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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MELISSA M. BIALLA,

Plaintiff and Appellant,

v.

BRENT B. THOMSON,

Defendant and Respondent.

A139031

(Marin County
Super. Ct. No. FL-1000898)

Plaintiff Melissa M. Bialla filed for dissolution of a domestic partnership from defendant Brent B. Thomson, and trial of the issues was bifurcated. In connection with both trials, Bialla requested a continuance and the appointment of a guardian ad litem or conservator to accommodate a mental disorder. The family court denied the request each time, but after the second request the court altered the structure of trial in order to accommodate Bialla's claimed disability. Bialla contends the family court abused its discretion in denying her requests and finding her competent to participate in the proceedings. We affirm.

I. BACKGROUND

This is Bialla's second appeal. We rely on our nonpublished opinion in the first appeal, *Bialla v. Thomson* (May 31, 2012, A131409) (*Bialla I*), for an account of the first stage of the proceedings.

A. Early Proceedings

On February 22, 2010, Bialla filed a pro se petition to dissolve her domestic partnership with Thomson, alleging the parties registered their domestic partnership in

Vermont on or about August 17, 2001, and separated on August 17, 2009. Thomson's response to the petition alleged the parties registered their partnership on March 18, 2002, and separated in January 2006, a span of less than four years. Thomson moved to bifurcate the issue of the parties' date of separation and have it set for an early trial. Bialla stipulated to a separate trial on the date of separation and agreed to a trial date of July 13, 2010 for that issue.

In June 2010, the parties stipulated to continue the trial date to September 22, 2010 to accommodate the settlement efforts in which they were then engaged. Those efforts failed, and on August 10, 2010, Thomson began to attempt discovery. Bialla requested and received various continuances to respond to the discovery, ultimately failing to appear for deposition before the scheduled trial, despite diligent attempts by Thomson to take the deposition and a family court order requiring Bialla's appearance.

The day before trial, Bialla retained an attorney solely to represent her at the trial. Before trial began, the family court granted a motion in limine precluding Bialla from introducing documentary evidence and from giving oral testimony at the bifurcated trial as a result of her violation of the court's order. Later that day, Bialla's counsel argued Bialla was not competent to participate in the trial because she suffered from bipolar disorder and requested the appointment of a guardian ad litem. The court denied the request and found the parties' date of separation was January 26, 2006.

On November 1, 2010, the family court denied a request by Bialla for temporary support and attorney fees, finding the parties had been financially independent since their separation in 2006 and there were no significant property issues remaining to be litigated, making a fee award unnecessary. Bialla filed an order to show cause for reconsideration the court's orders and for relief based on mistake or excusable neglect pursuant to Code of Civil Procedure section 473, which was denied.

Bialla appealed the order denying reconsideration. We held that only one of the issues raised in the order was appealable, the family court's denial of Bialla's request for relief on grounds of mistake or excusable neglect. We affirmed that decision and noted appeal of the remaining issues must await entry of a final judgment.

B. Bialla's Request for Appointment of a Guardian Ad Litem

Bialla's request for the appointment of a guardian ad litem, to which we referred above, came after a morning session of trial. As noted, Thomson made a motion in limine at the outset of trial to preclude Bialla from presenting evidence regarding the couple's date of separation. During argument with respect to Thomson's motion, Bialla's attorney told the court: "I do not feel [Bialla's] responses have been irrational. I don't think she needs a psychiatric examination, but she has not been as solidly grounded as I would have her be. . . . What I see is a lot of foot dragging and a lot of fear." Following the court's grant of the motion, Thomson presented her case.

After lunch, the parties returned for closing argument. After Thomson's attorney presented his closing, Bialla's attorney told the court he was "prepared to represent to you that I don't think [Bialla is] competent to follow these proceedings." After describing Bialla's purported poverty, counsel said Bialla had been taking two medications for "extreme bipolar," but she could no longer afford the medications. He observed, "Her responses frequently are irrational, frequently not responsive to the issues that are here. I don't think she is being anything other than hysterical, meaning high emotionality, no ability to track these things." Counsel then requested a continuance and appointment of Bialla's daughter as her guardian ad litem.

The court responded: "There was never a suggestion raised ever before this minute that there was any kind of a mental defect that may have inhibited [Bialla's] ability properly to prepare this case." The court rejected counsel's representation with respect to Bialla's mental state, noting: "[Y]our professional status doesn't permit psychiatric or psychological diagnoses. While it may be that she's suffering from some malady, the fact is she elected to proceed on her own as she did in initiating this case." The court rejected counsel's claim of disability, stating: "The clear picture is Ms. Bialla did not wish to cooperate in discovery, and based on her motion for continuance in this case did not want this issue ever to be adjudicated. Were she not forced to proceed today, it seems unlikely to me that the matter would ever proceed to hearing willingly on Ms. Bialla's behalf." After a discussion of the nature of the evidence Bialla might present

regarding the date of separation, the court concluded that, even if all of Bialla's representations were true, they would not demonstrate a later date of separation than the date proposed by Thomson.

C. Bialla's Request for Appointment of a Conservator

Following remand in August 2012, a trial of the remaining issues was scheduled for April 17, 2013. Throughout the early months of that year, Bialla, representing herself, participated actively in the litigation, including attending a settlement conference and sitting for a deposition. In the process, Bialla filed two separate pleadings claiming she was psychologically incapable of pursuing the litigation. At the deposition, Bialla revealed that, despite claims of poverty, she was receiving income of \$7,000 per month from a rental property.

On April 11, 2013, Bialla filed an ex parte request for accommodation of a disability under California Rules of Court, rule 1.100, seeking a continuance of the trial and appointment of a conservator for herself. The request was supported by declarations from a psychiatrist, a therapist, and a friend of Bialla. The psychiatrist stated he had treated Bialla for bipolar disorder "off and on" for 10 years. As a result of financial reversals beginning in 2010, he said, Bialla had been unable to afford the medication that tempered the effects of her condition. As a result, she suffered from "periods of paranoia, high anxiety, suicidal thoughts and long periods of disorganized behavior" and was "fully disabled and incompetent." The therapist's declaration replicated the psychiatrist's observations and conclusions. The friend, a social worker, said she had volunteered to act as a temporary conservator for Bialla. She believed Bialla was "not able to competently represent herself in this matter."

In her trial brief, Thomson contended the family court's ruling setting a date of separation resolved all substantial issues in the proceeding. She contended Bialla had not articulated any significant remaining issues and was merely attempting to prolong the proceedings out of personal animus toward Thomson. On the issue of Bialla's capacity, Thomson wrote: "Melissa has claimed before, and again recently, that she lacks capacity to participate in these proceedings, including by way of last minute ex parte applications

to block this trial. Yet, throughout these proceedings, Melissa has proven herself to be a very capable litigant, and her recent and multiple ex partes and efforts to delay the trial, combined with her very cogent, detailed, and sophisticated responses and contentions at her March 14 deposition (and her ability to manage her properties . . .) reveal that Melissa is fully capable of proceeding, and, that she remains the sole force responsible for the continuation and extraordinary delay of these proceedings.”

When the matter was called for trial on April 17, the court began by asking Bialla to describe the parties’ assets at the commencement of the domestic partnership. Bialla responded she was “not prepared to answer the question.” Instead, Bialla raised the issue of the court’s denial of her ex parte request for accommodation.¹ Bialla said she had not “been able to understand the process from the very beginning of this case. And I have had to take a couple Xanax today just to be able to try to sit here because I want to live, you know.” Bialla said her psychological condition ordinarily prevented her from going outside and she had not been able to work for over two years.

In response, the court noted that Bialla’s conduct of the litigation suggested she was competent to proceed. The court noted the resemblance between Bialla’s claimed circumstances and those in the decision *In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261 (*Christine C.*), and opined that Bialla was attempting to do “everything Christine C. did in that case to try to render yourself incapable of going forward.” The court denied the motion for a continuance and urged Bialla to participate in the trial, saying, “[W]e are just going to go through slowly, and I am going to get an idea from you, without pressure, or I will do the questioning.” When Bialla attempted to pursue the issue further, the court declined to hear further argument and began to question Bialla about the community assets.

Over the course of the next 20 pages of hearing transcript, the court elicited from Bialla information about the nature of her assets and her claims in the proceeding,

¹ There is no ruling on the ex parte request in the record, but Bialla’s comments at the hearing suggest she appeared in court on the day the request was filed and was not granted the requested relief.

stopping to explain various legal concepts and the legal implications of Bialla's answers to the court's questions. From the record, it appears Bialla understood the questions and responded intelligently. Eventually, however, Bialla grew frustrated and asked for a "five-minute break." She was then seen leaving the courthouse, and the matter proceeded in her absence. Bialla never returned.

At the conclusion of the hearing, the court explained its ruling on Bialla's request for a continuance: "By way of making sure that the record is clear, the Court believes that Ms. Bialla is perfectly capable of proceeding with her case. She has repeatedly filed rather extensive legal documents containing legal argument. I note that when she wants something the legal pleadings are rather detailed and articulate. However, when she is asked a question which she does not particularly want to answer, she suddenly claims a lack of understanding. [¶] The Court also notes that when she was here two weeks ago before Judge Adams, she asked to continue the trial, Judge Adams declined. Ms. Bialla came back a week later and asked this Court to continue the trial based on a statement from a therapist that she has bipolar disorder. Ms. Bialla, according to her own pleadings, has had bipolar disorder for many, many years, which did not keep her from filing a motion for transfer of venue, motions for support, motions for advancement of community property, many, many motions regarding scheduling, did not prevent her from filing an appellate brief in this matter. [¶] Therefore, the Court believes that Ms. Bialla may be trying to take from the case regarding *Christine* [C.] because I cannot help but note the similar pattern that she has exhibited since that case was brought to her attention by the Court of Appeal." A final judgment was entered on April 26, 2013.

II. DISCUSSION

In the present appeal, Bialla challenges the denial of her attorney's oral request for appointment of a guardian ad litem and the court's finding she was competent to

participate in the first trial and the more recent denial of her request for a continuance to accommodate her alleged disability and the appointment of a conservator.²

A. 2010 Proceedings

Under Code of Civil Procedure section 372, a guardian ad litem may be appointed to represent a person “who lacks legal capacity to make decisions” in litigation. Penal Code section 1367, which sets the standard for competency in the context of criminal proceedings, is also used as the standard for competency in civil proceedings. (*In re James F.* (2008) 42 Cal.4th 901, 916.) Under Penal Code section 1367, subdivision (a), “A defendant is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” We review the denial of a request for appointment of a guardian ad litem for abuse of discretion. (*In re Ronell A.* (1995) 44 Cal.App.4th 1352, 1368.)

We find no abuse of discretion in the family court’s conclusion Bialla was competent at the time of the 2010 proceedings and its denial of the request for appointment of a guardian ad litem. The family court was offered no competent evidence on which to make a finding of incompetence. Bialla presented neither oral testimony nor documentary evidence on the issue. As the court noted, Bialla’s attorney was not qualified to offer an opinion as to mental disability, and there was no other evidence presented.

² Bialla’s notice of appeal indicated that she was appealing the judgment generally. Because she raises only the issues related to her mental health in her opening brief, we deem any other challenges to the judgment to be waived. (*People v. Williams* (2013) 218 Cal.App.4th 1038, 1062, fn. 5.) Thomson suggests Bialla may also be contending on appeal that she lacked the mental capacity to dissolve her domestic partnership. Because this issue was never properly presented to the family court, we do not consider it.

Bialla submitted attachments with her opening and reply briefs, and Thomson has filed separate motions to strike or disregard certain of those documents. We agree with Thomson that inclusion of the materials was improper, and we have disregarded the materials cited in Thomson’s motions in the decision of this appeal.

Yet even if counsel's representations were considered competent evidence, they did not make out a case for incompetence. Although counsel believed Bialla's reaction to the trial was overwrought, he did not contend Bialla was unable to understand the nature of the proceedings or to assist him in the conduct of trial. On the contrary, Bialla had litigated the matter herself prior to trial and sat with counsel during trial.

In light of Bialla's pro se pursuit of the litigation, her lack of cooperation during discovery, the timing of the request for appointment of a guardian ad litem, and counsel's disavowal of any mental disorder during the morning session, which directly contradicted his representations in the afternoon, the court did not abuse its discretion in denying the request for appointment of a guardian ad litem as a litigation tactic.

B. 2013 Proceedings

California Rules of Court, rule 1.100 "allows persons with disabilities covered by the Unruh Civil Rights Act, Civil Code section 51 et seq., the [Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.)], or other applicable state and federal laws to apply for accommodations to ensure full and equal access to the judicial system. . . . Under the appropriate circumstances, an accommodation may be a trial continuance." (*Vesco v. Superior Court* (2013) 221 Cal.App.4th 275, 279.) To qualify, the applicant must demonstrate he or she has "a physical or mental impairment that limits one or more of the major life activities." (Cal. Rules of Court, rule 1.100(a)(1).) The court is required to provide "accommodations" for the disability, defined as "actions that result in court services, programs, or activities being readily accessible to and usable by persons with disabilities. Accommodations may include making reasonable modifications in policies, practices, and procedures; furnishing, at no charge, to persons with disabilities, auxiliary aids and services, equipment, devices, materials in alternative formats, readers, or certified interpreters for persons with hearing impairments; relocating services or programs to accessible facilities; or providing services at alternative sites." (Cal. Rules of Court, rule 1.100(a)(3).) Accommodations must be provided to persons who satisfy the requirements of the rule, unless the accommodations would create a financial or administrative burden on the court. (Cal. Rules of Court, rule 1.100(f).) We

review the family court's ruling for abuse of discretion. (*Biscaro v. Stern* (2010) 181 Cal.App.4th 702, 708.)

We find no abuse of discretion in the family court's conclusion that Bialla's request for a continuance as an accommodation of her mental disability was unjustified. As the court found, Bialla had, despite her disability, managed to file and pursue the dissolution proceedings, including participating in an earlier trial, pursuing an appeal, appearing for deposition, and making a number of applications to the court. While the declarations Bialla submitted indicated that bipolar disorder at times limited her activities, Bialla had managed to support herself throughout the course of the proceedings, including arranging for substantial rental income from a property she owned. Bialla was able to appear for the scheduled trial date and was, in fact, able to participate successfully in the proceedings before she left the court. Given her apparent ability to participate, there was no need for the requested continuance of the trial date to accommodate Bialla's mental disorder. On the contrary, as the court found, there was reason to believe Bialla's request for a continuance was a tactic intended to forestall resolution of the proceedings.

In this connection, it is important to recognize the family court did not deny all accommodation to Bialla. Although it found a continuance unjustified, the court did not conduct an ordinary adversarial trial. Expressly in order to put Bialla at ease and diminish the stress associated with the proceedings, the family court did not require Bialla to put on evidence in a formal manner. Instead, the family court itself questioned Bialla, patiently explaining the proceedings and various aspects of family law. In other words, the family court accommodated Bialla in an appropriate manner.

Bialla relies on *Christine C.*, *supra*, 158 Cal.App.4th 1261, in which the Court of Appeal reversed the refusal to grant a continuance requested under California Rules of Court, rule 1.100, but we find *Christine C.* distinguishable. In that case, the applicant, Christine, suffered from both bipolar disorder and cancer. As a result of a combination of the disability and illness, she had required several earlier continuances. (*Id.* at pp. 1265–1267.) At the time of the request in question, Christine presented a declaration from her

psychiatrist stating she would recommend that Christine be hospitalized for her own protection at the time scheduled for trial and that she would require a substantial period of rest before she would be capable of participating in trial. In fact, she was hospitalized at the time of trial and sent a friend to appear and explain her circumstances. Even though a treating physician confirmed Christine was hospitalized, the family court proceeded in her absence. (*Id.* at pp. 1269–1270.) The Court of Appeal, characterizing bipolar disorder as “a potentially incapacitating mental illness which may result in disability under the ADA,” held it was an abuse of discretion not to grant a continuance, in light of Christine’s hospitalization. (*Id.* at pp. 1273–1274.)

As noted in *Christine C.*, bipolar disorder is a “potentially” incapacitating disorder. Whether it is, in fact, disabling and the degree to which it is disabling must be measured by the circumstances demonstrated at the time of the request for accommodation. At the time Christine requested a continuance, she was hospitalized, and her doctor believed she would require significant rest to be restored to mental health. Bialla offered no similar proof of current severe disability. Unlike Christine, for example, she was not hospitalized at the time of trial. Although Bialla provided evidence she had been temporarily hospitalized in the past, there was no evidence of a recent hospitalization. The family court’s conclusion that a continuance was unnecessary and that a lesser accommodation would suffice did not constitute an abuse of discretion.

Nor did the family court abuse its discretion in denying Bialla’s request for appointment of a conservator. Probate Code section 1801 allows appointment of a conservator for “ ‘a person who is unable to provide properly for his or her personal needs’ [citation] or . . . ‘for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence.’ ” (*In re Michael K.* (2010) 185 Cal.App.4th 1112, 1118.) We review the decision on a request to appoint a conservator for abuse of discretion. (*Conservatorship of Ramirez* (2001) 90 Cal.App.4th 390, 403.)

There was no evidence Bialla was seriously impaired in providing for her personal and financial needs. Despite her claims, she had managed to provide for herself

throughout the period of the proceedings. It appears Bialla sought the conservator as an aid to her preparation for the proceedings, but there is no legal basis for appointing a conservator for such a purpose when the requirements of Penal Code section 1801 are not otherwise satisfied.

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:

Humes, P.J.

Dondero, J.