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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re E. C., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

B. B.,

Defendant and Appellant.

G051960

(Super. Ct. No. DP025072)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Gary L. Moorhead, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant
and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Jeannie Su,
Deputy County Counsel, for Plaintiff and Respondent.

* * *

Mother B. B. appeals from the termination of her parental rights. Without explanation, she failed to appear at the Welfare & Institutions Code section 366.26 hearing (the .26 hearing).¹ After delaying the hearing approximately 90 minutes, the trial court denied a request for a further continuance. And after the presentation of evidence, the court terminated mother's parental rights and found minor suitable for adoption. Mother appealed and contends the court abused its discretion in denying the continuance. We affirm.

FACTS

In June 2014, the Orange County Social Services Agency (SSA) filed a petition under section 300, subdivision (b) (failure to protect), alleging that on June 5, 2014, mother was found incoherent and in need of medical attention at her residence. The child's father stated that mother had passed out and he was taking the child to a friend's house. Mother was transported by ambulance to the hospital and placed on a psychiatric hold pursuant to section 5150 (5150 hold) for three days. Mother self-reported she was diagnosed with bipolar disorder, anxiety, and post-traumatic stress disorder (PTSD). Mother had previously been hospitalized for a mood disorder. In her most recent hospitalization, she had been treated for post-partum depression. Mother stated that she had not been seeing a psychiatrist prior to her last hospitalization. She had been prescribed Abilify and Xanax for her bipolar and anxiety and Norco for her pain by her primary care physician. She had stopped taking her psychotropic medications while pregnant on the advice of her doctor, and had an appointment scheduled to resume taking her medication prior to being hospitalized. She had two previous suicide attempts.

¹ All statutory references are to the Welfare & Institutions Code unless otherwise stated.

SSA further alleged that mother had an unresolved substance abuse problem which, included methamphetamine and marijuana. Mother first admitted using methamphetamine just prior to her hospitalization, then denied using methamphetamine since the age of 19. Mother reported smoking marijuana for pain and anxiety, stating she had a medical marijuana card. In 2005 she had been convicted of possession of a controlled substance and paraphernalia and completed a court-ordered drug treatment program in 2006. Her criminal history included arrests and/or convictions for assault with a deadly weapon, not a firearm, or force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)); possession of controlled substance (Health & Saf. Code, § 11377, subd. (a)) and paraphernalia (Health & Saf. Code, § 11364); and possession of an unauthorized item in a sterile area of an airport (Pen. Code, § 171.5, subd. (b)). SSA also alleged that father had an unresolved substance abuse problem, might have a problem with anger management, had a history of domestic violence, and had a criminal history.

At a hearing on June 11, 2014, at which mother was present, one-month-old minor was detained. The court ordered monitored visitation for the parents of at least three 2-hour visits per week, as well as drug testing. Minor was placed with a family serving as an emergency shelter home.

According to a report by Senior Social Worker Yvette Cole regarding the allegations in the petition, mother claimed that the day she was taken to the hospital, maternal grandmother convinced the paramedics that mother was suicidal and coached mother to tell the paramedics that she was suicidal. Mother claimed she was under the influence of Xanax and that she did not know what she was saying that day. Mother confirmed she had been diagnosed with bipolar disorder, anxiety, and PTSD. She also reported that she had been put on a 5150 hold twice prior to the present case, once for an attempted suicide, and once out of concern that she was suicidal.

Mother was advised to enroll in services, including drug and alcohol testing, drug treatment, mental health treatment, a personal empowerment program, counseling, and parenting education. Mother was referred to drug testing on June 13, 2014, but missed every single drug test for the entirety of the underlying proceedings.

Based on mother's criminal history, her unresolved drug abuse, and mixed record of visiting minor, Cole recommended, pursuant to section 361.5, subdivision (b)(12) (reunification services need not be provided to a parent who has been convicted of a violent felony), that reunification services not be provided.

At a hearing in September 2014, the court appointed a guardian ad litem for mother. On September 21, 2014, minor was placed with nonrelative extended family members who would ultimately become prospective adoptive parents.

As of October 28, 2014, mother still had not complied with any drug testing. Mother had been visiting with minor and reports from the visits were that "the interaction between the mother and father and the child is positive."

Mother's visits with minor were inconsistent. She cancelled or did not show up for four visits in July 2014. She left the next visit 30 minutes early. She missed visits on October 3, November 12, December 10, December 19 and December 31, 2014. When she visited, she interacted with minor positively and acted appropriately. On one occasion, however, the monitor noted that mother changed minor into clothes that reeked of cigarettes. When confronted, mother became offended and agitated, blaming the smell on others who smoked, and ultimately left. Mother had been observed smoking a cigarette five minutes prior to the visit.

The court conducted a hearing on the petition on January 13, 2015, at which mother was present, and found the allegations of the petition to be true and declared minor a dependent of the court. Father waived reunification services. The court found by clear and convincing evidence that reunification services did not need to be provided to mother pursuant to section 361.5, subdivision (b)(12). The court ordered

ongoing visitation for the mother once per week for two hours. The court set a .26 hearing for May 12, 2015. The court informed mother of the provisions of section 366.26 and ordered her to return to court on the next hearing date. Mother was also mailed a notice of the .26 hearing which contained, in bold, a notice that mother's parental rights may be terminated at the hearing.

In a report prepared shortly before the .26 hearing, a senior social worker observed the minor to be thriving under the care of her foster parents, the nonrelative extended family members. The foster parents expressed interest in adopting minor. At that point the foster parents had been caring for the one-year-old minor for seven months, during which they had provided "a safe, loving, stable home." "The child has been observed . . . to have a secure, trusting, and comfortable relationship with the caretakers as evidenced by the way the child seeks out her caretakers for reassurance and for soothing when she is upset or sick."

Mother's visits after the January 13 hearing were more consistent. Out of the 15 visits between January 14, 2015 and April 21, 2015, mother only missed two visits. "The visitation notes generally paint a picture of the participants engaging with the child in a healthy and appropriate manner with activities such as, holding the child, hugging and kissing the child, carrying the child, feeding the child a bottle, feeding the child cereal in a high chair, playing with the child on the floor, changing the baby's diaper, and taking pictures of the child." However, there was one negative incident on April 7, 2015, which the social worker described as follows: "Of concern to the undersigned was the undersigned's observation of the child's mother's mannerisms and facial expressions. The child's mother was noted to be moving her head left to right in wide sweeping motions throughout the visit. The child's mother was noted to have her eyes in an almost-closed position throughout the visit. The child's mother was noted to slump over periodically, seemingly unable to maintain adequate posture and head control. After the visit, when the undersigned engaged her, the child's mother did not speak

clearly and the child's mother seemed to have poor control of her facial expressions, frequently moving her mouth and jaw from left to right. The undersigned asked the child's mother when the last time she had used illegal substances was as the undersigned suspected that the child's mother was under the influence. The child's mother replied that the [last] time she used drugs was the week prior when she had used marijuana, further, that this was necessary due to the pain associated with her neuropathy."

At a visit on May 5, 2015, the social worker observed the mother to be acting normal and the interaction with minor to be positive: "The child was noted to be more upbeat and interactive on this day, very tuned into her environment and she reacted enthusiastically to her mother and maternal grandmother, and to others in the visiting area. This, on [sic] contrast with visit the undersigned observed on April 7, 2015, in which the child seemed a bit more disengaged and stoic. This time child was noted to be actively playing with toys, crawling around the play area, smiling, and waving at various persons in the visiting area, including the mother, maternal grandmother, and the undersigned."

Mother's presence at hearings over the course of the proceedings was generally consistent. Mother was present for hearings on August 5, 2014, September 17, October 7, October 28, November 19, November 24, December 15, January 12, 2015, and January 13, 2015.

On May 12, 2015, the date of the .26 hearing, mother was present. Instead of a .26 hearing, however, the court noted that mother had expressed dissatisfaction with her counsel and thus held a *Marsden* hearing.² The court stated on the record that the .26 hearing was to be continued to 1:30 p.m. the following day.

In a closed session hearing, mother stated that, in fact, she was satisfied with her attorney. Instead, she asked the judge to "hear [her] out before [he came] to any

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

conclusion.” She then talked at some length about her personal history, her joy of having a daughter, the struggles she faces, and her confidence that she can provide a proper environment for her daughter. The court concluded the hearing, stating, “At this point, it’s kind of a non-*Marsden* hearing, but we let her get what she wanted to say off of her chest. She’s not dissatisfied with [her attorney’s] representation and apparently very happy with her guardian ad litem. And so we will see her again tomorrow at the .26 hearing.”

Except that mother never showed up the next day for the 1:30 p.m. hearing. Her counsel stated on the record, “It is now about 3:05 p.m. on May 13th. Mother was here a good portion of the day yesterday. She was ordered back for today. However, I nor the guardian ad litem have heard from the mother and we have repeatedly looked out in the hallway for her. [¶] I would ask that the matter continue so that we can make further — make attempts to secure mother’s presence. I do not know — I will say I do not have any message from the mother nor does the guardian ad litem as to her whereabouts or why she is not present at this time.” The request was denied.

When Mother’s counsel was asked whether she had evidence to present, counsel stated, “For the record, I did have two witnesses under subpoena, including social worker Cori Bearbower, as well as Roger Medina, the New Alternatives monitor. But in consultation with the guardian ad litem, at this time, I will waive cross-examination of the preparer of the report and proceed to argument after extensive consultation with my guardian ad litem on the subject.” Notably, she did not indicate that she had planned on mother testifying.

Mother’s counsel argued that the parental-benefit exception to the termination of parental rights applied, noting that mother’s visits with minor went well and that she acted in a parental role during those visits.³ After hearing argument from all

³ The parental-benefit exception is found in section 366.26, subdivision (c)(1)(B), which provides that, having denied the mother reunification services, parental

parties, the court terminated mother's parental rights and ordered minor to be placed for adoption. The court stated, "With respect to the [parental-benefit exception], the court did have an opportunity to speak with the mother yesterday in a closed session hearing. The court has no doubt that the mother does love and care for her daughter. This is a very sad case. The mother has mental health issues that based on my observations yesterday are ongoing and I feel because of those mental health issues and potential drug-related issues that the visits that the mother had while appropriate were not as consistent as one would hope to see. The mother missed several visits over the last year with the child. [¶] The court recognizes that when she was with the child the visits were appropriate, but that's simply not enough for the court to find that the exception applies in this case." The court also noted that minor had "been with the prospective adoptive parents now for almost all of the child's life. The child appears to be thriving in that situation." Mother appealed.

DISCUSSION

Mother's sole contention on appeal is that the court abused its discretion in denying a further continuance of the .26 hearing for purposes of locating mother. We disagree.

Section 352, subdivision (a), provides, "Upon request of counsel for the parent, guardian, minor, or petitioner, the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor.

rights shall be terminated unless "[t]he court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. ¶ Continuanes shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance. . . . Whenever any continuance is granted, the facts proven which require the continuance shall be entered upon the minutes of the court. ¶ In order to obtain a motion for a continuance of the hearing, written notice shall be filed at least two court days prior to the date set for hearing, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance."

In a dependency case, "[c]ontinuanes should be difficult to obtain." (*Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238, 1242.) "Although continuanes are discouraged in dependency cases [citation], the juvenile court has discretion to grant a continuance upon a showing of good cause if it is not contrary to the best interest of the child. [Citation.] We review the court's ruling on a continuance request for an abuse of discretion." (*In re Mary B.* (2013) 218 Cal.App.4th 1474, 1481.)

We agree with the trial court that this is a sad case. But mother has offered no grounds upon which we could conclude the trial court abused its broad discretion. She makes two arguments, neither of which we find persuasive.

"First, [mother] was present for all the hearings in this case." "No reasonable trier of fact, in light of [mother's] perfect record of attendance at over nine hearings over a year, would have denied her counsel's request for a continuance." "Second, the court was well aware [mother] suffered from mental illness which impaired her abilities." From this evidence, however, the court could draw a conclusion adverse to mother: her perfect attendance record demonstrated that her mental illness did not prevent her attendance.

Ultimately, there is simply no explanation for mother's absence. We cannot find that the *absence* of an explanation required the court to grant a further continuance. To the contrary, it is the moving party's burden to show good cause. (§ 352, subd. (a).) Moreover, the court lighted upon a plausible explanation for mother's absence: she had already told the court everything she had to say the day before.

While mother suffered from mental illness, there is nothing in the record to indicate that her illness prevented her from understanding the nature of the proceedings. She, in fact, appeared on the originally scheduled date of the hearing and gave a (mostly) coherent explanation of her circumstances and her desire to keep minor. Also, on at least three prior occasions, she signed a paper that contained the following prominent warning: "your failure to appear in court on the day at the time set forth above may result in the court making orders/judgments in accordance with the request and recommendations of the social services agency which may include termination of your parental rights to your child [or] children." While these warnings were not directed at the .26 hearing in particular, they put mother on notice of what was at stake in the proceedings. Additionally, she was mailed a notice of the .26 hearing that specifically warned her that her parental rights could be terminated. In addition to those warnings, on the originally-scheduled date of the .26 hearing, the court instructed mother to return the next day at 1:30 p.m. In short, there is nothing to indicate the court abused its discretion in refusing to continue the hearing for more than 90 minutes.

Even if the circumstances before the court did require a longer continuance, "an abuse of discretion results in reversible error only when the denial of a continuance results in the denial of a fair hearing, or otherwise prejudices a party." (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527.) There is no evidence that mother was prejudiced here. Her counsel never indicated mother intended to testify, much less made an offer of proof of what that testimony would have been. There is, therefore, no indication that mother's presence would have made any difference at the hearing.

DISPOSITION

The postjudgment order terminating parental rights is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.