

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PAUL H. KREIDER, III, and	:	
DEBORAH H. KREIDER, TIM A.	:	
EISENHAUER and MELODY A.	:	
EISENHAUER, SCOT A. FERTICH and	:	
NANCE J. FERTICH, individually and as	:	CIVIL ACTION
representatives for other similarly situated	:	
individuals,	:	
Plaintiffs,	:	NO. 99-1896
	:	
v.	:	
	:	
COUNTY OF LANCASTER, on its own	:	CLASS ACTION
behalf and as representative for other	:	
similarly situated political subdivisions,	:	
and THOMAS WALKER, in his capacity	:	
as Register of Wills and as representative	:	
for other similarly situated officers, and	:	
BENJAMIN HESS, JR., in his capacity as	:	
Controller and as representative for other	:	
similarly situated officers,	:	
	:	
Class Defendants.	:	

MEMORANDUM AND ORDER

YOHN, J. December , 1999

Three married couples who have adopted children in Lancaster County, Pennsylvania, have brought this suit to challenge the validity of Pennsylvania’s adoption counseling filing fee (the “fee” or the “counseling fee”), which is paid into a segregated fund of the counties (the “fund” or the “counseling fee fund”) by the adopting parents. See 23 Pa. Cons. Stat. Ann § 2505(e) (West Supp. 1999). The plaintiffs allege that the fee violates the Takings and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. See Plaintiffs’ First Amended Complaint ¶¶ 69-73 (Doc. No. 2). The plaintiffs also allege that

the fee violates the Pennsylvania Constitution. See id. ¶¶ 74-78. The plaintiffs ask the court to declare the fee unconstitutional under both the United States Constitution and the Pennsylvania Constitution, issue injunctive relief to stop the collection of the fee, and reimburse the plaintiffs, with interest, for the amount they have paid into the fund.

The named defendants include: Lancaster County; Thomas Walker, the Register of Wills allegedly responsible for the collection of the fee; and Benjamin Hess, the County Controller allegedly responsible for depositing and administering the fee (collectively the “defendants”). See Am. Compl. ¶¶ 6-11. Before the court is the defendants’ motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). The defendants claim that the Tax Injunction Act, 28 U.S.C. § 1341 (1993), deprives the court of federal jurisdiction over this claim because the fee is a “tax under State law” and the plaintiffs have a “plain, speedy and efficient remedy” in the state courts. I disagree because I find that the counseling fee is a regulatory fee, not a tax. The court has jurisdiction therefore to determine the constitutional validity of this fee and accordingly, I will deny the defendants’ motion to dismiss for lack of subject matter jurisdiction.¹

FACTUAL BACKGROUND

¹On July 13, 1999, the plaintiffs filed a motion to certify a class. The parties agreed that the defendants will have fourteen days after service of a court order disposing of the defendants’ motion to dismiss, or seventeen days if the court order is served by mail, to respond to the plaintiffs’ motion for class certification. See August 10, 1999, Stipulation and Order of Court (Doc. No. 11). Therefore, because this memorandum and order disposes of the defendants’ motion to dismiss, the defendants shall respond accordingly to the plaintiffs’ motion for class certification upon receipt of this order.

In 1992, the Pennsylvania Adoption Act was amended to provide that “each report of intention to adopt . . . shall be accompanied by a filing fee in the amount of \$75 which shall be paid into a segregated fund established by the county.” 23 Pa. Cons. Stat. Ann. § 2505(e) (West Supp. 1999). According to the statute, if a biological parent is in need of counseling concerning the relinquishment of his or her parental rights, and is unable to afford such counseling, the costs of the counseling will be paid from this fund. Pa. Cons. Stat. Ann. § 2505 (d)-(e) (West Supp. 1999). In addition to the fee paid into the fund by persons applying to be adoptive parents, the county may also make supplemental contributions to the fund. Pa. Cons. Stat. Ann. § 2505(e) (West Supp. 1999). The court may reduce or waive the fee in the case of a prospective adoptive parent who is able to demonstrate financial hardship. Id.

STANDARD OF REVIEW

A challenge to a federal court’s subject matter jurisdiction may be brought at any time by filing a motion pursuant to Federal Rule of Civil Procedure 12(b)(1). See Halstead v. Motorcycle Safety Found., No. 99-2199, 1999 WL 997474, at *2 (E.D. Pa. Oct. 29, 1999); see also Fed. R. Civ. P. 12(b)(1) (permitting a challenge to subject matter jurisdiction to be made by motion). If the court is lacking subject matter jurisdiction, the court shall dismiss the action. See Fed. R. Civ. P. 12(h)(3). Pursuant to a Rule 12(b)(1) challenge to subject matter jurisdiction, the plaintiff bears the burden of proving that the relevant jurisdictional requirements are satisfied. See Development Fin. Corp. v. Alpha Housing & Health Care, 54 F.3d 156, 158 (3d Cir. 1995); Mellon Bank (East) PSFS v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992); Gehling v. St. George’s Sch. of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985).

A Rule 12(b)(1) challenge may be either a factual or facial challenge to the complaint.

See Mortensen v. First Fed. Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). “In the case of a factual challenge, the court is free to consider and weigh evidence outside the pleadings to resolve factual issues bearing on jurisdiction and to ‘satisfy itself as to the existence of its power to hear the case.’” See Gould Elecs., Inc. v. United States, No. 99-1130, 1999 WL 817719, at *1 (E.D. Pa. Oct. 12, 1999) (quoting Mortensen, 549 F.2d at 891). When the challenge is facial, however, the court must accept as true all well-pleaded allegations in the complaint and draw reasonable inferences in favor of the plaintiff. See Mortensen, 549 F.2d at 891.

The defendants contend, and the plaintiffs do not contest, that this is a facial challenge to the court’s subject matter jurisdiction to hear this case. See Defendants’ Memo. of Law in Support of Their Motion to Dismiss for Lack of Subject Matter Jurisdiction (“Defs.’ Memo.”) at 4-5 (Doc. No. 6); Plaintiffs’ Brief in Opposition to Defendants’ Motion to Dismiss (“Pls.’ Br.”) at 10 (Doc. No. 15). Thus, the court will accept as true all well-pleaded allegations in the plaintiffs’ complaint and will draw all reasonable inferences in the light most favorable to the plaintiffs.

DISCUSSION

The Tax Injunction Act (“the Act”) provides that “[t]he district court shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341 (1993). The purpose of the Act is “to preclude unnecessary judicial interference in state revenue raising operations.” Anders v. Borough of Norristown, No. 97-2026, 1997 WL 660637, at *3 (E.D. Pa. Oct. 22, 1997) (citing Rosewell v. LaSalle Nat’l Bank, 450 U.S. 503, 522 (1981), and Robinson

Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371, 374-76 (3d Cir. 1978)). Thus, Congress passed the Act “to promote comity and to afford states the broadest independence, consistent with the federal constitution, in the administration of their affairs, particularly revenue raising.” Wright v. McClain, 835 F.2d 143, 144 (6th Cir. 1987); see also Arkansas v. Farm Credit Servs. of Central Ark., 520 U.S. 821, 832 (1997) (“The Tax Injunction Act is grounded in the need of States to administer their fiscal affairs without undue interference from federal courts.”); Rosewell, 450 U.S. at 522 (observing that the Act was “first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern”).² The courts have read the Tax Injunction Act quite broadly, and “although the plain language of the Act prohibits only injunctions, the Supreme Court has held that the Act also prohibits a federal court from issuing declaratory judgments.” Behe v. Chester County Bd. of Assessment, 952 F.2d 66, 68 (3d Cir. 1991) (citing California v. Grace Brethren Church, 457 U.S. 393, 408 (1982)).

In analyzing whether the Tax Injunction Act deprives the court of jurisdiction, the court must resolve two questions: (1) whether the suit seeks to invalidate a “tax under state law”; and

²According to the Third Circuit, a second purpose of the Tax Injunction Act was to “deprive out-of state corporations of an advantage over state taxpayers in being able to threaten localities with protracted injunctive litigation in federal courts which induced the localities to compromise their tax claims.” Robinson Protective Alarm Co., 581 F.2d at 375. As the Third Circuit explained, prior to the Tax Injunction Act, “[i]n-state taxpayers usually had to pay their disputed taxes and sue for a refund in state court,” while out-of-state citizens could sue in federal court relying on diversity jurisdiction. See id. The Supreme Court in Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981), questioned whether this was the sole purpose behind the passage of the Act. See id. at 522 n.29. The Court concluded that “first and foremost” the Act was designed to prohibit federal judicial interference with local tax collection. See id. at 522. Nonetheless, even if the Act was intended to prevent giving out-of-state corporations an advantage in challenging taxes, that purpose is not served by forbidding injunctive relief in this case.

(2) if so, whether the state courts offer the plaintiffs a “plain, speedy and efficient remedy.” See 28 U.S.C. § 1341 (1993); see also Anders, 1997 WL 660637, at *3 (listing factors for court to consider in determining whether the Act bars federal jurisdiction).

The threshold question, therefore, is whether the fee promulgated by section 2505 is a “tax under state law,” so as to trigger the Tax Injunction Act, or merely a regulatory fee, which would not implicate the Act. As a court in this district recently observed, “[d]istinguishing a tax from a fee often is a difficult task. Indeed, ‘the line between a ‘tax’ and a ‘fee’ can be a blurry one.’” Trading Co. of N. America v. Bristol Township Auth., 47 F. Supp. 2d 563, 568 (E.D. Pa. 1999). It is clear, however, that the label assigned by the state to the assessment is not dispositive of whether the assessment is a “tax” within the meaning of the Act. See Robinson Protective Alarm Co., 581 F.2d at 374-76. “[T]he meaning of the term ‘tax under state law’ in 28 U.S.C. § 1341 should be determined as a matter of federal law by reference to congressional policies underlying the Tax Injunction Act, rather than by adoption of state tax labels developed in entirely different legal contexts.” Id. at 374.

The Third Circuit has not yet clearly articulated a test for determining when an assessment is a “tax under state law” for purposes of the Tax Injunction Act. See Trading Co., 47 F. Supp. 2d at 568-69 (applying a test utilized by the Ninth Circuit in determining whether the assessment at issue was a “tax under state law”). There are, however, some general factors considered by courts in this circuit when deciding this issue. First, an assessment that is imposed for the primary purpose of raising revenue is a “tax,” while an assessment imposed for regulatory or punitive purposes is not a “tax,” but rather, a fee.³ See Anders, 1997 WL 660637, at *3 (citing

³It is clear that the fee at issue here is not imposed for punitive purposes.

Robinson Protective Alarm Co., 581 F.2d at 374). Moreover, in general, a tax is imposed by a legislative body, while a fee is imposed by a regulatory agency. See Trading Co., 47 F. Supp. 2d at 568. Finally, courts have observed that an assessment that benefits the general public is a tax, while an assessment that benefits a narrow class of persons is a fee. See id.; see also Robinson Protective Alarm Co., 581 F.2d at 376 (holding that the assessment at issue was a tax in part because the “moneys collected are added to the public fisc”).

Recently, in deciding the issue of whether a state assessment was a “tax under state law,” a court in this district applied the test enunciated by the Ninth Circuit in Bidart Brothers v. California Apple Commission, 73 F.3d 925 (9th Cir. 1996). See Trading Co., 47 F. Supp. 2d at 568. In Bidart Brothers, the Ninth Circuit identified the following three factors for courts to examine in deciding whether an assessment is a tax: “(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.” Bidart Bros., 73 F.3d at 931. The Trading Co. court concluded that these factors effectively considered the principles behind the Tax Injunction Act. See Trading Co., 47 F. Supp. 2d at 568. I agree. Thus, I will also consider these factors in analyzing whether Pennsylvania’s adoption counseling fee is a “tax under state law.”

First, the court must consider the body charging the assessment. “An assessment imposed directly by the legislature is more likely to be a tax than an assessment imposed by an administrative agency.” Trading Co., 47 F. Supp. 2d at 568 (quoting Bidart Bros., 73 F.3d at 931). In this case, the Pennsylvania legislature, not an administrative agency, created the fee in the counseling provision of the Pennsylvania Adoption Act. Consideration of this factor,

therefore, suggests that the fee is a “tax under state law.”

Second, the court must analyze the group of persons upon whom the fee is imposed. In general, if an assessment is imposed upon a broad group of individuals, it is more likely to be a tax than a fee. See Trading Co., 47 F. Supp. 2d at 568-69; Trailer Marine Transport Corp. v. Vazquez, 977 F.2d 1, 6 (1st Cir. 1992) (holding that the fee at issue was not a tax because, among other things, it was collected only from a narrow class of persons who sought the “privilege” of driving on state highways); see also Bidart Bros., 73 F.3d at 932-33 (holding that an assessment imposed on apple producers was a fee because, among other reasons, it was imposed upon a narrow group of organizations). In other words, “[t]he classic tax is imposed upon many, or all, citizens.” San Juan Cellular Tel. Co. v. Public Serv. Comm’n of P.R., 967 F.2d 683, 685 (1st Cir. 1992).⁴ In this case, the fee is imposed upon a narrow group of individuals, that is, only upon persons who voluntarily choose to file a report of intention to adopt in Pennsylvania. See Pa. Cons. Stat. Ann. § 2505(e) (West Supp. 1999). Thus, this factor suggests that the adoption counseling fee is a regulatory fee, not a tax.

Third, the court must examine the “ultimate use of the funds generated” to determine whether the fee is expended for the benefit of the general public or devoted to the interests of a limited group of individuals. Indeed, the Third Circuit has emphasized the importance of this issue. See Robinson Protective Alarm Co., 581 F.2d at 376 (considering that the “moneys collected are added to the public fisc” as a factor in determining that an assessment was a tax and

⁴The court recognizes that “an assessment imposed upon a narrow class of persons still can be characterized as a tax under the [Tax Injunction Act].” Bidart Bros., 703 F.3d at 931 (citations omitted). This factor, therefore, is instructive but not dispositive in deciding whether an assessment is a fee or a tax within the meaning of the Act.

not a fee); United Wire, Health and Welfare Fund v. Morristown, 793 F. Supp. 524, 530 (D.N.J. 1992) (explaining that the ultimate use of the money is an important consideration in the Third Circuit), aff'd in part, rev'd in part on other grounds, 995 F.2d 1179 (3d Cir.), cert. denied sub nom, New Jersey Carpenters Welfare Fund v. Dunstein, 510 U.S. 944 (1993). If an assessment is “placed in a special fund and used only for special purposes,” it is more likely to be a fee than a tax. See Trading Co., 47 F. Supp. 2d at 569 (quoting Bidart Bros., 73 F.3d at 932). Similarly, if an assessment is used to benefit the entire community, it is more likely a tax than a fee. See Trading Co., 47 F. Supp. 2d at 569.

In this case, the statutory language makes clear, and the parties do not dispute, that the fee is placed into a “special fund” that is segregated from the general public fisc. See 23 Pa. Cons. Stat. Ann. § 2505(e) (West Supp. 1999) (providing that the fee shall be paid into a “segregated fund established by the county”). The placement of the money into a segregated fund, although not dispositive of the issue, suggests that the fee is regulatory in nature and is not intended to raise revenue for the benefit of the general public. See Vazquez, 977 F.2d at 6 (considering, among other factors, that the money paid was held separately from general funds in concluding that the assessment at issue was not a tax); see also Robinson Protective Alarm Co., 581 F.2d at 376 (concluding that the assessment was a revenue-raising tax in part because the “moneys collected are added to the public fisc”); Butler v. State of Maine Supreme Judicial Ctr., 767 F. Supp. 17, 19 (D. Me. 1991) (concluding that a three hundred dollar jury fee was a tax in part because the money collected was channeled into the state’s general fund). But see Hager, 84 F.3d at 871 (finding that a fee was regulatory and not a tax despite the fact that it was held in a general fund); Bidart, 73 F.3d at 932 (explaining that “even assessments that are segregated from

general revenues are ‘taxes’ under the [Act] if expended to provide a ‘general benefit’ to the public”) (quoting San Juan Cellular, 967 F.2d at 685); Trading Co., 47 F. Supp. 2d at 569 (finding that a fee held in a separate fund was a tax because “the charges assessed ultimately are for the public benefit even if the funds are segregated”).

There is a dispute as to the ultimate use of the money in the fund. The plaintiffs contend that the fund is not intended to benefit the general public, but rather, is intended to provide “a specific benefit to birth parents.” See Pls.’ Opp. at 14. In response, the defendants argue that the fund creates a public benefit “in the form of a system of private adoptions that functions as intended and provides adopted children with stable homes.” See Defs.’ Reply at 4-5. The defendants therefore contend that the benefits of the fund are “widespread.” See id. at 5.

In support of their argument, the defendants assert that the fund creates stability in the adoption process by providing needed counseling to a birth parent considering the difficult decision of whether to terminate his or her parental rights. Even if it is true that such counseling decreases the chance that a birth parent will later change his or her mind about the termination decision, this benefit, although certainly significant, still only reaches the biological parent or parents, adoptive parent or parents, and the adopted child. This is not a broad enough segment of the population of the Commonwealth of Pennsylvania to consider this a benefit to the “general public.” Cf. Trading Co., 47 F. Supp. 2d at 568-69 (finding that a fee for sewer system use was promulgated for the health and general welfare of the public). Instead, the court concludes that the counseling fee in the Pennsylvania Adoption Act is a regulatory fee imposed to provide a benefit to a narrow group of citizens in the Commonwealth of Pennsylvania and thus, is not a

“tax under state law.”⁵

In sum, the court concludes that the seventy-five dollar adoption counseling fee is regulatory in nature and is not intended to raise revenue for the benefit of the general public of the Commonwealth of Pennsylvania. See *Trading Co.*, 47 F. Supp. 2d at 568 (citations omitted) (“Assessments imposed primarily to raise revenue are ‘taxes,’ while assessments imposed for regulatory or punitive purposes are not ‘taxes.’”). That it may indeed raise some revenue is merely incidental to its primary purpose, that is, to provide counseling to biological parents who are in need of counseling services and are unable to pay for such services themselves. Furthermore, the court is confident that permitting a federal suit to go forward in this case will not threaten the flow of revenue relied on by the Commonwealth of Pennsylvania or any county thereof. See *Vazquez*, 977 F.2d at 6 (explaining that a federal injunctive suit would not threaten the tax revenue relied on by Puerto Rico in holding that the assessment at issue was regulatory). Thus, a finding that the court does not have jurisdiction would not further the purpose of the Act because imposing federal injunctive relief in this case would not alter the Commonwealth’s ability to tax its citizens and raise necessary revenue.

Because the court concludes that the adoption counseling fee is not a “tax under state law,” it is unnecessary to decide the second step of the analysis under the Tax Injunction Act, that

⁵The plaintiffs contend that the fund is dedicated exclusively to paying for counseling. See Pls.’ Opp. at 4. The defendants, on the other hand, argue that paying for counseling services is not the “exclusive” purpose of the counseling fee fund. See Defs.’ Memo. at 2 n.1. The court need not determine, however, whether the fund is used exclusively for payment for counseling services. The court concludes, from examining the face of the statute, that the primary purpose of the fund is to provide compensation for counseling for natural parents who are unable to pay for counseling concerning the relinquishment of parental rights. See 23 Pa. Cons. Stat. Ann. § 2505 (West Supp. 1999).

is, whether the state courts would provide the plaintiffs with a “plain, speedy and efficient remedy.” The court holds therefore that the Tax Injunction Act does not deprive it of jurisdiction to decide the present case.

CONCLUSION

Upon consideration of the defendants’ motion to dismiss, the plaintiffs’ response, and the defendants’ reply thereto, I conclude that the counseling fee is a regulatory fee, not a tax imposed for the purpose of raising revenue. Thus, the Tax Injunction Act does not deprive the court of subject matter jurisdiction over this action. Accordingly, I will deny the defendants’ motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h) for lack of subject matter jurisdiction.⁶ An appropriate order follows.

⁶The defendants’ motion to dismiss for lack of subject matter jurisdiction is brought pursuant to Federal Rules of Evidence 12(b)(1) and 12(h)(3). The defendants’ motion and accompanying memorandum of law make no reference whatsoever to a Federal Rule of Civil Procedure 12(b)(6) defense of failure to state a claim upon which relief can be granted.

On July 2, 1999, the Pennsylvania Office of Attorney General filed a brief as amicus curiae urging the court to dismiss the action for failure to state a claim pursuant to Rule 12(b)(6). See Brief of Pennsylvania Office of Attorney General, as Amicus Curiae, In Support of Defendants’ Motion to Dismiss (“Amicus Curiae Brief”) (Doc. No. 8). In their response, the plaintiffs addressed the arguments raised in the Amicus Curiae Brief. In a footnote in their reply brief, the defendants requested that the court consider the arguments raised in the Amicus Curiae Brief as an alternative argument if the court decided that it has jurisdiction over the action. See Defendants’ Reply Memo. of Law in Support of Their Motion to Dismiss for Lack of Subject Matter Jurisdiction (“Defs.’ Reply”) at 7 n.2. This is the only time the defendants mention a defense of failure to state a claim upon which relief can be granted. This brief mention is not sufficient to find that the defendants themselves raised the Rule 12(b)(6) defense of failure to state a claim upon which relief can be granted.

The next issue, therefore, is whether the court should consider the Rule 12(b)(6) defense as raised by the amicus curiae. The court concludes that it should not consider the arguments made by the amicus curiae at this time because the issue has not been properly raised by a party to the action. An amicus curiae is only a “friend of the court,” not an advocate before the court. See Newark Branch, NAACP v. Harrison, New Jersey, 940 F.2d 792, 808 (3d Cir. 1991).

Because the amicus curiae is not a party to the litigation, the amicus does not necessarily represent the interests or the views of either party. See id. Therefore, “it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus.” Id. (citations omitted); see also Berry v. Doles, 438 U.S. 190, 202 (1978) (Rehnquist, J., dissenting with Stevens, J., joining in dissent) (finding that the United States, as amicus curiae in the case, had no standing to request relief which had never been requested by the parties). The court finds that the Attorney General, as amicus curiae, may not raise a defense that has not been raised, or briefed, by the defendants.

Accordingly, the court will not determine at this time whether the plaintiffs’ complaint fails to state a claim upon which relief can be granted. If, and when, this defense is properly raised by the defendants, who are a party to this action, the court will decide the merits of the defense of failure to state a claim upon which relief can be granted.

