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SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ETHAN C., *et al.*,	
Minors Coming Under	**SUPREME COURT**
the Juvenile Court Law,	**NO.**
LOS ANGELES COUNTY	
DEPARTMENT OF CHILDREN	
AND FAMILY SERVICES,	
Plaintiff and	
Respondent,	**Case No. B–219894**
v.	
	Superior Court No.
WILLIAM C.,	**CK-78508**
Defendant and	**(LOS ANGELES**
Petitioner.	**(COUNTY)**

PETITION FOR REVIEW BY PETITIONER WILLIAM C.
AFTER A PUBLISHED DECISION THE
COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIVISION ONE, AFFIRMING A JUDGMENT
MAKING HIS MINOR CHILDREN DEPENDENTS OF THE
THE JUVENILE/SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE SHERI SOBEL, REFEREE

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(Under Appointment by the
Court of Appeal California
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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

WILLIAM C. hereby petitions the California Supreme Court for Review after a published decision by the Court of Appeal, Second Appellate District, Division One, of a judgment making and continuing his children as dependents of the juvenile court. These judgments were rendered by the Superior Court of Los Angeles County, sitting as a juvenile court.

REASON FOR GRANTING REVIEW.

The first issue is whether a petition filed under Welfare and Institutions Code section 300, subdivision (f), alleging that certain minors are at risk because their parent "caused the death of another child through abuse or neglect" may be sustained solely upon the basis that the "neglect" involved is "ordinary" negligence rather than "criminal" negligence. As the majority opinion in this case noted, this issue has not been addressed in any previous published opinion. As petitioner noted in his briefing in the Court of Appeal, there was one unpublished opinion, ***Jorgelina E. v. Superior Court***, case no. D-048461, decided August 30, 2006, that held that, as a matter of statutory interpretation and history, the negligence required was "criminal negligence." While this case was pending, another case, ***In Re A. M.*** (2010) 187 Cal.App. 4th 1380, impliedly agreed that "ordinary" negligence was sufficient to establish jurisdiction although it did not expressly so hold. Review has been sought in that case both by the father and the minors as Case No. S-186493, Petition for Review filed October 1, 2010; the respondent agency has, as of this date, indicated a desire to file a response to the petitions for review and, in fact, did so on or about October 20, 2010.

Obviously, there is a question in the appellate courts as to whether "ordinary" negligence or "criminal" negligence is required to establish jurisdiction under subdivision (f) of section 300. Petitioner submits that the history of subdivision (f) is that "criminal" negligence is required but that the social services agency may prove that the parent was "criminally" negligent using the standard of preponderance of the evidence (the normal standard of proof for jurisdiction under the juvenile dependency law) rather than the more rigorous standard of proof beyond a reasonable doubt that would be needed to sustain a criminal conviction.

In addition, there is a second reason for granting review. That issue is whether, assuming that the parent, did cause the death of a child by "abuse or negligence," there must be a present risk of harm to the parent's surviving children. The Court of Appeal in this case and in ***A. M.***, concluded that jurisdiction was proper even if there was no present risk of harm. The dissenting opinion in this case concluded that Welfare and Institutions Code section 300.2 requires that there be a "present risk" of harm to the minors before dependency can be established for any reason. Petitioner believes that the dissent in this case properly analyzes section 300.2 and that the clear intention of the dependency law requires that there be a "present risk" of harm to a minor before the court may assert dependency jurisdiction over the minor.

As noted, review has been sought in ***A. M.*** on both of these issues and petitioner believes that uniformity of decision is essential for both of these questions, neither of which have been answered by appellate courts of this state, in published opinions until now. Because these questions are both novel and far reaching, it is for this Court to answer them rather than leave these questions with conflicting answers from the appellate courts in both published and unpublished opinions.

STATEMENT OF THE CASE AND FACTS.

The facts and procedural aspects of this case are set forth in the brief of the petitioner in the Court of Appeal. The case a be summarized as follows. Specific references to the transcripts may be found in petitioner's opening brief in the Court of Appeal. In the event that this Court grants review, petitioner specifically reserved the right to file a more complete summary of the facts and case as may be appropriate.

Petitioner William C. and Kimberly G. are the parents of three children. Two of them are the subject of this appeal. The older one is Ethan, now almost five years old (DOB 1/28/06). The younger one is Jesus, who is now two (DOB 11/17/09). Their third child was Valerie (DOB 11/28/07). Valerie died in an automobile accident that occurred on June 17, 2009.

The circumstances surrounding this accident are what really led to the filing of the petition on August 16, 2009. At the time of the accident, Kimberly and petitioner were separated but the children were living with petitioner. On June 17, petitioner returned home and discovered that Valerie had injured her arm. Petitioner was concerned and decided to seek medical attention. Apparently, there was some difficulty in locating a child restraint car seat so petitioner drove to the hospital without one. Valerie was being held by her paternal aunt and grandmother. As petitioner was lawfully driving up the roadway, another car ran a stop sign at a great rate of speed and "t-boned" him, spinning his car around and causing him to strike at least one other vehicle. Valerie was fatally injured in the accident. The accident reports are part of the record on appeal. The most telling aspect of these reports is the diagram of the accident prepared by the investigating officers. It shows that petitioner (driving V-2) was headed northbound on Avalon Boulevard and had entered the intersection at 90th Street; 90th Street had a stop sign; Avalon had

none so petitioner clearly had the right of way. The driver of V-1 entered the intersection unlawfully and struck petitioner's car at a speed sufficiently fast to cause it to spin around and strike another vehicle; a fourth vehicle then struck petitioner's car and that vehicle sped off without stopping. There has never been any dispute but that the driver of the other vehicle was solely at fault for the accident and petitioner has no legal responsibility for the accident.

Further investigation showed that petitioner and Kimberly engaged in various acts of domestic violence with Kimberly being the primary aggressor; Kimberly had some mental health issues in that she was borderline retarded and had a personality disorder. The petition was filed on August 16, 2009. The allegations included ones involving domestic violence and Kimberly's mental health issues. However, one allegation was filed under Welfare and Institutions Code section 300, subdivision (f) – an allegation that William had caused the death of Valerie through abuse or neglect thus rendering him potentially ineligible for reunification services.

By the time of the disposition hearing on October 22, 2009, petitioner had found new accommodations but respondent had yet to determine if they were suitable. He was participating in visits with his children on a regular basis, was attending grief therapy, anger management and domestic violence classes. Both petitioner and Kimberly submitted on the basis of the social worker's reports although petitioner made an argument that the evidence was insufficient to support a finding on the subdivision (f) allegations on the basis that petitioner's negligence was not criminal in nature but, rather, civil in nature and thus could not be the basis for that kind of a petition. The court sustained the subdivision (f) allegations and the ones based on Kimberly's use of domestic violence and her mental health issues. Both petitioner and Kimberly were granted monitored visitation and were offered reunification

services. Only petitioner appealed the trial court's decision. The decision of the Court was rendered on September 24, 2010. A copy of that opinion is attached hereto as Exhibit "A."

POINTS AND AUTHORITIES IN SUPPORT OF PETITION

I.

REVIEW MUST BE GRANTED AND THIS COURT MUST HOLD THAT THE NEGLIGENCE OR ABUSE CONTEMPLATED BY SUBDIVISION (f) OF SECTION 300 MUST BE CRIMINAL IN NATURE RATHER THAN "ORDINARY" OR CIVIL.

Ethan and Jesus were made dependents of the juvenile court primarily based upon the events that led up to Valerie's death – namely that petitioner had failed to properly secure her in a child car seat as required by Vehicle Code section 27360. Petitioner became involved in an accident and Valerie was killed in the accident; everyone, including respondent concluded that petitioner had no legal responsibility for the accident; rather the driver of the other car was solely at fault. Nevertheless, the trial court made a true finding under subdivision (f) of Welfare and Institutions Code section 300 that Ethan and Jesus should be made dependents. Subdivision (f) permits a court to adjudge a child to be a dependent child if the court if "if the child's parent or guardian caused the death of another child through abuse or neglect." The type of abuse or neglect – civil or criminal – is not specified.

Furthermore, once the court makes that finding, it may then decide not to grant the parent reunification services. Welfare and Institutions Code section 361.5, subdivision (b), subsection (4), states that the trial court need not provide reunification services if "the parent or guardian has caused the death of another child through abuse or neglect." Again, the type of abuse or neglect – civil or criminal – is not specified. However, it may be noted that the operative language of both subdivision (f) of section 300 and subdivision (b), subsection (4) of section 361.5, is identical in all meaningful respects and, therefore, under general rules of statutory construction, if the Legislature uses the same language in closely related contexts, it intends that the same meaning

shall be accorded to the words. This is known as the principle of *ejusdem generis.* (***In Re Corrine W.*** (2008) 42 Cal.4th 522, 531; ***Bernard v. Foley*** (2006) 39 Cal.4th 794, 806-807).

The law recognizes two basic types of negligence – ordinary negligence which governs most civil acts and is a lack of ordinary or reasonable care. The standard BAJI instruction 3.10 defines it as follows:

> "Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do...It is the failure to use ordinary or reasonable care...Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others.

The CACI instruction 401 uses similar language:

> "Negligence is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation."

The other form of negligence is criminal negligence. Penal Code section 7 defines criminal "neglect/negligence" as a "want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." Criminal negligence requires a greater degree of culpability than ordinary or civil negligence. (***People v. Penny*** (1955) 44 Cal.2d 861, 879; ***Sea Horse Ranch, Inc., v. Superior Court*** (1994) 24 Cal.App.4th 446, 454). The facts must be such that the consequences of the negligent act or acts could reasonably have been

foreseen and it must appear that the death or danger to human life was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act. (***People v. Kinkhead*** (2000) 80 Cal.App.4th 1113, 1123).

This petition, as does the petition in ***A. M.***, squarely presents the issue of what sort of "negligence" is required under subdivision (f) – mere civil negligence or the much stricter form of criminal negligence. The statute is silent. However, the statutory history clearly suggests that the Legislature intended that only "criminal" negligence or abuse could trigger an application of subdivision (f). While both the majority opinion in this case and the court in ***A. M.***, give lip service to the statutory history, neither really looks at the history in any meaningful manner.

Prior to 1997, jurisdiction was authorized only if a parent had been convicted of causing the death of another child through abuse or neglect. (Statutes 1987, chapter 1485, section 4). As originally enacted then, the type of abuse or neglect had to criminal in nature.

In 1996, the Legislature reenacted subdivision (f) in its present form. There were two basic concerns. First was that a jurisdiction hearing in a dependency case almost always occurred before a conviction could occur in a criminal case thus making it almost impossible to sustain a petition under subdivision (f) if the death of the other child occurred close in time to the detention of the living children. Second, the Legislature was concerned about imposing the criminal standard of proof beyond a reasonable doubt in dependency proceedings which are generally governed by the lesser standard of preponderance of the evidence. (Welfare and Institutions Code section 355). (Senate Committee on Judiciary, Analysis of Assembly Bill No. 2679 (1995-1996 Regular Session) as amended May 14, 1996, p.o., hereafter Bill

Analysis). The Legislature obviously wanted subdivision (f) to have the same standard of proof that is required in the other subdivisions.

The Legislature was also concerned about the effects of any findings of fact made by the juvenile court might have on any criminal proceedings involving the deceased child – "care must be taken that the juvenile court action does not create a bar (collateral estoppel) as to any issues of fact." (Bill Analysis). In other words, the Legislature did not want the juvenile court's finding that the parent acted with negligence in causing the death of the child to have any effect on any pending criminal case that might be brought against the parent.

It may be noted that subdivisions (b), (e) and (i) of section 300 permit dependency jurisdiction when "the parent or guardian knew or reasonably should have known" of a household member's abuse or neglect of the parent's child. This phrase is conspicuously absent from subdivision (f). When a critical word or phrase is present in some subdivisions of a statute, omission of that phrase or word from another shows a different legislative intent. (***In Re Reeves*** (2005) 35 Cal.4th 765, 786; ***In Re Young*** (2004) 32 Cal.4th 900, 907). The phrase "knew or reasonably should have known" connotes civil negligence; its absence from subdivision (f) strongly suggests that the Legislature did not intend to import ordinary standards of civil negligence into subdivision (f) and this Court should so hold.

Furthermore, the fact that the Legislature made no attempt to redefine the phrase "abuse or neglect" in its amendments to subdivision (f) back in 1996 further underscores that it intended that the original definition which clearly used the criminal definition of neglect and abuse remain in place under subdivision (f) as it would render it almost indistinguishable from subdivision (j) which permits dependency jurisdiction when siblings/half siblings are

abused.[1] A court will not interpret a statute so as to render it meaningless or largely duplicative of another statute. (***De Young v. San Diego*** (1983) 147 Cal.App.3d 11, 17).

In other words, the amendments to subdivision (f) were intended to accomplish limited purposes – to allow a dependency court to adjudge a minor to be a dependent of the court when his/her parent has caused the death of another child through criminal negligence but with the proviso that the dependency court could make that finding by a mere preponderance of the evidence. Perhaps the strongest evidence of this is the concerns expressed in the legislative history about collateral estoppel effects that the findings of the juvenile court might have on any criminal proceedings. If the dependency court could make a true finding under subdivision (f) based upon mere "ordinary" or "civil" negligence, there would have been no concerns about any collateral estoppel effects on the criminal case as "ordinary" or "civil" negligence cannot support a criminal conviction. Thus, the concerns that are found in the legislative history regarding collateral estoppel only make sense if the Legislature had intended that criminal negligence was required for a true finding under subdivision (f) because then there could be some concern that the juvenile court's finding of "criminal negligence" might have collateral estoppel effect on criminal proceedings.

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[1] The only difference would be that subdivision (f) would apply to instances in which the parent caused the death of a non-sibling. Typically, since non-siblings are not part of the same household as the "surviving children," it might well make sense to impose a higher standard under subdivision (f) than under subdivision (j) which basically incorporates the standards of subdivisions (a), (b), (d), (e) and (i) of section 300. This only supports a conclusion that subdivision (f) incorporates the criminal standards of neglect and abuse rather than the civil standards.

Another reason for finding that the Legislature intended that only criminal neglect be the basis for a true finding under subdivision (f) is that a finding under subdivision (f) can be the basis for denying a parent reunification services under subsection (4) of subdivision (b) of section 361.5, which, as noted, uses the exact same language. A decision to deny reunification services under this provision can only done if the misconduct or neglect is serious (***Mardardo F. v. Superior Court*** (2008) 164 Cal.App.4th 481, 488) or if the misconduct is "too shocking to ignore." (***In Re Alexis M.*** (1997) 54 Cal.App.4th 848, 851). Such language clearly goes far beyond "ordinary" or "civil" negligence and clearly reunification services can only be denied if there has been criminal negligence.

It is clear that sections 300, subdivision (f), and 361.5, subdivision (b), subsection (4), are intended to cover essentially the same ground and the same construction must be given to the terms employed by both as the language is the same. These two provisions are parallel provisions and must be read as having the same basic requirements – criminal neglect is required for both.

The majority in this case as well as the ***A. M.*** court ignored these basic principles and incorrectly held that mere civil or "ordinary" negligence is enough to justify jurisdiction under subdivision (f) of section 300. This Court must grant review and hold that jurisdiction under subdivision (f) requires a finding that the parent was "criminally" negligent in the death of another child. In other portions of this petition, petition will demonstrate that any other interpretation of the statute will lead to absurd results. Petitioner will also demonstrate that his actions did not involve "criminal" neglect as that term is understood in the law.

II.

REVIEW MUST BE GRANTED TO CLARIFY THAT CRIMINAL NEGLIGENCE REQUIRES THAT DEATH OR INJURY MUST BE A "NATURAL AND PROBABLE" RESULT OF A "RECKLESS, AGGRAVATED OR FLAGRANTLY NEGLIGENT ACT."

If, as petitioner, contends, a true finding under subdivision (f), requires a finding that the parent was criminally negligent in causing the death of a child, the further question of whether petitioner's acts constituted criminal negligence must still be addressed by this Court. Petitioner recognizes that this is a question that is better answered in briefing on the merits once this Court elects to grant review on the more vital question of whether criminal negligence is required in the first instance. Petitioner also recognizes that the Court of Appeal declined to answer the question of whether petitioner's actions constituted criminal negligence as it concluded that "ordinary" negligence was sufficient to meet the test under subdivision (f). Nevertheless, petitioner believes it important for this Court to understand that his actions did not constitute criminal negligence as that term is understood in the law. Such an understanding is essential to place the primary question in proper perspective.

The first question is whether the failure to use a child restraint car seat is a flagrantly negligent act. Petitioner has found no case on point. However, common sense tells us that it is not. First, any failure to use such a device is but an infraction punished by little more than a nominal fine of $100.00.[2] Vehicle Code section 27360 is what is known as a regulatory offense. It is not

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[2] Very often, it is treated as a "fix it" ticket, that is, the offending parent goes to court, demonstrates that he/she has an appropriate car seat and the matter is dismissed sometimes with a stern warning from the bench.

a *malum in se* offense or "evil in itself" but merely *malum prohibitum* or wrong because we say it is. At any given time, there are hundreds, if not thousands of violations of this statute. Very few of these violations, well less than one -tenth of 1% – result in any harm to the child in question. Society did not see fit to mandate the use of child restraint car seats until 1982. Doubtless, most baby boomers when they were babies and/or toddlers (and their parents) were transported in cars without the use of such devices but were held by an adult or older sibling. They survived. Petitioner submits that a violation of section 27360 is not, in and of itself, so flagrant, so aggravated or so reckless as to constitute criminal negligence. It may be civilly negligent but it is not criminally negligent.

Another way to look at it is that any failure to use a child car restraint seat, like a failure to use a seat belt, is not highly likely to result in any injury. There must still be an intervening cause – someone speeding, someone driving intoxicated, someone running a stop sign and so on that causes a collision (or near collision) before injury occurs. In and of itself, a failure to use a child restraint car seat causes no injuries. It increases the risk of injury in case of an intervening cause but, in and of itself, it causes no injuries. It is unlike hitting a child with a bullwhip – that will always cause an injury. It is unlike throwing a baby at a wall – the baby will always be injured. There is a difference between taking all prudent measures that will decrease the risk of injury or death should untoward events occur and actively engaging in activity that will always (or almost always) cause injury without any intervening activity by third parties occurring. Failure to use a child car restraint seat is simply not an activity that will inevitably result in injury or death or even likely result in injury or death in and of itself unless some intervening unforeseen act occurs. It is prudent to use them as this case demonstrates; it may well be civilly

negligent not to use them but it is simply not criminally negligent to fail to use them.

In addition to the neglect, there must be a causal connection between the parent's acts or omissions and the death of the child in question that must be more than tenuous or speculative. It must be a substantial contributing cause. Under criminal stands, "the death must be the probable consequence naturally flowing from the commission of the unlawful act or the criminal negligence." (***People v. Wong*** (1973) 35 Cal.App.3d 812, 830). It must be substantial and not tangential. (***People v. Caldwell*** (1984) 36 Cal.3d 210, 220). It is not enough to say that petitioner could have done something to lessen the likelihood of Valerie's death in the event of a collision; his actions must still be a substantial factor.

Here, we know what caused Valerie's death. It was the decision of a driver to run a stop sign at a significant rate of speed. There is no question that petitioner was driving in a safe and prudent manner and neither the investigating officers nor respondent ever contended otherwise. Perhaps Valerie might have survived the accident had she been in a child restraint car seat. Perhaps she might still have died. It is wholly speculative to say one way or the other. What we can say is that there was nothing in the way that petitioner drove that caused this tragic accident. But for the reckless and grossly negligent conduct of another driver, this accident would never have occurred. Valerie would have been treated for her injured arm and taken back home safe and sound. The sole cause of the accident was the other driver. Petitioner's failure to use the child restraint car seat was, at most, a tangential or secondary cause and, even at that, it is wholly speculative to say that Valerie would have survived had one been used. Causation has not been established within the meaning of cases like ***Caldwell***.

Petitioner also notes that the failure to use a child restraint seat is an offense that is classified as a "public welfare" or "regulatory" offense and, as such, does not require a *mens rea*. *Mens rea* is a basic concept in criminal law. It has been held that "true crimes" as opposed to "regulatory" or "public welfare" offenses require a *mens rea*. Penal Code section 20 states it clearly – "In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence." However, the concept applies only to "true crimes" or, to use law school jargon, crimes that are *malum in se* – evil in and of themselves. Public welfare offenses – or *malum prohibitum* offenses do not require a *mens rea*. (***United States v. Freed*** (1971) 401 U.S. 601 [91 S.Ct. 1112, 1117, 28 L.Ed2d 356]; ***In Re Jorge M.*** (2000) 23 Cal.4th 866, 873). Hence, if an offense does not require a *mens rea* of any sort, be it specific intent, malice, general intent, knowledge and so on, a violation of the statute cannot form the basis for a finding of criminal negligence as criminal negligence is a form of *mens rea*. (***People v. Peabody*** (1975) 46 Cal.App.3d 43, 47). However, as petitioner developed *supra* – criminal negligence goes far beyond mere civil negligence and it is not determined by the nature of the harm that ultimately resulted. (***Somers v. Superior Court*** (1973) 32 Cal.App.-3d 961, 969 – fact that victim died as a result of negligence does not, in and of itself, show that the negligence was criminal in nature as opposed to civil in nature).

If no *mens rea* is required for a violation of Vehicle Code section 27360, then it would be impossible to establish that petitioner's conduct fell within the scope of subdivision (f) which requires the criminal *mens rea* of "criminal negligence." This Court, in ***Jorge M.***, listed a number of potential factors that could be used to determine if a particular offense was a "true crime" or merely a public welfare offense. One important factor is whether the

statute itself requires a *mens rea*. Clearly section 27360 does not. Another one, perhaps the most important one, is the severity of the punishment – all things being equal, the greater the punishment, the more likely that some fault is required. (*Id.*, at 873). Obviously, a $100 fine is a token punishment at best. Another factor would be the difficulty for the prosecution in proving a mental state – the more difficult it would be to prove a mental state, the greater the likelihood that no mental state is required. Again, trying to prove a mental state for failing to use a child restraint seat would be very difficult to prove. Another factor is the purpose of the statute; is it designed to punish perpetrators or protect the innocent? Obviously, the purpose of section 27360 is not to punish perpetrators but to encourage them to use a safety device to protect children. Furthermore, as Professor Witkin notes, most minor traffic infractions are considered public welfare offenses not requiring a criminal *mens rea*. (Witkin, California Criminal Law, 4th Ed., Elements, section 17).

Based upon all of these factors, petitioner submits that a mere failure to use a child restraint seat, in and of itself, is not enough to justify a true finding under subdivision (f). Perhaps combined with some other factor such as careless driving, it might arise to that level but, as even respondent has tacitly conceded, petitioner's driving was not a contributing cause of the accident; the accident was caused solely by another individual running a stop sign at a relatively high rate of speed.

Here, it may be noted that even driving intoxicated with the children in the car may not even be enough to justify dependency jurisdiction. In the case of ***In Re J. N.*** (2010) 181 Cal.App.4th 1010, both parents were in a car with the father driving; both parents were highly intoxicated (the father's blood alcohol level was .20 or 2½ times the legal limit), the children were not properly secured in their car seats and the father drove into a pole causing

minor injuries to one of the children. There was no other evidence that either parent had a substance abuse problem. The Court of Appeal held, despite the fact that the parents were intoxicated and that they had failed to properly secure the children in a car seat, that was not enough to justify dependency proceedings. (*Id.*, at 1023-1036).

Clearly, the conduct of the parents in that case was far more egregious than was petitioner's conduct in this case. Not only was the father responsible for the accident, he was criminally responsible for the accident. Driving while highly intoxicated is an act that carries with it a criminal *mens rea* of at least "criminal negligence" involving, as it does, conduct that is highly likely to result in danger of harm or death to the driver or to others. In addition, the parents did the exact same thing petitioner failed to do, secure the children in child safety seats but, as noted, they did considerably more – they were responsible for the accident and were highly intoxicated. If dependency could not be established on those facts, they cannot be established on these facts which show a far lesser degree of culpability. The only difference is that the children in ***J. N.*** suffered only minor injuries; here Valerie died. However, the important thing is that petitioner had no legal responsibility for the fatal accident whereas the parents in ***J. N.*** had full and sole legal responsibility for the accident. Petitioner submits that the totality of the evidence amply demonstrates that respondent failed to meet its burden under section 300, subdivision (f), to show that petitioner's surviving children should have been made dependents under that code section. Review must be granted and this Court must so hold.

III.

REVIEW MUST BE GRANTED TO SETTLE THE QUESTION OF WHETHER THERE MUST BE A PRESENT RISK OF HARM TO A MINOR BEFORE JURISDICTION UNDER SUBDIVISION (f) OF SECTION 300 MAY BE FOUND.

Both the majority opinion in this case and the Court in ***A. M.*** concluded that the respondent agency was not required to show a present risk of harm to the minors before jurisdiction could be found under subdivision (f). (Slip Opinion at p. 11; ***In Re A. M.***, *supra,* at 1387). Neither case considered the impact of section 300.2 of the Welfare and Institutions Code. The dissent in this case, however, considered the impact of that provision which states, in relevant part, as follows:

> "Notwithstanding any other provision of law, the purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually or emotionally abused, being neglected or being exploited and to ensure the safety, protection and physical and emotional well-being of children who are at risk for that harm."

This provision does nothing more than codify certain long accepted principles of law, namely that exercise of dependency jurisdiction must be based upon existing and reasonably foreseeable future harm to the welfare of the child. (***In Re D. R.*** (2007) 155 Cal.App.4th 480, 486, citing to ***In Re Robert L.*** (1998) 68 Cal.App.4th 789, 794). These principles of law go back to at least 1962 when the court stated that, before terminating custody and control of parents who "are morally depraved" requires such condition of moral lapse be found to exist at the time of the hearing. (***In Re Zimmerman*** (1962) 206 Cal.App.2d 835, 844).

Petitioner submits that the dissent in this case "got it right." Before dependency jurisdiction may be asserted over any child, there must either be present harm from which the child suffers or a substantial risk of future harm to the child based on presently existing conditions.

The ***A. M.*** court came to the conclusion that subdivision (f) did not require a finding of present risk because the language of other provisions of section 300, notably subdivisions (b), (c), (d) and (j) contained language to the effect that the child be "at substantial risk," or has suffered harm. (*Id.*, at 1387). In contrast, the dissent in this case found that unpersuasive because the Legislature's failure to use the past tense language in subdivision (f) is all the more reason to interpret subdivision (f) as requiring proof of a current or future risk of harm. (Slip Opinion, Rothschild, J., dissenting, p. 2, fn. 4).

However, as noted, both the majority opinion and the ***A. M.*** court failed to consider the impact of section 300.2 which clearly applies to all parts of section 300 and which does require a risk of future harm to the child before dependency jurisdiction may be found. Review must be granted and this Court must squarely hold that section 300.2 requires a present risk of future harm to the minor before dependency jurisdiction may be sustained under any provision of section 300, including subdivision (f).

A good illustration is found in ***Mardardo F. v. Superior Court***, *supra*, in which jurisdiction was based upon the fact that the father, when he was fifteen, had murdered and raped a 13 year old child; he spent ten years in CYA and was then dishonorably discharged; he was determined to be a danger to society and to the child and was diagnosed with an antisocial personality disorder. (*Id.*, at 484). These facts, which squarely fall within the scope of subdivision (f), under any theory, were the sole basis for sustaining the petition

as to the father.[3] The issue on appeal was whether the father could be denied reunification services under section 361.5, subdivision (b), subsection (4), which, as noted, is a parallel provision to subdivision (f), containing the precise same language. The issue on appeal was whether the father had to be a parent at the time he caused the death of the child in question. The Court of Appeal held that it was not necessary that the individual be a parent at the time that he caused the death of the child, only that he be a "present danger" to the safety of the child at the time reunification services are denied. (*Id.*, at 491-492). Although ***Mardardo F.*** dealt with the issue of reunification services rather than the establishment of jurisdiction *ab initio*, it nevertheless illustrates the principle that the provisions of subdivision (f) and its parallel provisions of subsection (4) of subdivision (b) of section 361.5 both require a present risk of harm to the child before they can be applied.

Furthermore, common sense requires a present risk of harm to the child before subdivision (f) can be applied. If one accepts the lower court's interpretation of subdivision (f) as (1) only requiring "civil" or "ordinary" negligence in causing the death of a child and (2) no present risk of harm to the minor before dependency jurisdiction may be found, then truly absurd results can occur.

Take a very ordinary situation. When Ms. Jones was 19 years old, she was involved in an automobile accident at which she was clearly at fault; perhaps her attention was distracted from the road because she was chatting with a passenger or perhaps she took a very wide turn. In any event, a child died as a result thereof and a court found her civilly liable. Ten years later, she gives birth to her own child. Under the construction of subdivision (f) as

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[3] There were allegations under subdivisions (a) (b) and (j) as to the mother but those allegations did not pertain to the father.

advanced by the Court of Appeal, a trial court would have no choice but to make her child a dependent of the juvenile court based upon the events of some ten years earlier. In fact, the accident need not have occurred ten years earlier but, perhaps, only a year earlier (or even a month earlier) and the trial court would still be required to make a true finding under subdivision (f). A one time lapse in judgment is no basis for finding that a child must be made a dependent of the juvenile court. (*See*, ***In Re J. N.***, *supra* – one time incident of drunk driving even with an accident in which a child improperly restrained and was slightly injured not enough to sustain dependency jurisdiction).

Another example will illustrate the need to have a present risk element in subdivision (f). A homeowner has a pool; the fence around the pool is defective and a neighbor child sneaks into the backyard and drowns. Clearly, the homeowner is negligent and responsible for the death of the child. But are his children "presently at risk" for future harm if he immediately repairs the fence? Of course not!

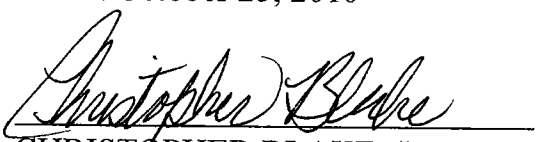
The above examples illustrate the absurdity of the extreme application of subdivision (f) that advanced in this case and in ***A. M.*** Courts will avoid absurd interpretations of statutes. (***California School Employees Association v. Governing Board of the Marin Community College District*** (1994) 8 Cal.4th 333, 339, 342). Limiting the extreme provisions of subdivision (f) to instances in which the parent has acted with criminal negligence and in which there is a "present risk" of future harm to his/her child avoids any possibility of absurd results yet preserves the original intent of the legislation. This Court must grant review and so hold and give a common sense interpretation to subdivision (f).

IV.

CONCLUSION.

For these reasons, petitioner respectfully submits that this Court must grant review. Both this case and ***In Re A. M.*** present extreme interpretations of subdivision (f) that must be avoided. Subdivision (f) should be applied only when (1) the parent has caused the death of a child by "criminal abuse or neglect" and (2) there is a present risk of danger to the parent's own children by reason of that "criminal abuse or neglect." This Court should grant review in this case and in ***A. M.*** Because the two cases present significantly different scenarios, both should be briefed on the merits with separate opinions but it may be prudent to have them orally argued on the same day. In any event, review must be granted to clarify the true meaning of Welfare and Institutions Code subdivision (f) and avoid the potentially absurd results that the interpretations advocated by the majority opinion in this case and by ***A. M.***[4]

Dated: October 25, 2010



CHRISTOPHER BLAKE, #53174
Attorney for Petitioner,
WILLIAM C.

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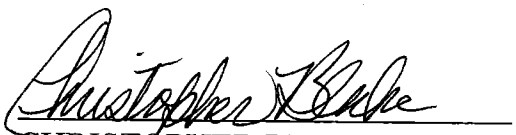
[4] To the extent practicable, petitioner incorporates the briefing filed by the appellant and the minor in ***A. M.***, in this Court in support of review in that case as part of his petition for review in this case. As noted, *supra*, ***A. M.*** is pending before this Court as case S-186493. This is done pursuant to California Rules of Court, Rule 8.200, subdivision (a), subsection (5).

CERTIFICATE OF NUMBER OF WORDS IN BRIEF.

I hereby certify that this brief consists of 6,599 words, including footnotes, as counted in the word count function of WordPerfect X4, the computer program used to prepare this brief.

Dated: October 25, 2010



CHRISTOPHER BLAKE

EXHIBIT

(1) PUBLISHED OPINION OF THE COURT AFFIRMING THE DECISION MAKING PETITIONER'S MINOR CHILDREN, ETHAN C. AND JESUS C., DEPENDENTS OF THE JUVENILE COURT AND CONTINUING THEM AS DEPENDENTS OF THAT COURT DATED SEPTEMBER 24, 2010.

Filed 9/24/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re ETHAN C. et al., Persons Coming Under the Juvenile Court Law.	B219894 (Los Angeles County Super. Ct. No. CK78508)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Appellant, v. WILLIAM C., Defendant and Appellant.	

APPEALS from an order of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Affirmed in part; reversed in part.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Appellant.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

A father drove his toddler daughter after failing to secure the child in a car seat. The father became involved in a traffic accident, and the child was thrown from the car and died. The father's other two children were detained by Department of Children and Family Services (DCFS). The father contends dependency court jurisdiction was improperly asserted because, although he negligently failed to secure his daughter in a car seat, his undisputed negligence did not rise to the level of criminal negligence he claims is required by Welfare and Institutions Code section 300, subdivision (f).[1] We affirm.

DCFS filed a cross-appeal, arguing the juvenile court erred by dismissing allegations under section 300, subdivision (b), which refer to the father's neglect of his daughter which resulted in her death. These allegations are a necessary predicate to sustain identical allegations under section 300, subdivision (j), which the juvenile court sustained. We agree the juvenile court erred in this respect; the dismissed allegations must be reinstated and sustained.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant William C. and his wife Kimberly G. (who is not a party to this appeal) are the parents of three children, Ethan C. (born January 2006), Jesus C. (born November 2008), and the now-deceased Valerie C. (born November 2007). On June 17, 2009, 18-month-old Valerie died in an automobile accident. The circumstances surrounding that accident led up to the filing of the Welfare and Institutions Code section 300 petition in this action by DCFS.

In March or April,[2] William and Kimberly separated. The children lived with William and numerous members of his extended family in their paternal grandmother's home, which was described as very crowded and unkempt.

On June 17, William left Valerie in the care of her paternal grandmother and a paternal aunt. When he returned, he noticed Valerie's arm was injured,[3] and he decided

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

[2] Unspecified date references are to 2009.

to take her to the hospital to have the arm checked out. His car, which had a child's car seat, was being used by someone else. William was unable to get another car seat from Kimberly so he drove his daughter to the hospital unsecured by any child safety restraint. Valerie traveled in the car sitting on the lap of her aunt or paternal grandmother. As William, who had the right-of-way, drove into an intersection, another car traveling at a high rate of speed ran through a stop sign and struck William's car, causing it to spin into another car. William's car was then struck by a fourth vehicle. As a result of the collisions, Valerie was thrown from the car and landed on her head. The coroner concluded the cause of Valerie's death was accidental, and due to blunt force injury. An early DCFS report indicated that criminal charges would likely be filed against William and the driver who ran through the stop sign; no criminal charges have been filed against William.

About a week after Valerie's death, DCFS received a referral claiming Ethan and Jesus were the victims of general neglect by their parents. The children's hygiene was reportedly quite poor, and their paternal grandmother's home was allegedly filthy, with food, feces and trash strewn everywhere. Although a DCFS investigation revealed the conditions at the paternal grandmother's home were not as severe as reported, the home was unsanitary, none of the utilities were working properly, the children lacked cribs or appropriate sleeping arrangements, and there appeared to be an excessive number of people (20 or more) living in the home. Ethan and Jesus were dirty and they ran around the yard with no one paying any noticeable concern for their safety.

Kimberly told DCFS she was not sure William had ever had any car seats. Kimberly seemed detached from her emotions, and had difficulty understanding and responding to questions. Kimberly's mother (the children's maternal grandmother), told DCFS Kimberly had cognitive impairments: she was 20 years old at the time, but had the mental capacity of an 11 year old. The maternal grandmother said Kimberly's

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[3] The child, left unsupervised, had fallen out of bed. Until William returned, no one had noticed Valerie's injury.

impairments became more noticeable after she, William and their children began living with William's relatives, who treated Kimberly poorly and were sometimes physically abusive to her. Shortly before Valerie's death, the maternal grandmother had taken Jesus to live with her because she worried that he had been neglected, isolated and that his medical needs were going unmet. After Valerie died, the maternal grandmother brought Ethan to her home too. She believed all the children had been seriously neglected by William's family, and that Ethan would be in danger if he stayed with his paternal relatives. When the maternal grandmother took Ethan to her home, his diaper contained a bowel movement so firmly stuck to his buttocks the child had to be bathed in order to soften and remove the feces. Ethan, who was then three years old, did not know how to use utensils to feed himself (he ate using his hands), was confused about the difference between day and night, and lacked language skills. He also displayed what appeared to be signs of developmental delays, and had several rotten teeth that required extraction.

Additional investigation revealed the children's parents had engaged in acts of domestic violence in the home. Kimberly was the primary aggressor. On various occasions, Kimberly had hit William with objects and had cursed at, slapped, socked and threatened him. William attributed Kimberly's behavior to emotional instability and his wife's extreme jealousy. He told DCFS that three times the behavior had escalated to a point that Kimberly wanted to harm herself. William took her in for mental health services, but Kimberly had not consistently complied with her treatment plans. Kimberly admitted she got angry at and sometimes hit or threw objects at William, but she said she did "'not physically abuse him, just like a punch.'" She did not believe her punches were abusive, or that William had not been physically hurt because she "'did not give him a black eye or nothing.'" Kimberly conceded she had difficulty controlling her anger, but said she had never hit her children and never would. There was evidence Kimberly had been diagnosed with borderline personality disorder, had a history of suicide attempts and generally functioned at a level no greater than a 13 year old. A psychologist expressed serious reservations about her ability to care for young children.

DCFS and the parents agreed the family would participate in a voluntary reunification plan. Nevertheless, DCFS decided the children should be detained due to, among other things, safety concerns about inappropriate adult supervision that had resulted in Valerie's initial arm injury, the apparent lack of children's cribs or car seats, and the unacceptable conditions at the paternal grandmother's house. The boys were placed in foster care, and the parents were given monitored weekly visitation, and agreed to participate in psychological assessments.

Beginning in late June, William and Kimberly began participating in parenting classes, and William started grief counseling. But William still had not moved out of paternal grandmother's home into a clean, safe, less populated residence into which DCFS could safely restore the children to his care. In addition, the criminal investigation surrounding Valerie's death remained open. In mid-August, the LAPD informed DCFS it planned to ask the District Attorney to charge William with child neglect and endangerment, but was waiting for more information before it did so. A psychological evaluator told DCFS William continued to experience difficulty dealing with his grief over the death of his daughter, and as a result had some negative and violent interactions with Kimberly. William was also taking painkillers for back pain he suffered as the result of another traffic accident in which he had been involved in 2008.

DCFS determined it was not feasible to consider whether the children could safely be returned to William's care within the time parameters provided by the Voluntary Family Reunification program. Other limitations inhibited DCFS's ability to consider returning the children to Kimberly. Her limited cognitive abilities and acknowledged need for assistance to help her properly care for and supervise her children presented a serious impediment. It was clear the parents loved their children. Nevertheless, DCFS had continued and significant concerns that the children would remain at physical and emotional risk in either parent's care. DCFS opined that the issues could be "worked through," and the "family would greatly benefit from supportive services." Accordingly, it recommended the juvenile court detain and assert its jurisdiction over the children.

A section 300 petition was filed on August 18. As ultimately sustained, the petition alleged that Ethan and Jesus were at substantial risk of suffering serious harm due to Kimberly's inability to provide regular care, as a result of her mental impairments or developmental disability, that the parents' history of domestic violence endangered the children's physical and emotional health and safety, and Kimberly had significant cognitive impairments which would require extensive services in order to enable her to appropriately care for and supervise her children. (§ 300, subd. (b).) The petition also alleged that William had created a detrimental, endangering and abusive situation by driving Valerie in a car and failing to place her in a car seat, thereafter becoming involved in an accident that resulted in her death. Valerie's death, which was alleged to have occurred due to William's choice to drive her without securing her in a car seat, also created a potentially detrimental, endangering and abusive or neglectful situation for her brothers, endangering their physical and emotional health and safety, and placing them at risk of physical and emotional harm, damage, danger and death. (§ 300, subds. (f), (j).) At the detention hearing the juvenile court found a prima facie case for detention was shown. The boys were temporarily placed in foster care, and the parents were given monitored visitation.

The contested jurisdictional hearing, initially set for early September, was conducted on October 22. In interviews conducted in preparation for that hearing, the police told DCFS William would likely be charged with "[c]hild [e]ndangerment," although he was unlikely to be sentenced to jail time, because his record was "not bad" and he had not caused the deadly traffic accident. Kimberly continued to acknowledge that she easily became sad, upset and emotional and that she had thrown objects at and hit William. Her anger management problems arose primarily from her extreme jealously and possessiveness toward William. Kimberly admitted she sometimes thought about (but would never actually commit) suicide. Kimberly continued to have concerns about her parenting skills, but expressed a desire to reunite with her husband and sons, so they could live together again as a family. The maternal grandmother told DCFS she thought

Kimberly could take care of her sons, as long as she received a great deal of guidance and assistance.

William told DCFS he would participate in any services in order to reunify with his sons. He said he was looking for a place of his own to live. DCFS was not willing to release the boys back into the home of their paternal grandmother, which remained overcrowded, unkempt and unsanitary, and where they had not been appropriately supervised. In its report, DCFS observed that the action, filed under section 300, subdivision (f), in part, satisfied the statutory criteria for the court's denial of reunification services. (§ 361.5, subd. (b)(4).) It was "clear that [William's] negligence caused/contributed to the death of . . . Valerie. [William] failed to use proper restraints when transporting the child." Although his extreme negligence in choosing not to use a car seat "cost the life" of and "directly contributed to" Valerie's death, it did "not appear that [William's] intent was to harm, injure or kill the children's sibling. [William] exercised extremely poor judgment which resulted in a horrific consequence." DCFS informed the court that William was extremely remorseful, and had been compliant since the case came to DCFS's attention. Thus, although he was not necessarily entitled to them, by virtue of section 361.5, subdivision (b)(4), DCFS opined that the case involving William's family was one of the rare instances in which the family could benefit from reunification services.

At the hearing on October 22, the parties informed the juvenile court the parents agreed to submit on all counts alleged in the petition, except the count alleged under section 300, subdivision (f). William argued that count should be dismissed because, although he had admittedly been negligent by failing to secure Valerie into a car seat, and she died as a result of injuries sustained as a result of his failure to do so, his conduct did not rise to the level of "criminal negligence" which he argued was necessary to meet the requirements of section 300, subdivision (f).

The trial court disagreed. It observed that section 300, subdivision (f) provides for assertion of juvenile court jurisdiction in cases in which "the child's parent or guardian

caused the death of another child through abuse or neglect." In light of the fact that "the law is absolutely clear about buckling a child in a safety seat," which William had clearly neglected to do for his one-year-old daughter, the court observed that it couldn't "even imagine what the argument could possibly be" that the requirements of section 300, subdivision (f) were not met. The court found by a preponderance of evidence that Ethan and Jesus were dependents of the juvenile court within the meaning of section 300, subdivisions (b), (f) and (j), and sustained the petition, as amended. The court also found, by clear and convincing evidence, that there were no reasonable means to protect the boys short of removal, and placed them in DCFS custody. The parents were given reunification services and monitored visitation. William appealed. DCFS filed a cross-appeal.

DISCUSSION

1. William's appeal

a. The juvenile court properly sustained allegations premised on William's failure to secure Valerie in a car seat

A child may come within the juvenile court's jurisdiction if his "parent or guardian caused the death of another child through abuse or neglect." (§ 300, subd. (f).) William maintains that the "abuse or neglect" contemplated by this statute must rise to the degree of culpability encompassed within the concept of criminal negligence, and that ordinary civil negligence will not suffice. Focusing on legislative changes to the statute, William contends the juvenile court applied the wrong legal standard in sustaining the jurisdictional allegations under section 300, subdivision (f).

Before 1997, dependency jurisdiction was authorized under section 300, subdivision (f) only if the juvenile court found the child's parent or guardian had already been *convicted* of causing another's child's death through abuse or neglect. (Historical and Statutory Notes, 73 West's Ann. Welf. & Inst. Code (2008 ed.) foll. § 300, p. 266; see 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 547, p. 671.) In 1996, the statute was amended to its current form, deleting the requirement of a criminal

conviction. The reasons underlying the change were twofold: First, jurisdictional hearings in dependency actions are almost uniformly held long before the criminal charges arising from a child's death are resolved. The previously lengthy delay prevented a juvenile court from making jurisdictional findings under section 300, subdivision (f) until the parent causing a child's death had actually been convicted of the crime. The shift from requiring a conviction to a merely causal relationship eliminated that problem. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2679 (1995–1996 Reg. Sess.) as amended May 14, 1996, § 2-E, p. o.) The second express goal of the amendment was to "lower the standard of proof by which the parent's cause of the other child's death is found," from the higher "beyond a reasonable doubt" criminal standard, to the lower mere "preponderance of the evidence" standard required in a civil action. (*Ibid.*)

William contends that although an express purpose of the statutory revision was to lower the standard of proof to the civil measure, the Legislature intended to limit application of section 300, subdivision (f) solely to those cases in which the parent acts with criminal negligence. He submits that his failure to put Valerie in a car seat (an infraction in violation of Vehicle Code section 27360), was simply not the sort of "flagrant," "aggravated" or "reckless" sort of act that rises to the level of extreme criminal negligence contemplated by the statute.

Our task in construing a statute is to ascertain the intent of the legislators to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) If the language is clear and unambiguous, the plain meaning rule applies: we presume the Legislature meant what it said. (*Ibid.*) The language of the statute is simple and clear. A child is within juvenile court jurisdiction if the actions of his "parent . . . caused the death of another child through . . . neglect." We find no ambiguity in this language, and nothing in the statute compels us to analyze the Legislature's intended meaning of "negligence." (*People v. Thomas* (1996) 42 Cal.App.4th 798, 801.) Had the legislature intended section 300, subdivision (f) to be predicated on criminal

negligence, we believe it would have expressly said so. (*Ibid.*) But, to the extent an ambiguity may be said to exist, it is readily clarified by the legislative history which specifically provides that the purpose of the 1996 revision was to *lessen* the evidentiary burden, and "expand[] [the] provision by eliminating the requirement of a conviction of the death of another child, and instead simply provide[] that the parent has caused the death of another child." (Analysis of Assem. Bill No. 2679, p. c.) Nowhere is there an indication the Legislature intended to require a finding of criminal negligence.

Not surprisingly, neither we nor William have found any published cases holding that an allegation under section 300, subdivision (f) cannot be sustained in the absence of evidence of *criminal* neglect. William relies primarily on two cases to support his assertion that criminal negligence is the standard; neither is on point. In *Patricia O. v. Superior Court* (1999) 69 Cal.App.4th 933 (*Patricia O.*), a mother's boyfriend physically abused her baby, who died of blunt force trauma. The boyfriend had inflicted chronic injuries on the child that would have caused obvious pain and symptoms, such as a spinal fracture that was as old as six weeks, injuries to the baby's humerus that had healed, as well as other injuries that were weeks old, and bruises of varying ages. (*Id.* at pp. 936, 938.) Another child told DCFS he had told his mother "'1,000 times'" that her boyfriend regularly hit the baby (and mother's other children), but "she didn't listen." (*Id.* at p. 937.) Juvenile court jurisdiction was not at issue. Rather, in *Patricia O.* the challenge was whether there was clear and convincing evidence demonstrating mother's total and complete disregard for her child's welfare, sufficient to justify the juvenile court's decision to deny her reunification services under section 361.5, subdivision (b)(4). The appellate and juvenile courts agreed mother's neglect had been pervasive; it rose to the level of "criminal culpability" and she could easily have been prosecuted for murdering her child, so that her claim that reunification services under section 361.5, subdivision (b)(4) had improperly denied "border[ed] on frivolous." (*Id.* at pp. 940, 942.)

Jurisdiction was also not at issue in *In re Ethan N.* (2004) 122 Cal.App.4th 55 *Ethan N.*). There the victim was a newborn who died as the result of a "golf ball-sized

wad of paper lodged deep in his esophagus." (*Id.* at p. 61.) He also had severe injuries to his rectum and anus, a dozen broken ribs, facial injuries and other obvious wounds suffered as the result of "repeated and extensive abuse." (*Ibid.*) The mother failed to seek medical care for her child. The appellate court found the juvenile court had abused its discretion by failing to conduct a best interest analysis, and by ordering reunification services under section 361.5, subdivision (c) for mother. As a parent responsible for the death of a child, it was mother's responsibility to demonstrate by clear and convincing evidence that reunification was in her other child's best interest; she had not met that burden. (*Id.* at pp. 63–69.) Both *Patricia O.* and *Ethan N.* had advanced beyond the jurisdictional phase, at which the allegations under section 300, subdivision (f) were sustained. (See *Patricia O.*, *supra*, 69 Cal.App.4th at p. 938; *Ethan N.*, at pp. 59–60.)

Furthermore, the one published decision to address whether section 300, subdivision (f) contains a requirement that children be currently suffering harm or currently at risk of harm holds against such interpretation. In *In re A.M.* (Aug. 11, 2010, D056196) __ Cal.App.4th __ [2010 Cal.App. Lexis 1518], our sister court addressed this question and squarely rejected the proposition that a current harm or current risk requirement is implied in subdivision (f) despite the fact that the plain language of the statute itself contains no such requirement:

"When 'the statutory language is unambiguous, "we presume the Legislature meant what it said, and the plain meaning of the statue governs." [Citation.]' (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 485.) Section 300, subdivision (f), makes no mention and does not require that a minor be at risk of harm for the court to take jurisdiction over the minor. The statute states that the court has jurisdiction over a minor if the court finds by a preponderance of the evidence that '[t]he child's parent or guardian caused the death of another child through abuse or neglect.' (§ 300, subd. (f).) The language of section 300, subdivision (f), does not require a finding of current risk.

"The language of the statute is in contrast to the remaining subdivisions to section 300. In looking at the language of the remaining subdivisions, including subdivisions (a), (b), (c), (d) and (j), we see that these subdivisions specifically provide provisions allowing a court to take jurisdiction over a minor when a minor is at risk of harm. (*Ibid.*) '"Where a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted."' (*In re Connie M.* (1986) 176 Cal.App.3d 1225, 1240.) Thus, we conclude the court did not need to make findings that D.M. posed a risk to the minors under the language of the statute."

We find this reasoning to be sound.

Moreover, William ignores the fundamental principle that dependency proceedings are civil in nature, not criminal or punitive. (*In re Malinda S.* (1990) 51 Cal.3d 368, 384.) The purpose of dependency law is to protect children, not to prosecute their parents. (*Ibid.*) Based on the foregoing, we find no support for William's assertion that criminal negligence must be shown to sustain an allegation under section 300, subdivision (f), and thus no error in the court's finding sustaining the allegations under that subdivision.

b. Remaining allegations

William also asserts there is insufficient evidence to support the court's findings sustaining the allegations of section 300, subdivision (b) regarding the risk of harm to Ethan and Jesus due to historical domestic violence between their parents and Kimberly's cognitive limitations. He is mistaken.

First, apart from his attorney's representations at the hearing, the record contains no evidence of William's attendance, progress or completion of the court-ordered programs designed to help him alleviate the problems which led to juvenile court intervention. Nor is there any evidence he has obtained appropriate housing free of the unsatisfactory and unsanitary conditions found at the paternal grandmother's home. Arguments and representations made by counsel do not constitute evidence. (*Du Jardin*

v. City of Oxnard (1995) 38 Cal.App.4th 174, 179; *In re Heather H.* (1988) 200 Cal.App.3d 91, 95 ["Evidence" is testimony, writings, material objects, or other things presented to the senses and offered to prove the existence or nonexistence of a fact; "unsworn testimony does not constitute 'evidence'"].) There is substantial evidence that domestic violence has been a significant part of the life of William and Kimberly's family for quite some time. William and Kimberly were still living together, at least intermittently, in paternal grandmother's home as late as three weeks before Valerie's death in June 2009. Even if the parents were living apart by the time of the October hearing, fewer than four months had passed by the time of that event, and at least Kimberly was still clearly desirous of reuniting with William. Thus, it was not unrealistic for the juvenile court to conclude that William's claim the parties were permanently separate was premature. The effects of domestic violence in the home form a sufficient basis for jurisdiction under section 300, subdivision (b), even if a child is not physically harmed. "[D]omestic violence in the same household where children are living *is* neglect; it is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect *causes* the risk." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194.)

As for the allegations regarding the impact of Kimberly's cognitive impairments on her ability to care for and supervise the boys, there is no evidence much has changed. By her own admission, Kimberly continues to experience anger management problems, and still needs help controlling her temper and jealousy. Although Kimberly wants to reunite with her children and with William, she has also expressed significant reservations about her ability to provide adequate care and supervision for her sons. There is sufficient evidence to support the juvenile court's findings sustaining the allegations under section 300, subdivision (b), counts b-2 and b-3.[4]

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[4] We need not address William's argument that the allegations of section 300, subdivision (j) must be dismissed. That argument hinges on dismissal of the allegations of section 300, subdivision (f), for which we find ample evidentiary support.

2. *DCFS's appeal: The juvenile court erred by dismissing the allegations under section 300, subdivision (b), count b-1*

The juvenile court sustained the allegation of the petition under section 300, subdivision (j) which stated that William had created a detrimental and endangering situation by driving Valerie without securing the child in a car seat, an act which resulted in her death. This detrimental and endangering situation in which William negligently placed his daughter was alleged also to have similarly endangered the health and safety of his sons, placing them at risk of physical and emotional harm, damage, danger and even death. This sustained allegation was identical to the one alleged under section 300, subdivision (b), count b-1, which the juvenile court inexplicably struck when it amended the petition.

A sustained count under section 300, subdivision (j) requires, as a predicate, and as relevant here, sustained counts under section 300, subdivisions (a) or (b).[5] (§ 300, subd. (j).) Accordingly, the portion of section 300, subdivision (b) relating to William as a cause of Valerie's death (for which there is ample evidentiary support as discussed above), must be reinstated and sustained as predicate support for the sustained count under section 300, subdivision (j).

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[5] The court struck the allegations under section 300, subdivision (a) regarding the parents' domestic violence. That ruling is not at issue.

DISPOSITION

The order dismissing the allegation of the petition under section 300, subdivision (b), count b-1 is reversed. The matter is remanded with instructions to reinstate that count. In all other respects, the order is affirmed.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

I concur:

MALLANO, P. J.

ROTHSCHILD, J., Dissenting.

Because the evidence does not show that either Ethan or Jesus is currently being neglected or at risk of being neglected as the result of William's failure to buckle Valerie into her car seat or due to past domestic violence between William and Kimberly, I disagree with the majority that sufficient evidence supports the finding as to William under Welfare and Institutions Code section 300, subdivisions (b) or (f)[1]

I. JURISDICTION BASED ON DEATH CAUSED BY NEGLECT

The court based jurisdiction in part on section 300, subdivision (f), which defines a dependent child as one whose "parent or guardian caused the death of another child through abuse or neglect." William contends that the "neglect" referred to in subdivision (f) must be criminal negligence not ordinary negligence as found by the juvenile court.[2] The majority agree with the trial court's conclusion that a showing of ordinary negligence is sufficient. In my view, resolution of that issue is unnecessary because jurisdiction under subdivision (f) fails for an independent reason.

Section 300.2, added in 1996,[3] states in relevant part: "*Notwithstanding any other provision of law*, the purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection for children who are *currently* being physically, sexually, or emotionally abused [or] being neglected . . . and to ensure the safety, protection, and physical and emotional well-being of children who are *at risk* of harm." (Italics added.)

By its plain language ("notwithstanding any other provision of law") section 300.2 applies to all subdivisions of section 300 including subdivision (f) and requires a showing in all cases that the children are *currently suffering* harm or *currently at risk* of harm.

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1 All statutory references are to the Welfare and Institutions Code.

2 Criminal negligence is negligence that is "'aggravated, culpable, gross, or reckless . . . .'" (*People v. Penny* (1955) 44 Cal.2d 861, 879.)

3 Stats. 1996, ch. 1084, § 2.

The Legislature's choice of the italicized language was not accidental. By requiring a showing of current risk under section 300.2, the Legislature has created a safety net to avoid removal where the conduct leading to a child's death does not create a current risk of harm to another child.

In an opinion written by the Presiding Justice of this Division, we recognized that section 300.2 "'declares what case law had previously determined: that exercise of jurisdiction must be based upon existing and reasonably foreseeable future harm to the welfare of the child.'" (*In re D.R.* (2007) 155 Cal.App.4th 480, 486, quoting from *In re Robert L.* (1998) 68 Cal.App.4th 789, 794; and see, e.g., *In re Melissa H.* (1974) 38 Cal.App.3d 173, 175 [dependency jurisdiction requires that "unfitness exist at the time of the hearing"]; *In re Morrow* (1970) 9 Cal.App.3d 39, 56 [before terminating parental custody and control "[i]t is reasonable to consider . . . whether the conditions which gave rise to the cruelty or neglect still persist"]; *In re Zimmerman* (1962) 206 Cal.App.2d 835, 844 [terminating custody and control of parents who "'are . . . morally depraved' [requires] such condition of moral lapse be found to exist at the time of the hearing"].)[4]

The majority relies on *In re A.M.* (2010) ___ Cal.App.4th ____, _____ which held that dependency jurisdiction under section 300, subdivision (f), does not require a finding of current risk because, unlike other subdivisions of section 300, there is no such explicit requirement in subdivision (f). *In re A.M.*, however, made no mention of section 300.2

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[4] There is a split of authority as to whether proof of a current or future risk of harm is required before jurisdiction can be found under section 300, subdivision (b), which refers in part to a child who "has suffered" serious physical harm. (Cf. *In re J.N.*, *supra,* 181 Cal.App.4th at pp. 1021-1025 [evidence must show current risk] with *In re Adam D.* (2010) 183 Cal.App.4th 1250, 1261-1262 [current risk not required].) That issue is irrelevant to the determination of jurisdiction under subdivision (f) because subdivision (f) does not contain the past tense ("has suffered") language of subdivision (b). If anything, the Legislature's failure to use the past tense language in subdivision (f) is all the more reason to interpret subdivision (f) as requiring proof of a current or future risk of harm. "'It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.'" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725, citation omitted.)

and thus failed to note that the statutory language of that section is unambiguous and applies across the board to *all* the subdivisions of section 300.

Cases may arise in which a parent's negligence in causing the death of a child is sufficient by itself to support an inference that the surviving children are currently suffering harm or at risk of harm. *In re A.M.*, *supra*, is such a case. There, a newborn died from suffocation while sleeping in the same bed with his father, mother and older brother. The father heard the baby crying and "making sounds like he was struggling to breathe" but instead of checking on the child he just rolled over and went back to sleep. (*In re A.M.*, *supra*, ___ Cal.App.4th at p.____.) (Maj. opn. *ante*, pp. 11-12.)

This is not such a case. The risk that William's negligence posed to Valerie was the same whether or not an accident occurred yet no one would seriously contend that the risk posed by a single instance of failing to place a child in a car seat is a sufficient basis for imposing juvenile court jurisdiction over the child and her siblings. Indeed, in *In re J.N.* (2010) 181 Cal.App.4th 1010, the court reversed a finding of dependency jurisdiction under section 300, subdivision (b), on facts showing a much more serious lapse in judgment than William's but without the fatal result.

In *In re J.N.*, three children were declared dependents of the court under section 300, subdivision (b), after their father, driving with a 0.20 blood-alcohol level, crashed the family car into a light pole. One of the children, who was not fastened in a car seat, received nine stitches for a laceration to her head. (*In re J.N.*, *supra*, 181 Cal.App.4th at pp. 1014, 1017.) The mother, who was also in the car, and drunk, allegedly failed to prevent the intoxicated father from driving. The Court of Appeal reversed the judgment of dependency as to all three children. As relevant to our case, the court observed that "[d]espite the profound seriousness of the parents' endangering conduct on the one occasion in this case, there was no evidence from which to infer there is a substantial risk that such behavior will recur." (*Id.* at p. 1026.)

William's single lapse in judgment with respect to Valerie does not support jurisdiction over his other two children under section 300, subdivision (f).

II. JURISDICTION BASED ON DOMESTIC VIOLENCE

A child comes within section 300, subdivision (b), if the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of . . . her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." A child continues to be a dependent child under subdivision (b) "only so long as is necessary to protect the child from risk of suffering serious physical harm or illness." (*Ibid.*)

The court sustained the petition under section 300, subdivision (b), with respect to William on the ground that "mother and father have a history of domestic altercations. On prior occasions, the mother and father struck each other. Such altercations endangers [sic] the children's physical and emotional health and safety and places them at risk of harm."

William does not dispute the evidence of domestic violence between Kimberly and him, but contends there is no evidence that either child suffered or was at substantial risk of suffering "serious physical or emotional harm" as a result of these altercations as required by subdivision (b).[5] The record supports William.

The record contains no evidence showing that Ethan or Jesus suffered any physical harm as a result of the physical and verbal altercations between their parents or that they

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5 The petition alleged that the parents' domestic violence placed the children at risk of emotional as well as physical harm. The risk of emotional harm requires proof of "serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as the result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care." (§ 300, subd. (c).) Neither the majority nor the DCFS contend there was sufficient evidence to sustain the petition on the ground of risk of serious emotional damage.

were at risk of suffering such harm in the future. Instead of relying on evidence, the DCFS relies on dictum in *In re Heather A.* (1996) 52 Cal.App.4th 183, 194 (*Heather A.*) that children are at risk of harm as the result of their parents' physical violence because they run a "substantial risk of encountering the violence and suffering serious physical harm or illness from it." Although the court in *Heather A.* entertained the possibility that mere exposure to domestic violence might satisfy the jurisdictional requirements of section 300, subdivision (b), the court upheld the juvenile court's jurisdiction under subdivision (b) because the record contained evidence of *actual* physical injury to one of the children resulting from a fight between the parents. "During one of the incidents, Father smashed a glass vase and one of the minors cut her finger and foot on the glass and needed medical attention." (*Id.* at p. 188.) The court found that "it was the domestic violence which caused both the breaking of the vase and the delay in cleaning up the broken glass." (*Id.* at p. 194, fn. 9.)[6]

Even if exposure of children to any domestic violence could alone establish jurisdiction under section 300, subdivision (b), the DCFS has not cited any evidence that such exposure occurred in this case and a review of the record has disclosed none, either before or after the detention hearing.

Further, the record contains no evidence of any domestic violence between the parents since they have lived apart. Nor does the record contain any other evidence of William participating in domestic violence that might reasonably suggest the children would be exposed to such violence in the future. Unlike the father in *In re Heather A.*, *supra*, relied upon by the DCFS, there is no evidence that William has been abusive to any other person. In contrast in *Heather A.* the court affirmed the removal of the children from their father's custody based in part on evidence that the father "move[d] from one domestic relationship to another" and had a "'long history of disruptive emotional

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6 It is not necessary in this case to decide whether a single incident of harm is sufficient to support jurisdiction under subdivision (b). (See *In re J.N.*, *supra*, 181 Cal.App.4th at p. 1023.) In the case before us, there were *no* incidents of harm to the children.

relationships with women.'" Thus, the court concluded, even if the father had no further contact with the mother or stepmother, "there was good reason to believe he would enter into another domestic relationship with someone else and his pattern of domestic abuse would continue." (*Heather A., supra*, 52 Cal.App.4th at pp. 194-195.)

Because the record contains insufficient evidence that the children have suffered or are at risk of suffering serious physical harm there is no basis for jurisdiction under section 300, subdivision (b).

The Legislature expressed a preference that children be raised by their parents unless very good reasons, and only those expressly provided by legislation, demand that they be raised by others. Thus we are bound by the provisions of section 300, subdivision (b), which do not permit the juvenile court to assert jurisdiction over a child in the absence of actual physical harm or a substantial risk of such harm and then "only so long as is necessary to protect the child from risk of suffering serious physical harm or illness." And the record in this case, as to William, shows that the evidence does not support jurisdiction under section 300, subdivision (b), on the grounds alleged.[7]

ROTHSCHILD, J.

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[7] Although there may be sufficient evidence to support jurisdiction over Ethan and Jesus under subdivision (b) based on William's neglect of the children's health and well-being, neglect was not charged in the original petition nor was the petition amended to add that charge, so William did not have notice of that ground or the alleged facts supporting it. Nevertheless, nothing would prevent the DCFS on remand from amending the petition to allege different factual grounds for jurisdiction so long as William is given reasonable notice and opportunity to defend.

PROOF OF SERVICE

I, CHRISTOPHER BLAKE, declare:

I am a citizen of the United States, over 18 years of age, and not a party to this action. My business address is 4455 Lamont Street, #B, San Diego, California 92109. On this date, I served one copy of the attached document, to wit:

PETITION FOR REVIEW

on each of the individuals below by placing in the course of Messenger Service, addressed as follows, or in the course of Delivery by United States Mail, first class postage, prepaid, as follows:

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Party of Interest (Counsel for Petitioner in S-186493, ***In Re A. M.***).
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I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California.

Dated: October 25, 2010

Christopher Blake