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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

Jennifer B.,

Defendant and Appellant.

B278574

(Los Angeles County
Super. Ct. No. DK15356)

APPEAL from an order of the Superior Court of Los Angeles County, Victor Greenberg, Judge; Rudolph Diaz, Judge. Affirmed.

John L. Dodd for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother appeals the juvenile court's dispositional order removing her son from her custody. She argues that the court erred in failing to require the Department of Children and Family Services (DCFS) to evaluate the alleged paternal grandparents for placement. Mother also asserts that the court erred in failing to hold a *Marsden*-like hearing when mother asserted her trial counsel was not adequately representing her. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Mother gave birth to her son in December 2015; the child was premature and remained under hospital care for two months. DCFS became involved because mother tested positive for amphetamine and methamphetamine at birth. Mother identified the child's father, who requested a paternity test. The juvenile court did not determine whether the man was the child's biological father.

1. Jurisdiction

On January 29, 2016, DCFS filed a non-detained Welfare and Institutions Code section 300 petition on behalf of the child, alleging the child was at risk of harm due to mother's history of alcohol abuse and current use of methamphetamines and amphetamines.¹ On April 29, 2016, the juvenile court sustained the section 300 petition, declared the child a dependent of the court, maintained the child in mother's custody, and ordered mother to participate in services, including random drug testing.

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

The juvenile court did not order DCFS to provide the alleged father with services because his paternity was not confirmed.

2. *Mother's Positive Drug Test*

A month later, on May 27, 2016, mother tested positive for amphetamine and methamphetamine. On June 2, 2016, DCFS contacted mother to inform her it was seeking a court order to detain the child because of the positive drug test. In response, mother denied using drugs. The next day, DCFS obtained a detention order and attempted to detain the child. Mother informed DCFS that the child was in Texas with his alleged paternal grandparents and that she wanted him to remain there. Although mother told DCFS that she had brought the child to Texas on May 26, 2016, she had in fact transported the child to Texas on June 3, 2017.

3. *Detention and Section 387 Petition*

On June 9, 2016, the juvenile court issued and held a protective custody warrant for the child and an arrest warrant for mother. The court held the warrants pending the next hearing. On June 14, 2016, DCFS filed a section 387 petition alleging the child was at risk of harm due to mother being a current abuser of methamphetamine and amphetamine, and because mother took the child to Texas in violation of court orders. The petition sought immediate detention of the child. That same day, the court made emergency detention findings, quashed the warrants it previously issued, and continued the matter to June 16, 2016. Sometime between June 3, and June 14, 2016, DCFS retrieved the child from Texas and placed him in foster care.

On June 16, 2016, the court made detention findings, and ordered mother's visits to be monitored. At the hearing, mother's counsel stated there had not been reasonable efforts to place the

child with relatives, pointing out that DCFS did not place the child with an aunt who had already been cleared for placement. The court ordered DCFS to assess all relatives presented for placement and for visitation or monitoring.

4. *Hearings Leading Up to Adjudication of the Section 387 Petition*

The court heard the section 387 petition on August 25, 2016. During the hearings leading up to adjudication of the section 387 petition, mother's counsel focused on placing the child with the aunt. The child's counsel opposed placing the child with yet another caregiver because of concerns regarding the child's attachment issues and having multiple caregivers in a short span of time. DCFS subsequently determined that the aunt was not biologically related to the child, and recommended the child remain in his foster placement.

On August 4, 2016, when the matter was on calendar for the section 387 petition, mother asked for a continuance because she had retained private counsel and would be requesting a substitution of attorney. The new counsel was not present, but her "apprentice" was. The court continued the matter to address mother's request for a substitution of attorney. At this hearing, mother also requested the court to initiate an Interstate Compact on the Placement of Children (ICPC) investigation of the alleged paternal grandparents in Texas. "The purpose of the ICPC is to facilitate cooperation between participating states in the placement and monitoring of dependent children." (*In re Johnny S.* (1995) 40 Cal.App.4th 969, 974-975; Fam. Code, § 7901.1 [one state can request a home study by the other state to assess safety and suitability of a potential placement in that state].) In response, the court ordered DCFS to, in its discretion,

begin the ICPC evaluation of any appropriate relative or non-related extended family member.

Mother's newly retained counsel again failed to appear on August 5, 2016. The court advised mother that her appointed counsel would continue to represent her until the substitution was properly made. DCFS repeatedly reported that it was not in the child's best interest to be removed from his foster home, as he was doing well there. DCFS also reported that mother tested positive for amphetamine and methamphetamine on August 9, 2016.

5. *Adjudication of the Section 387 Petition*

On August 25, 2016, the court conducted the contested section 387 petition hearing. The retained attorney for mother appeared. She and mother told the court that there had been confusion and that the attorney had not been retained. Mother confirmed that her court-appointed attorney would continue to represent her.

The court admitted into evidence the DCFS report and a photograph from mother. Mother's strategy at the hearing was to discredit the drug test results by showing that protocol was not followed in collecting the urine samples from mother. Mother testified about how the procedures followed by the drug testing facility were different on May 27, 2016 than on other dates. Mother consistently denied drug use. Mother also testified she believed she was authorized to take the child to Texas.

Mother's appointed counsel called an employee from his law firm as a witness. The law firm employee testified to conversations she had with an employee from the drug testing facility. Mother became upset immediately following her attorney's direct examination of the law firm employee, which

ended when the court sustained a foundation objection. Mother stated: "I'm going to leave." Her attorney told her not to leave, to which she responded "[t]his is ridiculous." The court then advised mother that there were rules and procedures for the presentation of evidence. Mother then told the court: "I don't feel I've been represented properly." The court informed mother that her comments were inappropriate midtrial and asked her to control herself.

DCFS and child's counsel asked the court to sustain the section 387 petition, and mother's counsel requested the court to dismiss it. The juvenile court explained that it did not believe mother's various explanations for the multiple positive drug tests. The court sustained the section 387 petition allegations that the child was at risk of harm because mother took the child to Texas in violation of court orders and due to mother being a current abuser of methamphetamine and amphetamine, with an amendment referencing mother's August 9, 2016 positive drug test.

Mother left the courtroom while the court was making its findings. The court asked mother's counsel if he wanted to take a moment to see if mother wished to return for the disposition portion of the hearing. Mother's counsel declined the offer.

The court then proceeded to disposition. Mother's counsel stated that he had intended to set a contested disposition hearing but since mother left, he lacked further direction. The court ordered Austin to remain a dependent of the court, removed the child from mother's custody, vacated the order that mother participate in 12 drug tests, and ordered that she complete a full drug treatment program. The court gave DCFS discretion to increase visitation. The court ordered that if DCFS were to

consider re-placement of the child, the matter needed to be brought to court.

6. *Mother Appealed*

On October 12, 2016, mother filed a notice of appeal from the juvenile court's August 25, 2016 findings and order.

7. *Mother Obtained New Counsel*

In December 2016, the court relieved mother's court-appointed counsel. Mother retained attorney Robert Howell, who appeared on behalf of mother at the December and later hearings.

8. *Subsequent Events Related to the ICPC Evaluation*

At a hearing on June 16, 2017, the juvenile court revisited the order it had made 10 months earlier at the in August 2016 section 387 hearing. The court reminded counsel that it had ordered DCFS to conduct an ICPC evaluation of the alleged paternal grandparents in Texas, but pointed out that the minutes did not reflect such an order. The court stated that it was going to "nunc pro tunc" indicate that the order was made in the June 2016 hearing minutes.

The court told the parties that it understood that the ICPC request was withdrawn and asked the parties to confirm that they were no longer requesting the ICPC evaluation of the alleged paternal grandparents in Texas. With mother present, mother's attorney, Robert Howell, stated that mother no longer desired the ICPC evaluation. With the parties' consent, the court vacated the ICPC order.

On October 6, 2017, the court ordered DCFS to initiate an ICPC investigation of the alleged paternal grandparents if the grandparents indicated an interest in placement with them.²

DISCUSSION

1. *Mother's Argument About the Failure to Order an ICPC Investigation is Moot*

Mother argues on appeal that the juvenile court erred in failing to order an ICPC assessment of Dorla V. (the alleged paternal grandmother who lives in Texas) for placement. Mother requests that we reverse the dispositional order, and remand this case with direction to the juvenile court to order an ICPC.

We decline to do so because not only did the juvenile court in fact make the order when requested in August 2016, but mother's subsequent June 2017 request to vacate the ICPC order mooted the issue. “ “A judicial tribunal ordinarily may consider and determine only an existing controversy, and not a moot question or abstract proposition.” ’ ” (*Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1183.) “ “[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed.’ ” (*In re Dani R.* (2001) 89 Cal.App.4th 402, 404-405.) Because mother withdrew her request for the ICPC evaluation, there is no existing controversy regarding any deficiencies in the

² On October 13, 2017, DCFS requested this court to take judicial notice of the juvenile court's October 6, 2017 order. The request was unopposed. Pursuant to Evidence Code section 459, we grant DCFS's request for judicial notice.

court's 2016 ICPC order or about DCFS's actions in complying with that order. The respondent's brief made much of this point and mother failed to file any reply brief in response.

Moreover, in October 2017, the juvenile court also ordered an ICPC evaluation if placement with the alleged grandparents was requested in the future. As such, the court has already ordered the relief mother seeks on appeal, i.e. an order for the ICPC evaluation. Mother's appeal as to this issue is moot.

2. *Mother Has Failed to Show Prejudice from Failure to Hold the Marsden-like Hearing*

Mother argues that the trial court erred in failing to hold a *Marsden*-like hearing in response to comments mother made at the section 387 adjudication hearing.³ In making this argument, mother refers to her statement to the court: "I don't feel I've been represented properly." Mother argues that when she voiced her dissatisfaction with counsel, the court was required to hold a *Marsden*-like in-camera inquiry to assess the scope of her concerns. She contends that the court's failure to do so was reversible error.

In general, section 317, subdivision (b) requires appointment of counsel for an indigent parent in a juvenile dependency case where the recommendation is out-of-home care. (*In re A.M.* (2008) 164 Cal.App.4th 914, 923.) All parents who are represented by counsel have a statutory right to competent

³ *People v. Marsden* (1970) 2 Cal.3d 118, held that criminal defendants represented by appointed counsel may move to replace counsel if the lawyer is not adequately representing them. Because parents have a statutory and due process right to competent counsel, *Marsden*-type hearings are permitted in dependency court. (*In re M.P.* (2013) 217 Cal.App.4th 441, 455.)

counsel at all dependency proceedings. (§ 317.5, subd. (a).) When an indigent parent expresses dissatisfaction with his or her court-appointed attorney, the juvenile court should hold a *Marsden*-type hearing. (*In re Ann S.* (1982) 137 Cal.App.3d 148, 149-150; *In re M.P.*, *supra*, 217 Cal.App.4th at p. 456 [“A *Marsden* ‘inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the future.’ ”].) Nonetheless, failure to conduct a *Marsden*-type hearing is not reversible error in dependency cases, where the procedural error did not result in a miscarriage of justice.⁴ (*Id.* at p. 460; see *In re James F.* (2008) 42 Cal.4th 901, 915-916 [calling into question whether the structural error doctrine that has been established for certain errors in criminal proceedings should be imported into dependency cases].)

Here, mother asserts that she suffered prejudice because her counsel erred in failing to pursue placement of the child with the alleged paternal grandparents. As explained above, the court actually ordered an ICPC investigation of Dorla V. Mother’s claim of prejudice is further disproven by her own request (with the aid of her new counsel) to vacate the order for the ICPC investigation. Even if we were to assume the trial court erred – which we do not – Mother suffered no prejudice from a failure to appoint new counsel because the only concern mother had with her original counsel was the failure to pursue the ICPC issue, a point that mother later withdrew.

⁴ Mother asserts that the failure to hold a *Marsden*-type hearing was per se reversible error. Mother cites no dependency case law for this proposition. Our review of dependency cases indicate that such structural error does not automatically warrant reversal: mother must prove prejudice.

DISPOSITION

We affirm the court's disposition order.

RUBIN, Acting P.J.

WE CONCUR:

FLIER, J.

GRIMES, J.