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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
In the Family Court

Jocelyn B. Cate, Family Court Judge

Appellate Case No. 2018-001656

Holly Lawrence.....Petitioner,

v.

Jennifer Brown.....Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

- I. The Court of Appeals correctly affirmed the Family Court's finding that it lacked jurisdiction to determine whether Biological Mother was entitled to appellate attorney's fees and, therefore, Biological Mother's Petition should be denied.

COUNTER-STATEMENT OF THE CASE

On October 27, 2013, Holly Lawrence (Biological Mother) gave birth to Baby Girl. On October 30, 2013, Biological Mother executed a *Consent for Adoption* document in favor of Jennifer Brown (Adoptive Mother). That same day, Adoptive Mother filed an adoption action in the Charleston County Family Court via case number 2013-DR-10-4057. (Appendix pp. 47-53). No Answer, Counterclaim or other responsive pleading was ever served or filed on behalf of Biological Mother, even after she was granted the right to intervene in that action.

On November 26, 2013, Biological Mother filed an action in the Charleston County Family Court via case number 2013-DR-10-4386 (Appendix pp. 54-58) attacking the validity of the *Consent for Adoption*, arguing that North Carolina law applied so as to allow her to revoke her consent, alleging non-compliance with the Interstate Compact on the Placement of Children (ICPC) and requesting “reimbursement of attorney fees and costs.” (Appendix p. 58). Adoptive Mother filed an Answer and Counterclaim to Biological Mother’s Complaint on December 17, 2013, requesting that Biological Mother’s action be dismissed, that attorney fees and costs be awarded to Adoptive Mother, temporarily and permanently, requesting the appointment of a Guardian *ad Litem* (GAL) and asking the Court to direct the parties to participate in mediation. (Appendix pp. 70-75). Biological Mother never served or filed a Reply.

On November 26, 2013, Biological Mother filed a Notice of Motion and Motion for Emergency Relief and Motion to Intervene and to Consolidate via case number 2013-DR-10-4057 as well as case number 2013-DR-10-4386. (Appendix pp. 59-69). In this Motion, Biological Mother alleged that the consent document was improperly executed,

that North Carolina law applied so as to allow her to revoke her consent and that the placement of the child in South Carolina violated the ICPC – essentially the same allegations raised in her underlying pleadings, without the specific request for attorney fees. Based on the allegations raised in her Motion, Biological Mother requested immediate legal and physical custody of the minor child, and that she be allowed to intervene in the termination of parental rights and adoption action filed by Adoptive Mother via case number 2013-DR-10-4386 and that both cases, Adoptive Mother's TPR and Adoption Action (4057) and Biological Mother's action to defeat the adoption (4386), be consolidated.

A Temporary Order was issued on December 30, 2013, which granted (by agreement of the parties) the Biological Mother's request to intervene and to consolidate their respective actions. (Appendix pp. 22-23). Both cases were scheduled for a two-day evidentiary hearing on an expedited basis. The GAL, Jon A. Mersereau, Esquire, was also appointed at that time and both parties were granted discovery, also on an expedited basis. A "Notice of 'A Case' Trial Date" was issued by the Charleston County Clerk of Court on February 25, 2014, notifying both parties that their respective cases had been scheduled as the "A case" or the day certain trial for April 7-8, 2014 to begin at 9:00 a.m. on April 7th. (Appendix p. 104).

During the pendency of this action, multiple motions were filed by both parties including Adoptive Mother's *Motion to Compel Discovery, to Reconvene Deposition and Continue Evidentiary Hearing*, and Biological Mother's *Motion to Limit Discovery and Motion for Voluntarily Dismissal of Particular Cause of Action*, all of which were heard on March 5 and 7, 2014 by the Honorable Jocelyn B. Cate. (Appendix pp. 76-103; pp. 113-16, respectively). By Order filed March 10, 2014, Judge Cate granted Biological Mother's request to dismiss her third cause of action and preserved Adoptive Mother's right to request

attorney fees and costs as to her defense of that allegation. (Appendix pp. 24-27). The Court also granted Biological Mother's request to limit her discovery responses in part, and overruled Biological Mother's objection to producing text messages after reviewing the same *in camera*. Biological Mother was directed to produce such text messages to Adoptive Mother within twenty-four (24) hours. The Court also considered the question of whether an unwed biological mother has a fundamental right to withhold the identity of a putative father in an action where she seeks to invalidate her Consent for Adoption of her child based on an allegedly improperly executed consent, finding:

The determination as to whether or not the legal document was properly executed is heavily dependent upon the credibility of the testimony of the witnesses to its execution. The ability of the Court to make credibility assessments is critical. It has been satisfactorily shown to the Court that the putative biological father may have important relevant evidence concerning the credibility of Biological Mother that Adoptive Mother has a right to explore.

(Appendix p. 26, Order of March 10, 2014).

According to the Court, "Biological Mother should not be entitled to assert the need to maintain the confidentiality of adoption proceeding and her right to avoid disclosure of personal matters where she is attempting to end it." (Appendix p. 26). Therefore, the Court ordered "Biological Mother should be required to disclose the name of the putative biological father of Baby Girl Harper and any and all contact information she has for him." (Appendix p. 26). The Court then held its ruling in abeyance for ten (10) days to afford Biological Mother time to file an interlocutory appeal, if one should be available. No appeal was filed. The Court also issued other relief at that same time, including allowing Adoptive Mother to reconvene the deposition of Biological Mother, requiring Biological Mother to provide written authorizations requested in addition to any and all necessary information so as to allow

Adoptive Mother to obtain certain background information as to Biological Mother on her own. Both parties' request for attorney fees and costs were held in abeyance.

On March 31, 2014, Adoptive Mother filed a Notice of Motion and Motion to Bifurcate Issues and to Limit the Evidence, arguing:

"The pivotal inquiry in this case is the validity of the Consent for Adoption. If the Plaintiff is successful in her attempt to invalidate the Consent for Adoption, the Defendant's adoption action will end as Plaintiff will be restored to her legal position of natural mother. On the other hand, if the Plaintiff fails to meet her burden in challenging the Consent for Adoption, the Defendant will be entitled to move forward with her request for the Court to approve her adoption."
(Appendix p. 122).

Adoptive Mother *agreed*, stating in her Return to Motion to Bifurcate and Limit the Evidence:

"Holly Lawrence consents to bifurcate the issues raised by Ms. Lawrence in her temporary motion so as to focus solely on the 'dispositive issue of the validity of the consent for adoption.'"
(Appendix p. 130).

Following a two and a half day trial, the Family Court issued an Order granting Biological Mother's Rule 15(b) Motion to conform her pleadings to the evidence presented so as to amend Biological Mother's first cause of action to read, "the Consent document purportedly signed by Biological Mother was not witnessed pursuant to S.C. Code Ann. Section 63-9-340 and therefore is void, voidable or invalid due to improper execution;" finding the Consent for Adoption signed by the Biological Mother on October 30, 2013 was invalid and without any force or effect; finding that it was in the best interest of the minor child that the child be immediately returned to the Biological Mother without delay and denying Adoptive Mother's request for attorney fees and costs. (Appendix p. 38).

On April 25, 2014, Adoptive Mother filed a Notice of Appeal and Request for Supersedeas to stop the immediate transfer of the child. Biological Mother moved to dismiss

the appeal pursuant to *Terry v. Terry*, 400 S.C. 453, 734 S.E.2d 646 (2012), arguing the Family Court's ruling did not decide with finality whether the adoptive mother or the biological mother would ultimately prevail as both parties had yet to be heard on their causes of actions.

On May 1, 2014, the Court of Appeals dismissed the appeal without prejudice pending a decision on the Rule 59 Motion. On May 5, 2014, the Family Court entered an Order denying reconsideration, and on that same date, Adoptive Mother filed a voluntary dismissal of her Amended Complaint in case number 2013-DR-10-4057 as no Answer, Counterclaim or other responsive pleading had been served or filed. (Appendix pp. 39-41; pp. 131-32, respectively).

Adoptive Mother filed and served a second Notice of Appeal and second Request for Supersedeas. The Court of Appeals entered a temporary supersedeas on May 6, 2014, preventing transfer of the child. On May 16, 2014, Biological Mother filed a Return to Adoptive Mother's Petition for Supersedeas as well as a Motion to Dismiss the appeal. (Appendix pp. 151-57). On June 6, 2014, this Court entered an Order denying the Motion to Dismiss the Appeal. (Appendix pp. 16-17).

The case was heard before this Court on July 23, 2014 and August 4, 2014; a decision affirming the Family Court was issued. (Appendix pp. 18-21). This Court also clarified in a footnote that the Family Court's finding that the consent document was invalid constitutes a final decision that Adoptive Mother cannot proceed with the adoption of the child. (Appendix p. 19 n.8). On August 15, 2014, Adoptive Mother filed a Writ for Supersedeas and expedited review as well as a Petition for Writ of Certiorari to the Supreme Court of South Carolina. On August 20, 2014, the Supreme Court issued an Order granting Adoptive

Mother's Petition for Writ of Certiorari and oral arguments were held on September 23, 2014.

On September 29, 2014, the Supreme Court affirmed the Court of Appeal's decision affirming the Family Court's finding that Biological Mother's consent to the adoption was invalid. (Appendix pp. 4-13). The Supreme Court further held that because the Adoptive Mother was not the prevailing party on appeal, an award of attorney fees would be inappropriate. (Appendix p. 12 n.8). *Brown v. Baby Girl Harper*, 410 S.C. 446, 455 n.8, 766 S.E.2d 375 (2014). There was no mention of attorney fees as to Biological Mother in that such issue was not presented at trial and, therefore, not an issue on appeal.

The Remittitur from the Supreme Court was issued October 7, 2014. (Appendix p. 14). On October 29, 2014, the Supreme Court ruled that pursuant to Rule 222, SCACR, the motion filed by Biological Mother requesting costs and fees was awarded in the amount of \$1,583.39 and the Family Court was directed to add this reward of costs to the Remittitur. (Appendix p. 15). This award of fees and costs was properly included by the Family Court in its last Order. (Appendix p. 46).

On October 21, 2014, Biological Mother filed a Pre-Trial Hearing Request, citing the "type of case," as "Contested adoption attorneys fees." (Appendix p. 133). The scheduling clerk issued a Notice of Hearing on this Pre-Trial Hearing Request which was scheduled for November 18, 2014. The Chief Administrative Judge at that time, the Honorable Jocelyn B. Cate, directed both parties to prepare memorandums as to their respective positions and accepted oral argument as well. As reflected in Biological Mother's Memorandum in Support of Biological Mother's Request for Hearing on Her Request For Attorneys' Fees, Biological Mother argues, "Now that jurisdiction in this case has been restored to the Family Court, Biological Mother wishes to pursue her Fifth Cause of Action, for attorneys' fees."

(Appendix p. 136). Biological Mother also concedes in her memorandum, “Biological Mother no longer seeks a hearing on the ICPC issue, as it has become moot by the Supreme Court’s determination that the consent document was invalid.” (Appendix p. 136). Biological Mother urges the Family Court to allow her to “introduce her attorney fee affidavit in support of her request for attorneys’ fees and present testimony on the *Glasscock* and *E.D.M.* factors,” as well as, “limited discovery regarding the issue of attorneys’ fees.” (Appendix p. 136). In her memorandum, Adoptive Mother argued that Biological Mother’s request was improper, that the case was closed and that the time for Biological Mother to request attorney fees and costs was at the trial of the matter. (Appendix. pp. 138-63).

On January 29, 2015, an Order denying Biological Mother's request for further hearing as to her request for attorney fees and costs, and denying her request to reopen the matter so as to conduct additional discovery, was filed in the Charleston County Family Court. (Appendix pp. 42-43). Biological Mother then filed a Rule 59(e) Motion to Reconsider, Alter or Amend, but failed to supply the Court with its motion for months. Biological Mother then urged the Court to consider her untimely Motion and the matter was scheduled for another hearing.

Finally, on February 11, 2016, the Family Court issued an Order upholding its prior ruling as to Biological Mother’s request to re-open the matter, conduct additional discovery and pursue her request for attorney fees. (Appendix pp. 44-46). The Court supplemented its previous ruling to include additional findings, including the denial of Biological Mother’s request for additional costs and fees incurred by her during the appeal. This instant appeal followed.

On March 2, 2016, Biological Mother filed a Notice of Appeal from Judge Cate's

January 29, 2015 and February 11, 2016 Orders. The Court of Appeals issued an opinion affirming the family court's finding that it lacked jurisdiction to determine whether Biological Mother was entitled to appellate attorney's fees, reversing the family court's finding that it lacked jurisdiction to determine if Biological Mother was entitled to trial-level attorney's fees, and reversing the family court's finding that Biological Mother abandoned her cause of action for attorney's fees. (Appendix pp. 315-20). The Court remanded the case for a determination of whether Biological Mother was entitled to trial-level attorney's fees. (Appendix p. 320). Biological Mother filed a Petition for Rehearing, which was denied by Order of the Court on August 16, 2018. (Appendix p. 333).

On September 17, 2018, Biological Mother served her Petition for a Writ of Certiorari.

ARGUMENTS

- I. **The Court of Appeal correctly affirmed the Family Court's finding that it lacked jurisdiction to determine whether Biological Mother was entitled to appellate attorney's fees and, therefore, Biological Mother's Petition should be denied.**

Nothing in this Court's Remittitur required or authorized the Family Court to address the issue of Biological Mother's request for appellate attorney's fees and costs outside of those fees and costs awarded to Biological Mother by this Court in the amount of \$1,583.39. (Appendix p. 15). The Family Court properly included this award in its Order Denying Biological Mother's Motion for Attorney Fees and Costs, filed February 11, 2016. (Appendix pp. 44-46).

Biological Mother argues that the Family Court has jurisdiction to award attorney fees and costs she incurred as a result of the appeal; however, such argument is without merit. The Family Court would only be vested with authority to award additional costs and fees incurred pursuant to appeal where such issue was an issue on appeal and the case was

remanded for consideration of attorney fees in light of an ultimate decision on remand. Rule 222, SCACR; *Green v. Green*, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995). In this case, only Adoptive Mother's request for attorney fees was an issue on appeal. Where Biological Mother failed to raise her entitlement to such fees at trial, such issue necessarily was not ruled upon by the trial judge and not preserved for appellate review.

It is undisputed that Biological Mother chose not to request an award of attorney fees and costs at trial and that no evidence in support of such an award was presented on her behalf. It is also undisputed that Adoptive Mother *did* request attorney fees and costs at trial. In support of her request for attorney fees and costs, Adoptive Mother introduced her attorney's Affidavit of Fees and Costs (Appendix pp. 231-48), Adoptive Mother's sworn financial declaration (Appendix pp. 225-30) and Biological Mother's sworn financial declaration (Appendix pp. 221-24) - all without objection from Biological Mother. Adoptive Mother also offered testimony as to her request for attorney fees and costs. (Appendix pp. 185-88). Had Adoptive Mother prevailed on appeal, her request for attorney fees was raised to and ruled upon by the trial judge and was properly preserved for appellate review and all fees, including those incurred pursuant to the appeal, could be considered and awarded by the Family Court in light of such ultimate decision on remand. However, the Adoptive Mother did not prevail on appeal, there was no remand in this case, no further direction to the Family Court and Biological Mother cannot now ask the Family Court to award her fees incurred pursuant to the previous appeal.

After hearing all the evidence over the course of the two and a half day trial and, "based upon an examination of the pleadings [and] consideration of all the testimony," the Family Court issued a final, written order which included a ruling on the issue of attorney fees.

(Appendix pp. 28-38). In its Order, the Court thoroughly considered the issue of attorney fees and denied the same to Adoptive Mother, the only party that had requested such relief. (Appendix pp. 37-38). Of note, the Family Court Order denying an award of costs and fees to Adoptive Mother specifically includes a consideration of Biological Mother's ICPC allegations as to the issue of fees/costs, ultimately weighing the ICPC issue against Adoptive Mother as it related to her request for fees and costs. (Appendix p. 37). It, therefore, appears the trial judge ruled on every issue raised by Biological Mother in her appeal, except the issue of her entitlement to attorney fees, which issue she admits she chose not to request at trial. Therefore, as Biological Mother failed to preserve the issue of attorney's fees on appeal and the case was not remanded for reconsideration of attorney's fees, the Court of Appeals correctly affirmed that the Family Court lacked jurisdiction to award attorney's fees.

Biological Mother's heavy reliance on § 63-3-530(A)(38) of the South Carolina Code is misguided. Section 63-3-530(A)(38) grants the Family Court exclusive jurisdiction "to hear and determine an action where either party . . . prays for the allowance of suit money." S.C. Code Ann. § 63-3-530(A)(38). "Suit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court." *Id.* Here, the Court of Appeals held that § 63-3-530(A)(38) vested the family court with authority to award *trial-level* attorney's fees, yet failed to find the same statutory authority applied to *appellate-level* attorney's fees. (Appendix pp. 316-18).

Biological Mother cites to cases that purport to convey this statutory power to appellate-level fees. In *Smith v. Smith*, the Court remands the case to the family court to provide an additional fee for the services rendered. *Smith*, 262 S.C. 291, 204 S.E.2d 53 (1974). At no time does the Court characterize the additional fee as being appellate fees.

The Court relies on the factors in awarding attorney's fees at the trial-level, one of which is the beneficial results accomplished, and the necessity of counsel's further appearance in the lower court as a result of their ruling. *Id.* Further contravening Biological Mother's argument, *Smith* finds the family court's statutory power to award trial-level attorney's fees in § 20-112, now § 20-3-120, providing for attorney's fees in divorce actions as opposed to the jurisdictional statute. *Id.* Additionally, in *Michael Scott B. v. Melissa M.*, the Court never discusses any appellate attorney's fees. *Michael*, 378 S.C. 452, 663 S.E.2d 58 (2008). In fact, the issue presented was whether § 63-3-530(A)(38) applied to termination of parental rights actions. The Court weighs the *Glasscock* factors to support the family court's award of trial-level attorney's fees. *Id.* Neither of these cases support the Family Court's jurisdiction to award appellate-level attorney's fees under § 63-3-530(A)(38).

Biological Mother then attempts to support her claim for jurisdiction through various cases that find the trial court has jurisdiction to award fees incurred at the appellate level after remittitur. However, none of the cases cited are family court cases and all involve the statutory award of attorney's fees, none of which are applicable to the analysis here. In the first case cited, *McDowell v. S.C. Dep't of Social Serv.*, although Biological Mother incorrectly implies that *McDowell* is an appeal from family court, the appeal actually arises from the court of common pleas and involves the award of fees to the prevailing party in State initiated actions. *McDowell*, 304 S.C. 539, 405 S.E.2d 830 (1991). The second case relied on by Biological Mother, *Muller v. Myrtle Beach Golf and Yacht Club*, involved attorney's fees as provided under the mechanic's lien statute. *Muller*, 303 S.C. 137, 399 S.E.2d 430 (Ct.App. 1990). As asserted by the Biological Mother in her Petition, the Supreme Court in *Muller* reversed the trial court's denial of appellate fees based on a lack of jurisdiction,

"holding that the mechanic's lien statute vested the lower court with jurisdiction to award fees incurred on appeal." (Appellant's Petition, p. 13) (emphasis added). *Id.* The third case, *Taylor v. Medenica*, involved attorney's fees under the Unfair Trade Practices Act. *Taylor*, 324 S.C. 200, 479 S.E.2d 35 (1996). Biological Mother's fourth case cited, *Parker v. Shecut*, is an appeal from the master-in-equity and involves attorney's fees in partition actions. *Parker*, 359 S.C. 143, 597 S.E.2d 793 (2004). Lastly, *Austin v. Stokes-Craven Holding Corp.* involved the mandatory award of fees to the prevailing party under the South Carolina Regulation of Manufacturers, Distributors and Dealers Act. *Austin*, 406 S.C. 187, 750 S.E.2d 78 (2013). These cases deal with specific statutory awards of attorney's fees that do not apply to the family court.

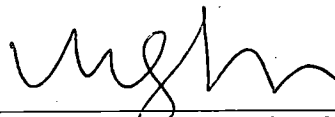
Biological Mother has relied on these cases in support of her argument that this Court in *Thornton* incorrectly analyzed and broke the precedent rendered in non-family court matters involving "fee-shifting statutes." In *Thornton*, this Court held that "the family court's award of attorneys' fees should not include fees incurred in the course of appellate representation." *Thornton v. Thornton*, 328 S.C. 96, 113-14, 492 S.E.2d 86 (1997). The attorney's fees awarded by the family court were ordered to be reduced accordingly to exclude any fees for prosecuting or defending the appeal. *Id.* The Court of Appeals correctly relied on *Thornton* in finding that the family court did lack jurisdiction to award appellate attorney's fees. *Thornton* speaks directly to the issue of appellate attorney's fees in family court and has not been overruled by this Court. Further, the Court of Appeals in *Green v. Green*, affirmed the family court's award of attorney's fees that excluded any costs associated with the appeal. *Green*, 320 S.C. 347, 465 S.E.2d 130 (Ct.App. 1995). Therefore, it would be unreasonable to rely on alleged non-family court case "precedent" to

support an award of appellate attorney's fees by the family court when this Court and the Court of Appeals have already ruled on this issue, and ruled on it after the decisions in the cases cited.

CONCLUSION

For the reasons stated, this Court should deny Biological Mother's Petition and affirm the Court of Appeal's finding that the Family Court lacked jurisdiction to determine Biological Mother's entitlement to appellate attorney's fees.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date below, a copy of the *Return to Petition for a Writ of Certiorari* was delivered to all counsel of record, via U.S. Mail with proper postage affixed thereto at the following addresses:

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