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Office of Regulations and Reports Clearance
Social Security Administration
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Submitted via www.regulations.gov


These comments are submitted on behalf of Justice in Aging. Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources.

We have decades of experience with Social Security and Supplemental Security Income (SSI) benefits, with a focus on the needs of low-income beneficiaries and populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency. Justice in Aging conducts training and advocacy regarding Social Security and SSI benefits, provides technical assistance to attorneys and others from across the country on how to address problems that arise under these programs, and advocates for strong protections to ensure that beneficiaries receive the benefits to which they are entitled promptly and without arbitrary denial or disruption.

For many years, we have focused our advocacy on improving the Social Security Administration’s (SSA) representative payee program, since current payees don’t have adequate training resources, and the program is projected to be inadequate to meet the growing need for third parties to manage beneficiaries’ finances. We’ve worked to shine a light on these problems and suggested measures the SSA could implement to make the program work better. Some of our recent recommendations are included in our issue briefs, How SSA Can Improve the Representative Payee Program to Protect Vulnerable Seniors and Skilled Nursing Facilities and Other Creditors Acting as Representative Payees. These issue briefs are attached to these comments as appendices.
There are significant differences in how local offices manage the representative payee program. Each office has different practices, different interpretations of the policies, and different allocations of resources to the payee program. For example, the preference lists are tailored to specific populations of beneficiaries, and establish, but do not require, a recommended priority for selecting a payee. It appears that different SSA claims representatives emphasize different factors in the preference lists and sometimes use them as requirements rather than recommendations in order to achieve a certain result. At this point, the payee program is affected less by formal written policies and procedures, and more by local office management and staffing.

SSA should engage in agency-wide coordination and oversight of the decisions that are made in local offices concerning the payee program. Although beneficiaries have the right to appeal either the decision that they need a representative payee, or the person or organization SSA has chosen as their representative payee, few of these appeals are ever filed. SSA must utilize other oversight methods rather than relying on beneficiary appeals to correct errors. In addition, SSA should provide dedicated local office staff who can serve as contact persons on the representative payee program. Their priority job should be to recruit, train, and monitor representative payees; to serve as a resource for questions from payees and beneficiaries about the payee program; to systematically monitor annual accounting filings; and to investigate potential cases of misuse.

(1) Is the current order of preference list appropriate when selecting or changing a representative payee?

(2) If you believe that the order of preference list is not appropriate, what would you change about the order of preference list?

As beneficiaries will soon be able to indicate in advance the individual or individuals they prefer to serve as their payee should they no longer be able to manage their own benefits, this designee should be incorporated into the order of preference list, at the top.

SSA should also incorporate into the order of preference list a factor for deciding among potential payees as to whether the prospective payee is located within a reasonable distance of the beneficiary's residence or has viable alternate means of communication with the beneficiary, in order to maintain regular contact with the beneficiary and be aware of the beneficiary's needs and requirements.

(3) Should we change how we consider public and non-profit agencies or institutions and private, for-profit institutions in our order of preference list?

SSA should require all organizational and fee for service payees to report the following information:

- Copies of their own annual external financial audits.
- All names under which they conduct business and all addresses where they operate or provide services.

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• The results of criminal background checks on new and existing employees who are involved with beneficiary funds.
• Policies regarding background checks.

If they do not provide this information to SSA, they should not be appointed to serve as payee.

(4) Since there are statutory provisions that generally prevent a creditor from serving as a representative payee, should we consider creditor status in our order of preference list? If so, how should we consider creditor status in light of the statute?

Creditors should still be appointed as representative payees, but only as a last resort and with enhanced scrutiny.

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.

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.\(^1\)

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.”\(^2\)

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,”\(^3\) the agency does not have any information publicly available about which states have enacted such legislation, and what institutions are prohibited under these state laws from managing individuals’ money. There needs to be more information available from SSA about these limitations, and better coordination with the particular states that have taken steps to limit which institutions can manage residents’ funds.

Appointing an institution 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 claims representatives 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.

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\(^2\) POMS GN 00502.160: Additional Development/Considerations When an Institution is Involved (June 28, 2013), secure.ssa.gov/apps10/poms.nsf/lnx/000502160.
\(^3\) Id.
According to these policies, SSA claims representatives should conduct a more rigorous analysis in determining whether a creditor is an appropriate representative payee.  

Furthermore, SSA 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. Fee-for-service 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 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.

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.

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).

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.

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4 POMS GN 00502.135 Payee Applicant is a Creditor (June 26, 2017), secure.ssa.gov/poms.nsf/lnx/0200502135.

5 A beneficiary who already 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.

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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.

(5) Are our policy and operational procedures effective in properly determining whether to change a representative payee?

Flexibility and individualization in determination of need and appointment of payees is important, and needs to be accompanied by protections of beneficiaries’ rights and oversight of the individuals and organizations serving as payees. Monitoring of payees must strike an appropriate balance between protecting beneficiaries and their benefits, and not discouraging qualified individuals and organizations from becoming payees.

In the past, SSA has not done any publically available analysis to evaluate the effectiveness of its policy and operational procedures for determining whether to change a representative payee. SSA should conduct thorough reviews of these determinations in order to evaluate their effectiveness. It should also make this analysis publically available, so that stakeholders can access this information and provide input on how to change SSA’s policies and procedures in order to make these determinations more effective.

(6) Do we effectively determine when to change from a payee that has a higher order of preference (such as a family member) to a payee that has a lower order of preference (such as a creditor)?

No. SSA needs to provide more training to its employees on its procedures to ensure better compliance with its policies on payee preference order, especially in the situation where a creditor applies to be the payee and a family member is already serving as payee. It should also conduct reviews of these determinations in order to ensure that the relevant procedures are being followed.

(7) When a request to change a payee arises from someone other than the beneficiary, do we effectively determine the need to change the payee?

Currently, there is no oversight or monitoring of the process when an SSA claims representative makes the decision to change from one payee to another. This makes it impossible to evaluate whether these determinations are being made effectively and in compliance with SSA’s policies.

One problem arises when a beneficiary is living in a facility which is their payee, and is ready to move from one facility to another, or to leave a facility and return to living in the community. Making a smooth transition of finances can prove to be challenging. When the beneficiary 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 is often delayed at SSA and lead to a delay in benefits being paid to the correct party. This can be especially complicated if the

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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 beneficiary 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, or direct payment may need to be restored to the beneficiary. Again, making this change is often delayed at SSA. 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,6 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.

8 What would you change about our policies and procedures to help us determine when to change a payee?

SSA should create an online form to request a change of payee or to restore direct payment to the beneficiary.

SSA needs better-established, mandatory procedures for payee replacement when misuse is suspected. Factors such as a lack of incentives and resources for SSA staff to investigate allegations of misuse, and the complexity of relationships between beneficiaries and their payees often lead claims representatives to simply appoint a new payee rather than formally make a determination on misuse. SSA should establish mandatory procedures for payee investigation and replacement when misuse is suspected. When misuse or suspected misuse is the reason for changing the payee, staff should provide full documentation about their findings in the beneficiary’s record, and provide notice about the finding to the beneficiary.

If a family member is already serving as payee, the change to another payee, including to an institution/creditor as payee can currently be done without consulting the beneficiary or their family member. The procedures outlined in POMS GN 00504.100, Determining the Need for a Successor Payee, direct the SSA claims representative to “contact the current payee for their views, unless it would be inappropriate to do so.” 7 There is no further explanation or examples of what would be a situation where it would be “inappropriate” to contact the current payee, thereby leaving this decision entirely to the discretion of the SSA employee, with no further oversight or review of their decision. Furthermore, the SSA claims representative is instructed to not disclose the name of the new payee applicant to the current payee.

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6 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).

7 POMS GN 00504.100. B (April 15, 2016), https://secure.ssa.gov/poms.nsf/lnx/0200504100#b

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Both the beneficiary and the current payee should be notified when another party applies to be made payee, and they should both be informed as to the identity of the new payee applicant.

(9) Is there any evidence of difficulty in finding suitable payees, overtime and in various circumstances? If so, how should this evidence influence our order of preference list and our policies for changing payees?

SSA’s own projects and research have demonstrated that there are difficulties in finding suitable payees for certain populations. Most beneficiaries are related to their payees, and the selection process is relatively easy when beneficiaries have a family member who is willing and able to serve as payee. However, for adult beneficiaries who do not have family members available to serve as their payees, the payee identification and selection process can be more challenging. In announcing the Maryland Representative Payee Pro Bono Pilot project in 2014, SSA stated “Nearly 21 percent of people who need help managing their payments do not have family members or trusted friends who can help them.”

This effort to recruit attorneys to serve as payees on a pro bono basis did not prove to be successful, the pilot project ended and this model was not expanded to other states.

In looking to the future, SSA researchers have projected that the number of beneficiaries needing representative payees will increase from 2.94 million beneficiaries in 2013 to 3.27 million by 2025 and to 3.56 million by 2035. Retired-worker beneficiaries who are no longer able to manage their own benefits are much less likely to have a family member serving as their payee than younger, disabled-worker beneficiaries. “For beneficiaries whose representative payee is not a family member, we project an increase from 887,086 as of December 2013 to 1,008,175 in 2025 and 1,123,394 in 2035. The model projects that the increases between 2013 and 2025 are due primarily to greater numbers of retired-worker beneficiaries, and that the increases between 2025 and 2035 are due primarily to greater proportions of retired-worker beneficiaries who will be aged 85 or older.”

SSA will not only need to recruit and retain eligible representative payees for an increasing number of older retired-worker beneficiaries in the coming years, it will also need to devote additional resources to providing training to payees as well as monitoring greater numbers of non-family payees, to reduce the incidence of elder abuse and financial exploitation.

Both the Social Security Act and POMS require the maintenance of a list of “public agencies and certified community-based nonprofit social service agencies” to address situations in which payee candidates are not readily available for a beneficiary in need of one. However, in some instances:

Social_Security_Announces_Representative_Payee_Pro_Bono_Pilot
10 42 USC 405(j)(3)(I)
11 POMS GN 00502.100 How to Find Payee Leads (Nov. 14, 2008), https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502100

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local offices, these lists are very limited or do not exist at all. SSA should devote the resources
necessary to create a program to identify, train, certify, and maintain a pool of voluntary payees
who are available on an as-needed basis.

Thank you for the opportunity to provide these comments. If you have any further questions
about this submission, please contact Kate Lang at klang@justiceinaging.org.

Respectfully submitted,

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Justice in Aging
How SSA Can Improve the Representative Payee Program to Protect Vulnerable Seniors

ISSUE BRIEF • JUNE 2016

Written By
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This is the final paper in a series of issue briefs and fact sheets that address the Social Security Administration's (SSA) Representative Payee Program. This issue brief is supported by a fellowship grant from the Borchard Foundation Center on Law and Aging. The author offers her appreciation to the Borchard Foundation, Kate Lang, and the Justice in Aging team for committing resources and providing valuable expertise to address the many issues facing our nation's most vulnerable seniors.

Introduction

SSA's Representative Payee Program provides necessary support for beneficiaries who are unable to manage their own benefits, but presents a host of negative consequences when SSA fails to administer the program properly or provide representative payees for those people who really need them. As discussed in previous Justice in Aging fact sheets, studies show that SSA's current representative payee program does not adequately


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protect seniors who are at risk of losing their benefits due to misuse or lack of a representative payee. In particular, the program seems to be underutilized by people over 65, while, at the same time, an aging population and an increase in Alzheimer's and other cognitive disorders point to a growing need. Less than 10 percent of Supplemental Security Income (SSI) recipients aged 65 and over had a representative payee in 2009, whereas one third of SSI recipients with disabilities between the ages of 18 and 64 had a payee. Further, in 2008 about 5 million beneficiaries over the age of 85 were identified, but only 4.6 percent of them had representative payees. As the program gains attention and is more comprehensively evaluated by the disability advocate community, it is also vital for aging advocates to share their perspectives on how to help improve the overall program in order to protect growing numbers of vulnerable older adults.

This paper provides a summary of efforts SSA has made to educate and train both payees and SSA personnel, and it also provides recommendations for SSA to ensure that older adults receive the support and protection they require to help meet their daily needs. We offer both high-level recommendations and more specific recommendations in various sections around the issues of recruiting, training, and retaining payees to meet the growing need for representative payees for older adults.

About the Representative Payee Program

A representative payee is an individual or organization appointed by SSA to receive Old Age Survivor and Disability Insurance (OASDI), Social Security Disability Insurance (SSDI) or SSI benefits for someone who cannot manage or direct someone else to manage his or her income. If SSA determines that a beneficiary is incapable of managing his or her own benefits, it has the authority to appoint a representative payee. Prior to appointing a payee, SSA must determine the need for a representative payee, carefully balancing the goal of independence with that of protection. To make this determination, SSA needs to assess the capabilities of the beneficiary. Deciding that an individual needs a payee essentially deprives beneficiaries of fiscal independence and self-determination regarding how benefits are spent. Thus, in making this assessment, SSA officials must consider whether the beneficiary is capable of spending funds in a responsible manner, such that their food, shelter, and medical needs are met on a daily basis.

Once SSA determines that a person needs a representative payee, the agency decides who to appoint as payee by considering multiple factors such as: the relationship of the potential payee to the beneficiary; the amount of interest a person shows in the beneficiary; any legal authority such person has to act on behalf of the beneficiary; whether the potential payee has custody of the beneficiary; and whether the potential payee is in a position to look after the needs of the beneficiary. Lastly, SSA performs soft background checks prior to appointments and also conducts representative payee assessments. The purpose of the investigation is to serve as a precautionary measure prior to appointment. Upon appointment, benefits may be certified to the representative payee for use on the beneficiary's behalf. A previous fact sheet has outlined this process in more detail.
Major Issues Facing the Representative Payee Program

SSA's Representative Payee Program has a number of serious issues that put older adults who cannot manage their own financial affairs at great risk of losing their homes and resources, and falling victim to abuse. With the projected increase in cases of dementia and Alzheimer's, there is a growing need for persons who can serve as representative payees for older adults. Protection and advocacy agencies, adult protective services, and aging advocates struggle to find and retain payees for vulnerable older adults. Yet, there are likely sources for additional representative payees that have not been identified, but could be if SSA would first develop a sustainable initiative to recruit and train payees. Even in cases where vulnerable seniors are found to be in need of representative payees, SSA's capability determination process and monitoring of appointed representative payees fall short of the protection needed to ensure that older adults retain autonomy and age in dignity. The current payee program also does not fully consider the right to self-determination after a representative payee has been appointed. Using the supported decision making model, SSA should develop solutions that promote independence and dignity for older adults. Supported decision making is a viable alternative to appointing a representative payee where the beneficiary may make use of friends, family members, and professionals to help them understand their financial situation so they can make their own decisions.10

Recommendations to Improve the Representative Payee Program

- Prepare for the increased need for representative payees by developing methods to recruit and retain eligible representative payees.
- Provide more in-depth training, support, and resources for representative payees and field office personnel.
- Promote the use of the supported decision making model to ensure that the capability determination process and resulting appointments promote autonomy and financial independence for as long as possible.
- Ensure that third party monitoring and oversight of representative payees includes the appropriate level of oversight and protects older adults from financial abuse.

The remaining sections of this paper focus on more specific problems in different aspects of the Representative Payee Program and include recommendations.

Reforming the capability determination process

For older adults in particular, the inability to manage their own funds leads to increased chances for abuse and misuse of funds, homelessness, and extreme poverty. Advocates have presented viable options to reform the Representative Payee Program to help avoid these crisis situations. SSA’s Office of Inspector General has also consistently recommended that SSA gather improved data on the program and prepare to address the needs of the growing aging population. In a recent study, the Institute of Medicine of the National Academies of Sciences, Engineering, and Medicine appointed the ad hoc Committee to Evaluate the Social Security Administration’s Capability Determination Process for Adult Beneficiaries (hereinafter, the Committee). The Committee provided SSA with recommendations to improve the way it determines financial capability, particularly for adults with disabilities. SSA should implement these recommendations and also explore implementing other improvements that are used effectively by some non-SSA benefit programs.

First, the study considered SSA’s standard for financial capability. Financial capability is the beneficiary’s ability to manage or direct the management of his or her benefits. According to SSA, the least restrictive standard for proper management of funds is meeting one’s best interests by satisfying basic needs of food, shelter, and clothing. In further evaluating financial capability, the Committee made a distinction between financial performance and financial competence, which both need to be considered when making a capability determination. In sum, the Committee found that financial performance reflects financial competence to implement financial decisions in the real world, versus in a clinical or professional setting. Thus, evidence of beneficiaries’ real world financial performance in meeting their basic needs is the best indicator of their financial capability.

Particularly important, regarding capability determinations for older adults, the study explored the vastly different effects that cognitive disorders have on beneficiaries. Despite an increased need for assessment of financial capability, additional evidence besides a diagnosis and medical evidence is needed. This scenario is very different from that of individuals with significant physical limitations but retention of the ability to direct the management of benefits. For these very reasons, it is vital for SSA to collect medical and lay evidence from reliable third party informants and individuals who have first-hand knowledge of the beneficiary’s financial performance outside of a clinical setting.

Other agencies have implemented more nuanced ways to evaluate capability that SSA could consider implementing. The Department of Veterans Affairs (VA) and the U.S. Office of Personal Management (OPM) each use a combination of legal, medical, and lay evidence to determine the capability of a beneficiary. However, one important distinction in the VA’s program is a supervised direct payment option for individuals determined to have limited capacity. This aspect of the VA’s program directly aligns with the supported decision making model and the importance of maintaining self-determination when possible. For many seniors, SSA’s capability determination process is over-inclusive in that is does not permit an option for supervised assistance absent a determination of incompetence and appointment of a representative payee. Although the VA’s program is not without its own shortfalls, this supervision component encourages the necessary self-motivation needed for seniors to maintain an active role in their

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12 Id. at 4.
13 Id.
14 Id at 6.
15 Id.
16 Id.
17 Id at 7.
18 Id.
19 Id at 3.
20 Id.
own finances and ability to live independently despite having some limitations.\textsuperscript{21}

Another aspect of the VA system that could yield more consistent and positive determinations is the VA's policy to favor competency despite a finding of legal incompetency by a court.\textsuperscript{22} While such an order may raise a red flag and prompt further development of evidence, it does not necessitate a binding determination of incompetence under the VA's program. In determining incapacity under SSA's current process, legal evidence such as a court order declaring a beneficiary as legally incompetent is binding and such beneficiary must be appointed a representative payee.\textsuperscript{23} This aspect of SSA's program is especially problematic in that no further development of evidence is required, which leads to more instances of over-inclusive determinations.

Unfortunately, legal and procedural challenges to data sharing prevent the type of cross-agency collaboration that would serve to better protect individuals who also receive benefits from other federal agencies. Although these challenges will persist until legislative action is taken, SSA is fully capable of implementing policies to improve intra-agency communication between the SSI and OASDI programs. In 2014, almost 11,000 individuals who were receiving benefits from both the SSI and OASDI programs had been assigned a representative payee in one program but not the other.\textsuperscript{24} The lack of communication and failure to facilitate information sharing and consistency across programs administered by SSA leaves room for potential misuse and negative consequences for older adults.\textsuperscript{25}

Unlike SSA's SSDI beneficiaries, recipients of Old Age and Survivors benefits do not undergo periodic continuing disability reviews. These reviews provide an opportunity for capability reassessments, which in turn aid SSA in recognizing changes in beneficiaries' capability over time. However, as the Committee found, even these periodic reviews do not fully serve the purpose of reassessment because they are geared toward identifying improvements in the person's capacity which would result in changes in the medical basis for a beneficiary's disability award.\textsuperscript{26} Acknowledging this distinction, the report suggests that SSA develop a systematic mechanism targeted toward incapable beneficiaries who may improve over time, as well as those at risk of becoming incapable.\textsuperscript{27}

These critical suggestions are timely and present the urgent need for SSA to increase accountability and improve how it decides whether seniors should be stripped of their ability to choose and make financial decisions for themselves. As advocates of the supportive decision making paradigm assert, the power of choice leads to self-determination. Justice in Aging advocates on behalf of the elderly to ensure that aging in dignity is well within reach. A positive step in that direction for SSA would be to act upon these recommendations.

**Recommendations**

- SSA should collect evidence of beneficiaries' real world financial performance as the best indicator of financial capability. Medical and lay evidence should be collected from reliable third parties who have first-hand knowledge of beneficiaries' financial performance.
- SSA should adopt the supported decision making model for older adults with limited capacity.
- SSA should develop a periodic reassessment tool to identify older adults at risk of becoming incapable of managing their own benefits.

\textsuperscript{21} Id.
\textsuperscript{22} Id. at 32.
\textsuperscript{23} Id.
\textsuperscript{26} Id. at 10.
\textsuperscript{27} Id.
Improving monitoring and oversight of the program

One of the most well-known cases of representative payee misuse is that of Henry’s Turkey Farm in Atalissa, Iowa. This horrific case of abuse was discovered in 2009 after 21 adults with disabilities were taken advantage of by their organizational payee, Henry’s Turkey Service. Despite the attention garnered and the many individuals who have been brought to justice, there is still great potential for representative payees to misuse funds and fail to perform basic representative payee duties. While many of these cases of abuse are malicious in nature, there have also been instances in the past in which organizational and individual payees have been found to misuse funds unintentionally. These cases generally present a deeper issue surrounding SSA’s failure to properly train and monitor payees and SSA field offices and personnel.

Currently, as there is no independent third-party review of individual representative payees and limited review of organizational payees, SSA needs additional help to better target investigations into misuse and abuse. A possible strategy to combat this issue is to employ outside review by a qualified entity knowledgeable about the needs of elders and adults with disabilities. A current model SSA could continue to follow is its partnership with the National Disability Rights Network (NDRN), the national membership and technical assistance/training provider for the federally funded and mandated state Protection & Advocacy (P&A) system. In 2010, in the aftermath of the Henry’s Turkey Farm case, SSA contracted with NDRN to involve the P&A agencies in reviews of selected SSA organizational representative payees. NDRN developed a web-based curriculum for P&A staff, and conducted training. These reviews addressed not only mismanagement of SSA benefits, but also issues of beneficiary employment, housing, safety and mistreatment. The advantages of this partnership extend beyond the investigations into payees, to the additional reviews and referrals of problems such as poor living conditions, possible financial mismanagement, and potential violations of employment laws to agencies other than SSA.

An extension of the NDRN review project to more organizational payees may require additional funds and training, but could ultimately lead to enhanced oversight over the Representative Payee Program. SSA should also consider contracting with the state P & A agencies directly. These agencies have strong ties and existing relationships within the communities where many payees and beneficiaries live. These contracts could be limited to overseeing large volume individual payees and organizational payees with fewer than 50 beneficiaries.

Another option for reducing the likelihood of misuse of a beneficiary’s payments could include more thorough training of field offices and on-site review staff. This recommendation would ensure that SSA staff can identify instances of abuse, neglect, and exploitation that could lead to misuse of benefits. SSA could also share this training information with other federal agencies and community networks. The Representative Payee Program could benefit from volunteer payee monitors for selected cases signaling the potential for misuse. SSA offices could

32 Id.
33 Id.
also select, screen, coordinate, train, and supervise volunteers to interview beneficiaries and payees, and report any red flags back to SSA. The volunteer reports could be used to further identify situations where there may be payee problems, and better target follow-up checks.36

Recommendations

- Extend the NDRN review project to allow the organization to work closely with P&A agencies and provide more reviews of organizational payees with fewer than 50 beneficiaries and high volume individual payees.
- Coordinate and supervise a volunteer payee monitor program to increase oversight and monitoring of payees.

Taking required action against representative payees in cases of misuse

Under the Social Security Protection Act of 2004, SSA has a responsibility to examine allegations of misuse, determine the facts, and make a formal decision of whether misuse has occurred.37 A recent report has found that although SSA generally complies with these requirements, it needs to improve its actions in instances of misuse by organizational and high-volume individual payees.38 When misuse is found, SSA must reissue the benefits to the beneficiary or an alternate representative payee.39 In some limited circumstances, SSA will allow a payee who misused the beneficiary's payments to continue serving as a payee.40 The report also found that SSA did not reissue benefits misused by organizational and high-volume individual representative payees. Nor did SSA obtain restitution from those payees who misused benefits.41

In 2014, Justice in Aging joined with Disability Rights Oregon and the Oregon Law Center to stop a similar injustice in Oregon, in which hundreds of SSI beneficiaries were in danger of becoming homeless after SSA decertified their representative payee. Together, the advocates filed an emergency class action lawsuit against SSA to ensure that all the beneficiaries would receive their checks while a new representative payee was found. Advocates across the country have struggled to ensure that clients are paid directly upon the removal of both organizational and individual representative payees. As shown in this Oregon case and many other cases, when there has been misuse of SSI benefits, SSA has a legal responsibility to make certain that beneficiaries receive their benefits directly if a representative payee is not appointed.42

Recommendations

- SSA should take prompt action after a representative payee is decertified to ensure that beneficiaries receive benefits directly.
- Improve information sharing across programs and ensure the availability of additional representative payees.

38 Id.
40 Id.
41 Id.
Properly monitoring the direct deposit system

Technological advances have made the use of the direct deposit system more widespread. However, this has increased the possibility of benefits being diverted by unauthorized people and used in unauthorized ways. This issue was explored by the Office of the Inspector General (OIG) in 2013. At the time, beneficiaries were able to initiate changes to their direct deposit account by calling or visiting an SSA field office, calling SSA’s 800-number, using SSA online applications, or auto enrolling through financial institutions. Although SSA established policies to increase controls over the process, in 2012 the OIG received over 18,000 reports that benefits had been redirected away from beneficiaries’ bank accounts. Upon detailed review, the OIG found that controls were not fully effective and did not prevent SSA field office staff from processing direct deposit account changes requested by persons other than the beneficiary, their representative payees, or other authorized persons.

 SSA has taken steps to strengthen identity verification procedures, namely through the direct deposit fraud initiative. However, this issue persists today and may be expected to continue as the aging population increases. SSA should continue to partner with financial institutions and encourage increased oversight and more stringent identification procedures. Since the purpose of the Representative Payee Program is to ensure that benefits are used in the best interest of beneficiaries who have been deemed incapable, education and outreach about the usefulness of the program is another way to address this problem.

However, educating about the benefits of the Representative Payee Program is an ongoing challenge. In particular, it is difficult to relay the importance and usefulness of the Representative Payee Program to individuals who believe the direct deposit system makes the role of representative payees obsolete. For instance, beneficiaries who receive financial assistance from family members and close friends are reluctant to learn more about the Representative Payee Program because someone already performs this function for them. For beneficiaries, the use of the direct deposit system eliminates federal oversight of their funds and the Representative Payee Program may be viewed as overly burdensome. However, some older adults may rely too heavily on this unofficial fiduciary relationship and become targets for financial abuse and misuse of funds, thus signifying the need for SSA to clarify goals and provide education on the importance of the program. Even though this education and training may be better performed by social services agencies, SSA should initiate the conversations and establish viable partnerships with organizations capable of performing this function. The reach of the agency makes it necessary to engage in these relationships to protect the financial well-being of millions of beneficiaries.

Recommendations

- Partner with banks and other financial institutions and encourage increased oversight and identification procedures.
- Establish partnerships with organizations that can provide education on the importance of the Representative Payee Program and conduct trainings on how to protect vulnerable older adults.

44 Id.
45 Id at ii.
Identifying those in need of a representative payee

Given the many studies and statistics widely available and highlighting the growing need for representative payees, it is undeniable that SSA will need to increase the pool of representative payees serving older adults. However, it is not readily apparent how SSA will determine if and when older adults may need a representative payee. SSA has not developed a mechanism for identifying older adults receiving retirement and survivors benefits who may need a payee, and relies exclusively on the reports of family members, friends, health care professionals, and community members who have first-hand knowledge of a beneficiaries' capability to manage their own finances. While these types of reports are useful and often extremely reliable, SSA must do more to identify these individuals.

SSA conducts the Centenarian Project, an effort geared toward individuals who are or near 100 years of age. If a centenarian appears capable, based on the current capability determination process and interviews, a representative payee is not appointed. There is no other targeted program to identify older adults who may not be capable of managing their own benefits. The entry point into SSA’s benefits system for adults 66 or older is much different than it is for beneficiaries with disabilities who receive SSI or SSDI. First, there is no medical assessment or capacity determination to qualify the older adult for benefits, as they are qualified based on age and income. Thus, older adults who apply for SSI in particular are not subject to ongoing assessments to track changes in capacity. SSA should develop a project similar to the centenarian project, which encourages field office staff to work collaboratively with state agencies and community partners.

SSA should also take prompt action and provide adequate guidance when representative payees, who also receive Social Security benefits, become unable to manage their funds. As beneficiaries age and develop cognitive impairments, especially those who serve as representative payees for their spouses and disabled adult children, proper oversight and detection of these cases will be imperative. SSA must also recruit and support additional payees to assist isolated older adults who do not have family or friends to serve in the payee role. SSA should establish policies and detailed guidance for field offices and SSA personnel to address these situations.

Recommendations

- Develop a training program to help field offices identify older adults who may be in need of a representative payee.
- Establish policies and detailed guidance for field offices to identify and replace representative payees who are also beneficiaries in need of a representative payee.

Training qualified representative payees to meet the growing need

SSA encourages representative payees to go beyond managing finances and become actively involved in the beneficiary’s life. Such involvement includes helping the beneficiary find available public benefits and community resources, and including them in financial decisions. Taking on this additional role requires SSA to provide more in-depth training for representative payees. As many representative payees are family members and non-professionals, it may be difficult for representative payees to take on these additional tasks while fulfilling their basic duties, such as adhering to SSA’s reporting requirements. Thus, representative payees certainly need additional guidance to fully understand their basic responsibilities, as well as to understand how to provide additional services to beneficiaries.

SSA currently provides a handbook, available both online and in print, and a few online resources.

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for representative payees to refer to at any time. In addition, SSA has been working with public and private organizations such as the Consumer Financial Protection Bureau, Wells Fargo, and various state organizations to create online training modules for representative payees. Although these efforts will provide additional resources for representative payees, the content of these trainings and the availability of SSA employees to assist representative payees are still inadequate.

According to the National Research Council, "payees must understand their duties and responsibilities, including details such as how to keep records, how to deposit benefits into separate accounts, and how to save money." SSA should consider using broad networks and combine efforts of other federal agencies to better educate payees. For instance, SSA and the VA have taken steps in providing such guidance via webinars and a web-based Guide for Representative Payees. Additionally, the Consumer Financial Protection Bureau (CFPB) has developed a “lay fiduciary guide” to help representative payees and other non-professional fiduciaries better understand their similar responsibilities. Older adults who receive Social Security benefits are often eligible for other public benefits programs, such as Medicaid and Food and Nutrition services. There are also complex Medicaid and Medicare benefits rules that payees may or may not be equipped to properly handle.

Collaboration not only decreases administrative costs of the Representative Payee Program, but also reaches a much greater audience than SSA can reach alone. These recommendations have the potential to provide valuable resources and information that can be disseminated across broad networks at minimal costs.

In addition to online training modules, pamphlets, and manuals, SSA should provide additional support to ensure that representative payees can properly carry out their functions. SSA does not have a toll free number that offers support specifically for representative payee issues. Going forward, SSA should establish this type of infrastructure to accept complaints or concerns from community members, and provide any additional resources payees may need. For organizational payees or individual payees with more than fifteen beneficiaries, it is important that someone in the community is present to provide them with the support they need, handle any issues they may have, and help hold them accountable.

Recommendations

- Provide additional training and guidance to representative payees to help them fully understand their basic responsibilities, and provide additional services to beneficiaries.
- Establish partnerships with other federal agencies, such as the VA, and consider other broad networks to better educate payees.
- SSA should establish a toll-free number solely for issues involving the Representative Payee Program, including complaints and community concerns.

49 Please visit the Consumer Financial Protection Bureau website to find a full copy of the guide, which is also available at http://files.consumerfinance.gov/f/201310_cfpb_lay_fiduciary_guide_for_representative.pdf.
50 SSA has yet to release the video modules completed in collaboration with Wells Fargo. Please visit their Representative Payee website in the coming months to gain access to these modules.
52 Id.
53 Id.
54 Id.
Conclusion

In 2013, SSA worked with nearly 5.9 million payees handling $74 billion in annual benefits for over eight million beneficiaries. As previously stated, this number is expected to increase dramatically in coming years. This increase should not be taken lightly considering SSA's inability to adequately identify older adults in need of representative payees. Given the history of misuse and lack of oversight within the program, SSA must make necessary reforms to prevent repetition of the often dehumanizing instances of fraud and misuse of funds.

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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.
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. Their benefits are deposited directly into a pre-designated bank account in their name or onto a Direct Express card. 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. 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. 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.

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. 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.

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1 POMS GN 00502.001 Capability Determination and Representative Payee Payment Overview (January 26, 2017), secure.ssa.gov/apps10/poms.nsf/lnx/0200502001.
3 42 USC § 405(j)(1)(A).
4 42 USC § 405(j).