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Divorce and Social Security Benefits: Navigating Complex Rules for Support

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Today's faculty features:

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DIVORCE AND SOCIAL SECURITY
BENEFITS

NAVIGATING COMPLEX RULES FOR SUPPORT

Presented by attorneys Grayson Cannon, and
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About the Speakers



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Nothing contained in this presentation is legal advice



Topics we will cover

Title II and Title XVI Benefits

Child Support

Spousal Support

Special Needs Trusts





Types of Benefits

Title II Benefits

Title II is based on payment into the system

- Monthly benefit
- Dependent benefits
- Medicare coverage



Types of Benefits

Title XVI Benefits

Title XVI, also known as SSI, is a needs-based welfare program

- Need-based
- Maximum benefit set by Congress
- Citizenship or lawful residence



Commonality

What do Title II and XVI benefits have in common?

- Administered by SSA
- Parallel identical appeal processes
- Eligibility
- Reduction for SSA

Types of Title II Benefits

RETIREMENT (AGE BASED)

- Available for normal retirement age at 65+
- Must be fully insured
- Medicare coverage available to retirees

DEPENDENT & SURVIVOR BENEFITS

- What is a dependent? What is a survivor?
- Living wage earners must generally be in pay status
- 50% of the PIA or the amount payable to the retired/disabled person for living wage earners
- Persons eligible on more than one record will only receive the greatest one of the benefits available

DISABILITY INSURANCE BENEFITS

- Amount based on having worked and paid into the system
- Must be fully insured - 20/40 met
- Disabled Adult Children
- Disability must be total and permanent

Types of Title XVI Benefits

TITLE XVI DISABILITY

- Adults over 18
- Must meet I & R requirements
- Income limitations

Title XVI DISABLED CHILD

- Child under age 18
- Same resource limitations as adult
- Child must have limitations that prevent age-appropriate activity
- Parent must use payments for benefit of child

TITLE XVI RETIREMENT

- SSI does not offer early retirement
- Do not have to have any earnings history
- Must meet financial eligibility criteria

Child Support and Title II Benefits Under Tennessee Law

- Where the child support obligor is a disabled Title II recipient and receives a dependent benefit for children for which he is under a support order, Tennessee follows the majority.
 - Sherrell v. Sawyer
 - Layton v. Life USA
- In the above situation, the obligor is also entitled to credit for retroactive dependent benefits against retroactive support obligations
 - Howard v. Howard
 - Wilkerson v. Wilkerson
- However, the obligor will not get extra credit for any portion of the monthly dependent benefit which exceeds the court-ordered support amount
 - Attaway v. Attaway
- Title II Disabled Adult Child (DAC) benefits are similarly considered a safety net program intended for the recipient alone, and not subject to payment of child support
 - State of Tennessee ex rel. Raybon v. McElrath
- Social Security law and regulations, 42 U.S.C. '659 and 20 C.F.R. '404.1820
- Title II recipients with minor children
- Retired Title II recipients

Child Support and Title XVI Benefits Under Tennessee Law

- SSI benefits are not subject to child support payments in Tennessee
- SSI benefits are not considered income for child support purposes
 - Tenn. Dept. of Human Services ex rel. Young v. Young
- It is interesting to note that Young has been distinguished or rejected by courts in Arkansas, Kentucky and Pennsylvania

Child Support, SSI and SSDI Under California Law

- SSI (Supplemental Security Income) is not income for child support purposes
 - *Elsenheimer v. Elsenheimer*
- SSDI may be income for child support purposes
 - Issue becomes complex when dealing with a disabled, non-custodial parent who is the child support payor
- This triggers the law on derivative benefits
 - California Family Code §4504 sets forth a specific procedure for those situations where the non-custodial parent:
 - Is the disabled parent, and
 - Is paying child support to the custodial parent

Spousal Support, SSI and SSDI Under California Law

- How does the court treat SSI and SSDI under California spousal support law?
 - California family court's treatment of SSI / SSDI for spousal support purposes is discretionary
 - Family Code 4320 gives the court broad discretion
 - Family Court takes all assets, liabilities, income and expenses into consideration



Spousal Support and Loss of Eligibility for SSI

REDUCTION OF BENEFITS

Spouse who is eligible for SSI may lose eligibility or have his or her benefits reduced due to a spousal support order

UNEARNED INCOME

That is because the spouse (or ex-spouse) receives unearned income, which is what the social security administration may consider spousal support to be

DOLLAR-FOR-DOLLAR REDUCTION BUT...

Receipt of this unearned income may cause a dollar-for-dollar reduction after the first \$20

Once it reaches a “phaseout cap”, it may eliminate the benefit

One potential way to retain that eligibility is to assign those benefits to a special needs trust (SNT)



Child Support and Loss of Eligibility for SSI

REDUCTION OF BENEFITS

Child support payments made on behalf of an SSI child may be unearned income to that child

THE COMPLEXITY OF THE RULES

If the child for whom support is paid is under 18 (or under age 22 if still a student), one-third of the child support amount payment to or for an eligible child by an "absent parent" is excluded when the SSA determines the child's income for purposes of SSI

WHAT IS AN ABSENT PARENT?

SSI rules define an "absent parent" as one who does not live in the same household as the child "unless such parent retains parental responsibility and control"

We have no clear guidelines under California family law. It helps if the court order states the parent who receives support has sole custody

Special Needs Trusts

- One potential way to retain that eligibility is to assign those benefits to a special needs trust (SNT)
- How does that work with spousal support payments?
- How does that work with child support payments?
- Is the support paid to the SNT?
- Does the assignment of support to the SNT have to be irrevocable?
- Can the provisions to pay the SNT be by “stipulation and order” or must it be a court order without a stipulation?
- The California Family Code does not have a specific section authorizing the court to establish what we call a first party SNT
- There is no direct case law on this issue in California
 - What about Tennessee?
- Family law attorneys should immediately consult with an attorney experienced with SNTs

Table of Authorities

- 20 C.F.R. Section 404.300 et seq regarding Title II benefits and eligibility
- 20 C.F.R. Section 416.200 et seq regarding Title XVI benefits and eligibility
 - Sherrell v. Sawyer, 1987 WL 12498 (Tenn. App.)
 - Layton v. Life USA, 2000 WL 633443 (Tenn. App.)
 - Howard v. Howard, 1987 WL 15083 (Tenn. App.)
 - Wilkerson v. Wilkerson, 1996 WL 722051 (Tenn. App.)
 - Attaway v. Attaway, 2001 WL 378744 (Tenn. App.)
 - Tenn. Dept. of Human Services ex rel. Young v. Young, 802 S.W.2d 594 (Tenn. 1990)
 - State of Tennessee ex rel. Raybon v. McElrath, 2003 WL 22401276 (Court of Appeals, Middle Section, 10/22/2003)
 - State of Tenn. ex rel. Baker v. Tolliver, 1997 WL 367200 (Tenn. App)
 - Burchfield v. Nave, 1995 WL 422654 (Tenn. App.)
- Elsenheimer v Elsenheimer (2004) 124 Cal.App.4th 1532
- California Family Code section 4320
- California Family Code section 4504



REFERENCE MATERIAL & TIPS

SSA.GOV

www.ssa.gov/regulations/index.htm is a great source for applicable Social Security and SSI regulations and rules

CIRCUIT SPECIFIC CASE LAW

Social Security case law is very Circuit-specific and you should search your Circuit Court of Appeals first when looking for cases on Social Security issues

CURRENT DOLLAR LIMITS FOR BENEFITS

To see current dollar limits for benefits, SSA publishes an annual “Fact Sheet” under the Press Release tab on its web page that updates amount subject to change or subject to COLAs. This worksheet is usually posted on www.ssa.gov/news/press/factsheets/ and is released annually around mid-October

Thank You



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