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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Patricia Welsch, et al.,

Plaintiffs,

v.

Leonard W. Levine, et al.,

Defendants.

CIVIL 4-72-451

MEMORANDUM AND ORDER

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Luther A. Granquist, Legal Advocacy for Developmentally Disabled Persons in Minnesota, 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, MN 55415, for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, Maureen W. Bliss, Special Assistant Attorney General, and Beverly Jones Heydinger, Assistant Attorney General, Second Floor Space Center Building, 444 Lafayette Road, St. Paul, MN 55101, for defendants.

Thomas H. Jensen, Foster & Jensen, 754 Midland Bank Building, 401 Second Avenue South, Minneapolis, MN 55401, for intervenor.

Richard A. Cohen, Court Monitor, 106 Legal Education Center, 40 North Milton Street, St. Paul, MN 55104.

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This matter is before the Court on the motion of the Association of Minnesota Counties for an order of the Court permitting it to intervene as a party defendant in the above-entitled matter. The motion will be granted on the condition that intervention is allowed only with respect to the Hearthside Homes compliance proceeding and all matters directly appurtenant thereto.

FILED NOV 26 1986

JUDGMENT ENTERED

FACTS

This is a matter involving the Welsch consent decree[1] (the decree). The court monitor issued findings of fact and recommendations dated January 22, 1986, with regard to the Hearthside Homes compliance proceeding. Plaintiffs have moved for implementation of the monitor's recommendations. Defendants have interposed their vigorous objections. The Association of Minnesota Counties (AMC) now moves to intervene in this matter as a party defendant.

In the Hearthside Homes compliance proceedings the monitor found that paragraph 24 of the consent decree, which provides that "[p]ersons discharged from state institutions shall be placed in community programs which appropriately meet their individual needs," requires that defendants develop and implement an individual habilitation plan (IHP) for each discharged class member placed in a community program. Under the scheme envisioned by plaintiffs, implementation of IHPs would require Minnesota counties to promulgate written intervention plans setting forth specific objectives and teaching strategies, to regularly review and modify the plans, and to retain direct care, professional and supervisory staff, and develop state and county personnel standards. The responsibility for carrying out these broad policy objectives would for the most

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[1] The Welsch consent decree is the product of a 1972 class action brought by mentally retarded residents of Minnesota mental hospitals, all of whom had been judicially committed, seeking improvements in hospital conditions. The facts of the case are detailed in prior orders of the Court including Welsch v. Likins, 373 F.Supp. 487 (D.Minn. 1974); id. 68 F.R.D. 987 (D.Minn. 1975); id., 525 F.2d 987 (8th Cir. 1975); id., 550 F.2d 1122 (8th Cir. 1977).

part descend on the Minnesota counties which exercise day-to-day oversight responsibility for the various community programs. In light of the fiscal and administrative burden which implementation of IHPs would impose on the counties, the AMC filed this motion to intervene. The AMC is a private, voluntary association which represents the interests of Minnesota counties in a number of matters. At present, eighty-five of the state's eighty-seven counties belong to the AMC. The AMC's motion to intervene is brought pursuant to Rule 24 of the Federal Rules of Civil Procedure.

DISCUSSION

A. Rule 24(a) Intervention as of Right

Rule 24(a) of the Federal Rules of Civil Procedure provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a). Intervention as of right is required under the rule when: (1) the intervenor asserts an interest in the subject matter of the primary litigation; (2) there exists a possibility that the intervenor's interest will be impaired by the final disposition of the litigation; (3) there exists a danger of inadequate protection by the party representing the intervenor's interests; and (4) the intervenor has made a timely application to

intervene. Liddell v. Caldwell, 546 F.2d 768, 770 (8th Cir. 1976). The question of whether a right to intervene has been established is one committed to the discretion of the trial court, whose decision will not be overturned absent abuse of that discretion, Payne v. Block, 714 F.2d 1510 (11th Cir. 1983); Gabriel v. Standard Fruit & S.S. Co., 448 F.2d 724 (5th Cir. 1971), although the scope of permissible discretion is narrower when intervention as of right is sought. Brink v. DaLesio, 88 F.R.D. 610 (D.Md. 1980), reversed on other grounds, 667 F.2d 420 (4th Cir. 1981).

1. Interest in the Subject Matter - Impairment

Intervention of right requires a showing that the intervenor has a "significantly protectable interest" in the subject matter of the primary litigation. Donaldson v. United States, 400 U.S. 517, 531 (1971); Corby Recreation, Inc. v. General Electric Co., 581 F.2d 175, 177 (8th Cir. 1978). The interest requirement of Rule 24(a) is primarily a practical guide to disposition of lawsuits designed to involve as many apparently concerned persons as is compatible with efficiency and due process. United States v. Reserve Mining Co., 56 F.R.D. 408 (D.Minn. 1972).

The AMC has demonstrated a "significantly protectable interest" in the subject matter of the instant litigation. Implementation of the monitor's recommendations would have a far-reaching and direct impact on Minnesota counties in their administration of services to discharged class members. As noted above, it is the counties who bear primary responsibility for

administration of the community programs. See Minn. Stat. §§ 256B.092; 258B.20, subd. 4; 256E.08, subd. 1. Implementation of the monitor's recommendations would require Minnesota county officials to issue directives, monitor placements, and to take various other administrative actions. In addition, plaintiffs' motion raises several issues central to the AMC's primary oversight interest, including (1) the proper scope of the consent decree as it affects the counties; (2) the authority of the monitor and ultimately the Court to compel the counties as non-parties to take specific action; and (3) the appropriate role of the Court in complex state-county relations. The AMC has demonstrated the requisite interest in the Hearthside Homes compliance proceedings.

The AMC has also demonstrated that absent intervention there exists a possibility that its interests and the interests of its constituent members would be impaired. For purposes of Rule 24 intervention, the question of impairment is closely related to the question of intervenor's interest. National Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission, 578 F.2d 1341 (10th Cir. 1978). The interest claimed by intervenor need not be a direct interest provided it is an interest that would be impaired by an adverse outcome. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135-36 (1967). Here, a ruling in favor of the monitor's recommendations would have an immediate and direct impact on the fiscal and administrative interests of the AMC's constituent members. Implementation of the IHP program recommended by the monitor would, in some instances, require the counties to

employ additional direct care, supervisory, and professional staff, and would necessitate the promulgation of an extensive network of new and comprehensive regulations. Intervenor has shown the requisite potential for impairment.

2. Inadequate Representation

The burden resting on the intervenor to show that its interests are not adequately represented by existing parties is a "minimal" one. Little Rock School District v. Pulaski County Special School District No. 1, 738 F.2d 82, 84 (8th Cir. 1984). In assessing the adequacy of existing party representation the courts have considered whether the interests of a present party are sufficiently similar to that of the absentee such that the legal stance taken by the former will undoubtedly duplicate that taken by the latter, whether the present party is capable and willing to make such arguments, and whether, if permitted to intervene, the intervenor would add some necessary element to the proceedings which would not be covered by then parties to the suit. Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977). Other factors to consider include: the presence or absence of collusion between the representative and an opposing party, whether the interests of the representative are adverse to those of the intervenor, and whether the representative has been diligent in prosecuting or defending the litigation. Liddell, 546 F.2d at 771; Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania, 674 F.2d 970 (3d Cir. 1982); United States v. School District of Omaha, State of Nebraska,

367 F.Supp. 198 (D.Neb. 1973). Inadequacy of representation need not be shown to a certainty, Frank J. Delmont Agency, Inc. v. Graff, 55 F.R.D. 266 (D.Minn. 1972); it is sufficient if it is shown that such representation may be inadequate. Reserve Mining, 56 F.R.D. at 410.

Here, intervenor has amply met its burden of showing inadequate representation. The interests of the state of Minnesota and the counties at some points diverge, in that the state's interest lies in compliance with the Court's order, while the interest of the counties lies in whether they can or will comply with the state's directives. More significantly, intervenor will add a necessary element to these proceedings by voicing the viewpoint of those governmental entities most directly involved with implementation of the proposed IHPs. Further, the putative representative fully supports AMC intervention. Under the circumstances of the case at bar, the Court finds that intervenor has shown the requisite representational inadequacy.

3. Timeliness

The burden of establishing the timeliness of the request for intervention rests on the intervenor. Nevilles v. Equal Employment Opportunity Commission, 511 F.2d 303, 305 (8th Cir. 1975). The question of timeliness is to be determined by the district court in its discretion; absent an abuse of that discretion, the district court's decision will not be disturbed. Equal Employment Opportunity Commission v. Westinghouse Electric

Corporation, 675 F.2d 164, 165 (8th Cir. 1982). In exercising this discretion, several factors are probative, including the progress of the litigation at the time intervention is sought, the length of the delay, the reason for the delay, and the prejudice other parties would suffer if intervention were permitted. Westinghouse, 675 F.2d at 165; McClain v. Wagner Electric Corp., 550 F.2d 1115, 1120 (8th Cir. 1977); Liddell, 546 F.2d at 770.

The general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and justification for failure to request intervention sooner. United States v. Associated Milk Producers, Inc., 534 F.2d 113, 116 (8th Cir. 1976). This principle also pertains to intervention following entry of a consent decree. See, e.g., Westinghouse, 675 F.2d at 165. Here, the AMC seeks to intervene six years following entry of the Welsch consent decree. While this long delay is a significant factor militating against intervention, on balance the Court finds that intervenor's motion is timely. The Hearthside Homes compliance proceeding is the first such proceeding since the inception of this case in which plaintiffs have sought statewide relief that specifically and pervasively affects the counties. Prior compliance proceedings implicated specific class members and specific counties. Here, plaintiffs seek an order which would direct all Minnesota counties statewide to administer IHPs in conformity with the monitor's interpretation of paragraph 24 of the decree. The relief sought is far more sweeping than any previously sought in this matter; consequently, the AMC is

justified in seizing upon this opportunity to intervene. It cannot be said that the AMC was derelict in failing to intervene previously, in that the individual case compliance proceedings thus far litigated did not carry the far-reaching impact of the instant matter. It was not until the monitor issued his recommendation on January 22, 1986 that the nature and scope of the proposed relief became readily apparent. Shortly thereafter, the AMC sought leave to intervene. Under the circumstances, the Court finds that the AMC's motion to intervene is timely.

B. Pleading

Rule 24(c) provides that a motion to intervene shall be accompanied by a pleading setting forth a claim or defense for which intervention is sought. Fed.R.Civ.P. 24(c). The AMC failed to submit a pleading with its motion to intervene. This technical defect may be remedied without prejudice to the parties, however. See, e.g., Spring Construction Co. v. Harris, 614 F.2d 374, 376-77 (4th Cir. 1980). Accordingly, the AMC will be granted ten days from the date of this order to file the appropriate pleading.

The above analysis is limited to the Hearthside Homes compliance proceeding. Whether AMC intervention is appropriate as to other matters which may in the future arise in connection with the decree is an issue not presently before the Court. Accordingly, the AMC will be permitted to intervene for purposes of the Hearthside Homes compliance proceeding solely. Conditional intervention

limited to specified matters is fully permissible under Rule 24. Spirt v. Teachers Insurance and Annuity Association, 93 F.R.D. 627 (S.D.N.Y. 1982); Moore v. Tangipahoa Parish School Board, 298 F.Supp. 288 (E.D.La. 1969); Harris v. General Coach Works, 37 F.R.D. 343 (E.D.Mich. 1964).

Accordingly, based on the foregoing, and upon all the files, records, and proceedings in this matter,

IT IS ORDERED that the motion of the Association of Minnesota Counties to intervene as a party defendant in this matter is granted, except that intervention is limited to the Hearthside Homes compliance proceedings and all other proceedings directly appurtenant thereto.

IT IS FURTHER ORDERED that the Association of Minnesota Counties must file a Rule 24(c) pleading within ten days of the date of this order.

Judge Harry H. MacLaughlin
United States District Court

DATED: November 26, 1986