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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re KHLOE B., a Person Coming Under
the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

TRACY B.,

Defendant and Appellant.

G049186

(Super. Ct. No. DP023312)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Dennis J. Keough, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputies County Counsel, for Plaintiff and Respondent.

This appeal centers on the delicate question of when a trial judge in a dependency proceeding involving a mentally ill parent must, despite the lack of any request from the parent or the parent's counsel, step in sua sponte to appoint a guardian ad litem for the parent on the grounds of the parent's incompetency. In this case we determine that while Tracy B., the mother of the infant Khloe B., was indeed mentally ill – she suffers from anxiety and bipolar disorders – she did not exhibit such extreme or bizarre manifestations of mental illness as to require the trial judge to appoint a guardian ad litem on his own motion prior to her voluntary waiver of reunification services. We therefore affirm the subsequent order terminating parental rights.

FACTS

The petition that led to this appeal regarding Khloe B. was filed in late November 2012, but Khloe's mother Tracy was well familiar with the juvenile dependency system prior to that. Khloe is the most recent of Tracy's five children, having been born in June 2012. Tracy has had four other children: Darlene, born in January 2006, Leilani, born in August 2007, and twins, Lo. and La., born in February 2011. All four older children had been the subjects of prior dependency proceedings. By November 2012, the twins had been declared dependents and reunification services were denied, Leilani had been voluntarily placed with relatives, and Darlene was living with her father. The petition regarding then 5-month-old Khloe centered on allegations of general neglect in light of Tracy's "ongoing mental illness." Social workers opined Tracy was still in need of supervision by the juvenile court system. The referral that resulted in the petition regarding Khloe was the 13th involving Tracy, though a number of those referrals had ultimately been found unsubstantiated.

Tracy's mental illness was described in the initial social worker's report as an anxiety disorder, for which she was taking Xanax. Without her medication she would experience panic attacks. A social worker's report in mid-December further noted that

Tracy had been diagnosed by a psychiatrist as having bipolar disorder, for which the psychiatrist had prescribed Abilify.

While Khloe was technically detained on November 30, 2011, she was immediately released to Tracy's care. Tracy was living at the time with her maternal great aunt Doreen.

Doreen became alarmed in late January 2013, when she noticed Tracy's Facebook page expressed some thoughts of killing herself. Moreover, in early January 2013, Tracy had cut herself, apparently on her arm, though just the day before Doreen had told a social worker that Tracy had said she would like to begin dating.

A jurisdictional hearing was held March 27, 2013. The record of that hearing recounts a patient explanation by the trial judge to Tracy of her procedural rights: He told her to interrupt him if he said anything she didn't understand, explained the nature and limit of reunification services that might be offered her, and told her that the proceeding could indeed result in Khloe's removal from her home and might ultimately result in the termination of Tracy's parental rights. The explanation consisted mostly of the trial judge speaking one or two sentences and then asking Tracy if she understood him. While the judge did most of the talking, Tracy's responses were entirely appropriate for each question; each no and each yes correlated with the nature of the judge's question. (For example, the judge asked, "Do you understand, ma'am, the potential range of consequences that could follow from a submission on your part?" She answered "yes," which is the answer of someone who was paying attention.) At the end, the trial judge asked Tracy if she wanted to discuss anything with her attorney, she said no, and confirmed that she was indeed willing to submit the issue of jurisdiction to the court.

The same pattern replicated itself at the dispositional hearing on May 13, 2013, which was the hearing in which Tracy specifically agreed to waive her right to reunification services. The court explained that Tracy (and the father, who was present at this hearing) had the right to reunification services which could extend as long as 18

months. The court then further explained that if they waived services a permanent plan could be established for Khloe which would result in the loss of their parental rights, with Khloe being placed for adoption, or having a legal guardian appointed for her, or being put into long-term foster care.

We should note here that on May 10, about a week before the dispositional hearing, a social worker's report advised the court that Tracy was apparently already inclined to waive her right to reunification services. The report specifically cited the section of the Welfare and Institutions Code which provides for a voluntary waiver of such services by a parent. (Welf. & Inst. Code, § 361, subd. (b)(14).)

Five days after the dispositional hearing Tracy moved out of Doreen's home, leaving Khloe with Doreen. She would make no requests to visit Khloe until early August. Her parental rights were formally terminated on September 10, 2013, at a hearing at which she was not present. She then appealed from the order of termination.

DISCUSSION

This appeal raises but one argument, namely that the trial judge erred in not appointing a guardian ad litem for Tracy. The theory is that Tracy's mental instability made it impossible to really ascertain whether she truly meant to waive her right to reunification services.

The issue is a sensitive one, because most of the time judges need only *react* to matters placed before them. This appeal, however, posits a sin of omission, in asserting the trial judge was insufficiently proactive in failing to recognize, on his own, a need to appoint a guardian ad litem. In such a context, it is hardly enough to say the issue itself was waived at the trial level because neither Tracy nor her attorney asked for a guardian ad litem. By definition someone in need of such a guardian may not know he or she needs one. As Justice Cantil-Sakauye wrote in *In re M.F.* (2008) 161 Cal.App.4th 673, 682: "The failure to appoint a guardian ad litem in an appropriate case goes to the very ability of the parent to meaningfully participate in the proceedings. For

the same reasons that [the minor parent] needed a guardian ad litem, she was ‘hardly in a position to recognize . . . and independently protest’ the failure to appoint her one. [Citation.]” (Quoting *In re S.D.* (2002) 99 Cal.App.4th 1068, 1080.)

On the other hand, the law hardly requires trial judges to become instant psychiatrists, experts in the degree to which mental illness may, or may not, render a parent in a dependency “incompetent” (to use the phrase from the basic governing statute, section 372 of the Code of Civil Procedure). The statute lists three grounds requiring appointment of a guardian ad litem for a parent: (1) minority; (2) incompetency, and (3) conservatorship.¹ Two of those three (minority and conservatorship) represent clear, binary demarcations making it easy for the judge to know what to do.

As to the third, incompetency, the standard of review of the judge’s non-appointment of a guardian ad litem is abuse of discretion (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368). Thus almost all the cases in which appellate courts have held that juvenile dependency judges erred in failing to appoint a guardian ad litem have involved the trial judge simply not recognizing that the statute requires appointment in the either-or cases of minority or conservatorship. (See *In re M.F.*, *supra*, 161 Cal.App.4th at p. 387 [parent was 14-year-old minor]; *In re D.D.* (2006) 144 Cal.App.4th 646, 653 [parent was minor in custody]; *In re A.C.* (2008) 166 Cal.App.4th 146, 155 [court informed that a conservator had *already* been appointed for the parent].)

In the one published dependency opinion we have found holding that it was error for a trial court not to appoint a guardian ad litem on its own motion in the context of possible parental incompetency, the trial court *itself* recognized the incompetency on the record. It simply failed to implement the statute. (See *In re Lisa M.* (1986) 177

¹ The statute opens with these words: “(a) When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case.”

Cal.App.3d 915, 916, 919 [court itself found, as opinion put it, “mentally retarded and emotionally disturbed” 22-year-old mother was not competent but still did not appoint guardian ad litem].)²

Applying an abuse of discretion test to the present case, the trial judge’s reticence was well within the bounds of reason. The record indicates Tracy’s main mental afflictions are anxiety disorder and bipolar disorder. As to the former, it is well known that many competent people often suffer the same affliction. The great basketball player, Bill Russell, for example became so anxious before a game that he usually vomited. If he *didn’t* vomit his teammates worried they would lose. (See Menand, *The Prisoner of Stress* (Jan. 27, 2014) *The New Yorker*, 64, 68.) Indeed, many famous thinkers from Kierkegaard to Sartre to Freud have associated anxiety as part of the general condition of simply being human. (*Id.* at pp. 64-67.) Without in any way minimizing the seriousness of the anxiety disorder from which Tracy suffers, we can safely say the trial judge was certainly not unreasonable to assume that Tracy was still a competent person even though afflicted with that disorder.

Bipolar disorder is perhaps the more serious affliction (it afflicted the parent in *James F.*, *supra*, 42 Cal.4th 901 for example), but even here the trial judge was well within reasonable bounds. The social worker’s report had indicated Tracy had been prescribed medication for her bipolar disorder and it is a fair summary of this record that refusing to take her meds was *not* a theme that presented itself to the judge.

² *Lisa M.* appears to be the beginning of this line of dependency court jurisprudence; the opinion cites only no dependency case in its explication of Code of Civil Procedure section 372.

It is relatively easy to see why abuse of discretion is the only viable standard in cases of possible incompetency. Appointment of a guardian ad litem is just as fraught with peril of reversal as is non-appointment. (Cf. *In re James F.* (2008) 42 Cal.4th 901 [error in procedure in appointing guardian ad litem for parent then in state mental hospital subject to harmless error analysis]; *In re Sara D.* (2001) 87 Cal.App.4th 661, 668 [due process violation to appoint guardian ad litem without notice to parent]; *In re Christina B.* (1993) 19 Cal.App.4th 1441, 1448-1449 [upholding challenge to appointment based on theory trial judge used wrong standard].)

Indeed, on this record the weight of the evidence appears to be on the side of competency. In the courtroom where the trial judge could observe her for himself, Tracy gave wholly-appropriate answers at both the jurisdictional and disposition hearings to the court's explanation of her rights. There were no outbursts, or any objective indications she was not entirely understanding what the trial judge was telling her. To be sure, the incident of self-laceration and expressed suicidal ideation in January were certainly grounds for concern, but nothing in the record would force a diagnosis of incompetence, particularly given the way Tracy "presented" (as physicians use the phrase) at the two hearings.

Tracy's situation, in fact, compares favorably with two decisions in which the parent manifested more obvious symptoms of mental illness, yet the appellate court held there was no abuse of discretion in not appointing a guardian ad litem. In *Ronell A.*, *supra*, 44 Cal.App.4th 1352, the father had the mental capacity of a 12 year old, suffered from schizophrenia "characterized by unpredictable violence," and had run away from a drug treatment program. (*Id.* at p. 1358.) Nevertheless, the court upheld the order because it was enough he understood the nature of the proceedings and was "able to participate meaningfully" in those proceedings and cooperate with his counsel. (*Id.* at p. 1367.) Likewise, in *In re R. S.* (1985) 167 Cal.App.3d 946, the parent was noted to be suffering "mild mental retardation" and had a "dependent personality disorder," yet the non-appointment was upheld because she was still able to "meaningfully participate" in the proceedings. (*Id.* at pp. 979-980.) The issue of meaningful participation clearly was one considered by the court, and from all that presents itself in this record, correctly resolved.

DISPOSITION

The termination order appealed from is accordingly affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.