

Skilled Nursing Facilities and Other Creditors Acting as Representative Payees

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Introduction

The Social Security Administration has a process by which creditors, such as nursing facilities or other residential facilities, can act as representative payees for residents. Though this isn't necessarily a problem, there must be adequate consumer protections and oversight to ensure that beneficiaries are not harmed by this arrangement. This issue brief will dive into some of the conflicts between assisted living facilities, nursing facilities, and other entities to whom the beneficiary owes a debt, *i.e.*, a creditor, acting as a representative payee for that beneficiary. The issue brief then proposes some ways to strengthen the oversight and protections within the representative payee system so that when creditors do act as representative payees, there are safeguards in place to protect the best interest of the beneficiaries and the Social Security system.

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Representative Payee Program Was Established for Those Not Capable of Managing Their Own Money

Most recipients of Social Security benefits, including disability, retirement, and survivors benefits, and Supplemental Security Income (SSI) benefits, are presumed to have the capability to manage those funds themselves.¹ Their benefits are deposited directly into a pre-designated bank account in their name or onto a Direct Express card.² The beneficiary is then responsible for paying their bills and managing their money. When a beneficiary is no longer able to manage, or instruct another on how to manage their money due to incapacity, someone will be appointed by the Social Security Administration (SSA) to act as the beneficiary's representative payee. A representative payee is an individual or organization appointed by SSA to receive benefits for a beneficiary who cannot manage or instruct someone else to manage their income.³ In some instances, a representative payee may be an assisted living facility, a skilled nursing facility, or a group home where the beneficiary lives.

Social Security Determines Who Can Act as a Representative Payee

To ensure that all beneficiaries can receive their benefit payments and make proper use of those funds, Congress has granted SSA the authority to appoint third parties, known as representative payees, to receive and manage the benefits when the beneficiary is unable to do so.⁴ In administering the representative payee program, SSA has put in place regulations and procedures in order to: 1) determine whether it is in the beneficiary's best interest to have a payee; 2) select the proper payee; 3) have adequate oversight over the payee's activities; and 4) provide redress for any misuse of funds.⁵

An individual or organization seeking to become the representative payee for a particular beneficiary must file an application at the local SSA field office. In choosing a payee, SSA has established a payee preference list in its policies, first looking to family and friends who are aware of the beneficiary's needs and eligible to serve as a payee.⁶ SSA relies heavily on family members to serve as payees, as they are usually the ones who are aware of the beneficiary's daily needs and lifestyle, and are best suited to serve in this role. SSA considers multiple factors when deciding who to appoint as a payee, such as the relationship of the person to the beneficiary and whether the potential payee is in a position to look after the needs of the beneficiary.

1 POMS GN 00502.001 Capability Determination and Representative Payee Payment Overview (January 26, 2017), secure.ssa.gov/apps10/poms.nsf/lnx/0200502001.

2 POMS GN 02402.001 Direct Deposit as a Form of Electronic Payment (August 22, 2012) secure.ssa.gov/apps10/poms.nsf/lnx/0202402001; POMS GN 02402.004 "Go Direct" Campaign (April 29, 2011) secure.ssa.gov/apps10/poms.nsf/lnx/0202402004.

3 42 USC § 405(j)(1)(A).

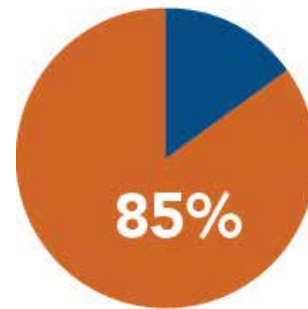
4 42 USC § 405(j).

5 20 CFR §§ 404.2001 – 404.2065, 416.601 – 416.665.

6 POMS GN 00502.105 Payee Preference Lists (June 21, 2017), secure.ssa.gov/apps10/poms.nsf/lnx/0200502105.

Family Members Are Payees for 85% of Beneficiaries

Sometimes, however, a family member or friend is not available, in which case SSA will consider appointing someone else, including qualified organizations, to serve as a representative payee. Such organizations could include a non-profit, or a skilled nursing facility. There are special procedures that SSA staff should be following when screening creditors, such as a facility where the beneficiary is living, which have applied to be appointed as a representative payee for that beneficiary.⁷



Qualified organizations serving as a representative payee may collect a small fee from the monthly benefits as compensation for acting in this role.⁸ Collecting such a fee will impose additional regulatory requirements for the representative payee, such as a requirement that the organization be bonded and an audit conducted every three years.⁹ For tracking and data collection purposes, organizations that collect a fee are separated out from other organizations into a category called Fee for Service (FFS) payees. Many organizations that do not collect a fee are lumped together into a category called “non-psychiatric facility payees.” Non-psychiatric facility payees are, by definition, not state-run psychiatric hospitals (which are monitored through intensive, in-person, onsite visits), and include assisted living facilities, skilled nursing facilities, and group homes. These facilities are audited every four years.

The Number of Older Adults with Representative Payees is Projected to Grow as the Population Ages

As the U.S. population continues to age and the Baby Boomers start to receive Social Security benefits and need increased medical care, the need for better protections for beneficiaries will only increase. While age alone does not determine an individual’s capability to manage personal finances, research shows that the incidence of Alzheimer’s and other forms of dementia that undermine financial capability increases with age.¹⁰

Corresponding with the overall growth in the number of older Americans over the next two decades, it is projected that the number of older adults who receive Social Security and SSI benefits and need a representative payee will greatly increase.¹¹

In addition to the growth in numbers of payees needed, it is projected the type of payee needed will change. SSA must be equipped to provide representative payees for all beneficiaries in need, including those individuals

7 POMS GN 00502.135 Payee Applicant is a Creditor (April 15, 2016), secure.ssa.gov/apps10/poms.nsf/lnx/0200502135.

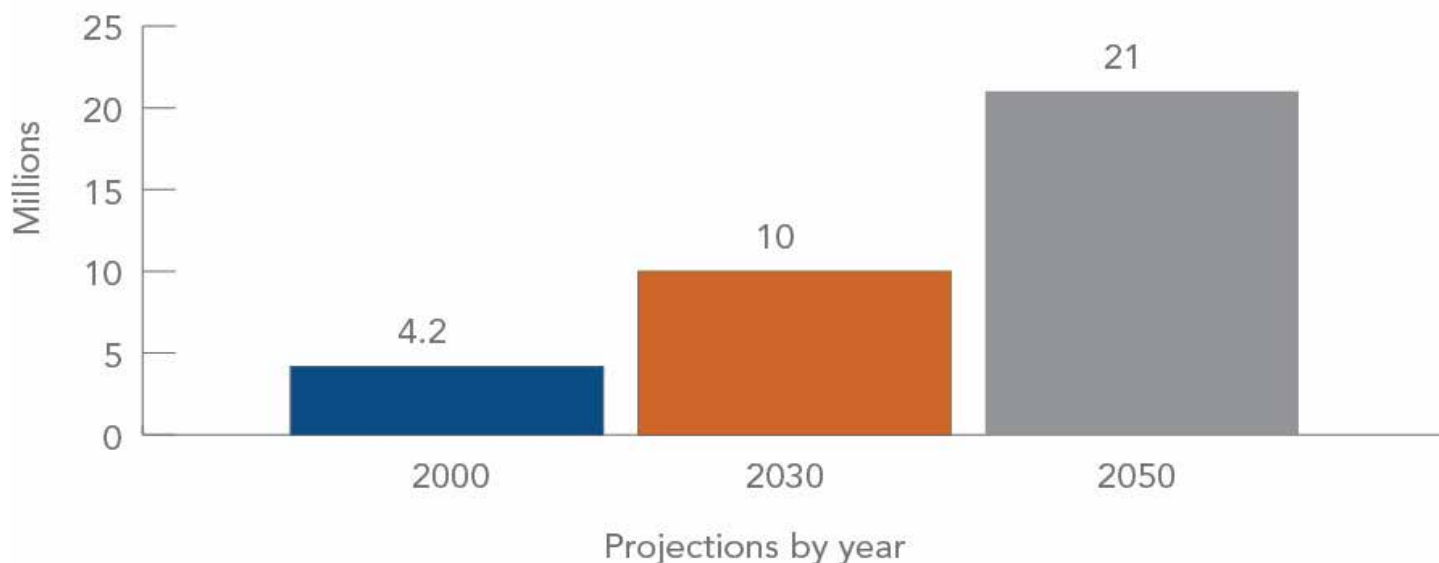
8 42 USC § 405(j)(4) and § 1383(a)(2)(D); 20 CFR § 404.2040a and § 416.640a; POMS GN 00506.001 Fee for Service – Overview (April 15, 2016), secure.ssa.gov/apps10/poms.nsf/lnx/0200506001.

9 See 42 USC § 405(j)(4) and (j)(6)(A)(ii), 42 USC § 1383(a)(2)(G)(i)(I).

10 Hebert, Liesi, Paul A. Scherr, Julia L. Bienias, David A. Bennett, and Denis A. Evans, “Alzheimer Disease in the US Population: Prevalence Estimates Using the 2000 Census,” *Archives of Neurology*, vol. 60, no. 8 (August 2003), 1119-1122; Agarwal, Sumit, John C. Driscoll, Xavier Gabaix, and David I. Laibson, “The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation,” *Brookings Papers on Economic Activity* (Fall 2009), 51-117, [brookings.edu/wp-content/uploads/2016/07/2009b_bpea_agarwal.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/2009b_bpea_agarwal.pdf).

11 Chris E. Anguelov, Gabriella Ravid, and Robert R. Weathers II, “Adult OASDI Beneficiaries and SSI Recipients Who Need Representative Payees: Projections for 2025 and 2035,” *Social Security Bulletin*, Vol. 75, No. 2, 2015. [ssa.gov/policy/docs/ssb/v75n2/v75n2p1.html](https://www.ssa.gov/policy/docs/ssb/v75n2/v75n2p1.html). The projected increases between 2013 and 2025 are due primarily to greater numbers of retired-worker beneficiaries, and the increases between 2025 and 2035 are due primarily to greater proportions of retired-worker beneficiaries who will be aged 85 or older.

Beneficiaries Age 85 & Older (in millions)



who do not have family or friends to serve in this role. There is projected to be an increase in the number of adult beneficiaries whose representative payee is not a family member from 890,000 in 2013 to 1 million in 2025 and 1.125 million in 2035.¹² As these trends continue into the future, SSA will not only need a greater number of payees overall, but specifically will be turning to non-family payees for beneficiaries over age 66.

While nearly 70 percent of all adult beneficiaries with a payee have an adult child, spouse, or other family member serving as their payee, in December 2015, 12.2 percent of adults with a payee had a “non-psychiatric facility” serving in this role – around 455,000 individuals.¹³ Although SSA’s policies indicate that “[s]ome States have enacted legislation limiting the instances where a State or private institution may act as the manager of a patient’s funds,”¹⁴ the agency does not have any information publically available about which states have enacted such legislation, and what institutions are prohibited under these state laws from managing individuals’ money. Despite any steps particular states may have taken to limit which institutions can manage residents’ funds, there are creditor-facilities serving as payees for hundreds of thousands of beneficiaries.

Current Challenges with Creditors Serving as Representative Payees

When the beneficiary lives at and receives services from (and thus owes a debt to) a facility, and that facility also serves as that beneficiary’s representative payee, there is the potential for conflicts of interest between the beneficiary and their payee. While having a nursing facility act as a representative payee may be convenient for the beneficiary and ensure that the beneficiary does not get evicted from the facility for failure to pay, there are some challenges to giving creditors control over a beneficiary’s funds through the representative payee program.

¹² Id.

¹³ Social Security Advisory Board, Charts on the Social Security Representative Payee Program, Chart #6: “Most representative payees are related to the beneficiary” [ssab.gov/FOIA/2017-Rep-Payee-Home/2017-Charts](https://www.ssa.gov/FOIA/2017-Rep-Payee-Home/2017-Charts) (visited November 22, 2017).

¹⁴ POMS GN 00502.160: Additional Development/Considerations When an Institution is Involved (May 15, 2015), [secure.ssa.gov/apps10/poms.nsf/lnx/0200502160](https://www.ssa.gov/poms.nsf/lnx/0200502160).

Trouble Transferring Facilities or Transitioning Home

One problem that arises when a nursing facility is serving as payee is that when a resident is ready to leave, making a smooth transition of finances can prove to be challenging. If the resident wishes to move to a new facility but the current facility is the representative payee, there may be a delay of several months in transitioning representative payee status to the new facility. This could create a barrier to the move. Changing the payee may be delayed at SSA and lead to a delay in benefits being paid to the correct party. This can be especially complicated if the resident is moving to a new state in order to be closer to family as the resident may not be eligible for Medicaid in the new state yet.

If the resident wishes to move back into the community, an option supported by Medicaid programs in many states, a representative payee may need to be identified among family members, friends, or community organizations. This process increases stress and puts additional financial burdens on the beneficiary during a transition to in-home care, and can create additional barriers to leaving an institutional setting. Such barriers preventing residents from living in the community is contrary to the spirit of the Supreme Court's decision in *Olmstead*,¹⁵ which upheld the Americans with Disabilities Act and affirmed that individuals with disabilities have the right to live with dignity in community settings that offer them privacy, meaningful choices among housing and services options, and opportunities for social connections with family members and other community members.

Forcing Residents, Directly or Indirectly, to Appoint the Facility as Representative Payee

On occasion, facilities force or strongly recommend that residents appoint the facility as their representative payee. Some assisted living facilities and nursing facilities contain a provision in the admissions contract requiring that the facility be named as the representative payee as a condition of residence. Such a tactic goes against the entire notion that the representative payee system is only for individuals who have been determined by the Social Security Administration to be incapable of handling their own funds and that a family member or friend should be the preferred payee.

Sometimes the facility does not require the representative payee appointment in the language of the facility contract, but the employees are instructed to strongly recommend to the prospective resident and their family that the facility be named as the representative payee. Particularly when residents and their family members have to sign many forms and other official documents, making a known and informed decision about accepting the facility as the resident's representative payee may be overlooked.

Family members might not be willing or able to serve as a representative payee, especially if the facility is willing to do it free of charge. The upside is that it is much less likely that the resident will be discharged from the facility for nonpayment if the facility is the payee. The downside is that it is often not explained to family members what exactly is happening and it discourages family members that may be well-suited to act as representative payees from doing so. If a family member is already serving as payee, the change to the facility as payee can be done without consulting the resident or their family members.

15 *Olmstead v. L.C.*, 527 U.S. 581 (1999). The U.S. Supreme Court's *Olmstead* decision affirmed that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," thus qualifying as a form of discrimination prohibited by Title II of the Americans with Disabilities Act (ADA).

Determining How Much a Nursing Home Resident on Medicaid Must Pay to the Facility (Also Called “Available Income”)

All recipients of Social Security funds, not including those only receiving SSI,* are responsible for paying a portion of the costs for living in a skilled nursing facility. They must pay this cost even if they are on Medicaid, which otherwise pays for long-term care costs. This payment to the skilled nursing facility is called the beneficiary’s “available income.”

The nursing facility is responsible for calculating the available income each month based on state law and the amount of income the beneficiary receives. Each state has basic guidelines outlined in their State Plan (the approved document outlining the state Medicaid program to the Centers for Medicare & Medicaid Services (CMS)) that details how the available income should be calculated, but it will include an amount set aside for the beneficiary’s personal needs, the exact amount of which varies by State Plan. The nursing facility will let the beneficiary know how much he or she must pay to the facility as available income.

One problem is that the available income will be determined by the nursing facility in advance of the beneficiary becoming a resident, but the process for Medicaid long-term care assistance approval can take several months. If the beneficiary does not pay the amount specified, even if they have not yet been approved for Medicaid, they could be involuntarily discharged for non-payment.

*Recipients of SSI will have their benefits reduced to \$30 a month by the Social Security Administration for the duration of their stay in a skilled nursing facility. If the recipient does not inform SSA that they are residing in a nursing facility, or if SSA does not reduce the amount of SSI benefits being paid out, the recipient will accrue an overpayment.

Confusion over Distribution of Personal Needs Allowance

Since the facility is also a creditor and may have control and access to all of the beneficiary’s funds as payee, tension between what is owed to the facility and money that is set aside for the personal needs of the beneficiary may arise. A personal needs allowance (PNA) is a small amount of money set aside each month for the beneficiary to purchase small items such as toothpaste, shampoo, and underwear. The amount set is designated in the Medicaid State Plan, but is typically a small amount.¹⁶ Medicaid rules specify that a beneficiary living as a resident of a facility must receive a personal needs allowance (PNA) every month, and these funds should not be touched by anyone other than the beneficiary.¹⁷ This means that beneficiaries should always be receiving PNA. The amount of PNA is set when the facility does the initial Medicaid calculation in accordance with state guidelines.¹⁸ Problems can arise when there is a delay in the processing of a Medicaid application creating a debt to the facility, the resident is using Medicaid spend down to qualify, or the resident needs healthcare that is not covered under Medicare or Medicaid. Through no fault of the beneficiary, a debt to the facility may be created.

16 The mean amount of PNA per month in 2009 was approximately \$50. “Personal Needs Allowances for Residents Long-Term Care Facilities: A State by State Analysis,” National Consumer Voice, lcombudsman.org/uploads/files/support/brief-pna-mar-2009.pdf.

17 CMS-PM-02-1, cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/SA0201.pdf.

18 The required amount of PNA varies by state.

For example, a beneficiary may need dental care for an abscessed tooth. Dental care is not covered under Medicare and is an optional service under Medicaid. In some states, the beneficiary may have no health insurance coverage for that service, but should be able to go and see a dentist. The cost of this service would most likely exceed the approximately \$50 a month that the beneficiary receives in PNA. Since the dental service is an out-of-pocket cost, it may be difficult for the beneficiary or the beneficiary's family to get the nursing facility to release additional funds from their monthly benefits and enable the beneficiary to get the health care he or she needs.

Additionally, when the beneficiary owes a debt to the facility and may not be using the money in their PNA account, facilities may expect that the money in that account should be used to pay down the debt to the facility. This creates an unnecessary tension between the representative payee and the beneficiary that is avoided when the representative payee is not also a creditor.

Creditors Using Resident Trust Fund Accounts

The Social Security Administration has set up a process whereby an assisted living facility or skilled nursing facility may establish and have access to separate accounts, known as resident trust fund accounts, for each resident where their Social Security benefits will be deposited, without the facility having to go through the process of applying for and being appointed as a representative payee for each resident.* The problem with this system is that the facility is essentially acting as a representative payee with the benefit of having direct access to the guaranteed Social Security benefits, meaning they can ensure they get paid first, without the auditing, tracking, or other protections of the representative payee system. In addition to having guaranteed payment, the facility is arguably in conflict with the Social Security Act and regulations prohibiting the garnishment of federal benefits by creditors. If a facility is guaranteed access to residents' Social Security benefits, the facility should be subject to the same oversight as any other institution through the representative payee system.

*POMS GN 00603.020 Collective Checking and Savings Accounts Managed by Representative Payees, (Feb 16, 2017) [secure.ssa.gov/poms.nsf/lnx/0200603020](https://www.ssa.gov/poms.nsf/lnx/0200603020).

Recommendations to Improve Representative Payee Service When the Representative Is Also a Creditor

As the administrator of the representative payee program and the agency who determines whether a facility is an appropriate representative payee for an individual beneficiary, SSA has discretion to improve the system and enhance protections for beneficiaries that do require a representative payee. Below are some recommendations within the agency's discretion that could help address the conflict of interest when a creditor is also a representative payee.

Identification and Tracking of Skilled Nursing Facilities and Other Creditors Acting as Representative Payees

As discussed above, SSA currently has special procedures for FFS representative payees, but does not identify creditors (who are not taking a fee to act as representative payees) separately from other organizational payees. This means that there is currently no transparent way to identify how many creditors are also acting as representative payees. FFS payees are subject to an audit every three years. Institutions that act as representative payees for over 50

beneficiaries, but do not collect fees, are audited every four years. Institutions that act as representative payees for less than 50 beneficiaries are not audited at all, other than paper review of their annual accounting forms submitted to SSA. This means that SSA is currently more thoroughly tracking and monitoring nonprofits collecting a small fee than skilled nursing facilities who are creditors also acting as representative payees.

Given the inherent conflict of interest, creditors acting as representative payees should be identified in their own category by SSA and they should undergo audits every three years as well. These audits should be done to look carefully for evidence that the payee may not be acting in the beneficiary's best interest or is not following the rules of the representative payee program. The audit would not have to be the same as the one administered to the fee-collecting representative payees, but should at the very least ensure that the creditor is familiar with the rules of the representative payee system and is acting in the beneficiary's best interest. Increased audits would incentivize facilities to become more familiar with the rules of the benefit programs and to become better stewards of their residents' benefits.

Stronger Enforcement of the Payee Preference List

When an institution that would be both payee and creditor applies to SSA to become the beneficiary's payee, SSA should do a thorough search, to determine if there is another potential payee available that is higher on the payee preference list, such as a relative who shows strong concern for the beneficiary, or a public or nonprofit agency or organization.¹⁹ SSA's own policy manual directs its employees: "Before you appoint an institution as payee, be sure there are no qualified payees outside the institution who might better serve the beneficiary's interests. Do not overlook family members who demonstrate interest in the beneficiary, even though they do not have custody."²⁰ Appointing a facility as payee which is also the beneficiary's creditor should always be a last resort, and they should only be appointed when no other suitable alternative is available. SSA employees in local offices considering payee applications from creditors must fully follow the agency's policies, for example in GN 00502.135, Payee Applicant is a Creditor.²¹ According to these policies, SSA employees should conduct a more rigorous analysis in determining whether a creditor is an appropriate representative payee.²²

Improved Beneficiary Protections for All Institutional Representative Payees Including Creditors

Prohibit Any Requirements That Creditors Be Appointed Representative Payees

Clauses in admissions contracts requiring residents to have the facility act as the representative payee not only flouts the SSA's discretion and preferred list of representative payees, but also places an unfair burden on beneficiaries who may have limited choices over where they can receive appropriate care. Any facility that includes these provisions in admissions contracts should be specifically banned from acting as representative payees for any Social Security beneficiaries until SSA can determine that the facility is no longer using the contractual language and the facility has been trained on how to appropriately act as a representative payee.

19 POMS GN 00502.105 Payee Preference Lists, paragraph C. Procedure – Payee Preference List for Adults (June 21, 2017), secure.ssa.gov/apps10/poms.nsf/lnx/0200502105.

20 POMS GN 00502.160: Additional Development/Considerations When an Institution is Involved (May 15, 2015), secure.ssa.gov/apps10/poms.nsf/lnx/0200502160.

21 secure.ssa.gov/poms.nsf/lnx/0200502135.

22 POMS GN 00502.135 Payee Applicant is a Creditor (April 15, 2016), secure.ssa.gov/apps10/poms.nsf/lnx/0200502135.

Require Disclosures to Beneficiaries and Family Members Who Agree to Have a Creditor Appointed as a Representative Payee

Similarly, facilities that suggest or encourage residents to have the facility named as the representative payee should be required to provide information to the beneficiary as well as family members or other interested parties involved in the process (such as a social worker or advocate).²³ These disclosures should include information on the personal needs allowance set aside for the resident's use, how to change representative payees, and how to report suspected misuse of funds. It should also make clear that the beneficiary does not have to allow the facility to become the representative payee if they do not agree to that arrangement. While not meant to dissuade beneficiaries from using the facility as a representative payee, helpful and clear information could prevent beneficiaries from feeling forced into a relationship with the facility that is against their best interest. This is especially true when an individual is moving into a skilled nursing facility, as this can be a stressful time for beneficiaries and their families when they are most vulnerable.

Increased Penalties for Creditors That Misuse or Steal Beneficiaries' Funds

Finally, there seem to be few repercussions for representative payees that misuse or steal beneficiaries' funds. Even in extreme cases, bad actors are usually simply required to return funds and may continue to act as representative payees. Without any repercussions, there is no incentive for facilities to follow the rules or attempt to comply with any guidance from the SSA. This could easily be remedied by imposing fines or penalties in these situations, such as is done to bad actors in other industries such as companies found violating banking regulations or environmental regulations. The SSA would have discretion as to when to impose fines, ensuring that cases that were either minor violations or had other mitigating factors did not result in unfair fines. By acting as representative payees, facilities are ensuring that they receive funds to pay for the care they are providing. This guarantee of payment is a benefit that the facility is receiving. If the facility reaps that benefit, but fails to comply with the rules of the representative payee program, the facility should have to provide recompense to the SSA in the form of a penalty or fine. Based on current federal law, the SSA is already entitled to impose civil monetary penalties for the misuse of funds, or can refer the case for criminal prosecution.²⁴

Creditors Should Still Be Appointed as Representative Payees, but Only with Enhanced Scrutiny and as a Last Resort

When creditors act as representative payees, there is an inherent conflict of interest that necessitates increased oversight, better reporting, and enhanced penalties for wrong doing. As a trade-off for the burden of more oversight, the creditor is essentially ensuring payment, creating a level of certainty that more than compensates for requiring compliance with the representative payee program's audit and reporting requirements.

23 A beneficiary who has a representative payee has been ruled to not be able to manage their own money, so the information should be given to whoever is currently serving as representative payee with copies available to the beneficiary.

24 Social Security Handbook, Section 1617.8: What Are The Penalties For Misused Social Security Or SSI Funds? ("When a representative payee misuses funds, we may refer the case for criminal prosecution. The penalty upon conviction for a payee's misuse of funds may be a fine of up to \$250,000, imprisonment up to 10 years, or both. When the case is not criminally prosecuted, SSA may impose a civil monetary penalty up to \$5,000 for each payment or partial payment misused and an assessment of not more than twice the amount of the misused benefits.") ssa.gov/OP_Home%2Fhandbook/handbook.16/handbook-1617.html.