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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL R.,

Petitioner,

v.

THE SUPERIOR COURT OF  
SAN DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Real Party in Interest.

D061304

(San Diego County  
Super. Ct. No. J517-957B)

PROCEEDINGS in mandate after reference to a Welfare and Institutions Code section 366.26 hearing. Cynthia Bashant, Judge. Petition granted.

Michael R., the father of Athena V., seeks extraordinary writ relief (Cal. Rules of Court, rule 8.452); he challenges the juvenile court order terminating reunification

services and setting a hearing under Welfare and Institutions Code section 366.26 (all statutory references are to the Welf. & Inst. Code). Michael contends the court erred because there was a substantial probability Athena could have been placed in his custody by the 18-month review date.

We issued an order to show cause, the San Diego County Health and Human Services Agency (Agency) responded, and the parties have waived oral argument. We have reviewed the petition on its merits and issue a writ of mandate directing the juvenile court to vacate its order and revisit the issues in conformity with this opinion.

## FACTS

Michael and Athena's mother had a brief relationship, which ended when Athena was four months old and the mother told him he was not Athena's father.

In July 2010, Athena, then two years old, was living with her mother, stepfather and two half-sisters. The family came to the attention of Agency because of domestic violence and substance abuse. Agency offered voluntary services, but the mother and stepfather did not participate in any services. In mid-October, the stepfather pushed the mother down the stairs while she was holding Athena's infant half-sister.

On October 18, Agency filed a dependency petition on behalf of Athena, alleging she was at risk because she was exposed to domestic violence. The test results established Michael as Athena's biological father.

Michael wanted custody of Athena, but was unable to care for her at the time because he lived in a one-bedroom apartment with a roommate and he worked graveyard shifts for two security companies with only one night off. Michael said he wanted

Athena to live with his mother. While Agency assessed the paternal grandmother's home for placement, the social worker arranged one hour of visitation for Michael and the grandmother. Michael soon progressed to unsupervised visits.

In March, the court found Michael to be Athena's presumed father and ordered Agency to provide him with reunification services. Michael's reunification plan required him to attend counseling and complete a parenting class.

In April, Athena was placed with the paternal grandmother, and Michael visited her on Saturdays. According to the paternal grandmother, Michael did not interact very much with Athena during the visits.

In June, Michael completed a parenting class and began therapy.

On July 28, the court found Michael had made some progress with his plan and ordered Agency to continue to provide services to him. The court granted de facto parent status to the paternal grandmother and terminated services for the mother.

The grandmother told the social worker that Michael did not visit Athena for the entire eight hours which he was allotted and missed visits every other Saturday because he was sick or too tired. The social worker left a phone message for Michael in September stating she wanted to approve his apartment for overnight visits, but Michael did not return her call. He later told her that he was too tired and did not have the energy for overnight visits.

By the end of October, Michael had attended eight sessions of therapy and was making good progress. Michael had missed only one session because of illness. He also

had applied for day-time jobs to University of California San Diego and the Hilton Hotel Corporation.

In early November, Michael told the social worker he still was not able to care for Athena full time because of his work schedule. Michael also said his visits with Athena had been inconsistent because he had been sick and hospitalized. His ailments included mononucleosis, a stomach hernia and colitis. The social worker told Michael he had limited time to reunify with Athena because of her age. The paternal grandmother, who had adopted Michael when he was a child, wanted to adopt Athena. This upset Michael because the grandmother had said she would care for Athena until he was able to do so. He believed she had gone behind his back in trying to adopt Athena.

After meeting with the social worker, Michael began seeking child care and a preschool for Athena through his church. Nonetheless, his therapist discharged him after 10 sessions because he did not have a specific plan to address the limitations placed on him by his work schedule and living arrangement.

Agency recommended Michael's services be terminated at the 12-month hearing.

At the contested 12-month permanency hearing on January 20, 2012, the social worker testified that Michael was unsuccessful in therapy because he had not met the goal of finding suitable housing and employment. The social worker did not believe Michael could do so by the 18-month review date because he already had one year in which to do so. Michael had never asked for placement and he declined the offer of overnight visits, the social worker testified. For awhile, Michael missed every other Saturday visit, but lately his visits had been consistent.

Michael testified he had missed some visits because of health issues, which had since been resolved. Although he lived in a one-bedroom apartment, Athena could share his room. He was able to purchase a bed for her and intended to do so that day. Michael testified that he had arranged for Athena's aunt to care for Athena while he was at work and he would pick her up in the morning and take her to preschool. Michael said he had completed therapy to the therapist's satisfaction.

The court found that placing Athena with Michael would create a substantial risk of detriment to the child's physical and emotional well-being. The court also found there was not a substantial likelihood that Athena could be returned to Michael's custody by the 18-month date, which was three months away. The court terminated Michael's services and scheduled a section 366.26 hearing.

## DISCUSSION

At the 12-month review hearing, if the child is not returned to parental custody, the juvenile court has the discretion to continue the case to the 18-month review date. (§ 366.21, subd. (g)(1).) Section 361.5, subdivision (a)(3) allows the court to extend services to the 18-month review date even to the parent of a child who was under three years on the date of the initial removal from parental custody if the court finds there is a substantial probability the child will be returned to the parent's physical custody and safely maintained in the home within the extended time period, or reasonable services have not been provided to the parent. (§§ 361.5, subd. (a)(3), 366.21, subd. (g)(1).)

A substantial probability of return finding has three prerequisites or prongs: the court must find the parent has consistently visited the child; the parent has made

significant progress in resolving the problems that led to the child's removal; *and* the parent has demonstrated the capacity and ability to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being. (§366.21, subd. (g)(1)(A)(B)&(C).)

The reviewing court must affirm an order setting a section 366.26 hearing if it is supported by substantial evidence. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1020.)

Since Michael is a nonoffending, noncustodial parent -- that is, he had nothing to do with Athena's dependency and removal -- there are only two applicable requirements for a finding of substantial probability of return in this case: consistent visitation; and a showing that he was able to complete case plan objectives and provide for Athena's well-being. Michael's visitation, which has remained unsupervised for more than one year, was spotty early on, but was consistent by the time of the hearing. The court so found, and Agency does not dispute the finding.

The dispute is whether Michael, who had fulfilled the two requirements of his case plan, showed he was capable of providing for Athena's safety, protection and physical and emotional well-being. At the 12-month review hearing, Michael had not shown on that day he was able to provide for his daughter's safety and well-being in his home. But that does not end the matter.

What Michael demonstrated at the hearing was that he was making himself capable of providing for Athena's safety, protection and physical and emotional well-being. He had saved enough money to purchase a bed for her and had arranged with

Athena's aunt to care for her while he was at work. It took Michael longer than Agency and the court would have liked to show some initiative, but after less than a year of services (May 2010 to January 2011), he had come up with a proposal that deserved consideration. We also note the record shows Michael had three serious health problems that slowed his progress during the dependency.

Nonetheless, the court discounted Michael's testimony that he now was prepared to act to gain Athena's custody. The court said Michael had not demonstrated he had the "will" to take the "little steps that need to occur." Putting aside the nebulous notion of "will," we disagree with the court's conclusion. Throughout this case, there have been two stumbling blocks for Michael to gain custody of Athena -- his living situation and his work schedule. Michael's attempts to find a day-time job were unsuccessful, which is not surprising considering the current high unemployment rate. In any event, by the time of the 12-month hearing, Michael presented undisputed evidence that he had devised solutions to the stumbling blocks. Michael had set aside the money to buy a bed for Athena, with whom he could share his room. Michael also had an arrangement with Athena's aunt to solve the child care problem. He had demonstrated the capacity to complete objectives of his treatment plan and to provide for Athena's safety and well-being. (§366.21, subd. (g)(1)(C).) The other two prerequisites of section 366.21, subdivision (g)(1) were either satisfied or not applicable. Therefore, the court's finding that there was not a substantial probability that Athena will be returned to Michael's physical custody and safely maintained by the 18-month review date -- three months away -- was not supported by substantial evidence.

The court also prioritized settling Athena's permanency planning. Noting Athena's "young" age, the court said: "I have to make a permanency decision for her as quickly as possible." We realize that under our dependency system, "[t]he presumptive maximum term" for a parent's reunification services is six months when the child was under the age of three years at the time of removal. (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512.) But the time period is not "immutable." (*In re Derrick S.* (2007) 156 Cal.App.4th 436, 445.) The court may extend services to the 18-month review date for a parent of a child who was under three years old at the time of removal. (§ 361.5, subd. (a)(3).)

This is a case where such discretion should have been exercised. Michael is a nonoffending, noncustodial parent who was not responsible for Athena's dependency status. There is a legislative preference for placement and custody with nonoffending parents. (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1132; see §361.2, subd. (a).) By setting the section 366.26 hearing rather than extending his services for three months, the court created the potential for termination of Michael's parental rights, which it seems to us would be an anomalous result under the circumstances of this case. Courts should tread carefully in the name of expediency when a nonoffending parent who desires custody becomes involved. (See *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1823, 1829.)

The court had the discretion to consider continuing services to the 18-month review hearing to afford Michael the opportunity to establish he is able to protect and provide for Athena's well-being. We grant the petition and remand this matter to the juvenile court so it may exercise its discretion in that regard.

## DISPOSITION

Let a peremptory writ of mandate issue, directing the juvenile court to vacate its orders terminating Michael's reunification services and scheduling a section 366.26 hearing. The matter is remanded to the juvenile court to exercise its discretion whether to continue the review hearing and order additional services for Michael.

McINTYRE, J.

I CONCUR:

BENKE, Acting P. J.

I CONCUR IN THE RESULT.

HUFFMAN, J.