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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Patricia Welsh, et al.,

Plaintiffs,

v.

Sandra Gardebring, et al.

Defendants.

Civil 4-72-451

O R D E R

The above matter was before the undersigned on May 20, 1987, upon a motion to intervene by Minnesota Chapter, Congress of Advocates for the Retarded, Inc., Dean F. Thomas as legal guardian for Terry P. Thomas, and Melvin D. Heckt as parent and next friend of Janice M. Heckt. Karl Cambronne, Esq., appeared on behalf of applicant intervenors. Luther Granquist, Esq., and Ann Henry, Esq., appeared on behalf of plaintiffs. Maureen Bollis, Esq., and Beverly Jones Heydinger, Esq., appeared on behalf of defendant.

FACTUAL AND PROCEDURAL BACKGROUND

This case was commenced in 1972 on behalf of a class of judicially committed mentally retarded residents in Minnesota's state hospitals. Plaintiffs claimed that their rights under the due process clause of the Fourteenth Amendment to the United States Constitution were abridged because they were not receiving a minimal level of habilitation and because they were being committed to state institutions because of insufficient community alternatives. The action was initially commenced against the

Department of Public Welfare (now known as the Department of Human Services) of the State of Minnesota and the administrators of six of the Minnesota state hospitals (now known as Regional Treatment Centers or RTC's) providing services for disabled persons in the class.

Initially, the focus of the case was the Cambridge State Hospital. By order of the trial court in 1974, the class was certified, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, to include judicially committed mentally retarded persons at Cambridge and five other hospitals, with a subclass certified pursuant to Rule 23(c)(4) consisting of the class members residing at Cambridge. Further hearings were held in 1975 leading to a series of orders in 1976 which were considered by the Court of Appeals in 1977. In December, 1977, the parties negotiated a consent decree which applied only to the Cambridge State Hospital.

In May, 1980, plaintiffs presented their case with respect to four of the state hospitals. Defendants were to present their case in July, 1980. The parties, however, reached a tentative settlement prior to that time, and the court approved a consent decree on September 15, 1980. The parties agreed that the 1980 consent decree was applicable to all eight of Minnesota's state hospitals then serving members of the class.

The 1980 consent decree provided, inter alia, for reduction in the state hospital population from 2650 to 1850 by July 1, 1987, for certain staffing ratios, for procedures

governing the use of major tranquilizers and certain behavior management practices, for discharge planning and evaluation, and for the appointment of a monitor to review compliance with the decree and to report to the court, and to resolve complaints about non-compliance with the decree through a procedure which culminated in court review of the monitor's findings and recommendations.

In addition, the 1980 consent decree provided that the court's jurisdiction over the action would end on July 1, 1987, if the defendants had substantially complied with the terms of the decree. The parties agreed to amend that provision, and by order of the court dated April 14, 1987, the date was extended to September 30, 1987. This agreement was reached in order to allow time to facilitate settlement of the remainder of the action.

The parties submitted a negotiated settlement dated April 14, 1987, to the trial court. Approval of the settlement would obviate the need for protracted litigation to determine whether the defendants have substantially complied with the decree as required. The negotiated settlement is premised, in part, on passage of legislation providing for state administrative and judicial review of case management services for persons in the class.

Pursuant to the requirements of Rules 23(d)(2) and 23 (e) the trial court issued an order on April 14, 1987 requiring notice of the negotiated settlement to each class member, to the parents, guardian, or conservator of each class member, or to a

relative or close friend of each class member. On May 20, 1987, counsel for the class represented to the undersigned that the required notices have been given. A hearing regarding approval of the settlement is scheduled for June 5, 1987. It is contemplated that all those wishing to comment on the terms of settlement will be permitted to address the court.

Applicant intervenors served notice on the parties on May 5, 1987, of their intention to intervene to oppose the settlement. Both plaintiffs and defendants oppose the motion to intervene.

DISCUSSION

A. Intervention of Right

Intervention of right under Rule 24(a) of the Federal Rules of Civil Procedure requires, inter alia, that an applicant for intervention claim an interest relating to the property or transaction which is the subject matter of the action, and establish that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest. Fed.R.Civ.P. 24(a). In order to be allowed intervention as of right, applicants must make a showing that they have not only a mere interest, but a substantive, legally protectable interest relating to the case. Donaldson v. United States, 400 U.S. 517, 531 (1971).

Applicants for intervention claim that their interest is apparent by virtue of the fact that they are "guardians or close relatives of members of the plaintiff class and simply . . .

citizens of Minnesota who are concerned about the care which the state provides to members of the plaintiff class." The mere fact that a person is concerned about the general subject matter of a case is not the sort of legally protectable interest anticipated by the rules. Lelsz v. Kavanagh, 710 F.2d 1040, 1046 (5th Cir. 1983). In addition, applicants suggest that they have a legitimate interest in the retention of some adult children, including their own, in residential state institutions. They, however, cite no authority demonstrating a legally protectable right to be institutionalized in a state hospital for treatment of mental retardation. See Lelsz, 710 F.2d at 1047.

Applicants for intervention also claim that they have a legal interest in asserting the state's immunity to this action under the Eleventh Amendment. Applicants for intervention claim that this court lacks jurisdiction under the Eleventh Amendment to approve the settlement, citing Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984). Regardless of the merits of such an argument, in the circumstances here, the Eleventh Amendment does not provide the applicants a basis for intervention.

The Eleventh Amendment provides that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state, except insofar as the suit challenges the constitutionality of a state official's actions. A federal court is without jurisdiction to order a state to conform its activity to state law. Pennhurst,

supra. Applicants, however, cite no authority for the proposition that private parties may intervene in an action for the purpose of asserting the Eleventh Amendment immunity of the state. The defense is one for a state defendant to raise, or for the court to raise sua sponte. See Granados v. Reivits, 776 F.2d 180, 183 (7th Cir. 1985); McKay v. Boyd Construction Co., 769 F.2d 1084, 1086 (5th Cir. 1985); Akron Center for Reproductive Health v. Rosen, 633 F.Supp. 1123, 1129 (N.D. Ohio 1986). Moreover, the parties here have represented to the court that the proposed settlement has been very carefully drafted to avoid any instance in which the federal court, would have to determine if the state has violated state law.

Even if applicants' stated interests did evince a legally protectable interest, the motion for intervention of right must be denied because those interests are adequately represented by existing parties. Adequate notice was provided to members of the class and to guardians, parents, relatives or friends of members of the class of the hearing scheduled for June 5, 1987 regarding the negotiated settlement. The order, dated April 14, 1987, states that the court will receive comments in writing or at the hearing by or on behalf of persons with mental retardation who live at the regional treatment centers or who have been discharged from the regional treatment centers since September 15, 1980. It then sets forth the terms of the proposed settlement and specifies the locations at which proposed settlement documents may be reviewed. In short, applicants have

been given an opportunity to object to and participate in the court hearing regarding the proposed settlement.

It is obvious from a review of the terms of the proposed settlement itself that painstaking efforts have been made to carefully consider the interests of those persons remaining in state institutions, those who may be discharged, and those who will be discharged. The proposed settlement addresses the adequacy of treatment in the RTC's, and the discharge process. There is no ongoing reduction of population as was established in the 1980 consent decree, although it is probable that some persons will in fact be discharged. The proposed settlement also addresses the rights of parents who do not wish their children to be discharged and provides them with a right of appeal backed by a prompt action requirement. There is also a provision regarding a new appeals mechanism regarding the adequacy of case management and the quality of service provided. In addition, there are detailed proposals regarding the interests of those who remain institutionalized and those who may be discharged set forth in the proposed settlement, along with a detailed discharge protocol. Combined with the opportunity to participate in the court hearing regarding the proposed settlement, applicant's interests are amply represented by the parties already in the suit.

Finally, and very significantly, the motion to intervene is grossly untimely. Questions of timeliness in motions for intervention must be decided on the basis of all the

circumstances of the case. NAACP v. New York, 413 U.S. 345, 365-66 (1973); EEOC v. Westinghouse Electric Co., 675 F.2d 164 (8th Cir. 1982). Three factors are to be weighed in determining timeliness: (1) the stage of the proceeding; (2) prejudice to other parties, and (3) the reason for and the length of the delay. McClain v. Wagner Electric Corp., 550 F.2d 1115, 1120 (8th Cir. 1977); Arkansas Electric Energy Consumers v. Middle South Energy, Inc., 772 F.2d 401, 403 (8th Cir. 1985). In this case, the original lawsuit was filed in 1972, and the Faribault class members, which would include the individual applicant's children, have had notice of the issues related to the case for fifteen years. Both parties strenuously assert that they would be excessively prejudiced should applicants be allowed to intervene. They assert that applicants' purpose in bringing this motion is to undo the settlement of this lawsuit. Against these arguments, applicants do not provide an adequate explanation of their delay in moving to intervene. Plaintiff's attorney pointed out that if there was any time to intervene, it was in 1980 when a mandatory population reduction was initiated. The record is clear that at least one of the applicants, Mr. Melvin D. Heckt, knew of the case and its posture then, and had been following its progress since 1972. The case has been widely publicized, and the applicants have been kept abreast of the developments of the case.

In a similar case, the Eighth Circuit found that a motion to intervene in a class action was untimely where the

motion was filed after entry of a consent decree which was preceded by extensive, well-publicized, industrywide negotiations. Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (8th Cir. 1978). The court found that serious prejudice would befall the parties already in the suit because the decree was already being fulfilled, and to countermand it at such a late date would create havoc and postpone the needed relief. Id. at 659. In Alaniz, appellants sought intervention two and one-half years after suit was filed. The appellants knew or should have known of the continuing negotiations, and did not explain their delay. Accordingly, the court found that their application for intervention was properly denied.

In another case, the Ninth Circuit found that an applicant's motion for intervention was untimely where it was made only after a proposed, and as it turned out, final settlement had been reached by all the parties after five long years of litigation. General Acc. Ins. Co. v. Namesnik, 799 F.2d 539, 538 (9th Cir. 1986). The district court had held that "[t]here's no doubt in my mind that the possibility of this settlement unraveling is so prejudicial that to allow [intervention] would be tantamount to disaster here . . ." Id. At this late stage of the proceeding, where the prejudice to the parties likewise would be tantamount to disaster, and where the delay in the motion to intervene is gross without adequately supported reason, the undersigned finds it clear that applicant's motion for intervention should be denied.

B. Permissive Intervention

Permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure requires, inter alia, that an applicant for intervention claim a question of law or fact in common with that raised in the main action. Fed.R.Civ.P. 24(b). In addition, the court must consider, in exercising its discretion, whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

First, applicants for intervention characterize the common questions as "the nature and scope of the state's role in providing care and treatment for retarded citizens." As discussed above, such a broad policy reason for intervention does not qualify as a legally protectable interest, nor does it qualify as a common question of law or fact.

Prejudice to the parties is also evident and precludes the undersigned from exercising discretion to allow intervention. There is an overriding public interest in favor of settlement, especially in class actions. Alliance to End Repression v. City of Chicago, 91 F.R.D. 182 (D.C. Ill. 1981). Here, applicants desire specifically to challenge the proposed settlement, although, as discussed above, they already have the right to challenge the settlement at the court hearing. In addition, applicants seek to have the action dismissed. Applicants' effort to obtain dismissal of the action would unduly prejudice the current parties by undoing the substantial work-product of the parties over the last fifteen years that has finally culminated

in the proposed settlement. It would be grossly unfair to allow applicants to intervene at this point.

Finally, the undersigned finds that the approval process set forth in Rule 23(e) of the Federal Rules of Civil Procedure provides an extra measure of protection in ensuring a just result. See Piambino v. Bailey, 757 F.2d 1112, 1144 (11th Cir. 1985). Given the above, the undersigned finds that applicants' motion for permissive intervention must be denied.

Accordingly, based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the motion of applicants for intervention is DENIED.

DATED: June 9, 1987.

JANICE M. SYMCHYCH
United States Magistrate