

NATIONAL DISABILITY FORUM

HOW TO DEFINE THE ROLE OF A SUPPORTER FOR INDIVIDUALS WHO DIRECT THE MANAGEMENT OF THEIR BENEFITS

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I am an attorney in Arlington, Virginia. During my 38 years as an attorney I have managed the trust department of a bank, and have spent the last 23 years devoting my practice to “special needs planning”. I assist individuals with a disability and their families in planning for the future, including advising on benefits issues, and preparing Wills, Special Needs Trusts, and Powers of Attorney. We also work with families who are pursuing guardianship where necessary. Last, I serve as Trustee, Guardian, Conservator, Agent under a Power of Attorney or Representative Payee for approximately 55-60 individuals at any given time. So I have dealt with the Representative Payee system frequently for the last 23 years.

In addition, I was a member of the National Academies Committee that produced the 2016 SSA commissioned study “Informing Social Security’s Process for Capability Determination”. However, my statement is my individual opinion and I am not speaking for the Committee.

I have long been concerned about the appointment, performance and monitoring of representative payees. The first challenge is determining if a payee is necessary. This determination is sometimes made when it is not necessary, but that is not my experience, nor is that supported by any studies found. The determination is frequently not done when it is necessary - and that was supported by several studies reviewed by the Committee. My personal experience is that there are many benefits recipients who require a representative payee but have not had one appointed, and do not themselves recognize the need. This is particularly true among individuals with mental illness who so often have no supporters to assist them with financial management.

We spent a great deal of time in the Committee discussing the capacity determination process. Screening is done by the Field Office but with very vague direction as to when a capability determination should be recommended, and only 67% of SSA disability applications are made with any direct interaction between the beneficiary and an SSA representative. The DDS office gathers medical evidence but it seems that most of that is based on the evaluating physician’s checking of a box recommending appointment of a payee. We all know how pressured physicians are to complete masses of paperwork and it is understandable that little thought is given to this recommendation. When I am petitioning for appointment of a Guardian in Virginia I must submit an evaluation from a physician that emphasizes functioning as opposed to

diagnosis. I must harass physicians on a daily basis to get them to fill these out with more than 5-10 words. I have also had many physicians state their concern that their patient wants them to support the need for disability benefits but is adamantly opposed to the physician recommending appointment of a payee. Therefore the physician expresses concern that doing so will be detrimental to the therapeutic relationship between physician and patient. My experience has been that we cannot uniformly rely on the evaluation of a physician on this topic.

The Committee also discussed the concepts of financial competence versus financial performance. "Competence" is the ability to handle financial responsibilities in a controlled setting and that is what the Committee concluded is all that is evaluated by the physician. "Performance" is handling financial responsibilities in the context of daily life, including environmental factors and relevant supports or barriers to performance in the real world. So someone who does well in a controlled setting may not be able to perform in real life and vice versa. Therefore it would seem that an assessment by lay people - family, friends, community supporters, and SSA staff observations would be more helpful to determine financial performance capability.

The second challenge is the choice of a payee. When a Guardian or Conservator has been appointed for the individual it is annoying to have to wait for SSA to decide if they will honor a court order, but they usually do and this seems to be the correct result. If there is no court order, then it seems to be the luck of the draw as to whether an appropriate person is appointed. While parent or spouse might seem to be the logical choice, my experience is there is not enough consideration of the appropriate person. Parents frequently take advantage of their child's resources, whether due to their own poverty, or substance abuse issues; spouses may have disability issues of their own; and the person with whom the benefits recipient resides are certainly not always appropriate choices. I have a case right now in which the beneficiary's "fiancee" was appointed representative payee despite the objections of his uncle who was appointed in every financial role by the beneficiary's now deceased father. We have substantial evidence that the "fiancee" is financially exploiting the beneficiary and provided it to SSA, but it fell on deaf ears.

Last, we must consider the concept of "supported decision making". This recognizes that all of us need assistance in decision making of various kinds, and some of us just need a little more than others. In my experience most Guardians, Conservators and Representative Payees work very hard to take a supporting, rather than paternalistic, approach to the role. While in principle I endorse the concept of supported decision making, I admit that my many years of serving in these roles, and counseling families who have difficulties with exploitation of their loved ones, lead me to emphasize the need for others to make decisions rather than be left to simply "support" in no formal/legal role.