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KEFFELER V. DEPARTMENT OF SOCIAL AND HEALTH SERVICES: HOW THE SUPREME COURT OF WASHINGTON MISTOOK CARING FOR CHILDREN AS ROBBING THEM BLIND

Tobias J. Kammer

Abstract: Social Security benefits aid in the basic care of beneficiaries. Washington's Department of Social and Health Services (DSHS) used benefits toward this end until *Keffeler v. Department of Social and Health Services*. In *Keffeler*, the Supreme Court of Washington ruled that DSHS, even when acting as representative payee, could not use a foster child's Social Security benefits to pay for his or her current maintenance. The court held that DSHS's use of Social Security benefits to pay for the current maintenance of foster children violated 42 U.S.C. § 407 of the Social Security Act, which protects Social Security beneficiaries from the claims of creditors. The Supreme Court of Washington reasoned that because state law required DSHS to provide foster care, it could not reimburse itself for the costs of that care without becoming a creditor, in violation of § 407(a). Section 405(j) of the Social Security Act states that benefits must be used in the best interests of the beneficiary. The court stated that because DSHS was already required to provide for the current maintenance of foster children, using Social Security benefits for maintenance was not in the children's best interests. This Note argues that federal law and Social Security regulations permit DSHS—when acting as representative payee—to use Social Security benefits for the current maintenance costs of foster children. States may act as representative payees, and use benefits to pay for the current maintenance of beneficiaries under 42 U.S.C. § 405(j), which pronounces that such a use is considered to be in the best interests of a beneficiary.

Social Security—usually associated with old age and retirement—provides a vital resource not only for the elderly but also for children.¹ Indeed, approximately 3.8 million children collect benefits.² However, many children in Washington State will never receive the Social Security benefits to which they are entitled.³ The children eligible for these benefits have usually suffered the loss of a parent, have a disabled parent, or are disabled themselves.⁴ These benefits are meant to aid with the

1. SOCIAL SECURITY ADMINISTRATION, SSA PUBLICATION NO. 05-10085, BENEFITS FOR CHILDREN (2001).

2. *Id.*

3. The Supreme Court of Washington recognized this in *Keffeler v. Department of Social and Health Services*, 145 Wash. 2d 1, 32 P.3d 267 (2001). In *Keffeler*, the court acknowledged that Washington's Department of Social and Health Services (DSHS) would not apply to become representative payee for foster children if not allowed to use Social Security benefits for the child's current maintenance. *Id.* at 14, 32 P.3d at 274. Unless the state forced DSHS to apply for Social Security benefits, as in the best interest of foster children, many children will be left entirely without benefits.

4. See *supra* note 1.

shortfall such losses create—to pay for food, clothing, shelter and, funds permitting, perhaps a computer or music lessons.⁵ Yet for some children those funds will never appear and instead will sit idle in the federal treasury.

This loss is the result of *Keffeler v. Department of Social and Health Services*.⁶ In *Keffeler*, the Supreme Court of Washington held that the state's Department of Social and Health Services (DSHS) could not use Social Security benefits to pay for a foster child's current maintenance costs, even when the Social Security Administration (SSA) had appointed DSHS to act as the representative payee for the child.⁷ *Keffeler* is especially harsh to the truly abandoned child, effectively favoring children who have someone to act on their behalf over those who have no one other than the state.⁸ As the court was fully aware, DSHS will not apply to act as representative payee if not permitted to use benefits for the child's current maintenance due to the application expenses.⁹ Thus, those children who rely completely on DSHS will necessarily be left without their benefits.

Under certain circumstances—such as those in *Keffeler*—SSA may assign state agencies the responsibility of acting as representative payee.¹⁰ An agency, such as DSHS, must first apply to SSA to act as representative payee for each beneficiary it wishes to serve.¹¹ In deciding whether to accept the application to act as payee, SSA considers numerous factors¹² and will only appoint the person or agency that it determines will act in the best interest of the beneficiary.¹³ The Social Security Act generally forbids creditors from acting as representative

5. 20 C.F.R. § 404.2040(a)(1) (2001).

6. 145 Wash. 2d 1, 32 P.3d 267 (2001).

7. *Id.* at 25, 32 P.3d at 279.

8. This is the case because children who rely exclusively on the state for such representation will, after *Keffeler*, have no one to petition SSA on their behalf to receive their Social Security benefits. See *infra* Part IV. While there is a remote possibility a relative or someone else may step forward to seek benefits on behalf of these children, the reality is that many of these children are entirely dependent on the state. See *infra* Part IV.

9. See *Keffeler*, 145 Wash. 2d at 15, 32 P.3d at 274.

10. See 42 U.S.C. § 405(j) (1994).

11. 20 C.F.R. § 404.2025 (2001). DSHS is authorized by the Washington State Legislature to act as representative payee for foster children. WASH. REV. CODE § 74.13.060 (2001).

12. 20 C.F.R. § 404.2025.

13. *Id.* § 404.2020.

payees,¹⁴ though the Commissioner may appoint a creditor where he or she determines it would be in the best interests of the beneficiary.¹⁵ SSA recognizes that a payee who uses benefits to pay for a child's current maintenance costs acts in the child's best interests.¹⁶ In *Keffeler*, SSA appointed DSHS to serve as representative payee for certain foster children.¹⁷ DSHS in turn used those benefits to pay for the current maintenance of the beneficiaries in state care,¹⁸ as explicitly permitted by the Social Security Act.¹⁹ Nonetheless, while all other representative payees may still use Social Security benefits to pay for a beneficiary's current maintenance,²⁰ the Supreme Court of Washington, singled out the state and said that it could not act as representative payee.²¹

This Note argues that the *Keffeler* court erred in its interpretation of the Social Security Act's representative payee program, which permits a representative payee to apply a beneficiary's Social Security earnings toward that person's current maintenance. Part I of this Note examines DSHS and the methods it uses to realize its mission. Part II explores the purpose of the Social Security Act, focusing on the provisions relevant to *Keffeler*. Part III describes the deference that courts must give to agency decisions. Part IV outlines the facts, procedural history, holding, and rationale of the *Keffeler* decision. Finally, Part V argues that the Supreme Court of Washington erred in holding that a representative payee cannot use Social Security earnings to pay for the current maintenance of foster children. Federal laws and regulations permit representative payees, including DSHS, to use benefits to pay for a beneficiary's current maintenance costs, which is exactly what DSHS did and should be allowed to do.

14. 42 U.S.C. § 407(a) (1994).

15. *Id.* § 405(j)(2)(C)(ii).

16. 20 C.F.R. §§ 404.2035, 404.2040 (2001).

17. *Keffeler*, 145 Wash. 2d at 3–8, 32 P.3d at 268–69. The one class member for whom DSHS did not serve as representative payee was Daniel Keffeler, the class representative. *Id.* at 14, 32 P.3d at 273. DSHS never collected any of Keffeler's Social Security benefits. *Id.*

18. DSHS also used benefits to pay for the past maintenance of beneficiaries. *Keffeler*, 145 Wash. 2d at 11–12, 32 P.3d at 272. This Note does not take issue with the court's holding that benefits may not be used for past maintenance, as per 42 U.S.C. § 407(a).

19. *Id.* § 405(j).

20. *See Keffeler*, 145 Wash. 2d at 25–26, 32 P.3d at 279 (applying only to state agencies' use of benefits).

21. *Keffeler*, 145 Wash. 2d at 16, 32 P.3d at 274.

I. WASHINGTON'S DSHS EXISTS IN PART TO ENSURE THE WELL-BEING OF THE STATE'S CHILDREN

DSHS is an umbrella organization responsible for the integration of statewide social service programs that form a safeguard for those who are unable to effectively care for themselves.²² Through seven separate administrations,²³ DSHS administers a large family of programs designed to aid those in need.²⁴ Of interest for this Note is the Children's Administration (CA), which runs the foster care program.²⁵ The state, taxpayers, and parents all share the burden of paying for the foster care program operated by CA.²⁶

CA is the collection of programs within DSHS charged with providing child welfare, child protective services, childcare licensing, and foster care.²⁷ CA's foster care program serves children in need of protection from abuse, neglect, or other serious family problems.²⁸ While children are in foster care, the state pays for their upkeep, as required by state law.²⁹ As of September 1999, the state had over 10,000 foster children under its supervision.³⁰ CA takes care of these children by finding them families that can meet their needs.³¹ Only families that CA determines

22. WASH. ADMIN. CODE § 388-01-020 (2001); *see also* WASH. REV. CODE § 43.20A.010 (2001), (stating that "[t]he department of social and health services is designed to integrate and coordinate all those activities involving provision of care for individuals who, as a result of their economic, social or health condition, require financial assistance, institutional care, rehabilitation or other social and health services.").

23. The programs are the following: the Aging and Adult Services Administration; the Children's Administration; the Economic Services Administration; the Health and Rehabilitative Services Administration; the Juvenile Rehabilitation Administration; the Management Services Administration; and the Medical Assistance Administration. *See* WASH. ADMIN. CODE § 388-01-020; WASH. REV. CODE § 43.20A.010 (2001).

24. WASH. ADMIN. CODE § 388-01-020; WASH. REV. CODE § 43.20A.010.

25. WASH. ADMIN. CODE § 388-25-0010 (2001).

26. *See In re Feldman's Welfare*, 94 Wash. 2d 244, 250-51, 615 P.2d 1290, 1294 (1980); WASH. REV. CODE § 74.13.031 (2001), WASH. ADMIN. CODE § 388-25-0215 (2001).

27. WASH. ADMIN. CODE § 388-25-0010 (2001). WASH. REV. CODE. § 74.13.031 1-10 (2001) authorizes the CA to make available foster care services. *Id.*

28. WASH. REV. CODE § 74.13.031 (2001).

29. *Id.* This provides that "[t]he department shall have the duty to provide child welfare services and shall: (1) Develop, administer, supervise, and monitor a coordinated and comprehensive plan that establishes, aids, and strengthens services for the protection and care of runaway, dependent, or neglected children." *Id.*

30. *Keffeler v. Dep't of Soc. and Health Servs.*, 145 Wash. 2d 1, 5, 32 P.3d 267, 269 (2001).

31. WASH. ADMIN. CODE § 388-25-0090 (2001).

will meet a child's needs may provide foster care.³² While foster families are responsible for meeting a child's basic needs, such as cooking dinner or taking an ill child to a doctor,³³ they are not financially liable for the child's current maintenance.³⁴

The State of Washington is financially responsible for the current maintenance of foster children.³⁵ The state meets this fiduciary obligation by paying foster families for the child's current maintenance,³⁶ and in turn the foster families provide for the child's day-to-day upkeep.³⁷ The state also pays for any additional special needs the child might have when the payment schedule does not provide enough to meet that need.³⁸

The state is not alone in its duties toward these children. Parents must reimburse the state for foster care services³⁹ in the amount determined by DSHS's Division of Child Support, thereby decreasing the overall burden to taxpayers and holding parents accountable for their parental duties.⁴⁰ Additionally, CA must use a child's unearned income—such as Social Security benefits and inheritances, for that child's current maintenance costs—except where the terms of receipt of the income specifically exclude such use.⁴¹ Such unearned income must be sent to DSHS's Division of Child Support if the child is in foster care,

32. *Id.*

33. *Id.*

34. Washington state, under WASH. REV. CODE § 74.13.031 (2001), and parents, under WASH. ADMIN. CODE § 388-25-0215 (2001), are financially responsible for a foster child's maintenance.

35. WASH. REV. CODE § 74.13.031.

36. WASH. ADMIN. CODE § 388-25-0120 (2001). This regulation provides that the state will provide for a foster child's room, board, clothes, and other personal needs. *Id.* It determines the amount by looking at a number of factors, including the child's age. *Id.* For example, a foster family caring for a four-year-old foster child would typically receive \$351.31 per month, while a foster family caring for a 13-year-old would receive \$499.95 per month. *Id.*

37. WASH. REV. CODE § 74.13.330 (2001).

38. WASH. ADMIN. CODE § 388-25-0125 (2001); *see also id.* § 388-25-0160.

39. *Id.* § 388-25-0215; *see also* *In re Feldman's Welfare*, 94 Wash. 2d 244, 250, 615 P.2d 1290, 1294 (1980).

40. WASH. ADMIN. CODE § 388-25-0220 (2001); *see also* *Cole v. State*, 54 Wash. App. 342, 346, 773 P.2d 866, 868 (1989), (requiring parents to pay for their children helped "advance the law's purpose of recovering state child support expenditures to the extent possible." (*quoting* *State v. Gerlack*, 25 Wash. App. 541, 547, 612 P.2d 382, 385 (1980))).

41. WASH. ADMIN. CODE § 388-25-0210 (2001).

regardless of who receives it on the child's behalf.⁴² Again, this is meant to lessen the burden on the taxpayer.⁴³

In summary, taxpayers support foster children through means other than DSHS and state taxes. Social Security income is one example of this. As stated above, many children are eligible for Social Security benefits. Prior to the *Keffeler* decision, DSHS was in a position to help those children receive those benefits, which it would then apply toward the costs of their care. After *Keffeler*, DSHS will not expend state resources to reach those benefits since they may no longer be used by the state to care for the child and thus pursuing these benefits would act as an overall drain on the foster care program.

II. SOCIAL SECURITY BENEFITS GUARANTEE ELIGIBLE CHILDREN A MINIMAL LEVEL OF INCOME AND ARE HEAVILY GUARDED AGAINST CREDITORS

Social Security is often associated with retirement benefits and is familiar to most people as paycheck deductions. Yet Social Security has many applications apart from retirement.⁴⁴ Notably, children are eligible for benefits under limited circumstances, such as where they have suffered the loss of a parent, have a disabled parent, or are disabled themselves.⁴⁵ The function of these benefits is to offer a minimum level of income and provide stability to children who have lost someone upon whom they depended,⁴⁶ or to help them overcome obstacles put in place by their disability.⁴⁷ SSA estimates that it provides benefits to approximately 3.8 million children in an effort to address these concerns.⁴⁸ The cost of providing these benefits to children totals approximately \$1.6 billion dollars every month.⁴⁹ In light of this, SSA

42. *Id.* See also WASH. REV. CODE. § 74.20A.010 (2001) ("It is declared to be the public policy of this state that this chapter be construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through welfare programs.").

43. *Cole*, 54 Wash. App. at 346, 773 P.3d at 868.

44. SOCIAL SECURITY ADMINISTRATION PUBLICATION NO. 05-10085 (March 2001).

45. *Id.*

46. *Mellies v. Mellies*, 815 P.2d 114, 116 (Kan. 1991).

47. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1988).

48. SOCIAL SECURITY ADMINISTRATION PUBLICATION NO. 05-10085 (March 2001).

49. *Id.*

takes great effort to guard these benefits against undue appropriation, and shields benefits from creditors.⁵⁰

A. Representative Payees Help Children Manage Their Benefits to Meet Their Basic Needs

Given the large sums at stake, SSA seeks to administer children's benefits efficiently and to that end regularly assigns representative payees where the beneficiary is less than 18 years old.⁵¹ A representative payee is an individual or organization that receives benefits on behalf of the beneficiary, either because that person is incapable of managing his or her own benefits or because such an arrangement is in the person's best interest.⁵² A representative payee can be a person, organization, agency, or institution.⁵³ SSA appoints representative payees to safeguard the beneficiary from exploitation and misuse of benefits.⁵⁴ SSA therefore seeks to appoint the person or agency that will, in its view, best serve the beneficiary's interests.⁵⁵ Representative payees who fail to fulfill their duties may face removal from the position.⁵⁶

1. The SSA has Broad Discretion to Appoint Representative Payees Who Act in the Best Interest of the Beneficiary

The Commissioner of SSA has broad discretion to appoint representative payees.⁵⁷ The central issue is the Commissioner's determination that a particular representative payee will act in the best interest of the beneficiary.⁵⁸ The Commissioner determines who will act in the beneficiary's best interest based on a number of factors, and

50. 42 U.S.C. § 407 (1994).

51. *Id.* § 405 (j)(1)(A); *see also* 20 C.F.R. §§ 404.2001(b), 416.601(b) (2001).

52. 42 U.S.C. § 405(j)(1)(A); *see also* 20 C.F.R. §§ 404.2001(b), 416.601(b) .

53. 42 U.S.C. § 405(j)(1)(A).

54. 20 C.F.R. § 404.2035 (2001).

55. *Id.* § 404.2020.

56. *Id.* § 416.650.

57. 42 U.S.C. § 405(j)(1)(A) (1994). Lower level SSA employees, not the Commissioner, make the actual determination.

58. *See id.* § 405(j).

appoints whichever person or organization is determined to best serve those interests.⁵⁹

Before appointing a representative payee, the agency will first examine whether the beneficiary actually needs a representative payee.⁶⁰ SSA's policy is that wherever feasible, each beneficiary will receive and manage his or her own benefits.⁶¹ To determine whether a beneficiary needs a representative payee, SSA looks to information contained in court documents and medical records, and considers statements made by relatives, friends, or others in a position to know and understand the beneficiary's capabilities as to whether she or he needs assistance in managing benefits.⁶² If SSA determines it is in the beneficiary's best interests to have a representative payee, SSA will provide notice of its decision to the beneficiary and provide time to appeal.⁶³ Once SSA concludes that the beneficiary needs a representative payee, the focus shifts to choosing the best one.⁶⁴

In deciding whether a potential payee would best serve the interests of the beneficiary, SSA considers many issues. These include: the relationship between potential payee and the beneficiary;⁶⁵ the extent of interest the potential payee has shown in the beneficiary;⁶⁶ any legal authority the potential payee has to act for the beneficiary;⁶⁷ whether the

59. For example, 20 C.F.R. § 404.2020 (2001) provides:

In selecting a payee we try to select the person, agency, organization or institution that will best serve the interest of the beneficiary. In making our selection we consider –

- (a) The relationship of the person to the beneficiary;
- (b) The amount of interest that the person shows in the beneficiary;
- (c) Any legal authority the person, agency, organization or institution has to act on behalf of the beneficiary;
- (d) Whether the potential payee has custody of the beneficiary; and
- (e) Whether the potential payee is in a position to know of and look after the needs of the beneficiary

60. 20 C.F.R. § 416.615 (2001).

61. *Id.* § 416.601.

62. *Id.*

63. 42 U.S.C. §§ 405(j)(2)(E)(ii), 1383(a)(2)(B)(xii) (1994); 20 C.F.R. § 404.2030 (2001).

64. *See* 42 U.S.C. § 405(j).

65. 20 C.F.R. § 416.620(a) (2001).

66. *Id.* § 416.620(b).

67. *Id.* § 416.620(c).

applicant has custody of the beneficiary,⁶⁸ and whether the applicant is in a situation “to know of and look after the needs of” the beneficiary.⁶⁹ SSA will evaluate these factors and appoint as representative payee the applicant who best satisfies these criteria.⁷⁰

The agency prefers to appoint parents or other family relations to the representative payee position where possible.⁷¹ Yet SSA’s primary concern is to choose the best possible representative payee; thus, if SSA determines that a state agency will be a better representative payee than a parent, SSA will appoint the state agency.⁷² The emphasis on choosing a representative payee who best serves the beneficiary’s interest is so great that the Commissioner may appoint individuals or organizations even when the statute specifically prohibits them from becoming representative payees.⁷³ For example, the statute ordinarily precludes someone convicted of a violation of 42 U.S.C. § 408(b)—a felony offense involving misuse of Social Security benefits—from becoming a representative payee.⁷⁴ However, the Commissioner may appoint that person or agency to act as payee if it is in the best interest of the beneficiary to do so.⁷⁵ Even a beneficiary’s creditor,⁷⁶ who the statute normally precludes from serving as a representative payee, may act as a representative payee where the Commissioner determines that such an appointment would be in the best interest of the beneficiary.⁷⁷

2. *Representative Payees Must Act in the Best Interest of the Beneficiary and Follow SSA Guidelines or Face Removal from the Payee Position*

The Commissioner of SSA will appoint whomever he or she determines will act in the best interest of the beneficiary, the person who

68. *Id.* § 416.620(d).

69. *Id.* § 416.620(e).

70. 20 C.F.R. § 416.625 (2001).

71. *Id.* § 416.621 (2001); *see also* 42 U.S.C. § 405(j)(2)(C)(iv)(III) (1994).

72. *See* 20 C.F.R. § 416.621 (2001); *see also* 42 U.S.C. § 405(j)(2)(C)(iv)(III).

73. 42 U.S.C. § 405(j)(2)(C)(ii).

74. *Id.* § 408(b).

75. *Id.* § 405(j)(2)(C)(ii).

76. A creditor is defined in *id.* § 405(j)(2)(C)(i)(III) as an individual who provides the beneficiary “with goods and services for consideration.”

77. *Id.* § 405(j)(2)(C)(iii)(II).

will best accomplish the duties of a representative payee.⁷⁸ Representative payees owe, to the beneficiaries they serve, a duty to use the benefits received in a manner they determine to be in the beneficiaries' best interests.⁷⁹ The statute requires them to inform SSA of events that could affect the right of the beneficiary to receive benefits.⁸⁰ They must, upon request, submit a written report accounting for the benefits received⁸¹ and they must inform SSA of anything that would affect their performance of payee duties.⁸²

SSA considers payments made for the current maintenance of the beneficiary to be in the best interests of the beneficiary.⁸³ Beneficiaries have challenged this conclusion, notably in *Mellies v. Mellies*⁸⁴ and *In re Guardianship of Nelson*.⁸⁵ In *Mellies*, a Kansas case, the beneficiary claimed that because his representative payee was already required to provide for his current maintenance,⁸⁶ that his payee should conserve his benefits for other uses rather than spend them on maintenance costs the payee was already legally obligated to provide.⁸⁷ The beneficiary argued that any benefits spent toward current maintenance amounted to actions by the representative payee not in his best interests, in violation of SSA regulations and federal law.⁸⁸ This rationale did not persuade the Kansas Supreme Court.⁸⁹ Specifically, the *Mellies* court wrote that a representative payee had "no obligation to exhaust his personal finances

78. *Id.* § 405(j)(1)(A).

79. 20 C.F.R. § 404.2035 (2001).

80. *Id.*

81. *Id.*

82. *Id.* In an effort to continually track whether the representative payee is fulfilling his or her duties, SSA may also require that payee to continue to provide certain information after the initial appointment. *Id.* § 404.2035 (2001). Failure to provide such information may result in removal of that payee. *Id.* The SSA will provide notice and time to appeal to a beneficiary's current representative payee if it selects another payee. 42 U.S.C. §§ 405(j)(2)(E)(ii), 1383(a)(2)(B)(xii); 20 C.F.R. § 404.2030 (2001).

83. 20 C.F.R. § 416.640 (2001).

84. 815 P.2d 114 (Kan. 1991).

85. 547 N.W.2d 105 (Minn. Ct. App. 1996).

86. The representative payee in *Mellies* was also the beneficiary's father and thus required to pay for his child's current maintenance regardless of Social Security benefits. *Mellies*, 815 P.2d at 115.

87. *Id.* at 116.

88. *Id.*

89. *See id.*

in providing for [the beneficiary's] support before spending any of [the child's] Social Security benefits on . . . maintenance."⁹⁰

The plaintiff in *Nelson*, in a Minnesota court, made essentially the same argument.⁹¹ In this case it was the representative payee who went to court and asked to be allowed to use the Social Security benefits he received on the beneficiary's behalf for that beneficiary's current maintenance.⁹² As was the case in *Mellies*, this representative payee was already legally required to provide for the current maintenance of the beneficiary.⁹³ The lower court had held that the representative payee could not use the beneficiary's Social Security benefits for current maintenance because he was already required to provide for that maintenance.⁹⁴ The Minnesota Court of Appeals reversed.⁹⁵ The court held that representative payees were not only allowed to use benefits for the beneficiary's current maintenance, but that they were also *required* to do so—a state court ruling demanding anything to the contrary violated federal law.⁹⁶

SSA may replace representative payees who fail to act in the beneficiary's best interests.⁹⁷ A payee fails to act in the beneficiary's best interests where he or she does not use the benefits according to SSA guidelines or falls short of the responsibilities described above.⁹⁸ Failure to cooperate with SSA will also result in removal from the representative payee position.⁹⁹ Moreover, misuse of benefits by a representative payee is a felony.¹⁰⁰ Misuse includes "knowingly and willfully convert[ing] . . . payment, or any part thereof, to a use other than for the use and benefit of [the beneficiary]."¹⁰¹

90. *Id.* at 117. However, where Social Security benefits exceed the beneficiary's current maintenance and other needs, the representative payee then has the duty to conserve or invest the funds for the beneficiary. See 20 C.F.R. § 416.645 (2001).

91. See *Nelson*, 547 N.W.2d at 106.

92. *Id.*

93. *Id.* at 107.

94. *Id.* at 106–07.

95. *Id.*

96. *Id.* at 109.

97. 20 C.F.R. § 416.650 (2001).

98. *Id.*

99. *Id.*

100. 42 U.S.C. § 408(a)(5) (1994).

101. *Id.*

B. Social Security Benefits are not Subject to Creditor Claims, Even Where the Creditor is a State that Provides for the Basic Maintenance of Beneficiaries

Social Security benefits are meant to provide for a beneficiary's basic needs, not to pay debt owed to creditors.¹⁰² While the law requires representative payees to use benefits for the best interest of the beneficiary, creditors have no such obligation whatsoever.¹⁰³ To the contrary, creditors by definition simply seek to reimburse themselves for goods and services rendered.¹⁰⁴ Section 407(a) protects beneficiaries from creditors by preventing them from reaching Social Security benefits.¹⁰⁵ The "other legal process" provision of § 407(a) is a sweeping provision meant to prevent creditors from using creative ways to illegally reach benefits.¹⁰⁶ The sections that follow describe these creative attempts in detail. This statute protects beneficiaries by creating an expansive bar against creditor claims, even where the creditor is a state.¹⁰⁷ Indeed, some creditors may be institutions that provide for a beneficiary's basic needs, such as a state mental institution or a prison.¹⁰⁸ While this kind of institution provides for a beneficiary's current maintenance, thus fulfilling a primary concern of Social Security, it is nonetheless still a creditor and § 407 prevents it from reaching benefits.¹⁰⁹ The "[c]ourts have uniformly recognized that the purpose of § 407(a) is to protect Social Security beneficiaries . . . from the claims of

102. *Id.* § 405(j).

103. The statute defines creditor in 42 U.S.C. § 405(j)(2)(C)(i)(III) as an individual who provides the beneficiary "with goods and services for consideration." The statute imposes no duties on creditors.

104. *See supra* note 76.

105. 42 U.S.C. § 407 provides "(a) the right of any person to any future payment under this title [42 U.S.C. §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

106. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973); *Bennett v. Arkansas*, 485 U.S. 395, 396 (1988).

107. *See Philpott*, 409 U.S. at 417; *Bennett*, 485 U.S. at 396.

108. *See Philpott*, 409 U.S. at 414; *Bennett*, 485 U.S. at 397; *Crawford v. Gould*, 56 F.3d 1162, 1168 (9th Cir. 1995); *Brinkman v. Rahm*, 878 F.2d 263, 264 (9th Cir. 1989).

109. Pursuant to § 407, a beneficiary may not assign or transfer his or her right to receive benefits, and those benefits are unavailable to creditors. 42 U.S.C. § 407(a) (1994). This section applies to Title II benefits. Title XVI benefits are equally protected. *Id.*

creditors.”¹¹⁰ Nonetheless, creditors have persistently tried and failed to skirt this provision.¹¹¹

1. *Case Law Supports § 407’s Broad Bar Against Creditor Claims, Even Where The Creditor Provides for the Basic Needs of the Beneficiary*

Creditors appear in many forms and provide numerous services. At times they attempt to veil themselves in the cloak of permissible expense, such as by claiming they are accomplishing the goals of Social Security by caring for beneficiaries and thus should receive the benefits.¹¹² Creditors have claimed that because they fulfill the same needs that a representative payee would, they may also receive benefits.¹¹³ However, the difference between a creditor and a representative payee is striking and has made a critical difference in determining whether a state may collect Social Security benefits.¹¹⁴ Section 407 creates a broad bar against creditor claims, and the fact that a creditor is a state institution and provides for the current maintenance of a beneficiary does not mean that the creditor may therefore seize Social Security benefits.¹¹⁵ Numerous courts have applied § 407 as a broad bar against the claims of creditors, as seen in *Philpott v. Essex County Welfare Board*,¹¹⁶ *Bennett v. Arkansas*,¹¹⁷ *Brinkman v. Rahm*,¹¹⁸ and *Crawford v. Gould*.¹¹⁹ Each of

110. *Fetterusso v. State of New York*, 898 F.2d 322, 327 (2d Cir. 1990).

111. See *Philpott*, 409 U.S. at 416; *Bennett*, 485 U.S. at 396; *Brinkman*, 878 F.2d at 264; *Crawford*, 56 F.3d at 1166.

112. See *Philpott*, 409 U.S. at 416; *Bennett*, 485 U.S. at 396; *Brinkman*, 878 F.2d at 264; *Crawford*, 56 F.3d at 1166.

113. See *Philpott*, 409 U.S. at 416; *Bennett*, 485 U.S. at 396; *Brinkman*, 878 F.2d at 264; *Crawford*, 56 F.3d at 1166.

114. Creditors have no legal duty to use Social Security benefits for the best interests of the beneficiary. See 42 U.S.C. §§ 407(a), 405(j) (1994). Representative payees, on the other hand, are required to act in the best interests of the beneficiary. *Id.* § 405(j). Moreover, misuse of Social Security benefits by a representative payee is a felony, under 42 U.S.C. § 408(1994).

115. See *Philpott*, 409 U.S. at 416; *Bennett*, 485 U.S. at 396; *Brinkman*, 878 F.2d at 264; *Crawford*, 56 F.3d at 1166.

116. 409 U.S. 413 (1973).

117. 485 U.S. 395 (1988).

118. 878 F.2d 263 (9th Cir. 1989).

119. 56 F.3d 1162 (9th Cir. 1995).

these cases supports the rule that creditors may not reach Social Security benefits.

In *Philpott*, the U.S. Supreme Court ruled that a state may not reach Social Security benefits by virtue of providing a beneficiary with welfare services.¹²⁰ This was the case even though the beneficiary signed an agreement to remit to the state all welfare benefits, including any Social Security he might receive.¹²¹ When the beneficiary in *Philpott* did receive Social Security benefits, in the amount of \$1,864.20,¹²² the Essex County Welfare Board decided to enforce the agreement to pay back welfare benefits.¹²³ New Jersey argued on behalf of the Welfare Board.¹²⁴ The state claimed the beneficiary ought to at least pay back the state the amount of money by which his welfare benefits would have been reduced had he been receiving Social Security benefits when he first applied for welfare.¹²⁵ The welfare board knew of § 407 and argued that, despite being a creditor, an implied exemption existed to its attachment of benefits, at least with regard to the amount it could have withheld if the beneficiary had been receiving Social Security benefits when he applied for welfare.¹²⁶ The Court found no merit in New Jersey's argument, stating "[w]e see no reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditor."¹²⁷

In *Bennett*, the Supreme Court again made clear that a creditor could not reach benefits.¹²⁸ The Court found this to be the case even where the creditor completely provided for the beneficiary's current maintenance.¹²⁹ In *Bennett*, the Arkansas state legislature sought to attach the Social Security benefits of prison inmates.¹³⁰ The state argued that this situation differed from that in *Philpott* because where the Essex

120. *Philpott*, 409 U.S. at 416.

121. *Id.*

122. *Id.* at 415.

123. *Id.*

124. *Id.* at 414.

125. *Id.*

126. *Id.* at 416.

127. *Id.*

128. *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988).

129. *Id.*

130. *Id.*

County Welfare Board paid for only a percentage of the beneficiary's upkeep, a state necessarily had to pay for *all* of a prisoner's upkeep.¹³¹ In a per curiam decision, the Court reiterated that § 407(a) "unambiguously rules out any attempt to attach Social Security benefits."¹³²

However, even after *Philpott* and *Bennett*, creditors, including states, still sought to circumvent § 407. In *Brinkman*, the Ninth Circuit Court of Appeals held that Washington State violated § 407 when it tried to attach Social Security benefits of mental patients "for whom the state [was] not the representative payee."¹³³ Washington's policy was to seize benefits in order to pay for a patient's basic care and maintenance.¹³⁴ The state provided notice to the patients of its intent to seize their benefits from accounts with the state hospitals, and allowed time for appeal.¹³⁵ If the patient lost or failed to appeal, the state collected Social Security benefits via attachment, seizure, or garnishment.¹³⁶ The Ninth Circuit held that such an action was in direct violation of 42 U.S.C. § 407(a), regardless of the fact that the state paid for the mental patients' current maintenance.¹³⁷ The court did not decide whether a state could lawfully use Social Security benefits to pay for current maintenance when acting as representative payee.¹³⁸

In *Crawford*, the state of California also tried to reach mental patient benefits.¹³⁹ California distinguished itself from the situation in *Brinkman* by seeking patient permission to reach benefits.¹⁴⁰ However, where a patient refused to give permission the state still attached the benefits.¹⁴¹ The California statute made no mention of the seizure, garnishment, and attachment procedures outlawed by 42 U.S.C. § 407(a), in contrast to the

131. *Id.*

132. *Id.*

133. *Brinkman v. Rahm*, 878 F.2d 263, 264 (9th Cir. 1989).

134. *Id.*

135. *Id.*

136. *Id.* at 265.

137. *Id.* at 266.

138. *Id.*

139. *Crawford v. Gould*, 56 F.3d 1162, 1166 (9th Cir. 1995).

140. *Id.* at 1165–66. The state asked the patients to sign a contract transferring their benefits to the state for their costs of care. *Id.*

141. *Id.* at 1166.

Washington statute, but the state did still employ those procedures.¹⁴² This distinction did not persuade the Ninth Circuit, which held that California's request that patients sign a form with no practical import, combined with an absence of language in the state's statute authorizing specifically outlawed procedures, lacked significance and held the practice violated § 407(a).¹⁴³

2. *Federal Regulations Permit Representative Payees, Including States, to Use Benefits to Reimburse Current Maintenance Costs*

Although state institutions may not claim Social Security benefits when acting as creditors, they may reimburse themselves for care provided when acting as representative payee pursuant to Social Security regulations.¹⁴⁴ Unlike creditors, representative payees must act in the best interests of the beneficiaries, as overseen by SSA. While creditors have consistently tried and failed to reach benefits, a state's ability to act as representative payee and receive reimbursement for its services has gone virtually unchallenged.¹⁴⁵

Only three cases have dealt with challenges to a state's ability to serve as representative payee. In *C.G.A. v. State*,¹⁴⁶ the Alaska Supreme Court held that a state may act as representative payee,¹⁴⁷ even over the protests of the child beneficiary and that beneficiary's existing representative payee.¹⁴⁸ The state placed this child beneficiary, C.G.A., in state care

142. *Id.* The Washington statute specifically permitted attachment, garnishment, and seizure of benefits, though without reference to § 407(a). *Id.*

143. See *Crawford*, 56 F.3d at 1166.

144. See, e.g., 20 C.F.R. § 404.2040 (2001) ("If a beneficiary is receiving care in a Federal, State, or private institution because of mental or physical incapacity, current maintenance includes the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's conditions while in the institution.")

145. Only three cases, *Keffeler v. Dep't of Soc. and Health Servs.*, 145 Wash. 2d 1, 32 P.3d 267 (2001), *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991), and *C.G.A. v. State*, 824 P.2d 1364 (Ak. 1992), have confronted this issue. *Keffeler* is the only case to hold that a state may not reimburse itself in the manner permitted by Social Security regulations. *Keffeler*, 145 Wash. 2d at 4, 32 P.3d at 268.

146. 824 P.2d 1364.

147. *Id.* at 1366.

148. *Id.* at 1365.

after he was arrested for committing various minor crimes.¹⁴⁹ SSA appointed the Department of Health and Social Services (DHSS) as representative payee in place of the child's mother, Ida Jousma,¹⁵⁰ who voluntarily relinquished her payee status.¹⁵¹ Both Jousma and C.G.A. challenged the state's use of C.G.A.'s benefits, arguing that by reimbursing itself for C.G.A.'s care, the state violated the provisions of 42 U.S.C. § 407.¹⁵² The court referred to the pertinent Social Security regulations,¹⁵³ and found that "statutory authority exists for the state to be designated C.G.A.'s representative payee, and that, as payee, the state can devote C.G.A.'s benefit funds to authorized expenditures."¹⁵⁴ The Alaska Supreme Court went on to specifically authorize the use of benefits for foster care.¹⁵⁵ The court also noted that the Social Security Act clearly contemplated states as representative payees and did not prohibit states from reimbursing themselves from Social Security benefits.¹⁵⁶

The Eighth Circuit Court of Appeals also found that states could become representative payees in *King v. Schafer*.¹⁵⁷ Here the court was faced with a state mental institution using benefits to reimburse itself for two classes of patients: patients for whom the state acted as representative payee and patients for whom the state did not.¹⁵⁸ All of the patients brought suit to stop the state from using their Social Security benefits to pay for their current maintenance costs.¹⁵⁹ The court did stop the state's practice of using benefits to pay for the current maintenance of the mental patients for whom the state was not representative payee

149. *Id.*

150. *Id.* at 1366.

151. *Id.* at 1365. The lower court also found that Jousma had not used C.G.A.'s benefits for his current maintenance, as required under federal regulations. *Id.* at 1366.

152. 42 U.S.C. § 407 (1994).

153. The court specifically referred to 20 C.F.R. § 404.2021(b)(7) (1990).

154. *C.G.A.*, 824 P.2d at 1368.

155. *Id.* at 1368–69.

156. *Id.* at 1369. The court did not decide whether juvenile incarceration was the kind of institutional care the Social Security Act permitted, and instead left that question to SSA pursuant to the agency's primary jurisdiction over such matters. *Id.* at 1369–70.

157. 940 F.2d 1182 (8th Cir. 1991).

158. *Id.* at 1183.

159. *Id.* at 1184.

because this violated 42 U.S.C. § 407.¹⁶⁰ However, the Eighth Circuit permitted the state to use the funds of those patients for whom the state did act as representative payee.¹⁶¹

The five patients in *King* acknowledged that as to them, the federal regulations were clear and did allow the state to use their benefits to pay for their current maintenance costs.¹⁶² The patients argued that the state's application to act as a representative payee violated the "other legal process" provision of § 407(a).¹⁶³ The court found no merit in this claim given the clarity of the regulations.¹⁶⁴ The Eighth Circuit also pointed out that for many of the patients the state was the only entity able to serve as representative payee and there was no logic in preventing them from doing so.¹⁶⁵

Both *C.G.A.* and *King* stand for the proposition that a state may become a representative payee.¹⁶⁶ As illustrated in these cases, the only two courts to consider the question prior to *Keffeler* agreed that the Social Security Act allows states to act as representative payee, and use benefits for current maintenance.¹⁶⁷ The fact that SSA appointed state agencies as representative payees in these cases shows that the agency itself had reached the same conclusion.

III. FEDERAL REGULATIONS AND AGENCY DECISIONS DEMAND DEFERENCE FROM STATE COURTS

Courts generally defer to agency interpretations of federal statutes, particularly where an agency is in charge of carrying out many of a statute's mandates.¹⁶⁸ The United States Supreme Court has addressed this issue, notably in *Chevron U.S.A. v. Natural Resources Defense*

160. *Id.* at 1186.

161. *Id.*

162. *Id.*

163. 42 U.S.C. § 407 (1994). As explained above, the "other legal process" provision is a sweeping provision meant to prevent creditors from using creative ways to illegally reach benefits. *See also* Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973).

164. 940 F.2d at 1185.

165. *Id.*

166. *Id.* at 1185–86; *C.G.A.*, 824 P.2d at 1365.

167. *King*, 940 F.2d at 1185–86; *C.G.A.*, 824 P.2d at 1365.

168. *See infra* note 170.

Council,¹⁶⁹ and *Fidelity Federal Savings and Loan v. de la Cuesta*.¹⁷⁰ In each case, the Court emphasized the deference courts owe agency decisions.¹⁷¹

In *de la Cuesta*, the Court decided a conflict regarding the effect of a federal agency decision on state law.¹⁷² Specifically, the Court overruled a California Court of Appeals judgment which contradicted the discretionary decision of the administrator of the Federal Loan Bank Board (Board).¹⁷³ The Court examined whether the Board and its administrator acted within the scope of their delegated authority.¹⁷⁴ The Board's administrator had included a due-on-sale clause¹⁷⁵ to the Board's loans, at a time when such clauses were held by California state courts to be unlawful restraints on alienation.¹⁷⁶ In examining whether the Board's decision would control, the Court wrote that "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review *only to determine whether he has exceeded his statutory authority or acted arbitrarily*."¹⁷⁷ In *de la Cuesta*, the Board and administrator had acted within their statutory authority.¹⁷⁸ Therefore the Board's decision controlled the state court's ruling, pursuant to the Supremacy Clause of the Constitution.¹⁷⁹

The Court again addressed this issue in *Chevron*, creating a two-step analysis with which courts could determine whether they could review a federal agency decision.¹⁸⁰ First, a court must determine "whether Congress has directly spoken to the precise question at issue."¹⁸¹ If Congress has, then the matter ends there, and no further inquiry is

169. 467 U.S. 837 (1984).

170. 458 U.S. 141 (1982).

171. See *Chevron*, 467 U.S. 837, 840-43; *de la Cuesta*, 458 U.S. 141, 144-46.

172. *de la Cuesta*, 458 U.S. at 144.

173. *Id.* at 170.

174. *Id.* at 154.

175. A due-on-sale clause is a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred. *Id.* at 145.

176. *Id.* at 149.

177. *Id.* at 153-54 (emphasis added).

178. *Id.*

179. *Id.*

180. 467 U.S. 837, 842-43 (1984).

181. *Id.* at 842.

permissible.¹⁸² However, where a court finds ambiguity in the statute as to whether Congress has directly spoken to a certain issue, a court may then determine whether the regulation is acceptable.¹⁸³ Ambiguity exists where a statute allows for more than one reasonable interpretation.¹⁸⁴ Where such ambiguity exists, the court must look at the statute in its entirety and read the particular provision in context.¹⁸⁵ If still ambiguous, the court must defer to the agency's interpretation of the statute, if it is "based on a permissible construction of the statute."¹⁸⁶ Then the court may only overrule the agency's interpretation where it is "arbitrary, capricious, or manifestly contrary to the statute."¹⁸⁷

IV. THE *KEFFELER* COURT HELD THAT DSHS COULD NOT USE SOCIAL SECURITY BENEFITS TO PAY FOR THE CURRENT MAINTENANCE OF FOSTER CHILDREN

The controversy at issue in *Keffeler v. Department of Social and Health Services*¹⁸⁸ arose when DSHS tried to gain representative payee status for Daniel Keffeler.¹⁸⁹ At the time the of the state's attempt to become representative payee, Keffeler was in Washington's foster care program and his grandmother was his representative payee.¹⁹⁰ The state failed to gain representative payee status and Keffeler sued the state¹⁹¹ on behalf of all foster children, past, present and future, within the state of Washington.¹⁹² Keffeler claimed that DSHS acted as a creditor in violation of § 407, the anti-attachment provision of the Social Security

182. *Id.* at 842–43.

183. *Id.* at 843.

184. *DeGeorge v. United States Dist. Court for Cent. Dist. of Cal.*, 219 F.3d 930, 939 (9th Cir. 2000) (internal quotation marks omitted).

185. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

186. *Chevron*, 467 U.S. at 843.

187. *Id.* at 844.

188. 145 Wash. 2d 1, 32 P.3d 267 (2001).

189. *Id.* at 13–14, 32 P.3d at 273.

190. *Id.*

191. *Id.*

192. *Id.*

Act,¹⁹³ and demanded that DSHS return all Social Security benefits which it had ever collected as representative payee.¹⁹⁴

1. *The Keffeler Court Held that DSHS Failed to Act in the Best Interests of Foster Children in Violation of 42 U.S.C. § 405(j)*

Although Keffeler did not raise the issue, the Supreme Court of Washington considered sua sponte whether DSHS acted in the best interests of foster children, as required by 42 U.S.C. § 405(j).¹⁹⁵ The court found that DSHS did not act in the best interests of the foster children for whom it acted as representative payee.¹⁹⁶ Because Washington State law already required DSHS to provide for foster children, the court held that the DSHS would better serve the children if it did not use their Social Security benefits for current maintenance.¹⁹⁷ The court instead stated that benefits should be saved for the non-essential needs not necessarily provided for by DSHS.¹⁹⁸ Because the children would be better served by the state conserving the funds in this manner, the court reasoned that DSHS did not act in the foster children's best interests.¹⁹⁹

2. *The Keffeler Court Held That The Thrust of Case Law Elevates Social Security Benefits Beyond the Reach of States*

The Supreme Court of Washington also agreed with Keffeler's claim that DSHS actions as representative payee violated 42 U.S.C. § 407.²⁰⁰ The court pointed to *Philpott v. Essex County Welfare Board*,²⁰¹ *Bennett v. Arkansas*,²⁰² *Brinkman v. Rahm*,²⁰³ and *Crawford v. Gould*²⁰⁴ in support

193. *Id.*

194. *Id.*

195. *Id.* at 23–24, 32 P.3d at 278.

196. *Id.*

197. *Id.* at 20, 32 P.3d at 276.

198. *Id.*

199. *Id.*

200. *Id.* at 23–24, 32 P.3d at 278.

201. 409 U.S. 413 (1973).

202. 485 U.S. 395 (1988).

203. 878 F.2d 263 (9th Cir. 1989).

204. 56 F.3d 1162 (9th Cir. 1995).

of its decision.²⁰⁵ Although each of these cases dealt specifically with creditors who did not have representative payee status, the court ignored this distinction and reasoned that together they suggested that Social Security benefits are “for all intents and purposes, beyond the reach of the state.”²⁰⁶ According to the court, *Philpott* imposed “a broad bar against the use of any legal process to reach all Social Security benefits . . . broad enough to include all claimants, including a State.”²⁰⁷ The court found that in *Keffeler*, DSHS acted like the Essex County Welfare Board in *Philpott*.²⁰⁸ The Supreme Court of Washington reasoned that the state should not receive any preferred status because of its duty to care for the needy, and thus § 407 barred the state from using Social Security funds just as all other creditors.²⁰⁹ The fact that SSA appointed DSHS representative payee for each of the foster children for whom it collected benefits failed convince the court that Social Security regulations actually permitted them to do so.²¹⁰ The court explained that in its view, DSHS applied to act as payee in order to apply benefits toward maintenance costs; DSHS sought payee status only to “confiscate the child’s SSI money to benefit the state.”²¹¹

3. *The Supreme Court of Washington Held that the State may be Appointed Representative Payee, But Cannot Use Benefits to Pay for the Current Maintenance of Foster Children*

DSHS pointed to two cases in support of its argument in which courts permitted states to act as representative payees, *King v. Schafer*²¹² and *C.G.A. v. State*.²¹³ However, the Supreme Court of Washington was not persuaded by these cases.²¹⁴ The court reasoned that *King* was not on point because it stood only for the proposition that states may apply to

205. *Keffeler*, 145 Wash. 2d at 18, 32 P.3d at 275.

206. *Id.* at 20, 32 P.3d at 276.

207. *Id.* at 18, 32 P.3d at 275, (quoting *Philpott*, 409 U.S. at 417).

208. *Id.* at 22, 32 P.3d at 277.

209. *Id.*

210. *Id.* at 16, 32 P.3d at 274.

211. *Id.*

212. 940 F.2d 1182 (8th Cir. 1991).

213. 824 P.2d 1364 (Ak. 1992).

214. *Keffeler*, 145 Wash. 2d at 21–23, 32 P.3d at 277.

act as representative payee.²¹⁵ According to the court, the only issue in *King* was whether a state applying to act as representative payee amounted to a creditor's attempt to use an "other legal process" to reach benefits, and thus violated § 407(a).²¹⁶ The parties in *King* accepted that federal regulations clearly allowed representative payees, including states, to use benefits for current maintenance.²¹⁷ The Supreme Court of Washington explained that because this notion was accepted by both parties, the court did not have to rule on its validity and thus the court did not actually hold as much to be true.²¹⁸ To the contrary, the court found the only persuasive aspect of *King* to be the notion that a state could apply to become a representative payee.²¹⁹

The fact that the Alaska Supreme Court explicitly asserted that a state could become a representative payee for foster children and apply a foster child's Social Security benefits toward that child's current maintenance costs did not convince the Supreme Court of Washington to hold the same.²²⁰ The Supreme Court of Washington concluded that *C.G.A.*, like *King*, stood merely for the proposition that a state could apply to become and be appointed representative payee, not that a state could use Social Security benefits to pay for the current maintenance of beneficiaries.²²¹ The Supreme Court of Washington did not address the Alaska Supreme Court's direct statement to the contrary.²²²

The Supreme Court of Washington saw no conflict between its decision in *Keffeler* and the decisions in *C.G.A.* and *King* because in its view there was "nothing ipso facto wrong with DSHS applying to become the representative payee for certain foster children, as § 405(j) and the SSA's accompanying regulations explicitly contemplate."²²³ The problem, according to the court, was the fact that the state reimbursed itself for a foster child's current maintenance, therefore crossing the line

215. *Id.*

216. *Id.*

217. *King*, 940 F.2d at 1185.

218. *Keffeler*, 145 Wash. 2d at 21–23, 32 P.3d at 277.

219. *Id.*

220. *Id.*; see also *C.G.A. v. State*, 824 P.2d 1364, 1369 (Ak. 1992).

221. *Keffeler*, 145 Wash. 2d at 21–23, 32 P.3d at 277.

222. See *Keffeler*, 145 Wash. 2d at 13–14, 32 P.3d at 273.

223. *Id.* at 21–22, 32 P.3d at 277.

established by § 407(a) and the creditor cases detailed above.²²⁴ Because DSHS would only be reimbursed for its foster care services by Social Security if it acted as representative payee and because it acted as representative payee in order to receive such reimbursement, the court reasoned DSHS acted as a creditor.²²⁵ According to the Supreme Court of Washington, DSHS's capacity to act as representative payee under § 405(j) was "at best immaterial" to its § 407 analysis.²²⁶

4. *The Keffeler Dissent Argued that SSA Appropriately Appointed DSHS Representative Payee, and Therefore DSHS Should be Allowed to Act as a Representative Payee*

The dissent disagreed with the majority's opinion that DSHS could not use Social Security benefits to pay for the current maintenance of foster children.²²⁷ Writing for the three-member dissent, Justice Bridge noted that federal law permits agencies like DSHS to become representative payee and permits representative payees to use such funds for the current maintenance of beneficiaries.²²⁸ The dissent reasoned, DSHS should—once appointed representative payee—be able to use Social Security benefits for the current maintenance of beneficiaries.²²⁹ The dissent pointed out that the Social Security Act itself allows creditors to be appointed representative payee.²³⁰ Although the dissent did not mention *de la Cuesta* or the *Chevron* doctrine, Justice Bridge did note that it was the Commissioner who had the discretion to appoint a representative payee.²³¹ She also wrote that "even if DSHS is characterized as a creditor, the commissioner of Social Security may find, and here *has* found, DSHS acceptable to serve as a representative payee for these children in foster care. The determination of the Social Security Act should control."²³² The dissent also discussed the case law

224. *Id.*

225. *Id.* at 17, 32 P.3d at 274–75.

226. *Id.*

227. *Id.* at 27, 32 P.3d at 279 (Bridge, J., dissenting.).

228. *Id.* at 27, 32 P.3d at 279–80.

229. *Id.* at 27, 32 P.3d at 280.

230. *Id.*

231. *Id.*

232. *Id.* at 28, 32 P.3d at 280.

cited by the majority and suggested it applied to creditors, but where SSA appointed a creditor as representative payee, that appointment should control.²³³

V. THE SUPREME COURT OF WASHINGTON
MISINTERPRETED THE LEGAL AUTHORITY RELEVANT
TO *KEFFELER* AND FAILED TO DEFER TO SSA'S
DETERMINATION THAT DSHS COULD ACT AS
REPRESENTATIVE PAYEE

The Supreme Court of Washington erred by holding that a state, acting as a representative payee, could not use Social Security benefits for a beneficiary's current maintenance. The cases the *Keffeler* court relied on stand only for the proposition that states may not violate § 407(a) of the Social Security Act. The court misinterpreted these cases by finding that they prohibited states from reaching benefits altogether. Federal law and regulations explicitly permit state agencies to act as representative payees. Moreover, the Supreme Court of Washington failed to adequately distinguish other case law which indicates that states may act as representative payees and that they may reimburse themselves for the current maintenance costs of the beneficiaries on whose behalf they act. The *Keffeler* court also should have applied the *Chevron* doctrine and shown appropriate deference to the SSA's decision to appoint DSHS representative payee for the beneficiaries in this case. For these reasons, the Supreme Court of Washington erred when it held that DSHS could not use a beneficiary's Social Security benefits to pay for his or her current maintenance, and its error cost foster children in Washington their Social Security benefits.

A. *The Cases Used as Support for the Supreme Court of Washington's Decision Stand Only for the Proposition that a State May Not Violate § 407(a) of the Social Security Act*

The Supreme Court of Washington misinterpreted *Philpott*,²³⁴ *Bennett*,²³⁵ *Brinkman*,²³⁶ and *Crawford*.²³⁷ In construing these decisions,

233. *Id.*

234. *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973).

235. *Bennett v. Arkansas*, 485 U.S. 395 (1988).

the court claimed that the “thrust of the case law is that Social Security benefits are, for all intents and purposes, beyond the reach of the state.”²³⁸ Yet, each of these cases stands solely for the proposition that state agencies may not violate § 407(a) of the Social Security Act.²³⁹ At most, these cases suggest that Social Security benefits are, for *almost all* intents and purposes, beyond the reach of creditors.²⁴⁰ For example, in *Philpott*, the Court refused to allow a creditor to reach Social Security benefits.²⁴¹ The Court made clear that this was the case even where the creditor was a state.²⁴² This is all that the Court held or implied: a broad bar exists against *creditors* reaching Social Security benefits, a bar which applies even to states.²⁴³ To reconstruct this holding to suggest that there is a broad bar against *states* reaching Social Security benefits in all circumstances is a broad leap of logic.²⁴⁴ This expansion of the holding in *Philpott* is particularly striking when contrasted with the court’s exceptional narrowing of the holdings in *C.G.A.* and *King*.²⁴⁵

The *Keffeler* court’s explanation of *Bennett* is equally flawed. In *Bennett* the Court again held that a creditor could not reach Social Security benefits,²⁴⁶ even where the creditor provided for *all* of the maintenance of the beneficiary.²⁴⁷ The *Keffeler* court claimed that DSHS tried to “evade § 407(a) by arguing that it simply provides the ‘care and maintenance’ intended by the SSA.”²⁴⁸ The court found DSHS’s argument unconvincing, “notwithstanding some factual dissimilarities.”²⁴⁹ Yet the “factual dissimilarities”²⁵⁰ that the Supreme Court of Washington used to distinguish *Bennett* and *Keffeler* are glaring

236. *Brinkman v. Rahm*, 878 F.2d 263 (9th Cir. 1989).

237. *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995).

238. *Keffeler*, 145 Wash. 2d at 20, 32 P.3d at 276.

239. *See supra* Part II.B.1.

240. *See supra* Part II.B.1.

241. *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416 (1973).

242. *Id.*

243. *See id.* (emphasis added).

244. *See supra* note 238.

245. *See supra* Part III.B.

246. *Bennett v. Arkansas*, 485 U.S. 395, 398 (1988).

247. *Id.*

248. *Keffeler v. Dept. of Soc. and Health Servs.*, 145 Wash. 2d 1, 19, 32 P.3d 267, 276 (2001).

249. *Id.*

250. *Id.*

and should not have been dismissed so lightly. The primary “dissimilarity” is that the defendant in *Bennett* was a creditor with no obligations regarding the beneficiary or the beneficiary’s Social Security funds whatsoever.²⁵¹ In *Keffeler*, the defendant was a representative payee²⁵² required by federal law to use the beneficiary’s Social Security benefits for the beneficiary’s best interests.²⁵³ Representative payees have numerous responsibilities, and their misuse of benefits constitutes a felony.²⁵⁴ *Bennett* re-enforces the U.S. Supreme Court’s holding in *Philpott* that creditors may not reach Social Security benefits.²⁵⁵ Nothing in *Bennett* suggests that because a creditor may not reach Social Security benefits, a representative payee is likewise unable to reach Social Security benefits to pay for a beneficiary’s current maintenance.²⁵⁶ Similarly, *Brinkman* and *Crawford* also stand only for the proposition that a state may not violate § 407(a), and nothing more.²⁵⁷

DSHS fully complied with the rules established by *Philpott*, *Bennett*, *Brinkman* and *Crawford*.²⁵⁸ These cases made clear that a state that is not a representative payee may not attach, seize, levy, garnish, or use other legal processes to reach Social Security benefits.²⁵⁹ Additionally, states may not excuse § 407(a) violations by using funds illegally seized to pay for a beneficiary’s current maintenance.²⁶⁰ The fact that the state agencies in *Philpott*, *Bennett*, *Brinkman* and *Crawford* owed and fulfilled other statutory obligations, such as providing welfare or mental health services, had no bearing on the legality of their claim to the Social Security benefits.²⁶¹ Likewise, had DSHS fulfilled its foster care duties, but not acted as representative payee, it could not have reached Social Security benefits.²⁶² Yet, unlike the state agencies in these cases, DSHS

251. *Bennett*, 485 U.S. at 398.

252. *Keffeler*, 145 Wash. 2d at 16, 32 P.3d at 274.

253. 20 C.F.R. § 404.2035 (2001).

254. 42 U.S.C. § 408 (1994).

255. *Bennett*, 485 U.S. at 398.

256. *Bennett* discusses only creditors access to benefits and does not discuss representative payees. See *Id.* at 395.

257. See *supra* Part II.B.1.

258. See *supra* Part II.B.1.

259. See *supra* Part II.B.1.

260. See *supra* Part II.B.1.

261. See *supra* Part II.B.1.

262. See, e.g., *Bennett v. Arkansas*, 485 U.S. 395 (1988).

did not attach, seize, levy, garnish, or use any other legal process to illegally reach any Social Security benefits.²⁶³ To the contrary, DSHS applied to the Social Security Administration to act as representative payee for certain foster children.²⁶⁴ In so doing, DSHS created a legal obligation between itself, the beneficiary, and the Social Security Administration to use Social Security benefits for the best interests of the beneficiary,²⁶⁵ an obligation completely lacking in *Philpott, Bennett, Brinkman* and *Crawford*.

While DSHS also used benefits to pay for the current maintenance of beneficiaries,²⁶⁶ it is easily distinguishable from *Philpott, Bennett, Brinkman* and *Crawford*. Simply put, SSA recognizes that use of benefits for current maintenance *by a representative payee* is in the best interests of the beneficiary.²⁶⁷ DSHS had a legal obligation to use Social Security benefits in the beneficiaries' best interests.²⁶⁸ This duty differentiates DSHS from the state agencies in the § 407(a) cases, which had no such duty to use the benefits in the beneficiary's best interests because they were not representative payees.

B. The Supreme Court of Washington Failed to Adequately Distinguish Cases that Permit States to Act as Representative Payee

Both *King v. Schafer* and *C.G.A. v. State* stand for the proposition that a state may become a representative payee. Once appointed representative payee, a state may *act* as representative payee.²⁶⁹ This rule is strikingly simple, especially in contrast to the *Keffeler* court's attempt to suggest that a state may apply to become and even become a representative payee, but not act as a representative payee.

The *Keffeler* court attempted to distinguish *King* and *C.G.A.* by suggesting they stood merely for the proposition that a state could apply to become, and even be appointed representative payee, but that a state

263. *Keffeler v. Dep't of Soc. and Health Servs.*, 145 Wash. 2d 1, 15, 32 P.3d 267, 274 (2001).

264. *Id.*

265. *Id.* at 24, 32 P.3d at 278.

266. *Id.* at 11, 32 P.3d at 272.

267. *See* 20 C.F.R. § 404.2040(a)(1) (2001) (emphasis added).

268. WASH. REV. CODE § 74.13.031 (2001).

269. *See supra* note 143.

could not use Social Security benefits for a beneficiary's current maintenance.²⁷⁰ However, there is nothing in either case, or in any other case, statute or regulation, to suggest such a limitation.²⁷¹

The *Keffeler* court's limitation of the *King* and *C.G.A.* holdings contradicts the thrust of those decisions and the provisions of the Social Security Act. *King* and *C.G.A.* each involved beneficiaries battling to keep Social Security benefits out of the hands of state representative payees.²⁷² In each case, the beneficiary challenged the state's legal right to become representative payee.²⁷³ The beneficiaries in both cases accepted that representative payees may use benefits for what they determine are in the beneficiary's best interests, including current maintenance.²⁷⁴ The *Keffeler* court reasoned that because each set of plaintiffs accepted this as obvious, the courts never actually reached the issue.²⁷⁵ The *Keffeler* court thus determined that *King* and *C.G.A.* only stood for the proposition that states could apply to become and be appointed representative payee, not that they could use benefits as other representative payees could.²⁷⁶

Yet the courts in each of these cases clearly envisioned the states taking and using the benefits in question to pay for the maintenance of the beneficiaries.²⁷⁷ For example, the Alaska Supreme Court in *C.G.A.* explicitly authorized use of Social Security benefits for foster care, stating a representative payee's "authority to spend these [Social Security] funds is limited to spending on maintenance that does not conflict with Social Security laws and regulations. Thus, the state could legitimately apply *C.G.A.*'s benefits toward foster care."²⁷⁸ In *King*, the beneficiaries claimed that a state application to become representative payee violated § 407(a) of the Social Security Act.²⁷⁹ The Ninth Circuit

270. *Keffeler*, 145 Wash. 2d at 21–22, 32 P.3d at 277.

271. *See supra* Part II.B.

272. *King v. Schafer*, 940 F.2d 1182, 1183 (8th Cir. 1991), and *C.G.A. v. State*, 824 P.2d 1364, 1365 (Ak. 1992).

273. *King*, 940 F.2d at 1183; *C.G.A.*, 824 P.2d at 1365.

274. *King*, 940 F.2d at 1185.

275. *Keffeler*, 145 Wash. 2d at 21, 32 P.3d at 277.

276. *See id.*

277. *See King*, 940 F.2d at 1185–86.

278. *C.G.A.*, 824 P.2d at 1369 n.14.

279. *King*, 940 F.2d at 1185.

court rejected this contention because the Act clearly allowed states to become representative payees.²⁸⁰ The fact that the courts in *King* and *C.G.A.* did not specifically hold that state representative payees may use benefits to pay for a beneficiary's current maintenance does not indicate that the issue was unresolved, as the *Keffeler* court suggests.²⁸¹ Rather, to the contrary, this simply indicates that as to *King*, a state acting as representative payee was so clear and obvious an extension of its holding that it was not necessary to state explicitly.²⁸² *C.G.A.* did state explicitly that a state could *use* benefits in this manner.²⁸³

The simpler and more logical reading of the *King* and *C.G.A.* decisions accepts that the courts understood and intended that their rulings would permit state representative payees to apply funds toward current maintenance. This is due to the plain implications of their decisions, and because the Social Security Act permits states to become representative payees.²⁸⁴ To suggest that a state may become a payee but not use funds for current maintenance implies that state representative payees have a different set of obligations from other representative payees—a concept completely unsupported by the statute or case law.²⁸⁵

Representative payees may reimburse themselves for current maintenance.²⁸⁶ Payees may do this even where required to provide for the current maintenance of the beneficiary, regardless of Social Security benefits. This is most clearly illustrated in *Mellies v. Mellies*²⁸⁷ and *In re Guardianship of Nelson*,²⁸⁸ which both stand for the proposition that a parent who is legally required to care for a child may nevertheless use Social Security benefits for that child's basic needs.²⁸⁹ In *Mellies*, the child beneficiary argued that because his father was required to pay for his basic needs, that his Social Security benefits should not be spent on

280. *Id.*

281. See *Keffeler v. Dep't Soc. and Health Servs.*, 145 Wash. 2d 1, 21, 32 P.3d 267, 277 (2001).

282. See, e.g., 42 U.S.C. § 405(j)(1994) which explicitly envisions state agencies acting as representative payee.

283. See *C.G.A.*, 824 P.2d at 1368. (emphasis added).

284. See 20 C.F.R. § 404.2040(a)(1) (2001).

285. See *supra* Part II.A.1.

286. See *supra* Part II.A.1.

287. 815 P.2d 114 (Kan. 1991).

288. 547 N.W.2d 105 (Minn. Ct. App. 1996).

289. *Mellies*, 815 P.2d at 116; *Nelson*, 547 N.W.2d at 109.

those same needs because such a use would not be in his best interests.²⁹⁰ The beneficiary argued he would be better off with his father paying out of his pocket for basic care and having the Social Security funds invested or saved in some other manner.²⁹¹ This is analogous to the court's reasoning in *Keffeler*, as the state was already required to provide foster care, it would not be in the beneficiary's best interests to use Social Security benefits to pay for current maintenance, but to conserve those funds.²⁹² The *Mellies* court found this argument unconvincing, and held that the representative payee had no obligation to first expend its own funds before using a beneficiary's Social Security benefits to pay for that beneficiary's current maintenance.²⁹³ The *Nelson* court reached essentially the same conclusion.²⁹⁴ The Supreme Court of Washington in *Keffeler* did not cite to the Kansas Supreme Court's decision in *Mellies* or to Minnesota's ruling in *Nelson*, holding the same conduct approved of by the Kansas court to be a violation of § 407(a).²⁹⁵ The *Keffeler* court held that it was in the beneficiary's best interest to have Social Security benefits conserved and not spent on the beneficiary's current maintenance where that maintenance was already required by law.²⁹⁶

The *Keffeler* court did not go so far as to suggest that parents acting as representative payees could not use benefits for current maintenance, although this is the only logical extension of the court's decision.²⁹⁷ Yet such an extension would vastly alter the laws controlling representative payees, which explicitly state that a payee spending benefits on current maintenance is considered to act in the best interest of the beneficiary.²⁹⁸ To apply the *Keffeler* holding only to states acting as representative payee would create two separate sets of rules for representative payees, one set for states and another for other representative payees. There are no separate rules for state representative payees as opposed to non-state

290. *Mellies*, 815 P.2d at 116; *Nelson*, 547 N.W.2d at 109.

291. *Mellies*, 815 P.2d at 116; *Nelson*, 547 N.W.2d at 109.

292. See *Keffeler v. Dep't. Soc. and Health Servs.*, 145 Wash. 2d 1, 17–18, 32 P.3d 267, 275 (2001).

293. *Mellies*, 815 P.2d at 117.

294. *Nelson*, 547 N.W.2d at 105–106.

295. *Keffeler*, 145 Wash. 2d at 19, 32 P.3d at 276.

296. *Id.*

297. See *supra* Part IV.3.

298. See *supra* Part II.B.2.

representative payees, despite the *Keffeler* court's implication to that end.²⁹⁹

Limiting *King* and *C.G.A.* in the manner suggested by *Keffeler* would effectively make an application to act representative payee by a state pointless and risky. Representative payee status for a state agency would be pointless if the state was unable to use the funds in a way it determined to be in the beneficiary's best interests. Gaining representative payee status would also carry great risk because the rules governing payees might or might not apply, making it exceptionally difficult for the state to know which rules to follow in order to avoid potential liability.

C. *The Supreme Court of Washington Failed to Give Proper Deference to the Social Security Administration's Own Interpretations and Decisions in Keffeler*

The Supreme Court of Washington should have, at the very least, read *Keffeler* in light of the *Chevron* doctrine and the United States Supreme Court's decision in *de la Cuesta*. Indeed, the only place in which *Keffeler* made a nod to the authority of SSA was in the dissent, where the dissenting justices noted that "even if DSHS is characterized as a creditor, the commissioner of Social Security may find, and here *has* found, DSHS acceptable to serve as a representative payee for these children in foster care."³⁰⁰ If the Supreme Court of Washington had examined the issues before it in light of *Chevron* and *de la Cuesta*, it would have reached the correct result.³⁰¹

The *Chevron* doctrine requires that courts apply a two-step analysis when deciding whether to review agency decisions.³⁰² Thus, the court would have had to ask whether Congress had already spoken to this issue raised in *Keffeler*, namely whether a state may use Social Security payments for the current maintenance of a person for whom that state

299. See *supra* Part II.B.2.

300. *Keffeler*, 145 Wash. 2d at 28, 32 P.3d at 280 (emphasis in original).

301. See *supra* note 179.

302. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). First, a court must determine whether Congress has already spoken directly to the exact question at issue. If Congress has then the matter ends and no further inquiry is permitted. See also *supra* Part III.

acted as representative payee.³⁰³ The answer to this question is clearly yes,³⁰⁴ a state may use benefits to pay for the current maintenance of a beneficiary when acting as representative payee, even to the extent that it reimburses itself for services which it is required to provide.³⁰⁵ This rule is found in 42 U.S.C. § 405(j), which permits states to act as representative payees, and allows representative payees to apply benefits toward the current maintenance of beneficiaries.³⁰⁶ By way of example it is also helpful to note that 20 C.F.R. § 404.2040 specifically allows state institutions to use benefits to pay for a beneficiary's institutional care.³⁰⁷ This is significant especially in light of *King*, which allowed a state mental institution, when acting as representative payee, to use beneficiaries' Social Security benefits to pay for their care at the institution.³⁰⁸ The statute and federal regulations unambiguously permit states to act as representative payees and to apply benefits to the beneficiary's current maintenance.³⁰⁹

Even if the Supreme Court of Washington had found that Congress had not directly spoken to this question, under the second prong of the *Chevron* doctrine the court should have found SSA's decision permissible and therefore controlling.³¹⁰ The U.S. Supreme Court emphasized the importance of deferring to permissible³¹¹ agency interpretations.³¹² Agency regulations are unacceptable only where they are "arbitrary, capricious or manifestly contrary to the statute."³¹³ The regulations permit the state to reimburse itself for maintenance, and the Supreme Court of Washington failed to show how the agency's own

303. See *supra* Part III.

304. See *Chevron*, 467 U.S. at 843.

305. See 20 C.F.R. § 404.2040 (2001). See also *Mellies v. Mellies*, 815 P.2d 114 (Kan. 1991).

306. 42 U.S.C. § 405(j) (1994).

307. 20 C.F.R. § 404.2040.

308. *King v. Schafer*, 940 F.2d 1182, 1183 (8th Cir. 1991).

309. See *supra* note 170.

310. See *supra* note 170.

311. The use of the word "permissible" suggests that the court need not necessarily agree that the regulation is the best interpretation possible, just that it conforms to the statute. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). See also *NLRB v. Hearst*, 322 U.S. 111, 130 (1944) (stating that courts cannot substitute their judgment for an agency's where the agency is using its expertise to apply the relevant statute or regulations to a particular set of facts).

312. See *supra* note 154.

313. *Chevron*, 467 U.S. at 843.

determination that the state could serve as representative payee and use Social Security benefits for maintenance was “arbitrary, capricious or manifestly contrary to the statute.”³¹⁴

The preemption issues discussed by the U.S. Supreme Court in *de la Cuesta* also permitted DSHS to use benefits for costs of current care.³¹⁵ The facts of *de la Cuesta* are particularly relevant given similarities to the issues in *Keffeler*.³¹⁶ The Court in *de la Cuesta* held that “[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review *only to determine whether he has exceeded his statutory authority or acted arbitrarily*.”³¹⁷ In *Keffeler*, as in *de la Cuesta*, there was an administrator directed by Congress to exercise discretion in managing a federal program.³¹⁸ Both the majority and the dissent in *Keffeler* acknowledged that SSA had appointed DSHS to act as representative payee.³¹⁹ In such circumstances the U.S. Supreme Court has made clear that the administrator’s judgments are subject to review by the courts only to determine if the administrator has acted beyond the scope of his statutory authority or has acted arbitrarily.³²⁰ Nonetheless, the Supreme Court of Washington provided no evidence of abuse of discretion and yet did not defer. This is particularly conspicuous in light of the U.S. Supreme Court’s past decisions emphasizing the need to provide even greater deference to an agency’s own interpretations of the law in complex fields like Social Security.³²¹

To the extent that DSHS could be considered a creditor in *Keffeler*, the dissent correctly pointed out that the court owed deference to the Commissioner’s decision to appoint DSHS representative payee.³²² Even if DSHS is considered a creditor, SSA still has the discretion to appoint DSHS representative payee if it determines that that appointment is in

314. *Id.*

315. *See supra* Part III.

316. *See supra* Part III.

317. *Fidelity Federal Sav. and Loan v. de la Cuesta*, 458 U.S. 141, 153–54 (1982) (emphasis added).

318. *See supra* note 145.

319. *Keffeler v. Dep’t of Soc. and Health Servs.*, 145 Wash. 2d 1, 19, 27–28, 32 P.3d 267, 276, 280 (2001).

320. *See de la Cuesta*, 458 U.S. at 153–54.

321. *Schweiker v. Gray Panthers*, 453 U.S. 34, 40 (1981) (holding there is a special need to defer to the Commissioner’s interpretation of the Social Security Act).

322. *Keffeler*, 145 Wash. 2d at 27–28, 32 P.3d at 280.

the child's best interests.³²³ The courts must provide deference to agency decisions like this, pursuant to both *Chevron* and *de la Cuesta*.³²⁴ Here, had the *Keffeler* court given SSA's determinations the deference they were due, Social Security benefits in Washington could still be spent on current maintenance costs for foster children today.

VI. CONCLUSION

SSA appointed DSHS to act as representative payee, and it carried out its duties responsibly and within the guidelines established by federal laws and regulations. DSHS is not a creditor in this situation, but even if it were, it could still act as representative payee with an appointment from the Commissioner of SSA. The Washington State Supreme Court should have applied the statute and regulations as interpreted by SSA. Furthermore, by expanding *Philpott*, *Bennett*, and *Brinkman* to apply to the strikingly different circumstances in *Keffeler*, the court overstepped the bounds of logic and forced two parts of the Social Security Act into irreconcilable conflict. The Supreme Court of Washington should not have on the one hand read those opinions so broadly and on the other hand spliced the opinions of *C.G.A.* and *King* so minutely in order to reach false harmony between them. Instead, the court should have deferred to SSA decisions and followed the rules established by the only other courts to address similar facts.

Unless the United States Supreme Court reverses the *Keffeler* court's decision, many children will continue to go without the Social Security benefits to which they are entitled. The Supreme Court of Washington failed to do these children justice because it did not provide due deference to the Social Security Administration or existing case law. Had the court done so, DSHS could still use these benefits to care for children.

323. 42 USC § 405(j)(2)(C)(iii)(II) (1994).

324. See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 840–843 (1984); *Fidelity Federal Sav. and Loan v. de la Cuesta*, 458 U.S. 141, 144–146 (1982).

