COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Real Party in Interest/Respondent, v. N.S., Appellant.	Case No. A154443 Alameda County Superior Court No. HJ08-00915-03

[PROPOSED] AMICUS CURIAE BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, IN SUPPORT OF REAL PARTY IN INTEREST, ALAMEDA COUNTY SOCIAL SERVICES AGENCY

The Honorable Brenda Harbin-Forte, Judge

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I. Introduction

This appeal concerns an issue of statewide importance and of first impression. Appellant, Nicole S., and amicus curiae, Advokids, ask this Court to award attorney's fees to Bay Area Legal Aid ("Bay Legal") for pursuit of a writ of mandate in the underlying dependency case through Code of Civil Procedure section 1021.5 ("Section 1021.5").

Attorney's fees have never been awarded in a dependency case. No dependency case has applied Section 1021.5. Dependency is a discrete area of the law, governed by its own set of rules, generally set forth in the Welfare and Institutions Code. Dependency proceedings are considered special proceedings of a civil nature to which the Civil Code and the Code of Civil Procedure do not apply unless made expressly applicable by the California Legislature. A few cases have expanded this rule to apply statutes outside the Welfare and Institutions Code to dependency cases, but only in the narrow situation when such application is consistent with the dependency scheme and when it can be determined the Legislature intended the outside provision to apply.

Advokids and Appellant attempt to obfuscate the inapplicability of Section 1021.5 to dependency cases by focusing on what they perceive as a hole in the dependency compensation and representation scheme for preparation of extraordinary writs known at common law (i.e. writs of mandate, prohibition, and certiorari). Advokids asserts that because the Welfare and Institutions Code explicitly states trial counsel is responsible for filing extraordinary writs in only two situations, pursuing a common law writ of mandate is not within appointed trial counsel's legally mandated responsibilities. They also argue that that because a writ of

mandate is not an "appeal," the Court of Appeal cannot appoint appellate counsel.

For many reasons, their arguments fail. First, decisional law is clear that trial counsel are responsible for filing extraordinary writs known at common law and extraordinary writs required by Welfare and Institutions Code sections 366.26 and 366.28. Second, the Court of Appeal has broad authority to appoint counsel for children and non-minors when their best interests so require. Third, awarding attorney's fees to Bay Legal would create a windfall for Nicole's appointed trial counsel who was required to prepare the writ of mandate himself and who circumvented the appointment process when he engaged Bay Legal to prepare the writ of mandate pro bono without notifying the juvenile court. Awarding attorney's fees in this case would create a perverse incentive for appointed counsel to not fulfill their statutorily mandated duties to their indigent clients, in favor of utilizing private attorneys to pursue litigation in the hopes of prevailing at the Agency's expense. This contravenes the Legislature's mandate that dependency cases be as informal, non-adversarial, and expeditious as possible.

Finally, awarding attorney's fees in a dependency case would undermine the comprehensive appointment and compensation scheme for indigent clients in dependency cases that was created by the Legislature. The Welfare and Institutions Code and the implementing Rules of Court require appointment of attorneys for indigent parents, children, and non-minors in dependency proceedings. They further require appointment of appellate counsel when a child is the appellant, when there is a conflict of interest between the Agency and the child, or when the child's best interest can only be protected by appointment of an appellate attorney. The

Legislature has mandated that these appointed attorneys be reasonably compensated by the State. Section 1021.5 simply does not apply to dependency cases.

The trial court's order denying attorney's fees should be affirmed.

II. Statement of Facts

California State Association of Counties ("CSAC") has had limited access to the record on appeal in this case. It has reviewed the briefs filed by the parties in this matter (A154443) as well the amicus brief filed by Advokids, pursuant to California Rules of Court, rule 8.401, subdivision (b)(2). CSAC has also reviewed the briefing filed in the trial court related to the issue of attorney's fees from the clerk's transcript ("CT") pages 1146 to 1767. Thus, any references to facts or procedural history in this brief will cite to the party's briefing or the portion of the clerk's transcript that CSAC has reviewed.

A. Dependency Proceedings

Nicole entered foster care in Alameda County for the second time in 2010, after a guardianship with her grandmother failed. (RB at p. 9; AOB at p. 12.) When Nicole turned 18 in July 2014, Nicole became a non-minor dependent in the extended foster care program. Thereafter, Nicole struggled with her mental health as well as methamphetamine use. She was not enrolled in school, had not participated in a program to remove barriers to employment, or maintained regular contact with the Alameda County Social Services Agency ("Agency"). (RB at p. 9-10; AOB at p. 12.)

At the next two review hearings, the Agency recommended, and the juvenile court agreed, that Nicole continued to qualify as a non-minor dependent under Category 5 (see Welfare and Institutions Code section 11403, subdivision (b)(5)) because her mental health precluded her from

participating in education, employment, or barrier removal. (RB at p. 9-10; AOB at p. 12.)

In February 2016, the Agency recommended that Nicole's case be dismissed because her whereabouts were unknown, she had not been in an approved placement since November 2015, and she had not participated in any services. Nicole was using methamphetamines and declined substance abuse and mental health treatment. (RB at p. 10.) Nicole contested the Agency's recommendation, and the hearing occurred over several dates in April and May of 2016. (RB at p. 11; CT 1310.)

During the course of the hearing, Nicole and her therapist testified. (CT 1310.) Nicole believed she remained eligible for extended foster care under Category 5, and the Agency sought to ask Nicole's therapist additional questions about whether Nicole qualified under Category 5. Nicole's appointed counsel from East Bay Children's Law Office ("EBCLO") invoked the psychotherapist-patient privilege on Nicole's behalf. (RB at p. 11; CT 1310.) After briefing on the issue, the juvenile court held on June 7, 2016 that the privilege did not apply. (RB at p. 12; AOB at p. 12.) The findings from this hearing indicate that a Notice of Appellate rights was given to Nicole. (RB at p. 12.)

That day, Nicole's appointed trial counsel, Robert Waring, of EBCLO, filed a Notice of Intent to File a Writ Petition. (RB at p. 12.) Mr. Waring then assisted Nicole in retaining Bay Legal pro bono to pursue a writ of mandate on her behalf. (RB at p. 12; AOB at p. 13; CT 1504.) Mr. Waring later stated in a declaration that EBCLO, which is contracted to represent all minors and non-minors in Alameda County, does not generally have the resources to pursue appeals and writs for its clients. (RB at p. 12; CT 1502-1505.)

On December 16, 2016, the Court of Appeal issued a decision on the writ and held the psychotherapist-patient privilege did apply in Nicole's circumstances. (RB at p. 13; AOB at p. 13; *N.S. v. Superior Court* (2016) 7 Cal.App.5th 713, 724.) The opinion was subsequently published.

Nicole turned 21 on February 23, 2017 and her dependency was terminated by operation of law. (RB at p. 13; AOB at p. 13.) The Court issued its remittitur on March 24, 2017 and costs were not awarded to either party. (RB at p. 13; AOB at p. 13.)

B. Attorney's Fees Proceedings

On April 28, 2017, Bay Legal filed a motion for attorney's fees in the amount of $93,804 and asked that the dependency case be reopened. (CT 1146.) The Agency opposed in several responsive briefs. (RB at p. 14.) On October 16, 2017, the superior court heard argument on Bay Legal's motion. (RB at p. 14.) On December 29, 2017, the court asked for supplemental briefing on whether Bay Legal should have filed its motion in the Court of Appeal and whether the County is the proper party to pay fees, if they were awarded. (CT 1720, 1721.) Both parties responded. (CT 1730, 1724.)

On March 29, 2018, the court issued a 27-page written decision: (1) granting the Agency's motion to strike the Welfare and Institutions Code section 388 petition; (2) denying the county's motion to strike the motion for award of attorney's fees; and (3) denying Nicole's motion for attorney's fees. (CT 1741-1767.)

III. Argument

A. Application of Section 1021.5 to Dependency Cases Would Frustrate the Purpose of Dependency and be Disruptive to Counties Across California.

The only way the Court can award attorney's fees pursuant to Section 1021.5 is by accepting the premise espoused by Appellant and Advokids that there is a hole in the appointment and compensation scheme for the filing of non-statutory writ petitions, which must be filled by compensation via Section 1021.5. CSAC and Respondent submit that (1) no such hole exists and (2) compensation via Section 1021.5 is not legally permissible in light of the comprehensive legislative scheme to provide counsel (who serve also as a CAPTA guardian ad litems) to indigent minors in all dependency proceedings, all writ proceedings, and on appeal, when the child/non-minor initiates an appeal/writ or when appointed counsel is necessary to protect the child's best interests. (See Welf. & Inst. Code, §§ 317, subd. (e)(1), 395; Penal Code, § 1240.1; Cal. Rules of Ct., rules 5.661 and 8.403; *In re Mary C., supra*, 41 Cal.App.4th 71.)

1. Children and Non-minors are Entitled to Representation in Non-Statutory Writ Proceedings, Whether by Appointed Trial Counsel or by Appointment of an Appellate Attorney Through the Court of Appeal.

There is no statute in the Welfare and Institutions Code or elsewhere that allows a juvenile court to award attorney's fees pursuant to Section 1021.5 in a dependency case. There is also no case law that states a juvenile court can issue attorney's fees pursuant to Section 1021.5 in a dependency case. This is because there is no reason to award these fees in dependency cases.

a. Indigent Parties are Entitled to Competent Counsel to Perform all Duties.

Where children, non-minor dependents, or parents are indigent and

cannot afford counsel, they are entitled to court-appointed, competent counsel in dependency proceedings. (Welf. & Inst. Code, §§ 317, 317.5, 317.6, 318.) Appointed counsel are entitled to receive reasonable compensation. (Welf. & Inst. Code, § 218.) The state pays for these appointed attorneys through funds administered by the Administrative Office of the Courts, and local courts are responsible for administering attorney services in dependency cases. (Welf. & Inst. Code, § 218; Trial Court Funding Act of 1997, Gov. Code, § 77000 et seq., at <https://www.courts.ca.gov/15577.htm>; § 77003, subd. (a)(4).) Counties vary widely as to their individual dependency representation programs. (Dependency, Representation, Administration, Funding and Training Program, at <https://www.courts.ca.gov/15577.htm>.) Using San Francisco as an example, the Bar Association of San Francisco administers a dependency representation program in collaboration with the San Francisco Superior Court, through which attorneys from a panel are appointed by the juvenile court to represent indigent clients. These panel attorneys then bill their time to the Bar Association of San Francisco at an hourly rate of $98.00 for their work on a dependency case. (San Francisco Superior Court Dependency Representation Program, p. 1, 62, at <https://www.sfbar.org/forms/lawyerreferrals/drp/procedures_manual.pdf>.) San Francisco Superior Court permits hourly billing in the preparation of writs generally, and does not delineate between statutory and non-statutory writ petitions in its billing codes. (San Francisco Bar Association, Dependency Phase and Task Codes, p. 1, at <https://www.sfbar.org/forms/lawyerreferrals/taskandphasecodes.pdf>.)

b. Extraordinary Writs are an Integral Part of Competent Representation of Indigent Parties.

Trial counsel who are appointed to represent indigent clients have special duties, including initiating appeals. (Seiser & Kumli, Calif. Juvenile Courts: Practice and Procedure (2018) § 1.22[3], p. 1-42, citing Penal Code, § 1240.1 and 5 California Criminal Defense Practice, § 101.03, Appeal, Part A, Right to Counsel (Matthew Bender 2018).) Trial counsel are also required to prepare extraordinary writ petitions in two specific situations: (1) challenging a referral to a Welfare and Institutions Code section 366.26 hearing, and (2) challenging a placement change after parental rights have been terminated. (Welf. & Inst. Code, §§ 366.26, 366.28; Cal. Rules of Ct., rules 8.450, subd. (c), 8.454, subd. (c).)

Section 317 requires that appointed counsel provide adequate representation to a child and non-minor dependents; requires that they advocate for the protection, safety, and physical and emotional well-being of the child or non-minor dependent; requires that they make recommendations to the court concerning the child's welfare; and requires that they participate in the proceedings to the degree necessary to adequately represent the child. (Welf. & Inst. Code, § 317, subds. (c)(2), (e)(1).)

Section 317 also requires that the Judicial Council promulgate rules to establish guidelines for appointed counsel for children. (Welf. & Inst. Code, § 317, subd. (c).) The Rules of Court define "competent counsel" in dependency cases as "an attorney who is a member in good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrates adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceedings, the specific statutes, rules of court, and cases relevant to such proceedings, and procedures for *filing petitions for*

extraordinary writs." (Cal. Rules of Ct., rule 5.660, subd. (d)(1), italics added.) Advokids states this "must be read as a reference to the statutory writ petitions that sections 366.26, subdivision (l)(3)(D), section 366.28, subdivision (a), rule 8.450(c), and rule 8.454(c) explicitly require trial counsel to file under the circumstances specified in those statutes." (Amicus Brief, at p. 13.) There is no such qualifying or limiting language in rule 5.660, subdivision (d)(1) and there are no grounds to read into the rule this limiting qualifier. In fact, the Supreme Court has explained that "[a] writ of mandate, or mandamus, is an extraordinary writ known at common law." (*People v. Mena* (2012) 54 Cal.4th 146, 153.) Statutorily defined writs and common law writs are all extraordinary writs. Thus, appointed trial counsel are required to be competent in the filing of extraordinary writ petitions, making it incumbent upon them to prepare both types of writs when necessary to protect the interests of their clients.

Non-statutory and statutory extraordinary writs are not substantively different—one is a creature of common law and one is a creature of statute. Both merely expedite the process by which a reviewing court reviews a trial court's decision. Statutory writs require: (1) summary of the particular factual bases supporting the petition, (2) references to specific portions of the record, (3) a relation of the facts to the grounds alleged as error, (4) notations of disputed aspects of the record, and (5) a memorandum of points and authorities. (*Cheryl S. v. Superior Court* (1996) 51 Cal.App.4th 1000, 1005.) Traditional writs require: a summary of the facts, a memorandum, and an explanation of why the reviewing court should issue a writ (i.e. argument). (Cal. Rules of Ct., rule 8.486, subd. (a).) As the requirements of each demonstrate, there is no substantive difference between the two, or for that matter an appeal. (See e.g., *In re Matthew P.*

(1999) 71 Cal.App.4th 841, 844 ["We lament, however, the eight months consumed while this appeal has progressed through this court and *remind dependency counsel* that traditional writ relief is available to remedy errors that unnecessarily delay a dependent child's progress toward permanency and stability." (Italics added.)]; *In re Pablo D.* (1998) 67 Cal.App.4th 759, 761 ["We bewail the waste of time this appeal has caused, for this court, the parents, and, most importantly, for Pablo. If counsel had sought traditional writ relief immediately following the 12-month review hearing, any error could have been dealt with in a timely and effective manner."].)

Case law reinforces that trial counsel are responsible for filing statutory and non-statutory extraordinary writs in dependency cases. In *Johnny W. v. Superior Court* (2017) 9 Cal.App.5th 559, father's appointed trial attorney filed a petition for writ of mandate; father's public defender filed an alternative writ in *In re Jonathan M.* (1997) 53 Cal.App.4th 1234, 1236; the county filed a petition for writ of mandate and father's and mother's public defenders opposed in *In re Jeanette H*. (1990) 225 Cal.App.3d 25, 28; mother's public defender filed a petition for writ of mandate in *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1183; minor's appointed attorney, a public defender, filed a writ of mandate in *Taylor M. v. Superior Court* (2003) 106 Cal.App.4th 97, 100; and father's public defender filed a petition for writ of mandate in *Joe B. v. Superior Court* (2002) 99 Cal.App.4th 23, 25. There is no merit to the suggestion that appointed trial counsel are not responsible for filing common law extraordinary writ petitions and therefore will not be reasonably compensated. The Rules of Court make it clear that pursuing extraordinary writs is an integral part of representing indigent parties in a dependency case. (Cal. Rules of Ct., rule 5.660, subd. (d)(1).) Appellant and Advokids

ask this Court to find a hole where there simply is none. (See Amicus Brief, at p. 11.)

c. EBCLO and Advokids' Arguments to the Contrary are Unavailing.

i. A Purported Lack of Resources is not a Justification for EBCLO's Failure to Prepare the Writ of Mandate.

Mr. Waring's assertion that EBCLO does not typically have the resources to pursue writs and appeals for its child and non-minor clients, did not relieve him from the requirement that he competently represent his client and advocate for her safety and protection. If Mr. Waring felt he did not have the resources to pursue the writ petition, but felt it was necessary (CT 1503-1504), he should have brought the matter to the juvenile court's attention, rather than unilaterally engage Bay Legal to handle the appellate proceedings pro bono without notifying anyone. (Welf. & Inst. Code, § 317, subd. (e)(1), (3); Cal. Rules of Ct., rule, 5.660, subd. (g)(3)(D); Alameda County Local Rules, rule 5.541.) "The fact that the attorney is appointed by the court and paid a flat fee is, of course, irrelevant—if he deems the fee inadequate, he need not accept the appointment." (*Cheryl S. v. Superior Court* (1996) 51 Cal.App.4th 1000, 1005 [appointed counsel must file adequate statutory writs and are not relieved from their obligation to present an adequate record, argument, and points and authorities]; see also *Amarawansa v. Superior Court* (1996) 49 Cal.App.4th 1251.) By failing to file the petition himself and failing to raise his perceived predicament to the juvenile court, Mr. Waring skirted his duties and circumvented the law, and Bay Legal should not be generously rewarded at the Agency's expense.

Even excusing Mr. Waring's failure to prepare the writ himself and his failure to alert the trial court to his perceived predicament, Mr. Waring's

failure to seek appointment of appellate counsel through the First District Appellate Project through the Court of Appeals cannot be overlooked. In any appellate proceeding in which the child is an appellant, the Court of Appeal *shall* appoint separate counsel for the child. (Welf. & Inst. Code, § 395, subd. (b)(1).) When a child is not the appellant, there is a discretionary appointment process. California Rules of Court, rule 8.403, subd. (b)(2), generally provides that for Welfare and Institutions Code section 300 cases, "[t]he reviewing court may appoint counsel to represent an indigent child, parent, or guardian," and, for appointment of attorneys for children, the rule refers readers to California Rules of Court, rule 5.661 to consider certain factors. If counsel concludes the child's best interests cannot be protected without the appointment of separate counsel on appeal, the child's trial counsel must file a recommendation in the Court of Appeal requesting appointment of separate counsel. (Cal. Rules of Ct., rule 5.661, subd. (c).) The recommendation should consider factors such as a conflict of interest between the child and respondent and the child's best interests. (Cal. Rules of Ct., rule 5.661, subd. (f).)

ii. Advokids' Narrow Reading of the Applicable Statutes and Rules of Court is Wrong.

Advokids asserts that because a writ petition is not an appeal, the appellate court cannot appoint counsel because section 395 and the implementing Rules of Court (5.661 and 8.403) only refer to appeals. (Amicus Brief, at p. 14.) Even if this were true, and the Court of Appeal found that Nicole was not entitled to appellate counsel as a matter of right because this was a writ proceeding not an appellate proceeding, Mr. Warring should have used the factors in Rule 5.661 to ask that the Court

appoint an appellate attorney for Nicole in this circumstance.[1] According to Mr. Waring, both Nicole's best interest required pursuit of the writ of mandate and her position was in conflict with the Agency both at trial and on appeal.

Advokids' overly narrow reading of Welfare and Institutions Code section 395, Rule 5.661 and Rule 8.403 as applying only to "appeals," thus denying appointed counsel to indigent minors/non-minors in all non-statutory writ proceedings, would lead to a result wholly inconsistent with the dependency scheme. This interpretation would leave those whom the system is designed to protect vulnerable to no representation or inadequate representation in situations where a non-statutory writ petition is the only avenue to obtain timely relief from a reviewing court.

Even a judgment allowing for attorney's fees in this case to fill this alleged gap in representation would fall short of protecting a child/non-minor's best interests, as there are few guarantees created by a rule allowing for attorney's fees in a dependency case. There is no guarantee a child/non-minor will be able to locate a private attorney who is competent in dependency cases to take a case pro bono, no guarantee they will file a non-statutory writ, no guarantee they will prevail, and no guarantee of

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[1] In this case, because Nicole was appointed an attorney, Mr. Waring also served as her CAPTA guardian ad litem. Every child in a dependency case is entitled to appointment of a Child Abuse Prevention and Treatment Act ("CAPTA") guardian ad litem. (42 U.S.C. § 5106a(b)(2)(A)(xiii).) A CAPTA guardian ad litem is a fiduciary whose role is to investigate the child's circumstances and advocate for her best interests. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 679.) Thus, CAPTA and the implementing state statutes and rules ensure that each child in a dependency matter will have a trained, independent guardian ad litem prepared to understand the child's circumstances and make recommendations based on an evaluation of the child's best interests. The CAPTA provisions extend to appeals. CAPTA's requirements apply to every "judicial proceeding" involving an abused or neglected child, without distinction between proceedings before a juvenile court or an appellate court. (*In re Josiah Z., supra*, 36 Cal.4th at p. 680.)

attorney's fees pursuant to Section 1021.5. This was surely not the intent of the Legislature when it enacted sections 317 and 395 and the Judicial Counsel when it enacted the implementing Rules of Court. It would lead to an illogical result, contrary to a child's best interest, to glean from all of this that, because the form of appellate court relief in a petition for writ of mandate differs slightly from an appeal, a minor is not entitled to appointed counsel when pursuing a non-statutory writ. As respondent appropriately points out, appellate jurisdiction simply means the power of a reviewing court to correct an error in the trial court proceeding. (Response to Amicus Brief, at p. 19.) The only way to guarantee that the interests of a child/non-minor are protected when seeking review of trial court's orders is to reject the notion that there is a hole in the dependency scheme that does not provide for appointed counsel when pursing non-statutory writ petitions.

If there is any ambiguity left by the statutes and Rules of Court, case law eliminates it.[2] Decisional authority has consistently held that when a parent is an appellant, the statutory duty to appoint counsel at public expense in the trial court is the same as on appeal. (*In re Mary C.* (1995) 41 Cal.App.4th 71, 77.) *In re Mary C.* examined whether this rule applies to minors, given there was no statute directly on point. (*Ibid.*) It held a minor is entitled to appointed appellate counsel in two situations: (1) when there is a conflict of interest between the county child welfare agency and the child because their interests are not aligned, and (2) when there is a showing that the best interests of the child require the assignment of counsel. (*Id.* at p. 79.) The court reasoned it "is the minor's interest and

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[2] The Advisory Committee Comment to California Rules of Court, rule 8.403 notes that "[t]he right to appeal in Welfare and Institutions Code section 300 (juvenile dependency) cases is established by Welfare and Institutions Code section 395 and case law."

safety which are the paramount concerns in proceedings commenced pursuant to section 300 and Family Code section 7660 et seq." (*Id.* at p. 79.) The court went on to hold this "rule of law is consistent with section 317, subdivision (c), which applies in the trial court," even though section 317 does not by its terms apply to appointed counsel in an appeal. (*Id.* at 75, 79; see also *In re Joshua B.* (1996) 48 Cal.App.4th 1676, 1681.) While *In re Mary C.* preceded enactment of Welfare and Institutions code section 395, rule 5.661 appears to codify *In re Mary C.* (Cal. Rules of Ct., rule 5.661, subd. (f)(1), (8).) Thus, the only reasonable conclusion that can be drawn from case law is that Court of Appeal retains wide latitude when deciding to appoint appellate counsel for minors in dependency cases, given the necessity of protecting the interests of children and non-minors. The paramount consideration in dependency both at the trial and appellate level is the child's best interest and his or her best interests need to be protected through guaranteed, adequate representation in both the trial court and on appeal, at the public's expense if he or she is indigent.

2. Section 1021.5 Does not Apply to Dependency Cases.

"Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code." (*In re Chantal S.* (1996) 13 Cal.4th 196, 200; see also *In re Josiah Z., supra*, 36 Cal.4th at p. 679 ["Unless otherwise specified, the requirements of the Civil Code and the Code of Civil Procedure do not apply [to dependency cases]."].) The Courts of Appeal have long held the Civil Code and the Code of Civil Procedure do not apply to dependency cases unless made expressly applicable. (*In re Mary B*. (2013) 218 Cal. App. 4th 1474, 1479 [Code of Civil Procedure section 630

inapplicable to dependency cases]; *In re Hadley B.* (2007) 148 Cal.App.4th 1041 [Code of Civil Procedure section 410.30 inapplicable to dependency cases]; *In re Joshua G.* (2005) 129 Cal.App.4th 189, 198 [Code of Civil Procedure section 128 inapplicable to dependency proceedings]; *In re Daniel S.* (2004) 115 Cal.App.4th 903, 911 [rules applicable to civil cases are not applicable to dependency actions unless expressly made so]; *In re Shelly J.* (1998) 68 Cal.App.4th 322 [Code of Civil Procedure section 430.80 inapplicable to dependency cases]; *In re Chantal S.* (1996) 13 Cal. 4th 196 [Family Code section 3190 inapplicable to dependency cases]; *In re Jennifer R.* (1993) 14 Cal.App.4th 704, 711 [Civil Code 4600 et seq. inapplicable to dependency cases]; *In re Angela R.* (1989) 212 Cal.App.3d 257, 273 [the statute at issue, Code of Civil Procedure section 585, applied to civil "actions" governed by part 2 of the Code of Civil Procedure, whereas juvenile dependency cases are "special proceedings" governed by part 3 of the code].)

In *In re Chantal S., supra*, 13 Cal.4th 196, the Supreme Court examined application of Family Code section 3190 (presumption of joint custody) to dependency cases. The court first observed that nothing in the juvenile court law specifies that the presumption of joint custody applies, even though the Legislature has expressly provided that other specific parts of the Family Code apply to orders issued by the juvenile court. (*Id.* at p. 206-207.) This showed "that the Legislature knows how to make the Family Code applicable to the juvenile court when it intends to do so, and suggests that the Legislature's omission to do so with respect to Family Code section 3190 reveals that the Legislature did not intend that section to apply in juvenile court proceedings." (*Ibid.*) The court was especially reluctant to infer legislative intent to apply a part of the Family Code to

juvenile court proceedings that was not expressly made applicable, if the result would be inconsistent with the purpose of juvenile court law, which it found Family Code section 3190 to be. (*Ibid*.)

The Court should reach the same result here. The Legislature has made certain sections of the Code of Civil Procedure applicable to dependency cases. (See e.g., Welf. & Inst. Code, §§ 213.5 [restraining orders], 341 [subpoenas], 348 [variance and amendment of pleadings]; Code of Civ. Proc., § 917.7 [stay pending appeal of placement order made "any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding"]. Its omission of any reference to Section 1021.5 is telling, and the reasoning of *In re Chantal* applies. The Legislature knows how to make provisions of other codes applicable to dependency cases and failure to do so infers a clear intent that the other statutory provisions do not apply. (*In re Chantal S., supra*, 13 Cal.4th at p. 206-207.)

Appearing to expand the holding of *In re Chantal S.*, a few Court of Appeal cases have announced a broader rule to assess the application of statutes outside the Welfare and Institutions Code to dependency cases. These cases have taken the view that the Legislature need not make expressly applicable sections of the Code of Civil Procedure in order for them to apply. (See *In re Claudia E.* (2008) 163 Cal.App.4th 627; *In re David H.* (2008) 165 Cal.App.4th 1626; *In re Mark B.* (2007) 149 Cal.App.4th 61, 78-79.) These cases set forth the rule that the court should determine whether the outside statute applies to special proceedings and also determine whether the outside section is consistent with the overall purpose of the dependency system. (*In re David H.* at p. 1639; *In re Mark B.* at p. 75-76.) But even applying this broader test, Section 1025.1 is still inapplicable to dependency cases.

In re David H., supra, 165 Cal.App.4th 1626 held a statute outside the Welfare and Institutions Code applies in a dependency case if (1) the statute applies to special proceedings such as juvenile dependency cases and (2) if it is consistent with the overall purposes of the juvenile dependency system. The court in *David H.* held that Code of Civil Procedure section 430.80 did not apply to dependency cases because it appeared in part 2 of the Code of Civil Procedure, which applies to civil proceedings, not part 3 which applies to special proceedings. (*Id.* at p. 1640.) Additionally, the *David H.* court reasoned that the Welfare and Institutions Code expressly incorporates one chapter of part 2 of the Code of Civil Procedure (chapter 8 of title 6 of part 2) and did not expressly incorporate Code of Civil Procedure section 430.80 or the chapter in which it appeared, chapter 3 of title 6 of part 2. (*Ibid.*, citing Welf. & Inst. Code, § 348.) Moreover, the court found that applying that outside section to dependency cases was inconsistent with the purpose of dependency cases in so far as it would cause unnecessary delay and conflict with the emphasis on permanency and stability for dependent youth. (*Ibid.*)

In re Mark B., supra, 149 Cal.App.4th 61 held that sanctions pursuant to Code of Civil Procedure section 128.7 could be imposed in a dependency case notwithstanding the absence of specific authorization, because (1) the plain language of section 128.7 applied to complaints in civil actions and petitions in special proceedings; (2) because the internal organization of the Code of Civil Procedure suggested that section 128.7 applied to every civil court and proceeding (section appeared in part 1 versus in parts 2 or 3 which only apply to specific kinds of proceedings); and (3) because the policy underlying section 128.7 favored its use in dependency cases given courts need deter or punish frivolous filings which

disrupt matters, waste time, and burden courts' and parties' resources. (*Id.* at p. 75-76.)

The Legislature did not specifically apply Section 1021.5 to dependency cases. Section 1021.5 provides, in pertinent part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which 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 large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, 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.

Nothing in the plain language of Section 1021.5 makes it applicable to dependency proceedings. Moreover, Section 1021.5 does not apply to special proceedings and is not consistent with the overall dependency scheme. As was the case in *In re David H., supra*, 165 Cal.App.4th 1626 reasoned, Section 1021.5's placement in the code indicates it does not apply to dependency cases by its own terms. (*Id.* at p. 1640.) Section 1021.5 appears in Part 2 of the Code of Civil Procedure. Part 1 of the Code of Civil Procedure is titled "Of Courts of Justice," Part 2 is titled "Of Civil Actions," Part 3 is titled "Of Special Actions of a Civil Nature," Part 3.5 is titled "Of Alternative Procedures," and Part 4 is titled "Miscellaneous Provisions." Our Supreme Court has made clear that dependency cases are special proceedings of a civil nature, exactly how Part 3 is titled. (*In re Chantal S., supra*, 13 Cal.4th at p. 200 [Dependency proceedings in the juvenile court are special proceedings . . ."]; *In re Melinda S.* (1990) 51 Cal.3d 368, 384 ["dependency proceedings are civil in nature . . . "].) They are not generic civil actions as Part 2 is tilted.

Moreover, Section 1021.5 appears in chapter 6, of Part 2, titled "Of Costs." Costs are not awarded in dependency cases. California Rules of Court, rule 8.493, subsection (a) states, "[e]xcept in a criminal or juvenile or other proceeding in which a party is entitled to court-appointed counsel . . . the prevailing party in an original proceeding is entitled to costs if the court resolves the proceeding by written opinion after issuing an alternative writ, an order to show cause, or a peremptory writ in the first instance." Chapter 6 addresses only the question of costs and attorney's fees in civil actions, not in dependency cases. As the court stated in *Fogelson v. Municipal Court* (1981) 120 Cal.App.3d 858, 862, about the inapplicability of Section 1021.5 in criminal prosecution defense cases, "[w]ere one to follow petitioner's suggestion and interpret the word 'action' whenever it appears in chapter 6 to include criminal prosecutions, total chaos would result." (*Id.* at p. 862.) Applying the logic of this District in *In re David H., supra*, 165 Cal.App.4th 1626 to determine the Legislature's intent, Section 1021.5 clearly does not apply to the special subset of the law that is dependency.

Furthermore, the policy underlying Code of Civil Procedure section 1021.5 does not favor its use in dependency cases, as described more fully below.

3. Application of Section 1021.5 to Dependency Cases is Inconsistent With the Dependency Scheme, it Would not Further the Private Attorney General Doctrine, and it Would Lead to Undesirable Results for Counties.

Application of Section 1021.5 to dependency cases is incongruent with the dependency scheme and also does not further the purpose of the private attorney general doctrine. (*In re David H., supra*, 165 Cal.App.4th 1626; *In re Chantal S., supra*, 13 Cal.4th 196.)

The purpose of Section 1021.5 is to incentivize attorneys by providing substantial attorney's fees to participate and initiate litigation in private cases that serve important public policies, "when there are insufficient financial incentives to justify the litigation in economic terms." (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1211; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565.) The doctrine is premised on the general principal that each party is responsible for their own fees, but when a private attorney takes on a case that advances greater public policies and prevails, they should not be. (*Graham v. DaimlerChrysler Corp.* at p. 565.) Fees granted under the private attorney general doctrine are not intended to punish those who violate the law but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the cost of litigation. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1180.) The idea is that "without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." (*In re Head* (1986) 42 Cal.3d 223, 227.)

There is no need to incentivize private attorneys to take on dependency cases, for several reasons. First, parties are entitled to appointed counsel, so private attorneys need not be motivated to participate in dependency cases. Important public policies are furthered every day in dependency cases through advocacy of attorneys appointed by the juvenile court and the Court of Appeal. As the trial court observed in issuing its decision here, in other discrete areas of the law where counsel is appointed for clients or fees are statutorily provided for elsewhere, like in family court, probate court, and criminal cases (in defense from prosecution), Section 1021.5 either does not apply (*Fogelson v. Municipal Court* (1981)

120 Cal.App.3d 858) or no case has applied the statute to that area of the law. (CT 1765.) Second, parties in dependency cases are not responsible for their own fees, as both the petitioner (the social worker) and indigent parents and children/non-minors are entitled to representation provided by the state. (Welf. & Inst. Code, §§ 317-318, 318.5; Cal. Rules of Ct., rules 5.530, subd. (d), 5.660.) Third, as described in great detail above, the Legislature has determined that appointed attorneys in dependency cases are necessary and are accordingly provided reasonable compensation at the trial level, in writ proceedings, and at the appellate level. (*Ante*, at p. 9-14; Welf. & Inst. Code, §§ 317, 317.6, 395, subd. (b)(1); Cal. Rules of Ct., rule 5.660, subd. (d)(1), rule 5.661, subd. (d), & rule 8.403.) Thus, the purpose of the private attorney general doctrine is not served in dependency cases.

Advokids argues "[a] review of these provisions demonstrates that they do not preclude an award of attorney's fees when an attorney, whether or not that attorney is court-appointed, prevails on an original writ petition that was filed to protect the individual child but which results in a published decision that benefits all similarly situated dependents of the court." (Amicus Brief, at p. 11-12.) This is not the standard the high court articulated in *In re Chantal S.* to determine whether an outside statute applies in a dependency case. The question is whether the Welfare and Institutions Code allows for attorney's fees. It clearly does not, given the Legislature's predetermined scheme that already allocates compensation for attorneys appointed to indigent parents, children, and non-minors at the juvenile court and appellate level, when the child is the appellant or when an appointed attorney is necessary to protect the child's best interests.

Additionally, allowing attorney's fees in dependency cases would create a perverse incentive to private attorneys, given dependency

proceedings are informal and non-adversarial. (Welf. & Inst. Code, § 350.) Juvenile court proceedings are also intended to be efficient and speedy. (Welf. & Inst. Code, § 350 [the juvenile court should conduct proceedings in an expeditious manner]; 317.6, subd. (b) [courts should adopt local rules to eliminate unnecessary delays in dependency cases].) Protracted attorney's fees litigation, such as occurred in this case, would undermine this clear legislative mandate. The goal of dependency proceedings, both at the trial and appellate levels, is to safeguard the welfare of California's children. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) Section 1021.5 would serve no purpose in dependency cases because indigent non-minors and children are entitled to free appointed counsel at all stages in the judicial proceedings in order to protect their best interests. (See Welf. & Inst. Code, § 202, subd. (d); *In re Josiah Z., supra,* 36 Cal.4th at p. 673.)

It would be a significant departure from existing statutes and case law for this Court to determine that a juvenile court can award attorney's fees in a dependency case to be paid by the Agency, as the "opposing party" pursuant to Section 1021.5. Section 1021.5 allows recuperation of attorney's fees against the opposing party, "which is responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest that gave rise to the litigation." (*Connerly v. State Personnel Bd., supra*, 37 Cal.4th at p. 1177.) While there was little question the Agency is the real party in interest and thus "opposing party" in the underlying litigation, a decision allowing for recovery of attorney's fees against a child welfare agency, whose job it is to intervene on behalf of abused and neglected children, could end up costing counties across California vast amounts of money and would inevitably take money away from services available to children, non-minors, and their families.

The majority of money spent in child welfare cases is federal money that comes from Title IV-E of the Social Security Act, which is the largest federal funding stream for child welfare activities. (See 42 U.S.C., § 670 et seq.) Each county's allotted funding is typically based on the number of children in foster care. (*In re Joshua S.* (2007) 41 Cal.4th 261, 267, fn. 3 [Title IV–E "establishes a cooperative assistance program under which counties provide payments to foster care providers on behalf of qualified children in foster care, using a combination of federal, state, and county funds. California participates in this federal program through its AFDC–FC program."].) The implications of an award of attorney's fees—such as the more than $100,000 award requested here—are significant when viewed in the context of the predetermined amount of money allotted to each county for the provision of its child welfare services. The implications further highlight the need to rely not on an attorney's fees statute, but on the Legislature's predetermined scheme for compensation of appointed counsel in dependency proceedings.

Dependency cases are not finite. They do not end at a certain point in the same way a tort or a criminal case ends. These cases often last, as Nicole's case unfortunately did, for the majority of one's childhood and early adult years. At almost every hearing, important decisions will be made about a child or non-minor's well-being and future. Indeed, child welfare cases are intended to prevent abuse and neglect of children; ensure that children have safe, permanent homes; and promote the well-being of children and their families. Often, child welfare litigation involves fundamental rights. (See e.g., *Stanley v. Illinois* (1972) 405 U.S. 645 [the right to raise a family is constitutionally protected].) There will always be an argument that litigation in a dependency case will result in enforcement

of an important right affecting the public interest. Awarding attorney's fees in dependency cases is simply not appropriate given the altruistic purpose of the state's intervention in a family's life, the delay in proceedings that would inevitably result from motions to bring attorney's fees, and the ramifications to county child welfare agencies across California of being responsible to remunerate private attorneys.

The same rights Bay Legal and Mr. Waring contend they have vindicated in the underlying litigation here would be hampered in the long term by an award of attorney's fees against county welfare agencies.

IV. Conclusion

On behalf of its 58 member counties, CSAC respectfully asks this Court to affirm the trial court's order denying attorney's fees.

Dated: April 19, 2019~~April 8, 2019~~ Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains # of words counted words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on Date of Execution.

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By:____________________________
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