SUPREME COURT COPY

No. S175855

In the Supreme Court of the State of California

IN RE CONSERVATORSHIP OF ROY WHITLEY, NORTH BAY REGIONAL CENTER,

Respondent,

vs.

VIRGINIA MALDONADO, as Conservator for Roy Whitley,

Petitioner.

ANSWER TO PETITION FOR REVIEW

From A Non-Published Decision of the Court of Appeal (1st Dist., Div. 4; A122896) Affirming an Order of the Sonoma County Superior Court, Denying Private Attorney General Fees (No. SPR-061684)
Honorable Elaine Rushing, Judge

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INTRODUCTION

Appellant Virginia Maldonado seeks review of the Court of Appeal, First District, Division Four's unpublished opinion, which affirmed an order denying her an award of private attorney general fees under Code of Civil Procedure section 1021.5 (section 1021.5). The opinion does not merit review, however, and North Bay Regional Center respectfully requests the Court to deny the petition.

II
THIS CASE IS NOT REVIEW-WORTHY

The issue the petition presents is whether a litigant's nonpecuniary interest in pursuing litigation that otherwise meets section 1021.5's three-factor test may justify the denial of a fee award.[1] The unanimous authority, applied by the Court of Appeal, is that such an interest may be considered as part of a court's analysis whether the "necessity and financial burden of private enforcement" make an award appropriate. (Opn. at 7)

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[1] A prevailing party is entitled to a fee award under section 1021.5 only if the litigation satisfies three criteria: (1) the action enforced an "important right affecting the public interest"; (2) the success of the litigation conferred a "significant benefit" on the "general public or a large class of persons"; and (3) the "necessity and financial burden of private enforcement" make an award appropriate. Code Civ. Proc. § 1021.5; *Punsly v. Ho*, 105 Cal. App. 4th 102, 109 (2003).

Despite this authority, Mrs. Maldonado principally asserts that the opinion deserves review because this Court previously granted review on the same issue in a case it later decided on other grounds. *Adoption of Joshua S.*, 42 Cal. 4th 945 (2008). For two reasons, however, that issue does not merit review, at least not in this case: (1) the rule that allows courts to consider a litigant's nonpecuniary interests is consistent with section 1021.5, has proved workable in practice, and has not been over-used; and, in any event, (2) this case is an unsuitable vehicle in which to review that issue. We develop each point below.

A. Background Of Case

This case arose out of a decision to move Roy Whitley, a person with developmental disabilities, from Sonoma Developmental Center to a community care home. *Conservatorship of Whitley*, 155 Cal. App. 4th 1447 1453-54 (2007). Whitley's sister and conservator, appellant Virginia Maldonado, challenged the planning team's decision in what is known as a *Richard S.* hearing in Sonoma County Superior Court.[2] *Id.* at 1456-57. The trial court upheld the community placement decision.

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[2] A *Richard S.* hearing, which was the product of a settlement in earlier litigation that did not involve Mrs. Maldonado, was intended to be the mechanism through which any member of a

The Court of Appeal then reversed that decision without reaching the question whether the planned transfer was appropriate. The Court held that the Lanterman Act's statutory fair hearing procedures superseded all common law remedies and that "the only means by which Maldonado, as a conservator, could object to NBRC's community placement decision was by invoking" those procedures. *Conservatorship of Whitley*, 155 Cal. App. 4th at 1453; *see also id.* at 1463-64 (discussing and applying doctrine of exhaustion of administrative remedies).

Mrs. Maldonado, who was represented by counsel during the *Richard S.* hearing, had not raised this exhaustion of remedies issue in the trial court. Rather, the issue did not arise until Court of Appeal directed the parties to address it as part of their briefs on the merits. (Opn. at 9)

Following remand, Mrs. Maldonado sought an award of $177,877 as attorney fees for the appeal under section 1021.5. (App. 7-37) The trial court denied Mrs. Maldonado's motion. (App. 255-56) The court found that "no evidence was presented to support the speculative assertions that this case would have ramifications for a large class of persons. Additionally, while the appeal may have clarified the administrative procedure for others as

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developmentally disabled person's planning team could request a court hearing on a community placement decision. (Opn. at 2)

well as Mr. Whitley's conservator, the necessity of litigation cannot be said to be out of proportion to the individual stake in the matter." (App. 255:21-24) The Court of Appeal affirmed that order on the latter ground. (Opn. at 6-9)

B. The Court Should Deny Review For Two Reasons

1. The Unanimous Court Of Appeal Authority Correctly Provides The Courts With The Discretion To Consider A Litigant's Nonpecuniary Interests In A Limited Number of Cases

The argument at the core of the petition is that consideration of nonpecuniary interests in the context of a section 1021.5 fee motion will too often deny fees to a deserving litigant. The source of Mrs. Maldonado's argument is the dissenting opinion in *Families Unafraid To Uphold Rural El Dorado County v. El Dorado County Bd. of Supers.*, 79 Cal. App. 4th 505, 523-39 (2000) (Sims, J., conc. in result and dissenting) (*Families Unafraid*). The facts tell a different story.

It has been nearly about nine years since *Families Unafraid* was decided and four years since the Court granted review in *Adoption of Joshua S.* In that time, there has not been a spate of cases denying fees under section 1021.5 based on a litigant's nonpecuniary interest. The decisions — published and unpublished — are limited to a handful. Indeed, North Bay is unaware of a published decision denying fees based on a litigant's nonpecuniary interests since *Punsly v. Ho* was decided in 2003.

The absence of a substantial number of cases denying fees has dispelled Justice Sims's fear that consideration of nonpecuniary interests would undermine section 1021.5's salutary purposes. *See Families Unafraid*, 79 Cal. App. 4th at 528-29 (Sims, J., conc. in result and dissenting). The limited number of decisions denying fees also demonstrates that the courts are capable of making principled distinctions between litigants who deserve fees and those who do not on account of their pronounced personal stake in the litigation. *See, e.g., Bowman v. City of Berkeley*, 131 Cal. App. 4th 173, 181-82 (2005) (rejecting argument that plaintiffs' nonpecuniary interests should have compelled denial of fees).

The relevant cases have persuasively demonstrated, moreover, that consideration of a litigant's nonpecuniary interests is consistent with both section 1021.5's language and this Court's decisions. *Families Unafraid* was the first case to consider whether some type of personal, rather than financial, interest could justify denial of fees for pursuing litigation that also conferred a public benefit. There, the Third District reviewed this Court's decisions, including *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311 (1983), with respect to section 1021.5's requirement that the litigation imposed a financial burden disproportionate to the plaintiff's individual stake in the matter. *Families Unafraid*, 79 Cal. App. 4th at 513-16. Consistent with *Press*, the court held a non-financial interest is sufficient to block an award of fees under section 1021.5, provided it is "specific, concrete and significant, *and* these attributes must be based on *objective* evidence." *Id.* at 516 (italics in original).

Hammond v. Agran, 99 Cal. App. 4th 115 (2002), was the next case to grapple with the issue. There, the Fourth District, Division Three, agreed with *Families Unafraid*'s analysis and added two other reasons why that case had reached the correct conclusion:

- First, *Hammond* holds that the text of section 1021.5 does not foreclose consideration of non-financial interests. The relevant language is that the "necessity and financial burden of private enforcement ... are such as to make the award appropriate." Cal. Code Civ. Proc. § 1021.5. As *Hammond* notes, this language invites a comparison between the cost of the litigation and what the claimant hoped to gain from it. 99 Cal. App. 4th at 125. However, "[t]he addition of the word 'necessity' suggests, lest it be redundant, that factors beyond just 'financial burden' also may be looked at." *Id.*

- Second, *Hammond* concluded that the "Central Concept" behind section 1021.5 justified recognition of non-financial interests as a factor to consider in deciding whether to award fees. 99 Cal. App. 4th at 126-28. Noting that the "word 'transcend' also appears throughout the cases," the court reasoned that before a court may award fees, the purposes of the litigation "must *transcend* one's interests, whether pecuniary or not." *Id.* at 127 (italics in original).

The most recent published case is *Punsly v. Ho*, 105 Cal. App. 4th 102. That action involved a family law dispute in which party seeking fees (Ms. Ho) objected to an order giving visitation rights to her child's paternal grandparents. On appeal, the

Fourth District, Division One, held that the relevant Family Code statute was unconstitutional as applied. *Id.* at 107-08. Following remand, Ms. Ho unsuccessfully sought an award of fees under the private attorney general doctrine, and the Court of Appeal affirmed the order denying fees.

Relying primarily on *Families Unafraid*, the court rejected the argument that even if a non-financial interest may justify denial of fees, such an interest still should have a close link to the party's "property interests and assets." 105 Cal. App. 4th at 117. Rather, "the basic framework of the section 1021.5 fees statute can and must be adapted to resolve" family law and similar disputes. *Id.* In the case before it, the court noted the evidence proving that Ms. Ho's "strong, objectively ascertainable personal interests fully justified this litigation, along with any burden incurred to pursue it." *Id.* at 118. Given that Ms. Ho's personal and maternal interests "were admittedly paramount in her mind," the court could not conclude that "some other incentive was needed to pursue this litigation." *Id.*

These cases reach results that give appropriate regard to human nature. In some instances, persons initiate litigation not because of the chance for financial gain, but because of individualized, heart-felt, and deeply-rooted nonpecuniary motives. They are willing to undertake the expense and risk of litigation whether or not there is a prospect for a counterbalancing damages award or a chance of taking advantage of a fee-shifting statute such as section 1021.5 at the end of the day.

That is the same result the Court of Appeal reached here, and the court correctly evaluated Mrs. Maldonado's interests as they existed at the time major litigation decisions were made. (Opn. at 8-9, citing *Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1353 (2006)) Mrs. Maldonado initiated the *Richard S.* hearing to block Whitley's transfer to the community and testified that her mother, who had preceded her as Whitley's conservator, had asked her to ensure that he would continue living at Sonoma Developmental Center. Because Whitley had to be re-admitted to that Center after a previous experience living in the community, his mother did not want him to go through a similar experience again. Mrs. Maldonado thus saw her litigation efforts as furthering a promise she made to her mother regarding her brother's welfare. (App. 154) (Opn. at 8) What is more, Mrs. Maldonado had not raised an exhaustion of remedies argument when she initiated the *Richard S.* proceeding or when she appealed the trial court order upholding the community placement decision. That issue, as noted, arose by virtue of the Court of Appeal's briefing order. (Opn. at 9)

This case thus proves that there is a small but readily identifiable category of actions in which a litigant's nonpecuniary interests are paramount and remove the necessity for private attorney general fee awards. Our courts do, and should, have the discretion to weigh those interests when analyzing a request for fees under section 1021.5. The Court should deny review on this basis alone.

2. This Case Does Not Provide A Suitable Vehicle For Review Of The Issue Presented Because The Denial of Fees Rests On An Independent Ground

Even if the Court still believes that it should review whether a litigant's nonpecuniary interest may support denial of fees under section 1021.5, this case is not an appropriate vehicle in which to undertake that analysis. The reason is that a decision in Mrs. Maldonado's favor on that issue would not change the outcome.

As the trial court concluded, Mrs. Maldonado failed to establish that the Court of Appeal's first decision conferred a benefit on sufficiently large class of persons, one of section 1021.5's requirements. *See Punsly v. Ho*, 105 Cal. App. 4th at 109. Although the Court of Appeal had no reason to decide the issue, the trial court's ruling is firmly within its broad discretion and provides an alternative basis for affirmance.

In most section 1021.5 cases, the class of persons benefited by the litigation has been either the public generally or a class numbering at least in the hundreds. *See, e.g., Press v. Lucky Stores, Inc.*, 34 Cal. 3d at 319 (affirming plaintiffs' entitlement to fees in litigation that enforced free speech and petition rights, which "benefits society as a whole"); *Saleeby v. State Bar*, 39 Cal. 3d 547, 574 & n. 14 (1985) (upholding award of fees in litigation regarding State Bar's Client Security Fund; evidence in opinion suggested that several hundred claims were made on the fund each year); *Planned Parenthood of Santa Barbara, Ventura & San Luis Obispo Counties, Inc. v. Aakhus*, 14 Cal. App. 4th 162, 171-72 (1993) (affirming fee

award in litigation that enforced "fundamental constitutional rights"); *Braude v. Automobile Club of So. Cal.*, 178 Cal. App. 3d 994, 1012-13 (1986) (reversing denial of fees in litigation that affected 1.8 million members of nonprofit corporation and resulted in modernization of California's nonprofit corporations law); *Wilkerson v. City of Placentia*, 118 Cal. App. 3d 435, 445 (1981) (ordering award of fees in litigation that had "an impact over a very wide area of virtually all employees in the public sector").

Mrs. Maldonado's case stands on a much different footing. The Court of Appeal's first decision in this case decided only the narrow question whether a parent or conservator may challenge a community placement decision through the *Richard S.* procedure or must utilize the Lanterman Act's fair hearing procedures. *Conservatorship of Whitley*, 155 Cal. App. 4th at 1458-59.

In her fee motion, however, Mrs. Maldonado presented no evidence that the Court of Appeal's decision benefited a class of persons large enough to justify a fee award. When this case arose in 2005, the record indicates that interested persons had rarely used the *Richard S.* procedure since 2000, the year of the *Richard S.* settlement. As the Court of Appeal observed in its first opinion, the trial court had to "create a *Richard S.* proceeding out of whole cloth." *See Conservatorship of Whitley*, 155 Cal. App. 4th at 1457. Had challenges to community placement decisions regularly arisen, the trial court and parties could have taken advantage of an informal body of precedent on how to conduct a *Richard S.* proceeding.

Other evidence before the trial court in this matter likewise indicated that the class affected by the Court of Appeal's first decision is necessarily small. By definition, that decision applies only to (1) persons who have standing to initiate the Lanterman Act fair hearing process, (2) concern a person with developmental disabilities residing in a developmental center, and (3) an objection to a planning team's decision regarding whether to pursue community placement for a person with developmental disabilities. *See Conservatorship of Whitley*, 155 Cal. App. 4th at 1459-60.

As of the end of 2006, less than 3,000 persons were residing in developmental centers statewide. (App. 229) That number, which has been steadily declining, represents just 1.3% of persons with developmental disabilities served by the California Department of Developmental Services. (App. 229, 234) Other evidence before the trial court indicates that, as of late 2006, more than 2,000 developmental center residents suffered from profound or severe mental retardation. (App. 120) A reasonable inference is that very few of these persons are likely candidates for community placement.

More recent evidence buttresses this inference. A search of the Office of Administrative Hearings website for matters involving the Department of Development Services reveals just one

decision citing the Court of Appeal's first opinion in this case. And that decision does not involve a community placement issue.[3]

In sum, although the Court of Appeal's first decision in this case clarified the law on a procedural issue applicable to community placement decisions, there is no proof that the decision benefits a class of persons large enough to warrant a fee award under section 1021.5. Thus, even if Mrs. Maldonado's strong and concrete nonpecuniary interests do not matter, this lack of proof alone justified denial of her motion for attorney fees.

III

CONCLUSION

There is no basis for review here, and North Bay Regional Center respectfully requests that the petition be denied.

Dated: September 17, 2009 RANDOLPH CREGGER & CHALFANT LLP

By _____
Joseph P. Mascovich
Attorneys for Respondent North Bay Regional Center

[3] The website is http://www.oah.dgs.ca.gov/DDS+mediation+and+Hearings/default.htm. The decision is *Sean S. v. Fairview Developmental Center*, OAH No. 2009050274 (Aug. 10, 2009).

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(d)(1) of the California Rules of Court, the enclosed Answer to Petition for Review is produced using 14-point Roman type including footnotes and contains 2777 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 17, 2009

JOSEPH P. MASCOVICH
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PROOF OF SERVICE

CASE: **Maldonado v. North Bay Regional Center**
NO: **Supreme Court No. S175855;**
Court of Appeal, FirstAppellate District, No. A122896
Sonoma County Superior Court No. SPR-061684

The undersigned declares:

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of 18 years and not a party to the within above-entitled action; my business address is 1030 G Street, Sacramento, California.

I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service; said correspondence will be deposited with the United States Postal Service the same day in the ordinary course of business.

On the date stated below, I served the within **ANSWER TO PETITION FOR REVIEW** on all parties in said action as addressed below by causing a true copy thereof to be:

x **placed in a sealed envelope** with postage thereon fully prepaid in the designated area for outgoing mail:
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___ **telecopied by facsimile -**
___ **delivered by FedEx;**

to the parties/attorneys listed on the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 17, 2009 at Sacramento, California.

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