S274943

IN THE
SUPREME COURT OF CALIFORNIA

In re N.R.,
A Person Coming Under the Juvenile Court Law.

THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

O.R.,

Defendant and Appellant.

From an Unpublished Decision by the Court of Appeal
Second Appellate District, Division Five, Case No. B312001
Los Angeles Superior Court Case No. 20CCJP06523A
On Appeal from the Superior Court of Los Angeles County
Honorable Martha Matthews, Judge Presiding

RESPONDENT LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES' ANSWER TO AMICUS BRIEFS IN SUPPORT OF APPELLANT

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Introduction

Pursuant to California Rules of Court, rules 8.200(c)(6) and 8.520(f)(7), Respondent, the Los Angeles County Department of Children and Family Services (Department), submits this consolidated answer brief to the seven amicus curiae briefs filed in support of petitioner, O.R. (Father). The Department incorporates and reaffirms all arguments in its Answer Brief on the Merits.

Amici supporting Father contend children and their families will be harmed if juvenile courts are permitted to: (1) find parental "substance abuse" outside the clinical definition of "substance use disorder" as defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM)[1] for purposes of asserting dependency jurisdiction pursuant to Welfare and Institutions Code[2] section 300, subdivision (b)(1); and (2) infer vulnerable children of "tender years" are at a heightened risk of a parent's inability to provide regular care where a court has made a finding of parental substance abuse.

Two of the repeated themes found in several of amici's briefs can be summarized as follows: (1) only clinicians with expertise in substance use disorders can make determinations

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[1] The Department will use the term "DSM" to refer to the manual in general and specify any particular manual edition of the DSM when needed.

[2] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

whether a parent's substance abuse places the child at risk of harm; allowing social workers and courts to make those determinations (including using the tender years inference) leads to disparate treatment of families of color based, in part, on implicit biases and a racist child welfare system built on a foundation of white supremacy, and (2) children in foster care placement suffer more trauma than any danger they are exposed to in the family home with parental substance abuse.

The Department will first generally address the two recurring themes and will then respond to some of amici's particular contentions related to the issues on review. Failure to respond to any specific points raised in amici's briefs should not be considered a concession on those points.

Argument

I. Concerns Expressed By Amici Regarding Disproportionality and Disparity In the Child Welfare System.

The amicus briefs filed in support of Father contend the child welfare system disproportionately intervenes in the lives of people of color and disproportionately places children of color in foster care. (American Civil Liberties Union [ACLU] of Southern California, ACLU of Northern California, ACLU, National Center for Youth Law, and Children's Rights, Inc. [collectively ACLU Affiliates] Amicus, pp. 15, 20, 32; Professors of Law with Expertise in Child Welfare, Public Health, and Drug Policy [Professors] Amicus, p. 2; Drug Policy Alliance, Any Positive Change, The Beyond Do No Harm Network, et. al. [collectively Drug Policy Affiliates] Amicus, pp. 20-21, 29; Professor Alan J.

Dettlaff and Professors of Social Work and Social Workers [collectively Social Workers] Amicus, pp. 5, 29)

Amici are critical of the child welfare system in general and focus on the separation of families and placement of children in foster care. Although the issues raised in the amicus briefs discuss valid concerns worthy of attention, they are not narrowly focused on the section 300 provision dealing with juvenile courts' initial assumption of jurisdiction based on parental substance abuse.

The Department shares amici's concerns about the potential harms of foster care placement and agrees that children should remain in parental care when possible and if detention and/or removal of a child from parental care is warranted, placement of the child with relatives is preferred over foster care placement. The law requires as much. (See, e.g., § 361.3 [after removal from parental care, "preferential consideration shall be given to a request by a relative of the child for placement. . . ."].)[3] In addition, constitutional protections are woven into the dependency statutes to provide further safeguards against unnecessary intrusion on family life and removal of children from

[3] The amicus brief written by the California State Association of Counties (CSAC) in support of the Department provides an overview of the child welfare agencies' referral process, investigation, and filing of section 300 petitions. (See CSAC Amicus, pp. 12-17.) Their brief emphasizes the Department's goal of keeping families together and the checks and balances provided by statutes and the juvenile court hearings to ensure the children's safety and placement with family where practicable. (*Ibid.*)

their parents. "The dependency scheme, when viewed as a whole, provides the parent due process and fundamental fairness while also accommodating the child's right to stability and permanency. [¶] Significant safeguards have been built into the current dependency scheme." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) "The interests of the parent and the child are thereby balanced through a scheme that is fundamentally fair and provides due process." (*Id.* at p. 310.)

The matter at bar exemplifies the Department's efforts in maintaining children in parental care, or alternatively relative care, despite issues in the family home. Here, N.R. was initially detained from Mother and released to Father. (Opinion, p. 4.) When the Department detained N.R. from Father, the child was then placed in the home of a maternal uncle. (Opinion, p. 4.) At disposition, N.R. was not removed from parental care but returned to Mother's custody with family maintenance services. (Opinion, p. 9.) Thus, as the instant matter illustrates, the Department shares amici's overall concerns about a child's unnecessary placement in foster care and made and reasonable efforts to ensure N.R. was never separated from family.

Further, the Department agrees that addressing racial disparity and disproportionality is vital, and more work must be done regarding this exceptionally complex issue, including, but not limited to, ongoing caseworker training, updating policies and strategies, and providing families with resources to prevent detention and juvenile court intervention. (See, e.g., Child Welfare Information Gateway, *Child Welfare Practice to Address*

Racial Disproportionality and Disparity (April 2021), U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, available at: https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf.) However, these issues are not currently before this Court, which granted review to address how to define "substance abuse" for purposes of section 300 and analyze the "tender years" inference.

II. Nothing in the Text, Structure, Stated Purpose, or History of the Dependency Statutes Limits Juvenile Courts to the Clinical Definition of Substance Abuse Provided by the DSM.

Two representative arguments in favor of defining "substance abuse" for purposes of section 300 by only consulting the DSM are as follows: "The term 'substance abuse' is stigmatizing and outdated, and should be properly interpreted to refer to a substance use disorder, which can only be accurately diagnosed by a trained professional" (Association for Multidisciplinary Education and Research in Substance Use and Addiction [AMERSA] and California Society of Addiction Medicine [CSAM] Amicus, p. 14); and "Research has shown that the child welfare system is not able to effectively identify parental drug use problems among families in the system . . . . Therefore, the Court should adhere to DSM-V or similarly rigorous diagnostic criteria to identify risk of harm emanating from parental drug use, particularly given that studies have found that only about 25 percent of substance users identified by child welfare services meet the DSM-V's diagnostic criteria for substance use disorders" (Professors Amicus, pp. 26-27).

The amici's arguments suggest that a finding of parental substance abuse for purposes of dependency jurisdiction should be found only where a trained clinician has made a diagnosis of a substance use disorder. (See, e.g., Policy Alliance Amicus, p. 2.) However, the amici's arguments in support of defining "substance abuse" according to the clinical definitions of "substance use disorder" do not reference or address the plain language text, structure, stated purpose, or history of the dependency statutes. Such an analysis is critical to determining Legislative intent and applying the statutes as written, regardless of whether one agrees with them. To further illustrate this point, section 300, subdivision (b)(1) was most recently amended in January 2023, and the Legislature elected not to amend the term or definition of "substance abuse."

In comparison, the Legislature has recently proposed several amendments to sections 5008, 5350, and 5358 of the Welfare and Institutions Code, including adding 5122 to the Welfare and Institutions Code, and amending section 1799.111 of the Health and Safety Code, relating to mental health. (See Sen. Bill No. 43 (2023-2024 Reg. Sess.) April 27, 2023.) Existing law, for purposes of involuntary commitment, defines "gravely disabled" as either a condition in which a person, as a result of a mental health disorder, is unable to provide for basic personal needs for food, clothing, or shelter or has been found mentally incompetent, as specified. (*Ibid.*) The proposed legislative amendments will expand the definition of "gravely disabled" to include "[a] condition in which a person, as a result of

a mental health disorder or a *substance use disorder*, or both, is at substantial risk of serious harm. . . ." (*Id.* at § 2, emphasis added, proposed amendment to Welfare and Institutions Code § 5008.) This amendment is significant because the Welfare and Institutions Code will now include the term "substance abuse" in section 300, subdivision (b)(1), but the term "substance use disorder" in section 5008. The newly amended section 5008 will state, "The existence of a mental health disorder or substance use disorder diagnosis does not alone establish a substantial risk of serious harm to the physical or mental health of a person." (*Ibid.*) This proposed legislation further demonstrates that the Legislature did not intend for juvenile courts to only consult the DSM's definition of "substance use disorder" when defining parental "substance abuse" for purposes of dependency jurisdiction under section 300, subdivision (b)(1).

In addition, amici's arguments in favor of having medical professionals, and not social workers and courts, determine whether children are at risk from parental substance abuse are further complicated by the specific clinical purpose of the DSM criteria. "The DSM is the 'authoritative guide to the diagnosis of mental disorders for health care professionals around the world.'" (AMERSA/CSAM Amicus, p. 24.) AMERSA and CSAM discuss the nuanced differences between "substance abuse" and "addiction," noting that "[i]ndividuals dealing with addiction are not 'abusing' a drug so much as purposely using it to experience a desired effect." (*Id.* at p. 25.) AMERSA and CSAM claim "there is also no frequency, duration, or amount of [drug] use that would

by itself equate to a substance use disorder" (*id.* at p. 25) because "frequency, duration, or amount of substance use" are not factors that go into the diagnosis of a substance use disorder (*id.* at p. 29). Put another way, a parent who uses large amounts of cocaine daily for years may not have a substance use disorder because "substance use affects individuals differently depending on their environment, brain chemistry, and other unique characteristics." (*Id.* at p. 28.) Regarding Father's cocaine habit, AMERSA/CSAM argues, "[I]f anything, a stable pattern of volitional substance use cuts against a [substance use disorder]" and Father's four-day cocaine binge "does not qualify as a great deal of time" spent using drugs. (*Id.* at pp. 38-39.)

Father's and amici's arguments for courts to only use the DSM definition of substance use disorder when determining parental substance abuse is not only not required by section 300, subdivision (b)(1), but further contradicted by their own admissions that "[w]hile the DSM-5-TR attempts to lay out a set of objective criteria for consideration, many of the criteria are still vague and require exploration and interpretation in a clinical setting." (*Id.* at pp. 31-33.) "The DSM-5-TR provides a set of diagnostic criteria to consider when diagnosing a [substance use disorder]. But actually using these criteria to make a diagnosis requires specialized training and education." (*Id.* at p. 31.) The DSM is a "*diagnostic manual* for mental disorders" and "[s]ubstance use disorders are clinical conditions that should only be diagnosed by trained professionals—not courts." (*Id.* at p. 30.) These concessions bolster the need for social workers and juvenile

courts to have the ability to find substance abuse outside the medical diagnosis of a mental disorder when assessing the risk to children in the dependency context.

The Department believes the better and more legally-sound approach to ensure a child's safety is to have social workers and courts consult, but not be restricted by, the DSM when defining parental substance abuse in the dependency context. As stated in *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1280: "We recognize the [*In re*] *Drake M.* [(2012) 211 Cal.App.4th 754] formulation as a generally useful and workable definition of substance abuse for purposes of section 300, subdivision (b)[1]. But it is not a comprehensive, exclusive definition mandated by either the Legislature or the Supreme Court, and we are unwilling to accept [a parent's] argument that only someone who has been diagnosed by a medical professional or who falls within one of the specific DSM-IV-TR categories can be found to be a current substance abuser."

III. Drug Test Results Are One Metric Used to Assist Juvenile Courts in Defining Parental Substance Abuse.

The Department agrees with amici's arguments that "parental drug use alone" does not support substantial risk of harm to a child (Professors Amicus, p. 22), a "single positive [drug] test" alone is not proof of risk of harm (Professors Amicus, p. 25), and "a parent's diagnosis of substance use disorder does not automatically place a child at substantial risk [of harm]. . . ." (AMERSA/ CSAM Amicus, p. 42). However, the amicus argument that the "War on Drugs fomented the dangerous assumption that

parental drug use alone poses harm or risk of harm to their children and justifies state intervention" (Professors Amicus, p. 36) misstates the current law. (See *In re J.A.* (2020) 47 Cal.App.5th 1036, 1046, 1048 ["The law is clear that jurisdiction must be based on substance *abuse*; mere substance *use* is not sufficient for jurisdiction." Even where there is a finding of parental substance abuse, the Department must prove substantial risk of harm to the child].)

In addition, to the extent amici argue that drug testing provides little to no information about substance abuse, the Department disagrees. (See Drug Policy Affiliates Amicus, p. 11, fn. 16; AMERSA/CSAM Amicus, p. 29; Social Workers Amicus, pp. 4, 21, 31.)

While a drug test may not provide a complete picture, it is one tool that can help courts determine whether a parent has a substance abuse problem, gauge a parent's progress in attaining and maintaining sobriety, and evaluate the extent of a parent's drug use and/or abuse. (See *In re K.B.* (2021) 59 Cal.App.5th 593, 601-602 [Court rejected the strict use of clinical definitions of substance abuse and the need for clinical diagnosis, finding a mother's positive drug test, years-long history with drug use, a prior arrest for possession, and attempts to conceal her drug use were enough to establish jurisdiction under § 300, subd. (b)(1)]; see also *In re Christopher R., supra,* 225 Cal.App.4th at p. 1213, 1217 [given the parent's initial false denial of cocaine use despite positive drug test for cocaine and methamphetamine, the juvenile court reasonably disbelieved the parent's portrayal of limited,

sporadic drug use; and, a missed drug test properly considered the equivalent of a positive test result].)

Some of the amici's contentions support the Department's position. For example, drug test results can be particularly useful because "people who use drugs often do not disclose drug use or full extent of drug use. . . ." (Drug Policy Affiliates Amicus, p. 18, fn. 38.) Furthermore, "[t]rained professionals can only diagnose [substance use disorders] after conducting a clinical interview and assessing the eleven DSM-5-TR criteria." (AMERSA/CSAM Amicus, p. 30.) When a parent is not truthful about substance abuse and unwilling to participate in a clinical interview, drug test results perhaps become a more reliable indicator in determining a parent's substance abuse issues. (See *In re K.B., supra,* 59 Cal.App.5th at pp. 601-602 [where mother initially denied all drug use, tested positive for methamphetamine, and later changed her story about drug abuse, a juvenile court was entitled to conclude the mother was trying to hide her ongoing addiction].)

Even assuming parents are willing to participate in clinical interviews concerning substance use disorders, problems would nonetheless persist. As argued in CSAC's amicus brief in support of the Department, "[T]he subjective nature of the now-11 criteria in the DSM-V-TR that constitute 'substance use disorder,' makes most of the criteria difficult, if not impossible, to prove without candid self-reporting from the parent. Thus, tethering the definition of substance abuse to the diagnostic criteria in the DSM would effectively write the term out of the statute." (CSAC

Amicus, pp. 10-11.) The amici's arguments in support of Father further support CSAC's concern. "Trained professionals can only diagnose [substance use disorders] after conducting a clinical interview and assessing the eleven DSM-5-TR criteria." (AMERSA/CSAM Amicus, p. 30.) "While the DSM-5-TR attempts to lay out a set of objective criteria to consider, many of the criteria are still vague and require exploration and interpretation in a clinical setting." (*Id.* at p. 31.) For example, criteria one requires knowing the drug user's "subjective intentions" of how much of the drug they intended to use versus how much they actually consumed. (*Id.* at pp. 28-29, 32)

In determining parental substance abuse, courts should consult the DSM criteria but also be allowed to consult the Structured Decision Making Policy and Procedures Manual by California Department of Social Services criteria, drug test results, and other criteria to determine, based on the facts in a particular case, including a parent's attempt to hide their substance abuse, whether a child is at substantial risk of serious physical harm due to parental "substance abuse."

IV. The Tender Years Rule is Simply an Inference that a Parent Found to Have a Substance Abuse Problem Is Unable to Provide Regular Care for a Child of Tender Years.

Similar to Father's arguments, amici's briefs overstate the tender years rule by claiming *In re Drake M., supra,* 211 Cal.App.4th at p. 767 and *In re Christopher R., supra,* 225 Cal.App.4th at p. 1219 held "that a parent's substance use or substance use disorder automatically leads to a substantial risk of harm for children of tender years." (AMERSA/CSAM Amicus,

p. 40; see Public Defenders Amicus, pp. 19-20.) Not so. The "tender years" rule is a reasonable inference but the Department still has the burden to show causation and risk of harm before a juvenile court can assert dependency jurisdiction.

One amicus brief supporting Father argues, "[A] parent's diagnosis of substance use disorder does not automatically place a child at substantial risk, regardless of the child's age. For example, parents with a diagnosed [substance use disorder] who are in treatment may be able to effectively parent with no risk to their children. Rather than applying an automatic presumption of harm, courts must engage in a fact- and case-specific inquiry to determine whether a parent's substance use disorder poses a substantial risk of harm to the child." (AMERSA/CSAM Amicus, p. 42.)

The Department agrees. A juvenile court must always weigh all the relevant evidence when determining whether the child is described by section 300. In the example above, a parent who has sought intervention and engaged in treatment services to address substance abuse issues may very well not need Department and juvenile court intervention to minimize the substantial risk of physical harm to the child. However, any of amici's arguments that suggest the age of the child is not relevant when assessing risk of harm goes against commonsense and empirical evidence. (See CSAC Amicus, pp. 43-45 [discussing the needs of vulnerable children during the "tender years" of life].) The tender-years rule is an inference consistent with the statutory scheme and furthers the Legislature's stated purpose

regarding substance abuse. (See § 300.2.) The rule is well-grounded and should be affirmed.

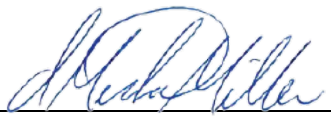
Conclusion

For all the reasons stated, the Department respectfully requests the Supreme Court affirm the Second District's decision in the instant case.

DATED: May 4, 2023

Respectfully submitted,

DAWYN R. HARRISON
County Counsel

By 
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DATED: May 4, 2023

Respectfully submitted,

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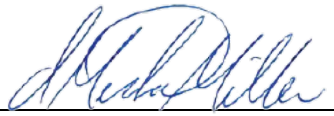
By 
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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