# STATE OF MICHIGAN

# COURT OF APPEALS

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*In re* BBG, Minor.

UNPUBLISHED
September 14, 2017

No. 335504
Oakland Circuit Court
Family Division
LC No. 2016-839416-AG

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Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Although this case arises from the adoption of BBG by the adoptive parents-petitioners under the Michigan Adoption Code, MCL 710.21 *et seq.*, this appeal involves only the fees petitioners paid to appellant, Bethany Christian Services ("Bethany"), the agency that facilitated the adoption. Bethany appeals as of right the trial court's order allowing, in part, Bethany's fees and costs, but disallowing a fee of $1,600 for "preparation for and participation in court hearings."[1] For the reasons set forth below, we vacate the trial court's order and remand for further proceedings.

## I. FACTUAL BACKGROUND AND PROCEEDINGS

Bethany is a nonprofit Michigan corporation licensed as a child-placing agency. On March 28, 2014, Bethany and petitioners entered into an "Adoption Services Contract" by which petitioners agreed to pay Bethany the sum of $23,800 for adoption services. The minor child, BBG, was born in December 2015. Petitioners subsequently petitioned the trial court to authorize the adoption of the child. Thereafter, petitioners filed a verified accounting and a supplement to their verified accounting in which they requested that the court approve a total of $25,367 in fees they paid to Bethany for the adoption services. Attached to these accountings were receipts, Bethany invoices, and Bethany's fee schedule, which itemized and described each service and the associated fee.

On August 31, 2016, the trial court entered an order approving, in part, the payments petitioners made to Bethany. Although the majority of the fees were approved, the trial court disallowed $1,600 of the $4,100 fee attributable to "preparation for and participation in court

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[1] This appeal was held in abeyance pending this Court's decisions in *In re MJG* (Docket No. 332928), *In re JSP* (Docket No. 333813), and *In re BGP* (Docket No. 333700). This Court issued published decisions in those cases on July 11, 2017. *In re MJG*, ___ Mich App ___; ___ NW2d ___ (2017) (Docket No. 332928); *In re BGP*, ___ Mich App ___; ___ NW2d ___ (2017) (Docket Nos. 333700, 333813).

hearings." After the trial court issued its order, Bethany filed a motion for intervention and reconsideration. Bethany asserted that as a child-placing agency, it was an interested party under MCL 710.24a(1)(d) and, therefore, it was entitled to intervene in the adoption proceedings. Bethany then argued that the trial court erred in disallowing $1,600 of the $4,100 fee attributable to preparing and participating in court hearings. It asserted that the entire $4,100 fee was reasonable and represented the actual amount Bethany incurred to facilitate the adoption.

In support of its motion, Bethany submitted an affidavit from its vice-president of finance, Scott DeVries, who explained that it would be impractical to record staff time on a case-by-case basis. Consequently, Bethany used "operational performance in [its] adoption and pregnancy support services to guide [it] in establishing [its] fees, including those fees for preparing for and participating in the adoption hearing." DeVries further explained that when the annual budget for each service program is created, the "various actual costs and fees associated with maintaining each program must be allocated to each service provided." DeVries averred that the charges itemized in the fee schedule were the actual and reasonable fees for the services provided. He further stated that if Bethany's fees were routinely cut, there would be dire consequences for its adoption services program.

At a hearing on October 12, 2016, the trial court granted Bethany's motion to intervene, but then denied the motion to reconsider its decision to disallow $1,600 in fees, and also denied Bethany's request to present a witness to testify in support of its fee structure. The trial court then explained why it disallowed a portion of the fees:

> Previously there was—there were charges from Bethany called Bethany program support fee of $5,000.00, and it was an administrative fee, and this has been disallowed by the courts, okay? And after that began to be disallowed, the – Bethany revised their fee schedule. Case management increased from 4,000 to 5,000, preparation for and participation in court hearing increased from 2,500 to 4,100, post placement services increased from 1—1,500 to 2,500, adoption prep services for putative father increased from 600 to 1,000, release consent services increased from 1,500 to 2,500; total increase in those fees is 5,000.
>
> So it appears that because that fee was disallowed, it was just added to other fees, and I –I don't know if there's a basis.
>
> Now, I didn't disallow all of that, which I might have, and another judge might have, but I did disallow certain fees because the preparation for and participation in court hearing – almost all of that is done by our adoption department, not by Bethany, and certainly that is not warranted, 4,100. So that's why I did what I did.[2]

Bethany thereafter reimbursed petitioners $1,600, and then filed this appeal challenging the trial court's ruling.

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[2] It appears that the trial court's articulated basis for disallowing a portion of the fee was related to a previously conducted inter-court scrutiny of Bethany's fees. Indeed, the court's rulings on the record mirrored language contained in an inter-court memorandum prepared by the circuit court's chief of juvenile support services.

## II. ANALYSIS

Bethany argues that the trial court erred by disallowing $1,600 of the $4,100 fee for preparation for and participation in court hearings. Bethany further argues that the trial court violated its due process rights by disallowing the $1,600 fee without affording it notice or a meaningful opportunity to explain why the fee was permissible. We agree.

We review issues of statutory interpretation de novo, but a trial court's determination to disallow fees is reviewed for an abuse of discretion. *In re MJG*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 332928); slip op at 4; *In re BGP*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket Nos. 333700, 333813); slip op at 4. Because Bethany first raised its due process argument in a motion for reconsideration, the issue whether Bethany was deprived of due process is unpreserved. *In re BGP*, ___ Mich App at ___; slip op at 3 n 6. Therefore, our review of that issue is limited to whether plain error affecting substantial rights occurred. *Id.* at ___; slip op at 3.

In *In re MJG*, this Court recognized that "courts normally do not interject themselves into contractual matters between competent parties where no party takes exception to how the contract was performed[.]" *In re MJG,*___ Mich App at ___; slip op at 1. However, when the contract involves fees associated with the adoption of a child, "MCL 710.54[ ] requires courts to review payments made in connection with Michigan adoptions." *In re MJG*, ___ Mich App at ___; slip op at 1. MCL 710.54 provides as follows:

> (1) Except for charges and fees approved by the court, a person shall not pay or give, offer to pay or give, or request, receive, or accept any money or other consideration or thing of value, directly or indirectly, in connection with any of the following:
>
> (a) The placing of a child for adoption.
>
> (b) The registration, recording, or communication of the existence of a child available for adoption.
>
> (c) A release.
>
> (d) A consent.
>
> (e) A petition.
>
> (2) Except for a child placing agency's preparation of a preplacement assessment described in section 23f of this chapter or investigation under section 46 of this chapter, a person shall not be compensated for the following activities:
>
> (a) Assisting a parent or guardian in evaluating a potential adoptive parent.
>
> (b) Assisting a potential adoptive parent in evaluating a parent or guardian or adoptee.
>
> (c) Referring a prospective adoptive parent to a parent or guardian of a child for purposes of adoption.

(d) Referring a parent or guardian of a child to a prospective adoptive parent for purposes of adoption.

(3) An adoptive parent may pay the reasonable and actual charge for all of the following:

(a) The services of a child placing agency in connection with an adoption.

(b) Medical, hospital, nursing, or pharmaceutical expenses incurred by the birth mother or the adoptee in connection with the birth or any illness of the adoptee, if not covered by the birth parent's private health care payment or benefits plan or by Medicaid.

(c) Counseling services related to the adoption for a parent, a guardian, or the adoptee.

(d) Living expenses of a mother before the birth of the child and for no more than 6 weeks after the birth.

(e) Expenses incurred in ascertaining the information required under this chapter about an adoptee and the adoptee's biological family.

(f) Legal fees charged for consultation and legal advice, preparation of papers, and representation in connection with an adoption proceeding, including legal services performed for a biological parent or a guardian and necessary court costs in an adoption proceeding.

(g) Traveling expenses necessitated by the adoption.

(4) An adoptive parent shall pay the reasonable and actual charge for preparation of the preplacement assessment and any additional investigation ordered pursuant to section 46 of this chapter.

(5) A prospective adoptive parent shall pay for counseling for the parent or guardian related to the adoption, unless the parent or guardian waives the counseling pursuant to section 29 or 44.

(6) A payment authorized by subsection (3) shall not be made contingent on the placement of the child for adoption, release of the child, consent to the adoption, or cooperation in the completion of the adoption. If the adoption is not completed, an individual who has made payments authorized by subsection (3) may not recover them.

(7) At least 7 days before formal placement of a child under section 51 of this chapter, the following documents shall be filed with the court:

(a) A verified accounting signed by the petitioner itemizing all payments or disbursements of money or anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption. The accounting shall include the date and amount of each payment or disbursement made, the name and address of

each recipient, and the purpose of each payment or disbursement. Receipts shall be attached to the accounting.

(b) A verified statement of the attorney for each petitioner itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child. If the attorney is an adoption attorney representing a party in a direct placement adoption, the verified statement shall contain the following statements:

(*i*) The attorney meets the requirements for an adoption attorney under section 22 of this chapter.

(*ii*) The attorney did not request or receive any compensation for services described in section 54(2) of this chapter.

(c) A verified statement of the attorney for each parent of the adoptee itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child. If the attorney is an adoption attorney representing a party in a direct placement adoption, the verified statement shall contain the following statements:

(*i*) The attorney meets the requirements for an adoption attorney under section 22 of this chapter.

(*ii*) The attorney did not request or receive any compensation for services described in section 54(2) of this chapter.

(d) A verified statement of the child placing agency or the department itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the child placing agency or the department for, or incidental to, the adoption of the child, and containing a statement that the child placing agency or the department did not request or receive any compensation for services described in section 54(2) of this chapter.

(8) At least 21 days before the entry of the final order of adoption, the documents described in subsection (7) shall be updated and filed with the court.

(9) To assure compliance with limitations imposed by this section and section 55 of this chapter and by section 14 of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements that, directly or indirectly, led to placement of the individual for adoption.

(10) The court shall approve or disapprove all fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.

> (11) A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both, for the first violation, and of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both, for each subsequent violation. The court may enjoin from further violations any person who violates this section. [Footnotes omitted.]

This Court interpreted the foregoing statutory provisions to require court approval of all fees and expenses that fall within the statute's ambit. *In re MJG*, ___ Mich App at ___; slip op at 7. Conversely, "if a fee is for a service that is not related to the adoption itself, then it does not fall within the scope of the statute, and the circuit court has no authority to preclude the expense." *Id*. at ___; slip op at 8.[3] Ultimately, the Court in *In re MJG* articulated a three-part process for analyzing fees in adoption cases:

> Therefore, we believe the proper framework for analyzing fees under the statute involves these inquiries:
>
> (1) For each of . . . [the] fees, do they fall within the scope of the statute? If not, then the court has no authority to disapprove the fees.
>
> (2) If the fees do fall within the scope of the statute, are they prohibited by subsections (1) or (2) [of MCL 710.54]?
>
> (3) If they are not prohibited under subsections (1) or (2), are they permitted under subsection (3)? [*In re MJG*, ___ Mich App at ___; slip op at 8-9 (footnote omitted).]

While this Court in *In re MJG* addressed the statutory provisions governing adoption fees, in *In re BGP*, it also addressed the issue of due process. The appellant in that case, American Adoptions, Inc., a not-for-profit adoption agency based in Kansas, argued on appeal that it was denied due process "because it was unable to participate in a hearing related to the approval of the [adoption] fees." *In re BGP*, ___ Mich App at ___; slip op at 3. This Court concluded that American Adoptions had a property interest in the administrative fee at issue, "because the adoptive parents were contractually bound to pay this fee to it." *Id.* Consequently, this Court recognized that "[t]he key is whether there was a meaningful opportunity to be heard *before* the decision was rendered . . . ." *Id.* at ___; slip op at 3 n 8 (emphasis in original). Ultimately, in *In re BGP*, the Court found no due process violation. *Id*. at ___; slip op at 3. In doing so, this Court concluded that American Adoptions had been provided a meaningful opportunity to be heard because the petitioners had attached to their accounting a letter from American Adoptions's Director of Community Resources explaining its fee structure. *Id*. By including this information with the accounting, the petitioners provided to the trial court the information American Adoptions wanted the trial court to consider. *Id*. at ___; slip op at 3 n 8. This Court explained:

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[3] By way of an example, this Court stated, "[W]e preliminarily note that the marketing fees paid by the adoptive parents to broadcast via the Internet their availability to adopt are not fees paid 'in connection with the adoption,' and therefore, they are not subject to court approval." *In re MJG*, ___ Mich App at ___; slip op at 2-3.

> First, although American Adoptions may not have been formally invited to participate in the proceedings at the circuit court because it was not a party to the adoption, it nonetheless was able to successfully present its views regarding the administrative fees to the circuit court through the "fee explanation" letters written by [its Director of Community Resources]. Thus, the court received materials to consider petitioners' request to approve the fees, and among those materials was American Adoptions's letter outlining what the administrative fees covered. Importantly, "[a]n oral hearing is not necessary to provide a meaningful opportunity to be heard." *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 460; 688 NW2d 523 (2004). [*In re BGP*, ___ Mich App at ___; slip op at 3 (footnote omitted).]

Accordingly, in *In re BGP*, this Court concluded that American Adoptions had failed to establish that the circuit court's failure to hold a formal hearing amounted to plain error. *Id*.

Applying the foregoing principles to the present appeal, we conclude that the trial court's final order allowing the requested fees and costs in part, but disallowing $1,600 of the $4,100 fee attributable to preparing and participating in court hearings, should be vacated. Bethany was denied due process under the circumstances of this case because, unlike the appellant in *In re BGP*, it was not provided a meaningful opportunity to be heard. Clearly, Bethany had a property interest in the fee at issue because the adoptive parents contractually agreed to pay this fee. *In re BGP*, ___ Mich App at ___; slip op at 3. Consequently, Bethany was entitled to be offered "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id*. (citation and quotation marks omitted.) However, Bethany was not provided this opportunity. Petitioners filed their supplemental verified accounting on August 22, 2016. Then, without affording Bethany notice or opportunity to be heard, the trial court entered its August 31, 2016 order reducing the fee at issue by $1,600. At that time, unlike the circumstances in *In re BGP*, Bethany had not been permitted the opportunity to explain its fee structure. The result in *In re BGP* turned on the fact that because the petitioners had attached a fee explanation letter to their accounting, the appellant in that case had been provided an opportunity to present its views to the court. *Id*. No such letter or affidavit accompanied petitioners' supplemental accounting[4] in the present case, and it is this factual distinction that requires a different outcome than that reached in *In re BGP*. Accordingly, we conclude that Bethany has established plain error affecting its substantial rights.

Therefore, we vacate the trial court's order allowing in part and disallowing in part Bethany's fees, and remand to allow the trial court to reconsider the adoption fees at issue under the framework set forth in *In re MJG*. *In re MJG*, ___ Mich App at ___; slip op at 8-9. Additionally, MCL 710.54(3) identifies an exclusive list of expenses adoptive parents may pay that are related to the adoption. *In re MJG*, ___ Mich App at ___; slip op at 8. "Because such charges are authorized under subsection (3), the circuit court must approve fees that fall under this subsection if they are *for reasonable and actual charges*." *Id*., citing MCL 710.54(3) (emphasis added). Thus, if the trial court

[4] Nor was one required. MCL 710.54(7)(a) only requires that the adoptive parents include in their accounting "the date and amount of each payment or disbursement made, the name and address of each recipient, and the purpose of each payment or disbursement."

determines that the fee at issue ought to be allowed after evaluating it in light of the framework set forth in *In re MJG*, the trial court must also determine if the fee was *reasonable*. MCL 710.54(3).[5]

We vacate the trial court's order allowing in part and disallowing in part Bethany's adoption fees and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Kathleen Jansen
/s/ Christopher M. Murray

[5] As noted, the trial court denied Bethany's request to provide testimony explaining the fee structure. In *In re BGP*, ___ Mich App at ___; slip op at 3, this Court observed that "[a]n oral hearing is not *necessary* to provide a meaningful opportunity to be heard," *id*. (citation omitted; emphasis added; alteration in original), but it may be helpful in a case involving the reasonableness of a fee, *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005) (citations omitted). But it is for the trial court to decide.