424 Mass. 476
Supreme Judicial Court of Massachusetts,
Bristol.
The JUDGE ROTENBERG EDUCATIONAL CENTER, INC., & others[1]
v.
COMMISSIONER OF THE DEPARTMENT OF MENTAL RETARDATION (No. 4).

Argued Nov. 5, 1996. | Decided March 13, 1997.

Attorneys, who represented mental health patients in substitute judgment cases, moved to be appointed as next friends to patients. Presuming to act as next friends, attorneys moved to intervene in contempt action brought by class of patients, their parents, and guardians against Department of Mental Retardation. The Bristol Division of the Probate and Family Court Department, Elizabeth O'Neill LaStaiti, J., denied motions. Attorneys appealed. The Supreme Judicial Court, Lynch, J., held that: (1) probate court did not abuse its discretion by declining to appoint attorneys as next friends, and (2) attorneys lacked standing to bring motion to intervene.

Affirmed.

Attorneys and Law Firms

****157 *476** Judith S. Yogman, Assistant Attorney General, for the Commissioner of the Department of Mental Retardation.

Michael P. Flammia (Peter F. Carr, II, Boston, with him), for the Judge Rotenberg Educational Center, Inc.

Eugene R. Curry, for the class of students, parents and guardians.

***477** C. Michele Dorsey (Paul A. Cataldo, Franklin, with her), for the class of students.

Steven J. Schwartz, for individual students.

Before ABRAMS, LYNCH, GREANEY, FRIED and MARSHALL, JJ.

Opinion

LYNCH, Justice.

This is an appeal from motions brought by "guardianship counsel" for patients at The Judge Rotenberg Educational Center, Inc. (JRC),[2] seeking to be appointed next friend[3] and to intervene in *Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1),* 424 Mass. 430, 677 N.E.2d 127 (1997).

Nine attorneys, who collectively refer to themselves as guardianship counsel, filed a motion which asked the judge to appoint them as next friend to patients they represent in substituted judgment cases.[4] Presuming to act as next friends, guardianship counsel then moved to intervene in the contempt action brought against the Department of Mental Retardation (department).[5] Both motions were denied. Guardianship counsel appealed and we granted application for direct ****158** appellate review. We conclude that the judge did not abuse her discretion.

The following facts are not in dispute for purposes of this appeal.[6]

***478** The patients at JRC suffer from severe disabilities, including mental retardation, autism, and psychiatric disorders. Each patient has a permanent legal guardian, who is usually a parent. The guardian is responsible for the general care and control of his ward. See G.L. c. 201, § 6A. In addition, a Probate Court judge appointed a guardian ad litem to oversee the general welfare of all the patients.

The patients are members of a certified class of plaintiffs which consists of the patients at JRC, their parents, and guardians. The class was organized in 1986 to participate in an action brought by JRC against the department's predecessor, the office for children (OFC).[7] The judge certified the class after finding that the requirements of Mass. R. Civ. P. 23, 365 Mass. 767 (1974), were satisfied. Even though the class was represented by counsel, the judge also appointed separate counsel to represent the patients' interests within the class.

After a preliminary hearing on the 1986 action, the plaintiff class, JRC, and OFC, entered into a court-approved settlement agreement. All parties to the action participated and signed the agreement, including the attorneys appointed to represent the patients' interests within the class.

In 1993, JRC and the patients, their parents, and guardians, brought a contempt action against the department for allegedly violating the settlement agreement.

[1] *Discussion.* The threshold question for us to decide is whether the judge abused her discretion by declining to

appoint guardianship counsel as next friend. Guardianship counsel contend that the judge erred because the patients were not adequately represented in the contempt action. Specifically, guardianship counsel allege that the potential for conflict between the patients and their guardians required the judge to appoint a next friend. We disagree.

[2] [3] [4] The decision to appoint a guardian or next friend rests within the sound discretion of the judge. See *Strange v. Powers,* 358 Mass. 126, 136, 260 N.E.2d 704 (1970); ***479** *Ryan v. Cashman,* 327 Mass. 677, 680, 100 N.E.2d 838 (1951); *N.O. v. Callahan,* 110 F.R.D. 637, 649 (D.Mass.1986). Rule 17(b) of the Massachusetts Rules of Civil Procedure, 365 Mass. 763 (1974), reads as follows:

> "Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."[8]

Under this rule, a judge has the discretion to appoint a next friend when it appears that an incompetent person is not adequately represented. *N.O. v. Callahan, supra* at 649; *Developmental Disabilities Advocacy Ctr., Inc. v. Melton,* 689 F.2d 281, 285 (1st Cir.1982). See *Matter of Moe,* 385 Mass. 555, 563, 432 N.E.2d 712 (1982); *Ryan v. Cashman, supra* at 680, 100 N.E.2d 838; *Buckingham v. Alden,* 315 Mass. 383, 388-389, 53 N.E.2d 101 (1944); *Mansur v. Pratt,* 101 Mass. 60, 61 (1869). A next friend is not required where there is a duly appointed guardian, unless it is clear that the interests of the guardian and the ward conflict. See *Gardner v. Parson,* 874 F.2d 131, 140 (3d Cir.1989); *N.O. v. Callahan, supra;* ****159** *Developmental Disabilities Advocacy Ctr., Inc. v. Melton, supra.* See also *Buckingham v. Alden, supra* at 389, 53 N.E.2d 101; *Mansur v. Pratt, supra* at 61. Here, the judge did not err in finding that the patients were adequately represented.

[5] Each patient had a legal guardian. The guardians were involved in both the settlement agreement and the contempt action. The motion judge found: "At all times, the [p]arents [were] aware of BRI's program and have demonstrated a strong commitment to the welfare and best interests of the [patients]." Courts are reluctant to appoint a next friend when there is a duly appointed representative. See *Mansur v. Pratt, supra* at 61; *Developmental Disabilities Advocacy Ctr., Inc. v. Melton, supra* at 285.

***480** The patients were members of the certified plaintiff class. The class joined the contempt action on behalf of all class members. Under Mass R. Civ. P. 23(a), a class may not bring an action on behalf of the class members unless "the representative parties will fairly and adequately protect the interests of the class." The motion judge concluded the class, which originally was certified in 1986, should still be joined because "[t]he questions of law or fact common to all members of the [c]lass continue to be the same as they were in 1986 and apply to the [c]lass as a whole." Moreover, the patients had separate counsel to ensure their interests were adequately represented within the class. The judge noted, "[the attorneys who represent the patients] continue to effectively represent the [patient] members of the [c]lass directly and independently of the [p]arents authority as [p]arents, [g]uardians and [n]ext [f]riends." The judge considered the direct representation adequate to protect the patients from any potential conflict with the other class members.[9]

Guardianship counsel allege that patients and guardians could disagree on aversive treatment decisions. These decisions, however, are scrutinized in substituted judgment proceedings and were not at issue in the contempt action. In addition, the guardian ad litem was appointed to recognize potential and actual conflicts between the parents and the patients' interests.

In sum, the patients were represented by their guardians, the plaintiffs, and the guardian ad litem. The judge did not abuse her discretion in finding that the patients' interests were adequately protected.

Having concluded that the judge properly denied the motion to be appointed next friend, it is unnecessary to discuss the motion to intervene. Guardianship counsel's relationship with the patients was limited to substituted judgment cases. Because guardianship counsel had no other legal relationship with the patients, they had no standing to bring the motion to intervene. *Hirshson v. Gormley,* 323 Mass. 504, 506-507, 82 N.E.2d 811 (1948). See *Developmental Disabilities Advocacy Ctr., Inc. v. Melton, supra* at 285.

***481** The Probate Court judge's denial of the two motions is affirmed.

So ordered.

Footnotes

[1] Matthew L. Israel, executive director of The Judge Rotenberg Educational Center (JCR); Leo Soucy, individually, and as parent and next friend of Brendon Soucy; and Peter Biscardi, individually, and as parent and next friend of P.J. Biscardi, both as representative of the patients at the Behavior Research Institute, their parents, and guardians.

[2] The Judge Rotenberg Educational Center, Inc. (JRC), was formerly known as the Behavioral Research Institute, Inc.

[3] In the past, courts distinguished between the terms "next friend" and "guardian ad litem." A "next friend" was a person other than a guardian who brought an action on behalf of an infant or incompetent person. Black, Infants-Next Friends-Actions, Settlements, and Attorneys' Fees, 34 Mass. L.Q. 19, 19-20 (1949). A "guardian ad litem" described a person appointed to defend or prosecute a suit on behalf of an incompetent person otherwise represented. *Id.* at 21-23. The distinction was only formal and the functions of the two representatives were really the same. See *N.O. v. Callahan,* 110 F.R.D. 637, 648 n. 6 (D.Mass.1986). Today, we use guardian ad litem and next friend interchangeably. See G.L. c. 201, § 34.

[4] Substituted judgment standard describes a legal proceeding to determine whether an incompetent person would choose treatment if competent to make such a decision. See *Superintendent of Belchertown State Sch. v. Saikewicz,* 373 Mass. 728, 745-759, 370 N.E.2d 417 (1977). Guardianship counsel represent fifty-eight patients at JRC in the substituted judgment cases.

[5] See *Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1),* 424 Mass. 430, 677 N.E.2d 127 (1997), for more detail.

[6] The facts were taken from the record and the order denying guardianship counsel's motions.

[7] The office for children (OFC) was the State regulatory agency responsible for licensing JRC in 1986. That function was later transferred to the Department of Mental Retardation.

[8] Rule 17(b) of Massachusetts Rules of Civil Procedure, 365 Mass. 763 (1974), mirrors Fed.R.Civ.P. 17(c) (1996).

[9] The motion judge stated, "direct representation of the [patients], independent of any [g]uardian or [n]ext [f]riend authority, is considered ... important in protecting the [patients] from potential conflict with the interests of the [p]arents and [g]uardians."