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# THE ELDERLY WITH A DISABILITY: SOCIAL SECURITY AND REPRESENTATIVE PAYMENT

Michael J. Churgin\*

Hundreds of thousands of elderly Social Security recipients receive their monthly benefits indirectly.<sup>1</sup> As a result of a determination by the Social Security Administration (SSA), checks are sent to some other person (or entity) to use the funds on the beneficiary's behalf.<sup>2</sup> How that decision is made and the selection process of the payee are the issues discussed in this paper. For the elderly who live in an assisted living facility, mental health facility, nursing home, or other group environment, the situation of representative payment poses special problems, especially when the facility is named as the payee. (The Railroad Retirement Board and the Department of Veterans Affairs have similar programs, but they are beyond the scope of this paper.)<sup>3</sup>

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1. U.S. GOV'T ACCOUNTABILITY OFFICE, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE, REP. NO. GAO-04-655, at 7 (2004). The data are based on an age of sixty-five. *Id.*

2. See generally 42 U.S.C.A. § 405(j) (Westlaw through 2009 Pub L. 111-62).

3. See, e.g., 20 C.F.R. § 266.1-266.13 (2009) (Railroad Retirement Board); *Department of Veterans Affairs' Fiduciary Program: Hearing Before the Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 108th Cong. (2004).

## INTRODUCTION AND BACKGROUND

Congress enacted the Social Security Act in 1935.<sup>4</sup> The first significant amendments to the program occurred in 1939, which extended coverage to survivors and dependents;<sup>5</sup> among the other provisions was an authorization for representative payment.<sup>6</sup> (In 1978, a long-time employee of the SSA told me that when the program was created, the goal was to distribute the funds, and there was no interest in how people might spend the proceeds. It soon became apparent that some individuals could not handle their funds appropriately, and it was up to the SSA to decide what to do.)<sup>7</sup> As one official stated in testimony: “[F]rom 1939 until well into the 1970’s, we encountered very, very few difficulties with our representative payee policies because in the very large majority of these cases the normal payee sources yielded suitable payees, such as close relatives, friends, and so on.”<sup>8</sup> What once had been a short paragraph has grown to many pages of statutory language in the United States Code Annotated as Congress indicated its concern with the way the representative payment program has operated.<sup>9</sup> A few years ago, Congress mandated an external study of the system, which is the latest in a series of reports by various entities on the program, including the now defunct Administrative Conference of the United States, the SSA, and most recently, the National

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4. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

5. Social Security Act Amendments of 1939, Pub. L. No. 76-379, §§ 201, 202(b)-(f), 53 Stat. 1360, 1362-66 (1939).

6. *Id.* sec. 201, § 205(j), 53 Stat. 1360, 1371.

7. *See, e.g., Use of Representative Payees in the Social Security and Supplemental Security Income Programs: Hearing Before the Subcomm. on Social Security and Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 101st Cong. 40 (1989) (statement of Louis D. Enoff, Deputy Comm’r for Programs, Social Security Administration). There was litigation in the 1970’s concerning the determination of the need for representative payment as well as use of state officials as payees when they also were creditors.

8. *Id.*

9. *Compare* *Jordan v. Heckler*, 744 F.2d 1397, 1398 (10th Cir. 1984) (quoting 42 U.S.C. § 405(j)) *with* 42 U.S.C.A. § 405(j) (Westlaw through 2009 Pub L. 111-62).

Academy of Sciences.<sup>10</sup>

## DETERMINING COMPETENCY

The SSA has broad discretion to decide whether or not to pay benefits to an individual directly.<sup>11</sup> Even if an individual is deemed capable of managing his or her own affairs under state law, the federal government may decide that payment through a representative payee is appropriate or the converse.<sup>12</sup> The decision to pay benefits to someone other than the direct beneficiary can have a profound impact on one's life. Initially, the SSA took the position that it really was of little consequence since the representative payee would use the benefits for the individual's best interest.<sup>13</sup> The United States Court of Appeals for the Tenth Circuit agreed: "The private interest affected in this action is the free use of Social Security benefits. There is not a termination of benefits . . . but rather a deprivation of free use of benefits."<sup>14</sup> However, for the individual concerned, the decision to stop benefits and to pay the proceeds to another can be significant.<sup>15</sup> It can affect feelings of self-worth, personal autonomy—the ability to control one's own life choices.<sup>16</sup> "The

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10. Margaret G. Farrell, *Report for Recommendation 91-3: The Social Security Administration's Representative Payee Program: Problems in Administrative Paternalism*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS 263 (1991); SOC. SEC. ADMIN., FINAL REPORT OF THE REPRESENTATIVE PAYMENT ADVISORY COMMITTEE (1996); COMM. ON SOC. SEC. REPRESENTATIVE PAYEES, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IMPROVING THE SOCIAL SECURITY REPRESENTATIVE PAYEE PROGRAM: SERVING BENEFICIARIES AND MINIMIZING MISUSE (2007).

11. 42 U.S.C.A. § 405(j)(1)(A) (Westlaw through 2009 Pub L. 111-62).

12. *Id.*

13. *See, e.g., Use of Representative Payees in the Social Security and Supplemental Security Income Programs: Hearing Before the Subcomm. on Social Security and Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 101st Cong. 40 (1989) (statement of Louis D. Enoff, Deputy Comm'r for Programs, Social Security Administration).

14. *McGrath v. Weinberger*, 541 F.2d 249, 253 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977).

15. *See, e.g., Dale v. Hahn*, 440 F.2d 633, 636 (2d Cir. 1971) (relating to a challenge to a statutory declaration of incompetency based on admission to a mental hospital).

16. *See id.*

stigma of incompetency, the implication that she has some kind of mental deficiency, with attendant untrustworthiness and irresponsibility, and the consequences to her reputation and her normal human relationships with others in her community involve more than a property right."<sup>17</sup> There is a rich and growing literature about the importance of recognizing the autonomy of the elderly,<sup>18</sup> and the lack of recognition of the importance of managing one's own affairs was an unfortunate failing of Social Security. As a leading review article states: "Financial capacity comprises a broad range of conceptual, pragmatic, and judgment abilities that are critical to the independent functioning of adults in our society."<sup>19</sup>

Some courts recognized the importance of competency.<sup>20</sup> In a representative payee challenge in Connecticut in which I was involved, the federal district court found that:

[T]he official determination that one is incapable of managing benefit payments does implicate due process rights because of the obvious "stigma of incompetency" coupled with the fact that such a characterization leads not just to some possible loss of reputation, but to a significant "alteration of legal status" in depriving the individual entitled to benefits of control over, and direct use of his funds.<sup>21</sup>

During the pendency of these cases, the SSA first decided to give advance notice to the beneficiary that representative payment was being contemplated.<sup>22</sup> Action would be taken in ten days if no protest was received.<sup>23</sup> Social Security fought expanded due process protections for the beneficiary faced with representative

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17. *Id.*

18. See, e.g., Jennifer Moye & Daniel C. Marson, *Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research*, 62B J. GERONTOLOGY: PSYCHOL. SCI. 3 (2007).

19. *Id.* at 7.

20. *Kennedy v. Secretary*, No. N-74-220, [1977 – 1978 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15, 116 (D. Conn. 1977) [hereinafter *Kennedy v. Secretary*].

21. *Id.* (citations omitted).

22. *McGrath*, 541 F.2d at 251 n.3.

23. *Id.*

payment,<sup>24</sup> but later adopted changes and today, thirty years later, an individual perusing the statute would note that Congress has mandated advance notice along with information about the right to appeal, review evidence, and submit additional evidence.<sup>25</sup>

The SSA's Program Operations Manual System (known as POMS) provides internal guidance for personnel in decision-making.<sup>26</sup> The POMS chapter devoted to representative payment echoes the congressional mandate: "Deciding that a beneficiary is incapable of managing or directing someone else to manage his or her funds is one of the most important decisions you will make. This decision deprives an individual of fiscal independence and self-determination regarding how benefits are spent."<sup>27</sup> However, cutting in the other direction is a highlighted admonition: "REMEMBER: In all payee actions, the beneficiary's best interest must always be considered."<sup>28</sup> It is quite conceivable that someone could handle the beneficiary's claim check better than the individual, but that is beside the point. The threshold question must be whether the person is capable of managing his or her own benefits, not whether the SSA personnel approve of how the money is spent or not.

There remain some significant issues concerning the decision to resort to representative payment. The way in which Social Security approaches the determination raises some flags for concern, particularly for persons housed in group environments. A key piece of evidence is the physician's statement, a two-page form.<sup>29</sup> The current version of the form is

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24. See, e.g., *Kennedy v. Secretary*; the federal district court's judgment in the case anticipated the due process protections that Social Security and Congress eventually provided; see *Kennedy v. Califano*, No. N-74-220 [1979 Transfer Binder] Social Security Matters, Unempl. Ins. Rep. (CCH) ¶ 16, 185 (D. Conn. 1978).

25. 42 U.S.C.A. § 405(j)(2)(E) (Westlaw through 2009 Pub L. 111-62).

26. Social Security Online Program Operations Manual System, Front Page, <https://secure.ssa.gov/apps10/poms.nsf/aboutpoms> (last visited Oct. 25, 2009).

27. *Id.*, Section GN 00502.010, <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502010!opendocument> (last visited Oct. 25, 2009).

28. *Id.*

29. Physicians/Medical Officer's Statement of Patient's Capability to Manage

an improvement over that used previously.<sup>30</sup> The form today asks whether "the patient is capable of managing or directing the management of benefits in his or her own best interest."<sup>31</sup> A previous version of the form did not contain the phrase "directing the management;"<sup>32</sup> in this day and age when automatic bill payment can be arranged through a bank or credit card, the "directing the management" language is a positive step.<sup>33</sup> The prior form also contained language warning that being able to sign a check was not enough to indicate ability to manage one's affairs;<sup>34</sup> this might have led to the evaluator believing a high degree of competency was necessary.<sup>35</sup> Unfortunately, some key language is not on the same side of the form as is the place where the physician indicates an opinion: "However, even though a person may need some assistance with such things as bill paying, etc., does not necessarily mean he/she cannot make decisions concerning basic needs and is

Benefits, Form SSA-787 (02-2009) (on file with author) [hereinafter Form SSA-787].

30. See *Kennedy v. Secretary* ("The only directly adverse opinion consisted of a 'no' box checked off by a state hospital psychiatrist on a Social Security form inquiry [SSA-787], 'in your opinion, is the patient able to manage benefit payments in his (her) own interests...'""); see also Letter from James E. Forbus, Acting Director Bureau of Retirement and Survivors Insurance, to author (June 17, 1975) (on file with author) [hereinafter Letter from James E. Forbus]. The letter explains:

During the years 1973 and 1974, this Bureau [Department of Health, Education, and Welfare: Social Security Administration] studied the design and content of the form SSA-787 and one of its recommendations was that the form should be modified to reduce its self-serving makeup, particularly where conflict of interest situations may apply to institutional doctors. Where item 7 of the form is concerned, other institutional components, especially hospital administration, can usually supply the required information if the doctor does not have it. Other revisions undoubtedly will include expanded instructions to the physician completing the form, especially about the impact of his opinion on the rights of the beneficiary or patient involved.

*Id.* at ¶2.

31. Form SSA-787, *supra* note 29.

32. See *Kennedy v. Secretary* ("The only directly adverse opinion consisted of a 'no' box checked off by a state hospital psychiatrist on a Social Security form inquiry [SSA-787], 'in your opinion, is the patient able to manage benefit payments in his (her) own interests...'""); see also Letter from James E. Forbus, *supra* note 30.

33. Form SSA-787, *supra* note 29.

34. See *Kennedy v. Secretary*; see also Letter from James E. Forbus, *supra* note 30.

35. See *id.*

incapable of managing his/her own money.”<sup>36</sup> It would be helpful if this admonition were on the same page as the crucial question to emphasize that the inquiry concerns basic needs and the benefits contained in a monthly Social Security check and not managing a substantial estate.<sup>37</sup>

If a patient lives in an environment with lots of elderly people, where nurses distribute medication and check on residents, that patient’s physician might conclude that such dependency mandates a medical finding that the beneficiary is incapable of managing the proceeds of his or her own monthly payment. Relying on such a statement skews the calculus. A personal assessment by a Social Security representative would be helpful, but this usually only occurs when the beneficiary comes to the office. Generally, outreach in terms of going to interview individuals where they reside is not an option; the cost in terms of time and money is too high.<sup>38</sup> Therefore, the tendency would be to rely on the medical certificate accompanied by the statements of the person applying to be a representative payee. I am not referring to a venal applicant, but one who sincerely believes that she could assist the relative or friend by managing the benefits. However, the stated presumption is that the beneficiary should receive the benefits directly.<sup>39</sup>

As indicated previously, sending a notice indicating that representative payment is planned is now a requirement.<sup>40</sup> However, without more, this information might not reach the

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36. Form SSA-787, *supra* note 29.

37. *See id.*

38. The United States Government Accountability Office has described long waiting times at field offices. *See Social Security Administration: Further Actions Needed to Address Disability Claims and Service Delivery Challenges: Hearing Before the Subcomms. on Income Security and Family Support and Social Security of the H. Comm. on Ways and Means, 111th Cong. 2 (2009)* (statement of Daniel Bertoni, Director Education, Workforce, and Income Security).

39. Social Security Online Program Operations Manual System, Section GN 00502.010, <https://secure.ssa.gov/apps10/poms.nsf/lx/0200502010!opendocument> (last visited Oct. 25, 2009).

40. 42 U.S.C.A. § 405(j)(2)(E)(ii) (Westlaw through 2009 Pub L. 111-62).



intended recipient. Many facilities that house the elderly have arrangements with family that business mail should be sent to the relative rather than the resident in the facility. Therefore, the notice from Social Security as to representative payment might well be forwarded to the family member, possibly the very person who applied to be a representative payee. There is no requirement of certified mail, return receipt requested, or some indication on the face of the envelope that the notice must be delivered to the named beneficiary.<sup>41</sup> Since direct deposit is encouraged by the government for Social Security checks,<sup>42</sup> the first word a beneficiary might receive that something is awry is when the check is not deposited in her account.

### SELECTION OF AN APPROPRIATE PAYEE

Who will be the representative payee? This is the question facing the Social Security official once a determination has been made that the beneficiary is incapable of managing the benefits.<sup>43</sup> For the elderly, the choice is not always clear. The easy course of action is to name the person who applied to be the payee. Unfortunately, that might not be the correct choice. (At one time, the choice of a particular person to be a representative payee was not subject to full administrative review.)<sup>44</sup> As a federal district court noted in the mid 1970s: "[T]he Secretary has now wisely expanded the scope of pertinent regulations to include the particular choice of representative payee as among those administrative actions which do involve a right to eventual administrative hearing."<sup>45</sup>

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41. *See id.*

42. *See* Social Security Online, Direct Deposit Frequently Asked Questions, <http://www.socialsecurity.gov/deposit/DDFAQ898.htm> (last visited Sep. 14, 2009), "Social Security strongly encourages all Social Security and SSI beneficiaries to receive their monthly benefits by direct deposit. As of January 2007, 80 percent of all Social Security and SSI beneficiaries received their benefits by direct deposit." *Id.*

43. 42 U.S.C.A. § 405(j)(1)-(2) (Westlaw through 2009 Pub L. 111-62).

44. *See, e.g.,* McAuliffe v. Secretary, [1977 - 1978 Transfer Binder] Social Security Matters, Unempl. Ins. Rep. (CCH) ¶ 15, 116 (D. Conn. 1977).

45. *Id.*

Congress now has mandated the right to an appeal and hearing.<sup>46</sup>

For individuals living in a group environment, a frequent applicant to be the representative payee might be the facility. If the person is in state housing, a state official might be the applicant. While the regulation indicates that these are not preferred payees, they are eligible to serve.<sup>47</sup> There are many potential problems since these individuals are also creditors of the beneficiary. The SSA recognizes that it is legitimate to apply the monthly benefits for living expenses at the facility.<sup>48</sup> "Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items."<sup>49</sup> How the benefits are allocated among these various items is left to the sound discretion of the representative payee.<sup>50</sup> When a facility or a state official is the payee, there might be a tendency to allocate a standard, small, amount for personal comfort items or for other miscellaneous expenses, while using the rest for the monthly bill. Not surprisingly, the focus would be to maximize payment for the care provided.

Some states have been particularly aggressive in trying to capture Social Security benefits of residents in state facilities.<sup>51</sup> I was involved in litigation in Connecticut thirty-five years ago concerning the activities of the state commissioner of finance and control.<sup>52</sup> Using a special state statute, individuals in state mental health facilities with limited assets were declared incompetent, and the commissioner was named their conservator.<sup>53</sup> He then applied to become the representative payee of all residents of various mental health facilities.<sup>54</sup> The

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46. 42 U.S.C.A. § 405(j)(2)(E)(i) (Westlaw through 2009 Pub L. 111-62).

47. 20 C.F.R § 404.2021(a) (2009).

48. 20 C.F.R §§ 404.2040(a)-(b) (2009).

49. 20 C.F.R § 404.2040(a).

50. *See id.*

51. *See, e.g.,* McAuliffe v. Carlson, 377 F. Supp. 896 (D. Conn. 1974).

52. *See id.*

53. *Id.* at 898-99.

54. *Id.*

federal district court found the statutory scheme unconstitutional.<sup>55</sup> In a related case concerning the decision of the SSA to designate the commissioner of finance and control as the representative payee, the district court noted that “[t]here is considerable force to the conflict-of-interest argument.”<sup>56</sup> Similar litigation ensued in Pennsylvania.<sup>57</sup> Their comparable statute was held unconstitutional,<sup>58</sup> and the SSA indicated it would abide by the decree.<sup>59</sup> In Illinois, at about the same time, the federal district court found both the state and federal procedures unconstitutional in terms of representative payee appointments.<sup>60</sup> However, where Indiana followed appropriate procedures in applying to be a representative payee for state hospital residents, and was so appointed by the SSA, the court of appeals upheld the awkward creditor situation, noting that the “Social Security Act and regulations . . . permit—in fact, encourage—state institutions to act as representative payees and, more pertinently, when acting as payees, to apply recipients’ benefits to the cost of their care and maintenance at a state institution where they reside.”<sup>61</sup> (Occasionally, facilities note that individual representative payees ignore the maintenance bills for the beneficiary.<sup>62</sup> Upon complaint to the Social Security Administration, an evaluation of the suitability of the payee can take place, and the facility could be named as successor payee.)<sup>63</sup>

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55. *Id.* at 905-06.

56. *McAuliffe v. Secretary*, No. 15, 494, [1977 – 1978 Transfer Binder] Social Security Matters, Unempl. Ins. Rep. (CCH) ¶ 15, 116 (D. Conn. 1977).

57. *Vecchione v. Wohlgemuth*, 426 F. Supp. 1297, 1300 (E.D. Pa.), *aff’d*, 558 F.2d 150 (3d Cir. 1977).

58. *Vecchione*, 426 F. Supp. at 1300.

59. *Id.* at 1302; *see* Social Security Online Program Operations Manual System, Section GN 00502.160, <https://secure.ssa.gov/apps10/poms.nsf/Inx/0200502160> (last visited Oct. 25, 2009) (noting the *Vecchione* decision).

60. *See Tidwell v. Schweiker*, 677 F.2d 560, 564, 566 (7th Cir. 1982).

61. *Mason v. Sybinski*, 280 F.3d 788, 792-93 (7th Cir. 2002).

62. *See* the following three provisions in concert with one another: 20 CFR §§ 404.2050(b), 404.2040(b), and 404.2021 (2009) (private or public institution where person is housed as payee).

63. *Id.*

POMS notes the problem of institutional representative payees: "The appointment of an institution as payee requires special handling because the institution is typically the beneficiary's primary creditor."<sup>64</sup> The employee is admonished: "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."<sup>65</sup> However, the applicant is the institution, and unless the family member is easy to locate and contact, the likelihood is that the institution will become the representative payee, at least in the interim. It is not that the facility or state does not care about the beneficiary; it is that there are divided loyalties.<sup>66</sup> Usually, a set amount will be allocated for personal items for all residents who have payees rather than any individualized assessment. The focus is payment for the care and maintenance of the beneficiary in the institution.<sup>67</sup>

## JUDICIAL AND CONGRESSIONAL OVERSIGHT

The subject of Social Security representative payment has drawn increasing public and congressional attention during the last two decades.<sup>68</sup> The focus largely has been on instances of fraud committed by representative payees.<sup>69</sup> Unscrupulous persons have diverted the monthly benefits for their own use rather than for the care and maintenance of the beneficiaries.<sup>70</sup> Testifying before the Ways and Means Committee of the House of Representatives, a Social Security official noted that the

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64. Social Security Online Program Operations Manual System, Section GN 00502.160, *supra* note 59.

65. *Id.*

66. *See id.*

67. *Id.*

68. *See Use of Representative Payees in the Social Security and Supplemental Security Income Programs: Hearing Before the Subcomm. on Social Security and Subcomm. on Human Resources of the H. Comm. on Ways and Means, 101st Cong. 40 (1989); Social Security Representative Payees: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means, 106th Cong. (2000).*

69. *See id.*

70. *Id.*

changing landscape of beneficiaries, with “the enactment of Supplemental Security Income (SSI) in 1972, and demographic and political changes in American society—such as the de-institutionalization of the mentally ill, and the increase in substance abusers,” increased the necessity for representative payment in more situations.<sup>71</sup> The percentage of beneficiaries appointed representative payees has more than doubled since 1972, particularly for individuals with disabilities.<sup>72</sup> “Today, these individuals are not institutionalized and often have no close family willing or able to serve as payee.”<sup>73</sup>

The search for an appropriate representative payee can be time consuming. There was a time when the SSA cut off benefits and permitted funds to accrue when it was determined that a representative payee was required but none was currently available.<sup>74</sup> This could be a situation where there had been a payee, but none presently, or when a person had just been determined to require representative payment.<sup>75</sup> In the late 1980's, beneficiaries filed a class action lawsuit in California to address this situation.<sup>76</sup> The SSA maintained that it could suspend payment for ninety days (although the period often seemed to be longer),<sup>77</sup> but the court of appeals found the impact devastating: “Rent cannot be paid, and mentally disturbed individuals take up ‘life’ on the streets. Food and necessities are foregone, causing the precipitous declines in physical and mental health which one might expect.”<sup>78</sup> Told to find payees, individual beneficiaries “turn to potentially unreliable characters,” who in turn “abscond with the beneficiaries’

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71. *Social Security Representative Payees: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 106th Cong. 7 (2000) (statement of Susan M. Daniels, Deputy Commissioner, Disability and Income Security Programs).

72. *See id.*

73. *Id.*

74. *See, e.g., Briggs v. Sullivan*, 886 F.2d 1132, 1133 (9th Cir. 1989).

75. *Id.* at 1133-34.

76. *Id.*

77. *Id.* at 1135.

78. *Id.* at 1136.

money" or worse.<sup>79</sup> The prayer for relief was direct: "temporarily paying the money directly to the beneficiaries, even though they may have some serious disabilities themselves."<sup>80</sup> The consequences could not be worse than what was occurring.<sup>81</sup> The Ninth Circuit directed the entry of an injunction.<sup>82</sup>

The SSA did not appeal the entry of the injunction.<sup>83</sup> After the trial court ultimately found that certain procedures satisfied due process, the court of appeals revisited the case.<sup>84</sup> "The district court held that the Secretary has a duty to investigate representative payees. The district court did not err in this conclusion."<sup>85</sup> The court noted that "investigation of the suitability of representative payees was a significant congressional concern" in a 1984 amendment.<sup>86</sup> However, the court did not go further.<sup>87</sup>

Another recurrent problem during the 1980s concerned accounting by representative payees for the benefits they received on behalf of beneficiaries.<sup>88</sup> In 1980, a federal district court had certified a nationwide class of all disability recipients and in 1983 had ordered "the Secretary to 'implement appropriate mandatory periodic accounting procedures within one year.'"<sup>89</sup> Social Security's compliance was limited.<sup>90</sup> More litigation ensued.<sup>91</sup> Ultimately, the district court basically reaffirmed its previous ruling.<sup>92</sup> By the time the matter reached

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1148. The injunction did not include individuals whose SSI benefits were based on alcohol or drug abuse. *Id.* at 1146 n.12.

83. *Briggs v. Sullivan*, 954 F.2d 534, 536 (9th Cir. 1992).

84. *Id.* at 536, 539.

85. *Id.* at 537.

86. *Id.*

87. *Id.*

88. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 734 (10th Cir. 1987).

89. *Id.* at 734-35.

90. *Id.* at 735.

91. *Id.*

92. *Id.*

the court of appeals once again, Congress had acted and required a somewhat more limited accounting scheme that exempted situations where the beneficiary and payee lived in the same household,<sup>93</sup> which the district court rejected.<sup>94</sup> (The Secretary's attempt to appeal the district court order was dismissed.)<sup>95</sup>

The twin problems of payee selection and accounting would vex Social Security and invite congressional oversight through the next twenty years.<sup>96</sup> The precipitating event that grabbed public and congressional attention was the discovery of eight bodies in the backyard of a boarding home operator in Sacramento.<sup>97</sup> Even though she previously had been convicted of multiple counts of Social Security fraud, she had been appointed representative payee of one of the victims.<sup>98</sup> This September 1988 event led to hearings in June of 1989<sup>99</sup> and legislation in 1990 to strengthen the representative payee process.<sup>100</sup>

A face-to-face interview would be required "to the extent practicable" for representative payees, identity would have to be verified, prior Social Security crimes would be ascertained, and prior payee service would be investigated.<sup>101</sup> Lists would be maintained and circulated to field offices of those barred from service.<sup>102</sup> In addition, funds were to be paid directly to

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93. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, sec. 16(b), § 1631(a)(2)(C)(ii), 98 Stat. 1794 (1984).

94. *Jordan*, 808 F.2d at 735-36.

95. *Id.* at 736-37, *cert. denied*, 484 U.S. 925 (1987).

96. *Social Security Representative Payees: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 106th Cong. 4, 16-18 (2000) (statement of Susan M. Daniels, Deputy Commissioner, Disability and Income Security Programs).

97. *SSA's Representative Payee Program: Safeguarding Beneficiaries from Abuse: Hearing Before the S. Spec. Comm. on Aging*, 101st Cong. 2, 10 (1989).

98. *Id.*

99. *Id.* at 1-2.

100. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, sec. 5105, 104 Stat. 1388-254 (1990).

101. *Id.* at sec. 5105(a)(2)(A)(i), § 205(j)(2)(A)-(B), 104 Stat. 1388-255-56 (1990).

102. *Id.*

beneficiaries if no payee could be found within thirty days.<sup>103</sup> Creditors would be limited in their ability to serve as payees, but this did not extend to relatives, state facilities, or those whose facilities are licensed by states or localities.<sup>104</sup> The due process protections instituted administratively after litigation in the 1970s were now written into the statute.<sup>105</sup> Accounting would be mandated and heightened scrutiny was to be given to high-risk payees.<sup>106</sup> If SSA had been negligent in selection of a payee, the beneficiary was to be reimbursed.<sup>107</sup> Finally, organizational payees could collect fees,<sup>108</sup> and the GAO would assess the program and report back to Congress.<sup>109</sup> Even with the changes, the consultant for the Administrative Conference of the United States sharply criticized the nature of the representative payee decision-making process for “neither safeguarding autonomy nor providing beneficiaries the assistance they need.”<sup>110</sup>

In 1995, the Commissioner of Social Security appointed a fourteen-person Representative Payment Advisory Committee to conduct research, hold hearings, and prepare a report on the program.<sup>111</sup> In November 1996, the committee announced its findings and presented a series of recommendations that emphasized the autonomy of the individual and the need for care in selecting payees.<sup>112</sup> Three sentences of the final report aptly describe the problem as observed by the committee: “However, it is clear that SSA places a premium on speedy case processing to get payments out quickly. Equal emphasis is not given to the important decisions involved in representative

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103. *Id.* at sec. 5105(a)(2)(A)(i), § 205(j)(2)(D)(ii)(I), 104 Stat. 1388-257 (1990).

104. *Id.* at sec. 5105(a)(2)(A)(i), § 205(j)(2)(C), 104 Stat. 1388-256-57 (1990).

105. *Id.* at sec. 5105(a)(2)(A)(i), § 205(j)(2)(E), 104 Stat. 1388-257.

106. *Id.* at sec. 5105(b)(2), 104 Stat. 1388-263-64 (1990).

107. *Id.* at sec. 5105(c)(1), § 205(j)(5), 104 Stat. 1388-265 (1990).

108. *Id.* at sec. 5105(a)(3)(A)(i), § 205(j)(4)(A), 104 Stat. 1388-260-61 (1990).

109. H.R. REP. NO. 101-964, at 928-33 (1990) (Conf. Rep.)

110. Margaret G. Farrell, *Administrative Paternalism: Social Security's Representative Payment Program and Two Models of Justice*, 14 CARDOZO L. REV. 283, 298 (1992).

111. REPRESENTATIVE PAYMENT ADVISORY COMM., SOC. SEC. ADMIN., FINAL REPORT, vii (1996).

112. *See id.*



payment. Capability decisions sometimes are handled perfunctorily."<sup>113</sup> While the Administration struggled to implement the recommendations, the clash of funding, speed of decision-making, and the difficulty in assessment of capacity and finding payees seems to have slowed progress.<sup>114</sup>

By the new millennium, there still were calls for reform in the representative payment process.<sup>115</sup> The Social Security Protection Act of 2004 was a major effort by Congress to improve representative payment.<sup>116</sup> For the first time, representative payees were made liable for misused funds and a statutory scheme for recovery was established.<sup>117</sup> Organization payees now had to show bonding and licensing (if available in that state),<sup>118</sup> and Social Security must conduct periodic on-site reviews.<sup>119</sup> The annual accounting is strengthened by requiring payees to personally collect the checks at a field office if no accounting is filed.<sup>120</sup> If there is misuse of funds by payees, checks must be reissued to the beneficiary.<sup>121</sup> No longer is there a finding of negligence necessary.<sup>122</sup> Finally, Congress directed a one-time study of the representative payee program—this was contracted out to the National Academies, which issued a comprehensive report in late 2007.<sup>123</sup> The study focused on the selection of payees, both individuals and organizations, as well

113. REPRESENTATIVE PAYMENT ADVISORY COMM., SOC. SEC. ADMIN., FINAL REPORT, at viii.

114. See *Social Security Representative Payees: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 106th Cong. 4 (2000).

115. See *id.* at 4, 16-18.

116. Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493 (2004).

117. *Id.* at sec. 105(a)(4), § 205(j)(7)(A), 118 Stat. 504 (2004).

118. *Id.* at sec. 102(a)(1)(D), § 205(j)(9), 118 Stat. 497 (2004).

119. *Id.* at sec. 102(b)(1), § 205(j)(6)(A), 118 Stat. 498 (2004).

120. *Id.* at sec. 106(a)(2), § 205(j)(3)(E), 118 Stat. 505 (2004).

121. *Id.* at sec. 101(b)(1), §§ 807(i)(A)-(B), 118 Stat. 495 (2004).

122. See *id.*

123. COMMITTEE ON SOCIAL SECURITY REPRESENTATIVE PAYEES, NATIONAL RESEARCH COUNCIL, IMPROVING THE SOCIAL SECURITY REPRESENTATIVE PAYEE PROGRAM: SERVING BENEFICIARIES AND MINIMIZING MISUSE 1 (National Academies Press 2007).

as the accounting process.<sup>124</sup> The systems in place were found to be flawed and suggestions were made for improvements.<sup>125</sup> It will be interesting to see what steps, if any, Social Security takes to modify the program.

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124. *Id.* at 4-6.

125. *See id.*

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