

1-1-2002

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Publication Information

Jay E. Grenig, When Can a State Agency Use a Child's Social Security Benefits to Pay for Foster Care Expenses?, 2002-03 Term Preview U.S. Sup. Ct. Cas. 135 (2002). © 2002 American Bar Association.

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Repository Citation

Grenig, Jay E., "When Can a State Agency Use a Child's Social Security Benefits to Pay for Foster Care Expenses?" (2002). *Faculty Publications*. Paper 415.

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When Can a State Agency Use a Child's Social Security Benefits to Pay for Foster Care Expenses?

by Jay E. Grenig

PREVIEW of *United States Supreme Court Cases*, pages 135-139. © 2002 American Bar Association.

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ISSUE

Does an agency that has been appointed as a representative payee to receive benefits on behalf of a beneficiary violate the Social Security Act when the agency uses the benefits to pay for the beneficiary's current care?

FACTS

Foster care in the State of Washington is provided to children who have been abused or neglected or have become the responsibility of the state. Washington provides foster care through the Washington State Department of Social and Health Services (DSHS), using a combination of federal, state, and private funds, although the program is largely state-funded. To be eligible for federal funding under the Social Security Act, a state must provide foster case services under a plan approved by the Secretary of Health and Human Services.

It is the policy of the DSHS to attempt to recover the costs of foster care from the children's parents.

If the parents of a foster child are unavailable or unwilling to reimburse DSHS for the costs of foster care, state law provides that DSHS may reimburse itself using other funds that come into its possession while the child is in its custody.

When a child is eligible for Social Security benefits, federal law provides a process by which a "representative payee" may be appointed to receive and administer the funds on behalf of the child. A representative payee is generally appointed whenever a beneficiary is under the age of 18. The Social Security Administration (Administration) will appoint an authorized agency only if no parent or guardian is available to serve as representative payee. The appointment of a state agency like DSHS as a child's representative payee is last on the Administration's priority list.

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WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES
ET AL. V. GUARDIANSHIP ESTATE OF
DANNY KEFFELER ET AL.
DOCKET NO. 01-1420

ARGUMENT DATE:
DECEMBER 3, 2002
FROM: SUPREME COURT OF
WASHINGTON

Case at a Glance

When a child is eligible for Social Security benefits, federal law provides a process by which a "representative payee" may be appointed to receive and administer the funds on behalf of the child. This case presents the issue of whether a state agency that has been designated as a child's representative payee violated federal law when it used the child's Social Security benefits to reimburse itself for foster care expenditures.

Representative payees must use Social Security benefits for the beneficiary and in the beneficiary's best interest. The Administration's regulations specifically authorize a representative payee to use Social Security Benefits to defray the cost of the beneficiary's "current maintenance," including food, shelter, clothing, medical care, and personal items.

When monthly benefits exceed the amount needed for current maintenance, the regulations require the representative payee to conserve and invest the remaining benefits in trust for the benefit of the beneficiary. Large amounts of retroactive benefits must be placed in a separate, dedicated account and used only for certain, enumerated expenditures.

In September 1999, 1,480 foster care children were in the custody of DSHS and receiving Social Security benefits. DSHS acted as the representative payee for 1,411 of those children. When DSHS receives Social Security benefits as representative payee for a foster child, the funds are deposited in the Foster Care Trust Fund Account at the Office of the Washington State Treasurer. Although the funds are kept in a single account, the Trust Fund Union maintains an individual "subsidiary account" for each child for whom benefits are received.

The Children's Administration (Children's) unit of DSHS provides services to all foster children regardless of whether the children also receive Social Security benefits. Children's is responsible for providing the current maintenance needed by a child in foster care. It does not normally purchase a child's food, shelter, clothing, and other items directly; such items are purchased and provided by the child's foster parent. Children's pays the foster

parent a fixed amount based on a schedule. Where a special item or expenditure is needed, the Trust Fund Unit will issue a check to either the foster parent or directly to a store or service provider. Such expenditures are authorized by DSHS in its discretion as the representative payee.

The Trust Fund Unit typically uses a child's Social Security benefits to pay for a child's basic foster care expenses. As a representative payee, DSHS has the discretion to spend a child's Social Security benefits on items other than current basic foster care expenses. Children in foster care for whom a person or entity other than DSHS serves as representative payee still receive state-supported foster care. Foster children who do not receive Social Security benefits are eligible for state funding for extra items and special needs if funds are available in the state foster care budget.

In 1996, a class action was filed against DSHS on behalf of all foster children within the State of Washington, past, present, and future, who receive Social Security benefits and for whom the State of Washington acts or has sought to act as representative payee. The plaintiffs asked that DSHS be found to have violated the provision of the Social Security Act that forbids creditors access to Social Security benefits. They contended that DSHS, as representative payee, used the foster children's Social Security Benefits to reimburse the state for the costs of foster care.

The trial court held that DSHS's use of Social Security Benefits to reimburse the cost of foster care violates federal law. On appeal, the Washington Supreme Court held that DSHS, as a representative payee, violated the Social Security Act when it applied Social Security ben-

efits to the current maintenance needs of foster children for whom it acted as representative payee. 145 Wash.2d 1, 32 P.3d 267 (2001). The Washington court observed that DSHS receives reimbursement for foster care only if it serves as a representative payee and concluded that it only serves as a representative payee so that it can confiscate the child's money.

Relying on a Social Security regulation providing that the "primary concern is to select the payee who will best serve the beneficiary's interests," the court stated:

Obviously the child is better off with any payee other than the state because DSHS must provide foster care under state law *regardless* of whether it receives a reimbursement. DSHS's self-prioritization is extremely disquieting in the face of a regulatory mandate that we consider these disenfranchised children before enriching government coffers.

Guardianship Estate of Keffeler v. State Department of Social and Health Services, 145 Wash.2d 1, 17, 32 P.3d 267, 275 (2001) (italics in original, footnotes omitted).

The court concluded that under 42 U.S.C. § 405(j) a representative payee may not be a "creditor of such individual who provides such individual with goods and services for consideration."

The United States Supreme Court thereafter granted DSHS's petition requesting review of the Washington Supreme Court's decision. 122 S.Ct. 2288 (2002).

CASE ANALYSIS

A provision of the Social Security Act (42 U.S.C. § 407(a)) prohibits creditor access to Social Security benefits. Thus if DSHS acted as a

creditor when it reimbursed itself for foster care costs out of the foster children's Social Security entitlements, it would have violated the Act's anti-attachment provisions.

Social Security regulations also provide that it is the responsibility of the representative payee to "[u]se the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines ... to be in the best interests of the beneficiary." 20 C.F.R. § 404.2035(a). The regulations permit use of Social Security benefits for the current maintenance of the beneficiary. 20 C.F.R. § 404.2040(a)(1).

In *Philpott v. Essex County Welfare Bd.*, 40 U.S. 413 (1973), the U.S. Supreme Court declared that Section 407(a) barred New Jersey's attempt to reach federal Social Security benefits in order to reimburse itself for the public assistance expenditures it made on behalf of the petitioners. State welfare recipients had been made to execute an agreement, as a condition precedent to receiving welfare benefits, to reimburse the county welfare board with any funds that came into their possession. The Court stated, "We see no reason why a State, performing its statutory duty to take care of the need, should be in a preferred position as compared with any other creditor."

Section 407(a) was again before the Supreme Court in *Bennett v. Arkansas*, 485 U.S. 395 (1988). Arkansas had attempted to attach certain federal benefits paid to individuals incarcerated in Arkansas prisons to reimburse the state for maintaining the prison system. Arkansas argued that there is an "implied exception" to the bar of Section 407(a) when the state is providing public money for the care and maintenance of Social Security

beneficiaries. The Court found no such "care and maintenance" exception for states given the express language of Section 407(a).

DSHS contends that the Social Security Act and regulations expressly authorize it, acting as representative payee, to use benefits for the beneficiary's current maintenance. It also argues that Section 407 does not bar a representative payee from using benefits to pay for current maintenance. DSHS claims that, instead of violating Section 407(a), its use of Social Security benefits actually implements a carefully crafted federal statutory plan to appoint responsible representative payees for needy children and ensure that benefits are properly used.

According to DSHS, it is illogical to conclude that Section 407(a) prohibits what Section 405(j) and the regulations permit. DSHS explains that Section 407(a) protects benefits from execution, levy, attachment, garnishment, or other legal process by a person who is not a representative payee. When a representative payee is appointed, DSHS says that it becomes the duty of the Commissioner of Social Security to ensure that the payee is using the benefits properly.

DSHS also argues that the Washington Supreme Court's decision is inconsistent with the Commissioner of Social Security's interpretation of the Social Security regulations. According to DSHS, the Commissioner has consistently taken the position that payments made for current maintenance are permissible under its regulations, even when that maintenance would otherwise be provided by the state at no charge to the beneficiary.

DSHS distinguishes the Supreme Court's decision in *Bennett* from the

present case, asserting that, unlike the present case, *Bennett* involved a court action by a state seeking to attach Social Security benefits under a state statute authorizing the state to seize a prisoner's property or estate to help defray the cost of maintaining the prison system. It also distinguishes *Philpott*, explaining that the Supreme Court applied Section 407(a) to bar a state lawsuit from reaching the Social Security benefits in an individual bank account under an agreement to reimburse.

Finally, DSHS contends that as a representative payee it did not act as a creditor when it used the Social Security benefits to pay for a foster child's care. Acknowledging that Section 407(a) prevents DSHS from bringing suit to compel a private representative payee to pay for a beneficiary's current care, DSHS asserts that if a private payee refuses to use the Social Security benefits to pay for current care, the Commissioner of Social Security has an obligation to remove that payee and choose an alternate payee who will make proper use of the benefits. DSHS notes that this action is seldom necessary since private payees pay Social Security benefits to the state to help offset the cost of care.

The respondents, on the other hand, assert that Section 405(j) requires DSHS to act in the beneficiaries' best interest and prohibits self-dealing. They claim that DSHS's cost-recovery program cannot be justified as a use of the benefits by a representative payee for "current maintenance." Respondents stress that DSHS uses the benefits to reimburse for past care and services and to repay programmatic expenses. Respondents also claim that DSHS has been "double dipping"—reimbursing itself for costs already paid

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from federal funds or already reimbursed by the child's parent.

According to respondents, DSHS is barred by state law from using the discretion required of a representative payee. They say that a proper administration of benefits would require DSHS to consider the child's current and future needs before contemplating reimbursement.

It is respondents' position that Washington's statutes and regulations compelling the use of respondents' Social Security benefits to reimburse foster care costs amount to a "legal process" forbidden by Section 407(a). Respondents declare that DSHS violates 407(a) when it assigns their Social Security benefits to reduce the cost of providing foster care in Washington.

Respondents argue that the regulations relied upon by DSHS address the direct payment of current maintenance costs, not reimbursement, and definitely not a state-mandated cost-recovery program. In addition, respondents declare that the regulations instruct that even the direct payment of such costs is not authorized unless it is in the best interest of the beneficiary.

SIGNIFICANCE

The circuit courts have applied Section 407(a) in various situations. The Seventh Circuit in *Mason v. Sybinski*, 280 F.3d 788 (7th Cir. 2002), held that a payee's use of benefits to pay for the current maintenance of beneficiaries in a state hospital did not violate Section 407(a) because "no attachment or legal process took place."

The Eighth Circuit upheld a practice in Missouri where the state, as representative payee, received the Social Security benefits due involuntarily committed mental patients and reimbursed itself for the care

and maintenance costs it had expended for the patients out of public funds. *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991), cert. denied sub nom. *Crytes v. Schafer*, 502 U.S. 1095 (1992). The court explained "that the Department's participation in the administrative representative payee is [not] the kind of coercive legal action envisioned by Section 407(a). See also *C.G.A. v. Alaska*, 824 P.2d 1364 (Alaska 1992); *Ecolono v. Division of Reimbursements*, 769 A.2d 296 (Md. App. 2001).

In *Brinkman v. Rahm*, 878 F.2d 263 (9th Cir. 1989), however, the Ninth Circuit ruled that DSHS may not deduct Social Security benefits as reimbursement for the costs of care and maintenance paid out of public funds for involuntarily committed mental health patients in state hospitals. Another case, *Cræwford v. Gould*, 56 F.3d 1162 (9th Cir. 1995), involved a California law requiring patients committed to state psychiatric hospitals to be responsible for the costs of their own incarceration. California required that all funds and income, including Social Security benefits to which the patient was entitled, be placed in a hospital trust account from which the state could deduct as reimbursement the costs of care and maintenance expended on the patient. The Ninth Circuit held that Section 407(a) preempted the California procedure, stating that Section 407(a) is designed "to protect social security beneficiaries and their dependents from the claims of creditors."

The financial impact of this case is readily apparent from the fact that DSHS forecasted it would receive \$6.733 million from Social Security reimbursement, or a full 18 percent of the state's contribution to the foster care budget of \$37 million for fiscal year 2000. Upholding the

Washington Supreme Court's decision could have an adverse impact on the availability of services for needy children. Other states that follow procedures comparable to those used by DSHS would be similarly affected. Some have suggested that children are at risk of losing critical state and federal benefits if their Social Security benefits are allowed to accrue.

On the other hand, children in foster care are less than 1 percent of the total population receiving Social Security benefits. A decision upholding DSHS's actions could affect millions of older Americans receiving Social Security benefits as well as foster children and other children receiving Social Security benefits. Some of these persons could face indigency if their benefits are used to reimburse government agencies.

ATTORNEYS FOR THE PARTIES

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