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Emma McMullen

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For the Good of the Group: Using Class Actions and Impact Litigation to Turn Child Welfare Policy into Practice in Illinois

By Emma McMullen

The Children's Bureau, a division of the Federal Department of Health and Human Services, has defined child welfare as "a group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families to care for their children successfully."¹ Considering this definition of child welfare, it makes sense to put children at the center of any child welfare legal analysis as well as making them the primary concern of family law.² Meeting children's needs should be the goal of policy initiatives within child welfare and family law because doing so promotes justice toward the next generation.³ However, the current rhetoric of child welfare policy debates often focuses on adults' responsibilities in parenting and guardianship—both the responsibilities of the parents themselves and the state when it acts as a guardian through child welfare services.⁴ All children deserve and need to be heard, and this article will argue that child welfare laws should reflect that concept.

Unfortunately, children affected by child welfare policy frequently go unheard because they have been alienated from the creation of the system they ended up in. These children are essentially excluded from the system when their well-being is governed by laws that they have not had a say in making.

An alternate approach to traditional policy change within the child welfare system is to use class action lawsuits or impact litigation. Class actions and impact litigation are lawsuits that are filed by an individual or a small group of people who represent a larger group of people impacted by a practice.⁵ They can bring about larger policy shifts by demanding change in future treatment of that class. A study by Children's Rights, Inc. and the National Center for Youth Law found that over the past few decades class action lawsuits positively impacted the child welfare system in twelve jurisdictions they studied.⁶ Documented outcomes of class action litigation include enforcing quality assurance, expanding training, and increasing funding.⁷ Therefore, class actions are proven to be an alternative to traditional policy change within the realm of child welfare given the success they have had in reaching these outcomes on behalf of children.

This article will provide a brief history of the child welfare system nationally and within the state of Illinois. It will examine child welfare class action and impact litigation as an alternative to traditional legislative policy change in Illinois, focusing on four major efforts for reform: The

¹ *How the Child Welfare System Works*, CHILD WELFARE INFORMATION GATEWAY: CHILDREN'S BUREAU, U.S. DEPT OF HEALTH & HUM. SERV. (Feb. 2013), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf>.

² Barbara Bennet Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1814 (1993).

³ *Id.* at 1814, 1838.

⁴ *See generally id.* (discussing child welfare rhetoric and how it focuses on parents without giving attention to children's rights).

⁵ *Improving the Child Welfare Workforce: Lessons Learned from Class Action Litigation*, THE HUMAN SERVICES WORKFORCE INITIATIVE, (Feb 2017) available at http://www.cpsr.us/workforceplanning/documents/07.02_lessons_learned.pdf

⁶ Claire Sandt Chiamulera, *A Better Workplace: Learning From Class Action Litigation*, 26 NO. 2 CHILD L. PRAC. 28, 28 (2007).

⁷ *Id.* at 28-30.

B.H. Consent Decree, *Ashley M. v. the Department of Child and Family Services*, a series of class actions regarding safety plans, and *In re Aristotle P.* Finally, this article will look at the successes of these actions and determine the prospects of using this means of change in the future and how to discern if these methods of change are effective.

The child welfare system in America is relatively new; the federal legislation governing it has only been in place since 1980 and there have not been many changes to the initial framework except for a clarification of standards in 1997.⁸ The Adoption Assistance and Child Welfare Act lays out guidelines and a framework in which the states must fit their systems and provides standards states must meet in order to receive federal funding for their child welfare programs, but still leaves significant discretion to the states.⁹ Through this act, the federal government imposes standards for state systems that the states must set goals for their progress, display reasonable efforts, and create case plans for the children in care.¹⁰ But for the most part, there are no standardized systems for how these federal standards must be met by the states. While the federal government's legislation has remained mostly unchanged, states have gone through shifts in their policies.

Within child welfare policy, costs are immediate but the payoffs are delayed because the results are often not seen until the children are older. Therefore, it can be difficult to garner motivation and support for child welfare policy. Thus, child welfare legislation can be reactionary, meaning legislative pushes for policy change are spurred by specific instances where the policies have failed to protect children.¹¹ For example, after the Sandusky case in Pennsylvania, there were 24 pieces of state legislation passed to alter the mandated reporting statute in an attempt to better protect children.¹² When situations like this are heavily publicized, legislators act fast to tell their constituents they solved or prevented the problem, but while their motivation is important for change to occur, it can rush a solution without enough thought into the residual effects of the new policy. When people mobilize around these reactionary efforts, however, they want quick fixes and quick results. Reactionary policy is particularly dangerous within child welfare because it allows policymakers to claim they made a change and then ignore the problems.

⁸ *Id.*

⁹ *Adoption Assistance and Child Welfare Act*, Pub. Law 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C.A. § 670 et seq.).

¹⁰ *Id.*

¹¹ See generally Ariana Brockington, *Hot Car Deaths: Senators Propose Bill to Help Prevent Child Heatstroke in Vehicles*, NBC (Aug. 1, 2017) <http://www.nbcnews.com/news/us-news/hot-car-deaths-senators-propose-bill-help-prevent-child-heatstroke-n788571>, *Chloe Valentine's Death Prompts Changes to SA Child Protection Laws*, ABC (Apr. 14, 2016) <http://www.abc.net.au/news/2016-04-15/chloe-valentine-case-prompts-child-protection-amendments/7328078>, *Following Children's Deaths, Legislation looks to more closely monitor home-schoolers*, MICH. RADIO (Apr 17, 2015), <http://michiganradio.org/post/following-childrens-deaths-legislation-looks-more-closely-monitor-home-schoolers>, *Florida lawmaker Introduce 'Caylee's Law' in Response to Case*, TAMPA BAY TIMES, (July 7, 2011) <http://www.tampabay.com/news/publicsafety/crime/florida-lawmakers-introduce-caylees-law-in-response-to-case/1179303> (As can be seen from these examples, when tragic incidents involving children occur there are often efforts to prevent the future problem with legislation.)

¹² See generally *Penn State Scandal Fast Facts*, CNN LIBRARY (Nov. 8, 2016), <http://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts> (the Sandusky case involved a football coach from the Pennsylvania State University committing several counts of child abuse. After the news of this scandal broke, it became apparent that several other professionals knew what had occurred but hadn't reported it. Therefore, after the scandal, the legislators pushed for a legislative change to remedy this particular issue); Debra Schilling Wolfe, *Revisiting Child Abuse Reporting Laws*, 12 SOC. WORK TODAY 14 (2012); *Child Protective Services Laws*, PA. DEP'T OF HUM. SERV. (last visited June 1, 2017), <http://keepkidssafe.pa.gov/about/cpsl/index.htm>.

Additionally, it is difficult for children to advocate for themselves because throughout history, children's rights have been curtailed and they have been unable to fully participate in society as they are seen as lacking the capacity to make their own decisions.¹³ Originally, in America children were treated like property of their parents and valued for what they could provide to the family.¹⁴ While the nation has moved away from the proprietary conception of the parent-child relationship, children's rights are still abridged when they are seen as inferior to adults because they have less power in determining their own future.¹⁵ Parents are given both the right and the duty to raise their children; therefore, while children are no longer seen as their parents' property, they are still seen as an extension of their parents.¹⁶

When parents shirk their duty to parent, their right to do so is compromised.¹⁷ When this happens, the state must step in with the *parens patriae* power, meaning "parent of the country."¹⁸ This doctrine originated in England in the sixteenth century and gave the courts both the right and the responsibility to care for people who were unable to care for themselves, specifically the right to intervene when parents were not adequately caring for their child.¹⁹ This power was affirmed in the United States in *Ex Parte Crouse*, which stated it is in the interest of the state to raise the child if the parents are unable or unwilling to do so.²⁰ However, given the flaws in the system and its inability to take the children's perspective into consideration, its ability to step in as a parent under the *parens patriae* doctrine is hindered.

A child's entry into the child welfare system is another barrier these children have to advocating for their needs. It is already difficult for children to advocate for themselves in the legal system given their reduced position in society. They are not considered responsible enough to do certain things, such as vote or enter into contracts, until they reach adulthood, which is typically eighteen years old.²¹ There are also some things that children can only do with adult permission or assistance, such as initiate legal action.²² While in some cases children are allowed to testify in court cases, they are not allowed to file lawsuits without parental assistance.²³

When children's rights are less than those of adults, it becomes very difficult for them to fight for themselves, particularly within a court of law. While some states—like Illinois—appoint attorneys or guardians ad litem (GALs) to children once they enter the court system through child protective services, this is not the only time children could benefit from representation.²⁴ While these appointed attorneys are advocating for the child's rights and best interest within the particular

¹³ Anne C. Dailey, *Children's Constitutional Rights*, 96 MINN. L. REV. 2099, 2101 (2011).

¹⁴ Joan B. Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILD. 121, 121-22 (1994), <http://www.jstor.org/stable/pdf/1602481.pdf>.

¹⁵ Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 256 (1979).

¹⁶ *Id.*

¹⁷ *See generally* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹⁸ DOUGLAS E. ABRAMS, *A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI* 4-6 (2003).

¹⁹ Gregory Thomas, *Limitations on Parens Patriae: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51, 52-55 (2007).

²⁰ *Ex parte Crouse*, 4 Whart. 9, 10 (Pa. 1839).

²¹ RESTATEMENT (SECOND) OF CONTRACTS § 12 (AM. LAW INST. 1981).

²² *See generally* *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997) (discussing minors and permission for medical treatment).

²³ *See generally* Stephanie Rabiner, *Why Can't Minors File Lawsuits?*, FINDLAW (Apr. 17, 2012), <http://blogs.findlaw.com/injured/2012/04/why-cant-minors-file-lawsuits.html>.

²⁴ 750 ILL. COMP. STAT. ANN. § 5/506.

legal context issue, they are limited in scope as to what they can advocate for.²⁵ Additionally, Illinois and several other states can sometimes provide child representatives who represent the wishes of children as opposed to solely advocating for their best interests, but typically they are only appointed in domestic relations cases.²⁶ Therefore, because the contexts in which the GAL or child representative can act are limited, even when children obtain this representation, they are often still voiceless in advocating for their other needs after they have been removed from their parents' care and put in the child welfare system.

Not only do children struggle to find a voice within their individual cases, but they are systematically excluded from assisting in creating child welfare policy. Although every state has an individual child welfare system in place, these systems are not always effective at protecting children, as is evidenced by the children who fall through the cracks, whether that be by spending too long in a temporary home, being transferred between multiple foster homes, not receiving proper services, being taken from their parents unjustly, or one of myriad other potential problems that could arise in flawed state systems.²⁷ While some systems work better than others, every state has children who are hurt by the policy framework intended to protect them.

I. ILLINOIS CHILD WELFARE BACKGROUND

To understand the impact of child welfare class actions in Illinois, it is important to understand the trajectory of how the child welfare system has developed in the state, especially considering the class action suits discussed here against the Illinois Department of Children and Family Services (DCFS). Illinois has consistently been on the forefront of many legislative changes involving children. DCFS was established on January 1, 1964 and was the first cabinet-level state child welfare agency.²⁸ Prior to the creation of DCFS, child welfare efforts were a part of the Department of Mental Health.²⁹ Illinois also housed the first juvenile court, was one of the first states to pass child protection laws, and implemented one of the nation's first child abuse hotlines.³⁰ However, legislative progress has come in waves and often caused the pendulum of child welfare practices to swing between extremes, frequently going too far one way.

The mission of DCFS is to protect abused and neglected children, increase families' capacities to care for children, provide permanent families, support early intervention, and partner with communities.³¹ DCFS offers a range of services and interventions to fulfill this mission, such as providing temporary out-of-home placements, finding foster parents, offering parenting classes, providing treatment programs for parents, and more. The number of children served by DCFS has ranged from 4,000 in 1964, the year it was established, to 51,000 in 1997; currently, it serves approximately 15,000 children per year.³² The number has not only varied as a result of the agency

²⁵ Child Representative/Guardian Ad Litem, CIR. CT. OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/DomesticRelationsDivision/ChildRepGuardianAdLitemGAL.aspx> (last visited Mar. 29, 2017) [hereinafter Child Representative].

²⁶ 750 ILL. COMP. STAT. ANN. § 5/506.

²⁷ Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 CHILD., FAM., AND FOSTER CARE 1 (2004).

²⁸ *About DCFS*, ILL. DEP'T. CHILD. FAM. SERV. https://www.illinois.gov/dcf/aboutus/Pages/ab_about.aspx (last visited June 1, 2017).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

offering more comprehensive services and thus serving more clients, but also has fluctuated the system's priorities have shifted.

While the mission of DCFS is noble, its work is not without criticism. Since its creation, there have been several class action suits brought against DCFS to reorient its practices to better serve the children that come into the system. While lawsuits are not thought of as a traditional means of policy implementation the way legislative changes are, the lawsuits have nonetheless often been effective in making the desired changes. The following examples of class actions will demonstrate this assertion.

II. B.H. CONSENT DECREE

The first class action to be discussed is *B.H. v. Sheldon*, a class action suit the American Civil Liberties Union (ACLU)³³ in Illinois brought against DCFS in 1988.³⁴ The plaintiffs were a group of ten children who ranged from two to seventeen years old who had been removed from their homes and placed in DCFS custody after experiencing abuse, neglect, or dependency.³⁵ The complaint alleged that DCFS routinely subjected the children to serious damage to their mental health, development, and physical well-being, specifically, purporting DCFS failed to provide them with safe and stable placements.³⁶ The plaintiffs also claimed they had been shuffled among upwards of six homes or facilities, often ending warehoused in violent and overcrowded shelters or in foster homes where they once again faced abuse and neglect from which DCFS was supposed to protect them.³⁷ The complaint also alleged that DCFS failed to provide children and families with appropriate services to prevent the initial removal from their home or ultimately to reunify these children with their families.³⁸

The Court held that the plaintiffs' allegations set forth a claim under the Fourteenth Amendment, as the treatment violated the children's constitutional right to be "free from unreasonable or unwarranted intrusions upon their physical and emotional well-being."³⁹ It in turn found that, at a minimum, the state must provide the children adequate food, shelter, clothing, and medical care, as well as adequately train caseworkers on how to secure these basic constitutional rights for the children.⁴⁰

³³ See generally *Our History*, ACLU, <http://www.aclu-il.org/about/our-history> (last visited June 1, 2017) (The ACLU is a "non-partisan, non-profit organization dedicated to protecting the liberties guaranteed by the U.S. Constitution, the state Constitution, and state/federal human rights laws. The ACLU accomplishes its goals through litigating, lobbying, and educating the public on a broad array of civil liberties issues.").

³⁴ *B.H. v. Sheldon: Case Overview*, ACLU, <http://www.aclu-il.org/bh-v-sheldon22> (last visited June 1, 2017) [hereinafter *Case Overview*]. The reason this is called "B.H. v. Sheldon" is because the current DCFS director's name is George Sheldon. The case as originally filed as *B.H. v. Gordon Johnson*, as he was the director in in 1989, and when the consent decree was published it was originally titled *B.H. v. Sue Suter*.

³⁵ Consent Decree, *B.H. v. Sheldon* (No. 88-C-5599, N.D. Ill., Dec 20, 1991), <http://www.aclu-il.org/wp-content/uploads/2011/07/B%20H%20-%201997%20Restated%20Consent%20Decree.pdf> [hereinafter *Consent Decree*].

³⁶ *Id.* at 2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 3 (A procedural due process claim was also raised, but that will not be discussed in this article as it was originally dismissed and was not a part of the consent decree.).

⁴⁰ *Id.*

The parties settled the case and as a result of negotiations, agreed to enter into the B.H. Consent Decrees; thus, it was a form of settlement and not a determination of liability.⁴¹ The lawsuit and resulting consent decree led to several positive impacts on children. First, the required reforms have improved the safety of the children by ensuring DCFS provide at least minimally adequate care, meaning the children in DCFS care are free of physical harm and receive adequate food, clothing, shelter, and mental and medical care.⁴² Second, it holds DCFS accountable to these promises by creating a system that improved caseworkers' ability to provide appropriate and necessary services, enforce reasonable efforts standards, and make timely decisions about children's placements.⁴³ Third, it led to a shift in the supervision system that provides for more thorough investigations and has helped ensure accountability within DCFS and its employees.⁴⁴ Fourth, the B.H. Consent Decree created regulations for case plans to ensure they are developed promptly and thoroughly and are ultimately effective.⁴⁵

In 1993, five years after litigation began, DCFS completed an initial assessment of the circumstances to determine what changes would need to be made to comply with the consent decree.⁴⁶ As a part of the settlement agreement, the ACLU has been tasked with holding DCFS accountable for the changes it promised to make when it agreed to the B.H. Consent Decree and in order to do this it was granted the judicially enforceable right to request DCFS compliance through a court.⁴⁷ For example, although Illinois did not have a budget from 2014 until July 2017, the ACLU requested compliance with the B.H. Consent Decree to demand that child welfare services continue to be funded.⁴⁸ The ACLU itself is burdened with monitoring the actions of DCFS to ensure it complies with the B.H. Consent Decree, and, if a violation occurs, it is the ACLU's responsibility to bring the violation to the attention of the judge who can order DCFS compliance.⁴⁹

In addition to requesting compliance, the ACLU has also used the B.H. Consent Decree as a jumping off point for further changes. Following reports from 2014 of a severe shortage of mental health services provided to children at residential homes, the ACLU utilized the consent decree to spur negotiations for further systematic changes with former DCFS Director George Sheldon.⁵⁰ The ACLU informed DCFS it was in violation of the consent decree then filed an emergency motion to enforce compliance.⁵¹ In 2015, the Court granted the motion and appointed experts to evaluate the services and recommend appropriate solutions, proving the consent decree continues to be an asset to children in DCFS care.⁵²

While the B.H. Consent Decree has been a cornerstone for DCFS reform, it is not a solution in and of itself because the enforcement process is neither simple nor automatic. The ACLU must

⁴¹ *Id.* at 5.

⁴² Consent Decree, *supra* note 35, at 9.

⁴³ *Id.* at 10, 51; Case Overview, *supra* note 34.

⁴⁴ Case Overview, *supra* note 34.

⁴⁵ Consent Decree, *supra* note 35, at 19.

⁴⁶ *Id.* at 11-12.

⁴⁷ *Id.*

⁴⁸ Case Overview, *supra* note 34; Consent Decree, *supra* note 35.

⁴⁹ Consent Decree, *supra* note 35, at 55-57.

⁵⁰ Case Overview, *supra* note 34.

⁵¹ *ACLU urges Federal Court to Force Changes on Broken and Dangerous DCFS*, ACLU (Feb. 16, 2015), <http://www.aclu-il.org/aclu-urges-federal-court-to-force-changes-on-broken-and-dangerous-dcfs>.

⁵² Case Overview, *supra* note 34.

monitor DCFS's progress, as there is no other entity holding them accountable.⁵³ On one hand, DCFS has positively impacted children by implementing new ACLU-approved programs and raising standards of care to comply with the consent decree terms.⁵⁴ However, DCFS has also at times attempted to make changes that are not in line with the consent decree, at which point the ACLU was forced to request compliance through the court.⁵⁵

The B.H. Consent Decree was an alternative avenue for change in this situation because it allowed not only for policy change, but also for accountability from DCFS to ensure maximum benefits to children. By putting children at the forefront of policy change, the B.H. Consent Decree ensured the changes would target their needs in a way traditional policy was not satisfying. It brought deficiencies to light and corrected them.

III. ASHLEY M. v. DCFS

Another case that illustrates the impacts of class action and impact litigation in the child welfare system is *Ashley M. v. DCFS*, a case brought in 2013 by the Family Defense Center, a Chicago-based nonprofit whose mission is to advocate for justice for families impacted by the child welfare system.⁵⁶ Unlike *B.H. v. Sheldon*, the named plaintiffs in *Ashley M.* were parents, but nonetheless, its outcomes focused on changing DCFS practices to better serve families and therefore better serve children. There were six named plaintiffs for the class, all similarly situated in that they had been affected by a DCFS administrative regulation known as Allegation 60.⁵⁷ Allegation 60, otherwise known as "environment injurious," was a catch-all category that DCFS used to indicate parents for abuse and neglect⁵⁸ when no other violations could be proven.⁵⁹ In 1980, however, in *Julie Q. v. Dep't of Children & Family Servs.*, the Illinois Appellate Court declared Allegation 60 should not serve as a basis for a neglect finding.⁶⁰ The Supreme Court of Illinois later affirmed this ruling and declared Allegation 60 void in 2013.⁶¹

However, when the Abused and Neglected Child Reporting Act was amended in 2012, lawmakers once again proposed including the language "environment injurious" as one way to define neglect of a child.⁶² The final form of the bill as passed into P.A. 97-0803 gave DCFS the authority to investigate and indicate persons for subjecting a child to an "environment injurious" meaning the parent or guardian blatantly disregarded their duties and that was likely to cause the

⁵³ Consent Decree, *supra* note 35.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See generally *About Us*, THE FAM. DEFENSE CTR. (April 9, 2017), <http://www.familydefensecenter.net/about-us/>.

⁵⁷ 9A ILL. JURISPRUDENCE FAM. L. § 11:106;

Complaint at ¶ 731, *Ashley M. v. DCFS*, No. 2013-CH-20278, 2013 WL 5273715, (Ill. Cir. Ct. Sept. 3, 2013).

⁵⁸ See generally 325 ILL. COMP. STAT. ANN. §5/3 (When a parent has been "indicated" of child abuse or neglect it means that credible evidence was found that the alleged abuse and neglect exists. When this an investigation is unfounded, it means that there is not credible evidence that the alleged abuse or neglect existed. If an indicated report is later unfounded, it means that the adult's record is expunged of this finding and the status of the report changes.).

⁵⁹ Complaint at ¶ 26, *Ashley M. v. DCFS*, No. 2013-CH-20278, 2013 WL 5273715, (Ill. Cir. Ct. Sept. 3, 2013).

⁶⁰ *Julie Q. v. Dep't of Children and Family Servs.*, 963 N.E.2d 401, 413 (Ill. App. Ct. 2011).

⁶¹ *Julie Q. v. Dep't of Children and Family Servs.*, 995 N.E.2d 977, 986 (Ill. 2013).

⁶² S.B. 2849, 97th Gen. Assemb., 1st Reg. Sess. (Ill. 2012); *Ashley M. v. DCFS*, No. 2013-CH-20278, 2013 WL 5273715, at ¶¶ 32-38 (Ill. Cir. Ct. Sept. 3, 2013).

child harm, and that the parent unreasonably exposed his or her child to an obvious danger without exercising precautionary measures.⁶³

Despite the decision affirmed by the Illinois Supreme Court declaring Allegation 60 void, DCFS continued to apply Allegation 60 in such a way that had already been declared void.⁶⁴ While DCFS was voluntarily unfounding indications made prior to the date of the Appellate Court decision, they continued to use Allegation 60 to investigate and indicate families without employing any of the limitations passed in P.A. 97-0803, thus violating the Illinois Supreme Court holding.⁶⁵

When the Family Defense Center brought *Ashley M.*, they were opposing DCFS's use of Allegation 60 after it had already been declared void.⁶⁶ While each named plaintiff pled unique facts, the relief sought on behalf of the class was that all subsequent indications under Allegation 60 were to be expunged. The Circuit Court in *Ashley M.* held that because the Supreme Court previously found Allegation 60 to be void *ab initio*,⁶⁷ it was as if P.A. 97-0803 had never been passed.⁶⁸ The Court therefore held that investigations and indications under Allegation 60 were in violation of the Procedures Act and outside the scope of DCFS's authority.⁶⁹ Following this ruling by a Circuit Court judge, this case eventually settled.⁷⁰

The settlement agreement stated that DCFS had to expunge all indicated findings entered in the one-and-a-half-year period between the Appellate Court ruling and the Supreme Court ruling.⁷¹ The settlement also required that DCFS implement investigation procedures that conformed to the new tenants and requirements of the new Allegation 60.⁷² Additionally, DCFS was required to implement new training on the changes to all investigative staff and to issue a memorandum to all service providers and employees informing them of the changes.⁷³

This class action litigation was able to make a policy change that was not being accomplished through the legislative process, as demonstrated by the repeatedly void versions of Allegation 60 that were being unjustly used by DCFS.⁷⁴ Similar to the B.H. Consent Decree, this litigation required an outside agency to enforce DCFS policies, but in this case the policies already should have been in place. Even after the *Ashley M.* settlement, DCFS continues to incorrectly implement Allegation 60 to indicate mothers who are non-offending adult victims of domestic

⁶³ Complaint at ¶¶ 32, 36, *Ashley M. v. DCFS*, No. 2013-CH-20278, 2013 WL 5273715, (Ill. Cir. Ct. Sept. 3, 2013).

⁶⁴ 89 ILL. ADMIN. CODE tit. 89, § 300 app. B (2014).

⁶⁵ Complaint at ¶¶ 44, 46, *Ashley M. v. DCFS*, No. 2013-CH-20278, 2013 WL 5273715, (Ill. Cir. Ct. Sept. 3, 2013).

⁶⁶ *Id.* at ¶¶ 39-40.

⁶⁷ Black's Law Dictionary defines void *ab initio* as "null from the beginning." *Void*, BLACK'S LAW DICTIONARY (9th ed. 2009).

⁶⁸ Judge's Memorandum and Opinion at 4, *Ashley M. v. DCFS*, No. 13-CH-20278, 2014 WL 3535216 (Ill. Cir. Ct. May 28, 2014).

⁶⁹ *Id.* at 5.

⁷⁰ Melissa L. Staas, *Victorious settlement in Ashley M. v. DCFS secures class wide relief for Illinois residents wrongfully accused for "environment injurious" and ensures long-lasting reform*, FAM. DEF. CTR. (Feb. 10, 2015), <http://www.familydefensecenter.net/victorious-settlement-in-ashley-m-v-dcfs-secures-class-wide-relief-for-illinois-residents-wrongly-accused-for-environment-injurious-and-ensures-long-lasting-reform>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

violence, despite that they should be presumed not neglectful.⁷⁵ And while the Family Defense Center continues to fight for these clients as the cases arise, the Ashley M. settlement was a victory for families because it expunged at least 3,000 indicated findings from the state central register, meaning 3,000 wrongful indications of neglect were removed from people's records.⁷⁶

IV. SAFETY PLAN ILLINOIS IMPACT LITIGATION

Another DCFS practice the Family Defense Center combatted with impact litigation was safety plans. In 2017⁶, the Family Defense Center settled a series of suits against DCFS challenging the uncorrected implementation of safety plans in a way that harmed children.⁷⁷ Safety plans are a tool DCFS uses during investigations of child abuse and neglect where an investigator removes the children from the home of their guardian, and typically to place them with a relative or friend when the investigator deems there to be an immediate and imminent threat of harm to the child.⁷⁸ Frequently, although safety plans are meant to be only a few days long, they often last longer and throughout the duration of the safety plan communication between the parent and the child is at least restricted, if not completely halted.⁷⁹ The measure is meant to be voluntary for parents, but parents are often coerced into signing the plans to avoid a consequence threatened by the investigator.⁸⁰ If the parent does not consent to the safety plan, the investigator still may remove the child by taking protective custody, and while this is a more involved process than just requiring a parent signature on the safety plan, it is more permanent than a safety plan.⁸¹ While safety plans can be beneficial, when implemented unjustly they only end up hurting the children DCFS is meant to protect. The Family Defense Center challenged these incorrect implementations.

The first of the safety plan suits that the Family Defense Center brought was *L.W. v. Simpson*, a federal civil rights case that alleged the practice of inquiring into a parent's mental health status during the investigation was discrimination and a violation of the Americans with Disabilities Act. In the underlying facts of this case, DCFS was investigating L.W.'s mother after a call was made to the child abuse and neglect hotline stating she was a paranoid schizophrenic,

⁷⁵ *Id.*

⁷⁶ Staas, *supra* note 74.; Diane Redleaf & Sara Gilloon, *Family Defense Center Files Civil Rights Suit on Behalf of Violence Victim and Her Children, Case Exposes Illegal Policy Practices of DCFS*, 18 FAM. DEFENDER 2015, <http://www.familydefensecenter.net/wp-content/uploads/2015/02/familyDefenderIssue18.pdf> (last visited June 1, 2017).

⁷⁷ 2016 Safety Plan Settlements, FAM. DEFENSE CTR., <http://www.familydefensecenter.net/fdc-cases/2016-safety-plan-settlements> (last visited June 1, 2017) [hereinafter 2016 Settlements].

⁷⁸ *Understanding and Responding to Department of Children and Family Services' Abuse and Neglect Investigations in Illinois*, FAM. DEFENSE CTR. (April 2016), <http://www.familydefensecenter.net/wp-content/uploads/2016/04/Responding-to-Investigations-Manual-FINAL.pdf>; *Safety Plan Rights and Responsibilities for Parents*, DCFS, https://www.illinois.gov/dcf/aboutus/notices/Documents/CFS_1441-D_Safety_Plan_Rights_and_Responsibilities_for_Parents_and_Guardians.pdf (last visited June 1, 2017) [hereinafter Rights and Responsibilities]; *Hernandez v. Foster*, 657 F.3d 463, 474-475 (7th Cir. 2011).

⁷⁹ 2016 Settlements, *supra* note 77.

⁸⁰ See *Hernandez*, 657 F.3d 463. 7th Circuit Appellate Court denounced coercion practices for safety plans, reversing an earlier decision, *Dupuy II v. Samuels*, which claimed coercive safety plans were acceptable because they still gave the parent the choice. *Id.*

⁸¹ Rights and Responsibilities, *supra* note 78.

an accusation that was later proved false.⁸² Without investigating to determine if this was true, DCFS took protective custody of L.W. with no basis for this demand and told L.W.'s mother she could have no contact with her child.⁸³ She was then indicated of neglect under "environment injurious," despite this allegation being considered void in March of 2013.⁸⁴ This case challenged the unlawful separation of L.W. from the mother under the Fourteenth Amendment and the Americans with Disabilities Act as well as various other claims about the improper procedure followed during the investigation.⁸⁵

This case was settled in 2016 and the settlement included a promise by DCFS to craft a new mental health policy and procedure and to end the use of mental illness as a risk category during its safety assessment.⁸⁶ Most notably, the settlement included a provision that DCFS would clarify and revise its standards for removing children from their home and implementing safety plans.⁸⁷ By clarifying the safety plan protocol to investigators and case workers, DCFS began reorienting how safety plans were used to allow them to be beneficial to children instead of unjustly separate them from their parents.

The second safety plan case the Family Defense Center brought was *W.M. et al v. Giscombe*.⁸⁸ In this case, the Family Defense Center opposed the DCFS practice called "hospital holds," a tactic used to prevent parents under investigation for abuse or neglect from taking their child home from the hospital.⁸⁹ W.M. was brought to the hospital for an injury that a doctor reported as potential abuse and W.M. was then held in the hospital for several days before DCFS came to interview his parents.⁹⁰ The parents were told that if they wanted to leave the hospital with W.M., they would have to agree to a safety plan.⁹¹ This is contrary to the standard that safety plans are to be voluntary agreements.⁹²

W.M.'s parents ultimately agreed to the safety plan and despite the guidelines for safety plan duration, it continued for almost three months.⁹³ Although doctors clarified there was no evidence did not conclusively prove child abuse, DCFS maintained protective custody of W.M.⁹⁴ Thus, W.M. was taken into protective custody without probable cause or exigent circumstances, which specifically violates *Hernandez v. Foster*.⁹⁵ Eventually, the juvenile court determined that

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*; Julie Q. v. Dep't of Children and Family Servs., 995 N.E.2d 977, 986 (Ill. 2013).

⁸⁵ Complaint at 3, *L.W. v. Simpson*, Case N. 1:13-cv-8463, available at <http://www.familydefensecenter.org/wp-content/uploads/2016/08/L.W.-v.-DCFS-Filed-Complaint-11-22-13.pdf>.

⁸⁶ *Id.*; Memorandum Opinion and Order, *L.W. v. DCFS*, N. 1:13-cv-8463, available at <http://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2013cv08463/290284/43/>.

⁸⁷ *Id.*

⁸⁸ *W.M. v. Giscombe*, Civil Action No. 15-cv-305, available at <http://www.familydefensecenter.org/wp-content/uploads/2016/08/Complaint-File-Stamped.pdf>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Rights and Responsibilities, *supra* note 81.

⁹³ *W.M. v. Giscombe*, Civil Action No. 15-cv-305, available at <http://www.familydefensecenter.org/wp-content/uploads/2016/08/Complaint-File-Stamped.pdf>.

⁹⁴ *Id.*

⁹⁵ 2016 Settlements, *supra* note 80; *Hernandez*, 657 F.3d 463 (holding that either probable cause or exigent circumstances are constitutional requirements for removing a child).

there was no probable cause to find W.M. neglected and he was returned home.⁹⁶ However, after this decision, DCFS would not remove W.M.'s mother with an indicated finding until an attorney intervened on her behalf.⁹⁷

DCFS suggested the case be settled and the parties reached several agreements.⁹⁸ First, they agreed that DCFS cannot utilize a "rule out" policy, meaning DCFS cannot take protective custody of children when it cannot rule out abuse; instead, there must be specific evidence of abuse to take protective custody.⁹⁹ Additionally, DCFS agreed to discontinue the use of the "hospital hold" policy, which the Family Defense Center deemed a coercive practice that can lead to unlawful safety plan demands.¹⁰⁰ This settlement protects the fundamental rights of parents to parent because it prevents DCFS from taking children away from parents unjustly.¹⁰¹

Together, these class action litigations were able to make great strides in holding safety plans to the standards set out in their creation and keep their use focused on their intended purpose. While these cases were focused on the rights of parents, they were doing so to implement best practices to benefit children. Although DCFS agreed to the settlement, it is difficult to enforce its terms until it is too late and the safety plan is already implemented. Therefore, the Family Defense Center has used not only class action means to try to correct these problems, but has also fought in individual cases and provided pro se resources to parents adversely affected after being coerced into a safety plan.¹⁰² Again, the problem of accountability arises when DCFs has promised to implement a practice but there is no accountability forcing them to do so. Part of the problems that arise with holding DCFS accountable for the proper use of safety plans is that attorneys are not often alerted when a safety plan is created. While both settlements are recent, it is clear from the history of the Family Defense Center that they will continue to hold DCFS to their promises and in turn reorient the system work to protect the children and families as it is meant to.¹⁰³

V. ARISTOTLE P. v. GREGG

The final lawsuit which will be addressed here, In 1988, *Aristotle P. v. McDonald*, was brought by the Office of the Cook County Public Guardian against DCFS in 1988.¹⁰⁴ In this suit, the plaintiffs were children with siblings who had been removed from their homes and placed in foster care without their siblings and were denied opportunities for visitation with their siblings.¹⁰⁵ Claimants brought claims under the Adoptive Assistance and Child Welfare Act of 1980, the First

⁹⁶ W.M. v. Giscombe, Civil Action No. 15-cv-305, available at <http://www.familydefensecenter.org/wp-content/uploads/2016/08/Complaint-File-Stamped.pdf>.

⁹⁷ *Id.*

⁹⁸ 2016 Settlements, *supra* note 77.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; *Troxel v. Granville*, 530 U.S. 57, 57 (2000) (establishing a fundamental right to parent).

¹⁰² *Understanding and Responding to Department of Children and Family Services' Abuse and Neglect Investigations in Illinois*, FAM. DEFENSE CTR. (April 2016), <http://www.familydefensecenter.net/wp-content/uploads/2016/04/Responding-to-Investigations-Manual-FINAL.pdf>.

¹⁰³ *See generally* 2016 Settlements, *supra* note 77.

¹⁰⁴ Complaint, *Aristotle P. v. Johnson* (N.D. Ill. 1989) (No. 88 C 7919).

¹⁰⁵ *Id.*

Amendment, and the Fourteenth Amendment.¹⁰⁶ They asked that while in foster care, the children were either to be placed in a foster home with their siblings or permitted to visit them regularly.¹⁰⁷

The case proceeded to The United States District Court in 1989.¹⁰⁸ The claim under the Adoptive Assistance and Child Welfare Act of 1980 was dismissed, but the First and Fourteenth Amendment claims remained.¹⁰⁹ The court found the siblings had a constitutional right to maintain these relationships.¹¹⁰ Eventually the court recommended, and the parties agreed, it was best to settle to avoid the burdens of future litigation.¹¹¹ The decision to settle came in 1993 and the resulting consent decree was filed in March of 1994, five years after the case was filed.¹¹²

The Aristotle P. Consent Decree required that DCFS promulgate new rules governing the placements of siblings in foster care and review the placements of siblings currently in foster care.¹¹³ The new rules clarified that it was in the best interest of the child to be placed with a sibling unless there were short-term diagnostic placements, there was a risk of emotional harm if placed together, the placement together would remove one sibling from a placement in his best interest, or a separate placement was necessary for permanency.¹¹⁴ The consent decree also stated that if the caseworker felt it was not in the best interest of the child to be placed with his or her siblings, the case plan must reflect why this was the case.¹¹⁵ The new rules also required a diligent search to locate a placement that could accommodate all siblings.¹¹⁶ The Consent Decree required a review of placements for all siblings in the foster care system to ensure they complied with the newly rules promulgated rules.¹¹⁷

Additionally, the Consent Decree mandated that DCFS facilitate sibling contact and visitation when placement together is not possible.¹¹⁸ DCFS is to provide the foster parents with the contact information for the sibling or siblings in other care.¹¹⁹ In turn, the foster parents are to provide for visits for siblings at least twice a month unless ordered otherwise, if the sibling does not want visits of this frequency, or distance does not permit.¹²⁰ DCFS is required to facilitate these sibling relationships whenever possible, with only a few exceptions for good cause.¹²¹ Further, DCFS must make sibling contact and visits part of the child's service plan.¹²²

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Aristotle P.*, 721 F. Supp. 1002 (N.D. Ill. 1989).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (sibling relationships should be protected from unjust state interference); *See generally* Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187 (1993).

¹¹¹ *Aristotle P.*, 721 F. Supp. at 1012; Consent Decree, *Aristotle P. v. Ryder*, 88-C-7919, 1, 3 (N.D. Ill. 1994), available at <https://www.clearinghouse.net/chDocs/public/CW-IL-0006-0006.pdf>.

¹¹² Consent Decree, *Aristotle P. v. Ryder*, 88-C-7919, 1, 3 (N.D. Ill. 1994), available at <https://www.clearinghouse.net/chDocs/public/CW-IL-0006-0006.pdf>.

¹¹³ *See generally* Consent Decree, *Aristotle P. v. Ryder*, 88-C-7919, 1 (N.D. Ill. 1994), available at <https://www.clearinghouse.net/chDocs/public/CW-IL-0006-0006.pdf>.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 9-10.

¹¹⁶ *Id.* at 10.

¹¹⁷ *Id.* at 10-11.

¹¹⁸ *Id.* at 12, 15.

¹¹⁹ Consent Decree at 12-13, *Aristotle P. v. Ryder*, 88-C-7919, 1 (N.D. Ill. 1994), available at <https://www.clearinghouse.net/chDocs/public/CW-IL-0006-0006.pdf>.

¹²⁰ *Id.* at 15.

¹²¹ *Id.* at 13-14.

¹²² *Id.*

Finally, the Consent Decree required that within one year of its entry, both DCFS workers and private agency staff be trained in implementing the new rules and that they continue to be updated on the training.¹²³ It also required foster parents be informed of the rule and trained on sibling relationships.¹²⁴ It gave the Public Guardian's Office the ability to review the training materials as well.¹²⁵

In order to monitor the Consent Decree and the progress that would be made, DCFS was to continue to inform the Office of the Public Guardian of any proposed changes made to rules and procedures regarding sibling visits and provide adequate time for comments before passage and implementation.¹²⁶ DCFS was to review the children in care and discern the number of sibling groups in care, the number placed together and separately, and the results of quality assurance of those not placed together.¹²⁷ As of 2016, the Consent Decree is still in place and has been renewed multiple times.¹²⁸

Unfortunately, upon the 2014 renewal of the consent decree, the data showed that the reviews of the siblings were not being completed or filed as intended—only 65 reviews were conducted for 467 sibling groups.¹²⁹ Additionally, DCFS failed the 2012 United States Department of Health and Human Services random sampling of sibling visitation performance because in only 55% of cases reviewed were children placed with siblings.¹³⁰ DCFS has canceled meetings with the Office of the Public Guardian, who have tried to collaborate on best practices, and has failed to account for the decreasing number reviews.¹³¹ An issue that has become apparent is the lack of reasoning given for why a sibling placement is not sought.¹³² While the parties agreed there were some reasons why it would be impractical to keep sibling groups together, without documentation proving that was the case it appears the separations are a violation of these children's rights. There have been multiple issues of non-compliance and lack of enforcement.¹³³ The Consent Decree was extended on February 23, 2015 for two years and the Office of the Public Guardian continues to push for DCFS's compliance.¹³⁴

In this case, the lawsuit was filed by a state agency that was already working with the children in the class, unlike the previous cases, which were filed by outside agencies. Like the B.H. Consent Decree, this case was directly child-driven and was an out-growth of the children in care expressing the desire to see their siblings.¹³⁵ The changes were designed to fill the need for family connections that the children demonstrated and expressed. Although the results have not

¹²³ *Id.* at 21.

¹²⁴ *Id.* at 22.

¹²⁵ Consent Decree at 22, *Aristotle P. v. Ryder*, 88-C-7919, 1 (N.D. Ill. 1994), available at <https://www.clearinghouse.net/chDocs/public/CW-IL-0006-0006.pdf>.

¹²⁶ *Id.* at 23-24.

¹²⁷ *Id.* at 24.

¹²⁸ Children's Report to the Court and Motion to Extend the Consent Decree for Two Years and For Additional Relief, *B.H. v. Gregg*, No. 88-C-7919, (N.D. Ill. 2014).

¹²⁹ *Id.* at 2.

¹³⁰ *Id.* at 5.

¹³¹ *Id.* at 3.

¹³² *Id.* at 4.

¹³³ *Id.* at 6.

¹³⁴ Children's Report to the Court and Motion to Extend the Consent Decree for Two Years and For Additional Relief, *B.H. v. Gregg*, No. 88-C-7919, (N.D. Ill. 2014).

¹³⁵ See generally Complaint, *Aristotle P. v. Johnson* 1, 4-17 (N.D. Ill. 1989) (No. 88 C 7919) (The complaint details the circumstances of each family and why they are bringing an action).

yet reached the level of success they could, the consent decree as a result of *Aristotle P.* allows for continued enforcement and continued progress toward the goal.

VI. MEASURING SUCCESS

When analyzing the success of class actions, it is important to look at both the promised changes and the actual impacts that result and how they alleviate the hardship of the affected class. The lawsuits discussed previously cannot be called successes at the formation of settlements or consent decrees, but instead the effects on children must be examined to measure the outcomes. Within child welfare, there are unique questions to be addressed to determine success and some of those will be addressed here.

a. Who gets a voice in class action lawsuits?

As previously defined, the goal of child welfare is to promote the well-being of children and therefore their needs should be at the forefront if the child welfare system.¹³⁶ Currently, child welfare rhetoric centers on parents' rights and responsibilities, making it hard to direct the policies toward who they are aimed to support—the children.¹³⁷ Class actions are a way to give the children in the system a voice to advocate for their needs by placing the child's best interests at the heart of the litigation. Yet, due to the legal restrictions on youth, specifically regarding age, class actions beg the question of which party, the parent or the child, has the more effective voice through impact litigation.

The Illinois cases previously discussed were not solely promoting for the rights of the children, but the right of the parents and the family as a whole. Four of these involved children as the named plaintiffs, but all were effective at putting the child's best interests at the heart of the litigation. However, it can be argued that cases like *Aristotle P.* or *B.H. v. Sheldon* are more likely to hold the child welfare systems accountable to the changes made because the changes directly affect the children, and therefore enforcement relates directly to the positive impacts on the children.

In many instances, the children who have entered the child welfare system are hindered from advocating for themselves. The case of *Aristotle P.* was particularly noteworthy considering the Office of the Public Guardian advocated for the children it served on a large scale, rather than fighting for individual change. With the power of an agency like the ACLU or the Family Defense Center, these children have the benefit of a strong advocate acting on their behalf. However, it is not necessarily easy for children to access these resources. Although in Illinois, children in the child welfare system may have the benefit of having the representation of their GAL, the GAL is more focused on the individual child's well-being and not in creating large scale policy change, considering his or her job is to advocate for the child's best interest.¹³⁸

Class actions and impact litigation provide more opportunities for children to be heard on concerns they have with how the system is operating, so long as they have an advocate to speak on their behalf. They may also have their rights advocated for through their parents in these types of litigation. Regardless of who the named plaintiffs are, when the litigation is fighting in the name of their voice, it ensures that they stay at the center of the discussion and the relief, unlike in traditional legislative policy change.

¹³⁶ *How the Child Welfare System Works*, *supra* note 1; Woodhouse, *supra* note 2, at 1755.

¹³⁷ See generally Dailey, *supra* note 14, at 2113.

¹³⁸ 750 ILL. COMP. STAT. ANN. 5/506.

b. How are these changes reflected in numbers?

As a data-driven society, one way that success is often defined is through numerical values— how many people were affected, how much money was saved, how long it took to accomplish something—people strive to quantitatively define success.

The ACLU reports the B.H. Consent Decree as having a large, positive impact on the child welfare system in Illinois because of the changes for which they were able to bargain.¹³⁹ However, it is important to note that throughout the implementation of the changes, there was notable shifting in the child welfare system.¹⁴⁰ The number of children in care in Illinois peaked at 51,000 in 1997, almost ten years after the consent decree was established.¹⁴¹ While the decline in the amount of children in welfare is admirable, and in some ways due to the B.H. Consent Decree, it is difficult to discern exactly how much change it spurred. One tangible way to follow how the B.H. Consent Decree is affecting the Illinois child welfare system is through the ways the ACLU is able to hold the state accountable for financing the services they provide.¹⁴² Following the 2014 budget crisis in Illinois when the state did not have a budget from 2014-2017, DCFS attempted to stop paying for necessary services to children and lay off workers, thus increasing caseloads of the remaining workers.¹⁴³ The ACLU referred the Court to the consent decree and requested a judge issue an emergency order that the state was to continue these services and pay for them despite the lack of a budget.¹⁴⁴ This process was also followed and an order was granted during a similar situation of under-funding in 2009.¹⁴⁵

Another way to analyze this litigation is to examine the number of families affected. For example, as a result of the *Ashley M.* verdict, the Family Defense Center estimated that 3,000 names would be expunged, meaning those parents would no longer be listed as “indicated” of child neglect under Allegation 60.¹⁴⁶ While this data is important and shows effective work, it begs the question of how much work DCFS did to remedy the situation. For example, once an adult is “indicated,” they can no longer maintain a job in a childcare field. In cases where a wrongfully indicated person has lost their job, simply expunging the record may not be enough. Additionally, although the data shows that DCFS complied with the written agreement to expunge the findings, future cases show that they continue to utilize Allegation 60 of neglect to investigate and indicate

¹³⁹ Case Overview, *supra* note 34.

¹⁴⁰ See generally *Few Options are Open for Drug Babies*, CHI. TRIB. (Jan. 31, 1996), http://articles.chicagotribune.com/1996-01-31/news/9602010284_1_drug-babies-alcohol-abuse-crack-cocaine (One such circumstance that led to an increase in the number of children in the system was the crack cocaine epidemic that hit Chicago in the late 1980s which led to more children coming into the child welfare system.); *Has Child Protective Services Gone Too Far?*, NATION (Sept. 30, 2016), <https://www.thenation.com/article/has-child-protective-services-gone-too-far/> (In a generation of free-range parenting, some feel the oversight by DCFS and similar agencies in other states has led to more involvement than necessary into families' lives and in turn brought too many children into the system).

¹⁴¹ About DCFS, *supra* note 32.

¹⁴² *ACLU asks federal court to protect vulnerable children during budget impasse*, ACLU (July 6, 2015), available at <http://www.aclu-il.org/aclu-asks-federal-court-to-protect-vulnerable-children-during-budget-impasse-2/>.

¹⁴³ *Id.*

¹⁴⁴ Joint Emergency Motion For Entry of Agreed Order, *B.H. v. Sheldon*, 88-C-5599 (N.D. Ill. 2015), available at <http://www.aclu-il.org/wp-content/uploads/2015/07/486-Joint-emergency-motion-and-exhibits.pdf>.

¹⁴⁵ *Victory for Children in State Custody*, ACLU (June 30, 2009), available at <http://www.aclu-il.org/victory-for-children-in-state-custody/>.

¹⁴⁶ Staas, *supra* note 70.

parents, thereby affecting the lives of the children.¹⁴⁷ So although the consent decree here did positively affect a significant number of families,

The *Aristotle P.* impacts have been tangible, but not as large as they ideally would have been, as evidenced by the continued extensions of the consent decree.¹⁴⁸ DCFS has failed to properly implement the agreed-upon practices and, as a result, too few reviews are being completed—specifically, in only 55% of the cases that need placement reviews and visitation support are receiving support based on the number from the random sample.¹⁴⁹ However, the Office of the Public Guardian continues to push DCFS to follow the agreed-upon policy, something that would not be as feasible without this consent decree.¹⁵⁰ Therefore, the changes that have come out of the decree are more positive than negative and do allow for continued pressure on DCFS to provide children the resources to pursue their right to connect with their siblings so long as the decree is extended.

While the safety plan litigation is still too new to determine any resulting data, these impact litigations show that there is more to a successful change than numbers may reflect. It will likely never be clear how many families were benefitted by the enforcement of proper safety plan implementation or how much money was saved. However, that is not an indication that the change was not successful in supporting children. Therefore, it is important to keep in mind all aspects of success when analyzing a change.

VII. CONCLUSION

Discussions of making the child welfare system “work” for those who it is intended for are not new.¹⁵¹ However, class actions take a different approach to the issue and allow not only the system to work for kids, but for kids to work within the system. Class actions in the form of impact litigation can be an effective use of legal power to make change in the child welfare system. Unlike legislative change, these four examples in Illinois show that using litigation to change the implementation of policy can be an appropriate way to make less reactive and more proactive change. Litigation brings the issue to the court as opposed to waiting for the legislators to change it and avoids the politics that is often intertwined in legislative changes. In Illinois, impact litigation has shifted the practices of the child-welfare system to be more child-directed, whether directly or indirectly.

However, complications with using impact litigation to bring change to the child welfare remain. First, it is difficult to bring this means of change to the people that need to utilize it. Second, it is hard to identify the problem when the people affected often do not have the opportunities to bring light on their situations when the agencies are not working with the children

¹⁴⁷ *Young Mother's Parental Rights Terminate for Smoking Marijuana*, THE FAM, DEFENSE CTR. (Aug. 4, 2016), <http://www.familydefensecenter.net/young-mothers-parental-rights-terminated-for-smoking-marijuana> (A mother was indicated under Allegation 60 for neglect in 2014 despite the allegation being declared null and void.).

¹⁴⁸ Children's Report to the Court and Motion to Extend the Consent Decree for Two Years and For Additional Relief, B.H. v. Gregg, No. 88-C-7919, (N.D. Ill. 2014), available at <https://www.clearinghouse.net/chDocs/public/CW-IL-0006-0007.pdf>.

¹⁴⁹ *Id.* at 5.

¹⁵⁰ *Id.*

¹⁵¹ See *Generally Making Child Welfare Work: How the R.C. Lawsuit Forged New Partnerships to Protect Children and Sustain Families*, BAZELON CTR. FOR MENTAL HEALTH (May 1998), http://www.bazon.org/LinkClick.aspx?fileticket=vUdhhPjx4_E%3d&tabid=104 (discussing past proponents and efforts of the child welfare system shifting to be more “child focused”).

on a daily basis. Third, there must be supporting agencies to take on these cases, such as the Family Defense Center or the ACLU, and these resources are limited.

Despite these challenges, there is hope for productive use of impact litigation in the child welfare system to give children and families who have been disenfranchised a voice to advocate for themselves.