

**Hearing before the
House Ways and Means Committee
Subcommittee on Social Security
Wednesday, June 5, 2013**

**“How Social Security Protects the Benefits of
Those Who Cannot Protect Themselves”**

**Statement of Reid Kress Weisbord¹
Vice Dean and Assistant Professor of Law
Rutgers School of Law – Newark
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Thank you, Chairman Johnson and Ranking Member Becerra, for noticing this hearing on the important topic of protecting vulnerable Social Security beneficiaries. This statement will: (1) address the problem of representative payee misuse; and (2) propose a cost-saving program to improve agency oversight of representative payees.²

Background on Representative Payee Misuse

In 1939, Congress enacted the Social Security representative payee system to protect vulnerable beneficiaries who suffer from cognitive impairments or are otherwise incapable of managing their own financial affairs. Under the representative payee system, the Social Security Administration (“SSA” or “the agency”) appoints a responsible intermediary, known as the representative payee, to (1) receive and cash the beneficiary’s Social Security benefit checks; and (2) expend the benefit amounts toward the beneficiary’s living necessities, medical care, recreation, or personal savings. The representative payee system serves a vital function, but because it entails direct payment of funds to third-party payees, the potential for misuse, misapplication, or theft of the beneficiary’s funds is an unavoidable corollary.

Under the Social Security Protection Act of 2004, Congress imposed a statutory mandate on SSA to monitor representative payees and reimburse misused funds in certain cases where the agency’s negligent failure to investigate or monitor results in monetary loss to the beneficiary. The agency, however, lacks a reliable, structural mechanism for detecting benefit misuse. Beneficiaries with representative payee appointments are often not in a position to detect or report misuse of funds because of their cognitive impairments, so it is difficult for SSA to discharge its obligation to

¹ This statement is not written on behalf of any paying client, person, or organization. I am writing in my capacity as an academician employed by Rutgers, The State University of New Jersey, located at the above-noted address.

² This statement is drawn from academic research recently published under the following cover: Reid K. Weisbord, *Social Security Representative Payee Misuse*, 117 Penn State Law Review 1257 (Spring 2013).

monitor and investigate problematic payees. A report by the National Academy of Sciences, commissioned by SSA in 2007, concluded that the actual incidence of representative payee misuse is likely significantly higher than official agency estimates, and that reliance on beneficiaries or third parties to report misuse is neither reliable nor efficient as a form of protection. Anecdotal accounts and audits performed by the SSA Inspector General suggest that the incidence of benefit misuse is likely more frequent within certain subsets, such as cases where a nursing or group home has been appointed as representative payee or where a single individual has been appointed representative payee on behalf of multiple beneficiaries.

Proposal for a “Family Representative” System

With the twin goals of protecting vulnerable Social Security beneficiaries and conserving scarce government resources, I respectfully propose the creation of a “family representative” system to enhance oversight of representative payees. This system would rely on the volunteered service of family and friends who express a significant degree of concern for the beneficiary but who may be unwilling to accept the burden and liability associated with serving as representative payee. These carefully vetted individuals would be appointed as a family representative with authority to oversee the conduct of the representative payee.

Under the proposed system, SSA would appoint a family representative according to the same statutory selection criteria used to select representative payees. Those criteria include: (1) a prohibition on certain individuals (persons convicted of certain crimes, persons whose status as representative payee has been revoked for misuse, creditors of the beneficiary); (2) individualized inquiry into the prospective representative’s relationship to and degree of concern for the beneficiary; and (3) verification of Social Security number, identity, and income of the prospective representative.

Upon appointment, the family representative would monitor the representative payee in a non-fiduciary capacity. To facilitate oversight, the family representative would be provided with information concerning the representative payee’s performance, in particular, the accounting information that all representative payees are required to submit to SSA at least annually. This information would include documentation of all benefits funds received and spent on the beneficiary’s behalf. The family representative’s personal familiarity with the beneficiary would permit a more penetrating evaluation of the representative payee’s conduct than one performed by the agency. For example, if a representative payee reported spending \$100/month on clothing for the beneficiary, but the family representative knew from first-hand observation that the beneficiary had worn a hospital gown for the prior twelve months, the family representative would be in a superior position to detect benefit misuse as compared to a governmental agency lacking personal contact with the beneficiary.

The family representative would have legal authority to report allegations of benefit misuse to the agency on a confidential basis. SSA would be responsible for acting upon and investigating allegations of misuse. In place of the agency’s current

reliance on specialized audits of targeted representative payees, the family representative system would create a national network of cost-free, private auditors perpetually on the lookout for benefit misuse. The family representative's personal concern for the beneficiary would serve as an incentive to engage in the appropriate level of oversight.

To prevent fraudulent behavior by the family representatives themselves, a family representative would never be given access to the beneficiary's Social Security funds and certain private information concerning the beneficiary could be redacted from reports provided to the family representative. The family representative would serve in a non-fiduciary capacity, so the burden and liability would be far less onerous than those imposed on representative payees. Since the family representative's capacity would be limited to oversight of the representative payee, the family representative would not be required to engage in record keeping or file annual reports and no liability or penalty would flow from the family representative's failure to monitor; such immunity would also help in recruiting potential family representatives. Like the vast majority of representative payees, family representatives would not be compensated for their service.

The potential benefits of the proposed family representative system are manifold. Most importantly, vulnerable beneficiaries would receive heightened protection from misuse, abuse, and neglect by problematic representative payees; and the agency would gain a structural oversight mechanism enabling a cost-saving reduction in the reimbursement of misused funds. Other possible benefits include:

- (1) the mere appointment of a family representative may serve as a deterrent against benefit misuse by representative payees;
- (2) the system would increase the likelihood of detecting inaccurate but plausible entries on the annual accounting form submitted by representative payees;
- (3) the system may attract greater participation in the beneficiary's care by concerned family and friends;
- (4) individuals who would be unwilling to serve as representative payee (or only serve begrudgingly) could serve as monitors for an organizational payee willing to accept the burden, liability, and administrative obligations associated with appointment as representative payee; and
- (5) appointment of a family representative would minimize disruption to the existing representative payee system by leaving intact SSA's primary repose of decisionmaking authority to the payee.

Applying Lessons from the "Trust Protector" Model

The proposed family representative system bears a doctrinal connection to a relatively recent development in private trust law—the settlor's appointment of a "trust protector" empowered to oversee the trustee's performance. In the trust law context, the trust protector model tends to reduce agency costs inherent in the settlor-trustee-beneficiary relationship, therefore, providing a useful analogy to the representative payee context where SSA's lack of access to information about the Social Security

beneficiary naturally limits its ability to monitor and evaluate the performance of the representative payee.

To alleviate some of the difficulties associated with fiduciary enforcement—and, by extension, to reduce agency costs inherent in the trust relationship—trust settlors have increasingly been advised to designate a trust protector to provide an additional layer of supervision over the trustee. The trust protector device has become popular in modern trust practice because it enables the settlor to select someone other than the beneficiary to monitor and evaluate the trustee’s conduct once the trust becomes irrevocable. By selecting a trustworthy and reliable trust protector, the settlor can increase the probability that the trustee will be compelled to carry out the settlor’s donative intent.

Like a trustee, a Social Security representative payee is held to a fiduciary standard, but neither SSA nor the beneficiary is a suitable monitor of the payee’s performance. SSA, which unlike private trustees has legal standing to enforce the payee’s duties, lacks access to information that would allow for proper evaluation of the payee. The beneficiary, who by virtue of the representative payee appointment has been found to suffer from a mental disability or cognitive impairment, is unlikely to be capable of managing her own financial affairs, let alone monitoring a third-party payee’s more remote conduct. Thus, the Social Security representative payee system creates agency costs that manifest most acutely in the cost of monitoring the payee’s performance (or, alternatively, costs arising from SSA’s failure to monitor the payee’s performance).

Because the settlor-trustee-beneficiary relationship and the Social Security representative payee system are structurally similar, the trust protector device may provide a useful model for reducing agency costs in the Social Security representative payee system. Under the legislative proposal described above, the family representative would be the Social Security program’s analogue to the trust protector, empowered to monitor the representative payee and report evidence of suspected misuse to SSA.

Conclusion

Representative payee misuse adversely affects the most vulnerable beneficiaries within the Social Security program and is exceptionally difficult to detect under current agency protocols. Additionally, when SSA’s failure to monitor a representative payee results in benefit misuse, SSA is statutorily required to reimburse certain beneficiaries for all misused funds. To reduce the incidence of benefit misuse (and, by extension, to reduce government reimbursement of misused funds), this statement proposes a “family representative” system whereby a concerned family member or friend would be carefully vetted and appointed with authority to monitor the representative payee’s performance. A family representative with first-hand observation of the beneficiary would be in a better position to detect and report benefit misuse than a governmental agency lacking personal contact. This proposal would be essentially cost-free, protect

vulnerable beneficiaries, and reduce government spending on benefit misuse reimbursements.