

Statement on Federal Approaches Toward Elder Financial Exploitation by Fiduciaries –Representative Payees and Guardians

For

Elder Justice Coordinating Council

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Federal third party representative payees, court-appointed guardians and conservators, agents under powers of attorney, and trustees fill a role that society calls “fiduciaries” – those entrusted to manage property for someone else, often a vulnerable individual easily at risk for abuse. Fiduciaries are to act according to the highest standards of loyalty, good faith, trustworthiness and honesty.¹ Fiduciaries play dual roles on financial exploitation. First, they stand as a bulwark against it, protecting beneficiary funds. That’s why they were appointed -- to manage and protect the funds of another. But sadly, they sometimes become the perpetrators, despite their fiduciary role. While many perform well, inevitably some take advantage of their position of trust and confidence, misusing or exploiting funds that are to be for the sole use of the beneficiary --and others simply lack an understanding of their responsibilities.

This paper will outline approaches the federal government could take toward: (1) educating and training fiduciaries; (2) preventing or reducing financial exploitation by Social Security representative payees and VA fiduciaries; and (3) promoting effective practices and accountability by court-appointed guardians with control over the funds of an individual (often and hereinafter called “conservators”). The paper builds on my Statement at the October 11 Elder Justice Coordinating Council. It is drawn from my own professional experience, and does not represent the policy of the American Bar Association, where I serve as Assistant Director for the Commission on Law and Aging. The paper focuses more on big-picture collaborative federal strategies rather than internal SSA and VA improvements, which are underway and need additional recognition and support. The paper does not address the many actions states can take to reform the adult guardianship system.

I. Education and Training of Fiduciaries

Representative payees and conservators -- particularly family and other non-professional payees and conservators -- frequently do not fully understand their basic responsibilities and do not always know what is expected of them. According to the National Research Council, “payees must understand their duties and responsibilities, including details such as how to keep records, how to deposit benefits into separate accounts, and how to save money.”² Conservators must understand similar responsibilities, including prudent asset management, and the requirements for an inventory and for annual or regular accountings to court.

It is notable that the Consumer Financial Protection Bureau (CFPB) is developing a “lay fiduciary guide” (through a contract with the ABA Commission on Law and Aging) to help family and other non-professional fiduciaries better understand their roles and responsibilities as conservators, representative payees, agents under powers of attorney and trustees. The guide will set out key fiduciary duties for each role. This upcoming CFPB guide is only one way to heighten payee and guardianship awareness.

The SSA and the VA have taken steps in providing such guidance. SSA has a web-based *Guide for Representative Payees*,³ as well as a webinar;⁴ and the VA has listed responsibilities of a fiduciary on its web site.⁵ However, it appears that payees still need more help. Possible vehicles for guidance might include: staff or volunteers charged with educating federal fiduciaries, broadly distributed plain language brochures, samples of completed forms, additional fact sheets, videos and web applications – available in languages other than English. SSA and VA collaboration with courts and community agencies would be useful. For instance, since many guardians also serve as representative payee, courts could routinely provide materials concerning payee duties and procedures to newly appointed guardians. There may be multiple similar governmental and community channels that could be tapped to get information directly to payees in a form they can use.

While educating guardians is the work of state courts (and many states developed have handbooks and videos),⁶ federal resources through the State Justice Institute, the Administration on Community Living, the Department of Justice and other agencies can offer needed support, as well as greater visibility.

II. Strategies Concerning Representative Payees

Violations and misuse⁷ of funds by Social Security and other representative payees have ranged from high visibility cases such as a 1988 Sacramento scandal involving a boarding home operator payee with a criminal record⁸ to less visible payee exploitation of benefits, control of funds beyond the benefits, charging of excessive fees, and failure to keep records and submit reports. For instance, scenarios include instances in which:

- A Social Security representative payee deposited beneficiary funds into a joint personal bank account, from which her spouse withdrew a large amount.
- An organization serving as representative payee and collecting fees housed beneficiaries in unsafe and unsanitary housing.
- Representative payees failed to notify the Social Security Administration and continued to collect SSA benefits although the beneficiaries had moved and were no longer in contact.

While these compelling scenarios are not common, problems of financial exploitation, misuse of funds and mismanagement do occur⁹ in Social Security's mammoth program of representative payees appointed by the agency to handle benefits for close to 5.6 million beneficiaries unable to do so on their own – including close to four million children and almost 1.6 million adults, of which some approximately 700,000 are age 65+.¹⁰ These payees – who may be family members, other individuals or organizations – have counterparts in other federal agencies, particularly VA “fiduciaries” (in 2008, managing benefits for more than 103,000 beneficiaries),¹¹ OPM representative payees, and third party payees in other agencies as well.

Representative payees differ from guardians, who are appointed by state courts. Representative payees are authorized only to manage the agency benefits, not the person's other funds, which might be managed by a guardian or might continue to be managed by the individual. The representative payee and the guardian might or might not be the same person or organization.

Federal studies and investigations have highlighted problems in the government's representative payment systems. The 2007 National Research Council report on *Improving the Social Security*

Representative Payee Program,¹² shined a light on systemic gaps and made recommendations for SSA actions in improving payee performance, as well as preventing and detecting misuse. Additionally, the GAO currently is conducting an investigation concerning options to help the SSA in managing the representative payee program. The 2010 Government Accountability Report on *VA's Fiduciary Program*¹³ outlined potential VA actions to improve oversight of the program and minimize risks to beneficiaries.

While both federal programs are taking steps¹⁴ -- within the constraints of existing resources -- to better train staff, select and educate payees, review payee reports, monitor payees, maintain data and achieve more national uniformity, there are some additional potential strategies, many of which involve coordinated actions by federal agencies. The SSA and VA are best equipped to detail where their internal efforts stand, and what deficiencies and challenges remain. Instead, this statement looks more holistically, beyond internal agency management approaches, to existing gaps and possible federal government strategies to prevent and detect representative payee misuse and abuse, with an emphasis on the SSA program.

Gap: Representative payment programs are not coordinated with other systems serving the same population, putting vulnerable adults at risk of financial exploitation. There are several different permutations – for example, one person could serve as both guardian and representative payee for one or more individuals; or an individual could have two or three different people or entities making financial decisions on his or her behalf in different roles. In 2004, a GAO report, *Guardianships: Collaboration Needed*,¹⁵ found a lack of coordination among state courts handling guardianship, the VA fiduciary program, and the SSA representative payee program. The GAO concluded that “this lack of coordination may leave incapacitated people without the protection of responsible guardianship and representative payees.” A 2011 GAO report on *Oversight of Federal Fiduciaries*¹⁶ found that gaps in information sharing continued to exist, and recommended disclosure of information by federal agencies to state courts: “It is . . . in the best interest of incapacitated beneficiaries for federal agencies to disclose certain information about these beneficiaries and their fiduciaries to state courts.” Consider these situations:

- B was appointed by SSA as rep payee for A. B also petitioned the court to be A’s guardian. The court appointed B, not knowing that B had misused A’s Social Security benefit funds.
- Adult protective services received a report of alleged abuse by guardian B, who was also the SSA rep payee, but APS could get no information on B’s rep payee performance or record.
- B was appointed by the court as A’s guardian, but C was appointed by SSA as A’s rep payee and by the VA as A’s fiduciary. Neither B nor the court had adequate information about A’s situation to act in his best interest – and each would have had a more complete picture had they shared information.
- B was appointed by the court as A’s guardian and by SSA as A’s rep payee, yet there was no coordination between the court and SSA about B’s separate reports.

Possible Strategy: SSA has maintained that the federal Privacy Act limits the sharing of information about beneficiaries and representative payees with courts, adult protective services, and the aging network.¹⁷ However, spurred by the 2011 GAO report, recent discussions by SSA, the Social Security Office of Inspector General, and the Administration on Community Living are exploring ways to overcome barriers to sharing information. This is an encouraging development.

Possible Strategy: Regardless of information sharing about specific cases, coordination among SSA field offices, VA regional offices, state courts, and community agencies could be a win-win approach. With coordinated efforts, it may be easier to develop training, recruit volunteers, and educate the public.

A process of jointly examining how the overlapping systems currently work as silos, what the patterns are, and where the logjams occur could result in imaginative solutions. Initial pilot meetings of SSA, VA, courts and community agencies in selected locales could be a practical way to begin. (This is very much in accord with recent recommendations by the National Guardianship Network's 2011 Third National Guardianship Summit¹⁸ to create state or local Working Interdisciplinary Networks of Guardianship Stakeholders, which would promote communication among courts and relevant agencies.)

Gap: There is no independent third-party review of individual SSA representative payees and less than full review of organizational payees. Outside review by a qualified entity knowledgeable about needs of elders and adults with disabilities could help SSA to better target misuse and abuse.

Possible Strategy: The National Disability Rights Network is the national membership and technical assistance/training provider for the federally funded and mandated state Protection & Advocacy (P&A) system. In 2009, following a shocking case of longstanding exploitation by Texas payees who employed individuals with intellectual disabilities in a poultry plant, SSA contracted with NDRN to involve the P&A agencies in reviews of selected SSA organizational representative payees.¹⁹ NDRN developed a web-based curriculum for P&A staff, and conducted training. P&As began reviews in late 2009. The reviews addressed not only mismanagement of SSA benefits, but also issues of beneficiary employment, housing, safety and mistreatment.

As of mid-2011, the P&As had reviewed 425 payee organizations (currently more), identifying 210 problems for SSA at 140 organizations.²⁰ The P&A network appears squarely positioned to conduct payee reviews because it can look not only at management of benefits but at the health, housing and welfare of the individuals served; and can suggest resources to help. One option could be to extend the NDRN review project, at least on a pilot basis, to additional organizational payees – as well as selected individual payees, which would require different review procedures and training. Getting P&A “eyes and ears” on a broader range of payees could enhance internal SSA oversight. An additional option might be similar review specifically through the aging network – perhaps with a role for Older Americans Act legal assistance programs or other knowledgeable aging advocates.

Possible Strategy: Another approach to independent third-party review of payees might be to develop a program of volunteer payee monitors for selected cases. This concept is patterned after the successful model of court-based volunteer guardianship monitoring programs originated by AARP and updated by the American Bar Association.²¹ SSA offices could select, screen, coordinate, train and supervise a cadre of dedicated volunteers to visit and interview beneficiaries and payees, and report back. SSA could use the volunteer reports to identify red flags where there may be payee problems, and better target follow-up checks.

Gap: The SSA may not have a sufficient pool of responsible payees for the growing number of beneficiaries unable to manage their own funds -- especially for high risk “unbefriended” beneficiaries who may be homeless, have substance abuse or mental health problems, as well as multiple chronic

health conditions. The demands of such beneficiaries are enormous; and crisis situations may force use of payees not well qualified to meet the needs.

Possible Strategy: The 2007 National Research Council report discussed the use of volunteers to fill this gap²² (as well as possible expansion of fees beyond the specified organizational payees to small organizations and individuals who might be equipped to serve).

As with programs of volunteer guardians, volunteers may be best matched with the more routine cases in which there is a need for a representative payee, leaving the especially challenging situations for professionals. The trick is to use volunteers wisely, identifying the most appropriate cases, and ensuring high-quality recruitment, training, supervision and technical assistance. Ideally, this might free up organizational time or even the time of qualified, paid individuals to cover high-demand cases. Such a strategy might best develop through a joint effort of the court, community agencies and SSA that could recruit and train for both volunteer guardians and volunteer representative payees (as well as volunteer monitors, as outlined above); and could designate cases needing professional attention as well as entities to serve. The Corporation for National and Community Service might even play a role in advising on volunteer programs, or in volunteer recruitment.

Gap: Federal front-line employees and federally-funded stakeholders who commonly encounter beneficiaries may fail to recognize and identify payee misuse -- and more broadly, fiduciary abuse and exploitation.

Possible Strategy: Individuals working for a wide range of federal programs or who are federally-funded regularly come into contact with beneficiaries and payees, yet may not identify the paradigm of “abuse” or “misuse.” For example, HUD housing services coordinators may find representative payees using funds in a way that appears primarily to benefit the payee. Long-term care ombudsmen, long-term care surveyors, CMS-funded state insurance counselors, and a much broader list of workers might “bump into” payee problems yet may not realize it nor know where to report it. One option could be a simple flyer or curriculum unit, widely disseminated through government channels, that explains the payee programs, the “red flags” of misuse, and what to do about it.

Ultimately, to ensure that representative payees effectively carry out their fiduciary duties, we need a combination of (1) continued internal SSA and VA (as well as OPM and any other federal governmental third party payee programs) steps to strengthen payee performance and bolster oversight, with (2) collaborative governmental efforts that extend agency capacity.

III. Strategies Concerning Conservators

While conservatorship/guardianship is governed by state law, practice suffers because of the Balkanization of law, data, and procedures across state lines, and because of increasingly strained court budgets. There is a clear rationale and role for the federal government in addressing conservator practices, with at least three foundations or “hooks” for such federal involvement in state affairs: (1) conservators manage significant federal pensions and other federal funds; (2) conservatorship/guardianship involves fundamental rights protected by the U.S. Constitution; and (3) conservatorship/guardianship increasingly crosses state and international lines, thus creating issues that extend beyond the reach of individual state jurisdictions.

With these rationales in mind, example of potential federal roles in improving conservatorship and preventing financial exploitation include:

- Guardianship Court Improvement Projects. Since 1993, federal funding has supported the Child Welfare Court Improvement Project (CIP), in which HHS grants are awarded to the highest state courts to support implementation of reforms in child welfare court practices. No such parallel program exists for implementation of court reforms affecting adults. One proposal, adopted in part by the pending S.1744 (“Guardian Accountability and Senior Protection Act”), is the establishment of “Guardianship Court Improvement Projects” in which state courts could work with state units on aging, disability agencies and others to identify and address deficiencies in the state conservatorship/guardianship system.
- ACL or Other Funding of Specific Pilot Projects. The Administration on Community Living could play a role by funding pilot projects focused on specific areas of need – such as the e-filing and background check pilots proposed in S.1744 – as well as training, data collection, court technology for monitoring, help for family and other lay conservators, and more. In 2011, the GAO recommended that “the Secretary of HHS direct the Administration on Aging to consider supporting the development, implementation, and dissemination of a limited number of pilot projects to evaluate the feasibility, cost, and effectiveness of one or more generally accepted promising practices for improving court monitoring of guardians.”²³
- Volunteer Visitors. On the child welfare front, Congress has for many years appropriated Department of Justice (Office of Juvenile Justice and Delinquency Protection) funds for technical assistance to states and courts in the development of CASA (Court-Appointed Special Advocates) programs to protect at-risk children. A somewhat parallel idea for adults is the development of volunteer guardianship monitoring and assistance (or “visitor”) programs (as mentioned above).. While the State Justice Institute Board has named guardianship/conservatorship one of its five priorities, especially highlighting “visitors,” a 50% cash match is required, making grants out of reach for many courts and community agencies. Additional federal funding could boost this concept and leverage usage in courts nationally.
- Data Issues. The dire lack of data on adult conservatorship/guardianship impedes judicial oversight and the prevention of abuse. A 2007 Senate report on *Guardianship for the Elderly* urged attention to data issues, including surveying a representative sample of counties to generate nationwide estimates, promoting data collection by states, and “research to identify and publicize successful [local data] systems already in place. . . .”²⁴ Federal attention to conservatorship/guardianship data issues through the Bureau of Justice Statistics would galvanize the collection of needed statistics.

¹ *Black’s Law Dictionary Free*, 2nd Edition, <http://thelawdictionary.org/fiduciary/> .

² National Research Council, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse*, Executive Summary, “Payee Training,” p. 9 (2007).

³ Social Security Administration, “A Guide for Representative Payees,” <http://www.ssa.gov/pubs/10076.html>.

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- ⁴ Social Security Administration, “Social Security Online,” <http://ssa.yorkcast.com/webcast/Viewer/?peid=1fa6cad00e7d44cf9e0b117b52d649e31d>
- ⁵ U.S. Department of Veterans Affairs, “Responsibilities of a VA Fiduciary,” <http://www.vba.va.gov/bln/21/Fiduciary/responsibilities.htm> .
- ⁶ American Bar Association Commission on Law and Aging, “Guardianship Law and Practice,” – List of State Guardianship Handbooks, List of State Guardianship Videos, http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html .
- ⁷ The 2004 Social Security Protection Act (P.L. 108-203) defined misuse by a representative payee: “Misuse occurs in any case in which the representative payee receives payment under this title for the use and benefit of another person and converts such payment, or any part thereof, to a use other than for the use and benefit of such other person.” However, a payee may improperly use a benefit, or commit a violation of payee duties that is not technically a misuse. See National Research Council, Chapter 4, “Defining and Discovering Misuse,” at note 2 above.
- ⁸ U.S. Senate, Special Committee on Aging, *SSA’s Representative Payee Program: Safeguarding Beneficiaries From Abuse*, Hearing, Serial No. 101-5, p. 2 (June 1989).
- ⁹ SSA officially reported the amount of misuse in the program as less than 0.01 percent, but the Committee on Social Security Representative Payees that conducted the study required by Congress in 2004 found misuse in 0.2 percent of payees. See National Research Council, p. 4, at note 2 above.
- ¹⁰ Social Security Administration, Office of Retirement and Disability Policy, *Annual Statistical Supplement, 2012*, <http://www.ssa.gov/policy/docs/statcomps/supplement/2012/5i.html> .
- ¹¹ U.S. Government Accountability Office, *VA’s Fiduciary Program: Improved Compliance and Policies Could Better Safeguard Veterans’ Benefits*, p. 1 (2010).
- ¹² National Research Council, *Improving the Social Security Representative Payee Program* at note 2 above.
- ¹³ U.S. Government Accountability Office, *VA’s Fiduciary Program*, at note 11 above.
- ¹⁴ See Social Security Advisory Board Issue Brief Series, *Disability Programs in the 21st Century: The Representative payee Program*, Vol. 2, No. 1 (September 2010), http://www.ssab.gov/Documents/Rep_Payee_Program.pdf . Also see GAO, *VA’s Fiduciary Program*, at note 11 above.
- ¹⁵ U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* (2004)
- ¹⁶ U.S. Government Accountability Office, *Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement* (2011).
- ¹⁷ See GAO, *Guardianships: Collaboration Needed*, at note 15 above.
- ¹⁸ National Guardianship Network, *Third National Guardianship Summit: Standards and Recommendations* (2011), at www.guardianshipsummit.org .
- ¹⁹ Office of the Inspector General, Social Security Administration, “The Social Security Administration’s Oversight of Employer Representative Payees, Congressional Response Report, A-13-10-20125 (2010), http://oig.ssa.gov/sites/default/files/audit/full/html/A-13-10-20125_7.html
- ²⁰ National Disability Rights Network, *Report on the Social Security Administration Representative Payee Review Project*, (April 2011).
- ²¹ American Bar Association Commission on Law and Aging, *Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community* (2011), <http://ambar.org/VolunteerGrdMonitor> .
- ²² National Research Council, *Improving the Social Security Representative Payee Program*, Recommendation 6.1, at note 2 above.
- ²³ GAO, *Incapacitated Adults*, p. 16, note 16 above.
- ²⁴ U.S. Senate, Sen. Gordon Smith & Sen. Herb Kohl, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*, pp. 41-42 (2007).

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