S271809

SUPREME COURT No._____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL G., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY, et al., Real Party in Interest.	Court of Appeal No. G060407 Orange County Superior Court No. 19DP1381

HONORABLE ANTONY C. UFLAND, JUDGE PRESIDING

PETITION FOR REVIEW

After Published Decision of the Court of Appeal, Fourth Appellate District, Division Three

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Table of Contents

TABLE OF AUTHORITIES

Cases

Welfare and Institutions Code

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re A.G., A Person Coming Under the Juvenile Court Law. MICHAEL G., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY., Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY, Real Party in Interest.	Court of Appeal No. G060407 Orange County Superior Court No. 19DP1381

APPEAL FROM AN ORDER OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF ORANGE

HONORABLE ANTONY C. UFLAND, JUDGE PRESIDING

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Michael G. (Father or Petitioner) respectfully petitions this Court to grant review of the published decision by the Court of Appeal, Fourth Appellate District, Division Three (per Goethels, J.), filed on October 6, 2021 (*Michael G. v. Superior Court of Orange County* (2021) 69

Cal.App.5th 1133), which found no error or violation of due process in the dependency statutory scheme on which the juvenile court terminated family reunification services despite finding that the family had not adequately received those services in the preceding review period. A copy of the opinion is attached to this petition as Appendix A.

ISSUE PRESENTED

1.) Whether the dependency statutory scheme requires courts to extend reunification efforts beyond the 18-month review when families have been denied adequate reunification services in the preceding review period.

GROUNDS FOR REVIEW

Review is necessary to secure uniformity of decision and to settle an important question in dependency law that arises from a statutory scheme that Justice Goodwin Liu of this Court commented is "ambiguous" and in which there is "substantial tension." (*J.C. v. Superior Court* (June 28, 2017, G054816), 2017 WL 3681590 [nonpub. opn.] review den. Aug. 23, 2017, S243357 (stmt. of Liu, J. [2017 Cal. Lexis 6576, at p. *11] (Statement, Liu, J.).)

The question considered by Justice Liu four years ago persists today in the present case; that is, whether the statutory scheme requires courts at

the 18-month review to determine that families received adequate reunification services before terminating those services and scheduling the Welfare and Institutions Code[1] section 366.26 hearing. Father respectfully submits that such a finding is necessary for the statutory scheme to comport with due process and fundamental fairness. However, due to an ambiguous statutory scheme, case law has yet to deliver a uniform answer.

Provisions that govern status reviews vary on whether and how a finding of reasonable services conditions the setting of the section 366.26 hearing. Those governing the six- and twelve-month review hearings expressly condition the setting of the section 366.26 hearing on a finding of reasonable services. (§ 366.21, subds. (e)(3) and (g)(1)(C)(ii).) In contrast, the statutes applicable at the 18-month review, namely sections 366.22, subdivision (b) and 361.5, subdivision (a)(4)(A), seem to have eliminated the reasonable services requirement for all but a narrowly-defined subset of parents.[2] As Justice Liu commented, "it is unclear why the Legislature

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[1] Statutory references are to this Code unless otherwise noted.

[2] The exception describes the following: (1) a parent making significant and consistent progress in a court-ordered residential substance abuse treatment program, (2) a minor or a dependent parent at the time of the initial hearing who is making significant and consistent progress in establishing a safe home for the child's return, or (3) a parent who was recently discharged from incarceration, institutionalization, or the custody of the Department of Homeland Security (DHS) and who is making significant and consistent progress in establishing a safe home for the child's return. (§ 366.22, subd. (b); see also § 361.5, subd. (a)(4)(A) [similar].)

would have chosen to provide such protection only to this subset of parents and guardians" (Statement, Liu, J., supra, at p. *8].)

As noted by Justice Liu, this "lack of clarity in the statutory scheme has given rise to differing interpretations in the courts." (Statement, Liu, J., supra, at p. *7; see also, APPENDIX, p. 9; *In re M.F.* (2019) 32 Cal.App.5th 1, 21 [collecting cases].) Indeed, there remains "a split of authority in case law whether the juvenile court must observe the 18-month deadline for setting a section 366.26 placement hearing when reasonable services have not been provided." (*M.F., supra*, 32 Cal.App.5th at p. 21, [collecting cases].) With publication of the present case, that rift shows no sign of abating.

The need for settled and uniform guidance on when a court may terminate reunification efforts cannot be overstated. As is well-established, "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." (*Troxel v. Granville* (2000) 530 U.S. 57, 65 [120 S.Ct. 2054, 2060, 147 L.Ed.2d 49].) The decision to terminate reunification services, which triggers the setting of the section 366.26 hearing, has the potential to gravely affect this liberty interest as it "is often the prelude to termination of parental rights." (*In re D.N.* (2020) 56 Cal.App.5th 741, 743.)

The question presented "implicates a delicate balance of 'competing values'—'protecting children from harm, preserving family ties, and avoiding unnecessary intrusion into family life'—that seems best resolved by the Legislature." (Statement, Liu, J., supra, at p. *7) However, the provision of reasonable services is a vital component of due process and fundamental fairness in the statutory scheme. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307-308.) Father humbly submits that the provision of reasonable services is no hollow formality, and that for the statutory scheme to comport with due process and fundamental fairness, it should precondition the termination of services and setting of the section 366.26 hearing on a finding of reasonable services for all parents, not just those narrowly defined in section 366.22, subdivision (b).

Four years ago, Justice Liu commented that the issue presented is fundamentally a policy decision for the Legislature but acknowledged that the California Supreme Court "may eventually have to intervene." (Statement, Liu, J., supra, at p. *7.) After four years without a response from the Legislature, families in dependency courts statewide remain subject to disparate rulings that affect fundamental liberty interests. Father humbly submits that this case presents an opportune time for review.

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PROCEDURAL AND FACTUAL STATEMENT

For purposes of this petition only, petitioner Father, adopts the background set forth in the opinion of the Court of Appeal, *Michael G. v. Superior Court of Orange County* (2021) 69 Cal.App.5th 1133, appended hereto as Appendix A. Briefly, Father additionally submits the following to provide further context to the issues presented herein.

At the 18-month review hearing held on June 17, 2021, the assigned social worker testified that the child A.G. could not be safely returned to her parents, and recommended terminating reunification services. (RT[3]71.) When asked why A.G. could not be safely reunified with her father, the social worker testified that based on a psychological evaluation of Father, he believed Father "still need[ed] help psychologically, with psychological counseling and medication." (RT71-72, 91, 113.)

However, the social worker had not reviewed that psychological evaluation until earlier that day. (RT108-109, 111-112.) Despite having been aware of it since February of 2021, he was unable to locate the report and had never spoken with Father about it. (RT108-109, 111-112.) The court had the report since December 17, 2020 (RT166-167) and had made clear early in the case that Father's psychological issues needed to be

[3] "RT" refers to the Reporter's Transcript.

determined as part of his case plan. (RT167.) Yet, the social worker reported he could not locate Father's current case plan. (2CT405.) Throughout his entire time on the case from February 3, 2021 to the end of May (RT63, 89, 98), he made no service referrals. (RT64, 92, 107.)

The juvenile court appropriately found that the agency failed to provide reasonable services but nonetheless ordered them terminated. The court believed that case law dictated that its finding of no reasonable services did not automatically require an extension of services. (RT168.) Citing *San Joaquin Human Services Agency vs. Superior Court* (2014) 227 Cal.App.4th 215, the juvenile court believed it needed to determine whether there was a substantial probability that A.G. could be returned to the parents within an extended period of services based on the factors in section 366.22, subdivision (b)(1) through (3). (RT168-169.)[4] The court concluded the evidence did not support said factors, declined to extend reunification services, terminated them and scheduled the section 366.26 hearing. (2CT462, 464; RT169, 171.)

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[4] The appellate opinion may be read to indicate that Father argued for application of the substantial probability of return factors in section in 366.22, subdivision (b). (APPENDIX. 5, 8, fn.4.) For clarity, Father argued that the juvenile court's application of the factors was error and fundamentally unfair, but argued in the alternative that the court's factual findings were not supported by substantial evidence.

ARGUMENT

I. AT THE 18-MONTH REVIEW HEARING, AN ORDER TERMINATING REUNIFICATION SERVICES AND SCHEDULING THE SECTION 366.26 HEARING SHOULD BE CONDITIONED ON A FINDING THAT THE FAMILY HAD BEEN PROVIDED REASONABLE SERVICES IN THE PRECEDING REVIEW PERIOD

A. The provision of reasonable services in the period preceding the 18-month review is an integral component of family preservation and is vital to courts' ability to make accurate and just decisions concerning parental rights.

"Family preservation, of which reunification services constitutes an integral component, is the 'first priority' through the review hearing stage of dependency proceedings. [Citation.]" (*In re James Q.* (2000) 81 Cal.App.4th 255, 263.) At the section 366.22 hearing, held eighteen months after the child was initially removed from the parents, reunification of the family is presumed unless the agency proves by a preponderance of the evidence that reunification "would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a)(1).)

In determining detriment, courts are required to "consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided."

(§ 366.22, subd. (a)(1).) Further, "[t]he failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental." (Ibid.) "If the child is not returned to the parent's custody at that hearing, the court must terminate reunification services and set a section 366.26 hearing." (APPENDIX A, at p. 7; 366.22, subd. (a)(3).)

In light of the "'critical' decisions concerning parental rights" made at the 18-month review (*In re J.E.* (2016) 3 Cal.App.5th 557, 563–564) reunification services are unquestionably vital to a parent's fundamental liberty interest, as well as courts' ability to make accurate and just decisions affecting that interest.

B. The current state of the law fails to ensure a remedy for families deprived of reasonable services at the critical 18-month review.

Parents deprived of adequate reunification services in the period preceding the 18-month review currently have no assured remedy. Although the statute requires a finding of reasonable services (§ 366.22, subd. (a)(3)), and conditions the setting of the section 366.26 hearing on "clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian" (§ 366.22, subd. (b)(3)(C)), courts have interpreted that such relief is available only to the narrow subset of parents defined within subdivision (b). (APPENDIX A, at p. 8;

N.M. v. Superior Court (2016) 5 Cal.App.5th 796, 806; *Earl L. v. Superior Court, supra*, 199 Cal.App.4th at 1504; *San Joaquin Human Services Agency v. Superior Court* (2014) 227 Cal.App.4th 215, 224.)

Subdivision (b) of section 366.22, as amended by the Legislature in 2009, appears to "'provide[] a limited right to a continuance where additional reunification services would serve the child's best interests' to have additional services provided to (1) a parent making 'significant and consistent' progress in a 'court-ordered residential substance abuse treatment program;' (2) a parent who was either a minor parent or a dependent parent at the time of the initial hearing and is making significant and consistent progress in establishing a safe home for the child's return; or (3) a parent who was recently discharged from incarceration, institutionalization, or the custody of the United States Department of Homeland Security and is making significant progress in establishing a safe home for the child's return and the parent is making 'significant and consistent progress' in treatment programs or in establishing a safe home after release from custody." (*Earl L v. Superior Court., supra,* 199 Cal.App.4th at p.1504; § 366.22, subd. (b); see also § 361.5, subd. (a)(4)(A) [similar].)

Based on this statutory language, courts, including the Court of Appeal herein, have concluded that a juvenile court's "authority to set a

section 366.26 hearing 'is not conditioned on a reasonable services finding.'" (APPENDIX A, at p. *9; see also, *N.M. v. Superior Court* (2016) 5 Cal.App.5th 796, 806; *Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1490, 1504; *San Joaquin Human Services Agency v. Superior Court* (2014) 227 Cal.App.4th 215, 224.)

In the present case, as neither parent fit the description in section 366.22, subdivision (b), the Court of Appeal held that section 366.22, subdivision (a)(3) "obligated the court to terminate services and set the section 366.26 hearing, regardless of whether reasonable services had been provided in the most recent review period." (APPENDIX A, at p. 8.) However, the Court of Appeal agreed the statutory scheme is ambiguous and ripe for review by the Legislature. (Id., at p. 10.) The Court also acknowledged "[t]here is a split of authority in case law whether the juvenile court must observe the 18-month deadline for setting a section 366.26 placement hearing when reasonable services have not been provided." (Id., at p. 10, citing, *M.F., supra,* 32 Cal.App.5th at p. 21, [collecting cases].) Notably, several recent cases reached conclusions inconsistent with the present case. (see *In re M.F., supra*, 32 Cal.App.5th at p. 5 [at 18-month review hearings, juvenile court "may not set a section 366.26 hearing unless it finds by clear and convincing evidence that

reasonable services were offered or provided to the parent"][5]; *In re M.S.* (2019) 41 Cal.App.5th 568, 598 [concluding mother and daughter's interest in reunification, mother's fundamental constitutional due process right in care, companionship, and custody of child must prevail over statutory time limit where reunification services denied]; *T. J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1256 [with "timely challenge to the adequacy of services for the statutorily required minimum period… failure to provide services will justify the extension of services beyond 18 months, even without a showing of best interests of the child or substantial probability of return, and even if the permanent plan is not to return the child to the parent"].)

Courts have also considered section 352[6], which authorizes continuances of "any hearing" beyond statutory time limits, as an alternative to the narrow restrictions in section 366.22, subdivision (b). (*In*

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[5] The Court of Appeal herein disagreed with the *M.F.* court's conclusion that "section 361.5, subdivision (a)(4)(A), explicitly authorizes the extension of services to the 24-month date on specified circumstances not applicable here *or on a finding that reasonable services were not offered or provided.*" (APPENDIX A, at p. 10, fn. 5.) In the Court's view, "the italicized language above means a court only has the ability to extend reunification services past the 18-month mark if subdivision (b) of section 366.22 applies … not in any and all cases where reasonable services were not offered." (*Ibid.*)

[6] The statute permits continuances "beyond the time limit within which the hearing is otherwise required to be held" upon a showing of "good cause" and that the continuance will not be "contrary to the interest of the minor." (§ 352, subd. (a)(1) and (a)(2).)

re D.N., *supra*, 56 Cal.App.5th 741, 762; *In re J.E.*, *supra*, 3 Cal.App.5th 557, 567; *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1017; *In re M.F.*, *supra*, 32 Cal.App.5th at pp. 23-24; *Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1424.) Although section 352 is a welcome alternative to the termination of services and scheduling of the section 366.26 hearing, its relief is dependent on court discretion and reviewable under the abuse of discretion standard. (APPENDIX A, at p. 12.) Given the fundamental liberty interests at stake, clearer guidance is warranted.

In evaluating section 352, courts have also considered "the likelihood of success of further reunification services," which is a more onerous burden than what section 352 requires. (*In re J.E.*, *supra*, 3 Cal.App.5th at 567; *Mark N. v. Superior Court, supra,* 60 Cal.App.4th at 1017; *In re Dino E.* (1992) 6 Cal.App.4th 1779-1780; see also, APPENDIX A, at p. 8, fn. 4, [juvenile court assessed substantial probability return factors in section 366.22, subdivisions (b)(1) through (3)].) In many cases, it would be unfair to impose on parents the burden of proving the "likelihood of success of further reunification services" after the deprivation of such services has denied them the opportunity to demonstrate such a likelihood.

As the foregoing illustrates, there are varying approaches in the statutory scheme and case law on whether reunification efforts should be

extended beyond the 18-month review for families deprived of such services in the preceding review period. Given what is at stake at the 18-month review, review is warranted to settle this important question in the law.

C. Because the provision of reunification services is one of the precise and demanding substantive and procedural requirements that ensures due process and fundamental fairness in the statutory scheme, a finding of reasonable services should be a prerequisite to an order terminating services and scheduling the section 366.26 hearing.

Although the Court of Appeal joined Justice Liu in inviting the Legislature to reexamine the interplay of the statutes (APPENDIX A, at p. 10), until the Legislature responds, the statutory scheme remains in need of clarification to ensure that decisions for families deprived of reasonable services comport with due process and fundamental fairness.

The requisite finding of reasonable services at the 18-month review in section 366.22, subdivision (a)(3) should not be hollow formality. "Reunification services implement 'the law's strong preference for maintaining the family relationships if at all possible.'" (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787, internal citation omitted.) Furthermore, reunification services reduce the risk of erroneous decisions affecting fundamental liberty interests. When "appropriate services designed to mitigate risk to the child have not been provided to a parent, it is likely risk

to the child will not have been mitigated. Thus, where reasonable services have not been provided or offered to a parent, there is a substantial likelihood the juvenile court's finding the parent is not likely capable of safely resuming custody of his or her child may be erroneous." (*In re M.F., supra*, 32 Cal.App.5th at, 18-19, internal citation omitted.) Accordingly, ensuring families are provided reasonable services as a condition to the setting of the section 366.26 hearing best addresses these concerns.

Moreover, the provision of reasonable services is an indispensable component of due process and fundamental fairness in the statutory scheme. The reason why "terminating parental rights comports with the due process clause of the Fourteenth Amendment [is] because the precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.) "[C]learly, one of the 'precise and demanding' substantive requirements [an agency] must meet to satisfy due process is affording reasonable reunification services. To put it another way: in order to meet due process requirements at the termination stage, the court must be satisfied reasonable services have been offered during the

reunification stage." (*In re Daniel G.* (1994) 25 Cal. App. 4th 1205, 1215-1216.)

"The essential characteristic of due process in the statutory dependency scheme is fairness in the procedure employed by the state to adjudicate a parent's rights." (*In re James Q., supra,* 81 Cal.App.4th at p. 265, internal citation omitted.) "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." (*Santosky v. Kramer* (1982) 455 U.S. 745, 753-754.) It is fundamentally unfair for a procedure to allow an agency to prevail on its recommendations to deny family reunification and terminate services after depriving parents of adequate opportunities to participate in them.

For the foregoing reasons, the statutory scheme should ensure families receive adequate reunification services before proceeding to the section 366.26 hearing.

D. Requiring a finding of reasonable services as a condition to the setting of the section 366.26 hearing promotes the interest of children and their parents in the preservation of the family through timely provision of reunification services, and assists courts in making just and accurate decisions affecting their family relationships.

The Court of Appeal recognized that "denying or terminating reunification services can be heart wrenching" but added that "'in order to prevent children from spending their lives in the uncertainty of foster care,

there must be a limitation on the length of time a child has to wait for a parent to become adequate.' [Citation.]." (APPENDIX A, at p. 11.) The Court concluded that "[t]he statutory restrictions are consistent with the overall objective of the statutory scheme—that is, the protection of abused or neglected children and the provision of permanent, stable homes if they cannot be returned to parental custody within a reasonable time." (Ibid., internal citation omitted.)

While it is axiomatic that children have a right to permanency, a parent and child also have a recognized "interest in each other's care and companionship" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419) as well as a presumed interest in the accuracy of decisions affecting their relationship.

"Our state's dependency statutory scheme imposes strict requirements to resolve cases expeditiously. It also requires due process for all parties, including parents." (*In re James Q.* (2000) 81 Cal.App.4th 255, 267–268.) "While the Legislature was concerned with reducing delays in arriving at a permanent resolution of the child's placement," courts have determined that the Legislature did not "intend[] a speedy resolution of the case to override all other concerns including 'the preservation of the family whenever possible' especially given the lengths to which the Legislature went to try to assure adequate reunification services were provided to the family." (*In re Daniel G., supra*, 25 Cal.App.4th at p. 1214; *Patricia W. v.*

Superior Court (2016) 244 Cal.App.4th 397, 430; *In re Elizabeth R.*, *supra*, 35 Cal.App.4th at 1794.)

On balance, the varying, and at times competing, interests weigh in favor of requiring a finding of reasonable services as a prerequisite to terminating reunification services and scheduling the section 366.26 hearing. A remedy that equitably responds to a deprivation of reasonable services not only ensures due process and fundamental fairness, it promotes the timely and adequate provision of services which in turn will reduce delays in achieving permanency. Requiring adequate reunification services also ensures more informed and accurate decisions on whether to continue or abandon reunification efforts at the critical 18-month review, and serves to "constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.)

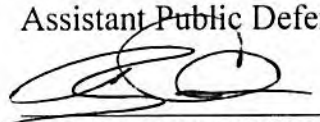
CONCLUSION

For the foregoing reasons, this Court should grant the petition for review.

Dated: November 15, 2021

Respectfully submitted,

MARTIN SCHWARZ
Public Defender
SETH BANK
Assistant Public Defender

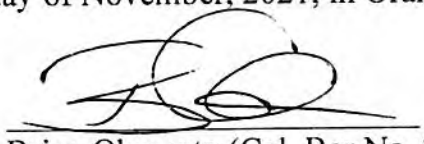


BRIAN OKAMOTO
Deputy Public Defender

CERTIFICATE OF WORD COUNT

I, Brian Okamoto, hereby certify that pursuant to California Rule of Court, rule 8.504(d), the enclosed brief was produced using 13-point Roman type font and has approximately 4,782 words, including footnotes, based on the word count of Microsoft Word, the computer program used to prepare this brief.

Executed this 15th day of November, 2021, in Orange, California.



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CERTIFICATE OF SERVICE

I Lanette Taffolla hereby declare: I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 341 The City Drive South, Suite 307, Orange, California. On November 15, 2021, I served a true and correct copy of the PETITION FOR REVIEW, by placing copies thereof in a sealed, fully pre-paid envelope for collection with FedEx, addressed as follows:

Superior Court of California
County and City of San Francisco
Hon. Monica Wiley
400 McAllister St.
San Francisco, CA 94102

California Court of Appeal
Fourth District, Division Three
P.O. Box 22055
Santa Ana, CA 92702

Orange County Juvenile Court
Hon. Antony Ufland, Judge
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I also electronically served copies to the following via email:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of November, 2021, at Orange, California.

Lanette Taffolla

APPENDIX A

COURT OF APPEAL OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL G. et al. Petitioners, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY et al., Real Parties in Interest.	G060407 (Super. Ct. No. 19DP1381) O P I N I O N

Petitions for extraordinary writ relief challenging an order of the Superior Court of Orange County, Antony C. Ufland, Judge. Petitions denied.

Martin Schwarz, Public Defender, Seth Bank, Assistant Public Defender, and Brian Okamoto, Deputy Public Defender, for Petitioner Michael G.

Juvenile Defenders and Donna P. Chirco for Petitioner Kristie G.

Leon J. Page, County Counsel, and Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Law Office of Harold LaFlamme and Hannah Gardner for Real Party in Interest A.G.

* * *

In separate petitions for extraordinary writ relief, Michael G. (Father) and Kristie G. (Mother) ask us to set aside the juvenile court's order at the 18-month review hearing terminating reunification services and setting a permanency planning hearing under Welfare and Institutions Code[1] section 366.26 as to their 16-year-old daughter, A.G. According to the parents, the court should have continued services in light of its finding that the Orange County Social Services Agency (SSA) had provided inadequate services during the most recent review period. Father further contends there is a substantial probability that A.G. could be returned to him with additional services, and the court should have granted a continuance under section 352. Father also argues the court's ruling denied him fundamental fairness and due process. For the reasons set forth below, we disagree and deny the writ petitions.

FACTS

As detailed in our previous opinion in this case (*Orange County Social Services Agency v. Michael G.* (Oct. 26, 2020, G059045) [nonpub. opn.]), A.G. left home in the fall of 2019 due to Father's escalating mental health issues. According to A.G., Father heard voices and had delusions of persecution by demons, witches, and the government; he also yelled, threw things, and punched the walls in their home. At the

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[1] All further undesignated statutory references are to this code.

time, A.G. was not in contact with Mother, who lives in North Carolina, and whose background includes mental health issues, psychiatric hospitalization, alcohol abuse, attempted suicide, and a criminal history.

The juvenile court found A.G.'s reports were credible and concluded Father's mental health issues, coupled with Mother's mental health issues, criminal history, and failure to maintain a relationship with the child, put the child at risk of suffering serious physical harm. Based on these findings, the court assumed jurisdiction over the child in January 2020, removed her from her parents' custody, ordered both parents to undergo general counseling and other reunification services, and ordered an Evidence Code section 730 evaluation of Father.

During the six-month review period, Father refused to sign his case plan and the therapy referral, or to participate in the section 730 evaluation. Mother made even less progress and was terminated from counseling due to non-attendance.

At the six-month review hearing in September 2020, the juvenile court found that returning A.G. to her parents "would create [a] substantial risk of detriment to [her] safety, protection, or physical or emotional well-being"; that reasonable reunification services had been provided or offered to the parents, who each had made only "minimal" progress toward alleviating or mitigating the causes necessitating placement; and that there was a substantial probability A.G. may be returned to their custody within six months. The court scheduled the 12-month review hearing for December 2020 and continued reunification services, as recommended by SSA.

During the 12-month review period, Father signed the case plan and engaged in some recommended services, including counseling and the parenting class. He continued to refuse to participate in the section 730 evaluation, however, relenting only after we affirmed the juvenile court's jurisdictional finding and disposition order in October 2020. (*Orange County Social Services Agency v. Michael G., supra*, G059045.) The section 730 evaluator, Dr. Gerardo Canul, conducted his evaluation of Father in

November and issued his report in December, concluding Father's "psychological and psychiatric problems are significant."

At the 12-month review hearing in December, the juvenile court again found that returning A.G. to her parents "would create [a] substantial risk of detriment to [her] safety, protection, or physical or emotional well-being"; that reasonable reunification services had been provided or offered to the parents; that Father's progress toward alleviating or mitigating the causes necessitating placement was "moderate," while Mother's progress was "minimal"; and that there was a substantial probability A.G. may be returned to their custody within six months. The court scheduled the 18-month review hearing for April 2021 and continued reunification services, as recommended by SSA.

At the 18-month review hearing, which was continued to June 2021, SSA recommended terminating services and setting a section 366.26 hearing. A.G.'s counsel joined in these requests. Counsel for Mother and Father both objected and asked the juvenile court to continue services under sections 352 and 366.22 and in accordance with principles of due process.

After taking the matter under submission, the juvenile court terminated reunification services and ordered a section 366.26 hearing to be held within 120 days. Citing section 366.22, subdivision (a), which we discuss below, the court found by a preponderance of the evidence that returning A.G. to her parents would create a substantial risk of detriment to her safety, protection, or physical or emotional well-being. (See § 366.22, subd. (a)(1).) The court also found that, notwithstanding its reasonable services findings at the six and 12-month hearings (which the court "firmly believe[d]" were the "right call, given the involvement or lack thereof of the parents at that time"), SSA had not provided reasonable services in the most recent review period.[2]

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[2] In finding a lack of reasonable services during the 18-month review period, the juvenile court was evidently troubled by two things: (1) the social worker had

Even so, the juvenile court decided to terminate reunification services, finding the lack of reasonable services in the most recent review period did "not automatically require the court to extend services." Citing section 366.22, subdivision (b), and the parents' "lack of significant and consistent progress in this case to date," the court concluded the provision of additional services would not be in A.G.'s best interest and that further services were not likely to positively impact reunification. Accordingly, the court ordered a section 366.26 hearing to occur within 120 days and ordered the termination of services. (See § 366.22, subd. (a)(3).) Father and Mother each filed notices of intent to file writ petitions.

DISCUSSION

Father and Mother challenge the juvenile court's order terminating reunification services at the 18-month review hearing and setting a permanency hearing under section 366.26. They assert they should have received additional reunification services because they did not receive reasonable services in the most recent review period. Father further contends there was a substantial probability that A.G. could be returned to him with additional services, and the court should have granted a continuance under section 352. He also asserts he was denied due process.

Although we normally review an order terminating reunification services for substantial evidence (*In re M.S.* (2019) 41 Cal.App.5th 568, 580), we review the interpretation and application of the dependency statutes de novo (*In re M.F.* (2019)

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inexplicably failed to obtain or review a copy of Father's section 730 evaluation until just before the June 2021 hearing, which the court found unreasonable considering the fact that the court had a copy of it as early as December 2020, and the court had made it clear from early on that Father's psychological issues needed to be addressed in his case plan; and (2) the social worker also acted unreasonably when he incorrectly believed Mother was only allowed written communication with A.G., when in fact Mother's case plan permitted monitored phone calls, as well as in-person visitation if she ever came to California.

32 Cal.App.5th 1, 18 (*M.F.*)). We review the denial of a continuance request for abuse of discretion. (See *In re J.E.* (2016) 3 Cal.App.5th 557, 567.)

Before addressing the issues raised on appeal, we begin with a brief overview of the statutory provisions governing the duration of reunification services and the time for setting section 366.26 hearings. "As a general rule, when a child is removed from parental custody under the dependency statutes, the juvenile court is required to provide reunification services pursuant to section 361.5 to 'the child and the child's mother and statutorily presumed father.' (§ 361.5, subd. (a).) The purpose of these reunification services is 'to facilitate the return of a dependent child to parental custody.' [Citations.] Unless an express exemption exists, reunification services provided pursuant to section 361.5 are mandatory, subject to strict timelines, and monitored through periodic court reviews at which parents are admonished that failure to participate successfully in reunification efforts could lead to the termination of their parental rights. (§§ 361.5, 366.21, 366.22.)" (*In re Jaden E.* (2014) 229 Cal.App.4th 1277, 1281.)

The parent and child typically receive up to 12 months of reunification services. (§ 361.5, subd. (a)(1)(A) [for a child age three or older, "court-ordered services shall be provided beginning with the dispositional hearing and ending 12 months after the date the child entered foster care as provided in Section 361.49, unless the child is returned to the home of the parent or guardian"].) The juvenile court may extend services up to 18 months, however, if it finds there is a substantial probability the child will be returned to the parent's custody within the extended time period, or if it finds reasonable services were not provided. (§ 361.5, subd. (a)(3)(A); see also §§ 366.21, subd. (g)(1), 366.22, subd. (a)(1).)

If the case is so continued, at the 18-month permanency review hearing, the juvenile court must "order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety,

protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a)(1).) If the child is not returned to the parent's custody at that hearing, the court must terminate reunification services and set a section 366.26 hearing. (*Id.*, subd. (a)(3).)

However, a narrow exception allows the continuation of services under certain exceptional circumstances: pursuant to subdivision (b) of section 366.22, if the juvenile court determines at the 18-month permanency review hearing that the best interests of the child would be met by the provision of additional reunification services, and if the court concludes that reasonable services were not provided to the parent or 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 period of time, the court may continue the matter for up to six months so that additional reunification services may be provided. This exception applies only if the parent is (1) a parent making significant and consistent progress in a court-ordered residential substance abuse treatment program, (2) a minor or a dependent parent at the time of the initial hearing who is making significant and consistent progress in establishing a safe home for the child's return, or (3) a parent who was recently discharged from incarceration, institutionalization, or the custody of the Department of Homeland Security (DHS) and who is making significant and consistent progress in establishing a safe home for the child's return. (§ 366.22, subd. (b); see also § 361.5, subd. (a)(4)(A) [similar].)[3]

Except for those limited circumstances, if the child is not returned to the parent's custody at the 18-month permanency review hearing, the juvenile court must terminate reunification services and set a section 366.26 hearing. (§ 366.22, subd. (a)(3).) To quote the statute, "Unless the conditions in subdivision (b) are met and the child is not returned to a parent or legal guardian at the permanency review hearing,

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[3] Alternatively, "a juvenile court may invoke section 352 to extend family reunification services beyond these limits if there are 'extraordinary circumstances which militate[ ] in favor of' such an extension." (*In re D.N.* (2020) 56 Cal.App.5th 741, 762.)

the court shall order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, . . . guardianship, or continued placement in foster care is the most appropriate plan for the child. . . . The court shall also order termination of reunification services to the parent or legal guardian. . . . The court shall determine whether reasonable services have been offered or provided to the parent or legal guardian." (*Ibid.*) Thus, "[a]lthough the juvenile court still must make a finding regarding whether reasonable services have been offered in such circumstances, its authority to set a section 366.26 hearing '"is *not* conditioned on a reasonable services finding."'" (*N.M. v. Superior Court* (2016) 5 Cal.App.5th 796, 806 (*N.M.*).)

After reviewing these statutory provisions de novo, we conclude the juvenile court in this case did not err in terminating reunification services at the 18-month review hearing, notwithstanding its conclusion that reasonable reunification services were not provided in the most recent review period. Subdivision (b) of section 366.26 does not apply, as the parents here are not minor or dependent parents, in court-ordered substance abuse treatment programs, or recently discharged from incarceration, institutionalization, or DHS custody.[4] Because subdivision (b) does not apply, subdivision (a)(3) obligated the court to terminate services and set the section 366.26 hearing, regardless of whether reasonable services had been provided in the most recent review period. We find no error or due process violation.

Our conclusion is consistent with the two cases the juvenile court cited in support of its decision: *Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1490 (*Earl*)

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[4] It is unclear why the juvenile court felt compelled to address the parents' "lack of significant and consistent progress in this case," whether additional services would be in A.G.'s best interest, or the other factors listed in subdivision (b)(1) through (3), considering subdivision (b) plainly does not apply here. But because we conclude subdivision (b) does not apply, we need not address Father's contention that substantial evidence does not support the court's application of subdivision (b), including its finding that there was no substantial probability that A.G. could be returned to Father with additional servicing.

and *San Joaquin Human Services Agency v. Superior Court* (2014) 227 Cal.App.4th 215 (*San Joaquin*). In *Earl*, we rejected the father's argument that the lower court erred in terminating reunification services at the 18-month permanency review hearing, notwithstanding its finding that inadequate reunification services were provided during the most recent review period. (*Earl,* at p. 1495.) As we explained in *Earl*, the setting of a section 366.26 hearing at the 18-month permanency review hearing is not "'conditioned on a reasonable services finding'"; although subdivision (b) provides a limited right to a continuance if reasonable services were not provided in certain unique circumstances, where subdivision (b) is inapplicable (as is the case here), the lack of reasonable services cannot bar the setting of a section 366.26 hearing. (See *Earl,* at p. 1504.) Similarly, in *San Joaquin*, our colleagues in the Third District concluded the lower court lacked the ability to "extend services beyond 18 months, regardless of whether or not reasonable services were provided," because "the statutorily required factors [i.e., those listed in section 366.22, subdivision (b)] were not present." (*San Joaquin*, at p. 224; see also *N.M., supra,* 5 Cal.App.5th at p. 806 [if returning a child to his or her parent would create a substantial risk for the child, and subdivision (b) does not apply, the court must set the section 366.26 hearing and terminate services].)

This is a difficult issue, and we recognize "[t]here is a split of authority in case law whether the juvenile court must observe the 18-month deadline for setting a section 366.26 placement hearing when reasonable services have not been provided." (*M.F., supra*, 32 Cal.App.5th at p. 21 [collecting cases]; *see id.* at p. 23 [concluding dependency statutes allow court to "extend services on a finding that reasonable services

were not offered or provided to a parent, even if it means that services will be offered beyond the 18-month review date"].)[5]

That split is not wholly surprising. In a statement supporting the California Supreme Court's denial of review of our 2017 opinion in *J.C. v. Superior Court*, Justice Goodwin Liu noted the "statutory scheme is ambiguous" and ripe for review by the Legislature. (*J.C. v. Superior Court* (June 28, 2017, G054816) [nonpub. opn.] review den. Aug. 23, 2017, S243357 (stmt. of Liu, J. [2017 Cal. Lexis 6576, at p. *11] (Statement , Liu, J.).) We agree. As Justice Liu observed, although some authority (e.g., section 366.22 and *San Joaquin*) supports the conclusion that "the juvenile court must observe the 18-month deadline for setting a section 366.26 placement hearing whether or not reasonable reunification services had been provided," other statutory provisions suggest or imply that the section 366.26 placement process may not move forward unless

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[5] We disagree with the *M.F.* court's conclusion that "section 361.5, subdivision (a)(4)(A), explicitly authorizes the extension of services to the 24-month date on specified circumstances not applicable here *or on a finding that reasonable services were not offered or provided.*" (*See M.F., supra*, 32 Cal.App.5th at p. 23, italics added.) Section 361.5, subdivision (a)(4)(A), states that "court-ordered services may be extended up to a maximum time period not to exceed 24 months after the date the child was originally removed from physical custody of the child's parent or guardian if it is shown, *at the hearing held pursuant to subdivision (b) of Section 366.22*, that the permanent plan for the child is that the child will be returned and safely maintained in the home within the extended time period. The court shall extend the time period only if it finds that it is in the child's best interest to have the time period extended and that there is a substantial probability that the child will be returned to the physical custody of the child's parent or guardian who is described in subdivision (b) of Section 366.22 within the extended time period, or that reasonable services have not been provided to the parent or guardian." In our view, the italicized language above means a court only has the ability to extend reunification services past the 18-month mark if subdivision (b) of section 366.22 applies (i.e., where the parent is a minor or dependent parent, in a court-ordered substance abuse treatment program, or recently discharged from incarceration, institutionalization, or DHS custody, etc.), not in any and all cases where reasonable services were not offered.

reasonable reunification services were provided.[6] (Statement, Liu, J., *supra,* at pp. *9-10.)

On balance, however, we feel compelled to defer to the language in section 366.22, subdivision (a)(3), and we conclude the juvenile court properly terminated reunification services and set the section 366.26 hearing at the 18-month review hearing, notwithstanding its conclusion that reasonable services were not provided in the most recent review period. "We recognize denying or terminating reunification services can be heart wrenching. But 'in order to prevent children from spending their lives in the uncertainty of foster care, there must be a limitation on the length of time a child has to wait for a parent to become adequate.' [Citation.] The statutory restrictions are consistent with the overall objective of the statutory scheme—that is, the protection of abused or neglected children and the provision of permanent, stable homes if they cannot be returned to parental custody within a reasonable time." (*San Joaquin, supra,* 227 Cal.App.4th at p. 225.) We also believe the statutory scheme at issue here, despite its complexities and the ambiguity cited by Justice Liu, provides parents with

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[6] Justice Liu gave the following examples: (i) section 366.22, subdivision (a)(3), "requires the juvenile court to 'determine whether reasonable services have been offered or provided to the parent or legal guardian' at the permanency hearing, although it does not expressly condition a placement hearing on a finding of reasonableness"; (ii) section 366.21, subdivision (g)(1)(C)(ii), and section 366.22, subdivision (b)(3), "both state that the 'court shall not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian.' But this prohibitory language resides in a subdivision of each statute, and it is not clear whether the prohibition applies in all situations or only in the situations addressed by those subdivisions"; and (iii) section 352, subdivision (a), "authorizes juvenile courts to 'continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor.' This provision could be read to authorize trial courts to continue a section 366.26 placement hearing after 18 months in the event that reasonable reunification services have not been provided." (Statement, Liu, J., *supra*, at pp. *7-8.)

fundamental fairness and therefore satisfies due process requirements. We nonetheless join Justice Liu in inviting the Legislature to reexamine the interplay of these statutes.

Father alternatively insists the juvenile court should have continued reunification services under section 352, and its refusal to do so was an abuse of discretion. We cannot agree. Section 352 allows a court to order a continuance only if it is not "contrary to the interest of the minor," giving "substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (§ 352, subd. (a)(1).) The court here concluded additional services would not be in A.G.'s best interest, given both parents' lack of consistent and regular contact and visitation, their lack of significant and consistent progress in the prior 18 months in resolving the problems that led to her removal, and a lack of evidence that either parent had demonstrated the capacity or the ability to complete the components of the case plan. On this record, the court reasonably concluded A.G.'s interests were best served by moving forward with the case; we see no abuse of discretion. (See also *Earl L.*, *supra,* 199 Cal.App.4th at p. 1505 ["It defies common sense to continue reunification efforts for a parent who has made minimal efforts throughout a case"].)

DISPOSITION

The petitions challenging the juvenile court's order terminating services and setting the section 366.26 hearing are denied.

GOETHALS, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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