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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.B., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.B.,

Defendant and Appellant.

E054134

(Super.Ct.No. J237144)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed as modified.

Hassan Gorguinpour, under appointment by the Court of Appeal, for Defendant and Appellant A.B.

Jean-Rene Basle, County Counsel, and Svetlana Kauper, Deputy County Counsel, for Plaintiff and Respondent.

Defendant A.B. (Mother) appeals from an order sustaining a juvenile dependency petition and removing her minor child, J.B., from her custody. She contends the court violated her constitutional right to competent counsel when it denied her counsel's motion to be relieved. She further contends there is insufficient evidence to support the allegation under Welfare and Institutions Code section 300, subdivision (b)¹ that she had undiagnosed mental health issues.

I. PROCEDURAL BACKGROUND AND FACTS

On January 24, 2011, seven-year-old J.B. came to the attention of plaintiff San Bernardino County Children and Family Services (CFS) when a family advisor for his elementary school made a referral. The sheriff's department was called to perform a welfare check. J.B. reported that Mother had told him she would laugh if he were killed at school. He said that he did not feel safe when Mother was yelling and mad, and that he is sent to his room with no food. According to J.B., "[his] heart gets smaller and smaller because [his] mom does not love [him]."

When the investigating deputy requested access to Mother's home in order to assess its condition, Mother claimed she had no key and had to drive to her sister's house to get a spare. Mother was uncooperative, confrontational, and argumentative, and threatened to sue. The deputy concluded that J.B. could be at a substantial risk of harm at home, and thus caused a warrant to be issued to search the house and interview J.B.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother was instructed to meet the deputy at her home; however, she left in her car and never showed up at her home.

The deputy forced entry into the house and found it to be in a deplorable condition. It was littered with trash and scattered clothes. There was rotting food on the kitchen counters, chairs, and inside the refrigerator. The counters were covered in grime and the bathroom sink was covered in filth. Mother did not reappear at her home or the sheriff's department to regain physical custody of J.B. Because there was no knowledge of the father's existence or whereabouts and the home was in an unsafe living condition, the social worker determined that exigent circumstances required detention of J.B. in a foster home.

On January 26, 2011, a section 300 petition was filed on behalf of J.B., alleging that he was within subdivisions (b) (failure to protect and provide), (c) (serious emotional damage), and (g) (child left without provision for support). Specifically, it was alleged that Mother suffered from an undiagnosed mental health issue, which compromised her ability to properly care for and parent J.B. and led her to verbally abuse him. It was further alleged that Mother failed to provide a safe, sanitary, and healthy living environment, and that J.B. had expressed depression and hopelessness that Mother did not love him. At the detention hearing on January 27, the court ordered J.B. detained and placed with CFS.

The jurisdictional/dispositional report filed on February 14, 2011, expanded on the events of January 24, noting that Mother had gone to J.B.'s school, tried to grab him, and

yelled that he was stupid, a liar, and “should be in specialized care . . . institutionalized.”² Mother was irate, carrying on for more than three hours. According to J.B., Mother yells at him every morning. On that particular morning, when he woke up Mother by eating a banana, she told him: “If somebody kills you at school, I will laugh and laugh.” J.B. concluded that Mother “wants [him] to die.” He feared that Mother would hurt him or punish him.

The social worker asked Mother about the allegations in the petition. Mother denied having any mental illness, although she was diagnosed with depression in 1999, and claimed that she had been unable to clean the house because she had been sick. The social worker identified the main issue as Mother’s emotional abuse of J.B. Given Mother’s behavior on January 24, 2011, the social worker opined that J.B. was “truly . . . emotionally abused by [his] mother,” and he “has an irrational and persistent fear of being ‘punished’ . . . [such that he] has told his teachers that he does not want to go home, and he will be good if they will let him stay at school.” According to the social worker, J.B.’s “punishment was almost a form of emotional torture for him.” Mother acknowledged saying things that might have been hurtful to J.B.; however, she dismissed them, claiming he was simply too sensitive. School personnel described Mother as loud, aggressive, mean, intimidating, and completely unaware of how her words and actions frighten J.B. She lacks understanding of how her anger affects him. Her expectations for J.B. exceed his attention span and maturity level. CFS recommended reunification

² According to his teachers, J.B. is “brilliant.”

services, including counseling and visitation. On February 17, 2011, the court set a contested jurisdictional hearing.

On March 1, 2011, Mother's first counsel filed a motion to be relieved as counsel on the ground that there was a complete breakdown of the attorney-client relationship. According to counsel, Mother claimed he was incompetent, threatened to file a complaint against him, and believed that counsel held a hearing in her absence. On March 2, the Children's Advocacy Group (the Group), representing J.B., filed for a restraining order against Mother on the ground that her continual calls to the office, despite being represented by counsel, were disruptive of daily operations. Her contacts were harassing the employees. Finally, the Group sought orders to stop Mother from approaching and threatening J.B.'s counsel in court. The Group's motion was granted on March 2, and Mother's first counsel's motion was granted on March 4. New counsel was appointed.

On March 21, 2011, Mother filed an affidavit of prejudice (Code Civ. Proc., § 170.6) seeking reassignment to another judge on the grounds of prejudice. On March 22, the matter was reassigned to Judge Barbara A. Buchholz.

On March 30, 2011, at the contested jurisdictional hearing, Mother requested a *Marsden*³ hearing to relieve her second counsel. Her motion was granted, and the court also held a *Faretta*⁴ hearing. The court found that Mother could not adequately represent

³ *People v. Marsden* (1970) 2 Cal.3d 118.

⁴ *Faretta v. California* (1975) 422 U.S. 806.

herself without assistance of counsel. New counsel was appointed to represent her, and the matter was continued.

On April 19, 2011, Mother filed a motion to dismiss the petition on the grounds there was no evidence of child abuse, neglect or abandonment, and that section 300 does not apply. The motion was denied.

In the addendum report filed on June 17, 2011, CFS recommended that Mother undergo a psychological evaluation to tailor her needs better in anger management and behavioral control. The report traced Mother's progress in parenting and anger management classes. Although it stated she had completed 11 out of the required 12 parenting classes, she had not benefitted from the classes. She did not report any use of learned skills in practice, acceptance of responsibility or empathy development. In individual counseling sessions, Mother expressed anger and frustration with CFS, her belief that the legal system was unjust, and that her lawyer was in collusion with the judge. According to the therapist, "[t]here is no therapy going on; it is mostly just her talking about court. She is still mad at being arrested fifteen years ago. But when she talks about [J.B.], she has a flat affect." Mother described the court as a "'kangaroo court' and [claimed that] her lawyer is in collusion with the judge." The facilitator of the anger management class expressed her doubt that the remaining sessions would be useful to Mother, given that she had failed to absorb the information taught.

According to the social worker, Mother was not benefiting from the services provided. She did not understand the damage she was inflicting on J.B. by yelling at him.

She was unable to accept responsibility for her poor behavior, and J.B. appeared to be very agitated and anxious when Mother yelled at him. Moreover, during her daily telephone conversations with J.B., Mother continued to discuss the court hearings, screaming that he better be at court. After being yelled at, J.B. regressed in his behaviors.

On June 10, 2011, Mother's third counsel filed a motion to be relieved. According to counsel, there was "a complete breakdown of the attorney-client relationship thus making it impossible for the continued representation of [her]." Apparently, Mother refused to "follow any advice given and has accused [her attorney] of being in collusion with County Counsel and the Social Worker in this matter." Counsel further informed the court that "Mother is adamant of representing herself." During the hearing, the court noted that there was no information to preclude counsel from adequate representation. Thus, the motion was denied.

On June 20, 2011, Mother filed a motion to relieve her appointed counsel and proceed in propria persona. She claimed ineffective assistance of counsel and collusion with CFS and county counsel. Mother also filed, in pro. per., a motion to continue the trial, a motion for modification of visitation, and a demand for an evidentiary hearing.

In evaluating the motions, the court reviewed the record and found "there was no agreement behind anyone's back" and Mother's "claim of fraud doesn't exist with regard to this petition." The court explained that dependency proceedings are collaborative and all attorneys on the case, along with the court, work together to obtain the result that would be in the best interest of the child. Thus, if there was a negotiation, Mother's

counsel would have prepared an informal agreement; however, because all parties were present for trial, no agreement was reached.

The court pointed out that “[it had] allegations made by [Mother] about every single attorney this Court has appointed. It is the same claim [Mother] make[s] on every single attorney. . . .” In responding to Mother’s allegations of failing to subpoena the investigating deputy and the caregiver, Mother’s counsel maintained that she had explained which witnesses would be relevant to call for trial: “The witnesses that I listed are the ones I believe to be relevant to the case as to the allegation.” To which Mother responded emphatically: “There were no subpoenas issued. I said I want three social workers. I said three social workers. She said no. She said only one. I said I need all three.” The court explained to Mother that it was not the duty of her counsel “to proceed at [Mother’s] request or whim”; rather, in her service to the court, counsel was obligated to “use her best judgment and her ability to make a decision as to how best to proceed.” All of Mother’s motions were denied, and the matter proceeded to the contested jurisdictional/dispositional hearing.

After listening to the evidence and the testimony, along with argument from the parties, the juvenile court found the allegations in section 300, subdivisions (b)(2), (c)(4), and (g)(6) to be true. As to the subdivision (b)(1) allegation, the court also found it to be true as amended and ordered Mother to undergo a psychological evaluation.

II. MOTION TO BE RELIEVED AS COUNSEL

An indigent parent whose child has been removed has a statutory right to appointed counsel. (§ 317, subd. (b).) Moreover, he or she also has a constitutional right to appointed counsel when, under the circumstances of the particular case, fundamental fairness requires such an appointment. (*Katheryn S. v. Superior Court* (2000) 82 Cal.App.4th 958, 971; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1707-1711 [Fourth Dist., Div. Two].) This right encompasses the parent's entitlement to competent counsel as well, whether court appointed or privately retained. (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 238.)

Here, Mother was continuously represented by counsel. Although there is no allegation in the dependency petition that exposes Mother to criminal charges, nor is she facing termination of her parental rights, she has been appointed three different competent attorneys to conduct the proceedings, and she has been afforded two judges to avoid any potential unjust decision.⁵ Nonetheless, she contends the juvenile court "erred by not replacing [her] attorney despite the attorney's repeated insistence that she could not proceed due to a conflict of interest with her client."

Assuming, without deciding, that Mother held a constitutional right to effective assistance of counsel, we conclude that her right was fully afforded to her, given the record before this court. At the time that Mother's third appointed counsel sought to be

⁵ We also note that Mother requested that J.B.'s attorney also be conflicted out of the case on the grounds of "bias that she feels she's been exposed to by that firm."

relieved, counsel had represented Mother for less than 90 days. According to counsel, Mother accused her (Counsel Tinoco-Vaca) of being “in collusion with County Counsel,” and stated there had been “absolutely no communication between the attorney and the client.” The juvenile court aptly noted that Mother “creates this problem with every single attorney.” Thus, while Mother may not have communicated with counsel, the court noted nothing had been presented indicating counsel was “otherwise incapable of providing [Mother] with adequate representation on this matter.” We agree.

Mother was an incredibly difficult client who repeatedly sought to disqualify both counsel of record and/or the judge hearing the matter. She wanted to dictate procedural mechanisms and tactical decisions. When being denied such control, she sought to proceed in pro. per. Thus, on appeal, Mother contends that her disagreements with counsel regarding relevant witnesses and the issuance of subpoenas “are significant facts because they reveal a problem with counsel’s ability to represent [M]other effectively.” She argues that it appears counsel believed “that [M]other’s allegations would influence counsel’s ability to focus solely on [M]other’s interests in the case.” We disagree.

Despite her efforts to the contrary, Mother was unable to affect the ability of her counsel to represent her (Mother’s) best interests. As demonstrated in the jurisdictional/dispositional hearing, counsel exhibited competence in representing Mother. She elicited testimony that Mother loves J.B. and he loves her; that she does not yell at him during visits; that she attended anger management; counseling, and parenting classes; and that no visit with J.B. was ever terminated early due to her behavior.

Counsel objected when appropriate, pointed out there had been no diagnosis of any type of mental illness, and that Mother had to drive from Big Bear down to Riverside to visit with J.B.

When questioning Mother, counsel elicited testimony that Mother had never been diagnosed with a mental illness, only depression; that she was not taking any medication for any mental illness; that she had been ill with bronchitis for six weeks on the day she was accused of yelling at J.B.; that she never told J.B. she would laugh if he was killed; and that she was a single mother who had been caring for J.B. all his life. Counsel allowed Mother to explain why she was not cooperative when the sheriff's department wanted to search her home. Mother explained why visitation closer to her home was necessary, and the benefits she had obtained from taking the various parenting and anger management classes.

During closing argument, counsel acknowledged that, while Mother is "not the easiest person to get along with," "she really does care for her son[, and] her frustration, lack of trusting everybody in the system was uttered from prior experiences or what it was the one thing that always came back to was her son." Counsel argued that the fact that Mother does not have a personality everyone can get along with does not amount to a mental illness. Counsel opined that J.B. is not at risk with Mother, nor is he afraid of her. Rather, the fear is "a bit exaggerated maybe somewhat retaliation for how Mother has treated everybody else." Thus, counsel requested that the case be dismissed with an order

that the family participate in counseling. Alternatively, she requested that the court consider placing J.B. in family maintenance once the house is cleaned.

Given the above, we cannot conclude that the juvenile court erred in denying counsel's request to be replaced as counsel of record. In any event, we find that even if the request should have been granted, we cannot reverse the order on appeal, as it does not appear reasonably probable that a result more favorable to Mother would have been reached had she been represented by different counsel. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152-1153; *In re Nalani C.* (1988) 199 Cal.App.3d 1017, 1028 [application of *Watson*⁶ test to determine harmless error].) We disagree with Mother's claim that "there were actions that the lawyer could have taken, but failed to take." Specifically, she refers to calling the officer and the caregiver as witnesses. Given counsel's performance at the hearing more witnesses were unnecessary. Counsel competently challenged the allegations in the petition and called into question the observations in the social worker's reports.

III. SUFFICIENCY OF EVIDENCE

Regarding the section 300, subdivision (b)(1) allegation, the court found it to be true, as amended, which now reads: "[M]other . . . suffers from an undiagnosed mental health issue that compromises her ability to properly care for and parent her child and leads her to verbal abuse, name calling and threats to the child [J.B.]. Thus placing the child at risk of serious emotional harm or injury." Mother challenges the sufficiency of

⁶ *People v. Watson* (1956) 46 Cal.2d 818.

the evidence to support this amended allegation. She contends CFS “did not prove that [her] purported undiagnosed mental health issues fell into any of [the] categories [identified in the subdivision] or caused physical harm.” More specifically, she argues there was no evidence (1) of mental illness, (2) that her “purported mental health issues . . . led to any risk of *physical* harm or illness” to J.B., or (3) that “the condition of the home” was due to Mother’s purported mental state. Moreover, she claims that a “purported risk of ‘serious emotional harm’ . . . is not properly addressed in subdivision (b), which focuses on physical issues.”

In response, CFS concedes that section 300, subdivision (b), does not provide the basis of jurisdiction for emotional harm. (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717-718 [§ 300, subd. (b) does not provide for jurisdiction based on “emotional harm”].) However, it notes “the emotional harm language was properly pled in subsection ‘c’ which [the] trial court found true and which is not challenged by [Mother.]” Thus, CFS argues that, “because other alleged statutory grounds exist for finding jurisdiction, [we] need not consider whether [Mother] indeed had undiagnosed mental health issues or if those alleged mental health issues were substantially supported (b-1).” We agree.

Because we conclude the juvenile court’s true finding of the section 300, subdivision (b)(1) allegation, as amended, must be reversed according to the holding in *In re Daisy H.*, *supra*, 192 Cal.App.4th at page 718, we need not address whether there is

sufficient evidence to support it.⁷ However, jurisdiction was also based on the court's true finding of the allegations contained in section 300, subdivisions (b)(2), (c)(4), and (g)(6). Because Mother does not challenge these allegations, the order finding jurisdiction is affirmed.

IV. DISPOSITION

The true finding of the amended section 300, subdivision(b)(1) allegation is reversed, and the juvenile court is directed to modify disposition to indicate that the subdivision (b)(1) allegation is found to be not true. In all other respects, the order sustaining the juvenile dependency petition and removing her minor child, J.B., from her custody, is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

MILLER

J.

⁷ The order that Mother undergo a psychological evaluation has not been challenged and thus is affirmed on appeal.