

Memorandum in Support

To: Social Security Administration

From: Daniel Hatcher, Professor of Law, University of Baltimore School of Law

Re: POMS Clarification of Representative Payee Fiduciary Role

Date: October 27, 2021

Thank you for the opportunity to discuss concerns regarding how state and county child welfare agencies are misusing foster children's Social Security benefits (including SSI and OASDI). During our meeting on October 21, 2021, SSA requested a memorandum in support of suggested clarification in POMS regarding representative payees' fiduciary role. The following provides the needed clarification and summarizes the legal framework necessitating the clarification.

Suggested Clarification:

Add the following or similar language to POMS GN 00602.001 (Use of Benefits): "When a child has been placed in foster care or other out-of-home care in the custody or care of a child welfare agency, the child's current maintenance needs are provided and paid for by the agency. Thus, the representative payee may not use the child's benefits to pay or reimburse the costs of care, and, consistent with the fiduciary role, the representee payee must conserve or invest benefits on behalf of the beneficiary (using available savings mechanisms that are exempt from relevant asset limits) or use the benefits for other existing and foreseeable needs that are not already provided by the child welfare agency."

Why Clarification is Necessary:

Under current practices, state foster care agencies seek out children who are disabled or have deceased parents, apply for Social Security SSI or OASDI benefits and apply to take control of the children's benefits as representative payee—all usually without notifying the children or their legal representatives. Then, once the agencies assume the fiduciary obligation as representative payee, the agencies use the children's benefits to reimburse themselves for agency costs that children have no legal obligation to reimburse (and that the state agencies are legally obligated to provide and pay for). Often, revenue maximization contractors help with the entire process.

The child welfare agencies' appropriation of children's SSI and OASDI benefits could not be a clearer violation of their fiduciary obligations. "There is no equitable principle more firmly established in our jurisprudence than that a fiduciary is under a duty of loyalty to his beneficiaries and cannot use the property of a beneficiary for his own purposes." *Gianakos, Ex'r v. Magiros*, 238 Md. 178, 185-86 (1965). The agencies incorrectly

rationalize their breach of fiduciary obligation by claiming they can use foster children's SSI and OASDI benefits to reimburse "current maintenance" costs that the state agencies have paid for. As summarized below, the child welfare agencies are purposefully misinterpreting federal law.

The Social Security Act requires representative payees to act as fiduciaries, to use SSI and OASDI funds for the beneficiary's "use and benefit" and in a manner that they determine is in the beneficiary's best interest. 42 U.S.C. § 405(j); 20 C.F.R. § 404.2035(a) ("representative payee has a responsibility to [u]se the benefits received on your behalf only for your use and benefit in a manner and for the purposes he or she determines. . . to be in your best interests. . ."). This requirement is reiterated in the Social Security Administration's policy manual, the Program Operations Manual System ("POMS"). According to the POMS, a representative payee must exercise individualized discretion for each child beneficiary and apply the benefits "in the best interests of the beneficiary, according to his/her best judgment..." (POMS GN 00602.001 (Use of Benefits)).

Within this framework, the payee/fiduciary can use the benefits to pay for current maintenance needs if those needs are not being provided for elsewhere. However, if current maintenance costs are already paid for, as in the circumstance of children in the custody of child welfare agencies, then the payee must either conserve the benefits or use the benefits for other foreseeable needs not already paid for by the agency. POMS GN 00602.001 (Use of Benefits) ("A payee must use benefits to provide for the beneficiary's current needs such as food, clothing, housing, medical care and personal comfort items, or for reasonably foreseeable needs. *If not needed for these purposes... the payee must conserve or invest benefits on behalf of the beneficiary...*")(emphasis added). *See also*, POMS GN 00602.001 (Payee Responsibilities and Duties)("The representative payee responsibilities and duties are to: • *meet with the beneficiary on a regular basis to ascertain his or her current and foreseeable needs*; • *use funds in the beneficiary's best interest*; • *conserve benefits not needed for the beneficiary's current needs . . .*")(emphasis added).

The obligations of a representative payee are therefore clear. The payee is a fiduciary and must exercise individualized fiduciary discretion in determining how to use a beneficiary's OASDI funds. The over-arching principle governing the exercise of discretion is to serve the best interests of the beneficiary. And, because the beneficiary's best interest is paramount, the payee's self-interests cannot be considered. POMS GN 00602.001 (Use of Benefits) (directing Social Security Administration staff to ensure that "*the payee understands the fiduciary nature of the relationship, and that benefits belong to the beneficiary and are not the property of the payee.*")(emphasis added).

Foster children do not have a debt obligation to pay for their own care. Rather, state and federal law explicitly requires the state foster care agencies to pay the costs of foster care services. *E.g.*, Md. FL § 5-527(b)-(c) (requiring that the "Department shall pay for foster care" for all foster children). Like state laws, Title IV-E of the Social Security Act requires state child welfare agencies to provide and pay for the current maintenance costs of foster children. Title IV-E mandates that states "*shall make foster care maintenance payments on behalf of each child...*" 42 U.S.C. § 672(a)(1) (emphasis added). The foster care maintenance payments must include "payments to cover the cost of (and the 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, Title IV-E requires state agencies to pay for the current maintenance costs that the agencies are wrongly reimbursing with children's SSI and OASDI benefits.

Further, Title IV-E requires states to pay their share of the costs of care with state funds, and Title IV-E specifically prohibits states from using other federal funds (including SSI and OASDI benefits) to defray or replace the required state expenditures. 45 CFR § 75.306 explicitly prohibits state agencies from using money other than state funds to pay the cost of care. The regulation even specifically prohibits the use of other (non-IV-E) federal funds (which includes Social Security Benefits) for the state costs. *See also*, OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., HAWAII DEPT. OF HUM. SERVICES – AN ORG. REP. PAYEE FOR THE SOC. SEC. ADMIN., A-09-08-28045 at 5 (2008) (citing then 45 C.F.R. § 92.24) (concluding that a foster care agency "must pay its share of the foster care costs with State funds," that Federal regulations prohibit the agency "from using a child's OASDI benefits to reimburse itself for the State's share of Title IV-E costs . . .").

Such structure 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:

Each of the cited provisions similarly discusses how 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 (D. Mass. Jan. 4, 2011). *See also*, e.g., *C.H. v. Payne*, 683 F.Supp.2d 865 (S.D. Ind 2010)(same). Given this enforceable right of foster children to force state agencies to pay foster care maintenance payments on their behalf, the state agencies cannot possibly have a countervailing ability to force the children to reimburse those same payments. As even further support for this obvious conclusion, in its training manual for organizational representative payees, the SSA explains that "paying legal guardianship fees would not constitute proper use of benefits" if the "[g]uardianship costs and fees are included as part of a state's support obligation to the beneficiary..." SOCIAL SECURITY ADMINISTRATION, TRAINING ORGANIZATIONAL REPRESENTATIVE PAYEES, Unit 6, available at <http://www.ssa.gov/payee/LessonPlan-2005-2.htm>.

In addition to misinterpreting federal law, child welfare agencies have also wrongly relied on the Supreme Court's decision in *Washington State Dep't of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003). (E. 67). In *Keffeler*, the Court's sole holding is that a state agency did not violate the anti-attachment provision of the Social Security Act by applying children's Social Security benefits to state foster care

costs. The Court concluded the anti-attachment provision was not applicable, because the state agencies are not creditors to the children—because the children owe no debt for the cost of care. The Court noted that it was not addressing other legal concerns with the agency practices, including constitutional concerns and that the agency payees are acting inconsistently with their fiduciary obligations under § 405(j) of the Social Security Act. In fact, the Supreme Court explicitly indicated that such fiduciary concerns should be addressed by the SSA:

Respondents also go beyond the § 407(a) [anti-attachment provision] issue to argue that the department violates § 405(j) itself, by, for example, failing to exercise discretion in how it uses benefits, periodically “sweeping” beneficiaries' accounts to pay for past care, and “double dipping” by using benefits to reimburse the State for costs previously recouped from other sources. These allegations, and respondents’ § 405(j) stand-alone arguments more generally, are far afield of the question on which we granted certiorari.... Accordingly, we decline to reach respondents’ § 405(j) arguments here, except insofar as they relate to the proper interpretation of § 407(a). *Respondents are free to press their stand-alone § 405(j) arguments before the Commissioner, who bears responsibility for overseeing representative payees, or elsewhere as appropriate.*

Id. at 390, n.12 (emphasis added).

Thus, current child welfare agency practices of taking children’s benefits to reimburse agency costs violates their fiduciary obligations and conflicts with the entire intended structure of the representative payee system. The practices necessitate clarification by the SSA in the POMS or elsewhere, that child welfare agencies acting as payees cannot use children’s benefits to reimburse themselves for the costs of care.

cc: Amy Harfeld, Jill Hunter-Williams,