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SUMMARY:

... On December 2, 1998 Commissioner Nicholas Scoppetta announced a novel and favorable settlement in *Marisol v. Giuliani*, a lawsuit initiated by children's rights advocates who sought federal court takeover of the City's Administration for Children's Services. ... The *Marisol* decision was by consent of plaintiffs, but traditional principles of equity would allow a court to deny an injunction with affirmative duties, even over plaintiffs' objection, where the governmental agency itself is doing what is appropriate to prevent violations of law. ... The remarkably candid and readable report analyzed the failures of the agency and out-lined a reform program that included an increase in staff, a reduction of case loads, better training and information systems, tighter controls for foster care contractors, and improved supervision. ... The second suit, *Joel A. v. Giuliani*, is a class action brought on behalf of gay children in foster care. ... Judge Ward ruled that this charge against ACS is covered by the *Marisol* settlement with the result that a court may intervene on a systemic basis only if it is shown that ACS failed to act in good faith. ... More important than personal relationships or qualifications, however, was the fact that ACS under Scoppetta had demonstrated that it was acting in good faith to reform the agency, and could sustain an argument that children's rights advocates and the court ought to have confidence in the agency. ...

TEXT:

[*2] On December 2, 1998 Commissioner Nicholas Scoppetta announced a novel and favorable settlement in *Marisol v. Giuliani*, n1 a lawsuit initiated by children's rights advocates who sought federal court takeover of the City's Administration for Children's Services. The advocates filed the lawsuit in December 1995 following the death of Eliza Izquierdo, a six-year-old whose mother had beaten her to death. ACS's predecessor agency had been monitoring the mother to protect the child. Attorneys from Children's Rights, Inc. and Lawyers for Children alleged that systemic failures to protect children under protection of ACS put children at risk of neglect and abuse, and demanded that the agency be placed under a federal receivership answerable to the federal court in Manhattan.

The settlement announced in December imposed no constricting milestones typically included in similar court

orders. The parties, in effect, endorsed ACS's own reform agenda that the agency devised a year earlier. The City will continue to manage its child welfare programs unfettered by a court-imposed plan so long as the agency in good faith makes efforts towards reform. The burden to show a lack of good faith will be on the children's rights advocates, an important concession because the agency, like many others, has such a large case load and is subject to so many different legal requirements that some violations, even some violations with tragic consequences, are inevitable.

[*3] [] *Child welfare*

The *Marisol* decision was by consent of plaintiffs, but traditional principles of equity would allow a court to deny an injunction with affirmative duties, even over plaintiffs' objection, where the governmental agency itself is doing what is appropriate to prevent violations of law. *Marisol* illustrates such a solution and is a model for how judges might resolve other institutional reform cases pending against local governments.

THE CITY'S STRATEGY

The Izquierdo killing had not gone unnoticed by City officials. On January 15, 1996, four weeks after plaintiffs had filed the *Marisol* complaint, Mayor Rudolph W. Giuliani announced his own program to restore confidence in the City's child protective programs. The Mayor accepted responsibility for reforming the programs and, by executive order, separated the agency from HRA, renamed it the Administration for Children's Services, directed the head of the agency to report directly to him and not through a deputy mayor, and appointed Nicholas Scoppetta as commissioner. n2

Children's rights advocates nonetheless pursued a vigorous litigation strategy. In July 1996 Judge Robert J. Ward, in an opinion favorable to the children's rights advocates, refused to dismiss the complaint, and their attorneys began aggressive pre-trial discovery by calling for agency documents and depositions of ACS personnel. Meanwhile Commissioner Scoppetta and his new team began to develop a comprehensive plan to reform the agency. In December 1996, eleven months after taking over ACS, he and the Mayor released their plan in a report entitled "Protecting the Children of New York: A Plan of Action for the Administration for Children's Services." n3 The remarkably candid and readable report analyzed the failures of the agency and out-lined a reform program that included an increase in staff, a reduction of case loads, better training and information systems, tighter controls for foster care contractors, and improved supervision.

The City, resolved to resist receivership and avoid court supervision, prepared its trial defense. Judge Ward scheduled the trial to begin in July 1998, and the parties estimated that it would take six or more months to complete. By July, however, the parties had begun settlement talks. Judge Ward granted a series of short adjournments to allow the talks to continue. On December 2, 1998 the parties announced the settlement and the simultaneous termination of the litigation.

A NOVEL REMEDY

The allegations by the children's rights advocates ran the gamut from federal and state record keeping failures to constitutional violations, but their central claim was a systemic failure to protect children from neglect, abuse, and death. Typically, plaintiffs in such cases demand that the court issue sweeping orders that impose a host of managerial directives and resource enhancements, a code of conduct for how the agency is to accomplish its mission, and mile-stones for each obligation. Such an order might, for instance, require ACS to hire a specified number of caseworkers and others with particular skills and training by a certain date, construct offices or dormitories, install new data systems, increase home visits, limit caseload, or rewrite the City's contracts with foster care providers. In *Marisol*, plaintiffs initially went even further, demanding the appointment of a receiver to run the agency. These children's rights advocates had already won such judicial takeovers of child welfare agencies in Washington, DC and elsewhere.

Such remedies have many flaws. Local officials lose authority over their agencies. Plaintiffs, or more accurately their attorneys, become co-commissioners through their control of the court orders, and the orders themselves become

encrusted with new and revised bargains, compromises and promises that may have little to do with the underlying law but which lock officials into decisions that may or may not make sense.

Litigation may also get in the way of reform. As Commissioner Scopetta commented in announcing the settlement, "Litigation is not a way to reform a government institution." Successful reform requires not only support from the mayor and the commissioner, but also expertise and time. As examples of the problems presented by litigation, Commissioner Scopetta described ACS's difficulties in seeking advice from outside expert consultants. He feared that by being candid with outside experts the agency would expose itself to additional claims in court. In addition, solutions, however well thought out, once incorporated into a court decree deny the agency flexibility when programs inevitably need to be refined in light of experience.

Attorneys for plaintiffs, however, generally prefer court orders. With a court order the advocates hold the whip hand over agency programs and gain an ongoing and powerful influence over agency management. As an example, the 1979 Rikers Island prison court order required prisoners be given access to the law library. In 1996, after a series of violent assaults had occurred in the prison library, officials decided it would be safer to bring books to the cells of prisoners known to be violent rather than allow those prisoners to go to the library. Attorneys who had negotiated the 1979 court order disapproved. Their refusal to consent held up the change for months, during which time additional prisoner injuries occurred. The City [*4] was ultimately forced to consent to detailed rules on how and when it would deliver books to cells. This sort of second guessing of management decisions will be avoided in the reformation of ACS.

Managerial latitude is essential for an agency like ACS with an expansive mission because, even with the most strenuous effort by top level management -- whether a commissioner appointed by the mayor or a receiver appointed by the court -- there will still be failures. Some parents will still abuse their children. ACS caseworkers daily risk mistakes and misjudgments. The ACS goal must be the protection of every child, but the reality will surely fall short.

The wisdom of the *Marisol* agreement is its acceptance of the agency's own reform program, without change. No battle of experts, no cross-examination of agency officials, and no additional programmatic obligations were added in the court order. Only in the event that ACS acts in bad faith will the court step in. This contrasts sharply with other decrees where a failure to meet any of the specific court-ordered obligations triggers court intervention irrespective of good faith.

Court jurisdiction in *Marisol*, even in reserve, will terminate automatically after two years unless the children's rights advocates prove that the City has acted in bad faith. This reverses the usual practice which permits court supervision to go on indefinitely until the City affirmatively proves that it has brought itself into compliance with all of its obligations, a burden local governments rarely meet. The shift of burden does not free ACS to do less for children, but does limit how long the court may supervise the City.

The settlement contains other important elements. An advisory panel of experts will review ACS's performance and recommend solutions, but cannot impose new duties. The panel may give informal advice to ACS, will submit its reports in draft to the parties for comment and, in evaluating ACS's efforts, take into account legal and operating constraints that may have blocked or delayed implementation of reforms. The settlement also ended the *Wilder* litigation that for 25 years had controlled the City's foster care programs. n4 Agency policies and programs developed in the course of *Wilder* continue, but the court case is ended.

The importance of the *Marisol* settlement has been quickly illustrated. In approving it on January 22, Judge Ward ruled that it barred another suit against ACS filed only a week earlier. The second suit, *Joel A. v. Giuliani*, is a class action brought on behalf of gay children in foster care. The suit charges that ACS fails to protect these children from being abused on account of their sexual orientation. Judge Ward ruled that this charge against ACS is covered by the *Marisol* settlement with the result that a court may intervene on a systemic basis only if it is shown that ACS failed to act in good faith. Individual plaintiffs may sue for personal relief, but not on behalf of a class.

GOOD FAITH AS A DEFENSE STRATEGY

This was not a sweetheart settlement. Plaintiffs' attorneys, with a record of success against other child care agencies, took some 70 depositions and ultimately filed 3,500 pages of factual material and documents with the court in preparation for trial. Plaintiffs' lead attorney, Marcia Lowery, grilled Commissioner Scoppetta during a three-day deposition. The case had all the earmarks of a clash of wills.

What led to settlement? Some of the reasons were traditional. The six-month trial and its costs looked daunting making settlement more attractive. Prior associations also encouraged a level of trust. David Brodsky, a private attorney the children's rights advocates brought in for trial, had been a close associate of Michael Hess, the City's Corporation Counsel. They, along with Nicholas Scoppetta, the ACS Commissioner who developed the agency's reform program, worked together as Assistant United States Attorneys in the early 1970s. Commissioner Scoppetta's personal background and commitment also greatly assisted settlement. He had been a foster child, worked as a case worker while in law school, and later chaired the board of the Children's Aid Society.

More important than personal relationships or qualifications, however, was the fact that ACS under Scoppetta had demonstrated that it was acting in good faith to reform the agency, and could sustain an argument that children's rights advocates and the court ought to have confidence in the agency. In the two years between the complaint and settlement ACS hired 1,425 new caseworkers who met heightened eligibility standards. It expanded its training program for new caseworkers and added training for supervisors. It reduced the average caseload for child protective caseworkers from 27 to 11.3. Private foster care agencies were subjected to tighter controls.

MODEL FOR REFORM

The *Marisol* settlement was by consent, but should still be seen as a model for judges even where plaintiffs do not consent. As the US Supreme Court has stated, the purpose of the corrective injunction is to prevent violations of law, not punish the violator. n5 The purpose of an injunction is to prevent future violations of law harming plaintiffs. But where an injunction will not insure better compliance than the government's efforts, a court ought not impose the additional burden of an affirmative injunction. Justice and the public interest support allowing elected officials to manage their public agencies whenever possible without restrictions on management options. The advocates in *Marisol* marshaled substantial evidence of violations and harmful results, [*5] but they were not automatically entitled to an injunction. Also relevant to a decision on remedy were the efforts by ACS to address those same violations and harmful results. On such a showing a court would be justified to refuse an injunction.

Not every institutional reform case has a basis in equity for trusting agency leadership, but some do. In *Marisol*, because the City refused to negotiate and instead prepared for trial, there was sufficient time for ACS to develop its own plan and to demonstrate its ability to carry it out. A court might achieve the same result by delaying imposition of a remedy long enough for the agency to build a record of its good faith, but judges and plaintiff-advocates need to recognize that institutional change even under the best of circumstances is a lengthy process. Plaintiffs would likely have raged against delay if the court in *Marisol* had stayed its hand for two years, but that probably is a realistic time frame for a large governmental agency to change leadership, develop a plan, and begin to demonstrate its capacity to act on the plan.

The value of local democracy ought to be taken into consideration when a court has before it a local government, yet it is not a value greater than the children's rights asserted in this case. Nevertheless, in some cases the interests of local government may outweigh the demand for an injunction. Here, the parties through agreement produced a fair apportionment of burdens: the children's rights advocates retain access to the court, but must prove the absence of good faith, while ACS must pursue in good faith its burden of performance in the field. This is a model that other judges ought to consider.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies General Overview Family Law Delinquency & Dependency Foster Care Governments Local Governments Employees & Officials

FOOTNOTES:

n1 *Marisol v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996).

n2 Exec. Order No. 26 (1996); *City Law*, Vol. 2, at 9 (1996).

n3 *City Law*, Vol. 3, at 21 (1997).

n4 *Wilder v. Bernstein*, 78 Civ. 957 (S.D.N.Y.).

n5 *Hecht Co. v. Bowles*, 321 U.S. 321 (1944).