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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.L., a Person Coming Under the Juvenile
Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

E.S.,

Defendant and Appellant.

F063299

(Super. Ct. No. 08CEJ300033)

OPINION

APPEAL from an order of the Superior Court of Fresno County. Mary Dolas,
Commissioner.

Linda K. Harvie, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel,
for Plaintiff and Respondent.

E.S. (mother) appeals from an order terminating her parental rights to her son, M.L. (Welf. & Inst. Code, § 366.26.)¹ Arguing that she should be excused from failing to seek writ review of the section 366.26 setting hearing, she raises the following issues: (1) the juvenile court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Family Code section 3400 et. seq.; (2) the juvenile court erred in appointing a guardian ad litem and in failing to remove the guardian ad litem, sua sponte, during the course of the proceedings; and (3) the jurisdictional findings should be vacated. We find no merit to mother's arguments and therefore reject them.

FACTUAL AND PROCEDURAL HISTORY

In January 2008, mother's oldest child, three-year-old Erianna B., died from injuries sustained while in the custody of mother and mother's boyfriend, M.L. (father). The coroner ruled Erianna's death a homicide caused by multiple blunt force injuries with complications that were sustained at another's hands. Mother and father were arrested for murder and cruel and inhumane treatment, but mother was released from jail within a week. While father was charged with murder, he was released from custody in October 2008 when the murder charge was dropped.

At the time of Erianna's death, mother had two children with father, an 18-month-old son La.L. and two-month old daughter M.L. The Fresno County Department of Children and Family Services (Department) initiated dependency proceedings over La. and M. Thereafter, mother gave birth to daughter Le.S., who became the subject of a subsequent dependency petition.²

In 2009, dependency jurisdiction was taken over La. and M. after the Fresno County juvenile court found the following true: (1) mother and father caused Erianna's

¹ All undesignated statutory references are to the Welfare and Institutions Code.

² Le.'s father is J.J.

fatal injuries (§ 300, subd. (a)), (2) mother and father failed to protect Erianna from physical abuse and protect La. and M. from ongoing domestic violence (§ 300, subd. (b)), and (3) mother was negligent in failing to protect Erianna from severe physical abuse by father, and mother and father caused Erianna's death through severe physical abuse (§ 300, subd. (f)). Dependency jurisdiction was taken over Le. based on mother's negligence in failing to protect Erianna from severe physical abuse by father (§ 300, subd. (f)), and mother's neglect and abuse of Le.'s half-siblings which placed Le. at risk of serious physical harm or neglect (§ 300, subd. (j)).

Mother and father both were denied reunification services and their parental rights were terminated in December 2009. The court ordered a permanent plan of adoption for the three children, who had been placed together in a relative/mentor placement. The relatives were in the process of adopting the children.³

The Present Case

On August 10, 2010, mother gave birth to a son, Ma.L. (baby), in a hospital in Las Vegas, Nevada. When mother was admitted to the hospital she used her middle name, Brianna, as her first name, although she provided her correct address in Fresno. That day, the Clark County Department of Family Services (CCDFS) in Las Vegas, Nevada, received a referral alleging that mother's child had been killed in Fresno, where mother had a child protective services history, and mother did not have custody of any of her children. A CCDFS social worker called and spoke with the Department's adoption

³ Both mother and father appealed from those orders, which we affirmed in unpublished opinions. (*In re L.L.* (Dec. 22, 2010, F059133) [father's appeal]; *In re L.L.* (Dec. 23, 2010, F059134) [mother's appeal].) The California Supreme Court granted review of these appeals solely on the issue of whether criminal negligence is required to support jurisdiction under section 300, subdivision (f). (*In re L.L.*, review granted Mar. 30, 2011, S190245; *In re L.L.*, review granted Mar. 30, 2011, S190230.) Our Supreme Court recently answered this question in the negative in *In re Ethan C.* (Jul. 5, 2012) 54 Cal.4th 610 (*Ethan C.*).

social worker on the children's dependency case, who confirmed Erianna's death in January 2008 and that mother's other children were in an adoptive placement because mother's parental rights had been terminated.

CCDFS placed a medical hold on the baby. When a CCDFS social worker contacted mother at the hospital, mother said her name was Brianna S[]. She denied having a CPS history or that she had a three-year-old daughter who was murdered. Mother eventually admitted her true name, but denied involvement in Erianna's death. CCDFS initiated court proceedings regarding the baby while waiting for the Department to accept jurisdiction.

On August 13, 2010, a detention hearing was held in Nevada. The hearing was continued to August 17, 2010 to determine whether Fresno County would accept jurisdiction. On August 13, a Department social worker received a referral from CCDFS that mother had given birth at a Las Vegas hospital using a different name and the baby had been removed from her care. The Department social worker noted the referral was made to initiate the process of transferring custody of the baby to Fresno County, as mother and father still lived in Fresno, and an extended family member in Fresno had requested placement. The social worker assured CCDFS that Fresno County would accept jurisdiction.

On August 16, 2010, the Department social worker called mother, who said she was still in Las Vegas but would be returning to Fresno since she still lived there. The social worker explained that CCDFS would withdraw its petition regarding the baby and the Department would file a petition in Fresno. That same day, the Department filed an initial petition over the baby and the Fresno County Superior Court issued a protective custody warrant. On August 17, 2010, a Department social worker picked the baby up at the Las Vegas airport pursuant to the protective custody warrant and transported him to the Fresno home of relatives who had been approved for placement. At the August 24,

2010 detention hearing, the juvenile court appointed a guardian ad litem for mother and detained the baby.

In January 2011, a jurisdictional hearing was held on the third amended petition. Mother and father both submitted on the Department's reports, which recounted the evidence regarding Erianna's death. The evidence showed that in January 2008, father and mother were living together with their two children, La. and M., and father's aunt, Charlotte. Mother's daughter Erianna, whose father was J.B., primarily lived with her paternal grandmother, Virginia B. Erianna had neurofibromatosis, Noonan's Syndrome, and autism, and was nonverbal.

According to Virginia, on Sunday, January 20, 2008, she took Erianna to father and mother's house so they could watch her because Virginia was going out of town. Mother said that when she was giving Erianna a bath on January 22, she noticed red marks on her body. She called Virginia, who said the marks might have been caused by a swing and scheduled a doctor's appointment for Erianna. Deanna M., La.'s and M.'s paternal grandmother, told police that in the evening of January 22, she noticed what she believed to be bruising on Erianna's chest and told mother to take Erianna to the doctor.

Virginia claimed mother called her on Wednesday, January 23, and said Erianna had several minor bruises on her stomach and some unexplained injuries elsewhere on her body. That same day, Virginia took Erianna and mother to see Dr. Gwen Huffer, who diagnosed several small red dots on Erianna's skin as impetigo. Erianna also had three half-dime-sized bruises on her abdomen that appeared to be at least a week old, which Virginia attributed to playing on a swing. Dr. Huffer prescribed medication and cream.

Mother told Virginia she wanted to keep Erianna until 9 p.m. that night. When Virginia returned to pick up Erianna, father told her Erianna was asleep, so Virginia left Erianna in mother's care. The following day, Virginia called mother to arrange to pick up Erianna, but was told Erianna was sick. Virginia agreed to pick her up on January 27, 2008. Mother said she did not leave her home on January 24, and she put Erianna to bed

with the rest of her children around 9:30 p.m. Deanna, however, told police that on the evening of January 24, she and mother had their nails done while father watched the children, including Erianna. Mother told a social worker that she first noticed the bruises on Erianna's body on January 24, when the bruises on her abdomen "just popped up." Mother assumed the marks were impetigo because Erianna had never sustained a bruise before. When she saw the marks, mother put the prescribed cream on each bruise and covered them with adhesive bandages.

At about 9 a.m. on the morning of January 25, mother went downtown with Deanna and her boyfriend Michael to go shopping. They left Deanna's daughter, as well as mother's children, in the apartment with father and Charlotte. Charlotte walked to the drug store around 9 a.m. When she returned, father was home alone with the children and Erianna. Charlotte left for school around 9:55 a.m. and did not return to the apartment until mid-afternoon.

Father told police that as soon as Deanna, Michael and mother left, he gave La. a bath. After that, he got Erianna ready for a bath and placed her in the bathtub. He left Erianna in the bathtub with the water running to check on M., who was crying. Three to five minutes later, father checked on a thumping sound he heard from the children's bedroom and then went into the bathroom, where he saw La. standing near the bathtub, holding Erianna's hair. Erianna was hanging over the bathtub with her arms out of the water; she was gasping for air and coughing. He assumed Erianna had slipped under the water. He picked her up, took her to the bedroom and dried her off. Eventually she fell asleep and he put her down for a nap in a bedroom.

Mother claimed that when they returned to the apartment a couple of hours later, father said Erianna had soiled herself and when he gave her a bath the other children were "messaging" with her and pulling her hair. Mother found Erianna asleep on a bed. When she returned awhile later, Erianna was lying face down on the floor. Mother picked Erianna up and carried her to the living room. Mother tried to get Erianna to stand up,

but she was semi-conscious and could not stand. Deanna thought Erianna was having a seizure, so she called an ambulance.

Erianna was transported to Children's Hospital Central California (CHCC). A Department social worker received a crisis referral alleging physical abuse and general neglect of Erianna. Erianna was admitted to CHCC with a severe closed head injury; a CT scan showed significant cerebral edema and subarachnoid hemorrhage. She was in the intensive care unit on life support. She had numerous bruises of varying shapes and colors on her abdomen, back, legs, face and arms. There was an abrasion on her chin, an adult-sized bite mark on her elbow and a smaller bite on her back, and a red circular mark inside her left knee. Her brain was swelling and she was not expected to survive. Erianna died on January 27, 2008.

Dr. Don Fields, CHCC's child advocacy physician, told a social worker that Erianna died from the head trauma she suffered and her medical conditions did not contribute to her death. While Noonan's Syndrome can cause a bleeding disorder and easy bruising, the bruises on her body were not caused by the syndrome, as they were too numerous to measure. Bruises covered her entire body; they were in all different sizes, shapes and colors, and in various stages of healing. Moreover, according to a geneticist Dr. Fields spoke with, her current bruises could not have been related to her Noonan's Syndrome because she did not have a history of bruising. Erianna also had burn marks on her face, adult and child-size bite marks on her elbow and back, and a "loop mark" bruise on her knee consistent with extension cords.

According to Dr. Fields, the marks on Erianna's body were not impetigo, but were undeniably bruises that were two to three days old and in various stages of healing. He opined that Erianna had sustained head trauma on January 25, 2008. The injuries were inflicted by an adult, and could not have been caused by falling in a bathtub, against furniture or on the ground. There was no evidence that Erianna exhibited any symptoms

consistent with a drowning victim. It appeared to Dr. Fields that she simply had been beaten.

According to Dr. Kathleen Murphy, a neurosurgeon at CHCC, Erianna had a significant closed head injury with cerebral edema and multiple traumatic-appearing bruises with no clear history to account for them. She thought an adult likely inflicted the apparent bite marks on Erianna.

According to Dr. Huffer, Erianna's new injuries were not present when she examined her on January 23. While Dr. Huffer recognized that Erianna had an illness that could cause her to bruise more easily, trauma still needed to occur for bruises to appear. Dr. Huffer concluded Erianna's visible and internal injuries were excessive even considering her pre-existing medical conditions and, in her opinion, could only have been caused by external blunt force trauma.

During an autopsy on Erianna's body, the pathologist found blunt force injuries to the head, trunk, and arms/legs. The head injuries included multiple abrasions and bruising of the face and scalp region, diffuse cerebral edema with a thin layer of grossly identifiable subdural blood in the dural leaflets of the brain, and subgaleal and focal hemorrhages. The trunk injuries included contusion of the front of the stomach and the mesentery to the small intestine, circular injury over the right side of the abdomen which was possibly a healing abrasion, ovoid hemorrhage of the muscles of the left anterior chest, and subcutaneous hemorrhage of the upper abdominal wall. Injuries to the arms and legs included hemorrhages over the right knee, right shin, and of the soft tissue and skin of the left forearm.

Based on this evidence, the juvenile court in the present case found true allegations in the third amended petition under section 300, subdivisions (a), (b), (f) and (j). With respect to subdivision (a), the juvenile court found that Erianna had died after receiving severe head trauma and numerous bruises and bite marks which were inflicted non-accidentally, and the baby was at substantial risk of suffering serious physical harm

inflicted by mother and father, as each of them caused Erianna's fatal physical injuries and had no reasonable explanation regarding the cause of her injuries. With respect to section 300, subdivision (b), the juvenile court found that the baby was at substantial risk of suffering physical harm or illness in that (1) mother failed to protect Erianna from receiving fatal physical injuries caused by the father, and she reasonably should have known of Erianna's ongoing physical abuse, and (2) father failed to protect Erianna from receiving fatal physical injuries caused by mother, and he reasonably should have known of Erianna's ongoing physical abuse.

With respect to section 300, subdivision (f), the juvenile court found that mother and father caused Erianna's death by inflicting severe physical abuse, as Erianna suffered non-accidental fatal injuries while in their care, and neither parent had provided a reasonable explanation regarding the cause of the injuries. Finally, with respect to section 300, subdivision (j), the juvenile court found that mother and father had previously abused or neglected the baby's siblings and half-siblings, and both mother and father failed to address the issues that led to dependency jurisdiction over them.

The Department recommended that mother and father both be denied reunification services pursuant to section 361.5, subdivision (b)(4), (6), (7) and (11), and a section 366.26 hearing be set. The Department noted in a report prepared for the dispositional hearing that while mother and father stated they wanted to reunify with the baby and were willing to participate in any recommended services, they had missed numerous visits, had not accepted responsibility for Erianna's death and did not feel a need to participate in any services. The Department determined the parents had not made substantial progress toward ameliorating the conditions that brought them to the Department's attention and the baby would be at substantial risk of suffering similar harm if he were returned to their care.

At the April 5, 2011 dispositional hearing, father's attorney objected to the bypass of reunification services, as review of the appellate decision in the prior dependency case

had been granted and the bypass of reunification services in this case was based on the jurisdictional finding in the prior case under section 300, subdivision (f). Father, however, did not offer any evidence or witnesses. Mother's attorney also did not offer any witnesses or evidence, although she joined in father's attorney's argument and objected to the bypass of services. Mother's guardian ad litem concurred with mother's attorney.

The parties submitted on the Department's reports. After argument of counsel, the juvenile court found that mother had made minimal progress in alleviating or mitigating the causes necessitating placement, while father had made no progress, the baby was a child described within section 300, subdivisions (a), (b), (f) and (j), and made the baby a dependent. The court ordered that reunification services not be provided to either mother or father pursuant to section 361.5, subdivision (b)(4), (6), (7) and (11). The court set a section 366.26 hearing for July 19, 2011.

At the section 366.26 hearing, both mother and father submitted on the Department's reports, which recommended termination of their parental rights. The juvenile court ordered parental rights terminated, and selected adoption as the baby's permanent plan. The court advised the parents of their right to appeal from the orders and terminated mother's guardian ad litem, other than to assist mother with filing the notice of appeal.

DISCUSSION

I. The Failure to Seek Writ Review

Mother appeals from the section 366.26 hearing order terminating her parental rights. The issues she raises on appeal, however, pertain only to orders made at or before the April 2011 dispositional hearing. Specifically, she attempts to challenge (1) the August 2010 appointment of a guardian ad litem (GAL), (2) the juvenile court's failure to remove the GAL at or before the dispositional hearing, and (3) the jurisdictional findings.

She also contends the juvenile court lacked subject matter jurisdiction under the UCCJEA.

A petition for writ review from the order setting the section 366.26 hearing is the exclusively prescribed vehicle for appellate review of all orders issued at that hearing. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021-1023; § 366.26, subd. (l).) Where, as here, the section 366.26 hearing was set at the dispositional hearing, failure to seek writ review precludes a parent from seeking relief from any order made at or before the dispositional hearing. (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 815-816; see also *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151 [pursuant to the waiver rule “an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order . . . ”].)

A juvenile court violates its statutory duty when it fails to provide notice of the right to writ review after referring the case for a section 366.26 hearing. (§ 366.26, subd. (l)(2); Cal. Rules of Court, rule 5.590, subd. (b).) The violation excuses the parent from filing a writ pursuant to California Rules of Court, rule 8.452, and allows the parent to assert issues which arose at the earlier hearing. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 450; *In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-723.) When a GAL has been appointed for a party, the party must appeal by the GAL. (See Code Civ. Proc., § 372.) This means that any appeal, or in this case extraordinary writ review, must have been taken by the GAL on mother’s behalf. (See *In re Moss* (1898) 120 Cal. 695, 697.)

Here, both mother and her GAL were present at the dispositional hearing. After the juvenile court denied reunification services and issued its dispositional orders, the juvenile court stated as follows: “The Court will also advise the parents you have the right to appeal from the orders of this court. You have 60 days from today’s date to file that appeal. It needs to be filed in this court not the Court of Appeal signed by you, your attorneys, or both of you.” The Department’s attorney then asked for referral to the “Consortium” pending the section 366.26 hearing, since it was a prospective adoption by

relative care providers. After ordering the referral, the court stated: “And the Court will advise the parents that at this time the Court has decided to make a more permanent plan for your child that may result in the termination of your parental rights and adoption of your child. If you want an appellate court to review this court’s decision, you must first tell the court by filing this Notice of Intent. [¶] You’ll each be provided with this Notice of Intent with instructions on how to complete it and information on where to file it. [¶] It’s to be filed with the Superior Court Clerk’s Appellate Department, 1100 Van Ness Avenue, fourth floor, which is the fourth floor of this building, Room 401. The hours of operation are Monday through Friday, 8:00 a.m. to 4:00 p.m. [¶] The record shall reflect that the deputy is handing each parent their writ rights and each parent is ordered back for July 19th, 2011, 8:00 a.m., this department.” Neither the GAL nor mother filed a notice of intent or a notice of appeal.

Mother acknowledges that normally she would be precluded from challenging orders made at the dispositional hearing. Nevertheless, she asserts we should find that she did not waive the issues she raises here because (1) the juvenile court gave conflicting advisements on the appropriate method for appellate review of the orders made at that hearing, and (2) she should not be penalized for her GAL’s failure to seek writ review. We question whether the conflicting advisements excuse the failure to seek writ review on mother’s behalf. Even if mother or her GAL were confused by the advisements, they should have filed either a notice of appeal or a notice of intent, or both, to preserve mother’s appellate rights. Instead, they did nothing. Mother is correct, however, that because a GAL has the right to control the litigation on behalf of the incompetent person (*In re Christina B.* (1993) 19 Cal.App.4th 1441, 1453 (*Christina B.*)), she did not control the litigation. For this reason, we will address her claims.

II. Jurisdiction Under the UCCJEA

Mother contends the juvenile court lacked subject matter jurisdiction because it failed to comply with the UCCJEA. The UCCJEA is California’s exclusive method of

determining the proper forum for custody disputes, including juvenile dependency proceedings, involving other jurisdictions. (Fam. Code, §§ 3421, 3424, subd. (d); *In re Stephanie M.* (1994) 7 Cal.4th 295, 310 (*Stephanie M.*)) It was enacted in part to litigate custody where the child and family have the closest connections, avoid jurisdictional competition and conflict and promote exchange of information and assistance between courts of sister states. (*In re C.T.* (2002) 100 Cal.App.4th 101, 106.) The policy of the UCCJEA is not to establish concurrent jurisdiction, but to identify one court that will exercise primary jurisdiction. ““Courts in other states are required to defer to that court’s continuing jurisdiction and to assist in implementing its orders.”” (*Stephanie M.*, at p. 313.)

“Subject matter jurisdiction either exists or does not exist at the time the action is commenced and cannot be conferred by stipulation, consent, waiver or estoppel.” (*In re Jaheim B.* (2008) 169 Cal.App.4th 1343, 1348; *In re A.C.* (2005) 130 Cal.App.4th 854, 860.) Since subject matter jurisdiction cannot be waived, we reject the Department’s contention that mother may not raise this claim on appeal. While the juvenile court did not make a determination concerning subject matter jurisdiction, “[w]e are not bound by the juvenile court’s findings regarding subject matter jurisdiction, but rather ‘independently reweigh the jurisdictional facts.’” (*In re A.C.*, *supra*, 130 Cal.App.4th at p. 860.)

Under Family Code section 3421, subdivision (a), a California court has jurisdiction to make an initial child custody determination only if, as pertinent here: “(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceedings and the child is absent from this state but a parent or person acting as a parent continues to live in this state; [¶] (2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate

forum under Section 3427 or 3428, and both of the following are true: [¶] (A) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and [¶] (B) Substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships.”

The UCCJEA defines “home state” as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.” (Fam. Code, § 3402, subd. (g).)

Mother argues that Nevada is the baby’s statutory “home state,” and therefore the only state with jurisdiction to make a custody determination, because the baby was born in Nevada and lived there with mother until he was detained by Nevada’s child protective services. The Department disagrees, asserting that California is the baby’s “home state” because the baby lived with mother before the Department commenced the California dependency proceeding and, when he was born, mother was a California resident who was temporarily absent from California visiting relatives in Nevada.

We question whether either state is the baby’s “home state,” as we doubt that a temporary hospital stay incident to delivery confers home state jurisdiction on Nevada under the UCCJEA,⁴ and the baby never lived with mother in California after his birth.

⁴ Apparently no California case has addressed the issue of whether “home state” jurisdiction is conferred on a state when the child’s only connection to that state is his or her birth in a hospital in that state. Courts in other states, however, have addressed the issue and concluded that a temporary hospital stay incident to delivery, which occurred when the mother was visiting the state, is insufficient to confer “home state” jurisdiction under the UCCJEA. (see, e.g. *In re D.S.* (2005) 217 Ill.2d 306; *Adoption House, Inc. v.*

We need not decide the issue, however, because even if mother is correct and Nevada is the “home state” under the UCCJEA, California obtained subject matter jurisdiction pursuant to Family Code section 3421, subdivision (a)(2). Under this section, California has jurisdiction if (1) Nevada has declined to exercise jurisdiction on the grounds that California is the more appropriate forum under Section 3427,⁵ (2) the baby and at least one of his parents has a significant connection with California, other than mere physical presence; and (3) substantial evidence is available in California concerning the baby’s care, protection, training, and personal relationships.

On the first point, the minute orders from the Clark County District Court in Nevada (the Nevada court) show that the Nevada court declined to exercise jurisdiction after determining a California court would be a more appropriate forum.⁶ At an August 13, 2010, hearing in Nevada, the Nevada court noted that mother, who was visiting from California, had a prior case in Fresno and planned to return to California, where father reportedly was. The State of Nevada requested the matter be set for review for the court “to have a UCCJEA with the Judge in California to determine jurisdiction as to minor.” The Nevada court ordered baby to remain in protective custody, and set a

A.R. (Del.Fam.Ct. 2003) 820 A.2d 402; *In re R.P.* (Mo.App. 1998) 966 S.W.2d 292; *Joselit v. Joselit* (1988) 544 A.2d 59.)

⁵ Family Code section 3427, subdivision (a) provides that a court of this state that has jurisdiction under the UCCJEA to make a child custody determination “may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.” Nevada, which has adopted the UCCJEA, has the same statutory provision for declining to exercise jurisdiction when it determines it is an inconvenient forum and another state is a more appropriate forum. (See N.R.S. 125A.365; *Friedman v. Eighth Judicial Dist. Court of State, ex rel. County of Clark* (2011) 264 P.3d 1161, 1165.)

⁶After filing her opening brief, mother filed a request to take judicial notice of the August 13, 2010 and August 17, 2010 court minutes regarding the baby, for hearings held in the District Court of Clark County, Nevada. We deferred ruling on the request, which we now grant. (Evid. Code, §§ 452, subd. (d), 459.)

review hearing for August 17. The Department filed its petition in Fresno County juvenile court on August 16, 2010, and a protective custody warrant was issued that day. At the August 17 hearing in the Nevada court, the Nevada court noted it and Judge Dolas had agreed the baby needed to be transported to California to be placed under its jurisdiction, and after statements were made, the Nevada court ordered the baby transported to California and took the matter off calendar. The baby was transported back to California that day.

On the second point, the record shows that the baby and his parents have significant connections to California, as the baby's siblings and half-sibling, as well as mother and father, all reside in California, and while mother had given birth to the baby in Nevada, she intended to return to California. On the third point, there is no question that substantial evidence is available in California concerning the baby's care, protection, training, and personal relationships, as all of the parties are residents of California, the baby's siblings and half-siblings are the subject of dependency proceedings pending in the same juvenile court that entered the decision below, and those proceedings have generated a substantial record relating to mother's parental fitness.

Since Nevada declined to exercise any home state jurisdiction it had and determined California was a more appropriate forum for resolution of the dependency case, mother's claim that California did not have subject matter jurisdiction fails.

In her opening brief, mother contends the Fresno County juvenile court did not have jurisdiction over baby because it failed to communicate with the Nevada court. In her reply brief, mother acknowledges the Nevada court's minutes show communication occurred between the two courts but asserts they do not show "definitive compliance" with the UCCJEA. Even if communication between the courts did not definitively comply with the UCCJEA, however, the record shows that the Nevada court declined to exercise its jurisdiction in favor of the Fresno County juvenile court. Mother does not assert that Fresno County is an inappropriate or inconvenient forum, neither does she

assert that the Nevada court continued to exercise dependency jurisdiction over the baby, thereby leading to conflicting dependency orders. Accordingly, any failure to definitively comply with the communication requirements of the UCCJEA does not warrant reversal because there is no showing of prejudice. (*In re C.T.*, *supra*, 100 Cal.App.4th at p. 111 [juvenile court's failure to immediately contact court in another state, while error, did not warrant reversal because there was no showing of prejudice].)

This case is distinguishable from *In re Joseph D.* (1993) 19 Cal.App.4th 678, cited by mother, in which a California juvenile court was aware that a sister state custody order was in effect and nonetheless improperly asserted continuing concurrent jurisdiction to determine the child's custody. Here, by contrast, the juvenile court did not assert jurisdiction in the face of a competing order. Instead, the Nevada court communicated with the Fresno County juvenile court to determine which state was the most appropriate forum to litigate dependency and then ceased exercising jurisdiction. Fresno County juvenile court then had jurisdiction to proceed with the dependency case. Accordingly, mother's claim that Fresno County juvenile court lacked subject matter jurisdiction fails.

III. The Guardian Ad Litem

Mother contends the juvenile court erred when it appointed the GAL, as substantial evidence did not support the appointment. She also contends the GAL failed in her duties by submitting on jurisdiction without speaking with mother and not seeking writ review when the section 366.26 hearing was set. She asserts the trial court should have removed the GAL when the GAL submitted on jurisdiction or, at a minimum, questioned the GAL further about her contact with mother, and should have directed the GAL to take steps necessary to preserve mother's appellate rights.

A. Hearing Proceedings

At the August 24, 2010 detention hearing, after the attorneys submitted on the detention report and the juvenile court questioned mother about the identity of the baby's father, mother's attorney asked the court, on mother's behalf, "she's indicated that she

would like a [GAL] appointed because she doesn't understand the nature of the hearing or the case and in request with that, I will agree with her, a [GAL] may be proper in this situation." Mother's attorney confirmed she had explained to mother what a GAL would do and what mother would be giving up by having a GAL appointed; she had told mother "that I would be speaking to that person in [lieu] of herself and that that person would be making determinations and acting on her behalf."

The court then held a hearing with only mother and her attorney present. Mother's attorney told the court she was requesting a GAL for mother based on mother's indication to her "that she does not understand the proceedings and the hearings that are effectuated with that." Mother's attorney said she had explained to mother that if a GAL were appointed, the GAL would act "in lieu of herself," would make decisions on her behalf, and would be the one speaking to the attorney.

The court asked mother if she understood what her attorney had told her about having another person appointed as a guardian. Mother responded, "No." In response to questioning by the court, mother told the court she was requesting a GAL "[b]ecause I don't understand." Mother understood that she was in court that day for the baby, but when the court asked if she understood where the baby was right then, she stated she did not understand "that part." Mother understood the baby had been removed from her care and was in the Department's custody for his safety. Mother knew she was in court "[f]or my son," "to see what [was] going on" about him in the hope of "[g]etting him back." Mother answered "Yes," when the court asked if she agreed with her attorney that the court should appoint a GAL.

Mother confirmed she understood that if a GAL was appointed (1) the GAL would meet with her and discuss her concerns, feelings, and opinions about the case, but the GAL would be making the decisions in the case, (2) the GAL could make decisions on her behalf if she was not present in court, and (3) the GAL, after speaking with her, would be the person making decisions as to what to tell mother's attorney and how the

attorney should proceed in the hearings. Understanding these things, mother confirmed it was her position that a GAL be appointed to essentially make decisions and appear on her behalf based on her inability to understand the court hearings, including what happens in court and the procedure. Mother further confirmed she understood the person appointed would be the one helping her attorney as the case proceeds, with mother's assistance. The court concluded by asking mother if there was anything else she wanted to ask or say. Mother responded, "No." The court then appointed the office of Ms. Van Doren as GAL for mother.

At the November 17, 2010 hearing, which was the date originally set for the contested jurisdictional hearing, mother's GAL declared a conflict and asked that another GAL be appointed. The juvenile court relieved Ms. Van Doren as mother's GAL and appointed Nan Selover in her place. Ms. Van Doren provided mother with Ms. Selover's contact information, including her address and telephone number.

Mother and her GAL were present at the January 4, 2011 contested jurisdictional hearing. The GAL informed the court she was not prepared to proceed, as she had been on vacation and had not had time to discuss the case with mother or mother's attorney. The GAL knew the orders terminating parental rights to mother's other children had been affirmed on appeal, but she had just received copies of the opinion that morning. The GAL requested a continuance to give her time to properly prepare and discuss with mother what was in her best interest. Mother's attorney stated that while she had not had a chance to discuss the matter with the GAL, it was her position that mother should withdraw the contest and submit on jurisdiction that day, as the fact that the appeal had been affirmed precluded arguments she had intended to make and it would be in mother's best interest to submit to jurisdiction at that point. The juvenile court continued the hearing after mother's attorney and the GAL agreed they would confer and decide how to proceed. The juvenile court set January 19, 2011 for the settlement conference and February 1, 2011 for trial, and advised the parents to be present at both court dates with

the understanding that if they failed to appear, they would be waiving their right to participate in the hearings and the court would make findings and orders in their absence.

Mother was not present at the January 19, 2011 continued hearing, although both her attorney and GAL were there. The GAL explained that she had prepared a waiver of rights form on mother's behalf, but was "doing so reluctantly" as mother failed to contact her since she was last in court. The GAL had no evidence to present, and did not anticipate there would be any evidence, so she was submitting on the social worker reports and the documents in the court file. Mother's attorney confirmed the submission. The juvenile court found the report contained sufficient evidence to allow it to find the allegations of the third amended petition true.

B. Analysis

"In a dependency case, a parent who is mentally incompetent must appear by a guardian ad litem appointed by the court." (*In re James F.* (2008) 42 Cal.4th 901, 910; *In re Sara D.* (2001) 87 Cal.App.4th 661, 665.) "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." (*In re James F.*, *supra*, 42 Cal.4th at p. 910; *In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1186; *In re Sara D.*, *supra*, 87 Cal.App.4th at p. 667.) If the parent consents to the appointment, due process is served since the parent has participated in the decision. (*In re Sara D.*, *supra*, 87 Cal.App.4th at p. 668.) If there is no consent, the court or counsel must explain the purpose of a GAL and the parent should be given the opportunity to respond. (*Ibid.*) The court should make an inquiry sufficient to satisfy it that the parent is, or is not, competent. (*Id.*, at p. 672.) "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.*, *supra*, 42 Cal.4th at p. 911.) "[E]rror in the procedure used to appoint a guardian ad litem for a parent in a dependency proceeding is trial error that is amenable to harmless error analysis rather than a structural

defect requiring reversal of the juvenile court's orders without regard to prejudice." (*Id.*, at p. 915.)

Here, mother expressly consented to the GAL's appointment. She claims, however, there was an insufficient showing she was incompetent. She asserts it was clear from the juvenile court's questioning that she understood and was able to process the basic fundamentals of the proceedings, and that she could assist her attorney. Mother argues her statement that she did not understand what was happening was insufficient to justify a GAL appointment, and even if she consented to the appointment, the juvenile court nevertheless was required to ensure there was sufficient evidence of incompetence before appointing a GAL. The Department counters that mother's consent relieved the juvenile court of the obligation to inquire further regarding mother's incompetence or to require evidence of incompetence before appointing the GAL.

We need not decide this issue because even if the juvenile court erred in appointing the GAL, the error was not prejudicial. We review the erroneous appointment of a GAL to determine whether the error is harmless beyond a reasonable doubt. (*In re Esmeralda S.* (2008) 165 Cal.App.4th 84, 96; *In re Enrique G.* (2006) 140 Cal.App.4th 676, 687; *In re Sara D.*, *supra*, at p. 673.) In so doing, we hold any error was harmless, as the record does not reveal that any prejudice resulted from the appointment. The outcome of the proceedings was not affected by the appointment of the GAL. (*In re Esmeralda S.*, *supra*, at p. 93.)

Mother claims she was prejudiced because the GAL failed to communicate with her before she submitted on jurisdiction and failed to file a notice of intent to pursue her writ remedies following the dispositional hearing. With respect to the first claim, mother does not explain what she would have told the GAL had the GAL spoken with her before submitting on jurisdiction. As we explain in the following section regarding the jurisdictional findings, ample evidence supported those findings. Mother does not identify any additional evidence she would have provided on the issue. The situation

differs from that in *In re Joann E.* (2002) 104 Cal.App.4th 347, on which mother relies, where there was reason to believe the appointment of the GAL prevented the parent from presenting evidence. (*Id.* at p. 360 [record showed mother had a number of people whom she believed to be helpful witnesses but none were subpoenaed or testified after the GAL was appointed].) Neither is there prejudice from the GAL's failure to file a notice of intent, since we are now reviewing mother's claims regarding orders made at or before the dispositional hearing.

Mother also asserts the juvenile court had a sua sponte duty to remove the GAL for violating her duties, citing *Estate of Emery* (1962) 199 Cal.App.2d 22, 26-27, in which the appellate court concluded the trial court did not abuse its discretion in removing a GAL who had a conflict of interest which could seriously affect her duties. Mother contends the GAL violated her duties when she submitted on jurisdiction without obtaining some countervailing and substantial benefit to mother. It has been held "the guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit." (*Christina B.*, *supra*, 19 Cal.App.4th at p. 1453.) The holding, however, presumes the existence of something with which to bargain. In the face of ample evidence supporting jurisdiction, neither the GAL nor mother's attorney could identify any evidence or argument to show there was no jurisdiction. On appeal, mother does not identify any benefit she could have, but did not, obtain in exchange for submitting on jurisdiction. Moreover, even if the juvenile court had a duty to remove the GAL, as we have already concluded, mother suffered no prejudice from the GAL's continued appointment. Accordingly, reversal is not required.

IV. Jurisdictional Findings

Mother challenges the jurisdictional findings made under section 300, subdivisions (a), (b), (f) and (j). She contends reversal is required because all of the jurisdictional allegations were based on Erianna's death and the claim that mother either inflicted the fatal injury herself or, in the case of the subdivision (b) allegations, reasonably should

have known father was physically abusing Erianna. She asserts the pertinent inquiry as to the existence of jurisdiction in this case is whether criminal negligence is required to support jurisdiction under section 300, subdivision (f). She contends the Department was required to establish mother was criminally negligent, yet failed to do so.

Section 300, subdivision (f) authorizes jurisdiction over a child if the court finds that “the child’s parent . . . caused the death of another child through abuse or neglect.” Our Supreme Court recently held that section 300, subdivision (f), allows the juvenile court to adjudge a child a dependent if a parent’s lack of ordinary care caused another child’s death, under the normal concepts of legal causation. (*Ethan C.*, *supra*, 54 Cal.4th at p. 618.) In so holding, the Supreme Court specifically rejected the argument mother makes here, i.e. that an adjudication of dependency based on a parent’s neglect leading to the death of another child under section 300, subdivision (f), requires evidence the parent was guilty of criminal negligence rather than a mere want of ordinary care. (*Ethan C.*, *supra*, 54 Cal.4th at pp. 626-637.)⁷

Thus, mother’s argument fails. Mother does not assert any other ground for reversal of the juvenile court’s jurisdictional findings or contend there was insufficient evidence of ordinary negligence to support jurisdiction under section 300, subdivision (f). She would be hard-pressed to do so, as the evidence shows the allegations under section 300, subdivision (f) were true, i.e. that mother caused Erianna’s death through abuse or

⁷ Mother has filed a request that we take judicial notice of eight documents filed in her case that is currently pending before the California Supreme Court, *In re L.L.*, review granted Mar. 30, 2011, S190230. Mother asserts the documents are relevant to her argument on appeal that criminal negligence is required under section 300, subdivision (f). We deferred ruling on the request, which we now deny. Since the California Supreme Court has rejected mother’s argument, the documents are irrelevant. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 559 fn. 3; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1062-1063, overruled on another point in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276 [only relevant materials may be judicially noticed].)

neglect. Erianna died of multiple blunt force trauma to her head and body inflicted by an adult. The trauma was not present at the January 23 doctor’s appointment. Erianna was in either mother’s or father’s care between that appointment and when the ambulance was called on January 25. After the doctor’s appointment, mother acknowledged seeing an increase in bruises on Erianna’s body, yet she did not intervene or seek medical care. In finding the subdivision (f) allegations true, the juvenile court concluded mother knew of Erianna’s injuries – either because she inflicted them, knew that someone else inflicted them, or observed the obvious bruises – and failed to intervene or obtain medical care, thereby causing Erianna’s death. The evidence supports this conclusion and is sufficient to sustain jurisdiction under subdivision (f).

DISPOSITION

The juvenile court’s orders are affirmed. We grant mother’s “Second Request for Judicial Notice” of the August 13, 2010 and August 17, 2010 “Court Minutes” from the District Court of Clark County, Nevada. We deny the request for judicial notice of documents filed in California Supreme Court case no. S190230.

Gomes, J.

WE CONCUR:

Levy, Acting P.J.

Detjen, J.