

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Jacqueline Fields, et. al.)
)
Plaintiffs,)
)
vs.)
)
GORDON JOHNSON,)
)
Defendant.)

No. 89 C 1624

H. STUART CUNNINGHAM, CLERK
UNITED STATES DISTRICT COURT

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vs.	)	No. 89 C 1624
	)	Magistrate Gottschall
GORDON JOHNSON,	)	
	)	
Defendant.	)	

PLAINTIFFS' POST-TRIAL MEMORANDUM
IN SUPPORT OF PRELIMINARY INJUNCTIVE RELIEF

I. INTRODUCTION¹

James Norman and Gina Johnson, named plaintiffs in this case, seek to enjoin the defendant, Gordon Johnson, the director of the Illinois Department of Children and Family Services ("DCFS") from imposing on them impossible financial conditions for return of their children. Plaintiffs contend that defendant's arbitrary imposition of financial conditions coupled with his failure to assist them to meet these conditions violates the

¹ Plaintiffs earlier fully briefed the power of the district court to grant the relief requested. That discussion will not be repeated here. (See Pl. Memos. dated March 3, 1989 and March 24, 1989). Judge Hart has preliminarily denied defendant's Motion to Dismiss but will permit defendant to re-brief issues related to private rights of action after these preliminary injunction proceedings are resolved. (See Minute Order dated June 6, 1989). For that reason, plaintiffs will reserve argument on the issue of a private right of action under the Adoption Assistance and Child Welfare Act for claims under 42 U.S.C. §671(a)(15) and Title IV-B. Addressed below are the legal and factual basis of plaintiffs' claims for preliminary relief as developed at trial and the issue of collateral estoppel (raised for the first time in defendant's Pretrial Memorandum).

"reasonable efforts" requirement of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), 42 U.S.C. §671(a)(15), the "case plan" and "case review" requirements of 42 U.S.C. §671(a)(16), and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs also allege that DCFS workers are unaware of available programs offering cash and housing to families and that DCFS has failed to coordinate its programs and services with those of Title IV-A and Title XX as well as other programs related to child welfare, in violation of 42 U.S.C. §§622(b)(2) and 671(a)(4).

The evidence at trial pertaining to the cases of James Norman and Gina Johnson graphically demonstrates DCFS's unwarranted destruction of families, coupled with its failure to work speedily to reunite them. Plaintiff Norman's children were first removed by DCFS for "environmental neglect" -- in violation of DCFS's own written criteria. At the time of the state's initial intervention, the state offered Mr. Norman no services to prevent placement of his children in foster care. Due to the state's intervention, however, Mr. Norman lost his home, his job and the monthly public benefits and Social Security he used to support his children. He is now told by DCFS that he must regain those very things before DCFS will recommend reunification of his family. DCFS has consistently failed and refused to offer the basic services the Norman family needs to be reunited: cash for housing, assistance in procuring a source of income, assistance in locating housing, and transportation to locate housing. These

services are available and, pursuant to federal law, should either have been provided to reunify the family or the impossible financial conditions for reunification should have been dropped.

DCFS removed plaintiff Gina Johnson's children following sexual abuse of one sibling by another when Ms. Johnson was out of the house. Despite the possibility that homemaker, day care or other services might have adequately protected her children if they remained in Ms. Johnson's custody, DCFS made no attempt of any kind to provide any services to enable her children to remain at home. Due to the state's intervention and the placement of her children, plaintiff Johnson lost her public benefits. Then, unable to pay rent without such income, she lost her housing. DCFS thereafter imposed upon plaintiff the condition that she acquire "stable permanent housing". While she later procured a spacious apartment, plaintiff Johnson's DCFS worker refuses to permit the reunification plan to proceed, in part because her housing is not "permanent". Ms. Johnson now is in an impossible bind: without her children she cannot afford "permanent housing", but without permanent housing she cannot regain custody.

DCFS thus holds plaintiffs' children hostage as plaintiffs struggle on their own to find housing and sufficient income to satisfy DCFS. Plaintiffs contend that either DCFS must assist them to meet the financial conditions it imposes, or it must cease to impose these burdensome requirements.

II. FACTS ESTABLISHED AT TRIAL

A. DCFS Has An Established Policy and Practice of Failing to Provide Preventative and Reunification Services

DCFS receives millions of dollars in Title IV-B and IV-E funding to implement the child welfare program mandated by the AACWA, 42 U.S.C. §620 and §670 et seq. (Denton Dep. p. 85).² This funding includes money for family reunification services. (Id. p. 123).

1. Neglect Reporting Procedures, Protective Custody and the Initial Provision of Services to Families

Cases of abuse or neglect normally come to the attention of DCFS through a call to the DCFS Hotline in Springfield. DCFS notifies its Division of Child Protection ("DCP") concerning each call, and a DCP worker is then assigned to interview the child involved within 24 hours. (Testimony ("T") of Theresa Mayberry-Dunn).³ DCP workers are empowered by state law to take protective custody of children. Ill.Rev.Stat.ch.23 §2057.4 (b)(2). They are also charged by law with the duty to assess the need for, and to render, services to keep families intact. Ill.Rev.Stat. ch. 23, §2057.4.

In determining whether to take protective custody of children, DCP workers make use of a "Risk Assessment" Inventory.

² Plaintiffs submitted three depositions taken prior to trial under Fed.R.Civ.P.30(b)(6), and these depositions were admitted in evidence for use "by an adverse party for any purpose" pursuant to Fed.R. Civ.P.32(a)(2). These depositions of DCFS Regional Administrator Ina Denton, caseworker John Mukasa-Ssebanna and caseworker Susan Bobolink, are identified in the text by the last name of the deponent, "dep" and page.

³ Plaintiffs ordered transcripts only of the testimony of James Norman, Gina Johnson and Denise Kane. Their testimony is cited by page, but other witnesses' testimony at trial is cited generally, based on plaintiffs' recollection and notes.

(Denton Dep. pp. 106-107). This inventory relies on the worker's assessment of 13 factors, including the age of the child, history of abuse or neglect, environmental factors, stresses on the family, and the "cooperativeness of the family". (See Pls. Exhs. 21, 23, and 24). DCFS also has written standards in its rules and regulations for determining if injuries or conditions constitute "neglect", and if so, how serious is the case. If the case is serious enough, DCFS may take protective custody of the child. Protective custody may be taken based on an allegation of "inadequate shelter" or "inadequate food". (Denton Dep. pp. 75, 91). DCP workers have broad discretion, however, to determine whether, in each case, there is adequate reason to remove children from their home. (Id. pp. 100, 103, 105). DCFS's standards regarding "inadequate shelter," "inadequate food" and other "environmental neglect" are set forth at DCFS Manual Pt.88.4, 300(61) (Pls. Exh. 13).

When DCFS removes children, its DCP workers do not assess whether alternative services would enable the family to remain together. (Denton Dep. p. 68; but cf., Ill.Rev.Stat. ch. 23 §2057.4(b)(3) (DCP workers are mandated to make "an evaluation as to whether there would be an immediate and urgent necessity to remove the child if appropriate family preservation services are provided")). This duty is not a part of the DCP function (Denton Dep. p. 90), since DCP workers are considered "investigators", not service providers. (Id. p. 67). Thus, if cash or housing assistance is all that a family needs to remain intact, DCFS

would not expect such assistance to be provided by its DCP workers. It would instead expect the DCP workers to use their discretion in determining whether to take protective custody. (Id. pp. 102-103).

Beginning in October, 1988, DCFS initiated a \$1.5 million program in Cook County which enables a small group of children to remain home instead of entering the foster care system. This program -- called the "Family First Initiative" -- provides "intensive home-based services", including cash assistance of up to \$500 per family, to some families. This program was developed "to meet the mandate" of both state and federal law, i.e., the Family Preservation Act, PA-85-985, embodied in Ill.Rev.Stat. ch. 23 §2057.4, §5005 and ch. 37 §801 et seq. (to be codified) and the AACWA (T. of Diane Yost). The program currently serves only families:

- (1) for whom there is an abuse or neglect report;
- (2) whose case was reported to DCFS after October, 1988;
- (3) who have at least one child under the age of six;
- (4) who have fewer than three prior indicated reports;
- (5) whose children are in DCFS protective custody or placement is imminent; and
- (6) who are referred by DCP.

(T. of Diane Yost; Pls. Exh. 15 pp.4-5). There was conflicting testimony at trial as to whether sexual abuse cases were to be included in the Family First Initiative. (Compare T. of Diane Yost (sexual abuse cases included) with T. of DCP worker Walter

Henry (such cases are not included)).

On May 4, 1989, DCFS, through Diane Yost, issued a memorandum to its site offices concerning special assistance available to families threatened with removal of their children. (Def. Exh. 23). This memorandum tells staff that requests for this aid are to be "centralized through Sharon Garber". It does not mandate staff to identify all cases eligible for such funds. It is not clear whether DCP workers have been given this memorandum or any instructions concerning processing such requests for assistance.

The only other cash or housing assistance available from DCFS for families threatened with removal of their children is a small demonstration project with the Chicago Housing Authority ("CHA") at the Ida B. Wells public housing project. (Denton Dep. p. 58). This demonstration project serves 10 families in the DCFS East Area and is currently being revamped. (Id. pp. 50-56).

2. Casework and Service Delivery Following Removal of Children

After children are removed from their families, the children's and family's cases are assigned to a child welfare worker at a field or site office. (T. of Theresa Mayberry-Dunn). This assignment takes approximately two to three weeks. Id. Actual case handling after assignment may take much longer. (The delay is currently challenged in Artist M. et al v. Johnson, No. 88 C 10503 (Dec. 14, 1988; Judge Shadur)).

Children who are removed from their families are placed in substitute care (including "foster care"). (Denton Dep. p. 78).

Such care may cost more than \$100 per day. (Id. pp. 78-80).

Within 30 days, child welfare workers are to develop a "service plan" for each family. (Id. p. 127). These plans are to specify a "permanency goal" for the family, with "return home" a preferred goal. DCFS Policy §305 (29), Def. Exh. 21 p. 7). Service plans must also provide a statement as to why the children were removed and a complete listing of services the agency will provide to remedy the causes for removal. Service plans are to be developed with full consultation with the parent. (Denton Dep. p. 115).

Once service plans are developed, DCFS has an administrative case review ("ACR") system to review progress on the plans every six months.⁴ (Id. pp. 81, 135). DCFS exempts children in relatives' homes from its ACR system, (Denton Dep. p. 136) however (despite a decision from the U.S. Department of Health and Human Services grant appeal's board disapproving this exclusion). (See Decision, April 13, 1989, attached hereto as Appendix 1).

DCFS provides some services to parents through purchase of service agreements with private agencies. (Id. pp. 20, 28). Services that are routinely provided include counselling and homemaker services. (Id. pp. 112-113, 129-130). DCFS does not itself provide any housing assistance services, nor does it have any purchase of service agreements concerning any form of housing

⁴ These plans and reviews are intended to comply with the requirements of 42 U.S.C. §671(a)(16).

assistance. (Id. p. 129; see also Mukasa-Ssebaana Dep. p. 102).

DCFS does operate one cash fund to assist families with security deposits, rent or furnishings. This fund, called the Harris Fund, is made available only to families who have already located housing and for whose children DCFS has determined return home is "imminent". (Mukasa-Ssebaana Dep. pp. 57, 100). Average grants from the fund are \$350. (Denton Dep. p. 85). Despite defendant's representations at the outset of this litigation that Harris Funds had been depleted, at the time of trial Harris applications still were being processed. (Id. p. 85; Letter of Bart Murphy to Diane Redleaf, April 24, 1989, Appendix 2 hereto; Def. Exh. 22).

Apart from the Harris Fund, DCFS provides no resources to its workers to assist impoverished families with cash or housing. (Mukasa-Ssebaana Dep. pp. 54, 102). While DCFS acknowledges its responsibility to link services to clients (Denton Dep. pp. 30, 58, 94, 96-97), DCFS itself has no liaison with the principal state and local agencies that provide cash or housing: i.e. the Illinois Department of Public Aid ("IDPA") and the CHA. (Id. p. 58). At the same time, however, DCFS service plans routinely require parents to secure adequate housing, furnishings and income before DCFS can recommend that children return home (Id. pp. 84, 93, 115; Service Plans of Norman and Johnson, Pls. Exhs. 1, 4, 7, 8). "Adequate housing" as used in these service plans is defined differently by different workers: for example, Mr. Norman has been told by one worker he needed a one-bedroom

apartment, while another worker insisted he locate a two-bedroom apartment to have his children returned. (Bobolink Dep. pp. 47 (how many bedrooms Mr. Norman needs depends on how "discrete" he is); see also Denton pp. 82-85; Mukasa-Ssebaana Dep. pp. 60-61, 64-65 (a caseworker will not recommend that a child return home if the parent's housing is "unstable and parent can be thrown out without notice"). The only written guideline as to what constitutes "adequate housing" is the DCFS Manual definition of "inadequate shelter" as a criteria for determining neglect. (DCFS R 300-Appendix B (14) at Pls. Exh. 13; Bobolink Dep. p. 27).

DCFS has no provisions -- including contracts, interagency agreements or specialized staff -- to help parents secure income or employment. DCFS does have a job program for its own minor wards, but not for parents of children in foster care. (Bobolink Dep. pp. 44-45). DCFS also has no internal mechanism for determining if "reasonable efforts", as required by federal law, are being made in an individual case. (Denton Dep. p. 131).

3. The Need For Cash, Housing and Other "Hard Services"
For Families With Children In Foster Care

DCFS has acknowledged that lack of housing is a "major obstacle to family preservation". (Letter to Laurene M. Heybach from John Goad, Administrator of DCFS Office of Child Protection (DCP), Pls. Exh. 12). DCFS believes that "many children remain in care because their parents cannot obtain suitable housing." (Id.).

Parents cannot obtain such housing because their own income

often drops precipitously when they lose custody. If they received AFDC or Social Security children's benefits when they had custody of their children, they lose these benefits when their children are removed. (Denton Dep. p. 117). In lower-income communities in Cook County, efficiency apartments cost approximately \$350 per month and two bedroom units cost approximately \$450, plus a two-month security deposit. Public housing and the Section 8 program provide federally-funded housing for some low income people, but many people experience a long wait to obtain such housing. (T. of Smallie Mike Cook).

Some initial housing rental funds are available in Cook County through the Federal Emergency Management Act ("FEMA") program. Margaret Hughes testified, in her capacity as administrator of the program, that FEMA grant agencies can provide security deposits, rent money and utility assistance to clients. This money can be used to augment monies from other sources -- e.g., DCFS's Harris Fund, to enable families to break into the housing market.

**B. The Effects of Separation on Parents and Children and
Appropriate Social Work Practice**

When the AACWA was passed, there was growing evidence that the separation of children from their natural families was extremely harmful to children's development. At trial, Dr. Ner Littner, a nationally-recognized psychiatric expert on the traumatic effects of family separation, testified that the ability of a child to reach his or her full potential depends on

the parent-child relationship. The parent-child relationship is the prototype of all relationships the child will later develop.

Dr. Littner himself conducted pioneering work on the effects of parent-child separation at the Children's Home and Aid Society (CHASI), the largest foster placement agency in Illinois.

Dr. Littner's work shows that the separation suffered by a child at initial placement is always harmful to the child, though the degree of harm depends on the child's age and health. The child views placement with fear. The child is confused, overwhelmed by a feeling of helplessness and guilt, filled with self-blame, and angry at the parents and society. The child's self-esteem is diminished, and he (or she) loses self-confidence. Regardless of the quality of the prospective foster home, the child becomes very wary and expects punishment, even physical harm. In addition, "placement anxiety" can cause headaches, colds and increased vulnerability to illness and infection.

If prolonged, separation from a parent is even more damaging,⁵ creating emotional scarring that is "trans-generational". Children placed in substitute care develop what is termed "repetition compulsion": they desire to place their own children in foster care. Dr. Littner indicated that this compulsion has arisen in every child he has studied. Moreover, because the child perceives himself as rejected by his parent, he

⁵ A "prolonged" separation for a child under six years of age is one lasting two to three weeks; for an older child, it is any time longer than 30 days. (T. of Littner).

equates love with rejection. This creates enormous problems for future development, including an inability to trust, difficulty sustaining close relationships and an inability to live up to one's potential. Indeed, the child often goes into adulthood copying the worst aspects of parental behavior.

The effect of separation on the parent is less well-known, according to Dr. Littner, due to the tendency of child welfare agencies to ignore parental needs. Parents do, however, suffer harm from separation: they miss their child, blame themselves, lose self-esteem, and lose the ability to function as well as before. If the parent was placed in foster care as a child, the parent also relives that nightmare. Separation can thus seriously impair the parent's mental health.

Placement of children with relatives does not resolve these problems. While such placement may lessen some of the child's fear, it can increase conflicts of loyalty and intensify guilt. Relatives also often are not helpful to the parent seeking reunification.

The traumatic effects of separation are so devastating and so universal, according to Littner, that placement must be avoided wherever possible. If placement cannot be avoided, children must be reunited with their parents as soon as possible.⁶

⁶ Where removal of a child from a home is unavoidable, some techniques can lessen some of the devastating effects of separation, including advance preparation of the child and parent, gradual introduction of the child to the foster home, and insuring the continuity of the child-caseworker relationship. (T.

Child welfare expert Denise Kane testified on rebuttal concerning the appropriate social work standards for avoiding placement or achieving speedy family reunification. She testified that in the 1970's, social workers became aware that children were entering foster care "too easily" and were remaining in foster care too long. As they began to take a look at these unnecessary family separations, they reevaluated intervention strategies with troubled families and determined that:

[I]ntake is the most important time to make the most vigorous efforts to work on problems of families to keep families together. If families could not be kept together, then such efforts must vigorously be pursued at least crucially for the next year in order to reunite families because statistics dropped off dramatically after that year. It was more than likely the families would linger without reunification.

(T. of Kane pp. 140-141). The imperative to deliver vigorous services to keep families intact, Ms. Kane explained, is referred to in the social work field as making "reasonable efforts". (Id. p. 140).

To accomplish "reasonable efforts", a worker must first make an objective "risk" and "needs" assessment for the family (Id. pp. 141, 169-171), documenting all relevant information in the case file (Id. pp. 218, 233). The worker must work aggressively and in collaboration with the family. (Id. p. 141). The sooner services are offered, the better the ultimate outcome. (Id. at p. 146). Both "hard" and "soft" services should be provided: hard

of Littner).

services are those aimed at meeting subsistence needs -- housing, cash and food. (Id. p. 142). These services are particularly important for the urban poor. (Id. p. 143). The more the agency involves the client in the development of the service plan, the more effective the outcome. (Id. p. 145). In addition, the caseworker must "come through" with services to gain the trust and respect of the client. (Id. p. 146). Good social work practice, therefore, dictates that a social worker be involved in the case at the very beginning and that services be arranged within a 48 hour period. (Id. pp. 147, 231).

In cases of sexual abuse, keeping the child at home (after removing the perpetrator) can be especially important. (Id. at pp. 150-151). The child victim tends to blame herself for the abuse and removal of the child under those circumstances can intensify self-blame and make the child feel ostracized. (Id. p.150).

Ms. Kane also testified that after the children are removed, the caseworker must immediately begin an aggressive reunification effort. (Id. p. 151). A case plan should be formulated immediately as a "partnership" between the service provider, parents and child. (Id. pp. 151-2, 175). To be minimally adequate, the service plan must contain specific tasks for the service provider to perform. (Id. p. 175). The timing of services is critical: the longer a child remains in foster care, the more difficult it will be to reunify the family. (Id. p. 153).

C. The Norman Family

Plaintiff James Norman is the single parent of Lynetta, age 12, and Jamie, age 10. (T. of Norman p. 3.). Mrs. Norman passed away in October of 1986. (Id.).

Plaintiff Norman has now been separated from his daughters for almost a full year. DCFS took custody of the Norman children solely for economic reasons. On August 16, 1988, DCFS investigator Sylvia Walker removed the Norman children from their home because the apartment allegedly was messy, with bugs, spoiled food in the refrigerator, and no utilities. (Bobolink Dep. p. 32; Pls. Exhs. 21, 22). Norman had lost his utility service because he was unable to pay the bills.⁷

Plaintiffs' expert, Denise Kane, testified that there were no sound social work reasons for DCFS's removal of the Norman children. (T. of Kane p. 172). In fact, DCFS's removal of the Norman children violated its own criteria for removal. First, the risk assessment form filled out by Ms. Walker improperly identified the children's age as placing them at "high risk", when the risk assessment instrument defines older children like Lynetta and Jamie as "low risk" unless they are disabled. (See Pls. Exh. 24; T. of Kane p. 172). The entire risk assessment is

⁷ A former steelworker, Mr. Norman has been unable to secure full-time employment since his wife became ill in 1984. (T. of Norman p. 5). He last worked part-time as a laborer in the summer of 1988, and also attended classes in advanced auto electronics at Lincoln Technical Institute at that time. (Id. pp. 4-5). In addition to the income from his part-time employment, Norman was receiving \$300 in Social Security Survivor's Benefits and a small amount in AFDC benefits for himself and his daughters. He was unable to meet all his expenses, including rent, clothing for his daughters, and medication for his heart condition on this limited income. (Id. pp. 6-7).

miscoded in a similar fashion and scored incorrectly. (See Pls. Exh. 21 (six high risk categories shown on right but tabulation on left improperly added up to 11)). Second, Ms. Bobolink, Mr. Norman's current caseworker, testified that the children's health must actually be impaired before removal is appropriate. Ms. Walker's risk assessment form indicates that the children both appeared very healthy, and Ms. Bobolink could not identify any records in the Norman file showing evidence to the contrary. (Pls. Exh. 21; Bobolink Dep. pp. 32-3). Finally, DCFS's own standards for "inadequate shelter" define the seriousness of the case by whether the conditions pose a danger to the children's safety (Pls. Exh. 13); here, there was no such evidence.

The condition of the Norman home -- basically, a household without utilities in the summer or a working refrigerator -- was readily correctable. (T. of Kane pp. 171-2). Yet at no time prior to the removal of the children did Ms. Walker offer Mr. Norman any assistance in obtaining utilities or refrigeration. (T. of Norman p. 9). Nor did she, after removing the children, offer him any assistance with any of the family needs that had been identified -- utilities, refrigeration, housekeeping, employment, and housing. (Id. pp. 9, 17; see also Pls. Exh. 25 -- no pre-placement services deemed "appropriate" by DCP worker).

Instead of offering assistance, DCFS placed economic conditions upon Mr. Norman for the return of his children. His September, 1988 service plan required him to obtain "a verifiable source of income" and "adequate housing". (Pls. Exh. 1). Mr.

Norman did not participate in the drafting of the service plan, and the plan does not specify any tasks to be undertaken by DCFS to assist Mr. Norman. (T. of Norman p. 21).

Mr. Norman's first three caseworkers failed to offer him any assistance in meeting the objectives of the plan. Ms. Earlie, the caseworker who followed Ms. Walker, also offered him no assistance, not even referrals, to obtain housing or employment. (Id. T. of Norman pp. 19-20). Ms. Pickett, the third caseworker, offered him no assistance in obtaining housing or employment except for two inappropriate job referrals. (T. of Norman pp. 22-23). While Mr. Norman indicated that he lacked funds to seek employment, no transportation assistance has ever been offered to him for this purpose. (T. of Norman p. 29). Indeed, Mr. Norman's caseworker believes such assistance would be "inappropriate". (Bobolink Dep. p. 44).

Norman's fourth and current caseworker, Ms. Bobolink, was assigned to his case in January of 1989, but did not attempt to contact him until March and did not meet with him in person until April 20. (Id. pp. 27-28). On that date, Ms. Bobolink drafted a second service plan for him. (Def. Exh. 9). As before, Mr. Norman did not participate in the drafting of this plan, which requires him to apply for subsidized housing for the disabled and to continue contact with an employment referral specialist (Pls. Exh. 2; T. of Norman p. 21). Ms. Bobolink made a phone call on Mr. Norman's behalf to CHA and referred him to the employment specialist but has not otherwise assisted him in securing housing

or meeting any of the other service plan conditions. (Id. p. 26). An addendum to the service plan, prepared May 1, and which Mr. Norman had not yet received at the time of hearing, also requires Mr. Norman to apply for Social Security Disability and Public Aid, and provides that DCFS shall assist him with such applications. (Pl.Exh 3). However, Mr. Norman has received no such assistance. (T. of Norman pp. 25-26). As Ms. Bobolink admitted in her deposition, this addendum -- the first to discuss any assistance at all to be offered by DCFS -- was prepared in response to this litigation. (Bobolink Dep. p. 58).

As he testified, Mr. Norman has a heart condition which has required him to be hospitalized twice in the last eight months; this, together with his lack of funds for transportation to seek employment, makes it nearly impossible for him to find and maintain a job. (Id. pp. 27-28). Until his children are returned to him, however, he is not eligible to receive AFDC or Social Security benefits on his children's behalf, the receipt of which income is necessary for him to be able to secure and maintain housing. Nor is Mr. Norman eligible for subsidized family housing while DCFS retains custody of his children. He presently has no income at all.

Mr. Norman has maintained frequent in-person and telephone contact with his daughters since their removal. (T. of Norman p. 30). The prolonged separation has drained him emotionally, however, and he fears that his family is growing apart. (Id. pp. 31-32). He feels his daughters are becoming depressed and want to

return to live with him. (Id. p. 30-31).

DCFS has not only placed impossible conditions on Mr. Norman; it has actually created much of his housing and income problem by improperly removing his children and therefore causing him to lose the housing, Social Security, and employment he had at that time. Now DCFS is offering Mr. Norman no assistance with these problems for which it is largely responsible. Mr. Norman testified that his own efforts to find employment have been extensive but without success (Id. p. 27) and that he cannot search for or secure housing without any income. (Id. p. 29). He is therefore in need of preliminary injunctive relief against all financial conditions imposed upon him and relief requiring DCFS to assist him immediately in reuniting his family.

D. The Johnson Family

Gina Johnson, the mother of five children in DCFS custody, was joined as a plaintiff on May 3, 1989 and also sought emergency relief. Her claim was consolidated with Mr. Norman's for hearing.

Ms. Johnson lost custody of her children in March, 1988, after her 7-year-old son Randy, who had just returned to her custody from his father three weeks before, sexually molested her daughter Cheryl, age 5.⁸ Ms. Johnson had left her children to go

⁸ Randy had lived with Ms. Johnson for only four months after his birth before going to live with his father. Ms. Johnson had no housing at the time her sons went to live with their father. (T. of Johnson p. 76). Randy and Wade returned to Ms. Johnson's custody in February, 1988 after their father went into custody for murder. Wade had extension cord marks all over his body at the time he returned to Ms. Johnson. (Id. p.80).

to the store when the incident occurred. (T. of Johnson p. 81).

Ms. Johnson's children were taken into DCFS's protective custody after Ms. Johnson took Cheryl to the hospital for her injuries. (T. of Johnson p. 84). DCFS offered Ms. Johnson no assistance in maintaining her family intact at that time. (Id. p. 84). DCFS also did nothing to assist the children in separating from their mother. DCP worker Walter Henry, who had no previous relationship with the children, did no more to alleviate separation trauma than tell the boys they were going into foster care because Randy had abused Cheryl. He could not recall saying anything to the girls. (T. of Walter Henry).

Following removal of her children, Ms. Johnson was told in by her public defender in the juvenile court that she had no choice but to agree to DCFS taking temporary custody of her children. (T. of Johnson p. 116). There was no hearing concerning the need for removal of the children. (T. of Walter Henry).

Immediately following her loss of custody of her children, Ms. Johnson lost her AFDC grant of \$504 and could no longer pay her rent of \$300 per month. (T. of Johnson pp. 77, 79, 80). She had lived in CHA housing for five years and maintained a stable residence for one year prior to losing her children in March 1989. (Id. p. 77). Following her loss of her AFDC benefits, however, Ms. Johnson was forced to move several times. (Id. pp. 78-79). When her AFDC benefits were cancelled, she had no income

at all until July, 1988, when she began receiving General Assistance benefits of \$154 per month. (Id. p. 95, 104).

Ever since Ms. Johnson's children were taken from her, DCFS has insisted that she must obtain an "apartment" or "permanent home" in order to secure their return. (Id. p. 88) (caseworker stated children could not return to a shelter). This housing condition appears in Ms. Johnson's service plans of September 28, 1989 and March 31, 1989. (Pls. Exh. 7 at p. 10; Pls. Exh. 8 at p. 7). None of the apartments in which Ms. Johnson has resided to date have been deemed suitable by Ms. Johnson's DCFS worker. (T. of Johnson p. 94). DCFS has also done nothing to help Ms. Johnson locate a suitable apartment. (Id. pp. 88, 94 (Ms. Johnson asked her caseworker how she could get an apartment with her income; he did not respond); Id. p. 99; Mukasa-Ssebaana Dep. pp. 98, 100 (no Harris Funds provided to Ms. Johnson)).

The loss of Ms. Johnson's children has caused her great hardship, including severe depression (T. of Johnson p. 87), and thoughts of suicide. (Id. p. 102). When her children had to leave her after visits, they would cry and throw tantrums. (Id. p. 93). Her daughter used to cry all the time and wanted to go home. (Id. p. 103). One son felt suicidal after the separation. (Id. p. 102).

Ms. Johnson at trial recounted her own history of abuse and neglect. (Id. p. 95). She herself had been a ward of DCFS, and in state custody became involved with numerous physically and emotionally abusive men. (Id. p. 81). She was discharged from

DCFS custody when her oldest son was born. (Id. p. 75). Beginning in the spring of 1988, however, Ms. Johnson participated actively in several counselling and parenting programs. (See Pls. Exhs. 4 and 5; T. of Johnson p. 87). Sherry Parker, Ms. Johnson's present counsellor at the Sarah's Inn domestic violence program, testified that Ms. Johnson made remarkable progress in her counselling, and as of March 31, 1989, Ms. Johnson was ready for unsupervised visitation with her children and a phased eventual return of her daughters to her custody. (Pls. Exh. 9 (Case review summary by Sherry Parker and Christine Mendoza); T. of Johnson p. 97).

Sarah's Inn began serving Ms. Johnson in December, 1988, after Ms. Johnson's prior therapist, Julie Norman, referred Ms. Johnson to the Austin People's Action Center for shelter and counseling. (Mukasa-Ssebaana Dep. p. 94; T. of Johnson p. 111-112). Sarah's Inn has a satellite office located at APAC. At the time Ms. Johnson was referred to Sarah's Inn, Ms. Parker understood that Ms. Johnson needed an apartment to have her children returned by DCFS. (T. of Sherry Parker).

DCFS has acknowledged that Ms. Johnson is a good mother and that the extended separation from her children is harmful to them. (Id. p. 106). Nonetheless, DCFS has stalled steps to reunite her family. Ms. Johnson had requested that she be allowed unsupervised visitation with her children as a first step toward family reunification. (T. of Johnson p. 96-97). At her March 31, 1989 case review, unsupervised visits were denied to her because

"she had to demonstrate stability and independent functioning." (Mukasa-Ssebaana Dep. 79, 86, 95). Ms. Johnson had not demonstrated stability, according to her caseworker, because she had lived in five different apartments between July 1988 and the present. (Id. p. 96). Moreover, her "stability" was not "independent". (Id. p. 96).⁹ Mr. Mukasa-Ssebaana explained this "independence" requirement in two ways:

(1) Ms. Johnson must maintain her own permanent (non-shelter provided) apartment for at least 6 months. (T. of Johnson pp. 94, 98; Muskas-Ssebaana Dep. pp. 86, 103).

(2) Ms. Johnson must live outside a supervised, structured living arrangement -- i.e. without the support of Sarah's Inn. (Mukasa-Ssebaana Dep. pp. 87, 96).

To be sure, Mr. Mukasa-Ssebaana also indicated in court that Ms. Johnson must remain out of "abusive relationships". As a result of counselling, however, she has successfully remained out of such relationships for at least six months and plans never to return to such a relationship. Thus, it is unclear for how long Mr. Mukasa-Ssebaana expects Ms. Johnson to "demonstrate" that she will not return to such relationships.

At the time of trial Ms. Johnson had saved about \$600 towards an apartment. (T. of Johnson pp. 112, 113). This money

⁹ This "independence" requirement nowhere appears in DCFS policy manual as a condition for return of children. Indeed, return home with supportive services is anticipated. (See Def. Exh. 21). Moreover, appropriate social work practice standards indicate a supportive living arrangement is an ideal setting for the reunification of family members affected by domestic violence. (T. of Kane p. 163).

would be immediately exhausted if Ms. Johnson were to attempt to satisfy Mr. Mukasa-Ssebaana's requirement that she demonstrate "independent living" by renting an apartment in the private housing market. (Id. p. 121). She will be unable to maintain such accommodations on her \$154 income since available housing costs at least \$200 per month. (Id. p. 99). Ms. Johnson needs \$300-\$400 per month income to maintain an apartment. (Id. p. 103). DCFS continues to insist she procure "permanent" housing she cannot afford, and unless this condition is enjoined by this Court, or adequate funding is provided her to secure and maintain housing, she will be unable ever to secure return of her children.

The need for \$300 to \$400 monthly income to afford private housing might be obviated if DCFS obtained a commitment of CHA housing for Ms. Johnson. To date, DCFS has done nothing of the sort. Rather, after months of prompting by Ms. Johnson, Mr. Mukasa-Ssebaana only sent one letter to CHA which did not contain any reference to a date by which Ms. Johnson's children might be returned. (Def. Exh. 28; T. of Johnson pp. 91, 92, 96 (CHA told Ms. Johnson she must have her children back in order to get CHA housing); Id. p. 102; Muskasa-Ssebana Dep. pp. 75-76). Without such a commitment, CHA will not furnish family housing to Ms. Johnson. (T. of Smallie Mike Cook).

In short, Gina Johnson's own extensive efforts to reunite her family have not been matched by any efforts on the part of DCFS to help her meet the conditions imposed on her. Ms. Johnson

therefore is in need of preliminary injunctive relief against all financial conditions imposed upon her and relief requiring DCFS to assist her immediately to reunite her family.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CONSTITUTIONAL CLAIMS

A. Plaintiffs Are Constitutionally Protected From Unwarranted State Intrusion Into Their Family Lives

In a long line of cases, the Supreme Court has firmly established that parents have a constitutionally protected liberty interest in matters of family life, particularly in raising and associating with their children. See, Santosky v. Kramer, 455 U.S. 745, 753 (1982); Quillion v. Wolcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 842 (1977); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974); Stanley v. Illinois, 405 U.S. 645, 651-2 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This liberty interest is framed broadly: substantive due process protections attach to "the parent's right to care, custody, and management of his children," Santosky, 455 U.S. at 753; the "integrity of the family unit," Stanley, 405 U.S. at 651; see also Bell v. Milwaukee, 746 F.2d 1205, 1245 (7th Cir. 1984); and "the private realm of family life," Smith, 431 U.S. at 842. Explicitly protected within this constitutional framework are the parent's right to live with his family and to have custody of his minor children. Shondel v. McDermott, 775 F.2d 859 (7th Cir. 1985); Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982).

This right of the family to remain together without coercive state interference has been called "the most essential and basic aspect of family privacy." Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977). Such interests are "far more precious ... than property rights" and more significant and priceless than liberties "which derive merely from shifting economic arrangements". Stanley, 405 U.S. at 651. Of all constitutionally protected freedoms of choice in matters of family life, including the decisions to marry and procreate, the freedom of parent and child "to maintain, cultivate, and mold their ongoing relationship" is "among the most important of the liberties accorded this special treatment." Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983).

These parents' and familial rights repeatedly have been deemed fundamental by the courts, including the Supreme Court and the Seventh Circuit. Santosky, 455 U.S. at 753 (parents have a "fundamental liberty interest in the care, custody, and management, of their children); Polovchak v. Meese, 774 F.2d 731, 734 (7th Cir. 1985) ("free personal choice in matters involving family life is a fundamental liberty interest protected by the Constitution" is beyond dispute); Doe v. Staples, 706 F.2d 985, 988-89 (6th Cir. 1983) (parents' liberty interest in family integrity is "essential or fundamental"); cf. Halet v. Wend Investment Company, 672 F.2d 1305, 1311 (9th Cir. 1982) (family life, in particular the right of family members to live together, is part of the fundamental right of privacy).

Plaintiffs Norman and Johnson have a fundamental right to family integrity and to the companionship, care, and custody of their children. These fundamental rights do not evaporate simply because the state has temporary custody of their children; the parents "retain a vital interest in preventing the irretrievable destruction of their family life." See Santosky, 455 U.S. at 753.

B. Defendant's Intrusion Into Plaintiffs' Families Must Promote A Compelling State Interest And May Not Unnecessarily Impinge Upon Their Fundamental Rights.

The fundamental right of family integrity is the right of family members to be free from state intrusion. See Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Halet v. Wend Investment Co., 672 F.2d 1305 (9th Cir. 1982). Indeed, the "most essential and basic aspect" of the right to family integrity is "the right of the family to remain together without the coercive interference of the awesome power of the state." Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

The Supreme Court has set forth the general principle that state intrusion upon a fundamental right must be narrowly tailored to promote compelling or substantial state interests. Shelton v. Tucker, 364 U.S. 479, 488 (1960). The state may not rely on an irrebuttable presumption that its interests are promoted in a given case; it must make a particularized showing in each case in order to avoid unnecessary infringement of fundamental rights. Franz v. United States, 707 F.2d 582, 606 (D.C. Cir. 1983). The state may not intrude by means "which sweep

unnecessarily broadly and thereby invade the area of protected freedoms." Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The level of intrusion may not be greater than necessary to achieve the state's interests:

If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."

Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (quoting Shelton v. Tucker, 364 U.S. at 488).

This principle has been repeatedly affirmed by the Court where constitutionally-protected familial rights have been threatened. Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Carey v. Population Services In'tl, 431 U.S. 678, 686 (1977) (right to contraception); cf. Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J. concurring) (right to contraception). The lower courts have extended this analysis in evaluating state intrusion into family integrity, noting that among such familial rights as the rights to make decisions about marriage and procreation, the right of parent and child "to maintain, cultivate, and mold their ongoing relationship" is one of the most important. Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983). "A parent is entitled to substantive due process protections which prohibit governmental interference with familial privacy in all but the most compelling and justifiable circumstances." Rivera v. Marcus, 533 F. Supp. 203, 208 (D. Conn. 1982), affirmed, 696 F.2d 1016 (2d Cir. 1982). Where

"ready access to less drastic means" are available for achieving the state's goals, "the decision (of the state) not to avail themselves of that option (is) inconsistent with the Constitution." Franz v. United States, 707 F.2d at 607. See Roe v. Conn, 417 F.Supp. 769, 779 (M.D.Ala. 1976).

The state's removal of children is a serious and substantial infringement upon the fundamental right to family integrity. Although Franz and Roe v. Conn dealt with the termination of parental rights, the same analysis is also appropriate in cases where the state has removed the children from the parents but not yet terminated their rights. As noted by the Seventh Circuit, "actions less than termination of parental rights have a divisive impact on family relations" and "significantly undercut" the liberty interests of family association. Polovchak v. Meese, 774 F.2d 731, 734-35 (7th Cir. 1985). "Breaking up the family unit by actual removal, even if temporary, interferes with each family member's interest in familial autonomy in the most severe manner possible. Moreover, removal seriously invades each parent's right to companionship with and control over the child." Note, The Constitution and The Family, 93 Harv. L. Rev. 1156, 1316-17 (1980). Cf. Wise v. Bravo, 666 F.2d 1328, 1337 (10th Cir. 1981) (concurring opinion) (in case of interference with father's visitation rights, the state may not impinge upon the parent-child relationship unless it can show "an overriding, compelling interest and the use of the narrowest, least restrictive means to effect that end.").

Thus in cases in which of children are removed where the interests in and injury to family autonomy are substantial,¹⁰ the state is permitted to intrude only to enforce a compelling state interest, and the means used by the state to enforce its interest must be those which least impinge upon the fundamental rights of the family members. See Note, The Constitution and the Family, 93 Harv. L. Rev. 1156, 1314-1315 (1980). Plaintiffs, who because of defendant's actions have suffered near destruction of their families, merit the application of this principle to their cases.

C. Defendant May Not Constitutionally Impose
Unreasonable Conditions on Family Reunification.

In addition to violating plaintiffs substantive right to family integrity, the DCFS policy of imposing arbitrary and unreasonable financial conditions for return of their children also violates their procedural due process rights under the Fourteenth Amendment. Due process prohibits requiring the satisfaction of conditions beyond a person's control. See, eg., McNeil v. Director Patuxent Institution, 407 U.S. 245, 251 (1972) (due process does not permit punishment for civil contempt of a person who lacks the present ability to comply with the court order). Moreover, DCFS's allowance of caseworkers to make

¹⁰ "The interest of parents themselves is threatened because loss of custody necessarily restricts their ability to shape the child's developing personality and to obtain the emotional satisfaction of childrearing. The interest of the child is threatened because removal from the home takes him from those likely to be most sensitive to his needs. Finally, the interest in social pluralism is threatened because state-organized childrearing may well lead to the standardization of children." Note, The Constitution and the Family, supra, at 1354-55. (Footnotes omitted).

personal judgments, unsupported by DCFS written policy, concerning what constitutes adequate housing or sufficient income for family reunification runs afoul of procedural due process principles as well. See, e.g., White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976); Carey v. Quern 588 F.2d 230 (7th Cir. 1978); Doston v. Coler, 85 C 2356 (Nov. 23, 1988, Hart J.) (enjoining subjective standardless non-cooperation determinations for welfare eligibility to child support program participants) (relevant page 88 of decision attached hereto as Appendix 3).¹¹

D. Defendant's Intrusion Into Plaintiffs' Families Here Is Unconstitutionally Excessive and Improper

State intervention based on "environmental" factors, such as the fitness of the child's surroundings, is particularly susceptible to due process invalidation, since such intervention is not "tightly drawn to advance the State's compelling interest in the child's welfare; a less intrusive alternative would focus only on the physical or emotional condition of the child ..."

Note, The Constitution and the Family, 93 Harv. L. Rev. 1156, 1238 (1980).

In view of the strength of the privacy interests at stake, heightened substantive due process scrutiny should limit state intervention to the least restrictive means necessary to ensure that the child is protected from the harm that justified intervention ... If a neglected

¹¹ Judge Hart's decision is over 100 pages, with appendices. Since plaintiffs rely only on one page of the decision here, they did not attach a full copy. Plaintiffs will gladly furnish copies of the full decision to the defense or the court if desired.

child could be protected through existing social services such as parental training or counseling, provision of homemaking services, or some form of in-home supervision, the state must pursue those other means before removing the child ...
Destitution alone would be a constitutionally impermissible basis for removal, for state aid to the family would less intrude on the family's protected rights.

Id. at 1321-22 (Emphasis supplied).

By removing plaintiffs' children and/or retaining them in state custody because plaintiffs do not have "adequate" housing or income, defendant has unnecessarily and improperly intruded directly into the constitutionally protected domain of plaintiffs' family lives. As plaintiffs have shown at the preliminary injunction hearing, less intrusive alternatives than removal and retention of custody were and are available to defendant to achieve his goal of child protection. However, defendant consistently has failed and continues to fail to utilize any of those less restrictive alternatives. Such failure to use or even consider less restrictive alternatives constitutes a substantive due process violation.

Defendant clearly misunderstands plaintiffs' constitutional claims and relies on a line of cases holding that plaintiffs have no affirmative constitutional right to government aid. See DeShaney v. Winebago County Department of Social Services, 489 U.S. , 109 S.Ct. , 103 L.Ed. 249 (1989); Def. Pretrial Mem. p. 26. However, these cases are inapposite. Plaintiffs are not

claiming a constitutional right to substantive state services¹² to repair familial relationships which the state had no part in destroying. On the contrary, plaintiffs claim that DCFS itself has improperly intervened into their families and improperly conditioned plaintiffs' right to be with their children on plaintiffs success in obtaining financial support; thus it has an obligation to remedy the danger it has caused through improper intervention.

E. Defendant Has Violated James Norman's and Gina Johnson's Constitutional Rights

DCFS violated James Norman's First and Fourteenth Amendment rights to family integrity by (1) improperly removing the Norman children from the home when there was no evidence of any risk to the children in the home and therefore no compelling state interest in removal, and (2) by creating and perpetuating the very conditions now cited by the state as keeping the Norman family apart -- lack of housing and income. DCFS also violated Norman's Fourteenth Amendment rights to family integrity by removing his children when there were less intrusive and equally effective forms of intervention readily available to it to insure that the children would be protected in the home -- such as the provision of homemaker services and assistance in reconnecting utilities. Moreover, DCFS has violated and continues to violate Norman's rights to family integrity by maintaining his children in placement when less intrusive and less costly state

¹² Plaintiffs do claim, however, a statutory right to services under the AACWA. See infra at pp. 35-44.

interventions -- such as provision of housing assistance -- would allow the family to be reunited. Finally, DCFS violated Mr. Norman's procedural due process rights by imposing conditions for reunification beyond his control.

DCFS has also violated plaintiff Johnson's First and Fourteenth Amendment rights by the removal and placement of her children. Intervention into Johnson's family certainly was not narrowly tailored to provide assistance in a manner least intrusive to the family since a less intrusive remedy was readily available: i.e. a homemaker or the use of a protective family shelter. Removal of all the children was unnecessary and, when balanced against the grievous harm inflicted on this family by separation, unwarranted.

Like plaintiff Norman, plaintiff Johnson's procedural and substantive rights are violated by the state's imposition on her of financial conditions to regain custody where the state precipitated the very financial problems it now holds her responsible for -- i.e. loss of income and "permanent" housing.

Through its unduly broad intervention, DCFS has triggered catastrophic financial crises for plaintiffs, rendering plaintiffs homeless and penniless; then it has demanded that plaintiffs rectify the damage themselves, all the while withholding from them the very means to do so. This infringement on their families' integrity furthers no compelling state interests and thus is unconstitutional.

IV. THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR STATUTORY CLAIMS

A. The Plaintiffs Are Likely to Succeed in Their Claims Under the "AACWA"; Defendant Has Violated the AACWA's Mandates of "Reasonable Efforts" to Prevent Placement and Reunite Families; Case Plans and Case Review, and Coordinated Services.

In 1980, after extensive hearings and revisions spanning a four-year period of time, Congress passed the AACWA, 42 U.S.C. 620 et seq. and §670 et seq. This statute amended the Social Security Act foster care payment provisions which had been in existence for over twenty years. The express purpose of the AACWA was to achieve major reform in the child welfare system throughout the United States, a system which - fueled by federal dollars - had removed hundreds of thousands of children from their natural homes only to set them adrift in an abusive, costly and transitory foster care network.

Convinced that many of these children were unnecessarily in foster care and that they could be kept home or returned home at much less expense to the government and much less harm to children, Congress imposed through the AACWA new obligations on the states to insure that foster care be utilized only when absolutely necessary. The most pertinent obligations are:

First, as a condition for receipt of new federal funding, Congress required that each state submit a state plan detailing the child welfare services it will provide. 42 U.S.C. §622(a) and (b)(5). This must include a specification of which preplacement and preventative services will be made available, including (but not limited to) homemakers, 24-hour caretakers, crisis counselling, emergency shelters, procedures and arrangements for

access to available emergency financial assistance, respite care and family-based services. See 45 C.F.R. 1357.15(e).

Second, Congress mandated that state agencies accepting federal foster care money make "reasonable efforts" "in each case" to "prevent or eliminate the need for removal of the child from his home" and to "make it possible for the child to return to his home". 42 U.S.C. §671(a)(15). This provision is implemented, in part, by a requirement that, in each case where the state removes a child from home, a judicial finding be made that "reasonable efforts" were made prior to removal. 42 U.S.C. §672(a)(1).

Third, the Act requires that the state agency must develop a "case plan" for "each child" receiving foster care, 42 U.S.C. §671(a)(16); that such case plan contain, inter alia, "a plan for assuring that the child receive proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the home and facilitate return of the child", 42 U.S.C. §675(1).

Fourth, the Act requires that the case plan requirement be implemented through a periodic case review system, 42 U.S.C. §671(a)(16), which assures that each child has a case plan designed to achieve placement in the least restrictive setting and that the status of each child is reviewed at least every six months to determine the "continuing necessity of placement" and "the extent of compliance with the case plan". 42 U.S.C. §675(5).

Just prior to passage of the final version of the AACWA,

Senator Alan Cranston, its author and a major proponent of the Act, discussed the case plan and case review provisions of the AACWA back-to-back with the "reasonable efforts" mandate.¹³ After first noting that case planning was one of the "most important aspects of this legislation" and that the case review provisions were "most critical", Senator Cranston stated:

[C]urrent law requires that a child in foster care receive proper care and services...These very generalized provisions have had little specific impact upon a State's responsibility to provide services designed to prevent a child's removal from his or her home, or to help alleviate the problem which caused the child's removal in the first place. Accordingly, some courts have specifically held that social services agencies had no affirmative duty to provide preventative services to a distressed family before the removal of a child. The Senate Amendment provided specific requirements that States must include in their [state plan] to assure that in each case reasonable efforts be made prior to the placement of a child in foster care to prevent or eliminate the need for removal...and that reasonable efforts be made to make it possible for a child to return... The [final version of the Act] includes these important provisions from the Senate Amendment.

* * *

[T]hese sections are aimed at making it clear that states must make reasonable efforts to prevent the removal of children from their homes. In the past, foster care has often been the first option selected when a family is in trouble; the new provisions will require the states to examine alternatives

¹³ This legislative history fully supports finding a private right of action under the reasonable efforts and case plan requirements of the AACWA. Plaintiffs will present a complete analysis of that issue in later briefing before Judge Hart, if required. (See note 1 supra).

and provide, wherever feasible, home-based services that will keep families together, or help reunite families...where removal can be prevented through the provision of home-based services, these agencies will be required to provide such services before removing the child and turning to foster care. These provisions...are among the most important aspects of this legislation. Far too many children and families have been broken apart when they could have been preserved with a little effort.

Cong. Rec. June 13, 1980 at 14766-14767.

As can be gleaned from the legislative history quoted above, the case plan requirements of §671(a)(16) and §675(1), the case review requirement of §671(a)(16) and §675(5) and the reasonable efforts provisions of §671(a)(15) of the AACWA, as well as the service provisions of §622 b), all interplay to form an integrated mandate for the provision of preventative and reunification services to families. Plaintiffs advance claims under each of these provisions.

A further provision of Titles IV-B and IV-E of the AACWA further requires the state child care agency to provide for the coordination of its services with all other child welfare programs in the state, including inter alia, the utilization of voluntary agencies, the federal AFDC program and Title XX services "with a view to provision of welfare and related services which will best promote the welfare of such children and their families". 42 U.S.C. §§622(b)(2) and (7), and §671(a)(4). Succinctly stated, this coordination requirement envisions that the state agency utilize all available resources from all programs to serve children and families to accomplish its

"reasonable efforts" mandate. Plaintiffs advance claims under each of these provisions.

B. Defendant Has Violated And Continues to Violate Plaintiffs Rights Under the AACWA

1. Statutory Violations In James Norman's Case

No clearer case of a violation of the reasonable efforts and service coordination requirements can be shown than that of Mr. Norman. At the time of DCFS intervention, the Norman children were safe and healthy. Indeed, DCFS intervention under the circumstances of this case violated state law and DCFS's written policy. What problems the family had -- no utilities, a messy house -- could easily have been rectified by a referral for cash and utility assistance, budgeting classes, and homemaker service. A 24-hour caretaker could have been placed in the home until Mr. Norman returned from his job interviews. Services could have been furnished without removal of the children.

Plaintiff demonstrated at trial that all these services exist -- e.g. United Charities (budgeting), IHEAP (utility assistance), Harris Fund (cash). (T. of Kane pp. 173, 177). Instead of making any effort to access these services, Title XX services or special cash assistance to prevent placement of the Norman children, however, DCFS employed the most drastic, damaging and expensive "remedy" to the family's problem: foster care placement. Not a single service was offered to the Norman family. The DCP worker never even spoke to Mr. Norman before taking his children. No efforts have been made since to provide cash or housing available from public aid and private sources.

The removal of children and prolonged intervention without reunification efforts is precisely the practice Congress so clearly condemned.

The conduct of DCFS in removing these children shocks the conscience when considered in light of Dr. Littner's testimony of the harm suffered by parent and child when separation occurs. DCFS took a problem and created a tragedy. As eloquently expressed by Ms. Kane:

My honest opinion, I was ashamed when I read [Mr. Norman's DCFS file]... No good social work standard would have pulled those children from this working class poor man who had suffered the loss of his wife, who had just launched off an older son graduating from high school in a neighborhood where 50% graduate... where his kids are doing well in school...

(T. of Kane p. 178).

In addition to violating the "reasonable effort" and "service coordination" requirements of AACWA, DCFS has consistently violated its case plan and case review requirements as well. During the 11 months his children have been separated from him, Mr. Norman has had four caseworkers assigned to his case and received no services at all other than two inappropriate job referrals. He had no case plan for the first weeks his children were in custody. (See Pls. Exh. 1). When the case plan was prepared and presented to Mr. Norman, without consulting him, it did not contain a single service or referral to be provided through DCFS that had anything to do with restoring utilities, obtaining cash or cleaning the house. Instead, it imposed a

series of financial conditions upon Mr. Norman (e.g. locate adequate housing, get verifiable income).

While visitation between parent and child is a key factor in the family reunification process, Mr. Norman was denied visits for a month after his children were taken into DCFS custody. (T. of Norman).¹⁴ He was told he would have to undergo a psychiatric evaluation first, even though the removal of his children had nothing to do with his mental health. When visits did commence, DCFS offered Mr. Norman no financial assistance for the cost of transportation even though Mr. Norman now lived in Chicago and DCFS had placed his children in Harvey, Illinois. No one assisted Mr. Norman in obtaining public aid. No worker even established enough contact with Mr. Norman to learn of his hospitalizations for a serious heart ailment.

After this case was filed in February and a preliminary injunction hearing was scheduled, Mr. Norman's fourth DCFS worker created a second service plan (again, without Mr. Norman's input). This service plan was equally inadequate. (Pls. Exh. 2). Just before the caseworker's deposition, the case plan was amended to provide for some transportation assistance and to commit the agency to assist Mr. Norman in obtaining medical records. (Pls. Exh. 3). No more was done. The DCFS worker never applied for Harris Funds, never advocated for Mr. Norman with

¹⁴ (But see Memorandum Order and Opinion in Bates v. Johnson, No. 84 C 10054, (June 29, 1989 Plunkett J.) -- DCFS held in contempt for non-compliance with visitation mandates). (attached as Appendix 4 hereto). DCFS is also obligated by law to provide transportation costs for visits. (Id.)

IDPA, referred him only to one of many Chicago-based housing assistance programs, never offered him assistance with budgeting, and never provided him with funds to look for affordable housing. The two case plans created by DCFS violate federal law in that they do not offer appropriate services to facilitate return home.

Finally, it is undisputed that Mr. Norman has never received a case review in accordance with 42 U.S.C. §671(a)16 and §675(5). Rather, DCFS has taken the position that children placed with relatives are not entitled to such a case review. (Denton Dep. p. 13). The U.S. Department of Health and Human Services which is charged with oversight of the Title IV-B and IV-E programs has expressly disapproved of this DCFS practice. (See HHS Grant Appeals Board Decision of April 13, 1989, Appendix 1 hereto).

2. Statutory Violations in Gina Johnson's Case

DCFS has never made reasonable efforts to prevent placement of Gina Johnson's children or to reunite her family. It is undisputed that DCFS offered no services to the Johnson family at the time the children were removed. (T. of Walter Henry). In fact, the DCP worker's early "reunification" efforts were directed only at placing the children with one of the fathers, a man who had been convicted of murder. A variety of services were available, however, and could have been used to attempt to keep the family together, including removal of the perpetrator and placement in a protective shelter with the remainder of the siblings. (T. of Kane at 181-2, 184, 224). Other services which could have been utilized to avoid placement included an

emergency caretaker, day care, and crisis counseling. (Id. at 183-224).

Following removal DCFS did refer plaintiff Johnson to services for domestic violence and sexual abuse, but none of these help her in meeting the impossible financial conditions imposed upon her. DCFS requires that she obtain "permanent" housing and that she live independently of any supportive services.¹⁵ The imposition of these financial conditions without correlative services to enable Ms. Johnson to meet them constitutes a clear violation of the AACWA's "reasonable efforts" and "case plan" requirements.

V. Plaintiffs Norman and Johnson are Irreparably Injured By DCFS's Imposition of Financial Conditions For Return of Their Children and DCFS's Failure to Assist Them to Meet These Conditions.

Few interests are considered as compelling as the interest of parents in maintaining custody of their children. Santosky v. Kramer, 455 U.S. 745, 753 (1982). Plaintiffs here have suffered lengthy separation from their children, based on conditions that are beyond their ability to satisfy. As a result of this separation, they have suffered psychological trauma and anxiety about their children, while their children's development has been

¹⁵ The AACWA clearly envisions that families should be reunited when supportive services enable them to do so. This is the entire thrust of the Act. (See remarks of Senator Cranston, *supra* at p. 39: "[T]he new provisions will require the states to...provide, wherever feasible, home-based services that will ...help reunite families". See also the remarks of Representative Stark: "[The AACWA] provides that a whole range of family reunification services be made available to the child and the family in order to bring the child home as quickly as possible". Cong. Rec. August 2, 1979 at 22114.

severely impacted by the separation. (T. of Dr. Littner). Moreover, Mr. Norman has suffered a complete loss of his subsistence income. Ms. Johnson lost her entire income following the separation from her children, and since July 1988 has only received \$154 per month. Loss of subsistence income long has been recognized as an "irreparable injury." See Moore v. Miller, 579 F.Supp. 1118, 1191 (N.D. Ill. 1983); see cases cited on pp. 3-5 of Pl. Mem. (March 3, 1989).

When constitutional and statutory rights are violated, injury may be presumed. See, e.g., Decker v. United States Department of Labor, 473 F.Supp. 770 (E.D. Wis. 1979). Here, however, no such presumption is required. The testimony at trial establishes clearly that plaintiffs Norman and Johnson have suffered enormously because of the prolonged separation from their children, and risk losing their family bonds altogether if the separation continues much longer. This harm to the plaintiffs clearly constitutes irreparable injury.

VI. DEFENDANTS' ARGUMENTS AGAINST RELIEF SHOULD BE REJECTED

Judge Hart has denied Defendant's Motion to Dismiss on abstention and Eleventh Amendment grounds. For that reason, plaintiffs will not reargue those issues here. Rather, plaintiffs here will address only defendant's newly-raised claim for dismissal based on collateral estoppel and their arguments concerning the burdens on them if relief is granted.

A. The Doctrine of Collateral Estoppel Does Not Apply to Issues Not Litigated Elsewhere.

Defendant in his pre-trial memorandum argues that plaintiff

here are barred by "issue preclusion" because they previously litigated and lost in state court the same issues raised here. (Def. Pre-trial Mem. p. 22). Defendant cites the test for collateral estoppel set forth in Kunzelman v. Thompson, 799 F.2d 1172, 1176 (7th Cir. 1986):

- (1) the party against whom the doctrine is asserted was a party to the earlier proceeding;
- (2) the issue was actually litigated and decided on the merits;
- (3) the resolution of the particular issue was necessary to the result;
- and (4) the issues are identical.

The evidence presented at the hearing demonstrates that under the Kunzelman test, requirements two, three and four have not been met here.

Defendant has failed to show that, in either case, the issue of whether reasonable efforts were made to avoid family separation was actually litigated in state court and decided on the merits. The facts presented at trial demonstrate the contrary. The orders for temporary custody of Lynetta and Jamie Norman (Def. Exhs. 1 and 2) record no findings on the issue of "reasonable efforts."¹⁶ Similarly, the juvenile court's dispositional orders for each of the Johnson children contain blanket omissions of "reasonable efforts" findings, and defendant can point to no prior litigation before the juvenile court

¹⁶ State law requires that, in making a finding that reasonable efforts have been made, "the court shall state in writing its findings concerning the nature of the services that were offered or the efforts that were made to prevent removal of the child and the apparent reasons that such services or efforts could not prevent the need for removal. Ill. Rev. Stat. ch. 37 §802-10(2). None of the orders presented conform to the requirements of state law.

concerning reasonable efforts. This is not surprising, in light of the testimony provided by DCP worker Walter Henry. Mr. Henry testified that, while he was the only employee of the Department present at the temporary custody hearing for the Johnson children, he proffered no testimony concerning reasonable efforts made by the Department, because the issue "never came up". Gina Johnson also testified that there was no temporary custody hearing in her case because the public defender consented to temporary custody without her approval (T. of Johnson p. 116).

Second, the resolution of the "reasonable efforts" issue is not necessary to the determinations before the juvenile court, despite defendant's misstatement of law to the contrary (Def. Pre-trial Mem. p. 23). The juvenile court in hearing a motion for temporary custody can and does determine the merits of such motion if it finds "probable cause" to believe the child was abused or neglected and "urgent and immediate necessity" exists for removal. The court may make such findings even if no reasonable efforts to prevent removal were made. See Ill.Rev.Stat. ch.37 §802-10(2). Thus, resolution of the "reasonable efforts" issue is not necessary to the result of the state court proceeding.

Finally, the issue of reasonable efforts before the juvenile court is not identical to the issue presented here, if only because the juvenile court at no time has been called to determine if reasonable efforts currently are being made in the Norman or Johnson case.

The collateral estoppel rule has also been held to require reference to state law to determine if state courts themselves would give preclusive effect to the findings at issue. Kunzelman supra; Allen v. McCurry, 449 U.S. 90, 66 L.Ed 2d 308, 101 S.Ct. 411 (1980); Migra v. Warren School Dist Bd. of Ed. 465 U.S. 75, 79 L.Ed 2d 56, 104 S.Ct. 892 (1984). Illinois law, however, adopts a similar test to Kunzelman and limits the doctrine only to identical issues "actually litigated and determined". Benton v. Smith, 157 Ill.App 3d 847, 510 N.E. 2d 952 (1st Dist. 1987) (and cases cited therein). The Illinois test is not whether plaintiffs had an opportunity to litigate the issues but whether they actually did litigate. Defendant here cannot meet this test since the "reasonable efforts" issue was never actually litigated in either James Norman's and Gina's Johnson state court cases.

B. The Balance of Harms and Public Interest Weigh Heavily In Plaintiffs Favor ¹⁷

Defendant argues he will be harmed if this Court intervenes and "substitutes its judgment" for that of its trained social workers. He further argues that all caseworker judgments will be affected by one federal court order here. Finally, he contends that the interests of plaintiffs' children may not be served by an "infusion of cash" to their parents, since this money will not protect against future DCFS intervention.

These arguments are specious. Plaintiffs do not seek to overturn caseworker judgments as to whether those children should

¹⁷ See pp. 8-10 of Pls. Mem. (March 9, 1989) regarding the additional test of absence of adequate remedies at law.

return home. In fact, the caseworkers here have already made the judgment that the Norman and Johnson children should return home. (See service plans at Pls. Exhs. 1-4 ("02" goal on all plans means "return home" goal). Rather, plaintiffs challenge the imposition of specific conditions for return of their children--conditions that plaintiffs cannot on their own satisfy. The caseworkers' judgments as to the appropriateness of services are also not challenged. Rather, plaintiffs challenge the defendant's policies and practices that result in DCFS's inability to provide services to enable plaintiffs to meet those conditions. These policies and practices include: (1) lack of any program to coordinate child welfare service delivery, especially cash and housing services; (2) authorization of DCP intervention to remove children from their homes without also empowering DCP workers to offer services to prevent removal; (3) failure to assign follow-up workers until weeks, or perhaps months, have elapsed with children in placement; and (4) failure to apprise workers of available cash or housing assistance while authorizing the imposition of income and housing requirements to regain custody. These policies and practices of defendant preclude caseworkers from delivering these services even if the workers decide they are most needed. Defendant's interpretation of plaintiffs challenge to defendant's failure to render services to particular families as a challenge to caseworker discretion is thus misplaced.

With respect to defendant's argument that a "cash infusion"

will not assist these plaintiffs, DCFS itself recognizes, albeit in a limited fashion, the importance of meeting clients' subsistence needs. It thus has adopted several modest programs to help clients in need of housing, but none of these programs currently are available to families like James Norman's or Gina Johnson's who are already separated and who cannot now locate permanent housing.

Defendant's strained argument that cash may not protect these children also flies in the face of his own workers' judgment that meeting the housing and income conditions in the service plans will lead to family reunification.¹⁸

Finally there is no doubt that the public interest, articulated in constitutional case law, the Illinois Family Preservation Act and the AACWA is served when families are reunited. See Illinois Migrant Council v. Pilliod 540 F.2d 1062, 1071 (7th Cir. 1976), mod., 548 F.2d 715 (7th Cir. 1977) (en banc). Defendant has no legal or financial interest in prolonging foster care here, or in delaying family reunification.

VII. CONCLUSION

As argued here, plaintiffs have met the prerequisites for preliminary injunctive relief, and defendant has offered no persuasive reasons why such relief should not issue. Plaintiff thus seek an order compelling defendant to refrain from imposing

¹⁸ Of course, no one can guarantee DCFS will never intervene in these families in the future. But refusing to help plaintiffs now cannot be justified on the basis of speculation as to unknown future possibilities.

financial conditions on plaintiffs' reunification with their children, or, in the alternative, provide plaintiffs Norman and Johnson with such financial assistance, services and referrals for services as will promptly enable them to obtain housing and otherwise satisfy the financial conditions DCFS has interposed as obstacles to the reunification of their families. This relief is absolutely necessary to prevent further irreparable injury to plaintiffs and their children.

Respectfully,


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