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# PURPOSE VS. POWER: *PARENS PATRIAE* AND AGENCY SELF-INTEREST

Daniel L. Hatcher\*

## INTRODUCTION

*“They’re my advocates? No they’re not. To me, they’re against me.”*<sup>1</sup>

Agencies that exist to serve also seek to exist. The purpose of state human service agencies to serve vulnerable populations such as abused and neglected children derives from the common law doctrine of *parens patriae*, embodying the inherent role of the state as parent of the country.<sup>2</sup> The doctrine provides the foundation for the very existence of agencies that serve vulnerable children and underlies the core purpose of the agencies to promote and protect children’s welfare and best interests.<sup>3</sup>

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1. *In re Ryan*, No. 802023006, at 3 (Balt. City Cir. Ct. June 16, 2011) (quoting a teenage foster child regarding the child welfare agency’s diversion of his Social Security survivor benefits to agency funds) (on file with author).

2. See Dwight R. Carswell, Comment, *CAFA and Parens Patriae Actions*, 78 U. CHI. L. REV. 345, 347 (2011); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 34 n.10 (2006); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 297 (2005).

3. See, e.g., Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 896–910 (1975) (providing historical progression of the *parens patriae* doctrine); Naomi Cahn, *State Representation of Children’s Interests*, 40 FAM. L.Q. 109, 112–13 (2006); Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 30 (2009) (stating a “child’s best interests provide the sole justification for the state’s exercise of its *parens patriae* authority”). In addition to providing states with authority to protect vulnerable children, the *parens patriae* doctrine also is invoked to provide states with authority to sue on behalf of their citizens—often in cases involving environmental concerns or other rights under federal law. E.g., Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 63–64 (2011); Robert A.

Yet along with this foundational purpose, the *parens patriae* doctrine also provides power that is often illusive to public knowledge and oversight.<sup>4</sup>

The agencies exist as guardians, with their interests assumed as both synonymous and intertwined with those of the children entrusted to their care. The agency power exists within societal expectations and assumptions of purity of agency purpose, allowing for agency actions that often go unquestioned and hidden from public consideration.<sup>5</sup>

To maintain their cloak of power, the very agencies created to fulfill the *parens patriae* obligations—to protect the rights of children—have systematically battled the children’s efforts to claim those rights as their own. As foster children have struggled to enforce their state statutory rights, federal statutory rights, and constitutional rights, child welfare agencies have sought to block the children’s efforts at every step.<sup>6</sup>

Also, the agencies created to protect the interests of children have now come to view their child beneficiaries as a source of revenue. As the agencies continue to face bleak budget outlooks, anti-tax sentiment, and the desire to cut state spending,<sup>7</sup> revenue maximization strategies have led to conflicts between the obligation to serve the interests of children

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Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 806–16 (2009).

4. See *In re Gault*, 387 U.S. 1, 16 (1967) (“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 . . .”).

5. See generally Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL’Y REV. 155 (1999); Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1 (2001); Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1 (2010).

6. For a discussion of the historical progression of children seeking to enforce their rights against state agency opposition, see generally Barbara L. Atwell, “*A Lost Generation*”: *The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980*, 60 U. CIN. L. REV. 593 (1992); Cristina Chi-Young Chou, *Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683 (1993); Sara J. Klein, Note, *Protecting the Rights of Foster Children: Suing Under § 1983 to Enforce Federal Child Welfare Law*, 26 CARDOZO L. REV. 2611 (2005).

7. Jon Donenberg, *Medicaid and Beneficiary Enforcement: Maintaining State Compliance with Federal Availability Requirements*, 117 YALE L.J. 1498, 1516 & n.100 (2008) (explaining that “Medicaid and other social programs are the first in line for cuts in cash-strapped states desperate for revenue,” quoting, Letter from Sen. Barbara A. Mikulski et al., to Sen. Max Baucus, Chairman, S. Fin. Comm. and Sen. Charles Grassley, Ranking Member, S. Fin. Comm. (Jan. 29, 2008)).

and the fiscal interests of agency self-preservation and growth.<sup>8</sup> Considering just one of the agency practices of treating children as a revenue source, foster care agencies across the country are taking over a quarter of a billion dollars each year from foster children in their care.<sup>9</sup> The agencies do so, often under the direction of private consultants working for a contingency fee, by targeting children who are disabled or have deceased or disabled parents and taking the children's Social Security benefits to replenish the state coffers.<sup>10</sup> This raw pursuit of money—even when taken from the children in agency care—is asserted to be in the greater good of all children served.<sup>11</sup>

The agencies are using their power to take resources from the vulnerable populations they exist to serve, under the rationale of increasing the agencies' capacity to serve the same vulnerable populations. However, as agencies take funds from children and the poor, states and private industry in turn take those funds from the agencies to bolster private profits and state general revenue.<sup>12</sup> As a result, the additional federal funds resulting from revenue maximization contracts may not lead to additional fiscal capacity for the human service agencies, but rather through fiscal maneuvers states often divert funds into their general revenues.<sup>13</sup>

The conflict of interest between agency purpose and fiscal self-interests is further complicated on multiple relationship levels: through the fiscal federalism relationship of the state governments with the federal government, the relationship of the state agencies with their private contractors, and the relationship of the state agencies with their parent states. First, the conflict between agency purpose and agency self-interest exists within a structure of fiscal federalism—an intended partnership of

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8. See Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 *CARDOZO L. REV.* 1797, 1799 (2006).

9. ADRIENNE L. FERNANDES-ALCANTARA ET AL., *CONG. RESEARCH SERV.*, RL 33855, *CHILD WELFARE: SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME (SSI) BENEFITS FOR CHILDREN IN FOSTER CARE* 16 (Apr. 27, 2011), available at [http://assets.opencrs.com/rpts/RL33855\\_20110427.pdf](http://assets.opencrs.com/rpts/RL33855_20110427.pdf).

10. See *id.* at 1830–32.

11. *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Kefeler*, 537 U.S. 371, 390–91 (2003) (noting arguments of amici that if state foster care agencies were no longer allowed to take foster children's Social Security benefits, the agencies would stop acting as payees, stop screening children for possible eligibility for Social Security benefits, and less total funds would be available to meet foster children's needs).

12. Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 *ARIZ. L. REV.* 675, 701–708 (2010).

13. *Id.*

strengths between the federal and state governments.<sup>14</sup> But as the state agencies seek to benefit from the fiscal strength of the federal government, their own strengths in addressing the local and individualized needs of their beneficiaries gives way to their self-interested revenue strategies.<sup>15</sup> Second, as a catalyst to the conflict, a vast poverty industry has grown around the fiscal federalism structure—capitalizing on the billions in grant-in-aid (federal aid) dollars flowing to the states by providing operational and consulting services for poverty programs and encouraging state strategies to increase claims of the federal funds.<sup>16</sup> Third, agencies exist as arms of the states and thus are subject to state control. The *parens patriae* power that is housed within state human services agencies, already diverted toward agency self-interest, is often further manipulated by the broader state powers and interests—with the states aiming to control their agency parts in order to serve themselves.<sup>17</sup>

This article will unravel the intertwined conflict between *parens patriae* purpose and power, as well as peel back and explore the layers of complication within the conflict. Part I will put the conflict between *parens patriae* purpose and power in its historical, theoretical, and practical context. Part II exposes the details of self-interested fiscal pursuits of human services agencies, to the detriment of those served. Litigation currently on appeal in Maryland will provide stark illustration as a framework to the discussion. Part III explains the additional layers of interrelationships between the agencies and the federal government, the poverty industry, and their parent states that both heighten and further complicate the conflict. This article concludes with recommendations to restore purity to *parens patriae*, both in theory and in agency application.

## I. PARENS PATRIAE UNRAVELED

The foundational structure and conflict within agency purpose and power in the context of human service agencies serving abused and neglected children stems from the historical roots of the *parens patriae* doc-

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14. See WALLACE E. OATES, *FISCAL FEDERALISM* (1972); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 *GEO. L.J.* 461 (2002); David A. Super, *Rethinking Fiscal Federalism*, 118 *HARV. L. REV.* 2544 (2005); Hatcher, *supra* note 12, at 683–85 (explaining that fiscal federalism is an economic theory suggesting a structure for government programs through a partnership between the federal government's financial power and the state government's strengths in serving localized needs, and is the basis for our nation's largest federal aid programs).

15. See generally Hatcher, *supra* note 12.

16. *Id.*

17. *Id.*

trine. This article examines the power in terms of confidentiality and the lack of due process, as well as how agencies seek to use their power to subvert the very rights of those the agencies exist to serve.

### A. Historical Purpose

The *parens patriae* doctrine is rooted in unfortunate beginnings. This section describes the emergence and misuse of the doctrine in feudal England, and traces the doctrine's evolution to America—where, although more benign in intent, the doctrine has been diverted again toward the financial self-interests of states and their human service agencies.

#### 1. Common Law Roots: Aid to the Unfortunate and Riches for the Crown

The state's power and responsibility to protect the well-being of vulnerable children and adults is historically rooted in the *parens patriae* doctrine, dating back to feudal England.<sup>18</sup> The doctrine was conflicted from the beginning, pitting the pure aim of aiding those in need of care against the self-interested fiscal motive of obtaining riches to sustain the crown.<sup>19</sup>

Part of the history of the *parens patriae* doctrine was benevolent, such as when the king provided assistance and protection to citizens who could not do so for themselves. The doctrine stemmed from the king's royal prerogative of "establish[ing] the king as a protector or supreme guardian of those classes threatened by forces beyond their control."<sup>20</sup> Regarding "idiots and lunatics," the king provided assistance without fiscal motives: "[W]e can conclude that in the seventeenth century the king's relation to idiots and lunatics was that of guardian to ward, that the guardianship was a duty of care rather than a source of profit."<sup>21</sup>

However, regarding children, actions of the crown under the *parens patriae* doctrine were lacking in benevolent motive.<sup>22</sup> Protection under the doctrine was not applied to all children, but rather focused on children of the landed gentry with estates that could provide riches to the

18. See generally John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 OXFORD J. LEGAL STUD. 159 (1994).

19. See Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 196–99 (1978).

20. George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 896–97 (1976).

21. Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147, 161 (1970).

22. Curtis, *supra* note 20, at 897–98; Custer, *supra* note 19, at 196.

crown.<sup>23</sup> This type of wardship was founded not upon the king's interests in protecting the vulnerable, but in the feudal tenurial system, and the focus on fiscal interests led to abusive practices.<sup>24</sup> Under this early wardship system, the guardians—usually a lord, or the king directly—had rights rather than duties with regard to the male and female heirs,<sup>25</sup> and such rights were abused:

In the case of wards of the crown, it was the practice of the Court of Wards and Liveries to sell both the wardship and marriage rights, and that these wardships went as often to strangers as to mothers or families of minor heirs indicates that this type of wardship was administered with a financial rather than a humanitarian motive. 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.<sup>26</sup>

## 2. *Parens Patriae* in America

As the doctrine began to appear in American jurisprudence, it provided not merely authority but a duty to the vulnerable—with a humanitarian and benign aim.<sup>27</sup> Although the treatment of children in early American history was certainly lacking, the *parens patriae* doctrine was quickly established as providing the foundational authority and duty of states to serve and protect the best interests of children.<sup>28</sup> However, while the duty to protect and serve the welfare of children became clear, actions taken by state agencies and juvenile courts became clouded within confidential court and agency systems and by an absence of due process.<sup>29</sup>

As the doctrine developed, along with the early failings of the child welfare system and juvenile courts, children finally found their own recognition as persons under the U.S. Constitution.<sup>30</sup> In finding children

23. Curtis, *supra* note 20, at 897–98.

24. Custer, *supra* note 19, at 196 (“It was this type of wardship that was most profitable for the crown and therefore most notorious for its financial abuses.”).

25. See Gilbert T. Venable, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894 (1966).

26. Custer, *supra* note 19, at 199.

27. *Id.* at 207.

28. *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.”).

29. See *In re Gault*, 387 U.S. 1, 16 (1967); see generally Fraidin, *supra* note 5.

30. See *In re Gault*, 387 U.S. at 16.

have due process rights, Justice Fortas's opinion in *In re Gault* noted the dubious history of the *parens patriae* doctrine: "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; but its meaning is murky and its historic credentials are of dubious relevance."<sup>31</sup>

The recognition of children's due process rights led to numerous cases finding children have enforceable rights and that states have a duty to act only in the best interests of children in order to protect and serve their welfare.<sup>32</sup> But even as the doctrine's benevolent focus has grown in alongside an increased recognition of children's independent rights, the child welfare system has continued to operate largely in the dark. Juvenile courts often still enforce a strict confidentiality over proceedings,<sup>33</sup> and state agency actions and procedures are often even more hidden from public view.<sup>34</sup> Children's due process rights, even after *Gault*, continue to be shortchanged.

### B. Cloak of Power

As the *parens patriae* doctrine has continued to evolve, moving forward under jurisprudence that has established the intended obligation to

31. *Id.*

32. *See, e.g.,* L.J. v. Wilbon, 633 F.3d 297, 307–10 (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, 169–72 (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); *see also* Everett Skillman, *The Adoption Assistance and Child Welfare Act and the Minor's Civil Rights Remedies*, 14 TRINITY LAW REV. 1, 13–14 & n.44 (2007) (noting some decisions that have found provisions under federal child welfare laws to be enforceable under 42 U.S.C. § 1983 (2006)) (citing Kenny A. *ex rel.* Winn v. Perdue, 218 F.R.D. 277, 292 (N.D. Ga. 2003)), Brian A. *ex rel.* Brooks v. Sundquist, 149 F. Supp. 2d 941, 949 (M.D. Tenn. 2000), Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 683 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997), Jeanine B. *ex rel.* Blondis v. Thompson, 877 F. Supp. 1268, 1283–85 (E.D. Wis. 1995)).

33. *See* Fraidin, *supra* note 5, at 2.

34. *Id.*; *see also* Nora Meltzer, *Dismissing the Foster Children: The Eleventh Circuit's Misapplication and Improper Expansion of the Younger Abstinence Doctrine in Bonnie L. v. Bush*, 70 BROOK. L. REV. 635, 672 (2005) (noting that "every state has legislation that makes foster care records confidential[.]" and that "[a]lthough the purpose underlying these confidentiality laws is protection of the child's privacy, the laws allow foster care agencies to evade accountability for their actions."); Abbey M. Marzick, Note, *The Foster Care Ombudsman: Applying an International Concept to Help Prevent Institutional Abuse of America's Foster Youth*, 45 FAM. CT. REV. 506, 508 (2007) ("Because all states have laws that keep foster care records confidential, foster care agencies are shielded from the public watch.").



serve and protect the welfare and rights of children, the state agencies created to protect children's interests continue to look back toward feudal England, when children were considered property and a source of funds.<sup>35</sup> Child welfare agencies have often sought to hide their actions from public view, fought to diminish children's rights, and maneuvered to place their own agency fiscal self-interest over the interests of the children they serve. This section describes the cloud in which agencies can act in confidentiality, the shortchanged due process rights provided to children, and agencies' efforts to subvert children's struggles to claim their rights as their own—all creating a cloak of power which allows the agency self-interested actions described in Part II.

### 1. Confidentiality and Societal Assumptions

Although children have been recognized as persons under the Constitution since Justice Fortas's opinion in 1967,<sup>36</sup> their rights—and protections—have not flourished.<sup>37</sup> In the words of appellate court judges, children's rights have grown stronger.<sup>38</sup> But children in state care still live in a dark world. Juvenile court proceedings are often either kept com-

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35. See generally Curtis, *supra* note 20; Custer, *supra* note 19; Venable, *supra* note 25.

36. *In re Gault*, 387 U.S. 1, 13 (1967).

37. See generally Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1996); see also Barbara Bennett Woodhouse, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008).

38. See, e.g., *In re Gault*, 387 U.S. at 13; *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (stating that foster children have a constitutional right to "adequate medical care, protection and supervision"); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (holding that a foster child's due process rights extend to "the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes"); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 953 (M.D. Tenn. 2000) (recognizing the right of a foster child "to be placed in the least restrictive, most appropriate, family-like setting while in state custody," and to "receive care, treatment and services consistent with accepted, reasonable professional judgment"); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 507 (D. N.J. 2000) (holding that foster children have a liberty interest "to the right to treatment, which includes the right to receive care, treatment and services consistent with competent professional judgment . . ."); *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 677 (S.D.N.Y. 1996) (holding that foster children have a constitutional right to protection from harm by the state); *B.H. v. Johnson*, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) (holding foster children have constitutional right "to be free from unreasonable and unnecessary intrusions on both [their] physical and emotional well-being").

pletely or partially confidential,<sup>39</sup> and only a small percentage of the hundreds of thousands of cases make it out to see the light of day through appeals. The vast majority of cases are heard in shockingly overcrowded court dockets before judges or masters who may struggle to fight back the overwhelming apathy of helplessness.<sup>40</sup> Most of what occurs in these court rooms, which are all too often still the “kangaroo” courts cautioned against by Justice Fortas, is never known beyond the courtroom walls.<sup>41</sup>

What is hidden in the courts is even more lost from public view in the purposefully and recklessly developed bureaucratic fog that shields child welfare agencies’ actions and policies.<sup>42</sup> Even in those states where

39. See Fraidin, *supra* note 5, at 30–33; see generally Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1 (2002).

40. See Bernardine Dohrn, *Seize the Little Moment: Justice for the Child 20 Years at the Children and Family Justice Center*, 6 NW. J. L. & SOC. POL’Y 334, 334 (2011). Professor Dohrn describes the state of a Chicago juvenile court as follows:

Sadly, the Juvenile Court of Cook County—the world’s first court for children and a global inspiration—was high in the abysmal category. Set in Chicago’s Near West Side, the juvenile courts and detention center (known colloquially as the Audy Home) were filthy, overcrowded, secretive, a haven for burnt-out judges, unaccountable, without published data, and a magnet for impoverished families and youngsters of color, primarily African-American children. Crowds of anxious parents and children were made to throng in the hallways, doors and toilet paper were missing in the bathrooms, public officials—judges, defenders and prosecutors, probation officers and court clerks—seemed not to look up as multitudes of accused were called forth and adjudged.

*Id.*; see also, Marcia Robinson Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J. L. REFORM 199, 207 (2007) (“The periodic family court case reviews included in the federal statutory scheme as a safeguard for children have been emasculated by a lack of adequate representation for children and, in many states, by an inadequately staffed juvenile court system.”); Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1716 (2000) (reviewing ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999), and stating that “[v]irtually everyone familiar with current child welfare practice in the United States agrees that it is in crisis.”); Solomon J. Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135, 166 (2003) (explaining how “juvenile courts have become increasingly discredited and bureaucratic under the weight of burgeoning dockets . . .”).

41. See *In re Gault*, 387 U.S. 1, 28 (1967); Dohrn, *supra* note 40 at 334; see also Fraidin, *supra* note 5, at 30–33; Bazelon, *supra* note 5, at 155; Bean, *supra* note 5, at 1.

42. See Nora Meltzer, *Dismissing the Foster Children: The Eleventh Circuit’s Misapplication and Improper Expansion of the Younger Abstention Doctrine in Bonnie L. v. Bush*, 70 BROOK. L. REV. 635, 672 (2005) (explaining that “every state has legislation that makes foster care records confidential[ ]” and that “[a]lthough the purpose underlying these confidentiality laws is protection of the child’s privacy, the laws allow foster care agencies to evade accountability for their actions”).

juvenile court proceedings are not closed to the public, agency records are generally kept confidential, assuming the agency actions are even documented in some form at all.<sup>43</sup> Also, despite the rulemaking requirements of state administrative procedures acts, much of the detail of agency policy and practices is set out in more informal agency directives—such as action transmittals and policy manuals—that are not developed through a formal rule making process.<sup>44</sup>

Child welfare agencies fight against disclosure of agency records and practices, under the assertion of protecting the confidentiality of children in their care.<sup>45</sup> Then, within the confidential structure, the agencies seek unfettered discretion, claiming such unquestioned and unexposed circumstances allow the agencies to do their best work on the children's behalf—claiming judicial interference with agency discretion would violate the doctrines of sovereign immunity and separation of powers.<sup>46</sup> The level to which some child welfare agencies are averse to any review of their discretion is evident in a brief by the Georgia Department of Human Resources:

As long as a child is in the legal custody of the Department, placement decisions regarding that child are solely within the purview of the Department . . . . When a deprived child is placed in the Department's temporary legal custody by a juvenile court, the Department "has the right to physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care, and the right and duty to provide for the care, protection, training, and education and the physical,

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43. *Id.*

44. See Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1802 n.19 (2006) (noting how "[i]n North Carolina, the state policy manual directs local offices and staff that '[t]he county DSS must be aware of all resources available to a child, which may include a child's unearned income from sources such as Supplemental Security Income, Social Security Survivor's benefits, trust funds, endowments, or child support paid directly to the agency.'" (quoting N.C. Dep't of Health and Human Servs., *Div. of Soc. Servs. Manual*)).

45. See, e.g., *Hanson v. Rowe*, 500 P.2d 916, 918 (Ariz. Ct. App. 1972) (stating that in an action by a parent against the state due to the death of a child and personal injuries of another child in foster care, the state agency fought against the disclosure of agency records, contending that "disclosure should be granted only under circumstances which would possibly assist in the protection, welfare or treatment of the children or their families").

46. See, e.g., Brief for Appellant Georgia Department of Human Resources at 23–26; *In re A.V.B. A Minor Child*, 482 S.E.2d 275 (Ga. 1996) (No. S96G1697); see generally Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377 (1995).

mental, and moral welfare of the child, subject to the conditions and limitations of the order and to the remaining rights and duties of the child's parents or guardian."

Yet, the Court of Appeals' decision in the instant case ignores the express authority referenced above and now permits juvenile courts to render decisions regarding placement of children in the Department's custody, decisions which heretofore were deemed to be solely within the province of the Department . . . . The net effect of this portion of the Court of Appeals' decision in this case permits any party which might disagree with placement decisions made by the Department to have those decisions re-evaluated by the courts, thereby allowing the courts to assume the role of a "super placement agency" and thus abrogate the State's sovereign immunity. Such a role is not only improper for the courts, but also is violative of both the doctrines of sovereign immunity and separation of powers inherent in Georgia's Constitution . . . .<sup>47</sup>

For much of the public, the assumption is that child welfare agencies are generally pure in their pursuit of children's best interests. We want to believe that a child welfare agency will strictly serve the welfare of children and put any conflicting interests aside. Although public outcry can be sparked after a horrific event, such as a child's death after ineffective agency assistance, the agency response is often simply a knee-jerk reaction of removing more children from their families when there is any perceived risk—while simultaneously trying to shut the door even more to public awareness of the agency inner-workings.<sup>48</sup>

## 2. Children's Rights in Darkness

Constitutional due process for children is weak because of the confidential systems used in agencies and juvenile and dependency courts. Within the confidential system of agencies serving children and juvenile and dependency courts, constitutional due process protections are weak. Appellate courts have been torn in determining the amount of due process protections necessary in matters involving children.<sup>49</sup> Even when courts have recognized due process protections for children, in practice they are often ignored by the overwhelmed juvenile court system.<sup>50</sup> As

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47. See Brief for Appellant Georgia Department of Human Resources, *supra* note 46, at 23–26.

48. See Fraidin, *supra* note 5, at 8–16, 40–43.

49. See generally Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 958–67 (2006).

50. See Dohrn, *supra* note 40, at 334; see also Fraidin, *supra* note 5, at 30–33; Bazelon, *supra* note 5, at 155; Bean, *supra* note 5, at 1. For purposes of simplicity, the

children struggle to preserve or establish their own rights to increased constitutional protections or enforceable rights under statutes drawn up to protect their interests, child welfare agencies fight even harder to undermine the children's efforts.<sup>51</sup>

#### a. Due Process Lite

In *In re Gault*, Justice Fortas described historical concerns of how overreliance on the *parens patriae* powers can lead to the denial of due process for children.<sup>52</sup> Before *Gault*, the state agencies and courts often provided children in child welfare proceedings with minimal, if any, due process rights, rationalizing the deprivation of rights under the theory that the state and courts were acting in a protective function.<sup>53</sup> *Gault* provided a notable step toward stopping the misuse of the *parens patriae* doctrine that long deprived children of rights, and the decision recognized children's rightful place under the Constitution.<sup>54</sup>

However, the revolution of children's due process rights has fallen short, because of the child welfare system's history of taking actions against children's rights.<sup>55</sup> Although *Gault* provided children with the right to counsel in juvenile delinquency proceedings, the right to counsel has unfortunately not yet been fully afforded to children in child protection proceedings.<sup>56</sup>

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dependency courts that address abuse and neglect proceedings and courts that address juvenile delinquency proceedings are often simply referred to as juvenile courts in this article.

51. See *infra* notes 61–64 and accompanying text.

52. See *In re Gault*, 387 U.S. 1, 16 (1967).

53. *Id.*

54. *Id.* at 13.

55. Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. Ill. L. REV. 1567, 1577–78 (2009). The author stated,

To date, the U.S. Supreme Court has given limited recognition to children's civil rights and civil liberties . . . . Historically, children were objects and not subjects of law, functioning more in the role of parental property than as persons. They were rarely seen as bearers of due process and equal protection right . . . . But *Brown v. Board of Education*, recognizing children's rights to equality of education, and *In re Gault*, recognizing children's rights in juvenile courts, began to change the legal landscape. As the Court stated in *Gault*, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." This promising bit of dicta has never fully matured. To date, most of the constitutional rights accorded to children have been rights of protection against state action as opposed to rights of active participation. *Id.* (alteration in original) (footnote omitted).

56. See AMY HARFELD, CHRISTINA RIEHL & ELISA WEICHEL, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN (2d ed. 2009), available at <http://www.firststar.org/>

As the growth of due process rights of children has stagnated, the application of those rights that have in fact been recognized is often truncated at best.<sup>57</sup> Judges overwhelmed with large caseloads, and jaded by years of exposure to the chaos and helplessness of the child welfare system, often go through the motions of civil procedure and due process, and sometimes barely so.<sup>58</sup> Much of the leg work might be shuffled down to judicial masters—whose dockets are sometimes even larger than the judges’—who then often retreat to focusing on forcing settlements rather than seeking to uncover the necessary details to determine the best interests of the children. If children do have a lawyer, they often meet them for the first time in court because of the lawyer’s crushing case load. Moreover, children may still not have a voice if the lawyer decides to interject his or her own view as to what is the best for the child rather than representing the child as the client.<sup>59</sup> The result is a system that is chaotic and lacks due process, which allows for children’s rights to be both overlooked and subverted.

#### b. Guardians Subverting the Rights of their Wards

State child welfare agencies exist to protect the interests, and the rights, of abused and neglected children.<sup>60</sup> Courts have long recognized

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LinkClick.aspx?fileticket=TRMFoSIkfFI%3d&tabid=74; Erik Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 665–66 (2006); see also Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 133–34 (1984) (explaining doubts about whether children have right to counsel in foster care proceedings).

57. As Professor Barbara Woodhouse explains, “[l]awyers and judges often dismiss or overlook children’s due process concerns in civil cases, because the law has for so long been accustomed to treating children as parental property, lacking not only ‘capacity’ but personhood.” BARBARA WOODHOUSE, CHILDREN’S RIGHTS, IN YOUTH AND JUSTICE (Susan O. White ed., 2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=234180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=234180).

58. See *supra* note 40 and accompanying text.

59. See generally Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573 (2008); Barbara Glesner Fines, *Pressures Toward Mediocrity in the Representation of Children*, 37 CAP. U. L. REV. 411 (2008); Barbara A. Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381 (2011); Andrea Khoury, *Why a Lawyer? The Importance of Client-Directed Legal Representation for Youth*, 48 FAM. CT. REV. 277 (2010).

60. E.g., Sandra Keen McGlothlin, *No More “Rag Dolls in the Corner”: A Proposal to Give Children in Custody Disputes a Voice, Respect, Dignity, and Hope*, 11 J.L. & FAM. STUD. 67, 72 (2008) (providing relevant history in section titled “The ‘Parens Patriae Doctrine’ and Its Role in the Protection of the Rights of Children.”); Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62

that although parents have constitutional rights in the parent-child relationship, children have independent rights. State agencies step in to protect those rights and interests when the parents can no longer appropriately care for their children.<sup>61</sup> The agencies serve in the nature of a fiduciary for children's rights, and the agencies' interests and actions are intended to align with the best interests of the children.<sup>62</sup> It is thus a bitter irony that the guardians of children's rights will turn against the children whose rights they champion, as the children seek to claim the rights as their own.

In case after case, as children have continued their struggle to break through the confidential impediments of the child welfare system to expand their rights, their agency guardians are always there. But rather than aiding their wards, the agencies have lined up against them. 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 . . . ."<sup>63</sup>

The agencies long for the past, when children knew—or were forced to accept—their place as voiceless chattel, and the agencies were free to act in confidential shadows without interference from constitutional

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RUTGERS L. REV. 305, 322 (2010) ("It is well accepted that, pursuant to the doctrine of *parens patriae*, states are obligated to care for vulnerable children. We argue that the *parens patriae* power also obligates states to protect children's constitutional rights."); See also Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393, 420 (1996) ("Children have 'needs-based rights' to all of our care, rights that flow not from children's autonomy but from their dependency. Because children—mine and yours—are *not* autonomous independent actors responsible for their own survival, they must rely on all of us. While neighborhoods, religious communities, informal fostering, adoption, and charities all play significant roles in the safety net for children, the buck stops with the State. The State must act in its *parens patriae* role, when the adults in children's lives are unable, refuse, or just need a helping hand in providing responsible parenting.").

61. *In re Ivey*, 319 So.2d 53, 58 (Fla. Dist. Ct. App. 1975) (stating that "the overwhelming weight of authority throughout the country supports the view that the state, as *parens patriae*, may step in and protect the rights of a child . . .").

62. See Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 939 (2011) (recognizing that the fiduciary relationship exists between guardian and ward).

63. 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.

rights.<sup>64</sup> Strikingly, the juvenile court judges of Ohio—the intended arbiters and ultimate protectors of juveniles—similarly pointed to the past in their impassioned argument against children’s rights as amicus curiae in *Gault*.<sup>65</sup> The judges looked to an 1882 decision to warn against placing constitutional limitations upon agency actions:

It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise.<sup>66</sup>

The judges tried to bring the past forward:

Does the fact that these problems are now more pressing than they have been justify a disregard of precedents going far back in time? Those who are ignorant of legal precedents, or choose to ignore them, usually can find excuse or reason for doing so. The present popularity of resorting to the constitutional safeguards of the liberties of the person presents an easy and plausible reason for ignoring the fact that children could not possibly grow to productive and law-abiding adulthood if they were entitled to those liberties which are the perquisites of physical, mental and emotional maturity.<sup>67</sup>

In the practices of our nation’s child welfare agencies, not much has changed.

## II. AGENCY SELF-INTEREST

As child welfare agencies have turned against their child beneficiaries’ attempts to establish and enforce their rights, the agencies have also turned inward. The confidential and loosely chaotic structure of the child welfare system has allowed agencies to focus on their own fiscal

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64. See *In re Gault*, 387 U.S. 1, 16 (1967).

65. Brief of the Ohio Association of Juvenile Court Judges as Amicus Curiae at 4, *In re Gault* 387 U.S. 1 (1967) 1966 WL 100788 at \*3.

66. *Id.* at 8.

67. *Id.*



bottom line rather than solely promoting and protecting the best interests of the children.<sup>68</sup>

The turn inward has also encompassed a look back, with state agencies reverting back to their ancestral roots in feudal England, when the *parens patriae* doctrine was often used for self-interested fiscal pursuits to bring riches to the crown.<sup>69</sup> But where the historical financial interests were aimed at children of landed gentry as a source of funds, today's agency self-interests are directed toward children living in poverty.<sup>70</sup>

#### A. *To Serve or Exist?*

Foster care and other agencies serving children's needs have continued to face stagnate or shrinking budgets and they have increasingly turned to revenue maximization strategies to increase agency funds.<sup>71</sup> Agency self-preservation in such a cash-deprived environment has often overcome the interests of those served. The agencies rationalize their efforts as a means of growing agency capacity to serve children in their care, but the fiscal strategies result in taking resources directly from the children.<sup>72</sup>

The strategies are numerous, evolving, and often overlap—but share a common trait of using children as a revenue source. As discussed in more detail in the section below, foster care agencies target children who are themselves disabled, or have deceased or disabled parents, and then convert the children's resulting Social Security benefits into agency revenue.<sup>73</sup> Similar agency strategies have turned child support enforcement practices away from aiding children to agency budgetary concerns.<sup>74</sup> Moreover, as explained in Part III, states are increasingly partnering with private industry to convert federal aid intended for vulnerable children into private profit and state general revenue.<sup>75</sup>

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68. See *supra* notes 42–43 and accompanying text; Hatcher, *supra* note 12.

69. See *supra* notes 22–26 and accompanying text.

70. *Id.*

71. Hatcher, *supra* note 12, at 678.

72. See *id.*

73. Hatcher, *supra* note 8, at 1799.

74. See generally Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST LAW REV. 1029 (2007); Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333 (2009).

75. Hatcher, *supra* note 12, at 677–79.

*B. Alex and Ryan: Foster Care Agencies Taking Orphans' Survivor Benefits*

"You know, the thing is, they are survivor benefits. I am a survivor . . . ."76

Alex and Ryan have much in common. Both young men entered foster care as adolescents,<sup>77</sup> and suffered through their parents' deaths while in state custody.<sup>78</sup> Both were shuffled between multiple placements including several group homes.<sup>79</sup> Both struggled with the transition to adulthood<sup>80</sup> and felt their foster care agency did not adequately serve their best interests while in foster care.<sup>81</sup> And both had their Social Security survivor benefits taken by their foster care agency without their knowledge.<sup>82</sup>

Across the country, child welfare agencies are taking over \$250 million in assets each year from foster children in their care.<sup>83</sup> The agencies seek out children in their care who might be eligible for Social Security benefits, either because of the children's disabilities or due to the death or disabilities of parents, and then apply for the benefits on the children's behalf.<sup>84</sup> Although benefits are an entitlement belonging to the children, the agencies do not notify the children of the application or resulting receipt of funds.<sup>85</sup> The agencies then apply to the Social Security Administration (SSA) to be appointed as the children's representative payee to gain control over the benefits. Once the agency becomes the payee, they convert the money to agency revenue rather than the intended purpose of serving the children's individualized needs.<sup>86</sup> Ryan, a teenager in the Baltimore City foster care system, describes his reaction to the agency taking his Social Security survivor benefits:

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76. *In re Ryan*, No. 802023006, at 3 (Balt. City Cir. Ct. June 16, 2011) (quoting the foster child in disagreement with the child welfare agency's conversion of his Social Security survivor benefits to agency funds) (on file with author).

77. Brief of Appellant *Myers v. Balt. Cnty. Dep't of Soc. Servs.* \*2 (Md. App. Oct. 8, 2010) (No. 2765), 2010 WL 4890061; *Ryan*, at 1.

78. Brief of Appellant, *supra* note 77, at \*2; *Ryan*, at 1.

79. Brief of Appellant, *supra* note 77, at \*2; *Ryan*, at 1.

80. Brief of Appellant, *supra* note 77, at \*3-4; *Ryan*, at 3.

81. Brief of Appellant, *supra* note 77, at \*3; *Ryan*, at 3-4.

82. Brief of Appellant, *supra* note 77, at \*2; *Ryan*, at 2.

83. *See* ADRIENNE L. FERNANDES-ALCANTARA ET. AL., *supra* note 9, at 16.

84. Hatcher, *supra* note 8, at 1800.

85. *Id.* at 1836-37.

86. *Id.* at 1805.

When I first wanted to move where I am now, they didn't want to do it, meaning they were fighting me. They thought I was better where I was in a group home, than be in a foster home where I was in a much better school, and getting the help I needed. For now, they're supposed to be here for me, but everything that benefits me they're fighting. My parents have passed away, you know. I loved my parents to death. I just lost my big brother. If my parents pass away, they would want me to have their work benefits, and DSS, they don't need it . . . . You know, the thing is, they are survivor benefits. I am a survivor . . . . Everyone's passed away, besides my aunt. I wish that I'd be able to get this, so I can move on with my life, and stop having to fight for everything that benefits me. That's what they ([Baltimore County Department of Social Services]) have been doing. They're my advocates? No they're not. To me, they're against me.<sup>87</sup>

The same agency practice happened to Alex, and his case is currently on appeal. *Myers v. Baltimore County Department of Social Services* illustrates the lengths to which a child welfare agency will go to convert a child's funds into agency revenue—and to fight the child's efforts to stop the practice.<sup>88</sup> The details and legal arguments set out below provide a stark example of a state agency turning its *parens patriae* power against the child by ignoring its legal and ethical obligations, and are illustrative of agency actions that are occurring nationwide.<sup>89</sup>

Alex was twelve when he entered foster care, following his mother's death.<sup>90</sup> During the six years Alex spent in foster care, he moved at least twenty times between temporary placements and relatives', friends', and group homes.<sup>91</sup> Soon after losing his mother, Alex's father also died.<sup>92</sup> Unbeknownst to Alex, he was then eligible to benefit from Old-Age, Survivors, and Disability Insurance funds (OASDI, or survivor benefits), which are paid to a child if a deceased parent made sufficient contributions to the program through payroll taxes.<sup>93</sup> Without telling Alex, the Baltimore County Department of Social Services (BCDSS) applied for survivor benefits on his behalf, and also to become his representative payee.<sup>94</sup> A representative payee is a fiduciary obligated to decide how to

87. *In re Ryan*, No. 802023006, at 3 (Balt. City Cir. Ct. June 16, 2011).

88. Brief of Appellant, *supra* note 77. The author of this article is also co-counsel in the *Myers* case.

89. ADRIENNE L. FERNANDES-ALCANTARA ET AL., *supra* note 9.

90. Brief of Appellant, *supra* note 77, at \*2.

91. *Id.*

92. *Id.*

93. 42 U.S.C. § 402(d).

94. Brief of Appellant, *supra* note 77, at \*2.

apply the benefits each month for the beneficiary's use, benefit, and in the beneficiary's best interests.<sup>95</sup> However, the foster care agency took every payment Alex received for a three-year period and kept the money for its own purposes.<sup>96</sup> Alex struggled during his years in foster care, left foster care penniless, and has struggled ever since—unfortunately facing the same daunting barriers and statistics that confront foster children across the country as they leave foster care.<sup>97</sup>

### 1. Shunning the Constitution, Again

Several constitutional disputes emerged in the *Myers* case, including unconstitutional takings of a child's property without just compensation,<sup>98</sup> and an equal-protection violation claim that the agency, BCDSS, forced orphaned or disabled foster children to pay for their own care but did not require other foster children to do so.<sup>99</sup> Perhaps the most striking constitutional failing is the agency's disavowal of Alex's due process rights, harking back to the pre-*Gault* mindset when *parens patriae* powers were used to rationalize the deprivation of children's rights.<sup>100</sup>

BCDSS began by applying to receive survivor benefits on behalf of Alex, the last connection to his deceased father, without letting Alex know of the application or that the funds even existed.<sup>101</sup> BCDSS did not tell Alex when he was determined to be eligible for the benefits, did not tell him when it applied to become his representative payee to gain control over the money, and never sought Alex's input as to how his money should be used. Rather the agency kept all of Alex's money to reimburse state costs that Alex had no obligation to pay.<sup>102</sup> Then, when Alex left foster care and discovered the agency's actions, BCDSS fought against Alex's right to file a claim under the state's tort claims act.<sup>103</sup> Although Alex filed his claim within one-year after the agency's last actions in taking his funds, the agency argued the one-year time limit began to run the

95. 42 U.S.C. § 402(a) (2006); 42 U.S.C. § 405(j)(1)(A) (2006); 20 C.F.R. § 404.2035(a) (2011).

96. Brief of Appellant, *supra* note 77, at \*2–3. In fact, it is likely that the funds taken from Alex did not result in additional revenue for the child welfare agency but rather were routed into state general revenue. See generally Hatcher, *supra* note 8, at 1818.

97. Brief of Appellant, *supra* note 77, at \*3–4; see *infra* note 237 and accompanying text.

98. Brief of Appellant, *supra* note 77, at \*29–30.

99. *Id.* at \*27–29.

100. *In re Gault*, 387 U.S. 1, 16 (1967).

101. *Id.* at \*1–4, \*25–26.

102. *Id.*

103. *Id.* at 4–9.

moment it became his representative payee although Alex was then a child in foster care and had received no notice of the agency's actions.<sup>104</sup>

In fact, notice is required from the SSA when an individual or organization applies to become a representative payee, in order to give the beneficiary an opportunity to object.<sup>105</sup> But, the SSA sent the notice about the child welfare agency's application to become Alex's payee to Alex's legal guardian—the child welfare agency itself.<sup>106</sup> BCDSS never notified Alex after receiving the notice of its own application, but amazingly asserted such notice as sufficient:

[The Court:] Social Security is really going to notify the fiduciary, the person who is responsible for the care?

[Attorney General's Office]: That's correct.

The Court: Which would be the State.

[Attorney General's Office]: Right.

The Court: Why isn't that a circular argument?<sup>107</sup>

To support its argument against Alex's due process rights, BCDSS relied upon *Guardianship Estate of Keffeler v. State* on remand in Washington State (*Keffeler II*).<sup>108</sup> However, the conduct of the agency in *Myers* is distinguishable from *Keffeler II*. In *Keffeler II*, notice was not sent in circular fashion back to the state agency applying to become representative payee; instead, notice was sent to the child's grandmother who was acting as the child's guardian and trying to stop the state from taking her grandson's benefits.<sup>109</sup> Nonetheless, BCDSS argued the notice of its own application to become Alex's payee, which came back to itself, was sufficient, and that any further notice would be of no value.<sup>110</sup> The agency reasoned that because Alex did not have the capacity to make his own

104. *Id.*

105. 42 U.S.C. § 405(j)(2)(E)(ii) (2006) (the statutory language currently requires that the notice be provided to the child's guardian or to the child's legal representative).

106. Brief of Appellant, *supra* note 77, at \*8.

107. Record Extract in Support of Brief of Appellant, *Myers v. Balt. Cnty. Dep't of Soc. Servs.*, No. 2765, 2010 WL 4890061, at B-054–B-055 (Md. Oct. 8, 2010) (on file with author).

108. *Guardianship Estate of Keffeler v. State*, 88 P.3d 949 (Wash. 2004).

109. *Id.* at 955 n.11. Similarly, although the court found sufficient notice in *Mason v. Sybinski*, 280 F.3d 788 (7th Cir. 2002), in which Social Security benefits were applied by the hospital representative payee to reimburse a beneficiary's costs of institutional care, the beneficiaries in that case did receive actual notice. In fact, the beneficiaries received notice from both the SSA and from the representative payee, even including specific notice that the hospital representative payee intended to use the benefits to reimburse costs. *See id.* at 794.

110. Record Extract in Support of Brief of Appellant, *supra* note 107, at 26–27.

decisions, and the state agency thus stepped in as payee to make decisions on his behalf as his fiduciary, any further notice to him would have been fruitless.<sup>111</sup>

This assertion compares strikingly to the pre-*Gault* rationalizations for denying constitutional rights to children—that because the children already had the state acting in their best interests under the power of *parens patriae*, they needed no rights of their own.<sup>112</sup> The agency’s effort to subvert a child’s rights under the guise of acting in its *parens patriae* power is precisely why the Supreme Court held that children must be afforded due process rights: at times the courts must step in to protect children from the very agencies entrusted to act in their best interests.<sup>113</sup>

Forty-five years ago the Supreme Court held that children are persons under the Constitution.<sup>114</sup> Thirty-five years ago the Supreme Court held that beneficiaries have a protected property interest in their Social Security benefits and cannot be deprived of their entitlements by government actors without due process.<sup>115</sup> The role of a state child welfare agency as *parens patriae* does not allow the agency to avoid its constitutional obligations to children in its care.<sup>116</sup>

## 2. Shirking the Duty to Pay

The core of BCDSS’s argument in the *Myers* case was that as Alex’s representative payee, it could legally use his funds to reimburse itself for the cost of his care.<sup>117</sup> The agency ignored a very simple legal and moral roadblock to its argument—that the agency, not Alex, had the obligation to pay for the foster care costs. Alex did not choose to end up in foster care, and the law rightly does not impose a debt obligation upon Alex to pay for his own care.<sup>118</sup> The state agency, however, was required to pay.<sup>119</sup>

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111. *Id.* at 27–28 (stating that when a person has a representative payee, “it has already been determined that the individual does not have the ability to manage his or her own funds”).

112. *In re Gault*, 387 U.S. 1, 16 (1967).

113. *See id.*

114. *Id.* at 13.

115. *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

116. *See, e.g., Jackson v. United States*, No. 07 CV 7216, 2008 WL 4089540, slip op. at \*5-6 (N.D. Ill. Aug. 21, 2008) (recognizing that only beneficiaries themselves have protected property interests in their government benefits, and that representative payees do not have a property interest in being a representative payee).

117. Record Extract in Support of Brief of Appellant, *supra* note 107, 39–43.

118. *See Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 377–79, 382 (2003).

Like other states, Maryland participates in the federal foster care assistance program under Title IV-E of the Social Security Act.<sup>120</sup> Title IV-E is a matching grant program, providing federal payments to improve states' ability to provide foster care, and does so by also requiring the states to match the federal funds with state spending on foster care services at a required match level.<sup>121</sup> Unsurprisingly, a state's matching share of the costs of children's care must be paid using *state funds*, and the match explicitly cannot be made up of other federal funds, such as Social Security benefits.<sup>122</sup> But nationwide, likely most, if not every, state foster care agency is in violation of the federal requirement and illegally using their wards' Social Security benefits to help pay the state's required spending—taking, in fact, over \$250 million from foster children each year by making themselves the payee of their wards.<sup>123</sup>

States participating under Title IV-E “shall make foster care maintenance payments on behalf of each child.”<sup>124</sup> 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 with respect to a child, and reasonable travel to the child's home for visitation,”<sup>125</sup> as well as reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. Thus, states receiving Title IV-E funds are required to pay the current maintenance costs that, in Alex's case, BCDSS claims children must pay. In fact, courts have found 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) (re-

119. Maryland law explicitly requires that its Department of Social Services “shall pay for foster care” for all foster care children. MD. CODE ANN., FAM. LAW §§ 5-527(b)–(c) (West 1984).

120. 42 U.S.C. §§ 670–79(C) (2006).

121. *E.g.*, 42 U.S.C. §§ 671, 672, 674 (2006); State of Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 839 (9th Cir. 2003); 45 C.F.R. § 92.24 (2010).

122. 45 C.F.R. § 92.24(b)(1) (2010).

123. ADRIENNE L. FERNANDES-ALCANTARA ET AL., *supra* note 9.

124. 42 U.S.C. § 672(a)(1) (2006).

125. 42 U.S.C. § 675(4)(A) (2006). As further analogous support, 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 . . . .” SOC. SEC. ADMIN., REPRESENTATIVE PAYEE PROGRAM, TRAINING ORGANIZATIONAL REPRESENTATIVE PAYEES, Unit 6, *available at* <http://www.ssa.gov/payee/LessonPlan-2005-2.htm>.

quiring 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.<sup>126</sup>

Thus, if a foster child has an enforceable right to force the state to pay his foster care maintenance payments, it would be nonsensical—and legally incorrect—for the state to have a countervailing ability to force the child to pay those same costs.

Moreover, states participating in the Title IV-E program are prohibited from using other federal funds as part of the required state spending a state must incur to secure the federal matching payments.<sup>127</sup> The federal regulatory requirements governing matching grant programs require that “a cost sharing or matching requirement may not be met by costs borne by another Federal grant.”<sup>128</sup> Also, the SSA’s Office of Inspector General explains that Title IV-E payments are intended to be a match for the state’s own spending on a child’s foster care, so states are prohibited from using other federal funds like Social Security survivor benefits (OASDI benefits) as part of their share of the costs of providing care:

Contrary to Federal regulations, HI-DHS [Hawaii Department of Human Services] used OASDI benefits to partially reimburse itself for the foster care payments it disbursed to the children’s providers. HI-DHS was unaware that it could not reimburse itself for the State’s share of Title IV-E costs from a child’s OASDI benefits . . . . Federal regulations prohibit HI-DHS from using a child’s OASDI benefits to reimburse itself for the State’s share of Title IV-E costs. To receive Federal Title IV-E benefits, HI-DHS must pay its share of the foster care costs with State funds. *Therefore, the OASDI benefits for a child who also receives Title IV-E benefits must be saved or used for a child’s other needs.*<sup>129</sup>

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126. *Connor B. v. Patrick*, 771 F. Supp. 2d 142 (D. Mass. 2011); *see also C.H. v. Payne*, 683 F. Supp. 2d 865 (S.D. Ind. 2010); *L.J. v. Wilbon*, 633 F.3d 297 (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 and case review system).

127. 45 C.F.R. § 92.24(b)(1) (2010).

128. *Id.*

129. OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., HAW. DEP’T OF HUM. SERVS.—AN ORG. REP. PAYEE FOR THE SOC. SEC. ADMIN., A-09-08-28045 at 5 (2008) (emphasis added) (citing 45 C.F.R. § 92.24 (2012)), *available at* <http://oig.ssa.gov/sites/default/files/audit/full/html/A-09-08-28045.html>; *see also* DEP’T OF HEALTH AND HUMAN SERVS., CATALOG OF FED. DOMESTIC ASSISTANCE, FOSTER CARE TITLE IV-E, *available at* <https://www.cfda.gov/index?s=program&mode=form&tab=step>



Thus, the child welfare agency's practice of taking Alex's OASDI benefits to reimburse (or replace) its required state spending was explicitly prohibited.

### 3. Misused Fiduciary Power

Alex alleged in his complaint that BCDSS violated two distinct fiduciary duties by misusing his survivor benefits. First, Alex alleged BCDSS violated its fiduciary duty under state statute and common law and, second Alex alleged BCDSS violated its fiduciary duty as representative payee under Social Security Act.<sup>130</sup> Under Maryland law, the child welfare agency was created to protect and serve the best interests of foster children.<sup>131</sup> This duty to act solely in the best interest of children in its care creates a fiduciary obligation owed by the state agency in its role as guardian of the children's welfare.<sup>132</sup> This fiduciary duty in Maryland, as in all states, stems from the common law doctrine of *parens patriae* in its application to protect children—not the fiscal interests of the state.<sup>133</sup> A foster care agency simply cannot be allowed to deny a child's rights under the assertion of the agency's power to protect the child.<sup>134</sup>

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1&id=fc0f7151661e7f487b083b57ddb729a9 (“Matching funds from State agencies must be appropriated monies raised from non-Federal revenue sources.”); DEP'T OF HEALTH AND HUMAN SERVS., CATALOG OF FEDERAL DOMESTIC ASSISTANCE, CFDA Overview, available at <https://www.cfda.gov/index?s=generalinfo&mode=list&tab=list&tabmode=list> (explaining that federal law requires the General Services Administration to disseminate federal domestic assistance program information through the Catalog of Federal Domestic Affairs).

130. Brief of Appellant, *supra* note 77, at \*10.

131. See, e.g., MD. CODE ANN., FAM. LAW § 5-525 (West 2011) (requiring that agency shall “concurrently develop and implement a permanency plan that is in the best interests of the child” and “shall provide 24-hour a day care and supportive services for a child who is committed to its custody or guardianship . . . .”); see also, MD. CODE ANN., FAM. LAW § 5-702 (West 2011) (purpose of subtitle is for “each local department to give the appropriate service in the best interest of the abused or neglected child”); see also, MD. CODE ANN., FAM. LAW § 5-710 (West 2011) (“[D]epartment shall render the appropriate services in the best interests of the child . . . .”).

132. *Buxton v. Buxton*, 770 A.2d 152, 164 (Md. 2001) (recognizing that a fiduciary relationship exists between a guardian and ward); RESTATEMENT (SECOND) OF TRUSTS § 7 (1959) (“The relation between guardian and ward, like the relation between trustee and beneficiary, is a fiduciary relation.”).

133. *In re Yve S.*, 819 A.2d 1030, 1041 (Md. 2003); *In re Nathaniel A.*, 864 A.2d 1066, 1074 (Md. App. 2005).

134. For example, in *In re Gault*, the Supreme Court described historical concerns of how misuse of the *parens patriae* powers can lead to the denial of children's due process. *In re Gault*, 387 U.S. 1, 19 (1967). Further, while the child welfare agency's *parens patriae* power is limited to prohibiting agency actions that may harm a

Thus, because the child welfare agency's role as guardian creates a clear fiduciary obligation to only act in a child's best interests, the agency's actions to take a child's property for a self-serving purpose is a clear violation of that duty.<sup>135</sup> Alex's guardian—the agency created to protect his interests—used its fiduciary power to secretly take his funds to repay state costs despite the fact that the agency is legally obligated to pay the costs of care, and abused and neglected children have no debt obligation to repay those costs.<sup>136</sup>

a. State Fiduciary Obligation, Morality, and a Historical Lesson

BCDSS sought to avoid its fiduciary obligation in the *Myers* case by relying on federal law governing representative payees.<sup>137</sup> Although the relevant federal statute clearly requires the payee to determine the use of benefits that best serves the beneficiaries, federal regulation indicates the best interests test may be met if the funds are used for “current maintenance” costs.<sup>138</sup> Thus, BCDSS, and other state foster care agencies across the country, argue they are within their rights to take control over children's funds and apply the money to reimburse agency costs.

There are fatal flaws to this argument. Stepping back from the law for a moment, it is striking that likely every child welfare agency in our

child's interests or rights, the juvenile courts' power to protect a child's best interests is virtually without bounds. *In re Danielle B.*, 552 A.2d 570, 574 (Md. App. 1989) (“The 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.”) (internal quotation omitted).

135. *Gianakos, Ex'r v. Magiros*, 208 A.2d 718, 722 (Md. 1965) (“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.”); *see also* Code Of Maryland Regulations (COMAR) 07.02.11.07(A) (2011) (“When there is a conflict between the rights of the parents or legal guardian and those of the child, the child's best interest shall take precedence.”); MD. CODE ANN., FAM. LAW § 5-502(b)(2) (West 2011) (declaring policy regarding foster children “to resolve doubts in favor of the child when there is a conflict between the interests of a minor child and the interests of an adult”).

136. MD. CODE ANN., FAM. LAW § 5-527(b)-(c) (West 2011) (requiring that the “Department shall pay for foster care” for all foster children in single-family homes). While a Maryland statute indicates the state may decide to pursue reimbursement of the costs from the parents, via child support obligations assigned to the government, MD. CODE ANN. CTS. & JUD. PROC. § 3-819(l) (West 2011), no statutory authority exists for the agency to seek payment from foster children. *See also* *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 377–79, 382 (recognizing that foster children have no debt obligation for their own care).

137. Record Extract in Support of Brief of Appellant, *supra* note 107, at \*39–43.

138. 20 C.F.R. § 404.2040(a) (2012).

country is engaged in this practice.<sup>139</sup> These agencies are the guardians of our nation's most vulnerable children, and they are taking either the last remaining assets left to children from their deceased parents, or are taking the benefits intended to aid children's disabling conditions.<sup>140</sup> The agencies are inverting the *parens patriae* power again, as was done thousands of years ago in feudal England when children were considered burdens, chattel, and bastards—and the children's assets were taken to provide revenue to the crown.<sup>141</sup>

Yet even if morality, ethical obligation, and historical lessons are overlooked, contemporary U.S. law is also no help to the agencies' legal justification for taking money from their wards. A foster care agency acting as representative payee operates under not one, but two fiduciary obligations: the state law and the federal law that govern representative payees.<sup>142</sup> The fiduciary duties are related, but are governed by different and distinct legal frameworks. Thus, when the foster care agency, already under fiduciary obligation via state law, voluntarily seeks the additional fiduciary obligation of representative payee, the agency cannot shirk its state fiduciary requirements.<sup>143</sup> Even if federal law might provide a representative payee discretion to apply benefits to current maintenance costs, any exercise of discretion cannot conflict with the agency's inherent obligations to only act in the children's best interests in its role as guardian under state law.<sup>144</sup>

#### b. Federal Fiduciary Obligation

Federal law also provides no cover for the foster care agencies' actions. The practice reached the Supreme Court in 2003,<sup>145</sup> and it may very

139. See ADRIENNE L. FERNANDES-ALCANTARA ET AL., *supra* note 9.

140. *Id.*

141. See *supra* notes 22–26 and accompanying text; Gill v. Ripley, 724 A.2d 88, 100 n.6 (1999) (regarding the past terminology and premises of the “Maryland Bastardy Act”). The Maryland Court of Appeals further noted:

Throughout history, children born out of wedlock have been referred to as “illegitimate.” The term “bastard” itself has been regarded as odious, not fit for use in polite conversation . . . . At early common law, there may have been a basis for those connotations, as such children had few rights under the law . . . . It is simply impermissible now for courts to refer to children in that manner. Children are never “illegitimate,” and certainly are not so because of their parents' circumstances.

*Id.*

142. Brief of Appellant, *supra* note 77, at \*10.

143. *Id.*

144. *Id.*

145. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Kefeler, 537 U.S. 371 (2003).

well end up before the Court again. In *Myers*, the BCDSS relied heavily on the Supreme Court's decision in *Keffeler*, contending that that decision validated the agency's practices.<sup>146</sup> The Baltimore City Circuit Court agreed in its dismissal of Alex's claims.<sup>147</sup> But the *Keffeler* decision, although broad at times in its language, is quite limited in its holding. In *Keffeler*, the Supreme Court concluded that a state agency did not violate the anti-attachment provision of the Social Security Act by applying children's Social Security benefits to reimburse the costs of care.<sup>148</sup> The Court did not reach any other possible challenges to the practice, including breach of fiduciary duty claims under state or federal law.<sup>149</sup>

In *Myers*, Alex contended the child welfare agency undertook an additional fiduciary obligation under federal law when it sought to become his representative payee.<sup>150</sup> This argument is supported squarely by the Social Security Act, which requires representative payees to use Social Security benefits in a manner that they determine is in the beneficiary's best interest.<sup>151</sup> Further, the fiduciary obligation is reiterated in the SSA's policy manual, the *Program Operations Manual System* (POMS).<sup>152</sup> POMS sets out the irrefutable overarching obligation: "In making representative payee decisions, the most important consideration is the claim-

146. Record Extract in Support of Brief of Appellant, *supra* note 107, at \*39–43.

147. *Id.* at \*39–43.

148. *Keffeler*, 537 U.S. at 375.

149. In *Myers*, the plaintiff alleged that the agency violated § 405(j) of the Social Security Act by failing to consider his best interest and to exercise discretion in its use of his OASDI benefits. In *Keffeler*, the Supreme Court was clear that it did not address § 405(j) claims mirroring those raised by Alex:

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.

150. Brief of Appellant, *supra* note 77, at \*10.

151. 42 U.S.C. § 405(j) (2006); 20 C.F.R. § 404.2035(a) (2006) (stating that the "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 . . .").

152. See *Keffeler*, 537 U.S. at 385 ("While these [POMS] administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect.").

ant's best interest."<sup>153</sup> Were that not sufficiently clear, POMS directs SSA 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."<sup>154</sup>

It is difficult to articulate how Alex received any benefit from the agency's use of his funds. He received no changed or increased services from BCDSS's decision to apply his money to state costs, because the agency was already obligated to provide the services he received.<sup>155</sup> In fact, throughout its brief on appeal, BCDSS does not attempt to explain how its decision regarding the use of his funds was in his best interests in any way.<sup>156</sup> The agency charged with caring for Alex's interests took the only asset left to him by his deceased father, and Alex ultimately left foster care penniless.<sup>157</sup>

Although comparison might be made to a relative acting as representative payee who decides to apply the funds to family costs, the situation of child welfare agencies taking the funds is completely different. If Alex's representative payee was a family member who used his funds for the family's cost of his care, Alex would likely have benefited because more resources would have been available for the entire family in which he lived.<sup>158</sup> In contrast, when BCDSS took Alex's funds neither Alex nor the household in which he lived received any benefit.<sup>159</sup> In addition to

153. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, § GN 00501.005(E)(1), Overview of Representative Payment (2012), available at <https://secure.ssa.gov/poms.nsf/0/06b4b46d5a2ec9bf8525754c0005d046!OpenDocument&Click=>. Further, the POMS also requires that a representative payee must exercise discretion, and apply the benefits "in the best interests of the beneficiary, according to his/her best judgment . . . ." SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, § GN 00602.001, USE OF BENEFITS (2011), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200602001>.

154. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, § GN 00602.001, USE OF BENEFITS (2011), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200602001>.

155. Brief of Appellant, *supra* note 77, at \*14–17.

156. Brief of Appellees, *Myers v. Balt. Cnty. Dep't of Soc. Servs.*, (Md. App. Dec. 29, 2010) (No. 2765), 2010 WL 6526220.

157. Brief of Appellant, *supra* note 77, at \*2–4.

158. See *Bowen v. Gilliard*, 483 U.S. 587, 606–607 (1987) (concluding that child support assignment requirements for welfare recipients did not constitute unconstitutional takings, the Court recognized that the child benefited from increased welfare payments by giving up child support in that the family as a whole was better off).

159. In fact, Alex would have been better off even if the agency refused to serve as representative payee. If the foster care agency did not serve as payee, then SSA would have been obligated to conserve the funds and provide them to a suitable payee or directly to Alex either at the age of majority or younger if no other suitable

Alex receiving no benefit, the BCDSS and other foster children also likely received no benefit. As explained further in Part III, the funds are often routed to general state revenue through this process rather than to provide additional funds to the foster care programs.

Despite the overwhelming clarity of how the child welfare agency's use of the funds conflicted with the best interests of Alex, the agency sought to side-step the conflict by claiming federal law provided a safe-harbor for its actions.<sup>160</sup> Illustrating just how far the agency was willing to go in its argument, the agency claimed it had no duty to exercise any discretion whatsoever as representative payee for Alex.<sup>161</sup> Because BCDSS concluded it has no duty to exercise discretion, but rather to simply adhere to a blanket rule of automatically taking foster children's funds, the agency described its actions accordingly: "The actions of BCDSS in receiving and disbursing payments through time as a representative payee are merely the continuing aspects of a unitary action that was initiated when BCDSS became the representative payee."<sup>162</sup>

The agency pointed to the following language in the federal regulation for the assertion that adhering to a rule of automatic self-reimbursement with a foster child's funds is appropriate, rather than making individualized decisions about the child's best interests: "We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items."<sup>163</sup> In fact, the Maryland agency has actually gone further than taking Social Security benefits from children in its care—promulgating a regulation requiring that all of the resources belonging to foster children "shall be applied directly to the cost of care."<sup>164</sup>

The agency's assertion that it had no duty to exercise discretion as Alex's representative payee flies in the face of the foundational principles governing its fiduciary role as representative payee, and conflicts with the

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payee could be located and SSA did not determine that direct payment would cause substantial harm. 20 C.F.R. §§ 404.2010(b); 404.2011 (2011).

160. Brief of Appellees, *supra* note 156, at 18–19.

161. *Id.* at \*21–23.

162. *Id.* at \*14.

163. 20 C.F.R. § 404.2040(a) (2012).

164. MD. CODE REGS. 07.02.11.29 (2011). The regulation is argued to be invalid in *Myers*, in violation of the federal and state law and constitutions, and the state Administrative Procedures Act. Brief of Appellant, *supra* note 77, at \*32–34 (citing this regulation in the brief as 07.02.11.26 because the state amended the code after the complaint was filed).

agency's core purpose to serve the best interests of foster children.<sup>165</sup> Courts have repeatedly rejected such blanket rules that interfere with a representative payee's exercise of fiduciary discretion, including the Maryland Court of Special Appeals in *Ecolono v. Div. of Reimbursements of Dep't of Health & Mental Hygiene*:

[W]e are left with the conclusion that, under federal law, a representative payee has a duty to exercise discretion and, in fact, the [Department] did not exercise discretion. As a result, we shall reverse and remand so that the Secretary can exercise discretion and determine whether any or all of the funds applied to the cost of current maintenance should be refunded to appellant or applied to other charges.<sup>166</sup>

Other courts have ruled consistently with *Ecolono*. The Sixth Circuit rejected such a rule that automatically assigned Social Security benefits to a beneficiary's child, finding that "[t]he practical effect of this policy is to directly allocate these funds to one other than the intended beneficiary, thereby eliminating the representative payee's discretion to determine how the benefits should be spent on the beneficiary's behalf."<sup>167</sup> The Second Circuit also reached a similar conclusion.<sup>168</sup>

In *In re J.G.*, the North Carolina Court of Appeals held that a child welfare agency acting as representative payee must exercise discretion,

Although [the child welfare agency] implies that it is always proper for it to reimburse itself for the cost of J.G.'s care using J.G.'s Social Security funds, even the Department of Social and Health Services in *Keffeler* acknowledged that it was not always appropriate to use all of a juvenile's Social Security funds to reimburse itself, in particular in anticipation of "impending emancipation."<sup>169</sup>

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165. See, e.g., MD. CODE ANN., FAM. LAW §§ 5-525(f)(1) ("In developing a permanency plan for a child in an out-of-home placement, the local department shall give primary consideration to the best interests of the child."); 5-702 ("requiring each local department to give the appropriate service in the best interest of the abused or neglected child"); 5-710 ("Based on its findings and treatment plan, the local department shall render the appropriate services in the best interests of the child.") (West 2011).

166. *Ecolono v. Div. of Reimbursements of Dep't of Health & Mental Hygiene*, 769 A.2d 296, 313 (Md. Ct. Spec. App. 2001).

167. *Snider v. Creasy*, 728 F.2d 369, 372 (6th Cir. 1984).

168. See *Riddick v. D'Elia*, 626 F.2d 1084, 1089 (2d Cir. 1980).

169. *In re J.G.*, 652 S.E.2d 266, 273 (N.C. Ct. App. 2007) (citing *Wash. Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 at 378-79).

The court recognized the limits of the Supreme Court's decision in *Keffeler* and concluded that an agency representative payee cannot satisfy its obligations to serve a foster child's best interest by automatically applying the child's benefits to reimburse the costs of foster care.<sup>170</sup> The foster care agency in *J.G.* initially intervened to become the boy's representative payee after his relatives misused his Social Security benefits, but then the agency also applied J.G.'s funds for the agency's own self-interested purpose.<sup>171</sup> The agency charged with protecting J.G.'s best interests decided to keep his benefits to reimburse state costs rather than use the money to pay the mortgage payments for a Habitat for Humanity home J.G. inherited from his deceased stepfather:

DSS made no payments toward the Habitat mortgage. Instead, DSS applied those funds . . . toward the cost of J.G.'s foster care . . . . In 2005, the Habitat home was valued at approximately \$80,000.00, and Habitat for Humanity held the outstanding mortgage of approximately \$27,000.00. Because the mortgage was not being paid, Habitat for Humanity initiated foreclosure proceedings.<sup>172</sup>

The trial court found that "DSS's use of J.G.'s Social Security benefits to reimburse itself, rather than make the \$221.00 monthly Habitat mortgage payment, had not been reasonable,"<sup>173</sup> and the North Carolina Court of Appeals upheld the decision:

Here, both the guardian *ad litem* and the trial court acted consistently with their supervisory roles in seeing to J.G.'s best interests, and J.G.'s best interests were central to the court's order, which noted that if Habitat for Humanity foreclosed on the Habitat home, J.G. would receive very little money from the sale and would be homeless when he aged out of foster care. . . . Although DSS implies that it is always proper for it to reimburse itself for the cost of J.G.'s care using J.G.'s Social Security funds, even the Department of Social and Health Services in *Keffeler*, acknowledged that it was not always appropriate to use all of a juvenile's Social Security funds to reimburse itself, in particular in anticipation of impending emancipation.<sup>174</sup>

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170. *In re J.G.*, 652 S.E.2d 266, 272–273 & n.3 (N.C. Ct. App. 2007).

171. *Id.* at 268–69.

172. *Id.* at 269.

173. *Id.*

174. *Id.* at 273 (internal quotation marks and citation omitted).



In addition to caselaw, the governing federal statutory and regulatory language, as well as the SSA's own guidance, clearly establish the obvious—that a representative payee is a fiduciary, and therefore must exercise individualized discretion in deciding how to use Social Security funds in the best interests of the beneficiary.<sup>175</sup> The payee's decision includes countless options, depending on what is best for the individual child at the time of the decision, including: (1) possibly applying the benefits toward current maintenance (if not already provided for); (2) considering how to allocate the funds among the different categories of possible unmet current maintenance needs; (3) deciding whether to apply the money toward other foreseeable or special needs; or (4) deciding to conserve the benefits for future needs if current needs are already met. The endless possibilities and changing circumstances are precisely why a representative payee is appointed, to weigh all the options and make individualized decisions to best meet the child's evolving needs.<sup>176</sup>

c. A Child Welfare Agency's Assertion that It's Illegal—and Overly Burdensome—to Serve the Interests of Children

The child welfare agency in *Myers* offered numerous attempts to dodge its fiduciary obligations in order to justify the agency's fiscally self-serving conduct. Despite the clear weight, clarity, and common sense of the law, BCDSS not only asserted it simply had no obligation to exercise any discretion, but went even further to contend it would have violated federal law if it did exercise discretion.<sup>177</sup> Next, the agency asserted that if it had to actually exercise discretion to determine the best interests of foster children, then serving as the children's representative payee would be too burdensome.<sup>178</sup> By arguing that it would have violated federal law

175. See, e.g., *infra* notes 180, 183–185 and accompanying text.

176. Although Alex was a teenager able to communicate his needs, DSS never met with Alex to discuss the best use of his benefits. Brief of Appellant, *supra* note 77, at \*2. In fact, an audit completed the same year that DSS began taking Alex's benefits found that in almost half of foster children's cases there was no record of the required contacts between the DSS caseworker and the child or the foster parent. OFFICE OF LEGISLATIVE AUDITS, DEP'T OF LEGISLATIVE SERVS., MD. GEN. ASSEMBLY, PERFORMANCE AUDIT REPORT: DEPARTMENT OF HUMAN RESOURCES SOCIAL SERVICES ADMINISTRATION OUT-OF-HOME CARE PROGRAM 6 (2002), available at <http://www.ola.state.md.us/Reports/Performance/FosterCare.pdf>.

177. See Brief of Appellees, *supra* note 156, at \*20.

178. *Id.* at 23. BCDSS argues:

The SSA does not contemplate that an agency acting as a representative payee must exercise individualized *discretion* as to how to utilize every benefit dollar received. If that were the case, many agencies would cease to act as representative payees because of the tremendous burden that would accompany such a requirement.

by exercising discretion to determine the best use of an orphaned foster child's Social Security benefits, BCDSS attempts to turn the requirements of Social Security Act—and the foundations of fiduciary law—on their heads.<sup>179</sup>

The exercise of discretion in the interests of the beneficiary lies at the heart of any fiduciary relationship.<sup>180</sup> Upon promulgation of its federal regulations, the SSA could not have refuted the child welfare agency's argument more directly: “[a]lthough we provide guidelines as to what is in the beneficiary's best interests, there is a considerable amount of discretion provided to the payee.”<sup>181</sup> Also, additional SSA guidance encourages representative payees to actively consider both “current needs and reasonably foreseeable needs,” and to specifically consider conserving the benefits for children who may need assistance with the transition to independence.<sup>182</sup> The SSA's guidance indicates that payees should consider reasonably foreseeable needs such as future education expenses, and directs that: “If the beneficiary is a child who will attain age 18 in the near future, consider the need to conserve funds for transition into an independent living arrangement, future education or occupational training.”<sup>183</sup> The SSA has explained how conserved Social Security benefits are necessary for children as they transition out of foster care: “Our current regulatory process is particularly problematic for those beneficiaries who make the transition out of foster care and for their payees.

*Id.* (emphasis added).

179. *See id.* at 20.

180. *See, e.g.,* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1100 (Ill. 1997) (internal citation omitted) (“[A]t the heart of a fiduciary relationship is trust, loyalty, and faith in the discretion of the fiduciary . . . .”); Ossenbeck v. Hamilton County Auditor, 638 N.E.2d 120, 123 (Ohio Ct. App. 1994) (quoting Yarosh v. Becane, 406 N.E.2d 1355, 1360 (Ohio 1980)) (“Where no discretion is involved and where tasks are clearly routine, a fiduciary relationship clearly does not exist.”).

181. Federal Old-Age, Survivors, and Disability Insurance and SSI for the Aged, Blind and Disable; Representative Payment, 47 Fed. Reg. 30,468-01 (July 14, 1982); *see also In re* Estate of Merritt, 651 N.E.2d 680, 683 (Ill. App. 1995) (stating that “the regulations are broadly phrased, thereby affording a representative payee wide discretion to use funds in the best interests of the beneficiary, not the State.”).

182. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, § GN 00602.030, Payment of Beneficiary's Past Due Debts—Claims of Creditors (2011), available at <https://secure.ssa.gov/poms.nsf/lnx/0200602030>.

183. *Id.*; *see also* SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, § GN 00602.001, Use of Benefits (2011), available at <https://secure.ssa.gov/poms.nsf/lnx/0200602001> (indicating that “[a] payee must use benefits to provide for the beneficiary's current needs . . . or for reasonably foreseeable needs. If not needed for these purposes . . . the payee must conserve or invest benefits on behalf of the beneficiary”).

These beneficiaries might need immediate access to the conserved funds to pay for rent or other necessities.”<sup>184</sup>

The child welfare agency contends that making decisions about how to use Social Security funds in foster children’s best interests would simply be too much work, and it issued a threat that the “tremendous burden” of having to make such decisions on behalf of foster children would cause foster care agencies to stop serving as representative payees.<sup>185</sup> The agency’s threat does not have a valid legal foundation and illustrates the extent to which its fiscal self-interests are distorting the agency’s view of its obligations as guardian and fiduciary for abused and neglected children.<sup>186</sup>

The SSA clearly explains that organizational representative payees serving as fiduciaries for multiple beneficiaries must consider the best interests of each individual beneficiary. An SSA training manual for organizational representative payees directs that “[t]he most important duty of all payees is to know the needs of each beneficiary and to use the benefits in the best interest of the beneficiary.”<sup>187</sup> The guidance also provides obvious advice—that organizational representative payees should collaborate with each beneficiary to decide how to best use the beneficiary’s funds. Thus, “SSA recognizes that representative payment works best when there is collaboration between SSA, the payee and the beneficiary.”<sup>188</sup> The SSA provides examples of how a payee should involve each beneficiary in making individualized decisions:

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184. Transfer of Accumulated Benefit Payments, 75 Fed. Reg. 7,551-01 (Feb. 2, 2010) (explaining final rule that made it easier to transfer conserved funds directly to the beneficiary). The Supreme Court in *Keffeler* also placed importance on the fact that the agency payee exercised discretion to occasionally forgo reimbursement in order use the funds for special needs or “to conserve a child’s resources for expenses anticipated on impending emancipation.” Wash. Dep’t of Soc. & Health Servs. v. Guardianship Estate of *Keffeler*, 537 U.S. 371, 379 (emphasis added); see also *In re J.G.*, 652 S.E.2d 266, 273.

185. Brief of Appellees, *supra* note 156, at \*23.

186. Such an agency view, if taken further, might also cause the agency to argue that it would be overly burdensome to make individualized decisions regarding, for example, foster children’s placements, permanency plans, educational needs, and health needs. See *L.J. v. Wilbon*, 633 F.3d 297 (4th Cir. 2011) (upholding enforceability of consent decree due to Maryland foster care agency’s systemic failures to adhere to federal requirements for providing foster care services, including required individualized case plans).

187. SOC. SEC. ADMIN., Lesson Plan, Training Organizational Representative Payees, Unit 4, available at <http://www.ssa.gov/payee/LessonPlan-2005-2.htm#UNIT4>.

188. SOC. SEC. ADMIN., Lesson Plan, Training Organizational Representative Payees, Unit 2, available at <http://www.ssa.gov/payee/LessonPlan-2005-2.htm#UNIT2>.

- Meet regularly with the beneficiary (preferably face-to-face);
- Establish a budget, discuss it with the beneficiary, and involve him/her as much as possible in financial decisions;
- Explain Social Security and/or SSI [Supplemental Security Income] payments and the beneficiary's expenses to him or her;
- Ensure that the beneficiary is aware of current and large retro-active payments . . . .<sup>189</sup>

There is irony in the child welfare agency's threat. If the agency had quit its role as Alex's representative payee, a different representative payee who would fulfill its obligations to Alex's best interests could have been selected.<sup>190</sup> Thus, BCDSS would not have been able to force another payee to send the money to the agency to reimburse the foster care costs because foster children have no debt obligation for their own care.<sup>191</sup> In fact, if no other individual or organization was willing to serve as Alex's payee when the agency quit, SSA would have simply conserved the funds and provided them either to a payee when located or directly to Alex when he reached the age of majority (if no payee was needed at that time).<sup>192</sup>

The point is simple: if the child welfare agency is not willing to fulfill its fiduciary obligations, then the agency should simply not apply to serve as representative payee for foster children.<sup>193</sup> If the agency's suggestion for a representative payee system that is discretionless and amounts to automatic cost reimbursement were realized, the system would be meaningless and a waste of administrative costs. Appointment of a fiduciary would be unnecessary to simply automatically route funds from the SSA directly to the state's coffers. Managing Social Security benefits for the individualized best interests of abused and neglected children is indeed difficult, but such difficulty is precisely why a fiduciary is appointed: "Organizations really do make a difference when they act as payees. . . because they provide a critical service to one of the most

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189. SOC. SEC. ADMIN., *supra* note 187; *see also* SOC. SEC. ADMIN., FAQs for Representative Payees, <http://www.ssa.gov/payee/faqrep.htm> (encouraging "payees to go beyond just managing finances and to be actively involved in the beneficiary's life").

190. *See* 20 C.F.R. § 404.2011 (2011).

191. *See* Wash. Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 389.

192. *See* 20 C.F.R. § 404.2011 (2011).

193. For a comparison to payees requiring compensation, *see* SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, § GN00502.113, Interviewing the Payee Applicant (2011), *available at* <https://secure.ssa.gov/poms.nsf/lnx/0200502113> ("If the payee tells you that, [sic] he or she will not carry out his fiduciary responsibilities without compensation, deny the application, and seek another payee.").

vulnerable segments of our population. Being a representative payee can be very demanding, but it can also be very rewarding. Representative payees can make a difference.”<sup>194</sup>

### III. LAYERS TO THE CONFLICT

The conflict between human service agencies’ purpose of serving the best interests of children and their use of the *parens patriae* power to serve their own fiscal interests is further complicated on multiple interrelationship levels. First, the conflict exists within the complicated fiscal federalism arrangement between the federal government and the states, which provides the funding structure for grant-in-aid programs.<sup>195</sup> Second, a poverty industry has grown and profited from the billions in grant-in-aid dollars flowing from the federal government to the states and has added to the conflict by encouraging state agency strategies to increase claims of the federal funds.<sup>196</sup> Third, the state human service agencies’ interests may further conflict with the fiscal interests of their parent states.

#### A. Fiscal Federalism

Fiscal federalism is an economic theory upon which our country’s largest federal grant-in-aid funds are founded, including Medicaid and the federal program to provide foster care funding under Title IV-E of the Social Security Act (Title IV-E Foster Care).<sup>197</sup> The economic structure of fiscal federalism aims to create a partnership between the relative strengths of the federal and state governments.<sup>198</sup> However, as state human service agencies seek to maximize their benefit from the federal government’s financial power, the alleged strengths of localized state agencies in addressing regional and individualized needs of their beneficiaries often give way to their self-interested revenue strategies.<sup>199</sup>

Under the fiscal federalism theory’s application, the federal government provides states with matching funds that are intended to increase

194. SOC. SEC. ADMIN., Representative Payee Program Fact Sheet, <http://www.ssa.gov/payee/factsheetengl.htm>.

195. See *infra* note 197 and accompanying text.

196. See *infra* note 204 and accompanying text.

197. See Super, *supra* note 14, at 2586 (describing application of fiscal federalism in matching grant programs, including Medicaid); see also Hatcher, *supra* note 12, at 676.

198. Super, *supra* note 14, at 2544; see Somin, *supra* note 14; WALLACE E. OATES, FISCAL FEDERALISM (1972).

199. Hatcher, *supra* note 12, at 689–90.

the ability of states to provide program services at the local level.<sup>200</sup> The federal government's centralized ability to raise revenue and to withstand economic downturns is paired with the view that states are better able to understand and serve the more localized and varying needs of their citizens.<sup>201</sup> At the heart of the theory is the idealistic notion that "government agencies, as 'custodians of the public interest,' would seek to maximize social welfare."<sup>202</sup>

However, as the examples above illustrate, the purity of government action in serving the social welfare is often lacking, as the government agencies may seek to serve themselves. During lean economic times, services and programs for vulnerable populations are in much higher demand but also are among the first programs states will cut to balance the budget.<sup>203</sup> Thus, especially during economic turmoil, state agencies may find themselves desperate for additional funding—to the point where the agencies' focus turns more to the search for money than on serving their intended beneficiaries.

The fiscal federalism structure can add to this conflict. The complexities of the eligibility and claiming process of the grant-in-aid programs, and the billions in funds potentially available, often cause the agencies to increase their gamesmanship and focus toward the fiscal pursuit while sometimes forgetting their reason for existence.<sup>204</sup> As the following sections describe, a vast poverty industry is heightening this conflict, as well as the tension between the state agencies and their parent states.

### B. Poverty Industry

The conflict between the intended benign service mission of human service agencies with the agencies' fiscal self-interests is further heightened by an industry seeking to profit from the billions in federal grant-in-aid funds available. An entire poverty industry has grown from the funding in federal grant-in-aid programs and the desire of state agencies to maximize the federal funds.<sup>205</sup>

This poverty-industrial complex now includes connections of contracts between private industry and the state and federal governments to provide services in all aspects of government services for vulnerable

200. *Id.* at 685–89.

201. Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120, 1121–22 (1999).

202. Wallace E. Oates, *Toward a Second-Generation Theory of Fiscal Federalism*, 12 INT'L TAX & PUB. FINANCE 349, 350 (2005).

203. Donenberg, *supra* note 7, at 1498 n.100.

204. Hatcher, *supra* note 12, at 705–13.

205. *Id.* at 689–92.

populations.<sup>206</sup> The industry is rife with conflicts of interest, pay-to-play tactics, and a revolving door of personnel between the industry and the agencies they serve.<sup>207</sup>

As the industry continues to take hold of operational services, private contractors are now also aiming directly at the source of federal funds. State agencies seek out every federal dollar they can find, and consultants have capitalized upon the frantic search by developing often questionable—if not illegal—strategies to claim additional federal funds with the contractors, often taking a significant percentage as a contingency fee.<sup>208</sup> Because federal grant-in-aid funds are structured with complex eligibility requirements, these revenue maximization consultants have stepped in to help, and to profit.<sup>209</sup> Illustrating the scope of the services and profits being made, the revenue maximization strategies involving Medicaid claims in only two states led to increased federal payments of over \$2 billion over four years, including over \$90 million paid to the revenue maximization consultants as contingency fees.<sup>210</sup>

In the context of the federal grant-in-aid program for state foster care services, the revenue maximization consultants aim to increase Title IV-E Foster Care claims by increasing the eligibility rate for children in state care.<sup>211</sup> While the Title IV-E rules for eligibility are complicated, they are based upon a foundational principle that states should only receive the federal funds when they remove a child from an impoverished household.<sup>212</sup> Thus, the private contractors develop strategies to increase

206. *Id.*

207. *Id.*

208. *See, e.g.,* ADAM CARASSO & ROSEANNA BESS, URBAN INSTITUTE, THE DISPOSITION OF FEDERAL DOLLARS IN FLORIDA'S SOCIAL SERVICES: INFORMING A FEDERAL FUNDING MAXIMIZATION STRATEGY, 32–34 (2003), available at [http://www.urban.org/UploadedPDF/410822\\_federal\\_dollars.pdf](http://www.urban.org/UploadedPDF/410822_federal_dollars.pdf); Hatcher, *supra* note 8, at 1807–10.

209. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, MEDICAID FINANCING: STATES' USE OF CONTINGENCY-FEE CONSULTANTS TO MAXIMIZE FEDERAL REIMBURSEMENTS HIGHLIGHTS NEED FOR IMPROVED FEDERAL OVERSIGHT (2005), available at <http://www.gao.gov/assets/250/246870.pdf>.

210. *Id.* at 4.

211. Hatcher, *supra* note 8, at 1821; *see also* Public Consulting Group, Child Welfare and Youth Services, Title IV-E Case Reviews, available at <http://www.publicconsultinggroup.com/HumanServices/ChildWelfare/TitleIVCaseReviews.html> (“PCG Human Services™ is a national expert in Title IV-E regulation and eligibility determination guidelines. We have extensive experience in helping states navigate ongoing eligibility determination processes. We can help you ensure federal compliance with your case reviews and help enhance your title IV-E revenue.”).

212. As one of the Title IV-E requirements, states must show that the child was removed from a home that would have been eligible for welfare assistance under the

the “penetration rate” for foster care agencies—meaning an effort to increase the percentage of children in agency care who were taken from poor families.<sup>213</sup> In addition to the aim of increasing agency’s penetration rates, the consultants also create strategies to maximize the federal foster care funds by increasing claims for Title IV-E administrative costs, often including millions in retroactive claims, and also increasing claims for training expenditures.<sup>214</sup>

In the context of foster children’s Social Security benefits, not only are the state agencies engaged in tactics to take the children’s funds but they are also employing private revenue maximization consultants to help in the process.<sup>215</sup> For example, the Public Consulting Group (PCG) claims to be the largest vendor in the country pursuing foster children’s Social Security benefits, through its Social Security Advocacy Management Services.<sup>216</sup> The company helps the foster care agencies look for children who are disabled or have deceased parents, files the applications, handles re-determinations and reviews, completes required representative payee accounting reports, and even 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. The company describes the revenue producing prospects: “PCG Human Services is now the SSI vendor for Foster Care agencies representing over 30,000 children in California. To date, the firm has generated over \$150 million in additional revenue for these agencies.”<sup>217</sup>

Similarly, Disability Associates of America developed a slide presentation where it advertises the benefits to its prospective clients of hiring the company to track down foster children’s Social Security benefits: “It’s a funding mechanism to pay the child’s cost of care with Federal Dollars

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old Aid to Families with Dependent Children (AFDC) rules. 42 U.S.C. § 672(a)(1)(B) (2006).

213. See *Title IV-E Federal Government Funding Overview*, WISCONSIN DEP’T OF CHILDREN & FAMILIES (June 16, 2008), <http://www.dhfs.state.wi.us/Children/TitleIV-E/proserv/FedGovFundingPortion.HTM> (“Frequently, the percentage of IV-E eligible children is referred to as the state’s IV-E ‘penetration rate.’”).

214. CARASSO & BESS, *supra* note 208, at 53–56.

215. Hatcher, *supra* note 8, at 1807–10.

216. *Social Security Advocacy Management Services-SSAMS™ Offerings for Foster Care Agencies*, PUBLIC CONSULTING GROUP (2012), [http://www.publicconsultinggroup.com/humanservices/SSI\\_SSDI/ssi\\_for\\_fostercare.html](http://www.publicconsultinggroup.com/humanservices/SSI_SSDI/ssi_for_fostercare.html).

217. *Case Study: California SSI Advocacy*, PUBLIC CONSULTING GROUP (2012), [http://www.publicconsultinggroup.com/humanservices/library/case\\_studies/CA\\_SSI.html](http://www.publicconsultinggroup.com/humanservices/library/case_studies/CA_SSI.html).



and not State & Local Tax Dollars.”<sup>218</sup> The company takes a 25 percent contingency fee from past-due benefits for its services, including its services of helping the foster care agency take over control of the funds by changing the payee when someone other than the agency is serving as representative payee.<sup>219</sup>

The overt focus on money can cause the foster care agencies to alter practices toward maximizing funds rather than maximizing services to best meet the needs of children in their care. For example, a Mississippi legislative committee report expressed concern with the state’s revenue maximization contract, including the resulting fiscal incentives and possible negative impact on services:

Nationally, the troubling policy issue arising with use of revenue maximization practices for these types of services is that an agency may have a greater financial interest in removing a child from a home if the child is eligible for federal foster care funds. Conversely, in trying to take full advantage of available federal funds, some children might not receive needed services if they do not qualify for federal programs.<sup>220</sup>

Thus, the increasing use of revenue maximization consultants by state human service agencies can divert the agencies’ efforts more toward increasing funds rather than improving services. Although the consultants can in fact help bring in additional federal funds, the resulting revenue maximization strategies developed by the consultants often lead to the funds being routed into general state revenue rather than toward increased funding for the agency services. The intended welfare maximization goals are overcome by revenue maximization strategies, with the federal funds intended to help the vulnerable populations being diverted into private profits and state general revenue.<sup>221</sup>

### C. Agency Interests vs. State Interests

Human service agencies exist as arms of the states and thus are subject to state control. As the agencies are desperately searching for additional funds, their parent states are as well. As a result, the additional

218. *Presentation on Social Security for Foster Care Children*, DISABILITY ASSOCIATES OF AMERICA (2007), <http://myssi.us/index.htm>.

219. *Fees*, DISABILITY ASSOCIATES OF AMERICA (2007), <http://myssi.us/fees.htm>.

220. JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW (PEER), REPORT TO MISSISSIPPI LEGISLATURE, THE DEPARTMENT OF HUMAN SERVICES’ USE OF REVENUE MAXIMIZATION CONTRACTS 7 (Dec. 6, 2000), available at <http://www.peer.state.ms.us/reports/rpt413.pdf>.

221. Oates, *supra* note 202, at 350.

federal funds resulting from revenue maximization contracts often do not result in additional fiscal capacity for the human service agencies. Instead, through fiscal maneuvers, states convert the funds into general revenue.<sup>222</sup> The *parens patriae* power that is housed within state human services agencies—already diverted toward agency self-interest—is often further manipulated by the broader state powers and interests, with the states aiming to control their agency parts in order to serve themselves.<sup>223</sup>

The states' financial conflict with their agencies and diversion of the federal funds can occur overtly. For example, New Hampshire's former Governor Judd Gregg created a new general revenue line item for federal Medicaid funds that he then diverted to general state use, which accounted for 28 percent of New Hampshire's total general fund revenue in the first year the practice was implemented.<sup>224</sup>

Or, the states can achieve the same result by simply reducing state budget allocations to its agencies in anticipation of increased federal funds to replace the state spending. For example, a report by the Arizona Office of the Auditor General describes such practice in the state's revenue maximization project, including a contract with the PCG to increase claiming of federal IV-E foster care funds: “[i]f the project results in new revenues or cost savings, the agency’s program budget may be reduced to return some newly generated revenues to the General Fund.”<sup>225</sup>

Thus, 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. The result is a conflict between agency purpose and self-interest, between the agencies and their parent states, and between the states and their agencies with the federal government. Rather than promoting collaboration between the federal

222. Hatcher, *supra* note 12, at 705–13.

223. *Id.* at 709–15.

224. Kevin Landrigan, *Feds Might Demand \$165m Payback: N.H. Official Warns Surplus at Risk over Medicaid “Bonus,”* NASHUA TELEGRAPH, Jan. 31, 2006, [http://www.nashuatelegraph.com/apps/pbcs.dll/article?AID=/2\]0060131/NEWS02/101310115](http://www.nashuatelegraph.com/apps/pbcs.dll/article?AID=/2]0060131/NEWS02/101310115).

225. STATE OF ARIZONA, OFFICE OF THE AUDITOR GENERAL, REVENUE MAXIMIZATION, REPORT NO. IB-0502 (Dec. 2005), available at [http://www.azauditor.gov/Reports/State\\_Agencies/Agencies/Economic\\_Security,\\_Department\\_of/Performance/IB-0502/IB-0502.pdf](http://www.azauditor.gov/Reports/State_Agencies/Agencies/Economic_Security,_Department_of/Performance/IB-0502/IB-0502.pdf) (explaining how the PCG helped the state claim more foster care funds, and explains that after PCG receives its contingency fees, the remaining additional funds were used to cover state budget reductions “made in anticipation of increased federal revenues from this project”); see also ARIZONA, MONTHLY FISCAL HIGHLIGHTS (June 2005), available at <http://www.azleg.gov/jlbc/mfh-jun-05.pdf> (explaining how the foster care agency budget was reduced by \$1.4 million in FY 2006 “in anticipation of the additional IV-E revenue”).

and state governments, the self-interested practices—spurred on by the revenue maximization consultants—pit the levels of government against each other.<sup>226</sup> The ideals of fiscal federalism are shredded, and children's interests are not served.

#### IV. CONCLUSION: RETHINKING AGENCY PURPOSE AND POWER

In feudal England, at a time when children were considered no more than property and societal burdens, the *parens patriae* power was used to assert guardianship over the children of wealthy landowners in order to increase riches for the crown.<sup>227</sup> Because the ability to provide protective services as *parens patriae* was limited, the crown developed fiscal strategy to seek out children with revenue enhancing potential.<sup>228</sup> Taking assets from the children of landed gentry after their parents died was considered the right of the crown in return for providing wardship services.<sup>229</sup> 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.<sup>230</sup> Today, as the *parens patriae* doctrine has been brought forward to provide the inherent purpose and power of child welfare agencies to serve vulnerable children, wealthy children are no longer targeted. But rich children have been replaced with the poor.

As today's agency inheritors of the *parens patriae* obligation face their own search for increased revenue, they have looked back and taken hold of the doctrine's unfortunate beginnings. Revenue maximization

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226. CARASSO & BESS, *supra* note 208, at 32–33. The report explains that “From the federal perspective, the purpose of federal entitlement and block grant programs is to finance safety net provisions more adequately; the federal formulas are intended to give states incentives to spend more on necessary programs they would not otherwise (fully) fund because of prohibitive cost.” *Id.* at 32. But the states view the money quite differently: “From the state government perspective, revenue maximization often means just spending less state general revenue and more federal and local revenue.” *Id.* at 33.

227. See *supra* notes 18–27 and accompanying text.

228. Curtis, *supra* note 20, at 897–98.

229. See *supra* notes 18–27 and accompanying text.

230. Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 199 (1978) (“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.”).

strategies concocted with private consultants again target children with revenue producing potential—but today’s targets are the vulnerable rather than the entitled: children living in poverty, suffering from disabilities, and with deceased or disabled parents.<sup>231</sup> Strategies to increase the agency’s “penetration rates” seek to increase the percentage of children in state care taken from poor families.<sup>232</sup> Then, often with the assistance of their revenue maximization consultants, the agencies track down children who are disabled or have deceased or disabled parents, because the children provide the revenue-enhancing opportunity of converting the children’s Social Security assets into agency funds.<sup>233</sup>

As the targeted self-interested fiscal practices of modern agency owners of the *parens patriae* power have come to match those of their feudal ancestors—albeit flipped from the rich to poor—so too has the rationale. As the feudal crown asserted its power over children’s assets as its prerogative for providing wardship services, today’s child welfare agencies claim their dominion over foster children’s assets as their right for carrying out their *parens patriae* obligations of providing the children with guardianship care.<sup>234</sup>

In fact, today’s agency practices are in many ways worse than those of feudal times. Whereas children born into the privileged class structure of the feudal tenurial system might maintain their social status and privilege after reaching adulthood and no longer needing wardship care,<sup>235</sup> children today enter foster care poor, and leave care poor—if not worse. The agencies take what is often the only asset the children possess, and virtually abandon the children to the streets after they age out of care.<sup>236</sup> Well over a third of the children aging out of foster care never graduated from high school, only 3 percent complete college, less than half find employment, 85 percent suffer from mental health issues, over a third are

231. Hatcher, *supra* note 8, at 1805–10.

232. *Id.*

233. *Id.*

234. *See generally* Brief of Appellees, *supra* note 156.

235. *See supra* notes 18–27 and accompanying text.

236. FIRST STAR & CHILDREN’S ADVOCACY INSTITUTE, THE FLEEING OF FOSTER CHILDREN: HOW WE CONFISCATE THEIR ASSETS AND UNDERMINE THEIR FINANCIAL SECURITY 2 (2011), *available at* [http://www.caichildlaw.org/Misc/Fleeing\\_Report\\_Final\\_HR.pdf](http://www.caichildlaw.org/Misc/Fleeing_Report_Final_HR.pdf) (“We essentially abandon our foster youth in the wilderness when they age out, with no resources, no map or compass, and no one to serve as guide.”).

homeless, and more than one out of every four males become incarcerated.<sup>237</sup>

So as child welfare agencies have sought to turn the clock back thousands of years to rationalize their treatment of their child beneficiaries as a source of funds, enlightenment is necessary again. Despite the agencies' loathing of judicial review, litigation must continue to bring the practices to the attention of the courts. Despite the agencies' clinging to confidentiality in their practices, the press must continue to make the public aware.<sup>238</sup> And despite the agencies' assertion of absolute discretion without interference, Congress must force the agencies to only act in the best interests of children—if the agencies will not do so on their own accord.<sup>239</sup>

In the end, it is not complicated. Agencies created with the sole purpose of serving the best interests of vulnerable children should only use their power to serve that goal.

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237. *Id.* at iii; Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 STAN. L. & POL'Y REV. 267, 278 (2004).

238. *See, e.g.*, Eric Eckholm, *Welfare Agencies Seek Foster Children's Assets*, N.Y. TIMES, Feb. 17, 2006, at A1. This article tells the story of J.G., whose case is described above. *Supra* notes 169–174 and accompanying text.

239. *See* FOSTER CHILDREN SELF SUPPORT ACT, H.R. 6192, 111th Cong. (2010); *see also* STATEMENT OF DANIEL HATCHER, COMM. ON HOUSE WAYS AND MEANS, SUBCOMM. ON HUMAN RESOURCES, 2006 WL 1415161 (F.D.C.H.), May 23, 2006 (testimony suggesting legislation to protect foster children's Social Security benefits from state agency practices that convert the funds into agency revenue).