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# Social Security Representative Payee Misuse

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## Abstract

This Article examines the problem of benefit misuse within the Social Security representative payee system, identifies shortcomings in the current legal framework for policing the payee's conduct, and proposes legislative reform. The Social Security "representative payee" system serves an important function by protecting beneficiaries who have cognitive impairments and therefore cannot manage their own financial affairs. For beneficiaries living in an institutional setting, such as a nursing or group home, however, the appointment of the home or home administrator as representative payee creates conflicts of interest that adversely affect the beneficiary. Benefit misuse by representative payees in this setting tends to go undetected because the Social Security Administration lacks resources to perform universal audits and the cognitively compromised beneficiary is often incapable of detecting financial improprieties. To improve oversight of institutional representative payees such as nursing and group homes, this Article proposes that Congress create a "family representative" program wherein a concerned relative or friend would be authorized to monitor the payee without assuming the burdens and liabilities of a representative payee appointment. The family representative would be a person familiar with the beneficiary's needs and circumstances and would receive a copy of all reports submitted by the representative payee to the Social Security Administration. The family representative's access to information regarding the payee's performance would facilitate greater detection and reporting of benefit misuse to the Social Security Administration than under the current system. The Article's Appendix contains legislative language for a proposed statutory amendment to the Social Security Act that would implement the family representative program.

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### INTRODUCTION

This Article addresses the problem of Social Security benefit misuse by representative payees appointed by the Social Security Administration (SSA). When a mentally impaired Social Security beneficiary cannot manage her own financial affairs, SSA has a statutory mandate to appoint a “representative payee” responsible for accepting payment on the beneficiary’s behalf. Once appointed, the representative payee has a legal duty to apply all benefit payments toward the beneficiary’s living necessities, medical care, recreation, or personal savings. Congress established this payment arrangement to prevent vulnerable beneficiaries from failing to obtain basic necessities or otherwise wasting their benefit funds. The representative payee system, however, entails direct payment of funds to third-party payees, so the system creates potential for misuse, misapplication, or theft of the beneficiary’s funds. This problem, generally known as benefit misuse, is difficult for SSA to detect because the beneficiary, by virtue of her cognitive impairment, is typically incapable of ascertaining whether the payee has engaged in financial improprieties. The representative payee system thus serves a necessary function by protecting cognitively impaired beneficiaries, but it is also highly susceptible to abuse by third-party payees.

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This Article will focus on Social Security benefit misuse in cases where the beneficiary's residential care facility, such as a nursing or group home, or the administrator of the residential care facility, has been appointed representative payee. By statute and regulation, SSA has authority to appoint a beneficiary's residential care facility as representative payee as a last resort after first searching for a concerned, competent relative or friend. Appointment of a residential care facility, however, is disfavored because it creates a conflict of interest for the representative payee: on one hand, the care facility has a duty as payee to expend Social Security funds in a manner consistent with the beneficiary's best interests; on the other hand, the care facility has a financial incentive to maximize its compensation for services provided to the beneficiary, and that compensation can be drawn directly from the beneficiary's monthly Social Security benefit check. Harms resulting from this conflict of interest undermine the social welfare goals of the Social Security program by diverting funds from the rightful beneficiary to representative payees who have breached their statutory duty to manage the beneficiary's funds properly. Two examples of benefit misuse, as documented in a study commissioned by SSA, illustrate the problem:

In one case, a woman took care of three elderly beneficiaries in her home. She commingled all funds and used the money for food, clothing, cleaning supplies, medications, taking the beneficiaries out to dinner once a week, and her own car maintenance. She did not keep separate accounts, nor did she keep records of expenditures. The funds were used to keep the group, including her, afloat. The committee characterized this case as misuse.

In another situation, a group of related payees in one state ran several homes for the mentally handicapped. They refused to use direct deposit and pooled all beneficiary funds. There was no rationale for the amounts charged for room and board, which were very high. Payees in this family learned from each other how to set up these homes and they applied for payee status at different SSA offices, even though they lived close to each other. These payees met together on a regular basis to discuss fees and other policies for their group homes. These cases were characterized as misuse by the committee.<sup>2</sup>

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2. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IMPROVING THE SOCIAL SECURITY REPRESENTATIVE PAYEE PROGRAM: SERVING BENEFICIARIES AND MINIMIZING MISUSE 70 (2007), *available at* <http://www.nap.edu/catalog/11992.html> [hereinafter NRC REPORT, SERVING BENEFICIARIES].

The lack of adequate supervision for representative payees creates opportunities for fraud and theft committed by payees against the beneficiaries they are appointed to represent.

It is difficult to quantify the frequency of representative payee misuse, but the problem is likely to be far more prevalent than official government reports suggest. SSA's own statistics on payee misuse indicate a low rate of incidence, but the agency has acknowledged the difficulty of detecting financial improprieties in this context and the strong likelihood of underreporting. Empirical studies, anecdotal accounts, and audits performed by the SSA Inspector General indicate a sufficiently high prevalence of misuse to warrant further inquiry and reform. The problem warrants renewed scholarly, legislative, and agency attention because it adversely affects the most vulnerable members of society and improperly diverts scarce government resources at taxpayer expense.

The existing scholarly literature on representative payee misuse with respect to adult Social Security beneficiaries is scant.<sup>3</sup> This Article helps to fill that void by advancing two key arguments. First, payee misuse among residential care facility providers is a significant problem in need of remedial reform. Second, an additional layer of payee oversight can and should be achieved at negligible expense by enlisting greater voluntary participation by the beneficiary's family and friends.

This Article proposes reform designed to reduce the incidence of representative payee misuse. In particular, the proposed reform contemplates an oversight program that would authorize a concerned relative or friend of the beneficiary to monitor the payee and report evidence of suspected misuse to SSA. This proposal assumes, perhaps correctly, that the unavailability of family or friends willing to serve as representative payee does not necessarily demonstrate a lack of family or friends concerned about the beneficiary. Anecdotal accounts, including a

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3. For prior scholarship relating to representative payee appointments for adult Social Security beneficiaries, see Margaret G. Farrell, *Symposium: Doing Unto Others: A Proposal for Participatory Justice in Social Security's Representative Payment Program*, 53 U. PITT. L. REV. 883, 891-94 (1992); Joan L. O'Sullivan & Diane E. Hoffmann, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 75 (1995/1996); Joseph A. Rosenberg, *Regrettably Unfair: Brooke Astor and the Other Elderly in New York*, 30 PACE L. REV. 1004, 1030 (2010); Samuel Saks, Comment, *Representative Payment Under the Social Security Protection Act of 2004*, 51 WAYNE L. REV. 1569, 1573 (2005) (primarily addressing appointment of payees for drug- and alcohol-dependent beneficiaries). For prior scholarship related to representative payee appointments for child Social Security beneficiaries (mainly in the foster care context), see Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1803 (2006); Jim Moye, *Get Your Hands Out of Their Pockets: The Case Against State Seizure of Foster Children's Social Security Benefits*, 10 GEO. J. ON POVERTY L. & POL'Y 67, 68 (2003).

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case litigated in a federal district court by this Article's author, suggest that beneficiaries often have relatives and friends who may be unwilling to accept the significant burdens and liabilities associated with serving as representative payee, but who maintain genuine concern for the beneficiary's health and welfare. In such cases, SSA could improve the representative payee system by designating a carefully selected, willing relative or friend of the beneficiary as a "family representative" with authority to monitor the representative payee's performance and report evidence of suspected abuse to the agency.

The proposed family representative program would enable a concerned relative and friend to assist the beneficiary while minimizing the burdens of reporting obligations, fiduciary duties, or personal liability. Far less onerous than a representative payee appointment, a family representative designation would not require the designee to assume responsibility for managing the beneficiary's expenses, maintaining detailed records, or submitting annual reports. SSA would remain the ultimate party in charge of supervising the representative payee and pursuing remedies for misuse, so the imposition of personal liability on the family representative would be unnecessary to protect the beneficiary. In addition to facilitating better detection of payee misuse, a family representative system could potentially: (1) provide deterrence against misuse by payees who know (or think) they are being monitored; (2) place the beneficiary at greater ease in knowing that a trusted individual is monitoring the payee; and (3) open new lines of communication between the nursing home and the beneficiary's family to enable greater discussion and evaluation of the beneficiary's needs. These benefits could be achieved with minimal cost to the federal government because family representatives, like the vast majority of representative payees, would not be compensated for their service.

The remainder of the Article will proceed as follows. Part I provides an overview of the Social Security representative payee system and the current statutory and regulatory protections against payee misuse. Part II examines the nature and prevalence of benefit misuse in cases where the beneficiary's residential care facility provider, such as a nursing or group home, has been appointed representative payee. Part III proposes a family representative system to facilitate better oversight of payees in this context, applies agency cost theory as an analytical tool, and explores the model's doctrinal connection to the trust protector device in modern trust law. The appendix presents a legislative proposal for enacting the family representative program.

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## I. THE SOCIAL SECURITY REPRESENTATIVE PAYEE SYSTEM

### A. *Overview of the Social Security Representative Payee System*

The Social Security Act (the “Act”), a central pillar of the 1935 New Deal economic reforms, created the largest social insurance and welfare program in the United States.<sup>4</sup> The Act’s largest programs are known as Old-Age, Survivors, and Disability Insurance (OASDI) and Supplemental Security Income (SSI).<sup>5</sup> The OASDI program alone distributes \$725 billion in annual benefit payments to 55 million beneficiaries, mostly over the age of 65 and/or disabled.<sup>6</sup> SSA, the federal agency responsible for administering the program, distributes those benefit payments in monthly check disbursements.<sup>7</sup> As of January 2013, the average monthly benefit was approximately \$1,154.75.<sup>8</sup>

Generally, SSA issues benefit checks payable directly to the beneficiary.<sup>9</sup> SSA’s direct payment system functions well for competent beneficiaries, but it is unsuitable for the sizable minority of elderly and disabled beneficiaries who suffer from cognitive impairment or mental disability. For those beneficiaries, direct payment of Social Security benefits would create enormous potential for waste and misuse of funds. Among the possible perils, mentally impaired beneficiaries could fail to cash the benefit check or, once cashed, improvidently spend the monthly benefit amount without first satisfying their most basic living necessities, such as food, shelter, and clothing. Such outcomes would leave vulnerable beneficiaries without an effective safety net and wastefully divert scarce government resources at taxpayer expense.

For those compelling reasons, Congress amended the Act in 1939 to provide for the appointment of representative payees when necessary to protect the beneficiary’s interest.<sup>10</sup> Following appointment by SSA, the

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4. See generally Wilbur J. Cohen, *Symposium: The New Deal and its Legacy: The Development of the Social Security Act of 1935: Reflection Some Fifty Years Later*, 68 MINN. L. REV. 379, 379-83 (1983).

5. See 42 U.S.C. § 401(a) (2006) (OASDI); 42 U.S.C. § 1381 (2006).

6. U.S. SOC. SEC. ADMIN., PUB. NO. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 9 (2012), available at <http://1.usa.gov/16Lw1yd> (discussing the OASDI program).

7. 20 C.F.R. § 404.1807(a) (2012).

8. U.S. SOC. SEC. ADMIN., MONTHLY STATISTICAL SNAPSHOT, JANUARY 2013 (2013), available at <http://1.usa.gov/14w1m9R>.

9. 42 U.S.C. § 405(i) (2006).

10. Social Security Act Amendments of 1939, ch. 666, § 205(j), 53 Stat. 1360, 1371 (1939). The Act’s current representative payee provision authorizes the Social Security Commissioner to appoint an individual or organization to receive and handle a beneficiary’s payments upon finding that “the interest of . . . [the beneficiary] would be served thereby.” 42 U.S.C. § 405(j)(1)(A) (2006). A representative payee may be appointed without regard to “the legal competency or incompetency of the

Act directs the agency to certify all Social Security payments to the representative payee for use on the beneficiary's behalf.<sup>11</sup> As a condition of their appointment, representative payees assume several duties, including obligations to: (1) ascertain the beneficiary's needs and expend Social Security funds to meet those needs; (2) save and protect Social Security funds not presently needed for the beneficiary's care; (3) maintain records of all Social Security funds received and spent on the beneficiary's behalf; (4) submit accounting reports to SSA at least annually; and (5) notify SSA of changes that would affect the beneficiary's eligibility to receive Social Security benefits.<sup>12</sup> SSA regulations instruct representative payees to apply benefit funds toward the provision of food and shelter first,<sup>13</sup> then for medical and dental care not covered by insurance,<sup>14</sup> and then for clothing and recreation;<sup>15</sup> any leftover funds must be saved for the beneficiary's future use.<sup>16</sup>

System-wide, approximately seven million Social Security beneficiaries receive payments through a representative payee.<sup>17</sup> Within the OASDI program, approximately 1.4 percent of retired workers and 11.3 percent of disabled workers receive benefit checks through representative payee appointments.<sup>18</sup> The majority of representative

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[beneficiary]. . . ." *Id.* SSA's Program Operations Manual System instructs agency officers to consider the following when determining whether to appoint a representative payee: "Does the individual have difficulty answering questions, getting the evidence or information necessary to pursue the claim, or understanding explanations and reporting instructions? If so, do you think this difficulty indicates the beneficiary cannot manage or direct the management of funds?" U.S. SOC. SEC. ADMIN., POMS SECTION: GN 00502.020 DETERMINING CAPABILITY—ADULT BENEFICIARIES (2012), *available at* <http://1.usa.gov/10a1IgR>.

11. *See* 42 U.S.C. § 405(j)(1)(A) (2006).

12. 20 C.F.R. §§ 404.2035, 416.635 (2012).

13. *See* U.S. SOC. SEC. ADMIN., PUB. NO. 05-10076, A GUIDE FOR REPRESENTATIVE PAYEES (Jan. 2009), *available at* <http://1.usa.gov/12HiPrM> [hereinafter REPRESENTATIVE PAYEES GUIDE]; *see also* 20 C.F.R. § 404.2040 (2012).

14. *See* REPRESENTATIVE PAYEES GUIDE, *supra* note 13, at 7 ("Examples of these expenses are reconstructive dental care, a motorized wheelchair, rehabilitation expenses or insurance premiums.").

15. *Id.* (noting that recreational expenses may include "movies, concerts or magazine subscriptions").

16. *Id.* Representative payees for SSI beneficiaries, however, must exercise caution in saving and spending funds to avoid accumulating more than \$2000 in assets, which would render the beneficiary ineligible for SSI benefits. *See* 42 U.S.C. § 1382(a)(3)(B) (2006).

17. NRC REPORT, SERVING BENEFICIARIES, *supra* note 2, at 1.

18. U.S. SOC. SEC. ADMIN., PUB. NO. 13-11700, ANNUAL STATISTICS SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 5.97 tbl.5.L1 (2011), *available at* <http://1.usa.gov/YEr9v6> [hereinafter SSA STATISTICS SUPPLEMENT] ("Number of Beneficiaries with a Representative Payee as a Percentage of All Beneficiaries, By Type of Beneficiary and Age, December 2010"). In 2010, representative payees were appointed for approximately 1.56 million adult beneficiaries. *Id.*

payees—nearly 90 percent—are individual payees, while the remaining 10 percent are organizational payees.<sup>19</sup> SSA believes the representative payee system is significantly underutilized within certain vulnerable segments of the population.<sup>20</sup> In 2010, for example, the SSA Inspector General found that approximately “[one] million beneficiaries over age 85 may have been incapable of managing or directing the management of their benefits” and “had individuals or organizations managing their Social Security benefits without SSA’s knowledge and approval.”<sup>21</sup> Currently, by contrast, only about 225,000 OASDI beneficiaries over the age of 85 had representative payee appointments.<sup>22</sup> With the aging of the “baby boomer” generation, SSA predicts a substantial increase in utilization of the representative payee program over the next two decades.<sup>23</sup>

*B. Current Protections against Representative Payee Misuse of Funds*

Beneficiaries suffering from cognitive impairment or mental disability rank among the most vulnerable members of society and are therefore highly susceptible to abuse committed by a representative payee. To minimize the incidence of fund misuse, Congress enacted sweeping protections governing the representative payee system. As

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19. See, e.g., RENE PARENT ET AL., OFFICE OF RET. & DISABILITY POL’Y, U.S. SOC. SEC. ADMIN., SELECTED CHARACTERISTICS AND SELF-PERCEIVED PERFORMANCE OF INDIVIDUAL SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME REPRESENTATIVE PAYEE (Dec. 2007), available at <http://1.usa.gov/WWHGqU>. The frequency of organizational representative payees for adult beneficiaries is likely lower than the overall frequency of organizational representative payees because SSA appoints representative payees for all minor beneficiaries, many of whom live in group home foster care facilities.

20. In 2010, the SSA Inspector General stated the following in an empirical study of elderly beneficiaries without representative payees:

We initiated this review to examine a concern that SSA may not be aware of aged beneficiaries who need representative payees. Medical statistics state that up to 50 percent of individuals over age 85 may suffer from Alzheimer’s disease or dementia. As of December 1, 2008, we had identified about 5 million beneficiaries who were over age 85. However, only 231,817 (4.6 percent) had representative payees. Accordingly, we reviewed a sample of these beneficiaries to evaluate their capability and need for representative payment. . . .

U.S. SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT NO. A-09-09-29002, AGED BENEFICIARIES IN NEED OF REPRESENTATIVE PAYEES (Apr. 2010), available at <http://1.usa.gov/15VBYpY> [hereinafter AUDIT REPORT].

21. *Id.* Within the studied sample of beneficiaries in need of a representative payee but without an official payee appointment, SSA found that 89% of cases involved unauthorized management by an individual (*i.e.*, the beneficiary’s adult child, spouse, or other relative), while 11% of cases involved management by an organization or agency.

22. See SSA STATISTICS SUPPLEMENT, *supra* note 18.

23. See AUDIT REPORT, *supra* note 20.

described in more detail below, the Act's statutory protections fall largely into three categories: (1) mandatory qualifications for and individualized assessment of prospective payees in the appointment process; (2) reporting requirements and monitoring systems; and (3) civil and criminal penalties for misuse of Social Security funds. In 2004, Congress expanded the statutory protections governing the representative payee program by enacting the Social Security Protection Act of 2004. Despite the comprehensive scope of the protections now in place, however, the prevention and detection of representative payee misuse continues remains a challenge because the beneficiaries for whom SSA must appoint a representative payee are often incapable of detecting and reporting the misuse of funds.

### 1. Mandatory Qualifications and Individualized Assessment

The Act imposes mandatory qualifications for individuals and organizations seeking to serve as representative payee. In particular, certain individuals and organizations are categorically prohibited from serving as a representative payee: (1) persons convicted of specified crimes;<sup>24</sup> (2) persons or organizations whose status as a representative payee has been revoked for fund misuse;<sup>25</sup> and (3) creditors of the beneficiary.<sup>26</sup> Importantly, however, the Act's prohibition on creditors serving as representative payee contains an exception for a residential care facility in which the beneficiary resides.<sup>27</sup> The beneficiary's residential care facility is a creditor to the extent the beneficiary fails to pay the facility for the provision of care and housing. Under this exception, a nursing or group home may serve as representative payee if, "after good faith efforts have been made by the local servicing office of the Social Security Administration to locate an alternative representative," no suitable alternative payee has been found.<sup>28</sup> This exception will be discussed in detail below.<sup>29</sup>

SSA regulations prescribe a priority for the selection of representative payees: concerned family and friends receive the highest priority, followed by institutional and organizational payees who have

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24. 42 U.S.C. § 405(j)(2)(C)(i)(I) (2006).

25. 42 U.S.C. § 405(j)(2)(C)(i)(II) (2006).

26. 42 U.S.C. § 405(j)(2)(C)(i)(III) (2006).

27. 42 U.S.C. § 405(j)(2)(C)(iii)(III) (2006) (exempting "a facility that is licensed or certified as a care facility under the law of a State or a political subdivision of a State" from the prohibition on creditor payees).

28. *Id.* § 405(j)(2)(C)(iii)(IV).

29. *See infra* Part II.

custody of the beneficiary.<sup>30</sup> SSA considers the following factors in determining whether to appoint a prospective payee:

- (a) The relationship of the person to the beneficiary;
- (b) The amount of interest that the person shows in the beneficiary;
- (c) Any legal authority the person, agency, organization or institution has to act on behalf of the beneficiary;
- (d) Whether the potential payee has custody of the beneficiary; and
- (e) Whether the potential payee is in a position to know of and look after the needs of the beneficiary.<sup>31</sup>

The Act requires SSA to scrutinize representative payee appointments by performing an individualized assessment on behalf of each beneficiary. SSA must determine whether a given appointment is suitable on the basis of “an investigation . . . which shall be conducted in advance . . . and shall, to the extent practicable, include a face-to-face interview with such person, and adequate evidence that [the appointment] is in the interest of such individual. . . .”<sup>32</sup> As part of the appointment process, SSA undertakes several precautionary measures including verification of the payee’s social security number, identity, income, and (if applicable) custody of the beneficiary.<sup>33</sup> Agency officers are also instructed to look for evidence of the beneficiary’s abuse or neglect, which must be reported to the applicable state health or welfare agency.<sup>34</sup>

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30. 20 C.F.R. § 404.2021(a) (2012) provides:

As a guide in selecting a representative payee, categories of preferred payees have been established. These preferences are flexible. Our primary concern is to select the payee who will best serve the beneficiary’s interest. The preferences are: (a) For beneficiaries 18 years old or older . . . our preference is—(1) A legal guardian, spouse (or other relative) who has custody of the beneficiary or who demonstrates strong concern for the personal welfare of the beneficiary; (2) A friend who has custody of the beneficiary or demonstrates strong concern for the personal welfare of the beneficiary; (3) A public or nonprofit agency or institution having custody of the beneficiary; (4) A private institution operated for profit and licensed under State law, which has custody of the beneficiary; and (5) Persons other than above who are qualified to carry out the responsibilities of a payee and who are able and willing to serve as a payee for a beneficiary; e.g., members of community groups or organizations who volunteer to serve as payee for a beneficiary.

31. *Id.* § 404.2020.

32. 42 U.S.C. § 405(j)(2)(A) (2006).

33. U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), GN 00502.117 (2012), available at <http://1.usa.gov/10eI7ui>.

34. U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), GN 00502.138 (2012), available at <http://1.usa.gov/13y7Mpg> (“Evidence of Neglect or Abuse Discovered During Initial Interview or Payee Investigation”).

## 2. Reporting Requirements and Monitoring Systems

The Act requires SSA to establish a reporting and monitoring system whereby all representative payees submit an accounting, at least annually, on their handling of beneficiary funds.<sup>35</sup> To this end, SSA requires representative payees to maintain and submit itemized records of all Social Security funds received and purchases made on the beneficiary's behalf by category (*e.g.*, food, shelter, clothing, and recreation).<sup>36</sup> The Act requires SSA to “establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which [representative payees] are not properly using such payments.”<sup>37</sup> SSA uses a computer program to review payee reports, and the SSA Inspector General performs targeted audits to ensure compliance.<sup>38</sup> The Act authorizes SSA to require payees who fail to submit required reports to “appear in person at a field office of the Social Security Administration . . . to receive [further] payments.”<sup>39</sup> The Social Security Protection Act of 2004, discussed in more detail below, requires SSA to perform a “periodic onsite review” of high-volume individual representative payees (administering benefits on behalf of 15 or more beneficiaries) and organizational payees (administering benefits on behalf of 50 or more beneficiaries).<sup>40</sup> In cases where SSA is presented with evidence calling into question a representative payee's conduct, agency officers must monitor and personally contact the payee to perform an investigative inquiry.<sup>41</sup>

## 3. Penalties for Misuse

The Act deters payee misuse by imposing criminal and civil penalties. Intentional misuse of Social Security funds by a representative

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35. See 42 U.S.C. § 405(j)(3)(A) (2006) (“[T]he Commissioner of Social Security shall establish a system of accountability monitoring whereby [representative payees] shall report not less often than annually with respect to the use of such payments.”).

36. 20 C.F.R. § 404.2065 (2012); see also REPRESENTATIVE PAYEES GUIDE, *supra* note 13, at 10-11 (Representative Payee Income and Expenses Worksheet).

37. 42 U.S.C. § 405(j)(3)(A) (2006).

38. See, *e.g.*, U.S. SOC. SEC. ADMIN., OFFICE OF INSPECTOR GENERAL, AUDIT REPORT NO. A-02-11-11161, THE GOLD CREST CARE CENTER—AN ORGANIZATIONAL REPRESENTATIVE PAYEE FOR THE SOCIAL SECURITY ADMINISTRATION (2012), available at <http://1.usa.gov/10R9caB>.

39. 42 U.S.C. § 405(j)(3)(E) (2006).

40. See Social Security Protection Act of 2004, Pub. L. No. 108-203, § 102, 118 Stat. 493 (2004) (codified as amended at 42 U.S.C. § 1310 (2006)); 42 U.S.C. §§ 405(j) and 1383(a)(2)(G)(i)(III) (2006).

41. U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), GN 00504.185, available at <http://1.usa.gov/14oXEOQ> (“Follow up on Questionable Representative Payees”).

payee is a felony punishable by five years' imprisonment.<sup>42</sup> Misuse is also sanctionable by civil monetary penalty and renders the violator personally liable for the misused funds.<sup>43</sup> Upon determining that a representative payee has misused Social Security benefits, SSA is required to revoke the representative payee certification "if the interest of the [beneficiary] would be served thereby," whether or not the payee's misuse was intentional.<sup>44</sup>

#### 4. Social Security Protection Act of 2004

In 2004, President Bush signed the Social Security Protection Act of 2004, legislation enacted to improve the representative payee program in several respects.<sup>45</sup> The following provisions, including some already noted above, enhance protections for the representative payee system: (1) SSA authorization to reissue benefits misused by an organizational representative payee "[i]n cases where the negligent failure of the Commissioner of Social Security to investigate or monitor a representative payee results in misuse of benefits by the representative payee";<sup>46</sup> (2) statutory mandate requiring SSA to perform a periodic onsite review of high-volume representative payees;<sup>47</sup> (3) disqualification of individuals convicted of offenses resulting in imprisonment for more than one year;<sup>48</sup> (4) fee forfeiture in cases of benefit misuse by representative payees authorized to charge the beneficiary a servicing fee;<sup>49</sup> (5) personal liability imposed on representative payees for fund misuse;<sup>50</sup> (6) SSA authorization to redirect delivery of benefit payments when a representative payee fails to provide a required accounting;<sup>51</sup> (7) statutory mandate (and \$8.5 million in legislative appropriations) requiring SSA to conduct surveys of the use of payments to

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42. See 42 U.S.C. § 408(a)(5) (2006) ("Whoever . . . having made application to receive payment under this subchapter for the use and benefit of another and having received such a payment, knowingly and willfully converts such a payment, or any part thereof, to a use other than for the use and benefit of such other person; . . . shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both.").

43. See *id.* § 1320a-8(3); *id.* § 405(j)(7) (2006).

44. *Id.* § 405(j)(1)(A) (2006).

45. See generally Erik Hansen, *A Legislative History of the Social Security Protection Act of 2004*, 68 SOC. SEC. BULL. 41 (2008).

46. 42 U.S.C. § 405(j)(5) (2006 & Supp. 2010).

47. See *id.* § 1383(a)(2)(G)(i)(III).

48. See *id.* § 405(j)(2)(B)(i)(IV).

49. See *id.* § 405(j)(4)(A)(i).

50. See *id.* § 405(j)(7).

51. See *id.* § 1007(h)(3) (2006).

representative payees;<sup>52</sup> and (8) civil monetary penalties for wrongful conversion by representative payees.<sup>53</sup>

### 5. Inherent Challenges Facing the Representative Payee Program

The current framework of statutes and regulations reflects a laudable effort to protect a vulnerable population of mentally impaired Social Security beneficiaries. Despite such sweeping protections, however, mentally disabled beneficiaries remain at risk of representative payee misuse because the system lacks a reliable mechanism for detecting financial improprieties. SSA itself has acknowledged the difficulty of detecting misconduct arising from the beneficiary's inability to monitor and assess the payee's performance.<sup>54</sup> A beneficiary who is sufficiently incapable of managing her own finances to necessitate the appointment of a representative payee is likely to be equally incapable of determining whether the representative payee has misused her benefit payments. The problem is particularly acute in nursing and group home settings, where the beneficiary receives ongoing care and may not be aware of the availability of Social Security benefits that could, but for representative payee misuse, be used to supplement that care.

In 2007, acting under its statutory mandate to conduct survey research on the representative payee system, SSA commissioned a detailed analysis of moderate-volume individual and organizational representative payees by the National Academy of Sciences.<sup>55</sup> The

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52. See 42 U.S.C. § 1310(c) (2006).

53. See 42 U.S.C. § 1320a-8(a)(3) (2006).

54. See *Ensuring the Integrity of Social Security Programs: Protecting Seniors from Representative Payee Fraud: Hearing Before the S. Spec. Comm. on Aging*, 108th Cong. 2-11 (2003) (statement of James G. Huse, Jr., SSA Inspector General). The SSA Inspector General offered the following testimony:

Our ability to deter and punish abusive representative payees hinges on referrals from SSA, documentation from SSA, and adequate legislation. A June 2002 review showed that SSA failed to refer 78 percent of representative payee abuse cases to our office for review. This represented over \$5.9 million in misused benefits.

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Our audit work indicates that your premise is correct, that many of these reports are not submitted and we also know they are not followed up on. These become workloads that are deferred for many reasons for example, resources and available time—and the net effect is that we do not know what we do not know, and that is not a good thing.

*Id.* at 3, 11.

55. See Social Security Protection Act of 2004, Pub. L. No. 108-203, § 107, 118 Stat. 493, 506 (2004) (codified as amended at 42 U.S.C. § 1310 (2006)); see also NRC REPORT, SERVING BENEFICIARIES, *supra* note 2, at 119 (surveying individual representative payees serving less than 15 beneficiaries and non-fee-for-service organizational representative payees serving less than 50 beneficiaries).

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resulting report, “*Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse*,” identified several weaknesses in the post-2004 representative payee system, including the following observations:

Relying on beneficiaries or third parties to report misuse to the Social Security Administration is not a reliable or efficient primary strategy for detecting misuse.<sup>56</sup>

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The methodology used by the Social Security Administration Inspector General does not detect misuse.<sup>57</sup>

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It is difficult to find appropriate payees for at-risk beneficiaries.<sup>58</sup>

\* \* \*

It is too easy for representative payees to learn that if they just fill out the accounting form with some plausible, but possibly inaccurate information, they will have complied with the program’s reporting requirement and that there will be no follow-up or other consequences. Essentially, the current monitoring process is an ‘empty threat’ that can easily be subverted and is an expensive administrative tool that does not yield the sort of data that are necessary to uncover misuse.<sup>59</sup>

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The Social Security Administration does not have a method for systematically evaluating and validating the material it receives on the annual accounting forms. The data on the accounting form are not retrievable for statistical analysis and therefore, empirically based policies and regulations cannot be formulated. In addition, the Social Security Administration’s legislative obligation to statistically tabulate the annual accounting form remains unfulfilled.<sup>60</sup>

Although SSA had officially reported the amount of misused funds as 0.01 percent program-wide, National Academy researchers concluded that the actual incidence of misuse is likely to be “a small percentage of

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56. *Id.* at 4.

57. *Id.*

58. *Id.* at 6.

59. *Id.* at 10.

60. NRC REPORT, *SERVING BENEFICIARIES*, *supra* note 2, at 10.

misusers in the [overall] population (about 0.2 percent), but . . . significantly higher than the SSA estimate.”<sup>61</sup>

Following the report’s publication, SSA engaged in efforts to implement the National Academy’s recommendations,<sup>62</sup> but inherent difficulties associated with identifying at-risk beneficiaries and detecting instances of benefit misuse persist, at least in part, because SSA lacks sufficient resources to perform comprehensive on-site auditing for a greater number of representative payees.<sup>63</sup> Comprehensive on-site auditing, however, is costly to administer and subject to a rule of diminishing returns, so policy reform that would simply expand the Inspector General’s audit program would likely present an inefficient solution.

## II. NURSING AND GROUP HOME REPRESENTATIVE PAYEES

This Part examines the problem of benefit misuse in cases where the beneficiary’s residential care facility, such as a nursing or group home, has been appointed as representative payee. Approximately 10 percent of beneficiaries with representative payee appointments live in a nursing or group home,<sup>64</sup> and a portion of those beneficiaries are individuals for

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61. *Id.* at 4. The study reported the following:

The [study] committee developed a new approach of identifying potential misusers and interviewing them with a two-person team that included an auditor and a social scientist with the goal of improving the ability to detect misuse in samples. In an in-depth study of 76 cases selected using this new methodology, the committee found 16 (21 percent) misusers and 17 (22 percent) cases of possible misuse but for which there was insufficient information to confirm misuse. Applying the committee’s methodology to the types of payees that the committee studied, more than 40,000 representative payees have many of the characteristics associated with misuse and warrant investigation. Among those estimated 40,000 payees, an investigation would probably find about 7,000 misusers and another 7,000 uncertain or potential misusers. The total number is still a small percentage of misusers in the population (about 0.2 percent), but it is significantly higher than the SSA estimate.

*Id.*

62. *See, e.g.*, Memorandum from Patrick P. O’Carroll, Inspector General, Soc. Sec. Admin., to Laurie Watkins, Phila. Reg’l Adm’r, Soc. Sec. Admin., Organizational Representative Payee Serving as an Individual Representative Payee in Philadelphia, Pennsylvania (Audit Report No. A-03-09-29094), at 2 (Sept. 23, 2009), *available at* <http://1.usa.gov/11O2p0o> [hereinafter Representative Payee Memorandum].

63. *See* NRC REPORT, SERVING BENEFICIARIES, *supra* note 2, at 102 (“Although failure to submit the [annual accounting] form can be an indicator of improper use or misuse, SSA told the committee that resources are inadequate for fully pursuing and investigating payees who fail to submit annual accounting forms. . .”).

64. *Id.* at 35. The beneficiaries described in this part reside in a group home, residence for senior citizen, nursing home, long-term care hospital or related institution, or facility for persons with mental retardation or physical disability. *Id.*

whom SSA has appointed the home itself or home administrator as the beneficiary's representative payee.<sup>65</sup> For purposes of this discussion, the terms residential care facility, nursing home, and group home refer to "a facility that is licensed or certified as a care facility under the law of a State or a political subdivision of a State."<sup>66</sup>

A. *Structural Conflicts of Interest in Creditor/Payee Appointments*

As a general rule, the Act prohibits creditors of the beneficiary—including, in particular, persons and organizations that provide the beneficiary "with goods or services for consideration"—from serving as the debtor/beneficiary's representative payee.<sup>67</sup> This prohibition exists to avoid creating financial conflicts of interest between the payee and beneficiary.<sup>68</sup> When a beneficiary is indebted to the representative payee, the payee's personal interest in obtaining repayment inevitably compromises her objectivity in determining how to allocate the beneficiary's Social Security funds. Suppose, for example, a creditor of the beneficiary were to serve as representative payee. Discharging the payee's fiduciary duties would require the application of Social Security payments toward the beneficiary's basic living necessities before other types of expenses, including indebtedness to creditors. The payee, however, would have a financial incentive to apply benefit payments toward the repayment of the debt before satisfying the beneficiary's basic needs. Granting a creditor/payee direct access to the beneficiary's Social Security payments enables the creditor/payee to act upon this impulse. Thus, the debtor-creditor relationship has a tendency to distort the beneficiary-payee relationship in ways that adversely affect the beneficiary's welfare and increases the likelihood of fund misuse.

Despite the financial conflicts of interest that arise when a creditor of the beneficiary serves as representative payee, the Act contains an exception allowing for the representative payee appointment of a nursing or group home, defined by statute as "a facility that is licensed or certified as a care facility under the law of a State or political subdivision of a State."<sup>69</sup> Such appointments are disfavored and only granted after "good faith efforts have been made by the local servicing office of the

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65. A sizable population of Social Security beneficiaries live in nursing or group homes and have a family member serve as representative payee. Family payees are not discussed in this Part.

66. 42 U.S.C. § 405(j)(2)(C)(iii)(III) (2006).

67. See 42 U.S.C. § 405(j)(2)(C)(i)(III) (2006).

68. Cf. 42 U.S.C. § 405(j)(2)(C)(iv)(II) (2006) (noting that the Commissioner must be satisfied that "the financial relationship of such individual to the beneficiary poses no substantial conflict of interest").

69. 42 U.S.C. § 405(j)(2)(C)(iii)(III) (2006).

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Social Security Administration to locate an alternative representative payee to whom such certification of payment would serve the best interests of [the beneficiary].”<sup>70</sup> Thus, in practice, when a beneficiary living in a nursing or group home has no family member or friend willing to serve as representative payee, SSA is authorized to appoint the care facility itself (or care facility administrator) as the beneficiary’s representative payee. Appointment of a nursing or group home rather than a family member as representative payee is an undesirable outcomes borne out of necessity, given that someone must be appointed as an intermediary between SSA and the cognitively impaired beneficiary.

The Act’s authorization of such appointments, however, creates conflicts of interest that can lead to fraud and abuse of the beneficiary’s funds. Because the facility/payee provides the beneficiary with shelter and food for consideration, it has a financial incentive to inflate the cost of providing those essential services and to compensate itself for the overcharges through the beneficiary’s Social Security payment. Unscrupulous facilities may also be tempted to charge the beneficiary for goods and services without actually providing them. This species of misuse is incredibly difficult to detect because overcharges may seem facially legitimate when reported on the annual accounting form submitted to SSA and the beneficiary is unlikely to detect the misuse. For these reasons, the National Academy of Sciences recommended that SSA “reevaluate its policies that permit creditors and administrators of facilities to serve as payees” in its 2007 report.<sup>71</sup>

*B. Examples of Misuse in the Nursing and Group Home Setting*

Audits performed by the SSA Inspector General following the National Academy’s 2007 report show that the appointment of nursing and group homes as representative payees continues to place beneficiaries at risk of misuse. In the absence of evidence of intentional misuse, however, SSA appears to tolerate noncompliance so long as the payee agrees to undertake corrective action. The agency’s willingness to leave seriously noncompliant representative payees in place highlights the need for better oversight of payees and, to a lesser extent, the difficulty of locating alternative representative payees for nursing and group home residents.

Consider, for example, the results of a 2009 audit titled, “*Individual Representative Payees Serving Multiple Beneficiaries*,” in which the SSA Inspector General uncovered several instances of a representative

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70. 42 U.S.C. § 405(j)(2)(C)(iii)(IV) (2006).

71. NRC REPORT, *SERVING BENEFICIARIES*, *supra* note 2, at 7.

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payee's failure to "manage benefits in the beneficiaries' best interests."<sup>72</sup> In that case, the subject of the audit served as an individual payee for nine beneficiaries and as an organizational payee for 18 beneficiaries living at two assisted living group homes under the payee's care in a low-income neighborhood of Philadelphia.<sup>73</sup> Of the nine beneficiaries represented by the payee in his individual capacity, eight lived in the payee-managed group homes and one lived at the payee's own residence.<sup>74</sup> During the audit period, the payee received \$312,960 in benefit payments on behalf of 27 beneficiaries.<sup>75</sup> The Inspector General found several instances in which the payee's handling of benefit funds violated statutory and regulatory requirements.

First, the audit revealed that the payee lacked supporting documentation for a substantial portion of expenditures:

[T]he representative payee was unable to provide supporting documentation to account for about \$105,000 (34 percent) in expenditures for 10 of the 27 beneficiaries in his care []. The representative payee did not have evidence of an agreement or contract that defined what the representative payee's duties were, the services rendered to the beneficiaries, or the beneficiaries' obligations.<sup>76</sup>

Despite substantial noncompliance in record keeping, the Inspector General concluded there was no direct evidence of fund misuse or neglect of the beneficiary's basic living necessities:

Although we were not able to confirm how these funds were expended without supporting documentation, nothing came to our attention that led us to believe that food, clothing, and shelter were not being provided to the beneficiaries. Furthermore, our interviews with nine beneficiaries did not disclose any concerns that led us to believe the beneficiaries' needs were not being met.<sup>77</sup>

Second, the audit revealed that the representative payee had "commingled 18 beneficiaries' payments with his operating account":

According to the representative payee, he received the beneficiaries' payments by paper check, cashed the checks at a local check-cashing facility, and deposited the funds in the organization's operating account. The representative payee did not maintain check registers or

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72. Representative Payee Memorandum, *supra* note 62, at 3.

73. *See id.* at 2.

74. *Id.*

75. *See id.*

76. *Id.* at 3.

77. *Id.* at 4.

copies of the canceled checks to account for about \$170,000 (54 percent) of the \$313,000 in payments received for the 18 beneficiaries.<sup>78</sup>

Third, the auditors uncovered a situation that, absent detection, would have resulted in the payee's misuse of funds:

While conducting our previous audit, we learned that one of the beneficiaries in the payee's care had been missing since early September 2008. During two visits in September 2008, the representative payee informed us that he did not know the beneficiary's whereabouts and failed to report this event to SSA. We informed SSA on September 24, 2008 that the beneficiary had been missing. SSA paid the October 2008 benefits to the representative payee but suspended the payments from November 2008 to February 2009 when the beneficiary was found living in another State. In February 2009, the Agency assigned a new representative payee who received the suspended benefit payments for the 4-month period. Because we immediately reported this event to SSA, it avoided the representative payee receiving an overpayment for this beneficiary from November 2008 to February 2009.<sup>79</sup>

After receiving the audit results, the representative payee submitted a written "Plan of Correction" containing the following representations:

Corrective action has been implemented to ensure Social Security benefits are properly used and accounted for. Each beneficiary who reside[s] at Quality Assisted Care and Chestnut Manor now has an established checking account that shows [the] beneficiary's name first as owner and organization as representative payee. W[h]ere [sic] their benefits will be directly deposited in their Individual account.

The monthly rental contract charges for each beneficiary include personal care services, food, clothing, transportation, and shelter will be transfer [sic] from the beneficiary checking account to the organizational business account. A minimum of eighty five dollars of the beneficiary[']s funds will be available for the beneficiary[']s personal and spending needs. Each beneficiary will sign as they received [sic] their \$85.00. Complete and accurate record[s] will be kept for each beneficiary. Social Security Administration will be notified promptly of any changes in beneficiary circumstances as required by Social Security Administration.<sup>80</sup>

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78. Representative Payee Memorandum, *supra* note 62, at 5.

79. *Id.* at 6.

80. *Id.* at app. E.

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SSA accepted the payee's written assurance of compliance and—despite discovering numerous violations—allowed the payee to continue serving the beneficiaries under his care.<sup>81</sup> SSA agreed with all seven of the auditor's precautionary recommendations, including to:

1. Refrain from placing additional beneficiaries with this representative payee until the representative payee has implemented corrective actions to ensure Social Security benefits are properly used and accounted for. If these corrective actions are not implemented within 6 months, consider placing each of the representative payee's beneficiaries with a new representative payee.

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7. Conduct follow-up reviews of the representative payee to ensure the payee is complying with SSA's requirements.<sup>82</sup>

Presumably, SSA found the payee's promise of future compliance to be credible. SSA also likely determined that identifying and appointing alternative representative payees would be more harmful or disruptive to the beneficiaries than leaving the existing payee in place. SSA's promise of continued oversight for this particular payee may have helped deter further violations.

In this case, the payee's inappropriate handling of beneficiary funds was most likely the result of carelessness rather than fraud. But even careless behavior can materially and adversely impact the beneficiary's health and welfare. Failure to maintain written documentation regarding the scope and cost of care provided by the facility enables the administrator/payee to overcompensate himself for the provision of shelter, food, and medical care. Failure to account for the whereabouts of beneficiaries residing at the administrator/payee's own facility suggests a blatant disregard for or inability to ascertain the beneficiary's needs. The administrator/payee's undocumented commingling of benefit funds creates the potential for unauthorized transfers of Social Security benefits among beneficiaries residing at the facility.

In other cases, more egregious examples of payee misconduct have been documented in which payees intentionally misused funds and engaged in calculated attempts to conceal their fraudulent behavior from SSA.<sup>83</sup> Anecdotal accounts of payee fraud and abuse, including a pro

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81. *See id.* at 9.

82. *Id.* at 9.

83. *See* NRC REPORT, SERVING BENEFICIARIES, *supra* note 2, at 70 (2007). The National Academy study recounts two examples of individuals operating group homes while serving as the resident's representative payee:

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bono case litigated by the author of this Article in a federal district court, suggest that intentional misuse may be far more prevalent than SSA's official statistics report.

### III. A "FAMILY REPRESENTATIVE" PROPOSAL

This Part will propose novel reform designed to enhance oversight in cases where a mentally disabled beneficiary's residential care facility, such as a nursing or group home, has been appointed representative payee. The proposal calls for the creation of a "family representative" program, in which a concerned relative or friend would be appointed to monitor the representative payee in a non-fiduciary capacity. This model is loosely based on the "trust protector," a relatively recent feature of trust law designed to facilitate closer oversight of the trustee's discharge of fiduciary duties.

#### A. *The Potential for (and Limitations of) Family Oversight*

The appointment of a nursing or group home administrator as representative payee is an option of last resort employed when the beneficiary lacks family or friends willing to serve. Importantly, however, the unavailability of a relative or friend willing to serve as representative payee does not necessarily indicate the absence of individuals who may be concerned for the beneficiary's care and welfare. The beneficiary may have concerned family and friends who already look after the beneficiary but for one reason or another are unwilling to assume the burdens and liabilities associated with serving as representative payee. Caring for an individual with cognitive impairments can be tremendously difficult and at times seemingly unrewarding, so even a relative or friend who initially agrees to assume

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In one case, a woman took care of three elderly beneficiaries in her home. She commingled all funds and used the money for food, clothing, cleaning supplies, medications, taking the beneficiaries out to dinner once a week, and her own car maintenance. She did not keep separate accounts, nor did she keep records of expenditures. The funds were used to keep the group, including her, afloat. The committee characterized this case as misuse.

In another situation, a group of related payees in one state ran several homes for the mentally handicapped. They refused to use direct deposit and pooled all beneficiary funds. There was no rationale for the amounts charged for room and board, which were very high. Payees in this family learned from each other how to set up these homes and they applied for payee status at different SSA offices, even though they lived close to each other. These payees met together on a regular basis to discuss fees and other policies for their group homes. These cases were characterized as misuse by the committee.

*Id.* These examples show the potential for problems when creditors of beneficiaries also serve as representative payees. *Id.*

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the burdens and liabilities of a payee appointment may resign out of frustration arising from the many challenges associated with caring for a mentally disabled individual.

Conceivably, concerned relatives and friends would find it more palatable to assist the beneficiary if their assistance did not require assuming the official responsibilities of a representative payee, including expense management, record keeping, and the filing of annual accounting reports. If given the opportunity to offer assistance through a less onerous format, free from personal liability, concerned relatives and friends with personal knowledge of the beneficiary's needs and living situation might be more willing to help supervise the representative payee. Assistance of this sort would be helpful even if it consisted merely of receiving and reviewing the representative payee's annual accounting submitted to SSA. Upon discovery of potential misuse, the relative or friend could then report evidence of suspicious activity to SSA.

To this end, this Article proposes that SSA create and implement a program through which a concerned relative or friend of the beneficiary could be designated as a "family representative" with permissive authority to oversee the representative payee's conduct. With immunity from personal liability, no obligation to file paperwork, and knowledge that participation is voluntary and gratuitous, a family representative appointment would be far less burdensome than a representative payee appointment. To enable effective oversight, SSA would have to grant the family representative access to the beneficiary's Social Security payment information and all reports filed by the representative payee. The family representative could use this data, along with personal knowledge of the beneficiary's living situation, to determine whether the representative payee has committed misuse and, upon reasonable suspicion, notify SSA of potential misconduct. An arrangement of this sort holds potential to increase detection of misuse because concerned family and friends are likely to have better access to information about the beneficiary's care and living situation than SSA. For example, if a representative payee has reported spending \$100 per month on clothing for the beneficiary for the prior 12 months, but the family representative has observed the beneficiary wearing the same clothes for the entire past year, then the family representative may have reason to question the representative payee's conduct. By contrast, without first-hand observation of the beneficiary, SSA would have no basis to uncover this type of fraud or misuse.

A family representative program enhancing payee oversight in this manner is consistent with recommendations by the National Academy. In particular, the National Academy found that, while many aspects of

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SSA's payee oversight system were ineffective, "[t]he use of a specialized team of auditors was effective in uncovering misuse of funds by representative payees."<sup>84</sup> But in practice, a large scale program of on-site, specialized audits performed by the agency would be cost prohibitive and manifestly impractical. A family representative program, however, could replicate many of the same benefits. By creating a vast network of concerned relatives and friends, SSA could establish, in effect, an army of private auditors perpetually on the lookout for representative payee misuse without incurring the expense of expert auditors hired by the agency. A family representative system would also seem to answer many of the National Academy's criticisms of the current representative payee system by: (1) reducing reliance on mentally impaired beneficiaries and random third parties to report payee misuse; (2) facilitating individualized oversight of the representative payee for each beneficiary with a family representative; (3) increasing the likelihood of discovering inaccurate but plausible entries on the annual accounting form; and (4) providing a low-cost system for evaluating information reported on the annual accounting form.<sup>85</sup>

Creation of a family representative system may also give rise to positive, spill-over effects that extend beyond the prevention of Social Security benefit misuse. By facilitating and encouraging a higher level of participation in the beneficiary's care and welfare among concerned family members and friends, the system may open productive lines of communication between the family representative and care facility administrator. Once productive lines of communication are established, family representatives may be more inclined to provide the facility administrator with constructive feedback and to express concerns about the beneficiary's overall level of care. This type of dialogue would inure to the benefit of cognitively impaired beneficiaries, who are often incapable of assessing problems and communicating with the facility about quality of care issues unrelated to their Social Security benefits.

Although a family representative system may hold potential to improve the representative payee program, there are some possible drawbacks. First, and most importantly, some relatives and friends who express concern for the beneficiary may, in fact, be predatory individuals in search of a victim, so granting them access to information about the beneficiary's Social Security benefits could create new avenues for fraud and misuse that do not currently exist. To prevent the appointment of untrustworthy family representatives, SSA should apply the same standard of scrutiny employed in the selection of individual

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84. *Id.* at 5.

85. *See supra* Part I.B.5.

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representative payees, including the statutory prohibition on creditors, individuals previously found to have misused Social Security funds, and individuals convicted of certain crimes from serving as a family representative.<sup>86</sup> SSA should also adopt selection criteria similar to those used in the appointment of representative payees.<sup>87</sup>

Second, some family representatives might express concern for the beneficiary at the outset and intend to oversee the representative payee's conduct, but once appointed, fail to do so. Other family representatives might attempt to oversee the representative payee's conduct but lack sufficient command of math, accounting, or financial management to do so competently. Because the family representative proposal contemplates immunity from suit, incompetent family representatives would not be liable to SSA or the beneficiary for failure to provide adequate oversight. In such cases, the goals of the family representative program will be significantly shortchanged. However, even in cases where the family representative fails to oversee the payee properly, benefits nevertheless obtain from the very fact of appointing a family representative. A care facility payee's knowledge that SSA has appointed a family representative, even an incompetent one, may create the appearance of oversight, thereby deterring misconduct that otherwise might have occurred.

*B. Agency Costs and the Trust Protector Model*

The family representative program proposed in this Part bears a doctrinal connection to a relatively recent development in private trust law—the settlor's appointment of a “trust protector” empowered to oversee the trustee's performance.<sup>88</sup> In the trust law context, the trust protector model tends to reduce agency costs inherent in the settlor-trustee-beneficiary relationship, therefore, providing a useful analogy to the representative payee context where SSA's lack of access to information about the Social Security beneficiary naturally limits its ability to monitor and evaluate the performance of the representative payee.

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86. See *supra* Part I.B.1.

87. See 20 C.F.R. § 404.2020 (2012); *supra* Part I.B.1.

88. The modern conception of a “trust protector” was imported from practices in foreign jurisdictions recognizing self-settled asset protection trusts. See, e.g., Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2764 (2005); UNIF. TRUST CODE § 808 cmt. (amended 2005) (“‘Trust protector,’ a term largely associated with offshore trust practice, is more recent and unusually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust.”).

A rich literature of law and economics scholarship has explored the agency costs inherent in relationships where an agent is retained to perform a service on behalf of a principal.<sup>89</sup> Because agents will instinctively act to further their own interests whenever possible, the principal must incur agency costs to ensure that, when faced with a choice of benefitting himself or the principal, the agent will undertake actions most consistent with the principal's welfare.<sup>90</sup> The principal's cost of monitoring the agent for breach of fiduciary duty is a classic example of an agency cost.<sup>91</sup>

An important subset of agency cost literature applies this theory to the trust law context, in which a trustee manages donated assets on behalf of beneficiaries subject to the settlor's *ex ante* instructions.<sup>92</sup> Viewed from the prospective of agency cost theory, the trustee can be characterized as an agent of both the settlor (whose donative purposes are served by faithful implementation of the trust) and the beneficiaries (the beneficial objects of the settlor's conveyance).<sup>93</sup> The trustee's conduct is governed by fiduciary duties, but neither the settlor nor the beneficiaries may be suitable monitors of the trustee's performance. The settlor, assuming she is still alive, is generally precluded by law from enforcing the trustee's fiduciary duties with respect to a private irrevocable trust because, once the conveyance becomes irrevocable, the settlor is said to lack a concrete stake in litigation concerning the trust; beneficiaries are the parties directly harmed by the trustee's breach, so the beneficiary's claims to litigation standing prevails over those of the settlor.<sup>94</sup> The beneficiaries, however, often lack sufficient information

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89. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

90. See *id.*

91. See *id.*

92. See Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 648 (2004) (presenting the normative claim "that the law should minimize the agency costs inherent in locating managerial authority with the trustee and the residual claim with the beneficiaries, but only to the extent that doing so is consistent with the *ex ante* instructions of the settlor"). But see Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2640 (2011) ("An agency cost theory of trusts produces not only a positively inaccurate account of modern trusts but a normatively incoherent philosophy to guide the evolution of trust law. Because the underlying assumptions of agency cost theory cannot be verified and because agency cost theory causes distortions of trust law theory and practice, utilizing agency cost analysis would provide inaccurate if not incoherent answers to open trust law questions.").

93. Cf. Sitkoff, *supra* note 92, at 624.

94. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 94(1) (2012) ("A suit against a trustee of a private trust to enjoin or redress a breach of trust or otherwise to enforce the trust may be maintained only by a beneficiary or by a co-trustee, successor trustee, or other person acting on behalf of one or more beneficiaries.").

and expertise to monitor the trustees properly.<sup>95</sup> Agency costs increase as the trustee's conduct becomes more difficult to police.

To alleviate some of the difficulties associated with fiduciary enforcement—and, by extension, to reduce agency costs inherent in the trust relationship—settlers can designate a trust protector to provide an additional layer of supervision over the trustee.<sup>96</sup> The trust protector device has become popular in modern trust practice because it enables the settlor to select someone other than the beneficiary to monitor and evaluate the trustee's conduct once the trust becomes irrevocable.<sup>97</sup> The device also allows the settlor “to repose primary decisionmaking responsibility in a single authority—the trustee—subject only to intermittent review by the protector.”<sup>98</sup> Like most features of trust law, the settlor enjoys wide latitude in defining the trust protector's powers and remedies. For example, a trust protector may be empowered to monitor and direct the trustee's conduct; where the trustee refuses to comply with such direction, the trust protector may be empowered to remove the trustee.<sup>99</sup> By selecting a trustworthy and reliable trust protector, the settlor can increase the probability that the trustee will be compelled to carry out the settlor's donative intent.<sup>100</sup>

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95. See Sterk, *supra* note 88, at 2764. Professor Sterk explains, “First, the beneficiaries themselves often lack the expertise to detect breach. Second, the beneficiaries may be dependent on the trustee, and hence they may be reluctant to take action to discipline the trustee. In combination, these factors suggest potential underdeterrence of trustee misbehavior.” *Id.* (footnotes omitted).

96. See Sitkoff, *supra* note 92, at 670-71 (predicting that trust protectors will tend to reduce agency costs); Sterk, *supra* note 88, at 2805 (arguing that trust protectors may reduce agency costs, but only when governed by “a fiduciary duty regime”).

97. Cf. Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CALIF. L. REV. 1877, 1916 (2000) (“An important recent development in trust and estate planning practice, especially in connection with offshore trusts, has been the use of trust ‘protectors.’ The protector may be one of several trustees or a beneficiary, but often is neither, and may be granted extensive authority or just a narrowly defined power to change trustees or the situs of administration. Some protectors with broader authority are granted powers to clarify or modify trust terms for purposes such as: qualifying for or accomplishing some specific tax or nontax objective(s); improving administration or otherwise promoting the settlor's general purposes or the beneficiaries' best interests; or adding or eliminating beneficiaries or rearranging their rights.”).

98. Sterk, *supra* note 88, at 2776.

99. See, e.g., UNIF. TRUST CODE § 808 (amended 2005). For statutes authorizing trust protector powers to remove a trustee, see ALASKA STAT. § 13.36.370(b)(1) (2008); S.D. CODIFIED LAWS § 55-1B-6(4) (Supp. 2010); WYO. STAT. ANN. § 4-10-710(a)(vii) (2009).

100. See, e.g., Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power*, 59 DRAKE L. REV. 67, 68 (2010) (“For practical purposes, a trust protector is generally a person selected by the settlor of a trust to represent the interests of the settlor in making decisions related to the trust that the settlor is unable to make, most often because the settlor is deceased. The idea behind the trust protector is to have a

The nascent legal framework governing the trust protector device has yet to resolve the matter of whether a trust protector should be treated as a fiduciary, subject to personal liability for failure to discharge protective responsibilities with care and loyalty.<sup>101</sup> Like a trustee, a trust protector is an agent of the settlor and beneficiaries, so the trust protector device replicates many of the agency costs inherent in the settlor-trustee-beneficiary relationship.<sup>102</sup> Imposition of fiduciary duties on the trust protector can help constrain those costs.<sup>103</sup> On the other hand, however, by holding trust protectors to a fiduciary standard, subject to personal liability, the law may deter otherwise willing individuals from serving as a trust protector. In 2000, drafters of the Uniform Trust Code took the position that trust protectors should be presumptively governed by fiduciary duties unless the trust states otherwise.<sup>104</sup> Although the Uniform Trust Code has been influential, not all states have adopted the provision imposing fiduciary duties on trust protectors. In Arizona, for example, trust protectors are presumptively not treated as fiduciaries.<sup>105</sup>

Agency cost theory would seem to apply neatly in the Social Security representative payee context because of its structural similarity to the settlor-trustee-beneficiary relationship in the trust context. Whereas some formulations of agency cost theory view the trustee as the agent of two principals (the settlor and beneficiary), the same can be said for the representative payee—the payee acts as an agent serving two principals: SSA (analogous to the settlor) and the Social Security beneficiary (analogous to the trust beneficiary). Like a trustee, the representative payee is held to a fiduciary standard, but neither SSA nor the beneficiary is a suitable monitor of the payee’s performance. SSA, which unlike private trustees has legal standing to enforce the payee’s duties, lacks access to information that would allow for proper evaluation of the payee. The beneficiary, who by virtue of the representative payee appointment has been found to suffer from a mental disability or

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‘living embodiment’ of the settlor to represent the settlor’s interests, even after the settlor is gone. The trust protector is, at its core, an agent. No title is vested in the trust protector as title is with the trustee—the protector has instead been chosen by the settlor to have some level of power to guide the trustee’s actions.”) (footnotes omitted).

101. See, e.g., *id.* at 68 (“No consensus has been drawn regarding the role of the trust protector as it relates to the duties of a fiduciary.”).

102. See Sterk, *supra* note 88, at 2773 (2005).

103. See *id.* at 2774.

104. See UNIF. TRUST CODE § 808(d) (amended 2005).

105. See ARIZ. REV. STAT. § 14-10818(D) (2009) (“[E]xcept to the extent otherwise provided by the trust instrument, a trust protector is not a trustee or fiduciary and is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector when performing or failing to perform the duties of a trust protector under the trust instrument.”).

cognitive impairment, is unlikely to be capable of managing her own financial affairs, let alone monitoring a third-party payee's more remote conduct. Thus, the Social Security representative payee system creates agency costs that manifest most acutely in the cost of monitoring the payee's performance (or, alternatively, costs arising from SSA's failure to monitor the payee's performance).

Because the settlor-trustee-beneficiary relationship and the Social Security representative payee system are structurally similar, the trust protector device may provide a useful model for reducing agency costs in the Social Security representative payee system. Under the proposal described in Part IV.A, the family representative would be the Social Security program's analogue to the trust protector, empowered to monitor the representative payee and report evidence of suspected misuse to SSA. By limiting the family representative's powers to those of monitoring and reporting, the family representative program would: (1) minimize disruption to the existing representative payee system by leaving intact SSA's primary repose of decisionmaking authority to the payee; (2) prevent family representatives themselves from engaging in fund misuse or fraud by not granting them direct access to the beneficiary's Social Security funds; and (3) obviate the need to impose fiduciary duties on the family representative (notwithstanding the current debate concerning fiduciary treatment of trust protectors) by allowing SSA to retain ultimate authority to determine whether the payee has engaged in fund misuse and, if so, what remedies should be pursued.

#### CONCLUSION

The Social Security representative payee system serves an important function by protecting beneficiaries who have cognitive impairments and therefore cannot manage their own financial affairs. For beneficiaries living in a nursing or group home setting, however, the appointment of the home or home administrator as representative payee creates conflicts of interest that adversely affect the beneficiary. Benefit misuse by representative payees in this setting tends to go undetected because SSA cannot audit every payee and the cognitively compromised beneficiary is often incapable of detecting the financial impropriety. To improve oversight of nursing and group home representative payees, Congress should create a "family representative" program wherein a concerned relative or friend volunteers to serve as a private watchdog without assuming the burdens and liabilities of a representative payee appointment. The family representative would be a person familiar with the beneficiary's needs and circumstances and would receive a copy of all reports submitted by the representative payee to SSA. The family

representative's access to information regarding the payee's performance would facilitate greater detection and reporting of benefit misuse to SSA than under the current system.

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**APPENDIX**

The following proposed statute, drafted by the author of this Article, would implement the family representative program described in Part III.

\_\_\_\_ Congress

\_\_\_\_ Session

To amend the Social Security Act to provide additional safeguards for Social Security and Supplemental Security Income beneficiaries by creating a “family representative” program to provide additional supervision for certain representative payees.

IN THE HOUSE OF REPRESENTATIVES

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A BILL

To amend the Social Security Act to provide additional safeguards for Social Security Old-Age, Survivors, and Disability Insurance and Supplemental Security Income beneficiaries by creating a “family representative” program to provide additional supervision for certain representative payees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS AND PURPOSE.

(a) Congress makes the following findings:

- (1) The Social Security Act provides for retirement, disability, and supplemental income for 56 million recipients of Social Security Old-Age, Survivors, and Disability Insurance (OASDI) and 7.9 million recipients of Supplemental Security Income (SSI).
- (2) A sizable minority of those beneficiaries receive payments through a representative payee because they are unable to manage their own financial affairs. Such beneficiaries are

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among the most vulnerable members of society because they often suffer from cognitive impairment or disability.

- (3) For beneficiaries who live in a residential care facility, such as a nursing or group home, and who lack a family member or friend willing to serve as representative payee, the residential care facility (or its administrator) is often appointed as representative payee.
- (4) When a residential care facility or its administrator serves as representative payee, a conflict of interest arises because the facility has a financial incentive to compensate, or in many cases, overcompensate, itself for services provided to the beneficiary by using funds drawn directly from the beneficiary's Social Security payment.
- (5) This conflict of interest has led to numerous instances of benefit misuse by representative payees, including theft of benefit payments and overcompensation for services rendered.
- (6) Representative payees are subject to reporting requirements and oversight by the Social Security Administration, but current protections are insufficient to detect and prevent representative payee benefit misuse.
- (7) Beneficiaries who suffer from cognitive impairment or disability are typically unable to detect or report misconduct by the representative payee, thereby creating a circumstance that precludes the Commissioner of Social Security from acquiring adequate information to enforce existing statutory prohibitions on benefit misuse.
- (8) In a significant number of cases, the beneficiary's family and friends are unwilling to accept the burdens and liabilities of a representative payee appointment, but otherwise care and tend to the beneficiary's needs. Such relatives or friends of the beneficiary may be willing to provide a less onerous form of assistance than appointment as representative payee: supervision of the representative payee's performance.
- (9) A beneficiary's family member or other concerned individual, if properly designated by the Commissioner of Social Security as a "family representative," would have superior access to

information regarding the beneficiary's care and, therefore, would be more likely to detect and report benefit misuse by the representative payee.

- (10) Oversight of the representative payee by a family representative may deter benefit misuse, place the beneficiary at greater ease in knowing that a trusted individual is monitoring the payee, and open new lines of communication between the residential care facility and the beneficiary's family to enable greater discussion and evaluation of the beneficiary's needs.

(b) **STATEMENT OF PURPOSE**—It is the purpose of this Act to prevent the misuse of funds by representative payees by establishing a family representative program wherein a family member or other individual concerned about the welfare of a Social Security beneficiary may be granted sufficient authority and information to supervise the performance of the beneficiary's representative payee, particularly in cases where the beneficiary's residential care facility, such as a nursing or group home, serves as the representative payee.

## SECTION 2. ESTABLISHMENT OF FAMILY REPRESENTATIVE PROGRAM.

(a) **IN GENERAL**—If the Commissioner of Social Security determines that the interest of any individual receiving benefits under this title would be served thereby, designation of a family relative or other individual concerned for the individual's welfare (hereinafter in this subsection referred to as the individual's "family representative") may be made to provide additional supervision of the individual's representative payee, subject to the selection requirements, powers, and limitations set forth in paragraphs (1), (2), and (3) of this subsection.

- (1) **APPOINTMENT AND SELECTION OF A FAMILY REPRESENTATIVE**—Selection and appointment of a family representative shall be based on the same criteria for selection and appointment of the individual's representative payee under 42 U.S.C. § 405(j)(2)(A).

(A) The Commissioner of Social Security shall, before appointing a family representative, verify that the prospective family representative is personally known to and familiar with the individual.

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- (B) Where a beneficiary's residential care facility, as defined in 42 U.S.C. § 405(j)(2)(C)(iii)(III), or the residential care facility's administrator, has been appointed representative payee, the Commissioner of Social Security shall undertake reasonable efforts to identify a concerned individual willing to serve as family representative.
- (2) **POWERS OF THE FAMILY REPRESENTATIVE**—The family representative shall have the following powers:
- (A) entitlement to receive and review all accountings submitted by the representative payee under 20 C.F.R. § 404.2065; and
- (B) standing to request an investigation by the Commissioner of Social Security upon discovery of suspected benefit misuse by the representative payee.
- (3) **LIMITATION OF FAMILY REPRESENTATIVE'S LIABILITY**—The family representative shall owe no fiduciary obligation to the beneficiary and shall not be liable for failure to detect or report misuse of funds by the representative payee.
- (4) **REGULATIONS**—The Commissioner shall promulgate regulations to enact the family representative program and establish criteria for the selection of family representatives according to subparts (1)-(3).