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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

A.S.,

Petitioner,

v.

THE SUPERIOR COURT OF THE CITY  
AND COUNTY OF SAN FRANCISCO,

Respondent;

SAN FRANCISCO HUMAN SERVICES  
AGENCY, et al.,

Real Parties in Interest.

A141931

(City & County of San Francisco  
Super. Ct. No. JD13-3027)

Petitioner A.S., father of the minor, A.S., Jr., files a timely writ petition seeking to set aside the juvenile court's May 21, 2014 order terminating reunification services offered to him and setting a hearing, pursuant to Welfare and Institutions Code section 366.26,<sup>1</sup> for September 24, 2014. We deny the petition.

**FACTUAL AND PROCEDURAL BACKGROUND**

A.S., Jr. was born at 32 weeks gestational age, approximately two months premature; at birth he weighed 4 lbs., 11 oz. His case was immediately referred to the San Francisco Human Services Agency (Agency) because of general neglect by his mother, who had had almost no prenatal care during the pregnancy and had a long history

<sup>1</sup> All further unspecified statutory references are to the Welfare and Institutions Code.

of substance abuse. Mother tested positive for methamphetamine during her pregnancy. She has four older children who had been removed by Child Protective Services, three of whom had been adopted and one of whom the Agency believed was being cared for by his father.

Petitioner informed the Agency he was A.S., Jr.'s father. He stated that he had a 3-year old son, whom he was barred from visiting due to a restraining order which prevented him from contacting both that child's mother and the child. He had a history of domestic violence, was currently on probation for violating the protective order and he was convicted in 2008 for carrying a loaded firearm in public. Petitioner was enrolled in a year-long class for batterers, was earning a Goodwill Program for Digital Literacy Certificate, but he was unemployed. He reported that he had been in a relationship with A.S., Jr.'s mother for the past year and he was participating in a program through which he hoped to find permanent, stable housing.

Petitioner possessed a medical marijuana card for pain resulting from an amputated toe and extensive, but medically unevaluated, back problems. He regularly used marijuana to help him deal with physical pain.

In his mid-twenties, Petitioner was diagnosed with bipolar disease but was not currently taking any medication or participating in psychotherapy for that condition. He had been involuntarily hospitalized pursuant Health & Safety Code section 5150 (for being a danger to himself or others) four times, including once in the last two years. Petitioner stopped taking the medications that had been prescribed for his bipolar disease because the medication made him feel slow and made him twitch. He reported feeling both anxious and depressed; he was open to receiving treatment for his mental health issues, but not to taking medication. He treated with a psychotherapist one time—in the fourth grade when his step-father committed suicide—but did not find therapy helpful.

On January 30, 2013 the Agency put a police hold on the child and removed him from his parents' care. On February 4, 2013 the court appointed counsel for the parents and for A.S., Jr. and determined that a prima facie case had been made that A.S., Jr. came within the scope of section 300, i.e, that there was a substantial danger to his physical

health, that he was suffering severe emotional damage and that there was no reasonable means of protecting him without removing him from the parents' care; it ordered him detained and placed in foster care. Both parents were allowed supervised visitation.

The Agency filed a disposition report on March 8, 2013. It recommended that (1) the mother receive no reunification services, but that petitioner be considered for reunification. The reunification case plan required petitioner to: (1) undergo individual therapy; (2) complete parenting education, including appropriate developmental expectations and non-physical discipline; (3) obtain and maintain suitable housing; (4) visit the minor regularly; (5) complete substance abuse assessment and comply with any recommendations, including drug testing; and (6) have a psychological evaluation and follow any recommended treatment regarding his ability to protect and parent the child and recommendations for therapy and/or medication.

At the May 20, 2013 disposition hearing, the court ordered that father receive reunification services as described in the March 8, 2013 report. It also found by clear and convincing evidence that the Agency had made reasonable efforts to prevent or eliminate the need to remove the minor from the home and had made reasonable efforts to enable the return of the minor to his home. Finally, it notified petitioner that it might terminate reunification services within six months if he failed to participate regularly in court-ordered reunification services.

Petitioner underwent a psychological evaluation on September 24 and 27, 2013. He was diagnosed as having a mood disorder, polysubstance abuse, in early partial remission with a rule out of cannabis dependence. He displayed obsessive-compulsive and anti-social traits, which did not rise to the level of a formal characterological diagnosis. On the Global Assessment of Functioning Scale, he scored 55, indicating that he was either displaying moderate symptoms or experiencing moderate difficulty in social, occupational or school functioning. The psychologist recommended that petitioner: (1) abstain from substance use so as to be able to be a more effective parent; (2) undertake cognitive behavioral and interpersonal therapy; (3) have a risk assessment to evaluate his current suicidal thinking; (4) have family therapy with his mother;

(5) have a psychiatric evaluation to determine whether medications would be helpful; (6) continue to participate in a parental support group; (7) attend parenting and child development classes; and (8) attend a stress management class or group. Petitioner emphasizes, however, that the report did not explicitly state whether anyone reviewed these recommendations with him. The evaluating psychologist testified at the 12-month review hearing that she did not routinely make suggestions to people she evaluates because the report is prepared for the Agency. Those being evaluated may, however, request a feedback session, but she did not recall that petitioner did so. Petitioner points out that there is no indication in the record that the Agency contacted the evaluating psychologist to provide further information.

On November 21, 2013 the Agency filed a status review report in anticipation of the six-month review by the court. The minor remained in confidential foster care, although petitioner visited him regularly. The Department's report noted its continuing concern about petitioner's parenting ability, based on his history of domestic violence and a 10-year restraining order keeping him from his older child. The report also noted that he was "struggling during his visits with his son" and, thus, referred him to a parenting program. Petitioner, however, disputes the accuracy of the report in this regard, maintaining that he never received that referral. Despite his "unstable" relationship with his mother he was then living in her home. The agency also addressed Petitioner's substance abuse issues. It noted that he was being tested for drugs regularly and each test was positive for marijuana. The report noted petitioner's "very serious history of untreated mental health issue for which he is not taking his prescribed medication" and referenced his psychological evaluation.

Turning to the psychological evaluation, the status report indicated that although the psychological evaluation was useful, its utility was limited because the psychologist did not request any information regarding Petitioner's mental health history. In addition, the Agency's report suggested that the psychologist's evaluation of petitioner's stated drug history was handicapped because she had not requested available information from the Agency. Petitioner informed the psychologist that he started smoking marijuana at 15

years of age, experienced problems due to his marijuana use, went through marijuana-related drug withdrawal, and stopped using marijuana approximately three months before his evaluation. However, weekly random drug testing revealed that he had tested positive for marijuana every week between March 7, 2013 and December 10, 2013, with five exceptions. His marijuana levels had ranged between 804 and 118.<sup>2</sup>

The agency referred Petitioner for therapy in March 2013, but he had not begun therapy as of November 6, 2013. Petitioner claimed that he went to the clinic to begin therapy but was told he did not need it. However, he failed to provide written confirmation of this claim by November 2013 despite the fact that the Agency had requested it approximately six months earlier. He had also been referred to the Drug Dependency Court (DDC) for support. However, “due to [his] lack of participation in DDC Court recommendations, continued positive drug testing and reported burst of anger, [the] DCC court dismissed his case in September, 2013.”

The Agency summarized petitioner’s progress as of December, 2013:

[Petitioner] is receiving reunification services despite the fact that there is a 10 year restraining order protecting his older son due to domestic violence. [Petitioner] has been compliant, in that he visits with his son consistently, participates in two fatherhood programs and is currently maintaining housing with his mother who reportedly has serious mental health issues. While [petitioner] has been compliant with the above stated requirements, it took him until October 2013, to let the Department into his mother’s home. It also took [him] until the end of September 2013, to meet with Dr. Jones to complete the psychological evaluation despite receiving the referral information in May 2013. [Petitioner] did not and has not complied with the substance abuse portion of his requirements and was dismissed from DDC court. [Petitioner’s] ability to parent over the long term without treating his substance abuse and mental health are of great concern to the Department when considering that [A.S., Jr.] has medical needs due to his exposure to methamphetamine that require an[] alert and mental[ly] sound adult to care for him. Despite the Department[‘s] concerns the recommendation at this time is for continued services.

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<sup>2</sup> The report does not indicate either the testing method or the units in which the test is reported. Presumably, these were urine tests, reported in nanograms per millileter (ng/mL).

On April 29, 2014 an Agency supervisor, Ms. Lusk, testified at the 12-month hearing, about issues stemming from the period reviewed at the earlier, six-month hearing. In particular, she testified that in the last week of November 2013, she learned that petitioner was concerned about how his case was being managed. He complained of his difficulty in reaching the case worker assigned to his case, that the worker took forever to respond to his calls, and that he was not afforded the respect that was due him as a parent. Based upon Petitioner's concerns and several apparent inaccuracies in the report regarding petitioner's completion of a parenting class and whether he was referred to the Safe Care program, Lusk transferred the case to another case worker.

On December 18, 2013 the Agency filed an Addendum to its six-month report. In the addendum, the Agency noted that petitioner was entitled to 22 hours of make-up supervised visits, which it arranged. Petitioner had requested an increase in visits and the report noted that the make-up visits would allow him to visit three days per week. The Agency also expressed its concerns about petitioner's parenting in light of his son's special needs. Thus, the Agency arranged to coordinate petitioner's visits with those of a nurse practitioner to address this need. It also agreed to evaluate the possibility of unsupervised visitation based on recommendations from the visit supervisor, the nurse practitioner, and petitioner's compliance with parenting classes.

Regarding other aspects of the case plan, the report indicated that although petitioner had completed one parenting class, he had chosen not to complete two others because he felt they were not helpful.<sup>3</sup> Petitioner agreed to work with a parent advocate to find more relevant parenting support. He lived with his mother, but, based on information provided by the petitioner, the Agency was concerned about the suitability of his mother's home for reunification purposes. Petitioner had not submitted to drug testing since the middle of November, but the testing that was available showed he

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<sup>3</sup> Petitioner contends that the report's assertion that he had not completed a parenting class was inaccurate. In fact, the report was inconsistent in this regard. In one place it states petitioner "provided the Agency with proof of completion of a Positive Parenting Class from City College of San Francisco." However, it also stated, "According to the case file record father has not complete[d] a parenting class."

continued to use marijuana. He agreed, however, to re-start testing in order to demonstrate low marijuana testing levels for a six-week period; the December 17, 2013 Addendum Report noted that there had been an unspecified four-week period in which drug levels were negative. He also agreed to a medical evaluation to determine if there was an appropriate medication to alleviate some of his depressive symptoms.

At the conclusion of the January 9, 2014 six-month review hearing, the court found by clear and convincing evidence that the Agency had provided reasonable efforts to provide or offer the father services designed to aid him to overcome the problems which led to the initial removal and continued custody of the child. Petitioner did not lodge an objection to the reasonable efforts finding. The court also ordered that services be continued and set the matter for a 12-month review hearing.

At the 12-month review the Agency's report recommended that services to petitioner be terminated and requested the setting of a section 366.26 hearing. The report chronicled Petitioner's efforts at reunification between the 6 and 12-month reviews. Petitioner had recently moved out of his mother's home and was staying on friends' couches. Because of his unstable housing, he had not yet had any unsupervised visits with his son. He previously reported having limited social support and he had now terminated all contact with his mother. His only social support was a cousin, with whom he intended to live. Petitioner reported feeling depressed and anxious and had been diagnosed with a mood disorder. However, he was not taking prescribed medication. Notwithstanding the psychologist's recommendation that he abstain from any substance use so he could be a better parent, he continued to use marijuana to cope with his pain. He had consented, however, to eight weeks of random drug testing and, as of the date of the report, all four of his tests showed a low THC/CR ratio (suggesting no new use of marijuana).

The Agency's 12-month report also addressed the minor's status. A.S., Jr. was doing well in foster care. He had overcome some cardiac and endocrine perinatal

complications. He had mild right cervical torticollis and plagiocephaly<sup>4</sup> which contributed to upper extremity asymmetries and related problems. He was described as having made “incredible gains” in gross motor skills and was working with both occupational and physical therapists to meet developmental milestones and to address some sensory deficits and increase the use of his hands for grasping toys and exploring his environment.

The Agency’s summarized its evaluation in its status report for the 12-month hearing by stating:

The undersigned received this case on 12/11/13 and has been consistent in meeting with [petitioner] and his attorney to discuss his current case plan and communicate about the importance of compliance, especially around his mental health, substance abuse and housing. [Petitioner] is receiving all of his reunification services and the undersigned has made attempts to offer alternative solutions to help [petitioner] succeed, in addition to resources to help meet his basic needs. [Petitioner] is currently on probation but has reported that due to his completion of his Domestic Violence and community service hours, he will move to Court Probation in March. [Petitioner] has a current 10-year stay-away order protecting his older son due to domestic violence. [Petitioner’s] changes in decisions regarding his housing, involvement with services and current mental health is a concern to the Agency when it comes to long-term parenting. Additionally, the Agency is concerned about [petitioner’s] substance abuse and the effect it would have on meeting the daily needs of [A.S., Jr.’s] development. The psychological evaluation reports that abstaining from substance use is recommended to effectively parent and [petitioner] continues to report that he uses marijuana to control his pain. [Petitioner] has been consistent with his visits and has shown to be appropriate and engaging, yet due to his housing situation, the visits have remained supervised. [A.S., Jr.] is meeting his developmental milestones and thriving in his current placement. [He] has formed a bond with his foster parents and they are interested in adoption, which allows [him] to have a safe and permanent home. The Agency recommends open adoption so [petitioner] can continue to establish a relationship with [A.S., Jr.].

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<sup>4</sup> Torticollis is a dystonic condition in which there is an abnormal, asymmetrical head or neck position. Plagiocephaly is a condition in which there is an asymmetrical distortion of the skull.

At the contested 12-month hearing, petitioner testified that with his cousin's permission, he resided in the living room of a one-bedroom apartment with her. The cousin agreed that the minor, A.S., Jr., could also stay with petitioner overnight. Petitioner and his cousin were attempting to move into a two-bedroom apartment in the same complex. However, when the case worker went to the cousin's apartment to assess the proposed living arrangements, she learned that petitioner's cousin did not want the Agency to conduct the required background check on her boyfriend. As of the date of the hearing, the cousin had not provided the information necessary for the Agency to run the background check on the boyfriend. Absent receipt of this information, the Agency could not complete its assessment of the cousin's apartment.

At the conclusion of the contested 12-month hearing, the court found by clear and convincing evidence that reasonable services had been offered or provided. Acknowledging the difficulty of the termination decision, given that petitioner "clearly cares for this child and has been working on a relationship with him," the juvenile court, nonetheless, ordered that services be terminated. Specifically, the court found that the "return of the child to his father would create a substantial risk of detriment to his safety, protection, physical or emotional well-being." The court referenced in its decision its concerns regarding "[petitioner's] ability to parent on a daily basis, continuing concerns about his mental health, substance abuse concerns, and appropriate housing." The court noted that although petitioner's progress in alleviating or mitigating the issues that originally necessitated placement had been "adequate," it was, nonetheless, "too little, too late." Thus, based upon the record, the court found no "substantial probability that the child would be returned by the 18-month review date, [i.e.,] July 30, 2014." The court then terminated reunification services and set a section 366.26 hearing for September 24, 2014. Finally, the court adopted the Agency's recommendation that an open adoption would be the most appropriate result in this case.

After filing a timely notice of intent, petitioner filed a writ petition in this court on June 23, 2014 challenging the superior court's decision on two bases: (1) the Agency failed to provide reasonable services and (2) the court erred when it determined that

returning the child to the father would create a substantial risk of detriment. The Agency, in response, argues that substantial evidence supports the court's reasonable services and detriment findings.

## DISCUSSION

In support of his contention that the Agency did not provide reasonable services Petitioner contends that for approximately two months leading up to the 6-month review the assigned social worker failed to: (1) meet with him to discuss the results of his psychological evaluation or to re-evaluate his visitation; (2) meet with him regularly; (3) review services he was being offered; and (4) review the referrals that had been made.<sup>5</sup>

We conclude that Petitioner has waived his lack of reasonable services claim. At the six-month review hearing the juvenile court determined that reasonable services had been offered and ordered that the Agency continue to provide reunification services. No objection was made to the reasonable services finding and appellate review of that finding was not sought. It is, thus, too late to challenge that determination now. (See *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811-812 [once a finding that reasonable services have been given became final, petitioner waives right to complain about services in the time period covered by that order]; see also *In re Jesse W.* (2001) 93 Cal.App.4th 349, 355, citing *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811 [“ ‘A challenge to the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed.’ ”]) Petitioner argues that *Steve J.*, *supra*, is factually distinguishable in that there the Agency's failure to provide services during the initial 6-month period had no effect on the subsequent 12-month review. We disagree. That factual difference between the

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<sup>5</sup> The Agency disputes the accuracy of this picture. For example, the Agency claims the gap in Service Log entries is shorter than what petitioner claims. It also contends that one cannot conclude that simply because no entries were made in the log that no contact occurred. However, we need not resolve these factual disputes to decide this case.

instant case and *Steve J.* does not support a different outcome. Although in *Steve J.* the father's arrest and incarceration, during the reunification period, superseded any effect of the early deficiencies in services provided, that fact had no bearing on the court's discussion of the circumstances under which a parent can challenge services that had previously been determined to be adequate. The general principle, applied in *Steve J.* and other California appellate courts reviewing appeals from dependency proceedings, is that untimely challenges to orders are waived due to "vital policy considerations of promoting finality and reasonable expedition, in a carefully balanced legislative scheme, and preventing late-stage 'sabotage of the process' through a parent's attacks on earlier orders." (*In re Jesse W.*, *supra*, 93 Cal.App.4th at p. 355, citing *In re Janee J.* (1999) 74 Cal.App.4th 198, 207.) Thus, the principle articulated in *Steve J.*, *supra*, 35 Cal.App.4th 798, 811, controls this case, even assuming there is arguably some impact from an earlier failure to provide adequate services.

Assuming that Petitioner's challenge to the adequacy of the Agency's efforts before the six-month review has not been waived, we would deny it on the merits. Petitioner focuses on what he claims is the lack of services he received in the two months before his 6-month hearing. His 6-month hearing took place in early January 2014. Although the parties disagree regarding its significance, the Agency concedes that there are no log entries in petitioner's file from October 17, 2013 through December 9, 2013. Yet, as shown below, petitioner's lack of cooperation and resistance to the reunification plan pre-dates that time period and appears largely to be unaffected by it.

It is well-established that in determining whether reasonable services were offered, we do not ask whether the services provided were perfect, but only whether they were reasonable under the circumstances. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547.) Services are reasonable if the agency identified the problems leading to the parent's loss of custody, offered services tailored to those problems, maintained reasonable contact during the course of the service plan, and made reasonable efforts to assist the parent as needed. (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 972–973.) The March 2013 report recommended that Petitioner undergo individual counseling, that he complete a parenting

education program focused on child development and non-physical discipline, that he obtain and maintain suitable housing for himself and his son, that he visit the child regularly, that he complete a substance abuse assessment, including drug testing, and comply with the recommendations of that assessment, and that he undergo a psychological evaluation and comply with its treatment recommendations. As of February 4, 2013, petitioner had been presented with a case plan detailing these recommendations, which, on advice of counsel, he refused to sign. The worker recommended that petitioner undergo a psychological evaluation in March 2013; although he received the formal referral for that evaluation in May 2013, he was not evaluated until late September, 2013. Petitioner received a referral for individual therapy in approximately January 2013, but elected not to start therapy for more than a year, in February 2014. And, notwithstanding his psychiatric diagnosis and symptoms he experienced, he refused to consider taking prescribed medications until approximately December, 2013. None of these delays by petitioner in availing himself of the services offered to him appears to have been significantly affected by any lack of follow-up by the Agency in the late October to late December 2013 time frame.

In addition, Petitioner had a significant history of prior domestic abuse; although his record regarding supervised visits with A.S. Jr. is exemplary, he was unable to secure an approved residence, at which he could have overnight visits with A.S. Jr., a special-needs child. Thus, his ability to parent A.S. Jr, remained untested at the critical 12-month review. Finally, petitioner's use of marijuana for pain relief remained problematic. To the extent that use was necessitated by back pain, he failed to provide documentation that the back problem had been medically evaluated. Moreover, petitioner was not forthright about his use of marijuana. Even though he had a valid marijuana card and, based on his testing, was using marijuana, he informed the evaluating psychologist that he had stopped taking the drug. His dishonesty about his continuing drug use may have been motivated by the psychologist's recommendation that he abstain from substance abuse to improve his parenting, but at a minimum, demonstrated an inability to reconcile his pain treatment with the need to function as an effective parent. Again, there is no showing that these

long-standing issues were affected significantly by any lack of contact between Petitioner and the Agency in late 2013.

In short, although the Agency might have demonstrated greater initiative in encouraging petitioner to overcome his resistance to treatment during the late October to late December 2013 time frame, overall the Agency did what was reasonably necessary to assist petitioner by identifying his problems, developing suitable interventions, and encouraging and helping him to meet his treatment goals. The record does not substantiate the claim that the two-month dearth of Agency contacts with Petitioner significantly affected his overall progress. To the contrary, there is substantial evidence to support the finding that the Agency provided reasonable services to ameliorate Petitioner's issues that necessitated intervention in the first place.

Petitioner's second claim — that there is no substantial evidence to support the court's conclusion that A.S., Jr. should not be returned to his father—also fails. Indeed, much of the same evidence that demonstrates that Petitioner failed to take advantage of the services offered by the Agency, also constitutes substantial evidence supporting the conclusion that returning the child to Petitioner would create a substantial risk of detriment to A.S., Jr. Petitioner had not yet secured suitable housing sufficient even to begin unsupervised visits. He had a long-standing history of domestic abuse and had been barred from contact with an older child. There remained a question about how he would cope with unsupervised home visits with A.S., Jr., a special-needs child, if they were allowed. He had only belatedly indicated a willingness to take medications to treat his bipolar disease, but had not yet even started taking that medication despite feeling both anxious and depressed and despite the severity of his underlying mood disorder which had resulted in his involuntary hospitalization four times. He had only recently started individual psychotherapy, despite his well-documented and long-standing domestic violence and mental health problems and despite having been referred for psychotherapy more than a year earlier. He continued to use marijuana despite concerns that it adversely affected his parenting. Rather than discussing his self-perceived need to use marijuana forthrightly, he dishonestly denied any recent use. Because of continuing

substance abuse problems, his case was dismissed from drug court. Thus, he had not established any track record to demonstrate that he was committed to overcoming these critically serious issues or that he had the perseverance to overcome the inevitable ups and downs of treatment. Therefore, notwithstanding the love and devotion he demonstrated towards A.S., Jr., there was no basis to find that there was a substantial probability that A.S., Jr. could be returned to his father. Thus, the juvenile court's decision to set a hearing to consider whether parental rights should be terminated was correct.

**DISPOSITION**

For the reasons explained above, we deny the petition for an extraordinary writ and the related request for a stay of the section 366.26 hearing. Because the section 366.26 hearing is set for September 24, 2014, our decision is immediately final as to this court. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.