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COMMENTS

PENNY WISE, POUND FOOLISH: CHILD WELFARE AGENCIES AS SOCIAL SECURITY REPRESENTATIVE PAYEES FOR FOSTER CHILDREN

Funding for state foster-care systems comes from a patchwork of sources. States provide funding to their own foster-care systems, but federal funding is also available. Title IV-E of the Social Security Act provides several billion dollars of federal funding to reimburse states for a portion of expenses they incur in caring for children who are removed because of maltreatment from certain low-income families.¹ A particularly lucrative method of foster-care funding comes from the foster children themselves, when child welfare agencies become representative payees for foster children receiving Social Security benefits and then apply those benefits to the cost of foster care. By using the Social Security benefits of foster children, agencies can receive additional federal funding and reduce the amount of state expenditures. This fiscal benefit to the state may be a significant detriment to foster children, for it strips them of assets that could be used to meet their individual needs or plan for their eventual emancipation. The U.S. Supreme Court held in *Guardianship Estate of Keffeler v. Wash. State Department of Social and Health Services*, however, that agencies' use of foster children's benefits does not

¹ Title IV-E funds are available only to children whose families would have qualified for Aid to Families with Dependent Children (AFDC) – a program that has not existed since the 1996 welfare reforms. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ASPE ISSUE BRIEF, FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD (August 2005), available at <http://aspe.hhs.gov/hsp/05/fc-financing-ib/ib.pdf>.

violate the anti-attachment provision of the Social Security Act, which protects Social Security benefits from creditors.²

Other commentators have analyzed the Supreme Court's decision in *Keffeler* and potential constitutional challenges and legislative solutions to agencies' use of foster children's benefits.³ This Comment attempts not to duplicate those analyses but rather attempts to give an overview of the problem and discuss new avenues for challenges that may have been opened by a recent North Carolina case. In Part I of this Comment, I examine the general statutory scheme covering children's receipt of Social Security benefits. In Part II, I discuss the Supreme Court's *Keffeler* decision and a recent North Carolina case challenging an agency's use of one child's benefits. In Part III, I consider what options may be available to child advocates who would like to release foster children's benefits.

I. SOCIAL SECURITY BENEFITS AND MINORS

In general, the Social Security Administration ("SSA") requires representative payees for all Social Security payments to minors.⁴ A representative payee receives benefits on behalf of the beneficiary, then uses the funds to pay for expenses relating to the beneficiary's care. The exceptions to the representative payee requirement include minors who receive disability benefits on their own work records, minors who live alone and support themselves, minors in the military, and minors who file their first application for benefits within seven months of their 18th birthday.⁵ Most foster children receiving benefits

² 537 U.S. 371 (2003).

³ See Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797 (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 (2003); Tobias J. Kammer, Note, *Keffeler v. Department of Social & Health Services: How the Supreme Court of Washington Mistook Caring for Children as Robbing Them Blind*, 77 WASH. L. REV. 877 (2002). The last two articles were written before the Supreme Court issued its decision in *Keffeler*.

⁴ 20 C.F.R. §404.2010.

⁵ A minor may receive Social Security benefits directly if he or she is:

- (1) Receiving disability insurance benefits on his or her own Social Security earnings record; or
- (2) Serving in the military services; or
- (3) Living alone and supporting himself or herself; or
- (4) A parent and files for himself or herself and/or his or her child and he or she has experience in handling his or her own finances; or
- (5) Capable of using the benefits to provide for his or her current needs and no qualified payee is available; or
- (6) Within 7 months of attaining age 18 and is initially filing an application for benefits.

will be among the vast majority of minor beneficiaries who require representative payees. However, SSA does not require that the representative payee for foster children be the agency that has custody of them. Even when a child is in foster care, SSA regulations apparently permit a foster child to have a representative payee other than the foster care agency.

The SSA has established regulations on its preferences for representative payees. For minors receiving Social Security payments, SSA's order of preference is:

- (1) A natural or adoptive parent who has custody of the beneficiary, or a guardian;
- (2) A natural or adoptive parent who does not have custody of the beneficiary, but is contributing toward the beneficiary's support and is demonstrating strong concern for the beneficiary's well being;
- (3) A natural or adoptive parent who does not have custody of the beneficiary and is not contributing toward his or her support but is demonstrating strong concern for the beneficiary's well being;
- (4) A relative or stepparent who has custody of the beneficiary;
- (5) A relative who does not have custody of the beneficiary but is contributing toward the beneficiary's support and is demonstrating concern for the beneficiary's well being;
- (6) A relative or close friend who does not have custody of the beneficiary but is demonstrating concern for the beneficiary's well being; and
- (7) An authorized social agency or custodial institution.⁶

SSA will consider several factors in selecting a payee:

- (a) The relationship of the person to the beneficiary;
- (b) The amount of interest that the person shows in the beneficiary;

⁶ 20 C.F.R. § 404.2021(c).

(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.⁷

The preference categories, as the regulations note, “are flexible,” and SSA’s “primary concern is to select the payee who will best serve the beneficiary’s interest.”⁸

In practice, child welfare agencies are almost always appointed representative payees for foster children who are receiving benefits.⁹ At the time the Supreme Court reviewed the state of Washington’s use of foster children’s benefits, for instance, the state agency was representative payee for 1,411 of the 1,480 foster children receiving Social Security funds; similar statistics are found in most states.¹⁰ Yet a child welfare agency falls into category (7) of 20 C.F.R. § 404.2021(c), which is supposed to be the last preference for a representative payee. All other relatives and close friends of the child beneficiary are accorded greater preference by the federal regulations. Nonrelatives known to the child—a family friend or godparent, for instance—would also fall into category (6) and apparently be entitled to preference over the child welfare agency.¹¹ The orders of preference for adult beneficiaries explicitly permit community groups, nonprofit agencies, or any other persons “qualified to carry out the responsibilities of a payee” to serve as representative payees, but the regulations for child beneficiaries do not contemplate such payees.¹²

⁷ 20 C.F.R. § 404.2020.

⁸ 20 C.F.R. § 404.2021.

⁹ See *infra* Part III for more discussion of the representative payee application process.

¹⁰ Hatcher, *supra* note 3 at 1831–32, n. 207 and accompanying text

¹¹ In order to apply to be a representative payee, any of these apparently more preferred individuals would have to complete SSA Form TOE-250, which asks for information about the would-be payee, about the payee’s relationship with the beneficiary, and about how the payee will know the beneficiary’s needs. Applicants must complete this application in a face-to-face interview in an SSA office. A face-to-face interview may be excused for organizational payees that have an established relationship with the local SSA office, or for individual payees for whom a face-to-face interview would be a burden. Social Security Administration, *Guide for Organizational Payees: How to Apply to be a Representative Payee*, <http://www.ssa.gov/payee/NewGuide/howapply.htm> (last visited April 9, 2008).

¹² 20 C.F.R. § 404.2021. Indeed, for disabled adults with drug or alcohol addictions, the first preference for representative payee is a community-based nonprofit agency. *Id.*

The Supreme Court noted in *Keffeler* that if a foster child has a non-agency representative payee, the state child welfare agency cannot compel that payee to reimburse the state for foster-care expenses.¹³ The representative payee then would have discretion to use the funds in any manner that is in the best interest of the beneficiary. As the Washington Supreme Court wrote: "Simply put, if DSHS is appointed representative payee for a foster child it will confiscate the child's SSI money to benefit the state. However, if anyone else is appointed, the state will bear the cost of foster care, and the child's SSI will be available to benefit the child in addition to the state-funded foster care program."¹⁴

If the child has a non-agency representative payee, the funds could be used for the child's special needs or desires not met by the agency—a summer camp, extracurricular activities, private tutoring, etc.—or saved so that the child will have resources in the future. In the case of an older teen, the saved resources can be especially important when the teen ages out of foster care. Recipients of SSI benefits are subject to an asset limit of \$2,000. Once their assets reach \$2,000, recipients become ineligible for future SSI benefits. However, as Professor Hatcher notes,¹⁵ several types of assets are excluded from this limit: a home,¹⁶ one car,¹⁷ "household goods" or "personal effects,"¹⁸ funds placed in "an approved plan to achieve self-support,"¹⁹ or funds placed in a "special needs trust."²⁰ Prof. Hatcher writes: "Any one of these options could be utilized to help foster children plan for their transition out of foster care while avoiding the \$2000 resource limit."²¹ Further, SSI recipients who are students under age twenty-two may earn up to \$6,100 yearly without it being counted as "income" for SSI purposes.²² The asset limit does not

¹³ *Keffeler*, 537 U.S. at 389. However, this is not true in all states; in Minnesota, at least, a statute requires courts to order "the parent or custodian of the child . . . to use the total income and resources attributable to the child . . . to reimburse the county." MINN. STAT. § 260C.331(b)(2006). The statute appears to apply even when the parent or custodian remains the representative payee while the child is in foster care. The Supreme Court did not mention this statute in *Keffeler*.

¹⁴ *Guardianship Estate of Keffeler v. Washington State Dep't of Soc. and Health Servs.*, 32 P.3d 267, 273 (Wash. 2001).

¹⁵ Hatcher, *supra* note 3.

¹⁶ 20 C.F.R. § 416.1212 (2005).

¹⁷ 20 C.F.R. § 416.1218 (2005).

¹⁸ 20 C.F.R. § 416.1216 (2005).

¹⁹ 20 C.F.R. §§ 416.1225, 416.1226 (2005).

²⁰ 42 U.S.C. § 1396p(d)(4)(A).

²¹ Hatcher, *supra* note 3, at 1821.

²² Social Security Administration, *Understanding Supplemental Security Income: Spotlight on Student Earned Income Exclusion*, <http://www.socialsecurity.gov/ssi/spotlights/spot-student-earned-income.htm> (last visited July 31, 2007). Other special rules govern students receiving SSI, including a regulation that allows SSI recipients to continue to receive benefits

apply to children who are receiving Old Age, Survivors, and Disability (“OASDI”) benefits due to a parent’s death or disability.²³

II. LEGAL CHALLENGES TO AGENCIES’ USE OF BENEFITS

A. Danny Keffeler

Danny Keffeler’s mother died shortly after he entered foster care in the state of Washington in 1990.²⁴ A court appointed Danny’s grandmother as guardian of his estate but continued his placement in foster care.²⁵ As guardian of his estate, Danny’s grandmother became his representative payee for OASDI benefits.²⁶ She used some of the money to cover needs that she thought were not being met by the state child welfare agency, and saved the rest in a college fund.²⁷ The state agency tried to remove Danny’s grandmother as payee, and for two years the agency was Danny’s payee.²⁸ Danny’s grandmother fought the removal in administrative appeals and, eventually, a class-action lawsuit.²⁹ By the time the lawsuit finally reached the U.S. Supreme Court in 2002, Danny Keffeler had graduated from Central Washington University and was gainfully employed as a personal trainer in Yakima, Washington.³⁰

The Washington Supreme Court held that the agency’s use of Social Security benefits to reimburse itself for the cost of foster care violated the anti-attachment provision of the Social Security Act.³¹ The United States Supreme Court reversed in a 9–0 vote, holding that state child welfare agencies may use children’s Social Security benefits to reimburse foster-care costs without violating the anti-

while studying abroad. Social Security Administration, Prepare for Your Career—Participate in an International Exchange Now, <http://www.ssa.gov/work/Youth/mobility.html> (last visited Aug. 2, 2007).

²³ Hatcher, *supra* note 3, at 1819–20.

²⁴ Petition for a Writ of Certiorari, Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, No. 01-1420, at 11.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Charles Pope, *Can States Seize Benefits of Kids in its Care?* SEATTLE POST-INTELLIGENCER, Dec. 4, 2002, http://seattlepi.nwsourc.com/national/98366_foster04.shtml (noting that Keffeler graduated with a degree in exercise science in June 2002 and works as a personal trainer); see also Eloísa Ruano González, *Stories from the Streets*, YAKIMA REPUBLIC-HERALD, Jan. 26, 2007 (noting that Yakima personal trainer Dan Keffeler was among volunteers conducting a survey of homeless people).

³¹ Guardianship Estate of Keffeler v. Wash. State Dep’t of Soc. and Health Servs., 32 P.3d 267 (Wash. 2001).

attachment provision of the Social Security Act.³² Child welfare agencies' use of Social Security benefits does not involve "legal process" within the meaning of the anti-attachment provision, because "the State has no enforceable claim against its foster children."³³ Therefore, the Court concluded, the practice does not violate the anti-attachment provision.³⁴

B. John G.

One North Carolina foster youth, John G., recently won a major appellate court victory forcing the child welfare agency to use a portion of his OASDI benefits to pay the mortgage on a Habitat for Humanity home that his adoptive father bequeathed him.³⁵ John's adoptive father died in 1994, leaving all his property to a testamentary trust for his son.³⁶ The boy lived with several caregivers after his father's death, each of whom misused his Social Security benefits and did not make regular payments on the Habitat mortgage.³⁷ He was adjudicated delinquent at the age of 13, and shortly thereafter he reported that he did not want to return to his aunt's home because of abuse.³⁸ He was then placed in foster care.³⁹

John told his guardian *ad litem* upon his entry into foster care in 2004 that he was concerned about the Habitat home being taken away because of the delinquent mortgage payments.⁴⁰ In 2005, the North Carolina Department of Social Services became John's representative payee, but it did not make any payments toward the mortgage.⁴¹ It used all of John's \$538 monthly benefit to pay for his therapeutic foster care, which cost \$1,300 per month.⁴² The Habitat mortgage payments were \$221 per month.⁴³ Habitat for Humanity initiated foreclosure proceedings, and John's guardian *ad litem* filed a motion with the court "to protect [his] reasonably foreseeable needs."⁴⁴ The

³² Guardianship Estate of Keffeler v. Wash. State Dep't of Soc. and Health Servs., 537 U.S. 371 (2003). The anti-attachment provision of the Social Security Act, which prevents Social Security benefits from being attached or garnished by creditors, is found at 42 U.S.C. §407(a).

³³ 537 U.S. at 386.

³⁴ *Id.* at 386–87.

³⁵ *In re J.G.*, 652 S.E.2d 266, 267 (N.C. Ct. App 2007).

³⁶ *Id.*

³⁷ *Id.* at 267–68.

³⁸ *Id.*

³⁹ *Id.* at 268.

⁴⁰ *In re J.G.*, 652 S.E.2d 266, 268 (N.C. Ct. App 2007).

⁴¹ *Id.* at 268–69.

⁴² *Id.* at 269.

⁴³ *Id.*

⁴⁴ *Id.*

trial court ordered the child welfare agency to use John's Social Security benefits to make monthly payments on the mortgage and to pay the past-due mortgage payments.⁴⁵

Nearly two years after the agency appealed this interlocutory order, the North Carolina Court of Appeals unanimously affirmed the order and held that the trial court had the authority to order the payments.⁴⁶ The court of appeals held first that federal law does not preempt state-court jurisdiction to enter orders affecting Social Security benefits and that state courts have concurrent jurisdiction over disputes between a beneficiary and a representative payee, even if state courts do not have jurisdiction to order SSA to make payments or to remove a representative payee.⁴⁷ In John's case, the trial court acted within its statutory jurisdiction to supervise John's best interests by ordering his representative payee to conserve his house so that he would not be homeless on his eighteenth birthday.⁴⁸

The agency had also argued that the trial court's order violated the anti-attachment (anti-alienability) provision of the Social Security Act, which protects Social Security benefits from "execution, levy, attachment, garnishment, or other legal process, or . . . the operation of any bankruptcy or insolvency law."⁴⁹ This is the same portion of the Social Security Act that the *Keffeler* plaintiffs alleged was violated by the agency using their benefits to pay for foster care.⁵⁰ The North Carolina appellate court, after reviewing considerable case law on the anti-alienability provision from jurisdictions across the country, ruled that the provision was a "shield" to protect a recipient's Social Security benefits from creditors.⁵¹ The provision applies only when creditors bring an action *against* Social Security beneficiaries, and the agency could not use the provision as a "sword" against the beneficiary it was designed to protect.⁵² John's case was brought by his guardian *ad litem*, not a creditor. The court did not confiscate or otherwise impede his access to his benefits (which were already in the control of the child welfare agency); it merely directed the child welfare agency to maintain John's mortgage payments for his benefit. Therefore, the trial court's order did not violate the anti-alienability provision.

⁴⁵ *Id.* at 269.

⁴⁶ *In re J.G.*, 652 S.E.2d 266, 270–71 (N.C. Ct. App 2007).

⁴⁷ *Id.* at 270–71.

⁴⁸ *Id.* at 272–73.

⁴⁹ 42 U.S.C. § 407(a).

⁵⁰ *Guardianship Estate of Keffeler v. Wash. State Dep't of Soc. and Health Servs.*, 537 U.S. 371, 375 (2003).

⁵¹ *In re J.G.*, 652 S.E.2d at 274–76.

⁵² *Id.* at 276.

The North Carolina appellate court did not rule on any constitutional issues because the parties had not made those arguments before the trial court. However, in a footnote, the court of appeals noted—citing Professor Hatcher’s article—that “there may be viable constitutional objections to the practice employed by DSS in the instant case and used by similar state agencies throughout the country.”⁵³ The footnote, while dictum, suggests that the court may be sympathetic to possible constitutional claims relating to the use of Social Security benefits. The North Carolina Supreme Court denied review of the agency’s appeal on Jan. 25, 2008.⁵⁴

III. POTENTIAL FUTURE AVENUES FOR RELEASING FOSTER CHILDREN’S BENEFITS

A. Litigation

John’s case was unique—most foster children, after all, do not own real estate. The issues his case raises, however, are applicable to other youth. The core of the North Carolina Court of Appeals’ ruling is that North Carolina law gives broad authority to a juvenile court to enter any order regarding the best interests of children who come under the court’s jurisdiction. Several states have similarly wide jurisdictional statutes for their juvenile courts.⁵⁵ In those states, guardians *ad litem* (“GALs”) could attempt to bring similar suits against the agency-representative payee to force the agency to use some of the money for a purpose that would serve the child’s best interests. For instance, many youths’ best interests might be served by ordering the child welfare agency to establish a small savings account to be accessible after they reach age eighteen, or by ordering the agency to issue the youths small “allowances” from the benefits after a certain age so that they will be able to develop some money-management skills before emancipation. Other youths might be best served by ordering the agency to use their SSI benefits to pay for certain training, or buy a certain item, that might mitigate their disabilities.

For creative GALs and children’s attorneys, there are many possibilities. Even GALs and attorneys outside of North Carolina, if they live in states with broad statutory juvenile court jurisdiction, may seize on the possibilities suggested in *In re J.G.* and try to convince

⁵³ *Id.* at 272, n. 3.

⁵⁴ *In re J.G.*, 362 N.C. 176 (2008).

⁵⁵ *See, e.g.*, 10 DEL. CODE § 925(15) (giving the Delaware Family Court jurisdiction to enter orders “against any party to the action as the principles of equity appear to require.”).

their states' courts to look to the case as persuasive authority. This is undoubtedly why the North Carolina Department of Social Services fought paying John G.'s mortgage—because it did not want to open itself to these nearly endless possibilities. Yet the litigation fears of the North Carolina Department of Social Services and other child welfare agencies are due in large part to their failure to adopt individualized policies for the uses of benefits. Policies permitting some benefits to be released in certain circumstances or for certain specified purposes potentially could stave off some litigation, because they would permit individualized consideration of a child's circumstances and needs. Agencies have not adopted such flexible policies, however, and instead have chosen to keep tight rein over all foster children's benefits. This inflexibility fuels the desire of many children's advocates to fight to release all the benefits.

B. Non-agency representative payees

As noted above, SSA regulations list child welfare agencies as the least preferred type of payee. This could allow other individuals in a child's life to file to become a representative payee. Even if someone did file to become a non-agency representative payee for a foster child and succeeded in being named representative payee, nothing prevents the child welfare agency from filing to replace those non-agency payees. Agencies routinely file requests to become a representative payee for children already receiving OASDI or SSI funds when they enter foster care.⁵⁶ In most cases, the children's parents were probably the previous representative payees. It does make some sense to remove parents as payee once the children enter foster care; the SSA Office of the Inspector General has investigated

⁵⁶ *E.g.*, ALASKA DEP'T OF HEALTH AND SOCIAL SERVICES, OFFICE OF CHILDREN'S SERVICES, POLICY MANUAL § 6.2.1.1 ("When a child is in a placement where the division is making cost of care payment, and that child receives or is eligible for benefits such as Social Security, the worker *will* apply to have those benefits paid to the State.") (emphasis added); ARKANSAS DEP'T OF HUMAN SERVICES, DIVISION OF CHILDREN AND FAMILY SERVICES, FAMILY SERVICES POLICY AND PROCEDURE MANUAL, Policy VI-I ("DCFS *must* ensure that changes in payee are made when a child receiving benefits initially enters foster care.") (emphasis added), available at <http://www.arkansas.gov/dhs/chilnfam/Master%20Policy-%20Aug%2016,%2002.doc>; NORTH DAKOTA DEP'T OF HUMAN SERVICES, POLICY MANUAL—AGENCY STEWARDSHIP AS THE SSI REPRESENTATIVE PAYEE (May 2007) ("North Dakota policy is that the county agency responsible for a child in care who is or becomes an SSI recipient *shall* apply to the Social Security Administration to become the Representative payee for the child's SSI payments during the time the child is in placement.") (emphasis added), available at http://www.state.nd.us/humanservices/policymanuals/ive-508/447_10_20_25_20.htm. OR. ADMIN. REG. 413-310-460 (1) ("The local branch office *will* make application for SOSCF to become Representative Payee on behalf of a child in substitute care placement . . . SOSCF *shall* remain Representative Payee for a child until SOSCF's custody is terminated, even if the child does not remain in a paid placement.") (emphasis added).

several parents accused of misusing their children's Social Security benefits while the children were in foster care.⁵⁷

If a child welfare agency did file to remove a non-agency payee, chances are good that its request would be granted. Although SSA regulations state that the SSA must diligently search for a "preferred" representative payee other than a state agency, SSA approves child welfare agency requests to become representative payee for foster children nearly automatically.⁵⁸ According to Professor Hatcher, a shortcut in the computer system known as the "kiddie loop" allows SSA "to process applications in batches when a single applicant files to be the representative payee for multiple beneficiaries," leading to virtually guaranteed approval.⁵⁹

In addition to the nearly automatic approval for child welfare agencies, other problems would confront non-agency payees. An SSA Office of the Inspector General's report on Baltimore's child welfare agency expressed concern that 166 foster children in Baltimore had representative payees other than the agency.⁶⁰ Some of these children had representative payees who were their foster parents (apparently often kinship caregivers), but at least 59 had payees who were not their foster parents.⁶¹ Of these, 38 had a parent, 3 had a grandparent, 16 had another relative, and 2 had non-relatives as representative payees.⁶² The report stated:

Since the representative payees for at least 59 children were not their foster care parents and the children were in long-term foster care placement [*i.e.*, a placement of more than three months' duration], we are concerned about whether the benefit payments for those children were used in accordance with SSA policy, that is, whether payments made to these representative payees were used for the children's food, shelter and clothing needs.⁶³

⁵⁷ OFFICE OF THE INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, REPRESENTATIVE PAYEES RECEIVING BENEFITS FOR CHILDREN IN FOSTER CARE: EVALUATION REPORT (Jan. 2006), available at <http://www.ssa.gov/oig/ADOBEPDF/audittxt/A-13-05-15047.htm> (last visited Aug. 2, 2007).

⁵⁸ Hatcher, *supra* note 3, at 1813-14, 1830-32.

⁵⁹ *Id.* at 1831.

⁶⁰ OFFICE OF THE INSPECTOR GENERAL, *supra* note 40.

⁶¹ *Id.* For 54 of the children, the Baltimore agency did not provide SSA with the name of the foster parent, so the Office of the Inspector General was unable to conclude whether the representative payee was a foster parent or not.

⁶² *Id.*

⁶³ *Id.*

The representative payees who filed the yearly representative payee report with SSA indicated that the total amount of benefits was used for the “care and support of the children,” but the Inspector General’s report indicated that it did not consider money to have been spent for the children’s care unless it was paid to the agency for foster care.⁶⁴ The report stated:

Representative payees reported the total amount of benefit payments were used for the care and support of the children. This information is not consistent with the data we obtained from BCDSS. First, the representative payees were not the foster care parents. Second, a BCDSS official stated that, generally, representative payees do not provide funds to BCDSS for children in foster care. The official did not provide any instances where this had occurred.⁶⁵

The report recommended that the Baltimore agency run all foster children’s Social Security Numbers through SVES, the SSA’s computer database of beneficiaries, and “apply, when appropriate, to be representative payee.”⁶⁶ Although the report acknowledges that non-agency representative payees may be appropriate in certain cases, such as short-term placements, it generally reaches the conclusion that benefits cannot be used for the child’s support (as required by federal law) unless they were used to pay for foster care.⁶⁷ The SSA regional administrator for Philadelphia agreed with the report’s recommendations and indicated that SSA “will remind other governmental agencies in our states with foster-care divisions to use SVES” in the way that the report recommended.⁶⁸

If a non-agency payee is removed, the payee can appeal the decision. The first step in an appeal is a request for “reconsideration,” a review by a different SSA employee.⁶⁹ “All evidence, plus any additional evidence submitted, will be reevaluated and a new decision will be rendered.”⁷⁰ If the reconsideration is unsatisfactory, the second step in the appeals process is a hearing with an administrative law judge.⁷¹ On average, it takes 443 days to receive a hearing before

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ OFFICE OF THE INSPECTOR GENERAL, *supra* note 40.

⁶⁷ *Id.*

⁶⁸ *Id.* at Appendix D.

⁶⁹ Social Security Administration, Frequently Asked Questions—How Do I Appeal a Social Security Decision? (Answer ID 189) (hereinafter “How Do I Appeal”), available at <http://www.ssa.gov>.

⁷⁰ *Id.*

⁷¹ *Id.*

an administrative law judge.⁷² The administrative law judge's decision may be further appealed to the Appeals Council.⁷³ The average processing time by the Appeals Council is seven months from the request to the final decision, "although it is not unusual to find delays on requests for review of up to 30 months."⁷⁴ Once all internal agency appeals are exhausted, an individual may initiate a civil suit in Federal District Court.⁷⁵ Thus, if the child welfare agency did replace a non-agency representative payee, the non-agency payee would confront a lengthy appeals process. Danny Keffeler's grandmother was tenacious enough to spend two years appealing her removal as representative payee, but other non-agency payees may not be.

Even if an individual is successful in becoming the foster child's representative payee and is not replaced by the child welfare agency, the child still may lose some or all of his or her eligibility for SSI benefits if the state receives IV-E foster-care maintenance payments for the child. Receipt of SSI benefits does not affect a child's eligibility for IV-E, because SSI payments are not counted as income for the purposes of determining whether the child meets the financial-need requirement for IV-E.⁷⁶ However, the Social Security Administration counts the IV-E payments as "income based on need," and IV-E payments "result in a dollar-for-dollar reduction in the SSI benefits."⁷⁷

The U.S. government policy manual on IV-E indicates that a choice regarding SSI and IV-E benefits should be made "in the best interests of the child,"⁷⁸ but many states leave the decision up to the state agency and require the agency to choose the benefits that result in the most financial gain to the state.⁷⁹ If the child is receiving Social

⁷² Social Security Administration, Frequently Asked Questions – How Long Does the Hearing Process Normally Take? (Answer ID 1160) (hereinafter "How Long"), available at www.ssa.gov.

⁷³ How Do I Appeal, *supra* note 55.

⁷⁴ How Long, *supra* note 58.

⁷⁵ How Do I Appeal, *supra* note 55.

⁷⁶ GEORGIA DEPARTMENT OF HUMAN SERVICES, POLICY MANUAL §2845 (April 2007), *Assistance for Child in Placement—SSI Eligible Child*, available at http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MANUALS/2845.doc

⁷⁷ Hatcher, *supra* note 3, at 1822; U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD WELFARE POLICY MANUAL, 8.4D, TITLE IV-E, GENERAL TITLE IV-E REQUIREMENTS, CONCURRENT RECEIPT OF FEDERAL BENEFITS, http://www.acf.dhhs.gov/programs/cb/laws_policies/laws/cwprm/policy_dsp.jsp?citID=76 (last visited Aug. 3, 2007)

⁷⁸ U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 63.

⁷⁹ Hatcher, *supra* note 3, at 1822; Or. Admin. R. 413-100-0330 (2005); State of New Hampshire, Inter-departmental Communication, PD 98-11, Concurrent Eligibility for SSI and Title IV-E Foster Care Payments (May 1, 1998), available at http://www.dhhs.state.nh.us/FSCem_hm/801_04_concurrent_eligibility_for_ssi_and_title_iv_e_foster_care_payments_fsc

Security benefits but the agency cannot become the representative payee for any reason, it is certainly in the agency's financial interests to seek IV-E payments if the child is eligible; that way the state can receive some federal compensation for foster care. Of course, this choice may not be in the child's best interests.

An additional problem with IV-E is that applications for SSI benefits cannot even be filed while the child is receiving IV-E assistance.⁸⁰ This means that youths in foster care who are receiving IV-E may emancipate from foster care at age 18 without SSI benefits in place—even though they may have serious disabilities that would qualify them for SSI as adults.

C. Legislation

At least two states—California and New Mexico—have debated placing some limits on agencies' use of foster children's Social Security benefits, and California has enacted some limiting legislation. California AB 1633 restates federal law on representative payees⁸¹ and requires the county agencies to inform foster children who are nearing their eighteenth birthdays of the requirements for continued receipt of SSI benefits, to provide information to the children about becoming their own payees if benefits continue beyond their eighteenth birthday, and to inform children of any SSI benefits that have accumulated.⁸² Follow-up legislation, AB 1331, requires counties to screen all foster children for eligibility for SSI benefits once they reach 16½ years old, and require the counties to apply for benefits on teens' behalf.⁸³ The bill also requires that California forgo federal IV-E funding for any youth eligible for both SSI and IV-E during the month of the SSI application, then seek IV-E funding again

m.htm_(last visited April 8, 2008); North Dakota Department of Human Services, *supra* note 42 (stating that although “[t]he first and primary concern of the Representative Payee in this decision must always be the interests of the child,” the agency must “consider the fiscal interest of the state in electing IV-E in lieu of SSI payments, *i.e.*, suspending the SSI payments and claiming IV-E.”). At least one state, Georgia, does provide in its policy manual three exceptions when the agency should choose SSI over IV-E, even when the financial benefit to the agency is greater from IV-E: “[i]f the child is expected to be in out-of-home care a short period of time, continue the SSI. . . . If the child is approaching emancipation, continue the SSI. (SSI benefits do not terminate at age 18, as do IV-E benefits.) . . . If the child is in the process of being adopted, continue the SSI.” Georgia Department of Human Services, Social Services Policy Manual, Foster Care Services: Eligibility §1003.16(3)(b) (Oct. 2006), available at http://www.odis.dhr.state.ga.us/3000_fam/3060_fostercare/Chapters/Foster%20Care%201003.d oc (last visited Aug. 10, 2007).

⁸⁰ U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 63.

⁸¹ Hatcher, *supra* note 3, at 1849.

⁸² Cal. State Assembly Bill 1633, § 4 (2005).

⁸³ Cal. State Assembly Bill 1331, § 2 (2007).

in the month following the SSI application.⁸⁴ On March 19, 2008, the California Department of Social Services issued a letter explaining the AB 1331 procedures to all county child welfare agencies.⁸⁵ The letter acknowledges that “[p]roviding SSI benefits to disabled foster youth exiting foster care will increase the chances for a successful transition to independent living and could help prevent homelessness.”⁸⁶

New Mexico has twice attempted to pass legislation requiring the state to conserve three months of Social Security benefits before a teen’s eighteenth birthday, and to set aside at least \$30 per month for uses other than the cost of foster care.⁸⁷ The latest attempt, Senate Bill 273, was rejected in committee in 2005.⁸⁸

At the federal level, Congressman Pete Stark introduced HR 1104 on Feb. 15, 2007. The bill, entitled the “Foster Children Self-Support Act,” would (1) prohibit representative payees from using OASDI or SSI benefits to reimburse a state for the cost of foster care; (2) require states to screen all foster children for benefits eligibility; (3) require state agencies to provide notice to the child’s attorney or guardian *ad litem* when they apply to be a foster child’s payee; (4) require state agencies to develop an individualized “Plan for Achieving Self-Support” (“PASS”) for each foster child; (5) and require representative payees for foster children to use the benefits in accordance with the child’s PASS.⁸⁹ Finally, the bill provides that IV-E maintenance payments for foster children are disregarded in determining the children’s income for purposes of SSI, meaning that there would be no reduction in the child’s SSI benefits if the state is also receiving IV-E funding.⁹⁰ The bill, which now has thirteen cosponsors,⁹¹ has been in the Ways and Means Committee since its introduction. The Income Security and Family Support Subcommittee conducted several hearings on foster care during the summer of 2007, but has not held a hearing specifically on HR 1104.⁹²

⁸⁴ *Id.*

⁸⁵ California Health and Human Services Agency, Department of Social Services, All County Letter 08-12 (March 19, 2008), available at <http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl08/08-12.pdf>

⁸⁶ *Id.*

⁸⁷ New Mexico Senate Bill 273 (2005), available at <http://legis.state.nm.us/Sessions/05%20Regular/bills/senate/SB0273.pdf> (last visited Aug. 10, 2007).

⁸⁸ *Id.*

⁸⁹ Foster Children Self-Support Act, H.R. 1104, 110th Congress (2007).

⁹⁰ *Id.* § 6.

⁹¹ Library of Congress—Thomas, HR 1104 Sponsors, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01104:@@@P> (last visited April 13, 2008).

⁹² Hearing Archives: Committee on Ways & Means: U.S. House of Representatives, <http://waysandmeans.house.gov/Hearings.asp?congress=18> (showing hearings on “Challenges Facing the Child Welfare System,” “Disconnected and Disadvantaged Youth,” “Children Who

Child advocates could seize on any of the ideas in these pieces of legislation to lobby their state legislatures for changes that would benefit children. In uncertain economic times, of course, legislation that would decrease alternative funding sources for foster care—and thereby increase the necessary level of state funding—is likely to be unpopular. In this regard, Congressman Stark’s “Foster Children Self-Support Act” seems unlikely to pass, since it would impose a categorical ban on using Social Security benefits to pay for foster care. Modest proposals for change, such as legislation that applies only to foster youths approaching emancipation, would be more likely to be successful than sweeping proposals to ban agencies from self-reimbursement with Social Security benefits.

CONCLUSION

Child advocates who would like to free at least some Social Security benefits from agencies’ control have several potential avenues of action. The most promising option may be new avenues of litigation opened up by the *John G.* decision in North Carolina, but legislative options also exist. It is unlikely that child advocates would succeed in prohibiting agencies from using any Social Security benefits to pay for foster care, given the fiscal impact of such a ban. However, child advocates can and should work to create policies and practices wherein children’s individual needs are considered. Foster youth approaching emancipation are a particularly vulnerable group, and agencies ought to consider these needs when determining how to expend those youth’s Social Security benefits.

The issue of foster children and Social Security benefits is one that is mostly below the radar, but it is one that deserves thoughtful attention from stakeholders in all aspects of the child welfare system. It is understandable in light of chronic budget shortfalls that state agencies seek to increase their funding by commandeering foster children’s Social Security benefits. However, this policy is penny-

wise, but pound-foolish. By increasing its foster-care funding through appropriation of children's Social Security benefits today, the state reduces the resources available to meet the needs of some of the nation's most vulnerable children and the support that foster youths have upon their emancipation from foster care, thus making it more likely that emancipated youth will become wards of the states' other institutions.

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