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Washington State
Court of Appeals
Division Two

December 1, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Interest of: D.D.W., A minor.	No. 47177-9-II Consolidated with: No. 47187-6-II
In re the Interest of: T.D.W., A minor.	UNPUBLISHED OPINION

LEE, J. — J.B. is the mother of D.D.W., a girl born in 2002, and T.D.W, a boy born in 2006. She appeals the trial court's order terminating her parental rights as to D.D.W. and T.D.W., arguing that the trial court erred by allowing counsel to withdraw on the day of her termination trial and that she was denied her right to counsel when the trial court conducted the termination trial after allowing counsel to withdraw. We hold that the trial court did not err because J.B. waived her right to counsel by her conduct. Accordingly, we affirm.

FACTS

In May 2012, the State removed D.D.W. and T.D.W. from J.B.'s care and filed a dependency petition for D.D.W. and T.D.W. In December 2012, the trial court entered a dependency order for D.D.W. and T.D.W. as to J.B. J.B. was represented by James Wooden during the dependency proceedings.

The dependency order required J.B. to complete a psychological evaluation, anger management evaluation, parenting classes, and all recommended follow-up treatments and

counseling. J.B. completed the psychological and anger management evaluations, but failed to complete any of the follow-up treatment recommendations. J.B. attended parenting classes, but misrepresented D.D.W and T.D.W.'s living situation to the provider. J.B. was offered out-of-home visits with the children, but J.B. made no attempts to visit D.D.W. or T.D.W. Thus, J.B. was unable to demonstrate any learned skills from her parenting class because J.B. did not visit her children.

In August 2013, the State petitioned for termination of J.B.'s parent-child relationship with D.D.W. and T.D.W.[1] In November, at J.B.'s request, the trial court appointed Scott Sonju as counsel in the termination proceedings. The trial court also appointed Darcy Scholts as guardian ad litem (GAL) for J.B. "in an attempt to get [J.B.] to communicate and cooperate with her counsel" because "historically she has been off and on with communicating with and cooperating with her prior counsel." Verbatim Report of Proceedings (VRP) at 5-6. Throughout the dependency proceedings, J.B. had difficulty communicating and cooperating with her counsel, and she had fired two attorneys. In December, Douglas Elcock was substituted for Sonju as J.B.'s counsel.[2] The termination trial was set for October 29, 2014.[3]

On September 10, 2014, Elcock met with J.B. and Scholts to discuss the pending trial and related issues. This meeting lasted approximately three hours and J.B. "made it clear at that time

[1] The State originally included D.W.W. and T.D.W.'s fathers in the petitions; however, they both defaulted and their parental rights were terminated October 4, 2013. The fathers are not parties to this appeal.

[2] In March 2014, Elcock took over the dependency case from Wooden.

[3] The termination trial was rescheduled two times prior to this trial setting.

she didn't want to relinquish [her parental rights]" but gave no other direction. Elcock sent J.B. materials regarding the termination trial.

Elcock did not hear from J.B. for approximately three weeks when, on October 1, J.B. e-mailed Elcock. Apparently, J.B. had moved from Vancouver, Washington to McMinnville, Oregon, but she did not leave a forwarding address or phone number for Elcock. In response to J.B.'s e-mail, Elcock asked whether J.B. received his letter and other materials regarding the upcoming termination trial and J.B. indicated that she had not. On October 2, Elcock forwarded another copy of the letter and termination materials to J.B.'s new address, emphasizing the need for her "immediate and active participation." Clerk's Papers (CP) (D.D.W.) at 115.

On October 7, Elcock and J.B. spoke briefly by phone. During the phone call, they discussed options and the need for J.B. to be in daily contact as the case preparation proceeded. She agreed to be available by phone to discuss the case further and they scheduled a phone appointment for the following day. J.B. missed the phone appointment and failed to respond to Elcock's subsequent phone messages and e-mails "asking her to participate with [him] so [they could] mount a defense if she want[ed] to contest the termination." VRP at 4; CP (D.D.W.) at 115.

On October 9, Elcock e-mailed J.B. saying:

> I have left several messages now which have not been returned. We have already lost considerable time because of your loss of residence and relocation. We need to discuss your case options and your decision. I will honor you[r] decision to proceed with trial if you so elect but I cannot do it without your participation.
>
> I need an immediate response or I will be forced to withdraw. I need your assistance.[4]

[4] Elcock also forwarded this e-mail to Scholts, J.B.'s GAL.

CP (D.D.W.) at 118. J.B. did not respond to Elcock's e-mail or contact him.

On October 10, Elcock moved to withdraw as counsel of record because of J.B.'s lack of participation and contact. A hearing on Elcock's motion to withdraw was set for October 27. Elcock served J.B. with notice of his motion to withdraw and the hearing date for the motion. J.B. did not appear at the hearing for the motion to withdraw. The trial court "reserve[d] on the motion until day of trial to allow Mother a chance to appear." CP (D.D.W.) at 156.

On October 29, the trial court heard Elcock's motion immediately before the termination trial began.[5] J.B. did not appear. At the hearing, Elcock represented to the trial court that he made discovery requests, filed an answer and affirmative defenses, and did "everything I can do without her cooperation." VRP at 4. Elcock sent follow up materials to J.B.'s address, but had no contact with her since their phone call. Elcock stated: "I can't present a case without my client or without some kind of a relationship so I understand how she wants me to argue the case. So at this point due to lack of contact I would like to withdraw." VRP at 4-5. The trial court found good cause and granted Elcock's motion to withdraw.

After the trial court granted Elcock's motion to withdraw, the State requested "further discussion regarding [Scholts'] role." VRP at 5. Scholts testified that during their September 10 meeting, J.B. represented that she did not want to relinquish her parental rights, and that she had not had contact with J.B. since their meeting with Elcock on September 10. The State argued that

[5] J.B. does not claim, nor is there any indication, that she did not have notice of Elcock's motion to withdraw, the hearing regarding the motion to withdraw, or the termination trial.

Scholts should be dismissed as GAL because she could no longer serve her purpose after counsel withdrew and J.B. did not appear. The trial court agreed and dismissed Scholts as J.B.'s GAL.

The termination trial proceeded, and the State presented four witnesses: Dr. Jeffrey Lee, who conducted a psychological evaluation of J.B.; Heather Peddie, T.D.W.'s therapist; Kevin Storm, the family's social worker; and Kelly Burgad, the court appointed special advocate and GAL for D.D.W. and T.D.W. The trial court found that J.B. was unfit to parent D.D.W. and T.D.W. and that "[i]t is in the best interests of the children that their mother's parental rights be terminated and that they can have a permanent placement" with their current adoptive foster parents.

Sometime in December, J.B. contacted Elcock for an update on the termination proceedings. At that time, J.B. told Elcock that she wanted to appeal the termination.

On February 3, 2015, Elcock filed notices of appeal and motions to accept late appeal.[6] Elcock presented orders of indigency and filed statements of arrangements. On February 10, 2015, Lisa Tabbut was appointed as J.B.'s counsel and filed a notice of appearance with this court.

We accepted and consolidated J.B.'s late appeals. The commissioner referred the appeal to a panel of judges for an accelerated decision.

ANALYSIS

A parent has a fundamental right to care and custody of her children. *In re Dependency of A.G.*, 93 Wn. App. 268, 279, 968 P.2d 424 (1998). But, that fundamental right "is held in tension

[6] There is no record that Elcock was (re)appointed as J.B.'s counsel, nor is there a record that Elcock filed a notice of appearance following his withdrawal.

with rights of others, here the rights of these children." *In re Welfare of A.G.*, 155 Wn. App. 578, 589, 229 P.3d 935 (2010); *see A.G.*, 93 Wn. App. at 279. The legislature recognized this tension in RCW 13.34.020, which states:

> The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.

J.B. argues that the trial court erred by allowing Elcock to withdraw at the start of her termination trial. Specifically, J.B. claims that the trial court (1) erred when it allowed Elcock to withdraw without her express permission before the start of J.B.'s termination trial; (2) denied J.B.'s right to counsel at the termination trial, which she requested and was entitled to; and (3) erred by entering findings of fact and conclusions of law because she was denied her right to counsel. The trial court did not deny J.B.'s right to counsel by proceeding to trial because J.B. waived her right to counsel by her conduct. Thus, we affirm.

A. WITHDRAWAL OF COUNSEL

J.B. argues that the trial court erred when it allowed Elcock to withdraw before the start of her termination trial without her permission and when she was not present. We disagree.

J.B. claims that the trial court erred by allowing counsel to withdraw without her explicit permission. We disagree.

We review a trial court's decision on counsel's motion to withdraw for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 743, 940 P.2d 1239 (1997); *see State v. Shelmidine*, 166 Wn. App. 107, 111, 269 P.3d 362, *review denied*, 174 Wn.2d 1006 (2012). A court abuses its discretion when its decision is unreasonable, based on untenable grounds, or for untenable reasons. *A.G.*, 93 Wn. App. at 276 n.3.

Elcock moved to withdraw after he made repeated efforts to have J.B. contact him to participate in the preparation of her case for trial. Elcock expressly told J.B. that he needed her participation in order for him to present her case. J.B. did not respond. Despite being made aware of the hearing date for the motion to withdraw and the trial date, J.B. did not appear. Counsel cannot ethically or effectively represent a client when counsel does not know the client's position on the relevant issues. *In re Dependency of E.P.*, 136 Wn. App. 401, 406, 149 P.3d 440 (2006). Therefore, under these circumstances, the trial court did not abuse its discretion by allowing Elcock to withdraw the morning of J.B.'s termination trial where Elcock represented that he did not feel that he could adequately represent J.B.'s interests based on her lack of communication.

B. RIGHT TO SUBSEQUENT ASSIGNMENT OF COUNSEL

J.B. argues that she was denied her right to counsel at the termination trial when the trial court heard the trial without the legal representation that she requested and was entitled to. We disagree.

Washington guarantees a parent the right to counsel in termination proceedings because of the significant interests involved. RCW 13.34.090(2); *In re Dependency of V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006). Under RCW 13.34.090, counsel shall be provided when an indigent

parent appears in a proceeding or requests the court to appoint counsel. *In re Welfare of G.E.*, 116 Wn. App. 326, 333, 65 P.3d 1219 (2003). But the right to counsel is not absolute.

A parent can waive the right to counsel. *E.P.*, 136 Wn. App. at 405. A parent can waive the right to counsel in three ways: "(1) voluntarily relinquish the right, (2) waive it by conduct, or (3) forfeit it through 'extremely dilatory conduct.'" *E.P.*, 136 Wn. App. at 405 (quoting *G.E.*, 116 Wn. App. at 334).

We review a trial court's determination that a defendant has validly waived the right to counsel for abuse of discretion. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 667 n.4, 260 P.3d 874 (2011) (citing *State v. Hahn*, 106 Wn.2d 885, 900, 726 P.2d 25 (1986)). The burden of proof is on the defendant asserting that her right to counsel was not waived. *State v. Smith*, 50 Wn. App. 524, 528, 749 P.2d 202, 110 Wn.2d 1025 (1988).

Here, J.B. requested counsel and the trial court found that based on her indigent status, she was entitled to appointed counsel. The counsel initially appointed to represent J.B. was substituted by Elcock. The trial court also appointed a GAL for J.B. to assist J.B. in communicating and cooperating with her appointed counsel, which J.B. was having difficulty with doing. Subsequently, the trial court allowed Elcock to withdraw from his representation of J.B. because of J.B.'s lack of communication with him and her lack of participation in his efforts to prepare a defense of her case. The trial court did not appoint new counsel.

The record does not show that J.B. voluntarily relinquished her right to counsel. However, the trial court was not required to appoint new counsel if J.B. waived her right to counsel by conduct or forfeited her right to counsel. *E.P.*, 136 Wn. App. at 406; *see G.E.*, 116 Wn. App. at

338. Thus, the question becomes whether J.B. waived her right to counsel by her conduct or forfeited her right to counsel.

Forfeiture results from extremely dilatory conduct. *E.P.*, 136 Wn. App. at 405. Waiver by conduct, a hybrid of waiver and forfeiture, "can be based upon conduct less severe than that constituting forfeiture." *City of Tacoma v. Bishop*, 82 Wn. App. 850, 859, 920 P.2d 214 (1996). A parent can waive the right to counsel by engaging in dilatory tactics or hindering a proceeding. *G.E.*, 116 Wn. App. at 334. Waiver by conduct requires that the parent be advised of the consequences of her actions; forfeiture can occur even where the parent was not warned about the consequences of her actions. *Bishop*, 82 Wn. App. at 859; *E.P.*, 136 Wn. App. at 405.

In *In re E.P.*, the mother was periodically out of contact with her attorney before the termination trial and failed to appear for the trial. *Id.* at 404-05. The mother's attorney "advised the court that [the mother] had not communicated with him even though" he had sent her letters and that "he had no idea what the mother's position was relative to termination of her parental rights." *Id.* at 404, 406. The trial court allowed the mother's attorney to withdraw. *Id.* at 404. The mother appealed, arguing that the trial court violated her statutory right to counsel by allowing counsel to withdraw at the beginning of the termination trial. *Id.* at 404.

The *E.P.* court affirmed the trial court's decision to allow counsel to withdraw, holding that because of the mother's inaction, the attorney could not effectively or ethically represent her in the termination trial. *Id.* at 406-07. And, the court held that because the mother forfeited her right to counsel, the court was not required to appoint new counsel. *Id.* at 406.

Similarly, the *A.G.* court also focused on the mother's own conduct. At the time of the termination trial, the mother had been out of contact with her lawyer and social worker for months, made no effort to appear for hearings or make her whereabouts known, and had failed to participate in the court-ordered drug treatment program. *A.G.*, 93 Wn. App. at 273-74. The mother did not appear for the termination trial, and her attorney asked to withdraw, recounting his diligent efforts to reach her and lack of communication. *Id.* at 274. The trial court allowed the mother's counsel to withdraw at the beginning of the termination trial. *Id*. The termination trial proceeded, and the mother's parental rights were terminated. *Id.* at 275. The *A.G.* court held that because of the mother's "inaction, [counsel] could not effectively or ethically represent" her, and her due process rights were not violated. *Id.* at 278.

The circumstances here are similar to both *E.P.* and *A.G.* Like *E.P.* and *A.G.*, J.B. was unavailable and out of contact with Elcock, and Elcock represented to the trial court that he did not have enough contact and information to represent her interests. Further, J.B. had repeatedly demonstrated a lack of effort to maintain her parental rights. J.B. failed to complete court ordered services; and she did not visit her children since they were removed from her care in 2012, despite Storm's repeated offers. The trial court appointed a GAL for J.B. because J.B. had demonstrated difficulty in communicating and cooperating with appointed counsel. Further, J.B. missed her scheduled appointments with Elcock, and failed to appear at the hearing on Elcock's motion to withdraw and the termination trial. J.B. did not reappear until over a month after her rights had been terminated. J.B.'s inaction prevented Elcock from effectively and ethically representing her. Like *E.P.* and *A.G.*, "the lack of contact between appointed counsel and the parents, together with

the parent's absence on the day of trial, made it impossible for counsel to effectively represent the parents in the termination trial." *V.R.R.*, 134 Wn. App. at 585.

J.B. argues that the record does not support waiver by conduct. She argues that she had contact with Elcock twice, and the September 10, 2014 meeting lasted three hours. J.B. asserts that "[d]uring those three hours, surely [Elcock] gleaned J.B.'s impression of the case and why J.B. thought it was wrong for the State to terminate her rights." Br. of Appellant at 16. However, her assertion is not supported by the record. Scholts testified that J.B. did not want to relinquish her rights, but neither Scholts nor Elcock reported any indication about "why J.B. thought it was wrong for the State to terminate her rights." While Elcock met with J.B. once for three hours, the time was spent reviewing particular documents and was not enough for Elcock to prepare for trial, mount a defense, or for Elcock to understand J.B.'s position sufficiently argue J.B.'s case.

J.B. also argues that she suffers from social anxiety, and that Elcock "knew of [her] social anxiety diagnosis." Br. of Appellant at 16. J.B. claims that "Elcock should not have been taken aback by J.B.'s inability to be a more effective communicator." Br. of Appellant at 16. However, the record does not support J.B.'s claims.

There is no record of J.B. receiving a diagnosis of social anxiety. Storm speculated that she suffered from social anxiety, but Dr. Lee gave her a "provisional diagnosis of delusional disorder, persecutory type." CP (T.D.W.) at 136. Elcock stated that without communication, he could not represent J.B.'s interests. J.B. offers no authority for the argument that an attorney can effectively represent his client without communication if the client suffers social anxiety. Further, J.B. offers no authority for the argument that social anxiety excuses a parent's lack of participation

in termination proceedings or failure to communicate with her attorney. Where no authorities are cited in support of a proposition, this court is not required to search out authorities, but may assume that a diligent search has produced none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). In the absence of authority, J.B.'s argument fails.

Under these circumstances, J.B.'s absence and inaction "made it impossible for counsel to effectively represent [her] in the termination trial." *V.R.R.*, 134 Wn. App. at 585. Therefore, the trial court did not violate J.B.'s right to counsel by allowing Elcock to withdraw and not appointing new counsel. And, the trial court heard testimony from four witnesses and considered documentary evidence. The record reflects that the trial court considered the case on its merits. "[A] child's right to a stable home cannot be put on hold interminably because a parent is absent from the courtroom and has failed to contact his or her attorney." *In re Dependency of C.R.B.*, 62 Wn. App. 608, 616, 814 P.2d 1197 (1991). Therefore, we affirm.

C. FINDINGS OF FACT AND CONCLUSIONS OF LAW

J.B. assigns error to the "[a]ll of the findings of fact and conclusions of law regarding termination of the parent-child relationship" because they "were entered in error as J.B.'s right[s] to parent were improperly terminated as J.B. was denied her right to counsel at the termination of parental rights trial." Br. of Appellant at 1. J.B. does not, however, offer any argument or authority to support her claim. In the absence of argument or authority, J.B. waives the assignment of error. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Furthermore, J.B. waived her right to counsel by her own inaction and was not denied her right to counsel.

Therefore, J.B.'s claim that the trial court's findings are erroneous because she was denied her right to counsel fails.

We affirm.

A majority of this panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Sutton, J.