



LAW OFFICE of

Adriane S. Grace, PLLC

ATTORNEY AT LAW

Social Security Rules the Estate Planning, Guardianship, and Probate Attorney Should Know

Adriane S. Grace

Attorney at Law

Law Office of Adriane S. Grace, PLLC

Phone: (972) 379-8167

adriane@gracelawoffice.com

About Adriane S. Grace



- Attorney
 - 10+ years devoted to Social Security law
 - Former Attorney-Advisor to SSA Chief Administrative Appeals Judge
- Practice Areas
 - Guardianship and Counseling on Alternatives, Supports & Services, and Public Benefits
 - Probate & Estate Administration and Litigation
 - Social Security Applications and Appeals



“Administrative law is not for sissies—so you should lean back, clutch the sides of your chair, and steel yourselves for a pretty dull lecture. There will be a quiz afterward.” —The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 3 DUKE L. J. 511 (1989)

Types of Social Security Benefits

- **Title II** of the Social Security Act
 - Retirement Insurance (RSI on own work record)
 - Spousal Benefits (RSI for spouse)
 - Widow/Widower Benefits (WIB)
 - Child Survivor Benefits
 - Disability Insurance Benefits (DIB/DI)
 - Adult Disabled Child Benefits
 - If a parent is pulling on a Title II benefit and has an unmarried adult child who was disabled prior to age 22
- **Title XVI** of the Social Security Act
 - Supplemental Security Income (SSI)
 - For disabled children or disabled adults



Social Security Disability Programs

- **Title II of the Social Security Act (T2)**
 - Social Security Disability Insurance for workers (DIB/SSDI)
 - Family benefits for “Auxiliaries”
 - Benefits for minor children of disabled workers or retired workers
 - Adult Disabled Child Benefits (CDB) (parent’s record)
 - Disabled widow(ers) over 50 (deceased spouse or ex-spouse record)
- **Title XVI of the Social Security Act (T16)**
 - Supplemental Security Income (SSI)
 - Disabled children under the age of 18
 - Disabled adults with limited or no work history

Who is Eligible for SSDI/DIB?

- U.S. citizens or permanent residents
 - Disabled “Insured” Worker
 - Individuals who stopped working full time due to disability and who are “insured”
 - Disabled Adult Child who
 - Has a parent who is deceased, or is receiving disability or retirement benefits;
 - Has a disability that began prior to the age of 22 (during the “developmental period”);
- AND
- Is unmarried.
 - Disabled widow(er) over 50, not remarried, or with deceased ex-spouse of 10-year marriage and not re-married

How to Become Insured for SSDI

- Insured status is based on credits earned for each quarter worked
 - In 2021, must make \$1,471 per quarter to receive one “credit”
- For people 31 years old and older you must have 20 quarters of coverage or “credits” in the 40 quarters prior to your disability date (i.e. 5 out of 10 years of reporting income to the IRS and paying taxes)
 - Different number of credits required for younger disabled people
- Not all jobs result in credits, for example:
 - Unreported self-employment income or unreported cash wages
 - State employees paying into an exempted retirement system

Who is Eligible for SSI?

- U.S. citizens and permanent residents
- Disabled children and adults with **limited income & resources**
- Income Limit
 - “countable income” both earned (wages, net earnings from self-employment, royalties) and unearned (worker’s compensation, other SS benefits, unemployment, pensions, annuities, rent, support payments, and other unearned income)
 - Earned income only: no more than \$1,693/month for individuals
 - Unearned income or mix: no more than the max federal benefit rate plus \$20, which is \$814 per month for individual
 - Deemed Income: children (parents’ income) and adults (spouse’s income)

Who is Eligible for SSI? (Resource)

- Resource Limits
 - limit of \$2,000 for single individual, \$3,000 if married
- Countable Resources
 - Resources of the individual and their spouse (if married) greater than \$2,000/\$3,000 limits
 - Countable Income that exceeds limits and isn't spent down (savings)
- Non-Countable Resources
 - Home (whether fixed or mobile) and adjacent land
 - One vehicle
 - Burial plots for the person and their immediate family and burial funds set aside of up to \$1500
 - Personal property
 - Life insurance policies with face value of \$1500 or less
 - Grants, scholarships, fellowships and tuition & fee gifts (9 mos.)

How much are the benefits?

- SSI: 2021 maximum federal amount is \$794 per month for single, \$1,191 for married couple if both eligible (some states supplement these benefits)
- BUT Reductions to SSI Benefits for
 - All types of income—earned (from jobs), unearned (interest from assets, inheritances), deeming of income from parent of a minor child or spouse of an adult
 - “in-kind support”: automatic 1/3 reduction applied to benefits if you are receiving in-kind support for both housing and food from someone else
- Disability Insurance Benefits
 - Monthly benefit is based on your personal work record (max approx. \$3K per month)
 - Average monthly benefit for a disabled worker in 2020 was \$1,447 per month
- Concurrent Benefits
 - Possible to get both SSI and SSDI/CDB 2020 maximum amount is \$814/month

Key Differences: SSI v. SSDI

SSI

- Max benefit \$794/month
- Resource cap (\$2,000)
- Unearned income limits
- Benefits begin the month after the application
- Reductions
 - In-kind support
 - Excess income

SSDI

- Max benefit \$3k
- Unlimited resources
- No unearned income limits
- Retroactive benefits for up to 12 months
- Reductions/offsets for worker's comp

Title II Survivors Benefits Overview

What are survivors benefits?

A one-time payment of \$255 and a monthly payment to eligible family members of a deceased worker.



Who is Eligible?

- Spouses
- Divorced Spouses
- Children
- Parents

How to Apply?

By phone: (800) 772-1213

When to Apply?

After the death reported to vital statistics but not later than 6 months after death.

Possible Eligibility Issues

THE FAMILY RELATIONSHIP



- Children

- Informal family relationships where parentage is not established

- Solution 1: Apply for benefits and follow Social Security process for establishing/proving parentage (Affidavits--> *cumbersome*)
 - Solution 2: Adjudication of Paternity under TEC Sec. 201.052
 - Tip: See Judge King's paper from 2006 Advanced Estate Planning & Probate, *Blood Will Out: The Use of DNA Evidence in Texas Estate Proceedings*



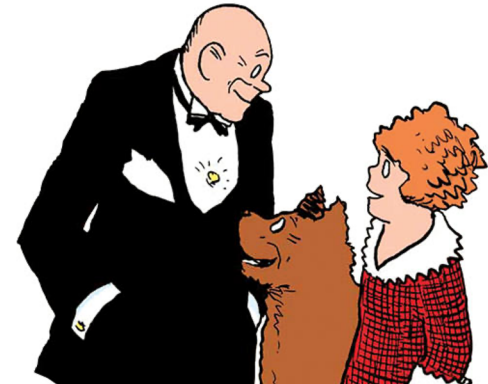
- Spouse

- Common law marriage

- Solution: Declaratory Judgment establishing marriage

Survivor Benefit for Minor Children

- Who can receive?
 - Child, stepchild, grandchild (50% support)
 - Under 18 and has not graduated H.S.
 - unmarried
- Need a Representative Payee
 - Consider Guardianship for guardians to secure Rep Payee Status
- Benefit for caregiving parent of a minor child < 16 years old
 - caregiver was married to the Decedent
- Max. Family benefit is 150—180% of SS Benefit
 - divided among ALL children of Decedent and eligible caregiver
- Distributions: benefit of the child (*cf* GOE/1301 Trust)
 - Can be saved; ***can be transferred to a trust!***
 - Payable to child at age 18 (get trusts approved that exceed 18)



Alternatives to
Guardianship

Social Security
Representative Payee
Program



Recent Rules for Social Security Representative Payee Program



In 2018, Congress enacted “Strengthening Protections for Social Security Beneficiaries Act”, Pub. Law No. 115-165

- Provides for advance designation of a representative payee
- Removes annual reporting requirement for payees who are family of the beneficiary, such as parents and spouses
- Prohibition on certain individuals from serving as representative payee including those who need rep payees themselves and those who have been convicted of certain crimes (expansion of offenses that disqualify)
- Provides for \$25M grant to create an organization that will identify and investigate representative payees who misuse benefits and also conduct quality control/reviews

GOE vs. Rep Payee: Who Can Serve

Guardian of Estate

- Court-Appointed
- Best Interests of Ward
- Court must make a finding of incapacity
- Priority
 - (1) Advance Designation of Ward
 - (2) Spouse
 - (3) Next of Kin



Representative Payee

- Appointed by Social Security
- Person who will *Best serve the Interest* of Beneficiary
- Finding of incapacity NOT required
 - Rep payee can be appointed for person who lacks legal capacity or who SSA deems to be a person incapable of managing benefits (including those with DAA)
- Priority
 - Legal Guardian, spouse, or other relative who has custody or demonstrates “strong concern” for the beneficiary’s well-being (issue if multiple people fit this description)

Disqualification Standards



Guardian of Estate

- Conflict of Interest
- “Notoriously Bad Conduct”
- “Presumed” Not in Best Interest
 - Final conviction for sex offense, aggravated assault, injury to child/elderly/disabled, abandoning/endangering child, terroristic threat, continuous violence against the family



Representative Payee

- Creditor with substantial conflict of interest
- Convicted of crime resulting in imprisonment of more than 1 year
- Convicted under Federal or State law of a felony for: Human trafficking, false imprisonment, kidnapping, rape or sexual assault, first-degree homicide, robbery, fraud to obtain access to government assistance, fraud by scheme, theft of government funds or property, abuse or neglect, forgery, or identity theft or identity fraud (includes convictions for attempt & conspiracy)

Representative Payee Appointment Process

Option 1: If the beneficiary's inability to manage benefits is not readily apparent to SSA, obtain and submit a signed letter from the beneficiary's treating physician with the applicable diagnosis and a statement that the beneficiary is incapable of handling or managing benefits. SSA will handle from there.

Option 2: Follow Option 1 above, but also complete Form SSA-11-BK and fax or mail CMRR (recommended!) to the beneficiary's local FO along with a certified copy of any applicable court orders on guardianship. DO NOT SEND POAs!

Duties of a Representative Payee

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

Liability of a Representative Payee

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

A large, yellow, multi-pointed starburst shape with a blue outline, centered on the slide.

Social Security Fee Authorization Rules

A blue, cloud-like thought bubble with a blue outline and three small circles leading to it from the top.

But
First....ETHICS

TDRPC Rule 1.04 Fees



- Rule 1.04 subpart a:
 - A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.
- Comment 1 to Rule 1.04, in part:
 - A lawyer in good conscience should not charge or collect more than a reasonable fee ... the lawyer is subject to discipline for an illegal fee or an unconscionable fee.

TDRPC Rule 1.04 Fees, Contd.'

- Comment 8 to Rule 1.04 (RE: unconscionable fee)
 - Two factors in otherwise borderline cases might indicate a fee may be unconscionable. The first is overreaching by a lawyer... a fee arrangement with an uneducated or unsophisticated individual having no prior experience in such matters should be more carefully scrutinized for overreaching.



SSA Fee Authorization Overview

- **WHAT** is Fee Authorization?
 - The Social Security Administration (SSA) regulates the charging of fees by attorneys who represent claimants in any claim before the Commissioner. The Social Security Act specifically states:
 - *“...whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim”.*
- 42 U.S.C. § 406(a)(1).

SSA Fee Authorization Overview

- **WHAT** is representation in a “claim”?
 - Representation of a claimant concerning any determination made by a field office, local office, hearing office, or the appeals council concerning any Title II or Title XVI Benefit
 - Examples:
 1. Disability medical determinations/appeals under medical rules
 2. SSI income and resource determinations/appeals (including approval of special needs trust terms)
 3. Earnings record appeals (RE: Title II Claims)
 4. Retirement and survivor claims
 5. Medicare coverage appeals
- **WHO** can authorize the attorney’s fee?
 - Social Security
 - State or Federal Court



SSA Fee Authorization Options

Fee Petition



- For any fee charged
- Reasonableness of time & effort
- Total fee approved, not hourly rate
- Must collect from client but can hold in trust/IOLTA account until SSA approves fee in writing

Fee Agreement

- Contingency fee arrangement
- Only get a fee if you are successful
- Capped at \$6K
- Directly withheld from client's past due benefits

Must Use Form 1696 and
1699 to Document
Representation & Fee
Arrangement

Alternatives to SSA Fee Authorization

Question:

How can I avoid SSA's Fee Authorization?

Answer:



**Get Your Fees
Approved in
Court!**

Fee Authorization Exceptions

- Fees that do not have to be authorized by SSA
 - POMS GN 03920.010 and HALLEX I-1-2-5
 - Proceedings before a state or federal court are not considered proceedings before SSA and therefore are not subject to SSA fee authorization.
 - A legal guardian, committee, conservator, or other state court-appointed representative obtains a state court order approving a fee for services provided in connection with a proceeding before SSA/the Commissioner.

Fee Approval by Probate Court

- Estates Code Authority
 - TEX. EST. CODE § 1151.251 (limited GOE to receive/spend up to \$12K of govt. benefits)
 - TEX. EST. CODE § 1155.101 (reimb. of guardianship expenses in connection with mgmt. of estate)
 - TEX. EST. CODE § 1155.102 (reimb. for collection of claim)
 - TEX. EST. CODE § 1155.054 (atty's fees for applicants for guardianship or management trust)
- Trust Code Authority
 - TEX. PROP. CODE § 114.064 (Judicial modification of a Trust to qualify for public benefits)

Close-up View of TEC 1151.251

POWERS AND DUTIES OF GUARDIAN APPOINTED AS NECESSARY FOR WARD TO RECEIVE GOVERNMENT FUNDS.

(a) A guardian of the person for whom it is necessary to have a guardian appointed to receive funds from a governmental source may:

(1) administer only:

(A) the funds received from the governmental source;

(B) all earnings, interest, or profits derived from the funds; **and**

(C) all property acquired with the funds; and

(2) receive the funds **and pay the expenses of administering the guardianship** and the expenses for the support, maintenance, or education of the ward or the ward's dependents.

(b) Expenditures under Subsection (a)(2) for the support, maintenance, or education of the ward or the ward's dependents **may not exceed \$12,000 during any 12-month period without the court's approval.**

Compare with TEC 1105.154

SPECIFIC BOND AMOUNT.

(a) Except as otherwise provided by this section, the judge shall set the amount of a bond of a guardian of an estate in an amount equal to the sum of:

....

(C) the aggregate amount of any installments or periodic payments, **excluding** income derived or to be derived from federal social security payments;

My Tips for Dealing with SSA

- Write a letter and send it CMRR
 - Don't call until you have sent the letter and 30 days have passed
 - Call 800-772-1213 before calling FO
- Follow-up with a fax only after writing letter
- Get last names and extensions of the people you talk to and note the dates you spoke with them
- Read letters from SSA carefully and follow ALL the directions
 - If they give you an address, write to *that* address!
- BE OBSEQUIOUS!!!





LAW OFFICE of
Adriane S. Grace, PLLC
ATTORNEY AT LAW



You did it! Questions?

Adriane S. Grace

Attorney at Law

Law Office of Adriane S. Grace, PLLC

Phone: (972) 379-8167

adriane@gracelawoffice.com