

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

GERALD N. and JOAN B.,
each on their own behalf and
on behalf of a class of persons
similarly situated,

Plaintiffs,

Case No. _____

v.

MILWAUKEE COUNTY,

Defendants.

**NOTICE OF REMOVAL
PURSUANT TO TITLE 28 U.S.C. § 1441**

STATEMENT OF THE GROUNDS FOR REMOVAL

On January 28, 2004 the plaintiffs served on Milwaukee County a lawsuit seeking a declaration of rights as they relate to elderly disabled individuals. The most prominent among the allegations are claims that Milwaukee County has violated the Americans With Disabilities Act, 42 U.S.C. § 12131(2), et. seq., § 504 of the Rehabilitation Act, The Civil Rights Act, Title 42 § 1983 and the Equal Protection Clauses of the U.S. and Wisconsin Constitutions. The District Court has original jurisdiction over the ADA, the Rehabilitation Act, The Civil Rights Act and the U.S. Constitution.

Therefore, the Defendant by its attorney Mary Ellen Poulos, Principal Assistant Corporation Counsel, hereby removes this action to the U.S. District Court for the Eastern District of Wisconsin.

Dated this 25th day of February, 2004.

S/Mary Ellen Poulos

MARY ELLEN POULOS
Principal Assistant
Corporation Counsel
State Bar No.: 01014190

Attorney for Defendants.

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STATE OF WISCONSIN

CIRCUIT COURT
CIVIL JURISDICTION

MILWAUKEE COUNTY

GERALD N. and JOAN B., each on their
own behalf and on behalf of a class of
persons similarly situated,

Plaintiffs,

v.

Case No.

MILWAUKEE COUNTY,

Case Code: 30701
Declaratory Judgment

Defendant.

SUMMONS

THE STATE OF WISCONSIN, To each person named as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is 901 North Ninth Street, Milwaukee, Wisconsin 53233, and to Robert Theine Pledl attorney for the plaintiffs, whose address is 16655 West Bluemound Road, Suite 330, Brookfield, Wisconsin 53005. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Date: January 28, 2003

SCHOTT, BUBLITZ & ENGEL, s.c.
Attorneys for Gerald N. and Joan B.

Robert Theine Pledl
State Bar No. 1007710

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STATE OF WISCONSIN

CIRCUIT COURT
CIVIL JURISDICTION

MILWAUKEE COUNTY

GERALD N. and JOAN B., each on their
own behalf and on behalf of a class of
persons similarly situated,

Plaintiffs,

v.

Case No. 04CV000862

MILWAUKEE COUNTY,

Case Code: 30701
Declaratory Judgment

Defendant.

COMPLAINT

Plaintiffs, Gerald N. and Joan B., by their counsel, Schott, Bublitz & Engel, s.c. by
Robert Theine Pledl, hereby state the following as their complaint:

INTRODUCTION

(1) This action is brought on behalf of persons with disabilities that are now or will in the future receive services from Milwaukee County's Family Care program. The plaintiffs allege that the policies and practices of the program discriminate against eligible individuals in several ways. The program funds community services for persons 60 years of age and older at a lower rate than similar services provided to persons with similar disabilities who are under the age of 60. The program also fails to provide adequate services based on the individual's needs and limits the choice of provider, again in comparison to similar persons under the age of 60. The failure to provide adequate services creates a substantial likelihood that persons covered by Family Care

will be unable to remain in the community and will be moved to more restrictive institutional settings. The named plaintiffs bring these claims on their own behalf and also seek to represent a class defined as follows:

All Milwaukee County residents who now qualify or who will in the future qualify for services through the Family Care program.

It is the position of the plaintiffs that Milwaukee County's application of discriminatory policies and practice to Family Care clients has and will violate their rights to equal protection under the United States and Wisconsin Constitutions and their rights under the Wisconsin Patients Bill of Rights, the Americans with Disabilities Act and §504 of the Rehabilitation Act.

PARTIES

(2) Plaintiff Gerald N. is an adult resident of Milwaukee County. He is 71 years old. The Milwaukee County Probate Court entered an order for guardianship of the person on July 30, 1993 and an order for protective placement on March 28, 1994. The guardian has retained the undersigned to serve as Gerald N.'s counsel herein and a petition to appoint the guardian as guardian ad litem pursuant to Wis. Stat., §803.01(3) will be filed with the Court. All of the court records and information concerning Gerald N.'s disability and disability services that he has received from Milwaukee County are confidential pursuant to Wis. Stat., §§51.30, 51.61(1)(n), 55.06(17), 55.07(1) and 880.33(6). County staff will be able to identify Gerald N. from the facts contained in this complaint based on their dealings with the plaintiff.

(3) Plaintiff Joan B. is an adult resident of Milwaukee County. She is 67 years old. The Dane County Probate Court entered an order for guardianship and protective

placement on October 28, 1982. The Milwaukee County Probate Court entered an order on June 7, 1988 naming the current guardian as successor guardian of the person. The guardian has retained the undersigned to serve as Joan B.'s counsel herein and a petition to appoint the guardian as guardian ad litem pursuant to Wis. Stat., §803.01(3) will be filed with the Court. All of the court records and information concerning Joan B.'s disability and disability services that she has received from Milwaukee County are confidential pursuant to Wis. Stat., §§51.30, 51.61(1)(n), 55.06(17), 55.07(1) and 880.33(6). County staff will be able to identify Joan B. from the facts contained in this complaint based on their dealings with the plaintiff.

(4) Defendant Milwaukee County is a municipal corporation with its principal place of business located at 901 North 9th Street, City and County of Milwaukee, Wisconsin.

FACTUAL ALLEGATIONS

Services for Persons with Disabilities

(5) Certain persons with disabilities such as developmental disabilities, mental illness, brain injury, Alzheimers, physical disabilities, etc. are unable to live independently in a single-family home or an apartment. (Others with these same disabilities are able to live independently based upon their individual skills.) Many of the persons with disabilities who are unable to live independently reside with their families. Many adults with disabilities continue to live with their aging parents until the death or illness of the caregivers makes that impossible.

(6) The total number of persons with disabilities is increasing due to medical advances that save the lives of medically fragile infants and persons injured in accidents. Also, as life expectancy increases generally, persons who already have disabilities are living longer and the number of persons with disabilities associated with the aging process is increasing along with the absolute number of elderly persons.

(7) Historically, most persons with disabilities were placed in nursing homes and other large custodial institutions if their families were not able to provide suitable care. Most of this institutional care is and has been funded through the federal Medicaid program. This reliance on institutions to provide residential care has changed over time.

In 1981, Federal law was changed to permit States to utilize Medicaid funding to pay for community care.

(8) In Wisconsin, Medicaid funding channeled through the Community Options Program (COP), Community Integration Program (CIP), Brain Injury Waiver (BIW) and Family Care is used to pay for most community care for persons with disabilities including both residential and day program services. The policies of these programs contain a preference for smaller community residences and for community services selected by the individual and/or the legal guardian.

(9) Persons with disabilities may receive care provided in their own home by outside caregivers. They may also receive care in adult family homes (AFHs), which are certified or licensed facilities for one to four persons, and community-based residential facilities (CBRFs), which are licensed facilities for five or more persons. AFHs and CBRFs are either licensed or certified pursuant Wisconsin statutes and regulations promulgated by the Wisconsin Department of Health and Family Services.

(10) Many persons with disabilities who receive residential services also attend day programs. These are programs that provide educational services, assistance with and training in activities of daily living and recreational activities. Day programs frequently include opportunities for participants to engage in community activities ranging from shopping to attending sports events other recreational activities. A day program may also include a vocational component.

(11) Individuals with disabilities and/or their guardians choose particular day programs and places to live for a variety of reasons. The reasons include the availability of specific disability services, appearance and layout, personal preferences regarding staff and other participants or residents, access to public or specialized transportation, proximity to churches, proximity to stores, proximity to recreational facilities, accessibility to work opportunities or vocational services, neighborhood characteristics, and closeness to friends and relatives.

Milwaukee County Services for Persons with Disabilities

(12) Wis. Stat., §§46.215, 51.42 and 51.437 require each county in Wisconsin to provide specified services to persons with disabilities.

(13) Wis. Stat., §51.61 require counties, as well as other persons and entities providing services to persons with disabilities, to observe certain rights that are guaranteed to persons with mental illness, developmental disabilities, alcoholism or drug dependency.

(14) Wis. Stat., §§55.06 and 55.07 require counties to follow certain procedures and observe certain rights that are applicable to persons who meet the criteria for protective placement.

(15) Services for persons with disabilities under the age of 60 in Milwaukee County are provided through the Milwaukee County Department of Human Services - Disability Services Division (DSD). It was formerly known as the Adult Services Division.

(16) Under DSD's policies and procedures, Milwaukee County residents with disabilities under the age of 60, or their guardians if appropriate, are permitted to select and approve specific day programs and residential settings.

(17) Under DSD's policies and procedures, Milwaukee County residents with disabilities under the age of 60 have not been removed from day and/or residential programs over their own objections or over the objection of their guardians.

(18) Under DSD's policies and procedures, day and residential providers are permitted to request rate increases from DSD for serving Milwaukee County residents with disabilities under the age of 60.

(19) Under DSD's policies and procedures, day and residential providers have received cost of living rate increases for serving Milwaukee County residents with disabilities under the age of 60.

(20) Services for persons with disabilities in Milwaukee County who are 60 years of age and older are provided through the Milwaukee County Department on Aging (DOA).

(21) Milwaukee County DOA voluntarily requested to participate in Family Care pursuant to Wis. Stat., §46.283. It was under no obligation to do so.

(22) Under DOA's policies and procedures, Milwaukee County residents with disabilities 60 years of age and older, or their guardians if appropriate, are not permitted to select and approve specific day programs and residential settings.

(23) Under DOA's policies and procedures, Milwaukee County residents with disabilities 60 years of age and older have been threatened with removal from day and/or residential programs over their own objections or over the objection of their guardians.

(24) Under DOA's policies and procedures, day and residential providers are not permitted to request rate increases from DOA for serving Milwaukee County residents disabilities 60 years of age and older.

(25) Under DOA's policies and procedures, day and residential providers have not received cost of living rate increases for serving Milwaukee County residents with disabilities 60 years of age and older since the County's involvement in Family Care.

(26) The failure to provide reasonable cost of living rate increases has and will cause day and residential providers to either cut the level of services or refuse to serve Milwaukee County residents with disabilities and this will cause substantial numbers of these residents to deteriorate and be admitted to institutions such as nursing homes.

Gerald N.

(27) Gerald N. has a developmental disability and a physical disability.

(28) Gerald N. resided in his family's home until his mother became too ill to care for him in November of 1998. Milwaukee County then placed him temporarily in a CBRF operated by Homes for Independent Living located in Menomonee Falls.

(29) Shortly before his mother's death in January of 1999, Milwaukee County placed the subject at Whitnall House, a CBRF operated by HIL in Hales Corners. He also began to receive day program services at Paragon Industries which is associated with HIL.

(30) Gerald N.'s guardian approved of his admission to Whitnall House and the Paragon day program.

(31) It is the guardian's continued desire that Gerald N. remain at Whitnall House and Paragon.

(32) Milwaukee County filed Watts reports with the Milwaukee County Probate Court on October 8, 1999, November 6, 2000, December 12, 2001 and October 14, 2002 stating that the subject's placement at Whitnall House was appropriate to his needs and recommending that his placement there continue.

(33) Gerald N. now receives and has received funding for his disability services from Family Care through Milwaukee County DOA.

(34) HIL attempted over the course of several year to negotiate with DOA to obtain a higher daily rate to cover the increased cost of providing services to Gerald N. and other clients. (A letter from Lincoln Burr, HIL dated October 22, 2003 to Dennis Ryan and a letter from Lincoln Burr dated December 11, 2003 to Meg Gleeson are attached to this complaint and incorporated here.)

(35) Milwaukee County DOA refused to approve a cost of living rate increase for Gerald N.

(36) HIL has given notice that it will terminate its contract with DOA effective April 1, 2004 due to the failure to grant any cost of living rate increases.

(37) HIL will continue to contract with DSD to serve Milwaukee County residents with disabilities under the age of 60.

(38) HIL has notified DOA that it would prefer to continue serving Gerald N. and that the funding dispute with DOA is the only reason for the contract termination.

(39) DOA intends to move Gerald N. to a different CBRF and day program over the guardian's objection.

(40) It would be very traumatic and harmful to Gerald N. to be forcibly removed from his home.

(41) Due to the severity of Gerald N.'s disabilities, it is likely that moving him would worsen his condition and lead to placement in a nursing home or similar institution.

Joan B.

(42) Joan B. has a developmental disability.

(43) Joan B. resided in the community with her family until 1955. She was then placed in the Milwaukee County Mental Health Complex until 1968 when she was transferred to the Central Wisconsin Center for the Developmentally Disabled, another large institution.

(44) Joan B. was transferred from Central Center in 1995 to a succession of community based residential facilities (CBRFs) in Milwaukee County. She moved to Vienna House in 1996 and Arbor House in 2000. Both houses are operated by HIL. She also attends the Paragon day program. Each of the transfers to a CBRF and to the Paragon program was with her guardian's approval.

(45) It is the guardian's continued desire that Joan B. remain at Arbor House and Paragon.

(46) Milwaukee County filed Watts reports with the Milwaukee County Probate Court on January 10, 1997, January 6, 1998, October 12, 1998, October 8, 1999, November 6, 2000, December 12, 2001, October 19, 2002 and July 23, 2003 stating that Joan B.'s placement at Vienna House and Arbor House was appropriate to her needs and recommending that her placement there continue.

(47) Joan B. now receives and has received funding for his disability services from Family Care through Milwaukee County DOA.

(48) HIL attempted over the course of several year to negotiate with DOA to obtain a higher daily rate to cover the increased cost of providing services to Joan B. and other clients. (A letter from Lincoln Burr, HIL dated October 22, 2003 to Dennis Ryan and a letter from Lincoln Burr dated December 11, 2003 to Meg Gleeson are attached to this complaint and incorporated here.)

(49) Milwaukee County DOA refused to approve a cost of living rate increase for Joan B.

(50) HIL has given notice that it will terminate its contract with DOA effective April 1, 2004 due to the failure to grant any cost of living rate increases.

(51) HIL will continue to contract with DSD to serve Milwaukee County residents with disabilities under the age of 60.

(52) HIL has notified DOA that it would prefer to continue serving Joan B. and that the funding dispute is the only reason for the contract termination.

(53) DOA intends to move Joan B. to a different CBRF and day program over the guardian's objection.

(54) It would be very traumatic and harmful to Joan B. to be forcibly removed from her home.

(55) Due to the severity of Joan B.'s disabilities, it is likely that moving her would worsen her condition and lead to placement in a nursing home or similar institution.

Putative Class Members

(56) Gerald N. and Joan B. bring this action on their own behalf and also seek to represent a class of Milwaukee County residents who now qualify or who will in the future qualify for services through the Family Care program.

(57) The number of persons with disabilities who are now or will in the future be affected by Family Care policies and procedures is very large and it would impractical to bring them all before the Court.

(58) Each year additional persons with disabilities are born in Milwaukee County, and each year additional persons without disabilities residing in Milwaukee County become disabled through accidents, injuries, disease and/or the progression of the aging process. It would impossible to identify or bring these unidentified future members of the putative class before the Court.

(59) Milwaukee County has acted or refused to act on grounds generally applicable to the putative class, thereby making appropriate preliminary and final injunctive relief and/or declaratory relief with respect to the class as a whole.

(60) The requirements of Wis. Stat., §803.08 are met in that the question before the Court is one of a common or general interest of many persons, the affected parties are very numerous and it is impractical to bring them all before the Court.

LEGAL CLAIMS

Count One: Wis. Stat., §51.61 - Wisconsin Patients Rights

(61) The previous allegation are incorporated here as if fully set forth.

(62) Gerald N., Joan B. and the putative class members are "patients" covered by the Wisconsin Patients Rights law pursuant to Wis. Stat., §§51.61(1) and/or 55.07.

(63) Milwaukee County DOA's acts, omissions, policies and procedures as set out above violate the rights of Gerald N., Joan B. and the putative class members to the least restrictive conditions necessary to achieve the purposes of admission, commitment or placement pursuant to Wis. Stat., §51.61(1)(e).

(64) Milwaukee County DOA's acts, omissions, policies and procedures as set out above violate the rights of Gerald N., Joan B. and the putative class members to prompt and adequate treatment, rehabilitation and educational services appropriate to their condition pursuant to Wis. Stat., §51.61(1)(e).

(65) Gerald N., Joan B. and the putative class members are entitled to declaratory and injunctive relief pursuant to Wis. Stat., §51.61(7).

Count Two: 41 U.S.C. §1983 and the Equal Protection Clause
of the United States Constitution.

(66) The previous allegation are incorporated here as if fully set forth.

(67) The actions of Milwaukee County and its agents and employees with regard to Gerald N., Joan B. and the putative class members were and are under color of state law.

(68) By virtue of its undertaking to provide care to Gerald N., Joan B. and the putative class members, Milwaukee County has established a special relationship with them.

(69) Persons with disabilities under the age of 60 who are eligible to receive services from Milwaukee County are situated similarly to persons with disabilities who

are 60 years of age and older who are eligible to receive services from Milwaukee County.

(70) Milwaukee County DOA's acts, omissions, policies and procedures as set out above discriminate against Milwaukee County residents with disabilities 60 years of age and older in comparison to residents under the age of 60 without any rational basis in violation of the Equal Protection Clause of the United States Constitution.

(71) Gerald N., Joan B. and the putative class members are entitled to declaratory and injunctive relief pursuant to 42 U.S.C. §1983.

Count Three: Equal Protection under Art. I, §1 of the Wisconsin Constitution.

(72) The previous allegation are incorporated here as if fully set forth.

(73) Milwaukee County DOA's acts, omissions, policies and procedures as set out above discriminate against Milwaukee County residents with disabilities 60 years of age and older in comparison to residents under the age of 60 without any rational basis in violation of Art. I, §1 of the Wisconsin Constitution.

(74) Gerald N., Joan B. and the putative class members are entitled to declaratory and injunctive relief.

Count Four: Americans with Disabilities Act

(75) The previous allegation are incorporated here as if fully set forth.

(76) Gerald N., Joan B. and the putative class members are "qualified individuals with a disability" pursuant to 42 U.S.C. §12131(2).

(77) Milwaukee County DOA's acts, omissions, policies and procedures as set out above have violated and will continue to violate the rights of Gerald N., Joan B. and

the putative class members under 42 U.S.C. §§12132 and 12203, and 28 C.F.R. §35.130 because: (a) they are preempted by the ADA; (b) they deny persons with disabilities the right to integrated community services; (c) they deny meaningful access to disability services programs or services; (d) they afford opportunities that are not equal to those provided to others; (e) they provide an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; (e) they deny a reasonable modification; and (f) they retaliate against eligible individuals who lawfully assert their rights under the ADA.

(78) Gerald N., Joan B. and the putative class members are entitled to declaratory and injunctive relief pursuant to 42 U.S.C. §12132.

Count Five: §504 of the Rehabilitation Act.

(79) The previous allegation are incorporated here as if fully set forth.

(80) Milwaukee County receives and has received federal financial support at all relevant times.

(81) Gerald N., Joan B. and the putative class members are disabled pursuant to 29 U.S.C. §705(9).

(82) Milwaukee County DOA's acts, omissions, policies and procedures as set out above have violated and will continue to violate the rights of Gerald N., Joan B. and the putative class members under 29 U.S.C. §794 because: (a) they are preempted by §504 of the Rehabilitation Act; (b) they deny persons with disabilities the right to integrated community services; (c) they utilize methods of administration that have the

effect of subjecting individuals with disabilities to discrimination; (d) they have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons; and (e) they deny a reasonable accommodation.

(83) Gerald N., Joan B. and the putative class members are entitled to declaratory and injunctive relief pursuant to 29 U.S.C. 794a.

CONCLUSION

WHEREFORE, plaintiffs request judgment against defendant Milwaukee County as follows:

- (A) A declaratory judgment holding that Gerald N.'s placement at Whitnall House and Joan B.'s placement at Arbor House are the least restrictive placements appropriate to their needs and are necessary to provide them with prompt and adequate treatment, rehabilitation and educational services pursuant to Wis.Stats., §§51.61(1)(e) & (f), and 55.06(9)(a).
- (B) A declaratory judgment holding that DOA's discriminatory treatment of Milwaukee County residents with disabilities 60 years of age and older violates Wis.Stats., §§51.61(1)(e) & (f), the Equal Protection Clause of the United States Constitution, Article I, §1 of the Wisconsin Constitution, the Americans with Disabilities Act and §504 of the Rehabilitation Act.
- (C) Preliminary and permanent injunctive relief prohibiting Milwaukee County from any future application or enforcement of policies and procedures that discriminate against Milwaukee County residents with disabilities who are 60 years of age and older.
- (D) Payment of the reasonable actual attorney fees including litigation expenses and costs pursuant to Wis.Stat., §51.61(7), 29 U.S.C. §794a, 42 U.S.C. §1988, 42 U.S.C. §2000d-7 and 42 U.S.C. §12205.

Date: January 28, 2003

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Attorneys for Gerald N. and Joan B.

/s/ Robert Theine Pledl

Robert Theine Pledl
State Bar No. 1007710

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