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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re J.D. et al., Persons Coming Under the
Juvenile Court Law.

MERCED COUNTY HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

G. G.,

Defendant and Appellant.

F063247

(Super. Ct. No. JP000080)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Merced County. Harry L. Jacobs, Commissioner, and John Kirihara, Judge.†

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

James N. Fincher, County Counsel, and Sheri L. Damon, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Gomes, J., and Kane, J.

† Commissioner Jacobs presided over the jurisdictional/dispositional hearing and Judge Kirihara presided over the Welfare and Institutions Code section 366.26 hearing.

G. G. (father) appeals from a 2011 order terminating parental rights (Welf. & Inst. Code, § 366.26) to his four-year-old son, J., and three-year-old daughter, M.¹ Father raises for the first time a series of issues dating as far back as the 2009 jurisdictional/dispositional phase of the children's dependency. On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

In 1994, father was found not guilty by reason of insanity on murder and attempted murder charges and committed to a state mental hospital. Approximately a decade later, he was placed on outpatient status in a community program, where he remained for several years. (Pen. Code, § 1600 et seq.) It was while he was on outpatient status that he fathered the children in this case. In early 2009, however, his outpatient status was revoked and he returned to a state mental hospital. The record is otherwise silent as to father's history.

By August 2009, the children's mother was unable to care for them. She frequently left the children, who were then ages two years and 17 months, alone with their five-year-old half-sibling. The family's home was in deplorable condition. When authorities located the mother, she appeared to be under the influence. The mother was arrested and the children were detained. As of the children's detention, father was in the Madera County jail for a restoration of sanity hearing.

Respondent Merced County Human Services Agency (agency) in turn petitioned the juvenile court to exercise its dependency jurisdiction over the children. In addition to allegations regarding the mother's neglect (§ 300, subd. (b) [children at risk of serious physical harm due to parental neglect], the agency pled that father was incarcerated and failed to adequately protect and provide for the children (§ 300, subd. (b)) and father was

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

incarcerated and unable to provide a safe home for the children (§ 300, subd. (g) [incarcerated parent cannot arrange child's care]).

At a detention hearing, the juvenile court declared father the children's presumed parent based on the mother's testimony. The court also appointed attorney Linda Groth to represent father, who was not present. In addition, the court issued an order, pursuant to Penal Code section 2625, to the Madera County Sheriff for father's appearance at a jurisdictional hearing.

Prior to the jurisdictional hearing, father completed and returned to an agency social worker a four-page questionnaire. The social worker attached the completed questionnaire to her jurisdictional/dispositional report. Father's answers were appropriate to the specific questions asked. Among the questions asked, and the answers father provided, were the following:

“Why do you feel your children are in foster care?”

“Because [mother] left my children at her apt[.] in [A]twater alone, which put them in danger. [Mother] was also under the influence of a controlled substance and was arrested and charge[d] with child endangerment.”

“What type of services do you feel you and your family could benefit from?”

“I have taken care of my children before being locked up. As soon as I get out, I'll take care of them as before. They're my children.”

“What would you like to see happen with this case and how do you suppose this will happen?”

“My children have a[n] older sister in TX. Call her or cont[act] her and see if she can take care of them until I get out. [Sister's name, address and three telephone numbers].”

“Do you have any relatives you would like to see considered for relative placement? Who? Address? Phone Number?”

“[the names, addresses and phone numbers of the paternal grandmother and two other relatives]”

To other questions, father suitably replied: he would like visitation, if appropriate, as well as services; he did not want to relinquish his rights; and he was opposed to a concurrent plan of adoption for the children.

The Madera County Sheriff reportedly refused to comply with the court’s transportation order for the jurisdictional/dispositional hearing. On the originally-scheduled hearing date, the juvenile court stated it could not proceed in father’s absence unless arrangements could be made for him to appear by phone or he wished to waive his presence. Attorney Groth volunteered that she would try to see father because she planned on going to the jail soon. The court in turn refrained from issuing an order to show cause directed at the sheriff and continued the hearing.

On the next hearing date, attorney Groth informed the court she had not spoken to father. The juvenile court continued the hearing a second time on the attorney’s promise she would go to see father.

Once again, however, attorney Groth did not see father. She thought she had the necessary authorization to visit her client but the Madera County Sheriff purportedly would not permit her to visit father without completing additional paperwork.

The juvenile court eventually elected to proceed with the jurisdictional/dispositional hearing in father’s absence “subject to being set aside upon the request of Ms. Groth.” The court relied on the fact the agency recommended offering father services. In the court’s view, father could not obtain a better result than an order for reunification services, due to his in-custody status. The court recommended attorney Groth talk to father about participating in whatever services were available.

The juvenile court consequently exercised its dependency jurisdiction over the children, having found each of the agency’s allegations true. The court also removed the children from the custody of both parents and ordered reunification services for them. In

its written order after hearing, the juvenile court additionally found that the Indian Child Welfare Act (ICWA) did not apply. The circumstances surrounding this finding are summarized in the Discussion.

Within a month of the jurisdictional/dispositional hearing for the children, father's petition for restoration of sanity was denied and he was transferred to the state mental hospital in Napa. Attorney Groth later informed the juvenile court she talked to father before he left for Napa. According to Groth, father understood what was going on and he told her he had been taking some classes.

Father later informed the social worker he would be in the state mental hospital for approximately one more year before a possible conditional release. Once that occurred, he would request residency in Merced County to be closer to the children. Due to his commitment, father was unavailable to be assessed by the agency for services.

In May 2010, the juvenile court terminated services for father, but continued them for the mother. In the fall of 2010, the court returned the children to their mother's custody subject to family maintenance services based on the progress she had made.

The mother's progress unfortunately was short-lived. She felt overwhelmed caring for the children and relapsed. She asked the agency to place them in foster care. As a result, the agency detained the children once again and filed a supplemental petition (§ 387) based on the mother's relapse and inability to care for the children.

During the proceedings on the agency's supplemental petition, attorney Groth reported more than once that father remained at the state mental hospital in Napa and he wrote to her about the children as well as sent her cards for the children. She added that father would remain in custody for a long time.

The juvenile court eventually terminated all services for the mother and set a section 366.26 hearing to select and implement a permanent plan for the children.

In its report for the section 366.26 hearing, the agency recommended that the court find the children were likely to be adopted. However, the children were not placed in an adoptive home. Their long-time foster parent wished to care for the children, but could not commit to either adopting them or becoming their legal guardian. As a result, the agency recommended the case be continued for six months in order to find an adoptive home for the children.

On the originally-scheduled section 366.26 hearing date, father was not present. He was represented by a newly appointed attorney, David Haycraft. The record is silent regarding the circumstances underlying the change in representation. Attorney Haycraft expressed concern about the court finding that the children were adoptable in father's absence. The court continued the hearing so that father could be transported to the hearing.

Once again, father was apparently in the Madera County jail and the sheriff would not permit him to be transported for the juvenile court proceedings. The court continued the hearing for attorney Haycraft to visit and advise father he had a right to attend the hearing if he wished.

Later in an addendum report, the agency stated it identified an adoptive home for the children and was transitioning the children from their current foster placement. The adults in the adoptive home were related to the children's foster parent. When the children's mother was advised of this and asked her opinion, she volunteered that they (an apparent reference to the children's family) would not have anything to do with her or the children. The agency recommended the court terminate parental rights.

Father signed a waiver of his right to attend the section 366.26 hearing, authorizing his attorney to represent him there. Nevertheless, father appeared by telephone at a July 2011 hearing. The court continued the matter until August 2011 for attorney Haycraft to review the addendum report with father.

The court eventually conducted the section 366.26 hearing in late August 2011. Father appeared by telephone, despite his preference to be physically present at the hearing. Father opposed termination of his parental rights. Father told the court:

“I really strongly want to be able to raise my own children. I’m in right now a civil commitment here, and even though it’s been going on for a little while, the fact is on the 15th, I possibly could be out and be able to move to Merced and to raise my own children with my mother there at her home. Now that’s my -- that’s my wish right now. That’s what I’m fighting for. But the fact is that I would even consider an adoption if it was an open adoption.

“Now my attorney is telling me that an open adoption is not even possible because of the parties that is involved doesn’t want this to happen. Well, I want to retain any type of rights that I have to my children, and I would like to see them, even if the Court decides to not give me -- to take my parental rights away from me by force.

“I still would like to be able to see them, to be able to have some interaction in their lives and to be able to -- for them to come and see me, you know? The best thing for any child is for them to be with their parents, their biological parents. That’s basically what I really want the Court to understand.”

Attorney Haycraft clarified that he explained to father the agency and the adoptive parents were under no obligation to consider an open adoption.

Counsel for the agency questioned father as follows:

“MR. TARHALLA: What are you currently incarcerated for? What charge?

“[FATHER]: I’m here for restoration of sanity right now.

“MR. TARHALLA: What were you arrested and charged with? Wasn’t it murder?

“[FATHER]: Um, not yet, guilty by reason of insanity.

“MR. TARHALLA: What is the charge, sir? Not your plea, but aren’t you charged with murder?

“[FATHER]: Um, that’s -- that’s what I was accused of, yeah.

“MR. TARHALLA: So that’s what you’re charged with. How long have you been in the Madera County Jail on that charge?

“[FATHER]: Um, I’ve been here for restoration of sanity for about eight months.

“MR. TARHALLA: When were you arrested on this charge?

“[FATHER]: In 1994.

“MR. TARHALLA: When were you -- you’ve been incarcerated now for eight months?

“[FATHER]: No, I’ve been in the -- I’ve been at Napa for nine years. I’ve been out in the county for six, and I’m here now fighting for restoration of sanity.

“MR. TARHALLA: Have you ever had these children living with you?

“[FATHER]: Yes, I’ve had them living with me since they was born.

“MR. TARHALLA: How long did they reside with you after their birth?

“[FATHER]: My oldest son ... resided with me until he was five; [J.], when he was two; and [M.] since she was one.

“MR. TARHALLA: So they’ve been out of your care for at least two years?

“[FATHER]: Yeah.”

The court subsequently adopted the agency’s recommendations and terminated parental rights.

DISCUSSION

I. Introduction

Father raises three claims of judicial error, which date back to the jurisdictional/dispositional hearing. According to father, the juvenile court erred by: (1) failing to appoint a guardian ad litem (GAL) for him due to his legal insanity or at least hold a hearing to determine whether it should appoint a GAL; (2) ruling that the ICWA did not apply in the children's dependency; and (3) not following the preference for relative placement over the course of the children's dependency.

Father also contends both of his attorneys provided ineffective assistance for not pursuing these issues. He further complains his first attorney was ineffective for not securing his presence in court or enabling him to otherwise participate in the jurisdictional/dispositional hearing while his second attorney was ineffective for not doing more to secure his physical presence at the section 366.26 hearing.

II. Appealability

Father assumes his issues related to the jurisdictional/dispositional hearing are preserved for our review because either he was incompetent or his attorneys were ineffective. He further contends that in the absence of these alleged errors individually or collectively it is reasonably probable the outcome of the juvenile court proceedings would have been more favorable to him.

Ordinarily, an appellate court may not inquire into the merits of a prior final judgment or appealable order in a dependency proceeding on an appeal from a later appealable order. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150 (*Meranda P.*)) One exception to this rule is mental incompetence claims. If a party were entitled to a GAL, that party would hardly be in a position to recognize the error and protest. (*In re A.C.* (2008) 166 Cal.App.4th 146, 156.) Thus, father's GAL claim of error is preserved for review in this appeal. (*Ibid.*)

On the other hand, in *Meranda P.*, this court declined to carve out an exception to the appellate waiver or forfeiture rule for ineffective assistance of counsel claims, finding no infringement on a parent's due process rights. (*Meranda P., supra*, 56 Cal.App.4th at pp. 1151-1155.) In addition, this court has long held that a parent who fails to timely challenge a juvenile court's action regarding ICWA is foreclosed from raising ICWA notice issues once the court's ruling is final in a subsequent appeal. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 185.)

Notwithstanding our prior opinions on the subject of waiver/forfeiture, we nevertheless will review on this appeal father's claims of judicial error regarding ICWA and relative placement. We do so out of concern for father's due process rights at the jurisdictional/dispositional hearing. As another court has put it, the crux of our waiver or forfeiture rule is that it will be enforced unless due process forbids it. (*In re Janee J.* (1999) 74 Cal.App.4th 198, 208.) In this case, there is no record that father received notice of the jurisdictional/dispositional hearing and his statutory right to attend the jurisdictional hearing (Pen. Code, § 2625). The order for his appearance, which included notice of his right to attend, appears to have been only served on the **Merced** County Sheriff's Office. In addition, we know that father's attorney did not consult with him before the juvenile court proceeded with the jurisdictional/ dispositional hearing. The juvenile court did elect to proceed with the jurisdictional/ dispositional hearing in father's absence subject to its orders being set aside upon the request of father's attorney. However, the record is silent as to whether the attorney explained this or the right to appeal to father.

III. Father's Mental Status

Because father was adjudged insane in 1994 and had not been restored to sanity as of the children's dependency, he contends he was most likely incompetent to participate in a meaningful way in these dependency proceedings. He argues the juvenile court erred

by failing to appoint a guardian ad litem (GAL) for him or at least hold a hearing to determine whether it should appoint a GAL. Father further claims that the juvenile court's inaction violated his due process rights. We conclude the juvenile court did not err.

In a juvenile dependency matter, a parent who is mentally incompetent must appear by a GAL appointed by the court. (*In re James F.* (2008) 42 Cal.4th 901, 910 (*James F.*), citing Code Civ. Proc., § 372 & *In re Sara D.* (2001) 87 Cal.App.4th 661, 665.) The test is whether the parent has the capacity to understand the nature and consequences of the proceedings and to assist counsel in preparing the case. (*James F.*, at p. 910.)

The fact that father was found not guilty by reason of insanity in the 1994 criminal proceedings does not mean he was mentally incompetent during these dependency proceedings. Penal Code section 25, subdivision (b) defines a person as not guilty by reason of insanity when "he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." This definition bears no similarity to the test for mental competence, as stated in *James F.* Likewise, the fact that the superior court in Madera County had not found father restored to sanity during the dependency proceedings does not mean he lacked the capacity to understand the nature and consequences of the dependency proceedings and to assist counsel in preparing the case.

Father also overlooks his statements contained in the record, which undermine his appellate claim of incompetence. Father's written answers to the social worker's questionnaire at the jurisdictional phase of the proceedings reveal he in fact understood the nature and consequences of the children's dependency and had the capacity to assist his attorney in preparing the case. His first attorney also informed the court that based on her subsequent conversations with father, he understood what was happening in the

dependency case. Likewise, father's statement to the court and his answers to counsel's questions at the section 366.26 hearing demonstrate the same. On this record, we therefore conclude there was no error. Having concluded there was no error, we necessarily reject father's related argument that the court's failure to appoint a GAL for him violated his due process rights.

To the extent father further claims his attorneys were ineffective for not advocating for a GAL appointment, we also conclude this claim is meritless. We do so because the premise of father's ineffective assistance claim is identical to his premise for arguing the juvenile court erred by not appointing a GAL, that is the fact he was adjudged insane in 1994 and had not been restored to sanity as of the children's dependency. Having rejected that premise in determining the juvenile court did not err, we similarly reject father's ineffective assistance claim. In addition, father again overlooks his own statements contained in the record which undermine his appellate claim of incompetence. On this record, we cannot say that father's attorneys failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696.)

IV. ICWA

At the 2009 detention hearing, the juvenile court conducted an ICWA inquiry of the mother. She testified both sides of her family were Miwok Indian.² She previously participated in Miwok powwows or other cultural activities, but neither she nor the children were enrolled in any Indian tribe. The mother also denied that either she or any extended family member ever received any education, health, or other benefit related to being Indian.

² The reporter's transcript spelled the tribal name as "Miwuk," while the mother completed a form stating the name of the tribe was "Miwok." We choose to use the mother's spelling which conforms with that used by some of the tribes.

In addition, the mother testified she was born on a reservation in Maricopa, Arizona. She claimed it was on her birth certificate, although that was all she knew. She added she was not “there that long.”

It is undisputed that the agency subsequently served notice of the underlying proceedings on all federally-recognized “Mewuk” and “Miwok” tribes as well as the Bureau of Indian Affairs (BIA) and none of those tribes nor the BIA responded that the children were members or eligible for tribal membership. All of the tribes’ service addresses were located in the state of California.

Father surmises that the agency failed to adequately investigate the mother’s claim that she was born on an Arizona Indian reservation because it did not provide notice to any Arizona tribes. Although father claims this was reversible error, we are not persuaded that any error occurred.

The fact that the agency did not serve notice on any Arizona tribes does not mean the agency failed to adequately investigate the mother’s claim of Indian heritage. The agency apparently did investigate further because, in its notice, the agency stated that the mother’s place of birth was actually in Phoenix, not Maricopa, Arizona. The agency also included identifying information about the mother’s parents and grandparents in its notice. The mother, who was served a copy of the agency’s notice, never objected to the accuracy of the notice.

Father additionally claims other evidence in the record reveals the mother’s Indian heritage was based in Arizona so as to render the notice that the agency sent inadequate. He cites to evidence that one of the mother’s grandmothers died in Arizona in 2007 and the mother visited “family” in Tempe, Arizona, in 2008.³ We fail to see how these two

³ Father also claims the mother lived for a while with a paternal grandmother in Arizona, but father misinterprets the record. It actually refers to a half-brother of the mother’s who went to live with his paternal grandmother in Arizona.

pieces of evidence either support father's claim or compels a conclusion that the mother's Indian heritage was based in Arizona.

We also find father's argument unpersuasive given that the mother clearly claimed she was Miwok and she had attended Miwok powwows and other cultural events. Finally, we observe that neither the mother nor her counsel ever asserted a claim that her Indian heritage was based in Arizona.

To the extent father contends either of his attorneys was ineffective for not challenging the ICWA notice given, we disagree. Father's ineffective assistance in this respect is based on the same premise — the agency failed to adequately investigate the mother's Indian heritage claim — we rejected in concluding the juvenile court did not err in finding ICWA inapplicable. Given the flaw in father's premise, we cannot say his attorneys failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-696.)

V. Relative Placement

Background

Prior to the jurisdictional/dispositional hearing, father asked that the agency call the children's older sister, who lived out of state, to see if she could take care of the children until he was released. He also supplied contact information for the paternal grandmother and the paternal uncle and aunt, whom he wished considered for relative placement. The mother also submitted the names of the same paternal aunt and uncle, as relatives she would like considered for placement.

The agency reported in September 2009 that it submitted the names of the paternal grandmother and the paternal uncle and aunt, each of whom lived in Merced County, to the "Home Assessment Team" to be considered for placement. At the October 2009 jurisdictional/dispositional hearing, the juvenile court found that the children were not placed with a relative requesting placement because the relatives were still in the

assessment process and had not been cleared for placement of the children. The record is silent after this point regarding whether any of those relatives were cleared for placement or completed the assessment process.

At a December 2010 hearing, after the children's redetention from their mother's care and the agency's filing of the supplemental petition, the mother asked that the children's paternal second cousins be considered for relative placement. She did not know their last names, but claimed they were outside the courtroom. County counsel on behalf of the agency responded that the agency would "check out the relatives."

In its report for the next hearing, scheduled on January 6, 2011, the agency stated the mother had not been available to discuss possible relative placements and asked that the court find the children were not placed with a relative requesting placement because "[n]o relative names have been submitted for approval." The mother did not attend the January 6 hearing or two later hearings on the supplemental petition. The court found there was "some game playing [on the mother's part] going on." In its order removing the children again from the mother's custody and setting the case for a section 366.26 hearing, the court found the children were not placed with a relative requesting placement because no relative names had been submitted for approval. The agency reported the same information and the court made the same finding in its August 2011 order terminating parental rights.

Argument

Father contends that the juvenile court did not follow the preference for relative placement in the children's dependency. He first claims the children's dependency may have been unnecessary because he should have been able to delegate the children's care to one of the relatives he identified prior to the jurisdictional/dispositional hearing, assuming one of those relatives were a suitable caretaker. Alternatively, he argues there is no proof that the relatives he identified were ever evaluated by the agency so that the

juvenile court could determine if any of the relatives were appropriate. Father further alleges the court's later finding that no relative names had been submitted for approval was not supported by substantial evidence. As discussed below, we are not persuaded by father's arguments.

Analysis

A.

To support his first argument that the children's dependency may have been unnecessary, father contends if an incarcerated parent can make suitable arrangements for his or her children's care during the period of incarceration, there is no basis for dependency jurisdiction. (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077 (*S.D.*), citing *In re Aaron S.* (1991) 228 Cal.App.3d 202, 212 (*Aaron S.*))⁴ In both *S.D.* and *Aaron S.*, a parent was incarcerated and the agency alleged the parent's incarcerated status as a jurisdictional basis under section 300, subdivision (g). In relevant part, section 300, subdivision (g) describes an incarcerated or institutionalized parent who cannot arrange for the child's care as a basis for dependency jurisdiction. However, in each case, there was no showing that the incarcerated parent was unable to arrange for care of the child. (*S.D.*, *supra*, 99 Cal.App.4th at p. 1077; *Aaron S.*, *supra*, 228 Cal.App.3d at p. 212.) Consequently, the appellate courts in *S.D.* and *Aaron S.* granted relief on appeal.

S.D. and *Aaron S.* are distinguishable from the dependency before us so as to render those opinions inapplicable here. In each case, the section 300, subdivision (g) allegation was the only jurisdictional ground which the juvenile court sustained. (*S.D.*, *supra*, 99 Cal.App.4th at p. 1074; *Aaron S.*, *supra*, 228 Cal.App.3d at p. 207.) Here, not only did the juvenile court find true allegations under section 300, subdivision (b)

⁴ Father quotes from *S.D.* in addition to citing other decisions, *In re V.F.* (2007) 157 Cal.App.4th 962 and *In re Isayah C.* (2004) 118 Cal.App.4th 684, which have relied on *S.D.*

pertaining to the mother's neglect, it also found true an allegation of the father's neglect under section 300, subdivision (b), which father overlooks. The rule as first advanced in *Aaron S.*, however, does not extend to incarcerated parents who have been the subject of a true finding on any jurisdictional ground other than section 300, subdivision (g). (*In re A.A.* (2012) 203 Cal.App.4th 597, 607.) Because the court exercised its dependency jurisdiction over the children based on father's neglect under section 300, subdivision (b), we conclude there is no merit to father's claim that the children's dependency may have been unnecessary. For the same reasons, we reject his claim that attorney Groth was ineffective for not pursuing this in the juvenile court.

B.

To the extent father complains there is no proof that the agency ever evaluated his relatives for placement purposes, we disagree. He overlooks the evidence that the agency submitted the names of the paternal grandmother and the paternal uncle and aunt for placement assessment and, as of the jurisdictional/dispositional hearing, the relatives were still in the assessment process and had not been cleared for placement of the children. We see no problem with the fact that the older sister's name was not submitted for placement assessment given that she lived out of state, thus inhibiting court-ordered reunification efforts and visitation between the children and their mother. (§ 361.3, subd. (a)(7)(E) & (F).)

It is true that the record is silent after the jurisdictional/dispositional hearing regarding the outcome of the assessment process. However, that does not mean father's relatives were not evaluated. It just as easily could mean the relatives did not complete the assessment process, withdrew their names from placement consideration, or were not cleared for placement. Also, although father implies the agency should have reported back to the court, he fails to cite any authority to support his assumption. In any event,

we cannot say on this record that it is reasonably probable that the outcome would have been more favorable to father had the agency reported back to the court.

To the extent father accuses his attorneys of being ineffectual for not pursuing the evaluation issue, we agree that attorney Groth, as a diligent advocate, should have inquired at the jurisdictional/dispositional hearing about the status of the ongoing relative placement evaluations and/or asked the court to leave the issue of relative placement open until the agency completed its evaluations. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-696.) We cannot imagine a practical or tactical reason for attorney Groth to remain silent in this respect. (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 243.)

However, our analysis of an ineffective assistance claim does not end there. Father also must show it is reasonably probable a more favorable determination would have resulted in the absence of his counsel's failing. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-696.) Father claims it is reasonably probable that had counsel advocated for relative placement, the children would have been placed with relatives. However, he does not cite to anything in the record or any rule of law to support his claim. His argument assumes too much and is little more than speculation on his part. However, even assuming *arguendo* one of his relatives qualified for placement, that certainly does not compel further conclusions that the placement would have been a successful one and the court eventually would have selected a permanent plan for the children, other than termination of parental rights.

C.

Last, father challenges the sufficiency of the evidence to support the finding in the supplemental petition proceedings that no relative names had been submitted for approval for relative placement purposes under section 361.3. Father points to the names of his relatives whom he submitted in 2009 and the names of the second cousins whom the

mother submitted at the December 2010 hearing when the children were redetained. We disagree.

First, father takes the juvenile court's finding out of context and draws an unreasonable inference to make his argument. The court did not find that no relative names had ever been submitted over the course of the children's dependency. Instead, the court found in January 2011 that the children were not placed with a relative requesting placement because no relative names had been submitted for approval. The reasonable inference to be drawn is that the court found once the children had to be redetained and removed from the mother's custody, they were not placed with a relative because no relative names had been submitted for approval.

Second, while it is true that the mother in December 2010 did offer the first names of the children's second cousins, second cousins, or even cousins for that matter, are not entitled to the benefits of the relative placement preferred consideration statute (§ 361.3). "Relative" in the relative placement statute means:

"means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great' or 'grand' or the spouse of any of these persons even if the marriage was terminated by death or dissolution. However, only the following relatives shall be given preferential consideration for the placement of the child: an adult who is a grandparent, aunt, uncle, or sibling." (§ 361.3, subd. (c)(2).)

Father focuses on the statutory phrase "an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship" in section 361.3, subdivision (c)(2) and argues a second cousin is within the fifth degree of kinship and therefore is a relative within the meaning of the relative preferential consideration statute. While that may be, his argument overlooks the balance of section 361.3, subdivision (c)(2), especially the concluding sentence:

“However, only the following relatives shall be given preferential consideration for the placement of the child: an adult who is a grandparent, aunt, uncle, or sibling.”

Thus, even if the children’s second cousins were relatives, they were not entitled to preferential consideration under section 361.3 so that there could be no error, as father claims, for not following the preference for relative placement. Similarly, because the second cousins were not entitled to preferential consideration for placement, we are not persuaded that had either of father’s attorneys questioned the sufficiency of the evidence that it would have made a difference in this case so as to prejudice father’s interests.

VI. Penal Code Section 2625

Last, father contends his attorneys were ineffective for not securing his presence in court during the children’s dependency proceedings. Penal Code section 2625 provides that a parent, who is incarcerated or institutionalized, is entitled to attend the hearing at which the court may exercise its dependency jurisdiction over the parent’s children (the jurisdictional hearing) and the hearing at which the court selects a permanent plan for the children. The exception to this rule is if the parent waives the right to attend such hearings.

Because father’s second attorney, Haycraft, secured father’s telephonic presence at the children’s permanency planning hearing, we conclude father’s argument is meritless as to attorney Haycraft. We cannot say the same, however, as to attorney Groth.

Attorney Groth did not protect or secure father’s right under Penal Code section 2625 at the October 2009 jurisdictional hearing. Given that she had not had any contact with father as of the October 2009 hearing, there could be no practical or tactical reason for attorney Groth’s inaction. (*In re Arturo A.*, *supra*, 8 Cal.App.4th at p. 243.) She should have at least communicated with father to inform him of his right to attend the hearing and to determine whether he wished to do so.

We assume for the sake of father's argument that had she done so, regardless of whether father exercised his right to attend, that he would have expressed the same wishes he did in his answers to the social worker's earlier written questions. He would have asked for reunification efforts, relative placement, and visitation, if appropriate. On appeal, father interprets this last wish as visitation at least while he was in Madera County or presumably if he were restored to sanity in the Madera County proceedings.

However, the more difficult question we confront is that of whether father suffered resulting prejudice. The court did grant father reunification services. Nevertheless, once father's restoration of sanity petition was denied and he returned to Napa, reunification was all but impossible. Relative placement evaluation would have been actively pursued by a diligent advocate, as previously discussed. However, that does not mean that actual relative placement was a foregone conclusion, let alone successful and would have prevented the eventual termination of the parents' rights in this case. Even an order for visitation could not have affected the outcome of this case. The Madera County Superior Court denied father's restoration of sanity petition within a month of the October 2009 jurisdictional/dispositional hearing and returned father to Napa. Father remained in the state hospital at Napa until he returned to Madera County in mid 2011 for another restoration of sanity proceeding. At most, a visitation order for the time he was in Madera County would have yielded a handful of visits over the course of more than 18 months.

We also cannot ignore in this prejudice calculus the children's overriding interest in permanence and stability when reunification is not possible (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309) not to mention the reason why father is institutionalized and the fact that throughout these dependency proceedings he necessarily remained a danger to the health and safety of others (see Pen. Code, § 1026.2 [requirement for restoration of sanity]).

We therefore conclude, whether on a reasonable probability or a heightened standard of prejudice, that attorney Groth's failure to protect father's right to attend the jurisdictional/dispositional hearing was not prejudicial so as to entitle him to a reversal of the order terminating parental rights.

DISPOSITION

The order terminating parental rights is affirmed.