STOP FOSTER CARE AGENCIES FROM TAKING CHILDREN'S RESOURCES

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Like a novel from the grave of Charles Dickens, foster care agencies are partnering with companies to search for children who are disabled or have dead parents—in order to take their money for state revenue. The agencies are monetizing vulnerable children. In Florida, a contract document with the Public Consulting Group describes "[p]redictive analytics" and "data mining techniques" to "score" and "triage" foster children to maximize revenue.[1] In Maryland, an assessment report by MAXIMUS, Inc. describes foster children as a "revenue generating mechanism."[2]

Largely unknown to the public, states and their contractors have carried out the strategies for years: targeting children who might be determined disabled or whose parents have died, applying for federal disability (Supplemental Security Income – "SSI") and survivor (Old Age, Survivors and Disability Insurance Program – "OASDI") benefits on their behalf, and then taking control of the children's money as representative payee.[3] Often, the children never see the money and receive no benefit.[4] Many states also confiscate Veteran's Assistance benefits from children whose parents died in the military.[5] And some states take even more.[6] The Nebraska foster care agency even drafted a regulation so it can claim a foster child's burial space.[7]

By taking foster children's resources to reimburse state costs, foster care agencies are forcing children to pay for their own care when the agencies and states are already legally obligated to do so. Further, if a parent or relative serves as representative payee and uses a child's disability or survivor benefits to help with expenses for a child's care, the child is better off because more funds are available to help in the

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1. PUB. CONSULTING GRP., STATE OF FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES SOCIAL SECURITY ADVOCACY ASSESSMENT 6, 28–29 (2012).

2. MAXIMUS BENEFITS & ELIGIBILITY ADVOCACY SERVS., SSI/SSDI ASSESSMENT REPORT MARYLAND DEPARTMENT OF HUMAN RESOURCES 5 (2013) (on file with author).

3. DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS 4 (2016) [hereinafter POVERTY INDUSTRY].

4. *Id*.

5. *Id*.

6. *Id*.

7. *Id.*

household where the child lives. When foster care agencies take resources from children, the children receive no benefit; their money is used to provide neither them nor their foster care home more assistance. Rather, the agencies ignore their fiduciary obligations and route the funds to government coffers—while the contractors also take a cut.[8]

Why are foster care agencies taking resources from the very children they exist to serve? States have not provided sufficient funding for child welfare services, including assistance to help families stay intact so that foster care is not needed. In a search for revenue, child welfare agencies have prioritized their own fiscal self-interests over their purpose of protecting the interests of children in their care.[9]

Cash-strapped agencies argue that taking the children's funds is actually good for the children, because increased agency revenue leads to improved agency services.[10] However, this rationale fails. The notion that child welfare agencies should fund themselves by taking resources from children they exist to serve is counterintuitive, at best. Further, foster care agencies are not better off after they confiscate children's resources: the funds are either routed directly to general state coffers or the state reduces funding for the agency based upon how much money is obtained from the children.[11]

These state revenue schemes target our country's most vulnerable children. According to past studies, foster children suffer from post-traumatic stress disorder (PTSD) at twice the level of U.S. war veterans;[12] over one-third of children aging out of foster care never graduate from high school;[13] only 3% complete college;[14] less than 50% find employment;[15] 80% suffer from mental health issues;[16] over one-third face homelessness;[17] and almost 75% of males become incarcerated by

8. *Id*. at 3.

9. *Id*.

10. *Id*. at 2.

11. *Id.* at 3.

12. Candice N. Plotkin, *Study Finds Foster Kids Suffer PTSD*, HARVARD CRIMSON (Apr. 11, 2005), https://www.thecrimson.com/article/2005/4/11/study-finds-foster-kids-suffer-ptsd/ [https://perma.cc/HD83-H3XW].

13. *Education*, NAT'L FOSTER YOUTH INST., https://www.nfyi.org/issues/education/ [https://perma.cc/K66C-VAW2] (last visited Sept. 27, 2018).

14. Toni Airaksinen, *Only 3% of Foster Care Youth Graduate College. Felicitas Reyes is One of Them*, USA TODAY (June 12, 2017, 11:58 AM), https://www.usatoday.com/story/college/2017/06/12/only-3-of-foster-care-youth-graduate-college-felicitas-reyes-is-one-of-them/37432803/ [https://perma.cc/8993-L897].

15. *Foster Care Facts*, PROMISES 2 KIDS, http://promises2kids.org/facts-figures/ [https://perma.cc/DH6M-3WJY] (last visited Sept. 27, 2018).

16. *Mental Health and Foster Care*, NAT'L CONF. OF STATE LEGISLATURES (May 9, 2016), http://www.ncsl.org/research/human-services/mental-health-and-foster-care.aspx [https://perma.cc/4RJS-JTQE].

17. *Foster Care Facts*, *supra* note 15.

age twenty-six.[18]

Rather than taking the children's resources, child welfare agencies could help foster children use their own funds to prepare for the difficult transition to independence. Examples include saving the funds for college costs or vocational training, purchasing specialized tools or equipment for work, helping pay future rent, purchasing a car—now virtually a necessity for independent living—or conserving the funds for countless other expenses the children will encounter.

In 2018, after several years of policy advocacy, litigation, and legislative effort, Maryland became the first state to enact legislation that begins to protect foster children's resources.[19] After strong opposition, Governor Larry Hogan did not sign the legislation but, in an election year, he decided not veto it either; so it became law without signature under the state constitution.[20] The remainder of this essay summarizes legal and policy concerns regarding states taking foster children's funds and explains how the Maryland law can serve as a model for other states so that child welfare agencies follow their purpose of helping children–not using them.

I. LEGAL AND POLICY CONCERNS

Rather than adhering to their mission of serving children's individualized needs, child welfare agencies are partnering with private contractors to place children onto revenue generating conveyor belts. Usually without notifying the children or their advocates, the agencies

18. MARK E. COURTNEY ET AL., UNIV. OF CHI., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26 at 92 (2011).

19. *2018 Regular Session Legislation*, GEN. ASSEMBLY OF MD., http://mgaleg.maryland.gov/webmga/frmLegislation.aspx?id=2018rs_passed_both_chambers&stab=02&pid=legisnlist&tab=subject3 [https://perma.cc/6C3W-2KWL] (last visited Sept. 27, 2018); *see* Associated Press, *States' Use of Foster Kids' Benefits Is Assailed*, CBS BALTIMORE (Mar. 16, 2011, 6:04 AM), http://baltimore.cbslocal.com/2011/03/16/states-use-of-foster-kids-benefits-is-assailed/ [https://perma.cc/5X8K-NTS7]; Daniel L. Hatcher, *How Maryland Robs Its Most Vulnerable Children*, BALTIMORE SUN (Oct. 14, 2013, 6:00 AM), http://www.baltimoresun.com/news/opinion/oped/bs-ed-foster-care-maryland-20131013-story.html [https://perma.cc/X2CB-SK26]; Daniel L. Hatcher, *Legislation Needed to Protect Foster Kids' Personal Funds*, BALTIMORE SUN (Mar. 3, 2015, 10:58 AM), http://www.baltimoresun.com/news/opinion/oped/bs-ed-foster-funds-20150303-story.html [https://perma.cc/DX42-VHPS]; Daniel L. Hatcher, *Maryland Needs to Stop Forcing Foster Children to Pay for Their Own Care*, BALTIMORE SUN (Apr. 2, 2018, 1:10 PM), http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0403-foster-care-20180402-story.html [https://perma.cc/7BVB-2PAP]; *How Local Foster Care Plays A Role In "The Poverty Industry,"* THE KOJO NNAMDI SHOW (June 28, 2016, 12:30 PM), https://thekojonnamdishow.org/shows/2016-06-28/when-poverty-becomes-an-industry [https://perma.cc/6A9K-8ABD].

20. H.B. 524, 2018 Gen. Assemb., Reg. Sess. (Md. 2018), http://mgaleg.maryland.gov/2018RS/bills/hb/hb0524E.pdf [https://perma.cc/MB29-R977].

and their contractors search for foster children to apply for disability (SSI) or survivor benefits (OASDI).[21] Although state agencies are the least preferred choice for representative payee under federal regulations, the contractors help the agencies gain control of the children's funds as payee.[22] Then, after the contractors get their cut, the agencies take the children's benefits to replenish state revenue by maximizing the number of children deemed disabled in order to take their disability benefits, and taking the last remaining assets left to children from their deceased parents.[23] Contract documents illustrate how children are dissected, sorted, and ranked based, not to prioritize serving their needs, but based on how much revenue they can bring to the states.[24]

Child welfare agencies have defended their practices of taking children's resources on policy grounds, arguing they are the representative payee "of last resort," that the federal asset limit for SSI benefits prohibits conserving children's funds, and that by taking disability and survivor benefits from foster children they can better help foster children.[25] These arguments do not withstand scrutiny.

First, the state agencies have asserted that they will not serve as representative payees for foster children if they are not able to apply the children's funds to repay state costs.[26] This assertion is nonsensical because the agencies essentially argue they will not take on the fiduciary role of protecting foster children's funds if the agencies are not able to take the children's funds. Further, child welfare agencies are not the "last resort" to serve as payee.[27] In fact, the state agencies are the least preferred choice under federal regulations, and several other options exist for payees—including relatives, family friends, and volunteer individuals or organizations.[28] Volunteer representative payee programs already exist for adults who are unable to manage their own Social Security benefits and such programs could also be created for foster children.[29] For example, a program could recruit retired individuals to serve as payees for the children, establishing mentor relationships and helping the children manage and benefit from their own funds. Even having no payee

21. POVERTY INDUSTRY, *supra* note 3, at 2.

22. *Id*. at 94.

23. *Id.* at 77–82; *see also* Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1802–03 (2006) (describing the continued practice of using children's benefits to "replenish the state coffers"); Daniel L. Hatcher, *Purpose vs. Power:* Parens Patriae *and Agency Self-Interest*, 42 N.M.L. REV. 159, 161 (2012) (describing how private consultants influence state agencies to behave like this) [hereinafter *Purpose vs. Power*].

24. POVERTY INDUSTRY, *supra* note 3, at 77–82.

25. *Id.* at 90–101.

26. *Id*. at 94.

27. *Id*.

28. 20 C.F.R. §§ 404.2021(c), 416.621(c) (2018).

29. POVERTY INDUSTRY, *supra* note 3, at 96.

would be better for foster children, because if the Social Security Administration cannot locate a suitable payee, the foster children's funds would then be conserved and paid out directly to the children upon reaching adulthood.[30]

Second, the agencies argue that by taking children's SSI (disability) benefits, the children do not risk surpassing the federal $2,000 asset limit to be eligible for continued benefits (which continue to be taken by the agency). Again, the assertion is incorrect. A representative payee who exercises true fiduciary discretion can avoid the asset limit for SSI by using the funds on countless unmet needs for the children, rather than the agencies taking the children's funds to repay themselves for costs that the children have no legal obligation to pay. Further, multiple exceptions exist to the asset limit, including special needs trusts, ownership interest in a home, purchasing an automobile, and buying household items and personal effects.[31] Also, the 2014 Achieving a Better Life Experience Act[32] ("ABLE Act") created new 529A plans modeled after 529 plans for college savings, but more expansive for the needs of disabled individuals and children.[33] The plans allow conservation of SSI funds that are exempt from the asset/resource limit, and "the funds can later be used for education or many ways to help a disabled child/young adult—including housing, transportation, employment training and support, assistive technology and personal support services," among others.[34]

Third, child welfare agencies have even argued they should be able to take foster children's funds so they have more revenue to serve all foster children.[35] Such a policy conflicts with federal and state law requiring that states must provide and pay for foster care services, not the children.[36] The policy is also counterintuitive, creating a form of foster care that is self-funded by abused and neglected children. Further, the practice usually does not result in more revenue for foster care agencies but rather in savings or general fund revenue to the states.

The revenue strategy also raises legal concerns. Although the United States Supreme Court addressed the issue in 2003 in *Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*,[37] the decision was limited. The Court held that the federal law prohibiting creditors from attaching Social Security benefits did not apply because foster children do not owe a debt for their care and thus foster

30. 20 C.F.R. § 404.2011 (2018).
31. 20 C.F.R. § 416.1216 (2018); POVERTY INDUSTRY, *supra* note 3, at 101.
32. Pub. L. No. 113-295, 128 Stat. 4056 (codified as amended at I.R.C. § 529A (2012)).
33. POVERTY INDUSTRY, *supra* note 3, at 101.
34. *Id*.
35. *Purpose vs. Power*, *supra* note 23, at 161.
36. *Id.* at 182–90.
37. 537 U.S. 371 (2003).

care agencies are not creditors.[38] However, the Court recognized that several other possible legal concerns remained undecided.[39]

For example, the Supreme Court did not rule on whether child welfare agencies' revenue practices conflict with their purpose as a fiduciary for foster children's interests, an obligation created by both state and federal law. Under state laws, child welfare agencies exist to serve and protect the best interests of abused and neglected children, establishing a fiduciary obligation.[40] Further, the agencies assume an additional layer of fiduciary obligation under federal law when they become representative payees for children's Social Security benefits.[41] Under the core tenant of fiduciary law, child welfare agencies must act in the best interests of their beneficiaries (the children) and can never use the fiduciary power to prioritize their own interests over the interests of the children.[42] The agencies violate their fiduciary obligations when they take control over foster children's Social Security benefits and use those benefits for agency/state interests rather than for the children.

The Supreme Court also has not addressed multiple constitutional challenges, including due process and equal protection concerns and whether state agencies taking foster children's resources results in unconstitutional takings.[43] Perhaps the most striking constitutional concern is how child welfare agencies ignore the due process rights of children in their care. After ranking foster children for their revenue generating capacity, the agencies and their contractors use the children to apply for their Social Security benefits—usually without telling the children or their advocates.[44] The agencies then try to take control over the children's funds as representative payee, again without notice to the children that would otherwise allow them to suggest someone else to manage their money.[45] And when the agencies divert the children's funds every month to replenish state revenue, the children again do not receive notice or opportunities to explain how their funds can be better used for

38. *Id*. at 382.

39. *Id.* at 380 n.4, 389–90 n.12.

40. *Purpose vs. Power*, *supra* note 23, at 182–84.

41. As representative payees, the Social Security Act requires that the agencies use or conserve the children's Social Security benefits in a manner that they determine is in the beneficiary's best interest. 42 U.S.C. § 405(j) (2012); 20 C.F.R. § 404.2035(a) (2018) (stating that the payee must "[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 . . . .").

42. *E.g*., Gianakos 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.").

43. *Keffeler*, 537 U.S. at 371, 380 n.4, 390 n.12.

44. POVERTY INDUSTRY, *supra* note 3, at 80.

45. *Id*.

unmet current needs or conserved for their future.[46]

II. MARYLAND LITIGATION AND LEGISLATION TO STOP FOSTER CARE AGENCIES FROM TAKING CHILDREN'S RESOURCES

Two former foster children, Alex and Ryan, challenged the agency practices in Maryland, including an argument that the lack of notice violated their constitutional right to due process.[47] Unfortunately, in *Myers v. Baltimore County Department of Social Services*,[48] the agency successfully convinced the court to dismiss Alex's claims under the Maryland Tort Claims Act by arguing he should have brought the claims within one year of entering foster care—even though he was only twelve at the time and had received no notice of the agency's actions.[49] However, the case of *In re Ryan W*.[50] reached Maryland's top appellate court, where the court concluded that Ryan's due process rights had been violated.[51] As a result, the Maryland Court of Appeals held that foster care agencies must give notice to foster children and their lawyers when the agencies apply to become representative payee for the children's funds, and must also provide regular accountings of how the money is used.[52] After receiving notice, foster children can challenge the appointment of the foster care agency as their representative payees and request a different payee that will truly protect their interests. Hopefully, advocates in other states will bring similar legal challenges—and strive to encourage legislation such as summarized below.

While pursuing litigation in Maryland, advocates simultaneously worked for several years on state legislation in an effort to stop the foster care agencies from taking children's resources. And in 2018, the Maryland General Assembly passed the first state legislation to begin protecting foster children's Social Security and Veteran's Assistance benefits—titled "Protecting the Resources of Children in State Custody," sponsored by Delegate David Moon and Senator Richard S. Madaleno, Jr.[53]

Under the new requirements, when a Maryland foster care agency acts

46. *Id*.

47. *Purpose vs. Power*, *supra* note 23, at 175–77.

48. 2010 WL 4890061 (Md. App. Oct. 8, 2010).

49. *Purpose vs. Power*, *supra* note 23, at 175–82 (The author of this essay was co-counsel for Alex.).

50. 76 A.3d 1049 (Md. 2013).

51. *Id.* at 1059.

52. *Id*. at 1052 (The author of this essay was co-counsel for amici supporting the foster child's appeal.).

53. S.B. 291, 2018 Gen. Assemb., Reg. Sess. (Md. 2018), http://mgaleg.maryland.gov/2018RS/bills/sb/sb0291T.pdf [https://perma.cc/6HB8-UNPW]; H.B. 524, 2018 Gen. Assemb., Reg. Sess. (Md. 2018), http://mgaleg.maryland.gov/2018RS/bills/hb/hb0524E.pdf [https://perma.cc/MB29-R977].

as representative payee for a child receiving disability or survivor benefits, the state must conserve at least 40% of the funds for the child starting at age fourteen, at least 80% of the funds starting at age sixteen, and 100% of the funds starting at age eighteen.[54] Thus, the children will have more of their own money available as they near the age of transitioning out of foster care and face the struggle for economic independence.

The legislation specifically includes the new 529A (ABLE) accounts as one of the options for saving the children's funds.[55] The 529A accounts provide tax benefits, are exempt from the $2,000 asset limit that otherwise applies to SSI benefits, and allow flexibility for the conserved funds to be used for education, housing, transportation, employment training, or many other ways to help a disabled young adult strive to become independent.[56] Further, the law requires the agencies to begin providing all foster children with financial literacy training when they reach the age of fourteen, which can help the children learn more about the financial issues they will soon face—and to engage the children in planning for their own futures.[57]

Advocates have also been supporting federal legislative efforts to protect foster children's funds, beginning with a federal bill introduced by former Congressman Pete Stark (CA) in 2007,[58] and similar legislation championed by Congressman Danny Davis (IL) in 2016.[59] Hopefully, the federal bill will be reintroduced and receive committee hearings and votes. Until then, states should move forward on their own legislation and make further improvements to protect all foster children's resources.

CONCLUSION

State governments exist for the purpose of maximizing the public welfare. Child welfare agencies exist to protect and serve the interests of vulnerable children. When states use their child welfare agencies to extract resources from vulnerable children in their care, the purpose of

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54. S.B. 291 § (C)(2)(I)–(III). Further, the legislation also indicates that when the foster care agency acts as payee for any child regardless of age it must "[u]se or conserve the benefits in the child's best interest, including using the benefits for services for special needs not otherwise provided by the Department or conserving the benefits for the child's reasonably foreseeable future needs . . . ." *Id.* § (C)(1).

55. *Id.* § (C)(4)(II).

56. *See* POVERTY INDUSTRY, *supra* note 3, at 101.

57. S.B. 291 § (C)(6).

58. Foster Children Self-Support Act, H.R. 1104, 110th Cong. (2007), https://www.congress.gov/110/bills/hr1104/BILLS-110hr1104ih.pdf [https://perma.cc/ET9Q-5CDH].

59. Protecting Foster Youth Resources to Promote Self-Sufficiency Act, H.R. 5737, 114th Cong. (2016), https://www.congress.gov/114/bills/hr5737/BILLS-114hr5737ih.pdf [https://perma.cc/EQB7-2HZ7].

government is undermined, the children are harmed, and we are all harmed as a result. Through increased awareness, litigation, and legislative reform summarized in this essay, the harm can be stopped.