

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
W. A. DREW EDMONDSON,
ATTORNEY GENERAL OF OKLAHOMA

Plaintiff,

vs.

AMERICAN LEGION CHILDRENS HOME, Inc.
an Oklahoma nonprofit corporation,
THE BOARD OF DIRECTORS OF
AMERICAN LEGION CHILDREN'S
HOME, INC., and individual
Directors, ART BESA,
DAVID KELLERMAN, and
W.D. WILSON,

Defendants.

Case No. CJ-2010-229

Filed in the DISTRICT COURT
Kay County, Oklahoma

NOV 23 2010

MARY RAMEY, Court Clerk

BY _____
DEPUTY

**PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION AND SUPPORTING BRIEF**

Plaintiff, the State of Oklahoma, through its Attorney General W.A. Drew Edmondson (the "State"), moves the Court for a temporary restraining order for such period of time until the Court may afford the parties a hearing, and moves the Court for entry of a temporary injunction at such hearing against defendants The Board of Directors of American Legion Children's Home, Inc., Art Besa, David Kellerman and W.D. Wilson. In support of this motion, the State states:

1. Defendant, the Board of Directors of American Legion Children's Home, Inc. ("the Board") is the board of directors charged with operating the American Legion Children's Home, Inc. (the "Children's Home"), a non-profit charitable organization and charged with maintaining the Children's Home's charitable trust.

2. The Children's Home is located at 1300 Summers Place, Ponca City, OK 74604.
3. The Children's Home currently houses 44 minor children. Additionally, personal property, including automobiles, furnishings, computers, electronics, institutional records and other equipment and supplies are located at said premises. The Children's Home also has cash assets of approximately \$2.6 million held as a charitable trust.
4. The Board and the individual Directors Art Besa, David Kellerman and W. Dee Wilson have provided notice of their intent to close the Children's Home on December 31, 2010 and auction all above-described personal property shortly thereafter.
5. The Board filed a Certificate of Dissolution of the Children's Home on November 19, 2010 and have requested that the Children's Home remit its cash assets to the Board as soon as possible.
6. Further, the Board violated Oklahoma law by failing to notify the Attorney General prior to voting to liquidate the personal property of the Children's Home. (*See* Petition, p. 6-7)
7. Upon information and belief, the Board has voted to misappropriate the Children's Home's property, assets and/or trusts by auctioning off the Children's Home assets. (*See* Petition, p. 7-8).
8. Upon information and belief, the Board has ordered the Director, Bill Alexander to immediately pay their attorney's fees and to return to the Donald W. Reynolds Foundation more than one million dollars in donations that were for the sole purpose of carrying out the Mission of the Children's Home. (*See* Petition, p. 8).
9. Unless restrained and enjoined by the Court, the Board, upon information and belief, will wrongfully close the Children's Home and improperly dispose of its personal

property in an auction, leaving the Children's Home and its 44 minor residents to suffer continuing irreparable damage for which there is no adequate remedy at law.

10. The wrongful actions of the Board are of such a grave and serious nature so as to require the issuance forthwith of a temporary restraining order.

11. A restraining order is a writ of the court compelling parties to maintain the subject of controversy in *status quo*. The order's object is to prevent irreparable injury until the court may rule on Plaintiff's application for a temporary injunction. *Morris v. Earnest, Inc.*, 1976 OK 31, 547 P.2d 955, 957 (Okla. 1976). A temporary restraining order is warranted where the Plaintiff has demonstrated that it is reasonably probable Plaintiff, the State of Oklahoma, will suffer irreparable harm absent a restraining order, or that Plaintiff in fact has suffered injury and is subject to continuing harm absent a restraining order. *Young v. Seaway Pipe Line, Inc.*, 1977 OK 248, 576 P.2d 1144, 1148 (Okla. 1977). The court is empowered to grant the requested relief under 12 O.S. § 1381, *et seq.*

12. A temporary restraining order is clearly warranted in this action, as the State has shown through its Petition that Defendants have breached their fiduciary duty as members of the Board of Directors of the Children's Home by wrongfully violating the requirements of the Oklahoma Open Meetings Act, failing to notify the Attorney General and/or file a request with this Court prior to disposing of the assets of a charitable trust; and voting to misappropriate the assets of the Children's Home. Upon information and belief, Defendants will continue to breach such covenants to the Children's Home's irreparable economic detriment. A restraining order is necessary to protect the State's and the Children's Home's rights and preserve the *status quo* until such time as the Court may afford the parties a hearing on the State's motion for a temporary injunction.

13. A temporary injunction should be granted in the Court's discretion based upon consideration of the following four criteria: (1) applicant's likelihood of success on the merits; (2) irreparable harm to the party seeking relief if injunctive relief is denied; (3) relative effect on the other interested parties; and (4) public policy concerns arising out of the issuance of injunctive relief. *Roye Realty & Developing, Inc. v. Watson*, 1990 OK CIV APP 21, 791 P.2d 821, 823 (Okla. Ct. App. 1990).

14. As to the applicant's likelihood of success on the merits, it is not necessary that Plaintiff's right to a final decision be without doubt; rather, Plaintiff need only make a prima facie showing of reasonable probability of prevailing on the merits. *Id.* The likelihood of the State succeeding on the merits of this action is great under the demonstrated circumstances.

15. The second criterion is also satisfied. Defendants' conduct, if left unrestrained, would irreparably harm the Children's Home's core operations and its employees, as well as the State's ability to care for the minor children currently living at the Children's Home. If Defendants are not enjoined from breaching their respective fiduciary duties to the Children's Home, the State's only recourse will be to attempt to recover damages for the breaches. Damages, however, will be difficult to measure because the Children's Home is the only American Legion children's residence in the country and its value to the residents and its employees is virtually impossible to quantify. If the assets of the Children's Home are sold by Defendants in the planned January 2011 auction, the Children's Home will almost certainly not be able to continue its important operations, even if the State eventually prevails in this lawsuit. This is due, in large part, to the fact that the deed to the land on which the Children's Home is built will revert back to the descendants of the original grantor on the date that the land is no longer used to operate a home for needy children.

Additionally, one or more of the Defendants are most probably financially incapable of responding with compensatory damages for the State's losses.

16. No injury will befall Defendants by granting the State injunctive relief. Defendants have no vested interest in closing the Children's Home on December 31, 2010 and selling off the assets of the Children's Home in a January 2011 auction. The public interest is best served by granting the requested injunction and avoiding the possibility that, due to the improper and illegal actions of Defendants, the State of Oklahoma will lose a valuable resource that provides a home and care for needy Oklahoma children.

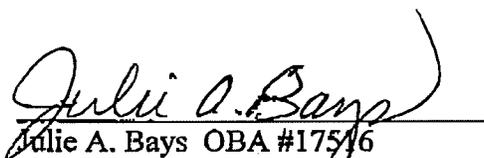
WHEREFORE, Plaintiff, the State of Oklahoma, through its Attorney General W.A. Drew Edmondson, requests that the Court grant the restraining order, and set for hearing as expeditiously as possible its motion for temporary injunction; and that the Court grant a temporary injunction at such further hearing, of the same substance as the restraining order, barring defendant the Board of Directors of the American Legion Children's Home, Inc. and all other defendants in this action from:

- (a) selling any assets currently held by the American Legion Children's Home, Inc.;
- (b) closing the American Legion Children's Home residence located at 1300 Summers Place, in Ponca City, Oklahoma;
- (c) requiring the Children's Home to remit to the Board of Directors any assets of the Children's Home, including, but not limited to, any funds held by the Children's Home as a charitable trust;
- (d) dissolving the American Legion Children's Home, Inc.;
- (e) wrongfully interfering with any of the Oklahoma Department of Human Services contracts; and

- (f) diverting any resources of funds for any activity or purpose other than necessary for the day to day operations of the Children's Home;
- (g) taking any other action that would jeopardize the ability of the Children's Home to continue to serve its mission of "provid[ing] a home and care for needy children...."

Respectfully submitted,

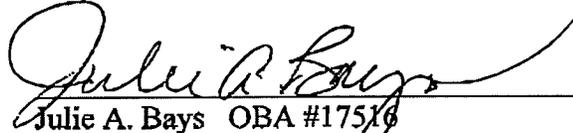
**W. A. DREW EDMONDSON,
ATTORNEY GENERAL OKLAHOMA**


Julie A. Bays OBA #17516
Assistant Attorney General
Consumer Protection Unit
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
Telephone: (405) 522-3082
Facsimile: (405) 522-0085

NOTICE OF HEARING ON MOTION FOR TEMPORARY INJUNCTION

A motion seeking a Temporary Injunction against the above named Defendants is scheduled for hearing, on 14th day of December 2010, in the Courtroom of the Honorable D W Boyd, Kay County, State of Oklahoma.

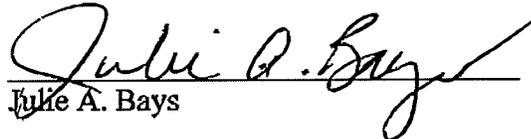
**W.A. DREW EDMONDSON
ATTORNEY GENERAL**



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Oklahoma City, Oklahoma 73105
Phone: (405) 521-3921
Fax: (405) 522-0085

CERTIFICATE OF SERVICE

A true and correct copy of this document was mailed by postage prepaid to Jay Israel, Attorney for Defendant Board, 401 N. Hudson, Oklahoma City, Oklahoma 73102, this 23 day of November 2010.



Julie A. Bays

NOV 23 2010

IN THE DISTRICT COURT OF KAY COUNTY MARY RAMEY, Court Clerk
STATE OF OKLAHOMA BY _____ DEPUTY

STATE OF OKLAHOMA, ex rel.,)
W. A. DREW EDMONDSON,)
ATTORNEY GENERAL OF OKLAHOMA)

Plaintiff,)

vs.)

AMERICAN LEGION CHILDRENS HOME, Inc.)
an Oklahoma nonprofit corporation,)
THE BOARD OF DIRECTORS OF)
AMERICAN LEGION CHILDREN'S)
HOME, INC., and individual)
Directors, ART BESA,)
DAVID KELLERMAN, and)
W.D. WILSON,)

Defendants.)

Case No. CJ-2010-229

**PETITION FOR THE REMOVAL OF THE BOARD AND
APPOINTMENT OF A RECEIVER**

The State of Oklahoma through the Attorney General's Office, by an through its counsel, Attorney General W.A. Drew Edmonson, petitions for the removal of The Board of Directors ("The Board") and the appointment of a Receiver over the assets of The American Legion Children's Home, Inc. In support of this Petition, the State states as follows:

PARTIES

1. The Attorney General W.A. Drew Edmondson exercises all the common law and statutory rights, duties, and powers granted to his office in connection with the supervision, administration and enforcement of charitable trusts, pursuant to the common law and Okla. Stat. § 175.18(B), and has the duty to see that the rights of the public in a charitable trust are protected and properly executed. *See Sarkeys v. Ind. School Dist. No. 40*, 1979 OK 42, ¶10, 592 P.2d 529

("[I]t is generally held that the Attorney General has a preclusive right to maintain proceedings to protect the trust and to prevent a misuse of property. devoted to a public charity.") The Attorney General's address is 313 N.E. 21st Street, Oklahoma City, OK 73105.

2. Defendant The American Legion Children's Home, Inc.(the "Children's Home") is an Oklahoma nonprofit corporation registered with the Secretary of State (see Certificate of Incorporation, attached as Exhibit 1), is recognized by the Internal Revenue Service as a 501(c)(3) organization (see Amended Certificate of Incorporation, filed May 27, 2009, attached as Exhibit 2, and is a charitable trust. The address of the registered agent for the Children's Home, Inc. is David Kellerman, 2311 N. Central, Oklahoma City, OK 73105.

3. Defendant Art Besa is the current President of the Board and has executed numerous documents on behalf of the Board. Defendant Besa's address is 916 SW 60, Lawton, OK 73505.

4. Defendant David Kellerman is the current Vice-President of the Board and has executed numerous documents on behalf of the Board. Defendant Kellerman's address is 1109 Charlotte Terrace, Mustang, OK 73064.

5. Defendant W.D. Wilson is a member of the Board and serves as its secretary. He has executed numerous documents on behalf of the Board. Defendant Wilson's address is 2311 N. Central, Oklahoma City, OK 73105.

JURISDICTION

6. This Court has jurisdiction over charitable institutional funds and charitable trusts, per 60 Okla. Stat. § 300, et al.

LEGAL STANDARDS AND UNDISPUTED FACTS

7. The Attorney General W.A. Drew Edmondson exercises all the common law and statutory rights, duties, and powers granted to his office in connection with the supervision, administration and enforcement of charitable trusts, pursuant to the common law and Okla. Stat. § 175.18(B), and has the duty to see that the rights of the public in a charitable trust are protected and properly executed. The authority of the Attorney General as a statutory right or as *parens patriae* requires notice. *See Sarkeys v. Ind. School Dist. No. 40*, 1979 OK 42, ¶11, 592 P.2d 529.

8. The Children's Home is defined under Oklahoma law as a charitable trust and an institutional fund holding funds exclusively for charitable purposes; thus its Board of Directors must comply with all applicable aspects of the Oklahoma Uniform Prudent Management of Institutional Funds Act and Oklahoma Charitable Fiduciary Act (60 Okla. Stat. §§ 300.11, et al and 301.1, et al.)

9. The Children's Home was incorporated with the Oklahoma Secretary of State as The American Legion Home School Corporation on July 9, 1929 as a nonprofit corporation. (*See* Articles of Incorporation, July 9, 1929, Ex. 3; Certificate of Dissolution, Ex. 4). The Articles of Incorporation were amended on January 21, 1968, changing the name to the American Legion Children's Home Corporation. (*See* Amended Certificate of Incorporation, filed in May 1968, Ex. 5).

10. The mission of the Children's Home is as follows: "To provide a home and care for needy children, with emphasis being placed on descendants of active and ex-service men and women of the United States Armed Forces, with preference to be given to the children of the State of Oklahoma" and "[t]o receive and administer funds for scientific, educational and charitable purposes within the meaning of § 501(c)(3) of the Internal Revenue Code...." (*See* 2009 Amended Certificate of Incorporation, Ex. 2).

11. The Certificate of Dissolution for the Children's Home, certified as true and correct to the best of Defendants Besa's and Wilson's knowledge, lists the directors of the Children's Home as follows: Art Besa, David Kellerman and W.D. Wilson. (See Certificate of Dissolution, filed on November 19, 2010 with the Secretary of State, Ex. 4).

12. The Children's Home's assets include land and the residential home located at 1300 Summers Place, Ponca City, OK 74604, as well as cash assets of approximately \$2.6 million and personal property, including automobiles, furnishings, computers, electronics and other equipment and supplies.

ARGUMENT

I. THE BOARD DID NOT COMPLY WITH THE OPEN MEETING ACT WHEN IT VOTED TO CLOSE THE CHILDRENS' HOME

13. The Board violated the Oklahoma Open Meeting Act (the "Open Meeting Act") when the Executive Committee met on October 24, 2010 and voted unanimously to close the Children's Home on December 31, 2010.

14. For an entity to be subject to the Act, it must be a "public body" as defined by the Act. The Act provides the following definition of "public body":

"Public body" means the governing bodies of all municipalities located within this state, boards of county commissioners of the counties in this state, boards of public and higher education in this state and all boards, bureaus, commissions, agencies, trusteeships, authorities, councils, committees, public trusts or any entity created by a public trust, task forces or study groups in this state *supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public property*, and shall include all committees or subcommittees of any public body. See 25 Okla. Stat. § 304(1)(emphasis added).

15. Under 25 Okla. Stat. §§ 301-304, certain private organizations which contract to provide services to the public on behalf of a governmental agency are subject to the requirements of the Open Meeting Act. See Oklahoma Attorney General Opinion, Question Submitted by:

The Honorable Danny Hilliard, Majority Floor Leader, State Representative, District 22, 2002 OK AG 37 (decided 8/21/2002).

16. Certain private entities may qualify as public bodies “not otherwise defined by express language in [the Act] or within its terms as a matter of law by reason of their constitutional or statutory origin.” *See id.; Sanders v. Benton*, 579 P.2d 815, 820 (Okla. 1978). Under the test set forth by the Oklahoma Supreme Court in *Sanders*, if a private organization is “supported in whole or in part by public funds or entrusted with the expending of public funds,” it is subject to the various requirements of the Open Meeting Act.¹ *Id.*; *see* 25 Okla. Stat. § 304(1).

17. In Fiscal Year 2010, the Children’s Home received \$635,837.00 in private donations and over \$3 million for operations support from the Oklahoma Department of Human Services.

18. Because the Children’s Home is clearly supported almost entirely by public funds and/or entrusted with the expending of public funds in caring for the minor children in its custody, it is subject to the requirements of the Open Meeting Act.

19. Under the Oklahoma Open Meeting Act, regulated entities are required to give written notice to the Secretary of State: (1) by December 15 of each calendar year of the date, time and place of the regularly scheduled meetings for the following calendar year and (2) within forty-eight (48) hours prior to special meetings. Additionally, regulated entities must display public notice of meetings at least twenty-four (24) hours prior to the meeting, excluding weekends and holidays. The public notice must be placed prominently at the principal office of

¹ “Full or partial publicly funded support is one of the criteria used to determine which parent-entities, not otherwise defined by express language in [the Act] or within its terms as a matter of law by reason of their constitutional or statutory origin, would come within the purview of the open meetings law.” *Sanders*, 579 P.2d at 820.

the public body and must include the date, time, place and agenda. *See generally* 25 Okla. Stat. § 301, et al.

20. Upon information and belief, the Children's Home Board of Directors did not provide such mandatory notice.

21. The Children's Home Board of Directors knew or should have known that it is required to satisfy the requirements of the Open Meeting Act.

22. Because the Children's Home willfully violated the Open Meeting Act when it held the meeting where it voted to close the Children's Home and auction off the Children Home's personal property, this vote must be deemed invalid and the individual members of the Board may be held personally liable. *See* 25 Okla. Stat. §§ 313, 314.

II. THE BOARD DID NOT PROVIDE NOTICE TO THE ATTORNEY GENERAL PRIOR TO VOTING TO CLOSE THE CHILDRENS'S HOME ON DECEMBER 31, 2010 AND AUCTION ITS PERSONAL PROPERTY

23. On May 27, 2009, the Board for the Children's Home filed amendments to the Children's Home Certificate of Incorporation. The amended certificate sets forth that the purpose for which the Children's Home is formed is "[t]o provide a home and care for needy children, with emphasis being placed on descendants of active and ex-service men and women of the United States Armed Forces, with preference to be given to the children of the State of Oklahoma. (See May 27, 2009 Amendment to Certificate of Incorporation at 4(a), attached as Exhibit 22).

24. The Certificate of Incorporation was also amended on the same date to include the following provision:

(k) Upon the dissolution of the Corporation or the winding up of its affairs, the assets of the Corporation shall be distributed exclusively to charitable, religious, scientific testing for public safety, library or educational organizations which

would then qualify under the provisions of § 501(c)(3) of the Internal Revenue Code and its Regulations as they now exist or may hereafter be amended.

(*See id.* at 4(k)).

25. Under 60 Okla. Stat. § 300.16(c), if an institution determines that “a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund” is “unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard.”

26. By deciding to close the Children’s Home and auction the personal property expressly donated to the Children’s Home, the Board of Directors explicitly decided to modify the purpose of the Children’s Home’s charitable trust and personal property.

27. Because it did not initiate a court proceeding or notify the Attorney General prior to voting to close the Children’s Home and place the Children’s Home’s personal property for auction, the Board of Directors violated Oklahoma law.

28. The Board’s decision to close the Children’s Home violated Oklahoma law; thus, it was not a lawful decision and should not have effect.

III. MISUSE AND/OR MISAPPROPRIATION OF CHARITABLE FUNDS AND IGNORING DONORS INTENT

29. The individual members of the Board of Directors of the Children’s Home, a charitable nonprofit corporation, are deemed to be fiduciaries acting in a fiduciary capacity. *See* 60 Okla. Stat. § 301.4.

30. Upon information and belief, the Board has misused or will misuse the Children's Home's property, assets and/or trusts.

31. Upon information and belief, the Board has ordered the Director, Bill Alexander to immediately pay their attorney's fees and to return to the Donald W. Reynolds Foundation more than one million dollars in donations that were for the sole purpose of carrying out the Mission of the Children's Home. (See letter written by the Pray Walker Law Firm regarding the restricted funds donated by the Donald W. Reynolds Foundation, Ex. 6.

32. Upon information and belief, the Board will misappropriate the Children's Home's personal property by placing the proceeds of the Children's Home's auction sale under the control of a non 501(c)(3) charitable organization.

33. By voting unanimously to wrongfully misappropriate the Children's Home assets, each member of the Board for the Children's Home has breached their fiduciary duties with respect to managing and safeguarding the charitable assets of the Children's Home.

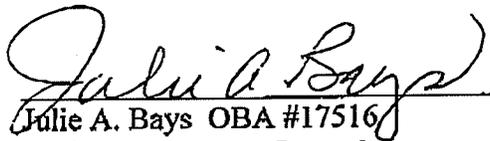
34. Further, by voting to close the Children's Home effective December 31, 2010 and filing a Certificate of Dissolution with the Secretary of State, the members of the Board have failed to promote the mission of the Children's Home: "To provide a home and care for needy children, with emphasis being placed on descendants of active and ex-service men and women of the United States Armed Forces, with preference to be given to the children of the State of Oklahoma."

35. Based on the above allegations, the Board and its individual members are liable for breach of fiduciary duty and the resulting damages caused by that breach.

36. Wherefore, Petitioner respectfully requests that this honorable Court:

- a. Issue an order removing Defendants Art Besa, David Kellerman and W.D. Wilson as Board Members of the Children's Home;
- b. Invalidate all decisions made by the Board in meetings after March 2010;
- c. Appoint a receiver over the assets of the Children's Home;
- d. Award Petitioner its reasonable costs and attorneys' fees in connection with this matter; and
- e. Order such other relief as may be just and equitable.

Respectfully submitted,
W. A. DREW EDMONDSON,
ATTORNEY GENERAL OKLAHOMA



Julie A. Bays OBA #17516
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313 N.E. 21st Street
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VERIFICATION

STATE OF OKLAHOMA)
COUNTY OF OKLAHOMA) ss

Affiant, being duly sworn, upon oath, deposes and says, I am an attorney for the Plaintiff, State of Oklahoma, in the above entitled action; I prepared the above pleading, know the contents thereof, and to the best of my knowledge and belief, the matters set forth therein are true and correct.

W.A. DREW EDMONDSON
ATTORNEY GENERAL

By: *Julie A. Bays*
Julie A. Bays OBA #17516
Assistant Attorney General
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
405-522-3082

SUBSCRIBED AND SWORN to before me this 23 day of November, 2010.

Cary L. Box
NOTARY PUBLIC

My Commission Expires:

1-21-14

