foster care to a child placed in the individual's home by a qualified agency;
 - 10) Any interest earned on excluded burial funds and any appreciation in the value of an excluded burial arrangement left to accumulate and become part of the separately identifiable burial fund;
 - 11) Certain home energy and other needs-based support and maintenance assistance;

- 12) One-third of support payments made by an absent parent to or for an eligible child;
- 13) The first \$20 per month of an individual's total unearned income other than income based on need;
- 14) Any unearned income used to fulfill an approved plan for achieving self-support in the case of a blind or disabled individual who is under age 65 or received SSI based on blindness or disability for the month he or she turned 65;
- 15) Federal housing assistance, whether provided directly by the Federal Government or through other entities such as local housing authorities, nonprofit organizations, etc.;
- 16) Any interest accrued on (or after April 1, 1990) and left to accumulate as part of the value of an excluded burial space purchase agreement;
- 17) The value of any commercial transportation ticket received as a gift and not converted to cash. This applies to travel among the 50 states, District of Columbia, Puerto Rico, Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands;
- 18) Hostile fire pay from the Uniformed Services received in or after October 1993;
- 19) Payments received from a State fund to aid victims of crime;
- 20) Relocation assistance provided under Title II of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970;
- 21) Austrian Social Insurance payments that are based, in whole or in part, on wage credits received for certain losses suffered before and during World War II;
- 22) Payments made by the Dutch Government under the Netherlands Act on Benefits for Victims of Persecution 1940-1945 to individuals who were victims of persecution and suffering from illnesses or disabilities resulting from the persecution.

f. **In-kind support and maintenance.** "In-kind income" is income that is not in the form of cash or negotiable instruments. See 20 C.F.R. §416.1130-1157. Examples of in-kind income include real property, food, and occasionally, wages (e.g., room and board as compensation for employment). In-kind income that is unearned and directly satisfies the need for food or shelter is called "in-kind support and maintenance." It has special rules for valuation. Any other in-kind income is valued at its current market value. There are two rules for placing a value on in-kind support and maintenance: the "one-third reduction rule" and the "presumed maximum value rule."

- 1) Under the one-third reduction rule, an amount equal to one-third of the FBR is considered to be the value of the in-kind support and maintenance (ISM) regardless of the actual current market value of the amount received. The one-third reduction rule applies to a claimant who lives in another person's household and receives both food and shelter from within that household, 20 C.F.R. §416.1131;

- 2) The presumed maximum value rule applies in any other situation (for example, where the claimant lives in a home owned by the claimant, and someone, like a trustee, outside the home pays the mortgage or some other food or shelter expense). Again, regardless of the amount paid, the reduction is the presumed maximum value amount, 20 C.F.R. §416.1140.

Table 1. The Individual and Couple Federal Benefit Rates, 2004-2013.

	2013	2012	2009-2011	2008	2007	2006	2005	2004
Individual Full FBR	\$710	\$698	\$674	\$637	\$623	\$603	\$579	\$564
Medicaid Care	\$30	\$30	\$30	\$30	\$30	\$30	\$30	\$30
Eligible Couple Full FBR	\$1,066	\$1,048	\$1,011	\$956	\$934	\$904	\$869	\$846
Medicaid Care - Couple	\$60	\$60	\$60	\$60	\$60	\$60	\$60	\$60

Table 2. The one-third reduction rule values (RRV) and applicable Presumed Maximum Values (PMV).

	2013	2012	2009-2011	2008	2007	2006	2005
Individual RRV	\$236.66	\$232.67	\$224.67	\$212.33	\$207.66	\$201.00	\$193.00
Eligible Couple RRV	\$356.00	\$350.00	\$337.00	\$318.66	\$311.33	\$311.33	\$289.66
Individual PMV	\$256.66	\$352.67	\$244.67	\$232.33	\$227.00	\$221.00	\$213.00
Eligible Couple PMV	\$356.00	\$350.00	\$337.00	\$318.66	\$311.33	\$311.33	\$289.66

2. **SSI Resource Requirements.** In addition to meeting the income requirements, the claimant must not have countable resources in excess of a specified amount at the beginning of each month, literally the first day of the month. The limits for January 2013 remain the same as they have for many, many years at \$2,000 for an individual and \$3,000 for a couple. 20 C.F.R. §416.1201.
- a. **Definition.** For SSI purposes, a resource is any of the following owned by the claimant or claimant's spouse, if any, including cash, liquid assets, and real or personal property that can be converted to cash to obtain support and maintenance. If the claimant has the right, authority, or power to liquidate the property, it is considered a resource.
 - b. **Resource exclusions.** Certain things are not counted as resources by operation of law. 20 C.F.R. §416.1210; 42 U.S.C. 1382b(a). They include:

1. An individual's **home**, regardless of value. A home includes any adjacent land and related buildings on it, 20 C.F.R. §416.1212;
2. **Household goods** and personal effects are excluded without regard to value. Household goods are defined as “items of personal property, found in or near the home, that are used on a regular basis, and needed by the householder for maintenance, use and occupancy of the premises as a home;” EXCEPT items “acquired or held because of their value or as an investment are not considered household goods.” “Household goods include, but are not limited to, furniture, appliances, electronic equipment such as personal computers and televisions.” Personal effects are defined as “items of personal property that are worn or carried by an individual or “items that have an intimate relation to the claimant;” and include, but are not limited to, “clothing, jewelry, personal care items, prosthetic devices, and educational or recreational items such as books, musical instruments, or hobby materials.” POMS SI 01130.430. and 20 C.F.R. §416.1216;
3. **One automobile**, regardless of value, if used to provide necessary transportation. For SSI purposes, “automobile” means any vehicle used for transportation. Vehicles used for transportation include but are not limited to cars, trucks, motorcycles, boats, snowmobiles, animal-drawn vehicles, and even animals. Not included is a vehicle that is used only as a recreational vehicle (e.g., a boat used on weekends for pleasure) which can NOT be excluded as “personal property” and whose equity value is counted as a resource. POMS SI 01130.200 and 20 C.F.R. §416.1218;
4. **Special Needs Trusts** pursuant to Foster Care Independence Act of 1999 (P.L. 106-169). Section 205; *42 U.S.C. 1382b*; and **Third Party Special Needs Trusts**. See POMS SI 01120.200 *et seq.*
5. **Life insurance with a face value of less than \$1500** with some caveats, 20 C.F.R. §416.1230 ;
6. **Burial spaces regardless of cost, and burial funds up to \$1,500**, 20 C.F.R. §416.1231;
7. **Title XVI (SSI) or Title II (SSDI, DAC or RIB) retroactive payments** as provided in CFR §416.1233;
8. Restricted allotted Indian lands, 20 C.F.R. §416.1234;
9. Property of a trade or business without limit;
10. Non-business property of a reasonable value that is needed for self-support;
11. Resources of a blind or disabled individual that are needed carry out an approved plan for achieving self-support, 20 C.F.R. §416.1225-1227;
12. Disaster relief, 20 C.F.R. §416.1237;
13. Payments or benefits excluded by provisions of a Federal statute other than Title XVI of the Social Security Act;
14. Housing assistance as provided in CFR §416.1238;
15. Refunds of Federal income taxes and advances made by an employer relating to an earned tax credit as provided in CFR §416.1255;
16. Shares of stock held by a native of Alaska in a regional or village corporation during the 20-year period in which, under the provisions of the Alaska Native Claims Settlement Act, such stock cannot be transferred;
17. Payments received as compensation for expenses incurred or losses suffered as a result of a crime for nine months following receipt, 20 C.F.R. §416.1229;

18. Relocation assistance from a State or local government for nine months; and
19. Dedicated financial institution accounts required to be established for the payment of past-due benefits to disabled children as provided in 20 CFR 416.1247.

3. **Deeming of Income and Resources.** Under certain circumstances, all or portions of the income or resources of a spouse, parent, or sponsor of an alien are “deemed” to be the income or resources of the claimant. Pension funds owned by an ineligible spouse or by an ineligible parent or spouse of a parent are excluded from resources for deeming purposes. Pension funds are defined as funds held in Individual Retirement Accounts (IRA's) or in work-related pension plans. **Note:** deemor's IRAs and pensions funds are excluded, but not the claimant's IRAs or pension funds under the theory that the claimant's IRAs can be converted to purchase food and shelter and therefore are NOT excluded in determining eligibility. 20 C.F.R. §416.1160. If a person is disabled, IRS rules do not require a penalty for withdrawing IRA funds prior to age 59½, and ordinary federal income tax only would be paid.

a. **Deeming from spouse to spouse.** The deeming of spousal income and assets applies only if the parties are living in the same household. In addition, if there are children under age 21 living in the household, an allocation for their living allowance is provided (up to \$356 in 2013 depending on the child's own income), as well as for the spouse who lives in the household. The allocation is equal to the difference in the FBR for an individual and the FBR for a couple. The resources of an ineligible spouse and the eligible claimant are added together and compared to the resource limit for a couple (\$3,000) to determine eligibility. In addition, the same income exclusions available to the SSI claimant spouse apply to the not SSI eligible spouse's income. 20 C.F.R. §416.1161 *et seq.*

b. **Deeming from parent to child.** Deeming does not apply if the SSI eligible child does not live in the same household as the parent (e.g., separated or divorced parents). Children are subject to deeming from natural, adoptive parents, and a stepparent if living in the same household. However, if the child is living with a stepparent only due to the death or divorce of the natural parent, the stepparent's income and resources are NOT deemed to a child. There are also living allocations for other children under age 21 (up to \$350 in 2013), and the income exclusions of both parents apply in determining eligibility. 20 C.F.R. §416.1165. The following chart, produced by SSA uses the 2012 benefit amounts; a new chart for 2013 will be produced by the Social Security Administration in February 2013 and found at <http://www.socialsecurity.gov/ssi/text-child-ussi.htm>. The chart tells you how much income the parent or parents can have and still retain at least \$1 of SSI disability payments for the child, which would trigger Medicaid automatically under §1634 states.

HOWEVER, READ VERY CAREFULLY THE CAUTIONARY NOTES FOLLOWING THE CHART. IF THE FAMILY'S SITUATION DOESN'T MATCH EXACTLY YOU MUST DO A HAND CALCULATION BEFORE ADVISING ANY CLIENT.

DEEMING ELIGIBILITY CHART FOR CHILDREN FOR 2012

CAUTION: Before using this chart, see [SSI FOR CHILDREN](#) . If there is any doubt about whether a child is eligible, please contact us for help.

Deeming Eligibility for Children	Gross monthly income BELOW the dollar amounts* shown means a disabled child may be eligible for SSI benefits. * Amounts given are general guidelines only.			
Number of ineligible children in household	All income is earned		All income is unearned	
	One parent in household	Two parents in household	One parent in household	Two parents in household
0	\$ 2,917	\$ 3,617	\$ 1,436	\$ 1,786
1	\$ 3,267	\$ 3,967	\$ 1,786	\$ 2,136
2	\$ 3,617	\$ 4,317	\$ 2,136	\$ 2,486
3	\$ 3,967	\$ 4,667	\$ 2,486	\$ 2,836
4	\$ 4,317	\$ 5,017	\$ 2,836	\$ 3,186
5	\$ 4,667	\$ 5,367	\$ 3,186	\$ 3,536
6	\$ 5,017	\$ 5,717	\$ 3,536	\$ 3,886

The Deeming Eligibility Chart for Children does not apply when:

- The parent(s) receives both earned income (for example, wages or net earnings from self-employment) and unearned income (for example, Social Security benefits, pensions, unemployment compensation, interest income, and State disability).
- The parent(s) receives a public income maintenance payment such as Temporary Assistance for Needy Families (TANF), or a needs-based pension from the Department of Veterans Affairs. See page 65 for more information on TANF.

- The parent pays court-ordered support payments.
- The child has income of his or her own.
Any ineligible child has income of his or her own, marries, or leaves the home.
- There is more than one disabled child applying for or receiving SSI.
- Your State supplements the Federal benefit.

Use the Deeming Eligibility Chart for Children in the following States or territory, which **do not supplement** the Federal benefit for children:

Alaska	Kansas	Ohio
Arizona	Maryland	South Carolina
Arkansas	Mississippi	Tennessee
Delaware	Missouri	Texas
District of Columbia	North Carolina	Virginia
Florida	North Dakota	West Virginia
Indiana	Northern Mariana Islands	

If you live in one of the States listed below, Social Security administers the State supplement for children. Call us for deeming eligibility information.

California	Montana*	Rhode Island
Hawaii	Nevada*	Utah
Iowa	New Jersey	Vermont
Michigan	New York	
	Pennsylvania	

*Montana supplements disabled and blind children in certified foster homes only. Nevada supplements blind children only.

If you live in one of the States listed below, your State administers the State supplement for children. Contact the State for information.

Alabama	Louisiana	Oklahoma
Colorado	Maine	Oregon*
Connecticut*	Massachusetts	Pennsylvania
Georgia	Minnesota*	Rhode Island
Idaho	Nebraska	South Dakota*
Illinois	New Hampshire*	Washington
Kentucky	New Mexico	Wisconsin
		Wyoming

*Connecticut, Minnesota, and New Hampshire only supplement benefits for blind children. South Dakota supplements disabled and blind children in residential care facilities.

4. **Transfer of Assets Penalty.** The same SSI statutory amendment that incorporated 42 USC §1396p(d)(4)(A) [the Medicaid Special Needs Trust exceptions] re-instituted a transfer of assets penalty for transferring ownership of a resource for less than fair market value. Such transfer can result in a period of ineligibility for SSI. Foster Care Independence Act of 1999 (P.L. 106-169). Section 205; 42 U.S.C. 1382b. This provision is effective for transfers made on or after 12/14/99. If the individual received fair market value for the transferred resource, the period of ineligibility does not apply. The look-back period to develop uncompensated transfers is 36 months. That is, any resources transferred 36 months before the date of application for SSI benefits, even if transferred for the specific purpose of qualifying for SSI, are permissible transfers. 42 U.S.C. 1382b(c).

a. **Penalty provisions.** If a resource was transferred without value and does not meet one of the exceptions below, the penalty is calculated by dividing the fair market value of the resource transferred by the FBR (Federal Benefit Rate, which is the maximum SSI payment to an single individual, for example, in 2013 it is \$710). The result is the number of months of ineligibility, capped at 36 months forward from the date of transfer. 42 U.S.C. 1382b(c)(1)(A). These rules are different from and more favorable for the SSI claimant than the Medicaid institutional care (nursing home) rules on penalties.

b. **Exceptions to the transfer of assets penalty:**

1) **Transfers to Trusts.** The period of ineligibility does not apply to an individual who transfers a resource to a trust established for the sole benefit of the individual's child of any age who is blind or disabled. This includes trusts qualifying as "Medicaid trust exceptions" in [SI 01120.200](#) ff. (i.e., trusts established under Section 1917(d)(4)(A) and (C) of the Social Security Act). 42 U.S.C. 1396p(d)(4)(A). The period of ineligibility also does not apply to an individual who transfers a resource to a trust established for the sole benefit of an individual including himself or herself who is under age 65 and is blind or disabled.

2) **Transfers of a home.** 42 U.S.C. 1382b(c)(a)(C). It is impermissible to even add another person to the title of the claimant's home. However, certain transfers of the home to another are permissible:

a) Transfer to a spouse (including a separated spouse), a child under age 21 regardless of student or marital status; a child of any age or any marital status who is blind or disabled.

b) Transfer to a sibling of the claimant who has an ownership interest (including life estate and equitable ownership) in the home, and who was residing in the claimant's home for at least 1 year immediately before the date the transferor becomes institutionalized.

c) Transfer to a Son or Daughter who was residing in the transferor's home for at least 2 years immediately before the date the individual becomes institutionalized, and who provided care to the individual which permitted the individual to reside at home instead of in an institution.

- 3) **Non-home resource transfer exceptions.** The penalty does not apply if the non-home resource was transferred to the transferor's spouse (including a separated spouse), or another person for the sole benefit of the transferor's spouse, or the transferor's child of any age who is blind or disabled. POMS SI 0150.123.
- 4) **Resource returned.** If the improperly transferred resource is returned, and then the claimant seeks conditional SSI payments subject to sale or proper disposition of the excess resource, the penalty does not apply. POMS SI 01150.124.
- 5) **Transfers for purposes other than to qualify for SSI.** Some transfers are made in the normal course of life, and then the claimant becomes unexpected medically eligible for SSI disability benefits. In this circumstance and similar ones, the penalty would not apply.
- 6) **Undue Hardship.** This exception is extremely limited, aiding those individuals who have disposed of resources and whose only funds are now equivalent to less than one month's FBR and whose ordinary expenses are greater than the FBR.

J. **Attorneys Fees.** Attorney's fees for representing SSI claimants are highly regulated. 42 USC §406; 20 CFR §§404.1720-1799. To charge and collect a fee a representative must obtain approval from the Social Security Administration. Failure to follow the requirements subjects the attorney to a fine and imprisonment, and disbarment from Social Security practice. 42 USC §406(a)(5). To represent a claimant, the attorney must file a form SSA 1696. Thereafter SSA will send duplicate notices to both the claimant and the attorney throughout the proceedings.

To collect a fee, an attorney must file an SSA tax form, SSA 1695, with the Social Security Administration prior to beginning representation of the claimant so that SSA can report the income to the IRS.

If the attorney representative wants to collect an automatic fee of 25% of the retroactive benefits won for the claimant, the attorney must file a Fee Agreement along with the 1696 Form. Otherwise, the attorney must file a Fee Petition on forms prescribed by the Social Security Administration prior to collecting a fee from the claimant or the trustee of a claimant's self-settled d4A Special Needs Trust.

K. **Special SSI Concepts To Keep in Mind** – SSI is paid on the first of each month.

1. **The Mantra:** "Income in the month received becomes a resource on the first of the following month." The PI net settlement check is "income" and if retained in the claimant's bank account, is a "resource" on the first day of the following month.

2. **Duty to Report Changes** – by the tenth day of the month following the month in which the change occurred. SSA determines initial eligibility; requires SSI claimant to report changes.

2. **How to Report** – in writing, certified return receipt (keep the receipt); report to the SSA local office that is responsible for all persons living in client's ZIP CODE (or if there's a Representative Payee, the ZIP CODE of the Rep Payee).

3. **Retrospective Monthly Accounting.** It's always two months later. Example: PI net settlement check given to client January 15. Client puts funds in SNT on January 16th.

Client reports January receipt of PI award and the SNT to SSA by February 10th. The SSI check is reduced on March 1st which is the earliest opportunity SSA has to “count” the income and adjust.

L. Determining the Amount of the SSI Benefit Check – Applying the income rules.

HOW DOES YOUR INCOME AFFECT YOUR SSI BENEFIT?

Step 1: We subtract any income that we do not count from your total gross income. The remaining amount is your "**countable income**".

Step 2: We subtract your "**countable income**" from the **SSI Federal benefit rate**. The result is your monthly **SSI Federal benefit** as follows:

- 1) Your Total Income
- Your income that we do not count
= Your countable income
- 2) SSI Federal benefit rate
- Your countable income
= Your SSI Federal benefit

EXAMPLE A – SSI Federal Benefit with only UNEARNED INCOME (concurrent benefits)

Total monthly income = \$300 (Social Security SSDI benefit)

- 1) \$300 (Social Security benefit)
-20 (Not counted)
=\$280 (Countable income)
- 2) \$710 (SSI Federal benefit rate)
-280 (Countable income)
=\$430 (SSI Federal benefit)

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) \$710 (SSI Federal benefit rate)
-116 (Countable income)
=\$594 (SSI Federal benefit)

EXAMPLE C – SSI Federal Benefit and STATE SUPPLEMENT with only UNEARNED INCOME

The facts are the same as example A, but federally administered State supplementation is involved.

- 1) \$300 (Social Security benefit)
-20 (Not counted)
=\$280 (Countable income)
- 2) \$710 (SSI Federal benefit rate)
-280 (Countable Income)
=\$430 (SSI Federal benefit)
- 3) \$430 (SSI Federal benefit)
+15 (State supplement payment for an individual living alone)
=\$445 (Total Federal and State SSI benefit)

EXAMPLE D – SSI Federal Benefit and STATE SUPPLEMENT with only EARNED INCOME

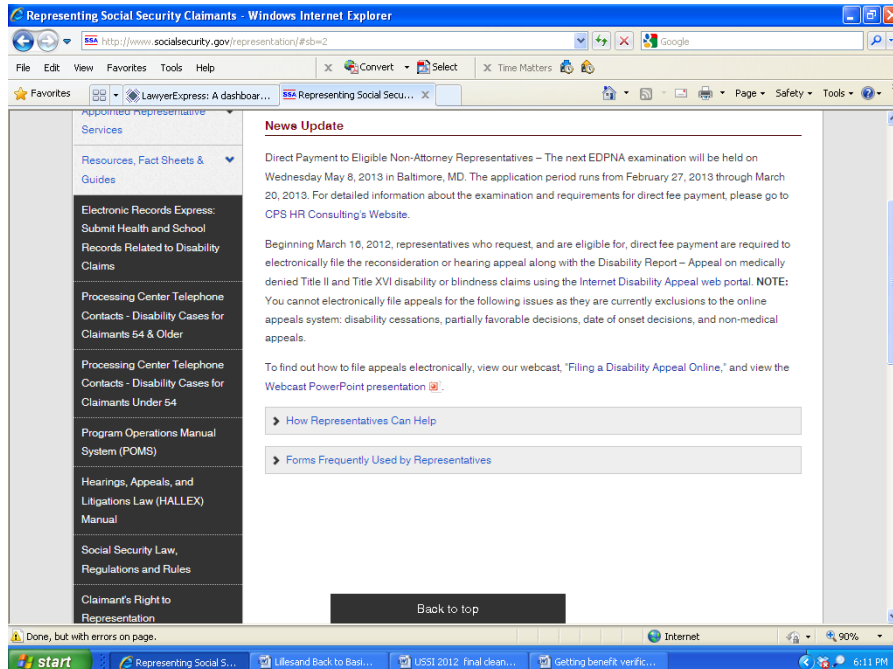
Total monthly income = \$317 (Gross wages)

- 1) \$317 (Gross wages)
 -20 (Not counted)
 \$297
 -65 (Not counted)
 \$232 divided by 1/2
 =\$116 (Countable income)
- 2) \$710 (SSI Federal benefit rate)
 -116 (Countable Income)
 =\$594 (SSI Federal benefit)
- 3) \$594 (SSI Federal benefit)
 +15 (State supplement payment for an individual living alone)
 =\$609 (Total Federal and State SSI benefit)

M. Sources of SSI Law.

For laypersons: The best internet source is – “Understanding Supplemental Security Income SSI Home Page -- 2013 Edition” – found at <http://ssa.gov/ssi/text-understanding-ssi.htm> which is a wonderful table of links to SSA explanations in layperson’s terms of SSI concepts and rules:

For attorneys: SSI eligibility is based on federal statutes (42 U.S.C. §§ 1381-1381c), federal regulations (20 C.F.R. §§416.101-416.2227) and the Social Security Administration’s Program Operations Manual System (the POMS). On the Social Security website, www.socialsecurity.gov, in the second column, click on “INFORMATION FOR ATTORNEYS & REPRESENTATIVES”



and then on the next page, in the left hand column, click on “Resources, Fact Sheets & Guides” and the black and white drop-down box appears on the left showing, among other things, the “Program Operations Manual System (POMS),” the “Hearings, Appeals and Litigations Law (HALLEX) Manual,” and the “Social Security Law, Regulations and Rules” tabs.

You thus have at your fingertips the statute, the federal regulations, the SSA staff manual, and the judges’ court manual.

N. **Dealing with SSI Overpayments – the Options.** A 20-page paper dealing with this issue is attached to these materials in more detail than we can cover here. However, there are a few salient points to remember that we should emphasize here:

1. Overpayments occur most often in our context when SSI claimants and their attorneys fail to advise SSA of the receipt of the inheritance or the personal injury (PI) award to start with, and then the failure to advise of the creation of the Special Needs Trust. The best defense to an overpayment is not to have one.

2. Overpayments can occur because of changes in household composition, increases in the earnings of deemor parents, or work activity by the person with disabilities.

3. There are two issues when the SSI claimant receives a notice of overpayment: first, is to consider whether there is an overpayment (substantive challenge) and second, if SSA is correct and there is an overpayment what to do about it. The attached paper explains how to promptly respond to meet the jurisdictional time limits.

4. Many people, even including attorneys specializing in bankruptcies, do not realize that unlike most government debts to the IRS and student loans, SSI overpayments can be wiped out completely in bankruptcy proceedings.

5. Alternatively, the worst that can happen with an SSI overpayment is that SSA can deduct only 10% of the Federal Benefit Rate (SSI = \$710/month in 2013, so the maximum deduction is \$71 in 2013) from future checks – at no interest!!

6. If the overpayment debt is for Title 2 SSDI benefits, SSA can negotiate a payment plan.

O. **Modification of SNTs and SSA Procedure.** One of the problems with modifying or amending a non-conforming Special Needs Trust is getting SSA to act on it. Do not assume that the state court's judicial modification will automatically be communicated to SSA, and further, do not assume that even delivering the modified or amended trust to SSA will cause them to process the claim and re-start SSI benefits. Some extraordinary steps must be taken either through the local office, or by contacting the SSA Regional Chief Counsel's staff to ensure they will now re-review the previously defective SNT.

P. **Deeming Calculations by Trustees and Attorneys.** One of the issues frequently encountered with disabled children's SNTs is how much can the parent or parents earn and still maintain at least some SSI to trigger Medicaid eligibility. For example, how much can a trustee pay to a parent as wages to provide in-home extraordinary services to the child. A quick chart was provided in these materials. However, it is most often necessary to do a calculation by hand to accurately reflect and consider all the income sources in the family – including teenage siblings, for example.

A lengthy paper on Deeming Calculations, with sample forms and examples, is attached.

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I. INTRODUCTION TO SPECIAL NEEDS TRUSTS

As we move toward universal health care effective January 1, 2014, the number of clients who will need Special Needs Trust will diminish significantly. By my calculation using the numbers of persons on Medicaid versus those on Medicaid Waiver, the number of persons absolutely needing Special Needs Trust will drop by approximately 84% compared to those persons with disabilities in 2012. While it gets easier for the clients, it gets that much harder for the Elder and Disability Law attorney to determine which clients will still need a trust, and to calculate and factor in things like the possibility of completely avoiding Medicaid payback, the cost of trustee fees versus the cost of maintaining SSI disability checks, the ability to postpone a decision in 2013 until full implementation on October 1, 2013, for private insurance without pre-existing conditions to begin on January 1, 2014. Cost/benefit analysis will become the central determinant for persons other than those on Medicaid ICP and the Medicaid Waiver programs.

However, if a trust is indicated, this session of the 2013 Elements of Elder Law addresses what it is required to make sure the trust drafted by the Elder and Disability Law attorney and the Special Needs Trust administered by the chosen trustee will not eliminate public benefits.

A. The Meaning of “Special Needs”

Special Needs Trusts are so called because the beneficiary is a person with disabilities who has “special needs,” not because the distributions that may be made from the trust are limited to medical supplies or services related to the beneficiary’s medical condition. Social Security Administration, Program Operations Manual System (POMS), SI 01120.203.1.a. Indeed, the list of goods and services that may be provided from funds held in a Special Needs Trust is endless, and may include the purchase of a residence for the person with disabilities, mortgage or rent payments, utilities, travel, entertainment, educational expenses, computers, household furnishings, automobiles, or vans with wheelchair lifts and other transportation expenses, as well as trust-paid caretakers, purchasing medical equipment and supplies, modification of homes for wheelchair accessibility, and additional medical and therapeutic treatment services over and above those furnished by other public and private resources.

The overall goal in Special Needs Trust planning is to maximize and supplement but not supplant the goods and services already provided by government resources or which could be provided to persons with disabilities with proper financial planning. It is particularly important to protect the severely disabled beneficiary’s access to publicly funded medical care because the private health insurance market is closed to such individuals until January 1, 2014, when ObamaCare kicks in and allows purchase of commercial health insurance without imposition of a pre-existing condition exclusion.

However, Special Needs Trust planning is not always required. Often there are better alternatives than SNTs. Unnecessary planning with attendant costs of creating and administering Special Needs Trusts is as inappropriate at times as no planning at all. Creating a proper SNT with Medicaid Payback may in fact be legal malpractice.

B. Planning For Persons With Disabilities

1. When SNT Planning May Not Be Required – the effect of the Affordable Care Act.

As the sign often says, “WATCH THIS SPACE.” Executing a Special Needs Trust to preserve SSI-disabled-related Medicaid, and doing so flawlessly, may make the Elder and Disability Law attorney a defendant in a legal malpractice lawsuit.

As of this writing, even conservative state governors previously opposed to “Obamacare” have announced that their state will join with the majority of states to have a federal private health insurance exchange (online purchase of private insurance with potential government subsidies) instead of a state-run health exchange. That will be significantly better for our disabled clients as has been shown by our state’s two years experience with the federal Pre-existing Condition Insurance Program (www.pcip.gov).

Most importantly, as of the preparation of these materials, it appears likely, most will opt in to Medicaid Expansion through the new “Adult Medicaid” category, also known as the “nonelderly Medicaid” category for persons ages 19-64 who have pre-existing conditions but who can also have unlimited assets and still be eligible, (“No state may impose an asset or resources test” per Section 2002(A)(14)(C) of the Affordable Care Act), with eligibility determined solely by Modified Adjusted Gross Income.

SEC. 2002(a) INCOME ELIGIBILITY FOR NONELDERLY DETERMINED USING MODIFIED GROSS INCOME.:

“(14) (C) **NO ASSETS TEST.**—A State shall not apply any assets or resources test for purposes of determining eligibility for medical assistance under the State plan or under a waiver of the plan.”

The federal Medicaid regulation to effectuate Section 2002 of the Affordable Care Act was published in final form in March 2012:

42 CFR §435.603 Application of modified adjusted gross income (MAGI).

(c) **Basic rule.** Except as specified in paragraph (i) and (j) of this section, the agency must determine financial eligibility for Medicaid based on “household income” as defined in paragraph (d) of this section.

(d) **Household income**—(1) General rule. Except as provided in paragraphs (d)(2) and (d)(3) of this section, household income is the sum of the MAGI-based income, as defined in paragraph (e) of this section, of every individual included in the individual’s household, minus an amount equivalent to 5 percentage points of the Federal poverty level for the applicable family size.

(g) **No resource test or income disregards.** In the case of individuals whose financial eligibility for Medicaid is determined in accordance with this section, the agency [e.g., Florida Medicaid] must not—

(1) Apply any assets or resources test...

That will mean that persons with disabilities can secure Medicaid and have complete access to and control of their formerly disqualifying inheritance or personal injury award.

Most importantly, by avoiding a Special Needs Trust, the client may secure Medicaid without a Medicaid lien at death. See **Exhibit A** attached which describes the application of ACA to a real factual situation in which use of non-probate alternatives to pass on an inheritance, combined with access to Medicaid through the “Adult Medicaid” provisions, completely avoids Medicaid Payback at death.

Second in our consideration of the alternatives to SNTs is the fact that for the first time in U.S. history, persons with pre-existing conditions may purchase private health insurance which has no lifetime or annual limits, guaranteed renewability, guaranteed accessibility, and rates, terms and conditions exactly equal to persons of the same age who have perfect health. See 42 U.S.C. 300gg-3. Prohibition Of Preexisting Condition Exclusions Or Other Discrimination Based On Health Status.

The drumbeat of clients continually complaining of poor service, bad doctors, lengthy waiting times to see a Medicaid doctor indicates that elimination of pre-existing condition exclusions in private health insurance plans will drive many already in SNTs as well as those seeking to avoid Medicaid to get better care through the private health insurance alternative. Few of us would ever opt to be on Medicaid instead of in private health insurance plans. Severely disabled persons will now have the same choice.

Therefore, persons who are not on Medicaid Home and Community Based Services Waiver or in need of institutional care, should not be considered for automatic application of the self-settled Special Needs Trust solution. Planning to acquire health insurance with no Medicaid payback at death must be considered to avoid legal malpractice claims by the client’s heirs.

As an example, the number of persons in Florida who need Special Needs Trusts to preserve access to health care is falling dramatically due to the Affordable Care Act. Research has shown similar results for other states. See the following data for Florida as an example:

19,000,000	Total Florida Population
342,893	Total SSI recipients who are “ <u>disabled</u> ” nonelderly – the first requirement to have an SNT – ELDER LAW ATTORNEYS’ CURRENT MARKET . Of that total:
295,329	Persons with disabilities <u>not on Medicaid Waiver</u> who will not need SNTs and who will on October 1, 2013, be able to buy private health insurance under Section 1201 of the Affordable Care Act, or continue to have Medicaid under Section 2002(a) as a “Category VIII” nonelderly individual in which assets do not count and only MAGI income counts in determining Medicaid eligibility. Will no longer absolutely need a Special Needs Trust to secure health care.
47,564	Persons with disabilities under age 65 <u>on Medicaid Waiver</u> will still need SNTs. The FUTURE MARKET is made up of:
	29,913 Persons with Developmental Disability Waivers*
	11,298 Aged/Disabled Adult Waivers*

5,601	HIV/AIDS Waivers*
317	TBI/SCI Waivers*
337	Alzheimer Waivers*
93	Adult Cystic Fibrosis Waivers*
9	Familial Dysautonomia Waivers*
5	Model – Children’s Medical Waivers

* NOTE: Seven of the eight Med Waiver categories include some or many persons who are age 65+ . Existing data does not have a breakdown for Waiver participants by age. The number of persons needing a Special Needs Trust will be fewer than the 47,564 above.

There are other government programs that may or may not be affected by Special Needs Trust planning, such as Section 8 housing which provides rent subsidies for low-income, disabled and elderly persons. This presentation cannot substitute for a thorough review of the rules and regulations of all the other benefit programs that an individual client may be trying to preserve.

2. The Link between SSI and SSI-related Medicaid

This presentation deals with trusts for beneficiaries with special needs who are “disabled” as defined in §1614(a)(3) of the Social Security Act. The common thread that runs through the drafting and administration of these trusts is that the beneficiary would not financially qualify for SSI and SSI-related Medicaid without the trust or some alternative financial plan.

The most typical special needs client seeks to maintain eligibility for the medical assistance provided by Florida Medicaid. Persons with disabilities meeting the SSA definition of “disabled” cannot engage in full time work and, for this year (2013) may not be insurable in the private health insurance market. Families can often provide a room and food for a person with disabilities, but cannot pay \$3,500 for an MRI, \$2,000 per month for prescription drugs or the occasional six-figure hospital bill.

The cash benefit provided by the Social Security Administration, the monthly SSI check, is limited to a maximum of \$710 (2013). Ironically, the benefit most often sought, Medicaid health insurance is most often acquired through SSI eligibility, not an independent application at the welfare office. As noted above, receipt of at least \$1 of federal SSI disability payments results in full financial eligibility for all Medicaid programs in most states, but not all.

Understanding the SSI rules is critical to successful Special Needs Trust planning is that federal Medicaid statutes prohibit the state of Florida from imposing financial eligibility standards for state Medicaid eligibility that are stricter than the federal SSI rules. 42 U.S.C. 1396a(a)(10)(C)(i)(III). Federal SSI eligibility rules, therefore, are the floor for financial eligibility. Creating Special Needs Trusts that meet the SSI standard will ensure that they meet state Medicaid rules. Therefore, the following discussion will place heavy emphasis on meeting the toughest standard, the federal SSI rules.

3. Sources of Law – Statutes, Regulations and POMS

SSI eligibility is based on federal statutes (42 U.S.C. §§ 1381-1381c), federal regulations (20 C.F.R. §§416.101-416.2227) and the Social Security Administration’s Program Operations Manual System (the POMS).

The POMS are no longer published in paper format, but are available on the SSA website, www.socialsecurity.gov, and accessed from the main page by clicking on “Our Program Rules.” The current URL for the POMS is <https://secure.ssa.gov/apps10/poms.nsf/partlist?OpenView> but practitioners are warned that SSA revises its website often and links are often broken. An alternative access is from the main page of the SSA award-winning website, click on “Attorneys and Representatives” and then on “Resources.”

The POMS are the only source of detailed guidelines for determining the validity of a Special Needs Trust and its proper administration. In *Chevron USA, Inc. vs. Natural Resources Defense Council, Inc.* (1984), 467 US 837, 104 S.Ct. 2778, the court held that in the absence of statutory or regulatory prohibitions, an agency’s interpretations of the applicable statutes shall be given deference. Recently, the U.S. Supreme Court ruled, in *Washington State Dep’t of Soc. & Health Serv. V. Guardianship Estate of Keffeler*, (2003) 537 U.S. 71, 123 S.Ct. 1017, that *Chevron* principles apply to the SSA POMS.

The most important reason, however, to carefully track the POMS in drafting and administering Special Needs Trusts is that the SSA staff regard the POMS as their bible in evaluating SNTs and SNT administration. SSA staff will determine if the SNT counts or does not count as a disqualifying resource, by applying the six main POMS sections that deal specifically with Special Needs Trusts, listed below:

- Si 01120.199 Early Termination Provisions and Trusts [New Section added on June 25, 2010]
- SI 01120.200 Trusts – General, including Trusts Established prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act.
- SI 01120.201 Trusts Established with the Assets of an Individual on or after 1/1/00.
- SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00.
- SI 01120.225: Pooled Trusts Management Provisions
- SI 01120.227: Null and Void Clauses in Trust Documents

As will be seen, the POMS also contain a step-by-step methodology that carefully leads the drafter to successfully create a Special Needs Trusts.

In addition to the POMS sections above, there are well over 50 Regional Chief Counsel Precedents (instructive opinion letters) that apply the POMS to specific trust situations from questions posed by SSA staff. These opinion letters are also published in the POMS at PS 01825.000, and are extremely helpful to drafters of Special Needs Trusts.

Finally, it is important to note that the success of Special Needs Trust planning and execution involves two distinct aspects: first, creating a Special Needs Trust whose terms comply with the SSI resource rules and will not be counted as an asset of the person with disabilities (a one-time event), and secondly, administering the Special Needs Trust according to the SSI income rules so that the distributions from the trust will not be counted as disqualifying income or be regarded as an improper transfer of resources (requiring a lifetime of proper trust disbursement decisions). If either the trust drafter or the trustee fails, the goal of retaining SSI and SSI-related Medicaid may be in jeopardy. Careful adherence to the POMS is the key to success.

C. Alternatives to SNTs

There are a number of other POMS to be aware of and be considered before drafting a Special Needs Trust that could provide good alternatives to such a plan. These are found as follows and the four main alternatives are discussed afterwards:

SI 01150.005: [Determining Fair Market Value](#) (which contains authorization for lifetime or termed prepayment of food and shelter, and lump sum advance payment for personal services)

SI 01150.007: [Transfer of Resources by Spend-Down](#)

SI 01150.120: [Exceptions to the Ineligibility Period--General](#)

SI 01150.121: [Exceptions -- Transfers to a Trust](#)

SI 01150.122: [Exceptions -- Transfer of a Home](#)

SI 01150.123: [Exceptions -- Non-Home Transfers to Certain Family Members](#)

SI 01150.124: [Exceptions -- Transferred Resource Returned](#)

SI 01150.125: [Exceptions -- Transfers for Purposes Other Than to Obtain SSI](#)

SI 01150.126: [Exceptions -- Undue Hardship](#)

Before setting out to do extensive SNT planning for any client, it is wise to consider the four primary alternatives that may be more cost effective and preferred by the client when faced with sudden disqualifying wealth from an inter vivos gift, inheritance or a personal injury settlement.

1. Purchasing Private Health Insurance

The end is near. On October 1, 2013, persons with disabilities will no longer be excluded from purchasing private health insurance and may purchase health insurance from the federal health exchange similar to buying airline tickets online. The insurance will begin January 1, 2014. This is purchasing private health insurance, with private doctors, private hospitals, private labs with premium cost no greater than a person of the same age without any disabilities, and no exclusions or limitations of benefits.

2. Spend-Down Plans

If a person cannot purchase private health insurance yet, other alternatives should be considered before creating a Special Needs Trust. A spend-down plan utilizes SSA statutes and regulations that exempt certain assets from the category of "countable resources." In other words, a Special Needs Trust may not be necessary if the disabled person can use the inter-vivos gift, inheritance, or personal injury settlement proceeds to purchase or add to the equity of certain exempt assets permitted by statute, 40 U.S.C. §1382b(a). The exempt resources are described in the regulations, and in an extremely useful section of the POMS at SI 01110.210 which has a hyperlink leading to more specific POMS sections detailing the requirements for each type of excluded resource. The main exempt resources include:

- A home of any value if used as the disabled person's primary residence, 20 CFR §§416.1210(a) and 416.1212;

- One vehicle of any value used for transportation of the SSI recipient or a member of the recipient's household, 20 CFR §§1210(c), and 416.1218;
- Household goods and personal effects, regardless of value, 20 CFR §§1210(c), and 416.1216;
- Burial spaces worth any amount, 20 CFR §§1210(l), and 416.1231(a);
- A dedicated bank account for "burial expenses" of no more than \$1,500, 20 CFR §§1210(f), 416.1231(b). However, an unlimited amount is allowed in an irrevocable funeral service contract. POMS SI 01120.201.H.1.a.
- Life insurance policies with a cash surrender value of less than \$1,500 and term insurance without limit, 20 CFR §§1210(h), and 416.1230;

For example, as an alternative to a Special Needs Trust, an SSI recipient could pay down an existing mortgage on the home owned by him or her, or buy a new home, or repair or expand the existing home. Often, individuals with disabilities living on SSI prior to the receipt of the inheritance or personal injury award, have put off buying a new refrigerator, washer/dryer or other appliances, clothing, televisions, computers, furniture, or other items of personal property. SSI recipients are often in debt, and can use the newfound funds to pay off credit card balances. Payment of personal loans, however, particularly oral agreements to repay family and friends, is ill-advised without a small claims court order first reducing the debt to a judgment.

3. Purchase of Future Goods and Services

The Foster Care Independence Act of 1999, imposes a penalty for transferring resources for less than fair market value in order to secure or maintain eligibility for SSI. H.R. 1802, 106th Cong. (1st Sess. 1999). The penalty is the amount transferred divided by the Federal Benefit Rate in effect at the time of the transfer. The result is the number of months from the date of the transfer, rounded down to a whole number and capped at a penalty of loss of SSI for no more than 36 months. POMS SI 01150.110.

The POMS issued to enforce the Act, however, include specifically approved techniques which have been determined to be a permissible transfer. For example, the SSI recipient could prepay under a written contract for food and shelter for a period of years. POMS SI 01150.005.C.3.b. Services may also be purchased in the future and prepaid, as long as the terms are reasonable. POMS SI 01150.005.C.3.c. Even a lifetime of prepaid room and board, pursuant to contract, may be purchased. POMS SI 01150.005.D.3.c. "Lifetime" must be measured according to the Life Expectancy Table developed by the SSA Office of the Chief Actuary for the Year 2000 found at POMS SI 01150.110.005.F.

4. Specific Transfers Allowed by Statute

The Foster Care Independence Act of 1999 also exempted certain transfers of resources from the SSI penalty provisions entirely. Included are certain transfers of the SSI recipient's home to a spouse or a child under age 21, a child of any age who is blind or disabled, or a spouse, including a separated spouse. POMS SI 01150.122.A.1. Of course, personal injury or inheritance funds could first be used to improve the home before the transfer. Once the old home is transferred, a new residence could be purchased and become the exempt principal residence of the SSI recipient. In addition, the transfer to a sibling of the SSI recipient's home is permitted if the sibling was residing in the home for at least one year immediately before the date the SSI recipient becomes institutionalized (for example, in a nursing home), as is a transfer to a son or daughter who resided in the home for at least two years before the date the person became institutionalized and who provided care to the mother or father which permitted them

to reside at home instead of in an institution. POMS SI 01150.122.A.2 and 3. Non-home resources may be transferred to the transferor's spouse, including a separated spouse, or another person for the sole benefit of the transferor's spouse, or the transferor's child of any age who is blind or disabled. POMS SI 01150.123.A.

If the client doesn't choose the alternative of the purchase of health insurance through the PCIP non-pre-existing condition health insurance programs under ObamaCare, note that the three alternative categories above – spend down plans, purchase of future goods and services, and specifically permitted transfers – are not mutually exclusive. A recipient of SSI or SSI-related Medicaid may choose to do none, some or all of the alternatives to a Special Needs Trust, and place the remainder of the inheritance or personal injury settlement proceeds in a Special Needs Trust as described below.

II. DRAFTING SPECIAL NEEDS TRUSTS

A. Types of Special Needs Trusts – General

Special Needs Trusts fall into two general categories. The first is trusts using the disabled individual's assets or income, often referred to as first party or Medicaid payback trusts, also called "d4A individual," or "d4C pooled" trusts from the subsections of the federal statute that created them, 42 U.S.C. 1396p. The second type of trust, called third party trusts, are those funded with assets owned by a third party, typically a parent, grandparent, sibling, or other close relative, or a friend.

Generally, trusts established with the assets of an individual (or spouse) will be considered a disqualifying resource for Supplemental Security Income (SSI) eligibility purposes. An individual will be considered to have established the trust

“if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

- (i) The individual.
- (ii) The individual's spouse.
- (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.
- (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.”

42 U.S.C. §1396p(d)(2)(A); For similar limitations in the Medicaid program, see ESS Public Assistance Policy Manual, §1640.0576.07. If the trust is revocable, the entire principal is included as an available asset to the individual. If the trust is irrevocable, any portion available for the benefit of the individual is an available asset. 42 U.S.C. §1396p(d)(3).

Exceptions to this policy apply to a trust established by a will, regardless of the relationship of the now deceased settlor to the individual; a trust for a disabled person under age 65; a Pooled Trust for a disabled person; and Qualified Income Trusts. 42 U.S.C. §1396p(d)(4); ESS Public Assistance Policy §1640.0576.08; Fla. Admin. Code Rules 65A-1.702(15)(a)–(15)(c).

Exempt first party trusts are typically funded from personal injury settlement proceeds or an inheritance. The main purpose of these trusts is to provide for care needs that might not be available from public

benefits. The Special Needs Trust allows the personal injury award to be used for a lifetime rather than used up in a short time if care is handled on a no-insurance, private pay basis.

The common denominator for exempt first party trusts is a “pay-back” provision at the termination of the trust to repay any state Medicaid program for benefits provided during the lifetime of the disabled person before any payments are made to heirs or contingent trust beneficiaries.

First Party Special Needs Trusts provide safe harbor to legally shelter the assets of a person with disabilities, for example, savings and other assets acquired before disability began, personal injury awards, significant monetary gifts and unplanned inheritances. First party trusts are statutory trusts specifically authorized by federal law and require Medicaid payback after the death of the disabled beneficiary. While it may seem harsh that the government requires paying back Medicaid before the remaining assets may be passed to residual beneficiaries, it seems less so when considering the true value of first party SNTs: the government makes a “loan” of medical care at the substantially reduced Medicaid payment rates to doctors and other medical providers and takes a lien, dollar for dollar with no interest, on the funds remaining in the first party SNT if, and only if, there are any funds left at the time the trust beneficiary dies.

For example, without a first party SNT, the person with disabilities would lose SSI (tax free income of over \$8,000 per year) and the SSI-related Medicaid (health insurance for persons with disabilities). Then if the person needed an x-ray, he or she would have to take standard \$250 charge from their invested funds today to pay the radiologist. On the other hand, if the person has a first party Medicaid payback trust, they get the same x-ray and pay nothing today (Medicaid has no co-pays and deductibles, and doctors must accept Medicaid as payment in full). Upon the person’s death, possibly 30 or 40 years or more later, Medicaid is repaid the Medicaid reduced-fee \$51, with no interest, and only if there are funds remaining in the trust at that time.

First Party Special Needs Trusts are sometimes called “statutory trusts” because of their genesis. The Omnibus Budget Reconciliation Act of 1993 (OBRA ’93), Pub.L.No. 103-66, 107 Stat. 312, codified at 42 U.S.C. §1396p, became effective August 11, 1993. This legislation sought to eliminate trust planning for elderly persons seeking Medicaid nursing home eligibility. OBRA ’93 created penalty periods of non-eligibility of up to five years for transfers to “Medicaid Qualifying Trusts.” This same legislation, however, sought not to hurt persons with disabilities, and therefore specifically exempted Special Needs Trusts created pursuant to statute by and for disabled individuals under age 65.

Specifically, OBRA ’93 delineated three trusts that are exempt from the transfer of asset rules in 42 U.S.C. §1396p(d)(4):

- 1) an individual Special Needs Trust containing the assets of a disabled person, under age 65, meeting the requirements described in subparagraph (d)(4)(A) of the legislation, hereafter referred to as a “d4A trust”,
- 2) a “Qualified Income Trust” or “QIT,” also called “Miller Trusts” after the court decision in *Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1990), described in subparagraph (d)(4)(B) of OBRA ’93, and
- 3) a “Pooled Special Needs Trust” described in subparagraph (d)(4)(C) of 42 U.S.C. §1396p.

These three trusts are considered first party trusts or Medicaid payback trusts.

Third Party Special Needs Trusts, however, contain the assets of persons other than the disabled beneficiary's, are not subject to Medicaid payback rules and were not created by statute, with one exception explained below. The validity of Third Party SNTs as a non-countable resource of a disabled beneficiary, and the disbursements from these trusts, are highly regulated by Social Security Administration's SSI rules which govern SSI cash payment eligibility. POMS SI 01120.200.

B. Definition of "Disabled" Person

A common element of all three statutory OBRA '93 trusts under subsection (d)(4) is that the individual must be "disabled" pursuant to the Social Security Administration's statutory definition.

The individual for whom this OBRA '93 trusts must be disabled as defined in the Social Security Act at 42 U.S.C. §1382c(a)(3)(A):

[A]n individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

A child under the age of 18 is considered similarly disabled if the child suffers from any "medically determinable physical or mental impairment" of comparable severity. 42 U.S.C. §1382c(a)(3)(C)(i).

The determination of whether a person is "disabled" under the Social Security Act is standardized in a five-step sequential evaluation process found at 20 C.F.R. §416.920(a)(iv). Note, however, that the person does not have to have a finding of disability prior to creating the Special Needs Trust.

The procedure to determine whether a person is "disabled" under the five-step sequential evaluation process begins with an Internet application (for SSDI benefits) or a call to the Social Security Administration toll-free number (1-800-772-1213) and ends eight steps later, if necessary, in the United States Supreme Court.

Beneficiaries of Third Party Special Needs Trusts do not have to meet the SSA definition of "disability" for the trust to be valid as a safe harbor, but must follow other rules specific to the determination of whether the Third Party SNT counts as a disqualifying resource of the person with disabilities. The rules for distributions from First Party and Third Party Special Needs Trusts, however, are identical and described below.

C. First Party d4 Special Needs Trusts

The Centers for Medicare and Medicaid Services (CMS), formerly known as the Health Care Finance Administration (HCFA), share regulatory responsibility for Medicaid programs with the Social Security Administration. Shortly after passage of OBRA '93, HCFA issued Transmittal 64 as that agency's definitive interpretation of the statutory changes to Medicaid policy. CMS has provided little additional guidance since Transmittal 64. Mastery and understanding of both the SSI rules (Social Security Administration) and Medicaid (Transmittal 64 and CMS regulations) are absolute prerequisites to drafting and administering Special Needs Trusts to allow individuals to become or remain qualified for SSI or Medicaid benefits.

1. Individual d4A SNTs

OBRA '93 provides for the creation of a Special Needs Trust (SNT) containing the assets of an individual under age 65 who is disabled. As noted earlier, in 1999 Congress grafted the OBRA '93 individual d4A disability trust provisions into the SSI rules. OBRA '93 provides that the SNT is exempt from transfer of resources rules if has the following characteristics:

A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of [Title 42]) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

42 U.S.C. §1396p(d)(4)(A).

This simple, one-sentence, 81-word paragraph contains numerous clauses that must be analyzed step-by-step against the SSI requirements for a valid d4A Special Needs Trust. The Social Security Administration has provided a “step-action” checklist to do just that in the POMS:

POMS SI 01120.203.D.1.: The following is a summary of special needs trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION
1	<p>Does the trust contain the assets of an individual who was <u>under age 65</u> when the trust was established? (SI 01120.203B.1.b.)</p> <ul style="list-style-type: none"> • If yes, go to Step 2. • If no, go to Step 8.
2	<p>Does the trust contain the assets of a <u>disabled</u> individual? (SI 011203B.1.d.)</p> <ul style="list-style-type: none"> • If yes, go to Step 3. • If no, go to Step 8.
3	<p>Is the disabled individual the <u>sole beneficiary</u> of the trust? (SI 01120.203B.1.e.)</p> <ul style="list-style-type: none"> • If yes, go to Step 4. • If no, go to Step 8.
4	<p>Did a <u>parent, grandparent, legal guardian or a court establish</u> the trust? (SI 01120.203B.1.f.)</p> <ul style="list-style-type: none"> • If yes, go to Step 5. • If no, go to Step 8.
5	<p>Does the trust provide <u>specific language to reimburse any State(s) for medical assistance paid</u> upon the individual's death as required in SI 01120.203B.1.h.?</p> <ul style="list-style-type: none"> • If yes, go to Step 6. • If no, go to Step 8.
6	<p>The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual attaining age 65. Any <u>assets placed in the trust after the individual attained age 65</u> are not subject to this exception, except as provided in SI 01120.203B.1.c.</p> <p>Go to Step 7 for treatment of assets placed in trust prior to age 65. Go to Step 8 for treatment of assets placed in trust after attaining age 65.</p>
7	<p>Evaluate the trust under SI 01120.200D.1.a. to <u>determine if it is a countable resource</u>.</p>
8	<p>The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Determine whether the pooled trust exception in SI 01120.203B.2. applies.</p>

The POMS sections referred to above lead to further considerations.

a. “Under age 65”

The trust must be established and funded when the person with disabilities is under age 65. The trust continues to be a safe harbor past age 65, however. Persons over age 65 cannot establish an individual d4A statutory trust under this provision. The Special Need Trust document should include an assertion that the beneficiary is under age 65, or contain the beneficiary’s date of birth as a reference point.

b. “Contain the assets of a disabled individual”

The beneficiary of the trust must be “disabled” pursuant to the definition in the Social Security Act, Section 1614(a)(3). However, the individual does not need to be determined disabled prior to establishing the trust. In fact, in many cases, the person with disabilities acquires the assets first, and the trust is done second, and finally the application is made to SSA for SSI disability benefits. SSA Claims staff will not take a full medical application for benefits if the SSI claimant has too many assets or too much income. Thus the planning must be done before the application can be filed. This leaves the practitioner with a problem that on some occasions, the Special Needs Trust planning is done without the certainty that SSA will award SSI benefits, not because the financial planning isn’t correctly done, but because the beneficiary is determined not disabled on medical grounds. It would be wise to consult an attorney who represents claimants for SSDI or SSI disability benefits who can give an opinion whether the person with disabilities qualifies under the SSA standards which are spelled out in the SSA five-step sequential evaluation process to determine “disability.” 20 C.F.R. §416.920(a)(iv).

In addition to real or personal property that may be transferred to a Special Needs Trust, either at initial funding or later, but before age 65, certain income sources may be irrevocably assigned to the trust, such as child support for a disabled child, or alimony for a disabled spouse. This was made clear in the 2009 amendments to the POMS on Trusts. However, SSA advises that there are certain payments that cannot be assigned, and therefore will continue to be counted as income not to the trust, but as potentially disqualifying income to the SSI recipient. See POMS SI 01120.J.1.c.

- Temporary Assistance for Needy Families (TANF);
- Railroad Retirement Board-administered pensions;
- Veterans pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security title II and SSI payments;
- Private pensions under the Employee Retirement Income Security Act (ERISA)(29 U.S.C. §1056(d)).

Any legally assignable payments not on the above list must be made “irrevocably” for those items to not count as disqualifying income to the beneficiary.

c. “Sole Benefit”

The statute does not use the phrase “sole benefit” but SSA requires that the trust be both established for and used for the sole benefit of the person with disabilities. This does not prevent naming contingent beneficiaries after the death of the disabled individual. However, early termination of the trust through “deemed death” provisions are strictly prohibited. For example, stating that “if the beneficiary is denied SSI or Medicaid, this trust shall end and the trust estate distributed as though the beneficiary had died” will result in the result in exactly what is sought to be prevented, denial of SSI and SSI-related Medicaid unless the new 2010 rules in POMS SI 01120.199 are strictly followed as detailed below.

Sole benefit is further defined in POMS SI 01120.201.F.2. which makes clear that payments to third parties that result in goods and services being provided to the beneficiary are not a violation of the sole benefit rule. This includes payment of trustee fees, legal fees, and other expenses that indirectly benefit the disabled beneficiary. The POMS section further advises that the issue of “sole benefit” should not routinely be questioned unless compensation is being provided to a family member or for

some other specific reason brought to the attention of the SSA Claims Representative. However, experience has shown that reasonable compensation paid to family members for extraordinary services will also pass muster with SSA. Although SSA has recently considered a new POMS on family member compensation, the 2009 edition of the POMS which replaced the 2001 edition, did not seek to limit family compensation other than it be evaluated under the normal transfer of resources rules requiring “fair market value” level of services for the amount of compensation paid.

d. “Established by a parent, grandparent, legal guardian or a court”

Presentations by staff who worked on the OBRA '93 Special Needs Trust exceptions revealed that two plain errors were made when drafting the d4A and d4C statutes and determining who could be settlor of the SNT. In the individual d4A SNT, the word “individual” was left out when describing who can “establish” a Special Needs Trust. In the pooled trust d4C section, the phrase “under 65” was left out of the trust section, but was included in the transfer of resources penalty section (to be discussed below). These errors demonstrate why legislation passed in the dead of night without congressional hearings can lead to mischief.

Two important and instructive POMS references help explain the problems raised, POMS SI 011203.B.1.f and B.1.g.

A d4A Special Needs Trust must be established by the individual’s parent(s), grandparent(s), guardian(s) or a court. With regard to parents of minor children, SSA regards this as no problem. But how does SSA treat a legally-competent, disabled adult (for example, a person who lost both legs but not his or her mind)? SSA requires that the parent or grandparent establish the SNT as a seed trust using a nominal amount, like \$10, of the their own money, or if state law allows, a “dry” (unfunded) trust. After the trust is established, the legally competent disabled adult transfers his or her assets to the d4A SNT.

If a d4A trust is established by a parent or grandparent who has a power of attorney from the disabled individual, the trust will be disallowed since the donee of the power is acting as the agent of the principal, here the disabled individual, and the statute does not permit the disabled beneficiary to establish his or her own trust. However, a parent or grandparent could establish the trust with their seed money, and use the power of attorney to transfer the disabled person’s funds into the trust.

With regard to using “a court” as settlor, from the perspective of the federal statute, any court will do – a trial court who handled the personal injury action, a guardianship or probate court, the family court in a divorce directing alimony or child support payments to a SNT, or even a traffic court judge as long as the court has authority under state law to act in that capacity.

However, there is one trap: the trust must actually be “established” by a court order, and not “approved” by the court order. SSA strictly follows the exact language of the 81 word sentence in OBRA '93. Some judges do not want to sign the Special Needs Trust document itself as “settlor.” SSA has approved SNTs where the court enters an order that “hereby establishes the Special Needs Trust and directs attorney [insert name] to execute the trust documents as settlor, on behalf of the court.” This seems to satisfy both SSA and judges.

e. “Reimburse state for medical assistance paid”

The trust must contain specific language that reimburses Medicaid after the death of the individual, before other expenses or disbursements are made. See below for the specific rules for termination by death of the individual.

In 2009, SSA issued new POMS that specifically dealt with this issue. There had been conflicting court decisions regarding the Medicaid reimbursement. Some courts had declared that only the Medicaid services rendered after the creation of the trust needed to be repaid. Other courts ruled that Medicaid was entitled to reimbursement for all Medicaid, even from birth, if the individual had been born with a disabling condition, but didn't create a Special Needs Trust until decades later when the individual inherited money or received a personal injury award. Also, some trusts had mistakenly provided for reimbursement to "Florida Medicaid" instead of requiring reimbursement to all states that provided "medical assistance," the formal name for "Medicaid." In addition to violating the statute, that provision would cheat New York or another state that may have "loaned" state Medicaid services expecting to have a lien for repayment after the death of the individual. A person with disabilities may live in multiple states during their lifetime. If they move from Florida, one of the Section 1634 states where Medicaid is awarded to all recipients of SSI disability checks without independent state Medicaid eligibility determinations, to any one or more of the states that are also Section 1634 states, the recipient of SSI and Medicaid only reports their change of address to SSI, and the new state would not be aware of any potential lien rights. SSA rules seek to apply the statute in strict compliance with the language of the statute.

The new 2009 POMS at SI 01120.203.B.1.h resolves these issues simply: the Special Needs Trust must provide for reimbursement to all states for all time. If the amount remaining in the SNT is less than the total of liens from all states, the remaining amount is prorated among the states based on the relative percentages of medical assistance (Medicaid) provided.

The statute uses the terms "medical assistance" rather than Medicaid because the federal Medicaid statutes use that term, even though the federal agency is call the Center for Medicare and Medicaid Services (CMS), and secondly, unlike Florida, some states have a special name for the Medicaid programs they administer in that state, such as TennCare in Tennessee and MediCal in California. The POMS state it as follows:

To qualify for the special needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in [SI 01120.203B.3.a](#). ...The trust must contain language substantially similar to the language above.

SI 01120.203.B.1.h. The POMS provisions that describe specifically what can be paid prior to Medicaid reimbursement is another trap for the practitioner. Under Florida law, funeral expenses are a Class 1 debt, and routinely paid quickly for obvious reasons. SSA requires, however, that upon death, before funeral expenses are paid, the trustee secure the payoff information from the Medicaid agency and pay the lien first. This has lead the author to label this "the stinking dead body rule:" drag the body to the local SSA office and leave it there while the trustee waits the three to six months to get the payoff information from the various states where the now decedent beneficiary had received Medicaid services.

To avoid the "stinking dead body rule" practitioners should place a notice in the trust document, and inform the trustee, that an irrevocable prepaid funeral contract and other arrangement should be made and funded before the death of the disabled beneficiary.

Other administrative expenses and some, but not all taxes, can be paid before the reimbursement to Medicaid, but not necessarily the ones that practitioners use in non-SNT trusts. Thus, it would be

wise to follow exactly the distributions after death language of the 2009 POMS SI 01120.201.B.3 below. Some practitioners just paste the POMS section into the SNT to avoid drafter's creativity that creates mischief and risk:

3. Allowable and Prohibited Expenses

The following instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.

a. Allowable Administrative Expenses

The following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s):

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

b. Prohibited Expenses and Payments

The following expenses and payments are examples of some of the types not permitted prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

c. Applicability

This restriction on payments from the trust applies upon the death of the beneficiary. Payments of fees and administrative expenses during the life of the beneficiary are allowable as permitted by the trust document and are not affected by the State Medicaid reimbursement requirement.

f. Assets Placed in Trust After Age 65

The SNT must be established prior to attaining age 65 and funded prior to age 65. New money added to the SNT after age 65 will not be sheltered, and that portion of the trust containing post-65 additions will be regarded as an SSI resource, and if the individual's total non-exempt assets exceed \$2,000, the person with disabilities will lose SSI and SSI-related Medicaid. However, interest, dividends or earnings of the trust are not considered additions by SSA. Also, where the trust contains the irrevocable assignment of the right to receive payments from a structured settlement annuity made when the individual was less than 65 years old, the annuity payments paid to an SNT after the beneficiary reaches age 65 are treated the same as before age 65. See also HCFA Pub. 45-3, Transmittal No. 64, §3259.7(A).

The document should direct that no assets be added to the trust after age 65 and give the power to the trustee to reject any assets on or after the beneficiary's 65th birthday.

g. Countable Resource Issues

The last step of the seven step-action chart quoted above, directs the staff to review whether the trust, even if it has all the SNT provisions, meets the general trust evaluation rules for ALL trusts, first or third party, described in SI 01120.200.D.

h. State law and Regional POMS on the Doctrine of Worthier Title

In addition to the items in the national SSI step-action chart, there is one additional requirement: to create a trust that is irrevocable under long-standing law.

Because first party trusts are “grantor trusts” – the settlor and the beneficiary are one and the same, the Social Security Administration believes that the Doctrine of Worthier Title transforms what would be considered an irrevocable trust into a revocable trust by operation of law in those states that have not abandoned the doctrine.

Some states, such as Florida, have fortunately, as a result of the work of the Florida Bar’s Elder Law Section and the Bar’s Ad Hoc Trust Revision Committee, the worthier title issue disappeared for trusts executed on or after July 1, 2007.

F.S. 689.175, passed in the 2006 legislative session, reads as follows:

The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor’s “heirs,” “heirs at law,” “next of kin,” “distributees,” “relatives,” or “family,” or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

The effective date of the new statute was July 1, 2007. The Elder Law Section then subsequently petitioned the Social Security Administration to revise the Regional POMS to reflect the new Florida statute, and the new Regional POMS was issued April 15, 2008. However, even with the excision of the Doctrine of Worthier Title, the trust document must say something about the distribution of the remaining assets after the death of the disabled beneficiary, even if it merely states that the remainder shall be paid to “my heirs at law.”

The relevant Regional POMS is SI ATL01120.201 (“Trust Property”) is typical of what is found in many states:

“Trusts involving SSI recipients/deemors must be reviewed to determine if they are a countable resource.

“Several factors must be evaluated, including irrevocability of the trust, and the identity of the grantor and the beneficiary.

“Even though the trust document has a provision stating that it is irrevocable, the trust might still be revocable under state law depending on the beneficiary designations.

“The beneficiary and the grantor may be the same person in some instances. The actions of a representative payee, legal guardian, a parent, or any other individual legally empowered to act on behalf of the recipient with respect to

his/her funds, in establishing a trust with these funds, are the actions of an agent for the recipient. The actions of the agent are equivalent to the actions of the SSI recipient. Thus, in such cases, it may be said that the SSI recipient has established the trust and therefore is both the trust grantor and beneficiary.

* * *

“A residual beneficiary, while not a current beneficiary of a trust, is named to receive the benefit of the trust after a specific event occurs, e.g., the death of the primary beneficiary. The trust would no longer be a grantor trust if there is a properly named residual beneficiary and may or may not be revocable according to the language used to name the residual beneficiary.

“6. Florida

“In Florida, a specific person or entity may be designated. In addition, wording such as "to my heirs," "to my heirs at law," "to my next of kin," "to my distributees," "to my relatives" or "to my family" (or language of similar intent) is sufficient to name a residual beneficiary.”

i. Choice of Trustee

Once the decision is made to set up a d4A trust, choice of a trustee becomes a major issue. When the proceeds of a settlement provide for a minor beneficiary, parents may want to become the trustee. Parents or other family are almost always the worst choice. This is a trust that needs an experienced fiduciary knowledgeable of and able to navigate in the world of public benefits. The typical choices include bank and brokerage trust departments or private fiduciaries, including attorneys. Several major banks have set up Special Needs Trust Departments, and have attorneys who are the trust administrators and members of the state bar’s Elder and Disability Law Sections, the Academy of Special Needs Planners, the National Academy of Elder Law Attorneys, and attend the Stetson College of Law’s annual Special Needs Trust multi-day conference. The SSI and Medicaid eligibility rules change often, without notice. There is no substitute for an experienced trust administrator.

However, the amount of assets to fund the trust will have a major bearing on choice of trustee. A million dollar settlement with \$800,000 in a structured settlement annuity, and need for a wheel-chair van and home, leaves little for the trustee to bank trust officer to administer other than the cash flow from the annuity. If a parent, other family member, or lay person is proposed as the trustee, some guardianship/conservatorship courts, when approving a settlement for a minor or an adult incapacitated person, have required that the court retain jurisdiction over all investments and disbursements from the SNT. That does not happen with a corporate trustee, and thus saves the substantial costs of maintaining a guardianship year after year. Most corporate trustees have corporate bonds insuring each account to a minimum of \$25 million from employee theft or malfeasance. In addition, where real property is going to be held in the SNT, banks will often have a blanket real property insurance policy at rates well below what the individual could secure for his or her home in hurricane-prone Florida.

j. Trust Protectors and Trust Advisory Committees

The concept of a trust protector is not defined by law in the vast majority of states. A trust protector can be an attorney or another individual who is given authority to remove a trustee, appoint a successor trust, and mediate disputes between the trustee and the beneficiary and the beneficiary’s family if disagreements arise over the trustee’s refusal to approve certain expenditures. The purpose of using a trust protector in this sense is to provide a non-judicial means to accomplish sometimes routine tasks.

Sometimes a trustee will resign, and even the named successor trustee will be unable or unwilling to serve. Giving the power to the trustee to name a new successor trustee saves the time and expense of seeking a court order.

The Trust Advisory Committee is another device that has multiple uses. Parents or other family members often wish to have some input into trust disbursement decisions. A committee with advisory powers, not binding on the trustee, provides that opportunity. Secondly, a committee may be useful in the case of a disabled child with warring divorced or divorcing parents who are fearful that the other spouse will have more influence with the trustee and reap some personal benefit from the disbursements from the child's trust. A three person trust advisory committee, with a mutually selected neutral member and each of the parents having one vote on all disbursements may resolve the problem. Finally, trust advisory committees could be given the power in appropriate situations to remove the trustee and appoint a successor.

2. Pooled d4C SNTs

A First Party Pooled Special Needs Trust is also a statutory trust with its required terms prescribed in the OBRA '93 statute, and fleshed out in the POMS at SI 01120.B.2. The statute, 42 U.S.C. 1396p(d)(4)C describes a pooled trust as follows:

(C) A trust containing the assets of an individual who is disabled (as defined in section [1614\(a\)\(3\)](#)) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section [1614\(a\)\(3\)](#)) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.

a. Similarities and Differences – d4A vs. d4C SNTs

The two statutory trusts, d4A and d4C, both require that the person be disabled. For d4A individual SNTs the settlor who “establishes” the trust may be a parent, grandparent, legal guardian or a court. For d4C pooled trusts, a non-profit association establishes the trust, often called the Master Trust Agreement, and the individual, his or her agent, parent, grandparent, legal guardian or the court executes a joinder agreement establishing a sub-account in the pooled Master Trust. The rules on transferring assets to the trust are the same.

The main differences are that the language that this trust is established and maintained by a non-profit agency not a private or bank trust department as trustee, and the individual with disabilities may

himself or herself sign the trust documents as grantor, which further means that an agent of the disabled individual under a power of attorney may also execute the trust documents.

Another difference in the statutory language is that it does not state that the person has to be under age 65. Although the requirement that the person be “under age 65” is not contained in paragraph d4C, the requirement that the penalty be imposed for age 65 or over transfers is found in the SSI transfer of resources penalty provisions in another part of the federal legislation. Therefore, although a person with disabilities may transfer assets to a d4C pooled trust, he or she will be subject to the SSI penalty period for up to 36 months, depending on the amount transferred, using the formula previously described. After paying the penalty, the funds being held in the d4C trust no longer count as disqualifying resources. However, if a person with disabilities is going to suffer a penalty period anyway, why not simply transfer the excess resources to a non-payback irrevocable first party trust, suffer the penalty period, and permit the assets remaining after death to pass to contingent beneficiaries selected by the person with disabilities, free from the Medicaid payback lien.

Practitioners should be aware, however, that in a departure from the national CMS Medicaid and SSA SSI rules, some state rules, such as the Florida Medicaid rules, are more favorable and permit a person over age 65 to join a pooled trust and not lose Medicaid benefits. However, while retaining Florida Medicaid, the disabled person would lose the federal tax-free SSI payments which range up to \$8,520 per year in monthly income checks.

Note that State Medicaid Manual 3257-3259, also known as HCFA Transmittal 64 at §3259.7 B includes the following warning:

NOTE: Establishing an account in the kind of trust described above (referring to d4C) may or may not constitute a transfer of assets for less than fair market value. For example, the transfer provisions exempt from a penalty trusts established solely for disabled individuals who are under age 65 or for an individual’s disabled child. As a result, a Special Needs Trust established for a disabled individual who is age 66 could be subject to a transfer penalty.

Some states still allow the transfer to a d4C trust even if the beneficiary is over 65, but the practitioner must be aware that the state’s position could change at any time. A letter from CMS in 2008 advised: “[O]nly trusts established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section [1396p](c)(2)(B)(iv) of the Act). If States are allowing individuals age 65 or older to establish pooled trusts without applying the transfer of assets provisions, they are not in compliance with the statute.” Letter from Verlon Johnson, CMS Associate Regional Administrator, U.S. Dep’t of Health & Human Servs. Letter 08-03 (July 2008), available at [http://lawyersusaonline .com/wp- f i l e s /pdfs /08-03-cms-pool-trusts.pdf](http://lawyersusaonline.com/wp-f i l e s /pdfs /08-03-cms-pool-trusts.pdf).

Some states, like Florida, to this date do not consider the transfer to a d4C trust by an individual over 65 years old as a disqualifying transfer for SSI purposes. But others do. And the courts are beginning to weigh in.

In a major blow to advocates that persons age 65 and above may place funds in a pooled trust to retain Medicaid benefits, and despite briefs from NAELA, AARP, and others, the U. S. Circuit Court of Appeals for the Eighth Circuit held in April 2012:

When all paragraphs of the statute are read together, a disabled individual over 65 may establish a type “C” pooled trust, but may be subject to a delay in Medicaid benefits. Despite the lack of an age limit within paragraph 1396p(d)(4)(C) for purposes of

counting resources, Congress intended to exempt transfers of assets into pooled trusts from the transfer penalty rules of subsection 1396p(c)(1) only if the transfers were by those under age 65. 42 U.S.C. § 1396p(c)(2)(B)(iv).

The South Dakota Supreme Court has also held that transfers by beneficiaries over age 65 to “C” pooled trusts are subject to the Medicaid Act’s disqualifying penalties. *In re Pooled Advocate Trust*, ___ N.W.2d ___, 2012 WL 1038644, at *9 (S.D. Mar. 28, 2012). “[U]nder the unambiguous statutory language, transfers of assets for less than fair market value into [“C”] pooled trusts by beneficiaries age 65 or older will be subject to a transfer penalty period for Medicaid eligibility purposes.”

Center for Special Needs Trust Administration, Inc. v. Olson, 676 F.3d 688, (8th Cir. 2012). The Third Circuit Court of Appeals has also ruled that entrance to pooled trusts for persons over age 65 is not penalty-free. *Lewis v. Alexander*, 685 F.3d 325 (3rd Cir. 2012). The score is now 0-2 in the United States Circuit Courts of Appeal for those who argue to the contrary.

The third difference between d4A and d4C trusts, from the perspective of the person with disabilities and his or her counsel, is that with the d4C pooled trust there is virtually no drafting required to “establish” the Pooled Special Needs Trust. The pooled trust, so named because it pools smaller amounts together for investment purposes while maintaining separate accounts for each individual, is similar to the way an attorney manages a client trust account. There is a “master trust” established by the non-profit agency, and the person with disabilities, his or her agent under a power of attorney, or the parent, grandparent, guardian or a court, signs a “joinder agreement.”

Fourth, upon death of the disabled beneficiary, the pooled trust may avoid Medicaid payback to the extent it keeps the remaining trust estate to benefit other persons with disabilities.

The Social Security administration has again provided a step-action chart for its staff to evaluate Pooled Special Needs Trusts.

POMS SI 01120.203.D.2. Pooled Trusts Established under Section 1917(d)(4)(C) of the Act. The following is a summary of pooled trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION
1	Does the trust account contain the assets of a disabled individual? (See SI 01120.203B.2.b.) <ul style="list-style-type: none"> • If yes, go to Step 2. • If no, go to Step 8.
2	Was the pooled trust established and maintained by a nonprofit association? (See SI 01120.203B.2.a. , SI 01120.203B.2.c. and development instructions in SI 01120.203F.) <ul style="list-style-type: none"> • If yes, go to Step 3. • If no, go to Step 8.
3	Does the trust pool the funds, yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (SI 01120.203B.2.d.) <ul style="list-style-type: none"> • If yes, go to Step 4. • If no, go to Step 8.

4	Is the disabled individual the sole beneficiary of the trust account? (SI 01120.203B.2.e.) <ul style="list-style-type: none"> • If yes, go to Step 5. • If no, go to Step 8.
5	Did the individual, parent(s), grandparent(s), legal guardian(s) or a court establish the trust account? (SI 01120.203B.2.a. and SI 01120.203B.2.f.) <ul style="list-style-type: none"> • If yes, go to Step 6. • If no, go to Step 8.
6	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203B.2.g. ? <ul style="list-style-type: none"> • If yes, go to Step 7. • If no, go to Step 8.
7	The trust meets the Medicaid pooled trust exception, however, the trust still should be evaluated under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203E.

There are several non-profit Pooled Special Needs Trusts that maintain websites with instructions on how to join the pooled trust, and provide online copies of the Master Trust Agreement already in place, as well as the Joinder Agreement that must be executed by one of the settlors mention in Step 5 of the SSA step-action chart above.

However, some pooled trusts are NOT COMPLIANT WITH FEDERAL LAW. The practitioner is warned that he or she should do their independent evaluation to determine if the pooled trust they are recommending meets the federal requirements. Use the Step-Action chart above to review the Pooled Trust Agreement.

b. Advantages and Disadvantages

Most practitioners turn to a d4C pooled trust when the amount of assets (inheritance, personal injury, or gift) is smaller, and use an individual d4A Special Needs when the assets are larger. Pooled trusts generally charge a small joinder fee, and a larger percentage of assets under management annual fee than banks charge, but without an annual minimum administrative fee. Thus, the 3% administrative trustee fee that some pooled trusts charge turns out to be much less than 1.25% administrative trust fee that some commercial trustees charge, because the commercial trustees usually have a minimum fee that could be up to \$15,000 per year or more. A 3% fee on a \$20,000 pooled trust account is \$600. And the pooled trust fee goes down as the trust assets are depleted.

However, because most pooled trusts retain all the assets upon the death of the beneficiary, sometimes well exceeding the potential or actual Medicaid lien, for larger amounts it may be advisable to use a commercial trustee with its larger fee, and permit the transfer of remaining assets to the contingent beneficiaries after payment of the Medicaid lien on the death of the disabled beneficiary. Other Pooled Trust operators will sign an agreement that if the Medicaid lien is smaller than the amount remaining in the pooled trust account, the trustee will pay off the lien, retain 5% as an administrative closing fee, and turn over the remaining funds to the deceased beneficiary's heirs. Thus, there is no one

right answer. It will depend on the size of the assets funding the trust, the possibility of not out-living one's assets, and the amount and cost of Medicaid services being provided each year.

First Party Special Needs Trusts, whether individual or pooled, are almost always declining balance or wasting trusts. The funds put aside are their lifetime savings, especially in personal injury awards for persons who are totally disabled and forever unable to work. Trust earnings are rarely, except in extraordinary multi-million dollar settlements, sufficient to maintain the nonworking individual for the rest of their life. Some principal is necessarily invaded to make distributions. As a result, in large personal injury settlements or inheritances, it may make sense to begin with a individual d4A trust in case of sudden death which yields a possibility of contingent beneficiaries receiving some of the remainder after payment of the Medicaid lien. Later as the trust estate dwindles to amounts that no longer justify the large commercial administrative annual minimum fees, transfer the trust estate to a d4C pooled trust. There is no POMS rule or statutory prohibition on transferring the assets from a d4A to a d4C Special Needs Trust.

c. Choosing a Particular Pooled Trust

There may be several fiduciaries involved in the Pooled Trust: the nonprofit organization, the trustee or trust administrator (or both), and the investment advisor.

There are several pooled d4C trusts in Florida as well as across the United States. As these trusts are utilized with more frequency, the attorney recommending a d4C will be well-served to develop a due diligence checklist. Following is a suggested starting point for such a list.

- Are the principals of this Pooled Trust bonded or insured against theft of the client's funds?
- When was the trust established?
- Is the administrator a nonprofit organization?
- What is the name, address, and telephone number of the nonprofit?
- What is the mission and length of existence of the nonprofit?
- Who are the principals of the nonprofit and the Pooled Trust?
- Who are the trustees of the Pooled Trust?
- Will the individual's assets be maintained in a separate account?
- Is there a fee schedule? If so, what are the fees and when are they paid?
- In addition to management fees, are there also fees charged for trades, mutual funds, and other investments?
- Are the trustees knowledgeable about SSI, Medicaid, and other benefit program requirements regarding disbursements?
- Does the trustee examine each disbursement request to ensure that the distributions are not going to adversely affect the beneficiary's eligibility for public benefits?
- Are there available curriculum vitae for all trustees relative to fiduciary experience?
- How many participants are in the Pooled Trust?
- What is the dollar value of total assets under management of the trust?

- Is there a separate investment advisor for the trust? Is there a curriculum vitae for the investment manager?
- Are the three most recent annual accountings of the trust available?
- How frequently is an accounting provided to the beneficiary? To the Department of Children and Families? To Social Security?
- Does the accounting follow statutory fiduciary accounting standards?
- What is the process on the death of a beneficiary?
- What happens to any remaining funds in the trust after the death of a beneficiary?

3. Alimony SNTs

One of the changes in the new 2009 POMS is the specific reference to alimony trusts in POMS SI 01120.201.C.2.b and SI 01120.200.G.1.d. Alimony trusts must be established by the court, with a court order irrevocably assigning the alimony payments to the d4A or d4C Special Needs Trust. However, practitioners should be aware that alimony payments which are tax deductible to the payor, and taxable to the payee, will lose their tax-favored status unless the parties execute a separate agreement, initiated by the payee, that the alimony payments paid to a third party, the Special Needs Trust, will continue to be treated as though paid to the payee for tax purposes. For public benefits purposes (SSI and SSI-related Medicaid), the irrevocably assigned periodic alimony payments will no longer be counted as disqualifying income to the payee disabled spouse. This will open up the possibility of acquiring public health insurance (Medicaid) for those ex-spouses who are uninsurable in the private market.

Bear in mind, however, the prohibition of non-assignability of some income streams discussed above. Specifically, family law attorneys frequently secure a Qualified Domestic Relations Order (QDRO) to divide a pension plan, which itself is sometimes the largest asset in the marital estate. However, an ERISA pension plan if awarded to a disabled spouse, cannot be assigned to a Special Needs Trust. POMS SI 01120.201.J.1.c. If the pension payment is greater than \$730, (the \$710 Federal Benefit Rate less the statutory \$20 monthly SSI income disregard), it will be counted as “unearned income” to the disabled divorced spouse and make the disabled ex-spouse permanently disqualified from SSI benefits and SSI-related community (non-institutional) Medicaid.

In such as scenario, the family law attorney may wish to trade off the pension plan for other marital assets during negotiations on equitable distribution of the marital assets, or seek additional alimony payments to be irrevocably assigned to eh alimony SNT.

Finally, an alimony SNT can hold more than the income stream from the alimony payments. It may also hold the equitable distribution cash or property assets that the disabled spouse received in the Marital Settlement Agreement or court judgment.

4. Child Support SNTs

Child support payments are income to the disabled child. There is a one-third reduction authorized by statute and regulation (see 20 CFR §416.1124(c)(11)) from the amount actually paid, but the remainder is subtracted from the child’s Federal Benefit Amount (\$674 in 2011), reducing the monthly SSI check payable to the child. This reduction may be avoided entirely by irrevocably assigning, by court order, the child support payments to a Special Needs Trust. POMS SI 01120.200.G.1.d and SI 01120.201.C.2.b.

As with alimony, if the disabled child also has any assets, the assets may be placed in the Special Needs Trust which will then contain both the assets and the legally sheltered child support income stream.

Child support may continue past age 18 for dependent disabled children. F.S. §743.07(2). There is no limitation on the type of child support that may be irrevocably assigned by court order to a d4A or d4C First Party Special Needs Trust.

Directing the child's assets and monthly child support payments will enable the child to receive SSI and SSI-related Medicaid. The Medicaid health insurance is important because parents' employment-related group health insurance often has limitations on coverage for adult children not in college, and children with disabilities are not insurable in the private health insurance market. The Obama health care legislation enacted in March 2010 now permits parents to continue health insurance until age 26 for adult children.

5. Structured Settlement Annuities and SNTs

A structured settlement is an alternative way to pay part or all of a personal injury claim on an installment basis, usually through a special annuity, that may have advantages to the disabled beneficiary. Properly handled so that the plaintiff avoids premature constructive receipt of the funds, the annuity payments are exempt from income tax under Internal Revenue Code §§104(a)(2) and 130(c).

There are structured settlement brokers involved in nearly every sizable personal injury settlement. The defense side usually makes the structure offer because the cost to the defendant is less for an annuity than for a cash settlement. However, there are now "plaintiff-oriented" structured settlement brokers to advise disabled plaintiffs and their personal injury attorneys, and shop for the best return on a structured settlement annuity contract that has a better rate of return on this investment.

The d4A trust often comes in as the case is about to settle or go to trial. The dollar amount of the broker's commission depends on the amount of the structured settlement sold. The structured settlement brokers have been advising the plaintiff, defendant, or both. The attorney experienced in public benefits availability then arrives on the scene to analyze the case from a public benefits perspective, advise on allocation among outright distribution, d4A or d4C trust, and structured settlement annuity, then draft the trust if appropriate. This scenario contains some potential conflicts among the players.

The structure brokers are advocating to place as much as possible in the structure annuity. The plaintiff's attorney wants what is best for the disabled party, but also wants the proceeds distributed at the earliest possible time in order to get paid and close the file. The attorney advising on disability issues may be wary of the rationale for determining the amount allocated to structure and concerned that more money should be in the d4A trust to meet the disabled person's needs. A structure paying fairly large monthly payments may not give the disabled person the amount needed to purchase a home or a disability-friendly vehicle and their replacements, or to cover other unforeseen needs.

Although structures are routinely used, it is unclear whether the Social Security Administration will consider the income from the structure unavailable even if placed in a properly drafted d4A trust.

POMS Section SI 01120.200G.1.d. provides:

A legally assignable payment (see SI 01120.200G.1.c for what is **not** assignable), that is assigned to a trust, is income for SSI purposes **unless** the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

Structured settlement is another subject that the practitioner must know about in the situations described in this presentation, but an exhaustive analysis is beyond the scope of the discussion. It is important for the attorney to understand the role of structured settlements and the role of the first party Special Needs Trust to make a reasonable allocation of the settlement proceeds. Robert Fleming, a Tucson, Arizona, elder law attorney, suggests that the structure allocation is really part of the traditional asset allocation for a fiduciary and that the structure portion equates to the income-oriented investment allocation. The amount allocated to the Special Needs Trust equates to the growth portion of the portfolio.

However, a structured settlement payment to a disabled individual rather than irrevocably assigned to the Special Needs Trust will be counted as unearned income, reducing the SSI payment by all but \$20 of the amount of the structured settlement monthly payment. Furthermore, a structured settlement payment to a parent or parents of a minor child where deeming of assets and income to the child is at play, will result in total elimination of SSI and SSI-related Medicaid eligibility because the structured settlement contract itself is a countable resource under the SSI resource rules. 20 CFR 416.1201(a)(1). Florida, along with 48 other states, provides a statutory mechanism for selling the structured settlement income stream. F.S. 626.99296. Therefore, the contract, even though “irrevocable” has an out, and can be sold to the secondary market in the structured settlement industry, albeit only after court approval. The fact that court approval is required before the disabled individual can access this structured settlement annuity resource does not make the item an “unavailable resource” under the rules. POMS SI 1110.305.C.1-3.

Finally, even with the 2009 version of the new POMS, there is no definitive statement on how to value, or whether to value, a structured settlement payment that is made to a disabled person, the person’s deems (parents or spouse) or even when irrevocably assigned to the Special Needs Trust. In the latter scenario, a decision by the Social Security Administration’s Appeals Council ruled that although the irrevocable assignment was permitted and the structured settlement agreement did not count as a resource, the monthly payments were to be treated as in-kind support and maintenance. This reduces the tax-free SSI monthly payments by one-third plus \$20 over the lifetime of the structure payments, which are often the lifetime of the person with disabilities. A loss of tax-free income for life can be expensive. It far outstrips any federal income tax advantage of using a structured settlement. If the settlement is taken for all cash, and the personal injury settlement placed in a Special Needs Trust, this reduction in the monthly SSI check is completely avoided.

D. Third Party Special Needs Trusts

1. Third Party SNTs under SSI rules

a. General Provisions

Third party trusts are evaluated under the rules in the POMS, at SI 10020.200. For public benefits purposes, the difference between a first party and a third party trust, seems easy: first party trusts contain the assets of the disabled beneficiary and third party trusts contain the assets of a third party. As we have seen with first party d4A trusts, the difference is not who is authorized by federal statute (parent, grandparent, guardian or court) to execute the trust. A person with disabilities will be considered to have established a trust if any assets of the individual were transferred to the trust other than by will either by the individual himself or herself, the spouse, or someone acting at the request or control of the individual. The latter refers to early attempts in the history of d4 SNTs to secure court orders directing settlement proceeds funded by an insurance company directly to a trust. This does not work. If the person with disabilities has the ability to control the assets, such as consent in settling the personal injury claim, the acts of the court and the insurance company are seen as the acts of the disabled person. Therefore a first party trust would be needed. POMS SI 01120.200.B.17.

With regard to inheritances, a devise or intestate share from a decedent's estate are the funds of the disabled person, even though the family may believe that "it was Uncle Charlie's money" that the disabled beneficiary inherited and have to be put into a d4 Medicaid payback trust to retain SSI and Medicaid benefits. Had Uncle Charlie executed a testamentary or inter vivos Special Needs Trust for the disabled person's benefit, it would be regarded by SSA as a third party trust, the Medicaid payback would not be required, the funds from Uncle Charlie would have passed to the contingent beneficiaries upon the death of the primary disabled beneficiary, and the disabled person's funeral expenses could have been paid if the terms of the trust so provided.

Third Party SNTs are subject, however, to the same trust distribution rules as First Party d4 Trusts during the life of the primary disabled beneficiary contained in POMS SI 01120.200.

b. Avoiding "Countable Resource" Determinations

For the individual beneficiary to secure or retain public benefits from the SSI or Medicaid programs, all trusts, including d4A, d4C and Third Party SNTs, must not permit the disabled beneficiary to:

- Revoke the trust
- Terminate the trust, nor
- Direct trust assets for his or her support (that is, the trust must contain a "spendthrift clause."

This issue is the seventh step in the assessment of d4A trusts, and applies to Third Party SNTs. POMS Section SI 01120.200D.2. provides:

If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his/her own support and maintenance, the trust principal **is not** the individual's resource for SSI purposes.

In POMS SI 01120.200.D.1.a. SSA reiterates that if there is any way the trust estate can be reached by the disabled beneficiary, the trust is going to be regarded as a countable resource.

If an individual (claimant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal **is** a resource for SSI purposes.

Additionally, if the individual can sell his or her beneficial interest in the trust, that interest is a resource. For example, if the trust provides for payment of \$100 per month to the beneficiary for spending money, absent a prohibition to the contrary (e.g., a valid spendthrift clause, see [SI 01120.200B.16.](#)), the beneficiary may be able to sell the right to future payments for a lump-sum settlement.

It is critical to avoid having any trust benefiting a person with disabilities from being counted as a "resource" under the SSA rules. If the trust, whether it is a first party or third party trust, is a countable resource and has more than \$2,000 in it, the SSI recipient will lose public benefits.

Both first and third party trust documents, therefore, need to explicitly provide that the disabled beneficiary shall neither have the power to revoke nor to terminate the trust, directly or indirectly.

In addition, the trust should contain two additional clauses.

First, limitations on the trustee's discretion as to the purpose of the distributions. This type of trust typically contains language that distributions should supplement, but not supplant, sources of income including SSI or other government benefits. POMS SI 01120.B.13. While a purely discretionary trust gives the power to a trustee to deny a particular distribution, in a support trust using health, education, maintenance and support (HEMS) language the trustee would not have the power to deny all distributions completely. Otherwise, the trustee would frustrate the intent of the settlor. Therefore, the standard language in a third party Special Needs Trust should include the expression of the settlor's intent as supplementing but not supplanting government benefits, including SSI and Medicaid.

Second, the trust should contain a spendthrift clause so that payments cannot be anticipated and assigned. According to the Social Security Administration definition,

A **spendthrift clause or trust** prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. This means that the beneficiary's creditors must wait until money is paid from the trust to the beneficiary before they can attempt to claim it to satisfy debts. It also means that, for example, if the beneficiary is entitled to \$100 a month from the trust, the beneficiary cannot sell his/her right to receive the monthly payments to a third party for a lump sum. In other words, a valid spendthrift clause would make the value of the beneficiary's right to receive payments not countable as a resource.

POMS SI 01120.200B.16

Third Party Special Needs Trusts do not have to contain Medicaid payback nor suffer many of the other limitations described the SSA eight step-action charts in the POMS at SI 01120.203.D.1 and 2, with one exception: if the person transferring his or her funds for the benefit of a disabled person is himself or herself doing so to be eligible for Medicaid benefits, the third party trust for the disabled person must meet the d4A or d4C requirements, including Medicaid payback on the death of the disabled beneficiary of the third party trust. See the federal Medicaid instructions to the states contained in "State Medicaid Manual 3257-3259," also known as HCFA Transmittal 64, dated November 1994, in Sections 3258.10.B and 3259.7.A.

E. Mandatory Notification to SSI or Medicaid on Creation of Trust

The last act of the drafter of Special Needs Trust of a d4A and d4C SNT or a funded Third Party SNT is to serve a copy of the executed Special Needs Trust on the Social Security Administration. It is not necessary to advise the public agencies of yet unused testamentary or unfunded stand-alone inter vivos trusts, because the possibility exists that the intended disabled beneficiary may predecease the settlor before the trust is funded, or the benefactor may never fund the trust for a variety of reasons.

However, it borders on malpractice not to serve the Social Security Administration with a copy of the d4A or d4C trust on behalf of the SSI claimant AT THE TIME IT IS FUNDED. And it is simple to do. Failure to do so subjects the client to potential civil and criminal penalties. Secondly, if there were to be a technical defect in the trust document, it is much better to know about it right away, than to have SSA discover the existence of the trust, and its defect, three years later. At that time, if the trust is defective, SSA will demand repayment of all the SSI funds paid during the past three years. Better to only have to deal with one month of overpaid funds, and fix the trust, or take an appeal if SSA has improperly denied benefits.

There is no right of privacy for persons receiving means-tested public benefits like SSI and SSI-related Medicaid. When the person with disabilities applies, they sign permanent waivers and agree to promptly report any changes in their finances. The duty to report is on the claimant; it is not the responsibility of the public benefits agencies to catch the claimant. See 20 CFR §416.704. When SSA or Medicaid does find someone who has hidden the changes in their financial status from the authorities, the agencies have a duty to investigate and where appropriate, terminate benefits and initiate criminal proceedings, one or both. It is never worth making a small civil problem into a big criminal one. Therefore, report. There is no such thing as over-reporting, only under-reporting.

1. Individual Already Receiving SSI Benefits

The SSA workload is divided by postal zip codes. Each local Social Security office serves one or several postal zip codes. To find the correct office, use the Social Security website, www.socialsecurity.gov, click on “how to contact us,” and type in the five digit zip code of the SSI recipient, or if he or she has a Representative Payee (the person appointed by SSA to receive the SSI claimant’s disability checks due to the incapacity of the SSI recipient), the zip code of the Representative Payee. Then send the following to the local SSA office, Certified Return Receipt Mail:

- A copy of the d4A trust, or if joining an existing d4C pooled trust, a copy of the pooled trust Master Agreement and the claimant’s Joinder Agreement;
- A copy of the appropriate d4A or d4C step-action chart found on the SSA website in the POMS at SI 01120.203 or copied from these materials.
- A copy of the “SSI Spotlight on Trusts” found on the SSA website at <http://www.socialsecurity.gov/ssi/spotlights/spot-trusts.htm>

The point of sending SSA staff pages from their own 55,000 page Program Operations Manual (POMS), is that some staff are not yet familiar with their own rules favorable to trusts, apply the first party Medicaid payback standard to the third party trusts by mistake, and make other errors. To reduce mistakes, practitioners should lead the SSA staff to the right conclusion.

2. Individual Not Yet Receiving SSI Benefits

Follow the above procedures if the person has an SSI application pending. If not pending, but the disabled beneficiary is about to apply for SSI benefits, give him or her the above listed three items to take to the SSA local office when they fill out the formal application.

3. Individual Receiving Medicaid Benefits Only

If the person is receiving Florida MEDS-AD, Medicaid ICP benefits, or other Medicaid-only benefits, notify the appropriate Florida DCF office. If the individual receives Home and Community Based Services, but not SSI, notify the individual’s DCF Support Coordinator (a private Social Worker paid by the government to help the client with benefit applications and administration).

III. ADMINISTRATION OF SPECIAL NEEDS TRUSTS

A. In General

The Special Needs Trust must not only get off to a proper start in order to protect benefits for the beneficiary, but also not cause the beneficiary to lose other benefits by making disqualifying distributions. SSI is a regulatory minefield. Continuing eligibility may be based on how payments are made more than what the payments are for. Anything less than expert knowledge of the relevant POMS is a potential nightmare for the trustee and the beneficiary.

The word “income” in the phrase “public benefits income” has nothing to do with IRS taxable or non-taxable income concepts. Income is defined differently in the SSI world and Medicaid world. It is important for the trustee to understand exactly which program or programs the beneficiary is receiving benefits from. The trustee also needs to examine the trust document to determine what type of discretion the trustee has over payments to be made to or on behalf of the beneficiary.

The trustee often must make decisions that are not popular with the trust beneficiary, particularly a beneficiary with enough capacity to know that there is a trust and that the trust may currently have the financial ability to pay for nonessential items. The special needs trustee must develop a methodology to confirm special needs and requests for trust distributions.

The trustee and the attorney for the trustee should consider the additional responsibilities that are part of a Special Needs Trust in determining reasonable fees for services.

B. Medicaid Disbursement Rules

For those beneficiaries that do not receive SSI, but only Medicaid ICP or HCBS benefits, state Medicaid rules must be considered before making any disbursements from a Special Needs Trust to third parties who provide goods and services to the disabled beneficiary. Any funds paid directly to the individual from the trust will be counted as income to the individual.

C. SSI Disbursement Rules – First vs. Third Party SNTs

For first party d4A individual and d4C pooled SNTs, there are two issues of concern when making distributions: whether a particular trust disbursement is going to be counted as “countable income” to the beneficiary, possibly reducing or eliminating the beneficiary’s SSI eligibility for that one month, and secondly, whether the distribution would be a violation of the SSI “sole benefit rule,” which could possibly, depending on the amount of the distribution, eliminate eligibility for up to 36 months from the date of the distribution. The first issue really involves not what is going to be provided from the trust funds, but how (adhering to the three great rules for trust distributions described below). The second issue requires an analysis of who benefits, even if the “how” of the distribution is done correctly. The two following sections discuss these different considerations.

For Third Party Special Needs Trusts, however, the trustee can make distributions from the trust funds to other persons, without concern for whether it is a violation of the sole benefit rule. The third party trustee only has to be concerned with violating the SSI income rules.

The reason that trustees of third party SNTs do not have to be concerned about the sole benefit rule is that settlors of third party testamentary or inter vivos trusts can do anything they want with their own assets. First party SNTs contain the assets of the disabled beneficiary. The SSI anti-transfer of resources statute prohibits individuals from giving away assets in order to qualify for SSI benefits. The anti-transfer statute allows the disabled person to place his or her assets in a trust, but the funds must be spent “solely” on that same person. Since the assets in the third party SNT never belonged to the disabled beneficiary, there is no possibility of the disabled beneficiary suffering penalty for “giving away” what was never the beneficiary’s in the first place. As will be shortly seen, “sole benefit” is a term of art, however, not easily applied.

1. Distributions and the SSI Income Rules

Social Security defines income as “any item an individual receives in cash or in-kind that can be used to meet his or her need for food or shelter.” POMS Section SI 00810.005.

Social Security policy regarding Disbursements from Trusts, at Section SI 01120.200E, succinctly describes the three great rules (paragraphs 1a, 1b, and 1c) for distributions from first or third party trusts:

E. Policy - Disbursements From Trusts

1. Trust Principal Is Not a Resource

If the trust principal is not a resource, disbursements from the trust may be income to the SSI recipient, depending on the nature of the disbursements. Regular rules to determine when income is available apply.

a. Disbursements Which Are Income

Cash paid directly from the trust to the individual is unearned income.

Disbursements from the trust to third parties that result in the beneficiary receiving non-cash items (other than food or shelter), are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt (see [SI 00815.550](#) and [SI 01110.210](#)).

For example, if a trust buys a car for the beneficiary and the beneficiary's spouse already has a car which is excluded for SSI, the second car is income in the month of receipt since it would not be an excluded resource in the following month.

b. Disbursements Which Result in Receipt of In-kind Support and Maintenance

Food or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rule. (See [SI 00835.300](#) for instructions pertaining to the PMV rule. See [SI 01120.200F](#) for rules pertaining to a home.)

c. Disbursements Which Are Not Income

Disbursements from the trust other than those described in [SI 01120.200E.1.a.](#) and [SI 01120.200E.1.b.](#) are not income. Such disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc (see [SI 00815.400](#)).

Disbursements made from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if those items would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt (see [SI 00815.550](#) and [SI 01110.210](#)).

For example, a trust purchases a computer for the beneficiary. Since the computer would be excluded from resources as household goods in the following month, the computer is not income (see [SI 01130.430](#)).

The Social Security Administration provides the following guidelines in its publication, “SSI Spotlight on Trusts”:

How does money from a trust that is *not* my resource affect my SSI benefits?

- Money paid directly to you from the trust reduces your SSI benefit.
- Money paid directly to someone to provide you with food or shelter reduces your SSI benefit—but only up to a certain limit. No matter how much money is paid for these items, we subtract no more than \$244.66 (in 2011) from your SSI check for the month you receive the items.

- Money paid directly to someone to provide you with items other than food and shelter does not reduce your SSI benefits. (Items that are not "food or shelter" include medical care, telephone bills, education, entertainment, etc.)

The trust administration disbursement rules can be easily summarized as 1) don't give the disabled beneficiary cash or write checks directly to him or her; 2) anything paid directly to a third party vendor for food or shelter will reduce the check but only by a small fixed number, and 3) anything paid to a third party vendor directly for items that are not food or shelter has no effect on SSI benefits.

The list of things that are not food and shelter are endless. The list includes, for example, Dallas Cowboy season tickets, computers, educational courses, movie tickets, transportation expenses, vacations, furniture, and on and on.

It is often not what is paid for, but how it is paid that requires careful thought by the trust administrator. An example illustrates the proper method of using SNT funds to benefit the SSI recipient. Suppose the SSI disabled beneficiary wants a big screen TV costing \$800. Giving \$800 by cash or check directly to the beneficiary, results in reportable countable SSI income, and SSA then subtracts the \$800 from the \$674 (2011) SSI check, yielding no SSI benefits the following month. Instead, to do it properly, the beneficiary shops, selects the HD TV they want, advises the trustee, and a check is cut to the electronics store for the cost of the TV. No reporting is required and no benefits are lost. The beneficiary has a nice new TV. If, however, the beneficiary wants a second or third car in the beneficiary's name, disbursement would result in the SSI claimant having countable assets over the \$2,000 limit. One car of any value does not count in the resource eligibility determination: two cars do (unless title is vested in the trust's name, which has its own set of problems).

With regard to the payment of food and shelter expenses, the application of the in-kind support and maintenance rule is capped by the Presumed Maximum Value (PMV), a fixed amount of deduction from the beneficiary's next monthly check. The SSI reduction of benefits applies only once per month, no matter how many items are purchased from the list of the ten items that legally make up "food and shelter" expenses under the SSA definition. Thus, a beneficiary could have a substantially improved lifestyle. The trustee could pay directly, each month, a \$5,000 mortgage or rent payment, a \$500 electric bill, and a \$700 grocery bill, with the total loss of benefits is capped by the PMV of \$56.66 (2013), which is subtracted from the SSI check of \$710. A new PMV is calculated each January as follows: one third of the Federal Benefit Rate (the maximum SSI payment to an individual, in 2013 it is \$710), plus \$20.

What makes up "food and shelter"? Food is fairly easy to define, and most trustees would recognize disbursements from the trust utilized for food. Determining shelter costs are not as easy to recognize. Social Security has a policy outlining 10 household operating expenses included as in-kind income and therefore reduce the individual's SSI check. But ONLY these ten reduce an SSI check because of in-kind support and maintenance. For example, things that would ordinarily be considered "household operating expenses" but are not under the SSI rules include telephone, pool maintenance, lawn care, cable or satellite TV, and supplies to maintain the home. Only the ten items below count.

The 10 household operating expenses denominated as such by SSA are:

- Food
- Mortgage (including property insurance required by the mortgage holder)
- Real property taxes (less any tax rebate/credit)
- Rent

- Heating fuel
- Gas
- Electricity
- Water
- Sewer
- Garbage removal

POMS Section SI 00835.465D.1.

Finally, SSA issued new POMS instructions in January, 2009, that seek to restrain use of credit cards to purchase food, and gift cards as a way to provide extra case to beneficiaries. See POMS SI 01120.201.I.1.d and e:

d. Disbursements for Credit Card Bills

If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month

For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.

e. Disbursements for Gift Cards and Gift Certificates

Gift cards and gift certificates are considered cash equivalents. If a gift card/certificate can be used to buy food or shelter (e.g. restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card/certificate is a resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g. bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income (see [SI 00830.522](#)).

2. Distributions and the “Sole Benefit Rule”

Of all the concepts in drafting or administering SNTs, attempting to comply with the “sole benefit rule” is the most difficult because it is subject to the most interpretation. Experts in Special Needs Trusts will disagree most often on the application of this rule.

Experts who take the narrowest view of the “sole benefit rule” cite the only POMS section that discusses the rule. POMS SI 01120.201.F.2. However, that section of the POMS talks about “sole benefit” in the context of “establishing” the trust, not administering the trust assets. Clearly, a d4A or d4C SNT could not name a person other than the disabled beneficiary in the document to benefit from the trust. The language also states that “the trust may provide” for compensation to professionals and for other services. It does not say that distributions cannot be made to others:

2. Trust Established for the Sole Benefit of an Individual

Consider a trust **established for the sole benefit of** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life. However, the trust may provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust.

NOTE: This should not routinely be questioned unless compensation is being provided to a family member or the adjudicator has some other reason to question reasonableness of the compensation.

Do not consider a trust that provides for the trust corpus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual. However, payments to a third party that result in the receipt of goods or services by the individual are considered for the sole benefit of the individual.

Certain debts seem to be unavoidable, and the trust funds are within the reach of creditors, given the general legal prohibition against sheltering trust funds from creditors through self-settled spendthrift trusts. For example, how could a d4A trustee refuse to pay the IRS for the beneficiary's unpaid federal income taxes, federal student loan obligations (not even dischargeable in bankruptcy), deficiency judgments in mortgage foreclosure and auto repossession actions, and civil judgments for defaults in payment of personal loans, and court-ordered child support and alimony obligations. Failure to pay certain creditors, even without a court order or judgment, are federal or state crimes, such as non-payment of federal income taxes (a felony), and non-payment of traffic tickets (a misdemeanor). Failure to pay court-ordered child support or alimony can result in criminal contempt and incarceration, as well as enforceable civil judgments against a person's assets, including those in a d4A or d4C trust.

Failure to provide food, clothing, shelter and medical care for children in the disabled person's care is a felony, punishable by incarceration, even in the absence of a court order for child support in most states. For example, Florida Criminal Statute §827.03(3) defines non-support of a child, styled "Neglect of a child," as a second or third degree felony and in Paragraph 1 of the statute defines it as:

A caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child.

Note that the criminal statute is not limited to parents. It imposes criminal liability on a "caregiver" which presumably could include a step-parent head of the family who was a beneficiary of a Special Needs Trust. There is no comparable criminal statute for failure to support a spouse in Florida. However, under the theory that marriage is a contract, the Florida legislature has created an action for maintenance of a spouse without requiring a divorce (dissolution of marriage) action.

Florida Statutes, §61.09: “If a person having the ability to contribute to the maintenance of his or her spouse...fails to do so, the spouse who is not receiving support...may apply to the court for alimony...without seeking dissolution of marriage, and the court shall enter an order as it deems just and proper.”

Cannot the trustee “settle” the claim before it is filed? The law always favors the resolution of claims before they become the subject of litigation. Based on the foregoing criminal statutes for support of spouses and children, it seems that the trust assets could be used to make payments for which failure to pay would result in serious penalties, as would failure to pay income taxes.

Another argument for using the disabled beneficiary’s Special Needs Trust funds to support spouses and particularly children, in apparent contradiction to the “sole benefit rule,” has to do with the very nature of the personal injury settlements or court verdicts that commonly form the excess resources of the majority of SNT trust estates.

One of the elements of a personal injury recovery is economic loss, particularly, past lost income and future lost income reduced to present-day value. It is from their income that individuals support their families. The purpose of providing settlement funds or court judgments is to make the injured party whole to, among other things, support his or her family. The size of the settlement is calculated based in part on the amount of income the injured party was making in the past, with a projection for lost wages in the future. It is then reduced to present day value and awarded to the plaintiff. Often these calculations result in tens or hundreds of thousands of dollars. If the plaintiff is a recipient of SSI and SSI-related Medicaid, he or she may use the personal injury settlement funds to establish a Special Needs Trust.

How ironic would it be if the rules for administering Special Needs Trusts would prevent the use of the funds for support of the disabled person’s family, when the size of the trust estate was based in part on the calculation of the lost earnings that would have been used to support the spouse and children. It is hard to believe that Congress, in fashioning the d4A and transfer of resources statutes intended to have a disabled parent collect all the funds for loss of future earnings, aggregate them, and then require that instead of supporting the spouse and children as intended, use the lost earnings only on the disabled person, leaving the spouse and children without a means of support.

There is no federal regulation or even an SSI POMS provision that addresses the use of d4A Special Needs Trust funds to pay items of support of the disabled person’s spouse or children. The published rules neither allow, nor disallow, such payments. Public policy and state non-support criminal statutes, however, would indicate that withholding support for spouses or children would violate the law. The Social Security Administration has indicated that payment of taxes, administration costs of the trust, and attorney’s fees do not violate the sole benefit rule. Because d4A Special Needs Trusts are self-settled trusts not safe from the claims of legitimate creditors, it would seem not only right, but proper, that trust funds be used to support the disabled person’s legal dependents.

There is no clear guidance on what is, or is not, within the sole benefit rule. A severely disabled eight year old child wants to go to Disney World. Obviously, the child cannot travel alone. If the parents do not have the funds to pay their own way, should the child’s SNT pay for the parents to travel and stay with the child? If the child has \$5 million in trust, would it be fair to deny the child the trip to Disney? What if it’s an adult paraplegic who wants to visit Disney? Wouldn’t it be appropriate to pay for a caretaker to accompany the beneficiary? What if the caretaker is the parent. Does that make a difference? As can be seen, these are all judgment calls.

D. Periodic Reporting by Trustees to SSA and Medicaid

1. Beneficiaries Receiving SSI and SSI-related Medicaid

SSI eligibility has been subject to the transfer of resources penalty and somewhat relieved by the safe harbor d4A and d4C individual and pooled Special Needs Trust exceptions since 1999. Despite its fourteen-year involvement in Special Needs Trust issues, SSA has yet to enact any regular reporting responsibilities by SSA rule or federal regulation. For SSI clients who receive SSI-related Medicaid benefits, trustees have no on-going duty to file reports with the Social Security Administration. During the last couple of years, SSA has reportedly discussed and considered imposing some regular trustee reporting duties, but the agency's Program Operations System Manual (called the "POMS") still does not require regular, periodic reporting by trustees to SSA. However, trustees are cautioned to comply with the trust distribution rules in this chapter.

Furthermore, it is clear that if SSA is reviewing a claimant's eligibility for SSI, the trustee must promptly respond to all periodic SSA requests for trust disbursement information. Individuals who apply for means-tested benefits must agree, as a condition of eligibility, to waive any bank confidentiality in order to receive SSI payments.

For claimants in those states who receive Medicaid via their eligibility for SSI benefits, there are no legal reporting requirements. Receipt of \$1 of SSI benefits triggers full financial eligibility for Medicaid. Medicaid cannot be terminated on financial grounds if SSI is still being paid.

2. Beneficiaries Receiving Only Medicaid ICP or HCBS Services

For those few disabled individuals, about one in eight who receive Medicaid without SSI the States generally do require periodic reporting. For example, even though there is no SSI federal reporting requirement, Fla. Admin. Code Rule 65A-1.702(15)(d) provides: "The trustee of a qualified income trust, qualified disabled trust or pooled trust shall provide quarterly statements to the department which identify all deposits to and disbursements from the trust for each month." Practitioners must be aware of and advise trustees on the duty to report.

IV. TERMINATION OF SPECIAL NEEDS TRUSTS

A. Termination Process Depends on Type of Trust

The steps that must be taken by the trust administrator upon the death of the beneficiary varies depending on the type of trust. Whenever government benefits have been extended to the person with disabilities during life, there will be different considerations than when third party money funds the trust for the benefit of the person with disabilities.

B. Termination of First Party d4A Individual SNTs Upon Death of the Beneficiary

Upon the death of the disabled beneficiary, the trustee must immediately consider the rules for what expenses can be paid from the trust, and in what order. The rules are set forth in POMS SI 01120.203.B.3.a.

3. Allowable and Prohibited Expenses

The following instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.

a. Allowable Administrative Expenses

The following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s):

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

b. Prohibited Expenses and Payments

The following expenses and payments are examples of some of the types not permitted prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

First, notice that funeral expenses cannot be paid from the SNT before the various state Medicaid agencies have been reimbursed.

Next, the trust administrator should contact each and every state where the claimant resided (or for New York, each county where the beneficiary resided), for all periods of time (even from birth) in which the decedent received Medicaid benefits. This task can be daunting, but unavoidable. Recall that the Medicaid reimbursement, under the federal SSI rules, is “to all states for all time.” Some states, however, only seek reimbursement from the date of execution of the trust to the date of death.

Once all the state Medicaid lien amounts are known, compare the amount remaining in trust after payment of trust administration expenses and taxes, to the total amounts of the various Medicaid liens. If the lien amounts are smaller, pay the Medicaid agencies in full, and distribute the remainder pursuant to the terms of the trust. If the lien amounts are greater than the remainder in trust, allocate proportionately the lien amounts to the various states, and wind up the trust.

C. Termination of First Party d4C Pooled SNTs Upon Death of the Beneficiary

Note that POMS SI 01120.203.B.3.a. quoted above states that “the instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.” That is not exactly true, because the non-profit agency trust administrators of d4C pooled SNTs may retain all of the trust funds remaining without paying the Medicaid liens. Otherwise, however, the pooled trust administrator must follow the rules above, and could not pay funeral expenses, or distribute remaining funds to contingent beneficiaries. The statute, 42 U.S.C. §1396p(d)(4)(C)(iv) states:

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.

Thus, the Pooled Trust has the option of retaining some or all of the funds prior to any payment to the state. Many of the Pooled Trusts will provide an addendum to their joinder agreement that provides a lump administrative fee to them. Payment will then be made to the state up to the amount equal to the total amount of medical assistance paid on behalf of the individual under the state Medicaid plan, with any remaining amount being distributed to named beneficiaries. This has to be negotiated on a case by case basis when joining the pooled trust.

Once the pooled trust sub-account has been distributed, the sub-account for the deceased individual is terminated.

D. Early Termination Prior to the Death of the Disabled Beneficiary for d4A and d4C SNTs

In June 2010, the Social Security Administration published a new POMS Section on early termination, titled “POMS SI 01120.199 Early Termination Provisions and Trusts.” The Section directs the staff to review d4A and d4C trusts pursuant to this new provision.

For both d4A and d4C SNTs, the trust provisions on early termination must provide as follows:

- Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and
- Other than payment for those expenses listed in [SI 01120.199F.3](#), in this section, no entity other than the trust beneficiary may benefit from the early termination (i.e., After reimbursement to the State(s), **all** remaining funds are disbursed to the trust beneficiary); and
- The early termination clause gives the power to terminate to someone other than the trust beneficiary.

However, there is an exception from the above for early termination clauses in Pooled d4C trusts:

For pooled trusts established under Section 1917(d)(4)(C), an early termination clause does not need to meet the above criteria if the clause solely allows for a transfer of the beneficiary’s assets from one Section 1917(d)(4)(C) trust to another Section 1917(d)(4)(C) trust. The early termination clause must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary Section 1917(d)(4)(C) trust or to pay for the expenses listed in [SI 01120.199F.3](#), in this section.

E. Termination of Third Party SNTs

Upon the death of the beneficiary as well as during the life of the third party trust beneficiary, the trust shall be distributed according to the trust document. There are no restrictions as to how distribution is made, other than those stated in the trust document. No payback provision to the state is required to be included in this trust.

APPENDIX A: APPLYING OBAMACARE TO POTENTIAL NEW CLIENT ON 12-1-2012

The client. This was a very interesting case to think through the new consumer health care economics under ObamaCare. If you spoke to him, you already know he is a very educated and thoughtful person – but lives very frugally. “I don’t even have cable, nor do I want to get and pay for it,” he says.

The incoming disqualifying funds. He is currently on SSI disability and Medicaid but getting \$300,000 from an inheritance in October or December next year, which could possibly be extended to January 2014 at his option. There is also a possibility that he could accelerate the distribution to this year.

The new health insurance options. Two new options will be available.

1. **Private Health Insurance.** Under the Affordable Care Act, and the implementing federal regulations beginning October 2013, he will be able to sign up online through the “federally-run Florida health exchange” to buy private health insurance beginning January 2014 and thereby purchase excellent health insurance without regard to his pre-existing medical conditions, without annual or lifetime limits, and without a difference in premium because of his health conditions. As a disabled 61 year old, he will pay the same amount of premium as a healthy 61 year old, and will get the same health insurance benefits. That insurance is guaranteed renewable until age 65 when his Medicare kicks in. By the way, the United States Congress is required by the Affordable Care Act to also buy their own health insurance for themselves and their family through the state health insurance exchanges, so it is doubtful that they will try to make the private insurance program unattractive.

New “Non-elderly” or Adult Medicaid” under Section 2002 of the Affordable Care Act. If the State of Florida opts in (now very likely) to the Medicaid expansion under Section 2002 of the Affordable Care Act and the CMS regs issued at 42 CFR §435.603 in March 2012 a new category is created called “nonelderly” or “Adult Medicaid.” It covers persons age 19-64. For these individuals, no amount of assets count in determining Medicaid eligibility. They do not need trusts, including Special Needs Trusts. Only “Modified Adjusted Gross Income” (MAGI) as defined on the IRS 1040 tax return determines free Medicaid eligibility. If the MAGI is less than 138% of the Federal Poverty Level, the Medicaid is free of premium and copay costs. For an individual, the 138% level is income of less than approximately \$12,000 per year.

The Federal Regulation: 42 CFR 435.603: (c) Basic rule. Except as specified in paragraph (i) and (j) of this section, the agency must determine financial eligibility for Medicaid based on “household income” as defined in paragraph (d) of this section.

(d) Household income—(1) General rule. Except as provided in paragraphs (d)(2) and (d)(3) of this section, household income is the sum of the MAGI-based income, as defined in paragraph (e) of this section, of every individual included in the individual’s household, minus an amount equivalent to 5 percentage points of the Federal poverty level for the applicable family size....

(g) No resource test or income disregards. In the case of individuals whose financial eligibility for Medicaid is determined in accordance with this section, the agency must not—

(1) Apply any assets or resources test....

[77 FR 17206, Mar. 23, 2012]

EFFECTIVE DATE NOTE: At 77 FR 17206, Mar. 23, 2012, § 435.603 was added, effective Jan. 1, 2014.

2. If this gentleman conservatively invests his \$300,000 inheritance (given his elderly and disabled status which indicates zero risk tolerance), his return at best maximized at 2% would be MAGI of \$6,000 per year, less than one-half the income amount of \$14,856 to be fully qualified for Medicaid. And that is without taking any above the line tax deductions.

Additional future public health insurance.

- At 65, he will get Medicare. He had worked the minimum of 40 quarters – ten years – to qualify him for Retirement Insurance Benefits.
- He will get age 65 Medicare even though he was not eligible for Social Security Disability Insurance (SSDI) payments, but only SSI disability checks, because he had not paid minimum income taxes or been recently enough connected to the work force within the five years previous to his becoming disabled to qualify for the SSDI. He didn't meet the SSDI 20/40 rule. His ten years of prior work, however, does qualify him for age-65 Medicare plus SSA Retirement Insurance Benefits.

Scheduled loss of SSI. He is 60.5 years old. At age 62 (his birthday in April 2014) approximately 18 months from now he will lose SSI anyway because he is forced to apply for all benefits for which he is eligible and will have to take early Social Security retirement checks (RIB) which will wipe out his SSI checks and Medicaid eligibility as “unearned income” in any event because, even if he protects his assets in a trust, he will be ineligible due to non-assignable countable monthly income.

Cost-benefit analysis of SNT. The analysis depends on whether he asks the trust to pay for any of the ten food and shelter items that would trigger an In-kind Support and Maintenance (ISM) reduction of his SSI check. The financial benefit of the trust is questionable or negative under either scenario.

- **Cost if he takes no ISM Payments.** The trustee fees to protect the SSI monthly check (2.25% = \$6750/year or \$562.50/month) are approaching the total SSI check he is trying to protect (\$710 per month = \$8,520/year) for 2013 if he draws nothing from the SNT for ISM). The trust will have no monthly value for December 2012 (assets received are “income in the month received) of in any subsequent month he accepts the inheritance. If he takes the money in 2012, for 2013 he will save a gross of \$1,770 (difference between \$710/mo. SSI less \$562.50/mo. in trustee fees) for 2013, and assuming the same SSI check for January to March 2014, a savings of an additional \$442.50 for a total gross savings of \$2,142.50. From the savings we need to subtract the \$500 one time trustee administrative set up fee, and the attorney's fees of \$2,500 for the

trust set up and notifications to the public agencies, which will leave him a negative net of -\$857.5 for the period including now through April 2014 when he loses his SSI and Medicaid anyway.

- **Cost if he has ISM paid by the trust.** If he uses the SNT to pay for any food and shelter expenses on the ISM list, his SSI payment is reduced to \$450 per month (\$5,400/year) so that the government benefit will be definitely much less than the cost of trying to protect it. The trustee fees of \$6750 will be greater than the total SSI/year of \$5,400/year.

For this analysis, I have not added in the one-time “Year One” \$500 admin trustee fee to open the SNT trust account, nor any lawyer’s fees for joining the pooled trust and doing the SSA/SSI reporting for of the trust.

Medicaid lien/no lien issues. Escaping the Medicaid lien at death requires thinking through both the potential Medicaid SNT lien and the potential Medicaid Estate Recovery lien for persons over age 55. So when he dies--

- If he has the SNT, Medicaid will win and have a lien against his money. Thus, the cost savings of running the trust as a non-ISM trust would be wiped out even if there are zero attorney’s fees for SNT setup.
- If he doesn’t have an SNT, Medicaid will lose and have no lien if
 - his funds are in a Pay-On-Death (POD) account to his heir (avoiding probate), or if
 - there is no probate filed until two years after his death (legally avoiding creditor liens).
- He will therefore never have to pay back Medicaid through either an SNT lien or a Estate Recovery Class Three creditor claim as long as he has no SNT and avoids probate through one of the two avenues above.

Plan.... Thinking it over. So he is reconsidering the new economics for the 18 months to protect his SSI versus the trustee fee cost, as well as the opportunities to avoid the Medicaid lien completely, and will let us know his decision.

Attachments and Exhibits

Paper for Trustees and Attorneys on the Calculation of Parental Deeming

Paper on Overpayments – Avoiding, Defending, Reducing and Destroying

Exhibit A – Matrix of the Four Major Government Programs

Exhibit B – Determining “disability” – the Five-Step Sequential Evaluation Process

Exhibit C – SSA Procedure – application and appeal

Exhibit D – Eight-step Checklist for the Perfect SNT

Exhibit E – Trustee Distribution Checklist

Exhibit F – Lillesand’s One-Page individual d4A Special Needs Trust

Deeming of Income and Resources in SSI Elderly and Disability Payments

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SSA Deeming of Income and Resources. There are four types of income that SSA considers in determining financial eligibility for persons on SSI elderly or SSI disability benefits. Remember, SSA wants to pay the SSI recipient the most they can. So they start out with the maximum federal SSI payment possible; in 2010, that is \$674 for an individual. From that, they subtract four types of income: earned income, unearned income, in-kind support and maintenance, and deemed income.

The last type of income to be considered in determining eligibility is deemed income. This is not income paid to the elderly or disabled individual themselves, but is income of a person or persons responsible for supporting the SSI recipient.

SSI deeming is counted in three and only three circumstances (spouse, parent of minor child, sponsor of alien), based on an irrebuttable presumption of support. Under these circumstances, all or portions of the income or resources of a spouse, parent, or sponsor (and the sponsor's spouse) of an alien are "deemed" to be the income or resources of the claimant, even if any of these deemors do not actually provide the support at all. Pension funds owned by an ineligible spouse or by an ineligible parent or spouse of a parent are excluded from resources for deeming purposes. Pension funds are defined as funds held in Individual Retirement Accounts (IRAs) or in work-related pension plans. **Note:** the deemor's IRAs and pensions funds are excluded, but not the SSI claimant's IRAs or pension funds, under the theory that the claimant's IRAs can be converted to purchase food and shelter and therefore are NOT excluded in determining eligibility. 20 C.F.R. §416.1160. A disabled person can withdraw IRA funds early, before age 59½, without the extra 10% income tax penalty for early distribution. See IRS Publication 590, page 53.

Deeming from spouse to spouse. The deeming of spousal income and resources applies only if the parties are living in the same household. In addition, if there are children under age 21 living in the

household, an allocation for their living allowance is provided (up to \$337 in 2010 depending on the child's own income), as well as for the spouse who lives in the household. The allocation for the SSI ineligible spouse or SSI ineligible child is equal to the difference in the FBR for an individual and the FBR for a couple. See the calculations on the subsequent pages. The resources of an ineligible spouse and the eligible claimant are added together and compared to the resource limit for a couple (\$3,000) to determine eligibility. In addition, the same income exclusions available to the claimant spouse, apply to the ineligible spouse's income. 20 C.F.R. §416.1161 *et seq.*

Please make note of who is and who is not a "spouse." Under the regulations at 20 C.F. R. §416.1806, a spouse includes not only legally married spouses, but also boyfriends and girlfriends who "hold themselves out" in the community as husband and wife as a hetero-sexual couple, and meet other requirements. 20 C.F. R. §416.1826(c). Spousal deeming applies even if the ineligible (healthy) spouse refuses to support the SSI claimant's otherwise eligible spouse. There is no concept of "spousal refusal" as found in nursing home eligibility practice in some states.

However, a heterosexual couple who "hold themselves" out" as if they were husband and wife, even though neither might be able to lawfully marry, will be considered "married" for deeming purposes, but there is no deeming between same-sex gay and lesbian couples, even if their relationship is solemnized in Massachusetts, California, or they are partners in a "civil union" in Vermont. This federal "common law" marriage concept applies only to "unrelated persons of the opposite sex." 20 C.F. R. §416.1826(c)(1).

SSA issued Emergency Memorandum EM-08063 REV on August 1, 2008, posted on the SSA Policy Net webpage, after the California Supreme Court ruling became the second to constitutionally strike down statutory limitations of marriage to only a man and a woman. The federal Defense of Marriage Act, enacted to limit the effect of the Massachusetts actions, had just the opposite effect, demonstrating the law of unintended consequences and providing an example of getting hoisted on one's own petard. Gay and lesbian spouse's income and resources cannot be deemed to prevent a gay or lesbian SSI claimant's eligibility for benefits. However, for Title II purposes, the Defense of Marriage

Act would prevent a gay or lesbian spouse from becoming eligible for disabled or surviving widow or widower benefits, according to EM-08063 REV:

Definition of Marriage and Spouse for Social Security Purposes

An individual whose claim for benefits is based on a State-recognized same-sex marriage or having the same status as spouse for State inheritance purposes cannot meet the statutory gender-based definition of husband, wife, widow, widower of the number holder (NH), including one who is divorced.

Under the Defense of Marriage Act, enacted by Congress in 1996, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife. Therefore, for all benefit purposes, SSA does not recognize such individual as the spouse of the NH.

Deeming from sponsor to alien. Deeming rules are slightly different for sponsors of aliens.

The sponsor does not have to live with the alien for the sponsor’s income and resources to be deemed to the alien. Secondly, it is not only the sponsor’s income and resources that count, but also the sponsor’s spouse’s income and resources, and the sponsor’s children’s income is not deducted from the dependent allocation when determining how much is deemed to the alien. 20 C.F.R. §416.1166a and 20 C.F.R. §416.1204.

Deeming from parent to child. Deeming does not apply if the eligible child does not live in the same household as the parent (e.g., separated or divorced parents). Children are subject to deeming from natural, adoptive parents, and a stepparent if living in the same household. However, if the child is living only with the stepparent due to the death or divorce or abandonment of the home by the natural parent, the stepparent’s income and resources are no longer deemed to a child. There are also living allocations for other children under age 21 (up to \$337 in 2010), and the income exclusions of both parents apply in determining eligibility. 20 C.F.R. §416.1165. A quick short-hand Deeming Chart attached as Exhibit A that tells you, ALL THINGS BEING EQUAL, the amount a parent or parents could earn and still have a disabled (“eligible”) child receive some SSI benefit.

Please note that it is dangerous to your malpractice carrier’s well-being to use this chart willy-nilly. It is a guide only, and no substitute for actually applying the deeming formula. Specifically the chart does NOT apply at all in any of the following circumstances:

- The parent(s) receives both earned income (e.g., wages or net earnings from self-employment) and unearned income (e.g., Social Security benefits, pensions, unemployment compensation, interest income, and State disability).
- The parent receives a public income maintenance payment such as Temporary Assistance for Needy Families (TANF), or a needs-based pension from the Department of Veterans Affairs.
- The parent pays court-ordered support payments.
- The disabled child has income of his or her own income – either trust disbursements for In-kind support and Maintenance, other unearned income such as child support, or wage or self-employment income.
- Any ineligible child (non-disabled or non-SSI-eligible brothers or sisters in the same household) has income of his or her own, marries, or leaves the home, or is a child for whom child support payments are being made.
- There is more than one disabled child applying for or receiving SSI benefits.
- The State supplements the Federal benefit.

Deeming methodology: applying the deeming formula to parents' income. SSA is required to consider the income and resources (assets) of parents who live in the same household with the disabled child. The law follows state law responsibilities to meet children's basic needs for food, shelter, and medical care but unlike state law, a parent's income and resources affect a disabled child's eligibility for SSI when and only when:

- The disabled child is living in the parents' household
- The disabled child is not married, and
- The disabled child is under age 18.

In other words, the income and assets of a parent who does not live with the disabled child, such as a divorced or separated father or step-father, are not counted against the child, no matter how wealthy the non-residential parent is. "Income" is the money a parent receives such as wages, Social Security benefits, pensions, gifts, and personal injury structured settlement proceeds. Income also includes non-cash items such as food or housing provided by someone, or something else, such as a family trust. Income is treated differently depending on whether it is earned income or unearned income. Remember, Earned income is income received from wages and self-employment. Unearned income is any income other than earned income, including Social Security benefits, structured settlement annuity payments, VA

payments, unemployment compensation, private pensions, and the value of food or housing received from others.

SSA uses a particular order to determine how much of parents' monthly income SSA counts in calculating the amount of a disabled child's SSI benefit. The calculations must be applied in order. That is very, very important. If the calculation is not made in this particular order, the result will change, and benefits could be lost.

1. SSA starts with the parents' monthly gross earned income (before taxes) and unearned income. SSA uses retrospective monthly accounting, meaning that income two months prior is counted in determining this month's SSI benefit; for example, income in January are used to calculate the March SSI payment amounts. Parents are obligated by law to inform SSA every month that their earnings from work or investments change. The extra month gives SSA time to change the following month's SSI payments based on the reported change in the previous month. In the example, the change occurs in January; the parents notify SSA in February; the March SSI check is adjusted.
2. SSA starts with the parents' unearned income.
3. Subtract a living allowance for each for the children in the household (living with the family) who is not eligible for SSI (that is, healthy or otherwise ineligible for SSI). The "living allowance" is a dollar amount equal to the difference between the SSI monthly benefit amount for a married couple and the SSI benefit amount for an individual. For 2010, the SSI amount for a couple is \$1,011, and for an individual, is \$674, so the difference is \$337. So for each healthy child, subtract \$337 (2010) ONLY IF the child has no income of his or her own. If the healthy child has income of their own, whether earned or unearned, such as child support received, that income is subtracted from the non-SSI eligible child's "living allowance" amount.
4. If the parents' unearned income is less than the living allowance for the children, SSA subtracts the balance of the living allowance from the parents' earned income.

5. SSA then subtracts \$20 from the parents' remaining unearned income. If the parents have less than \$20 in unearned income, SSA subtracts the balance of the \$20 from the parents' earned income.
6. SSA subtracts \$65 from the parents' remaining earned income, and then SSA subtracts one-half of any earnings over the \$65.
7. SSA then adds the parents' remaining unearned and earned income together.
8. SSA then subtracts a living allowance for parents in the household. If it is a two-parent household, the amount of the living allowance is \$1,011 (2010), and if it is a single-parent household, subtract \$674 (2010).
9. Any remaining income is counted as unearned income to the disabled child or disabled children, if more than one.
10. If SSA is determining SSI eligibility and payment amounts for more than one disabled child in the household, SSA divides the remaining income between those disabled children.
11. SSA then adds the parents' deemed income to the disabled child's own unearned income, such as trustee disbursements for the disabled child's food and shelter (ISM), a child's SSA Title II dependent benefits, etc.
12. SSA then subtracts the child's \$20 general income disregard. If the total of the child's unearned income and the parents' deemed income is less than \$20, SSA subtracts the balance of the \$20 from the child's earned income.
13. SSA subtracts \$65 from the child's earned income, and then subtracts one-half of any earnings over \$65.
14. SSA then combines the child's remaining unearned and earned income to get the total income used to determine the child's SSI eligibility and payment. To determine the payment amount, start with the maximum SSI payment for a disabled individual, which is \$674 in 2010, then subtract the total income from the SSI amount due the disabled child.

Worksheets. SSA Worksheets for applying the income formulas for parent-to-child and spouse-to-spouse deeming are attached as Exhibit B (parent-to-child) and Exhibit C (spouse-to-spouse).

Applying rules for deeming of deemor's resources. To be eligible for SSI, the SSI claimant's resources and the deemor's own resources cannot be more than the SSI resource limit. A claimant can have resources up to countable \$2,000. One parent in the household can have resources up to \$2,000 and two parents in the household can have resources up to \$3,000. Any amount over the parents' resource limit is counted as a resource of the disabled child. Remember, the resources of a parent who lives with the child "in the household" counts but the resources of the parents who does not live with the child does not count, no matter how much. In a household headed by a grandparent, for example, and neither parent lives with the SSI eligible child, there is no deeming whatsoever. The grandparents owe no legal duty of support to the child. However, even if the parents live with the child, they are entitled to the same resource exclusions as the disabled child – one house, one car per household, contents of home, personal effects, etc. Resources include the net market value of structured settlement annuities, which can be "factored" or sold for a severely discounted rate to J. G. Wentworth in response to his 3 a.m. ubiquitous TV ads.

Resources are counted in the following manner:

1. SSA generally does not count some of the parents' resources, such as the home they live in, one automobile, pension funds, burial spaces, and certain burial funds up to \$1,500. General rules for exclusion of resources apply. See 20 C.F.R. §416.1201 et seq.
2. SSA adds together the value of all the parents' resources that SSA does count.
3. SSA then subtracts the resource limit for the number of parents in the household (\$2,000 for one parents or \$3,000 for two parents).
4. SSA then counts the remaining amount as resources of the child. If SSA is determining SSI eligibility for more than one child in the household, SSA divides the parents' remaining resource amount between those children.

5. SSA then adds the remaining amount of the parents' resources to the value of any resources the disabled child owns. If the combined amount (parents plus child) is more than the child's resource limit of \$2,000, the disabled child is not eligible for SSI.

Billy's SSI benefits: an example of parent-to-child deeming. Assume a married couple with a household of three children, one disabled (called "an eligible child" by SSA), and two not (called "ineligible children"). This is the husband's first marriage and he has no children other than Billy, the disabled minor child born of this marriage. Billy's brother, Jack, is the wife's minor son from a previous marriage, and gets child support of \$150 per month, and also earns \$100 per month in a part time job while in high school. Billy's older brother, Tommy the rock star, is also the wife's son from a previous marriage, is 20 years old, dropped out of school, and is a lead singer in a rock band and earns in \$6,000 per year, but continues to live with his mother and step-father in the parents' garage. Dad earns \$2750 per month gross wages. Mom stays home to care for Billy, the disabled child, and has no wages or self-employment earnings. They have no savings or investment accounts other than dad's IRA and an old 401(k) that mom had from employment between her first and second marriage, and a joint checking account with a balance on the first day of the month of \$2,500 and a small savings account of \$2,000.

Thus the family household's total gross income is \$3,500 per month, or \$42,000 per year. It is comprised of dad's monthly gross income of \$2,750 plus Jack's child support of \$150, plus Jack's \$100 earnings from part time employment, and Tommy's rock band income of \$500 for a monthly total of \$3,500 or \$42,000 per year.

Is Billy eligible for SSI?

Billy's resource determination. The parents' total countable resources are \$4,500 (checking plus savings account balances on the first of the month. The pension funds are not deemable to the disabled child. Thus, \$1,500 will be deemed a resource against Billy's eligibility (the parents' \$4,500 less the \$3,000 exclusion for a couple, leaves \$1,500). But Billy himself also is entitled to a single person's \$2,000 resource exclusion, so \$1,500 less Billy's exclusion of \$2,000, means that Billy is under the \$2,000 resource limit to be eligible for SSI on the asset side.

Billy's income determination. As noted, a "Chart of Monthly Deeming Break-Even Points for a Federal SSI Payments" is attached as Exhibit A. Using it, however, would give us the wrong answer, unless we are aware of the "NOTE" at the bottom of the Chart, and hand-perform the calculations using a worksheet.

Before we can compute Billy's eligibility for SSI, we have to compute the amount of the allocations allowable for the support of the healthy or otherwise non-SSI eligible children, Jack and Tommy.

As shown on the chart, the normal allocation for non-eligible children is \$337 per month (computed as the difference between the FBR for an individual - \$674 in 2010, and the FBR for a couple - \$1,011). Can we use the entire \$337 deduction, times two ($337 \times 2 = 674$), for the two healthy children? No.

Jack, the high schooler, has his own unearned income of child support of \$150 from his father, and earned income from a part time job of \$100 per month gross. The \$150 child support payment actually received is reduced by one-third, so only \$100 counts. The income from the part time job is subject to the Student Earned Income Exclusion (SEIE) of \$1550 per quarter (up to \$6,240 per year), so none of the part time income counts. Therefore, Jack's \$337 allowance is reduced for the child support he receives, but only for \$100 of it (two-thirds of \$150) for a total of \$237.

Secondly, can we deduct Tommy the rock star's children's allowance in the parental deeming calculation? No, because although he is under age 21, the age at which the child allowance stops, and although he earns under the \$6,240 annual figure that would apply to his brother, Jack, Tommy is not a student. Therefore, Tommy's SSI healthy child allocation of \$337 is reduced by his monthly income of \$500, so his allowance is zero. Tommy's monthly income is counted in the calculations even though the rock star sends all his money buying music on iTunes, and contributes nothing to the household for food or shelter. Although the parents are feeding and housing Tommy and he is a member of the household, there is simply no allocation for him under the rules.

The parents' have no unearned income. If they did, the healthy child allocations of a minus \$237, and the general income disregard of minus \$20, would be first subtracted from the parents' unearned income. However, those deductions are not lost, since any amount not used to reduce unearned income can be used to reduce the parents' earned income.

Dad has \$2750 gross income, less the unused negative \$237 and the negative \$20 general income disregard, leaves \$2,493. Then subtract the \$65 earned income disregard, leaving \$2,428. Subtract one-half of that (the 50% deduction from earned income) to leave \$1,214.

The parents are allowed to have an allocation to feed, clothe and house themselves, which is equal to the amount they would be paid if SSI eligible themselves. In a one parent household, the deduction is \$674, and in a two parent household, it is \$1,011. In the case of Billy's parents, we subtract \$1,011 from the \$1,214, leaving \$203 to be deemed to Billy, the disabled minor child who lives with them.

Then we do Billy's computations to find out what his payment would be. He has unearned income of \$203 deemed income from his parents. If he had a trust paying food and shelter expenses we would add another \$244.67 ISM to his unearned income, or if he had child support payments, another 2/3 of the support actually paid. In this case, he doesn't, so we subtract the \$20 general income disregard from the \$203, leaving a total countable income of \$183. We subtract the \$183 from the SSI FBR rate of \$674 for an individual, leaving an SSI check due Billy of \$491.

Yes! Although Billy lives in a household that has \$42,000 per year family income, he is eligible for SSI, and in 31 jurisdictions of this country, automatic SSI-related Medicaid.

Some important POMS on deeming:

SI 01310.140 Deeming concept – Household

SI 01310.145 Deeming concept – Parent

SI 01310.165 Deeming concept – Temporary Absence

SI 01310.170 Deeming concept – Absence from a Deeming Household due to Military Service

SI 01310.140 Deeming concept – Household

SI 01310.201-209 Waiver of Parental Deeming rules

SI 01320.500 Deeming of Income from Ineligible Parent(s) Note: this has several examples which are instructive]

SI 01320.500 Deeming – Change of Status – Parents/Children

SI 01320.700 Monthly Deeming Worksheets

SI 01330.001 Deeming of Resources – General

SI 01330.220 Deeming – Exclusions from Resources (pension funds, and burial exclusions)

SI 01330.280 Examples Parent-to-Child Deeming (resources)

Two techniques to avoid deeming of resources. SSA has a special rule that excess resources that are in the process of being sold will not be counted in eligibility determinations. This is called “conditional eligibility.” 20 C.F.R. §416.1240 et seq. Under certain circumstances an individual with excess non-liquid resources may be paid an SSI benefit on agreement that they will dispose of the property in a timely fashion. This can apply to both personal or real property. Some of the benefits paid during conditional eligibility may have to be repaid to SSA when the asset is disposed of. However, it’s use is not just limited to creating a cash flow during the time the real or personal property is listed for sale. It also triggers Medicaid eligibility, which can often be life-saving.

A second, little known POMS section, is even more useful in parental deeming cases: although there is a prohibition on transferring resources for no or less than market value, which would prevent an SSI recipient from giving away his or her resources, that prohibition does not prevent a parent from transferring any or all of the parent’s resources for no value whatsoever. See the last sentence of POMS SI 01150 110.E., the POMS which otherwise imposes the transfer of resources penalty:

E. POLICY—TYPES OF TRANSFERS AFFECTED

This provision applies to transfers made:

- by an individual;
- by the individual's eligible or ineligible spouse (SI 00501.150);
- by persons who are co-owners of the resource being transferred;
- on behalf of the individual by a person acting for and legally authorized to execute a contract (e.g., a legal representative, a legal guardian, a parent for a minor child, etc.);
- by an individual transferring assets which he constructively received (e.g., he/she refused an inheritance).

- by an individual transferring assets in the month of receipt (e.g. the transfer of income that would have been considered a resource in the following month, if retained).

This provision does not apply to transfers made by a deemor unless the deemor is a co-owner of the resource or is the ineligible spouse. For example, the provision does not apply to a resource transfer made by a parent who is a deemor (unless the eligible child and parent are co-owners of the resource). [Emphasis added].

If the gift by the parent is over the \$12,000 annual IRS gift exclusion, a gift tax return will have to be filed, and possibly gift taxes paid. However, clever estate and tax attorneys have devised ways to create irrevocable family trusts that both avoid the gift tax and comply with the SSI resource and income rules by imposing SNT-type restrictions on how the trustee aids the parent deemor until the child dies or becomes age 18 and deeming ends.

Waiver of parental deeming. Under limited circumstances, the deeming of parental income and resources can be completely waived. Section 1614(f)(2)(B) of the Social Security Act prohibits the application of deeming of parents income and resources in determining the child's SSI eligibility:

Section 1614(f)(1) For purposes of determining eligibility for and the amount of benefits for any individual who is married and whose spouse is living with him in the same household but is not an eligible spouse, such individual's income and resources shall be deemed to include any income and resources of such spouse, whether or not available to such individual, except to the extent determined by the Commissioner of Social Security to be inequitable under the circumstances.

(2)(A) For purposes of determining eligibility for and the amount of benefits for any individual who is a child under age 18, such individual's income and resources shall be deemed to include any income and resources of a parent of such individual (or the spouse of such a parent) who is living in the same household as such individual, whether or not available to such individual, except to the extent determined by the Commissioner of Social Security to be inequitable under the circumstances.

(B) Subparagraph (A) [imposing deeming in determining eligibility for SSI payments] shall not apply in the case of any child who has not attained the age of 18 years who—

(i) is disabled;

(ii) received benefits under this title, pursuant to section 1611(e)(1)(B), while in an institution described in section 1611(e)(1)(B);

(iii) is eligible for medical assistance under a State home care plan approved by the Secretary under the provisions of section 1915(c) relating to waivers, or authorized under section 1902(e)(3); and

(iv) but for this subparagraph, would not be eligible for benefits under this title.

Summary. Knowledge of these rules can benefit our clients substantially. Our office recently used these rules to make \$12 Million “disappear,” \$6 Million of the child’s medical malpractice settlement proceeds and \$6 Million of the parent’s derivative share settlement proceeds as well, without creating an inheritance possibility for the unwed father who had abandoned the child at birth. It was critical that the severely disabled child maintain his SSI disability benefits to trigger automatic eligibility for Medicaid. His medical expenses run between \$1 million and \$3 million per year at fee-for-service rates. Knowledge of the SSI parental income and deeming rules provided an opportunity to save the child’s life, since access to medical care is often denied, in spite of personal wealth, for lack of private or public health insurance coverage.

Exhibits

- Exhibit A. SSA’s Quick Deeming Chart – “all things being equal...”
- Exhibit B. Blank Parent-to-Child Deeming 2010 Worksheet
- Exhibit C. Blank Spouse-to-Spouse Deeming 2010 Worksheet
- Exhibit D. An actual example from one of my SSA case files

**SSA's PUBLISHED DEEMING ELIGIBILITY CHART
FOR CHILDREN FOR 2010**

CAUTION: Before using this chart, see [SSI FOR CHILDREN](#). If there is any doubt about whether a child is eligible, please contact us for help.

Deeming Eligibility for Children	Gross monthly income BELOW the dollar amounts* shown means a disabled child may be eligible for SSI benefits. * Amounts given are general guidelines only.			
Number of ineligible children in household	All income is earned		All income is unearned	
	One parent in household	Two parents in household	One parent in household	Two parents in household
0	\$ 2,821	\$ 3,495	\$ 1,388	\$ 1,725
1	\$ 3,158	\$ 3,832	\$ 1,725	\$ 2,062
2	\$ 3,495	\$ 4,169	\$ 2,062	\$ 2,399
3	\$ 3,832	\$ 4,506	\$ 2,399	\$ 2,736
4	\$ 4,169	\$ 4,843	\$ 2,736	\$ 3,073
5	\$ 4,506	\$ 5,180	\$ 3,073	\$ 3,410
6	\$ 4,843	\$ 5,517	\$ 3,410	\$ 3,747

The Deeming Eligibility Chart for Children does not apply when:

- The parent(s) receives both earned income (for example, wages or net earnings from self-employment) and unearned income (for example, Social Security benefits, pensions, unemployment compensation, interest income, and State disability).
- The parent(s) receives a public income maintenance payment such as Temporary Assistance for Needy Families (TANF), or a needs-based pension from the Department of Veterans Affairs. See [SSI AND ELIGIBILITY FOR OTHER GOVERNMENT AND STATE PROGRAMS](#) for more information on TANF.
- The parent pays court-ordered support payments.

- The child has income of his or her own.
- Any ineligible child has income of his or her own, marries, or leaves the home.
- There is more than one disabled child applying for or receiving SSI benefits.
- The State supplements the Federal benefit.

Use the Deeming Eligibility Chart for Children in the following States or territory, which do not supplement the Federal benefit:

Alaska	Arkansas	Delaware	District of Columbia
Florida	Northern Mariana Islands	Indiana	
Kansas	Maryland	Mississippi	Missouri
Ohio	South Carolina	Tennessee	Texas
Virginia	West Virginia		

If you live in one of the States listed below, Social Security administers the State supplement for children. Call us for deeming eligibility information.

****MICHIGAN**

NOTE:**

California	Hawaii	Iowa	Massachusetts
Michigan	Montana*	Nevada*	New Jersey
New York		Rhode Island	
Utah		Vermont	

- * Montana supplements disabled and blind children in certified foster homes only. Nevada supplements blind children only.

If you live in one of the States listed below, your State administers the State supplement for children. Contact the State for information.

Alabama	Arizona	Colorado	Connecticut*
Georgia	Idaho	Illinois	Kentucky
Louisiana	Maine	Minnesota*	Nebraska
New Hampshire*	New Mexico	North Carolina	North Dakota
Oklahoma	Oregon*	Pennsylvania	South Dakota*
Washington	Wisconsin	Wyoming	

* Connecticut, Minnesota, New Hampshire, and Oregon only supplement benefits for blind children. South Dakota supplements disabled and blind children in residential care facilities.

MONTHLY DEEMING WORKSHEET
(Parent to Child)

MONTH OF: _____

NAME _____ SOCIAL SECURITY NUMBER _____

1. Parent's Unearned Income		ELIGIBILITY	PAYMENT
2. SUBTRACT TOTAL ALLOCATION FOR INELIGIBLE CHILD(REN)/ELIGIBLE ALIEN(S)			
	Allocation		
	Subtract Child's/Alien's Income		
a. Total Allocation		-	-
b. Remaining Unearned Income			
3. Parent's Earned Income			
a. Subtract Allocation from 2.a. Not Offset by Parent's Unearned Income		-	-
b. Remaining Earned Income			
4. ALL REMAINING INCOME		5. DETERMINATIONS:	
	ELIGIBILITY	PAYMENT	
Remaining Unearned Income (2.b.)			Individual's Deemed Income
Subtract General Income Exclusion	- 20	- 20	
Countable Unearned Income			Add Individual's Own Unearned Income
Remaining Earned Income (3 b.)			+ +
Subtract Balance of General Income Exclusion	-	-	Total Unearned Income
Remainder			Subtract General Income Exclusion
Subtract Earned Income Exclusion	- 65	- 65	- 20 - 20
Remainder			Total Countable Unearned Income
Subtract 1/2 Remainder	-	-	Add Countable Earned Income ¹
Countable Earned Income			+ +
Add Countable Unearned Income	+	+	Countable Income
Total Countable Income			Subtract Plan for Self-Support
Subtract Parent Living Allowance*	-	-	- -
Deemed Income			Countable Income
Divide By Number of Eligible Children	+	+	Add VTR if Applicable
Individual's Deemed Income			+ +
			Total Countable Income
			FBI plus State Supplement
			Subtract Total Countable Income
			- -
			Benefit

Signature _____ Title _____ Date _____

* Living allowance for ineligible parents: 1 parent = Individual FBR 1/2 Remainder after applicable exclusions; remainder of general income exclusion, student earned income, \$65, IRWE, blind work expenses
2 parents = Couple FBR

MONTHLY DEEMING WORKSHEET (Spouse to Spouse)		MONTH OF:
NAME	A/N	
1. Benefit payable as an individual (after subtracting individual's countable income, if -0- deeming is not applicable)	ELIGIBILITY	PAYMENT
2. Ineligible spouse's unearned income		
Subtract allocation for ineligible children/eligible aliens		
Allocation	#1	#2
	ELIGIBILITY	ELIGIBILITY
	PAYMENT	PAYMENT
	#3	#3
	ELIGIBILITY	ELIGIBILITY
	PAYMENT	PAYMENT
Subtract child's/alien's income	-	-
	+	+
	=	
a. Total Allocation	-	-
b. Remaining unearned income		
3. Ineligible spouse's earned income		
a. Subtract allocation for ineligible child(ren)/eligible alien(s) not offset by unearned income	-	-
b. Remaining earned income		
Add remaining unearned income from 2b.	+	+
4. Total income after allocations (If less than the DIFFERENCE between the couple's and individual's FBR, there is no income to deem to spouse)		
5. Combined incomes (eligible individual and ineligible spouse after ineligible child/eligible alien allocations)		
a. Unearned income		
Subtract general income exclusion	- 20	- 20
Countable unearned income		
b. Earned income		
Subtract balance of general exclusion not offset by unearned income	-	-
Remaining earned income		
Subtract \$65 earned income exclusion	- 65	- 65
Remaining earned income		
Subtract deduction for impairment related work expenses	-	-
Remaining earned income		
Subtract 1/2 remainder	-	-
Remaining earned income		
Subtract blind work expenses	-	-
Countable earned income		
Add countable unearned income from 5a	+	+
Countable income		
Subtract amount from approved plan to achieve self-support	-	-
Countable income		
Add VTR if applicable	+	+
c. Total Countable Income		
6. Determinations:		
FBR for a couple		
Subtract total countable income from 5c	-	-
Benefit--If larger than 1 above, use amount in 1		
SIGNATURE	TITLE	DATE

Form SSA-8015 (8-92) For State Supplementation Cases Use Form SSA-3123
 Destroy prior editions

14 STEPS TO DETERMINE
CHILD'S COUNTABLE INCOME

How Parents' Income and Resources Affect a Child's SSI

Why do the parents' income and resources affect a child's SSI?

The law requires us to consider the income and resources of parents who live in the same household with the child. This law recognizes the parents' responsibility to care for their child's basic needs.

When do parents' income and resources affect a child's SSI?

We count some of the parents' income and resources when the child is living in the parents' household, is not married, and is under age 18.

What is income for SSI purposes?

Income is the money a parent receives such as wages, Social Security benefits, and pensions. Income also includes non-cash items such as food or housing. Under the SSI program, income is divided into the following two categories:

- Earned income is income received from wages and self-employment.
- Unearned income is any income other than earned income. This includes Social Security benefits, Department of Veterans Affairs payments, unemployment compensation, private pensions, and the value of food or housing received from others.

How is parents' income counted?

We use the following steps to determine how much of the parents' monthly income we count:

1. We use the parents' gross earned and unearned monthly income.
2. We start with the parents' unearned income.
3. We subtract a living allowance for each of the children in the household who is not eligible for SSI. The amount we subtract is reduced if these children have their own income.
4. If the parents' unearned income is less than the living allowance for the children, we subtract the balance of the living allowance from the parents' earned income.
5. We subtract \$20.00 from the parents' remaining unearned income. If the parents have less than \$20.00 in unearned income, we subtract the balance of the \$20.00 from the parents' earned income.
6. We subtract \$65.00 from the parents' remaining earned income, and then we subtract one-half of any earnings over \$65.00.
7. We add the remaining unearned and earned income together.

2010
1,011
674
337/child



12/12/2007

8. We subtract a living allowance for parents in the household. *one parent = \$674.-*
9. We count any remaining income as unearned income to the child. *two parents = \$1,011.-*
10. If we are determining SSI eligibility and payment amounts for more than one child in the household, we divide the remaining income between those children.
11. We add the parents' income we count to the child's own unearned income.
12. We subtract an additional \$20.00. If the total of the child's unearned income and the parents' income we count is less than \$20.00, we subtract the balance of the \$20.00 from the child's earned income.
13. We subtract \$65.00 from the child's earned income, and then we subtract one-half of any earnings over \$65.00.
14. We combine the child's remaining unearned and earned income to get the total income used to determine the child's SSI eligibility and payment. *→ Deemed income is "unearned income" subject to \$20 income disregard.*

What is a resource for SSI purposes?

A resource is money and anything that parents' own and can turn into cash. A resource will be considered theirs even if they own it with someone else. Resources include cash, bank accounts, life insurance policies, automobiles, and other property.

Why are resources important in the SSI program?

To be eligible for SSI, the child's resources and the parents' own resources cannot be more than the SSI resource limit. A child can have resources up to \$2,000.00. One parent in the household can have resources up to \$2,000.00. Two parents in the household can have resources up to \$3,000.00. Any amount over the parents' resource limit is counted as a resource of the child.

How are parents' resources counted?

We use the following steps to determine how much of the parents' resources we count:

1. We generally do not count some of the parents' resources such as the home they live in, one automobile, pension funds, burial spaces, and certain burial funds up to \$1,500.00.
2. We add together the value of all the parents' resources that we count.
3. We subtract the resource limit for the number of parents in the household (\$2,000.00 for one parent or \$3,000.00 for two parents).

SSA-L8155

12/12/2007

4. We count the remaining amount as resources of the child. (If we are determining SSI eligibility for more than one child in the household, we divide the remaining amount between those children.)
5. We add the remaining amount of the parents' resources to the value of any resources their child owns. If the combined amount is more than the child's resource limit of \$2,000.00, the child is not eligible for SSI.



SSA-L8155

Exhibit D

Deeming Calculations

EXAMPLE

HOW WE FIGURED CHILD'S PAYMENT FOR March 2006

His Payment Amount (Child's SSI check)

The most SSI money the law allows us to pay	\$603.00
Minus (-) "Total income we count" (see below)	<u>-241.28</u>
Total SSI Payment for March 2006	\$361.72

His Income Other Than His SSI (Child's "Income")

Income he receives in January 2006 affects his payment for March 2006

"Total parents' income we count" (see below)	\$261.28
By law we don't count \$20.00 of above income	<u>- 20.00</u>
Total income we count	\$241.28

Parents' Income for January 2006

<i>Unearned</i>	(FATHER'S) miscellaneous income - <i>Unearned</i>	\$ 538.66	
	Minus (-) living allowance for ineligible child(ren)	<u>- 301.00</u>	
	Subtotal	\$ 237.66	
	We don't count \$20.00 of above income	<u>- 20.00</u>	
	Subtotal of above income we count	\$ 217.66	\$ 217.66
<i>Earned</i>	FATHER'S wages - <i>Earned</i>	\$1,079.33	
	MOTHER'S wages	604.66	
	FATHER'S net income from self-employment (NISE)	<u>+ 276.25</u>	
	Subtotal	\$1,960.24	
	We don't count \$65.00 of wages and NISE	<u>- 65.00</u>	
	We don't count 1/2 of this amount	\$1,895.24	
	1/2 of \$1,895.24 = \$947.62	<u>- 947.62</u>	
	Subtotal	\$ 947.62	<u>+ 947.62</u>
	Subtotal of parents' income we count		\$1,165.28
	Minus (-) living allowance for parents		<u>- 904.00</u>
Total parents' income we count		\$ 261.28	



Family's Income Total was \$ $\frac{\text{MONTHLY}}{538.66}$ - Dad's unearned from pension
 $1,079.33$ - Dad's WAGES
 604.66 - Mom's WAGES
 276.25 - Dad's self-employment (NET)
 $\$2,498.90 = \$30,000/\text{yr.}$
 $361.72/\text{mo}$ $4,340.64/\text{yr.}$
 $\$34,340/\text{yr}$

Dealing with SSI Overpayments: Avoiding, Defending, Reducing and Destroying

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I. Introduction and background.

Why this topic at this time? The Social Security Administration is re-staffing and beginning to review Special Needs Trusts, Personal Services Contracts, and other financial planning devices to acquire SSI eligibility and SSI-related Medicaid. This presentation will cover the major issues and important practice pointers in the emergency situation caused by potential termination of SSI and Medicaid benefits for various reasons.

This presentation does not cover the termination of benefits due to medical improvement and the underlying ineligibility cause by the disabled person's regaining the ability to work. Note also that the SSA rules for dealing with Title II overpayments in SSDI and Retirement benefit cases are slightly different than those dealing with the welfare component of disability and retirement, the SSI Claims.

Overpayments can occur for many reasons: increases in the wages of deemors (parents and spouses), increases in the part time work of the SSI claimant; changes in marital status; changes in living arrangement; changes in family composition; changes in the SSI recipients' children's status, income or residence; or the discovery of unreported financial transactions by too-clever attorneys and claimants.

SSA requests for repayment of "overpaid" benefits can be challenged in two ways: contesting that the alleged overpayment was not an overpayment at all; and secondly, agreeing that there was an overpayment but asking that it either be waived entirely, be reduced; or that a payment plan be devised that will not deprive the client of necessary funds to meet living expenses.

Finally, if all else fails, and if the situation otherwise permits and warrants, the client may file bankruptcy and wipe out the SSA overpayment.

Thus this topic will cover:

- Avoiding overpayments in the first place by reporting properly
- Defending the alleged overpayment – contesting the SSA position that the claimant was not entitled to the benefits received
- Reducing the overpayment – admitting the overpayment in whole or in part, and seeking to reduce the amount to be repaid, or the terms of the repayment; and
- Destroying the overpayment by filing for bankruptcy and immediately continuing eligibility as though the overpayment never occurred.

A. SSI Disability (SSI-D) vs. Social Security Disability Insurance (SSDI) benefits.

For purposes of retaining benefits during an appeal of a proposed termination, SSI and SSDI are treated differently both substantively and procedurally. Generally speaking, because SSI benefits are paid only to persons with less than \$2,000 in reserve (the maximum cash or liquid resource limit), SSA will take steps to continue benefits if possible, and to work out more favorable repayment plans. SSDI benefits, however, do not receive such favorable treatment.

B. Treatment of Overpayments by SSA – the difference between Title II of the Social Security Act (SSDI insurance) vs. Title XVI (SSI welfare). Title II benefits are those disability, retirement or survivor's insurance benefits paid on the basis of previous contributions to the Social Security system through the collection of FICA (Social Security) taxes on wages paid or self-employment income. Title XVI, the SSI program, is the federal welfare program for elderly persons over age 65, or persons under age 65 who are disabled.

C. General important principles of Title XVI SSI benefits:

1. **Categorical eligibility.** Claimants must be either elderly (age 65 and older) or medically disabled to have a viable SSI claim.

2. **Financial eligibility is determined on two bases: low countable income of the SSI claimant, and few countable resources.**

"Income" is not the IRS definition, and includes four types – earned (e.g., wages and self-employment from work activity), unearned (e.g., gifts, trust distributions, Title II SSDI or other government benefits), in-kind support and maintenance (food and shelter paid by others), and deemed income from parents to minor child, or healthy or younger spouse to disabled or elderly spouse).

"Resources" is akin to assets – what a claimant owns or has an interest in. Many resources are not counted – a home, a car, the contents of the home and personal effects, and some special exceptions. Generally, a claimant may not have more than \$2,000 in assets on the first of the month, or \$3,000 if a member of a married couple both of whom are eligible for SSI benefits.

3. **Monthly determinations of financial eligibility.** Each month is a separate eligibility period. Claimants often go into and out of financial eligibility multiple times during a year due to fluctuations in the living situation, income, the income or resources of deemors, and variations in pay periods.

4. **Initial determinations of financial eligibility is by SSA staff;** thereafter, the system relies on claimants to promptly report changes occurring this month, by the 10th day of the following month, so that benefits are adjusted in the third month.

5. **Duty to report.** The claimant, or his or her Representative Payee, is under a continuing obligation to timely report changes that would in any way affect the claimant's continuing eligibility for benefits, or the amount of those benefits. Items to be immediately reported include:

- Moving residence or changing address;

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- Anyone moves into or out of the claimant's household;
- The claimants, claimant's spouse's or parent's income or earnings change;
- The claimant's, or spouse's or parent's resources change
- The claimant begins to get help with living expenses or gets income from friends or relatives
- The claimant's spouse or anyone in the household dies;
- The claimant gets married, separated, or divorced, or begins or stops holding out as "husband and wife" regardless of lawful marriage under Florida law;
- The claimant's name changes;
- The claimant becomes eligible for other benefits or payments, whether or not received;
- The claimant enters or leaves an institution, such as a hospital, nursing home, prison or jail;
- The claimant leaves the United States or returns to the United States;
- A warrant has been issued for the claimant's arrest for a crime or attempted crime that is a felony, or a crime that is punishable by death or imprisonment for one year or longer;
- There is a change in school attendance, if under age 22;
- There is a change in claimant's immigration status
- If the claimant is a sponsored immigrant and the sponsor's income
 - changes;
 - The claimant's medical (physical or psychiatric) conditions improve; or
 - The claimant cannot keep a scheduled appointment with the SSA
 - office.

6. **Failure to report – civil vs. criminal.** Obviously, for the non-reporting to become criminal, there has to be some criminal intent involved. One way to avoid allegations of a criminal nature is to report to SSA before SSA finds out on its own.

7. **The two types of SSA-initiated reviews.** "Periodic redeterminations" of financial eligibility usually occur on an annual basis when SSA is fully staffed (they still are not at this point). "Continuing Disability Reviews," also called CDRs, are usually conducted on a specific schedule depending on the severity of the medical condition and the likelihood of medical improvement to the point of regaining the ability to engage in Substantial Gainful Activity, whether or not the claimant is actually working. Work activity of significant amounts and extended duration always results in CDRs, with potential for substantial overpayments going back many years, and possible criminal involvement.

8. **Goldberg v. Kelly protections for SSI claimants.** *Goldberg v. Kelly*, 397 U.S. 254 (1970) is a 14th Amendment due process claim which sought to require a hearing before certain government benefits could be withdrawn from recipients. The holdings of the case are relevant to SSI terminations, but not SSDI terminations. The major holdings include the following:

- a. Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. (NOTE: SSI is a form of welfare for elderly and disabled individuals, originally provided by the states through old age and disability welfare programs, but federalized under the SSI program in 1974.)

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b. The interest of eligible recipients in the uninterrupted receipt of public assistance, which provides them with essential food, clothing, housing, and medical care, coupled with the State's interest that payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

c. A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process.

i. Such hearing need not take the form of a judicial or quasi-judicial trial, but recipients must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting their own arguments and evidence orally before the decision maker.

ii. Counsel need not be furnished at the pre-termination hearing, but recipients must be allowed to retain an attorney if they so desires.

iii. The decision maker need not file a full opinion or make formal findings of fact or conclusions of law but should state the reasons for the determination and indicate the evidence relied on.

iv. The decision maker must be impartial, and although prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as decision maker, the decision maker should not have participated in making the determination under review.

II. Overpayments – General Procedural Principles.

A. **Parallel issues** – challenging whether there was an overpayment vs. dealing with the reduction of the amount or waiver of the overpayment, or the amount and timing of SSA recovery. Pursuant to 42 U.S.C. §404, SSA is permitted to recoup overpayments by decreasing future benefits or demanding a refund of an overpaid amount. Claimants can challenge whether SSA was correct in determining if there was an overpayment due to income or excess resources.

B. **It's an Emergency!** Fast action can preserve the right to benefits pending appeal.

1. **10 days** – continuation of benefits pending appeal. The official written notice by SSA of an overpayment triggers certain time deadlines for the claimant and the claimant's attorneys. Be careful! The notice will state on the front page, "if you disagree with this decision, you may appeal by filing a notice within 60 days receipt of this notice, plus 5 days for mailing..." However, usually on page 6 or 7, it states that if the claimant appeals within ten days, benefits will continue pending the appeal.

PRACTICE POINTER: The claimant needs to 1) run, not walk, to the local SSA office, seek continuation of the benefits pending appeal, and 2) get proof that they requested the continuation of benefits within the ten day period by a signed statement from the SSA Claims Representative. SSA will ask the claimant to sign a statement in return that the claimant acknowledges that should the claimant lose the appeal, additional amounts

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paid will become part of the overpayment. However, if the appeal is filed in good faith, SSA will often waive the repayment of the benefits paid during the pendency of the appeal, unless the claimant failed to cooperate in the appeals process. 20 CFR § 404.1597a(j)(3) and 20 CFR §416,966(g)(2).

PRACTICE POINTER: Ten days is really 15 days. If the SSA notice is dated January 10th, the claimant has until January 25th to file the request for continued benefits, because SSA assumes, absent evidence to the contrary, that the notice took 5 day to get to the claimant.

2. **65 days** – challenging the SSA position that there was an overpayment at all, or that the amount of the overpayment is correct. Filing a timely Request for Reconsideration or subsequently, a Request for Hearing, permits the claimant to challenge the correctness of the decision, but does not trigger the automatic right to continuation of benefits pending the appeal. If successful on appeal, the claimant will be entitled to the underpayment (the retroactive benefits that should have been paid because the claimant was correct).

PRACTICE POINTER: Whenever filing a jurisdictional document such as a Request for Reconsideration, or a Request for Hearing, or a Request for Review of Hearing Decision with the SSA Appeals Council in Falls Church, Virginia, always send such documents by Certified Return Receipt Mail or by some other means that produces a confirmed receipt by SSA.

3. **Unlimited time** – requesting a waiver of the overpayment, or a reduction in the amount, or timing and amount of monthly or periodic recovery can be sought at any time, and multiple times based on changing circumstances, **EXCEPT that there is a 30 day time** limit for filing a request for waiver if the claimant seeks to continue payment of benefits pending appeal.

C. Medical Reviews, a/k/a Continuing Disability Reviews. Medical reviews are beyond the purpose of the CLE presentation, since few Elder Law attorneys practice Social Security disability law on the medical eligibility side. However, claimants may seek the assistance of an Elder Law attorney, who should, in turn, contact a local Social Security disability attorney immediately, and if time is running short, advise the claimant to appeal and request continuation of benefits. Generally, as noted above, there is no constitutional right of Title II Social Security Disability Insurance recipients to continuing benefits under the *Goldberg v. Kelly* standard which applies to SSI welfare recipients. For example, if there were some non-medical reason why SSA should terminate Title II benefits, there is no right to continuation of benefits. However, when dealing with SSA determinations of medical improvement, a reform measure passed to stop the Reagan administration's wholesale termination of nearly everyone on the disability rolls, does provide statutory relief similar to Goldberg. The social Security Disability Benefit Reform Act of 1984, Public Law 98-460, provides recipients with three tools: the ten-day benefit continuation standard; the requirement that SSA not terminate benefits unless and until there is a face-to-face interview on the issue of medical improvement with an SSA staff person; and a standard of review that puts the burden of proof on SSA to show that the condition or conditions of the claimant are no longer disabling. The latter is called the "medical improvement standard."

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PRACTICE POINTER: In medical improvement cases, if the claimant failed to request benefits continue during the Reconsideration stage, upon an adverse finding at Recon that triggers the right to file a Request for Hearing, the claimant has a new ten-day window to request continuation of benefits pending the hearing before the federal Administrative Law Judge. Given that most Social Security Administration Offices of Disability Adjudication and Review (ODAR) are more than two years behind in their caseload, benefits can continue for a substantial time if the ten-day request was made. Failure to make the ten-day request within ten days, is also subject to a review for “good cause” and if SSA finds that the claimant had good cause in failing to request continuation within the ten days, benefits can be continued anyway. See 20 CFR §404.1597a(g)(1) and 20 CFR §416.996(d)(1).

Another difference between SSDI and SSI benefits: if SSDI benefits are terminated due to the claimant’s work record at Substantial Gainful Activity levels, SSA will not continue benefits during appeal. However, that is not true for SSI and concurrent SSDI-SSI cases. See 20 CFR §404.1597a(b) and §416,996(f) and §416.1336 and POMS DI 12027.015. Benefits continue for SSI recipients even if they engage in substantial gainful activity.

D. Financial Redeterminations. As shown above, there are substantial rights for claimants who act quickly in SSI financial termination cases. However, it is also important to realize that the SSI financial case should be decided at the local level, by requesting a Formal Conference when filing the Request for Reconsideration of a financial determination (such as, the Special Needs Trust failed to meet the requirements of the POMS at SI 01120.201 et seq.). Federal ALJs and the ODAR staff, with some exceptions, are generally disinterested and inexperienced in handling SSI financial eligibility issues; ODAR staff and ALJs work daily on medical disability issues. On the other hand, local District Office SSA Claims Reps are extremely experienced in SSI and the POMS, and all the ways that financial eligibility can continue legally. Try to keep your case decided at that level, but go on to the ALJ level if necessary.

III. Dealing with Overpayments – Avoiding, Defending, Reducing and Destroying.

A. Avoiding – by following the reporting rules. As noted above, there are myriad opportunities for claimants to forget to report. However, the consequences can be significant, and over-reporting rather than under-reporting is the first defense to suffering with overpayment issues.

PRACTICE POINTER: As an attorney, you have drafted the perfect Special Needs Trust, or Personal Services Contract, or otherwise created a perfect spend-down plan of the unexpected inheritance or the personal injury settlement award. It is so perfect, that you determine that since it meets all the SSI rules, you and your client have no duty to report because it is, in your mind, a non-event. Yes, IN YOUR MIND! But not in SSA’s. Guess who gets to determine if your d4A Special Needs Trust truly meets the SSA rules? That’s right – it’s for SSA to say, not you and not your client. Therefore, REPORT all changes of circumstances, even the ones that the claimant thinks will not affect eligibility. Keep a copy, send everything certified return receipt mail. Over-reporting, and proving that an item was reported, is the safest route.

1. Work Activity. Self-employment as well as traditional wage employment must be reported by claimants within ten days of the first of the month following the month of employment. Since wages or self-employment earnings may go up and down monthly,

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unfortunately the reporting, and the adjustment of benefits, will also have to go up and down monthly.

2. Financial Circumstance and Living Arrangements. All of the items listed in paragraph I-C-5 above, must be reported. For example, a child of a disabled parent who takes a part time newspaper delivery job, could affect the eligibility of the disabled parent, since the healthy parent's income is not counted in full based on the number of unemployed children in the household. When one changes from unemployed to employed, if the earnings of the child are sufficient, then the child may not be counted as an SSI dependent.

B. Defending overpayments on substantive grounds.

1. Challenging Continuing Disability Reviews (CDRs). This is too specialized for non-SSA disability attorneys. Refer the client to a specialist. As noted above, however, the Elder Law attorney may be important in recognizing the importance of appealing timely and requesting continuation of benefits.

2. Challenging financial determinations. The claimant and the claimant's attorney have the right to request a reconsideration, and later a hearing. At the reconsideration stage, the right includes the opportunity to review the file prior to the Formal Conference, which the good practitioner included when filing the Request for Reconsideration. In the claimant's file, many times there will be notes of communications with the SSA Regional Office in Atlanta, detailing the reasons why the claimant is thought to be ineligible. This is invaluable in preparing for the Formal Conference. The Formal Conference is conducted at the local Social Security office, often by the same person who made the determination of ineligibility. If the SSA staff person seems closed-minded and biased, ask to speak to the supervisor, and request that another staff person be assigned to conduct the conference, and cite the claimant's rights under *Goldberg v. Kelly, supra*. SSA is aware of *Goldberg*, and the decision's import appears in the POMS. The substantive preparation for the Conference is based on finding and citing to the SSA staff, the POMS which they regard as their bible. Citing court decisions, statutes, and even federal regulations is futile. SSA staff live and die by the POMS.

PRACTICE NOTE: A significant procedural problem developed as a standard practice in local Social Security District Offices around the country. SSA staff believed that it was not possible to challenge whether there was an overpayment, by filing only a Request for Reconsideration, and instead required that the challenge be made by filing a Request for Waiver of the Overpayment. Logically, that did not make sense. It should be possible to challenge whether there is an overpayment, without having to complete a detailed financial questionnaire to allege that the overpayment should be waived. SSA agrees with us. A letter by our law firm to the Atlanta Regional Chief Counsel resulted in a national EM - "Emergency Message" - to all SSA offices around the country, stating that we can challenge the overpayment without filing the Waiver form. See a copy of the attached Emergency Message. It may be a good idea to include the EM with your Request for Reconsideration if you are challenging whether there was an overpayment in the first place.

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C. Reducing the overpayment to zero or something more by requesting Waiver of the Overpayment.

In addition, or alternately to challenging whether there is an overpayment, the claimant may request that the overpayment be waived pursuant to 42 USC §404(b) which states: “In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this title or would be against equity and good conscience. In making for purposes of this subsection any determination of whether any individual is without fault, the Secretary shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including any lack of facility with the English language).”

Thus, a claimant must show two things: that the claimant was “without fault” in creating the overpayment, and secondly, that recovery of the overpayment would either “defeat the purposes of the Act” or “would be against equity and good conscience” for the government to recover the overpayment.

The above applies to all claimants. For SSI claimants, there is an additional “out” for the government: the recovery could be waived where failure to do so will “impede efficient or effective administration” of the SSI program due to the small amount (less than \$1,000) involved. See 20 CFR §416.550(b)(3).

Each of these terms are defined in the regulations and in the POMS.

“Without fault” as stated in 20 CFR 416.552 only considers the fault of the claimant or the Rep Payee, not the gross mismanagement of the file (i.e., fault) on the part of the Social Security Administration. Even if SSA caused the overpayment, it is like a bank ATM giving out \$1,000 instead of the \$100 requested: it still has to be repaid unless the SSA claimant was both without fault and meets the other requirements – defeats the purposes of the Act or against equity and good conscience. Fault is probably what you think it is. Suppose the claimant gave false or incomplete information to SSA, which caused SSA to pay benefits or an amount of benefits it would not have provided if the correct information was supplied. Often claimants will decide that answering whether they own other property, means only property in the United States. Failure to furnish required information, such as this, will trigger a determination that the individual was at fault in creating the overpayment.

SSA’s regulations at 20 CFR §404.510 gives fourteen examples of “fault” and “without fault,” in Title II claims (some of which apply to SSI claimants as well).

For SSI claimants, see 20 CFR §416.552 for the discussion of “without fault.”

“Defeats the purposes of the Act” means that recovering the funds from the claimant would create such a hardship that the claimant would be unable to meet ordinary and necessary living expenses. 20 CFR §404.508 and 416.553. The types of expenses include, for example, food, clothing, shelter, medical and drug expenses, court-ordered child support or court-ordered alimony. Given the meager payment of SSI benefits, SSA assumes that collection of overpayments from SSI claimants will create a hardship so significant that it “defeats the purposes of the Act.”

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"Against equity and good conscience" means that the claimant changed the claimant's position for the worse depending on the receipt of the benefits, or relinquished a valuable right depending on the continued receipt of the benefit, such as a person who moved out of Florida, giving up subsidized Section 8 housing, and depending on the SSI payment to pay for the new unsubsidized housing in North Carolina.

Making determinations of whether SSA should waive or reduce the overpayment is based on one single form, SSA-632, attached. It is long, it is detailed, but it is the basis for the opportunity to get part or all of the recovery waived, or to work out favorable repayment terms. Thus, the most important task for a claimant is to accurately complete Form SSA-632, "Request for Waiver of Overpayment Recovery or Change in Repayment Rate," attached to this outline. At the hearing level, each of the items of expenses should be proved up by documents and testimony, as appropriate. Finally, the Federal Claims Collection Act of 1966 provides that for those persons no longer receiving SSI or SSDI benefits, SSA is entitled to "compromise" the payment and accept less than its full amount. The amount and procedure for compromising claims is found in 20 CFR §404.515.

D. Destroying the overpayment determination – bankruptcy.

It is a common misconception that all debts owed to the U.S. Government cannot be discharged in bankruptcy. Ultimately, in appropriate cases, attorneys may recommend to clients that they seek consultation with bankruptcy attorneys.

Barring claimant fraud, overpayments may be discharged in bankruptcy. See *Neavear v. Schwieker*, 674 F.2d 1201 (7th Cr. 1982). However, be aware that even bankruptcy attorneys need to be apprised of the *Neavear* case. A copy of the *Neavear* case is attached.

The position of the Social Security Administration, however, is clear. They will honor a notice of filing a bankruptcy petition and will immediately stop all collection of the overpayment, including the reduction of the monthly payment for those claimants still receiving SSI or SSDI payments. Those payments will be restored to their full amount. See the POMS at GN 002215.185 on Bankruptcy Proceedings which directs the staff to stop all collection efforts immediately and restore benefits.

The Relevant SSI portion of Social Security Administration Federal Regulations

20 CFR §416.535 Underpayments and overpayments.

(a) *General.* When an individual receives SSI benefits of less than the correct amount, adjustment is effected as described in §§416.542 and 416.543, and the additional rules in §416.545 may apply. When an individual receives more than the correct amount of SSI benefits, adjustment is effected as described in §416.570. Refund of overpayments is discussed in §416.560 and waiver of recovery of overpayments is discussed in §§416.550 through 416.555.

(b) *Additional rules for individuals whose drug addiction or alcoholism is a contributing factor material to the determination of disability.* When an individual whose drug addiction or alcoholism is a contributing factor material to the determination of disability, as described in §416.935, receives less than the correct amount of SSI benefits, adjustment is effected as described in §§416.542 and 416.543 and the additional rule described in §416.544 applies.

(c) *Additional rules for eligible individuals under age 18 who have a representative payee.* When an eligible individual under age 18 has a representative payee and receives less than the correct amount of SSI benefits, the additional rules in §416.546 may apply.

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(d) *Additional rules for eligible aliens and for their sponsors.* When an individual who is an alien is overpaid SSI benefits during the 3-year period in which deeming from a sponsor applies (see [§416.1160\(a\)\(3\)](#)), the sponsor and the alien may be jointly and individually liable for repayment of the overpayment. The sponsor is liable for the overpayment if he or she failed to report correct information that affected the alien's eligibility or payment amount. This means information about the income and resources of the sponsor and, if they live together, of the sponsor's spouse. However, the sponsor is not liable for repayment if the sponsor was without fault or had good cause for failing to report correctly. A special rule that applies to adjustment of other benefits due the alien and the sponsor to recover an overpayment is described in [§416.570\(b\)](#).

(e) *Sponsor without fault or good cause exists for failure to report.* Without fault or good cause will be found to exist if the failure to report was not willful. To establish willful failure, the evidence must show that the sponsor knowingly failed to supply pertinent information regarding his or her income and resources.

20 CFR §416.550 Waiver of adjustment or recovery—when applicable.

Waiver of adjustment or recovery of an overpayment of SSI benefits may be granted when (EXCEPTION: This section does not apply to a sponsor of an alien):

- (a) The overpaid individual was without fault in connection with an overpayment, and
- (b) Adjustment or recovery of such overpayment would either:
 - (1) Defeat the purpose of title XVI, or
 - (2) Be against equity and good conscience, or
 - (3) Impede efficient or effective administration of title XVI due to the small amount involved.

§416.551 Waiver of adjustment or recovery—effect of.

Waiver of adjustment or recovery of an overpayment from the overpaid person himself (or, after his death, from his estate) frees him and his eligible spouse from the obligation to repay the amount of the overpayment covered by the waiver. Waiver of adjustment or recovery of an overpayment from anyone other than the overpaid person himself or his estate (e.g., a surviving eligible spouse) does not preclude adjustment or recovery against the overpaid person or his estate.

Example: The recipient was overpaid \$390. It was found that the overpaid recipient was eligible for waiver of adjustment or recovery of \$260 of that amount, and such action was taken. Only \$130 of the overpayment remained to be recovered by adjustment, refund, or the like.

§416.552 Waiver of adjustment or recovery—without fault.

Without fault relates only to the situation of the individual seeking relief from adjustment or recovery of an overpayment. The overpaid individual (and any other individual from whom the Social Security Administration seeks to recover the overpayment) is not relieved of liability and is not *without fault* solely because the Social Security Administration may have been at fault in making the overpayment. In determining whether an individual is without fault, the *fault* of the overpaid person and the *fault* of the individual seeking relief under the waiver provision are considered. Whether an individual is *without fault* depends on all the pertinent circumstances surrounding the overpayment in the particular case. The Social Security Administration considers the individual's understanding of the reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return checks which were not due, and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition). In determining whether an individual is without fault based on a consideration of these factors, the Social Security Administration will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) the individual may have. Although the finding depends on all of the circumstances in the particular case, an individual will be found to have been at fault in connection with an overpayment when an incorrect payment resulted from one of the following:

- (a) Failure to furnish information which the individual knew or should have known was material;
- (b) An incorrect statement made by the individual which he knew or should have known was incorrect (this includes the individual's furnishing his opinion or conclusion when he was asked for facts), or
- (c) The individual did not return a payment which he knew or could have been expected to know was incorrect.

§416.553 Waiver of adjustment or recovery—defeat the purpose of the supplemental security income program.

We will waive adjustment or recovery of an overpayment when an individual on whose behalf waiver is being considered is without fault (as defined in [§416.552](#)) and adjustment or recovery of the overpayment would defeat the purpose of the supplemental security income program.

(a) *General rule.* We consider adjustment or recovery of an overpayment to defeat the purpose of the supplemental security income (SSI) program if the individual's income and resources are needed for ordinary and necessary living expenses under the criteria set out in [§404.508\(a\)](#) of this chapter

(b) *Alternative criteria for individuals currently eligible for SSI benefits.* We consider an individual or couple currently eligible for SSI benefits to have met the test in paragraph (a) of this section if the individual's or couple's current monthly income (that is, the income upon which the individual's or couple's eligibility for the current month is determined) does not exceed—

- (1) The applicable Federal monthly benefit rate for the month in which the determination of waiver is made (see subpart D of this part); plus
- (2) The \$20 monthly general income exclusion described in [§§416.1112\(c\)\(3\)](#) and [416.1124\(c\)\(10\)](#); plus
- (3) The monthly earned income exclusion described in [§416.1112\(c\)\(4\)](#); plus
- (4) The applicable State supplementary payment, if any (see subpart T of this part) for the month in which determination of waiver is made.

For those SSI recipients whose income exceeds these criteria, we follow the general rule in paragraph (a) of this section.

§416.554 Waiver of adjustment or recovery—against equity and good conscience.

We will waive adjustment or recovery of an overpayment when an individual on whose behalf waiver is being considered is without fault (as defined in [§416.552](#)) and adjustment or recovery would be *against equity and good conscience*. Adjustment or recovery is considered to be *against equity and good conscience* if an individual changed his or her position for the worse or relinquished a valuable right because of reliance upon a notice that payment would be made or because of the incorrect payment itself. In addition, adjustment or recovery is considered to be *against equity and good conscience* for an individual who is a member of an eligible couple that is legally separated and/or living apart for that part of an overpayment not received, but subject to recovery under [§416.570](#).

Example 1: Upon being notified that he was eligible for supplemental security income payments, an individual signed a lease on an apartment renting for \$15 a month more than the room he had previously occupied. It was subsequently found that eligibility for the payment should not have been established. In such a case, recovery would be considered "against equity and good conscience."

Example 2: An individual fails to take advantage of a private or organization charity, relying instead on the award of supplemental security income payments to support himself. It was subsequently found that the money was improperly paid. Recovery would be considered "against equity and good conscience."

Example 3: Mr. and Mrs. Smith—members of an eligible couple—separate in July. Later in July, Mr. Smith receives earned income resulting in an overpayment to both. Mrs. Smith is found to be without fault in causing the overpayment. Recovery from Mrs. Smith of Mr. Smith's part of the couple's overpayment is waived as being *against equity and good conscience*. Whether recovery of Mr. Smith's portion of the couple's overpayment can be waived will be evaluated separately.

§416.555 Waiver of adjustment or recovery—impede administration.

Waiver of adjustment or recovery is proper when the overpaid person on whose behalf waiver is being considered is without fault, as defined in [§416.552](#), and adjustment or recovery would impede efficient or effective administration of title XVI due to the small amount involved. The amount of overpayment determined to meet such criteria is measured by the current average administrative cost of handling such overpayment case through such adjustment or recovery processes. In determining whether the criterion is met, the overpaid person's financial circumstances are not considered.

§416.556 Waiver of adjustment or recovery—countable resources in excess of the limits prescribed in [§416.1205](#) by \$50 or less.

(a) If any overpayment with respect to an individual (or an individual and his or her spouse if any) is attributable solely to the ownership or possession by the individual (and spouse if any) of countable resources having a value which exceeds the applicable dollar figure specified in [§416.1205](#) by an amount of \$50.00 or less, including those resources deemed to an individual in accordance with [§416.1202](#), such individual (and spouse if any) shall be deemed to have been without fault in connection with the overpayment, and waiver of adjustment or recovery will be made, unless the failure to report the value of the excess resources correctly and in a timely manner was willful and knowing.

(b) Failure to report the excess resources correctly and in a timely manner will be considered to be willful and knowing and the individual will be found to be at fault when the evidence clearly shows the individual (and spouse if any) was fully aware of the requirements of the law and of the excess resources and chose to conceal these resources. When an individual incurred a similar overpayment in the past and received an explanation and instructions at the time of the previous overpayment, we will generally find the individual to be at fault. However, in determining whether the individual is at fault, we will consider all aspects of the current and prior overpayment situations, and where we determine the individual is not at fault, we will waive adjustment or

recovery of the subsequent overpayment. In making any determination or decision under this section concerning whether an individual is at fault, including a determination or decision of whether the failure to report the excess resources correctly and in a timely manner was willful and knowing, we will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) of the individual (and spouse if any).

§416.557 Personal conference.

(a) If waiver cannot be approved (*i.e.*, the requirements in [§416.550](#) (a) and (b) are not met), the individual is notified in writing and given the dates, times and place of the file review and personal conference; the procedure for reviewing the claims file prior to the personal conference; the procedure for seeking a change in the scheduled date, time and/or place; and all other information necessary to fully inform the individual about the personal conference. The file review is always scheduled at least 5 days before the personal conference. We will offer to the individual the option of conducting the personal conference face-to-face at a place we designate, by telephone, or by video teleconference. The notice will advise the individual of the date and time of the personal conference.

(b) At the file review, the individual and the individual's representative have the right to review the claims file and applicable law and regulations with the decisionmaker or another of our representatives who is prepared to answer questions. We will provide copies of material related to the overpayment and/or waiver from the claims file or pertinent sections of the law or regulations that are requested by the individual or the individual's representative.

(c) At the personal conference, the individual is given the opportunity to:

- (1) Appear personally, testify, cross-examine any witnesses, and make arguments;
- (2) Be represented by an attorney or other representative (see [§416.1500](#)), although the individual must be present at the conference; and
- (3) Submit documents for consideration by the decisionmaker.

(d) At the personal conference, the decisionmaker:

- (1) Tells the individual that the decisionmaker was not previously involved in the issue under review, that the waiver decision is solely the decisionmaker's, and that the waiver decision is based only on the evidence or information presented or reviewed at the conference;
- (2) Ascertains the role and identity of everyone present;
- (3) Indicates whether or not the individual reviewed the claims file;
- (4) Explains the provisions of law and regulations applicable to the issue;
- (5) Briefly summarizes the evidence already in file which will be considered;
- (6) Ascertains from the individual whether the information presented is correct and whether he/she fully understands it;
- (7) Allows the individual and the individual's representative, if any, to present the individual's case;
- (8) Secures updated financial information and verification, if necessary;
- (9) Allows each witness to present information and allows the individual and the individual's representative to question each witness;
- (10) Ascertains whether there is any further evidence to be presented;
- (11) Reminds the individual of any evidence promised by the individual which has not been presented;
- (12) Lets the individual and the individual's representative, if any, present any proposed summary or closing statement;
- (13) Explains that a decision will be made and the individual will be notified in writing; and
- (14) Explains repayment options and further appeal rights in the event the decision is adverse to the individual.

(e) SSA issues a written decision to the individual (and his or her representative, if any) specifying the findings of fact and conclusions in support of the decision to approve or deny waiver and advising of the individual's right to appeal the decision. If waiver is denied, adjustment or recovery of the overpayment begins even if the individual appeals.

(f) If it appears that the waiver cannot be approved, and the individual declines a personal conference or fails to appear for a second scheduled personal conference, a decision regarding the waiver will be made based on the written evidence of record. Reconsideration is the next step in the appeals process.

§416.558 Notice relating to overpayments and underpayments.

(a) *Notice of overpayment and underpayment determination.* Whenever a determination concerning the amount paid and payable for any period is made and it is found that, with respect to any month in the period, more or less than the correct amount was paid, written notice of the correct and incorrect amounts for each such month in the period will be sent to the individual against whom adjustment or recovery of the overpayment as defined in [§416.537\(a\)](#) may be effected or to whom the underpayment as defined in [§416.536](#) and any amounts subject to installment payments as defined in [§416.544](#) would be payable, notwithstanding the fact that part or all of the underpayment must be withheld in accordance with [§416.543](#). When notifying an individual of a determination of overpayment, the Social Security Administration will, in the notice, also advise the individual that adjustment or recovery is required, as set forth in [§416.571](#), except under certain specified conditions, and of his or her right to request waiver of adjustment or recovery of the overpayment under the provisions of [§416.550](#).

(b) *Notice of waiver determination.* Written notice of an initial determination of waiver shall be given the individual in accordance with [§416.1404](#) unless the individual was not given notice of the overpayment in accordance with paragraph (a) of this section.

(c) *Notice relating to installment payments to individuals whose drug addiction or alcoholism is a contributing factor material to the determination of disability.* Whenever a determination is made concerning the amount of any benefits due for a period that must be paid in installments, the written notice will also explain the amount of the installment payment and when an increased initial installment payment may be made (as described in [§416.544](#)). This written notice will be sent to the individual and his or her representative payee.

§416.560 Recovery—refund.

An overpayment may be refunded by the overpaid recipient or by anyone on his or her behalf. Refund should be made in every case where the overpaid individual is not currently eligible for SSI benefits. If the individual is currently eligible for SSI benefits and has not refunded the overpayment, adjustment as set forth in [§416.570](#) will be proposed.

§416.570 Adjustment.

(a) *General.* When a recipient has been overpaid, the overpayment has not been refunded, and waiver of adjustment or recovery is not applicable, any payment due the overpaid recipient or his or her eligible spouse (or recovery from the estate of either or both when either or both die before adjustment is completed) is adjusted for recovery of the overpayment. Adjustment will generally be accomplished by withholding each month the amount set forth in [§416.571](#) from the benefit payable to the individual except that, when the overpayment results from the disposition of resources as provided by [§§416.1240\(b\)](#) and [416.1244](#), the overpayment will be recovered by withholding any payments due the overpaid recipient or his or her eligible spouse before any further payment is made. Absent a specific request from the person from whom recovery is sought, no overpayment made under title XVIII of the Act will be recovered by adjusting SSI benefits. In no case shall an overpayment of SSI benefits be adjusted against title XVIII benefits. No funds properly deposited into a dedicated account (see [§§416.546](#) and [416.640\(e\)](#)) can be used to repay an overpayment while the overpaid individual remains subject to the provisions of those sections.

(b) *Overpayment made to representative payee after the recipient's death.* A representative payee or his estate is solely liable for repaying an overpayment made to the representative payee on behalf of a recipient after the recipient's death. In such case, we will recover the overpayment according to paragraph (a) of this section, except that:

- (1) We will not adjust any other payment due to the eligible spouse of the overpaid representative payee to recover the overpayment, and
- (2) If the overpaid representative payee dies before we complete adjustment, we will not seek to recover the overpayment from the eligible spouse or the estate of the eligible spouse.

§416.571 10-percent limitation of recoupment rate—overpayment.

Any adjustment or recovery of an overpayment for an individual in current payment status is limited in amount in any month to the lesser of (1) the amount of the individual's benefit payment for that month or (2) an amount equal to 10 percent of the individual's total income (countable income plus SSI and State supplementary payments) for that month. The countable income used is the countable income used in determining the SSI and State supplementary payments for that month under [§416.420](#). When the overpaid individual is notified of the proposed SSI and/or federally administered State supplementary overpayment adjustment or recovery, the individual will be given the opportunity to request that such adjustment or recovery be made at a higher or lower rate than that proposed. If a lower rate is requested, a rate of withholding that is appropriate to the financial condition of the overpaid individual will be set after an evaluation of all the pertinent facts. An appropriate rate is one that will not deprive the individual of income required for ordinary and necessary living expenses. This will include an evaluation of the individual's income, resources, and other financial obligations. The 10-percent limitation does not apply where it is determined that the overpayment occurred because of fraud, willful misrepresentation, or concealment of material information committed by the individual or his or her spouse. Concealment of material information means an intentional, knowing, and purposeful delay in

making or failure to make a report that will affect payment amount and/or eligibility. It does not include a mere omission on the part of the recipient; it is an affirmative act to conceal. The 10-percent limitation does not apply to the recovery of overpayments incurred under agreements to dispose of resources pursuant to [§416.1240](#). In addition, the 10-percent limitation does not apply to the reduction of any future SSI benefits as a consequence of the misuse of funds set aside in accordance with [§416.1231\(b\)](#) to meet burial expenses. Adjustment or recovery will be suspended if the recipient is subject to a reduced benefit rate under [§416.414](#) because of residing in a medical treatment facility in which Medicaid is paying a substantial portion of the recipient's cost of care.

§416.572 Are title II and title VIII benefits subject to adjustment to recover title XVI overpayments?

(a) *Definitions*—

(1) *Cross-program recovery*. Cross-program recovery is the process that we will use to collect title XVI overpayments from benefits payable to you under title II or title VIII of the Social Security Act.

(2) *Benefits payable*. For purposes of this section, benefits payable means the amount of title II or title VIII benefits you actually would receive. For title II benefits, it includes your monthly benefit and your past-due benefits after any reductions or deductions listed in [§404.401\(a\)](#) and (b) of this chapter. For title VIII benefits, it includes your monthly benefit and any past-due benefits after any reduction by the amount of income for the month as described in [§§408.505](#) through [408.510](#) of this chapter.

(b) *When may we collect title XVI overpayments using cross-program recovery?* We may use cross-program recovery to collect a title XVI overpayment you owe when benefits are payable to you under title II, title VIII, or both.

§416.573 How much will we withhold from your title II and title VIII benefits to recover a title XVI overpayment?

(a) If past-due benefits are payable to you, we will withhold the lesser of the entire overpayment balance or the entire amount of past-due benefits.

(b)

(1) We will collect the overpayment from current monthly benefits due in a month by withholding the lesser of the amount of the entire overpayment balance or 10 percent of the monthly title II benefits and monthly title VIII benefits payable to you in the month.

(2) If we are already recovering a title II, title VIII or title XVI overpayment from your monthly title II benefit, we will figure your monthly withholding from title XVI payments (as described in [§416.571](#)) without including your title II benefits in your total countable income.

(3) Paragraph (b)(1) of this section does not apply if:

(i) You request and we approve a different rate of withholding, or

(ii) You or your spouse willfully misrepresented or concealed material information in connection with the overpayment.

(c) In determining whether to grant your request that we withhold less than the amount described in paragraph (b)(1) of this section, we will use the criteria applied under [§416.571](#) to similar requests about withholding from title XVI benefits.

(d) If you or your spouse willfully misrepresented or concealed material information in connection with the overpayment, we will collect the overpayment by withholding the lesser of the overpayment balance or the entire amount of title II benefits and title VIII benefits payable to you. We will not collect at a lesser rate. (See [§416.571](#) for what we mean by concealment of material information.)

§416.574 Will you receive notice of our intention to apply cross-program recovery?

Before we collect an overpayment from you using cross-program recovery, we will send you a written notice that tells you the following information:

(a) We have determined that you owe a specific overpayment balance that can be collected by cross-program recovery;

(b) We will withhold a specific amount from the title II or title VIII benefits (see [§416.573](#));

(c) You may ask us to review this determination that you still owe this overpayment balance;

(d) You may request that we withhold a different amount from your current monthly benefits (the notice will not include this information if [§416.573\(d\)](#) applies); and

(e) You may ask us to waive collection of this overpayment balance.

§416.575 When will we begin cross-program recovery from your current monthly benefits?

(a) We will begin collecting the overpayment balance by cross-program recovery from your current monthly title II and title VIII benefits no sooner than 30 calendar days after the date of the notice described in [§416.574](#). If within that 30-day period you pay us the full overpayment balance stated in the notice, we will not begin cross-program recovery.

(b) If within that 30-day period you ask us to review our determination that you still owe us this overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing.

(c) If within that 30-day period you ask us to withhold a different amount from your current monthly benefits than the amount stated in the notice, we will not begin cross-program recovery until we determine the amount we will withhold. This paragraph does not apply when [§416.573\(d\)](#) applies.

(d) If within that 30-day period you ask us to waive recovery of the overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing. See [§§416.550](#) through [416.556](#).

§416.580 Referral of overpayments to the Department of the Treasury for tax refund offset—General.

(a) The standards we will apply and the procedures we will follow before requesting the Department of the Treasury to offset income tax refunds due taxpayers who have an outstanding overpayment are set forth in [§§416.580](#) through [416.586](#) of this subpart. These standards and procedures are authorized by the Deficit Reduction Act of 1984 [31 U.S.C. §3720A], as implemented through Department of the Treasury regulations at 31 CFR 285.2.

(b) We will use the Department of the Treasury tax refund offset procedure to collect overpayments that are certain in amount, past due and legally enforceable, and eligible for tax refund offset under regulations issued by the Secretary of the Treasury. We will use these procedures to collect overpayments only from individuals who are not currently entitled to monthly supplemental security income benefits under title XVI of the Act. We will refer an overpayment to the Secretary of the Treasury for offset against tax refunds no later than 10 years after our right to collect the overpayment first accrued.

§416.581 Notice to overpaid individual.

A request for reduction of a Federal income tax refund will be made only after we determine that an amount is owed and past due and provide the overpaid individual with 60 calendar days written notice. Our notice of intent to collect an overpayment through Federal income tax refund offset will state:

(a) The amount of the overpayment;

(b) That unless, within 60 calendar days from the date of our notice, the overpaid individual repays the overpayment, sends evidence to us at the address given in our notice that the overpayment is not past due or not legally enforceable, or asks us to waive collection of the overpayment under section 1631(b)(1)(B) of the Act, we intend to seek collection of the overpayment by requesting that the Department of the Treasury reduce any amounts payable to the overpaid individual as refunds of Federal income taxes by an amount equal to the amount of the overpayment;

(c) The conditions under which we will waive recovery of an overpayment under section 1631(b)(1)(B) of the Act;

(d) That we will review any evidence presented that the overpayment is not past due or not legally enforceable;

(e) That the overpaid individual has the right to inspect and copy our records related to the overpayment as determined by us and will be informed as to where and when the inspection and copying can be done after we receive notice from the overpaid individual that inspection and copying are requested.

§416.582 Review within SSA that an overpayment is past due and legally enforceable.

(a) *Notification by overpaid individual.* An overpaid individual who receives a notice as described in [§416.581](#) of this subpart has the right to present evidence that all or part of the overpayment is not past due or not legally enforceable. To exercise this right, the individual must notify us and present evidence regarding the overpayment within 60 calendar days from the date of our notice.

(b) *Submission of evidence.* The overpaid individual may submit evidence showing that all or part of the debt is not past due or not legally enforceable as provided in paragraph (a) of this section. Failure to submit the notification and evidence within 60 calendar days will result in referral of the overpayment to the Department of the Treasury, unless the overpaid individual, within this 60-day time period, has asked us to waive collection of the overpayment under section 1631(b)(1)(B) of the Act and we have

not yet determined whether we can grant the waiver request. If the overpaid individual asks us to waive collection of the overpayment, we may ask that evidence to support the request be submitted to us.

(c) *Review of the evidence.* After a timely submission of evidence by the overpaid individual, we will consider all available evidence related to the overpayment. We will make findings based on a review of the written record, unless we determine that the question of indebtedness cannot be resolved by a review of the documentary evidence.

§416.583 Findings by SSA.

(a) Following the review of the record, we will issue written findings which include supporting rationale for the findings. Issuance of these findings concerning whether the overpayment or part of the overpayment is past due and legally enforceable is the final Agency action with respect to the past-due status and enforceability of the overpayment. If we make a determination that a waiver request cannot be granted, we will issue a written notice of this determination in accordance with the regulations in subpart E of this part. Our referral of the overpayment to the Department of the Treasury will not be suspended under [§416.585](#) of this subpart pending any further administrative review of the waiver request that the individual may seek.

(b) Copies of the findings described in paragraph (a) of this section will be distributed to the overpaid individual and the overpaid individual's attorney or other representative, if any.

(c) If the findings referred to in paragraph (a) of this section affirm that all or part of the overpayment is past due and legally enforceable and, if waiver is requested and we determine that the request cannot be granted, we will refer the overpayment to the Department of the Treasury. However, no referral will be made if, based on our review of the overpayment, we reverse our prior finding that the overpayment is past due and legally enforceable or, upon consideration of a waiver request, we determine that waiver of our collection of the overpayment is appropriate.

§416.584 Review of our records related to the overpayment.

(a) *Notification by the overpaid individual.* An overpaid individual who intends to inspect or copy our records related to the overpayment as determined by us must notify us stating his or her intention to inspect or copy.

(b) *Our response.* In response to a notification by the overpaid individual as described in paragraph (a) of this section, we will notify the overpaid individual of the location and time when the overpaid individual may inspect or copy our records related to the overpayment. We may also, at our discretion, mail copies of the overpayment-related records to the overpaid individual.

§416.585 Suspension of offset.

If, within 60 days of the date of the notice described in [§416.581](#) of this subpart, the overpaid individual notifies us that he or she is exercising a right described in [§416.582\(a\)](#) of this subpart and submits evidence pursuant to [§416.582\(b\)](#) of this subpart or requests a waiver under [§416.550](#) of this subpart, we will suspend any notice to the Department of the Treasury until we have issued written findings that affirm that an overpayment is past due and legally enforceable and, if applicable, make a determination that a waiver request cannot be granted.

§416.586 Tax refund insufficient to cover amount of overpayment.

If a tax refund is insufficient to recover an overpayment in a given year, the case will remain with the Department of the Treasury for succeeding years, assuming that all criteria for certification are met at that time.

§416.590 Are there additional methods for recovery of title XVI benefit overpayments?

(a) *General.* In addition to the methods specified in [§§416.560, 416.570, 416.572](#) and [416.580](#), we may recover an overpayment under title XVI of the Act from you under the rules in subparts D and E of part 422 of this chapter. Subpart D of part 422 of this chapter applies only under the following conditions:

- (1) The overpayment occurred after you attained age 18;
- (2) You are no longer entitled to benefits under title XVI of the Act; and
- (3) Pursuant to paragraph (b) of this section, we have determined that the overpayment is otherwise unrecoverable under section 1631(b) of the Act.

(b) *When we consider an overpayment to be otherwise unrecoverable.* We consider an overpayment under title XVI of the Act to be otherwise unrecoverable under section 1631(b) of the Act if all of the following conditions are met:

- (1) We have completed our billing system sequence (*i.e.*, we have sent you an initial notice of the overpayment, a reminder notice, and a past-due notice) or we have suspended or terminated collection activity under applicable rules, such as, the Federal Claims Collection Standards in 31 CFR 903.2 or 903.3.
- (2) We have not entered into an installment payment arrangement with you or, if we have entered into such an arrangement, you have failed to make any payment for two consecutive months.

(3) You have not requested waiver pursuant to [§416.550](#) or [§416.582](#) or, after a review conducted pursuant to those sections, we have determined that we will not waive collection of the overpayment.

(4) You have not requested reconsideration of the initial overpayment determination pursuant to [§§416.1407](#) and [416.1409](#) or, after a review conducted pursuant to [§416.1413](#), we have affirmed all or part of the initial overpayment determination.

(5) We cannot recover your overpayment pursuant to [§416.570](#) by adjustment of benefits payable to any individual other than you. For purposes of this paragraph, if you are a member of an eligible couple that is legally separated and/or living apart, we will deem unrecoverable from the other person that part of your overpayment which he or she did not receive.

The Relevant SSI Program Operations Manual System (POMS) Provisions

SI 02260.001 Basic Requirements Concerning Supplemental Security Income (SSI) Overpayment Waiver

A. Policy for waiving recovery of an overpayment

All overpayment waiver determination decisions **must** be made through the Modernized Supplemental Security Income Claims System (MSSICS) via Direct Supplemental Security Record (SSR) Update (MSOM BUSSR 004.001). Following are the basic waiver policies.

1. When to waive

We waive the recovery of an overpayment **only** if the liable individual is without fault in causing the overpayment, **and** recovery or adjustment would:

- **Defeat the purpose** of Title XVI of the Act; or
- **Be against equity and good conscience**; or
- **Impede effective or efficient administration** of Title XVI of the Act because of the amount involved.

2. Effect of waiver

The effect of an approved request for a waiver is to relieve the overpaid individual, his or her estate or his or her spouse (and the spouse's estate) of the obligation to repay the amount of the overpayment that is waived.

We reopen a determination to approve a request for waiver only if we later determine that the overpayment was the result of fraud.

3. When a waiver may be requested

A waiver may be requested at **any time**. A second or subsequent request may be made even if the prior waiver request was denied and the due process period has expired. Waiver may be requested after recovery has begun or even after recovery is complete.

The request must be in writing, over the individual's signature (or that of his or her representative payee, legal counsel, or other appointed representative). Even if the written request does not contain all the information required on the Form SSA-632-BK (Request for Waiver of Overpayment or Overpayment Recovery or Change in Repayment Rate) it is a request for a waiver.

The date of the waiver request is the date the written request is received in the field office (FO).

4. Effect of waiver request

A request for waiver stops recovery or adjustment effective with the month the written waiver request is received. We do not resume recovery or adjustment until we make the waiver determination and the appeal period has expired.

5. Action following waiver requests

If we cannot make the waiver determination within 10 days of the date the request was filed, we:

- **Stop** recovery or adjustment; and
- **Refund**, the amount recovered for the month the waiver was filed and any subsequent month.

6. Actions following a denial of a request for waiver

Following a denial of a request for waiver we:

- Notify the individual(s) who requested the waiver.
- Delay starting or resuming adjustment until 30 days (plus 5 days for mailing) after the date of the notice of waiver denial.

B. Waiver procedures

1. Written request for a waiver

In order to process a request for a waiver, the request must be in writing and over the individual's signature (or that of his or her representative payee, legal counsel or other appointed representative). Even if incomplete, this document is a waiver request.

A written request for waiver is not required if the total overpayment, not the outstanding balance, is less than \$1,000.01. See [SI 02260.030](#).

The date of the waiver request is the date the written request is received in the FO.

2. Actions following a request for waiver

- a. If you cannot make the waiver determination within 10 days of the waiver request date you must:
 - Stop all recovery or adjustment actions.
 - Refund the amount recovered in the month the request for waiver was filed and any subsequent months. Use the A-OTP process to refund the recovered amount(s). For instructions on the A-OTP process see SM 01902.005 and MSOM BUSSR 004.007 through MSOM BUSSR 004.009 and MSOM BUSSR 003.022.
- b. Do not refund any funds collected for months(s) before the month the request was received.
- c. Do not refund payment withheld if there is either another collect decision (i.e., different period of overpayment) or an unresolved overpayment.
- d. Develop only for the person(s) who is or are liable for making repayment.

For a discussion of liability when there is a representative payee see [SI 02201.020](#) through [SI 02201.023](#) and [SI 02201.025](#).

NOTE: Effective 12/04/2008, a representative payee (or his or her estate) is solely liable for repayment of payments he or she received on behalf of a deceased recipient for month(s) after the month of the recipient's death. See [SI 02201.005](#)

3. Actions following an approval of a request for waiver

- a. Post the approved waiver decision to the SSR using MSSICS Direct SSR Update and the UOWV screen. For instructions see MSOM BUSSR 004.009; and
- b. Refund funds recovered for the period covered by the approved request for waiver. Use the A-OTP process to refund the recovered amount. For instructions on the A-OTP process see SM 01902.005 and MSOM BUSSR 004.003 through MSOM BUSSR 004.009 and MSOM BUSSR 003.022.
- c. If the approved waiver covers months in which payments were adjusted to recover the waived overpayment, refund the amount that was withheld.
- d. Do not refund any funds if there is either another collect decision (i.e., different period of overpayment) or an unresolved overpayment.
- e. If the overpaid individual is a legal guardian or representative payee, send him or her a manual notice of an approved request for waiver. (See Notice of Waiver Decision-General, [NL 00803.200](#))

4. Action following the denial of a waiver request

For instructions on the waiver denial process see [SI 02260.006](#). If you deny a request for waiver of an overpayment you must:

- a. Post the waiver decision to the SSR using MSSICS Direct SSR Update and the UOWV screen. For instructions see MSOM BUSSR 004.009 UOWV screen. For instructions on posting a waiver denial, see MSOM BUSSR 004.009.
- b. Notify the individual(s) who requested the waiver. Use the Form SSA-8173-U3 (Notice of Waiver Denial) in current pay cases or Form SSA-8174-U4 (Notice of Waiver Denial) for non-payment cases.
- c. Never start or resume adjustment before 30 days (plus 5 days for mailing) after the date of the notice of waiver denial.

C. References

[GN 02250.325](#) - Waiver after administrative change of position

[GN 02250.330](#) - Blanket Waivers for Dollar Down Rounding Overpayments

[GN 02250.340](#) - Waiver Determinations for Automatic or Blanket Waivers

[SI 02220.017](#) - SSI Overpayment - Request for a Different Rate of Adjustment, Reconsideration or a Waiver

[SI 02220.065](#) - Recovery from Alien's Sponsor of Payments Made to the Alien

Other Attachments:

- EM-10092 – SSA Emergency Message on Processing Reconsiderations in Overpayment Cases
- Form SSA-632 to Request a Waiver of the Overpayment. [**Important Note:** When filing a Request for Waiver, 1) always attach receipts to prove the household expense items, and 2) always keep a copy and 3) send the form and attachments Certified Mail, Return Receipt, to prove SSA received the documents.]
- Bankruptcy case – *Neavear v. Schweiker*, 674 F.2d 1201 (7th Cir. 1982)

Identification Number EM-10092**Effective Date:**
12/22/2010**Intended Audience:** All
RCs/ARCs/ADs/FOs/TSCs/PSCs/OCO/ODARHQ**Originating Office:** ORDP OISP**Title:** Title II & Title XVI Overpayment Reconsideration Requests – One-Time-Only Instructions**Type:** EM - Emergency Messages**Program:** Title II (RSI); Title XVI (SSI)**Link To Reference:** See References at the bottom of this EM.**Retention Date: June 22, 2011**

The purpose of this message is to inform all technicians in the field office (FO) and program service center (PSC) that, without exception, we must make a determination on the reconsideration issue when we receive an SSA-561-U2 (Request for Reconsideration) for a Title II or Title XVI overpayment (OP).

A. Background

An overpaid individual or his or her representative may request a **reconsideration** when the overpaid person disputes the fact or amount of an overpayment. A **waiver** is a request for relief from making repayment. We are revising current policy to clarify that FO and PSC technicians must always make a formal determination on a Request for Reconsideration when it involves an OP, including implied waivers and OPs of \$1,000 or less and there will be no effect on payment status or the amount of the continuing or ongoing benefit, or both.

B. FO instructions for Title II OPs

If the FO receives an SSA-561-U2 for a Title II OP, stop recovery, and forward the material to the servicing PSC.

C. FO instructions for Title XVI OPs

If the FO receives an SSA-561-U2 for a Title 16 overpayment, stop recovery, and process the request per [SI 04020.030](#).

D. FO instructions for concurrent OPs

If the FO receives an SSA-561-U2 for a concurrent overpayment, see the **NOTE**: in [GN 03102.225B.6](#).

E. PSC instructions for Title II OPs

1. Reconsideration request

Determine whether the fact or amount of the overpayment is correct. Document the determination using the SSA-662 (Reconsideration Determination) (or equivalent), make the appropriate input to the debt management system (DMS), and send a reconsideration notice.

NOTE: Even if the overpayment amount is \$1,000 or less, process the request as a reconsideration and not as a waiver under the \$1,000 Administrative Waiver Tolerance procedures.

2. Implied Title II OP waiver

If the overpaid person indicates on the SSA-561-U2 the inability to repay the overpayment (or similar language), the PSC takes the following actions:

- process the reconsideration as if the beneficiary or representative is requesting both a reconsideration and waiver
- forward the necessary material to the servicing FO to process the waiver request; and
- annotate on the routing sheet that the reconsideration was processed but we still need to take an action on the implied waiver request.

Please follow the above instructions even if an OP balance s no longer exists...

NOTE: If the overpaid individual or his or her representative files both an SSA-561-U2 and an SSA-632-BK (Request for Waiver), first process the Request for Reconsideration. The reconsideration determination may result in the elimination or reduction of the OP in question.

We will update the necessary POMS instructions later.

Direct all program-related and technical questions to your RO support staff or PSC OA staff. RO support staff or PSC OA staff may refer questions or problems to their Central Office contacts.

References:

[GN 02201.025](#) – Overpayment – Reconsideration

[GN 03102.100](#) – The Reconsideration Process

[GN 03102.225](#) – Preparation of Form SSA-561-U2 (Request for Reconsideration)

[GN 03102.250](#) – Form SSA-561-U2 (Request for Reconsideration)

[GN 03102.325](#) – PC Reconsideration Processing Procedures

[GN 03102.425](#) – Reconsideration Notices of Determination

[GN 03102.450](#) – Form SSA-662, Reconsideration Determination

[SI 02220.017](#) – SSI Overpayment - Request for a Different Rate of Adjustment, a Reconsideration or a Waiver

[SI 04020.020](#) – Requests for SSI Reconsideration

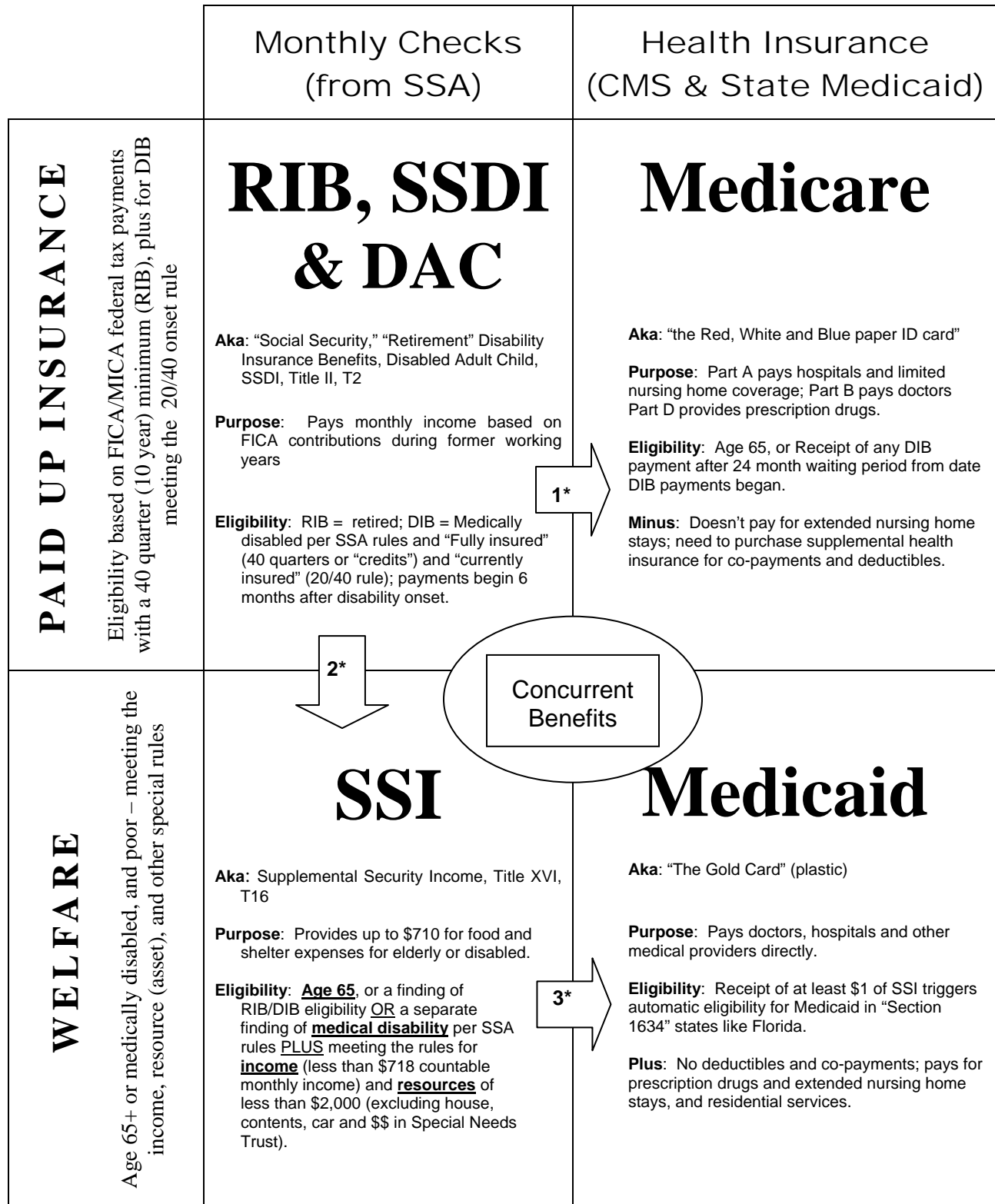
[SI 04020.030](#) – Developing and Processing SSI Reconsideration Requests

MSOM [DMS 006.003](#) – Protest/Stop Recovery Request (PC) (DRPR)

MSOM [DMS 006.019](#) – Protest/Stop Recovery Request (FO) (DRPF)

MSOM [BUSSR 004.010](#) – Appeal (UOAP)

Lillesand's Matrix of Public Benefits for Children and Adults – 2013
Understanding the relationships between Social Security, SSI, Medicare and Medicaid.



*① SSDI triggers Medicare after 24 month waiting period. *② RIB/SSDI of less than \$730 permits eligibility for concurrent SSI disability benefits.

*③ Receipt of at least \$1 of SSI triggers full eligibility for Medicaid in Section 1634 States © David J. Lillesand 2013.

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The Five Step Sequential Evaluation Process

[Substantive]

[Common sense translation]

Are you working now?

Do you have a minor problem?

Do you have an extremely serious illness, such as terminal cancer, that should qualify you automatically?

Are you able to return to any type of work you did in the last 15 years?

Given that you are a handicapped person, is there any other job anywhere that you are capable of doing?

1. Is the claimant engaging in "substantial gainful activity?"

No

2. Does the claimant have a "non-severe impairment"?

No

3. Does the claimant have an impairment which meets or equals the Listing of Impairments?

No

4. Can the claimant return to any former work which he had during the previous 15 years?

No

5. Given the claimant's Residual Functional Capacity, is there any other work that the claimant can do?

INITIAL REQUIREMENTS
Duration: Have condition that has lasted or will last 12 months or more
PLUS
SSDI Quarters: Have paid enough taxes to be covered at time of onset
OR
SSI Financial: Have low income and few assets

If no

No \$\$ Benefits
Can be paid by SSA

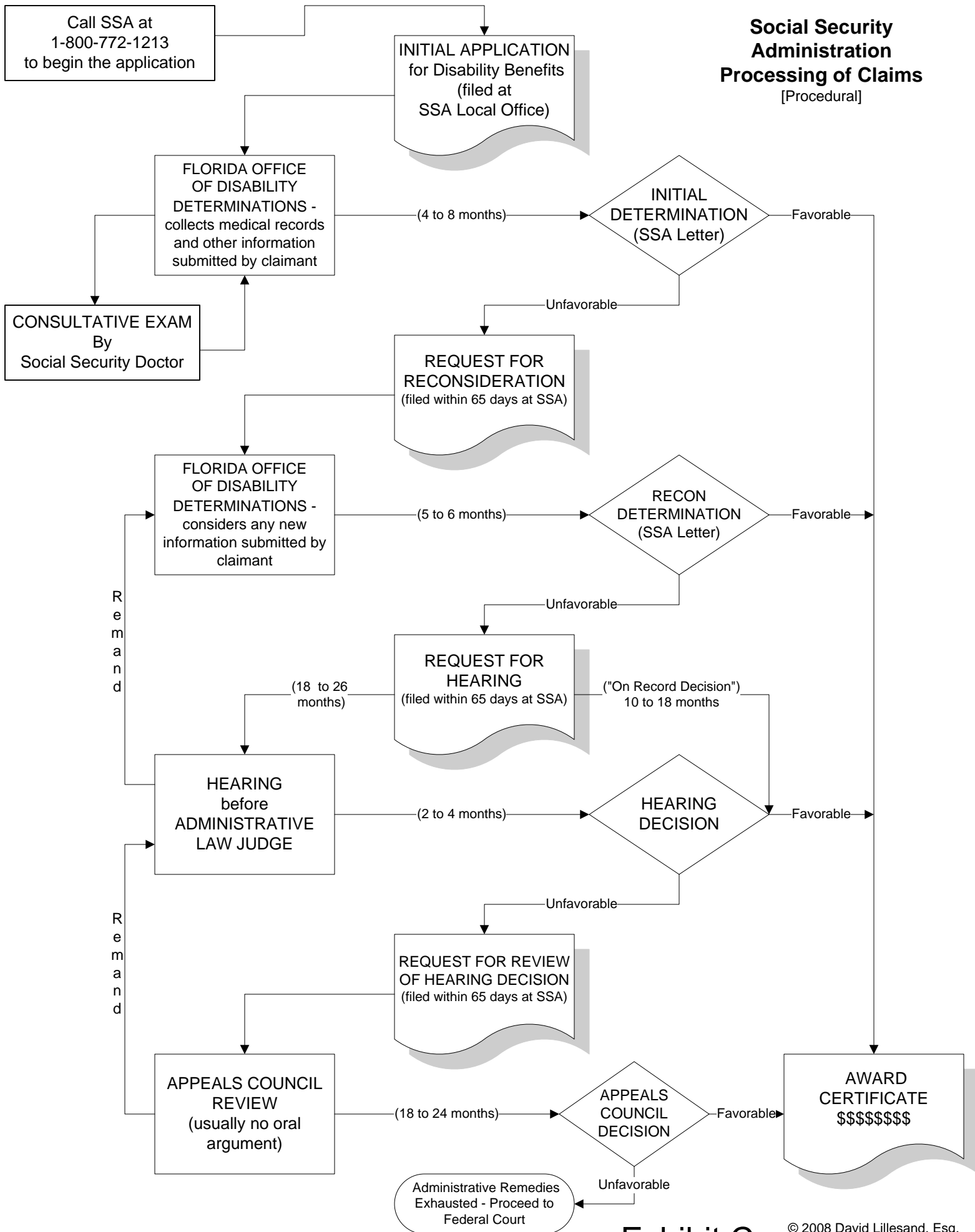
NOT DISABLED
(Claimant loses)

AWARD
CERTIFICATE
\$\$\$\$\$\$
(Claimant wins)

"Old Work"

"New Work"

**Social Security Administration
Processing of Claims**
[Procedural]



Seven-Steps to the Perfectly Valid Special Needs Trust
under Section 1917(d)(4)(A) of the Social Security Act

The following is a summary of special needs trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (SI 01120.203B.1.b.) <ul style="list-style-type: none"> • If yes, go to Step 2. • If no, go to Step 8.
2	Does the trust contain the assets of a disabled individual? (SI 011203B.1.d.) <ul style="list-style-type: none"> • If yes, go to Step 3. • If no, go to Step 8.
3	Is the disabled individual the sole beneficiary of the trust? (SI 01120.203B.1.e.) <ul style="list-style-type: none"> • If yes, go to Step 4. • If no, go to Step 8.
4	Did a parent, grandparent, legal guardian or a court establish the trust? (SI 01120.203B.1.f.) <ul style="list-style-type: none"> • If yes, go to Step 5. • If no, go to Step 8.
5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.1.h. ? <ul style="list-style-type: none"> • If yes, go to Step 6. • If no, go to Step 8.
6	The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.1.c. Go to Step 7 for treatment of assets placed in trust prior to age 65. Go to Step 8 for treatment of assets placed in trust after attaining age 65.
7	Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Determine whether the pooled trust exception in SI 01120.203B.2. applies.

The Five Government Rules on Disbursements From Trusts

SSA POMS SI 01120.201.I.1.

If the trust principal (or a portion of the trust principal) is not a resource, disbursements from the trust (or that portion) may be income to the SSI recipient, depending on the nature of the disbursements. Regular rules apply to determine when income is available.

a. Disbursements Which Are Income

Cash paid directly from the trust to the individual is unearned income.

Disbursements from the trust to third parties that result in the beneficiary receiving non-cash items (other than food or shelter), are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt (see [SI 00815.550](#)).

For example, if a trust buys a car for the beneficiary and the beneficiary's spouse already has a car which is excluded for SSI, the second car is income in the month of receipt since it would not be an excluded resource in the following month

b. Disbursements Which Result in Receipt of In-kind Support and Maintenance

Food or shelter received as a result of disbursements from a trust by the trustee to a third party is income in the form of in-kind support (ISM) and maintenance and is valued under the presumed maximum value (PMV) rule. (See [SI 00835.300](#) for instructions pertaining to the PMV rule. See [SI 01120.200F](#). for rules pertaining to a home.)

c. Disbursements Which Are Not Income

Disbursements from the trust that are not cash to the individual or are third party payments that do not result in the receipt of support and maintenance are not income. Such disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc (see [SI 00815.400](#)).

Disbursements made from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if it would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt (see [SI 00815.550](#)).

For example, a trust purchases a computer for the beneficiary. Since the computer would be excluded from resources as household goods in the following month, the computer is not income (see [SI 01130.430](#)).

d. Disbursements for Credit Card Bills

If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month

For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.

e. Disbursements for Gift Cards and Gift Certificates

Gift cards and gift certificates are considered cash equivalents. If a gift card/certificate can be used to buy food or shelter (e.g. restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card/certificate is a resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g. bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income (see [SI 00830.522](#)).

SSI Trust Compliance

Seven Step Chart for Special Needs Trust Disbursement Decisions

STEP 1. IN MAKING THE DISTRIBUTION, WILL THE TRUSTEE BE IN COMPLIANCE WITH STATE TRUST CODE RULES? – Is the distribution consistent with trustee’s duties to avoid conflict of interests, avoid self-dealing, not act arbitrarily, use best judgment, act in good faith, follow the trust terms, use reasonable skill and care, act in the beneficiary’s best interests, and use trustee’s special skills, if any - - or any other state trust code requirements.

If YES, GO TO STEP 2

If NO, STOP (DENY)

STEP 2. IS THE PROPOSED DISTRIBUTION “FOR THE SOLE BENEFIT” OF THE DISABLED INDIVIDUAL? – See the Sole Benefit Rule in POMS SI 01120.201.F as modified by traditional trust law (a self-settled or first party grantor trust cannot legally avoid creditors’ claims) and criminal law (e.g., felony child neglect to fail to provide food, clothing shelter and medical care for minor children; failure to pay IRS and state taxes, etc.): Does the disabled beneficiary reasonably receive some benefit, even if not exclusive benefit, from the distribution. Examples: trustee paying the mother’s admission tickets to Disney World to accompany of a disabled minor; discharging the child support or alimony obligation of a disabled adult beneficiary, or paying obligations to avoid criminal penalties for nonpayment of income taxes, traffic tickets, or neglect of children and spousal maintenance.

If YES, GO TO STEP 3.

If NO, STOP (DENY)

STEP 3. IS IT A SERVICE OR CONSUMABLE ITEM? (e.g., tank of gas for car, travel, medical service, caretaker, baseball tickets, etc.)

If YES, GO TO STEP 6

If NO, GO TO STEP 4

STEP 4. FOR RESOURCES – WOULD THE PURCHASED RESOURCE BE WITHIN THE SPECIAL SSI RULES THAT LIMIT THE AMOUNT, TYPE OR TITLING OF THE RESOURCE TO BE PURCHASED? IS THE PURCHASE ONE OF THE FOLLOWING?

- the only principal residence for the beneficiary – POMS SI 01130.100; SI 01120.200.F;
- one vehicle in accord with POMS SI 01130.200
- household effects of the disabled individual – POMS SI 01130.430
- personal effects of the disabled individual – POMS SI 1130.430
- other limited or excluded resources listed in POMS SI 01130, including burial plots, prepaid burial contracts, limited life insurance, etc.

If YES, GO TO STEP 6.

If NO, GO TO STEP 5.

STEP 5. IF THE DISABLED BENEFICIARY CANNOT HOLD TITLE TO RESOURCE (ASSET), CAN THE OVER-LIMIT RESOURCE BE HELD BY THE TRUSTEE, IN THE TRUST, AS A TRUST ASSET? For example, buying a camper (second vehicle), time share or vacation condo, held in trust’s name

- Should resource/asset be held in name of trust [auto liability laws exposing trust assets if there is an accident with the second car], or create a second trust to hold the asset, e.g., a “Transportation Trust”, for example; and
- Does the Institutional Trustee have a rule against holding, in trust, real property, cars, etc

If YES, GO TO STEP 6.

If NO, STOP (Deny)

STEP 6. DOES THE METHOD OF PURCHASING THE GOODS OR SERVICES, VIOLATE THE SSI INCOME RULES?

– The trustee must consider POMS SI 01120.201.I. - the three rules for distributions from a trust and the impact on benefits: 1) cash payments to a beneficiary are unearned income; 2) payments of items to third parties directly f/b/o beneficiary that are NOT “food or shelter” have no effect on amount of SSI benefit check; and 3) direct third party payments for “food or shelter” items reducing the SSI check, but the reduction is capped by the PMV rule (permissible unless the SSI check is already less than the PMV amount); Be aware also of the special limitations on Gift Card [POMS SI 00830.522] and Travel Tickets [POMS SI 01120.150].

If YES, STOP (Look for a different method)

If NO, PROCEED WITH DISBURSEMENT FROM TRUST

STEP 7. ARE THERE REASONS TO GO AHEAD ANYWAY, AND PURPOSELY GIVE UP SSI AND SSI-RELATED MEDICAID BENEFITS FOR A PERIOD OF TIME? [e.g., family going to live in Europe for three months]

If YES, MAKE THE DISBURSEMENT but only if it results in an income disqualification (temporary disqualification) vs. a sole benefit transfer violation (disqualification for up to 36 months).

If NO, STOP (DENY)

The John Smith Irrevocable Special Needs Trust Agreement

Creation of Trust. This irrevocable Trust Agreement is made pursuant to 42 U.S.C. §1396p(d)(4)(A) between Mary Smith, (the “Settlor”), mother of John Smith, and Wells Fargo Bank (“the Trustee”), for the sole benefit of John Smith (hereafter “John”), a disabled person under age 65. Mary Smith has transferred ten dollars of her own funds as seed money to Wells Fargo Bank as the initial trust estate. No property may be added to this trust after John’s 65th birthday.

Intent of Settlor. The creation, funding and administration of this Trust is intended to allow John to maintain eligibility for public assistance including SSI and Medicaid. The trust is to supplement and not supplant any benefits John receives from governmental programs. This Trust is a discretionary supplemental needs trust and not a basic support trust. All provisions of this Trust Agreement shall be construed to meet the requirements of 42 U.S.C. 1396p(d)4(A); 42 U.S.C. 1917(d)4(A), and the Social Security Administration’s Program Operations Manual (“POMS”), specifically SI 01120.203. John Smith shall have no right or power to alter, amend, revoke, or terminate this Trust, or direct the use of trust funds.

Trustee and Trust Protector. Wells Fargo Bank is appointed as initial Trustee and David Lillesand as Trust Protector. The Trustee and the Trust Protector shall be compensated pursuant to their usual and customary fees as may be amended from time to time. The Trustee shall not be required to furnish any bond. Neither the Trustee nor the Trust Protector shall be liable for any acts undertaken in good faith.

Distributions. The Trustee may pay or apply for the benefit of John Smith such amounts from income or principal as the Trustee in its sole and absolute discretion may deem advisable for John’s supplemental needs. As used in this instrument, “supplemental needs” refers to the requisites for maintaining John’s quality of life, good health, safety and welfare when such requisites are not being provided by government assistance. The Trustee may employ the Trust Protector to advise as to the effect of any distribution on John’s continuing eligibility for SSI and Medicaid health insurance and the method of making the distribution. Any trust income not distributed shall be added to trust principal.

Powers of Trustee. The Trustee shall have all the powers conferred by this agreement and by Florida law. The Trustee may use trust funds to employ agents in carrying out its duties. Upon the request of the Trust Protector, the Trustee is authorized to transfer all or any part of the Trust Estate to a pooled special needs trust that complies with 42 U.S.C. 1396p(d)(4)(C).

Trust Protector. The Trust Protector shall have the power to 1) amend or reform this agreement to ensure that the trust complies with all SSI and Medicaid rules to exclude the trust as a countable resource; 2) advise the Trustee in making distributions that comply with public benefit eligibility rules; 3) remove a Trustee and appoint a successor trustee for any reason, but the Trust Protector may not appoint himself as Trustee; and 4) appoint a successor Trust Protector for the trust.

Trustee. The Trustee may resign by giving 30 days written notice delivered to the Trust Protector and to John. Any Trustee serving under this agreement must be qualified to act in that capacity under state law. If a non-profit charity is to act as Trustee, this agreement shall be automatically amended to provide that such charity shall be a residual beneficiary of at least one dollar. Each successor Trustee serving under this agreement shall have all of the title, rights, powers and privileges granted to the initial Trustee named under this agreement.

Termination of Trust. The trust shall terminate upon John Smith’s death. The Trustee shall request certification of the total medical assistance paid during John’s lifetime from all states which provided such assistance. The Trustee may then pay, prior to reimbursement of medical assistance to the state(s): taxes due from the trust to the state(s) or federal government because of the death of the beneficiary; reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust. It is not permitted prior to reimbursement of the state(s) for medical assistance to pay taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate; inheritance taxes due for residual beneficiaries; payment of debts owed to third parties; funeral expenses; and payments to residual beneficiaries. The Trustee shall then re-pay all states for all medical assistance provided to John, or if there are insufficient trust funds to repay all states in full, then in proportion to the medical assistance provided by each state. Thereafter, the Trustee shall distribute the balance of this trust to such persons or entities in any such manner as John Smith shall appoint by his valid Last Will and Testament. In exercising this power of appointment, John Smith shall make specific reference to this power of appointment. If John Smith should die before the complete distribution of this trust without exercising the foregoing general power of appointment, the Trustee shall distribute the balance of the trust property to John Smith’s heirs at law.

Governing Law. This agreement shall be governed according to the laws of the State of Florida.

IN WITNESS WHEREOF, the undersigned Settlor has signed this Agreement on this ____ day of _____, _____.

Mary Smith, Settlor

Two Witnesses:

1. _____
First Witness signature

2. _____
Second Witness signature

Witness 1 Printed Name

Witness 2 Printed Name

Address: _____

Address: _____

STATE OF FLORIDA)

) ss:

COUNTY OF _____)

On this ____ day of _____, _____ the foregoing document was acknowledged before me by Mary Smith who [] is personally known by me, or who [] produced _____ as identification.

Notary Public

ACCEPTANCE BY TRUSTEE

On this ____ day of _____, _____ Wells Fargo Bank hereby accepts the position of Trustee, acknowledges the receipt of Ten Dollars from Mary Smith as the initial trust estate, and agrees to be bound by the terms of this trust.

Wells Fargo Bank, Trustee

by Melissa Banks, Trust Officer

STATE OF FLORIDA)

) ss:

COUNTY OF _____)

On this ____ day of _____, _____ the foregoing document was acknowledged before me by Melissa Banks who [] is personally known by me, or who [] produced _____ as identification.

Notary Public