

American Bar Association

ADOPTED BY THE HOUSE OF DELEGATES

February 4-5, 2002

Legal Problems of the Elderly (Report No. 100)

RESOLVED, That the American Bar Association urges the Administration to support and Congress to enact legislation that would strengthen the safeguards and protections of individuals receiving benefits under the Old Age, Survivors and Disability Insurance programs and the Supplemental Security Income program of the Social Security Act (Beneficiaries) which, because of such Beneficiary's disabilities and incapacities, are being received and managed by organizations designated by the Social Security Administration (SSA) as "representative payees." Such protections should include:

- (A) Replacement by SSA of any benefits misappropriated or misused by an organizational representative payee if not otherwise reimbursed;
- (B) Mandatory initial and continued bonding of organizational representative payees in all states where they provide services;
- (C) Forfeiture by representative payees of any fees normally allowed by SSA for any months in which an organizational payee has misused all or part of a Beneficiary's benefits; and
- (D) Authority for SSA to impose a civil monetary penalty against organizations which misuse, convert, or misappropriate payments for Beneficiaries received while acting in a representative payee capacity.

FURTHER RESOLVED, That to facilitate coordination, exchange of information, and accountability with respect to serving, or seeking to serve, as court appointed guardians and as representative payees of SSA for individuals incapable of properly managing their assets and monetary benefits, the American Bar Association urges SSA in the case of organizational representative payees, to cooperate with state and territorial courts with guardianship, juvenile, or family law jurisdiction by disclosing to

them and members of the immediate family of a Beneficiary, under an appropriate exception to the Privacy Act of 1974, ("routine use") information about representative payees or former representative payees considered for appointment as guardians for Beneficiaries or recipients of entitlements administered by the Social Security Administration or another government agency. In the case of organizational fiduciaries, disclosure of information about their records as representative payees should be made to a requesting state or territorial court without further administrative delay.

FURTHER RESOLVED, That SSA should require organizations or agencies that make application to serve as representative payees to:

- A) Provide advance notice of their intention to family members (parents, siblings, children, and grandparents) of Beneficiaries and to other legal representatives and, in so doing, advise such parties of SSA's general preference for appointment of individual payees, with a demonstrated interest in the Beneficiary, over organizational payees [20 C.F.R. §§ 404.2021, and 416.635, 640 and 645];
- B) Utilize all benefit payments received for the current exclusive use and welfare of the individual Beneficiary and make a maximum effort to conserve any unused funds to meet the special and future needs of such Beneficiary, pursuant to SSA's regulatory requirements and guidance on use, expenditure, and conservation of benefits [20 C.F.R. §§404.2035, 2040, and 2045 and 416.635, 640, and 645]; and
- C) Ensure that representative payees manage benefit payments in a way that prevents Beneficiaries from unnecessarily exceeding asset limits that would render them ineligible for federal benefit programs.

REPORT

This recommendation is designed to place the Association squarely behind needed improvements in and tightening of accountability and enforcement in the massive fiduciary program through which SSA ensures proper expenditure of program benefits for individuals who cannot manage those monies themselves.

Social Security Representative Payment Program—Background and Benefit Misuse Issues

Not many years after enactment of the Social Security Program in 1936, the Congress passed legislation granting SSA the power to appoint "representative payees" (RPs) to receive and disburse benefits for Social Security beneficiaries who were too frail, too young, or too incapacitated to manage their own finances [currently laid out in 42 U.S.C. §405(j) for old age, survivor and disability benefits and §1383(a) for SSI benefit recipients]. The legislation was implemented in 1939, and then covered retired workers, their spouses, their widows, and children of deceased workers. Today, the Representative Payment System is potentially available to all of the more than 50 million individuals receiving some form of Social Security benefit (including disabled workers and means-tested SSI Income beneficiaries whose benefit eligibility was established by legislative amendment several years after initiation of the RP system).

There are now more than 6.5 million persons whose benefits are actually under representative payee management, a group comprised of roughly 60% children and 40% adults. This equates to an approximate (and surprising) caseload of 1 out of 8 Social Security Act benefit recipients in the United States. Moreover, that proportion promises to rise in the near future as the number of our aged (and frail aged) citizens with "baby boomer" roots attain Social Security retirement benefit ages and the continued rise of SSI disabled child beneficiaries.

In overall volume, the hybrid and mammoth "special guardianship" program represented by the federal RP system now exceeds by a factor of more than 10 the combined number of all court guardianships/conservatorships active in the 50 states (estimated at roughly 600,000). Fortunately, more than 80% of today's RPs are parents, spouses, other relatives, friends of long standing, and court appointed guardians of the adult and child beneficiaries whom they serve and, thus, can be generally counted on for loving and responsible benefit management. However, no program this large could avoid instances of fiduciary fraud and abuse. Moreover, because federal Social Security benefits often represent the only source of income for a beneficiary, the power of a representative payee—and the potential harm arising from a payee's misuse of benefits—are considerable. Such incidents have indeed occurred and these have been particularly troublesome in the area of multi-client "organizational payees."

Organizational payees are typically non-profit agencies and organizations that serve as RPs for individuals without family members or close acquaintances who might be able to step in to meet their needs for responsible benefit management. Such organizations fill a definite need and most are responsible state institutions and community agencies with long histories of competent service. However, these entities, by their nature and the vacuum that they fill, frequently wind up in charge of the monthly Social Security income of 15 or 50 or 100 or 200 or more SSA beneficiaries, with large accumulations of funds to administer and enormous power over the

economic well being of the incapacitated individuals they have been authorized to serve. In the past decade, moreover, there has been a procession of instances of mismanagement of benefits and fraud by "high volume" payees, not large in number, but extremely damaging to the victimized beneficiaries who were involved. Such incidents were uncovered in the last half of the 1990s, for example, in the Los Angeles area, Northern Michigan, Detroit, Phoenix, Denver and the states of Washington and West Virginia. The most recent, at Martinsburg, West Virginia in late 1999, involved corrupt activities and deception perpetrated against wards and beneficiaries within both the state guardianship system and the federal representative payment system.

In the Martinsburg case, the glare of intense national TV publicity shocked the nation with respect to the toll of "volume payee" frauds. (ABC Television News, 20-20 Program, "When Nobody's Looking," Jan. 26, 2000). Here, more than 120 beneficiaries, mostly older citizens, but with a significant portion of disabled veterans and low income younger/middle aged adults, were cheated out of more than \$250,000 over a 4-year period by the chief executive (a local businessman) of a foundation that had been designated by SSA as the RP to handle their benefits. The wrongdoer entered guilty pleas to the felony offenses involved and was ultimately sentenced to serve a 3-year prison term. Perhaps more significant, however, is the fact that he exhausted virtually all of the misappropriated funds, declared bankruptcy, and was in no position to reimburse his victims for their loss of critical subsistence monies. In some cases, total life savings were misappropriated.

Legislative Strengthening of Monitoring and Enforcement Tools Against RP Abuse

The Martinsburg incident led to Congressional hearings in the Spring of 2000 and the introduction of remedial legislation to provide SSA with the tools and means for more tightly monitoring organizational payees, imposing civil penalties and forfeitures on wrongdoers, and providing restitution for those defrauded without the need to deal with preexisting restrictions that required meeting difficult burdens of proof of negligence and causal responsibility on the part of SSA. (See H.R. 4857 and S. _____, 106th Cong., 2d session).

For its part, SSA was instrumental in framing and endorsing such legislation and then promptly proceeding to initiate new oversight procedures, such as periodic and random site reviews of existing volume payees, orientation visits to new volume payees, and issuance of detailed guidance, reporting, and training materials for organizational payees.

Against this backdrop, the first recommended resolution expresses Association support for the legislative reforms introduced in the wake of the Martinsburg hearings (which were not passed by the 106th Congress, but have been reintroduced in the new 107th Congress in one house (S. 693) and are expected to be reintroduced in the other). These include:

- restitution by SSA of benefits misused by organizational payees (without any negligent causation test on SSA's part);
- mandatory bonding and licensing of representative payees;
- fee forfeitures by RPs otherwise entitled to fees where there has been misuse or misappropriation of benefits; and
- authority for imposition of civil monetary penalties against organizational payees who misuse funds.

The foregoing enforcement and monitoring tools are stated as desirable legislative objectives without detailed explication, so that the Congress can achieve the levels of specificity it deems appropriate for each initiative and can invest SSA with authority to prescribe standards and rules needed for optimal implementation of these measures.

State and Territorial Court Access to RP Records

The second recommended resolution addresses an interpretive barrier to the exchange of information between courts and SSA when courts seek information about the fiduciary records of individuals who are serving or have served as RPs and who come before courts seeking guardianship appointments or other custodial powers.

The resolution sponsors have been advised that SSA will not release RP records without the consent of the affected individuals as a matter of Federal Privacy Act protection even though the federal law specifically provides an exception permitting data access when relevant records are sought "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. §552a(b)(11). It appears that SSA does not recognize state and territorial courts as covered by the exception and will apply the exception only for federal courts. There is an absence of legislative history to support SSA's selective interpretation of the statutory phrase "court of competent jurisdiction." Moreover, among admittedly limited case precedent on this issue, the only reported cases dealing with the subject uphold or assume availability of the exception to state and territorial courts. See *Moore v. U.S. Postal Service*, 609 F. Supp. 681 (E.D.N.Y. 1985) and *Tootle v. Seaboard Coast Line. R. Co.*, 468 S.2d 237 (Fla. Dist. Ct. App. 1984). The resolution asks SSA to reconsider its position because of the apparent lack of legal foundation for its interpretations and, equally important, the values of free exchange of data on the records of individuals such as representative payees and guardians who accept and occupy positions of high fiduciary trust and responsibility with respect to incompetent or incapable individuals. It may be very useful, for example, for a court to have access to SSA's records on a particular RP who may be seeking enlarged fiduciary responsibilities as a guardian or conservator over individuals whose Social Security benefits that RP has managed or whose guardianship behavior has come under question in the course of court monitoring or oversight. Indeed, this kind of information sharing may facilitate court monitoring of individuals serving both as guardians and RPs and, through that, early detection or prevention of the kind of fiduciary fraud or abuse that has made such disturbing inroads on the integrity of the federal RP program and state guardianship systems.

Desirable Practices for Organizations or Agencies Which Seek RP Status

The third recommended resolution focuses on the duties of organizational payees which make application to serve as RPs (whether government agencies or private institutions) (i) to assure that other potential candidates who may be higher on SSA's preference lists are given an opportunity to come forward and express themselves, (ii) to expend monies received for the exclusive use of beneficiaries and solely for legally authorized purposes, including saving and conserving funds, wherever possible, as a safety net for beneficiaries, and (iii) to make sure that assets do not rise above ceilings that would jeopardize benefit eligibility.

Often, and especially in the case of neglected or abused children, it will be necessary for a public agency to step in and assume RP functions, even though federal guidelines clearly place, in the case of children, "an authorized social agency or custodial institution" at the bottom of its "order of preference" in appointment of representative payees. See 20 CFR §404.2021(b). Social agencies often are aware of parents and relatives who could nominally qualify for higher preference and should be careful not to ignore alerting such individuals when they seek plenary benefit management authority over children in their custody. See, e.g., *Michael B. v. Corker*, No. 3-94-0525 (M.D. Tenn., 1994) (litigation settlement requiring state human services agency to notify family members whenever seeking appointment as a child's RP). Similar considerations exist for those with disabilities or not-fully-competent adults. 20 C.F.R. §404.2021(a) (public or non-profit agencies and community groups and organizations placed lower on preference lists than spouses, relatives, legal guardians, and friends with custody).

Federal law is clear that Social Security and SSI benefits in the hands of RPs are the property of, and may be expended only for the exclusive use and needs of, the payee beneficiary—and federal implementing regulations provide detailed guidance on what those proper uses are. See, e.g., 20 C.F.R. §§404.2040, 2045 & 416.630, 416.35. Yet, on occasion, accounting failures, mergers of benefit monies with general pools of public assistance funds, and use of benefits to satisfy agency outlays and debts not strictly within the "exclusive" or "authorized" or "best interest" use of the affected beneficiary, whether through neglect or intention, may amount to failure of fiduciary obligation. See, e.g., *Willingham v. McDonald*, Cook County, Illinois Ct., No. 96-CO-00120 1996 (in settlement stipulation, state family services agency agrees to discontinue use of SSA/SSI benefits received as RP to reimburse personnel and administrative charges of private agencies providing contract foster care services). The resolution urges organizational payees to carefully discharge their obligations in this respect and, in the case of public agencies, that would suggest establishing clear policies which assure agency wide understanding of and compliance with these "exclusive use" principles.

It is essential that organizational RPs, in their mission to husband, expend and, where possible, conserve Social Security and SSI payments for their beneficiaries, do not do so in a manner which would violate prescribed asset ownership limits and thereby impair a beneficiary's continued eligibility for benefits. This is a special danger for beneficiaries in receipt of SSI benefits who may not accumulate funds in excess of their "countable resource limits" (generally \$2000 for unmarried individuals) without having to return excess amounts as overpayments or even losing future benefit checks. In the case of child beneficiaries approaching emancipation, the ability to build up savings for special educational or health needs can be very important and organizational payees must not forget that their fiduciary responsibilities require attention to asset preservation and protection, where possible, against benefit forfeiture. The last portion of the resolution stands as reminder of this fiduciary obligation, sometimes ignored in the pressures of volume RP management and accounting.

In *Guardianship Estate of Danny Keffeler v. Department of Social and Health Servs.*, 32 P.3d 267 (Wash. 2001), the Washington State Supreme Court held the state's child welfare agency violated social security law when acting as representative payee and applying children's benefits toward its costs of caring for them. The decision, although from a state rather than federal court, is the first reported high court decision to hold it unlawful for a state to apply foster children's

social security payments to offset its general costs and administration of foster care. The court held the agency was confiscating children's social security payments to benefit the state. It called "disquieting" the fact that these children's assets were "enriching government coffers," draining money away from support of their needs that wouldn't have been diverted if they had a parent, relative, or other adult managing those benefit funds. It found the agency to be in a conflict of interest position by allocating this money other than for the best interests of individual children. The court suggested that these funds could have otherwise been used or conserved to meet each child's special needs.

It is deemed important that the Association maintain a leadership and active advocacy role in the improved administration and accountability of the SSA representative payment program, which impacts on so many million disadvantaged and disabled citizens. This is by no means a new venture for the ABA. In 1995, the Director of the Association's Commission on Legal Problems of the Elderly was asked by the then Commissioner of Social Security to chair the Department's first Federal Advisory Committee, a "blue ribbon" group on Representative Payment charged with a broad assessment of the RP program and the generation of policy and operational improvement recommendations. That group amassed a considerable body of research, background data, and issue analysis, held a series of public hearings and produced a final report in November of 1996 containing over 25 major recommendations for RP program improvement (a number of which were subsequently accepted and adopted by SSA).

Subsequently, in fall 1998, the ABA Commission, in cooperation with the Association's Center on Children and the Law, launched a project to propose improved practices and prepare curriculum models for enhancement of coordination between state and territorial courts and the SSA representative payment program in furtherance of their respective fiduciary oversight responsibilities. This project was supported by SSA through a joint grant with the State Justice Institute and resulted in the release of five publications in July 2001, widely distributed among courts with guardianship, family, and juvenile jurisdiction. The project also conducted training seminars for a significant portion of the state guardianship/probate court judiciary. The recommendations here presented were a product of project experience with and study of the difficulties experienced in the past few years relative to fund misuse by organizational payees.

Association endorsement of the recommendations will, it is believed, materially enhance efforts to enhance accountability, avoid abuse, and advance effective administration of the Social Security representative payment program.

Respectfully Submitted,

F. Wm. McCalpin, Chair
Commission on Legal Problems of the Elderly

Bruce A. Boyer, Chair
Steering Committee on the Unmet Legal Needs of Children

February 2002

GENERAL INFORMATION FORM

Submitting Entity:
Commission on Legal Problems of the Elderly

Submitted By:
F. Wm. McCalpin, Chair, Commission on Legal Problems of the Elderly

1. Summary of Recommendation(s)

This recommendation is designed to place the Association squarely behind needed improvements in accountability and enforcement in the Representative Payment System, the massive fiduciary program through which SSA ensures proper expenditure of benefits for individuals who cannot manage those monies themselves. These recommended resolutions address matters of restitution by SSA in cases where there has been a misuse or misappropriation of funds by a representative payees, barriers to the exchange of information between state and territorial courts and SSA in cases where courts seek information from SSA about representative payees who have come before the court seeking guardianship or custodial appointments; and safeguards to ensure that organizational payees are properly managing the assets of beneficiaries.

2. Approval by Submitting Entity

Commission on Legal Problems of the Elderly, October 5, 2001.
Steering Committee on the Unmet Legal Needs of Children, November 3, 2001.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

No

5. What urgency exists which requires action at this meeting of the House?

6. Status of Legislation (If applicable)

There has been legislation introduced in both the Senate and House of Representatives that addresses part of the question of monitoring and oversight. The Senate version is more comprehensive than the House bill. However, similar legislation was introduced in the last Congress and died due to other pressing business.

7. Cost to the Association (Both direct and indirect costs)

None

8. Disclosure of Interest (If applicable)

None

9. Referrals

All Sections and Divisions
Commission on Mental and Physical Disability Law

10. Contact Person (Prior to the meeting)

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11. Contact Person (Who will present the report to the House)

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