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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re E.H. et al., Persons Coming Under the
Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN
AND FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

L.S. et al.,

Defendants and Appellants.

A142765

(Contra Costa County Super. Ct.
Nos. J13-00583, J13-00584,
J13-00585)

These are appeals by the mother and the father from orders terminating their parental rights. Chronology will figure significantly in resolving the contentions advanced, which largely center around a single issue.

On May 9, 2013, respondent Contra Costa County Children and Family Services Bureau (Bureau) filed a petition seeking to have appellants' three children¹ declared

¹The three minors at issue here are the children of both appellants. The oldest was born in 2010, and the twins were born in 2012. However, the mother was also the parent of four older children with other fathers. At the time the dependency of all seven commenced, the older children ranged in age from six to 12. As will be seen, all seven children were involved in the dependency, but they seem to have been kept in two separate groups, and the dependency proceeded along what might be described as separate tracks for appellants' children and the other four. (See fn. 4, *post.*)

dependents of the juvenile court by reason of appellants' alcohol abuse, plus the mother's "untreated depression." The next day the court ordered the children detained from appellants' custody.

On May 22, 2013, appointed counsel for the mother requested appointment of a guardian ad litem for mother. After conducting a closed hearing with the mother and her counsel, the court appointed a guardian ad litem for the mother.

At the July 1, 2013 jurisdictional hearing, both parents in effect admitted the amended allegations of the petition. The mother's guardian ad litem was present and approved of this decision. The Judicial Council "Waiver Of Rights-Juvenile Dependency" form was signed by mother and by the guardian ad litem.

At the July 31, 2013 dispositional hearing, the court declared the minors dependents, ordered reunification services for the parents, and set a six-month review hearing.

At the February 26, 2014 six-month review hearing, the court terminated reunification services and set a hearing pursuant to Welfare and Institutions Code section 366.26² to select a permanent placement plan. As authorized by rule 8.452 of the California Rules of Court, the mother filed a petition for an extraordinary writ to overturn these decisions on the ground that the juvenile court erred in terminating reunification services after only six months. On April 18, 2014, we denied the petition on its merits. (*L.S. v. Superior Court* (Apr. 18, 2014, A141162) [nonpub. opn.])

In June 2014, the father and the mother each filed a motion pursuant to section 388.³ The father sought to have both the termination of reunification services and

²Statutory reference are to this code.

³"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both ' "a legitimate change of circumstances" ' and that undoing the prior order would be in the best interest of the child. [Citation.] The petition is addressed to the sound discretion of the juvenile

the setting of the permanent plan hearing modified on the grounds that he “has maintained sobriety” and should now be trusted with custody of the minors. The mother also sought custody, claiming that she had “successfully completed a residential drug treatment program and graduated to a long term clean and sober living program.” On June 27, having conducting an extensive evidentiary hearing on the motions, and a second day exclusively for arguments, the court denied them, concluding that both parents had failed to establish “that the circumstances have changed” or “that it would be in the best interest of the children.”

With the parties’ agreement, the court proceeded directly to the termination issue, considering the evidence produced in connection with the parents’ modification motions. However, decision was not reached until August 11, 2014, after the court denied the parents’ motions to reopen evidence, and then heard argument. The court accepted the Bureau’s recommendation and terminated parental rights.

THE MOTHER’S APPEAL

The mother filed a notice purporting to appeal from “8-11-2014, per W&I sect. 366.26; 6-27-2014, Denying W&I sect. 388 Motion to Change Court Order; 6-27-2014, Denial of Motion to Relieve Minors Counsel; Denial of Motion for Mistrial.” Her opening brief, however, points to but a single claimed error—the appointment of the guardian ad litem. According to the mother, this error was so elemental that it invalidated every judicial action that followed. But there is a principle of appellate practice that may frustrate the mother’s attack.

“A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment.” (§ 395, subd. (a)(1).) There is, however, an important corollary. “ ‘The dispositional order is the “judgment” referred to in section 395, and all subsequent orders are appealable. [Citation.] “ ‘A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an

court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citation.]” (*In re S.J.* (2008) 167 Cal.App.4th 953, 959–960.)

appeal from a later appealable order.’ [Citation.]” [Citations.]’ [Citation.] Stated another way, ‘[a]n appeal from the most recent order in a dependency matter may not challenge earlier orders for which the time for filing an appeal has passed. [Citation.]’ [Citation.] ‘“Permitting a parent to raise issues going to the validity of a final earlier appealable order would directly undermine dominant concerns of finality and reasonable expedition,” including “the predominant interest of the child and state” [Citation.]’ [Citation.]” (*In re A.H.* (2013) 218 Cal.App.4th 337, 351.) This court has said the same thing on numerous occasions. (See, e.g., *In re Jesse W.* (2001) 93 Cal.App.4th 349, 355; *In re Janee J.* (1999) 74 Cal.App.4th 198, 206–207.)

This principle is known as the waiver or forfeiture rule. “[A]pplication of the forfeiture rule is not automatic. [Citations.] But the appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.] Although an appellate court’s discretion to consider forfeited claims extends to dependency cases [citations], the discretion must be exercised with special care in such matters. ‘Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code.’ [Citation.] Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance.” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

One of the few errors that is deemed sufficiently fundamental to evade the forfeiture rule is the *erroneous* appointment of a guardian ad litem. Acknowledging the forfeiture rule, the mother cites decisions recognizing this exemption. (*In re Joann E.* (2002) 104 Cal.App.4th 347, 360; *In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1190; cf. *In re M.F.* (2008) 161 Cal.App.4th 673 [termination order reversed because trial court *failed* to appoint guardian ad litem].)

Injecting the issue of whether the appointment is erroneous puts a reviewing court right in the middle of a chicken or egg argument. To ascertain whether the appointment is forfeited—that is, it will not be considered—the reviewing court must examine the merits of the appointment to determine if it was erroneous. If, having looked at the

merits, the reviewing court discerns no error, the issue of the appointment need not be formally considered because the issue was forfeited for failure to raise it at the earliest opportunity. Stated another way, the reviewing court must first examine the merits to determine if the appointment was erroneous and thus qualifies for the exemption.

In any event, the standards for determining whether appointment of a guardian ad litem for a parent in dependency was erroneous have been settled by our Supreme Court:

“In a dependency case, a parent who is mentally incompetent must appear by a guardian ad litem appointed by the court. [Citations.] The test is whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case. [Citations.] The effect of the guardian ad litem’s appointment is to transfer direction and control of the litigation from the parent to the guardian ad litem, who may waive the parent’s right to a contested hearing. [Citations.]

“Before appointing a guardian ad litem for a parent in a dependency proceeding, the juvenile court must hold an informal hearing at which the parent has an opportunity to be heard. [Citation.] The court or counsel should explain to the parent the purpose of the guardian ad litem and the grounds for believing that the parent is mentally incompetent. [Citation.] If the parent consents to the appointment, the parent’s due process rights are satisfied. [Citation.] A parent who does not consent must be given an opportunity to persuade the court that appointment of a guardian ad litem is not required, and the juvenile court should make an inquiry sufficient to satisfy itself that the parent is, or is not, competent. [Citation.] If the court appoints a guardian ad litem without the parent’s consent, the record must contain substantial evidence of the parent’s incompetence.” (*In re James F.* (2008) 42 Cal.4th 901, 910–911.)

Although our discussion in this opinion is severely constricted by the need for confidentiality—as represented by the sealed transcript preceding the appointment and sets of redacted and unredacted briefs from the mother and the Bureau—we have concluded that the appointment satisfied constitutional requirements. Therefore, there is no reason not to apply the forfeiture rule. Moreover, if the merits of the mother’s various arguments were properly preserved for review, they would not justify reversal.

We note that the circumstances here furnish a particularly telling illustration of the justification for the rule. The appointment of the guardian ad litem for the mother occurred in May 2013. Thereafter, the mother went through her entire involvement with the dependency without protesting the appointment. She could have appealed from the dispositional order, when the damage of an erroneous appointment could have been minimized. But she did not. She could have made the appointment an issue in the petition for extraordinary relief she filed following the six-month review hearing. But she did not. Even at the actual termination hearing that ended in August 2014 the mother did not protest the appointment. It is only with this appeal, which has now extended almost two and one-half years after the appointment, does the appointment elicit her first protest. At this remove, considerations of stability for the minors have paramount importance. (*In re S.B.*, *supra*, 32 Cal.4th 1287, 1293; *In re A.H.* (2013) 218 Cal.App.4th 337, 351.)

THE FATHER’S APPEAL

The father’s notice identifies his appeal as being only from the August 11 order terminating his parental rights. The sole contention he advances is framed in his opening brief as follows: “The denial of the motion for disqualification of minors’ counsel was an abuse of discretion because Ms. Logger [minors’ counsel] continued to have a conflict with her prior clients and was required to conduct investigation and argue against their interests; thus the denial of the petition for modification and termination of parental rights was an abuse of discretion and must be reversed and remanded with directions that the disqualification motion be granted and new hearings be held.”

Background

At the start of the evidentiary portion of the hearing on the parents’ modification motions (June 26, 2014), all seven of the dependents (see fn. 1, *ante*) were represented by a single counsel, Mary Logger, Esq. The hearing ended with the scheduling of argument for the next day.

The next day (June 27, 2014), the court opened the hearing by noting “an issue came up as a conflict. [¶] Mr. Stern [the mother’s counsel], did you wish to place on the record also in this matter?” Mr. Stern responded:

“Yes, Your Honor. [¶] My motion is, I guess ostensibly, a motion for a mistrial. I would request that the Court relieve Legal Aid Society from representation of these three minors. It became evident to me late yesterday and then this morning that Legal Aid, in representing these three minors and taking an active role in questioning and cross-examining all of the witnesses in the hearing yesterday involving the three minors . . . [and the] four half-siblings And yesterday’s testimony included questioning and testimony regarding two of the . . . half-siblings molesting [E.H., one of appellants’ children].

“And Ms. Logger, from Legal Aid representing the H[.] children [i.e., appellants’ children], was actively involved in that questioning and the taking of that testimony. I believe that was a conflict of interest. The Court did relieve Ms. Logger of Legal Aid from representing the half siblings *this morning* in that on-going case. (Italics added.)

“I have to renew my motion in this case for a mistrial and to have Legal Aid relieved as unfortunately I think Ms. Logger was caught on the horns of a dilemma. [¶] It was only recently that we all received evidence that two of the half siblings molested E[.] Within the last couple months, it came out. It was admissions by Ms. Logger’s clients. I don’t know exactly when she received that information, but it was clear yesterday that part of the .26 hearing was the issue of once members of a set of siblings molesting another set and how that affects reunification going forward or termination of parental rights for the H[.] children. I think Ms. Logger was put in the untenable position of questioning regarding what one of her clients did to another one of her clients.

“Unfortunately, that bell has now been rung. And I think that as an attorney we have an on-going duty and obligation to represent only one client. And once we have a situation where one of our clients or one of our past clients has an interest that is in opposition to each other, I don’t think we can represent either of those clients. It’s very similar in a divorce proceeding where an attorney has represented one divorcing party in

a previous business transactions. That attorney is foreclosed from representing anybody in that divorce. [¶] . . . [¶]

“I think Ms. Logger is in a position of not bringing forth that information to this court in another proceeding against another one of her clients, but protecting her client from that admission. And that did not occur. And I don’t think it can ever occur at this point because of that conflict. [¶] Ms. Logger has an on-going responsibility to protect the [half-sibling] children now, even though they’re ex-clients, because she has that on-going consideration. How could you . . . possibly [expect her to] argue in this case regarding the H[.] children because the allegations involved her other ex-clients? She has to throw somebody under the bus.”

The court then summarized: “So the position of your motion is both requesting a mistrial, but first you’re asking me to determine if there’s a conflict with this particular attorney, the child’s [*sic*: children’s] attorney in this case. I’ve already determined in the half siblings case that there was a conflict and relieved her.”

Counsel for the Bureau “question[ed] whether there was an actual conflict” as found by the court, and urged the court to allow Logger to continue serving as the attorney for appellants’ three children given the late stage of the dependency.

Ms. Logger essentially agreed with the Bureau: “[W]e are here today for a 388 to determine the limited issue whether services should be extended to these parents. That is the only issue before the Court. . . . We’re not here to determine if a molest occurred. [¶] This Court heard testimony regarding the propriety of extending those services. . . . The molest is a side issue. . . . [¶] . . . [W]e’re not fighting the fact that the child was molested. We’re beyond that. We’re now here to determine whether, based upon the performance of these parents at the 11th hour, whether they deserve a second chance. That’s all we’re here for.”

The father's counsel supported Mr. Stern's motion for the mother.⁴ Counsel argued to the court:

“Let me focus on the issue of the relevance of the molestation, which Ms. Logger believes is really nothing relevant at all. That was a big factor in her cross-examination as to the parents' inability to supervise the children, and that's . . . one of the big issues is whether these parents should be given more time. Given the fact that they have addressed the substance abuse, the anger management and the parenting skills, there was an inference that the parents lacked parenting skills because they failed to supervise an alleged molestation, which was a very important issue. Especially when we informally discussed this case in another department, that was a critical issue.”

The court then ruled as follows:

“I have found a conflict in the [half-sibling] matter earlier today and relieved counsel for the minors in that case. [¶] Having done that and having looked at everything that is before me at this point with the 388 is my first decision, I do not find a conflict for this attorney to continue to represent these three children in this case.

“I do not find that the allegations of sexual molestation, they're not before me. There's no supplemental petition before me on that. [There] are bits of evidence that will be presented or have been presented. There is no criminal charge pending at this time. And if there were, Ms. Logger is not the representative of any of these children in the criminal charges. This is a dependency case. [¶] So I am not going to find a conflict at this point in time in this case. [¶] With regard to the motion for mistrial, [¶] I will deny the motion for mistrial on the 388”

Review

On this subject our Supreme Court has held: “[T]he court should not automatically appoint separate counsel for separate children. In a dependency case, each

⁴Before hearing from father's counsel, the court noted “for the record that in the [half-sibling] matter—which . . . was on earlier today, [a]nd . . . you [father's counsel] did ask to appear and make comments in support of that case's motion for the Court to find a conflict.”

parent generally has separate counsel. Another attorney represents the social services agency. Counsel for the children is the fourth attorney in the case. . . . If each child [has] separate counsel, matters could become unwieldy, especially when there are several children; so many attorneys could interfere with the need to resolve dependency questions expeditiously as well as fairly. . . . In addition to the obvious inefficiencies of having so many attorneys—who might create scheduling difficulties and push the case in contradictory directions—and the serious draining of scarce public resources, separate counsel could also unnecessarily make siblings feel they are adversaries, which could harm their ability to provide mutual emotional support. Having a single attorney would also permit the children to consult with their attorney together rather than separately, which can be quite beneficial in the often intimidating environment of judicial proceedings. Children’s interests are not always adversarial, and they should not always be treated as such.

“On the other hand, sometimes the interests of siblings are so conflicting that they should have separate counsel. We must determine the exact standard for trial courts to apply when first appointing counsel and thereafter.

“Some courts have held that the court must appoint separate counsel for siblings only when an actual, not merely potential, conflict arises among them. [Citations.] Another said that there must be separate counsel whenever a ‘potential conflict of interest’ exists. [Citation.] The relevant statute seems to require separate counsel only when an actual conflict exists. [Citation.] . . . ‘Counsel for the child may be a district attorney, public defender, or other member of the bar, provided that the counsel does not represent another party or county agency whose interests *conflict* with the child’s.’ (§ 317, subd. (c), italics added.) [¶] . . . [¶] . . . We believe . . . that in the dependency context . . . an attorney may not represent multiple clients if an actual conflict of interest between clients exists and may not accept representation of multiple clients if there is a reasonable likelihood an actual conflict of interest between them may arise.” (*In re Celine R.* (2003) 31 Cal.4th 45, 55–57.)

Whether the juvenile court's action is attacked as the denial of the father's mistrial motion, or the refusal to relieve Ms. Logger and substitute new counsel, the same abuse of discretion test applies. (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 678 [mistrial]; *In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1262 [relief of counsel].)

The father's actual contention appears to have two parts: (1) "minor's [*sic*] counsel was required to investigate whether E[.], the allegedly molested child] had any recourse for the sexual abuse by her siblings, whether there were any funds available to compensate her for the abuse, and whether her sibling should be criminally prosecuted for the abuse. If it was determined that there was a potential cause of action that needed to be pursued, minor's counsel was required to recommend the appointment of counsel and a separate guardian ad litem to oversee E[.]'s potential claims"; and (2) "[m]inor's counsel had an actual and prejudicial conflict of interest because she needed to argue against Levi [one of the half-siblings] and the older siblings' interests in order to continue representing [appellants' three children]." We do not agree.

Initially, we note that by finding "I do not find a conflict for this attorney to continue to represent these three children in this case," the juvenile court in effect determined that there was no actual conflict, and the father does not directly claim this finding was erroneous. Indeed, his first argument appears to concede as much by speaking of "a potential cause of action" and "E[.]'s potential claims." On the other hand, the father's second argument is premised on an actual conflict.

We conclude the court's finding is supported by substantial evidence. Again, chronology is important. One thing that is clear from the excerpts quoted above is that the matter of real or alleged sexual abuse was confirmed for the first time at the June 26 hearing, and that it was completely unexpected. No one disputed the mother's counsel when he stated "It was only recently that we all received evidence that two of the half siblings molested E[.]" The father does not argue that the minors' counsel was professionally deficient for not discovering it sooner. The court's action in relieving Ms. Logger from representing the other four dependents appears to have been a purely

prophylactic measure. All of the father's specified "investigation" is in the future, not in the past. Moreover, contrary to the father's second argument, Ms. Logger did not "argue against Levi," but did in fact argue that "there is a bond between Levi and E[.]"

Ms. Logger did go on to argue that, notwithstanding this bond, the needs of the youngest of appellants' children (i.e., the twin infants) "for permanency and stability should outweigh that bond because I think to remove them from the caregiver that they have so closely bonded with would be detrimental. I just can't imagine the parents would want these children to languish because Levi is attached to her. [¶] . . . and to disrupt them now, I think would cause severe detriment to their psychological development." The father sees this argument as proof of the conflict because it was "in direct contravention to the wishes of her former client, Levi." Such a view misperceives counsel's role. "Despite the seemingly inherent conflict in all dependency cases where minor's counsel takes a position contrary to the minor's stated wishes, the Legislature has expressly provided that the best interests of the minor, not his or her wishes, determine the outcome of the case. [Citations.] . . . '[T]he paramount duty of counsel for minors is not zealously to advocate the *client's* objectives, but to advocate for what the *lawyer* believes to be in the client's best interests, even when the lawyer and the client disagree.' [Citation.] In this regard, minor's counsel may not 'act as a mouthpiece' for the child or advocate a position counsel has reason to believe might endanger the child." (*In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1541.) This is what Ms. Logger did.

Our analysis should not ignore the practical realities. The issue of conflict of interest arose almost literally at the last minute of this dependency. Reunification services had been tried and terminated. The Bureau's caseworker advised the court: "The children have been placed for over one year in their current foster home. This is a stable placement and the family is willing and able to adopt them." Only the most compelling reason would force the juvenile court to reverse course at such a late date. It is clear the court here did not think the potential conflict between Ms. Logger representing both groups of children constituted such a reason.

“A court should set aside a judgment due to error in not appointing separate counsel for a child or relieving conflicted counsel only if it finds a reasonable probability the outcome would have been different but for the error.” (*In re Celine R.*, *supra*, 31 Cal.4th 45, 60.) That probability is not shown here as a matter of law.

The orders are affirmed.

Richman, Acting P.J.

We concur:

Stewart, J.

Miller, J.

A142765; *In re E.H. et al.*