1989 WL 121210
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United States District Court, N.D. Illinois, Eastern Division.

ARISTOTLE P., et al., Plaintiffs,
v.
Gordon JOHNSON and Gary Morgan, Defendants.

No. 88 C 7919.
|
Oct. 3, 1989.

MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, District Judge.

***1** The seven plaintiffs bring this three count complaint on the behalf of a class of similarly situated children pursuant to 42 U.S.C. § 1983 alleging that the defendants violated their rights under the First and Fourteenth Amendments and under the Adoptive Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–628, 670–679 ("AAA"). On September 6, 1989, this court issued its memorandum opinion and order which denied the defendants' motion to dismiss Counts I and II, which allege the constitutional violations, and granted the motion to dismiss Count III, which alleges the statutory violation. *See Aristotle v. Johnson,* No. 88 C 7919, Slip op. (N.D.Ill. September 6, 1989) (Williams, J.). The court certified the plaintiffs' class on September 28, 1989.[1]

The defendants bring this motion to certify the issues resolved by the court's opinion for immediate appeal pursuant to 28 U.S.C. § 1292(b). The plaintiffs do not oppose and, in fact, support this motion. For the following reasons, the court will grant the motion for certification.

I

28 U.S.C. § 1292(b)

Under § 1292(b), a court may certify an interlocutory order for immediate appeal if the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). These two factors are met in this case. In addition, there are other extraordinary circumstances which "justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.' " *Cooper & Lybrand v. Livesay,* 437 U.S. 463, 475 (1978), *quoting Fisons, Ltd. v. United States,* 458 F.2d 1241, 1248 (7th Cir.), *cert. denied,* 405 U.S. 1041 (1972).

a) *Controlling Questions of Law*

Controlling questions of law have been defined as questions of law that would require reversal if decided incorrectly or as questions that could materially affect the course of litigation with resulting savings of the court or the parties' resources. *See Katz v. Carte Blanche Corp.,* 496 F.2d 747, 755 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974); *In re Cement Antitrust Litigation,* 673 F.2d 1020, 1026 (9th Cir.1982), *aff'd sub nom., Arizona v. Ash Grove Cement Co.,* 459 U.S. 1190 (1983). The court's legal rulings with respect to Counts I and II of the complaint involve controlling questions of law.

In Count I, the court found that the plaintiffs have a right to association with their siblings under the First Amendment which is allegedly being impermissibly infringed by the defendants' policy. *See Aristotle,* Slip op. at 4–10. The policy at issue is the defendants' practice of placing siblings in separate foster homes of residential facilities and denying the plaintiffs the opportunity to visit their sisters and brothers who are placed elsewhere. *Id.* at 3. In Count II, the court held that the plaintiffs had stated

a claim for the violation of their Fourteenth Amendment substantive due process rights by alleging that the defendants' policy had seriously damaged or severed their sibling relationships in an arbitrary and unreasonable manner. *Id.* at 10–13. The court also held that the plaintiffs had stated a claim for the violation of their substantive due process rights by alleging that the defendants had violated their affirmative duty to provide for the childrens' safety and well-being. The defendants allegedly violated their duty by pursuing the above policy which caused the plaintiffs to suffer emotional harm. *Id.* at 13–19.

***2** While the court has confidence in the correctness of its rulings, it recognizes that there is substantial ground for difference of opinion on these questions. Decisions from the Second and Eleventh Circuit provide direct support for the ruling with respect to one of the questions of law at issue here. Still, the court acknowledges that these substantial, complex questions of constitutional law have not been decided by either the Supreme Court or the Seventh Circuit. The court further notes that there is a question as to whether the Seventh Circuit's decision in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir.1984) is controlling authority with respect to some aspects of the plaintiffs' claims. Certification is proper when the applicability of prior precedent is in question. *See In Re Uranium Antitrust Litigation*, 617 F.2d 1248, 1252 (7th Cir.1980). Accordingly, the court finds that the first prong of the test has been satisfied.

b) *Material Advancement of the Termination of this Litigation*

There is little doubt that an immediate appeal would materially advance the termination of this litigation. If this court's judgment is reversed, the case will be finished because the remaining count of the plaintiff's complaint has already been dismissed. If this court's judgment is affirmed, the defendants have represented that the chances for a settlement of this case short of trial "will be greatly enhanced." Thus, it is likely that an immediate appeal will allow this case to be terminated short of trial regardless as to how it is decided. If an immediate appeal is not taken, the defendants have represented that they will be unlikely to settle the case and will fight on to the bitter end.[2] The defendants' position is influenced in large part by the three other class action cases that are pending against them in this District. These other cases also concern the existence of statutory and constitutional rights to various procedural and substantive protections. The defendants are hesitant to settle any of these cases without a definite determination as to their liability. Consequently, this case will, in all likelihood, proceed to trial if an immediate appeal is not allowed. A trial in this matter would involve the further, and possibly unnecessary, expenditure of substantial public funds as counsel for both sides are publicly funded.

In consideration of all of the above matters, the court finds that the defendants have met their burden of showing that this matter should be certified for an immediate appeal. Accordingly, their motion is granted.

Conclusion

For the foregoing reasons, the court certifies the plaintiffs' class and grants the defendants' motion for certification pursuant to 28 U.S.C. § 1292(b).

All Citations

Not Reported in F.Supp., 1989 WL 121210

Footnotes

1 With the parties' agreement, the court certified the plaintiff class as follows: Children who are or will be the subject of neglect, dependency, or abuse petitions in the State of Illinois; who are or will be in the custody or under the guardianship of the Department of Children and Family Services by order of court; who have not or will not be placed with their siblings in foster homes or residential facilities; and who have been or will be denied regular and reasonable visitation with their siblings.

2 No discovery has been conducted in this case. The parties anticipate, particularly because of the manner in which documents are organized at the Department of Children and Family Services, significant time will be required to organize and analyze the compiled data. Furthermore, expert witnesses will probably have to be retained and deposed.

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