SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ETHAN C., *et al.*,	)	
Minors Coming Under	)	**SUPREME COURT**
the Juvenile Court Law,	)	**NO. S-187587**
	)	
LOS ANGELES COUNTY	)	
DEPARTMENT OF CHILDREN	)	
AND FAMILY SERVICES,	)	
Plaintiff and	)	**Court of Appeal**
Respondent,	)	**Case No. B–219894**
v.	)	
	)	**Superior Court No.**
WILLIAM C.,	)	**CK-78508**
Defendant and	)	**(LOS ANGELES**
Petitioner.	)	**(COUNTY)**
	)	

REPLY TO ANSWER TO PETITION FOR REVIEW

HONORABLE SHERI SOBEL, REFEREE

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(Under Appointment by the
Court of Appeal California
Appellate Project Independent
Case System)

TOPICAL INDEX

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ETHAN C., *et al.*,	)	
Minors Coming Under	)	**SUPREME COURT**
the Juvenile Court Law,	)	**NO. 187587**
----------	)	
LOS ANGELES COUNTY	)	
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HONORABLE SHERI SOBEL, REFEREE

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 replies to the answer filed by Respondent Los Angeles County Department of Children and Family Services (DCFS) to his petition for review from a published opinion of Division One of the Second Appellate District, affirming judgments 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.

Petitioner WILLIAM C. responds to the answer filed by respondent DCFS to his petition for review and respectfully submits that the answer filed by DCFS not only fails to answer the questions he raised in his petition but affirmatively shows the reasons why this Court must grant review on certain critical issues in the juvenile dependency law.

Petitioner raised two basic reasons why this Court should grant review in this case. The first issue was 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. The Court of Appeal in this case held that "ordinary" or "civil" negligence was sufficient to justify a true finding on subdivision (f) rather than "criminal" negligence as petitioner argued. The dissenting opinion in this case, although not explicitly stating so, recognized that a compelling argument could be made that "criminal" negligence was required but the dissent was based on another argument which petitioner raised in his petition but which respondent DCFS failed to address in its answer to the petition for review.

The only other published case to deal with the meaning of subdivision (f) was decided shortly before this case and is also the subject of a petition for review in this Court as well. That case was ***In Re A. M.*** (2010) 187 Cal.App. 4th 1380, and it, too, impliedly found that "ordinary" negligence was sufficient to establish jurisdiction although it did not expressly so hold. Review has been sought in ***A. M.*** both by the father and the minors as Case No. S-186493, Petition for Review filed October 1, 2010; the respondent agency – San Diego County Department of Health and Human Services (DHHS) filed a response to the petitions for review on or about October 20, 2010. The only other case

to deal with the standards for finding jurisdiction under subdivision (f) was an unpublished opinion, ***Jorgelina E. v. Superior Court***, case D-048461, decided August 30, 2006, which held that, as a matter of statutory interpretation and history, the negligence required was "criminal negligence."

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. Respondent's answer to petitioner's Petition for Review is directed solely to this basis and petitioner will discuss why the answer of DCFS clearly demonstrates that review must be granted in this case.

Petitioner will, however, note that there is another case presently pending in the Fifth Appellate District, ***Fresno County DCFS v. E. S.***, case No. F-059134, set for oral argument in December of 2010, raising essentially the same issue. Obviously, the pendency of this case also indicates that this is an issue that is of great interest in the appellate courts and only emphasizes the need for this Court to grant review in this case and in ***A. M.***

The second basis on which petitioner sought review was whether, assuming that the parent, did cause the death of a child, whether his/her own or not, by "abuse or negligence," there must be a present risk of harm to the parent's 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 minor children of the parent 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. Respondent DCFS failed to address this argument for granting review in its answer and petitioner submits that the failure of DCFS to do so compels this Court to grant review and deal with that issue.

POINTS AND AUTHORITIES IN RESPONSE TO ANSWER TO PETITION FOR REVIEW

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 AND THAT THERE BE A "PRESENT RISK" TO ANY SURVIVING CHILDREN OF THE PARENT BEFORE JURISDICTION MAY BE INVOKED.

In general, petitioner is satisfied with the analysis that he presented in his Petition for Review that the "negligence" or "abuse" contemplated by subdivision (f) of section 300 must be "criminal" in nature as opposed to mere civil negligence. Nothing in the answer of DCFS to petitioner's arguments based upon the statutory history of subdivision (f) both in its original form and as amended directly deals with the fact that the original intent of the Legislature when it first enacted subdivision (f) was that it apply only to instances in which the parent was "criminally negligent" in the death of a child and that the Legislature had no intent to changing that aspect of subdivision (f) when it eliminated the requirement that the parent have suffered a criminal conviction therefor. Indeed, petitioner would submit that the failure of the Legislature to amend the words "abuse or negligence" when it passed the amendments to subdivision (f) of Welfare and Institutions Code section 300 clearly indicate that it did not intend to alter the original meaning of those two words in the original version of subdivision (f) which was to limit them to "criminal abuse" or "criminal neglect."

In his petition for review, petitioner noted that the language of subdivision (f) of section 300 closely parallels the reunification bypass provisions of Welfare and Institutions Code section 361.5, subdivision (b),

subsection (4); indeed, the language of both provisions is identical in all relevant respects. It is clear, and respondent DCFS does not dispute, that more than mere "civil" or "ordinary" negligence is required under this provision to deny a parent reunification services for causing the death of another child through negligence or abuse as the abuse or negligence required must be "too shocking to ignore" or "very serious," both of which connote more than mere "civil" liability but "criminal" liability. (***Mardardo F. v. Superior Court*** (2008) 164 Cal.App.4th 481, 488; ***In Re Alexis M.*** (1997) 54 Cal.App.4th 848, 851). As petitioner pointed out, where the Legislature uses the same language in closely related, if not parallel, provisions, the same meaning is applied to both provisions – 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). Respondent DCFS fails to discuss this principle in its response.

However, there is a more fundamental problem with respondent's opposition to review by this Court. Petitioner's second argument for review was based upon the dissent's discussion of section 300.2 of the Welfare and Institutions Code 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 mandates that, before any child can be made a dependent of the Court, the child in question must be currently being harmed or at a foreseeable risk for future harm. The opinion of the Court of Appeal in this

case and the opinion in ***A. M.***, both state that current harm or foreseeable risk of future harm is not necessary before jurisdiction may be based upon a finding pursuant to subdivision (f) of section 300. As petitioner pointed out, section 300.2 is nothing more than a codification of the long accepted principles of law that exercise of dependency jurisdiction must be based upon existing and/or reasonably foreseeable future harm to the welfare of the child., regardless of which provision of section 300 is invoked for jurisdiction . (***In Re D. R.*** (2007) 155 Cal.App.4th 480, 486, citing to ***In Re Robert L.*** (1998) 68 Cal.App.4th 789, 794). If there is no present harm to the child or a "substantial risk" of future harm, then there can be no basis for dependency regardless of whatever misconduct the parents may have committed in the past. Respondent DCFS utterly fails to discuss this principle of law and fails to acknowledge that the opinions of the majority in this case and the Court of Appeal in ***A. M.*** are completely in conflict with these well settled propositions of law. In fact, the conflict between the opinions in these two cases and almost every other case in juvenile dependency law is a reason for granting review.

The majority opinion in this case basically states that there are circumstances in which it is proper to establish dependency jurisdiction over a child notwithstanding the fact that there is not only no "present" but no "reasonably foreseeable future risk of" harm to the child. Under section 300.2, that is not the law. Review must be granted in this case to affirm a long line of cases dating back to at least 1962, that there must be a "present" or a "reasonably foreseeable future risk of" harm to a child before the heavy hand of the state can intervene in the family dynamics including sundering a family apart.

Respondent has pointed to no case that upholds dependency jurisdiction under circumstances where the child is not at risk. Here, the Court of Appeal

upheld jurisdiction under subdivision (f) without a finding that the parent presently is presently harming the child or poses a reasonably foreseeable risk of harm in the future and said no such finding was even required. Such a construction clearly contradicts well established case law and amply provides a basis for this Court to grant review under California Rules of Court, Rule 8500, subdivision (b), subsection (1) – to assure uniformity of decision amongst the various Courts of Appeal. Indeed, it compels review as the decision in this case, as well as in ***A. M.***, so clearly contradicts the overwhelming consensus of appellate courts of this state that dependency jurisdiction requires a "present" or "reasonably foreseeable future risk of" harm to the child.

Petitioner also notes that respondent DCFS failed to respond to petitioner's argument that, 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 or reasonably foreseeable risk of future harm to the minor before dependency jurisdiction may be found, then truly absurd results can occur.

Petitioner posited two situations to which respondent DCFS failed to respond. Briefly, they are the situations where a young driver accidently kills a child in an automobile accident under circumstances not amounting to criminal negligence and the situation where a homeowner negligently failed to maintain a fence around a swimming pool but promptly repaired the fence after a neighbor child sneaked into the yard and drowned in the pool. Under the construction of the Court of Appeal in both this case and in ***A. M.***, jurisdiction over the driver/homeowner's children in both cases would not only be proper, but mandatory, long after the incidents in question had occurred. In the latter example, jurisdiction would even be mandatory if the homeowner

had removed the pool from the property. Jurisdiction under either scenario would be absurd and DCFS failed to demonstrate to this Court how jurisdiction would be justified nor does it even attempt to argue that jurisdiction would be improper under either scenario. Presumably, DCFS believes that jurisdiction would be proper under either scenario. If, for no other reason, this Court must grant jurisdiction to disabuse social service agencies throughout this state that jurisdiction would be proper anytime an individual inadvertently causes the death of a child. Jurisdiction is only proper if (1) the inadvertence (or negligence) was too shocking to ignore, and (2) there is a substantial existing risk of harm to the parent's children as a result of such shocking inadvertence and, as noted, "shocking inadvertence" is "criminal negligence" as that term is understood in criminal law.

For this Court to allow the decisions in both this case and in ***A. M.*** to stand would be to expand dependency jurisdiction far beyond what the law contemplates. Both existing statutory and case law permit dependency jurisdiction only in situations where there is a present risk of harm to the child; it does not permit jurisdiction based upon a one-time lapse of judgment that is not likely to recur. (***In Re J. N.*** (2010) 181 Cal.App.4th 1010. 1023-1026). The majority's decision in this case as well as the majority decision in ***A. M.*** are sufficiently in conflict with long standing precedent of this Court and the other appellate courts of this state as to compel a grant of review to resolve conflicting views.

II.

CONCLUSION.

Petitioner notes that it is comparatively unusual for respondent social services agencies to file opposition to petitions for review. When they do so, it can only be seen as a sign that the social services agencies recognize that the issues involved are significant and of statewide importance and which need guidance from this Court. In this instance, not one but two, social services agencies from two of the state's largest counties, Los Angeles and San Diego, recognize the importance of resolving critical issues regarding the proper interpretation of subdivision (f) of section 300 of the Welfare and Institutions Code. That recognition, plus the fact that the decisions of both the majority in this case and the court in ***A. M.*** are in clear contradiction of a long line of cases that hold that dependency jurisdiction absolutely require present harm to a child and/or a reasonably foreseeable future risk of harm to the child absolutely compel a grant of review in both 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.***

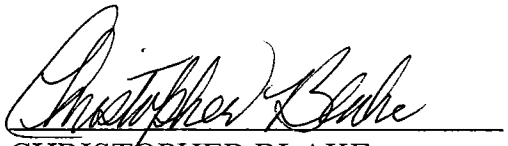
Dated: November 16, 2010

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

CERTIFICATE OF NUMBER OF WORDS IN BRIEF.

I hereby certify that this brief consists of 2,583 words, including footnotes, as counted in the word count function of WordPerfect X-4, the computer program used to prepare this brief.

Dated: November 16, 2010



CHRISTOPHER BLAKE

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:

REPLY TO ANSWER TO PETITION FOR REVIEW

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I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California.

Dated: November 16, 2010

Christopher Blake