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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

J.E.,

Defendant and Appellant.

E055491

(Super.Ct.No. INJ1100360)

OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton,
Judge. Dismissed.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant
and Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,
for Plaintiff and Respondent.

J.E. (Father) appeals, pursuant to Welfare and Institution Code section 395,¹ from the juvenile court's decision to refuse appointment of a guardian ad litem (GAL) for him made at the jurisdictional/dispositional hearing.²

I

PROCEDURAL AND FACTUAL BACKGROUND

A. *Removal from Mother's and Father's Custody*

On June 6, 2011, the Riverside County Department of Public Social Services (the Department) received a referral regarding general neglect by Father and Mother of six-year-old T.E. and four-year-old I.E. It was reported by someone at T.'s school that she suffered from severe anxiety and was prone to temper tantrums that involved kicking, screaming, and crying. Father was reported to be schizophrenic. T., I., Mother, and the maternal grandmother (Grandmother) were staying with an aunt because Father had been throwing and breaking things.

On June 8, 2011, the Department received a second referral. It was reported that on June 2 Father had threatened to cut and beat Mother. Father had been screaming and throwing things in the driveway of their residence with T. and I. present. Another referral was received that day that Father had threatened to use a knife on Mother and

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

² Counsel, appearing on behalf of M.S. (Mother) on appeal, filed a brief pursuant to *In re Sade C.* (1996) 13 Cal.4th 952 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493]. On June 5, 2012, this court gave Mother 30 days in which to file her own brief. Mother failed to do so, and on July 12, 2012, this court dismissed the appeal as abandoned under the authority of *Sade C.*, at page 994.

Grandmother. Father threatened to hit Grandmother over the head with a baseball bat. It was also reported that Mother had attempted to commit suicide the prior year.

On June 8, 2011, a social worker from the Department, accompanied by Riverside County Sheriff's Department Deputy Paixao, went to the home belonging to Father and Mother. Grandmother had obtained a restraining order against Father, and Deputy Paixao intended to serve Father with the order. Mother appeared at the door. When Deputy Paixao attempted to serve the restraining order, Mother yelled at him and said he needed a warrant to enter the home. She also told them that she and Father were well-known attorneys.

The social worker was informed by five different neighbors that there were loud arguments daily at the home. They had observed Father walking around gazing at the sun for hours. All of the neighbors expressed fear of Father and concern for the children.

The social worker and Deputy Paixao went to T.'s school. T. told them that Father was "psycho" and yelled at Mother and Grandmother. She said he broke dishes. T. also reported she had seen Father push Mother. T. was afraid of him. She told them that I. was with Mother and Father. People at the school expressed concern with T.'s behavior because she appeared very disturbed, easily agitated, and frustrated. Mother was contacted and threatened that the Department needed a warrant to speak with T. Mother was found at the Palm Desert Sheriff's station filing a complaint that Grandmother and the maternal aunt, M.K., had taken both T. and I. without her permission. Mother indicated that they had taken the children because Father had been throwing dishes and food in the house. Mother was speaking rapidly, was shaking, and

appeared nervous. She claimed that Grandmother and M.K. were tracking her movements. She contested the restraining order against Father and claimed she was going to sue the sheriff's department.

The Department continually asked Mother to see I. and Father. Mother finally took a social worker to a park where she claimed that I. and Father were located. They were found lying down in the park. It was very hot outside. Father had difficulty standing still, and his fingers were moving rapidly. He focused on the service of the restraining order, claiming Grandmother had a lot of power. Father and Mother were advised that T. and I. were being placed in protective custody.

The children were transported to the Department office. I. reported she was hot and thirsty. T. informed the social worker that Father was crazy and needed help. I. also reported being scared of Father and said she wanted to go with Grandmother. The children could not be placed with Grandmother because she lived with Mother.

According to the detention report, on December 7, 2010, Father was admitted to the UCLA Neuropsychiatric Hospital for 14 days on a mental health hold for threatening to kill Mother and Grandmother. Father had punched holes in the walls and had tried to hit Grandmother in the head with a bat. Father had threatened to kill Mother and Grandmother and to get a gun and shoot everyone in the house. He had disappeared for several weeks and spent a huge amount of money on his credit card. Mother was diagnosed with bipolar disorder in 2009.

On June 10, 2011, the Department filed a section 300 petition alleging a failure to protect and inability to provide proper care due to mental illness and developmental

disability or substance abuse (§ 300, subd. (b)) and serious emotional damage (*id.*, subd. (c)), based on Father's mental illness, evidenced by his angry outbursts and hospital hold; domestic violence between the two; Mother's suffering from mental illness, as evidenced by her attempted suicide in 2009; Mother's neglect of I., evidenced by leaving her in the care of Father; and severe emotional damage to T.

On June 13, 2011, the juvenile court found a prima facie case and ordered T. and I. be detained and remain in the custody of the Department with a foster family.

B. Jurisdictional/Dispositional Reports and Hearing

In a jurisdictional/dispositional report filed on July 6, 2011, the Department recommended that I. and T. remain in the custody of M.K. (where they had been placed on June 13, 2011). Reunification services were recommended for Mother and Father. It was also recommended that both Father and Mother participate in psychiatric evaluations and that Father's medication be evaluated to see if it was helping his underlying mental health conditions.

T. was interviewed on June 23, 2011. She reported that Father broke things and wanted to hurt her, Mother, and Grandmother. She also reported that Mother and Father fought and argued a lot. T. did not want to go home. At one point, T. put her head down, stating that she was tired of the fighting, arguing, and crying. I. was also interviewed. She reported that Father's "brain [was] not good" and that he yelled at her, T., Mother, and Grandmother. Mother and Father yelled at each other. I. reported she was scared when she and Father were alone in the park.

Both children felt comfortable staying with M.K. T. was developing normally but had a hard time focusing at school. Mother and Father had not acknowledged the concerns of the Department and had done nothing to mitigate the problems that brought the children to the attention of the Department.

There was no record of visitation between Father and the children, but there was a restraining order in effect. T. had outbursts and did not want to visit with Mother.

A jurisdictional/dispositional hearing was to be conducted on July 11, 2011. Father was present with counsel, Susan McPhee. He was declared the presumed father. The hearing was continued at his request. The restraining order that was served at the time of the detention had been dismissed. Father agreed at the hearing to submit to a psychological evaluation. However, counsel for Father stated, "Your Honor, as one of the allegations actually has to do specifically with a mental health diagnosis, I don't think it's in my client's best interest at this time to do a psychological evaluation."

An addendum report was filed on August 10, 2011. On August 2, 2011, M.K. informed the Department she could no longer care for the children. She could not provide Mother and Father with weekly telephone visits because Mother made it impossible. On August 4, 2011, the children were placed in a foster home.

Mother and Father missed a visit with the children. Mother claimed she got the date mixed up, then stated she had been in a car accident. On July 28, 2011, Father answered Mother's telephone. He claimed to be contacting private attorneys but had not received a call back. He did not set up a time to meet with the Department.

On August 4, 2011, a team decision meeting was held. Mother, Father, Grandmother, M.K., and another maternal aunt were present. Mother accused M.K. of filing the restraining order against Father and threatened to sue her in federal court. She also threatened to file a lawsuit against the Department. M.K. refused to take care of the children because of Mother's behavior. Father became belligerent when he was advised that T. and I. would not be returned to his care. Father threatened M.K. He did not want T. and I. to go to foster care because he was afraid they would be sexually abused. He said that M.K. needed to be "put against a wall and shot." Mother tried to calm him down, but he just kept getting louder. Father was asked to leave the meeting.

In July 2011, Father had been denied Social Security disability benefits. Father had claimed inability to work because of glaucoma, coronary problems, and mental illness. The letter Father received from the Social Security Administration stated that his condition was not severe enough to be considered disabling. His medical records had been considered.

The contested jurisdictional/dispositional hearing was scheduled for August 23, 2011, but was continued. Father was not present but his counsel was. At that time, a temporary restraining order (filed by Mother's counsel) was issued against Father to stay away from Mother, Grandmother, and the children. According to an affidavit submitted in support of the restraining order, on August 22, 2011, Father had entered Mother's room and threw a law book at her, hitting her in the face. He then grabbed her by her foot and dragged her from the bed to the floor. He "stomped" on her head with his foot. He dragged her to Grandmother's room and punched Mother. Grandmother grabbed a

small table and tried to fight with Father. He broke one of the table legs. He also bit Mother's ear. Mother and Grandmother were able to get the bedroom door closed. He banged on the door with the table leg, making a hole in it. Mother called the police, and Father was arrested.

The jurisdictional/dispositional hearing was held on August 24, 2011. An amended petition was filed. The allegations had been amended to allege only under section 300, subdivision (b), and the only facts supporting the accusations were that Father had exhibited mental health issues evidenced by his hospitalization, which created a detrimental home environment; Mother and Father engaged in domestic violence; and Mother suffered from anxiety and depression, endangering the well being and safety of the children. At the hearing, the Department submitted on the reports and the amended petition. Father was incarcerated at the time for the events detailed in the temporary restraining order affidavit as outlined, *ante*.

At the hearing, an attorney identified as "Mr. Vinson" appeared in the juvenile court. Mr. Vinson had been contacted by Father's counsel, Ms. McPhee, to speak to Father to determine if he wanted a GAL appointed. Mr. Vinson stated that he spoke with Father that day, along with Ms. McPhee, about the proceedings. Father had told Mr. Vinson and Ms. McPhee he did not want a GAL appointed. Mr. Vinson stated to the juvenile court that he had advised Father that if he was appointed as the GAL, he would make decisions for Father that were in Father's best interest. Ms. McPhee confirmed the discussion and stated that after speaking with Father and Mr. Vinson, they had made a lot of "headway." She also confirmed that Father did not want a GAL appointed.

The following exchange occurred between the juvenile court and Father:

“Q: All right. [Father], is it true that you do not desire to have a [GAL]?”

“A: Yes, your honor.

“Q: . . . [Y]ou understand that if you desire to have a [GAL] and your attorney wanted you to have one, and it appears that she would be in agreement with that, you would be entitled to have a [GAL]; do you understand that?”

“A: Yes, sir.

Q: However, as has been indicated, if it came to a point in time where there was a disagreement between you and your attorney, or where your [GAL] disagreed with certain critical decisions in the case, I could agree to follow the direction of the [GAL] on that issue and ignore your independent wishes; do you understand that?”

“A: I do, your Honor.

“Q: All right. And having reviewed all of that, it’s your desire to proceed without a [GAL]; is that true?”

“A: At this time, your Honor.”

Mother agreed to plead no contest to the amended petition and filed a waiver of rights. Father had also submitted a waiver of rights. Both Mother and Father acknowledged in open court that they had signed the waiver of rights and understood what they were waiving. The juvenile court found the allegations true under section 300, subdivision (b) against both parents as alleged in the amended petition for jurisdictional purposes. It entered a dispositional order against Father, but disposition against Mother

was continued. Father was granted reunification services. As part of his case plan, Father was to participate in a psychiatric and psychological evaluation.

C. Further Proceedings

An addendum report was filed on September 22, 2011, in anticipation of a hearing on a permanent restraining order and the disposition proceeding as to Mother. It was recommended that T. and I. remain out of the custody of the parents and that family reunification services be provided to Mother and Father. Mother had failed to show up for her psychological evaluations. On August 24, 2011, T. and I. were moved to another foster home. They had started counseling, and T. was receiving services at school. I. needed medical attention for seizures.

At a court hearing on September 28, 2011, Father was not present, although the restraining order was to be heard, and counsel stated he had been released and was supposed to be at the hearing. The restraining order and disposition for Mother were continued to November 14, 2011.

An addendum report was filed on November 8, 2011. T. and I. had been placed back with M.K. on October 4, 2011. There was a report that Mother had tried to take T. and I. from M.K. during a visit. T. and I. reported they no longer wanted to visit with Mother. T. did not want to visit with Father because he scared her.

On November 14, 2011, the hearing was once again continued, to November 16.

On November 16, 2011, the contested disposition for Mother was heard; Father was not present, but his counsel was. Mother was granted reunification services.

On January 17, 2012, Father filed a notice of appeal, claiming that he was appealing from the orders issued on November 14, 2011, and August 23, 2011, and “all orders attached hereto.” There were no orders attached.

II

ANALYSIS

Father claims that the juvenile court erred by failing to make adequate inquiry as to his competency in deciding not to appoint a GAL for him, and the failure to appoint a GAL was prejudicial. The Department responds that the appeal is untimely as it was filed over five months after the refusal to appoint a GAL, that Father has forfeited the issue because he refused a GAL and his counsel did not request further inquiry, and that the failure to appoint a GAL was not prejudicial. We first address the timeliness of the appeal.

California Rules of Court, rule 8.406 provides that a party has 60 days from the date of an appealable order in dependency proceedings to file an appeal. Most cases addressing the appointment of a GAL have involved an appeal from another final dispositional order or section 366.26 hearing. One court has concluded that the appealable order was the dispositional order, not the appointment of a GAL, but the appointment of a GAL could be part of that appeal. (*In re Joann E.* (2002) 104 Cal.App.4th 347, 353-354; see *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1149-1150 [findings and orders made prior to the dispositional hearing may be reviewed on appeal from the dispositional order].) Other courts have concluded that the party could raise the

issue of the appointment of a GAL along with the appeal from a section 366.26 hearing. (See, e.g., *In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1190.)

In the instant case, the dispositional order as to Father was issued on August 24, 2011. No further proceedings have been included in the record as to father, such as a setting of a section 366.36 hearing. Father finally filed a notice of appeal on January 17, 2012. The appeal was clearly filed after the 60-day deadline.³

Father claims his notice of appeal is from the jurisdictional and dispositional orders made on November 14, 2011, presumably meaning November 16, 2011, when the dispositional order was entered for *Mother*. He claims that the “discussion” of the appointment of a GAL on August 24, 2011, was not an appealable order, and he is appealing from the jurisdictional/dispositional hearing. However, as previously noted, the dispositional order for Father was entered on August 24, 2011, which was the same date that the juvenile court chose not to appoint a GAL. Father should have filed an appeal of the dispositional order, raising the failure to appoint a GAL in that appeal.

The recent case of *Contra Costa County Children and Family Services Bureau v. Superior Court* (2004) 117 Cal.App.4th 111 (*Contra Costa*), is instructive. In that case, the mother was appointed a GAL in 1999, prior to the jurisdictional/dispositional hearing. Thereafter, the jurisdictional/dispositional hearing was held and the section 366.26 hearing was set, with no appeal or writ filed by the mother. In 2003, she finally filed a

³ We note that on March 1, 2012, we issued an order that the instant appeal was from the dispositional hearing held on November 16, 2011. However, now that we have had an opportunity to review the entire record in this case, it is clear the dispositional hearing for Father was conducted on August 24, 2011.

motion to set aside the jurisdictional findings on the basis that the juvenile court erred by failing to make adequate inquiry into the appointment of a GAL. The juvenile court agreed and set aside the jurisdictional findings. (*Contra Costa*, at pp. 114-116.)

The appellate court reversed the juvenile court. First it acknowledged that there are certain requirements for appointing a GAL, as set forth in *In re Sara D.* (2001) 87 Cal.App.4th 661. It noted, “*Sara D.* arose on a direct appeal in a case where a guardian ad litem had been appointed for the parent based solely on her attorney’s statement the parent did not understand the proceedings. The appellate court concluded that ‘a guardian ad litem should be appointed if the requirements of either Penal Code section 1367 or Probate Code section 1801 are met [and] that the trial court must find by a preponderance of the evidence that the parent comes within the requirements of either section.’ [Citation.] ¶¶ *Sara D.* also set forth a new procedure to be followed before such appointments are made at counsel’s request, given the broad powers of a guardian ad litem. [Citation.] Absent the parent’s consent to the appointment of a guardian ad litem, the court must provide the parent with an informal hearing and opportunity to be heard on the question of the appointment. [Citation.] At this informal hearing, the court or the parent’s counsel should explain ‘the purpose of a guardian ad litem and why the attorney felt one should be appointed.’ [Citation.] The parent should be given an opportunity to respond. [Citation.]” (*Contra Costa, supra*, 117 Cal.App.4th at pp. 116-117.)

The appellate court then contrasted these due process concerns to the general rule in dependency proceedings that “[i]n developing parameters on the reunification

process, “the Legislature balanced numerous competing fundamental interests, including the child’s compelling interest in ‘a placement that is stable, permanent, and which allows the caretaker to make a full emotional commitment to the child,’ the parents’ compelling ‘interest in the companionship, care, custody and management’ of their child . . . and the ‘preservation of the family whenever possible. . . .’” [Citation.]” (*Contra Costa, supra*, 117 Cal.App.4th at p. 118.) The appellate court concluded that claims of due process violations in appointing a GAL against the consent of the party for whom the guardian is appointed cannot “be applied to vacate final orders of the juvenile court in dependency proceedings” (*Id.* at p. 119.)

The court also noted that the mother in that case was not without a remedy since the dependency proceeding was still ongoing, and that a party may move to change the GAL order by use of the “‘escape mechanism’” of a section 388 petition. (*Contra Costa, supra*, 117 Cal.App.4th at p. 119.)

Here, the time for filing an appeal from the jurisdictional/dispositional order had already lapsed. Father has not filed a section 388 petition. As such, we see no reason to disturb the dispositional order, which is now final. It is particularly important that Father or those representing him should seek review as soon as possible on the failure to appoint a GAL so it can be remedied in an expeditious manner. Father had a remedy available -- appeal from the disposition order -- but failed to exercise that option. Certainly, if the proceedings are still ongoing, he may be able to file a section 388 petition.

In his reply brief, Father relies on the authority of Code of Civil Procedure section 372. He claims his rights could not be adequately protected at the November 14, 2011, hearing unless a GAL was appointed for him. We are not quite sure what Father is arguing, considering that on November 14, 2011, there was only the continuance of the hearing. We assume he means the dispositional hearing held for Mother on November 16. Presumably his argument is that he could not timely file an appeal or represent his interests because he is incompetent. (See, e.g., *In re M.F.* (2008) 161 Cal.App.4th 673, 682 [“[f]or the same reasons that [the party] needed a guardian ad litem, she was ‘hardly in a position to recognize . . . and independently protest’ the failure to appoint her one”].) This argument essentially requires this court to consider the merits of his claim: whether he was incompetent and needed a GAL. We briefly address the claim.

Code of Civil Procedure section 372, subdivision (a) provides that when an incompetent person is a party to a court action, that party shall appear by a guardian ad litem appointed by the court. The court may appoint such a guardian on its own motion. (Code Civ. Proc., § 373, subd. (c).) Courts have applied Code of Civil Procedure section 372 in dependency proceedings. (See *In re M.F.*, *supra*, 161 Cal.App.4th at p. 678; see also *In re Lisa M.* (1986) 177 Cal.App.3d 915, 919 [“when the [juvenile] court already has knowledge of the [parent’s] incompetency, the [juvenile] court has an obligation to appoint a guardian ad litem sua sponte”].) In dependency proceedings, the test of mental incompetence 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.]” (*In re James F.* (2008) 42 Cal.4th 901, 910.)

Mental illness does not mean that a party is unable to understand the proceedings and assist counsel in the preparation of the case. (*People v. Ramos* (2004) 34 Cal.4th 494, 508 [“a] defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel”].)

Father had a record of mental illness, but this did not mean he was incompetent to the point he could not assist counsel. Father was an attorney. In the limited interaction he had with the Department, he complained about his children being taken from him. He was concerned they would be harmed in foster care. His attorney and another attorney stated that they had met with Father and had been able to discuss his case with him. It is clear that Father had violent tendencies and had been hospitalized for his mental illness. There was also evidence, however, that he was denied Social Security disability benefits because his mental illness was not a disability affecting his ability to work.

There is nothing in the record that supports a contention that he could not understand the proceeding against him. Father waived his rights to a hearing on the section 300 petition in open court and appeared to the juvenile court to understand the proceedings and his rights. Father responded appropriately when the juvenile court inquired regarding his understanding of the role of a GAL and whether he wanted one appointed for him. We therefore reject Father’s claim in his reply brief that somehow Code of Civil Procedure section 372 excused him filing an untimely appeal because he was incompetent.

Since we have concluded that Father did not timely file a notice of appeal from the jurisdictional/dispositional order, and that order was final at the time he filed the instant appeal, we will dismiss that appeal.

III

DISPOSITION

The appeal filed by Father on January 17, 2012, is deemed untimely and is dismissed.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.