IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

TYLESHA L. MASON and FERNANDEZ MASON , BY AND THROUGH LISA CANNON, AS THEIR NEXT FRIEND; HANNAHA WHITE, BY AND THROUGH CRYSTAL D. WHITE, AS HER NEXT FRIEND; SIMEYON EVANS, BY AND THROUGH ANDREA EVANS, AS HIS NEXT FRIEND, Plaintiffs, v, STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and RON ROSS, DIRECTOR Defendants.	)	Case No.CI 00-3389 **PLAINTIFFS' CLOSING ARGUMENT MEMORANDUM**

Introduction

The Nebraska Department of Health and Human Services has erroneously applied the Family Cap to newborn children of low-income disabled mothers across Nebraska whom are represented by this class of plaintiffs. The imposition of the Family Cap on these needy children is against clear statutory language, legislative intent, and public policy. The defendants' erroneous application of the Family Cap to the families of disabled adults does even greater damage to the very families who are in the greatest need and have no ability to become self-sufficient or make up for the cash assistance denied to their families.

The NOW Legal Defense and Education Fund Amicus brief succinctly identifies the harsh realities faced by members of the plaintiff class throughout their daily life. It

further illustrates the dramatic effects caused by the erroneous application of the Family Cap and identifies the damage it imposes upon the entire family.

> The hardship caused by the Family Cap is increased for a family of a disabled parent not only because of the parent's additional costs and limitations, but also because as her children grow, so do the costs of meeting their basic needs. Families who are struggling to survive on limited benefits are even more likely to suffer from inadequate or unsafe housing, lack of sufficient food, and other shortages of basic necessities where the only adult(s) in the family are disabled. Although, SSI may be available, the slightly higher benefit levels are only expected to make up for the recipient's higher expenses. Families of disabled parents where one or more children are denied ADC benefits under the Family Cap are even more likely to have difficulty meeting basic needs.

(Amicus Brief at 16)

Discussion of Dependent Children

The plaintiffs are dependent children as defined under Neb. Rev. Stat. § 43-501 et seq., which applicable language states:

> (1) The term dependent child shall mean a child under the age of nineteen years who is living with a relative in a place of residence maintained by such relative as her own home. (2) Except as provided in subdivision (2)(b) of § 68-1724, in awarding aid to dependent children payments, the term shall include an unborn child but only during the last three months of pregnancy.

(See also, 468 NAC 1-009 p. 2-3, the rule promulgated by the Department of Health and Human Services that defines a dependent child. (Exhibit A, p.1).

The plaintiffs are dependent children as defined under § 43-504 who are eligible for ADC financial assistance if the child's family is income and resource eligible under Neb. Rev. Stat. § 43-512. Nevertheless, the defendants have denied each of the plaintiffs their basic subsistence ADC benefits, on the pretext that the children were ineligible for such payment because of the so called "Family Cap" in the Welfare Reform Act, Neb. Rev. Stat. § 68-1724 (2)(b). (Plaintiff's Petition at 4-5)

The welfare reform initiatives include the "dependent children" cash assistance program authorized by Neb. Rev. Stat. § 43-512 (Reissue 1996). See e.g. Neb. Rev. Stat. § 68-1713 (m), (n), (o), and (p). This program for those applying for "financial assistance pursuant to § 43-512 [the ADC program]" was further reformed to focus on the individual assessment and self-sufficiency contract process for those with the "capacity to work", and to placing conditions on cash assistance for those with the capacity to work. Neb. Rev. Stat. § 68-1718 through 68-1726. The specific welfare "program" at issue in Neb. Rev. Stat. § 68-1724(2) (b) is designed to help families through a comprehensive assets assessment and a self-sufficiency contract. It is not the cash assistance program generally. (Plaintiffs' Trial Brief at 13)

This position is clearly illustrated by one of the primary sponsors of the Welfare Reform Act during floor debate, Senator Rasmussen:

> First of all, let's understand what's actually happening here. If we pass this legislation what we will have is a contract, and under that contract there will be support for the family size at the beginning of that contract. We will not be deducting or sanctioning someone for having an additional child, that is not what this policy is about. What it is saying is we are not going to give the additional $71.00 for a child born ten months beyond the initiation of the contract. . . This is not a policy about discouraging welfare families from having lots of children, because as I opened today and shared with you, the fact of the matter is the average size of someone on welfare is about two children. So I don't want to play into the myth that we are trying to promote this policy on the basis that people on welfare are having lots of children and are being irresponsible about that decision.

Floor Debate, LB 1224, 93rd legislature, Second Session, 1994 at 11939-11970 (debate on Senator Dierks' Amendment 4132 to strike the family cap and Senator Chambers' motion to reconsider Amendment 4132).

Discussion of Whom is Considered Exempt under the Welfare Reform Act

Neb Rev. Stat. § 68-1709(a) does contemplate people not able to work and thus unable to become self-sufficient. Indeed, the Nebraska Legislature candidly recognized the need to continue cash assistance benefits for these "exempt" families. In its legislative declarations, the Nebraska Legislature stated that the welfare system should be reformed by "providing continuing assistance and support for persons sixty-five years of age or over and for individuals and families with physical, mental, or intellectual limitations preventing total economic self-sufficiency." (Plaintiffs' Trial Brief at 11) This language directly applies to the members of this class.

When examining statutory construction and legislative intent, the fact that a broader construction imposes hardship upon those affected by the law argues against adopting that construction absent clear indication of legislative intent. A narrow construction is particularly appropriate where, as here, the hardship imposed by a broad view is directly contrary to the stated purposes of the law. A broad construction of the Family Cap would in fact, impose such hardship, only a narrow construction is consistent with traditional rules of statutory interpretation and the legislative intent. (Amicus Brief at 7)

Therefore the legislature could not have intended to impose hardship on families of parents with such disabling limitations. An examination of the Welfare Reform Act by one of its primary proponents, then Governor Ben Nelson, clearly recognizes the position of the plaintiff's class,

> The goal of LB 1224 [the Welfare Reform Act] is to remove recipients who are able to work from welfare to productive work so that they are able to support their families and themselves as well. These initiatives will not excuse government from the

> responsibility of assisting people who truly depend on public assistance for their ongoing day-to-day survival . . .For those unable to leave public assistance, we want to support them also in keeping their human dignity.

Committee Hearing, LB 1224, 93rd Legislature, Second Session, 1994 at 3-12.

Discussion of "Participation" and "Program" under the Welfare Reform Act

The Nebraska Welfare Reform Act, Neb. Rev. Stat. §§68-1708 through 68-1734 (2000 Cumm. Supp.), is very clear: the exclusion of subsistence benefits for children born into a family receiving cash assistance ten or more months of "participation in the program," Neb. Rev. Stat. §68-1724(2)(b) (Reissue 1996) does not apply to the children of those families whose "principal wage earner" is exempt from "participation in the program." This statute is clearly intended solely for those families with the capacity to enter a self-sufficiency contract and participate in its required activities. The actual language of the Nebraska Welfare Reform Act and legislative intent make this abundantly clear. (Plaintiffs' Trial Brief at 5)

The plain language of Nebraska Welfare Reform Act leads to the conclusion that the Family Cap is a condition only applied to the cash assistance of those "participating" in the self-sufficiency program. The fact that the defendants apply it to all children means it is being unlawfully applied to children of those families whom are "exempt" from participating in work activities required in a self-sufficiency contract. (Plaintiffs' Trial Brief at 11-12) The statute and legislative history are clear that such "participation" is to be "actively engaged" in required "work activities" described within a "self-sufficiency contract". This principal was clearly enunciated in the floor debate concerning the Welfare Reform Act, by one of its primary sponsors. A restriction on the

amount of cash assistance available is based upon the initial bilateral contract between a recipient and the State. Members of the plaintiff class are not subject to this contract.

> We are going to be talking about, number one, doing initial comprehensive assessment. Based on that assessment we will move to a self-sufficiency contract that defines the responsibilities for the state and the individuals. We are going to be requiring full participation as defined by the self-sufficiency contract.

Floor Debate, LB 1224, 93rd legislature, Second Session, 1994 at 11939-11970 (Senator Rasmussen-debate on Senator Dierks' Amendment 4132 to strike the family cap and Senator Chambers' motion to reconsider Amendment 4132).

The defendant's position that "participation" in the program is simply receiving benefits is incorrect. As the class of families in which the "principal wage earner" is exempt form participation in such a "program" the defendants are unlawfully excluding subsistence benefits from members of the class. Given this clear policy it is disturbing to realize the effects the defendants' broad-brush position. (Plaintiffs' Trial Brief at 6)

The term "participation in the program" described in Neb. Rev. Stat. §68-1724(2)(b), clearly refers to the work activities of a self-sufficiency contract formed after the applicant completes a comprehensive assets assessment and becomes a recipient engaged in a self sufficiency contract, not the act of merely receiving cash assistance benefits. This is demonstrated by a simple review of the clear statutory language. (Plaintiffs' Trial Brief at 12).

The Nebraska Welfare Reform Act set conditions on cash assistance for the self-sufficiency program featuring self-sufficiency contracts, not cash assistance generally. As Dan Cillessen, Director of the Economic Assistance for the Nebraska Department of Health and Human Services, indicated in his testimony; the terms "participation" and

"program" are terms of art that have a specifically tailored meaning. They are not broad general terms. Therefore, the defendants recognize the specificity required within each program yet apply the terms in a general manner which results in gross inequities.

The terms participation and program can be further clarified upon examination of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. This is the federal law defining the parameters for the States' welfare reform initiatives.

> (B) Monthly Participation Rates-The participation rate of a State for all families of the State for a month, expressed as a percentage, is- (i) the number of families receiving assistance under the State program funded under this part that include an adult head of household who is engaged in work for the month. . .(d) Work Activities Defined-As used in this section, the term work activities [i.e. participation] means [a listing of twelve education and employment activities].

Personal Responsibuity and Work Oppurtunity Reconcilliation Act , § 401 and 407 (1996). Federal law dictates that participation in the program is defined as involvement in work and or educational activities. Nowhere in the list of possible work activities enumerated does it contemplate that mere acceptance of cash assistance is a form of participation within the program.

Discussion of Defendants' Arguments

The defendants contend that a change in their policy would cause constitutional equal protection violations, harm mothers whom may receive a larger income amount through child support payments, and would be an administrative nightmare to implement. Each of these arguments is without merit. (Defendants' Brief at 6-7 and Trial Statements).

It is well established principal that when a case can be decided on merits otherwise the court will decline to base a ruling on the constitutional issues. Despite the

defendants constitutional concerns, "The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purposes of challenged governmental action. Absent this threshold showing one lacks a viable equal protection claim. Benitez v. Rasmussen, 261 Neb. 806, 817; 626 N.W. 2d 209, 219, (2001). Further, "The Equal Protection Clause is inapplicable however to groups of persons who are not similarly situated". United States v. Woods, 888 F. 2d 653 (1989). It is clear that an Equal Protection argument is inapplicable to this class of plaintiffs because they are not similarly situated to other cash assistance recipients due to their physical, mental, or emotional disabilities. They are disabled and without the ability to become self-sufficient and thus not similarly situated to other cash assistance recipients whom are required to fully participate within the context of a contract and meet the ultimate goal of self-sufficiency.

The defendants assert that some members of the plaintiff class may have a child support order in place that is in excess of $71.00 per month and a change in their application of the Family Cap provision would result in harming some members of the plaintiff class. This is simply a scare tactic. As indicated in Ms. Cannon's testimony, a child support order is not in fact an actual payment. Further, for low-income or unemployed fathers subject to a child support order the amount may in fact be much lower than $71.00 per month. Defendant's have failed to specifically identify how many, if any, within the plaintiff class would be adversely affected in such a manner. As noted so eloquently in the floor debate concerning the Welfare Reform Act when this very argument was debated, "Senator Rasmussen had said that if the ladies in this situation would get child support how they might be better off. Well, as they always say, if wishes

were horses beggars would ride." Floor Debate, LB 1224, 93rd Legislature, Second Session, March 29, 1994 at 11939-11970 (debate on Senator Dierks' Amendment 4132 to strike the family cap and Senator Chambers' motion to reconsider Amendment 4132).

The fact that a change in policy would create an "administrative nightmare" is ludicrous. The defendants are applying the Family Cap provision in violation of statue, legislative intent and public policy goals. Administrative changes in the application of this policy, which conform to the law, should be the tantamount concern of the defendants.

Conclusion

The exclusion of subsistence benefits for the children of parents unable to work and support themselves does not help these families become self-sufficient, the primary policy goal of the Nebraska Welfare Reform Act. In fact, it forces very poor families and children to become even poorer, places these children at risk, and damages the entire family. The Nebraska Welfare Reform Act's Family Cap provision clearly does not apply to children of disabled mothers whom are not subject to a the participation requirements within a contract and are unable to meet the goal of ultimate self-sufficiency. The defendants are engaged in a policy that is at total odds with the Nebraska Welfare Reform Act and their actions must be stopped. (Plaintiffs' Trial Brief at 6)

Tylesha Mason and Fernandez Mason, by and through Lisa Cannon as their next friend, Hannaha White, by and through Crystal D. White as her next friend, and Simeyon Evans, by and through Andrea Evans as his next friend, and all others similarly situated, Plaintiffs.

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