

**IN THE
THE COURT OF APPEALS OF MARYLAND**

SEPTEMBER TERM, 2012

NOS. 95 and 101

IN RE RYAN W.

**ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF
MARYLAND**

**BRIEF OF L.J., ET AL., THE PUBLIC JUSTICE CENTER, NATIONAL
ASSOCIATION OF COUNSEL FOR CHILDREN, FIRST STAR, CHILD
ADVOCACY INSTITUTE, SUSAN LEVITON, AND DANIEL L. HATCHER,
AS *AMICI CURIAE***

In support of Ryan W., Petitioner in No. 95 and Respondent in No. 101

Mitchell Y. Mirviss
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
(410) 244-7400
fax: (410) 244-7742
mymirviss@venable.com

Counsel for *Amici Curiae*, L.J. et al.

Daniel L. Hatcher
Associate Professor of Law
University of Baltimore School of Law
Civil Advocacy Clinic
40 W. Chase Street
Baltimore, MD 201201
(410) 837-5650
fax: (410) 837-4776
dhatcher@ubalt.edu

Counsel for *Amici Curiae*

March 4, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

QUESTIONS PRESENTED 1

STATEMENT OF FACTS 1

INTRODUCTION 1

INTERESTS OF AMICI CURIAE..... 3

ARGUMENT 7

I. DSS’S USE OF FOSTER CHILDREN’S SOCIAL SECURITY BENEFITS CONFLICTS WITH THE AGENCY’S CORE PURPOSE OF PROMOTING AND PROTECTING FOSTER CHILDREN’S BEST INTERESTS...... 7

A. Historical Misuse of *Parens Patriae* Power..... 7

B. Foster Children Improperly Used as a Source of Funds for States and Private Contractors...... 9

1. Agency Purpose vs. Self-Interest..... 10

2. Additional Layers to the Conflict..... 11

a. Revenue Maximization Consultants..... 11

b. Agency Interests vs. State Interests..... 12

II. DSS HAS A DUTY TO PROVIDE AND PAY FOR THE SERVICES THAT IT CLAIMS IT IS REIMBURSING BY TAKING RYAN’S FUNDS 12

III. THE STATE CAN FULFILL ITS DUTY TO SERVE A FOSTER CHILD’S BEST INTERESTS IF IT USES THE CHILD’S FINANCIAL RESOURCES IN A MANNER THAT DIRECTLY ADDRESSES THE CHILD’S UNMET NEEDS.....	14
A. Development-Enhancing Activities	15
B. Transitioning	17
1. Young Adults Fare Poorly When Transitioning from Foster Care to Independence.	17
2. Existing Transition Services Are Insufficient to Fully Address Foster Youths’ Needs	20
3. Providing Youth with Financial Resources Can Help to Ease their Transition to Adulthood.....	21
IV. THE COURT OF SPECIAL APPEALS’ DECISION IGNORES IMPORTANT LEGAL RIGHTS OF FOSTER CHILDREN, INCLUDING DUE PROCESS, THE POWER AND JURISDICTION OF THE JUVENILE COURT TO PROTECT THEIR PROPERTY, THE FIDUCIARY DUTIES OF SOCIAL SERVICE DEPARTMENTS, AND THE DUTY OF THE DEPARTMENT OF SOCIAL SERVICES TO APPLY ITS DISCRETION TO ACT IN THE BEST INTERESTS OF FOSTER CHILDREN.....	24
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

<i>Ashcraft & Gerel v. Shaw</i> , 126 Md. App. 325 (1999)	25
<i>Balt. City Dept. of Soc. Servs. v. Bouknight</i> , 493 U.S. 549 (1990).....	26
<i>C.H. v. Payne</i> , 683 F.Supp.2d 865 (S.D. Ind. 2010).....	9, 13
<i>Connor v. Patrick</i> , 771 F.Supp.2d 142 (D.Mass. 2011).....	9, 13
In re: Adoption/Guardianship Nos. J9610436 and J9711031, 368 Md. 666 (2002).....	4
<i>In re Adoption/Guardianship of RaShawn H.</i> , 402 Md. 477 (2007).....	24
<i>In re Adoption/ Guardianship No. T97036005</i> , 358 Md. 1 (2000).....	4
<i>In re Danielle B.</i> , 78 Md. App. 41 (1987).....	27, 28
<i>In re Gault</i> , 387 U.S. 1 (1967).....	7
<i>In re James G.</i> , 178 Md. App. 543 (2008).....	27
<i>In re: J.G.</i> , 652 S.E.2d 266 (N.C. Ct. App. 2007).....	21
<i>In re Justin D.</i> , 357 Md. 431 (2000).....	27
<i>In re Knowack</i> , 53 N.E. 676, 677 (N.Y. 1899).....	8
<i>In re Najasha B.</i> , 409 Md. 20 (2009).....	26
In re: Noberto C., 133 Md. App. 558 (2000).....	4
<i>Kenny A. ex rel. Winn v. Perdue</i> , 218 F.R.D. 277, 292 (N.D. Ga. 2003).....	9
<i>L.J. v. Donald</i> , No. 09-2259 (Fourth Cir. pending).....	4
<i>L.J. ex rel. Darr v. Massinga</i> , 699 F. Supp. 508 (D. Md. 1988).....	3
<i>L.J. ex rel. Darr v. Massinga</i> , 838 F.2d 118 (4th Cir. 1988).....	3

<i>L.J., et al. v. Massinga, et al.</i> , No. JH-84-4409 on January 2, 1987.....	3
<i>L.J. v. Massinga</i> , 778 F. Supp. 253 (D. Md. 1991).....	3
<i>L.J. v. Wilbon</i> , 633 F.3d 297, 307–310 (4th Cir. 2011), <i>cert. denied sub nom.</i> , <i>Dallas v. L.J.</i> , 132 S. Ct. 757 (2011).....	3, 9, 13
<i>Montgomery County v. Sanders</i> , 38 Md. App. 406 (1978).....	28
<i>State of California Dep't of Soc. Servs. v. Thompson</i> , 321 F.3d 835 (9th Cir. 2003).....	13
<i>Wentzel v. Montgomery Gen. Hosp.</i> , 293 Md. 685 (1982).....	28

STATUTES, RULES AND REGULATIONS

Maryland Code Annotated, Courts & Judicial Procedure

§ 3-802.....	25
§ 3-803.....	25
§ 3-819.....	25
§ 3-820.....	26

Maryland Code Annotated, Family Law

§ 1-201.....	25
§ 5-501.....	14
§ 5-527.....	14

Code of Maryland Regulations s (COMAR)

07.02.11.31.....	14
------------------	----

U.S. Code Annotated, The Social Security Act

42 U.S.C. § 671	13
42 U.S.C. § 672	13
42 U.S.C. § 674	13
42 U.S.C. § 675	13

Code of Federal Regulations

45 C.F.R. § 92.24.....	13
------------------------	----

STATEMENT OF THE CASE, QUESTIONS PRESENTED AND STATEMENT OF FACTS

The Amici adopt and incorporate by reference the Statement of the Case, Questions Presented and Statement of Facts in the Brief of Petitioner in Case No. 95.

INTRODUCTION

This case raises legal concerns that go to the core of the fiduciary responsibilities of the state agency entrusted with the care of our most vulnerable citizens, abused and neglected children. The agency charged with protecting Ryan’s best interests used that power to take his assets, placing the fiscal self-interests of the agency and state over the interests of a foster child, denying Ryan his constitutional protections, undermining the agency’s fiduciary obligations, and subverting the statutory purpose of a federal entitlement belonging to Ryan. The Baltimore City Department of Social Services (“DSS”) applied for Old Age Survivor’s and Disability Insurance (“OASDI” or “survivor benefits”) on Ryan’s behalf after his father died, applied to become his representative payee to gain control over the funds as, and then diverted those funds to reimburse state costs that Ryan had no obligation to pay for – all without providing notice to Ryan or his CINA attorney. The practices of the foster care agency violated its fiduciary obligations, violated Ryan’s statutory and constitutional rights, and caused harm to Ryan as he aged out of care.

Despite the ongoing judicial review in this case, the state has already started taking steps to expand the practice of converting foster children’s Social Security benefits into a state revenue source. The Maryland Department of Human Resources, the parent agency of DSS, issued a request for proposals to expand “collection efforts” of Social Security benefits from foster children, with proposals due June 22, 2012.¹ DHR, Soc. Svcs. Admin. Small Procurement Solicitation for Consulting Services, DHR Agency Control

¹ The RFP seeks proposals regarding expansion of collections of foster children’s SSI benefits, which are Social Security benefits belonging to disabled foster children that the state takes as “reimbursement” of foster care costs just like OASDI benefits.

No: SSA/CS 13-001 S, available at <http://www.dhr.state.md.us/blog/?p=1622>. Rather than requesting suggestions of how additional Social Security benefits could be used to benefit the foster children, the “Contractor Requirements” require strategies and analysis of how increased Social Security collections will increase state revenue – or how they will “impact existing State General Funds.” *Id.* Such focus is unfortunately consistent with prior state policy documents, indicating that the state views receipt of foster children’s Social Security benefits not as a means to increase services to foster children but as a strategy to bring millions in “savings to the General Fund.”²

Foster children like Ryan leaving foster care are not doing well: over half experience unemployment, almost three-fifths make less than \$10,000 in annual income, 43% lack health insurance, a quarter experience homelessness, 25% don’t graduate from high school, just 2% obtain a bachelor’s degree, over 80% of males have been arrested, and almost 60 % of the young men have been convicted of a crime. Midwest Eval. of the Adult Functioning of Former Foster Youth: Outcomes at Age 23 and 24, Chapin Hall at the Univ. of Chicago (2010), *available at* http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf. In addition to using OASDI benefits for current or reasonably foreseeable specialized needs not already paid for by the state, a child’s OASDI benefits could be used to assist the struggles most foster children face when leaving the system. But when DSS is the child’s payee, it refuses to consider any such a use.

Amici fully endorse Appellant’s arguments as to the illegality and impropriety of the DSS conduct at issue in this case. The Court of Special Appeals erred in overturning the decision of the juvenile court to protect Ryan’s best interests from the agency actions,

² See Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, fn. 131 (2006) (quoting Md. Dept. of Human Resources, Title IV-E Foster Care & Subsidized Adoption Program, noting that “[a]s of June 30, 1999, 586 foster children committed to the Department were in receipt of SSI benefits. This represents total potential annualized savings to the General Fund in excess of \$3.5 million (586 foster children receiving SSI x \$500 SSI benefit/month x 12 months/year)”).

and this Court should reverse the decision of the Court of Special Appeals.

INTERESTS OF AMICI CURIAE

L.J., et al., are a certified class of children (“the *L.J.* class”) who are or will be placed in the custody of DSS. The class was certified by the United States District Court for the District of Maryland in *L.J., et al. v. Massinga, et al.*, No. JH-84-4409 on January 2, 1987. *See L.J. ex rel. Darr v. Massinga*, 699 F. Supp. 508, 510 (D. Md. 1988). Petitioner Ryan W. is a member of the class. The *L.J.* case was brought to remedy violations of certain federal statutory and constitutional rights of children in foster care by BCDSS and its parent agency, the Department of Human Resources (“DHR”). Among the issues raised were unsafe placements, lack of health care services, and lack of adequate casework. In 1987, the U.S. District Court entered a preliminary injunction against DSS and DHR, *see id.* at 540, *aff’d, L.J. ex rel. Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988). The parties then entered into a comprehensive consent decree, *id.* at 518-26, which was modified in 1991 to extend to children in foster care placed with relatives. *see L.J. v. Massinga*, 778 F. Supp. 253 (D. Md. 1991).

In 2009, after the *L.J.* class filed for contempt and enforcement, the parties entered into a modified consent decree, but, before it was judicially approved, DHR and DSS asked the federal court to reject the new agreement and find that it lacked subject matter jurisdiction over the case. The federal court (Motz, J.) denied the motion and approved the new decree. DHR and DSS appealed to the Fourth Circuit, which affirmed, *L.J. v. Wilbon*, 633 F.3d 297, 307–310 (4th Cir. 2011), *cert. denied sub nom., Dallas v. L.J.*, 132 S. Ct. 757 (2011).

The *L.J.* class has a strong interest in ensuring that DSS does not take the federal benefits of class members to apply to their foster care costs, to which the *L.J.* class already is entitled to full support by the State, and instead to allow class members to use these proceeds to support their well-being, supplement their education, or prepare for independence. Neither the original nor the modified *L.J.* consent decree addresses the issues raised in this case, as those decrees focus on the services provided by DSS to

protect the safety and health of foster children and to achieve permanency plans, and not on the property rights of foster children. The *L.J.* class therefore has a strong interest in participating in this case, as it will decide vital property rights of class members and the powers and jurisdiction of the juvenile court to protect those rights. This Court previously granted the *L.J.* class leave to participate as amici in a case of systemic importance to Baltimore foster children, *In re Adoption/ Guardianship No. T97036005*, 358 Md. 1 (2000).

The **Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal services organization, has a longstanding commitment to protecting the rights of children in foster care. To this end, the PJC has participated in numerous appeals before this Court and involving the enforcement of federal and state child welfare laws. See, e.g., *L.J. v. Donald*, No. 09-2259 (Fourth Cir. pending); *In re: Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. 666, 796 A.2d 778 (2002); *In re: Noberto C.*, 133 Md. App. 558, 758 A.2d 637 (2000). The PJC has an interest in this case because its outcome will determine whether state agencies have a duty to use a foster child's financial resources to serve the individualized best interests of that child, thus improving the child's chances of overcoming the challenges he or she will face while in foster care and during the transition to independent adulthood.

Founded in 1977, the **National Association of Counsel for Children** (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. The organization is multidisciplinary and has approximately 1800 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs

servicing these goals include training and technical assistance, the national children's law resource center, the child welfare attorney specialty certification program, policy advocacy, and the amicus curiae program. Through its amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and in the Supreme Court of the United States.

First Star is a 501(c)(3) child advocacy organization that promotes practices that improve life for abused and neglected children in the United States. First Star's programs support these children's basic rights and include public policy advocacy against state confiscation of the assets of children in state care. First Star, along with the Children's Advocacy Institute, published "The Fleecing of Foster Children" (2011) which examines this issue in depth. First Star has regularly provided testimony and other information to lawmakers and has filed numerous legal briefs as amicus curiae regarding issues affecting abused and neglected children. Its programs also include direct service "foster care academies" that further the academic aims and achievements of foster children by providing them with residential academic programs housed on college campuses.

The **Children's Advocacy Institute (CAI)** is based at the University of San Diego School of Law. It has represented the interests of children in California and nationally for 24 years. Its operations include an academic center training law students in child advocacy law, including active clinics representing children and parents in juvenile dependency court and representing the interests of at-risk youth involved in delinquency court. It also operates one of the nation's leading child advocacy law firms, engaging in legislative and regulatory advocacy, impact litigation, and research and public education. Its director recently served as Chair of the Board of the National Association of Counsel for Children and currently serves as Counsel to the Board of Voices for America's Children; he has also authored the text *Child Rights and Remedies* (Clarity, 2002, 2006). One of CAI's primary areas of interest, research and advocacy is improving the outcomes of youth who age out of foster care. To that end, CAI has studied

various state and federal laws and policies that prevent former foster youth from achieving financial stability as young adults; this research culminated in the release of a national report, “The Fleecing of Foster Children: How We Confiscate Their Assets and Undermine Their Financial Security.” CAI’s participation in this proceeding is premised on its interest in ensuring that where the state serves as the legal parent of a child, any monies payable for the benefit of that child be so received, credited and utilized in a manner that serves each individual child’s best interests, that the duly appointed guardian ad litem and/or attorney representing the child be made aware of any such payments and of their distribution and use, and that such funds not be improperly diverted to the pecuniary advantage of a representative payee with a fiduciary duty to the child.

Susan Leviton is an attorney and professor of law. For several years, Professor Leviton represented children in abuse and neglect proceedings in Maryland courts. She founded Advocates for Children and Youth, a statewide child advocacy program, and she has served on various commissions to address the needs of foster children and other at-risk children, including the Governor’s Commission on Adoption, the Governor’s Commission on Students At Risk, and the CINS/CINA Task Force. She has run the Children’s Issues and Legislative Advocacy Clinic at the University of Maryland. Professor Leviton has an interest in this appeal because its outcome will impact the opportunities available to many children and youth in foster care, a population whose interests she has advocated throughout her career.

Daniel L. Hatcher is an associate professor of law and teaches in the University of Baltimore School of Law's Civil Advocacy Clinic. Professor Hatcher has prior experience in civil legal aid work, including statewide policy advocacy and representing children in foster-care proceedings in Baltimore City. He also worked for a national child-advocacy organization in federal policy development and legislative advocacy in all areas impacting child poverty. He has testified before Congress and before state-level legislative committees on a host of issues affecting children and low-income individuals

and families and has written extensively in these areas. *See, e.g., Foster Children Paying for Foster Care*, 27 *Cardozo L. Rev.* 1797 (2006); *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 *Brook. L. Rev.* 1333 (2009); Book Chapter, *Advocating for Nonresident Fathers in Child Welfare Court Cases, Legal Strategies to Address Child Support Obligations*, ABA Center on Children and the Law (2009); *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 *Ariz. L. Rev.* 675 (2010). His scholarship and advocacy has led to national press coverage, citation in multiple Congressional Research Service reports, requests to draft legislation, and continued participation in reform efforts to improve policies impacting children and impoverished families. Professor Hatcher also represented a former foster child in a case with substantially similar issues as the present case. *Myers vs. Baltimore County Department of Social Services, et al.*, No. 2765 (Sept. 2009)(Md. Ct. Spec. App., Aug. 29, 2012) (*cert. den.* Md. Ct. App., Dec. 17, 2012, Pet. Docket No. 458).

ARGUMENT

I. DSS’S USE OF FOSTER CHILDREN’S SOCIAL SECURITY BENEFITS CONFLICTS WITH THE AGENCY’S CORE PURPOSE OF PROMOTING AND PROTECTING FOSTER CHILDREN’S BEST INTERESTS.

The *parens patriae* doctrine establishes the foundational purpose of foster care agencies like DSS to serve vulnerable children and to promote and protect the children’s welfare and best interests. *E.g., In re Gault*, 387 U.S. 1, 16 (1967). However, the doctrine has also provided power that can be hidden from public awareness and oversight – and some state actors have sought to exercise the power to the detriment of those served.

A. Historical Misuse of *Parens Patriae* Power

The *parens patriae* doctrine, providing the power of state agencies to protect the best interests of vulnerable children, dates back to feudal England. Historical use of the doctrine was conflicted. *See* Lawrence B. Custer, *The Origins of the Doctrine of Parens*

Patriae, 27 EMORY L.J. 195, 196–99 (1978). Regarding “idiots and lunatics,” the King provided needed assistance under a perceived duty of care and without fiscal motives. Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of “Parens patriae,”* 22 S.C. L. REV. 147, 161 (1970). However, regarding children, the King’s actions under the *parens patriae* doctrine were often driven by self-interest, as the provision of care and protection was focused on children of wealthy landowners with estates that could provide riches to King. Custer, *The Origins of the Doctrine of Parens Patriae*, *supra* at 196-99. Taking assets from children of landed gentry after their parents died was considered the right of the crown in return for providing wardship services. Thus, the purpose of *parens patriae* to protect the vulnerable children in the King’s realm in turn rationalized the power to assert dominion over the children’s property and funds. Enlightenment and awareness led to societal revulsion that forced the end of such practices. Custer, *id.* at 199 (“The historical record itself suggests that the Court of Wards and Liveries was in fact established with the express purpose of increasing revenue from sales of wardships, and that reaction to abuses in this context led to the eventual abolition of the court, if not the wardship institution itself.”)

In early American history, although treatment of children was certainly lacking, the *parens patriae* doctrine became established the foundational duty of states to serve and protect children’s best interests. *E.g.*, *In re Knowack*, 53 N.E. 676, 677 (N.Y. 1899) (“The state, as *parens patriae*, by this legislation seeks to protect children who are destitute and abandoned by those whose duty it is to care for and support them.”). However, while the duty to protect the best interests of children became entrenched in American jurisprudence, state agencies and early juvenile courts were acting within a confidential system often with minimal if any due process. Explaining the shortcomings, the Supreme Court recognized the due process rights of children as persons under the constitution in *In re Gault*, 387 U.S. at 16. As Justice Fortas’ opinion noted, children’s rights and interests were frequently undermined under unchecked *parens patriae* discretion: “The Latin phrase [*parens patriae*] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme. . . .” *Id.*

Additional cases followed, finding that children have enforceable rights and solidifying the duty of the state to act only in the best interests of children in order to protect and serve their welfare. *See, e.g., L.J. v. Wilbon*, 633 F.3d 297, 307–310 (4th Cir. 2011) (holding that the Maryland foster care agency failed to establish that there was no private right of action of foster children to enforce federal requirements to provide individualized foster care case plans or a case review system); *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 169–172 (D.Mass. 2011) (children have an enforceable right in the state making foster care payments); *C.H. v. Payne*, 683 F.Supp.2d 865, 877 (S.D. Ind. 2010); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 292 (N.D. Ga. 2003) (found provisions under federal child welfare laws to be enforceable under 42 U.S.C. § 1983).

However, even as the *parens patriae* doctrine has been linked to increased recognition of children’s independent rights, and despite *In re Gault*, state actors possessing the *parens patriae* power have at times continued to misuse it. As today’s agency inheritors of the *parens patriae* power face their own search for revenue, the need for increased funding has caused the agencies to again consider children as a source of funds. But today the children targeted as potential funding sources are the impoverished rather than the entitled: abused and neglected children. Children today enter foster care poor, and often leave care poor – if not worse.

B. Foster Children Improperly Used as a Source of Funds for States and Private Contractors.

As foster children have struggled to assert state and federal statutory and constitutional rights as their own, child welfare agencies have sometimes sought to block the children’s efforts. And now, faced with budget concerns, foster care agencies have begun to treat their child beneficiaries as a source of revenue. As some agencies face bleak budget outlooks, anti-tax sentiment, and the desire to cut state spending, they have cited a need need for more funding. Unfortunately, resulting revenue maximization strategies have led to conflict between the obligation to serve the interests of children and

the fiscal interests of agency self-preservation and growth. The practice before this Court is one such conflict. *See* Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1799, 1830-32 (2006) (hereinafter “Foster Children Paying for Foster Care”); *See also* FIRST STAR & CHILDREN’S ADVOCACY INSTITUTE, THE FLEECING OF FOSTER CHILDREN: HOW WE CONFISCATE THEIR ASSETS AND UNDERMINE THEIR FINANCIAL SECURITY (2011), available http://www.caichildlaw.org/Misc/Fleecing_Report_Final_HR.pdf.

1. Agency Purpose vs. Self-Interest

Child welfare agencies take on a fiduciary role in protecting children’s rights, and the actions of the agencies are intended to solely focus on the best interests of the children. Therefore, it is unfortunate when the guardians of children’s rights take actions that are contrary to the children’s interests.

As children have struggled to expand their rights, their foster care agency guardians have sometimes taken positions against the children rather than always aiding the children’s best interests. For example, fighting against the assertion of rights by foster children to a minimum quality of care, the Maryland child welfare agency recently argued: “[T]he Due Process Clause does not itself impose on the State a generalized duty of optimal care, protection, and treatment to foster children, nor does due process demand that a state’s administration of a system of foster care meet statutorily—defined professional standards....” Reply Brief of Appellants at 16 *L.J. v. Donald*, 633 F.3d 297 (4th Cir. 2011) *cert. denied*, 132 S. Ct. 757 (U.S. 2011) (No. 09-2259), 2010 WL 2639447 at *9.

Evident in the present case, agencies like DSS have at times sought to deny children their most basic due process rights under the rationale that the agencies can best serve the children if their discretion is unchecked. And the agencies have also at times turned inward. Due to unfortunate fiscal circumstances, agencies have increasingly focused on their own fiscal bottom line – even when practices may harm the children the agencies exist to serve.

2. Additional Layers to the Conflict

The conflict between foster care agencies' purpose of serving the best interests of children and the agencies' fiscal self-interests is further complicated. First, private contractors have become involved in the efforts of states to seek out foster children's Social Security benefits. Second, the state human service agencies' interests often conflict with the fiscal interests of their parent states. *See generally*, Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 Ariz. L. Rev. 675 (2010) (hereinafter "Poverty Revenue").

a. Revenue Maximization Consultants

As state agencies are seeking out every dollar they can find due to insufficient funding, private consultants have aided the search by developing strategies to help agencies claim additional federal funds with the contractors often taking a significant percentage as a contingency fee. *Poverty Revenue* at 677. In the context of foster children's Social Security benefits, state agencies are often employing the private revenue maximization consultants to help in the process using the children's funds as revenue. For example, the Public Consulting Group claims to be the largest vendor of such services through its "Social Security Advocacy Management Services-SSAMSTTM." *Social Security Advocacy Management Services - SSAMSTTM Offerings for Foster Care Agencies*, PUBLIC CONSULTING GROUP (2012), http://www.publicconsultinggroup.com/humanservices/SSI_SSDI/ssi_for_fostercare.html The company helps foster care agencies look for children who are disabled or have deceased parents, files the applications, handles redeterminations and reviews, completes required representative payee accounting reports, and takes over "financial management assistance of awarded benefits" that ultimately results in the children's funds being used as a revenue stream for the agencies: "we have filed and represented over 30,000 applications, generating over \$250 million in additional revenue for our clients." *Id.* MAXIMUS, Inc. highlights its SSI Advocacy services for states looking to increase

revenue from taking foster children's Social Security benefits, and explains "22,421,236 in Revenue has been generated from the SSI Advocacy Project for the State of Iowa from September 2004 through May 2010." MAXIMUS, Subject Area: Human Services SSI Advocacy,

http://www.nascio.org/committees/clc/best_practices/MAXIMUS%20SSI%20Advocacy.pdf. Similarly, as noted in the introduction, Maryland is now seeking to increase its revenue from foster children's Social Security benefits by employing the assistance of a private contractor.

b. Agency Interests vs. State Interests

The pursuit of funding by state foster care agencies – even when taken from the children in agency care – is often asserted to be in the greater good of all children served. Agencies like DSS are using individual children's resources to reimburse state foster care costs under the rationale of increasing the agencies' capacity to serve all foster children. *Foster Children Paying for Foster Care, supra* at 1818-19. However, as agencies take funds from children, states and private industry in turn take those funds from the agencies to bolster private profits and state general revenue. *Id; see also Poverty Revenue* at 705-708. As a result, the additional federal funds resulting from revenue maximization contracts often do not lead to additional fiscal capacity for the human service agencies, but rather the funds are often diverted by states into general revenue. Thus, foster children are used as a source of funds for the agencies, which in turn are used as a source of funds for the states, with the children's best interests lost in the competing fiscal shuffle.

II. DSS HAS A DUTY TO PROVIDE AND PAY FOR THE SERVICES THAT IT CLAIMS IT IS REIMBURSING BY TAKING RYAN'S FUNDS

Maryland participates in the federal foster care assistance program under Title IV-E of the Social Security Act. Under the program, the federal government matches states'

foster care expenditures to increase the ability of states to provide foster care services. Title IV-E requires states to pay their share of the costs using *state funds*, and prohibits states from using federal funds, like OASDI benefits, to defray the states' required spending. *See* 42 U.S.C. §§ 671, 672, 674; *State of California Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 839-840 (9th Cir. 2003); 45 C.F.R. § 92.24.

Title IV-E mandates that participating states “shall make foster care maintenance payments on behalf of each child...” 42 U.S.C. § 672(a)(1). The foster care maintenance payments must include “payments to cover the cost of (and cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance... and reasonable travel...” 42 U.S.C. § 675(4)(A). Thus, states receiving Title IV-E funds must pay the very current maintenance costs that DSS incorrectly claims children must pay.

This is consistent with court decisions holding that foster children, as the direct beneficiaries of this federal mandate, have privately enforceable rights to force states to pay the foster care maintenance payments on their behalf:

the state must distribute benefits to *each child*.... 42 U.S.C. § 672(a)(1) (requiring that “each State with a plan approved under this part shall make foster care maintenance payments *on behalf of each child*”) (emphasis added). Plainly, these directives are both couched in mandatory terms and are unmistakably focused on the benefitted class, *i.e.*, foster children.

Connor B. v. Patrick, 771 F. Supp. 2d 142, 171 (D.Mass. 2011). *See also, e.g., C.H. v. Payne*, 683 F.Supp.2d 865 (S.D. Ind 2010) (same); *L.J. v. Wilbon*, 633 F.3d 297 (4th Cir. 2011) (holding that Maryland agency failed to establish there was no private right of foster children to enforce federal requirements to provide individualized foster care case plans). Given this enforceable right of a child to force the state to pay foster care maintenance payments on his behalf, the state cannot possibly have a countervailing ability to force the child to make those same payments. Using a child's OASDI funds in this way not only violates DSS's fiduciary obligations, it violates direct prohibitions in

federal law to pay for children's care.³

III. THE STATE CAN FULFILL ITS DUTY TO SERVE A FOSTER CHILD'S BEST INTERESTS IF IT USES THE CHILD'S FINANCIAL RESOURCES IN A MANNER THAT DIRECTLY ADDRESSES THE CHILD'S UNMET NEEDS.

All foster children are legally entitled to receive a wide range of services from DSS throughout the time they are in its care. For example, the state pays for all foster children to receive 24-hour care in an approved setting (MD. CODE ANN., FAM. LAW § 5-501(g)) and basic living necessities such as food, clothing, and transportation (*e.g.*, MD. CODE REGS. 07.02.11.31 (2010)). Even with these services that agencies are required to provide and pay for, foster children often lack the resources, services and support they need to develop into physically and mentally healthy, law-abiding, productive members of society. *See, e.g.*, Dianne H. Peterson, Jenna Lynn Mazzucca, *Youth at Risk: The ABA Initiative and Colorado's Participation*, 36 Colo. Law. 31, 33-34 (2007) ("In the foster care system, the state provides a bed, meals, clothing, and basic necessities, but generally does not provide for things like going to the movies, dances, participation in team sports, and other extracurricular activities where teens learn important social and life skills"). Therefore, when DSS acts as a representative payee for a foster child receiving OASDI benefits, it must promote that child's best interests by using the benefits to narrow the gap between the bare minimum the child is legally entitled to receive by virtue of being in foster care and what the child needs to thrive.⁴

³ Further, DSS was also obligated to pay for Ryan's care pursuant to state law. *See e.g.*, MD. CODE ANN., FAMILY LAW § 5-527(b)-(c) (requires that DSS "shall pay for foster care.").

⁴ Amici in no way suggest that DSS may use a foster child's OASDI funds to supplant its own payments in support of the child's basic needs, including shelter, clothing, food, medical treatment, school supplies and the like. As Appellant argues, DSS has a legal obligation to provide these services to all foster children, and that obligation is unaffected by the child's status as an OASDI beneficiary.

A. Development-Enhancing Activities

As just one example of a lawful way in which DSS can use a foster child's OASDI funds is to facilitate the child's participation in activities that would enhance his or her development. For example, young people achieve greater academic success when, instead of spending their free time in an unstructured manner, they become involved in structured programs that inspire and develop their interests and passions. *See* Rich Gilman, *The Relationship Between Life Satisfaction, Social Interest, and Frequency of Extracurricular Activities Among Adolescents*, 30 *J. Youth & Adolescence* 749, 753, 762 (2001); Jennifer A. Fredricks & Jacquelynne S. Eccles, *Developmental Benefits of Extracurricular Involvement: Do Peer Characteristics Mediate the Link Between Activities and Youth Outcomes?*, 34 *J. Youth & Adolescence* 507, 516 (2005) (reporting data that supports the theory that "extracurricular involvement increases students' identification with school and . . . academic benefits result from this increased identification"). Youth who are able to engage in such activities are less likely than their peers to get caught up in drugs, gangs, and premature sexual activity. *See* Deanna C. Linville & Angela J. Heubner, *The Analysis of Extracurricular Activities and Their Relationship to Youth Violence*, 34 *J. Youth & Adolescence* 483, 484 (2005). Contrastingly, youth who do not participate in activities that reinforce positive behaviors are 57% more likely to drop out of school, 49% more likely to use drugs, and 27% more likely to be arrested than those who do. *See* Davalos, *supra*, at 62. And ongoing involvement in structured programming can be especially beneficial to children and adolescents in out-of-home care. *See generally*, Anne E. Casey Foundation, *A Roadmap For Learning: Improving Educational Outcomes in Foster Care* 45 (2004), www.casey.org/Resources/Publications/pdf/RoadMapforLearning.pdf. (discussing the potential positive impact of co-curricular activities on foster children). A study found that youth in foster care who were able to participate in diverse after-school structured programs completed high school and began college at higher rates than youth who were not able to participate in such programs. *See* Peter J. Pecora et al, *Assessing the*

Educational Achievements of Adults who were Formerly Placed in Family Foster Care, 220 CHILD & FAM. SOC. WORK 231, 227 (2006). One reason for this trend is that year-after-year participation in such activities creates stability in the otherwise unpredictable and often chaotic lives of foster children. “[C]ontinuity of activities may . . . minimiz[e] the disrupting effect of placement in foster care” and shifts in foster placements and “is associated with improved measures of well-being.” Rowena Fong, *Continuity of Activities and Child Well-Being for Foster Care Youth*, 28 CHILD AND YOUTH SERVICES REV. 1359, 1371 (2006).

Regrettably, many foster children lack access to these development-enhancing opportunities. *See, e.g.*, KATHERINE KORTENKAMP & JENNIFER EHRLE, THE WELL-BEING OF CHILDREN INVOLVED WITH THE CHILD WELFARE SYSTEM: A NATIONAL OVERVIEW 3 (2002), http://www.urban.org/uploadedpdf/310413_anf_b43.pdf (last visited Oct. 7, 2010). This is so, at least in part, because states often do not pay for the costs associated with participation in particular activities or other needs of foster children beyond basic needs. *See, e.g.*, Pecora et al, *Educational Opportunities*, *supra*, at 227 (noting that most public foster care programs do not pay for foster children to pursue extracurricular opportunities); Kate Leckie, *Wish Granted Draws Tears in Courtroom*, FREDERICK NEWS POST, June 17, 2010, www.fredericknewspost.com/sections/news/display_comments.htm?StoryID=106261 (reporting that many Maryland foster youth need laptop computers for school or to pursue academic interests but cannot obtain them through DSS). Private organizations have sometimes attempted to fill this gap in services. *See, e.g.*, Camp Freedom, www.lions-campcrescendo.org/campfreedom.html (grant-funded camp for children with disabilities in foster care or in the custody of grandparents); Leckie, *supra* (reporting that Maryland lawyers formed a committee to collect laptops and digital cameras for some foster children). In Baltimore City, for instance, two attorneys who represent children in abuse and neglect cases discovered that “there were financial limitations to what the government could provide to foster the children’s abilities,” and formed A Step Closer Foundation to attempt to provide additional needed services and resources for some

children in foster care. A Step Closer Foundation, About Us, <http://www.astepcloser.org/about.html>. Donna's Place, a creation of another Baltimore City child advocacy organization, runs a literacy project for children in foster care and provides them with holiday gifts, toys, books, and computers. *See* Donna's Place, <http://www.mdlab.org/Donnas%20Place>. While these organizations undoubtedly make a difference in the lives of those they touch, they cannot afford to support all foster children who wish to pursue opportunities not paid for by the state's foster care dollars.

When DSS manages OASDI benefits on behalf of a foster child, the agency must evaluate whether it could promote the child's best interests and promote permanence by employing these funds to pay for needed current services beyond those services already provided and paid for by the agency. This must be an individualized assessment. Further, DSS must balance the use of the child's OASDI funds on such possible current needs, while also using the funds as resource and tool to plan for the child's future.

B. Transitioning

When DSS is managing OASDI benefits on behalf of a child – especially one who is unlikely to secure a permanent living arrangement prior to aging out of foster care – it must also consider using the benefits to ease the child's transition from foster care to independent adulthood. Having access to financial resources – their own financial resources – would provide an immense help to youth struggling to overcome some of the obstacles they face upon leaving state care.

1. Young Adults Fare Poorly When Transitioning from Foster Care to Independence.

Typically, foster youth who never secure a permanent living arrangement and simply “age out” of state care have suffered years of trauma and instability, and lack family and community support to help them make the transition to adulthood. The outlook for these young adults is bleak. Youth who age out of foster care experience high unemployment and earn little income during their first several years on their own.

See OFFICE OF THE ASSISTANT SECRETARY OF PLANNING AND EVALUATION, DEPT. OF HEALTH AND HUMAN SERVICES, COMING OF AGE: EMPLOYMENT OUTCOMES FOR YOUTH WHO AGE OUT OF FOSTER CARE THROUGH THEIR MIDDLE TWENTIES i (2008) (hereinafter “HHS STUDY”), http://www.urban.org/UploadedPDF/1001174_employment_outcomes.pdf.

Approximately one fifth to one third of aged-out foster youth have “very low probabilities of employment and hardly any earnings at any time between ages 18 and 24,” while an additional one fifth to one half had high rates of employment through their late teens but were much less likely to be employed during their early and mid-twenties. *Id.* at ii; see also, e.g. CHILDREN’S AID SOCIETY, YOUTH AGING OUT OF FOSTER CARE FACE POVERTY, HOMELESSNESS, AND THE CRIMINAL JUSTICE SYSTEM 2 (2006), <http://www.childrensaidsociety.org/files/upload-docs/FosterCare.pdf>; Carol Brandford & DIANA ENGLISH, FOSTER YOUTH TRANSITION TO INDEPENDENCE STUDY: FINAL REPORT 4 (2004) (reporting that less than half of aged-out foster youth in a Washington study were employed). Even to the extent that these young adults do have jobs, their earnings are typically very low. See CHILDREN’S AID SOCIETY, *supra*, at 2 (summarizing research findings that average wage of employed former foster youth was below the federal poverty level); BRANDFORD & ENGLISH, *supra*, at 4 (47% of employed aged-out foster youth in a Washington study earned wages at or below the poverty line). Unsurprisingly, many former foster youth must rely on public assistance to make ends meet. See BRANDFORD & ENGLISH, *supra*, at 4; CHILDREN’S AID SOCIETY, *supra*, at 2 (32-40% of former foster youth utilize public assistance, and 50% have experienced extreme financial hardship). Former foster youth are also less likely to complete high school or attend college than their peers. Researchers estimate that a significant proportion of transitioning foster youth, ranging up to 63%, do not have a high school diploma or GED. See CHILDREN’S AID SOCIETY, *supra*, at 2 (summarizing survey data showing that 40-63% of former foster youth have not completed high school). Young people aging out of foster care also “lag far behind their peers in the general population when it comes to attending college and graduating from college if they do attend.” AMY DWORSKY &

MARK COURTNEY, DOES EXTENDING FOSTER CARE BEYOND AGE 18 PROMOTE POSTSECONDARY EDUCATIONAL ATTAINMENT? 1 (2010), http://www.chapinhall.org/sites/default/files/publications/Midwest_IB1_Educational_Attainment.pdf; John Emerson, *From Foster Care to College: Supporting Independent Students*, 4 LEADERSHIP EXCHANGE 6, 7 (2007) (citing findings that 3% of former foster youth complete college, as compared to 27% of the general population); Curtis McMillen, et al., *Educational Experiences and Aspirations of Older Youth in Foster Care*, 82 CHILD WELFARE 475, 477 (2003) (citing research findings that only 2-11% of former foster youth attended some college). These statistics do not reflect any lack of interest in education among foster youth; most transitioning youth want to attend and expect to graduate from college. *See id.* at 483. Further, former foster youth are more likely to experience housing and health difficulties and become involved in criminal activity. Numerous studies have reported that, within five to seven years after leaving state care, large percentages of former foster youth find themselves homeless. *See e.g.*, AMY DWORSKY & MARK COURTNEY, ASSESSING THE IMPACT OF EXTENDING CARE BEYOND AGE 18 ON HOMELESSNESS: EMERGING FINDINGS FROM THE MIDWEST STUDY 3 (2010), http://chapinhall.org/sites/default/files/publications/Midwest_IB2_Homelessness.pdf; CHILDREN’S AID SOCIETY, *supra*, at 3 (concluding on the basis of surveys conducted in various states that 12-30% of youth leaving foster care have “struggled with homelessness”). Young foster care alumni also face a greater risk of mental illness than the general population. *See* CASEY FAMILY PROGRAMS, YOUNG ADULT SURVEY 2006: EXAMINING OUTCOMES FOR YOUNG ADULTS SERVED IN OUT-OF-HOME CARE 26 (2006) (hereinafter “CASEY YOUNG ADULT SURVEY 2006”) (reporting that, relative to the general population of young adults, former foster youth are twice as likely to suffer from depression, and more than twice as likely to suffer from psychosis or obsessive compulsive disorders). Exacerbating this problem is the widespread lack of health insurance among this demographic. *See* CASEY FAMILY PROGRAMS, CASEY YOUNG ADULT SURVEY: FINDINGS OVER THREE YEARS 5 (2008) (35.7% of surveyed former

foster youth had no health insurance).

2. Existing Transition Services Are Insufficient to Fully Address Foster Youths' Needs

Government efforts to facilitate foster youths' transition to independence have so far failed to serve the number of youth in need and provide the depth of services required. Federal support for youth in transition comes primarily from the Chafee Foster Care Independence Program, which provides \$140 million in funding for "independent living services," including mental health services, mentoring and life skills programs, employment preparation, and housing stipends, and also authorizes up to \$60 million in education vouchers (or "ETVs," worth up to \$5,000 annually per youth) for such youth. *See* NATIONAL FOSTER CARE COALITION, THE CHAFEE EDUCATIONAL AND TRAINING VOUCHER (ETV) PROGRAM: SIX STATES' EXPERIENCES 2, <http://www.casey.org/Resources/Publications/pdf/ChafeeETV.pdf>. Even with such resources, unfortunately "only about two-fifths of eligible foster youth receive independent living services, and service availability varies widely between states and even between counties within states." MARK COURTNEY, POLICY BRIEF: YOUTH AGING OUT OF FOSTER CARE 2 (2005), <http://transitions.s410.sureserver.com/wp-content/uploads/2011/08/courtney-foster-care.pdf>. Even with CFCIP funds and additional state spending, the availability of transitional housing assistance is inadequate to accommodate the number of youth aging out each year. *See* Rachel Sherman, *Serving Youth Aging Out of Foster Care*, THE FINANCE PROJECT ISSUE NOTE (Welfare Information Network, Washington, D.C.), Oct. 2004, at 4, <http://76.12.61.196/publications/servingyouthagingoutIN.pdf> (noting that, throughout the nation, transitional housing resources are insufficient to serve the population of youth in need). Thus, "state and local administrators agree that sufficient resources do not exist to provide the full range of supports and services needed by transitioning foster youth." Ben Kerman, et al., *Extending Transitional Services to Former Foster Children*, 83 CHILD

WELFARE 239, 241 (2004).⁵

3. Providing Youth with Financial Resources Can Help to Ease their Transition to Adulthood

When a state agency acts as a representative payee for a child receiving OASDI income, it can advance that child's best interests by saving the income and using it to ease his or her departure from foster care. There are several strategies a state might pursue. The agency can ensure the youth has stable housing upon becoming independent by using the accrued funds to pay for his or her rent, security deposit, basic moving and household expenses, or even mortgage. *See, e.g.,* Toni Naccarato & Emily DeLorenzo, *Transitional Youth Services: Practice Implications from a Systemic Review*, 25 CHILD & ADOLESCENT SOC. WORK J. 287, 299 (2008) (advising that social service agencies should either connect aging-out youth with existing subsidized housing resources or construct transitional housing for such youth); *In re: J.G.*, 652 S.E.2d 266, 275-76 (N.C. Ct. App. 2007) (holding that child welfare agency must use child's OASDI benefits to pay mortgage on Habitat-for-Humanity house that child owned); MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 18 AND OUT: LIFE AFTER FOSTER CARE IN MASSACHUSETTS 29 (2005), <http://www.chapa.org/pdf/18andOut.pdf>, (describing one agency's efforts to provide transitioning youth with financial assistance for housing). Or, the agency might use the funds to help the youth stay in his or her foster home beyond the point at which he or she would normally age out of the foster system. *See* Kerman, et al., *supra*, at 248 (explaining how one child welfare agency provides financial support to foster parents who wish to continue housing and caring for

⁵ Fortunately, Maryland waives state college tuition for youth who were formerly in the state foster care system. *See* Maryland Higher Education Commission, Tuition Waiver for Foster Care Recipients, http://www.mhec.state.md.us/financialAid/ProgramDescriptions/prog_fostercare.asp. But this waiver does not apply to out-of-state or private colleges or vocational programs, and it does not cover the cost of books or room and board or other life expenses.

foster children who have legally aged out of state care); *see also* DWORSKY & COURTNEY, HOMELESSNESS, *supra*, at 2, 7 (concluding that youth who remain in foster care for longer are less likely to experience homelessness in their late teens and early twenties, although they may still become homeless later in life). Assisting transitioning young adults to avoid homelessness reduces the probability that they will suffer mental illness or become victims of violent crime and increases the probability that they will succeed in school and work. *See id.* at 7.

Similarly, a child welfare agency can expend OASDI benefits in a manner that aids a transitioning youth to pursue higher education and secure employment. As discussed previously, if the state provides a transitioning teenager with stable housing, that teenager will be in a far better position to earn his or her degree and/or get a job. *See id.*; *see also* Amy Dworsky & Alfred Perez, *Helping Former Foster Youth Graduate from College through Campus Support Programs*, 32 *Child & Youth Services Rev.* 255, 261 (2010) (reporting that most foster care alumni who were in college found the availability of housing assistance important or very important to their academic success). Likewise, if the state helps the youth to earn a driver's license and/or purchase a car, the youth will have a greater capacity to search for and secure a job. *See* Pecora, *Northwest Foster Care Alumni Study*, *supra*, at 1477 (concluding that having a driver's license can positively impact youths' educational attainment); Kerman et al, *supra*, at 254 (recounting how one former foster youth was able to accept a higher-paying non-local job when her child welfare agency bought her a used car). If the youth in transition is a parent, the state can further support his or her participation in education and employment by paying for childcare. *See* DWORSKY & COURTNEY, *supra*, EDUCATIONAL ATTAINMENT at 5 (24.5% of female former foster youth who faced any barriers to educational attainment identified parenting responsibilities as the greatest barrier; 15.9% of female former foster youth who dropped out of college cited the need to care for children as their reason for terminating their education). Child welfare agencies can also utilize OASDI funds to fill gaps in the educational training voucher program. Specifically, an agency might use OASDI benefits to subsidize tuition for a youth who

did not receive a voucher, supplement the value of the voucher for a child who did receive one, pay room and board for a youth who has received a tuition waiver but has insufficient funds for room and board, fund the youth's participation in internships, or pay for the child to enroll in a non-traditional vocational program (e.g. medical billing programs, cosmetology school) that is not eligible for ETV funding. *See* NATIONAL FOSTER CARE COALITION, *supra*, at 23 (discussing gaps in ETV funding). Equally important are strategies aimed directly at the youth's academic needs. Many former foster youth are not "academically prepared" for college and need to take supplemental or remedial courses before they can attain a high school diploma or GED or enroll in a bachelor's or associate's degree program. DWORSKY & PEREZ, *supra*, at 258. By paying for such courses, the state can improve a former foster youth's chances of success in his or her education and subsequent employment.

Providing a transitioning youth with a stock of concrete, tangible resources, including cash and savings, has significant value in and of itself. One study revealed that about a third of young adults have less than \$250 and lack basic necessities, like dishes, when they exit foster care. *See* Pecora, *Northwest Foster Care Alumni Study*, *supra*, at 1469, 1471. Those who do have such assets fare better than those who did not, not only because the "wealthier" youth also enjoy better access to other non-financial supports, but also because having a bank account and a certain amount of money is critical to functioning as an adult in the United States. *See* Pecora, *Northwest Foster Care Alumni Study*, *supra*, at 1477; *see also* Jim Casey Youth Opportunities Initiative, Savings and Asset Building, <http://www.jimcaseyyouth.org/savings-and-asset-building>, (last visited Oct. 8, 2010) ("Savings and assets are key ingredients to success in society"). Of course, like all young adults, aging-out foster youth need information and advice so that they can make wise financial decisions, but programs like the Jim Casey Youth Initiative's Opportunity Passport are in place to provide just this type of guidance. *See generally* Jim Casey Youth Opportunities Initiative, Savings and Asset Building.

Through the Opportunity Passport, young former foster youth receive a 100% match for every dollar they put in to an individual development account ("IDA") up to

\$1,000/year, and they also receive financial literacy training and assistance with investment in education, housing, cars, healthcare, and microenterprise. *See id.* Depositing a transitioning youth's accrued OASDI benefits into an IDA is one effective way in which the state can help the youth to build his or her assets and learn skills necessary for financial survival. Using OASDI funds to conserve for future needs provides an incredible opportunity to engage the youth in thinking about how to best conserve the money and how to plan for future needs.

Again, there is no one approach that will be effective for all foster youth. Individualized planning is necessary, which is precisely the role of a representative payee. A transitioning youth with a child, for example, will likely have very different housing, educational, healthcare, and financial needs than a youth who is not a parent. Meanwhile, a youth who can cover most of her educational expenditures through scholarships and an educational training voucher might not need tuition support in the same way as a youth enrolling in a training program that does not qualify for an ETV subsidy but may need housing support or funding for internships in his or her field of study. The "paramount" inquiry is, as always, determining the evolving needs and what is in the best interests of each individual child. *See In re Adoption/Guardianship of RaShawn H.*, 402 Md. 477, 497 n. 9 (2007).

IV. THE COURT OF SPECIAL APPEALS' DECISION IGNORES IMPORTANT LEGAL RIGHTS OF FOSTER CHILDREN, INCLUDING DUE PROCESS, THE POWER AND JURISDICTION OF THE JUVENILE COURT TO PROTECT THEIR PROPERTY, THE FIDUCIARY DUTIES OF SOCIAL SERVICE DEPARTMENTS, AND THE DUTY OF THE DEPARTMENT OF SOCIAL SERVICES TO APPLY ITS DISCRETION TO ACT IN THE BEST INTERESTS OF FOSTER CHILDREN.

The decision by the Court of Special Appeals ("CSA") fails to properly address the rights of foster children in other respects: the violation of Ryan's due process rights, the breach of the Department of Social Services' fiduciary duties to safeguard Ryan's benefits for his future use, and its duty as a representative payee to exercise its discretion

and use the funds only as directed by Ryan's individualized best interests and not for the department's financial self-interest. *Amici* agree with the arguments on these issues presented by Ryan and adopt and incorporate them here.

The CSA's holding that the juvenile court lacks subject matter jurisdiction over Ryan's OASDI benefits and exceeded its statutory authority in imposing a constructive trust on DSS to preserve those benefits merits further discussion, however. In effect, the CSA held that juvenile courts lack power to safeguard the property interest of Children in Need of Assistance ("CINAs"). If affirmed, this ruling would substantially truncate the power of the juvenile court to protect CINA children and confer DSS agencies with unfettered discretion to control and disperse the property of CINA children without judicial oversight or accountability. The decision is contrary to statute and case law and should be reversed.

The Juvenile Cause Act confers concurrent authority of the juvenile court over financial support of a CINA child and plenary jurisdiction over the child's property. *See* MD. CODE ANN., CTS. & JUD. PROC. ("CJP") §§ 3-803(b), 3-819(c)(2) (conferring concurrent jurisdiction over support); § 3-819(g) (stating that no guardian may exercise control over CINA child's property unless specifically authorized by the juvenile court); *see also* MD. CODE ANN., FAM. LAW § 1-201 (explaining that "[t]his section does not take away or impair the jurisdiction of a juvenile court or a criminal court with respect to the custody, guardianship, visitation, and support of a child"). These provisions must be liberally construed. CJP § 3-802(a)-(b). The CSA never addressed these powers and instead ruled that, because no power to enforce a constructive trust is set forth in the statute, subject matter jurisdiction was lacking. This narrow view of the juvenile court's powers and jurisdiction leaves children in foster care without protection or adequate accountability against improper acts by DSS with regard to their property and funds.

In *Ashcraft & Gerel v. Shaw*, 126 Md. App. 325, 336 (1999) (Adkins, J.), the Court of Special Appeals affirmed a juvenile court order authorizing a court-appointed guardian of a CINA child's property to investigate (with depositions and other discovery) the conduct of counsel representing the child in medical malpractice settlements who

were suspected of conflicts of interest and acting against the best interest of the child and in favor of the child's mother, whom they were representing in the CINA proceedings. The child's CINA attorney raised concerns over the apparent conflict of interest and troubling facts regarding a settlement in one of the medical malpractice actions and petitioned the juvenile court to appoint a guardian of the property pursuant to former CJP § 3-820(e), now § 3-819(g), and separately filed a petition for appointment of a guardian of the property in circuit court. The court consolidated the cases, appointed a guardian of the property in both cases, and charged the guardian to investigate the concerns. The attorneys resisted discovery, claiming, *inter alia*, that the juvenile court lacked jurisdiction to order discovery from the attorneys. In that case, the CSA agreed with the guardian "that the circuit court, as an equity court with jurisdiction over [the CINA child's] property through the guardianship petition, and as a juvenile court with jurisdiction over [the child] personally through the CINA petition, had clear authority to order discovery to protect his interests." The expansive power of the juvenile court to protect the child's interest took paramount priority, and that power (and jurisdiction) clearly extended to the child's property, as protection and disposition of the child's property could be vital to protect the child's personal interests.

Numerous other cases have emphasized the juvenile court's overriding duty to exercise its *parens patriae* authority to protect the interests of CINA children. *See, e.g., Balt. City Dept. of Soc. Servs. v. Bouknight*, 493 U.S. 549, 559 (1990) (holding that juvenile court's obligation to protect a CINA child overrode parent's Fifth Amendment privilege against self-incrimination, as once the child "was adjudicated a child in need of assistance, his care and safety became the particular object of the State's regulatory interests" and parent who gained custody had obligation to cooperate with juvenile court's oversight authority to ensure child's protection); *In re Najasha B.*, 409 Md. 20, 33, 39 (2009) (rejecting DSS's claimed unilateral authority to withdraw its CINA petition and holding that the Juvenile Causes Act "present[s] clear constraints on [DSS's] autonomy to act in CINA proceedings"); *In re Justin D.*, 357 Md. 431, 449 (2000) (explaining that DSS "is held to a greater and more direct level of accountability to the

court” because its authority is derived by court order and in many respects DSS “acts as the court’s agent” and the court has a “clear supervisory role”); *In re James G.*, 178 Md. App. 543, 584 (2008) (affirming that requirement in CJP § 3.816.1 that juvenile courts certify whether DSS made reasonable efforts to meet the child’s needs and provide required services confirms the courts’ mandatory “regulatory oversight” role in the child welfare system); *In re Danielle B.*, 78 Md. App. 41, 68-69 (1987) (“As a result of their broad discretionary powers, juvenile court judges have the opportunity and indeed the obligation, to act as a monitor in order to review, order and enforce the delivery of specific services and treatment for children who have been adjudicated CINA.”).

The *Danielle B.* decision illustrates the breadth of the juvenile court’s authority and its obligation to use its equitable powers to protect children. There, a juvenile court master rejected the testimony of a 13-year old girl alleging repeated sexual and physical abuse by her step-father and his brother leaving her pregnant with an STD; the child’s CINA attorney filed an emergency exception prematurely, before the master issued written findings. As a result, the juvenile court could not hear the exceptions de novo, and it refused to reverse the master’s credibility finding when reviewing the case on the written record in considering DSS’s exceptions. The CSA held that, while the child’s exceptions were premature and thus ineffective, the juvenile court had broad equity powers to protect the child and a duty to make its own decision about how to do so:

As a result of their broad discretionary powers, juvenile court judges have the opportunity and indeed the obligation, to act as a monitor in order to review, order and enforce the delivery of specific services and treatment for children who have been adjudicated CINA. This duty flows from their inherent *parens patriae* jurisdiction.

The *parens patriae* jurisdiction of circuit courts in this State is well established. ... It is a fundamental common law concept that the jurisdiction of courts of equity over such persons is plenary so as to afford whatever relief may be necessary to protect the individual's best interests. ...

Id. at 68-69 (quoting *Wentzel v. Montgomery Gen. Hosp.*, 293 Md. 685, 702 (1982)). The CSA added that “[t]he court of equity ‘stands as a guardian of all children, and may interfere at any time and in any way to protect and advance their welfare and interests’”

and concluded that, based on this authority, “[t]he duties of a juvenile court judge are very broad and pervasive.” *Id.* at 69 (quoting *Montgomery County v. Sanders*, 38 Md. App. 406, 418 (1978)).

This case illustrates perfectly the compelling need for juvenile court oversight. Without it, DSS can abuse its discretion, breach fiduciary duties, and even mismanage its access to and control over CINA children’s benefits. Here, DSS wrongfully took significant benefits owed to Ryan without any accountability or oversight. Had the juvenile court not exercised its jurisdiction and an accounting not been made, the error would not have been detected and Ryan would have lost thousands of dollars of his property entrusted to DSS. This error never would have been detected without juvenile court oversight.

Other CINA children have not been so fortunate. In 2001, an audit by the Office of the Inspector General of the Social Security Administration (“OIG”) found that DSS was not adequately performing its duties as representative payee. OFFICE OF THE INSPECTOR GENERAL, FINANCIAL-RELATED AUDIT OF THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICE—AN ORGANIZATIONAL REPRESENTATIVE PAYEE FOR THE SOCIAL SECURITY ADMINISTRATION, A-13-00-10066 (Sept. 2001), <http://www.ssa.gov/oig/ADOBEPDF/A-13-00-10066.pdf>. Among other things, record keeping and proper accounting practices were virtually nonexistent, and BCDSS may have improperly spent children’s funds. BCDSS records showed \$864,000 in conserved funds owed to 290 beneficiaries no longer in state care, and the agency had taken no action to pay the conserved funds to the affected beneficiaries. In more than twenty-five percent of the cases reviewed, the children were no longer in BCDSS’s care, but the agency continued to receive and spend the benefit payments as representative payee. As a result of the audit, the OIG referred numerous cases for representative payee misuse determinations. Although a determination of misuse normally means a payee is no longer considered suitable to provide representative payee services, BCDSS continued to act as the representative payee for foster children in its care. *Id.* at iii, 3, 4, 8, 9.

As this case attests, those problems have not been fixed in the decade that lapsed since the damning SSA OIG audit. Less than a year ago, the Maryland Department of Legislative Services (“DLS”) found that DSS’s “controls were inadequate over trust accounts (for example, accounts remained open when children left foster care)”. Office of Legislative Audits, Department of Legislative Services, AUDIT REPORT: DEPARTMENT OF HUMAN RESOURCES LOCAL DEPARTMENT OPERATIONS, 18 (May 2012), http://dlslibrary.state.md.us/publications/OLA/DHR/LDO_2011.pdf. Thus, Ryan’s case hardly is unique.

CINA children need the protection of the juvenile court to ensure that their benefits and property are not mismanaged by DSS. In finding that the juvenile court lacked authority to order DSS to safeguard Ryan’s funds by imposing a constructive trust, the CSA confused remedy with jurisdiction. The juvenile court has statutory plenary jurisdiction over the property of the CINA and could have appointed a guardian of his property, if necessary, to conserve his assets. A constructive trust was just one of several equitable remedies that the court had at its disposal to ensure that DSS conserves and does not squander Ryan’s property. As a practical matter, juvenile court oversight is the only safeguard available to protect CINA children against the type of mismanagement shown in this case, the OIG audit, and the recent DLS audit. If the juvenile court loses that power, these vulnerable and most needy of children will continue to lose their assets to the confiscatory power of the State.

CONCLUSION

As the fiscal constraints of child welfare agencies have led the agencies to develop strategies that use foster children as a source of funds, judicial review by the juvenile court is crucial. The reasoning is simple. Agencies like DSS created with the sole purpose of serving the best interests of vulnerable children must remember to only use their power to serve that goal – even in the face of difficult budgetary needs. When fiscal concerns cause the agency to momentarily lose track of its core reason for existence,

judicial review is necessary to re-direct DSS's actions towards that over-arching best interests goal.

For the reasons set forth above, and in the Appellant's brief, this Court should reverse the decision below.

Respectfully submitted,

Daniel L. Hatcher
Associate Professor of Law
University of Baltimore School of Law
Civil Advocacy Clinic
40 W. Chase Street
Baltimore, MD 201201
(410) 837-5650
fax: (410) 837-4776
dhatcher@ubalt.edu

Counsel for *Amici Curiae*

Mitchell Y. Mirviss
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
(410) 244-7400
fax: (410) 244-7742
mymirviss@venable.com

Counsel for *Amici Curiae*, L.J. et al.

March 4, 2013

Times New Roman, 13 Point Font

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2013, I mailed first class, postage prepaid, two copies of the foregoing Brief to:

Ramesh Kasarabada
Legal Aid Bureau, Inc.
500 East Lexington Street
Baltimore, Md. 21202

Counsel for Petitioner

Julia Doyle Berndhardt, Esq.
Assistant Attorney General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202

Hilma J. Munson
Assistant Attorneys General
Office of the Attorney General
Saratoga State Center-Suite 1015
311 West Saratoga Street
Baltimore, Maryland 21201

Counsel for Respondents

Daniel L. Hatcher