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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re MADISON R., a Person Coming
Under the Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MICHAEL R.,

Defendant and Appellant.

F063738

(Super. Ct. No. 07CEJ300298-3)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Jane Cardoza,
Judge.

Caitlin U. Christian, 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.

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* Before Gomes, Acting P.J., Kane, J., and Detjen, J.

Michael R. (Michael) challenges the juvenile court's finding issued at a contested and combined six- and 12-month review hearing that he was provided reasonable services as to his two-year-old daughter Madison. (Welf. & Inst. Code, § 366.21, subs. (e) & (f).)¹ We affirm.

PROCEDURAL AND FACTUAL SUMMARY

These dependency proceedings were initiated in July 2010 when then eight-month-old Madison and her 23-month-old half-sister were removed from the custody of their mother (hereafter "the mother") by the Fresno County Department of Social Services (department) because of the mother's methamphetamine use. At the time, Michael was in jail on domestic violence charges involving the mother. Madison and her sister were placed together in a risk adopt home.

The mother told the social worker that she and Michael engaged in domestic violence and used drugs together. Michael said he used marijuana daily and methamphetamine one time 10 years before. He denied that domestic violence was a problem.

In July 2010, at the detention hearing, the juvenile court ordered Madison and her sister detained and ordered the department to offer Michael parenting classes, substance abuse, mental health and domestic violence assessments and recommended treatment, random drug testing, and reasonable supervised visitation. The juvenile court did not offer the mother any services and set the jurisdictional hearing for August 2010.

Michael was released from custody on September 1, 2010, and two days later, completed a substance abuse assessment with Lawrence Rice. Michael told Mr. Rice that he used marijuana for 18 years. He said he had been treated for depression and violent

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

behavior and was hospitalized once for psychological problems and counseled on an outpatient basis. He told Mr. Rice he could benefit from mental health treatment for childhood trauma. Mr. Rice recommended that Michael participate in less intensive outpatient drug treatment and complete mental health and domestic violence assessments.

On September 7, 2010, Michael completed a domestic violence assessment with Eduardo Acosta. Mr. Acosta recommended that Michael complete child abuse/batterer's treatment.

On September 15, 2010, the juvenile court conducted a contested jurisdictional hearing, adjudged the children dependents of the court, and set the dispositional hearing for October. The court also ordered the department to provide both children an expedited mental health assessment. Meanwhile, in late September 2010, Michael was evaluated by therapist Chun-Hsiu Hsu who did not recommend mental health treatment because Michael did not report any clinically significant symptoms.

In October 2010, the department recommended in its dispositional report that the juvenile court deny Michael reunification services based on a 1997 juvenile adjudication, which the department erroneously believed constituted a violent felony. The dispositional hearing was continued while Michael challenged the department's recommendation and prevailed.

In February 2011, social worker Jacqui Durtsche conducted a mental health assessment of Madison with Michael and Madison's foster mother present. Ms. Durtsche reported that Michael was nurturing toward Madison and she engaged with him. However, he attempted a few times to dominate her during play, causing her frustration. Ms. Durtsche also reported that Madison displayed some indiscriminate attachment patterns and reported that Madison "may benefit from attachment based family therapy to help strengthen her relationship with her caregivers." Ms. Durtsche also reported that Michael denied any history of domestic violence and substance abuse and did not take

any responsibility for his past behaviors. She recommended that he complete a “Psychological Evaluation/Risk Assessment” before visits progressed.

In an addendum report filed for the dispositional hearing, the department reported that Michael completed a course in parenting and substance abuse counseling and was participating in aftercare. He was also participating in a batterer’s intervention program and, though his overall progress was reportedly satisfactory, he denied any wrongdoing. The department expressed its concern about Michael’s mental health and violent propensity and questioned whether he could provide Madison a safe and stable home. The department recommended that the juvenile court order him to participate in a psychological evaluation/risk assessment and participate in any recommended treatment.

In April 2011, the juvenile court conducted a contested dispositional hearing and ordered Michael to complete the services previously ordered as well as a psychological evaluation/risk assessment. The juvenile court set a combined six- and 12-month review hearing (combined hearing) for September 2011 and granted the foster parents’ request for de facto parent status. The court also denied the mother reunification services and set a section 366.26 hearing as to Madison’s sister. The mother appeared at this hearing but her whereabouts subsequently became unknown.

On May 23, 2011, Michael completed a psychological evaluation/risk assessment with psychologist Tamika London. Michael told Dr. London that he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) as a child and was placed in a psychiatric facility for three months because he kept running away. He said he was not participating in psychotherapy, stating “I believe I’m doing pretty good.” He admitted, though, that he could benefit from therapy to manage stress, anger, and feeling overwhelmed.

Dr. London asked Michael about his involvement with substance abuse and domestic violence. Michael said that he only used methamphetamine once at the age of

17. He disclosed that he was an alcoholic and attributed his criminal offenses to his alcohol addiction. In her report, Dr. London stated that Michael did not appear to take responsibility for engaging in domestic violence. She said he minimized his actions and attributed the violent incidents between himself and the mother to their different parenting styles.

Dr. London diagnosed Michael with an anxiety disorder and a nonspecified personality disorder with dependent, antisocial, and avoidant personality traits. She also emphatically recommended against reunifying him with Madison at that time because of his violent history, substance abuse, and lack of insight into his behavior. Dr. London opined that Michael lacked the capacity to provide Madison a loving, stable, nurturing, and safe environment but recommended the juvenile court impose certain requirements on Michael in the event the court decided to attempt reunification, including one to two years of weekly individual psychotherapy.

In June 2011, Michael tested positive for methamphetamine. He was referred for 30 days of residential drug treatment. During his intake interview, he stated that he used alcohol, methamphetamine, and marijuana for 10 years.

In July 2011, Michael completed a psychological evaluation/risk assessment by psychologist Laura Geiger. Michael told Dr. Geiger that he lived with his adoptive mother who was very supportive and that he was an extern for a paralegal program. He said he did not have significant mental health issues but reported that he felt there was something wrong with him. He reported feeling suicidal as an adolescent and once choked himself when he was in a group home until he nearly lost consciousness.

Dr. Geiger finalized her report in early August 2011. She diagnosed Michael with ADHD and a nonspecified personality disorder with schizotypal and borderline traits. She explained that Michael did not have a disabling mental disorder but had a “personality pathology that [hindered] his functioning in day-to-day life. Namely, he has

a personality disorder with mixed pathology that is marked by magical thinking (premonitions, feeling that others may control him at times) and some affective instability especially in interpersonal relationships.” Dr. Geiger also stated that Michael admitted to engaging in domestic violence and was able to describe coping skills to prevent relapsing into that behavior. She said he had some insight into his thoughts being different and was receptive to receiving treatment.

Dr. Geiger characterized Michael’s risk of abuse as “low to moderate” if he continued his mandated services and had the support of family and county services. She recommended a medication evaluation for ADHD, continuing substance abuse treatment and follow-up, 12 weeks of individual cognitive therapy for negative self-evaluation distortions, and completion of domestic violence treatment.

On September 9, 2011, social worker Jennifer Wild met with Michael to discuss the results of the psychological evaluation/risk assessments. She told him that, according to the reports, Madison would be at a substantial risk if placed in his custody and that he had a personality pathology that hindered his daily functioning. As a result of the findings, she told him, the department was recommending termination of services. Michael told Ms. Wild that he felt therapy would help in dealing with his personality pathology.

In November 2011, Michael’s attorney challenged the reasonableness of mental health services in a statement of contested issues. On November 16, 2011, Ms. Wild attempted to refer Michael for therapy but was told that he would first have to complete a second mental health assessment. Ms. Wild authored an addendum report on behalf of the department and informed the juvenile court that she provided Michael two community resources for medication evaluations. She also reported that Michael appeared to be progressing in aftercare treatment and was testing negative for drugs. In addition, he was progressing in the batterer’s intervention program, although there were

still concerns about his sincerity and genuineness. She recommended that the juvenile court order Michael to participate in a second mental health assessment and defer advancing to unsupervised visitation until it was completed.

On November 23, 2011, the juvenile court convened the contested and combined hearing. County counsel advised the court of the department's change in recommendation. Michael's attorney stated she was not presenting witnesses or evidence but did not believe that the department provided Michael reasonable services. Michael's attorney also asked the court to order therapeutic supervised visits so that Michael could build a connection with Madison. She stated,

“[MINOR'S COUNSEL]: ... [I]n [Madison's] mental health assessment, ... it indicated that she may benefit from attachment based family therapy to help strengthen her relationship. That's with the care providers, so -- [¶] ... [¶] ... We need that relationship strengthened with her father as well, and regular supervised visits.”

At the conclusion of the hearing, the juvenile court found that the department provided Michael reasonable services and that he made moderate progress. The court continued services to the 18-month review hearing, which it set for January 2012, ordered Michael to participate in a second mental health evaluation, and ordered therapeutic supervised visits. Michael appeals from the juvenile court's reasonable services finding.²

² Respondent contends that the juvenile court's reasonable services finding is not appealable, citing *Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147 (*Melinda K.*), which held that where, as here, the juvenile court orders reunification services to continue, its finding that reasonable services were provided is not itself directly appealable unless the juvenile court takes adverse action based on that finding. (*Id.* at pp. 1153-1156.) We find *Melinda K.* distinguishable because the juvenile court also found that it would be detrimental to return Madison to Michael's custody, in part because of his mental health, which is a core component of his challenge to the juvenile court's finding he was provided reasonable services. (*Id.* at p. 1154.) Thus, we conclude Michael raised an appealable issue.

On December 19, 2011, Michael completed the second mental health assessment with therapist Rande Wood.³ Ms. Wood did not recommend mental health treatment for Michael. She reported, “[Michael] report[s] that he did not have any mental health symptoms that would warrant mental health treatment” and “was unable to create a [mental health] plan of care with the therapist.”

CONTENTIONS

Michael contends that the department failed to assist him in two key and interdependent areas; mental health therapy and visitation. Specifically, he contends that the department knew he needed mental health therapy in order to progressively bond with Madison through visitation yet failed to obtain the required second mental health assessment before the combined hearing. As a consequence, he further contends, the department did not provide him reasonable services and the juvenile court erred in finding that it did.

We disagree that Michael’s ability to progress in visitation was contingent on his participation in therapy or that the department’s failure to obtain a second mental health assessment before the hearing was unreasonable.

³ Respondent asked this court to augment the appellate record with an addendum report filed in the superior court on February 22, 2012, which documents the fact that Michael completed the second mental health assessment in December 2011 and that no treatment was recommended as a result. We issued an order construing the request to be a request to take judicial notice of the report and granted Michael leave to object by a date certain. Not only did Michael not object, but his appointed counsel refers to the report and its results in his reply brief filed in April 2012.

Ordinarily, this court does not consider evidence that was not before the juvenile court. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) However, in this case, we grant respondent’s request, take judicial notice of the report, and consider the evidence therein.

LEGAL PRINCIPLES

The department has a duty to devise and implement a services plan based on a goal of reunification. (*In re Mario C.* (1990) 226 Cal.App.3d 599, 603-604.) To that end, the department is required to make a good faith effort to help the parent access services. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 414.)

In determining whether reasonable services were provided, the juvenile court considers not only the appropriateness of services offered but also the extent to which the department facilitated utilization of the services and the extent to which the parent availed him or herself of the services provided. As a practical matter, one could always argue that the department could have done more or provided better services but that is not the standard. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547 (*Misako R.*)) The standard is whether the services provided were reasonable under the circumstances. (*Ibid.*)

On a challenge to the juvenile court's reasonable services finding, we view the evidence in a light most favorable to the department, indulging in all legitimate and reasonable inferences to uphold the finding. (*Misako R., supra*, 2 Cal.App.4th at p. 545.) If substantial evidence supports the juvenile court's finding, we will not disturb it. (*Ibid.*) Since Michael bears the burden of demonstrating error on appeal (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632), he must show that the juvenile court's reasonable services finding is not supported by substantial evidence.

Second Mental Health Assessment

Michael correctly asserts that his mental health was a known concern from the inception of this case, especially as it related to his potential for physical violence. However, there were divergent opinions as to whether he needed therapy and whether he could even benefit from it within the reunification period. In our view, the only recommendation for therapy was made by Dr. Geiger in August 2011. The question then with respect to reasonableness of mental health services is twofold: Did the department

unreasonably decline to act in August on Dr. Geiger's recommendation and, having changed its recommendation in November, did the department unreasonably delay in providing Michael a mental health assessment? We conclude that the department did not act unreasonably. A chronology of its actions with respect to mental health services supports our conclusion.

In September 2010, Michael completed a mental health assessment and because Michael did not report any "clinically significant symptoms," the therapist did not recommend treatment. The next mention of Michael's mental state came in February 2011 from Ms. Durtsche in her mental health assessment of Madison and it was made in the context of Michael's denial of his history of violence and substance abuse. Ms. Durtsche recommended that Michael complete a psychological evaluation/risk assessment, which the juvenile court ordered. Michael was first evaluated in May 2011 by Dr. London. Dr. London emphatically recommended against Madison reunifying with Michael, opining that he lacked insight into his behavior and the capacity to provide her a stable and safe home. Dr. London nevertheless recommended long-term therapy *if* the court decided to reunify them. In July 2011, Michael completed a second psychological evaluation/risk assessment with Dr. Geiger. Dr. Geiger completed her report in August. She reported that Michael admitted engaging in domestic violence and she opined that he had a "personality pathology" and posed a "low to moderate" risk of abuse and recommended therapy for him. The department did not, however, refer Michael for therapy. Instead, the department recommended that the court terminate reunification efforts. We conclude that the department's decision not to refer Michael for therapy was reasonable.

By the time the department received Dr. Geiger's report in August 2011, over a year had passed since Madison was removed from her mother and, by most accounts, Michael still had little insight into his violent behavior. In addition, according to Dr.

London, Michael posed a substantial risk to Madison's safety and lacked the capacity to safely parent her. She strongly advised against reunification but advised that Michael would require long-term therapy if reunification were contemplated. Under the circumstances and given the department's decision to recommend termination of services, it was not unreasonable for the department not to refer Michael for therapy. Nor was Ms. Wild's failure to obtain a second mental health assessment before the combined hearing unreasonable.

When the department changed its recommendation in November 2011, Ms. Wild promptly attempted to refer Michael for therapy. However, she was told that he had to be reassessed. Since the combined hearing was only a week away and a second mental health assessment required a court order, it was not unreasonable for Ms. Wild to request the assessment at the hearing.

Finally, any delay in pursuing therapy, assuming that it occurred and even assuming that it was unreasonable, was harmless given the fact that, according to Ms. Wood, Michael did not need therapy.

We conclude the department acted reasonably in attempting to provide Michael mental health services. We further conclude, as we discuss in the next section, that the department's failure to provide Michael mental health therapy did not undermine his ability to progress in visitation.

Visitation

Michael contends that the department was unreasonable in not providing him attachment based therapy as recommended by Ms. Durtsche. However, he misstates her recommendation. Ms. Durtsche did not recommend attachment based therapy for Michael; she recommended it for Madison's "care providers," which everyone, including Michael and his attorney, understood to mean Madison's foster parents. Had Michael wanted to participate in such therapy, nothing precluded him from requesting it.

That said, however, the record reflects that Ms. Durtsche recommended that Michael complete a psychological evaluation/risk assessment before visits progressed. Once he completed the evaluations, Michael could have requested a change in visitation that would enhance Madison's attachment to him. He did not, however, request such a change.

In summary, we conclude Michael failed to meet his burden on appeal of showing that the department was unreasonable for not providing him a second mental health assessment and attachment based therapy. Consequently, we find no error in the juvenile court's reasonable services finding and will affirm.

DISPOSITION

The order is affirmed.