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IN THE SUPREME COURT FOR THE STATE OF ALASKA

FAITH J. MYERS, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	)	Supreme Court No. S-11021

Trial Court Case No. 3AN 03-00277 PR

APPLICATION FOR FULL REASONABLE FEES

Comes now, appellant Faith Myers, by and through counsel, and moves (applies) for full reasonable attorney's fees pursuant to this Court's June 30, 2006, Order Regarding Fees and Costs (Order). On June 30, 2006, this Court issued its opinion on the merits (Opinion), the conclusion of which states:

> We conclude that the Alaska Constitution's guarantees of liberty and privacy require an independent judicial determination of an incompetent mental patient's best interests before the superior court may authorize a facility like API to treat the patient with psychotropic drugs. Because the superior court did not determine Myers's best interest before authorizing psychotropic medications, we VACATE its involuntary treatment order. Although no further proceedings are needed here because Myers's case is now technically moot, we hold that in future non-emergency cases a court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the patient's best interests and that no less intrusive alternative is available.

In the Order, this Court granted Ms. Myers $750 in attorney's fees and costs, "unless counsel applies for full reasonable fees as a public interest litigant," in which case, "the issue will be decided after the state has an opportunity to respond."

A. Ms. Myers is a Public Interest Litigant Here

In *Halloran v. Alaska Div. of Elections*, 115 P.3d 547, n.29 (Alaska 2005), citing to *Matanuska Elec. Ass'n v. Rewire the Bd.*, 36 P.3d 685, 696, 698 (Alaska 2001), this Court reiterated that,

> A party is a public interest litigant "if (1) the case was designed to effectuate strong public policies; (2) numerous people would benefit if the litigant succeeded; (3) only a private party could be expected to bring the suit; and (4) the litigant lacked sufficient economic incentive to bring suit."

1. <u>This Case Was Designed to Effectuate Strong Public Policies</u>.

The mission of the Law Project for Psychiatric Rights (PsychRights), counsel for Ms. Myers in this case, is "to bring fairness and reason into the administration of legal aspects of the mental health system, particularly unwarranted court ordered psychiatric drugging."[1] In furtherance of this mission, PsychRights undertook to represent Ms. Myers who had (and continues to be) a systems change advocate for people diagnosed with serious mental illness and felt she had a right not to be forced to take drugs that she knew to be unhelpful and harmful to her. Thus, this case falls squarely within the "designed to effectuate strong public policies" criteria.

[1] *See*, http://psychrights.org/index.htm, accessed July 5, 2006.

2. Numerous People Will Benefit

There can also be little doubt that numerous people will benefit. This Court's core holding in this case is that:

> in future non-emergency cases a court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the patient's best interests and that no less intrusive alternative is available.

Thus, all future patients who face involuntary medication proceedings will potentially benefit from this ruling. In a November 6, 2005, Anchorage Daily News article, "Lawyer says patients don't get fair hearings," Ron Adler, the CEO of API was quoted as saying there were almost 1,300 involuntary admissions in fiscal year 2005.[2] Not all of these are subject to involuntary medication proceedings,[3] but there is no question a substantial number of people will benefit. Over the long term, it will likely be thousands.

3. Only A Private Party Could be Expected to Bring the Suit

The current statute respecting the involuntary administration of psychotropic medication was enacted in 1992,[4] and in all the time and thousands of adverse trial court determinations since then, the Alaska Public Defender Agency, which is appointed to

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[2] A copy of this article is available on the Internet at http://psychrights.org/States/Alaska/CaseFour/ADN11-6-05onWetherhornvAPI.html

[3] Also, it is possible that not all of the almost 1,300 involuntary admissions in fiscal year 2005 were the result of formal commitment proceedings.

[4] §8, Ch. 109 SLA 1992

represent all or virtually all psychiatric respondents,[5] has never filed any challenge to it or, for that matter, any appeal of any involuntary commitment or involuntary medication order. Thus, even though one would hope the Public Defender Agency could be expected to bring such an appeal, that is clearly not the case.[6]

4. <u>Ms. Myers Lacked Sufficient Economic Incentive to Bring the Suit</u>

Ms. Myers had no economic incentive to bring this appeal. No economic recovery was ever possible and, moreover, it was only because the Law Project for Psychiatric Rights, through the undersigned, was available to undertake it *pro bono publico* that this appeal was brought.

There seems little or no doubt this is public interest litigation.

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[5] The Office of Public Advocacy will subsequently be appointed in cases of conflict, and rarely, such as here, another attorney enters an appearance on behalf of a psychiatric respondent.

[6] Currently pending before this court are two appeals by Roslyn Wetherhorn, through the Law Project for Psychiatric Rights in Case No. S-11939, currently ripe for decision, seeking to establish the right to effective assistance of counsel in these cases, and Case No. S-12249, in which the opening brief is due July 12, 2006, seeking Civil Rule 82 attorney's fees. As will be discussed later, psychiatric respondents' rights are dishonored in these proceedings as a matter of course because the Public Defender Agency fails to provide zealous representation. That no appeal of any involuntary commitment or involuntary medication order has ever been taken to this Court in spite of there being thousands of such orders starkly demonstrates that this type of public interest needs to be encouraged through attorney fee awards as this Court espoused in *Thomas v. Bailey*, 611 P.2d 536, 539, 541 (Alaska 1980).

B. Full Reasonable Attorney's Fees as Prevailing Public Interest Litigant Under Appellate Rule 508(e)

1. Standards

Appellate Rule 508(e) states, "Attorney's fees may be allowed in an amount to be determined by the court."[7] In *Thomas v. Bailey*, 611 P.2d 536, 539 (Alaska 1980), this court held with respect to the very similarly worded Rule 29(d) of the Alaska Rules of Appellate Procedure that it is appropriate to award full reasonable attorney's fees to successful public interest litigants and the same considerations are applicable as at the trial level (i.e., Civil Rule 82). This was based on this Court's position that litigation in behalf of the public interest should be encouraged.[8]

In setting compensation in public interest cases, this Court agreed generally with the proposition that courts should consider the benefit inuring to the public and the personal hardships that bringing this kind of litigation causes plaintiffs and their lawyers.[9] The starting point is a reasonable rate per hour determined with consideration of the following factors:

(1) The time and labor required, the novelty and difficulty of the questions

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[7] Through Ch. 86 SLA 2003, the Alaska Legislature amended AS 09.60.010, by adding subsections (b)-(e), changing the criteria for awarding public interest litigants full reasonable attorney fees. This amendment applies to all civil actions and appeals filed on or after its effective date, which was September 11, 2003, and since this appeal was filed prior to such date it is inapplicable. However, it will be noted that Ms. Myers undoubtedly qualifies for full reasonable fees under this statute, although it also appears the statute did not garner the two-thirds vote of the members elected to each house required under Art. 4, § 15 of the Alaska Constitution to change court rules.

[8] *Id* at 541.

[9] *Id.*

involved, and the skill requisite to perform the legal services properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitation imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.[10]

At note 16, this Court cited with apparent approval the following factors a commentator suggested should be utilized in determining the amount of attorney's fees to be awarded in public interest litigation:

> [T]he nature of the litigation; the novelty and difficulty of the questions involved; the skill required in the case; the skill and resourcefulness of the opposing counsel; the amount of time the attorney spent on the case; the attorney's age, skill and learning; his experience in the particular subject matter area; his standing in the legal community; the loss of employment for the attorney while working on the case; and the customary charges of the Bar for similar services.

For the *Thomas* case, this Court found the relevant factors to be

1. The time and labor required,
2. the novelty and difficulty of the questions involved,
3. the skill required,
4. the fee customarily charged in the locality for similar legal services,
5. the result obtained, and
6. the experience, reputation and ability of the lawyers performing the service.[11]

Finally, this Court held that while it did not believe a multiplier was appropriate in that case, it could conceive of such situations and a multiplier of 2 would seem clearly reasonable where the odds of prevailing were even.[12]

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[10] *Id* at 541-2.

2. Full Reasonable Fees

The same factors this Court found relevant in *Thomas* seem relevant here and will be discussed.

(a) Time and Labor Required and Local Rate.

It seems clear the beginning (and maybe ending) point in determining full reasonable fees is the amount of time expended times the appropriate rate. Attached hereto as Exhibit A, are counsel's three invoices for time spent on this appeal at his regular hourly rate of $225,[13] summarized as follows:

Invoice Date	Hours	Amount
6/25/2003	28.4	$ 6,390
10/18/2003	82.8	$ 18,623
7/6/2006	254.3	$ 57,227
Total	**365.5**	**$ 82,240**

(b) Skill, Novelty and Difficulty of the Questions Involved.

In some ways, it does not seem the questions involved were either particularly novel, nor particularly difficult, at least through the oral argument, nor that the skill required at this appellate level was higher than normal.[14] However, this Court requested supplemental

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[11] *Id* at 542.
[12] *Id* at 542.
[13] Prior to filing this application, counsel called an attorney of similar vintage in a small Anchorage law firm to enquire about his rates. Based on this and counsel's general knowledge of rates in the Anchorage area for private counsel in comparable positions, the $225 per hour would seem to be on the low end of fees customarily charged in Anchorage for comparable legal services.
[14] The one exception to the skill issue might be the way counsel set up the situation where he obtained a one week stay from the trial court of it's involuntary medication order that he managed to keep in place for the remaining 3.5 months Ms. Myers was held at API.

briefing, which did present novel and difficult questions. For both the original arguments and the supplemental briefing the questions involved were certainly matters of first impression in this jurisdiction. In addition, it was 26 months from oral argument and 21 months from the time the Supplemental Reply Brief was submitted, to the time the Court issued its Opinion, which at least suggests a certain level of novelty and difficulty. Counsel also likes to think it was the amount of time he spent on trying to present the arguments in a clear and cogent way which makes them seem neither novel, nor difficult.

(c) The Experience, Reputation And Ability Of Counsel

Since the last half of 2002, counsel has devoted himself to become very knowledgeable about the issues presented in this case. It seems doubtful there is anyone as knowledgeable in the Alaska bar, perhaps even remotely. After this display of *hubris* counsel will leave it to this Court to evaluate his reputation and ability.

(d) The Result Obtained

Ms. Myers obtained virtually everything she sought.[15] The result is an

[15] In §III.C.5., of the Opinion, this Court declined to rule on Ms. Myers contention that the "substituted judgment" rule adopted by the Supreme Judicial Court of Massachusetts should be adopted in Alaska, noting AS 47.30.839(g) is "designed to achieve the same goals as the substituted judgment approach, but by a slightly different path" and concluding:

> Since the meaning of this provision is not at issue here and remains open for future consideration, and since the provision may ultimately be interpreted as performing many of the same functions as the substituted-judgment approach, we see no present need to decide Myers's argument urging us to adopt that approach

Thus, even on this point, Ms. Myers' argument was clearly not rejected and perhaps was even given some support in the Opinion (albeit that the issue might be adequately addressed by statute).

unconstitutional involuntary psychotropic medication regime that had been in operation for 12 years and applied to thousands of patients has been ordered to come into compliance with Alaska's constitution. If the Opinion is effectuated in practice, thousands of Alaskans in the future will not have their fundamental right to be free from unwanted mind-altering and physically harmful drugs unless it is in their best interests and no less intrusive alternative is available.

(e) Should More Than the Time and Labor Required Times the Fee Customarily Charged in the Locality for Similar Legal Services Be Awarded Here?

As set forth above, *Thomas*, at 542, held that "a multiplier of two would seem clearly reasonable in a case whose odds [of prevailing] might be computed as even." This provision might come into play here and justify a multiplier of 2. However, Ms. Myers suggests there are other considerations inherent in Alaska's involuntary commitment and medication regime this Court might consider in deciding whether a multiplier is justified.

As set forth in §B.1., above, "this court has taken the position that litigation in behalf of the public interest should be encouraged."[16] Here, the Law Project for Psychiatric Rights has filled the vacuum created by the Public Defender Agency's abject failure over many years to effectively represent its clients' interests by challenging an unconstitutional involuntary medication regime. As mentioned *supra*., at n. 6, the Public Defender Agency has apparently never filed a single appeal to any of the thousands of involuntary commitment or forced drugging orders issued by the Superior Court since Statehood. Just

this fact alone, because it means there has been absolutely no appellate supervision of the Superior Court's decision-making in this area, makes it inconceivable that people's rights are being honored.

The two pending *Wetherhorn*, appeals also referred to at n. 6, *supra*., seek to establish the right to effective assistance of counsel before the trial court and that private counsel representing psychiatric respondents at the trial court level who prevail should receive attorneys fees to correct the situation aptly described by noted scholar Professor Michael Perlin[17] in Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got: The Role and Significance of Counsel in Right to Refuse Treatment Cases," 42 San Diego Law Review 735 (2005). as follows:

> The assumption that individuals facing involuntary civil commitment are globally represented by adequate counsel is an assumption of a fact not in evidence. The data suggests that, in many jurisdictions, such counsel is woefully inadequate—disinterested, uninformed, roleless, and often hostile. A model of "paternalism/best interests" is substituted for a traditional legal advocacy position, and this substitution is rarely questioned. (at 738, footnotes omitted)
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> * * *
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> The track record of lawyers representing persons with mental disabilities has ranged from indifferent to wretched; in one famous survey, lawyers were so bad that a patient had a better chance of being released at a commitment hearing if he appeared pro se. (at 743, footnote omitted)
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> * * *

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[16] *Thomas* at 541.
[17] See, *Martin v. Taft*, 222 F.Supp.2d 940, 965 (S.D. Ohio 2002), where the court referred to Prof. Perlin as such.

> A right without a remedy is no right at all; worse, a right without a remedy is meretricious and pretextual—it gives the illusion of a right without any legitimate expectation that the right will be honored. . . . "Empirical surveys consistently demonstrate that the quality of counsel 'remains the single most important factor in the disposition of involuntary civil commitment cases." (at 745-6, footnotes omitted)
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> * * *
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> Without such [adequate] counsel, it is likely that there will be no meaningful counterbalance to the hospital's "script," and the patient's articulated constitutional rights will evaporate. (at 749)[18]

This results in the situation where,

> [C]ourts accept . . . testimonial dishonesty . . . specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." . . .
>
> Experts frequently . . . and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment . . .
>
> This combination . . . helps define a system in which (1) dishonest testimony is often regularly (and unthinkingly) accepted; (2) statutory and case law standards are frequently subverted; and (3) insurmountable barriers are raised to insure that the allegedly "therapeutically correct" social end is met . . .. In short, the mental disability law system often deprives individuals of liberty disingenuously and upon bases that have no relationship to case law or to statutes.[19]

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[18] In a companion article, Professor Grant Morris, writes:

> Lawyers who represent mentally disabled clients in civil commitment cases and in right to refuse treatment cases, Michael tells us, are guilty of several crimes. They are inadequate. They are inept. They are ineffective. They are invisible. They are incompetent. And worst of all, they are indifferent. Is Michael right in his accusations? You bet he is!

Morris, Pursuing Justice for the Mentally Disabled, 42 San Diego Law Review, 757, 758 (2005)

[19] Perlin, "The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?" *Journal of Law and Health*, 8 JLHEALTH 15, 33-34 (1993/1994) (emphasis added).

The first *Wetherhon* case, regarding the right to effective assistance of counsel, is currently ripe for decision by this Court, and the opening brief on the second one involving Civil Rule 82 fees is currently due in a matter of days. These two *Wetherhorn* cases address the situation at the trial court level, while the instant fee application addresses the situation on appeal.

Currently, PsychRights only has access to a single attorney who has donated his time *pro bono* to the effort of bringing Alaska's involuntary commitment and forced drugging regime(s) into compliance with statutory and constitutional requirements.[20] In this case, former Chief of Schizophrenia Research at the National Institute of Mental Health, Loren R. Mosher, MD., testified that as a therapeutic matter, "involuntary treatment" (*i.e.*, involuntary commitment or forced drugging) should be difficult to implement and used only in the direst of circumstances.[21] Instead of involuntary commitment and forced drugging being difficult to obtain, primarily because of the abject failure of the Public Defender Agency to effectively represent its clients in these proceedings, it has become by far the path of least resistance, normally only requiring approximately 15 minutes of the psychiatrist's time.[22]

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[20] This case obviously is one, and the first *Wetherhorn* case addresses a couple other such areas, but there are others, the most egregious of which is probably the abuse of the *ex parte* proceedings whereby Alaska residents are hauled off by the police, most often in handcuffs, without prior notice or opportunity to respond to the allegations against them and where statutory predicates and constitutional justifications for such *ex parte* proceedings are not satisfied.

[21] *See*, TR 176-177.

[22] The proceedings in the first pending *Wetherhorn* appeal, Case No. S-11939 is a typical proceeding.

Unless a regime is fashioned whereby psychiatric respondents receive effective assistance of counsel, the response to this Court's Opinion will probably be the addition of two additional check boxes on the forms the psychiatrist fills out,[23] psychiatric respondents will have no meaningful opportunity to have their rights vindicated, and their rights will continue to be dishonored as a matter of course.

Full reasonable attorney's fees in this case based on the amount of time expended times the local rate does not realistically enable the Law Project for Psychiatric Rights to hire a full time attorney to work on these cases,[24] but a multiplier of two probably does. This would free the Law Project from Psychiatric Rights from having to rely on the limited availability of *pro bono* attorney representation to pursue these public interest cases.

In sum, the Court might consider whether

(1) the contingency factor discussed in *Thomas*,

and/or

(2) its potential objective in seeing the Opinion effectuated in practice,

justify a multiplier.

[23] One, that the medication is in the person's best interest and the second that there is no less intrusive alternative available.

[24] In addition to the attorney's salary, there is an unavoidable administrative overhead burden, such as office space, computer, supplies, etc., including possibly a secretary/assistant that goes along with hiring an attorney.

C. Request For a Judgment

Counsel's experience during the Alaska Mental Health Trust Lands litigation[25] is that while the State always pays attorney fee orders, it sometimes takes years for the legislature to appropriate the funds to do so. Therefore, in order to provide some incentive for the State to make a timely payment should this Court grant this motion, and that in the event timely payment might not be made, at least interest will accrue, Ms. Myers is requesting that a judgment be issued. A form of judgment to do so has been lodged herewith as well as a form of Order Granting Full Reasonable Fees.

D. Conclusion

For the foregoing reasons Ms. Myers requests this Court grant her Motion for Full Reasonable Fees in an amount the Court deems just, proper and appropriate under the circumstances.

Dated this 7th day of July, 2006 at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

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[25] *See, Weiss v. State*, 939 P 2d 380 (Alaska 1997).