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Keffeler v. DSHS: Picking the Pockets of America's Neediest Children

by Patrick Gardner

On December 3, 2002, the U.S. Supreme Court will hear arguments regarding whether the state of Washington violates the Social Security Act by using the Social Security benefits of individual foster children to pay for their foster care. Washington's reimbursement program is carried out by the Department of Social and Health Services (DSHS) acting as representative payee for Social Security recipients who are wards of the state. At issue is whether Washington may put its own fiscal interest ahead of the best interests of poor and disabled foster kids—children who are among the neediest in the nation.

This article reviews *Guardianship Estate of Danny Keffeler v. Dept. of Soc. and Health Serv.*¹ The article first surveys Social Security law and regulations and Washington's representative payee program for foster youth. Next, the facts and decision of *Keffeler* are reviewed, and the legal issues and argu-

ments on appeal are examined. The article concludes with a discussion of the policy implications raised by the debate over the appropriate use of foster children's Social Security benefits by the state acting on their behalf.

I. Background

A. Social Security Act²

In 1935, Congress created the Federal Old-Age, Survivors, and Disability Insurance Benefits program (OASDI), designated as Title II of the Social Security Act. Four years later, Congress extended Title II insurance benefits to cover children whose parent is entitled to old age or disability insurance or died with full or current eligibility for benefits.³ OASDI is intended to prevent economic hazards created by a wage earner's involuntary, premature retirement or death,⁴ by replac-

ing parental income no longer available to a child. Eligibility is not based on a determination that a child has a disability.

In contrast, Title XVI of the Social Security Act is a public assistance program based on economic need and a finding of individual disability. Created in 1972, the Supplemental Security Income program (SSI) provides cash assistance to those unable to meet the costs of essentials such as food, clothing, and shelter, due to an inability to engage in gainful employment.⁵

Congress distinguished between adult SSI, which would provide basic care funds to support those unable to work,

and child SSI, which would serve the preventative purpose of meeting the special needs of children doubly vulnerable by reasons of poverty and disability in order to promote successful transitions to adulthood.⁶ As Congress explained, the inclusion of children was neither incidental nor a simple extension of benefits to a wider age demographic: "[d]isabled children who live in low-income households are certainly among the most disadvantaged of all Americans and they are deserving of special assistance in order to help them become self-supporting members of our society."⁷

(continued on p.2)

6 See *Sullivan v. Zebley*, 493 U.S. 521, 546 (1990) (White, J., dissenting) (citing to H.R. Rep. No. 92-231, at 146-147 (1971)).
7 H.R. Rep. No. 92-231, pt. 2, at 5133-34.

5 See H.R. Rep. No. 92-231, at 146-147 (1971), reprinted in 1972 U.S.C.A.N. 4989, 5133 pt. 2.

2 This subsection is derived from the Brief for the Juvenile Law Center & National Center for Youth Law as Amici Curiae. *Keffeler*, 32 P.3d 267, cert. granted, 122 S.Ct. 2288, 152 L.Ed.2d 1048, 70 USLW 3616, 70 USLW 3719, 70 USLW 3724 (U.S.Wash. May 28, 2002) (No. 01-1420).

3 See 42 U.S.C. § 402(d)(1).

4 See *Mathews v. de Castro*, 429 U.S. 181, 186 n.6 (1976).



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In 1996, the Children's SSI program was amended as part of the Personal Responsibility and Work Opportunity Reconciliation Act,⁸ more popularly known as "welfare reform." This amendment narrowed SSI eligibility by creating a separate definition for child disability,⁹ and required the Social Security Administration to redetermine eligibility for more than 250,000 children under the new standard.¹⁰ As of December 1998, 60 percent of redeterminations had resulted in program disqualification.¹¹

Representative Payee Provisions

Social security recipients at times may need assistance managing their benefits. Recognizing this, Congress

Security beneficiary.¹² Representative payees are authorized under the Act to spend the recipients' money only "in the interest" of the beneficiary, as determined by regulation.¹³ The Social Security Commissioner has adopted regulations establishing that representative payees may use benefits "only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines . . . to be in the best interests of the beneficiary."¹⁴ Creditors are generally not allowed to serve as representative payees,¹⁵ and misuse of benefits is a criminal offense.¹⁶ Children receiving SSI or OASDI are routinely appointed a representative payee. There are about 4.2 million representative payees nationwide.¹⁷

Anti-Alienation Provision

The Social Security Act protects benefits from the reach of creditors. This "anti-alienation" provision is broad-based and protects SSI and OASDI benefits from "execution, levy, attachment, garnishment, or other legal process, or . . . the operation of

any bankruptcy or insolvency law."¹⁸ First enacted in 1935, Congress strengthened the protection from creditors in 1983 by adding § 407(b),¹⁹ which sharply limited exceptions to § 407(a).

The courts have broadly interpreted the anti-alienation provision. The U.S. Supreme Court declared that § 407(a) "imposes a broad bar against the use of any legal process to reach all Social Security benefits."²⁰ The statute's prohibition on attachment extends beyond judicial process.²¹ Courts have held invalid bank set-offs,²² deductions from trust accounts²³—even voluntary assignments²⁴—under § 407(a).

B. Washington's Cost Recovery Program

Washington's DSHS is responsible for protecting dependent and neglected children.²⁵ Although children in foster care in Washington are not obligated to the state for their care, state law authorizes DSHS to take custody of a child's income and use the money to pay for foster care expenses.²⁶ DSHS gains con-

trol over the children's income by serving as representative payee.

DSHS does not directly provide foster care to children under its control. Rather, the department pays foster parents a monthly stipend for each ward's basic care. The stipend is set based upon the foster child's age. If the stipend does not cover the full cost of care, foster parents are obliged to make up the difference. DSHS uses SSI and OASDI benefits it receives to reimburse itself for the monthly stipend paid to foster parents. The state characterizes these expenses as current maintenance because reimbursed expenses are charged against contemporaneous benefits.²⁷

In the rare case, Social Security benefits are used to pay for a recipient's special needs. Although Washington has no formal written procedure to access benefits, social workers may request a "waiver of reimbursement" from DSHS. Children and foster parents are not told, however, that Social Security benefits are available for their use.²⁸

At times, DSHS receives payment from more than one source for the same expenses. This happens when parents of some children in foster care make support payments to the state. It also happens when the state receives child welfare

authorized the Social Security Administration to appoint a representative payee to receive the recipient's benefit when it is in the interest of a Social

8 Pub. L. No. 104-193 (August 22, 1996).

9 42 U.S.C. § 1382c(a)(3)(C).

10 See Alice Bussiere, *Children's Disability Benefits Threatened Under Guise of "Welfare Reform"*, Youth Law News, Sept.-Oct. 1996, 1.

11 See Martha Mathews, *SSI Benefits for Teens with Disabilities in the Post-Welfare Reform Era*, Youth Law News, Jan.-Feb. 1999, 8.

12 42 U.S.C. §§ 405(j)(1)(A); 1383(a)(2)(A)(ii)(I).

13 42 U.S.C. §§ 405(j)(2)(A)(ii); 1383(a)(2)(B)(i)(II).

14 20 C.F.R. §§ 404.2035(a); 416.635(a).

15 See 42 U.S.C. §§ 405(j)(2)(C)(i)(III); 1383(a)(2)(B)(iii)(III).

16 See 42 U.S.C. §§ 408(a)(5); 1383(a)(4).

17 Brief for the United States as Amicus Curiae Supporting Petitioners, at 44 (hereinafter Br. for United States), *Keffeler*, 32 P.3d 267, cert. granted, 122 S.Ct. 2288, 152 L.Ed.2d 1048, 70 USLW 3616, 70 USLW 3719, 70 USLW 3724 (U.S.Wash. May 28, 2002) (No. 01-1420).

18 42 U.S.C. § 407(a); see also 42 U.S.C. 1383(d)(1) (extending the anti-alienation provision to Title XVI).

19 "No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." 42 U.S.C. § 407(b).

20 *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973); See also *Bennett v. Arkansas*, 485 U.S. 395 (1988).

21 *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995).

22 *Tom v. First Am. Credit Union*, 151 F.3d 1289 (10th Cir. 1998).

23 *Brinkman v. Rahm*, 878 F.2d 263 (9th Cir. 1989).

24 *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y. 1983).

25 Wash. Rev. Code § 74.13.031.

26 Wash. Admin. Code § 388-25-0210.

27 For example, expenses for March 2002 would be charged against the March 2002 account balance even though the actual reimbursement accounting takes place in May 2002, or even October 2002.

28 See Brief for Respondents at 8-9 (hereinafter Resp't Br.), *Keffeler*, 32 P.3d 267, cert. granted, 122 S.Ct. 2288, 152 L.Ed.2d 1048, 70 USLW 3616, 70 USLW 3719, 70 USLW 3724 (U.S.Wash. May 28, 2002) (No. 01-1420).

cost-share funds from the federal government.

Washington's payments to foster parents (including group homes) run between \$50 and \$70 million annually. From 25 to 30 percent of the total is paid by the federal government. Social Security payments for foster children in state care account for an additional 13 percent of the state's total outlay.²⁹

II. The Keffeler Decision

This case began about ten years ago when DSHS removed Danny Keffeler's grandmother as representative payee because she refused to reimburse the state for the cost of Danny's foster care. At that time, Danny was receiving OASDI and residing in a foster home. Although Danny's grandmother, Wanda Pierce, acted as guardian and representative payee, she was not his foster parent. Ms. Pierce won reinstatement as representative payee after two separate Social Security Administrative Law Judges ruled in her favor. Nearly four years into the litigation, Ms. Pierce moved to expand the case so that others wrongfully denied benefits could recover them.

The plaintiff class in *Keffeler* consists of children in foster care who receive Social Security benefits that are paid to DSHS as representative payee. As of September 1999, about 1,480 children in care in Washington were receiving

Social Security benefits.³⁰ Approximately two-thirds of the children were receiving SSI; and one-third were receiving OASDI. DSHS was representative payee for more than 95 percent of the children in care.³¹ The average monthly payment to recipients was approximately \$250 per month for OASDI recipients, and \$505 to \$520 for SSI recipients in 2000. Estimated aggregate gross receipts for Social Security recipients in foster care for 2000 was \$6,733,000.³²

Plaintiffs' principal claim, raised in their class action complaint, was that:

DSHS's actions violate the antialienation provision of 42 U.S.C. § 407(a) where DSHS, as representative payee, uses a foster child's Social Security benefits to reimburse the state for the costs of foster care.³³

In addition, the children alleged Constitutional violations under 42 U.S.C. § 1983, and the Due Process and Equal Protection clauses.

Analysis

The court's analysis begins with the observation:

[I]f 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.³⁴

Based on fact findings by the trial court, the Washington Supreme Court concluded that "DSHS receives reimbursement for foster care only if it serves as a representative payee, and it only serves as a representative payee so it can confiscate the child's money."³⁵ "This scheme..."

³⁴ *Id.* at 274 (emphasis in original).
³⁵ *Id.* at 274-5.

concluded the court, "is extremely disquieting...."³⁶

The court reasoned that where an agency acts as a creditor, the anti-alienation provision applies. Reviewing applicable case law,³⁷ the court found:

"[t]hese cases evince an expansive interpretation of the protections of § 407. The thrust of the case law is that Social Security benefits are, for all intents and purposes, beyond the reach of the state, however clever or subtle its attempt to seize them."³⁸

(continued on p. 4)

³⁶ *Id.* at 275.
³⁷ *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973); *Bennett v. Arkansas*, 485 U.S. 395 (1988); *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995); and *Brinkman v. Rahm*, 878 F.2d 263 (9th Cir. 1989).
³⁸ *Keffeler*, 32 P.3d at 276.



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²⁹ *Id.* at 4-6, 25.

³⁰ The actual number of class members is not known. The Washington Supreme Court noted that available records enumerated 7,798 members dating from 1991. However, the trial court found that class claims extend back to 1979. *Keffeler*, 32 P.3d at 273 n. 9.

³¹ *Keffeler*, 32 P.3d at 271 (noting that in 1999 the state was representative payee for 1,411 of the 1,480 children in state care who received SSA benefits).

³² Resp't Br. at 6. (citing to Pet. App.).

³³ *Keffeler*, 32 P.3d at 273.

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The court then turned to the question of whether the state's status as representative payee shielded it from the anti-attachment provision. In its defense, the state claimed two cases, *King v. Schafer*³⁹ and *C.G.A. v. Alaska*,⁴⁰ justified the reimbursement practice. *King* is a Missouri case where the state, "as representative payee, received SSA benefits due involuntarily committed mental patients and reimbursed itself for the care and maintenance costs expended out of public funds..."⁴¹ *C.G.A.* involved the state of Alaska's efforts to use a delinquent youth's OASDI benefit to pay the cost of his incarceration. The court distinguished these cases from the case at bar, observing, "[l]ike *King*, *C.G.A.* stands for no more than the

representative payees. Most notably, the court questioned DSHS's compliance with the statute's best interest requirement. Under Social Security Administration regulations, representative payees have the responsibility to use benefits only for the "use and benefit" of the beneficiary and only in the beneficiary's "best interests."⁴³ The court found that Washington failed to meet this responsibility: "We seriously doubt using the SSA benefits to reimburse the state for public assistance expenditure is in all cases, or even some, 'in the best interests of the beneficiary.'"⁴⁴

Finally, in concluding that the state's practice violated § 407(a), the court noted:

DSHS reimbursement is barred by § 407(a) because despite DSHS's status as representative payee it performs the role of creditor when it takes the foster child's SSA entitlement to reimburse itself for m o n e y s spent on the child.⁴⁵

Three justices filed an opinion concurring in part and dis-

senting in part. The concurring Justices took the position that DSHS violated federal law in "reimbursing itself for *past* maintenance or for its own administrative services, such as mileage reimbursements for

social workers."⁴⁶ Moreover, the minority opinion indicated that special needs must be met before the state could reimburse itself for current maintenance.⁴⁷

The decision affirmed the trial court and remanded the matter for further proceedings. The state of Washington petitioned the U.S. Supreme Court for *Writ of Certiorari*, which was granted on May 28, 2002.

III. Issues on Appeal

Two principal arguments are at issue on appeal. The first addresses the Social Security Act's anti-attachment provision, § 407(a). In Petitioner's view, if § 405(j) authorizes representative payees to spend a beneficiary's grant on the beneficiary's behalf, it makes no sense to read § 407(a) to prohibit that very responsibility. Respondents argue the state is not acting as representative payee at all, but is using the representative payee process to collect a debt in violation of § 407(a)'s prohibition on "execution, levy, attachment, garnishment, or other legal process."

The second argument deals with the Act's representative payee authority granted under § 405(j). Petitioners assert that using benefits for current maintenance is expressly authorized under the statute and regulations. Respondents charge that the statute and regulations require that expenditures must be in the best interest of the beneficiary, and Washington's cost recovery practice falls short

of this standard.

A. Does § 407(a) Apply to Representative Payees?

On appeal, Petitioners pro- pound the view that, "[b]y its terms, § 407(a) has no bearing at all on the use of Social Security benefits by a representative payee."⁴⁸ Washington supports this position with reference to the Social Security Act's provisions that expressly authorize the appointment of representative payees and the use of recipients' benefits, by their appointee on their behalf, to pay for current maintenance. The state further asserts that the practice is authorized by the Social Security Administration and is consistent with the purposes of the Social Security Act. Applying the anti-alienation provision to Washington's practice of using benefits to pay for current maintenance, according to the Solicitor General, "puts the Social Security Act at war with itself."⁴⁹

In Respondents' view, Congress put SSI and OASDI benefits beyond the reach of creditors. The Supreme Court has upheld the legislature's broad prohibition on attaching Social Security benefits. Yet, the state of Washington "candidly admits that cost recovery is the sole purpose of its application to serve as representative payee."⁵⁰ The trial court and the Washington Supreme Court

The children's attorneys respond that what Congress intended was to put Social Security benefits beyond the reach of creditors.

uncontested proposition DSHS may apply to become representative payee."⁴²

The court went on to point out that Washington's reimbursement scheme failed to comply with the rules pertaining to

39 940 F.2d 1182 (8th Cir. 1991).

40 824 P.2d 1364 (Alaska 1992).

41 *Keffeler*, 32 P.3d at 276.

42 *Id.* at 277 (emphasis added).

43 20 C.F.R. §§ 404.2035(a); 416.635(a).

44 *Keffeler*, 32 P.3d at 278.

45 *Id.* at 277.

46 *Id.* at 281 (emphasis in original).

47 *Id.*

48 Brief for the Petitioners at 26 (hereinafter Pet'r Br.). *Keffeler*, 32 P.3d 267, cert. granted, 122 S.Ct. 2288, 152 L.Ed.2d 1048, 70 USLW 3616, 70 USLW 3719, 70 USLW 3724 (U.S. Wash. May 28, 2002) (No. 01-1420).

49 Br. for United States at 15.

50 Pet'r Br. at 19.

specifically found that DSHS seeks representative payee status “for the sole purpose of obtaining reimbursement for foster care costs.”⁵¹ Without dispute, Washington is using the representative payee provision to do what the Act’s anti-attachment provision explicitly forbids.

Respondents disagree that their interpretation of the law puts the statute at war with itself. Rather, they contend DSHS simply is abusing § 405(j) to serve its own purposes in violation of § 407(a). Furthermore, in a contest between the two sections, Respondents demonstrate that Congress made a clear policy choice by adding § 407(b), which sharply limits exceptions to § 407(a).⁵² As § 405(j) has no express exception, Respondents insist the anti-attachment provision prohibits the state’s attempt to shelter its creditor practices under § 405(j).

Other Legal Process

Petitioners challenge Respondents’—and the Washington Supreme Court’s—focus on the “state as creditor” argument, however. The crucial question is not whether Washington acts as a creditor, but “whether following the statutes and regulations governing the appointment of a representative payee and the payee’s use of benefits to pay the beneficiary’s current care constitutes an ‘execution, levy, attachment, garnishment, or other legal process’ banned by § 407(a).”⁵³ More specifically, because receiving bene-

fits as representative payee is clearly not execution, levy, attachment, or garnishment, the question boils down to whether Washington’s cost recovery program constitutes “other legal process” which is barred under the statute.

According to the state of Washington, the answer to this question is no. In its view, “other legal process” plainly contemplates compulsory, judicial process in the vein of execution, levy, attachment, and garnishment. DSHS’s cost recovery practice does not seize benefits, rather the agency receives them as the beneficiary’s duly appointed representative payee. Neither the appointment as representative payee, nor the acceptance of benefits on the beneficiary’s behalf is coercive. Because § 407(a) is limited to protecting benefits from the coercive acts of creditors, “other legal process” cannot logically include authorized practices

under § 405(j).

Any other result would be illogical, contends the state. As proof of this, Petitioners analogize Washington’s program to parents who serve as representative payees.

The linchpin of the Washington Supreme Court’s analysis is that because Washington will pay for a foster child’s care itself if Social Security benefits are not available, it should not be permitted to deprive children of an extra benefit by using Social Security benefits to reimburse those costs. But this same principle would apply to *parents* who also have a legal obligation to support their children....⁵⁴

Defining “other legal process” to include a representative payee’s use of benefits to cover

⁵⁴ Pet’r Br. at 29 (emphasis in original).

current maintenance, argues the state, would by extension prevent representative payee parents from using Social Security benefits to pay for food, clothing, or rent. That, maintains the state, cannot be what Congress intended with § 407(a).

The children’s attorneys respond that what Congress intended was to put Social Security benefits beyond the reach of creditors. That the acts are accomplished through non-judicial means hardly takes them out of the realm of “other legal process.” Many courts have concluded that the Act’s broad prohibition includes judicial as well as non-judicial process.⁵⁵ Moreover, Respondents maintain that the state’s cost recovery practice is coercive “legal process”:

(continued on p. 6)

⁵⁵ See e.g., *Crawford v. Gould*, 56 E.3d 1162 (9th Cir. 1995). (Holding that § 407(a) was not designed to preclude only the judicial process to obtain Social Security benefits.)



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⁵¹ *Keffeler*, 32 P.3d at 274-5, fn 11.

⁵² See *supra* at note 19 and accompanying text.

⁵³ Pet’r Br. at 19.

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Although the mere act of being appointed representative payee may not be “legal process” under § 407(a), the creation by state law and regulation of a mechanism by which the State is required to attach Social Security benefits for its own reimbursement is legal process.⁵⁶

Respondents also point out that Congress made very clear that in order to escape the reach of § 407, a creditor practice must be specifically exempted. Where no such exemption appears, and where, as here, the creditor practice is so transparently self-serving as to conflict with the very notion of fiduciary obligation, it must be included in the list of prohibited collection activities.

Analogizing to parents who serve as representative payees is unavailing because the role of parents and the state are not analogous—not for SSI or OASDI. In the latter case, the child is eligible because one or both parents is disabled, retired, or deceased, and presumed unable to provide the child with care and support. This insurance program is designed to replace the resources that a parent or fam-

ily might otherwise have for food, clothing, and rent. As a personal entitlement, it is not designed to replace a duty or obligation of the state. Analogizing state with parent may be superficially appealing, but it does not reflect the essential nature of the OASDI program.

Alternatively, SSI is a needs-based entitlement. In order to be eligible, the household income available to the child must be less than the SSI allowance. The premise of the program is that the parents’ income deemed available to the child is insufficient to meet his or her basic needs, much less any special needs. The benefit is provided as a supplement to enable low-income parents to better meet their duty to provide for their children with special needs. This premise doesn’t obtain when

the state, as representative payee, is seeking to use the grant to supplant, rather than supplement available resources.

Treating state representative payees the same as parents has no programmatic or policy logic. Washington does not offer justification or authority for extending the decision to parents. A reasonable reading of the Washington Supreme Court’s decision must conclude that the ruling does not apply to or affect parents who are representative payees. Plainly, this argument is a straw man.

Trustee or Creditor?

The essential arguments being made here are: either the state is acting as trustee and is therefore governed by § 405(j), or creditor and is therefore governed by § 407(a). The Washington Supreme Court

decision emphasized the facts showing (and the law that mandates) that DSHS acts as a creditor under the cost recovery program. The decision below, however, was not unanimous on where to draw the line demarcating trustee and creditor acts. The Court’s majority included the use of benefits by the state to reimburse itself for current maintenance as the act of a creditor. The Court’s minority was more conservative, holding the line at past debts, administrative expenses, and payments made without regard to unmet special needs. Whether the U.S. Supreme Court will accept this parsing of representative payee status is unclear.

One thing is clear: § 407(a) applies only under circumstances where the state as representative payee has strayed from its duty to properly act in



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⁵⁶ Resp’t Br. at 37-8.

a fiduciary capacity on behalf of the Social Security beneficiary. It stands to reason, therefore, that Respondents' § 407 claim is premised on acts taken in contradiction to the provisions of § 405(j). To better understand this element of the case on appeal, we now turn to the arguments involving the state's responsibilities under the representative payee provisions of the Social Security Act.

B. Is Cost Recovery Authorized by § 405(j)?

Petitioners claim that using foster children's Social Security benefits to reimburse themselves for foster care expenses is not only consistent with the provisions of § 405(j), it is specifically authorized by the regulations. Respondents rejoin that self-dealing violates the Act because it fails to meet the requirement that use of benefits be in the best interest of the beneficiary. The *Keffeler* court concluded that DSHS's practice did not serve the beneficiaries' best interest.⁵⁷

Washington argues that it is an authorized representative payee appointed under the statutory authority of the Social Security Commissioner.⁵⁸ As representative payee, the state acknowledges that it must "[u]se the payments [the state] receives only for the use and benefit of the beneficiary in a manner and for the purposes [the state] determines...to be in the best interests of the beneficiary..."⁵⁹ The state posits

that "payments 'used for the beneficiary's current maintenance' are deemed to be used for 'the use and benefit of the beneficiary.'"⁶⁰ The regulations define current maintenance to include costs incurred such as "food, shelter, clothing, medical care, and personal comfort items,"⁶¹ "precisely the costs for which the Department uses the Social Security benefits in question."⁶² "In sum", conclude Petitioners, "the Department's appointment as representative payee and its use of the benefits to pay for current maintenance are expressly authorized by the Social Security statutes and regulations."⁶³

All of this is true, so far as it goes. But the state's argument does not go quite far enough. The Social Security statute mandates that,

Any certification made ... for payment of benefits to an individual's representative payee shall be made on the basis of adequate evidence that such certification *is in the interest* of such individual (as determined by the Commissioner of Social Security in regulations).⁶⁴

The Commissioner's regulations have interpreted this language to mean that a representative payee must use benefits "only for the use and benefit of the beneficiary. . . in the best

interests of the beneficiary..."⁶⁵ Petitioners have demonstrated that their use of benefits meets the "use and benefit" prong of the regulations. They have not shown, however, that they meet the regulation's "best interests" prong.⁶⁶ Whether the cost recovery program is "expressly authorized" under § 405(j) as claimed by the state, depends on whether the practice serves the best interests of the foster children for whom DSHS serves as representative payee.

The Washington Supreme Court concluded it does not.

DSHS's reimbursement procedure ... constitutes a conflict of interest precisely because DSHS uses the SSA benefits it receives as representative payee in a manner *inconsistent with the best interests of the foster children* entitled to the money.⁶⁷

Thus, while Washington has characterized the *Keffeler* decision as prohibiting the use of Social Security benefits for current maintenance, in truth the decision stands for the unremarkable proposition that to be valid, expenditures on current maintenance must be

in the best interests of the beneficiary.

Mason v. Sybinski: An Alternative View?

In the year after *Keffeler* was decided, the U.S. Court of Appeals of the Seventh Circuit, handed down its ruling in *Mason v. Sybinski*.⁶⁸ *Mason* involved a class action challenging Indiana's practice of using its authority as representative payee to deduct a portion of patients' Social Security benefits to pay for institutional maintenance at the state mental hospitals. *Mason* directly addresses the intersection of §§ 407(a) and 405(j), holding that the "...State's actions do not amount to other legal process..."⁶⁹

On its face, *Mason* seems to squarely contradict *Keffeler*. A closer look suggests otherwise. The facts in *Mason* are quite distinct from *Keffeler*'s. First, institutions such as the state hospital in *Mason* are specifically exempted from the bar against creditors serving as representative payees.⁷⁰ Second, the named plaintiff, Ivy Mason, was provided with a substantial spending allowance, and almost \$10,000 of a lump sum award to meet her individual needs before her costs of care were deducted. In *Keffeler*, recipients received on average only three percent of their benefits, and most never received any benefits at all.

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⁵⁷ *Keffeler*, 32 P.3d at 278.

⁵⁸ 42 U.S.C. §§ 405(j)(1)(A); 1383(a)(2)(ii)(I).

⁵⁹ 20 C.F.R. §§ 404.2035(a); 416.635(a).

⁶⁰ Pet'r Br. at 21-22.

⁶¹ 20 C.F.R. §§ 404.2040(a)(1); 416.640(a).

⁶² Pet'r Br. at 22.

⁶³ *Id.*

⁶⁴ 42 U.S.C. § 405(j)(2)(a)(2)(i) (emphasis added).

⁶⁵ 20 C.F.R. §§ 404.2035(a); 416.635(a).

⁶⁶ The Solicitor General asserts in his brief that Social Security rulings establish that "[s]uch current maintenance payments are deemed to be in the beneficiary's 'best interests.'" Br. for United States at 14. (Citing 47 Fed. Reg. 30,468) (emphasis added). That reliance is misplaced. The discussion in the Federal Register in fact reserved the matter to the discretion of the representative payee. The commentary asserts that both paying for current maintenance or paying for significant personal needs before paying institutional charges were proper performance by the representative payee.

⁶⁷ *Keffeler*, 32 P.3d at 278 (emphasis added).

⁶⁸ 280 F.3d 788 (7th Cir.2002).

⁶⁹ *Id.*, at 793.

⁷⁰ See 42 U.S.C. § 405(j)(2)(C)(iii)(III).

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Finally, under Indiana law, an adult resident of the state hospital is liable for the cost of her treatment and care. Accordingly, in some cases, it may make sense for a Social Security beneficiary to pay for her care to avoid an overwhelming future bill. It may be reasonable, therefore, for a fiduciary to pay for services that would be provided regardless of the patient's ability to pay. In Washington, a child is not liable for his or her foster care. Not surprisingly, the *Keffeler* majority observed, “[w]e seriously doubt using the SSA benefits to reimburse the state for its public assistance expenditure is in all cases, or even some, ‘in the best interests of the beneficiary.’”⁷¹

This trade-off . . . overlooks the fact that these needy children are entitled to benefits for which the state is seeking payment.

These factual distinctions may explain the different outcomes in *Keffeler* and *Mason*. But at bottom, *Mason* and *Keffeler* reached the same legal conclusion: § 407(a) does not constrain representative payees who, consistent with their fidu-

ciary duty, make payments for the use and benefit of the beneficiary in a manner determined to be in the best interest of the beneficiary. The federal court concluded that the hospital, in its representative payee capacity, had acted in the best interest of its patients.⁷² In contrast, the Washington Supreme Court determined that the state of Washington had not. The state had abandoned its fiduciary duty and was pursuing its own self-interest in conflict with the interest of the disabled foster children in its care.

IV. Policy Implications

The state of Washington maintains that the *Keffeler* decision, if sustained, would undermine the well being of disabled children in foster care.⁷³ Underpinning the state's position is an implicit trade-off: the state uses its authority as representative payee to re-pay itself for foster care expenses, and in return, foster children receive essential services (i.e., representative payees and application assistance for

72 According to the *Mason* Court, Plaintiffs did not claim that the state as representative payee failed to meet the best interest requirements of the statute and regulations. (“The class does not contend that the [29 C.F.R. § 404.2035] criteria are not being met.” *Id.* at 793.)

73 The Brief of Children's Defense Fund (CDF), et al. as Amici Curiae in Support of Petitioners (hereinafter CDF Br.), notes, “. . . if it were not for the effort of these state agencies, the disabilities of many children might go unrecognized, and they would never be determined eligible for—or actually receive—benefits. Simply put, many of these children have no relative or friend to apply for benefits or act as representative payee. The state agencies willingness to serve as payee is essential to these children receiving benefits.” Amici Curiae Br. of Children's Defense Fund, et al., at 21. *Keffeler*, 32 P.3d 267, cert. granted, 122 S.Ct. 2288, 152 L.Ed.2d 1048, 70 USLW 3616, 70 USLW 3719, 70 USLW 3724 (U.S. Wash. May 28, 2002) (No. 01-1420).

Social Security benefits) which would not otherwise be available. Stated another way, by pursuing its own interest, the state claims to indirectly serve the interests of abused and neglected children in state care.

This trade-off is a bad bargain for poor children. It overlooks the fact that these needy children are entitled to the benefits for which the state is seeking payment. As well, the bargain gives them little or nothing in return for forfeiting their entitlement. Finally, the policy violates the spirit—if not the letter—of applicable law, in part by transforming needy individuals' private entitlements into a public funding stream.

A. Washington's Duty to Foster Children

The policy of trading off individuals' Social Security benefits for child welfare services is premised on the notion that the state cannot, or will not, shoulder the burden of assessing foster children for eligibility and applying for Social Security benefits on their behalf unless the state can recover its costs through the representative payee system. This premise disregards the larger context within which the state cares for neglected and abused children.

Washington has a broad mandatory duty under federal and state laws to provide care, safety, health services, education, and more to foster children. These services are owed to abused, neglected, and disabled children in state custody as a matter of right. They cannot be

withheld based on a child's inability—or even unwillingness—to pay for them.

The preeminent duty owed abused and neglected children is to protect them from further harm and provide for their care. In 1980, Congress enacted the Adoption Assistance and Child Welfare Act (AACWA), establishing a new part to Title IV of the Social Security Act. The Act authorized federal foster care and adoption assistance to the states for the purposes of improving the quality of care provided, reducing the number of children removed from home and placed in substitute care, returning children home as soon as conditions permit, and facilitating adoption or other permanent placement for children who cannot be returned home.⁷⁴ In 1997, Congress passed the Adoption and Safe Families Act (ASFA),⁷⁵ which amended AACWA to prioritize adoptions over family reunification. ASFA clearly established health and safety as the paramount public policy concern for foster children under state care.

Washington has codified these federal policy goals. State law requires the Department to “[d]evelop, administer, supervise, and monitor a coordinated and comprehensive plan that establishes, aids, and strengthens services for the protection and care of runaway, dependent, or neglected

74 42 U.S.C. § 670-679b.

75 Pub. L. No. 105-89.

71 *Keffeler*, P.3d at 278.

children.”⁷⁶ The purpose of these duties is:

to safeguard, protect and contribute to the welfare of the children of the state, through a comprehensive and coordinated program of public child welfare services providing for: social services and facilities for children who require guidance, care, control, protection, treatment or rehabilitation.⁷⁷

This duty includes the responsibility to identify and treat a child’s special needs. This obligation exists without regard to whether or not the child welfare agency is reimbursed for care: it is implicit in the agency’s responsibility to provide for the safety and well-being of dependent children.

Washington’s Duty to Children with Special Needs

In addition to its obligation to adequately care for abused and neglected youth under state and federal child welfare statutes, Washington has a duty to assess and treat eligible children under Title XIX of the Social Security Act, more commonly known as Medicaid. Foster children in Washington are eligible for Medicaid and its comprehensive child treatment and prevention program Early, Periodic, Screening, Diagnosis, and Treatment (EPSDT).⁷⁸

76 Wash. Rev. Code § 74.13.031 (“Duties of the Department”).

77 Wash. Rev. Code § 74.13.010 (“Declaration of Purpose”).

78 See 42 U.S.C. §§ 1396a(a)(10)(A); 1396a(a)(43); 1396d(a)(4)(B); 1396d(r) (as added and amended by the Omnibus Budget Reconciliation Act of 1989).

The program provides a comprehensive health screening, diagnosis and treatment regime for covered children.

Under EPSDT, four discrete types of assessments are provided at every screening: medical (physical and mental health), vision, hearing, and dental, in addition to immunizations and other preventative care.⁷⁹ Covered children are required to be screened both at preset periodic intervals and whenever a problem is suspected.⁸⁰

By law, foster children in the State of Washington’s care must be screened routinely for physical and emotional defects under EPSDT. These regular, mandatory screenings are specifically designed to bring to light disabilities that the state contends “might go unrecognized,”⁸¹ if it cannot use Social Security grants to reimburse itself for foster care payments. EPSDT also requires that a covered child receive diagnostic evaluations and any necessary health care, treatment or additional services, as described at 42 U.S.C. §1396d(a), to “correct or ameliorate” a physical or mental illness.⁸² In sum, Medicaid coverage for children is both comprehensive and mandatory, and is provided as an entitlement to eligible children.

Washington also has an affirmative duty under the Individuals with Disabilities

79 42 U.S.C. §§ 1396a(a)(43); 1396a(a)(62); 1396d(r); 1396s (as added and amended by the Omnibus Budget Reconciliation Act of 1993).

80 See 42 U.S.C. §§1396a(a)(43); 1396d(r).

81 Pet’r Br. at 23.

82 42 U.S.C. §§1396a(a); 1396d(r)(5).

Education Act (IDEA) to identify, assess, and treat children with disabilities relating to education.⁸³ The IDEA provides the states with funding to create and develop programs to provide eligible children with disabilities a Free Appropriate Public Education (FAPE). By submitting an application and accepting federal IDEA funds, the state of Washington made a promise to provide a FAPE to its disabled children in the manner set out in the statute and regulations.⁸⁴

IDEA requires local school districts to seek out children with disabilities. Washington codi-

83 20 U.S.C. §1400 et seq. First enacted as the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, the statute was substantially amended in 1990, and renamed the IDEA, Pub. L. No. 101-476.

84 34 C.F.R. § 300.121(a).

fied this mandate, requiring local districts to conduct affirmative “child find activities” for the purpose of locating and evaluating students with disabilities.⁸⁵ The referral of a student suspected of having a disability by a parent, medical personnel, teacher, or any other interested person triggers a full and complete disability evaluation. This mandatory, comprehensive assessment may include an evaluation of health, social, and emotional status, general intelligence, academic performance, communicative status, and motor abilities.⁸⁶

If the child is determined to be eligible for special education

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85 Wash. Admin. Code § 392-172-100.

86 See 20 U.S.C. § 1414; Wash. Admin. Code §§ 392-172-100 et seq.



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and IDEA-related services, the evaluation data is then used to develop the child's individualized education plan. The plan outlines the additional services to which the disabled child is entitled under the statute.

Under IDEA and federal and state regulations, Washington has an ongoing duty to identify, evaluate, and provide services to disabled children.⁸⁷ The state's duty to meet the educational needs of disabled children and thereby provide a FAPE to all students, accomplishes many of the same screening, evaluation, and service goals of Washington's Social Security applications unit. As with Medicaid, these services are mandatory.

Because the state is required to

ing for their Social Security grants. Similarly, providing foster children with medical treatment for their special needs or disability-related educational services as the trade-off for sacrificing their Social Security benefits is no bargain because the state already is required by law to do so.⁸⁸

Although Washington has a mandatory duty to provide assessments, treatment, and services to foster children, there is no similar requirement to establish eligibility and apply for SSI or OASDI benefits for youth committed to its care. Nonetheless, Washington has compelling reasons to assess need and apply for Social Security benefits for eligible children quite aside from whether or not the state may use the resulting Social Security benefits to pay for foster care program expenses.

Returning children home or facilitating adoption is a primary goal of federal foster care legislation.⁸⁹ Reunification

and adoption is easier when children are endowed with an independent source of income, such as SSI or OASDI.

The added income allows families to better afford meeting these children's special needs once they return home or are permanently placed. States that

⁸⁸ The state does not bear the full cost of these entitlements to foster children as federal cost-sharing is the rule for these health, education, and child welfare programs.

⁸⁹ See 42 U.S.C. § 670 et seq.

assist youth with securing Social Security benefits improve outcomes for abused and abandoned children, and achieve the state's child welfare program goals.

Washington's legislature has expressed its commitment to reducing length of stay in foster care, recognizing that

the number of children entering out-of-home care is increasing and that a number of children receive long-term foster care protection. Reasonable efforts by the department to shorten out-of-home placement or avoid it altogether should be a major focus of the child welfare system.⁹⁰

If Social Security benefits help reunification and adoption placement, successfully applying for Social Security benefits will likely shorten their time in care. Not only will children be better off, the state will save money because, according to Washington, the Social Security benefits it recoups "seldom cover all of the actual cost of foster care."⁹¹

Having additional income would also improve care during a child's stay in state custody—if the income were used for the child's individualized needs. Access to SSI or OASDI benefits could provide necessary resources for future needs, as well. Children who age out of care are a special cause for

⁹⁰ Wash. Rev. Code § 74.14C.005(1).

⁹¹ Pet'r Br. at 14.

concern because they are so often set adrift without so much as cab fare. A modest savings account could prevent homelessness or pay for a car so that an emancipated youth may work. For OASDI recipients, there is potential for more substantial savings⁹² that might lead to a college education, for example. These outcomes serve the larger goals of transitioning foster youth into self-sufficient adults and thereby avoiding future financial dependence on the state.

Washington acknowledges the benefits arising from securing Social Security benefits for foster children in state custody. The state points out, however, that applying for and managing Social Security benefits costs money—\$1.9 million dollars a year, according to Washington.⁹³ These benefits and costs constitute the trade-off embodied in Washington's cost recovery program. But, as we have shown, the benefits are largely owed children as a matter of right, and those that are not, the state has good reason to provide.

Meeting Basic Needs of Foster Children

Washington claims that, if upheld, *Keffeler* will prevent Washington and other states from becoming representative payees for foster children. Because no one else will act in that capacity, the state predicts that eligible children will go without. Absent a representa-

⁹² Eligibility for OASDI, in contrast to SSI, is not need-based. Beneficiaries may accrue savings without adversely affecting their continuing program eligibility.

⁹³ Resp't Br. at 23 n. 18.

screen for physical and emotional needs under child welfare laws, Medicaid, and IDEA, without regard to the child's ability to pay, foster children gain no substantial added benefit from the assessment services the state is implicitly trad-

⁸⁷ Wash. Admin. Code § 392-172-100.



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tive payee, the state maintains, many children in foster care won't receive, or maintain eligibility for, their benefits or the special attention that is now directed to their disabilities and special needs.

Aside from providing application assistance, the most important benefit Washington might offer to eligible kids in state care is making the effort to meet their individual needs. Disabled foster children, especially, have enormous personal needs.

Evidence indicates that Washington does not use children's Social Security benefits for this purpose. Indeed, the state's cost recovery program virtually precludes consideration of an individual child's best interests, and is a barrier to addressing needs. The Washington Supreme Court concluded that any other payee would better suit the children's needs.⁹⁴

DSHS's procedures provide no easy access to Social Security benefits for disabled children, foster parents, or even the state's social workers.⁹⁵ No

formal procedure is in place to request money from a recipient's account for special needs. No procedure has been established to determine what special needs or extra items ought to be provided to children in care. The results of a sampling of 48 individual cases from a ten-year period demonstrates that very little financial benefit—three percent of total payments—is conferred on SSI and OASDI children as a result of DSHS's service as representative payee.⁹⁶ Virtually all of the children's Social Security benefits are used for cost recovery to re-pay the state for program expenses.

Some have argued that the state confers a benefit on SSI recipients where, acting as representative payee, it "spends down" benefits in order to maintain eligibility. Spend down essentially means reducing a child's account balance in order to avoid exceeding SSI's eligibility resource limit of \$2,000. Spending down a child's account to maintain eligibility is cold comfort, however, when none of the value of the current

benefit redounds to the child. For a beneficiary who receives only three percent of gross payments, the practice is tantamount to asset disposal.

The most disturbing evidence of the state's failure to meet Washington's foster children's special needs is the state's inability to meet their most basic needs. The National Center for Youth Law, along with local counsel, recently won a sweeping injunction against Washington to remedy the state's failure to provide safe or stable placements to thousands of children in state care.⁹⁷ The Court, after a jury trial, concluded that Washington's disabled children were subjected to unnecessary multiple placements, relegated to unsafe placements, and were denied necessary mental health care. "Foster parents," added the court, "are inadequately trained, informed and supported to provide proper care for children in the class."⁹⁸ Far from receiving extra care, these disabled children are not even protected from harm.

In summary, SSI and OASDI kids in Washington's foster care program get little in exchange for involuntarily forfeiting their benefits to the state. Some do get one benefit that matters: they become Social Security recipients. This future bene-

fit—virtually none of the benefit will accrue to the child while in care—is a valuable asset. But, make no mistake, the trade-off of current benefits for application assistance is a bad bargain for kids.⁹⁹ Worse, it's a bargain involuntarily made on their behalf by the entity that is charged by law to look out for their best interest.

B. Policies Put Individual Entitlements to Unauthorized Uses

Washington's cost recovery policy is a bad bargain for foster children. It is also a violation of the spirit, if not the letter, of the law.

Washington Compensates Itself as Representative Payee in Violation of Federal and State Policy

Under the Social Security Act, Congress authorizes representative payees to use benefits to offset administrative expenses. The set-off, however, is limited to the "lesser of 10 percent of the monthly benefit involved, or \$25.00 per month."¹⁰⁰ Under Washington law, the Secretary is directed to serve as representative payee for children placed with DSHS "without compensation."¹⁰¹ Notwithstanding, in Danny Keffeler's case, the state's willingness to serve as representative payee effectively cost him his entire Social Security grant

(continued on p. 12)

94 See *Keffeler*, 32 P.3d at 275.
95 See Resp't Br. at 9.
96 See *Id.*
97 See *Braam v. State of Wash. Dep't. of Soc. & Health Servs.*, No. 98-2-01570-1 (Whatcom County Super. Ct., May 31, 2001). Although the class of children in *Braam* are a different subset of children in care than those in *Keffeler*, all or most of the *Braam* children are disabled with special needs. See Bill Grimm, *Jury Finds Washington Foster Care System Unconstitutional*, Youth Law News, Jan.-Feb. 2002, 1.
98 *Id.* at 2.

99 According to the state's own figures, Washington takes in about \$7 million in benefits per year. Resp't Br. at 5-6. From that total, the state spends about 3 percent (\$210,000) directly on the children, and \$ 1.9 million on its benefits application unit, thereby netting nearly \$5 million from its cost recovery program.

100 42 U.S.C. §§ 405(j)(4)(A)(i)(I)-(II); 1383(a)(2)(D)(i)(I)-(II).
101 Wash. Rev. Code § 74.13.060.

94 See *Keffeler*, 32 P.3d at 275.

95 See Resp't Br. at 9.

96 See *Id.*

97 *Id.* at 2.

100 42 U.S.C. §§ 405(j)(4)(A)(i)(I)-(II); 1383(a)(2)(D)(i)(I)-(II).

101 Wash. Rev. Code § 74.13.060.

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of approximately \$5,000.¹⁰² Based on a sampling of individual cases, his experience was not unusual.¹⁰³

The state takes the position that the benefits are used, not for administrative expenses, but for current maintenance. In the litigation, however, the state has not addressed the fact that in addition to charging for basic foster care, DSHS also charges children for placement and counseling, case management services, transportation costs, and other administrative charges.¹⁰⁴ Moreover, in making its case, the state has made clear that applications assistance and representative payee services are at stake in the litigation.¹⁰⁵ The linkage is clear: Social Security benefits are

flouts federal and state restrictions on representative payee compensation.

Washington's Cost Recovery Transforms Private Entitlements into Public Funds

Washington is concerned that the *Keffeler* decision will bar the state from using Social Security benefits as a federal funding stream for its child welfare program. This concern was given voice by the Children's Defense Fund, et al., in their *amicus curiae* brief in support of Petitioners.

[A] reduction in DSHS's role as representative payee does [mean] that, without the offset, there will be fewer resources for *all* of the children in foster care in Washington.¹⁰⁶

This is an extraordinary proposition—appropriating the individual property of the neediest foster children for use as a public funding stream for foster children generally. The

justification seems to be that child welfare programs are traditionally under-funded, and providing individual benefits to some

foster children is unfair to others who are not Social Security recipients.

As disheartening as financial neglect of abused and abandoned children by the states may be, seizing the private

property of poor and disabled children to augment the state's purse is not the solution. As distressing as an uneven distribution of benefits among needy children may be, leveling benefits down to the lowest common denominator is not good public policy.

More to the point, nothing in the Social Security Act's representative payee provision suggests that Congress intended this result. The Social Security Act has numerous cost-sharing provisions whereby the federal government provides the states with program funding to achieve statutory goals.¹⁰⁷ Title IV-E of the Act specifically provides cost sharing for the very benefit for which the state's cost recovery program is seeking repayment.¹⁰⁸ By contrast, OASDI is an insurance program that pays benefits based upon individual contributions. SSI, although needs-based, is also an individual entitlement to property. The nature and design of SSI and OASDI are in obvious conflict with Washington's policy of aggregating individual benefits to fund its child welfare obligations. Additionally, the Act's anti-attachment provision loudly and clearly articulates Congress' intent to preserve Social Security benefits for the exclusive use by beneficiaries to meet their individual needs.

Cost recovery is a bad bargain

¹⁰⁷ See e.g., Temporary Assistance to Needy Families block grant funding, 42 U.S.C. § 603; Medicaid federal financial participation, 42 U.S.C. §§ 1396b(a); 1396d(b).

¹⁰⁸ Federal foster care maintenance payments are authorized under 42 U.S.C. §§ 674(a)(1); 675(4)(A).

for foster children. It also offends the fundamental nature of personal entitlements under the Social Security Act.

Conclusion

The Social Security benefits at issue in *Keffeler v. DSHS* are intended to provide supplemental resources to children in need. When the state takes these benefits to reimburse itself for services that the state is required to provide to foster children, it unfairly shifts the burden of care from the general public to the nation's neediest children—kids that have been abused or neglected, and in most cases, that are also severely disabled. The disingenuous argument that the practice serves the best interests of foster children undercuts our confidence in the agency that is entrusted with looking after abused and abandoned youth. These children often are the victims of a broken trust with their parents. Now, it appears, the state also seeks to put its self-interest ahead of the needs of these impoverished kids. The Washington Supreme Court rightly denounced Washington's cost recovery practice and declared it invalid. The *Keffeler* decision may be a close call on the fine points of Social Security law and regulations; but as regards *justice*, it is unassailable.

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The Keffeler decision may be a close call on the fine points of Social Security law and regulations; but as regards justice, it is unassailable.

used to underwrite application and representative payee services. Just as clearly, this policy

¹⁰² See Resp't Br. at 10 n. 12.

¹⁰³ See *Id.* at 9.

¹⁰⁴ See *Id.* at 23-25.

¹⁰⁵ In making its case that states are representative payees of last resort, Washington clearly implies that a bar on using benefits to reimburse itself would be a disincentive to undertaking the representative payee responsibility for foster children in its care. See Pet'r Br. at 34-35.

¹⁰⁶ CDF Br. at 22 (emphasis in original).