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Case No.: C-89-362

(Hon. Edmund A. Sargus, Jr.)

Motion To Decertify Class By

Thomas J. Grady, By And

Through His Father And

Guardian, Walter H. Grady

Douglas Robert Zieroff, By

And Through His Mother

And Guardian, Sandra L.

Zieroff; Alan C. Guy, By And

Through His Father And

Guardian, Fred T. Guy;

Lori J. Herold, By And

Through Her Father And

Guardian, Larry R. Herold;

Mary Delp, By And Through

Her Brother And Guardian,

Mark Delp; John Kennedy, By

And Through His Father And

Guardian, Leo J. Kennedy;

Christopher (Chip) Osinski,

By And Through His Sister

And Guardian, Mary Demecs;

Cindy Warner, By And

Through Her Mother And

Guardian, Dolores Warner;

Michael Adkins, By And

Through His Mother And

Guardian, Carol Snyder;

And Debra Lynn Moffett, By

And Through Her Mother

And Guardian, Wilda Ingham

MOTION

Class members Thomas J. Grady, by and through his father and guardian, Walter H. Grady; Douglas Robert Zieroff, by and through his mother and guardian, Sandra L. Zieroff; Alan C. Guy, by and through his father and guardian, Fred T. Guy; Lori J. Herold, by and through her father and guardian, Larry R. Herold; Mary Delp, by and through her brother and guardian, Mark Delp; John Kennedy, by and through his father and guardian, Leo J. Kennedy; Christopher (Chip) Osinski, by and through his sister and guardian, Mary Demecs; Cindy Warner, by and through her mother and guardian, Dolores Warner; Michael Adkins, by and through his mother and guardian, Carol Snyder; and Debra Lynn Moffett, by and through her mother and guardian, Wilda Ingham, move this Court, pursuant to Rule 23(c) and (d) of the Federal Rules of Civil Procedure, to enter an order decertifying the class previously certified by Judge George C. Smith in this action in 1990.

This motion to decertify is supported by an affidavit attached hereto executed by the guardian of each of the moving class members joining in this motion to decertify. Decertification should be granted for the reasons explained in the supporting memorandum below.

MEMORANDUM IN SUPPORT OF MOTION TO DECERTIFY CLASS

A. Introduction

The legal grounds for the instant motion to decertify are the same as those already articulated in the Motion to Decertify Class by Joel Martin Objectors filed September 7, 2004, Doc. 609 and the Motion to Decertify Class filed by the Klein Objectors filed October 22, 2004, Doc. 669. The purpose of this memorandum and the ten attached affidavits is to give the Court a

clearer picture of some of the profoundly retarded class members, and the factual reasons why the Consent Order would be the “worst case scenario.” Affidavit of Larry R. Herold at ¶ 3.

B. Identity Of The Class Members Joining In the Motion

Ten profoundly retarded adult Ohioans, by and through their respective parent or sibling guardians, have joined in the foregoing motion to decertify the class. All ten of the class members joining in the motion are residents of Anne Grady Center in Lucas County, Ohio, an intermediate care facility for the mentally retarded (ICF/MR) that is owned and operated by a private non-profit corporation funded by Medicaid benefits and private donations. All ten of these class members reside in an ICF/MR, are satisfied where they are, and desire ICF/MR funding to continue.¹

Each of the ten guardians whose affidavit is attached hereto has devoted decades to caring for a child or sibling who is profoundly mentally retarded. Many of the affiants have personal experience observing their wards at home or in community-based group homes before their loved ones moved into Anne Grady Center. As a result of decades of experience, the affiants are qualified to express opinions as expert witnesses as defined in Evid. R. 702 because their specialized knowledge can assist the court in determining whether the prerequisites of Civ. R. 23(a) and (b)(2) are met under current circumstances in Ohio. Each affiant has reviewed with legal counsel the terms of the Consent Order signed by the named parties in June of 2004, and each considers the relief sought in the Consent Order to be antithetical to the interests of their respective wards who desperately need ICF/MR services to continue. Each of the guardian affiants expresses an opinion, based on special knowledge and experience caring for a profoundly retarded loved one, that: 1) the special needs of their ward could not be met outside

¹ These ten class members therefore fit within subgroup (a) in point I.B. of the Klein Objectors' Memorandum of Law in Support of Decertification of Class. Doc. 669 at page 7.

an ICF/MR setting; and 2) the terms of the Consent Order threaten to take away services that are vitally important to their ward.

C. The Need For A Class Action Is Not Present Today.

The guardians whose affidavits are attached hereto have personally witnessed marked improvement in the quality of care provided by ICF/MRs in Ohio. They therefore agree with the Motion to Decertify Class by Joel Martin Objectors that there is no longer a practical need for a class action in this case.

One of the affiants, Walter H. Grady, father and guardian of class member Thomas J. Grady, was married to Anne Grady, a champion for the rights of the mentally retarded, for whom the Anne Grady Center is named. More than 40 years ago, Anne Grady began her tireless efforts on behalf of the profoundly mentally retarded. Anne Grady's accomplishments are summarized in the August 15, 2004 letter that is attached to the Affidavit of Walter H. Grady filed herewith. Anne Grady devoted her life to improving the conditions of ICF/MRs and promoting their funding for the benefit of her son and other profoundly retarded persons for whom community or home placements are inadequate and in many cases inappropriate. As Mr. Grady's affidavit attests, the Consent Order not only would threaten the health and safety of his son, but would also threaten to undo the life's work of his deceased wife, Anne Grady. Gratefully, because of the successful efforts of Anne Grady, and other activists like her,² this class action is no longer needed.

² See Affidavit of Alfred C. Leist filed October 22, 2004 attached to the Motion to Decertify Class by the Klein Objectors, Doc. 670. Mr. Leist, like Anne Grady, has been instrumental in reforms that have already corrected many of the problems that led the named plaintiffs to file this action in 1989. *Id.*

D. Prerequisites To A Class Action Are Not Present Today

Circumstances have dramatically changed since the Court certified a class in its order filed February 5, 1990. The Court specifically found that there was “no indication that the interests of the representatives are antagonistic to those of the class” and found that “the defendants have acted in a consistent manner towards the putative class members and subclass members” (Opinion and Order at pp. 5-6, Doc. 46); however, the affidavits filed herewith demonstrate that neither of these findings is true today.

The class members joining in the instant Motion to Decertify cannot be fairly and adequately represented by the named plaintiffs because their claims are “antagonistic” to the interests of the moving class members, contrary to the prerequisites of Civ. R. 23(a)(4). If the moving class members were in control of this litigation, they would be fighting to prevent the elimination of intermediate care facilities for the mentally retarded as an optional service under the State of Ohio’s Medicaid program. The claims of the named plaintiffs are not “typical” of the moving class members; to the contrary, the moving class members and their counsel have considered filing a separate class action seeking an injunction against elimination of ICF/MRs from the State’s Medicaid program. In short, the relief that the moving class members seek is the opposite of the relief proposed in the Consent Order, defeating the purpose of Civ. R. 23(a)(3).

The moving class members agree with the Joel Martin Objectors that the Consent Order deprives them of due process and freedom of speech. The moving class members have a right to initiate legal action themselves, or lobby the Ohio Legislature, to prevent elimination of ICF/MRs from the State’s Medicaid program. They agree with the rhetorical questions raised in the Klein Objectors’ Motion to Decertify:

Who represented the profoundly disabled in the “negotiations” leading to the proposed consent order? How could OLRS negotiate away the right to publicly funded ICF/MR placements enjoyed by a significant portion of the class?

Klein Objectors’ Memorandum of Law in Support of Decertification of Class at p. 12, Doc. 669.

The Court should not allow the named plaintiffs to trample the Constitutional rights of satisfied residents of ICF/MRs who desire ICF/MR funding to continue.

If the named plaintiffs remain dissatisfied with their residential setting or services, plaintiffs’ counsel can continue to pursue legal claims for the named plaintiffs individually to obtain appropriate individualized relief. On a larger scale, there may be particular ICF/MRs that are still in dire need of improvement or, hypothetically, where all the residents desire a different setting. If so, the OLRS can bring appropriate actions against the operators of such institutions to bring about necessary reforms. Even in those situations, however, the number of residents of a particular facility are not “so numerous that joinder of all [residents] is impracticable.” Civ. R. 23(a)(1).

E. Conclusion

The moving class members respectfully urge the court to read the affidavits attached hereto, which make a compelling case for decertification. These personal accounts are intended to familiarize the court with the personal circumstances of class members whose interests are not being fairly and adequately represented by the plaintiffs and OLRS in this case. These affidavits introduce the court to ten profoundly retarded class members whose parents and siblings remain intimately involved in overseeing and providing their care. The class should be decertified because the loved ones of these affiants cannot fairly be lumped together with the named

plaintiffs in a class seeking elimination of the very program that sustains the health, safety and well-being of the moving class members.

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And Guardian, Mary Demecs; Cindy
Warner, By And Through Her Mother And
Guardian, Dolores Warner; Michael Adkins,
By And Through His Mother And Guardian,
Carol Snyder; And Debra Lynn Moffett, By
And Through Her Mother And Guardian,
Wilda Ingham

PROOF OF SERVICE

This is to certify that on the 29th day of November, 2004, I electronically filed the foregoing **Motion To Decertify Class By Thomas J. Grady, By And Through His Father And Guardian, Walter H. Grady; Douglas Robert Zieroff, By And Through His Mother**

And Guardian, Sandra L. Zieroff; Alan C. Guy, By And Through His Father And Guardian, Fred T. Guy; Lori J. Herold, By And Through Her Father And Guardian, Larry R. Herold; Mary Delp, By And Through Her Brother And Guardian, Mark Delp; John Kennedy, By And Through His Father And Guardian, Leo J. Kennedy; Christopher (Chip) Osinski, By And Through His Sister And Guardian, Mary Demecs; Cindy Warner, By And Through Her Mother And Guardian, Dolores Warner; Michael Adkins, By And Through His Mother And Guardian, Carol Snyder; And Debra Lynn Moffett, By And Through Her Mother And Guardian, Wilda Ingham with the Clerk of the Court using the CM/EFC system which will send notification of such filing to the following: Mary Beth Ciocco, Diane Foley Hearey, Ann Elizabeth Henkener, Harry Blair Keith, Michael Kirkman, Karen L. Lazorishak, Douglas Langston Rogers, Carol Rolf, Alan Paul Schwepe, Kristin Sacco Smith, George Gary Tyack, Elizabeth Jean Watters, Michael Wise, and I hereby certify that I have mailed by regular U.S. Mail the document to the following non-CM/EFC participants: Martin David Gelfand, United States House of Representatives, 14400 Detroit Avenue, Lakewood, Ohio 44107; and to John F. Kirwan, 189 E. Market Street, Sandusky, Ohio 44870.

/s/ Barry W. Fissel

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