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CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

Adoption of JOSHUA S., a Minor.

ANNETTE F.,

Plaintiff and Respondent,

v.

SHARON S.,

Defendant and Appellant.

D045067

(Super. Ct. No. JA46053)

APPEAL from an order of the Superior Court of San Diego County, Cynthia Bashant, Judge. Reversed.

Blatchley & Blatchley and William E. Blatchley; John L. Dodd & Associates and John L. Dodd for Defendant and Appellant.

Luce, Forward, Hamilton & Scripps LLP and Charles A. Bird for Plaintiff and Respondent.

Judith E. Klein for Minor.

Sharon S., as the result of artificial insemination, gave birth to a son, Joshua S. Sharon signed an independent adoption agreement that, while preserving her parental rights and control of the child, allowed the adoption of Joshua by her partner, Annette F. Annette filed a petition to adopt Joshua as a second parent. Sharon moved to dismiss the petition on several bases, including that the adoption was unauthorized by statute. The motions were denied. Sharon petitioned for and this court granted a writ of mandate, holding that an adoption where a consenting parent does not relinquish all parental rights has no statutory basis. The Supreme Court granted Annette's petition for review. The Supreme Court reversed our judgment, finding that second parent adoptions are lawful. Additional related litigation followed. As part of that process, Annette was awarded \$92,049.15 in attorney fees under the "private attorney general" doctrine embodied in Code of Civil Procedure section 1021.5.¹ Sharon appeals the award of fees.

BACKGROUND

A. Sharon v. Superior Court

Sharon and Annette were in a committed relationship from 1989 through mid-2000. In 1996 Sharon was artificially inseminated and gave birth to Zachary. While retaining her parental rights, Sharon consented to Annette's adoption of the child.

(Sharon S. v. Superior Court (2003) 31 Cal.4th 417, 422.)

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

In 1999 Sharon was again artificially inseminated by the same sperm donor and gave birth to Joshua. Sharon and Annette made the same agreement allowing Annette to adopt Joshua while Sharon retained her parental rights. Thereafter the relationship between Sharon and Annette deteriorated and Annette left the family home. Annette filed a motion for an order of adoption. Sharon moved for court approval to withdraw her consent to adopt and to dismiss Annette's petition. Sharon relied on several arguments, including that the form of second parent adoption sought was unlawful. (*Sharon S. v. Superior Court, supra*, 31 Cal.4th at pp. 422-424.)

The trial court denied the motion to dismiss the adoption. Sharon filed and this court granted by a divided opinion a petition for writ of mandate, holding that the form of second parent adoption sought by Annette was without statutory basis. Our Supreme Court granted Annette's motion for review and reversed, finding that second parent adoptions like that sought by her were lawful. The Supreme Court remanded the matter for resolution of factual issues related to Sharon's claim that her consent for the adoption was gained by fraud and duress and that the attorney who originally represented her and Annette failed to obtain a signed waiver regarding conflict of interest. (*Sharon S. v. Annette F., supra*, 31 Cal.4th at pp. 422-424, 445-446.)

B. Motion for Award of Attorney Fees

On June 10, 2004, before the resolution of the duress and conflict of interest issues, Annette moved for an award of attorney fees in the amount of \$138,939.78 pursuant to section 1021.5. Annette sought the fees for legal services provided by her counsel, Charles Bird of the firm Luce, Forward, Hamilton and Scripps (Luce), in the

Court of Appeal and Supreme Court leading to the decision in *Sharon S. v. Superior Court, supra*, 31 Cal.4th 417.

The motion noted that while the matter was not yet fully resolved, Annette had prevailed in the Supreme Court on second parent adoption issues that were of benefit to a large class of persons and that she was, therefore, entitled to an award of fees pursuant to the private attorney general provisions of section 1021.5 for that portion of the case.

Annette and Luce had entered into a written engagement agreement providing for payment of fee at a described rate and for the reimbursement of expenses. Bird was aware that Annette might not be able to pay the fees if the case required action by the California Supreme Court. He assured her he would continue to represent her regardless of her ability to pay because of the importance of the legal issues involved. Bird explained that Luce would take the chance that Annette would prevail and she would be awarded attorney fees based on the public benefit resulting from the case.

Sharon opposed the motion.

C. Award of Fees

The trial court awarded \$92,049.15 in attorney fees to Annette. The court noted that fees could be awarded to a successful party if the action resulted in a significant benefit to the general public or to a large class of persons and when the necessity and financial burden of private enforcement were such that the award was appropriate. The court noted that Annette was successful as to the issues resolved by the Supreme Court. The trial court found the Supreme Court's decision conferred a significant nonpecuniary benefit on a large class of persons and resolved an important issue of law.

The trial court noted that before awarding fees it was required to compare the litigant's private interest in the case with the financial burden of private enforcement. The court stated: "In this case, there is no doubt in this court's mind that Mr. Bird agreed to represent [Annette] in the writ proceedings, not to pursue [Annette's] or Joshua's best interests, or even because he had any expectation of being paid for the numbers of hours he spent, but purely because he was concerned about vindicating a right important to the general public."

The court stated it was extremely difficult to say whether the ultimate cost of the writ proceeding was more than the value of the case to Annette. The court noted, however, that the threat to second parent adoptions contained in the Court of Appeal's opinion was what motivated Annette to hire Mr. Bird. The court concluded Mr. Bird was acting as a private attorney general within the meaning of section 1021.5 and awarded Annette \$92,049.15 in fees.

DISCUSSION

Sharon argues the trial court erred in awarding Annette attorney fees pursuant to section 1021.5. Sharon takes issues with the award on several bases. It is necessary we deal with only one. We conclude the trial court erred in awarding Annette attorney fees because it is clear she had a strong, objectively ascertainable private interest justifying the litigation and the burdens in bringing it. That being the case, she was not entitled to attorney fees pursuant to section 1021.5.

A. Law

1. Section 1021.5

In our system of justice, litigants as a rule are required to pay their own attorney fees. (*Alyeska Pipeline Service Co. v. Wilderness Society* (1975) 421 U.S. 240, 247; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565.) An exception to the rule is the private attorney general doctrine embodied in section 1021.5. That section allows a court to award attorney fees to a successful party in any action that "has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." (§ 1021.5; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634.)

The doctrine exists to encourage suits that enforce significant societal interests but do not involve private interests to the extent necessary to encourage litigation to enforce the right. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 44; *Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 77.) That being the case, attorney fees are awarded pursuant to section 1021.5 only " ' "when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his stake in the matter.' " ' " (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 513 (*Families Unafraid*)).

Given the nature of our civil justice system, the disqualifying private interest is often described as a financial one. Other private interests, however, have been found sufficiently compelling that their existence forecloses the awarding of attorney fees pursuant to section 1021.5. (See *Punsly v. Ho* (2003) 105 Cal.App.4th 102, 115-118; *Hammond v. Agran* (2002) 99 Cal.App.4th 115, 124-128; *Families Unafraid, supra*, 79 Cal.App.4th at pp. 512-516.)

In *Punsly v. Ho, supra*, 105 Cal.App.4th 102, this court applied a private interest analysis in affirming the denial of attorney fees to a prevailing party in a family law matter. In *Punsly* grandparents sought, pursuant to statutory authority, a court order establishing a visitation schedule with the child of their deceased son. Over mother's objection, the trial court made the order sought by the grandparents. Mother appealed. This court reversed, finding the order unconstitutional in light of a recent United States Supreme Court case dealing with nonparental visitation schedules. (*Id.* at pp. 107.)

After the appeal mother sought but the trial court denied attorney fees pursuant to section 1021.5. Among other bases for denying the award, the trial court concluded mother pursued the appeal primarily for her personal nonmonetary benefit and, thus, was not entitled to attorney fees. Mother again appealed. (*Punsly v. Ho, supra*, 105 Cal.App.4th at p. 108.)

In our opinion affirming the denial of the award, we addressed several issues, including the trial court's finding that mother's primary reason for appealing the visitation order was her private interest in maintaining control of grandparent visitation. We noted,

however, evidence suggesting that mother also pursued the case in part as a matter of principle. (*Punsly v. Ho, supra*, 105 Cal.App.4th at pp. 115-116.)

Looking to *Families Unafraid, supra*, 79 Cal.App.4th at pages 512-516, we noted that the basic framework of section 1021.5 applied to cases involving monetary and nonmonetary private interests. In this context the task is to realistically and practically compare the litigant's personal interest to the cost of the litigation. Ultimately, the question is whether the cost of the litigation is out of proportion to the party's personal stake in the outcome. (*Punsly v. Ho, supra*, 105 Cal.App.4th, at pp. 116-117.)

Adapting a test defined in *Families Unafraid*, we stated: "For this personal, family-related parental interest 'to block an award of attorney fees under the financial burden criterion, that interest must function essentially in the same way in the comparative analysis as a financial interest, clearly an objective interest. A subjective, vaguely grounded [parental] interest, even if 'heart-felt,' will not be considered sufficient; nor will a mere abstract interest in [family] integrity or [parental rights] preservation suffice to block an award of attorney fees.' [Citation.]" (*Punsly v. Ho, supra*, 105 Cal.App.4th at p. 118.)

We concluded mother's "strong, objectively ascertainable interests" (*Punsly v. Ho, supra*, 105 Cal.App.4th at p. 118) justified the litigation and the burden incurred in pursuing it. We concluded that given the facts of the case the trial court acted properly in denying mother attorney fees. (*Id.* at p. 119.)

2. Standard of Review

Whether a moving party has proved the requirement for an award of attorney fees pursuant to section 1021.5 is a matter best decided by the trial court. A trial court's judgment concerning the awarding of such fees will not be disturbed unless the reviewing court is convinced that it is clearly wrong and constitutes an abuse of discretion. An award of fees is clearly wrong and constitutes an abuse of discretion when there is no reasonable basis for it. We ask whether the reasons given by the court for its decision are consistent with the substantive law of section 1021.5 and comport with the purpose and policy of the statute. (*Punsly v. Ho, supra*, 105 Cal.App.4th at pp. 109, 113; *Family Planning Specialists Medical Group, Inc. v. Powers* (1995) 39 Cal.App.4th 1561, 1567.)

B. Analysis

The trial court abused its discretion in awarding Annette attorney fees pursuant to section 1021.5.

In rejecting personal interest as a bar to Annette's recovery of attorney fees, the trial court cited our decision in *Punsly*. It noted our observation that the case was fact intensive and resulted in a narrow decision of limited application.

The trial court then stated: "In this case, there is no doubt in this court's mind that Mr. Bird agreed to represent [Annette] in the writ proceedings, not to pursue [her] or Joshua's best interests, or even because he had any expectation of being paid for the number of hours he spent, but purely because he was concerned about vindicating a right important to the general public. Unlike *Punsly*, this was not a fact-intensive case, resulting in a relatively narrow, as-applied ruling. The ultimate result was a sweeping

statement affirming the second parent adoption procedure used throughout the State of California."

Mr. Bird's reasons for and expectations in representing Annette and the scope of any decision rendered while commendable, are irrelevant to the issue of Annette's personal stake in the outcome of the litigation.

The trial court then stated: "It is extremely difficult (if not impossible) to say whether the ultimate cost of the writ proceedings was more than the value to [Annette]. How, after all, can one place a value on keeping a child one intended to adopt? It is clear, however, that the threat to the second parent adoption procedure and the concern about the effect a published opinion would have on the general public motivated [Annette] to hire Mr. Bird. As much as she would have wanted to spend over \$100,000 on the litigation, she was not financially able to obtain more than the initial letter briefs she was able to attain before Mr. Bird's interest the case."

The trial court concluded that Mr. Bird had acted as a private attorney general and that this was "exactly the kind of case Code of Civil Procedure section 1021.5 was designed to encourage."

The trial court despaired for a means of calculating the value of keeping a child and ultimately determining how much doing so was worth to Annette. We have no such difficulty. In *Punsly* we affirmed a trial court's decision that the interest of a mother in maintaining full control over the visitation of her child with grandparents was so meaningful a personal interest that it foreclosed the award of attorney fees pursuant to section 1021.5. In the present case Annette faced not some minor loss of control but the

total loss of her parental rights over not only Joshua but possibly Zachary as well. Of course no cold dollar and cents figure can be placed on Annette's interest. The impossibility of doing so, however, arises not because the interest is too minor but because it is too great, not because it is monetarily incalculable but because we recoil at the thought that it can be reduced to such terms. For the purposes of evaluating Annette's personal stake in pursuing her case, it is enough to understand that the interest was of immense personal consequence to her.

It is unnecessary we simply attribute to Annette the general attitudes of human beings about children with whom they are bonded. In a declaration in opposition to a motion to dismiss her adoption petition filed in March 2004, Annette discussed her relationship with Joshua and Zachary. Annette was deeply involved in Sharon's pregnancies and took time off from work to care for Sharon and Zachary. Annette's parents stayed in the home to help care for Sharon and the child. Annette lived with Joshua for 14 months after his birth. Annette was a full-time parent and Joshua called her "Mommy." During that time Annette fully performed the duties of a parent. After Annette left the home, she continued to have visitations with both boys and did all possible to increase the visitation periods. Annette is extremely close with the children. She states in her declaration that when Joshua is told he has to leave her, he states he does not want to go. Annette has attempted to maintain a home-like atmosphere for the boys when they stay with her.

The ultimate question is whether the cost of this litigation is out of proportion to Annette's personal stake in the outcome. (See *Punsly v. Ho*, *supra*, 105 Cal.App.4th at

pp. 116-117.) In awarding fees the trial court improperly focused on counsel's motivations and interests and misapplied the concept of personal interest utilized in the context of a fee award in parental rights cases. Annette's personal interest in maintaining a parental relationship with Zachary and Joshua is palpable. Parents, whether natural, adoptive or putative, have made personal and financial sacrifices greater than those in this case to maintain their relationship with children. While Annette's personal and counsel's professional actions here are highly commendable, they do not support the award of attorney fees pursuant to section 1021.5. The trial court abused its discretion in finding to the contrary.

The order granting attorney fees is reversed.

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BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McDONALD, J.