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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Audrey G., a Person Coming Under  
the Juvenile Court Law.

2d Juv. No. B258959  
(Super. Ct. No. J067840)  
(Ventura County)

VENTURA COUNTY HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

D.G.,

Defendant and Appellant.

D.G., the mother of 17-year-old Audrey G., appeals from the July 21, 2014, order denying her motion to replace appointed counsel (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)). She contends that the juvenile court erred by conducting the Welfare and Institutions Code section 366.3, subdivision (d) post-permanency planning review without granting her request for a contested hearing pursuant to section 366.3, subdivision (f).<sup>1</sup> We affirm.

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise stated. Father is not a party to this appeal.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

In 2010, when Audrey was 12 years old, the Ventura County Human Services Agency (HSA) filed a petition alleging that Audrey was at risk of abuse or neglect because mother displayed aggressive and inappropriate behavior at Audrey's schools; failed to send Audrey to school regularly; sought unnecessary medical treatment for Audrey; and failed to benefit from extensive services provided by the dependency court in prior years when Audrey and her sibling were dependent children. (§ 300, subd. (b).) It also alleged that mother's mental illness and behavior caused Audrey severe emotional damage (*id.*, subd. (c)) and father was not available to support Audrey (*id.*, subd. (g)). The juvenile court sustained the petition, removed Audrey from mother's custody and authorized her placement in foster care, with supervised visitation.

At the beginning of Audrey's current dependency, the juvenile court ordered a bypass of reunification services. In May 2011, the court found it unlikely that Audrey would be adopted; that neither adoption nor the termination of parental rights was in Audrey's best interest; and that she would benefit from continuing her relationship with mother. The court selected legal guardianship as her permanent plan. Audrey's permanent plan and placements changed throughout her dependency. In March 2012, the court selected long-term foster care as her permanent plan. In April 2012, she was placed in a foster home which parented high-risk teens. She remained there until November 2012, when the foster parents requested her removal. HSA then placed Audrey in a specialized group home, where she was living at the time the juvenile court made its challenged rulings.

On February 6, 2013, the juvenile court terminated the permanent plan of long-term foster care, and selected a planned permanent living arrangement with the goal

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<sup>2</sup> We granted mother's request to take judicial notice of the records in her 2010 writ (*D.G. v. Ventura County Superior Court*, No. B229417) and her 2014 appeal from the termination of reunification services (*Human Services Agency v. D.G.*, No. B255087). (Evid. Code, §§ 459, 452, subd. (d).) We dismissed the writ at her request. We dismissed her 2014 appeal pursuant to *In re Phoenix H.* (2009) 47 Cal.4th 835, 845.

of reunification as Audrey's permanent plan. The court ordered extensive reunification services for mother, with explicit orders regarding her compliance with her plan and participation in counseling and mental health services, family therapy, and parent education. The court also ordered mother to provide documentation of her compliance and sign all consents necessary for HSA.

On March 13, 2014, after finding mother failed to comply with her case plan, and made minimal progress toward mitigating the causes necessitating placement, the court terminated reunification services. It ordered long-term foster care as the permanent plan for Audrey, with supervised visitation, and set the post-permanency plan review (§ 366.3) for June 23, 2014.

#### *Section 366.3 Post-permanency Plan Review*

On June 23, 2014, mother asked the juvenile court to appoint counsel to represent her. The court appointed Carlos Najera and continued the review hearing to July 21. Mr. Najera previously represented mother from June 2010 through January 7, 2013, when retained counsel substituted in.

In its June 23, 2014, status review report, HSA advised the court that Audrey's emotional and mental outlook had improved following the termination of reunification services because she could work on "her relationship with her mother in therapy at a slower pace without the mother's fear that disclosure of their arguments would jeopardize reunification." Audrey visited mother about twice per month "on a public pass." They also saw each other during therapy which was "offered weekly but the mother often cancel[ed]." Audrey reported that her relationship with mother was "okay." Audrey wished to stay at her current school, although she had peer problems there. Audrey's placement preference alternated between staying in the group home, where she had strong bonds with staff, and moving into a foster home.

#### *July 21, 2014 Marsden Hearing*

As proceedings commenced on July 21, Mr. Najera advised the juvenile court that mother was requesting a hearing pursuant to *Marsden, supra*, 2 Cal.3d 118. During a closed session, mother expressed concern about the communication between her

and Mr. Najera. She said she called Mr. Najera on July 14. He returned her call but said he would not talk or meet with her, look at documents, or talk "to witnesses . . .to assist the Court in making or repairing or maintaining or building parent-daughter relationship, investigating or filing any kind of meritorious motions for [her]." She continued as follows: "I am requesting a contested hearing for this permanency planning hearing. [¶] . . . I gave Carlos Najera a letter this morning with documents, names and dates and an overview of information that I believe is critical to my case. [¶] Given the serious and important nature of my case, I respectfully ask the Court to appoint me a different attorney who is willing to diligently represent me in this permanency planning review hearing." Mother also stated that when she spoke with Mr. Najera that morning, "he stated that he [did not] feel comfortable, and [became] very irritable and show[ed] anger toward [her] and [told her] to leave the room."

Mr. Najera explained that he was familiar with mother and her case, from his prior representation of her, and he was "more than prepared to go forward with" the July 21 permanency planning review hearing. He returned mother's July 14 call promptly to explain the focus of the review hearing and to say he did not feel a need to meet before the July 21 hearing date. He also told mother that if she had any issues or information that HSA did not have regarding Audrey and the care she was receiving, she should provide that information to the social worker. He further explained that mother had asked him "*to file a 388 in her behalf, and . . . indicated that [that was] why she felt [it was] so critical [to] set this matter for a contested hearing.*" (Italics added.) He tried to explain that mother could submit documents for his review so he could assess whether there was a basis for filing a section 388 petition. He acknowledged that he had asked mother to step outside after trying to explain his responsibilities to her, including making a strategic decision about whether a motion was appropriate "at this time."

The court asked if mother wished to make further comments. She responded: "Yes. I do understand that I do have . . . the right to ask for a . . . contested hearing, and a trial and to present the documents and the verifiable witnesses that I believe are pertinent to my case."

The juvenile court found that there was not such "a breakdown in the communication" to justify replacing Mr. Najera as her counsel. The court did not perceive that Mr. Najera was refusing to do what mother asked under any circumstances, but rather telling her the procedure for requesting a change of orders. The court denied mother's "request for a replacement of Mr. Najera." Mother immediately asked, "Am I to understand that I'm not about [*sic*, allowed] to ask for a trial or a contested hearing or a change of motion at this time?" The court responded, "I'm not saying that. I'm saying that there's a procedure to follow if you want to change existing court orders, and that procedure hasn't been followed yet." Mother then stated, "No. It hasn't been followed because Mr. Najera and I have not met since. . . June 23rd. It's already July 21st." The court indicated it understood and concluded the closed session.

*Section 366.3, subdivision (d) Review Hearing*

The juvenile court resumed the scheduled permanency plan review hearing. Both Mr. Najera and counsel for Audrey submitted the matter on the HSA review report. Mr. Najera indicated that if he subsequently determined that there was a basis for filing a section 388 petition to reinstate services for mother, he would prepare and submit such a petition. The court ordered that Audrey remain in long-term foster care, with supervised visitation for mother, and set a follow-up review hearing for January 5, 2015.

*DISCUSSION*

*Marsden Claim*

The juvenile court did not abuse its discretion when it determined that mother had not demonstrated sufficient grounds to replace counsel. An indigent parent has a statutory and a due process right to competent counsel in dependency proceedings. (§§ 317, subd. (b); 317.5, subd. (a); *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152-1153.) An exhaustive *Marsden* hearing is not required; it is only necessary that the juvenile court "make *some* inquiry into the nature of the complaints against the attorney." (*In re James S.* (1991) 227 Cal.App.3d 930, 935, fn. 13.) The standard is the same as it would be for a criminal case. The question is "(1) whether trial counsel failed to act in a manner expected of reasonably competent attorneys acting as

diligent advocates; and (2) whether such failure deprived the defendant of a potentially meritorious defense, or whether it is reasonably probable that a determination more favorable to the defendant would have resulted but for counsel's failings . . . .'

[Citations.]" (*Id.*, at p. 936.) Mother satisfies neither prong of this test.

During the *Marsden* hearing, mother claimed that Mr. Najera would not talk or meet with her, look at documents, or talk "to witnesses . . . to assist the Court in making or repairing or maintaining or building parent-daughter relationship, investigating or filing any kind of meritorious motions for [her]." The record shows that Mr. Najera responded quickly to mother's July 14 telephone call. He indicated that he would consider material from mother after the review hearing and file a petition for further reunification services if he determined there was a basis for doing so. Mr. Najera also explained that mother considered it critical to set a contested review hearing because she wished to file a section 388 petition. She neither disputed that statement nor indicated there was any other reason underlying her request for a contested hearing. She has not established that Mr. Najera's failure to submit a request for further reunification services by July 21 deprived her of the right to request such services at another time.

#### *Contested Review Hearing Claim*

Mother contends that the juvenile court erred by denying her request for a contested section 366.3, subdivision (d) permanency planning review hearing. "The standard of review where a parent is deprived of a due process right is whether the error was harmless beyond a reasonable doubt. . . ." (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1182, citing *In re Thomas R.* (2006) 145 Cal.App.4th 726, 734.) We conclude that if the court erred by failing to conduct a contested hearing, its error was harmless beyond a reasonable doubt. (*Ibid.*)

Section 366.3 provides, in part: When a dependent child "is in a placement other than the home of a legal guardian and jurisdiction has not been dismissed, the status of the child shall be reviewed at least every six months." (*Id.*, subd. (d).) "Unless their parental rights have been terminated, the parent or parents of the child are entitled to receive notice of, and participate in" post-permanency review hearings. (*Id.*, subd. (f).)

"It shall be presumed that continued care is in the best interests of the child, unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child." (*Ibid.*) In practice, section 366.3, subdivision (f) grants such a parent the right to a contested review hearing in which the parent may present evidence to overcome the presumption that continued foster care is in the child's best interests. (*In re J.F.* (2011) 196 Cal.App.4th 321, 331.) A parent is not required to file a section 388 petition in order to set a contested hearing at a section 366.3, subdivision (d) review. (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882.)

There is, however, a split of authority regarding a parent's right to obtain a contested review hearing without presenting an offer of proof. We agree with the cases which require an offer of proof before the juvenile court is required to conduct a contested hearing. In *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1147, the court reasoned: "We do not believe that a court is required to hold a contested hearing in order to understand and make a decision about whether to return a child to its parent. Moreover, nothing in section 366.3[, subdivision (f)] requires a juvenile court to hold such a hearing. We conclude that in order to meet the requirement set forth in section 366.3[, subdivision (f),] the juvenile court is required to accept an offer of proof from the parent seeking return of his or her child. The court is then required to focus its attention on the evidence presented, and to consider whether the parent's representations are sufficient to warrant a hearing involving full confrontation and cross-examination. Interpreting section 366.3[, subdivision (f)] in this way, we believe, produces a result that is workable and reasonable." Arguably, the court below should have asked mother to present an offer of proof, or questioned her further regarding the need for a contested hearing. Nonetheless, mother had an available remedy upon making the proper showing.

Citing *In re Rubin P.* (1991) 2 Cal.App.4th 306, mother argues that it is not possible to conclude the juvenile court's failure to grant her a contested review hearing was harmless beyond a reasonable doubt. We disagree. In *Rubin P.*, the Court of Appeal reversed the trial court's failure to hold a review hearing pursuant to section 366.26

because appellant suffered prejudice. (*Rubin P.*, at pp. 308-310, 313.) In contrast, the court's denial of mother's request for a contested hearing on July 21 in the instant matter did not preclude her from filing a section 388 petition if and when she possessed adequate evidence to support its filing, or from later requesting a contested hearing. (§ 366.3, subd. (f).) If the court erred by failing to conduct a contested review hearing on July 21, the error was harmless beyond a reasonable doubt and could be remedied upon a proper showing under section 388. (*M.T. v. Superior Court, supra*, 178 Cal.App.4th at p. 1182.)

DISPOSITION

The judgment (order) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Bruce A. Young, Judge  
Superior Court County of Ventura

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Pamela Deavours, under appointment by the Court of Appeal, for  
Defendant and Appellant.

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