Supreme Court Copy

No. S175855

In the Supreme Court of the State of California

Conservatorship of the Person and Estate of ROY WHITLEY.

NORTH BAY REGIONAL CENTER,

Petitioner and Respondent,

vs.

VIRGINIA MALDONADO,

Objector and Appellant.

SUPREME COURT
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ANSWER BRIEF ON THE MERITS

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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I
INTRODUCTION

This case presents the question whether a plaintiff's significant non-pecuniary interest in pursuing litigation is a factor the courts may consider when deciding a motion for attorney fees based on Code of Civil Procedure section 1021.5 (hereafter section 1021.5). North Bay Regional Center respectfully urges the Court to answer that question in the affirmative and to affirm the order denying petitioner Virginia Maldonado's motion for fees.

At the threshold, by deciding the case as North Bay requests, the Court would *not* be announcing a novel rule of law. On the contrary, for the past decade, the relevant Court of Appeal decisions have unanimously authorized our courts to consider whether a plaintiff's non-pecuniary interest precludes a finding under section 1021.5 that "the necessity and financial burden of private enforcement ... are such as to make the award appropriate." At the same time, however, these decisions have resulted in the denial of fees in very few instances.

North Bay believes these cases state the correct rule: one it is consistent both with section 1021.5's language and the public policy it embodies. The Legislature, after all, did not craft a statute, such as the one that applies in employment discrimination cases, that essentially mandates fee awards to a prevailing plaintiff. North Bay likewise believes that, as the past ten years' of decisions reflect, the denial of fees based on a plaintiff's non-pecuniary

interest in pursuing the litigation will be the exception rather than the rule. There have been, and will be, few cases in which the plaintiff's non-pecuniary interest is so powerful and proven by objective evidence that a court can confidently conclude that the prospect of fees under section 1021.5 is unnecessary to promote the litigation.

But this is such a case. Although Mrs. Maldonado prevailed in her prior appeal on a narrow jurisdictional issue, she did not raise that legal question either when she commenced this litigation in the trial court or filed her notice of appeal. The jurisdictional issue instead arose at the instance of the Court of Appeal, which directed the parties to address it in their briefs. Thus, Mrs. Maldonado's own actions prove that she commenced this litigation for entirely personal reasons rather than to vindicate an important public right.

The Court therefore should affirm the Court of Appeal's decision.

II
STATEMENT OF FACTS AND PROCEDURAL HISTORY

North Bay is a private, non-profit organization responsible for coordinating the care needed by persons with developmental disabilities. Cal. Welf. & Inst. Code § 4620(b); *Morohoshi v. Pacific Home*, 34 Cal. 4th 482, 487-88 (2004) (describing role of regional centers). Under the Lanterman Developmental Disabilities Services Act (Lanterman Act; Cal. Welf.

& Inst. Code § 4500 *et seq.*), a "planning team" periodically reviews and decides matters relating to the care and placement of a person with developmental disabilities. Cal. Welf. & Inst. Code §§ 4512(j), 4646(c), (d). Among the Lanterman Act's core principles are that persons with developmental disabilities should be cared for in the "least restrictive environment" and have the "right to social interaction and participation in community activities." *See* Cal. Welf. & Inst. Code § 4502(a)-(j).

This case arose out of a planning team's decision to move Roy Whitley, a person with developmental disabilities, from Sonoma Developmental Center (an institutional facility) to a community care home. *Conservatorship of Whitley*, 155 Cal. App. 4th 1447, 1453-54 (2007). Whitley's sister and conservator, appellant Virginia Maldonado, who initially did not oppose the community placement decision, challenged the planning team's decision in what is known as a *Richard S.* hearing in Sonoma County Superior Court.[1] *Id.* at 1456-57. Mrs. Maldonado, who was

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[1] A *Richard S.* hearing was the product of a settlement in earlier litigation that did not involve Mrs. Maldonado. The *Richard S.* litigation involved a challenge to the Department of Developmental Services's practice of not placing a developmentally disabled person in the community over the wishes of a family member or conservator. The hearing procedure created in this settlement provided a mechanism through which any member of a

represented by counsel, did not challenge the superior court's jurisdiction to review the planning team's decision. The Sonoma County Public Defender's Office, which was appointed to represent Whitley and sided with Mrs. Maldonado, likewise did not raise any jurisdictional objections. Following a two-day evidentiary hearing, the trial court upheld the community placement decision. *Conservatorship of Whitley*, 155 Cal. App. 4th at 1456-57.

Mrs. Maldonado appealed the superior court's decision and also filed a petition for writ of supersedeas to prohibit Whitley's placement at the community care home during the pendency of the appeal. *Conservatorship of Whitley*, 155 Cal. App. 4th at 1457-58. The Court of Appeal granted the writ petition and further ordered the parties to address several questions in their briefs, including whether the superior court had jurisdiction to review the community placement decision. *Id.* at 1458 n.6.

Following briefing, the Court of Appeal reversed the superior court's decision without reaching the question whether Whitley's planned transfer was appropriate. The Court held that the Lanterman Act's statutory fair hearing procedures (Cal. Welf. &

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developmentally disabled person's planning team could request a court hearing on a community placement decision. *Conservatorship of Whitley*, 155 Cal. App. 4th at 1458-59.

Inst. Code § 4710 *et seq.*) superseded other 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). Thus, the Court of Appeal's prior decision determines which public body reviews a challenge to a community placement decision in the first instance. Under the decision, an administrative law judge, rather than a superior court judge, will conduct that review.[2] *See generally* Cal. Welf. & Inst. Code § 4712 *et seq.*

Following remand, Mrs. Maldonado sought an award of $177,877 as attorney fees for the appeal under section 1021.5. (App. 7-37) North Bay opposed the motion, arguing that Mrs.

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[2] North Bay has no quarrel with the Court of Appeal's decision, but it is unclear how meaningful this jurisdictional ruling will be in practice. It is open to question whether an administrative law judge offers greater experience and expertise than trial judges, whose duties under the Welfare and Institutions Code often present issues closely akin to those that an administrative law judge would consider. *See generally* Cal. Welf. & Inst. Code §§ 6500, 6504.5, 6507, 6509. Indeed, following completion of the fair hearing process, our trial courts ultimately may review an administrative law judge's decision. *Id.*, § 4712.5(a).

Maldonado had not satisfied all requirements for a fee award under section 1021.5. (App. 134-38) In part, North Bay demonstrated that, during the *Richard S.* hearing, Mrs. Maldonado testified that she had challenged Whitley's community placement to fulfill a promise she had made to her mother. (App. 134-37, 153-55) Further, the jurisdictional issue that resulted in reversal of the order upholding Whitley's community placement arose due to the Court of Appeal's order. Thus, that issue was not present in the case when Mrs. Maldonado appealed the trial court's ruling and filed her petition for writ of supersedeas. (App. 135, 160-221) North Bay also argued that Mrs. Maldonado's success did not benefit a class of persons sufficiently large enough to justify a fee award. (App. 137-38, 223-37)

The trial court denied Mrs. Maldonado's fee 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 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) The court, in doing so, did not consider North Bay's arguments that the litigation had not benefited a sufficiently large class of persons and that even if Mrs. Maldonado was entitled to a fee award, she was not entitled to all the fees

requested. This Court then granted review to consider whether a successful litigant's non-pecuniary interest in pursuing the litigation may justify a denial of fees under section 1021.5.

III
ARGUMENT

A. Section 1021.5's Language And Purpose Support The Rule That A Litigant's Non-Pecuniary Interest May Justify Denial Of A Private Attorney General Fee Award

1. Section 1021.5's Language Allows Consideration Of A Litigant's Non-Pecuniary Interest

Under section 1021.5, which codifies the private attorney general doctrine, a prevailing party is entitled to a private attorney general fee award only if: (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. Cal. Code Civ. Proc. § 1021.5[3]; *see Woodland Hills Residents Ass'n, Inc. v. City*

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[3] In relevant part, section 1021.5 states:

> 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

Council of Los Angeles, 23 Cal. 3d 917, 933-34 (1979) (hereafter *Woodland Hills*) (noting section 1021.5's purpose and requirements).

Section 1021.5 is widely viewed as having been enacted in response to *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that the federal courts lacked the authority to award fees under a common law private attorney general doctrine. *See Woodland Hills*, 23 Cal. 3d at 934. In general terms, the prospect of an award of fees under the statute makes it more likely that private litigants will pursue public interest litigation. *Id.* at 933.

With respect to the first two section 1021.5 factors, "the Legislature contemplated ... a trial court would determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." *Woodland Hills*, 23 Cal. 3d at 939-40. With respect to the third factor, section 1021.5 authorizes a fee award "'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

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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.

plaintiff "out of proportion to his individual stake in the matter." (Citation.)'" *Id.* at 941, quoting *County of Inyo v. City of Los Angeles*, 78 Cal. App. 3d 82, 89 (1978).

At the threshold, whether the third factor authorizes a court to consider the successful litigant's non-pecuniary interest in pursuing the litigation presents a question of statutory interpretation. "When engaged in statutory construction, [the Court's] aim is 'to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuate the purpose of the law.'" *Chavez v. City of Los Angeles*, __ Cal. 4th __, 2010 WL 114941, *9 (Jan. 14, 2010) (citation omitted). The plain and ordinary meaning of the language the Legislature used "'is generally the most reliable indicator of legislative intent.'" *Id.* (citation omitted). When the words the Legislature used are unambiguous, the plain meaning of the statute governs. *See Olson v. Automobile Club of S. Cal.*, 42 Cal. 4th 1142, 1147 (2008) (holding that based on its plain meaning, section 1021.5 does not authorize an award of expert fees).

In this instance, the most natural reading of section 1021.5's relevant language does not require courts to turn a blind eye to the non-pecuniary interests that may motivate a party to pursue litigation. As with the first two statutory factors, the Legislature presumably contemplated that the courts would undertake a "realistic assessment" of the successful party's personal stake in the litigation, even if non-pecuniary in nature. The Legislature accomplished this end in two complementary ways.

As the Court of Appeal explained in *Hammond v. Agran*, 99 Cal. App. 4th 115 (2002), section 1021.5's relevant provision instructs courts to compare the cost of the litigation against what the claimant hoped to gain from it. But "[n]othing in the text confines the consideration of the necessity and financial burden clause to just financial interests." *Id.* at 125. Although use of the phrase "financial burden" indicates that a court should consider whether the successful party expected financial gain from the litigation, "it doesn't follow that a court must stop there. The addition of the word 'necessity' suggests, lest it be redundant, that factors beyond just 'financial burden' also may be looked at." *Id.; see also Delaney v. Superior Court*, 50 Cal. 3d 785, 798-99 (1990) (holding that "[s]ignificance should be given, if possible, to every word of an act"). *Hammond* holds, in other words, that the statutory language directs courts to consider whether a private plaintiff's personal interest alone — pecuniary or non-pecuniary — makes it unlikely that he or she would have incurred the cost of bringing the action.

Section 1021.5 also mandates that the "necessity and financial burden of private enforcement" must be "such" as to make an award appropriate. In this context, the word "such," which qualifies the preceding terms, reinforces the concept that Legislature intended to have courts identify and weigh the litigant's personal stake in the litigation. The weight a court attaches to that stake will determine whether enforcement of a significant public right will occur even when a fee award under section 1021.5 is unlikely.

Finally, a rule that forbids consideration of a litigant's non-pecuniary interests would have make section 1021.5's third requirement virtually meaningless in most family law and related litigation, including this case, which typically involves purely personal rights. Because these cases seldom offer the prospect for pecuniary gain, in the vast swath of family law-type cases application of section 1021.5 would be reduced to an inquiry whether the litigation produced a significant benefit for the public or a large class of persons. The third factor would never be a factor at all if a court could not even consider whether the prospect of a fee award is needed to motivate private litigation. That result, too, runs afoul of the principle that courts should strive to construe statutes to make all their terms operative and meaningful. *Delaney v. Superior Court*, 50 Cal. 3d at 798-99.

For these reasons, although section 1021.5's language may not expressly authorize consideration of non-pecuniary interests, it cannot reasonably be construed to prohibit it.

2. Based On Section 1021.5's Language And *Woodland Hills*, Where This Court Signaled That A Litigant's Non-Pecuniary Interest May Be Considered, The Court Of Appeal On A Limited Number Of Occasions Has Sensibly Denied Fees Based On The Strength Of A Litigant's Non-Pecuniary Interest

In several decisions, the Court of Appeal has unanimously held that a successful litigant's non-pecuniary stake in litigation may warrant denial of a fee award under section 1021.5. These cases are noteworthy both for their reasoning and because

they signal that, in most instances, the litigant's non-pecuniary interest will not be weighty enough to foreclose a fee award. By approving of these holdings, therefore, the Court would reach a result that is consistent with the statutory language and that will not impair section 1021.5's utility in the promotion of public interest litigation.

The starting point is the First District's opinion in *Williams v. San Francisco Bd. of Permit Appeals*, 74 Cal. App. 4th 961 (1999) (per Haerle, J.). There, the plaintiff successfully challenged a local agency's approval of a permit that authorized demolition of a single-story Victorian-style house and its replacement with a four-story apartment building. The trial court denied the plaintiff's fee request based on section 1021.5, and the Court of Appeal affirmed on the ground that the cost of the litigation was not out of proportion to his individual stake in the matter.

Pointing out that the construction work the permit authorized would have not have affected the value of his property, the plaintiff argued that he had no pecuniary interest at stake in the case that would support denial of fees. The Court of Appeal rejected this argument, explaining that prior decisions establish a rule under which courts consider whether the litigant pursued litigation to advance "a non-economic, albeit personal, interest." *Williams*, 74 Cal. App. 4th at 967-68, analyzing *Christward Ministry v. County of San Diego*, 13 Cal. App. 4th 31 (1993) (denying fees where litigation was pursued to protect property's ocean views). In this regard, the court pointed out that in *Woodland Hills*, 23 Cal. 3d at

941, this Court cited approvingly to *County of Inyo v. City of Los Angeles*, 78 Cal. App. 3d 82 (1978), where the Court of Appeal denied private attorney general fees based on the plaintiff's non-pecuniary interest in promoting environmental values. *Williams*, 74 Cal. App. 4th at 967 & 969 n.4.

The *Williams* Court also rejected the plaintiff's claim that in *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 321 n.11 (1983), this Court held that all non-pecuniary interests do not count in evaluating whether a litigant's personal stake in the litigation is outweighed by the costs involved. The decision explains that the footnote in *Press* was dictum and, in any event, did not state that a pecuniary interest is the only type of personal interest that will justify denial of fees. *Williams*, 74 Cal. App. 4th at 970-71. (See also discussion at pp. 22-23, below)

Several subsequent decisions have agreed with, and in some instances expanded upon, *Williams*'s reasoning:

- *Families Unafraid To Uphold Rural El Dorado County v. El Dorado County Bd. of Supers.*, 79 Cal. App. 4th 505, 516 (2000) (hereafter *FUTURE*), which involved environmental compliance litigation. The Third District's decision holds that a litigant's 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.* (italics in original).

- *Hammond v. Agran*, 99 Cal. App. 4th 115, which involved litigation arising out of a local election. In addition to its construction of section 1021.5's language (discussed above), the Fourth District, Division Three, 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. *Id.* 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).

- *Punsly v. Ho*, 105 Cal. App. 4th 102 (2003), which 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. The Fourth District, Division One, explained that "the basic framework of the section 1021.5 fees statute can and must be adapted to resolve" family law and similar disputes. *Id.* at 118. 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.* 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 are well-reasoned and reflect the insights of conscientious appellate justices throughout the state. These decisions teach that the courts have identified relatively few instances in which a litigant's strong and objective non-pecuniary interest warrants

denial of fees under section 1021.5. Still, the reasoning of these cases is grounded in the statutory language and produces results consistent with public policy. The Court should embrace them.

3. Section 1021.5's Legislative History Is Silent on Whether Fees May Be Denied Based On A Litigant's Non-Pecuniary Interest, But Such A Rule Is Consistent With The Statute's Overall Purpose

If the Court were to conclude, contrary to the Court of Appeal cases just discussed, that section 1021.5's relevant provision is ambiguous, then it should consider extrinsic aids, including the statute's legislative history. *See Olson*, 42 Cal. 4th at 1147-48. Where these extrinsic aids do not provide a satisfactory resolution of the ambiguity, courts choose the construction that most closely fits the "the Legislature's apparent intent" and promotes the "statutes' general purpose." *Imperial Merchant Services, Inc. v. Hunt*, 47 Cal. 4th 381, 388 (2009).

In this case, the Court will find nothing in the statute's legislative history that resolves the ambiguity. Although Mrs. Maldonado dwells on section 1021.5's legislative history, the materials she has submitted in her Request for Judicial Notice

(RFJN) simply do not refute a construction of section 1021.5 that allows consideration of a litigant's non-pecuniary interests.[4]

To the extent the admissible portion of this history permits generalizations about legislative intent, it merely shows that the Legislature desired to enact a mechanism by which fees could be awarded to litigants who successfully pursue litigation that produces a significant public benefit.[5] (*E.g.,* RFJN, Exhs. 5, 11) That message, however, is obvious from the statute itself. Beyond that

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[4] North Bay has objected to this RFJN. (See North Bay's Opposition To Request For Judicial Notice, filed December 1, 2009) For example, the RFJN includes several letters from non-legislative persons or groups urging either passage of the legislation or its approval by the Governor. But "as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature *as a whole.*" *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 30 (2005) (italics in original; citing *California Teachers Ass'n v. San Diego Community College Dist.*, 28 Cal. 3d 692, 701 (1981)). Under this standard, all but a few of the documents Mrs. Maldonado submitted are irrelevant here.

[5] Even the inadmissible portions of the history Mrs. Maldonado submitted tell the same story. In the main, these documents state that the law ought to encourage the private enforcement of significant public rights. No document submitted speaks to the question whether a litigant's non-pecuniary interest may be considered.

basic purpose, however, nothing in the history sheds any light on whether the Legislature ever considered what types of interests would be strong enough to justify a denial of fees.

Because the legislative history provides no answer, the Court is left to "select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results." *Imperial Merchant Services, Inc. v. Hunt*, 47 Cal. 4th at 388.

North Bay believes that consideration of a litigant's non-pecuniary interest best promotes section 1021.5's overall purpose. That purpose, as already noted, is to help make possible private litigation that establishes or enforces significant public rights. *Woodland Hills*, 23 Cal. 3d at 933. But as even the legislative history Mrs. Maldonado has submitted shows, the Legislature was advised that the legislation establishes a "very difficult standard" for an award of fees (RFJN, Exh. 4), and that "very few cases" will qualify for a fee award (RFJN, Exh. 10).

Thus, a rule that utterly ignores the role played by a litigant's non-pecuniary stake in litigation would, contrary to these statements, result in fee awards when the litigation would have occurred under any circumstances. Such a rule also would force courts to disregard the lessons of everyday life, something that the Court of Appeal in cases from *Williams* to *Punsly v. Ho* has been

loath to do. In some instances, persons initiate litigation not because of the chance for financial gain, but because of individualized, profound and deeply-rooted non-pecuniary motives. *See Punsly v. Ho*, 105 Cal. App. 4th at 118 (affirming denial of fees in case involving issue of grandparent visitation rights). They readily 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.

All this is not to say that courts would, or should, routinely deny fees based on a litigant's non-pecuniary interest. In many cases, such an interest would be too abstract or remote to justify denial of fees. *Press v. Lucky Stores, Inc.*, 34 Cal. 3d at 321 n.11; *see, e.g., Bowman v. City of Berkeley,* 131 Cal. App. 4th 173, 181-82 (2005) (rejecting argument that plaintiffs' non-pecuniary interests should have compelled denial of fees). In that circumstance, the "cost of the claimant's legal victory transcends his personal interest." *Woodland Hills*, 23 Cal. 3d at 941 (internal quotation marks and citation omitted). But in cases such as this one where the evidence clearly shows that a pronounced non-pecuniary interest motivated the litigation, a denial of fees is consistent with the view that "very few cases" will qualify for a fee award.

In sum, the both the trial court and Court of Appeal properly considered Mrs. Maldonado's non-pecuniary interest in pursuing litigation in her role as Whitley's conservator.

4. **The Court Of Appeal Correctly Held That Mrs. Maldonado's Non-Pecuniary Interest In Pursuing The Litigation Supported Denial Of Fees Under Section 1021.5**

The trial court's decision that Mrs. Maldonado pursued this litigation to vindicate a strong personal commitment is well supported by the record and is entitled to deference under the controlling abuse of discretion standard of review. *See Vasquez v. State of California*, 45 Cal. 4th 243, 251 (2008); *Connerly v. State Personnel Board*, 37 Cal. 4th 1169, 1175 (2006).

Mrs. Maldonado testified at the *Richard S.* hearing that her mother, who had been 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)

Mrs. Maldonado's children also expressed strong personal reasons in opposition to the proposed move. Because of the distance between their homes and Fairfield, where Miracle Lane is located, the planned move would disrupt the relationships they had developed with Whitley. (See App. 146, 149-50)

Mrs. Maldonado now downplays the testimony she gave, pointing out that it takes up just a few lines of transcript. That argument is meritless for two independent reasons. Under the

applicable standard of review, it does not matter whether her explanation why she pursued the litigation consumed a few lines or a few pages. What matters is whether the testimony is solid and credible. *See People v. Cudjo,* 6 Cal. 4th 585, 608 (1993). Short as it is, Mrs. Maldonado's testimony meets that standard, especially because it came before this fee dispute arose.

Equally important, Mrs. Maldonado's actions as well as her words conclusively demonstrate that she pursued the litigation for entirely personal reasons rather than to vindicate a significant public right. Although Mrs. Maldonado has been represented by counsel all along, the jurisdictional issue the Court of Appeal decided was *not* present in the case when Mrs. Maldonado initiated the *Richard S.* hearing or when she filed her notice of appeal and supersedeas petition. That issue arose only when the Court of Appeal ordered the parties to brief it.[6]

The issues of when and how the jurisdictional issue arose in this case are important because to ensure fairness, the

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[6] Mrs. Maldonado's counsel have claimed that they likely would have raised the issue on their own. The fact remains, however, that they have presented no evidence to that effect. The Court should not subject North Bay to a fee award that could exceed $250,000 based on the speculation that Mrs. Maldonado would have raised the jurisdictional issue in the absence of the Court of Appeal's order.

significance of a litigant's personal stake is judged not on the basis of hindsight, but at the time significant litigation decisions are made. *See Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1353 (2006) (stating that "the inquiry looks forward from the outset of counsel's vital litigation decisions, rather than backward after judgment"). Just as the courts do not deny fees when a litigant's recovery turns out to be greater than first anticipated [*id.*], they should not award fees to a litigant when a case pursued for purely personal motives ends up conferring a public benefit.

Thus, both the trial court and Court of Appeal correctly ruled that, given Mrs. Maldonado's personal motives in pursuing this litigation, an award of private attorney general fees would be inappropriate.

B. Mrs. Maldonado's Criticisms Of The Rule That Allows Consideration Of Non-Pecuniary Interests Are Misplaced

Mrs. Maldonado identifies several considerations that, so her argument goes, counsel against recognition of a rule that allows courts to consider a litigant's non-pecuniary interests when evaluating fee motions under section 1021.5. Most of her argument merely parrots Justice Sims's dissent in *FUTURE*, 79 Cal. App. 4th at 523-29 (Sims, J., conc. in result & dissenting). However, the majority opinion in *FUTURE* rather than Justice Sims's dissent states the correct rule. North Bay addresses each prong of Mrs. Maldonado's argument in turn.

1. This Court's Decision In *Press v. Lucky Stores* Did Not Hold That Only A Litigant's Pecuniary Interests May Be Considered

Mrs. Maldonado, like Justice Sims in *FUTURE*, relies on footnote 11 in *Press v. Lucky Stores, Inc*, in which she claims the Court plainly stated that only a litigant's expected financial interest may be considered under section 1021.5. But for sound reasons, neither the majority in *FUTURE* nor other courts have so construed *Press*'s footnote 11, as evidenced by the *Williams* Court's analysis of that opinion. *Williams v. San Francisco Bd. of Permit Appeals*, 74 Cal. App. 4th at 969-70.

As *Williams* correctly explains, the Court's statements in *Press* are dictum because they involved an issue that was neither briefed nor decided. *See People v. Knoller*, 41 Cal. 4th 139, 154-55 (2007) (reiterating that an appellate opinion, including a Supreme Court decision, is authority only for "the points actually involved and actually decided") (internal quotation marks and citation omitted); *In re Chavez*, 30 Cal. 4th 643, 656 (2003) (same). The defendant in *Press* did *not* argue that a plaintiff's nonfinancial interest should be a factor in determining whether private attorney general fees should be awarded. According to *Press* itself, the defendant opposed the plaintiffs' entitlement to fees solely on the ground that the litigant had "not conferred a 'significant benefit' on the public or a large number of persons." *Press*, 34 Cal. 3d at 317.

Further, *Press* arose before the 1984 amendment to Article VI, section 12 of the California Constitution, which

empowered the Court to grant review of particular issues rather than an entire case. Thus, because the entire case technically was before it, the *Press* Court may have believed it worthwhile to comment on whether the "necessity and financial burden of private enforcement" made a fee award appropriate. Still, because the defendant had not opposed a fee award on that basis, *Press*'s statement is and remains dictum.

That dictum, moreover, fails even to mention, much less discuss, the Court's prior decision in *Woodland Hills*, where it endorsed *County of Inyo v. County of Los Angeles*, 78 Cal. App. 3d 82. That case, as explained above, upheld a denial or private attorney general fees because the plaintiff public entity had powerful non-pecuniary motives for pursuing the litigation. For this reason, too, the *Press* dictum does not call into question the rule that the Court of Appeal has applied for the last ten years.

2. The Rule Allowing Consideration Of Non-Pecuniary Interests Does Not Invite Standardless Decision-Making

Mrs. Maldonado next insists that a rule that allows consideration of a litigant's non-pecuniary interests invites arbitrary and standardless decision-making. This "parade of horribles" contention, however, is both highly speculative and inconsistent with Mrs. Maldonado's other arguments.

The Court of Appeal's decision in *Williams* is more than ten years old and the decision in *FUTURE* is almost ten years old.

Yet over the ensuing decade just a few published cases have held that a litigant's non-pecuniary interest may defeat a claim to fees under section 1021.5. This small number of cases signals that our courts are capable of making principled decisions regarding the weight to place on a litigant's non-pecuniary interest. *E.g., Bowman v. City of Berkeley,* 131 Cal. App. 4th at 181-82 (rejecting argument in land use dispute that plaintiffs' non-pecuniary interests should have compelled denial of fees). There is no reason to believe that, in the future, decisions like the one below would become more frequent. Under the rule applied below our courts are not free to speculate about motives, but must look for objective evidence proving both that a non-pecuniary interest exists and that it is strong enough to warrant the litigation expense involved. *See Punsly v. Ho*, 105 Cal. App. 4th at 116-18; *FUTURE,* 79 Cal. App. 4th at 516.

Mrs. Maldonado's argument also belies her statement that *Williams* reached the correct result because the plaintiff's actions were closely tied to preserving the value of a tangible asset — his home. (Opening Brief on the Merits at 19-20) Recall that in *Williams* the plaintiff argued that he was entitled to fees because he did not pursue the litigation based on the prospect of pecuniary gain, pointing out that the proposed construction would not affect the value of his property. 74 Cal. App. 4th at 966. The Court of Appeal emphasized, however, that the proposed the construction would cause a "significant aesthetic loss" by allowing a building completely out of character for the neighborhood. *Id.* at 971.

But if that aesthetic loss did not affect the value of the plaintiff's property — and those are the facts in *Williams* — then Mrs. Maldonado must believe that our courts are capable of reliably quantifying the loss because it is connected to a tangible asset. With respect, a court's evaluation of a litigant's non-pecuniary interest generally is no different and no more challenging than quantifying an aesthetic loss connected to a tangible asset. Where, as in *Williams*, the tangible asset has not, and will not, decrease in value, the presence of such an asset adds nothing to the analysis.

Finally, our courts and juries make similar decisions on a daily basis. Courts must weigh intangibles when deciding, for example, whether to grant preliminary injunctive relief [*see* 6 Bernard E. Witkin, *California Procedure* Provisional Remedies § 293, at 232-33 (5th ed. 2008)] or whether some action is in the best interest of a child [*see* Cal. Family Code § 3020]. Juries also weigh intangible factors when deciding, for example, how to allocate fault for an injury between a criminal assailant and a negligent landowner or security company. *See Rosh v. Cave Imaging Systems, Inc.*, 26 Cal. App. 4th 1225, 1233-34 (1994). These types of issues are not susceptible to formulaic determinations such as a simple comparison between the cost of litigation and the expected financial gain. Still, our judicial system trusts judges and juries to reach reasoned results based on guiding legal principles and the application of common sense.

Mrs. Maldonado argues, however, that courts and juries must weigh these intangibles because there is no better alternative

and that the Court should not inject similar intangibles into the section 1021.5 calculus. That argument misses the point. Our judicial system respects these decisions not because there is no alternative, but because by resolving factual disputes and following the law, judges and juries make sound decisions on these matters. The issue here is no different in character.

3. The Rule Allowing Consideration Of Non-Pecuniary Interests Will Not Result In Expensive Fee Litigation

This case also belies Mrs. Maldonado's next argument, that if courts may consider non-pecuniary interests, then prolonged and expensive fee litigation is sure to result. The trial court resolved the fee issue in this case through a typical motion procedure, in which dispositive facts were found in the testimony Mrs. Maldonado gave during the *Richard S.* hearing or readily presented through declarations.

Although the character of a fee motion naturally will vary some from case to case, there is no reason to assume that consideration of non-pecuniary interests have markedly altered the task our courts face. Because fee motions arise at the conclusion of a case, the relevant evidence will already be known to the parties or readily available. Certainly the other decisions to date do not reveal that the factual questions involved in assessing non-pecuniary interests were any more complex or more difficult to decide than the issues that arise in fee motions generally. Further, were a defendant to argue that it needs extensive discovery or a lengthy hearing to

show that the plaintiff had significant non-pecuniary interests, that claim alone would be a sure sign that, as in *Bowman v. City of Berkeley*, such an interest is not present.

Even if a few cases involving non-pecuniary interests were to present time-consuming factual questions, the same is already possible under the rule that requires consideration of purely pecuniary interests. In an environmental or land use case, for example, a defendant has the right to show that the plaintiffs pursued the case to prevent a diminution in the value of their property. *See generally FUTURE*, 79 Cal. App. 4th at 518-19 (summarizing some of the evidence submitted in connection with the plaintiffs' fee motion). Issues of that ilk often may depend on expert testimony, which may not have been relevant, much less developed, during the litigation. The hypothetical prospect that a rare case involving non-pecuniary interests may take some time to resolve thus provides no reason for the Court to discard a rule that is consistent with section 1021.5's terms and that the courts have applied for more than ten years.

4. The Rule Allowing Consideration Of Non-Pecuniary Interests Neither Creates A Bias Against Fee Awards Nor Discourages Public Interest Litigation

Mrs. Maldonado also wrongly contends that the rule the Court of Appeal applied in this case creates a bias against fee award and will place litigants in her position at a disadvantage when they come up against well-funded non-profit groups or governmental entities.

As a preliminary matter, Mrs. Maldonado's rhetoric implies that the Court of Appeal applied a novel rule. Yet ten years' of court decisions refute her claim that the rule the Court of Appeal relied on creates a bias against fee awards. For good reasons, fees were not awarded to Mrs. Maldonado or to the plaintiffs in *Williams* or *Punsly v. Ho*. Beyond these very few examples, however, Mrs. Maldonado does not, and cannot, point to a long list of deserving litigants who have been unjustly denied an award of attorney fees.

As explained before, moreover, a rule that would force the courts to ignore a litigant's non-pecuniary interest actually would re-write section 1021.5 in family law-type cases. (See discussion at p. 11, above) In these cases, section 1021.5's three-part test in reality would be a two-part test. The third part of the test — involving the necessity and financial burden of the litigation — automatically would be satisfied in all but the most unusual case.

For similar reasons, the rule that authorizes courts to consider non-pecuniary interests does not discourage public interest litigation. Once again, although that rule has been recognized for at least ten years, the courts have invoked it on just a few occasions to deny attorney fee awards. There is no plausible basis to assume that the Court's approval of this rule would result in an exponential increase in the number of cases in which the courts would deny fee awards, thereby dissuading lawyers from taking on cases that involve widespread public rights.

Indeed, contrary to Mrs. Maldonado's related argument, section 1021.5 does not exist simply to equalize the terms of litigation between individuals of modest means and better funded entities. Section 1021.5 has that effect if — and only if — the litigation meets all the statutory criteria for an award of private attorney general fees. And, in many cases, multiple individuals or public interest groups pursue the litigation, a fact that minimizes the chance that the plaintiffs' non-pecuniary interests ever would be strong enough to warrant the denial of fees. *E.g., Bowman v. City of Berkeley*, 131 Cal. App. 4th at 181-82 (relying on this factor to hold that the plaintiffs were entitled to fees).

Nor does section 1021.5 exist to allow lawyers to pursue all pro bono cases for profit. It denigrates the legal profession to argue that lawyers and law firms will take on a public interest case only if they are confident of a fee award at the end of the day. At the very least, it is the province of the Legislature, not the courts, to re-write the statute to achieve that result, just as it has done in areas such as the Fair Employment and Housing Act, in which fee awards to a prevailing plaintiff are a near certainty. *See* Cal. Govt. Code § 12965(b).

5. The Rule Allowing Consideration Of Non-Pecuniary Interests Is Consistent With Rules Regarding Standing To File Suit

Much of the foregoing analysis refutes Mrs. Maldonado's argument, which echoes Justice Sims's dissent in *FUTURE*, that because litigants must have standing to file suit, the

rule the Court of Appeal applied will result in erroneous denials of fees or, at the very least, result in lawsuits being filed by persons least interested in the dispute. Once again, regardless of the concerns Justice Sims may have had a decade ago, the relatively few decisions since that actually have denied fees based on a litigant's non-pecuniary interest reveal the poverty inherent in Mrs. Maldonado's repetition of that same concern now.

Just as important, the focus on standing rules begs the question. The material issue under section 1021.5 is whether a fee award is necessary to encourage private enforcement of significant public rights. *See Hammond v. Agran*, 99 Cal. App. 4th at 127. A finding that a plaintiff has standing to pursue the action simply is not enough to support the conclusion, required under cases such as *FUTURE*, 79 Cal. App. 4th at 516, that the plaintiff's interest is "specific, concrete and significant," proven by "*objective* evidence." (Italics in original.)

For each of these reasons as well, the Court should affirm the Court of Appeal's decision and endorse the rule it applied regarding the relevancy of a plaintiff's non-pecuniary interests in the context of section 1021.5 fee motion.

C. Even If The Court Reverses The Court Of Appeal, It Should Remand The Case To That Court For Its Consideration Of The Parties' Additional Arguments

For the reasons stated above, the Court should affirm the Court of Appeal's judgment and announce a rule that authorizes

courts to consider a litigant's non-pecuniary interests when evaluating a motion for fees under section 1021.5. Were the Court to reach a different result, however, it should remand the case to the Court of Appeal with directions to decide the issues that court chose not to decide: (1) whether Mrs. Maldonado established that the outcome of her first appeal benefited a sufficiently large class of persons; and (2) if Mrs. Maldonado is entitled to fees, whether she is entitled to all the fees requested. These are substantial issues that, contrary to Mrs. Maldonado's claim, the Court should not ignore by ordering that she is entitled to fees.

With respect to the first issue, North Bay argued, and the trial court agreed, that it was speculative to conclude that the Court of Appeal's first opinion benefited a sufficiently large class of persons to justify an award of fees. Just as is true for the trial court's ruling that Mrs. Maldonado did not satisfy the "necessity and financial burden" factor, its ruling on this issue is entitled to deference on appeal. (See cases cited at p. 19, above)

In brief, the Court of Appeal's prior 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.

As of the end of 2006 (the last year for which data are available at the time Mrs. Maldonado filed her fee motion), 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 from this evidence — and the one the trial court noted — is that very few of these persons are likely candidates for community placement. (App. 255) Even then, the class of affected persons is fewer still, because the Court of Appeal's prior decision applies only if a parent or conservator were to challenge the planning team's decision regarding community placement. In sum, the class of persons affected by the Court of Appeal's prior decision could range from just a handful to at very most a few hundred persons. The evidence simply does not permit a more precise estimate.

With respect to the second issue, a partial award is expressly contemplated by cases such as *Woodland Hills*, 23 Cal. 3d at 942, where the Court held that in appropriate cases a court has the discretion to award less than the lodestar amount of fees requested:

> [W]e believe that if the trial court concludes that plaintiffs' potential financial gain in this case is such as to warrant placing upon them a portion of the attorney fee burden, the section's broad language and the theory underlying the private attorney general concept would permit the court to shift only an appropriate portion of the fees to the losing party or parties.

Id. at 942.

There is a solid basis in this case for a court to reduce the lodestar fee claimed by Mrs. Maldonado. For example, Mrs. Maldonado's fee request encompasses time spent on her petition for writ of supersedeas, which did not raise the legal issue the Court of Appeal later decided. (App. 49-51) Similarly, substantial portions of Mrs. Maldonado's briefs on the merits in her first appeal were devoted to discrete aspects of the trial court's decision upholding Whitley's community placement rather than the legal issues that would meet section 1021.5's criteria. At a minimum, the Court of Appeal should consider whether an apportionment of fees is warranted in this case.

IV

CONCLUSION

The Court should approve the Court of Appeal decisions that allow courts to consider a successful litigant's non-pecuniary interests when deciding whether to award fees under section 1021.5. That rule neither undermines section 1021.5's salutary purposes nor will result in a denial of fees in a significant percentage of cases. Instead, that rule simply recognizes the reality that some litigants have objective, deeply felt motives for pursuing litigation despite the

cost involved. This is such a case, and the Court should affirm the Court of Appeal.

Dated: January 21, 2010

RANDOLPH CREGGER &
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By ______________________
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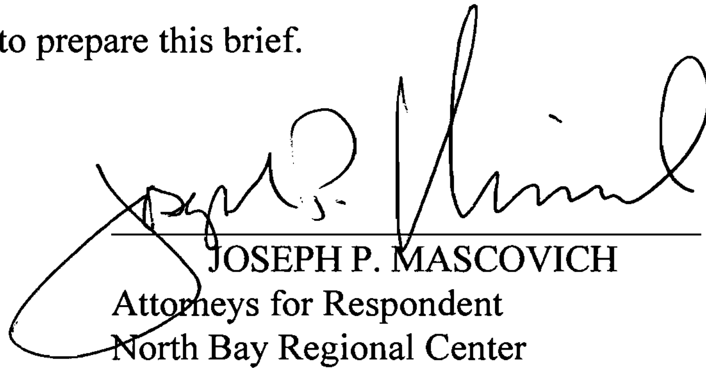
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(d)(1) of the California Rules of Court, the enclosed Answer Brief on the Merits is produced using 14-point Roman type including footnotes and contains 7,972 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: January 21, 2010



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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 BRIEF ON THE MERITS** 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:
___ **delivered by hand;**
___ **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 January 21, 2010 at Sacramento, California.

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