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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

M.H.,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA  
COUNTY,

Respondent;

ALAMEDA COUNTY CHILDREN &  
FAMILY SERVICES DEPARTMENT et  
al.,

Real Parties in Interest.

A148568

(Alameda County  
Super. Ct. No. SJ14023294)

Petitioner M.H. (Father), the father of three-year-old J.H., challenges the Alameda County juvenile court's May 3, 2016 order terminating family reunification services and setting a hearing, pursuant to Welfare and Institutions Code section 366.26.<sup>1</sup> Because the record shows that Father's case plan was incomplete more than 18 months following J.H.'s detention and he was not yet ready to assume responsibility for J.H., we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On July 25, 2014, the Alameda County Children and Family Services Department (the department) filed a petition on behalf of J.H., pursuant to Welfare & Institutions

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<sup>1</sup>Unless otherwise noted all statutory references are to the Welfare and Institutions Code.

Code section 300, subd. (b), alleging that the child’s mother, S.M. has a substance abuse problem and criminal history that was causing or placing the child at a substantial risk of suffering serious physical harm or illness.<sup>2</sup> The petition stated Father’s whereabouts were unknown “as is his ability to provide care and support for the minor.” On July 28, 2014, the juvenile court detained J.H. and ordered that his temporary placement and care be vested with the department.

In its Jurisdiction/Disposition report, filed August 15, 2014, the department recommended that Mother be bypassed for services and that none be provided to Father, who was then the alleged father, “unless or until he establishes a basis for such services.”<sup>3</sup> Father acknowledged his “extensive criminal history” and his parentage of three other children who were living with their respective mothers. Although he and J.H.’s mother were no longer a couple, he wished to be involved in the child’s life. He stated that up until the department intervened, J.H. had lived with him every other week. Father was present at J.H.’s birth, was listed on the child’s birth certificate as the father, and had signed a Declaration of Paternity. Furthermore, he provided for some of J.H.’s material needs.

On January 5, 2015, Father filed a Statement Regarding Parentage, stating that he is J.H.’s father and acknowledged that if he were adjudged to be, he would have support obligations until the child turned 18 or 19. On March 13, the juvenile court granted Father’s request for presumed father status, ordered his attorney to request reunification services, and invited briefing. Counsel requested that the juvenile court order the department to provide Father with reunification services and a specific visitation schedule.

J.H.’s caregivers filed a de facto parent statement in which they reported that J.H. had lived with them for two periods of time—from July 20, 2013, through April 2014 and

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<sup>2</sup> Since this writ petition was filed by father, we discuss facts concerning the mother only to the extent necessary to understand the general context of the case.

<sup>3</sup> The report is confusing regarding Father—identifying him with two different names— known here as B.L. and M.H.

from November 14, 2014, through the filing of the statement on March 18, 2015. They reported spending all their free time with him, teaching him, taking him on outings, and showing him new things. They also reported that J.H. had been seen by specialists from Children's Hospital in Oakland to help him overcome anger, behavioral issues, night terrors, and sleep problems. They indicated he was somewhat improving.

In advance of an April 2, 2015 special interim hearing, the department submitted a report recommending that J.H. remain a court dependent, that his out-of-home placement be continued, that services to Mother be terminated, but that services be offered to Father. Father's case plan had the following objectives: that he (1) obtain the resources to meet his child's needs and to provide him with a safe home; (2) avoid arrests and convictions; (3) develop positive support systems with family and friends; (4) remain free of illegal drugs, show his ability to live free from drug dependency, and comply with all required drug tests, (5) consistently appropriately, and adequately act as a parent to his child, and (6) pay attention to and monitor his child's health, safety, and well-being. He was to (1) participate in individual counseling to address domestic violence issues or to participate in and complete an approved domestic violence program; (2) participate in and complete parenting education; and (3) complete a substance abuse assessment and follow through with all the recommendations and to submit to random drug testing as recommended by the substance abuse service provider and the department. At the April 2 hearing, the juvenile court ordered the department to provide family reunification services to Father and J.H. and allow them therapeutic visitation.

On May 15, 2015 the family drug recovery specialist submitted a status report regarding Father. He was being seen five days per week for outpatient treatment and weekly drug testing, and already had two negative drug tests. However, the May 29, 2015 report from the specialist stated that despite an additional negative drug test on May 20, Father had been discharged from the program for stealing neckties from the Salvation Army store.

In its June 15, 2015 Addendum Report, the department recommended that Father continue to receive family reunification services. The department reported that since

Father's discharge from the Salvation Army Rehabilitation Center due to theft, he had entered the Cityteam Men's Recovery program. It further noted that he "consistently tested clean since entering Family Drug Court on May 7, 2015." The report also indicated that on April 6, 2015, Father had been referred to Terra Firma for domestic violence services and for parenting education. Between April 9 and 22 Terra Firma tried to reach Father and left phone messages for him, but he did not return any of the messages and the social worker was unaware whether Father was receiving any services for domestic violence or parenting skills. Furthermore, although the department had arranged for Father to visit with J.H., because of the "blackout" periods at both the Salvation Army and the Cityteam Men's Recovery program, he was unable to visit with his son until July, 2015.

On June 23, 2015, the court continued Father's reunification services, ordered him to participate in all aspects of his case plan, and set a 12-month review hearing for September 15, 2015.

In advance of the September 15 hearing, the department submitted a report recommending termination of Father's reunification services and setting a hearing to free J.H. for adoption. The report indicated that on August 6, 2015, Father left the Cityteam Men's Recovery Program because of his obligations apart from their program, in particular visitation with his other children. But things had been going very well at Cityteam. Father showed an " 'exceptional willingness' " to meet all the requirements, he had " 'a great work ethic,' " and the staff was " 'extremely proud' " of the progress he made in a short time. Despite these positive comments, Father was discharged from the program because he had outside obligations. Approximately a day later Father entered the Options Recovery Sober Living House and began their five-day per week outpatient treatment program. The intake coordinator stated that Father was still in the " 'denial management' " treatment stage, but Father continued to test clean through August, 2015.

Between April 6, 2015, and August 21, 2015, the department made various suggestions and referrals to Father regarding a suitable domestic violence prevention program. It is unclear exactly what, if any, objections Father had to the referrals that

were made. But as of August 21, 2015, there was no indication that Father had entered a domestic violence program, although he did participate in anger management classes.

Throughout April 2015, the department attempted to arrange parenting education for Father, but he did not respond to their messages. On May 18, 2015, however, the Salvation Army Adult Rehabilitation Center reported that Father was participating in their parenting education program. Since July, 2015 a clinician was providing dyadic therapy for father and child and supporting Father's attempts to meet his son's emotional needs.

Beginning July 14, 2015, Father had one hour of therapeutic visitation with his son each week. He missed no visits. J.H. seemed to enjoy the interactions. However, the caregiver reported that J.H. "still displays an increase in challenging behaviors at school the day after visits." For example, the day after one visit J.H. pushed another child down. J.H. was also having sleep disturbances throughout the night, especially the nights following a visit.

The department's assessment in mid-September 2015 was as follows: [Father] is currently . . . addressing his substance abuse issues and maintaining his sobriety. [He] has completed some anger management classes and parenting education. It is the Agency's hope that [he] will continue to prioritize his recovery and continue to make choices that positively impact his life. It is of note that treatment program staff have described [him] as having a positive attitude, having a great work ethic and as being unselfish in his willingness to help others achieve sobriety. Despite [his] progress he is still in early stages of his recovery, has recently begun therapeutic visitation with his son, has yet to complete his case plan responsibilities and is not in a position for the minor to be returned to his care at this time." The report noted that Father had not consistently participated in any one program and would benefit from finishing a domestic violence prevention program and parenting education. He would also benefit from a strong support system to assist him in maintaining his sobriety and obtaining housing and employment.

At the September 15, 2015 hearing, Father's counsel requested that visitation be increased to two hours, twice each week. The minor's counsel, the department and the de facto parents all objected. Counsel for the de facto parents explained that J.H. was having a difficult time and seemed to be upset after visitation.<sup>4</sup> J.H. had been referred to Stanford's High Risk Infant Services program and the Oakland Regional Center and was soon to begin services with both of them. There was a concern that changes to his stability might have a detrimental effect as the de facto parents were making "strenuous efforts" to help him. The court, however, ordered that Father's visitation be increased to two, two-hour sessions per week. Initially, the visits were to be supervised, but the department was granted discretion to move to unsupervised visits, conditioned on providing the parties with at least 72 hours notice. The court set October 16 for a progress report. At the October 16 hearing the juvenile court ordered that Father continue to visit twice per week and granted the department's discretion to increase the frequency of the visits.

In its Addendum Report, filed November 13, 2015, the department recommended that J.H. remain a dependent of the juvenile court, that a section 366.26 hearing be set to determine a permanent adoption plan, and that Father's reunification services be terminated. J.H. continued to live with his non-relative extended family.<sup>5</sup> After he was tested at the regional center, J.H. was said to have a mild delay in receptive language and a moderate delay in expressive language. He also scored in the extremely low range in overall adaptive functioning and social skills. He was receiving speech therapy and was scheduled to begin individual behavioral services and a therapist was to support the family in working with him.

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<sup>4</sup> The visitation with Father, however, at least on the occasion cited to the court, was preceded by a visit with the mother and another child, so it was unclear whether the child's contact with Father was upsetting him.

<sup>5</sup> On or about July 23, 2014 J.H. was placed in foster care. Since November 14, 2014, he had been living with non-relative extended family members who he had known as figurative grandparents. On April 30, 2015, the caregivers were granted de facto parent status.

The report noted Father's seven month's of sobriety, his positive attitude, and "great work ethic." It also recognized that he had "completed some anger management classes and parenting education." Nonetheless, sobriety was only a piece of what Father needed to accomplish to secure J.H.'s return to him. He had not yet completed all his case plan responsibilities. He lacked suitable housing where he could live with J.H.; he had no means of support and, if he were to find a job, no viable plan for childcare. The report noted that Father had only begun to receive formal reunification services in April 2015, but attributed some of the delay to Father partially because he refused to provide an address to the social worker so he could be contacted.

Finally, J.H. had been living with his caregivers for approximately one year and was thriving. The caregivers expressed their commitment to care for J.H., and they recognized that, in the event he were put up for adoption, continued contact with his birth parents would be important.

Father argued that there was a substantial probability that J.H. could be returned to his care with the provision of additional reunification services and that the court should order the continuation of services to the 18-month review hearing. His argument was based primarily on his consistent and regular visits with J.H., the significant progress he had made, consistently testing clean for possible substance abuse since May 2015 and his engagement and participation with the Family Drug Court, residential drug treatment, and outpatient drug treatment. Furthermore, through his inpatient program, he had addressed the domestic violence component of his case plan.

The contested hearing began on November 16, 2015, but was continued numerous times through April 26, 2016. Father testified that he had been addicted to various substances, primarily crystal methamphetamine, for 12 years, including the time J.H. was conceived. He testified that he has three other children with whom he is re-building a relationship. He also testified that he was charged with misdemeanor domestic battery against J.H.'s mother, for which he violated probation and served an additional 30 days in

jail.<sup>6</sup> In discussing the domestic violence incident Father maintained that he did not hurt J.H.'s mother and that the police pressured her into complaining against him by threatening to arrest her for being under the influence if she did not do so. He conceded however, that there was still an active restraining order prohibiting his contact with J.H.'s mother. Father admitted that, although he was required to take parenting classes, as of November 16, 2015, he had been doing so for only three or four weeks.

On January 21, 2016, the department filed a further addendum report, in anticipation of the 12-month and 18-month status reviews still recommending termination of Father's reunification services. Father was living in a transitional sober living environment, sharing a bedroom with another resident. The housing program could accommodate children and if J.H. were placed with his father, they would share a room with another resident and that resident's child. Father was continuing to receive outpatient services, to which he was committed. He also continued his participation in Family Drug Court. He had completed four out of the required 12 parenting education sessions. A month earlier he began to take Domestic Violence Prevention Classes. He was regularly visiting with J.H. twice per week, one hour of which was devoted to dyadic therapy. During visits, Father engaged J.H. in various activities and set limits with him. J.H.'s caretakers reported that J.H. manifested sleep and behavioral problems at daycare following the visits. Generally, J.H. was reported to have improved in the social emotional domain and was less aggressive at school. He was better attuned to his caregivers, in part because he had a consistent and predictable routine.

The department continued to believe it would be detrimental for J.H. to return to his father's care. First, it distinguished between Father's becoming sober and maintaining his sobriety because Father had yet to demonstrate that he could maintain his sobriety while caring for a young child with developmental deficits. Although Father recently obtained housing that accepted children, the department was concerned that a "large shared living environment is not in the best interest of the minor." Because of his

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<sup>6</sup> Father had been arrested on January 27, 2015, for a violation of an active restraining order, protecting J.H.'s mother.

age and developmental delays J.H. required structure and routine. The department was concerned that there was insufficient time for a progressive transition plan to see how a placement with Father would work out. It opined that a transition to a new home would be difficult for J.H. Family Drug Court paid for Father's housing for six months and the department understood that Father would need to find a job to support himself and J.H., develop a plan for childcare, be able to maintain and arrange for J.H.'s special services, and attend his own substance abuse outpatient sessions five times per week. The department did not believe it reasonable for him to accomplish all this and afford the department a timely opportunity to assess his ability to do so on a continuing basis.

On January 21, 2016, the social worker testified that J.H. had weekly appointments at the Regional Center with an individual therapist, a specialized instructor, and a speech therapist. Despite Father's invitation to get involved in "school issues," and his stated willingness to do so, Father did not have extensive knowledge of his son's developmental deficits, explaining that staff of the Regional Center did not tell him too much because his son was the Center's client.

On April 8, 2016, the department submitted another Addendum Report, again maintaining its earlier recommendation for termination of services. Although there had been some cancelled visits due to illness and Father's attendance at a parenting retreat, visits generally were going well. As of March 17 they were occurring at Father's home. The worker observed one visit and reported that J.H. was "smiling and active" during the visit. The caregivers continued to report that J.H. suffered from sleep and increased behavioral problems following visits.

The report recorded the impression of the dyadic therapist who worked with J.H. that despite some progress, "transitions remain difficult" for him and that he experienced accentuated separation anxiety. She also reported that J.H. was bonded with his caregivers and viewed them as "attachment figures"

In her testimony on April 8, 2016, the worker reiterated her impression that J.H. has difficulty with change and that Father's housing situation would create challenges for J.H.'s adjustment. According to the department's April 8 report, Father's bedroom at the

Life House Recovery Homes was a converted living room, shared by four men. There were two other rooms—one housing an additional four men, and one was the house manager’s quarters. Concerns about J.H.’s napping and sleep schedule were raised, especially in view of his special developmental needs, which require routine, consistency, and structure.

On April 8, Father testified that he was about to begin a paid training program at St. Vincent de Paul. He stated that J.H. was happily visiting him at his home twice per week. Father observed that when J.H. left it was “an easy transition.” He also observed that in his current living situation, there was not too much traffic in the house. The television was typically off by 10 p.m. and everyone was “mindful and respectful.” He did not anticipate much of a problem were J.H. to live with him.

On April 11, 2016, Father again testified. He had had a drug problem for “13-plus years” and had been sober for almost a year. He completed a drug program in 1995, but relapsed in 2003. He felt it was different this time because he had truly hit “rock bottom,” “was “sick and tired of being sick and tired,” and knew that he could not use drugs.

At oral argument, in support of its position to terminate services, the department cited the amount of time that had passed since J.H. had been detained, Father’s extensive drug history, J.H.’s reported behavior disturbances after visits, Father’s lack of demonstrated success in an independent living situation, and Father’s incomplete domestic violence and parenting portions of his case plan. J.H.’s counsel agreed with the department, arguing that despite the fact that the 18-month point had passed, Father had not completed any element of his case plan, and although he had made significant progress on his substance abuse, he still had not graduated from family drug court. Counsel stressed that Father had not engaged with the special services J.H. was receiving and did not understand those needs.

Father’s counsel cited Father’s consistent participation in drug treatment, the fact that Father had not relapsed, his participation in parenting and domestic violence classes,

his consistent visitation with his son, and his participation in therapy. Furthermore, Father had found suitable housing for himself and his son and had good job prospects.

On May 3, 2016, the juvenile court terminated Father's reunification services. The court acknowledged that Father had "turn[ed] his life around," and possessed many "strengths to offer to his beautiful child." Nonetheless, he had not yet completed his case plan, including his drug program, parenting education, and domestic violence programs. He was never J.H.'s primary parent and only recently began unsupervised visitation. Furthermore, he lacked an understanding of J.H.'s developmental and special needs. By a preponderance of the evidence, the court found that returning J.H. to Father at that time would create a substantial risk of detriment to his safety, protection or physical or emotional well-being because Father had not alleviated or mitigated the causes necessitating out-of-home placement. The court then set a 366.26 hearing for August 26, 2016.

Father timely filed a Notice of Intent to File Writ Petition in the Alameda County Superior Court. However, due to clerical oversight in the superior court, there was a delay in processing the Notice of Intent. A petition for extraordinary writ was filed in this court on August 1, 2016, and we issued an order to show cause and stayed the termination hearing. Oral argument was waived.

### **DISCUSSION**

Father makes two arguments in support of his petition: (1) there is a lack of substantial evidence to support the finding that returning J.H. to him would create a substantial risk or detriment to J.H.'s safety, protection, or physical or emotional well-being and (2) that the department failed to provide reasonable services when it did not allow Father to have unsupervised and overnight visits.

We review an order terminating reunification services pursuant to the substantial evidence standard. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 839.) If the evidence relied on by the juvenile court is " 'reasonable, credible, and of solid value, such that a reasonable trier of fact could find the court's order was proper based on clear and convincing evidence' " the juvenile court's order must be affirmed. (*Id.* at pp. 839–840.)

Where there is any substantial evidence to support the juvenile court's findings, we cannot weigh or evaluate the court's findings. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1361–1362, citing *In re Carrie W.* (1978) 78 Cal.App.3d 866, 872.)

**A. SUBSTANTIAL EVIDENCE SUPPORTS THE JUVENILE COURT'S DETRIMENT FINDING.**

In general, if a child cannot be safely returned to his/her parents within 18 months following detention, the juvenile court must terminate reunification services and set a section 366.26 hearing. (§ 366.22; *In re Andrew L.* (2004) 122 Cal.App.4th 178, 190–191.) When a child is younger than three years old when first removed from the parents' physical custody, court-ordered services are to be provided for six months from the dispositional hearing, but no longer than 12 months from when the child entered foster care unless the child is returned to the parents' home. (§ 361.5, subd. (a)(1)(B).) The child must be returned to the parent unless the court finds by a preponderance of the evidence that doing so would create “a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.” (§ 366.21, subd. (e)(1).) If the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in the parent's treatment plan, the court may schedule a 366.26 hearing within 120 days. (§ 366.21, subd. (e)(3).)

The juvenile court's analysis is a qualitative one—that is it must determine not just whether the parent participated in the activities mandated by the case plan, but whether those activities are doing any good. (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1747–1748.) A finding, however, that returning a child to a parent who has attended the required counseling and therapy would be detrimental to the child cannot be based solely on vague, indefinable constructs such as lacking “ ‘a sense of self,’ ” or “failure to ‘internalize’ general parenting skills.” (*Id.* at p. 1751.) The juvenile court must evaluate the parent's “capacity to meet the objectives of the plan.” (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1143.)

Here, we agree with the juvenile court that Father has come a long way. Since receiving reunification services, he has been attending inpatient and outpatient substance

abuse programs and has tested clean throughout the reunification period. That is a remarkable achievement for someone with a serious, 12- or 13-year drug history. But the court was required to consider more than Father's progress in substance abuse rehabilitation. It is important for the parent to successfully complete the entire case plan. Even though, as Father points out, compliance with a case plan need not be perfect to secure a child's return (*In re Paul E.* (1995) 39 Cal.App.4th 996, 1003–1004.), the issue is whether removal is required to protect the minor's physical or emotional health (*Ibid.*). Among other factors, the juvenile court may consider a parent's limited awareness of the child's emotional needs and the fact that the child has not lived with the natural parent for long periods of time. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704–705.)

Returning any child to a parent with a significant drug history requires a basis to have confidence that the parent will remain sober, successfully deal with the demands of the child, and be able to provide for his/her own material and emotional needs, as well as those of the child. Where the child has special needs for structure, routine, and consistency, the importance of these considerations is manifest. Here, Father had never been J.H.'s primary caregiver. There was no evidence that he was able to fill the role even for relatively brief periods of time, such as a weekend. There was no showing that he could successfully support himself and his child and remain sober and attentive to J.H.'s special needs. Indeed, the department was concerned that Father did not yet have a full understanding of J.H.'s special needs, based on his developmental delays. Furthermore, there is no record of Father successfully managing the various, competing demands on his energies and time that will arise if J.H. was returned to him, plus his need to remain sober and engage in activities designed to support his sobriety. Father also did not begin a domestic violence prevention program until December 2015. Accordingly, there is substantial evidence to support the juvenile court's decision to terminate services. Despite Father's exemplary effort and success with sobriety, there is evidence supporting the court's conclusion he was not yet ready to assume J.H.'s care more than 30 months after the child's detention.

**B. THE VISITATION SCHEDULE ESTABLISHED BY THE AGENCY DOES NOT SUPPORT A CONCLUSION THAT THE DEPARTMENT FAILED TO PROVIDE REASONABLE SERVICES.**

Father argues that the department failed to provide reasonable services because he had no unsupervised and overnight visits. We reject this contention. To provide reasonable services the department must identify the problems which led to the loss of custody, design suitable remedial services, maintain reasonable contact with the parent, and make reasonable efforts to assist the parent when compliance is difficult. (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 972–973.) The ultimate question is “ ‘whether the services were reasonable under the circumstances.’ ” (*In re T.G.* (2010) 188 Cal.App.4th 687, 697, citing *In re Misako R.* (1991) 2 Cal.App.4th 538, 547.)

As both Father and the department recognize, the frequency of visitation must be consistent with the child’s well-being. (See § 362.1, subd. (a)(1)(A) [“Visitation shall be as frequent as possible, *consistent with the well-being of the child*,” emphasis added].)

As an initial matter, Father’s claim that the department did not allow unsupervised visits is inaccurate. Certainly, at times the department did not allow visitation to progress as rapidly as Father wished, but Father did have unsupervised visits. Father and J.H. began them on February 4, 2016. By March 17, 2016, those visits took place in Father’s home. So the claim that the department did not allow unsupervised visits at all can be flatly rejected.

The real issue is whether by waiting until February 4, 2016, for the first unsupervised visit, the department waited too long.<sup>7</sup> And the simple answer is no, it did not. After working with therapists for over a year, J.H. would hit himself or bang his head against the wall. He would cover his face, throw himself on the floor, and scream. He was attending therapy either at the Regional Center or at home five days per week. The de facto parents, via counsel, argued that increasing visitation would interfere with these prescribed services and would be disruptive.

J.H. was also reported to be acting out or regressing following visits. Visitation

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<sup>7</sup> It is also accurate that overnight visitation did not occur.

had to be delayed when Father was in the blackout periods for his substance abuse counseling. Similarly, Father's initiation of services was delayed because of his initial refusal to provide the department with his contact information and because he did not promptly return his statement of paternity.

J.H.'s visits with Father did progress over time to unsupervised visits. Given J.H.'s special needs and his adverse behavior following visitation, we cannot conclude the department and court failed to provide reasonable services by not advancing visitation more rapidly. Progressing faster could reasonably have been considered inconsistent with J.H.'s well-being. Thus, the visitation schedule does not support Father's contention that he was not provided adequate services.

#### **DISPOSITION**

The petition for an extraordinary writ is denied. The stay, previously issued by this court on August 7, 2016, is dissolved. 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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Siggins, J.

We concur:

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McGuinness, P.J.

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Jenkins, J.