

STATE OF MICHIGAN
COURT OF APPEALS

In re ROBBY LAMPART.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

ROBBY LAMPART,

Respondent,

and

DIANA ALEXANDRONI,

Appellant.

FOR PUBLICATION

July 31, 2014

9:00 a.m.

No. 315333

Gogebic Circuit Court

Family Division

LC No. 2007-000087-DL

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J.

Appellant Diana Alexandroni, the mother and supervisory parent of juvenile respondent Robby Lampart, appeals by delayed leave granted¹ the trial court's order denying her motion to modify or cancel a restitution obligation. We reject certain portions of the trial court's reasoning, and therefore vacate in part, and remand for further proceedings. We affirm in part, because we at this time agree with the trial court's decision not to cancel or modify the restitution obligation, inasmuch as Alexandroni may have assets, or may in the future have sources of income, other than her social security disability income (SSDI) benefits, from which her restitution obligation can be satisfied.

¹ *In re Lampart*, unpublished order of the Court of Appeals, entered November 1, 2013 (Docket No. 315333).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 2007, Lampart, a juvenile at the time, entered a plea of admission to arson. Restitution was ordered in the total amount of \$28,210. The trial court subsequently ordered Alexandroni, on behalf of Lampart, to pay restitution, pursuant to MCL 712A.30(15), in the amount of \$250 per month. See also *In re McEvoy*, 267 Mich App 55, 57-58; 704 NW2d 78 (2005). The trial court further ordered Alexandroni's employer to withhold \$62.50 from her wages each week in order to satisfy the restitution obligation.

In September of 2009, Alexandroni suffered a heart attack. Her resultant heart condition left her unemployed. At the time of her heart attack, the unpaid restitution totaled \$22,960. Because Alexandroni was unemployed, the wage garnishment of \$62.50 that was originally ordered by the trial court terminated.

On April 18, 2011, the trial court held a reimbursement hearing regarding Alexandroni's obligation under the restitution order in light of the fact that garnishment of her wages was no longer available. In an affidavit, Alexandroni averred that she was unemployed and that her only source of income was \$730 per month in SSDI benefits.² Alexandroni argued that pursuant to 42 USC 407(a), which provides an anti-attachment provision for social security benefits, the SSDI benefits were exempt from attachment, garnishment, or other court-imposed obligation. 42 USC 407(a) provides:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Alexandroni argued that any attempt to enforce the restitution order would constitute "other legal process" under 42 USC 407(a), and that such attempt should be barred by the statute.

In an opinion and order dated April 27, 2011, the trial court concluded that enforcing a restitution order under the Juvenile Code did not constitute "execution, levy, attachment, garnishment or other legal process." The trial court concluded that it could consider Alexandroni's SSDI benefits as "income" and enforce the restitution order against Alexandroni personally, through the power of contempt, after the income was in her possession. The trial court reasoned that to hold otherwise would have the effect of making Alexandroni exempt from making payments under the restitution order.³ The court therefore indicated that it would "consider the family's income of \$1275" and, noting that "circumstances had changed and the current order may need to be reassessed," that it would schedule a new reimbursement hearing "to determine an equitable payment." That order was not appealed.

² Lampart received an additional \$545 per month.

³ The trial court made a similar finding as to Lampart's social security benefits.

On May 12, 2011, the trial court entered an order for reimbursement requiring Alexandroni to pay \$150 per month beginning on June 1, 2011, and continuing until the balance was paid in full. That order also was not appealed.

In 2012, Alexandroni filed a motion for relief from judgment pursuant to MCR 2.612(C)(1)(d) and/or (f), seeking to modify or cancel the obligation to make restitution payments. In an opinion and order dated January 25, 2013, the trial court denied that motion, noting that “the crux of this case boils down to whether the Court’s action in enforcing a restitution order subject to contempt is ‘other legal process’ under 42 USC 407(a).” Citing *Washington State Dep’t of Social & Health Servs v Guardianship Estate of Keffeler*, 537 US 371; 123 S Ct 1017; 154 L Ed 2d 972 (2003), the trial court applied a narrow definition of the term “other legal process,” and observed, once again, that it “has not pursued garnishment or attachment like actions in enforcement.” Aside from applying a narrow definition of “other legal process,” the trial court stated a policy justification for its decision:

. . . the Court cannot reconcile the arguments with common sense. That is, how can a Social Security Disability recipient (as opposed to a recipient of SSI, which is minimal and means tested) be exempt when often their [sic] income is greater than the working poor who are subject to enforcement. The guidelines promulgated by the collection statute for juvenile courts, MCL 712A.18(6), specifically mention Social Security Disability benefits as income that can be considered. . . . Those guidelines also start collecting SOMETHING on incomes as low as \$100 per week. To allow the exemption argued for would mean that no individual with any court obligation, no speeder, no drunk driver, no felon whose only income was Social Security Disability would ever have to pay restitution or court costs or fines of any nature. That result simply does not make sense.

The trial court denied the motion to modify or cancel Alexandroni’s restitution obligation. Noting that Alexandroni has suffered a reduction in household income due to the fact that Lampart was then in placement, such that his SSDI benefits were being received by the State, the trial court indicated that it would “again review the monthly payment status at the next review hearing.” It is this order that is the subject of this appeal.

On appeal, Alexandroni requests that this Court “amend” the trial court’s April 27, 2011 order “to provide that the Social Security benefits of [Alexandroni and Lampart] are exempt,” and that the “obligation requiring payment of restitution be canceled” because Alexandroni’s sole source of income is her SSDI benefits.

II. ANALYSIS

Resolution of this issue involves an issue of statutory interpretation, which we review de novo. *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012).

A. RESTITUTION STATUTE

Under the Michigan Constitution, crime victims are entitled to restitution. Const 1963, art 1, § 24. Under the Crime Victims’ Rights Act (CVRA), MCL 780.751 *et seq*, it is mandatory, not discretionary, for trial courts to order convicted defendants to “make full restitution to any

victim of the defendant's course of conduct that gives rise to the conviction." *People v Fawaz*, 299 Mich App 55, 64-65; 829 NW2d 259 (2012), quoting MCL 780.766(2). The defendant's ability to pay is irrelevant; only the victim's actual losses from the criminal conduct is to be considered. *Id.* at 65; *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001) ("Since June 1, 1997, MCL § 780.767; MSA 1287(767) no longer includes the defendant's ability to pay among the factors to be considered when determining the amount of restitution.").

Under the juvenile code, MCL 712A.1 *et seq.*, restitution also is required, and many of its provisions are substantively identically to the CVRA. *In re McEvoy*, 267 Mich App at 63. "The juvenile code, MCL 712A.30, provides for restitution of a loss sustained by a victim of a juvenile offense[.]" *Id.* at 60. An order of restitution under the juvenile code is "a judgment and lien against all property of the individual ordered to pay restitution for the amount specified in the order of restitution." MCL 712A.30(13). If a juvenile is or will be unable to pay a restitution order, "the court may order the parent or parents having supervisory responsibility for the juvenile . . . to pay any portion of the restitution ordered that it outstanding." MCL 712A.30(15). When ordering a parent to pay restitution, however, the trial court "shall take into account the financial resources of the parent and the burden that the payment of restitution will impose, with due regard to any other moral or legal financial obligations that the parent may have." MCL 712A.30(16). Regarding enforcement, MCL 712A.30(13) provides that "[a]n order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien." MCL 712A.30(13).

B. 42 USC 407(a)

Alexandroni contends that 42 USC 407(a) prohibits a state court from enforcing the restitution order against her because her sole income is her SSDI benefits. 42 USC 407(a) acts as an anti-attachment statute for social security benefits, and provides that:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The protection afforded to money received as social security benefits extends before and after the benefits are received. *Philpott v Essex Co Welfare Bd*, 409 US 413, 415-417; 93 S Ct 590; 34 L Ed 2d 608 (1973). See also *State Treasurer v Abbott*, 468 Mich 143, 155; 660 NW2d 714 (2003); *Whitwood, Inc v South Blvd Prop Mgt Co*, 265 Mich App 651, 654; 701 NW2d 747 (2005). The fact that the payments have been made does not make them lose the character of "Social Security benefits" or make them subject to legal process. To the contrary, the protections of 42 USC § 407(a) apply, by their terms, to "moneys *paid* or payable" (emphasis added); the fact that benefits have been paid and may be on deposit in a recipient's bank account does not shed them of that protection until they are in some way converted into some other kind of asset. *Philpott*, 409 US at 415-417. Thus, even after a recipient receives SSDI benefits and deposits them into a bank account, the SSDI benefits are still protected by 42 USC 407(a). *Whitwood*, 265 Mich App at 654. When a state court order attaches to social security benefits in

contravention of 42 USC 407(a), the attachment amounts to a conflict with federal law, and such a conflict is one “that the [s]tate cannot win.” *Bennett v Arkansas*, 485 US 395, 397; 108 S Ct 1204; 99 L Ed 2d 455 (1988). Other jurisdictions have held that a state court⁴ cannot order restitution to be paid from a defendant’s social security benefits. See, e.g., *State v Eaton*, 323 Mont 287, 294; 99 P3d 661 (2004).⁵

C. “OTHER LEGAL PROCESS”

In the case at bar, it appears undisputed that, at least as of the trial court’s April 27, 2011 order, Alexandroni’s only income came from her SSDI benefits. It is also undisputed that Alexandroni’s SSDI benefits were not subject to direct execution, levy, attachment, or garnishment, nor did the trial court employ any of those mechanisms. Thus, the issue becomes whether the trial court’s determination to consider Alexandroni’s SSDI benefits, after they were received, as “income” reachable through enforcement of the restitution order under the court’s powers of contempt, amounted to “other legal process” such that it violated 42 USC 407(a).

In *Keffeler*, 537 US at 384-386, the United States Supreme Court had occasion to interpret the phrase “other legal process” as it is used in 42 USC 407(a). Before doing so, the Court examined the terms “execution, levy, attachment, [and] garnishment,” and explained that “[t]hese legal terms of art refer to formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involve some form of judicial authorization.” *Id.* at 383. Noting that the term “other legal process” followed the use of the specific terms noted above, the Court concluded that 42 USC 407(a) uses the term “other legal process” restrictively. *Id.* at 384. The Court then employed the interpretive canons of “*noscitur a sociis* and *eiusdem generis*, [w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Id.* at 384 (citations and quotation marks omitted). Thus, the Court concluded, the term “other legal process”

⁴ 18 USC 3613(a) provides that:

The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined[.]

This provision also applies to the United States when it seeks enforcement of restitution orders. 18 USC 3613(f). Thus, although state courts may not enforce restitution orders or fines against an individual’s social security benefits, “[t]he United States may enforce” fines or restitution orders against an individual’s social security benefits. 18 USC 3613(a), (f) (emphasis added).

⁵ When interpreting federal statutes, we may look to decisions from other jurisdictions for guidance. See *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability. [*Id.* at 385.]

The Court explained that its definition was consistent with definitions of “other legal process” that were contained in the Social Security Administrator’s Program Operations Manual System (POMS). *Id.* One such definition explained “other legal process” as “the means by which a court (or agency or official authorized by law) compels compliance with its demand; generally, it is a court order.” *Id.*, quoting POMS GN 02410.001 (2002). Elsewhere, the POMS manual defined “other legal process” as “any writ, order, summons or other similar process *in the nature of garnishment.*” *Id.*⁶

In applying *Keffeler*, it is important to note the particular circumstances that were presented in that case. Specifically, the Department of Social and Health Services of the State of Washington provided foster care for children who were in need of such care, some of whom were recipients of social security benefits. The department was the “representative payee” for those children and, as such, the department directly received the children’s social security benefits. The suit alleged that the department’s use of those benefits to reimburse itself for the costs of foster care violated 42 USC § 407(a).

In formulating the definition of “other legal process” quoted above, the Supreme Court rejected the notion that the department’s “efforts to become [the children’s] representative payee and its use of [their] benefits in that capacity” fit within the definition. *Id.* at 386. Rather, “the

⁶ The Supreme Court in *Keffeler* made clear that its definition of “other legal process” was a product of *statutory* interpretation, which was merely “confirmed” by the “legal guidance” in the POMS. Obviously, revisions over time to the POMS do not alter the statute, or the Supreme Court’s interpretation of it in *Keffeler*. We note, in any event, that the current version of POMS GN 02410.200 (entitled “Garnishment”), which relates to a specific statutory exception for enforcing child support or alimony obligations, defines “legal process” for that purpose as “any writ, order, summons, or notice to withhold . . . or other similar process in the **nature of garnishment.**” Also, POMS GN 02410.001 (entitled “Assignment of Benefits”) applies generally to the statute’s sections that “prohibit the transfer of control over money to someone other than the beneficiary, recipient, or the representative payee.” Whereas that provision formerly defined “legal process” as quoted above, the current version reflects no definition, but instead states generally that, apart from certain exceptions that are not applicable here, 42 USC 407(a) “protect[s] payments as long as we can identify them as [social security benefits].” The provision cites as an example “a situation in which [social security benefits] are the only direct deposit payments in the account,” and notes that a “beneficiary or recipient can use [42 USC 407(a)] as a personal defense if ordered to pay his or her payments to someone else, or if his or her payments are ordered to be taken by legal process.”

department's reimbursement scheme operates on funds already in the department's possession and control, held on terms that allow the reimbursement." *Id.*

It is significant that the alleged "legal process" in *Keffeler* involved no resort whatsoever to the judicial process. For that reason, the Court contrasted the situation before it with one where there was "utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." *Id.* at 385. As the Court found, "other legal process" (1) requires utilization of some judicial or quasi-judicial mechanism; (2) by which control over property passes from one person to another; (3) in order to discharge or secure discharge of an existing or anticipated liability.

Unlike in *Keffeler*, we find that a judicial mechanism is being utilized here. Indisputably, resort is being made to the courts to secure payment. We further find that the mechanism is being used to secure the discharge of an existing liability, i.e., restitution. The question, therefore, is whether it is being used to pass control over property from one person to another, in a manner such as would run afoul of 42 USC § 407(a).

We find that the reasoning of the trial court, if effectuated through its contempt powers so as to cause Alexandroni to satisfy her restitution obligations from her SSDI benefits, would be such a use of a judicial mechanism to pass control over those benefits from one person to another. In that event, it would constitute "other legal process" that is prohibited under 42 USC 407(a). The process by which the trial court would enforce the restitution order would be the employment of its civil contempt powers. Civil contempt is defined as "[t]he failure to obey a court order that was issued for another party's benefit." *Black's Law Dictionary* (9th ed), p 360. "A civil-contempt proceeding is coercive or remedial in nature." *Id.*

When used in this manner, the court's use of its civil contempt powers to enforce a restitution order would act as a process much like the processes of execution, levy, attachment, and garnishment because in that context, the process would involve a formal procedure by which the restitution victim, through the trial court, would gain control over Alexandroni's SSDI benefits. *Keffeler*, 537 US at 383-384. Indeed, *Keffeler* noted that POMS defined "legal process" as it was used in 42 USC 407(a) as "the means by which a court . . . compels compliance with its demand; generally, it is a court order." *Id.* at 385 (citation and quotation marks omitted).⁷ Here, the court's demand was the restitution order, and the court would compel compliance with that demand through its civil contempt powers. Consequently, if the trial court were in fact to use its contempt powers in such as manner as would compel Alexandroni to satisfy her restitution obligations using her SSDI benefits, we would find that the process

⁷ As noted, the current version of POMS does not expressly reference this definition, but continues to describe 42 USC 407(a) as generally providing protection to social security benefits, and as allowing the recipient to use 42 USC 407(a) "as a personal defense if ordered to pay his or her payments to someone else, or if his or her payments are ordered to be taken by legal process." POMS GN 02410.001 (2014).

employed falls within the definition of “other legal process” as the term is used in 42 USC 407(a).

In this case, it appears undisputed that Alexandroni’s only source of income, at least as of the April 27, 2011 trial court order, was her SSDI benefits. The trial court clearly was aware of this, and nonetheless determined to consider her SSDI benefits as “income” for purposes of fashioning a restitution order “subject to contempt.” While we find no error merely in the trial court’s consideration of Alexandroni’s SSDI benefits as “income,” since 42 USC 407(a) does not directly proscribe such consideration, we find that, to the extent the trial court’s consideration of those benefits results in an order of restitution that could only be satisfied from those benefits, the use of the court’s contempt powers then would violate 42 USC 407(a). As noted, the protection afforded to SSDI benefits extends after those benefits are received. *Philpott*, 409 US at 415-417; *State Treasurer*, 468 Mich at 155; *Whitwood*, 265 Mich App at 654. See also *United States v Smith*, 47 F3d 681, 684 (CA 4, 1995) (holding, under a federal statute employing similar language to 42 USC 407(a), that a court could not order restitution against benefits after they were received because “[t]he government should not be allowed to do indirectly what it cannot do directly[,]” meaning that it could not require the defendant “to turn over his benefits as they are paid to him.”). As we explained in *Whitwood*, 265 Mich App at 654:

Plainly, pursuant to 42 USC 407(a), money received as social security benefits is not subject to execution or garnishment even after received and deposited by the recipient. Therefore, the trial court clearly erred when it found that the protection against garnishment ended when the social security proceeds were deposited into defendants’ account.

It appears to us that the trial court carefully avoided holding Alexandroni in contempt, yet came perilously close to using the threat of its contempt powers to compel Alexandroni to satisfy her restitution obligations from her SSDI benefits, which would violate 42 USC 407(a). On remand, the trial court should be careful to avoid any order that in fact would compel Alexandroni to satisfy her restitution obligation from the proceeds of her SSDI benefits. That said, the current record does not reflect whether Alexandroni possesses any assets, other than as generated by her SSDI benefit income, from which her restitution might be satisfied. Nor does the record reflect whether Alexandroni’s income remains solely her SSDI benefits, as her income and income sources conceivably could change over time. Those are matters that the trial court should explore on remand.

We note that it could be argued that, in imposing a civil contempt, a court does not touch a contemnor’s money directly, but rather imposes a personal sanction upon the contemnor that will be lifted if the contemnor chooses to comply. In other words, civil contempt imposes a *choice*; perhaps a choice in which neither alternative is appealing, but nonetheless a choice that the contemnor is in fact free to make. However, we find this argument not to be compelling where the circumstances are such that a contempt finding necessarily requires a contemnor to satisfy the legal obligation that is the subject of the contempt order by invading a monetary source that the court is not allowed to reach directly. In such circumstances, the contempt order would be the functional equivalent of an order directly reaching the funds, such that labeling the order as one of “contempt” rather than “garnishment” would exalt form over substance and ignore the reality of the circumstances. See *In re Bradley Estate*, 494 Mich 367, 388 and n49;

835 NW2d 545 (2013) (holding that the substance of an action labeled a civil contempt indemnification action was a claim for tort liability despite its label).

Given that the trial court in this case has not yet held Alexandroni in contempt, has not made a determination as to whether she has any assets (apart from any that are proceeds of her SSDI benefits), and has not made any recent determination of her income sources to ascertain whether any exist apart from her SSDI benefits, we decline to determine that such circumstances exist in this case at this time. However, on remand, the trial court should follow our direction in this opinion, to appropriately (and perhaps periodically) ascertain Alexandroni's assets and sources of income, perhaps through a contempt hearing,⁸ and to enter such further orders as are appropriate, while avoiding any directive, either explicit or otherwise, that will in fact cause Alexandroni to have to invade her SSDI benefits (or the proceeds thereof) to satisfy her continuing restitution obligation.

Finally, we note the differing approaches of other state and federal circuit courts as to whether the mere threat of contempt (such a arguably already exists in this case) itself amounts to "other legal process" under 42 USC 407(a). For example, in *Chambliss v Buckner*, 804 F Supp 2d 1240, 1255-1256 (MD Ala, 2011), the United States District Court determined that the plaintiff, Dexter A. Chambliss, from whom the Alabama Department of Human Resources sought child support payments, could not cite 42 USC 407(a) as a means to avoid a contempt hearing. In that case, Chambliss sought to avoid the hearing altogether and merely alleged, without providing support, that social security benefits were his only source of income. *Id.* Similarly, in *Danielson v Evans*, 201 Ariz 401, 412-413; 36 P3d 749 (Ariz Ct App 2001), the court held that a contempt order requiring the defendant, Donald Evans, to pay attorney fees to the plaintiff, Susan Danielson, did not violate 42 USC 407(a). Significantly, however, the court did not expressly require Evans to satisfy his obligations with his SSDI benefits. *Id.*

By contrast, the court in *Becker Co Human Services Re Becker Co Foster Care v Peppel*, 493 NW2d 573, 575 (Minn App, 1992), concluded that "an implied or express threat of formal legal sanction constitutes a 'legal process' within the meaning of section 407(a)." The trial court in that case had issued a child support order based on "the only source of income available to [the mother]: her SSI [Supplemental Security Income] benefits of \$407 per month,"⁹ and its order expressly stated that the mother "would be held in contempt if she failed to comply." *Id.* at 574. Consequently, the appellate court held that the trial court's "threat to hold [the mother] in contempt certainly qualifies as a legal process under section 407(a)." *Id.* at 575. See also *Fetterusso v New York*, 898 F2d 322, 328 (CA 2, 1990) (stating in dicta that "Congress intended

⁸ A contempt hearing can be a proper mechanism for ascertaining a person's assets or income for the purpose of satisfying a legal obligation. See, e.g., *Causeley v LaFreniere*, 78 Mich App 250, 251; 259 NW2d 445 (1977); *Moncada v Moncada*, 81 Mich App 26, 27-28; 264 NW2d 104 (1978).

⁹ Although 42 USC § 407(a) does not itself distinguish between SSDI benefits and SSI benefits, the court of appeals in *Becker* stressed that SSI benefits (unlike SSDI benefits, as the trial court in this case noted) are intended to protect indigent persons. *Becker*, 493 NW2d at 574.

the words ‘or other legal process’ to embrace not only the use of formal legal machinery but also resort to express or implied threats and sanctions”); *First Nat’l Bank & Trust Co of Ada v Arles*, 816 P2d 537, 541 (Okla, 1991) (“The contempt action was the procedure by which the court was attempting, through legal channels, to obtain jurisdiction over [the defendant] and force repayment of a [] debt. As such, it is a ‘legal process’ forbidden by Section 407(a).”).

Although we find that a contempt order that would cause Alexandroni to satisfy her restitution obligations from her SSDI benefits would be the use of “other legal process” in contravention of 42 USC 407(a), we decline to conclude that the mere specter of a contempt hearing necessarily constitutes such “other legal process.” That is, although we recognize that there is some level of threat and coercion inherent in a prospective contempt proceeding itself, the specter of contempt also can serve the legitimate purpose of providing a mechanism by which an obligor’s assets and income can be determined. See *Causeley*, 78 Mich App at 251; *Moncada*, 81 Mich App at 27-28. As noted in the current version of POMS, Alexandroni is entitled, at any such hearing, to use 42 USC 407(a) “as a personal defense if ordered to pay his or her payments to someone else, or if his or her payments are ordered to be taken by legal process.” POMS GN 02410.001 (2014).

We also note that the trial court found, as a matter of policy, that SSDI benefits should be used to satisfy restitution or court-imposed fines because such benefits are not need-based. The trial court determined that SSDI benefits should not be exempt from satisfying costs or fines because, unlike the recipient of Supplemental Security Income (SSI), an SSDI recipient’s benefits are not based on need, and may in certain instances be “greater than the working poor who are subject to enforcement.” The trial court correctly recognized that SSDI benefits, unlike SSI benefits, are not based on need. *Matthews v Eldridge*, 424 US 319, 340-341; 96 S Ct 893; 47 L Ed 2d 18 (1976). However, the trial court’s reasoning is flawed. 42 USC 407(a) represents a clear choice by Congress to exempt *all* social security benefits, whether from SSDI or SSI, from any legal process, save for a few enumerated exceptions not at issue in this case. See *Bennett*, 485 US at 398 (explaining that 42 USC 407(a) demonstrates Congress’ “clear intent . . . that Social Security benefits not be attachable.”); *Philpott*, 409 US at 417 (emphasis added) (explaining that 42 USC 407(a) acts as a “broad bar against the use of any legal process to reach *all social security benefits*.”). As such, regardless of whether Alexandroni’s SSDI benefits were based on need, such benefits may not be used to satisfy court-ordered restitution.

Although the trial court questioned the “sense” of that result, policy-making, whether sensible or not, is the province of the legislative branch of government, not the judiciary. See *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 581; 702 NW2d 539 (2005). Consequently, the “sense” of the policy, from a policy-making perspective, is not ours to judge.

If it were determined that Alexandroni’s only asset, or source of income, is and remains from SSDI benefits, 42 USC 407(a) prohibits the use of legal process—including by a finding of contempt—from reaching those benefits to satisfy the restitution order. See *Philpott*, 409 US at 417. If, however, Alexandroni is found to have other income aside from her SSDI benefits, or other assets that are derived from other sources, that income or those assets could be used to satisfy the restitution award. The restitution order itself remains valid. Indeed, Alexandroni’s receipt of SSDI benefits does not immunize her from the restitution order; rather, it merely prohibits the trial court from using legal process to compel payment of those benefits to satisfy

the restitution order. Because it is possible that Alexandroni may have assets or may receive income from other sources in the future, we affirm the trial court's refusal to cancel or modify Alexandroni's restitution obligation.

The trial court's contempt powers similarly remain a valid tool in enforcing the restitution order, and our decision today should not be read otherwise. Again, a contempt hearing can be an appropriate vehicle for determining income and assets from which the restitution order may properly be enforced. See *Causeley*, 78 Mich App at 251; *Moncada*, 81 Mich App at 27-28. However, the trial court may not compel Alexandroni to satisfy her restitution obligation out of her SSDI benefits, by a contempt finding or other legal process, as to which Alexandroni is entitled to the protections of 42 USC 407(a).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra

/s/ Jane M. Beckering

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RONAYNE KRAUSE, J. (*dissenting*)

I respectfully dissent and would affirm the trial court. I believe that the majority's reasoning would obviate any distinction between the kinds of legal processes that the United States Supreme Court has explained are contemplated by 42 USC § 407(a) and any legal processes of any kind, and furthermore doing so will hamstring trial courts and grant Social Security recipients essentially free reign to scoff at any law unless the violation thereof necessitates incarceration. I do not believe the plain language of the statute reflects an intent by Congress to achieve such an absurd result, so I would not create it.

The majority's recitation of the facts and the relevant statutes and case law requires no repetition. Where I part ways is with the majority's conclusion that 42 USC § 407(a) reflects a choice to exempt Social Security benefits from *any* legal process not explicitly enumerated as an exception. The United States Supreme Court emphatically explained that the term "other legal process" in that statute would be a way in which a court compels compliance with some requirement, but also that any such process would be "*in the nature of garnishment*," *Washington State Dep't of Soc & Health Servs v Keffler*, 537 US 371, 385; 123 S Ct 1017; 154 L Ed 2d 972 (2003), quoting from The Social Security Administration's Program Operations Manual System

(emphasis added by the Court). The United States Supreme Court further opined that “other legal process” should be defined narrowly rather than “in abstract breadth.” *Id.*

As the majority correctly notes, pursuant to 42 USC § 407(a), “moneys paid” (emphasis added) are also not subject to “execution, levy, attachment, garnishment, or other legal process;” the fact that such paid benefits are on deposit in a recipient’s bank account does not shed them of that protection until they are in some way converted into some other kind of asset. *Philpott v Essex Co Welfare Bd*, 409 US 413, 415-417; 93 S Ct 590; 34 L Ed 2d 608 (1973). The protection against legal processes under 42 USC § 407(a) therefore continues after the benefits are paid. *In re Vary’s Estate*, 401 Mich 340, 346-348; 258 NW2d 11 (1977).

Nevertheless, the United States Supreme Court observed that the terms “execution, levy, attachment, [and] garnishment” are “legal terms of art” referring to “formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involve some form of judicial authorization.” *Keffler*, 537 US at 383. It concluded that “other legal process” should therefore refer to the same kinds of processes. *Id.* at 384-385. Indeed, the Court emphasized that simply because some manner of legal process is involved does *not* mean that “other legal process” *within the meaning of 42 USC § 407(a)* is at issue. *Id.* at 384. In view of this “restrictive understanding of ‘other legal process,’” *id.* at 386, it is clear that not all legal processes or legal means of enforcing compliance with some court-ordered obligation will run afoul of the protections of 42 USC § 407(a). The consistent theme is that courts may not directly assume control over the money that comes into a person’s possession and control through SSDI payments, whether before or after those moneys are transferred.

The majority accurately notes that the factual scenario in *Keffler* did not entail a party resorting to judicial process. That does not, in my opinion, invalidate any of the Court’s reasoning. Beyond that, the majority apparently makes an end run around the Court’s straightforward construction by concluding that *any* process that would have the ultimate result of conveying any portion of a recipient’s Social Security proceeds into the hands of a court must be in the nature of garnishment. I simply cannot agree with that conclusion. The exercise of a trial court’s contempt power is not in the same nature as the “other legal process” contemplated by 42 USC § 407(a).

The power to punish contempts has always been considered inherent in courts and “essential to the exercise of their functions” or “the laws would be partially and imperfectly administered.” See *United States v John P Sheldon*, 5 Blume Sup Ct Trans 337, 344-345 (Mich Terr Sup Ct, 1829). They were regarded as being “inherent in, and as ancient as, courts themselves,” and, critically, in the nature of “attachment of the offender.” *In re Chadwick*, 109 Mich 588, 596; 67 NW 1071 (1896) (emphasis added). Contempt calculated to induce compliance with a court’s order—the situation at bar—is a civil contempt, as distinguished from a criminal contempt, which would be intended to punish some manner of misconduct. *Spalter v Kaufman*, 35 Mich App 156, 160-161; 192 NW2d 347 (1971). As the majority notes, a civil contempt is not an exercise by the court of direct control over the contemnor’s money, but rather is a personal sanction imposed on the contemnor him- or herself that the contemnor holds the power to lift upon payment.

Unlike the majority, however, I do not believe this distinction to be semantic pettifoggery without real-world relevance. The legal processes listed in the statute and discussed by the United States Supreme Court involved processes that either bypassed the SSDI recipient entirely or otherwise assumed control over the money itself. Exercising authority over a person is in the nature of something entirely different from garnishment. Under a “narrow” reading of what 42 USC § 407(a) means by “other legal process,” as the United States Supreme Court has held is appropriate, the protections of that statute do not extend to precluding courts from exercising their contempt powers to compel compliance with their orders.

That being said, I wish to emphasize that the trial court apparently determined that Alexandroni is indigent and consequently waived or suspended her payment of fees pursuant to MCR 2.002(D). Although ability to pay is not a consideration for determining the obligation to pay restitution, present income and resources *are* considerations under the guidelines for making actual payments thereon. See MCL 712A.18(6); *In re Juvenile Commitment Costs*, 240 Mich App 420, 441-443; 613 NW2d 348 (2000). Incarceration for civil contempt is limited to the extent the contemnor is actually able to comply with the order or otherwise purge the contempt. *Shillitani v United States*, 384 US 364, 371; 86 S Ct 1531; 16 L Ed 2d 622 (1966); *People v Johns*, 384 Mich 325, 333; 183 NW2d 216 (1971). Although *Shillitani* and *Johns* discussed civil contempts to enforce compliance with grand juries, the same principle applies here: if a person subject to a financial obligation to the court is unable to make payments due to destitution, the court can no more subject the person to contempt than require payments. If such a person claims such destitution, he or she is entitled to a hearing and determination thereof, and payments cannot be required unless or until the person is actually able to pay them. Put another way, the purpose and function of civil contempts is to deter *refusals* to comply with orders, not necessarily mere failures to comply. *In re Moroun*, 295 Mich App 312, 339-341; 814 NW2d 319 (2012). Social Security recipients are in no greater danger of debtors’ prison than any other potential contemnor, which is to say, they are not in any such danger.

Consequently, the trial court may not compel payments in the instant case at this time by using its contempt power, because insofar as I am aware, Alexandroni would not be able to comply. An inability to survive on the funds remaining after payment is, in my opinion, functionally identical to a lack of the funds altogether under any legal system that purports to have any concern for justice. However, the mere fact that her sole source of income is SSDI payments does not *per se* immunize her to the theoretical possibility of being ordered to make payments on pain of contempt. To hold otherwise would be essentially to neuter an inherent function of the courts and immunize recipients of SSDI payments, if they have funds to make payments, from making payment for traffic or parking tickets to misdemeanors, or indeed a great many other fees or financial obligations. It is equally incompatible with justice to prevent the

courts from being able to require persons who are able to comply with court orders from doing so. Victims in any case, and perhaps here in this case, may be on SSDI. I simply refuse to hold that victims should pay for crimes committed against them if a defendant has the ability to pay. The law does not require such a result and I will not do so to the victims of crime in this state.

I would therefore affirm.

/s/ Amy Ronayne Krause