

Swatting Gnats, Ignoring Elephants¹

By Hon. Kenneth L. Tacoma

A cyber-riot nearly erupted on probate@groups.michbar.org this spring when it was reported that a task force looking at problems of fiduciary infidelity in Power of Attorney (POA) situations was suggesting that electronic registration of POAs, or other similar policing steps, be required by state law.² It certainly would not be wise for me to opine one way or another on the merits of the proposals, and it is not necessary for me to do so to make the point that there must be an extant perception that abuse occurs at some level in POA cases, or there would not be a task force looking into solutions.

In a similar vein, in 2003 the Michigan Office of the Auditor General released a report of its performance audit of selected probate court conservatorship cases, creating quite a stir in the media and the impression of widespread abuse in conservatorship cases supervised in the Michigan probate courts. In 2005, the State Court Administrative Office released its final report in response to the OAG report, and that report tracked the conclusion of an interim report that had preceded it. That conclusion, the reader will recall, was that with certain not-to-be-minimized exceptions, Michigan's probate courts complied with statutory requirements for monitoring conservatorship cases.³ That brought to a close the "scandal" uncovered by the Auditor General, hyped by the media, and ridden into the ground by court detractors of various stripes.

I reflected on these concerns in light of several cases presented in the court over which I presided in the past several months. The most recent involved an older gentleman who had petitioned to establish guardianship and conservatorship over his even-older brother. Evidence showed that the subject of the petitions had been plucked clean by a nephew—a low-level criminal who had dispossessed the now impoverished ward of most of his property and wasted the same.

The thing that struck me, however, was how the nephew had obtained, and continued to retain, the old gentleman's income source as his Social Security system representative payee.

It was not the first case I have seen where the representative payee system was used to support the aberrant lifestyles of our culture's enterprising youth. A few months ago, a case was started by one of our local nursing homes on behalf of a resident when the institution had gone unpaid for her care for several months. It turned out that the elderly lady's grandson had been named her representative payee long ago, moved into grandma's house with some fellow drug-abusing hangers-on, and used her social security income to support the bunch. When her health turned for the worse, grandma was sent to the hospital and then to the nursing home, but the Social Security money stayed with her representative payee grandson (and his partying pals) until the home was ready to roll grandma out into the street.

The final case, which I will note, involved a high functioning mentally ill fellow for whom, in regular proceedings, a sister had been appointed conservator. The sister got her brother's affairs in order and stabilized his financial situation, doing a very good job under court supervision for a few years. At a review hearing, which she requested, it was disclosed that her brother had met a woman, and he and his new girlfriend had gone to the Social Security office where the girlfriend had been appointed representative payee for the ward, and off they went to Florida. The annoying part of this was that the conservator-sister had received no prior notice of the change, and after finding out what had happened, had been given the bums' rush by the Social Security Administration with the assertion that they do not honor state court fiduciary appointments in the face of a representative payee designation

by the ward. Whether the fellow and his girlfriend will live happily ever after, or whether he will end up homeless in Florida while the girlfriend goes to Disney World, has yet to be seen, but the window is open if you want to place your bets.

I have every reason to believe that these are not isolated incidents. If this kind of activity is as common as I believe, then a lot of effort is put into investigating and exposing the wrong areas of fiduciary misconduct. There is really no way to know how many Michigan citizens have prepared and executed Powers of Attorney, but I'd wager the number of active situations involving the agency so granted is quite low. However, we do have data sources involving guardianships and conservatorships. In 2003, Michigan had about 33,000 conservatorship cases, when adult and minor ward cases are combined. Add guardianships of developmentally disabled persons where the fiduciary would be responsible for the ward's financial affairs for another 19,000 cases, and we are up to about 52,000 cases supervised in the probate court system.⁴

On the other hand, according to Social Security Administration (SSA) statistics, in 2003 about 1,700,000 Michigan citizens received some form of OASDI⁵ benefits. Nationally, about 10.5 percent of these beneficiaries have representative payees; assuming this ratio holds in Michigan, this means about 178,500 people. Add to this the recipients of SSI⁶ (about 217,000 souls in Michigan) of which 99.3 percent of the minors⁷ and 33 percent of adults have representative payees, and we are talking about at least 71,000 more. Conservatively, then, over 250,000 Michigan citizens have their social security benefits paid to these representative payees, and SSA reports over 6.6 million representative payee cases nationwide.⁸

The logical questions in this context: How are representative payees chosen? And, how are they supervised? The realistic answers: haphazardly and not at all. SSA publishes pamphlets (and other stuff is available online) to guide representative payees. Basically, you become a repre-

sentative payee by asking and having the benefit recipient agree to have you appointed. Analytically this is a little curious, since by definition, if a person needs a representative payee, he or she is at some level unable to exercise appropriate judgment, but never mind. As for reporting, apparently once a year the SSA requests that Form SSA-623 (or SSA-6230 for payees for minors) be filed. I won't spoil the suspense by attaching this form; if you've read this far, you really must look up this fraud-buster on your own.

The cases first noted motivated the intrepid Probate Register for Wexford County to pay a visit to the local Social Security office to see how things worked in the real world. She reported a very nice visit with the SSA office representative and the following general conclusions:

- SSA has a meeting with representative payees at the time of appointment.
- SSA tries to appoint a family member as representative payee.
- The wishes of the recipient generally trump other considerations.
- They are basically happy to appoint anyone who is willing to step forward.
- The representative payee is informed of his or her duties at the time of appointment and instructed on the proper way to set up accounts, but there is no confirmation to see if the instructions are followed.
- The only supervision is to ask the ward if everything is okay. The SSA has no procedure to see if the money is actually being spent on the ward other than the annual payee self-report.
- They concede that a lot of fraud and misappropriation may be going on.

I did find one piece of practical information in the course of this review that I now routinely pass on to Court-appointed fiduciaries. When faced with the kinds of cases first noted, the Court-appointed fiduciary should contact the Office of the

Inspector General, Fraud Hotline, which is set up for receiving reports of Social Security fraud of all kinds. Although it may not bring results, at least the fiduciary has put SSA on notice of the problem.⁹

I'm not holding my breath for a press exposé on the above, as there is no glory for an investigative reporter nor headlines for a paper in dealing with problems without an easy, apparent villain. Given an issue where the problem is structural, nuanced¹⁰, and without simple sound-bite solutions, the reporters will flee. Frankly, so long as the human condition persists, no number of ineffectual bureaucrats will be able to police a system as big as the Social Security program in the United States. A little perspective, however, would be nice when the reporters do create their stories and then hype them for the brief public attention they gain.

Notes

1. This is an update and revision of an article originally published in *Inter-Com*, the Probate Court Judicial Section's Journal in March 2005.

2. See *Probate Digest*, Vol 23, Issue 34 (March 31, 2006) and the postings a few days before and after that date.

3. "In sum, the statewide review revealed that the vast majority of probate courts were either following the Estates and Protected Individuals Code (EPIC), and had appropriate procedures, or had minor issues that were quickly corrected following SCAO's review." "Final Report on Investigative Follow-up Review," *Statewide Phase to the Michigan Office of the Auditor General Performance Audit of Selected Probate Court Conservatorship Cases*, (January 2005), 2.

4. Data taken from SCAO 2003 Annual Report, Probate Court Statistical Supplement.

5. Old-Age (retirement), Survivors, and Disability Insurance—what most people think of as Social Security with the accumulated entitlements added over the years.

6. Supplemental Security Income - the cash assistance program for low-income, aged, blind, or disabled persons administered by the Social Security Administration.

7. I won't parse this beyond noting the observation of a jaded local protective services worker who refers to the efforts of his clientele in this area as the Social Security lottery in which the jackpot is to have a child designated

disabled, making the him or her a valuable asset for the custodial parent.

8. Social Security statistical information is available at www.ssa.gov on the internet and is voluminous. The specific information I cite is derived from Michigan Congressional Statistics, (December 2003), Tables 1 and 2; SSI Annual Statistical Report, Table 27; and Annual Statistical Supplement, (2003), Table 5.L1.

9. "Your information is important, however, without sufficient facts it is unlikely that we will be able to provide assistance." SSA, OIG website, Representative Payee Misuse. At least they're honest that nothing is likely to be done.

10. A word (actually newly-minted-to-make-us-sound-sophisticated word, as historically "nuance" was allowed to exist as a noun) with which the media chatterers are currently infatuated—rapidly moving up on this curmudgeon's Dumbwords list.



Hon. Kenneth L. Tacoma has served as Judge of Probate for Wexford County since 1994 and also as Presiding Judge of the Family Division, 28th Circuit Court since 1998. A graduate of the Indiana University School of Law - Bloomington, he has also been in the private practice of law in Cadillac, served as Domestic Relations Referee for the 28th Circuit, and served as Wexford County Prosecuting Attorney prior to assuming judicial office. Judge Tacoma is a member of the Michigan Probate Judges Association (executive board) and the Top O' Michigan Judges Association (president). He also serves on the Committee on Professional and Judicial Ethics of the State Bar of Michigan and on the Michigan Court Forms Committee (Probate and Family Division Section). He has served as a presenter at training programs throughout Michigan both when a member of the Prosecuting Attorney's Association of Michigan and currently for the Michigan Judicial Institute.