

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

LAW PROJECT FOR PSYCHIATRIC)
RIGHTS,)
)
Plaintiff,)
)
vs.)
)
STATE OF ALASKA, et al.,)
)
Defendants.)
_____)

Case No. 3AN-08-10115CI

BEFORE THE HONORABLE J. SMITH
DECISION ON RECORD

Pages 1 - 22
Wednesday, May 27, 2009
11:15 A.M.
Anchorage, Alaska

1 ANCHORAGE, ALASKA; WEDNESDAY, MAY 27, 2009
2 11:15 A.M.
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4 THE COURT: All right. This is the time for
5 the Court to place on record its decision in
6 defendant's motion for judgment on the pleadings in
7 case 3AN-08-10115CI, which is captioned Law Project
8 for Psychiatric Rights, an Alaska Nonprofit
9 Corporation, vs. The State of Alaska, Sarah Palin,
10 Governor of the State of Alaska, the Alaska
11 Department of Health and Social Services, William
12 Hogan as Commissioner of the Department of Health and
13 Social Services, Tammy Sandoval, the director of the
14 Office of Children's Services, Steve McComb, Director
15 of the Division of Juvenile Justice, Melissa
16 Witzler-Stone, Director of the Division of Behavioral
17 Health, Ron Adler, Director/CEO of the Alaska
18 Psychiatric Institute, and William Streur, Deputy
19 Commissioner and Director of the Division of Health
20 Care Services, as defendants.

21 Plaintiff, an Alaska nonprofit corporation,
22 is a public interest law firm whose mission is
23 described as mounting a strategic litigation campaign
24 against forced psychiatric drugging and electroshock
25 treatment of minor patients.

1 are not approved by the Food and Drug Administration
2 or included in the American Hospital Formulary
3 Service drug information, the United States
4 Pharmacopoeia Drug Information or Drugdex Information
5 System or both.

6 And three, order that all children and
7 youth in state custody currently being administered
8 psychotropic drugs and all children and youth to whom
9 the State of Alaska currently pays for the
10 administration of psychotropic drugs be assessed in
11 accordance with and brought into compliance with the
12 specifications of CriticalThinkRX, which the Court
13 will describe as the training program to educate
14 individuals involved in prescribing and
15 administering psychotropic medications about, quote,
16 critical thinking, end quote, of alternatives,
17 especially nonmedication action. And that training
18 must be by a contractor knowledgeable of the
19 CriticalThinkRX curriculum. And such other relief as
20 the Court finds just in the premises.

21 Plaintiff filed the action, the Complaint,
22 on September 2nd, 2008. An Amended Complaint was
23 filed on September 29, 2008. Defendant filed this
24 motion for judgment on the pleadings on March 16,
25 2009. Oral argument was not requested by either

1 Plaintiff filed a 54-page Complaint arguing
2 that the current procedures employed by the state in
3 authorizing psychiatric medication and treatment of
4 juveniles violates the constitutional rights of
5 Alaskan children and youth.

6 Plaintiff seeks, one, a declaratory
7 judgment that Alaskan children and youth have the
8 constitutional and statutory right not to be
9 administered psychotropic drugs unless and until
10 evidence-based psychosocial interventions have been
11 exhausted, rationally anticipated benefits of
12 psychotropic drug treatment outweigh the risks, the
13 person or entity authorizing administration of the
14 drugs is fully informed of the risks and potential
15 benefits, and close monitoring of and appropriate
16 means of responding to treating-emergent effects are
17 in place.

18 Two, an injunction against the defendants
19 and their successors from authorizing or paying for
20 the administration of psychotropic drugs to Alaska
21 children and youth without conformance with paragraph
22 1 and approving or applying for Medicaid
23 reimbursements to pay for outpatient psychotropic
24 drug prescriptions to Alaskan children and youth that
25 are not medically necessary or for indications that

1 party.

2 The defendant argues in its motion that
3 pursuant to Alaska Rules of Civil Procedure 12(c),
4 that judgment on the pleadings is appropriate because
5 plaintiff failed to meet the actual controversy
6 requirement under the Declaratory Judgment Act
7 because plaintiff lacked standing to sue.

8 Defendant argues that AS 22.10.020,
9 subparagraph G, explicitly requires the presence of
10 an actual controversy before the Court may issue
11 declaratory relief and that this matter does not meet
12 the actual controversy requirement because plaintiff
13 lacks standing to sue. Therefore, defendant argues
14 the Court should dismiss the Complaint.

15 Defendant recognizes that Alaska case law
16 has broadly interpreted the concept of standing to
17 promote liberal access to the courts. See Brause vs.
18 State of Alaska, Brause is B-R-A-U-S-E, at 21 P3d
19 357, an Alaska Supreme Court case from 2001.

20 In fact, in Alaska a complaint seeking
21 declaratory relief requires only a simple statement
22 of facts demonstrating that the Superior Court has
23 jurisdiction and that an actual justiciable case or
24 controversy is presented. And again, that's from
25 Brause.

1 To this end, Alaska courts recognize two
 2 forms of standing, an interest injury standing, and
 3 citizen taxpayer standing. That's from North Kenai
 4 Peninsula Road Maintenance Service Area vs. Kenai
 5 Peninsula Borough at 850 P2d 636, an Alaska Supreme
 6 Court case from 1993.

7 However, Defendant argues that even under
 8 Alaska's liberal requirements, Plaintiff satisfies
 9 neither type of standing. Defendant argues that to
 10 establish interest injury standing, a plaintiff must
 11 have an interest adversely affected by the conduct
 12 complained of.

13 Generally, a plaintiff may not assert
 14 another's constitutional rights unless a special
 15 relationship exists between the plaintiff and the
 16 third party. See Gilbert v. State at 139 P3d 581,
 17 another Alaska Supreme Court case from 2006.

18 Here plaintiff does not assert interest
 19 injury standing or claim an adverse interest, nor
 20 does plaintiff claim any sort of relationship at all
 21 to any relevant individual. Therefore, defendant
 22 argues plaintiff has not asserted standing under the
 23 interest injury doctrine.

24 Finally, defendant argues plaintiff also
 25 lacks citizen taxpayer standing. Defendant argues

1 for Alaska vs. State at 736 P2d 324, an Alaska
 2 Supreme Court case from 1987, it has citizen taxpayer
 3 standing to pursue these claims.

4 Plaintiff argues that this case raises
 5 issues of public significance and that there is no
 6 more directly affected plaintiff likely to bring this
 7 suit, and plaintiff argues it has therefore satisfied
 8 the adversity requirement. Plaintiff also argues it
 9 is able to competently advocate the position
 10 asserted.

11 Finally, plaintiff argues that the state,
 12 represented by the attorney general, would not be a
 13 proper plaintiff to pursue these claims. Contrary to
 14 the defendant's assertion that representation of the
 15 general public interest of children in state custody
 16 rests with the attorney general, plaintiff argues the
 17 state has ignored its responsibilities and refused to
 18 take appropriate action.

19 Plaintiff argues the state has ignored its
 20 responsibilities by not acting on the issues in this
 21 case, and therefore the state would not be a more
 22 appropriate plaintiff for bringing this suit.

23 Plaintiff argues there is every reason to
 24 presume that no affected child, youth, parent or
 25 guardian is likely to sue in this case because none

1 that while the criteria for citizen taxpayer standing
 2 in Alaska are liberal, plaintiff has shown no true
 3 adversity of interest.

4 Furthermore, there clearly exist parties
 5 more affected by the challenged conduct who are
 6 better suited to pursue these claims. Defendant
 7 argues plaintiff is not a child in need of aid, does
 8 not allege guardianship of such a child, and has not
 9 purported to represent a child or class of children
 10 subject to the department's duty of care.

11 Plaintiff is engaged in a campaign to change
 12 the manner and procedure under which the department
 13 operates without any alleged harm inflicted by the
 14 department on plaintiff or anyone plaintiff
 15 represents.

16 Defendant concludes that a policy agenda and
 17 a sweeping critique of alleged state actions
 18 perpetrated on no one in particular do not constitute
 19 the true adversity of interest required to maintain
 20 citizen taxpayer standing. Defendant asserts there
 21 are more appropriate plaintiffs to raise such issues
 22 and because of their true adversity would presumably
 23 be able to do so in a more concrete manner.

24 Plaintiff, in opposition to the motion,
 25 argues that under the standard espoused in Trustees

1 of these parties have yet to file a suit, and it is
 2 likely they will never bring this claim. Plaintiff
 3 argues these children and youth, as well as their
 4 parents, lack the resources to file suit, and the
 5 potential for being subjected to an award of
 6 attorneys fees against them is a powerful
 7 disincentive to bringing suit.

8 Plaintiff argues the Law Project for
 9 Psychiatric Rights was founded in late 2002 in order
 10 to mount a strategic litigation campaign against
 11 forced psychiatric drugging and electroshock therapy
 12 and notes that because it is the adults in their
 13 lives rather than they who are making the decisions,
 14 children are essentially forced to take psychiatric
 15 drugs, and thus this lawsuit fits squarely within the
 16 psych rights mission. Therefore, plaintiff claims it
 17 has adversity.

18 Plaintiff also argues that the motion for
 19 judgment on the pleadings is untimely, that Rule
 20 12(c) requires that a motion for judgment on the
 21 pleadings be brought within such time as to not delay
 22 the trial and that the instant motion filed on March
 23 12, 2009, some six months after the action was
 24 commenced, is going to interfere with the trial,
 25 which is set to commence on February 1, 2010.

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1 In its reply, defendant reiterated that
 2 plaintiff lacks citizen taxpayer standing to pursue
 3 these claims. Defendant argues the parents and
 4 children themselves are the best suited to address
 5 these issues and questions on behalf of themselves.
 6 Defendant argues that Keller v. French, a
 7 slip opinion at 13296 from April 3rd, 2009, an Alaska
 8 Supreme Court case, supports granting its motion in
 9 this case.
 10 The Alaska Supreme Court in that case held
 11 that the plaintiffs did not have citizen taxpayer
 12 standing because there were other potential
 13 plaintiffs better suited to bring suit and plaintiffs
 14 were truly -- plaintiffs who were truly at risk from
 15 the actions at issue.
 16 As the Court stated in that case,
 17 individuals who are more directly affected have
 18 chosen not to sue despite their ability to do so, and
 19 that does not confer citizen taxpayer standing on an
 20 inappropriate plaintiff.
 21 Looking at the law surrounding this case,
 22 the Court would note the following. Under Alaska
 23 Civil Rule 12(c), a party will prevail on a motion
 24 for judgment on the pleadings if there are no
 25 allegations in the plaintiff's pleading that, if

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1 proven, would permit recovery. Accordingly, a 12(c)
 2 motion only has utility when all material allegations
 3 of fact are admitted in the pleadings and only
 4 questions of law remain.
 5 One of the issues that needs to be decided
 6 is whether plaintiff has standing. In Alaska, it has
 7 been held that all that is required of a complaint
 8 seeking declaratory relief is a simple statement of
 9 facts demonstrating that the Superior Court has
 10 jurisdiction and that an actual justiciable case or
 11 controversy is presented. See Ruckle vs. Anchorage
 12 School District at 85 P3d 1030, an Alaska Supreme
 13 Court case from 2004, which was quoting Jefferson vs.
 14 Asplund at 458 P2d 995, a prior Supreme Court case
 15 from 1969.
 16 Under Alaska case law, the actual case or
 17 controversy language encompasses a number of more
 18 specific reasons for not deciding cases, including
 19 lack of standing, mootness and a lack of rightness.
 20 Standing in Alaska is not a constitutional
 21 doctrine. Rather, it is a rule of judicial
 22 self-restraint based on the principle that courts
 23 should not resolve abstract questions or issue
 24 advisory opinions.
 25 And again, see Trustees For State of

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1 Alaska -- or for Alaska versus the state that was
 2 cited previously.
 3 The basic requirement for standing in
 4 Alaska is adversity. Alaska case law has discussed
 5 two differing kinds of standing, interest injury
 6 standing and citizen taxpayer standing.
 7 Under the interest injury approach, a
 8 plaintiff must have an interest adversely affected by
 9 the conduct complained of. Plaintiff has not argued
 10 it has an interest injury standing in this case.
 11 However, in order to determine if a party has citizen
 12 taxpayer standing, the court must examine each case
 13 and decide if several criteria have been met.
 14 First, the case in question must be one of
 15 public significance. The plaintiff raising
 16 constitutional issues is likely to meet this first
 17 requirement. See Sonemann vs. State at 969 P2d
 18 632.
 19 Here it seems clear that plaintiff's
 20 Complaint raises questions of public significance.
 21 The asserted issue involves state and federal
 22 constitutional rights, state laws, municipal codes,
 23 and some unknown number of Alaska children and youth
 24 potentially impacted. Defendant indicates that the
 25 Complaint may in fact raise issues of public

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1 significance.
 2 Second, the plaintiff must be an
 3 appropriate party to bring the case. And again, see
 4 Trustees for Alaska vs. State.
 5 This appropriateness has three main facets.
 6 First, plaintiff must have a truly adverse interest.
 7 Second, plaintiff must be capable of competently
 8 advocating the position asserted. And third,
 9 plaintiff may still be denied standing if there is a
 10 plaintiff more directly affected by the challenged
 11 conduct in question who has or is likely to bring
 12 suit.
 13 Therefore, what needs to be determined is
 14 whether or not the plaintiff in this case is the
 15 appropriate party to bring this action.
 16 For the plaintiff to be the appropriate
 17 party as noted above, it must have an adverse
 18 interest, be capable of competently advocating its
 19 position, and there must not be a party more directly
 20 affected who has or is likely to bring suit.
 21 Let's stop for a second.
 22 (Off record.)
 23 THE COURT: Plaintiff's sincerity in
 24 opposing the alleged state's practice seems
 25 unquestioned. However, that adversity is based on

1 plaintiff's mission statement, which, if accepted,
2 would indicate any individual or group can create
3 adversity by simply creating a nonprofit and drafting
4 a mission statement opposing whatever issue they wish
5 to challenge.

6 Plaintiff's attorney, Mr. Gottstein, is
7 also its founder, president and CEO. Mr. Gottstein
8 has been practicing law in Alaska since 1978. From
9 1998 to 2004, Mr. Gottstein served on the Alaska
10 Mental Health Board. Without going into further
11 detail regarding the experience of plaintiff and its
12 counsel, it seems clear plaintiff is capable of
13 competently advocating the position asserted by
14 plaintiff.

15 But plaintiff apparently has no individual
16 client or group of clients or their custodians who
17 have actually had either psychotropic medications or
18 electroshock therapy administered against their
19 wishes.

20 Plaintiff starts with the premise that
21 children and juveniles are being forced to undergo
22 psychiatric medication and/or electroshock therapy,
23 that their parents, their guardians, the state and
24 the health care providers are allowing or doing this
25 without determining the best interests of the

1 plaintiff exists, and since that time, a line of
2 cases has denied citizen taxpayer standing where a
3 more appropriate plaintiff has or is likely to bring
4 suit. In Trustees, the Court reasoned that the
5 crucial inquiry is whether the more directly
6 concerned potential plaintiff has sued or seems
7 likely to sue in the foreseeable future.

8 In Clevin vs. Yukon-Koyukuk School District,
9 a former school administrator filed suit against the
10 school district, challenging his reassignment to a
11 position of lower pay and responsibility. That's at
12 853 P2d 518, Alaska Supreme Court case from 1993.

13 The Court finds -- this Court finds the
14 analysis in that case instructive. One of the main
15 issues before that court was whether an employee who
16 starts a grievance process and subsequently resigns
17 has standing to force the employer to continue with
18 the process and remedy problems presumably for the
19 benefit of those employees who remain.

20 Upon review, the Court determined that
21 Clevin lacks citizen taxpayer standing. The Court
22 stated, "Because the Yukon-Koyukuk School District's
23 remaining employees are certainly in a better
24 position to raise the grievances Clevin cites and
25 because we have no reason to believe that current

1 children or juveniles; and that they, as plaintiffs,
2 can ensure a more appropriate decision is made if
3 allowed to identify these children and juveniles.

4 Certainly plaintiff can espouse its
5 identified mission effectively, but approaching an
6 issue with the foregone conclusion that children and
7 juveniles are being forcefully medicated and treated
8 by their parents, guardians, health care providers
9 and/or the state raises concerns plaintiffs -- that
10 plaintiff has an inherent bias to use of medication
11 or therapies that may in fact be the most beneficial
12 to the recipient.

13 The last factor determining whether
14 plaintiff is an appropriate party is whether or not
15 there is a more directly affected plaintiff who has
16 or is likely to bring suit. The parties highly
17 contest this factor.

18 The Court in Trustees for Alaska vs. The
19 State stated that taxpayer citizen standing has never
20 been denied in any decision of this Court except on
21 the basis that the controversy was not of public
22 significance or on the basis that the plaintiff was
23 not a taxpayer.

24 But starting with that case, the Court set
25 out the requirement that no more appropriate

1 Yukon-Koyukuk School District employees would be
2 indisposed to press legitimate grievances, we agree
3 with the trial court that Clevin has failed to
4 establish citizen taxpayer standing."

5 The Court would note that plaintiffs in
6 this case have failed to establish any parent or
7 guardian with a legitimate grievance on behalf of
8 their juvenile or child has declined to sue.

9 In Fannon vs. Matanuska Susitna Borough at
10 192 P3d 982, another Supreme Court case from 2008
11 cited by the parties, the Court finds it's
12 distinguishable that the plaintiffs in this case have
13 not established any legitimate claim has gone
14 unpursued.

15 Finally, in a very recent decision, the
16 Supreme Court reviewed a case involving a claim that
17 a legislative investigation into the Governor's
18 dismissal of the public safety commissioner violated
19 the Alaska Constitution's fair-and-just-treatment
20 clause. See Keller v. French previously cited, but
21 it's at opinion No. 6352, April 3rd, 2009.

22 After the investigation began, the group of
23 five state legislators, the Keller plaintiffs filed a
24 complaint claiming the investigation was improper for
25 a number of reasons. Shortly thereafter, a different

1 group of state employees who had been subpoenaed to
2 appear before the senate judiciary committee
3 commenced a separate lawsuit. The Court referred to
4 them as the Kiesel plaintiffs.

5 Upon review, the Supreme Court held that
6 the five legislators did not have standing to claim
7 there was a violation of the fair-and-just-treatment
8 clause. The Court determined that the Keller
9 plaintiffs were truly adverse and capable of
10 competently advocating their position but that there
11 was nonetheless a substantial question here as to
12 whether other persons who are more directly affected
13 have sued or are likely to sue.

14 In deciding that the Keller plaintiffs
15 lacked standing, the Court stated that the Kiesel
16 plaintiffs were among the classes of persons in this
17 investigation most obviously protected by the
18 fair-and-just-treatment clause.

19 The Kiesel plaintiffs were more directly
20 affected by the investigation, and they had actually
21 sued some of the defendants. The Court reasoned that
22 the Kiesel plaintiffs did not allege any violation of
23 the fair-and-just-treatment clause, but had they
24 thought they were being mistreated, there would have
25 been far more appropriate plaintiffs to make that

1 clearly they are not the most appropriate plaintiff.

2 Let's stop for a second.

3 (Off record.)

4 THE COURT: As the Court concluded in
5 Keller, it appears the Keller plaintiffs are
6 attempting to assert the individual rights of
7 potential or imaginary third parties, and the Court
8 in that case indicated they had never before allowed
9 citizen taxpayer standings to be used in that way.

10 Comparing the present case with those
11 discussed above, it becomes clear that the facts of
12 this case support a finding of plaintiff lacks
13 standing.

14 There is no adversity of interest with
15 plaintiff except as they created with their mission
16 statement. And just like in Ruckle and Keller, there
17 appears to be a more directly affected party here
18 that would make a more appropriate plaintiff than the
19 Law Project.

20 As defendant argues, the affected children,
21 their parents or guardians or even the state would
22 make a more appropriate plaintiff if a legitimate
23 grievance existed.

24 The motion for judgment on the pleadings is
25 granted in this case. Parties will be given a copy

1 claim than the Keller plaintiffs, none of whom
2 self-identified as either a witness or a target of
3 the investigation.

4 In addition, the Supreme Court in that case
5 discussed the Governor's potentially more appropriate
6 plaintiffs, stating, quote: Even if the Governor did
7 not intend to sue, there is no indication that if she
8 thought her rights were being violated she would be
9 unable to do so. The Keller plaintiffs do not
10 contend that the Governor or any other potential
11 plaintiffs were somehow limited in their ability to
12 sue. That individuals who are more directly affected
13 have chosen not to sue despite their ability to do so
14 does not confer citizen taxpayer standing on an
15 inappropriate plaintiff. End quote.

16 In this case, plaintiff argues parents or
17 guardians are unlikely to sue, but that statement
18 reflects plaintiff's opinion that parents and
19 guardians are incapable of recognizing what
20 plaintiffs identify as, quote, forced, end quote,
21 medication and treatment.

22 Plaintiff seeks to be placed in the role of
23 decision maker for the children and juveniles
24 receiving psychotropic medication and electroshock
25 therapy in lieu of parents or guardians. Otherwise,

1 of the disk with the Court's decision, and this case
2 will be dismissed.

3 We'll be off record.

4 (Proceedings adjourned at 11:39 a.m.)

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CERTIFICATE

I, DIANE M. BONDESON, Registered Professional Reporter and Notary Public in and for the State of Alaska, do hereby certify that the foregoing pages numbered 1-21 are a true, accurate and complete transcript of proceedings in Case No. 3AN-08-10115CI, Law Project for Psychiatric Rights vs. State of Alaska, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability;

And further, that I am not a party to nor have I any interest in the outcome of the action herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand this SIXTH day of JUNE, 2009.

Diane M. Bondeson, RPR
My Commission Expires 9/6/10