

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re N.M. et al., Persons
Coming Under the Juvenile
Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

K.P.,

Defendant and Appellant.

B276743

(Los Angeles County
Super. Ct. No. DK12428)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Miller, Referee. Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother appeals the juvenile court's dispositional order removing the children from her custody and ordering mother to participate in services. Mother argues that the order is infected with structural error because the trial court denied mother's right to substitute counsel at the dispositional hearing. We affirm, finding no abuse of discretion.

FACTS AND PROCEDURAL BACKGROUND

1. Detention of the Children from Mother

Mother has two children: a nine-year-old daughter with father Felipe and a three-year-old daughter with father David. At the time the Los Angeles County Department of Children and Family Services (DCFS) became involved in this case, mother, David, and the children were living together. David had substance abuse problems and engaged in domestic violence towards mother in front of the children. On July 31, 2015, DCFS secured a protective custody warrant to temporarily remove both children from mother, and the younger child from her father, David.

On August 6, 2015, DCFS filed a dependency petition alleging that mother and David shared a history of domestic violence, that David abused alcohol, and that mother failed to protect the children from David. The older daughter's father, Felipe, was not named in the petition. The juvenile court detained the younger daughter in foster care and released the older child to her father, Felipe, who was then living in Colorado. When the petition was filed, the older sibling was already in Colorado visiting her father. The juvenile court also granted mother's request for a temporary restraining order against David.

At the detention hearing, the court appointed Mr. Randall from the Law Office of Rachel Ewing to represent mother. During the pendency of the case, Mr. Randall apparently left the Ewing office and was practicing elsewhere. Mr. Edge, another attorney from the Law Office of Rachel Ewing, eventually took over mother's representation.

2. *Jurisdiction Over the Children*

The juvenile court conducted the jurisdiction hearing in November 2015. The court sustained allegations of domestic violence and substance abuse putting the children at risk of harm under Welfare and Institutions Code, section 300, subdivision (b).¹ Mother also obtained a temporary restraining order against David.

The court's tentative ruling at the jurisdiction hearing was to return the younger sibling to mother. At the December 2015 disposition hearing, the juvenile court did not adopt its tentative because DCFS reported that mother and David were seen together at a Big Lots calling each other "babe." The juvenile court then continued disposition to January 2016, at which time the court intended to receive evidence from DCFS regarding mother's ongoing interactions with David.

3. *Conduct by Mother's Counsel During the Proceedings and the Court's Response*

On several occasions, at the jurisdiction and other hearings, the juvenile court admonished mother's counsel, Mr. Edge, about his trial tactics. More than once, the court interrupted Mr. Edge's examination of DCFS witnesses and said counsel's questions were argumentative. The court told Mr. Edge

¹ All subsequent statutory references are to the Welfare and Institutions Code.

that Mr. Edge had “screwed up” on his trial preparation. Almost immediately thereafter, the court acknowledged it should have said something like “made a mistake” instead of “screwed up.” The court also found on the record that Mr. Edge was doing “the slimy thing” by personally providing evidence – a statement for which the court again later apologized. The court also said that Mr. Edge had “alligator mouth overload hummingbird mouth.”²

Twice the court stopped proceedings to admonish Mr. Edge for his lack of respect. During the jurisdiction hearing, Mr. Edge told the juvenile court that it was mixing up the timeline of events. The juvenile court responded that because Mr. Edge was being disrespectful to the court, “you’re done today.” Later in the jurisdiction hearing, the court denied Mr. Edge’s request to proceed to disposition. When Mr. Edge pressed the issue, the court responded: “Mr. Edge, get out. Get out. We will call this case later. Get out.”

4. *The Court’s Denial of Mother’s Request to Substitute Counsel*

At the January 14, 2016 disposition hearing, mother appeared with Mr. Randall, the attorney who had represented mother at the early stages of the dependency proceedings. Mr. Randall asked the court for permission to substitute into the case

² We are unfamiliar with the term. At least one commentator suggests that the phrase originated in Texas during the 1920’s as: “Don’t let your alligator mouth overload your hummingbird ass.” Apparently the idiom expresses colorfully the notion that one might impressively talk the talk but be unable to walk the walk. (Bruce, *Let Your Mouth Overload Your Back* (October 15, 2015) <<https://idiomation.wordpress.com/tag/dont-let-your-alligator-mouth-overload-your-hummingbird-ass/>> (as of May 23, 2017).)

as mother's counsel. The following exchange took place between the court and Mr. Randall:

"THE COURT: So here's the problem. Of course, we are in the middle of the horse race. Now [mother] wants to change horses and we were going to have testimony today from a social worker, but we got a last minute information report identifying A, the identity of the social worker who made certain observations; and B, the substance of those observations which were basically that she saw [mother] and [David] together at the Big Lots and they appeared to be referring to each other as babe which I agree is a term of endearment between couples. The biggest problem, however, is that is, of course, contrary evidence to the testimony that [mother] gave that she was no longer involved with [David] and was not seeing him.

"We got another last minute information report indicating that [David] has admitted to being in [mother]'s company on several occasions during the time in which [mother] was claiming she was not seeing [David]; and they also talked to [mother's counselor].

"Anyway, that's what we were going to do today. We were going to resume with that. So are you going to be ready to go today?

"MR. RANDALL: Your honor, I'm looking at Mr. Edge's -- the documents I thought I saw in front of him and they are approximately five to six inches thick.

...

"THE COURT: . . . So what's your proposal?

"MR. RANDALL: Your honor, my proposal would be to allow -- to honor [mother]'s request that counsel be substituted in. I would need -- I would ask the case be continued for a period of time to allow me

to review the documents and then prepare a strategy which may include trial for the mother.

“THE COURT: We are already in trial. Now you want me to declare a mistrial.

“First of all, I’m going to note that I don’t have to accept the substitution of attorney and I can deny that motion and I can proceed with Mr. Edge and [mother] because she waited until the last minute. This substitution of attorney is dated today. So now I have to think about everybody else’s interest before I start, first of all, declaring a mistrial or resting the trial and starting all over again. If that is the case, then I’m going to deny the substitution.

“MR. RANDALL: Very well, your honor.

“THE COURT: Because I think, first of all, it’s a delay tactic; secondly, I don’t know why she is complaining about Mr. Edge. She ought to be complaining about her own conduct because that’s what is sinking her ship and I feel confident that I can say that since I am the trier of the facts and I heard the facts.”

When Mr. Edge stated that mother tried to arrange the substitution on Monday, three days before the hearing, the court replied that the request was “still tardy.” Mother then requested to replace Mr. Edge under *People v. Marsden* (1970) 2 Cal.3d 118. The juvenile court conducted a confidential hearing and denied the request.

Following mother’s *Marsden* motion, the juvenile court said it was no longer able to devote additional time to the case that day because it had other matters, including a detention hearing, on its calendar. Although the court proposed that the parties return the next day for the continued disposition hearing, Mr. Edge was unavailable. After discussion with counsel on their availability, the court continued the disposition hearing two

months, to March 17, 2016. Neither Mr. Edge nor Mr. Randall renewed mother's motion to substitute counsel.

5. *Disposition*

The juvenile court conducted the disposition hearing on two dates in March 2016. The court ordered both children removed from mother under section 361. The court placed the older child with Felipe in Colorado and terminated jurisdiction over the child with a family law custody order. The younger child was placed in foster care. Mother was given unmonitored visitation and ordered to participate in services.³

DISCUSSION

On appeal, mother argues that the juvenile court erred in denying her request to substitute counsel. In her reply brief she clarifies that the court erred by "denying her substitution request because at the time, the juvenile court did not know whether the request would actually delay the proceedings."⁴

1. *Standard of Review*

"The juvenile court has broad discretion in determining whether to grant a continuance" in order to allow a party to substitute counsel. (*In re V.V.* (2010) 188 Cal.App.4th 392, 399.) The juvenile court is in a far better position to manage the timing of its hearings and the presentation of evidence than we are. Thus, as "a reviewing court, we can reverse an order denying a

³ We observe that in August 2016, the juvenile court returned the younger sibling to Mother's custody. This subsequent order did not moot the appeal as the challenged disposition order also placed the older sibling with Felipe and ordered Mother to participate in services. On appeal, Mother sought review of all aspects of the order.

⁴ Mother does not raise the *Marsden* ruling on appeal.

continuance ‘only upon a showing of an abuse of discretion.’ ”
(*Ibid.*)

2. *Relationship Between Substitution of Counsel and Need for a Continuance in Dependency Cases*

Although parties generally have the right to substitute counsel (Code of Civil Procedure § 284), a substitution request may be denied where the substitution would impair progress of the proceedings. Thus, the issue here is not whether the court erred in denying the substitution, but rather whether the court erred in denying substitution of counsel because substitution would necessitate a lengthy continuance. (*In re V.V., supra*, 188 Cal.App.4th at p. 398.) The juvenile court has discretion to order a continuance of a dependency hearing for good cause. (§ 352.) The appellate courts take the good cause qualifier seriously.

In *In re V.V., supra*, 188 Cal.App.4th 392, the Supreme Court addressed a parent’s right to substitute counsel in a dependency proceeding. There, on the day of the section 366.26 hearing, the father sought to substitute his counsel and requested a three-week continuance so that his new counsel could prepare. (*Id.* at p. 399.) The Supreme Court explained the juvenile “court would have allowed the father to proceed with [the new attorney] if [the new attorney] was ready to go forward. [But, the new attorney] was not ready, and the juvenile court refused to continue the case to give him time to prepare.” (*Id.* at p. 398.)

In its evaluation, the Supreme Court stated the paramount importance of the child’s interests in a dependency proceeding and that “ ‘[t]he rights and protections afforded parents [as to choice of counsel] in a dependency proceeding are not the same as

those afforded to the accused in a criminal proceeding.’ ” (*In re V.V.*, *supra*, 188 Cal.App.4th at p. 399.) The Supreme Court concluded: “It was not an abuse of discretion to deny a continuance which would have substantially delayed the termination hearing.” (*Id.* at p. 400.)

Similarly, in *In re Giovanni F.* (2010) 184 Cal.App.4th 594, the father sought a continuance to substitute his attorney during closing arguments at the jurisdictional hearing. The juvenile court “denied the request, citing section 352 and noting the trial had commenced, there had been ample time for [the father] to hire an attorney and, given [the child]’s age, it would not be in his best interests to continue the hearing.” (*Id.* at pp. 603-604.)

The appellate court found no abuse of discretion. The court stressed that continuances are discouraged in dependency cases and that no continuance may be granted that is contrary to the child’s interest. (*Id.* at p. 604.) “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.” (*Ibid.*) The court concluded that the child was entitled to a timely resolution of his custody status, and that the father waited more than a month from setting this hearing to request the substitution. (*Id.* at p. 605.)

3. *The Court Did Not Abuse Its Discretion in Denying Substitution of Counsel*

Mother asked to substitute counsel in the middle of the disposition hearing. The record suggests that the juvenile court was inclined to grant the request but the court was understandably concerned that substitute counsel Mr. Randall

required a continuance. As the court explained, the court intended to hear testimony at the hearing from a social worker and address inconsistencies in mother's statements regarding her contact with David. The witness was ready to testify and the court was prepared to move forward to disposition. The court had ample basis to deny the continuance.

Continuing the disposition hearing to a later date would unreasonably delay the prompt resolution of the children's custody. If mother had not waited until the last minute to substitute counsel, she could have retained Mr. Randall and the court could have also maintained its schedule. More than a month had lapsed between the previous disposition hearing and the one at which new counsel was sought. Thus, mother had had plenty of time to make the request prior to the January 2016 hearing. Instead, she waited until the day of that hearing to do so. The children should not have to bear the burden of her tardiness.⁵ We conclude that the court did not abuse its discretion in denying the request for a continuance. Like the children in *In re V.V.* and *In re Giovanni F.*, mother's daughters were entitled to an efficient resolution of their placement. Our holding that the court reasonably denied the continuance essentially moots the remainder of mother's substitution of counsel argument because at no time was Mr. Randall prepared to substitute in without a continuance.

On appeal mother contends that the juvenile court's decision to deny substitution of counsel was affected by its

⁵ Mr. Randall represented to the court that Mother had tried to effect a change of counsel three days earlier but was unable to do so. The passage of those three days did not move the trial court and we find it insignificant for our analysis.

difficulties with Mr. Edge throughout the proceedings. In arguing that the trial court improperly tried to convince mother to continue with Mr. Edge, mother asserted that the juvenile court overlooked “the contentious interaction between Mr. Edge and the juvenile court [which was] impacting her case in a negative way.” The record suggests otherwise. The court stated: “Okay. Well, so Mr. Edge and me, we got an edgy relationship. Sometimes it gets like that, but he don’t have anything to do with how I feel about this case. . . . So whatever I decide to do has absolutely zero to do with Mr. Edge. Mr. Edge at every step of the way has fought tooth and nail to protect your interest or get what you wanted” Common sense concurs: it is hard to imagine how a court in a trial with, arguably, a difficult lawyer has an incentive to keep the lawyer in the case for improper reasons. The record is clear that the motion to substitute was denied because, as Mr. Randall phrased his request, it would have required, in the court’s view, an unjustified continuance. This ruling we have already found reasonable.

Mother asserts the juvenile court should have revisited its ruling on her substitution motion when, due to counsel conflicts, the court ended up continuing the disposition hearing for two months. The record does not reflect that either Mr. Randall or Mr. Edge ever renewed the substitution request, even with the significant change in court schedule. We know of no authority that *requires* a trial court on its own to reconsider an already denied motion. As mother failed to ask for reconsideration, she has waived this issue. (*In re Joshua G.* (2005) 129 Cal.App.4th 189, 197 [“when a parent does not raise an issue in the trial court, he or she is precluded from raising the issue on appeal”]; see *People v. Kenner* (1990) 223 Cal.App.3d 56, 62 [failure to

renew motion for self-representation constituted waiver]; *People v. Stanley* (2006) 39 Cal.4th 913, 933 [failure to renew request for self-representation indicated that defendant abandoned request].)

DISPOSITION

We affirm the juvenile court's order.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J.

FLIER, J.