

Legal Practice Tip: Keeping Financial Resources with the Family

by Emily Herder, Esq.

If a child has a disability or if a child's parent is deceased, the child may be receiving federal Supplemental Security Income (SSI) or Social Security death benefits. When a minor is eligible for benefits, the Social Security Administration (SSA) makes the payments directly to the adult or agency designated as the child's "representative payee." This means that a parent can lose the SSI or social security payments if a child enters DCF custody. Losing these payments can have catastrophic consequences for families who need the money to maintain the household so the child can return. How can you advocate for your parent to continue to be the child's representative-payee?



1. As soon as this issue presents itself, find out whether DCF will agree to wait to file an application to be designated as the child's rep-payee. Under DCF policy, social workers are supposed to notify the parent in writing of their intent to change the rep-payee designee. See DCF Policy # 84-007. Attorneys should then start by negotiating with DCF. In doing so, you can point to the regulatory framework of the SSA. The Social Security Administration states that its primary concern is "to select the payee who will be serve the beneficiary's interest." 20 C.F.R. § 404.2021. You can argue that the child's interests are tied to going home. DCF's own policies acknowledge that the "SSA may prefer to designate the parent(s)/guardian as Representative Payee if she/he demonstrates a strong interest in the child's well-being, visits regularly, pays a child support fee and/or reunification is planned within one year." The SSA also sets out a rep-payee designation preference. Highest on the list of preferences is the child's parent, regardless of whether the parent has custody. "An authorized social agency or custodial institution" is last on the SSA's list of preferences. 20 C.F.R. § 404.2021(c).
2. Lawyers can also point to DCF's own regulations. Arguments might be available that DCF is abusing its discretion by filing to be the child's rep-payee in the circumstances of your case. While DCF's regulations give the social workers discretion in deciding whether to seek SSI rep-payee status on behalf of a child, that discretion is not unfettered. 110 C.M.R. 4.09 sets out that the decision making should be individualized, on a case-by-case basis, factoring in the family's circumstances. Specifically, the regulations suggest some flexibility in how DCF might divvy up the payments with the parents. DCF may allow a non-custodial parent to remain rep-payee and either: (a) have that parent pay DCF 75% of the benefits they receive; or (b) DCF may take 0% of the benefits if the parent's income is at or below 150% of the federal poverty level.
3. If more than one child in the family is receiving payments, you can also negotiate a different plan for each child. For example, under 110 C.M.R. 4.01(1)(a), DCF could allow a parent to continue receiving benefits for one of the children and DCF would apply to be rep-payee for another. Or, if a child is entitled to benefits for a disability and survivor benefits, DCF could agree to seek rep-payee status for only one of those payments while the other remains with the family. You cannot seek review of DCF's decisions around becoming rep-payee for a child in its custody through a fair hearing. But, you can file a grievance under 110 CMR 10.36 et. seq. For more information on this process, please see Chapter 6 of the MCLE Child Welfare Manual.
4. If DCF plans to file for rep-payee status over your client's objection, you can consider seeking a preliminary injunction in court. This must be done promptly as once the paperwork is filed with the SSA, there is no way of knowing when the rep-payee will officially change or how long it will take to restore the parent as the designated rep-payee. If you are filing this type of a motion, ask DCF to agree to wait to file for rep-payee status until the motion is decided or you can seek an emergency order to prohibit DCF from filing the paperwork until the court has ruled on the motion.

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5. The court's authority to order DCF to allow a parent to remain their designated rep-payee could be framed as an argument that the social worker has abused their discretion (where you can cite to their obligations under 110 CMR 4.09. Or, you can frame the argument to show that DCF has breached its duty to facilitate reunification. In such cases where DCF has failed to make reasonable efforts, it is arguably within the court's equitable authority to enter remedial orders, including an order providing that the parent will stay as rep-payee. See *Care and Protection of Walt*, 478 Mass. 212, 228-230 (2017).

Permitting the family to retain rep-payee status is a critical "effort" that DCF can make to restore the family. Taking steps to address this issue early in the case can be an important part of our advocacy for children and parents alike. It should be noted that the parent rep-payee has a fiduciary duty to the child and must spend the money in a way that is in the child's best interests. Parents should carefully document how the money is being spent and ensure the money is used for the benefit of the child—such as going towards the child's portion of expenses necessary to maintain the household or on things that permit visitation. It should also be noted that when DCF receives payments as the rep-payee for a child in its custody, it uses the bulk of that money to reimburse itself for the cost of foster care. The money does not typically go to benefit the child directly. For more information on social security benefits for children in foster care and how the money is spent, click here to read an in depth federal [Congressional Research](#) study. For more information about obligations of a rep-payee, please see this SSA guide: <https://www.ssa.gov/pubs/EN-05-10076.pdf>.

Where's Walt?



Beginning this month, the CAFL newsletter will highlight efforts by attorneys to use Care and Protection of Walt in their advocacy for their clients. In Walt, the SJC reiterated DCF's statutory obligation to make reasonable efforts to prevent a child's removal and to reunify the family when removal is necessary. The Walt court held that if DCF fails to make reasonable efforts to avoid removal, the court has *equitable authority* to order DCF to provide visitation and other services needed to remediate the harm caused to the family.

In a recent case, the mother's attorney advocated for her client to remain the representative payee for her disabled child. The attorney argued that DCF's obligation to make reasonable efforts included allowing the mother to use the SSI payments to maintain the household to which her child would return home. Without this income, the parent was at risk of losing her housing, which would make reunification more difficult. After filing her motion, and then a petition for interlocutory relief in the Appeals Court, DCF agreed to let the mother continue as rep payee.

Have you successfully used Care and Protection of Walt in your cases to make an argument or seek relief on behalf of your client? The CAFL Training Unit wants to hear about it! Please contact Katharine Klubock at Kklubock@publiccounsel.net and tell us your Walt stories.

Also, check out our Walt and model motions pages on MyGideon!
