



National Center for Youth Law



EAST BAY  
FAMILY DEFENDERS

November 25, 2019

Honorable Tani Cantil-Sakauye, Chief Justice  
Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102

**RE: In the Matter of Nicole S.  
Supreme Court No. S258307  
First Appellate District, Division 4, No. A154443  
Alameda County Super. Ct. No. HJ08-00915-03**

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

The Youth Law Center, East Bay Family Defenders, and the National Center for Youth Law urge the Court to grant the Petition for Review filed in the above captioned case, *In the Matter of Nicole S.* The Court of Appeal's decision creates a new categorical rule against the recovery of fees under Code of Civil Procedure section 1021.5 for all cases arising out of dependency proceedings. The opinion is based on fundamental misunderstandings about the nature of the dependency system and unjustifiably diminishes access to counsel for a highly vulnerable population of children and families.

This letter is submitted pursuant to California Rule of Court 8.500, subdivision (g). Counsel for the Plaintiffs are aware of our interest, and support the filing of this letter.

**I. Amici Curiae Youth Law Center, East Bay Family Defenders, and the National Center for Youth Law's Interest in Review**

The Youth Law Center ("YLC"), the East Bay Family Defenders, and the National Center for Youth Law are interested in this case because it affects the ability of California's children to enforce countless statutory rights to critical services offered through joint federal-state programs. YLC is a non-profit that profit that advocates through youth-focused and research informed litigation, policy reform, media advocacy, collaborative system change

initiatives, training, and public education to transform foster care and juvenile justice systems so every young person can thrive. Since 1978, YLC has represented the interests of countless children and young adults in California and dozens of other states across the country. YLC staff have long been involved in public discussions, legislation, and court challenges regarding the treatment, services, and benefits available to youth; and have been active participants in the discussions and programs aimed at elevating the juvenile bar.

East Bay Family Defenders (“EBFD”) is a California nonprofit public benefit corporation serving parents, guardians, and children involved in the juvenile dependency system in Alameda County, California. East Bay Family Defenders’ mission is to keep families together and minimize the time children spend in foster care. EBFD’s primary activity is the provision of court-appointed legal representation, free of charge, to indigent parents in dependency court in Alameda County. In Alameda County, when a child is at risk of abuse or neglect, or when there are substantiated allegations of such, the Department of Children and Family Services files a petition with the court requesting that the child be removed from the home or remain in the home with court supervision. A hearing must be held before a superior court judge within 48 hours from the filing of the petition. Each parent is entitled to an attorney should they request one, and the child is also appointed an attorney at no cost to the family. In addition to directly representing parents in Alameda County’s dependency system, EBFD participates in stakeholder meetings convened by the Supervising Judge for the Juvenile Court to discuss policy issues related to the dependency system.

The National Center for Youth Law (“NCYL”) is a private, non-profit organization that uses the law to help children in need nationwide. For more than forty years, NCYL has worked to improve the federal, state, and local systems responsible for protecting children, including the child welfare, juvenile justice, health and mental health, and public benefits systems. As part of the organization’s child welfare advocacy, NCYL works to ensure the safety, stability, and well being of abused and neglected children. NCYL provides representation to children and youth in cases that have a broad impact and has represented many children in litigation to ensure their access to safe child welfare systems.

## **II. Support for Review**

The Petition for Review presents questions of exceptional importance to the public, including the children, parents, and families that Amici serve. Amici will specifically address issues number one and two, which are:

1. The Court of Appeal announced a new rule that categorically precludes Code of Civil Procedure section 1021.5 fee awards in any action arising out of a dependency proceeding. Is a categorical exclusion appropriate, or must courts analyze fee motions on a

- case-by-case basis to determine whether the action satisfies the criteria of section 1021.5?
2. Are government agencies categorically immune from Code of Civil Procedure section 1021.5 fee awards in actions arising out of dependency proceedings on the grounds that dependency proceedings have a mechanism for court-appointed attorneys? (Petition p. 5).

The Juvenile Dependency Court System in California serves the crucial function of providing safety and protection to children who are abused or neglected, balancing the fundamental importance of family preservation with the “safety, protection and physical and emotional well-being of the child” at issue. WIC § 300.2. In some cases, courts monitor a family while children remain at home; while in others, courts order children removed from home and placed into foster care. Still in others, children are placed in long-term foster care and remain dependent on the court’s monitoring of their well-being until children age out of foster care. In all juvenile dependency proceedings, the court is exercising its *parens patriae* power over private family life. One would be hard pressed to identify a more important type of legal proceeding with more fundamental rights at stake for parents, children, and family members. This interference in the most basic aspects of family life makes the dependency system inherently adversarial at times. Thus, the domain of the Juvenile Court must remain included in statutory schemes aimed to encourage the vindication of important rights for persons who would otherwise remain unheard.

A. The Special Nature of Dependency Proceedings Does Not Warrant Categorical Exception from the Recovery of Attorney Fees Under CCP 1021.5

While much has been made about the difference between dependency proceedings and other civil proceedings, it is well-established that dependency matters often involve hotly contested issues relating to parents’ and children’s fundamental constitutional rights. The Court of Appeal reasoned that a social services agency cannot be an opposing party because it serves in a hybrid capacity in which it performs some functions as an “impartial arm of the court.” (Slip Op. at 18). This takes far too narrow a view of the scope of the dependency system and the role of social services agencies. Despite their hybrid role, these agencies unquestionably stand in opposition to both parents and children at various times. *Nicole S.* presents a clear example of this fact.

In considering parties’ right to counsel and effective assistance of counsel in dependency proceedings, courts have determined that dependency proceedings are adversarial—and with respect to certain contested issues are perhaps the most adversarial of all proceedings.<sup>1</sup> California

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<sup>1</sup> *In re Emilye A.*, 9 Cal.App.4th 1695, 1709 (1992)(“Recognizing that the parents and county are both interested in an accurate and just decision in the child’s best interests, the dependency proceedings are adversarial in nature,

has a statutory mechanism for the appointment of counsel to both parents and children in dependency proceedings precisely because of the gravity of the rights at stake. (WIC § 317). The mere fact that a scheme exists for the appointment of counsel is indicative of the legislature’s expectation that opposition will occur.

The U.S. Department of Health and Human Services, through the Administration for Children, Youth and Families, also highlighted the adversarial nature of dependency proceedings and the fundamental rights at stake in a memorandum on the importance of legal representation in child welfare proceedings. In discussing the gravity of the rights and liberties at issue, it noted that “children and youth are subject to court decisions that may forever change their family composition, as well as connections to culture and heritage.”<sup>2</sup> It described the stakes as being even higher for parents facing the permanent loss of their children stating, “by any standard this marks a significant deprivation. Termination of parental rights is often referred to as the civil law equivalent of the death penalty.”<sup>3</sup> Even where child maltreatment is alleged, and the welfare of a child is the primary consideration, parents nonetheless maintain a fundamental liberty interest in the care and custody of their child.<sup>4</sup>

When a dependency court resolves a contested issue, serious and lasting consequences for a family result. Each decision and recommendation a social service agency makes alters the life and experience of a child. Often these matters can be addressed in a collaborative manner, but not in every case. Parents and children should have the greatest possible access to counsel when important legal and factual questions affecting their rights are at stake.

The Court of Appeal further reasoned that CCP § 1021.5 cannot apply in the dependency context because it might pose a fiscal burden on social services agencies. This possibility exists when any agency or government entity is the opposing party. This includes social services agencies in matters involving other social welfare programs. There is no special circumstance warranting fiscal protection of social service agencies for dependency matters. In fact, the fee award scheme is uniquely important in the dependency system.

Given the confidential nature of dependency proceedings under WIC § 827, social service agencies are hidden from public scrutiny in the vast majority of cases. Even children and parents engaged in dependency proceedings may not realize that other families are facing the

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which process presumably contributes to a just decision.”); *In re Kristin H.*, 46 Cal.App.4th 1635, 1661-1662 (1996).

<sup>2</sup> *High Quality Legal Representation for All Parties in Child Welfare Proceedings*, U.S. Department of Health and Human Services, Administration on Children, Youth and Families, Children’s Bureau, ACYF-CB-IM-17-02, p. 2, January 17, 2017.

<sup>3</sup> *Id.* at p. 3.

<sup>4</sup> *Santosky v. Kramer*, 455 U.S. 745 (1982).

same or similar infringements upon their rights. The initiation of proceedings and associated fee awards provide important checks on agencies largely shielded from public accountability.

The special nature of the dependency system does not warrant categorical exception from fee awards under CCP § 1021.5. The important rights at issue demand at least the same level of support granted in all other proceedings.

B. The Existence of a Scheme for Appointing and Compensating Counsel in  
Dependency Cases is Not a Basis for Precluding Fee Awards Under CCP § 1021.5

The Court of Appeal determined that allowing litigants to recover fees under CCP § 1021.5 in cases arising out of dependency proceedings would undermine the legislative scheme providing for the appointment and compensation of counsel to indigent children and parents. Quite the opposite is true. Allowing attorneys to seek compensation when they succeed in vindicating important rights on behalf of a large class of children and parents encourages attorneys to render assistance and thereby supports the main objective of WIC § 317—access to counsel. It also furthers the goal of providing competent counsel by allowing dependency attorneys to seek assistance on issues outside their specialty or expertise when it will benefit “the general public or a large class of persons.” CCP § 1021.5. The structure itself guards against seeking inappropriate or ill-qualified legal assistance because the recovery of fees not only requires competence, it requires actual success. (CCP § 1021.5).

As the dissent notes in *Nicole S.*, the mere existence of a compensation structure does not bar the recovery of fees. (Slip. Op. at 50). In *In re Head*,<sup>5</sup> this Court rejected the argument that a mechanism for compensating attorneys in habeas matters prevents recovery under CCP § 1021.5. The *In re Head* opinion found “no reason to presume that the Legislature contemplated that section 1021.5 would not apply because Penal Code section 987.2 exists.”<sup>6</sup> The holding thus ensured that the legislative purpose of CCP § 1021.5 “will not be frustrated by a restriction of the availability of attorney fee awards where the restriction is not clearly mandated by the language of the statute.”<sup>7</sup>

There is no exception for dependency proceedings in CCP § 1021.5, and creating any categorical exception frustrates a core objective of the statute—namely the initiation of proceedings that affect important rights. Nowhere can more important rights be found than in the dependency system. Perhaps no class of litigants has less ability to hire counsel than indigent children. The purpose and intent of CCP § 1021.5 are best served by allowing recovery in cases arising out of dependency proceedings. The question as to whether an attorney may recover fees

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<sup>5</sup> *In re Head*, 42 Cal.3d 223 (1986).

<sup>6</sup> *Id.* at Footnote 9.

<sup>7</sup> *Id.* at 232.

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in this scenario should follow the same analysis used in all other cases. If the result confers a “significant benefit” to a large number of people, then fees should follow.

The Court of Appeals opinion creates a new, and singular, categorical exception to private attorney general fee awards. In doing so it undermines the purpose of CCP § 1021.5 and frustrates the ability of children and parents to access necessary counsel for matters arising out of dependency proceedings. Given the gravity of the rights at stake for children and parents, and the necessity of access to counsel to protect those rights, Amici urge you to grant review of the opinion published by the Court of Appeal in *Nicole S.*

Thank you for your consideration.

Sincerely,

Erin Palacios  
Staff Attorney  
Youth Law Center  
832 Folsom Street, Suite 700  
San Francisco, CA 94107  
415-413-4127  
epalacios@ylc.org

Poonam Juneja  
Senior Attorney  
National Center for Youth Law  
405 14th Street, 15th Floor  
Oakland, CA 94612  
510-889-6576  
pjuneja@youthlaw.org

Zabrina Alegruie  
Co-Executive Director  
East Bay Family Defenders  
101 Callan Avenue, Suite 210  
San Leandro, CA 94577  
501-667-1075  
zabrina@familydefender.org