

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA

LARRY J. BELIN, individually and on *
behalf of all others similarly situated,
Plaintiff, *

v.

THOMAS L. WHITE, JR., in his official *
capacity as Comptroller of the State of
Alabama; and RICKY J. MCKINNEY, *
in his official capacity as Director of the
Alabama Office of Indigent Defense *
Services;
Defendants. *

Case No. CV-2011-901488.00

THIRD AMENDED COMPLAINT

Background and Factual Allegations

1. This is an action on behalf of all Alabama lawyers in either or both of the following classes:

GAL Class: All Alabama lawyers who

- a. have been appointed by any judge as a Guardian Ad Litem ("GAL") in any Domestic Relations case, including Child Support, Paternity, Juvenile, Dependency, Delinquency, and Need of Supervision, in any Alabama state court at any time prior to the date of final judgment in this action; and
- b. who were previously denied payment by the Comptroller for services as such GAL after submission of a judicially-approved fee declaration, or
- c. who have not previously submitted a judicially-approved fee declaration for such services to the Comptroller, but who would be denied payment upon such submission under the Comptroller's policy stated in his Memorandum dated October 25, 2010 (copy attached as Exhibit A).

Pre-June 14, 2011 Class: All Alabama lawyers who

- a. have been appointed by any judge to represent any indigent person in any Alabama state court at any time before June 14, 2011; and
- b. who have provided legal services pursuant to such appointment for which

payment would be due under Alabama statutory and case law; and

- c. who would be denied payment upon submission of a judicially-approved fee declaration under the OIDS policy stated in the Memorandum dated January 17, 2012 (copy attached as Exhibit B).

Exclusions: Each of the two classes above excludes

- a. all lawyers who provided any such services as "contract counsel" under § 15-12-26, Code of Alabama or as "public defenders" under § 15-12-41, Code of Alabama; and
- b. all lawyers whose fees as GAL are ordered by the court to be taxed as costs to any party under Ala.R.Civ.P. 17(d).

2. In 2006 Plaintiff Larry Belin was appointed by a Jefferson County judge to serve as guardian ad litem for two minor children, M.M. and C.M., in a paternity case. The case was protracted and litigated under three different case numbers. However, it was one and the same case and the Jefferson County circuit court approved Mr. Belin's motion to exceed the statutory fee cap. In May 2011 Mr. Belin submitted his fee declaration to the court in the amount of \$10,807.50, which approved the declaration and sent it to the Comptroller for payment.

3. The Comptroller (and/or his staff acting at his direction) have denied payment of Mr. Belin's fees and expenses for his representation of M.M. and C.M. on the ground that guardian ad litem fees are not properly payable from the Alabama Fair Trial Tax Fund. The Comptroller has further stated that, although the Comptroller has such fees were paid in the past, effective November 1, 2010 no guardian ad litem fees would be paid for declarations submitted after that date, as set forth in the attached Exhibit A.

4. Alabama law requires payment for all such services. See, e.g., § 26-17-612(b), providing that "*The court shall appoint a guardian ad litem to represent a minor or incapacitated child if the child is a party or the court finds that the interests of the child are not adequately represented.*" Likewise, § 15-12-21(b) provides "*If it appears to the trial*

court in a delinquency case, need of supervision case, or other judicial proceeding in which a juvenile is a party, that the juvenile is entitled to counsel and that the juvenile is not able financially or otherwise to obtain the assistance of counsel or that appointed counsel is otherwise required by law, the court shall appoint counsel to represent and assist the juvenile or act in the capacity of guardian ad litem for the juvenile."

5. *In re C.H.*, 723 So. 2d 1277, 1279 (Ala. Civ. App. 1998) specifically held that "The payment for such a fee is now governed by § 15-12-21(b) and (e), Ala. Code 1975. Section 15-12-21(b) authorizes the appointment of counsel in a "judicial proceeding in which a juvenile is a party," and § 15-12-21(e) outlines the procedure to be followed for counsel to obtain payment."

6. Furthermore, in *Wright v. Childree*, 972 So. 2d 771, 772 (Ala. 2006) (note 1), the Alabama Supreme Court specifically recognized that "... in civil proceedings that provide for the appointment of counsel -- for example, whether as an attorney or a guardian ad litem, ... the statutes governing such civil proceedings provide that attorneys appointed in those proceedings shall also be compensated under § 15-12-21, Ala. Code 1975."

7. The Comptroller is therefore under a legal and ministerial duty to pay all such fee declarations which are approved by Alabama judges and forwarded to the Comptroller for payment. His refusal to pay Mr. Belin's fee declaration, as well as numerous other similar declarations in a variety of cases submitted by other Alabama lawyers since November 1, 2010, is unlawful and without any legal excuse.

8. On January 17, 2012 Defendant Ricky J. McKinney issued the Memorandum attached as Exhibit B, which purported to impose certain deadlines to submit attorney fee declarations for appointments in indigent cases of any type where the lawyer was appointed prior to June 14, 2011.

9. Section 10 of Act 2011-678, which established the Alabama Office of Indigent Defense Services ("OIDS"), a sub-agency of the Department of Finance, requires the Director to promulgate rules in accordance with the Alabama Administrative Procedure Act ("AAPA"):

Section 10. The director shall promulgate rules pursuant to the Alabama Administrative Procedure Act necessary to implement this act.

10. The Director's January 17, 2012 Memorandum is a "rule" as defined by § 41-22-3(9), Code of Alabama, which provides in pertinent part that a rule is any "*...agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy...*".

11. The rule announced in the Director's January 17, 2012 Memorandum was not properly promulgated as such by the OIDS or the Finance Department in accordance with the AAPA, and is therefore void pursuant to § 41-22-5(d), Code of Alabama.

12. Mr. Belin is or will be affected by this purported rule in his rendering of legal services pursuant to indigent appointments.

13. Upon information and belief, Mr. Belin alleges that are many other Alabama lawyers similarly situated to him, who have provided legal services pursuant to judicial appointment in Alabama state courts but have been wrongfully denied payment by the Comptroller based on one or both of the above-described grounds.

Count One: Declaratory Judgment

14. Plaintiff realleges ¶ 1 – 13 above.

15. Plaintiff respectfully requests the Court to enter a declaratory judgment, pursuant to § 6-6-220 et seq., Code of Alabama as follows:

a. that *Wright v. Childree* and the other authorities cited above remain binding on

the State Comptroller;

b. that the Comptroller is not free to disregard such legal authority;

c. that all lawyers who accepted Alabama court appointments have entered into an express or implied contract with the State of Alabama as to all such appointments, which the State Comptroller is obliged to honor to the conclusion of each such case; and

d. that all such lawyers who accepted court appointments in civil as well as criminal cases are entitled to be paid by the Comptroller upon approval of their fee declarations by a judge, including overhead reimbursement for cases to which they were appointed prior to June 14, 2011 (when Act 2011-678 changed the way appointed counsel are compensated), and

e. that the rule purportedly established by Defendant McKinney in his capacity as Director of OIDS is void and of no effect.

16. Plaintiff further requests the Court to award him the costs and expenses of this action, together with reasonable attorneys' fees, pre-judgment interest, and costs of court.

Count Two: Injunctive Relief

17. Plaintiff realleges ¶¶ 1 – 13 above.

18. Plaintiff requests the Court to permanently enjoin the Comptroller in his official capacity as follows:

a. that the Comptroller shall immediately pay Mr. Belin's fee declaration in the amount of \$10,807.50, and all other such fee declarations of every class member which the Comptroller has previously denied or delayed, if they are otherwise regular in form and judicially approved; and

b. that the Comptroller shall hereafter promptly pay all fee declarations of any lawyer appointed to represent any indigent in Alabama courts prior to June 14, 2011 if the

declarations are otherwise regular in form and judicially approved; and

c. that the Comptroller and Defendant McKinney as Director of OIDS shall not deny or delay payment to any member of either class described in ¶ 1 above on the basis stated in either of the Memorandums attached as Exhibits A and B; and

d. that the State Comptroller shall not hereafter change any appointed fee payment practices relating to fee declarations and/or overhead reimbursements for work performed by counsel appointed to any case prior to June 14, 2011 until and unless there is a change in the law effected by legislative act, binding appellate decision, and/or agency rule lawfully promulgated under the AAPA.

19. Plaintiff further requests the Court to award him the costs and expenses of this action, together with reasonable attorneys' fees, pre-judgment interest, and costs of court.

Count Three: Breach of Contract and Pre-judgment Interest

20. Plaintiff realleges ¶ 1 – 13 above.

21. Plaintiff alleges that he, and every other lawyer who accepted a court appointment to provide representation for indigent criminal defendants, infants, minors, persons under a mental disability or other incompetent persons in Alabama, whether in a civil or criminal action of any sort, entered into a contract with the State of Alabama to provide legal representation to each such person.

22. Each such contract was express and/or implied in law or fact by virtue of one or more of the following:

a. § 15-12-21, Code of Alabama assures payment at a prescribed hourly rate to each lawyer accepting an appointed case, as well as payment for "expenses reasonably incurred", which the courts of Alabama have previously interpreted as providing for payment of overhead at an hourly rate to be fixed by local circuit court order.

b. All lawyers who accept such appointments expressly or impliedly agree to render services for the statutory rate of pay and such hourly reimbursement rate as is established by local circuit court order, and the State expressly or impliedly agrees to pay them.

c. The State of Alabama has promulgated official forms for fee declarations by lawyers providing court-appointed services. See State of Alabama Unified Judicial System Form C-62A.

d. For many years prior to the Comptroller's unilateral decision that no further guardian ad litem fees would be paid after November 2, 2010, the Comptroller's office recognized and adhered to the obligation to pay under the statutes and cases set out above by paying all such fee declarations which are otherwise proper in form and approved by a judge.

e. *Wright v. Childree*, 972 So. 2d 771 (Ala. 2006) and *In re C.H.* have explicitly affirmed this obligation.

23. The State of Alabama has thus invited lawyers to render legal services pursuant to court appointments, or else assured lawyers providing such services that they will be paid, creating an express or implied contract to pay as provided by statute, case law and long years of practice.

24. As a result Mr. Belin and every other lawyer accepting a court appointment in Alabama could and do reasonably expect that he or she has entered into an express or implied contract with the State under which he or she will be paid at the established rates of compensation.

25. The Comptroller's withholding of payments to Mr. Belin and all such other lawyers providing appointed representation was and is an ongoing breach of the State's contract with Mr. Belin and every other such lawyer.

26. As a result, Mr. Belin and all other lawyers who have been denied payment as set out above are entitled to interest on all amounts withheld from the dates of withholding through the dates of repayment, pursuant to § 41-16-3, Code of Alabama, provides in pertinent part that

(a) Whenever the State of Alabama is a party to any contract, the contract shall be executed by all parties in a timely fashion. When a party to a contract, other than the state, has fully executed the responsibility under the contract and there remains only the payment of funds by the state, payment shall be made in a timely manner. If the amount due by the state is not in dispute, payment shall be made within 30 days after the other party has completed his or her portion of the contract and presented a proper invoice. *If the amount payable is not paid within 30 days, interest on the amount shall be charged.* (Emphasis added).

27. Plaintiff further alleges that pre-judgment interest is due and proper to prevent the State from being unjustly enriched by its wrongful withholding of fee reimbursements at the expense of each affected lawyer in this case. By having the use of each lawyer's money the State has wrongly profited, and the interest on such money should be disgorged and paid to those lawyers denied the use of it. See *Sims v. White*, 522 So. 2d 239, 241 (Ala. 1988); *Williams v. Alabama Power Co.*, 730 So. 2d 172, 174-175 (Ala. 1999); § 40-1-44(b), Code of Ala. (providing for interest on all refunds of taxes erroneously paid to the State); and § 18-1A-211(a), Code of Ala. (providing for interest on the unpaid portion of all eminent domain judgments).

28. Prejudgment interest is also proper under this Court's inherent equitable powers to mold a judgment so as to give effective relief. *James v. James*, 768 So. 2d 356, 359 (Ala. 2000); *Coupounas v. Morad*, 380 So. 2d 800, 803 (Ala. 1980).

WHEREFORE, Plaintiff respectfully requests judgment against the Defendant for all unpaid fee declarations due and owing to himself and all other lawyers similarly situated, together with an award of prejudgment interest to himself and all other such lawyers on all

fee reimbursements withheld by the Comptroller, at the legal rate of interest set by statute if applicable, or at such other rate as the Court may determine to be just and equitable upon the trial of this issue; together with the costs and expenses of this action, and reasonable attorneys' fees, to be assessed against the State of Alabama, or in the alternative, to be paid out of the amounts of fee reimbursements to be paid.

Count Four: Deprivation of Federal Rights Under Color of State Law

29. This count is brought pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

30. Plaintiff realleges ¶ 1 – 28 above.

31. Plaintiff alleges that the Defendant Thomas White, acting in his official capacity, has under color of state law deprived Plaintiff and the class on whose behalf this action is brought of their collective and individual rights to due process of law under the Unites States Constitution by refusing to follow clearly applicable statutory and case law of Alabama, and by refusing to honor the express or implied contract of every class member with the State for legal services rendered at the invitation of the State.

32. Wherefore, Plaintiff requests the Court to permanently enjoin the Comptroller in his official capacity as follows:

a. that the Comptroller shall immediately pay Mr. Belin's fee declaration in the amount of \$10,807.50, and all other such fee declarations of every class member which the Comptroller has previously denied or delayed, if they are otherwise regular in form and judicially approved; and

b. that the Comptroller shall not hereafter change any appointed fee payment practices relating to fee declarations and/or overhead reimbursements for work performed by counsel appointed to any case prior to June 14, 2011 until and unless there is a change in the law effected by legislative act, binding appellate decision, and/or an agency rule lawfully

promulgated under the AAPA.

33. Plaintiff further requests the Court to award him the costs and expenses of this action, together with reasonable attorneys' fees, pre-judgment interest, and costs of court pursuant to 42 U.S.C. § 1988.

Count Five: Allegations of Class Relief

34. Plaintiff realleges all of the foregoing counts and allegations.

35. Plaintiff alleges that the claims in this action are appropriate for class treatment under Rule 23(a), Alabama Rules of Civil Procedure in that the requirements of numerosity of class members, commonality of legal and fact questions, and typicality of claims predominate, and that the Plaintiff will fairly and adequately represent and protect the interests of the classes composed of all lawyers in Alabama who have been or would be subject to unlawful denial of fee payments by the Comptroller and the Director of OIDS as alleged in ¶ 1 above.

36. Plaintiff further alleges that one or more of the prerequisites of Rule 23(b), Alabama Rules of Civil Procedure are also satisfied, in that

a. the Defendants have acted and will act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole, and

b. that the prosecution of separate actions by or against individual members of the classes would create a risk of inconsistent or varying adjudications with respect to individual members of the classes which would establish incompatible standards of conduct for the party opposing the classes, and/or

c. that class treatment of the issues herein is superior to individual litigation for the fair and efficient adjudication of the controversy.

37. Plaintiff therefore respectfully requests relief for the classes described in ¶ 1 above, excluding lawyers who are "contract counsel" under § 15-12-26, Code or "public defenders" under § 15-12-41, Code.

WHEREFORE, Plaintiff respectfully requests the following relief for himself and the class members herein:

- a. certification of a class as set out herein;
- b. entry of declaratory relief on behalf of the classes as requested in Count One above;
- c. entry of injunctive relief on behalf of the classes as requested in Count Two above;
- d. payment for all amounts withheld and unpaid, or which will be due for such declarations in pending and future cases when approved and submitted as alleged in Counts One, Two, Three and Four above, together with pre-judgment interest on all such amounts from their due dates through the date of payment; and
- e. the costs and expenses of this action, together with reasonable attorneys' fees pursuant to 42 U.S.C. § 1988, or awarded to plaintiff's counsel under applicable law.

Respectfully submitted,

s/ George C. Douglas, Jr.

George C. Douglas, Jr. [DOU002]
700 Century Park South, Suite 223
Birmingham, Alabama 35226
(205) 824-4620 phone
(866) 383-7009 fax
email: gcd@hiwaay.net

Attorney for Plaintiff Larry J. Belin
and the putative classes herein

CERTIFICATE OF SERVICE

I hereby certify that I have e-filed this document by AlaFile, which will send electronic notice and service to the lawyers below, and I have also served a backup copy by e-mail this March 28, 2012.

s/ George C. Douglas, Jr.

Hon. Mose Stuart
Senior Associate Legal Counsel
Alabama Department of Finance
600 Dexter Ave., Room E-313
Montgomery, AL 36130
mose.Stuart@finance.alabama.gov

Exhibit A
Comptroller Memorandum 10/25/10



BOB RILEY
Governor

BILL NEWTON
Acting Director of Finance

STATE OF ALABAMA
DEPARTMENT OF FINANCE
OFFICE OF THE STATE COMPTROLLER

RSA UNION
100 North Union Street, Suite 220
Montgomery, Alabama 36130-2602
Telephone (334) 242-7050
FAX (334) 242-2440

THOMAS L. WHITE, JR.
CPA (Inactive)
State Comptroller

October 25, 2010

MEMORANDUM

TO: All District, Circuit and Appellate Court Judges

FROM: Mr. Thomas L. White, Jr. 
State Comptroller

RE: Payment of Guardian Ad Litem Fees from the Fair Trial Tax Fund

Recently, a question was posed to this office regarding whether the fee owed to a guardian ad litem in a domestic relations case could be paid from the Fair Trial Tax Fund, in the same manner as fees and expenses paid to attorneys appointed to represent either indigent criminal defendants or minors in juvenile cases, pursuant to § 15-12-21 of the Code of Alabama. In determining the answer to this question, the Comptroller's Office found that, over a period of some years, there have been instances where guardian ad litem fees have been approved by a judge, submitted to the Comptroller, and have been paid from the Fair Trial Tax Fund. The Legal Division of the Department of Finance advised me that there is no provision in either the Code of Alabama or the Alabama Rules of Civil Procedure that authorizes the payment of guardian ad litem fees by the State of Alabama in domestic relations cases.

Rule 17(d), Ala.R.Civ.P. states:

"In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for services rendered in such cause, to be taxed as a part of the costs in such action, and which is to be paid when collected as other costs in the action, to such guardian ad litem."

I understand that there are attorney fee declarations for guardian ad litem fees pending in my office. Those will be paid in accordance with the current practice. However, effective November 1, 2010, the Comptroller will no longer accept attorney fee declarations for payment of guardian ad litem fees in domestic relations cases. Guardian ad litem fees in domestic relations cases are considered as part of the costs of the case to be taxed by the trial court.

Contact Ellen Eggers at 334-242-7052 if you have any questions or need additional information concerning this matter.

Exhibit B
OIDS Memorandum 01/17/12



STATE OF ALABAMA
Department of Finance
Office of Indigent Defense Services



100 N. Union Street, Suite 680
Montgomery, Alabama 36130
(334) 242-7059
www.OIDS.alabama.gov

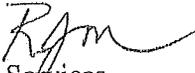
Robert Bentley
Governor

Ricky J. McKinney
Director

Marquita F. Davis, Ph.D.
Director of Finance

MEMORANDUM

To: All District, Circuit, Appellate Court Judges and Attorneys

From: Ricky J. McKinney 
Director of Indigent Defense Services

Date: January 17, 2012

Re: To establish a reasonable time for submission of fee declarations
for concluded cases where attorney appointment was prior to June 14, 2011

Pursuant to Act No. 2011-678, a fee declaration for services rendered in cases with an attorney appointment date on or after June 14, 2011 must be submitted to the Office of Indigent Defense Services (OIDS) within a reasonable time after disposition, not to exceed ninety (90) days. To insure appropriate fiscal responsibility and accountability, it has been determined by OIDS that a reasonable time for submission of fee declarations for services rendered in cases with appointment dates prior to June 14, 2011 should be established. A fee declaration for services rendered in cases with an attorney appointment date prior to June 14, 2011 must be filed with OIDS on or before June 30, 2012 for those cases concluded on or before March 1, 2012. Cases concluded after March 1, 2012 shall be subject to the ninety (90) day rule. Failure to submit fee declarations within the specified time frames may result in nonpayment.