

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:)	1 CA-CV 07-0411
)	
ROCHELLE MARIE WALTERS,)	DEPARTMENT B
)	
Petitioner/Appellee,)	MEMORANDUM DECISION
)	
v.)	
)	Not for Publication -
JACOB D. BESSINGER and ANITA)	(Rule 28, Arizona Rules
MOBLEY,)	of Civil Appellate Procedure)
)	FILED 3-27-08
Third Party)	
Intervenors/Appellants.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2004-094987

The Honorable Lisa Daniel Flores, Judge

AFFIRMED

Cantor Simon PLLC
By Keith Berkshire
Attorneys for Appellee

Tempe

Gregory A. Riebesehl
Attorney for Appellants

Phoenix

B A R K E R, Judge

¶1 In this appeal, we examine whether the trial court abused its discretion in awarding Mother attorney's fees pursuant to Arizona Revised Statutes ("A.R.S.") section 25-324 (2008). For the reasons that follow, we affirm the fee award.

Facts and Procedural Background

¶2 While incarcerated, Rochelle Walters ("Mother") gave birth to R., a baby girl. Because her family was unable to assist with the child, Mother placed the child in the care of Jacob Bessinger and Anita Mobley-[Bessinger] (the "Bessingers"), a couple who ran "Embrace," a "non-profit organization to care for at-risk children."

¶3 The Bessingers raised R. from the time of her birth in November 2002 until Mother got out of prison (twice) and eventually regained custody of R. in November 2006. Mother was twice incarcerated while the Bessingers cared for R. In the time between her prison terms, Mother had custody for a period of approximately eight months, until she was reincarcerated in April of 2005, and the father returned R. to the care of the Bessingers. The Bessingers claimed that during this eight-month period, Mother sexually and physically abused R., failed to give R. her medication, pulled R.'s hair, and would "fling" her against furniture. These claims were later determined to be "unsubstantiated," and the private dependency action the Bessingers had filed against Mother was dismissed. After Mother was released from prison for the second time and again sought custody of R., the Bessingers, in an effort to defeat the court's jurisdiction, initiated DNA testing for R. that established that she was of Native American heritage.

¶4 During an evidentiary hearing at which the court was to decide the Bessingers' right to have visitation rights to R. (after custody had been awarded to Mother), R. was taken from her home by two strangers. It was later determined that the individuals who took R. were B. and B-C., who claimed to be acting on behalf of the Cherokee River Indian Community and who were accompanied by a deputy of the Maricopa County Sheriff's Office. As explained at length in the court's minute entry, B. and B-C. "took custody of the child without legal authority, and with knowledge that their actions violated the custody order of this Arizona court."

¶5 B. had originally been hired by the Bessingers to file a petition for admission of R. to the Cherokee River Indian Community, although the Bessingers maintained that she acted independently in taking R. They did admit, however, that they had told her of the court hearing, enabling B. to know when Mother would be away from home. After B. and B-C. took R., Mother, who had been representing herself up to this point, hired a lawyer. Mother's lawyer appeared at the emergency hearings, issued press releases, and made numerous phone calls to the news media, police, and the Indian tribe; these efforts ultimately resulted in R. being located and returned to Mother two days later.

¶6 Prior to R.'s taking, the court had appointed a therapeutic interventionist to evaluate whether visitation from

the Bessingers was in R.'s best interest. Until the evaluation was made, the Bessingers were to have "no further visits" with R. After R. was taken, the court suspended the order appointing the interventionist and subsequently made final the denial of visitation.

¶17 Mother moved for attorney's fees under A.R.S. § 25-324, and submitted a fee application showing that she had incurred \$7,684.50 in fees as a result of R.'s abduction. The court granted this motion and awarded \$5,000 in attorney's fees to Mother against the Bessingers. The Bessingers timely appeal the fee award. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

Discussion

¶18 We review a trial court's award of attorney's fees under an abuse of discretion standard. *Medlin v. Medlin*, 194 Ariz. 306, 981 P.3d 1087 (App. 1999). We view the facts in the light most favorable to sustaining the family court's ruling. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 522 n.1, 169 P.3d 111, 112 n.1 (App. 2007).

¶19 The Bessingers argue that since they never specifically authorized, ratified, or had actual knowledge of B. and B-C.'s actions in taking R., they cannot be held responsible for their wrongful acts. The Bessingers cite to a number of cases that deal with agency law to support their position. However, we find these

cases and principles inapplicable to the statute on which the fee award was based. Under A.R.S. § 25-324 (Supp. 2002), “[t]he court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of . . . defending any proceeding under this chapter.” The criteria for making a fee award under this statute are thus (1) the financial resources of both parties and (2) the reasonableness of the positions each party has taken throughout the proceedings. *Id.* No finding of a principal-agent relationship between the Bessingers, B., and B-C. is necessary to sustain the award.

¶10 The Bessingers do not argue, and the record does not reflect, that they ever asked the trial court to make findings regarding the fee award as they were entitled to do under the statute, § 25-324(A); thus, we search the record for evidence tending to support the award without regard to the court’s actual reasons for making the award, which were not specified.

¶11 Regarding the first criterion, the Bessingers have never suggested that the relative financial resources of the parties would be a basis for invalidating the fee award. We note that Mother had applied for and received a deferral of court fees and costs based on the fact that she received food stamps from the government. While there is no direct evidence regarding the

Bessingers' financial position, one report states that Mr. Bessinger was "in the computer supply business" and that they were able to provide "food, water, an air conditioning unit and other life essentials" to R.'s father, including "paying for car maintenance and traffic fines and maintaining [her father's] driver's license." Thus the trial court had a basis to conclude in Mother's favor in this regard.

¶12 Regarding the second criterion, the record reveals several instances where the trial court explained why it believed the Bessingers' positions to be unreasonable. For example, the court explained that

[a]lthough the Bessingers would have been well within their rights to appeal this Court's November 14, 2006 decision [to award custody to Mother], they chose not to. Instead they pursued yet another avenue to attempt to gain custody of [R.], another "end run" as the child's Best Interests Attorney put it at the October 4, 2006 hearing. The Bessingers have proven themselves again to be unwilling to abide by this Court's orders. The tragic result of this latest effort is that the four year old child was taken from her home by complete strangers, and is being held in a "safe house," the location of which is unknown to all the people who love and care about her.

The Bessingers argue that the award was an abuse of discretion because it was based on "a leap of faith assumption by the court that Appellants[] had arranged or authorized the removal of the child." However, the court's findings did not assume that they ordered the removal or had any specific knowledge of it. Instead,

the court explained that their unreasonable actions were what caused the removal, even if they did not specifically intend the taking to result:

[t]he Cherokee River Indian Tribe would not have become involved in this case but for the activities of Jacob and Anita Bessinger. Prior to this Court's evidentiary hearing in October 2006, the Bessinger's sought intervention by the Cherokee Nation; the Cherokee Nation declined to become involved. It appears that after this Court denied the Bessingers continued custody of the child by order dated November 14, 2006, the Bessingers sought intervention by the Cherokee River Indian Tribe of Alabama. According to Mother, the Bessingers did not inform her that they had filed any documents with the Cherokee River Indian Tribe seeking intervention. The Bessingers' actions are the direct cause of the child being removed from Mother's home.

¶13 It was appropriate for the trial court to find it unreasonable for the Bessingers to attempt to get an Indian tribe to intervene without informing Mother that they were doing so. This unreasonable position ultimately led to the taking of R., which required R.'s mother to hire an attorney in order to get her back. The Bessingers have never attacked the *amount* of the fees incurred by Mother's lawyer as unreasonable, only the fact that they were awarded. Under these circumstances, there is a clear nexus between the unreasonableness of the Bessingers' position and the resulting fee award to R.'s indigent Mother even though such a nexus between the unreasonable position and the fee award is not required by A.R.S. § 25-324.

¶14 Even aside from the circumstances surrounding the taking of R., there is ample evidence in the record that the Bessingers had taken unreasonable positions months before the taking took place. For example, the court noted that both Child Protective Services ("CPS") and law enforcement considered the Bessingers' allegations that Mother had physically and sexually abused R. to be unsubstantiated. Moreover, the court specifically found that the Bessingers were "not credible," noting that there were examples of when they "greatly exaggerate[d] the truth to support their efforts to keep [R.]." The court pointed to discrepancies borne out by the record. For example, at one time, Mobley-[Bessinger] stated that "not less than ten patrol cars were sent to their home and an Amber Alert issued because of Mother's allegations they kidnapped R." However, neither was true according to the Maricopa County Sheriff's Office. Similarly, Mobley-[Bessinger] testified that Mother's son doused R. with lighter fluid and R. had to be taken into a locked bathroom for her safety, but according to CPS case notes, Mother's son was not in the family home when he set himself on fire and R. was never mentioned in the incident. The court further found that the Bessingers had "made every effort to undermine Mother's relationship with [R]."

¶15 Based on these facts, we find that the trial court's award of fees based on the unreasonableness of the positions taken by the Bessingers was not an abuse of discretion.

Conclusion

¶16 For the reasons stated above, the award of attorney's fees against the Bessingers is affirmed. We also determine that Mother is entitled to an award of her attorney's fees on appeal pursuant to A.R.S. § 25-324. Mother is to comply with Arizona Rule of Civil Appellate Procedure 21 in making her request.

DANIEL A. BARKER, Presiding Judge

CONCURRING:

PATRICK IRVINE, Judge

DIANE M. JOHNSEN, Judge