



Recommendation 91-3

The Social Security Representative Payee Program

(Adopted June 13, 1991)

As part of the Social Security program, Congress has authorized the Social Security Administration (SSA) to pay certain beneficiaries' benefits to other persons or organizations where the Secretary determines payment to such a "representative payee" would be in the interest of the beneficiary.¹ SSA currently pays about \$20 billion annually in social security benefits to representative payees of more than 4 million (or about 10%) beneficiaries. Because the program has been the subject of some concern and litigation, SSA asked the Administrative Conference of the United States to study certain procedural aspects of the representative payee program. While the study was underway, Congress addressed some of the procedural issues as part of the Omnibus Budget Reconciliation Act of 1990 (OBRA), Public Law 101-508, § 5015.

A. Rulemaking. The representative payee program operates under a statute that for the most part paints program requirements with a broad brush. SSA has some regulations, but many of the operating instructions are found in the Program Operating Manual System (POMS), the agency's internal operating manual. There are a number of issues the Conference believes should be the subject of regulations, either because they are not adequately addressed anywhere, or because they should be addressed in regulations rather than only in the POMS. These issues are discussed below. This recommendation contains specific suggestions for modifying the procedures for appointing representative payees (see section B, below). For a number of other issues, involving the establishment of program criteria, the Conference takes no position on the content of the rules, but recommends that the issues be addressed in the context of notice-and-comment rulemaking.

First, there currently exists no clear standard for when a representative payee should be appointed in a particular case. The Social Security Act provides that "(i)f the Secretary determines that the interest of any individual under this title would be served thereby, certification of payment of such individual's benefit under this title may be made * * * (to a

¹ The term "beneficiary" as used in this recommendation refers to those receiving benefits under both title II (old age survivors and disability benefits) and title XVI (supplemental security income payments). Those receiving benefits under this latter program are technically referred to as "recipients."



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representative payee)."² The Act does not contain any standard for determining when appointment of a representative payee is in the beneficiary's interest. Current SSA regulations provide only that a representative payee will be appointed when "due to a mental or physical condition or due to * * * youth," a beneficiary is "not able to manage or direct the management of" his or her own benefits.³ The regulations neither indicate what constitutes an inability to manage benefits, nor what mental or physical condition must be found. This lack of a standard requires SSA personnel to make largely discretionary decisions that are difficult to challenge individually or to evaluate programmatically.

While the Administrative Conference takes no position on what the substance of a standard for representative payee appointment should be, it believes the promulgation of a more detailed standard through rulemaking is important to promote the appearance and reality of fairness and consistency in operation of the representative payee program.⁴

Second, concerns have been raised that persons interested in gaining access to beneficiary funds may provoke SSA action to appoint a representative payee without sufficient factual basis. Thus, a standard should be developed for a minimum amount of evidence necessary to trigger the initiation of procedures that could result in the appointment of a representative payee.

Third, the Conference recommends SSA promulgate clarifying rules relating to eligibility to serve as a representative payee, including a method for determining priorities where there are competing applicants for such payee status. Although SSA has some internal guidelines for selecting appropriate representative payees, the Conference believes that such issues should be addressed in regulations, to provide public participation in their development and to provide easier access to their contents.

² 42 U.S.C. 405(j)(1) (Title II). For title XVI, the provisions are comparable. See 42 U.S.C. 1383(a)(2)(A).

³ 20 CFR 404.2001, 416.601 (1990).

⁴ Among the issues that might be addressed are how the specific standard should balance interests in beneficiary autonomy versus government beneficence, what factors should be considered in determining whether a beneficiary's interest would be served by appointing a payee, what should constitute inability to manage benefits, and who should be the decision maker (e.g., the states in guardianship proceedings, the state disability determination services, or trained agency lay or medical staff). Any rule setting a standard for appointing a representative payee should also address the question of what types of evidence are either appropriate or necessary in making the determination.

SSA should also itself carefully consider the education levels and other qualifications of agency officials making determinations on representative payee status to ensure that such decision makers have the necessary skills to apply whatever standard is developed.



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Finally, the question of SSA's responsibility to monitor representative payee performance has been a subject of concern. Although a court has ruled the Constitution's due process clause requires annual accounting by all representative payees,⁵ the decision's continued applicability is not clear.⁶ The Social Security Act currently requires annual accounting by representative payees, except certain institutions.⁷ Congress in the OBRA amendments expressly required SSA to study more stringent monitoring of "high risk" payees (e.g., representative payees who are not related to the beneficiary or who are creditors). SSA should undertake rulemaking to promulgate procedures for monitoring representative payee performance in a manner that will be both effective and efficient.⁸

B. Procedures--

1. *Current procedures.* When SSA receives information a particular beneficiary may need a representative payee, it seeks to gather evidence with which to determine whether the beneficiary is incapable of managing his or her own benefits.⁹ If SSA decides the beneficiary is incapable, its first step is to select a representative payee. SSA then sends what is called an "advance notice" to the beneficiary, informing the beneficiary he or she has been found incapable of managing benefits and SSA intends to appoint the named representative payee. The beneficiary is allowed 10 days to respond to SSA and provide additional facts. This is often the first notice that the beneficiary receives that appointment of a representative payee is being contemplated. If, after receiving any further information, SSA confirms its decision, it sends the beneficiary notice of its "initial decision," which is implemented immediately. The beneficiary may seek "reconsideration" from SSA, following which the beneficiary is entitled to a hearing before an administrative law judge and appeal to the Appeals Council.

Under these current procedures, the beneficiary generally is provided no notice that SSA is considering appointing a representative payee until the agency has already preliminarily decided that one is necessary and has selected a candidate. The "advance notice" does not explain the

⁵ *Jordan v. Schweiker*, 744 F.2d 1397 (10th Cir. 1984); *Jordan v. Bowen*, 808 F.2d 733 (10th Cir. 1987).

⁶ The *Jordan* case was a class action, certified in 1980. The court held that the Constitution required annual accounting for all payees. The impact of time on the class, as well as the impact of subsequent legislation, raises some questions concerning the case's current applicability.

⁷ 42 U.S.C. 405(j)(3).

⁸ Such a rulemaking could address such issues as what type of information is needed to make decisions, how often it should be reported or collected, whether different requirements should apply to different types of payees, and what SSA will do with the information it obtains in terms of its internal use and public availability.

⁹ Such evidence may include state adjudications of incompetence, a physician's opinion that a beneficiary is unable to manage benefits, or lay evidence to that effect.



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basis for the decision to appoint a representative payee. Nor is the beneficiary given an opportunity to meet with SSA face-to-face before a representative payee decision is implemented. While the present procedures appear to satisfy constitutional minima, considerations of efficiency, fairness and appearance of fairness suggest certain modifications to these procedures.

2. *Conference recommendations.* The Conference recommends several changes in the process, that, consistent with its other recommendations involving the Social Security program, encourage increased procedural safeguards at the beginning of the process in order to maximize correct decisions in the early stages and lessen the need for additional proceedings.¹⁰ The Conference recommends SSA notify a beneficiary as soon as the threshold for initiating action, discussed above, is met, offering the beneficiary an opportunity to have an informal face-to-face interview with an SSA claims representative. To the extent practicable, the notice (and all other notices) should be designed to be understandable to the beneficiary, taking into consideration information already in the file (e.g., what language the beneficiary understands).¹¹ The notice should also inform the beneficiary that appointment of a representative payee is being considered, describe the standard for and basic reason(s) why it is being considered, ask for all relevant information concerning the need for and selection of a representative payee, and ask the beneficiary to suggest a possible candidate. SSA should also notify the beneficiary of any person(s) it knows to be under consideration as a representative payee.

If, after completing its investigation, SSA decides to appoint a representative payee, it should notify the beneficiary of this determination, informing him or her of the right to review the evidence and appeal.¹² The determination then would be implemented, after which appeal to an ALJ and the Appeals Council would be available, as it is now. These procedures would eliminate the current opportunity for "reconsideration" that is provided after implementation but before the ALJ hearing.

The rationale for these recommended procedures is that a beneficiary should have notice and the opportunity to respond concerning his or her alleged inability to manage benefits before the SSA has made a de facto determination that a representative payee is required and

¹⁰ See, e.g., Recommendation No. 90-4, "The Social Security Disability Program Appeals Process: Supplementary Recommendation," 1 CFR 305.90-4.

¹¹ The expectation is that there would be several form notices with the clearest practicable wording in different languages, normal and large type sizes, and perhaps Braille.

¹² OBRA amendments require such notice. See 42 U.S.C. 405(j)(2)(E); 1631(a)(2)(B)(x) (xii).



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who that payee should be. The ability to manage benefits is not always strictly a medical determination; it may well involve consideration of observed behavior. Thus, it is likely that a decision maker who has had an opportunity to see and talk with the beneficiary will often make a more accurate determination of the need for a representative payee.¹³ The Conference believes that, as in the disability adjudication itself, procedures that encourage as complete a record as early in the process as possible offer significant advantages that far outweigh any short-term costs occasioned by adding an earlier notice and opportunity for a face-to-face meeting. Not only will early notice to beneficiaries and an opportunity for personal contact with SSA allow beneficiaries to provide any relevant information that they have at a pre-decisional level, it may also give them more confidence in the process, thus resulting in fewer appeals at later stages. Moreover, as noted above, the opportunity for "reconsideration" that is currently provided after implementation but before the ALJ hearing would no longer be required.

Under current procedures, beneficiaries are permitted to have assistance, by attorneys or non-attorneys, in disputes over representative payee status. However, because of the lack of formal procedures until late in the process and, more important, the lack of an "award" out of which to pay attorneys, there has been little attorney or lay assistance involvement in this program. It would thus be especially useful for SSA to develop and provide beneficiaries with information about legal assistance and other relevant organizations that may be available in their areas.¹⁴ In situations where someone applies to replace a representative payee, both the payee and the beneficiary should be given notice of the possible replacement. Both should be given an opportunity to file comments and to meet informally with SSA officials. If the representative payee is replaced, the beneficiary (but not the payee) should have the right to appeal the determination.

Although a beneficiary in representative payee status may apply to have such status terminated, no procedure currently exists for reexamining the need for a representative payee on any periodic basis. Because there are certain types of beneficiaries for whom a representative payee is less likely to be needed permanently (e.g., stroke victims, persons with reactive depression) it is in the interests of both the agency and beneficiaries to reassess periodically the need for representative payees for such individuals. Thus, the Conference

¹³ The Administrative Conference has recommended that face-to-face meetings be available in the context of medical disability determinations. Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations," 1 CFR 305.89-10.

¹⁴ The Conference has encouraged the use of non-lawyers in agency proceedings. See Recommendation 86-1, "Non-lawyer Assistance and Representation," 1 CFR 305.86-1.



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recommends SSA attempt to determine which, if any, types of beneficiaries in representative payee status ought to have their status periodically reevaluated and provide a method for doing so.

C. Misuse of funds and restitution—

1 *Current practice.* Currently, determinations by SSA that beneficiary funds have been misused are not appealable. This means neither the beneficiary nor the representative payee may challenge such determinations. Moreover, SSA does not currently have an effective mechanism for requiring payees who misuse beneficiary funds to return such funds to beneficiaries.¹⁵ SSA currently has only the options of referring cases to the Department of Justice for criminal prosecution or requesting the representative payee to return funds. Most cases are too small to warrant Justice Department action, and SSA has no authority to force a representative payee to pay restitution.

2. *Conference recommendations.* Beneficiaries should be permitted to appeal an administrative determination that their benefits have not been used properly.¹⁶ Representative payees should also be permitted to appeal misuse determinations. Although they have no right to payee status, a determination that they have misused funds will be entered into a data bank, will prevent them from being appointed as a representative payee in the future, and may have other negative ramifications. These consequences suggest that more process may be due. ACUS recommends a determination of whether representative payee misuse of beneficiary funds has occurred be considered an "initial determination," which triggers the right to reconsideration and, if necessary, a subsequent ALJ hearing.

The Administrative Conference also recommends Congress authorize an administrative remedy that would allow SSA to (1) require representative payees who have misused beneficiary funds to pay restitution, and (2) impose civil monetary penalties on such payees. Such authority would enable SSA to address the problem without burdening the courts.¹⁷

¹⁵ In cases where SSA has been negligent in investigating or monitoring representative payees, SSA must make restitution to the beneficiary. OBRA 5105(c).

¹⁶ Beneficiaries do have the right to use state court remedies.

¹⁷ See Recommendation 72-6, "Civil Money Penalties as a Sanction," 1 CFR 305.72-6; Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR 305.79-3. The Program Fraud Civil Remedies Act, 31 U.S.C. 3801, authorizes the imposition of administrative civil penalties for false claims against the government and for certain types of false statements. However, it is not clear whether this Act would apply to representative payee actions, and in any event, it does not provide a remedy of restitution.



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The OBRA amendments made clear that, where SSA's negligent failure to investigate or monitor a representative payee results in misuse of benefits, SSA must make restitution to the beneficiary for any such benefits, and then may seek repayment from the payee.¹⁸ The negative impact on a beneficiary caused by misuse of his or her benefits, however, is independent of whether any SSA negligence was involved. Congress should authorize research on the scope, causes and effects of representative payee misuse of benefits, and methods to ease the resulting burden on beneficiaries, including the use of loss underwriting arrangements.

D. *Other issues.* When this study was undertaken, the issue of SSA's need to investigate representative payees before their appointment was of major concern. The recent OBRA amendments, however, require SSA to undertake certain investigations of potential representative payees. For the present, those steps would appear to be adequate, but, after sufficient time has passed, their effectiveness should be reevaluated.

In the past, where SSA has determined that a representative payee is required, but has not found a suitable candidate, SSA has suspended benefit payments until a payee could be found, at which time the withheld payments would be released to that payee. In the OBRA amendments, Congress authorized SSA to suspend payments for no more than 30 days, where direct payment would substantially harm the beneficiary. However, where the beneficiary is legally incompetent, under the age of 15, or a drug addict or alcoholic, there is no time limit on the suspension of benefits. The Conference believes that SSA should study the impacts of the indefinite suspension of benefits on beneficiaries in these groups, with the objective of making legislative recommendations to Congress if the study suggests that time limits should exist for all classes of beneficiaries or that suspension should not be permitted at all.

In many cases, finding an appropriate representative payee is a significant problem. SSA should take steps to ease its burden by widening the pool of potential representative payees, and by periodically seeking input from beneficiaries. It would be useful for SSA to ask beneficiaries, at the time they apply for benefits and periodically thereafter, to designate a person whom, at that time, they would prefer to serve as a representative payee, should one become necessary. While such a designation would not bind the agency, in many cases, the designation of someone whom the beneficiary thought was appropriate could make the selection process easier for SSA and make the beneficiary more comfortable with the representative payee. SSA also should develop lists of national, regional and local organizations

¹⁸ OBRA 5105(c)(1), to be codified at 42 U.S.C. 405(j)(5).



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that could serve as representative payees on a volunteer basis, and evaluate carefully the performance of these and compensated or reimbursed representative payees.¹⁹

Recommendation

1. The Social Security Administration (SSA) should develop and promulgate by regulations criteria for deciding the following issues:

(a) Whether appointment of a representative payee should be made;

(b) What evidence constitutes a threshold for initiating procedures that could result in appointment of a representative payee;

(c) Who is eligible for appointment as a representative payee and whether the existing priorities among categories of payees should be modified, including which payee should be selected when there are competing payee applicants from the same category of payee; and

(d) How payee performance should be monitored and evaluated.

2. SSA should amend its procedures for appointing representative payees for beneficiaries²⁰ aged 15 and above as follows:

(a) At such time as the threshold described in ¶1 (a)(ii) is met, SSA should send a notice to the beneficiary that, to the extent practicable, is in language designed to be understandable to the beneficiary. This notice should contain the following information:

(i) That representative payee status is being considered;

(ii) A description of the standard for appointment of representative payee;

(iii) A request that the beneficiary provide all information relevant to the need for and selection of a payee;

¹⁹ Congress has authorized the use of reimbursed representative payees on a very limited basis. OBRA of 1990, Pub.L.101-508, sec. 5105(a)(3).

²⁰ The term "beneficiary" as used in this recommendation refers to those receiving benefits under both Title II (old age survivors and disability benefits) and Title XVI (supplemental security income payments) of the Social Security Act. Those receiving benefits under this latter program are technically referred to as "recipients."



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(iv) An offer for the beneficiary to meet in an informal face-to-face interview with an SSA representative;

(v) The names of any person(s) known by the agency to be under consideration as a representative payee, and a request for suggestions for possible representative payees, should one be determined necessary; and

(vi) A statement that the beneficiary may be assisted by an attorney or other person, and a list of legal aid and other relevant resources available in the area.

(b) If, after completion of the above procedures, a determination is made to appoint a representative payee, the beneficiary should be notified of the basis for that determination, the name of the payee, and the beneficiary's appeal rights. These should include the right to an administrative law judge hearing and review by the Appeals Council, but the currently provided "reconsideration" stage that precedes the ALJ hearing could be eliminated upon implementation of this recommendation.

(c) Direct payment should continue to the beneficiary until a representative payee appointment is effective.

3. Where a person applies to replace an existing representative payee, SSA should give notice to the beneficiary and to the existing payee. The notice to the beneficiary and to the payee should offer them the opportunity to meet in an informal face-to-face interview with an SSA official and to provide any relevant information, in writing or orally. If the existing payee is replaced, the beneficiary should be notified of the replacement and of his or her right to an ALJ hearing on the decision and review by the Appeals Council.

4. SSA should attempt to determine which, if any, type of beneficiaries in representative payee status are most likely to regain their ability to manage or direct the management of their own benefits, and provide a method for periodic reevaluations of their need for a representative payee.

5. SSA should amend its regulations to provide that a decision on whether beneficiary funds have been misused by representative payees should be considered an "initial determination" appealable by either the beneficiary or the representative payee.

6. SSA should take the following steps to facilitate the search for appropriate representative payees:



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(a) At the time of application for benefits and periodically thereafter, request beneficiaries to identify their current choice of a representative payee who could be considered for the position, after appropriate investigation, in the event that one may be required in the future.

(b) Identify and use national, regional and local organizations that offer representative payee services on a volunteer basis and evaluate their performance in light of other representative payees.

(c) Evaluate the need for further use of organizations that serve as representative payees on a reimbursed or compensated basis.

(d) To the extent possible, make referrals to social welfare agencies or take other appropriate action to ensure beneficiaries for whom representative payees are not available are not harmed by the absence of the social security benefits.

7. Congress should authorize SSA to use administrative adjudications to require representative payees who have misused beneficiary funds to pay restitution and to impose civil monetary penalties on such payees.

8. Congress should authorize research on the scope, causes and effects of representative payee misuse of benefits, and methods to ease the resulting burden on beneficiaries, including the use of loss underwriting arrangements.

9. SSA should develop data and study the effect on beneficiaries of suspending benefits when a representative payee is not available, with the objective of making recommendations on whether there should be time limits on suspension of payments for all categories of beneficiaries or whether suspensions should not be permitted at all.

Citations:

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