

A stylized map of New York State is positioned behind the title text. The map is filled with a green-to-yellow gradient and is set against a background of thin, white, curved lines that create a sense of depth and movement.

New York **Makes Work Pay**

Developing a path to employment for New Yorkers with disabilities

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Policy to Practice Brief #10

REPRESENTATIVE PAYMENT & RETURN TO WORK EFFORT

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About Policy-to-Practice Briefs

This is one of a series of policy to practice briefs published as part of the New York Makes Work Pay Project, a Comprehensive Employment Services Medicaid Infrastructure Grant funded by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) to the New York State Office of Mental Health (OMH) and its management partners, the Blatt Institute at Syracuse University and the Employment and Disability Institute (EDI) at Cornell University. The New York Makes Work Pay Initiative is currently funded for calendar years 2009 and 2010 and will provide an array of services to individuals with disabilities and the agencies and advocates that serve them, helping to remove obstacles to work and pave the way to self supporting employment.¹

The thoughts and opinions expressed in these materials are those of the authors and do not necessarily reflect the viewpoints or official policy positions of the Social Security Administration (SSA), CMS, or OMH. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency implementation and/or administrative responsibilities.

This publication is based on federal Social Security Disability Insurance (SSDI), Supplemental Security Income (SSI), Medicare and Medicaid laws, regulations, and policy, with a focus on how those provisions will affect New York State residents with disabilities. Although this is written for a New York audience and will focus on New York's unique SSI rates and the state's Medicaid Buy-In for Working People with Disabilities criteria in examples, the overwhelming majority of the principles discussed in this brief will be based on federal laws, regulations, and policy that will apply equally in all states. Therefore, this policy and practice brief will be a good resource for readers throughout the country.

¹ A detailed description of the New York Makes Work Pay Project and its services can be found at <http://www.NYMakesWorkPay.org>

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OVERVIEW

This is one of a series of policy and practice briefs written for benefits and work incentives practitioners, attorneys and advocates who encounter social security beneficiaries who receive payment through a representative payee. The thoughts and opinions expressed in these materials are those of the author and do not necessarily reflect the viewpoints or official policy positions of the SSA. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency implementation and/or administrative responsibilities.

I. Introduction

The Representative Payee Program provides for the payment of social security disability insurance (SSDI)² and/or supplemental security income (SSI)³ to a person other than the beneficiary in certain circumstances. The regulations explain the procedures that the Social Security Administration will follow when determining:

1. If a representative payee (payee) is needed, and
2. Who will be selected as a payee.

The regulations also explain the obligations and responsibilities of those appointed as payees and the responsibilities of the Social Security Administration in the initial and ongoing processes involved in the representative payee program.

The Social Security Protection Act of 2004 (P.L. 108-203) made significant changes in payee accountability policies aimed at providing greater protection for the beneficiary. The Commissioner issued final regulations on October 7, 2004, covering many of the provisions of the Act relating to Representative Payment.

The Representative Payee Program imposes significant restrictions upon beneficiaries' ability to control their lives. Things most of us take for granted, such as deciding where to live, what to eat, and what to wear take on a new significance when a third party controls your income. While the appointment of a representative payee by the Social Security Administration is intended to only assist the beneficiary to manage monthly cash benefits, at times the control of the representative payee is unintentionally extended beyond money management functions involving SSDI or SSI benefits. When a representative payee exerts control, beyond the limits of the Program, this can inhibit the beneficiary's ability to buy certain clothes, to live in certain places, to associate with particular friends and family and to work. The Program, as discussed below, does not condone a representative payee's control over decisions, morals, or behavior of a beneficiary. Instead the Program is intended to ensure that monthly cash benefits are used to meet the beneficiary's basic need for food and shelter.

² 20 C.F.R. 404.2001.

³ 20 C.F.R. 416.601.

The Ticket to Work Act provides that all beneficiaries who wish to attempt to return to work may avail themselves of benefits planning services, rehabilitation programs, legal advocacy services and each and every work incentive program available to that beneficiary. A representative payee should not stand in the way. In fact, a good representative payee should actively participate in a beneficiary's return to work effort in order to effectively manage benefits during this period of sensitive transition.

A well meaning representative payee may attempt to limit a beneficiary's work activity in an effort to preserve cash and health care benefits. While this may be done with good intention, it is beyond the scope of the Program and often done in ignorance of the work incentive programs available to beneficiaries who wish to begin a return to work force. Beneficiaries who receive benefits via the Program are often the most vulnerable and unable to assert themselves in decision making. Preventing interference with a return to work effort will require education of the representative payee and, at times, removal of a payee who is exerting unwarranted control over the beneficiary.

II. Who is Required to Have a Payee?

The Social Security Act and SSA policy recognize that all beneficiaries have the right to manage their own payments. There are two groups of exceptions to this policy: beneficiaries who must receive their benefits through a payee; and beneficiaries who may be individually determined to need a payee.

There are two categories of beneficiaries who must receive benefits through a payee.

1. Beneficiaries under the age of 18,⁴
2. Beneficiaries who have been determined to be "legally incompetent" by a court.⁵

PRACTICE TIP: *Drug addiction or alcoholism (DAA) is a "contributing material factor" to the disability determination when the individual cannot be found disabled independent of the substance abuse. SSA may still recommend that independently, or "otherwise disabled," individuals have a payee, e.g., listings- level back impairment with DAA involvement. However, this individual is not subject to the mandatory requirements of the new statutory provisions.*

Beneficiaries who fall into one of these two categories are required to have a payee in order to receive their benefits. SSA will withhold, or suspend, their benefits until a payee is appointed to receive the benefits. In these cases, SSA will presume that "substantial harm" will occur if direct payment is made. This is, however, a rebuttable presumption.⁶

⁴ 20 C.F.R. 404.2010(b), 416.610(b), although SSA will occasionally pay benefits directly to an older child when a payee is not readily available. POMS GN 00502.005 - .200.

⁵ 20 C.F.R. 404.2010(a)(1), 416.610(a)(1).

⁶ 20 C.F.R. 404.2011, 416.611.

SSA may also determine, on an individual basis, that other beneficiaries need payees. A payee will be appointed to manage payments if SSA determines that a particular beneficiary is mentally or physically unable to manage, or direct the management of, benefit payments in his or her own best interest.⁷ The inability to manage payments does not mean that the beneficiary cannot manage other affairs. The determination is not a competency determination. Although the inability to manage other affairs may be evidence of the inability to manage benefits, the standard used by SSA in this determination is much lower than that used by the courts to determine legal competency. Beneficiaries individually determined to need payees may appeal those decisions and try to prove that they are capable of managing their own benefits.⁸ Also, these beneficiaries may be paid directly if a suitable representative payee cannot be located. This is discussed in more depth in Section C below.

The inability to manage payments must be determined before a payee can be appointed.⁹ Information indicating that the beneficiary is legally incompetent or is mentally or physically incapable of managing payments will be considered by SSA when determining a beneficiary's need for payee services. This information may be in the form of court determinations of legal incompetency, medical evidence indicating a physician's opinion as to the competency to manage benefits payments, or statements of relatives, friends, etc., who have observed the beneficiary's inability to manage benefits or other financial matters.

III. Selection of a Payee

The selection of a payee must focus on the person, or entity, who will best serve the beneficiary's interests.¹⁰ SSA will consider:

1. The relationship of the nominated payee to the beneficiary,
2. The amount of interest the nominated payee shows in the beneficiary,
3. Any legal authority the nominated payee has over the beneficiary (i.e., guardianship, conservatorship),
4. Whether the nominated payee has custody of the beneficiary, and,
5. Whether the nominated payee is in a position to know of and look after the beneficiary's needs.

Prior to being appointed, or certified, as a payee, the nominated payee must file an application to be payee with SSA and be investigated by SSA.¹¹ Information must be provided to show SSA that the nominated payee is related to or is in a posi-

⁷ 20 C.F.R. 404.2001(b), 416.601(b).

⁸ 20 C.F.R. 404.902(o), 416.1402(d).

⁹ 20 C.F.R. 404.2001(b)(2), 416.601(b)(2).

¹⁰ 20 C.F.R. 404.2020, 416.620.

¹¹ 20 C.F.R. 404.2025(a), 416.625(a).

tion to be responsible for the care of the beneficiary. The investigation must also consider any past criminal activity of the nominated payee as well as any financial misdealing involving the nominated payee and other beneficiaries, whether criminal in nature or not.

To this list of investigatory tasks were added the requirements that SSA obtain proof of identity from all nominated payees, conduct face-to-face interviews with nominated payees “to the extent practicable,”¹² verify the social security number of the nominated payee, determine whether the nominated payee has been convicted of a “social security felony,” and determine whether the nominated payee has ever been determined to have misused another beneficiary’s funds.¹³

NOTE: After January 1, 1991, SSA is not permitted to appoint a nominated payee who has been convicted of a “social security felony” or has been determined to have misused benefits unless SSA determines that it is in the beneficiary’s “best interest” to have this nominated person serve as payee. The Congressional Committee considering this exception has clearly stated that its intent is to see that this exception be only rarely applied. Moreover, SSA must maintain a centralized file containing a list of the names and social security numbers of payees who have been found to have misused benefits in the past or have been convicted of a “social security felony.” The list must be readily retrievable by each local social security office.¹⁴ Advocates should ensure that a proposed payee has been checked against this list and that payees found to have misused benefits are added to the list. More recently, the Social Security Protection Act of 2004 will disqualify any individual convicted of offenses resulting in imprisonment for more than 1 year, or those fleeing prosecution, custody or confinement, from being appointed as a payee.¹⁵

Along with its investigation and appointment responsibilities, SSA has promulgated a regulatory order of preference as a guide in its payee selection.¹⁶ Although the primary concern is to select the payee that will best serve the beneficiary’s interest, the order of preference is as follows:

1. Spouse, legal guardian,
2. Friend in custody or who has demonstrated strong concern for the beneficiary,
3. Public or nonprofit agency in custody of beneficiary,
4. Private for profit agency in custody of beneficiary,
5. Members of community groups, volunteers.

¹² 20 C.F.R. 404.2024, 416.624.

¹³ 20 C.F.R. 404.2022, 416.622, POMS GN 00502.110 - .112.

¹⁴ POMS GN 00502.107 & .115

¹⁵ 20 C.F.R. 404.2022, 416.622.

¹⁶ 20 C.F.R. 404.2021(a), 416.621(a).

This list is concerned with payees to be appointed for beneficiaries who are age 18 or older.

Legal guardians serving as representative payees may pose particular issues for beneficiaries. Legal guardians have control over much more than the monthly benefits paid by the Social Security Administration and may, in fact, have the ability to control and decide upon the circumstances necessary for a beneficiary's return to work. It is critically important that legal guardians be provided with all necessary return to work and work incentive information and counseling to allow for the beneficiary to reach maximum potential. Furthermore, while the legal guardian appears to the top of the "preference list" for appointment as a representative payee, this list should not be seen as a requirement. Should a legal guardian be imposing undue burdens upon a beneficiary, consideration should be given to having another representative payee appointed and/or to remove the guardian that may be limiting a beneficiary's work ability.

In most cases, beneficiaries who are under the age of 18 will have a payee appointed.¹⁷ The order of preference for a child's payee differs slightly from that listed above.¹⁸ That list is as follows:

1. Natural or adoptive parent who has custody of the beneficiary,
2. Natural or adoptive parent who does not have custody but is contributing to support and is demonstrating a strong concern for the beneficiary's well being,
3. Natural or adoptive parent who does not have custody and is not contributing to support but is demonstrating a strong concern for the beneficiary's well being,
4. Relative or stepparent who has custody of the beneficiary,
5. Relative who does not have custody but is contributing to support and is demonstrating a strong concern for the beneficiary's well being,
6. Relative or close friend who does not have custody but is demonstrating concern for the beneficiary's well being,
7. Authorized social agency or custodial institution.

Social service agencies and custodial institutions can present quite a challenge to a beneficiary who is attempting to return to work. Often times, the agency/institution has an interest in continuing benefits eligibility at maximum levels, as the agency/institution is able to use up to 75% of the monthly benefit to recoup its costs associated with that individual beneficiary. Care should be taken to avoid having this type of representative payee interfere with any attempt to work. Rather, that agency should work with the beneficiary in order to teach budgeting, bill

¹⁷ The exceptions to this policy can be found at 20 CFR 416.610(b) or 20 CFR 404.2010(b).

¹⁸ 20 CFR 416.621(b) or 20 CFR 404.2021(b).

paying and banking skills and, in this way, assure that the beneficiary's fair share of monthly expenses is paid when due.

The following list was created for those individuals whose substance abuse impairment (DAA) was determined to be a "contributing material factor" in accordance with the new substance abuse statutory provisions.

1. Community-based, non-profit social service agency,
2. State or local agency whose mission is to carry out income maintenance, social service or health care related services,
3. State or local government agency with fiduciary responsibilities.

An exception to the substance abuse preference list exists for the appointment of a family member should SSA determine that such an appointment is appropriate in a particular beneficiary's circumstances. Finally, it is not likely that SSA will proactively disturb existing payee relationships for those in this category should those relationships be functioning appropriately.

NOTE: See the regulations at 20 C.F.R. 404.2040a, 416.640a for information concerning fees/compensation to organizations providing representative payment services as well as the discussion that follows below.

Most important to the selection process are the restrictions as to who cannot serve as a payee.¹⁹ In an effort to avoid potential financial conflicts of interest, SSA will not be able to certify a beneficiary's creditor (i.e. landlord) unless:

1. The nominated payee is a relative living in the beneficiary's household,
2. The legal guardian or representative of the beneficiary is a facility licensed or certified under state or local law,
3. The legal guarding or representative is an employee, owner, or administrator of the facility in which the beneficiary resides, and
4. SSA has made a good faith effort to find an alternative payee, or
5. SSA has made a written determination that the nominated payee poses no risk to the beneficiary, that there is no substantial conflict of interest, and that no other more suitable payee exists.²⁰

Before an appointment can be made SSA must notify the beneficiary of the intention to name a payee and the name of the nominated payee.²¹ If no objection is received from the beneficiary, SSA will act in accordance with its notice of planned action. If the beneficiary objects to the appointment of a payee or to the nominated payee, the beneficiary may review all evidence upon which the proposed SSA

¹⁹ 20 C.F.R. 404.2022, 416.622.

²⁰ POMS GN 00502.113.

²¹ 20 C.F.R. 404.2030(a), 416.630(a).

appointment was based and submit any additional evidence that should be considered by SSA prior to the appointment being made.²²

NOTE: In practice, SSA will often send only one notice to the beneficiary explaining who the proposed payee is and that this person will be appointed to receive and manage the benefits. These decisions are “initial determinations” for appeal purposes.²³ It is important to remember that this one notice contains two, appeal-able legal issues:

1. The need for a payee, and
2. The person to be appointed.

Once a determination is made, the beneficiary may file a Request for Reconsideration if the beneficiary is dissatisfied with the determination.²⁴ SSA must ensure that written notices be provided to the beneficiary in advance of any benefits being paid to the nominated payee. Such notice must be a clearly written, easily understood statement of the beneficiary’s rights to challenge SSA’s determination concerning the need or appointment of a payee.²⁵

It is important to realize that an appeal of the appointment of a payee or an appeal of the appointment of a particular payee may delay the beneficiary’s receipt of payments. For instance, should a beneficiary agree that the appointment of a payee is warranted but does not agree with the person appointed, SSA may defer or suspend the beneficiary’s benefits for a period of up to 30 days, unless SSA determines that direct payment would cause “substantial harm” to the beneficiary.²⁶ The suspension can last only 30 days, after which time, SSA must pay current benefits directly to the beneficiary. The beneficiary will be required to continue to attempt to locate a suitable payee while receiving direct payment.

NOTE: If direct payment continues for any significant period and the beneficiary is able to effectively manage his or her benefits, it will be worth exploring the potential of having the payee requirement removed. Use this history of money management to your client’s advantage.²⁷

If, during the deferral or suspension period, the beneficiary is in need of living expenses, portions of the suspended benefits can be distributed by the local SSA office monitoring the beneficiary’s file. Note also, that the direct payment effects only current payments. Retroactive benefits can be withheld until such time as a payee is located and appointed.

²² 20 C.F.R. 404.2030(b), 416.630(b).

²³ 20 C.F.R. 404.902.

²⁴ 20 C.F.R. 404.2030(c), 416.630(c).

²⁵ 20 C.F.R. 404.2030, 416.630.

²⁶ 20 C.F.R. 404.2011, 416.611.

²⁷ POMS GN 00502.005(A).

The 30 day limit on the suspension period does not apply to those beneficiaries who must have a payee in order to receive benefits, i.e., SSI disability benefits beneficiaries medically determined to be drug addicts or alcoholics, those determined legally incompetent by a court, and most children under the age of 18. For these beneficiaries, the suspension period will last until an appropriate payee is located and appointed. Once again, "substantial harm" will be presumed by SSA but this presumption can be rebutted by the beneficiary.²⁸ As with other beneficiaries, SSA should release portions of current payments needed for basic living expenses.

IV. SSA and Payee Responsibilities

SSA regulations provide that SSA liability for payment ends once a payment has been made to a "properly appointed" payee, in other words, a payee who has been certified in accordance with SSA policy and regulations. However, in cases in which payees have not been properly appointed, SSA may still be liable for funds paid to payees that were misused or stolen by the payees.²⁹

NOTE: SSA's common practice in appointing payees does not come close to the proper certification anticipated by its regulations. Advocates should carefully examine all instances where a beneficiary complains about misuse of funds by a payee in order to determine if funds were misused and if SSA liability for the funds exists.

The new Act differentiates between misuse by an individual payee and a group payee. In misuse cases involving an individual payee SSA will be required to issue a duplicate payment to the beneficiary equal to the amount of benefits misused by the payee if SSA also determines that SSA was negligent in the appointment and/or monitoring of the payee.³⁰ In a case of misuse involving a group payee SSA is authorized to issue a duplicate payment to the beneficiary in the amount of the benefits misused solely upon the Commissioner's finding of misuse. No negligence on SSA's part is necessary. A group payee is one that manages SSA funds on behalf of 15 or more beneficiaries.³¹

If SSA has been negligent in the investigation of a nominated payee, or in their monitoring of a payee's use of a beneficiary's funds, SSA will be liable to the beneficiary for the amount of funds misused by the payee. Further, SSA will be required to make a "good faith effort" to have the misused amounts returned by the payee.

Historically, a finding by SSA that a payee did not misuse benefits has not been considered an "initial determination" and was, thus, not appealable. As SSA can be liable for misused benefits resulting from SSA negligence the appeal-ability of the

²⁸ 20 C.F.R. 404.2011, 416.611.

²⁹ 20 C.F.R. 404.2041, 416.641.

³⁰ 20 C.F.R. 404.2041, 416.641.

³¹ 20 C.F.R. 404.2041, 416.641.

misuse determination has greater significance. SSA continues to take the position that a misuse determination is not an “initial determination.” Rather, SSA treats a report of misuse as an initial request for restitution. If SSA denies a request for restitution, SSA will provide a notice of appeal rights on the restitution issue. Inasmuch as misuse is a necessary factor for restitution on appeal, the question of whether there was misuse will be reviewed by the reconsideration reviewer, ALJ, Appeals Council, or a Court, as is appropriate.³²

NOTE: Even prior to the 1991 changes, SSA POMS provided for restitution if SSA failed to act with “good acquaintance.”³³ Whenever a report of misuse is made advocates should request that restitution be made pursuant to both POMS and the applicable regulations.³⁴ If denied the determination can be appealed.

As indicated earlier in this outline the Social Security Protection Act of 2004 made significant changes in the areas of misuse and oversight of payees. Section 101 of the Act defines misuse as occurring in any case in which the payee receives payment on behalf of the beneficiary and converts such payment, or any part thereof, for the use and benefit of someone other than the beneficiary.

Upon a Commissioner’s finding of misuse, the Commissioner shall certify for payment to the beneficiary (or to the beneficiary’s new payee) an amount equal to that found to have been misused. The “duplicate payment” will not be considered a resource for a period of 9 months.³⁵ Section 101(c)(2). “Duplicate payment” requires that the benefits have determined to have been misused **and** that SSA was negligent in the appointment and/or oversight of the payee. Note that these provisions are effective for misuse determinations made on or after 01/01/05.

Section 105 of the Act discusses the payee’s liability for misused benefits. Upon the determination by the Commissioner or a court that a payee (not a federal, state or local government agency however) has misused benefits, the amount of misused benefits will be treated as an overpayment to the payee. Upon recovering all or part of the misused funds, the Commissioner shall make payment in that amount to the beneficiary, or the beneficiary’s new payee. These provisions are effective for misuse determinations made by the Commissioner, or a court, after August 29, 2004. Also effective on this date is the provision that requires a payee, who takes a fee for services, to forfeit the fee for any month in which benefits were determined to have been misused. The fees will be considered part of the total of benefits misused.

Lastly, concerning misuse, Section 111 of the Act provides for civil monetary penalties for wrongful conversions of benefits by payees. If a payee knew, or should

³² See Emergency (GN) Instruction, IT No. 04-92, ORSI No. 92-021 (1/15/92).

³³ POMS GN 00604.010.

³⁴ 42 USC “405(j) and/or 1383(a)(2)(E).

³⁵ 20 C.F.R. 404.2041, 416.641.

have known, that the benefits were used for other than the “use and benefit” of the beneficiary, the payee shall be subject to a monetary penalty of \$5000 for each conversion plus an assessment of not more than twice the amount converted in lieu of damages sustained by the U.S. government.

The announcement of final rules issued on October 7, 2004, contained no new regulations concerning the assessment of overpayments for misused benefits to representative payees or civil monetary penalties.

Once a payee is appointed to manage a beneficiary’s payments SSA is responsible for informing and instructing that payee as to the proper use of the benefits received and the proper way to maintain records that will be needed to fully comply with SSA periodic reviews.³⁶ At this point in the appointment process the representative payee should avail herself of all available information concerning return to work programs should the beneficiary be beginning a return to work effort or have begun working. It is not the representative payee’s place to decide whether any individual beneficiary should work, but rather to manage reporting and monthly payments in such a way as to facilitate the work effort. Further, the representative payee has no authority to control earned income. The 1991 changes placed a much higher burden upon SSA to actively and meaningfully monitor the performance of payees. The Social Security Protection Act of 2004 likewise enhances SSA’s responsibility for payee oversight.

Section 102 of the Act calls for certification of “group payees” as well as periodic onsite review. Any community organization serving as a payee must meet the definition of a Certified community-based nonprofit social service agency. The agency will be required to comply with regulations promulgated by the Commissioner and must be certified annually to receive payments on behalf of beneficiaries. The agency must also be fully bonded and licensed (should licensing be required by the agency’s home state) for this purpose. Each annual certification request must be accompanied by any independent audit performed since the previous certification.

In addition to other reviews that the Commissioner may conduct, the Commissioner shall provide for periodic onsite reviews of any person or agency located in the U.S. that receives benefits as a payee when:

1. The payee is a person who serves 15 or more beneficiaries,
2. The payee is a certified community-based nonprofit social service agency,
or
3. The payee is a non-governmental agency that service more than 50 beneficiaries.

These provisions, along with SSA reporting provisions, became effective in 2004/2005.

³⁶ 20 C.F.R. 404.2065, 416.665.

NOTE: The 1991 changes allowed certain community based, non-profit social service agencies which were in existence on October 1, 1988, are bonded or licensed by their states, and have regularly provided payee services to five or more beneficiaries to collect a monthly fee of 10% of the monthly benefit due or \$35 (in 2007), whichever is less.³⁷ For those individuals determined to be drug addicts or alcoholics, the payee can elect to take a monthly fee of \$68 (in 2007) per month, or 10% of the monthly benefit, whichever is less.³⁸ This fee, unlike the fee described above, is indexed to the CPI, and, as a result, will increase each year. For more information concerning the structure and organizational ability to collect fees see the regulations at 20 C.F.R. 404.2040a, 416.640a.

V. The Use of Payments

A properly appointed payee takes on many important responsibilities when accepting this role. These responsibilities are taken on with the understanding that no fees can be paid to a payee for services provided on behalf of a beneficiary with the exception of the limited situations discussed above.

A payee has a responsibility to use the payments received only for the use and benefit of the beneficiary and in the beneficiary's best interest. A payee has the responsibility to notify SSA of any events that may change the status or payment level of the beneficiary, including the general reporting responsibilities of the beneficiary. As a result, the payee must make reports to SSA involving events such as the beneficiary's return to work or the beneficiary's receipt of income of any kind. A payee must submit written accountings and reports to SSA upon request and should maintain account records as part of routine payee business. A payee must notify SSA of any changes that may compromise the payee's ability to effectively serve on behalf of the beneficiary. For example, the payee becoming a creditor of the beneficiary or the payee's relocation to a different geographical area. Finally, a payee must accept potential financial liability for misused funds if SSA has properly certified, investigated and appointed the payee.

The use of payments received by a payee is controlled by SSA regulation.³⁹ Payments can be used for the beneficiary's "current maintenance." Current maintenance includes shelter expense, food, clothing, utilities, medical care not paid for by medicare or medicaid, and personal comfort items.

Shelter expense becomes a bit more complex if a beneficiary is institutionalized. If the institution is not receiving Medicaid funds on the beneficiary's behalf, the payee may use the benefits payments to cover the "customary charges for care and services provided by the institution," for personal needs to improve the conditions

³⁷ POMS GN 00506.001.

³⁸ POMS GN 00506.200(c)(2).

³⁹ 20 C.F.R. 404.2040, 416.640.

while institutionalized, and for expenses necessary to aid in recovery or release.⁴⁰ Any benefits remaining can then be used to maintain the beneficiary's residence unless a physician certifies that a return to the home is unlikely.

When an institution receives Medicaid funds on a beneficiary's behalf, a payee may not use payments to cover customary expenses and may only provide for the personal needs of the beneficiary.⁴¹

NOTE: This argument should be made in all cases where an institution (including a foster care setting) is receiving any form of public funding on a beneficiary's behalf.

SSDI (Title II) received by a payee may be used to support the legal dependents of the beneficiary after the needs of the beneficiary have been met.

Claims of creditors arising before the first month during which the payee was certified to receive payments on a beneficiary's behalf need not be met by using benefits funds. A payee may use these funds to meet this type of claim only if the current and reasonably foreseeable needs of the beneficiary have been met.

Funds remaining after the needs of the beneficiary have been met must be conserved for future use by the payee. Preferred investments are U.S. Savings Bonds, and insured, interest bearing savings accounts. If the payee is not the beneficiary's guardian or conservator then the accounts or bonds must be held in accordance with the relevant regulations.⁴² All interest and dividend payments made on these accounts or bonds are the property of the beneficiary and will be seen as "un-earned income" for all SSI beneficiaries.

Any savings accounts or investments held by a payee for an SSI beneficiary must also comply with the SSI income and resource eligibility rules.

VI. Removal of a Payee and Termination of Representative Payment

SSA regulations provide for the removal and/or replacement of a payee should certain circumstances arise.⁴³ A new payee will be appointed if SSA is informed that the needs of the beneficiary are not being met or that the payee no longer wishes to serve as payee. Upon payee resignation, as well as in all cases where a payee is needed, SSA has an affirmative obligation to assist in locating a suitable payee.⁴⁴

⁴⁰ 20 C.F.R. 404.2040(b), 416.640(b).

⁴¹ 20 C.F.R. 416.640(c).

⁴² 20 CFR 416.645(b) or 20 CFR 404.2045(b).

⁴³ 20 C.F.R. 404.2050, 416.650.

⁴⁴ POMS GN 00502.100(A).

While hindering or inhibiting a return to work effort may not be “misuse” of benefits, such action by a representative payee may warrant removal in order to assist the beneficiary beginning a work effort.

Upon resignation or termination of a payee, any accumulated payments must be immediately transferred to the new payee or to SSA in accordance with SSA instructions.

Representative payment will be stopped once a beneficiary is physically or mentally able to maintain his/her financial affairs. Evidence indicative of this fact includes:

1. A court order restoring rights to a formerly legally incompetent beneficiary,
2. A physician’s statement that a beneficiary is now able to manage his/her own payments, or
3. Other statements that indicate that the ability to maintain payments exists (i.e., statements of social workers, family members, etc., as to the beneficiary’s current ability to use and manage payments in his/her best interest).

Further, once SSA receives any indication that any social security funds are being, or have been, misused by a payee, SSA is required to investigate and cease payment to that payee. The Social Security Protection Act of 2004 provides SSA with the authority to redirect payments when a payee fails to provide a required accounting to SSA. After providing notice to both the beneficiary and the payee, SSA can require the payee to appear in person at the DO in order to receive payments.

The Act also requires SSA to conduct a survey considering the use of payments by payees and will consider the differences in use by individual, organization and government agency payees. The report is due to Congress in September of 2005.

VII. Need for Advocacy

A beneficiary who is subject to representative payment loses many significant rights. A payee, knowingly or unknowingly, accepts many significant responsibilities. SSA practice in appointing payees and holding payees to their responsibilities has been problematic at best. As a result, all beneficiaries subject to representative payment are extremely vulnerable. It is hoped that the OBRA `90 changes will bolster the position of beneficiaries forced to receive payments through payees. Cases involving such beneficiaries must be handled with extreme care and with much attention to the details surrounding the appointment of a payee and the payee’s use of any funds paid to the payee by SSA.

An initial entry into the work force, or a return to work after a period of disability, presents several very complex issues for beneficiaries and the representative payees who control and manage their SSA disability benefits. Complex work incentives must be applied to monthly benefits and the additional, or new, stressors involved with work activity can become overwhelming. A representative payee must be in

the position of understanding and being able to manage the beneficiary's benefits during this most sensitive transition from dependence to the world of work.

Inasmuch as Congress has determined that SSA is liable for benefits lost to unscrupulous payees, advocates should be diligent in ensuring that reports of misuse are treated seriously and investigated in a timely manner. All available appeals should be taken where appropriate.

Notes

Notes

www.NYMakesWorkPay.org

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Partnering Organizations

New York State Office Of Mental Health
Employment and Disability Institute (Cornell University)
Burton Blatt Institute (Syracuse University)

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