IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE ETHAN C., *et al.*,	
Persons Coming under	
the Juvenile Court Law	
LOS ANGELES COUNTY	**Case No. S-187587**
DEPARTMENT OF CHILDREN	
AND FAMILY SERVICES,	
Petitioner and	
Respondent,	
	Case No. B-219894
v.	**(Court of Appeal)**
	Superior Court No.
WILLIAMSON. C.	**CK-78508**
Respondent and	**(LOS ANGELES**
Petitioner.	**COUNTY)**

ON APPEAL FROM THE SUPERIOR COURT,
LOS ANGELES COUNTY

HONORABLE SHERRI SOBEL, REFEREE

BRIEF OF PETITIONER WILLIAMSON C. ON THE MERITS

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BRIEF OF PETITIONER WILLIAMSON C. ON THE MERITS

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

Appellant WILLIAMSON C., also known as WILLIAM C.,[1] hereby submits the following as his opening brief on the merits after this Court granted review of a published decision of the Court of Appeal, Second Appellate District, Division Two, affirming a decision of the trial court making

[1] Williamson appears to be petitioner's legal given name but he more commonly uses William. In deference to his wishes, present counsel, when necessary, will use William and requests that this Court and DCFS do likewise.

his surviving children dependents of the juvenile court.[2] This brief is intended to supplement the points and authorities presented in petitioner's petition for review and efforts will be made to avoid unnecessary duplication of facts presented therein.

ISSUES PRESENTED.

This case presents a variety of issues that have essentially lain dormant in dependency law for many years but which, in appellate cases decided in 2010 and 2011, has since exploded. They involved the interpretation of Welfare and Institutions Code section 300, subdivision (f), which permits the juvenile court to assume jurisdiction over minors whenever "[t]he child's parent or guardian caused the death of another child through abuse or neglect."

The issues on which appellant sought review were, first, whether this provision required that the parent be guilty of criminal negligence rather than mere civil negligence, and, second, whether there must be a present risk of harm to the parent's surviving children within the meaning of Welfare and Institutions Code section 300.2.

In addition, this Court requested briefing on an additional issue as framed in its order granting review which petitioner will quote *verbatim*:

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[2] Petitioner recognizes that dependency cases are considered confidential and that information about them are not always available on the Court's website. There has been a certain amount of controversy on how to refer to parties to a dependency appeal. Some have advocated the use of initials only while others, including the rules of court, now prefer the former practice of using first names followed by the initial of the last name unless the first name is so distinctive or unusual that its use would instantly alert the casual reader to the identity of the parties. The older practice is preferred as it makes opinions and briefs easier to read and decreases the likelihood that published cases will have the same caption title. Petitioner is in accord with these sentiments and notes that none of the participants in this proceeding have distinctive first names that would justify the use of initials only.

> "The petition for review is granted. In addition to the issues specified in the petition for review, the parties are ordered to brief the following issue: What is the definition of the word 'caused' in the context of dependency jurisdiction under Welfare and Institutions Code section 300, subdivision (f). Does it mean the sole cause, or the contributing cause, and should the existence of an intervening, superseding cause be considered as part of the analysis?"

It is petitioner's contention that the appropriate resolution of these questions is that criminal negligence is required to invoke this provision and not mere civil negligence; second, there must be a present risk of harm to the surviving children, and third, the parent's responsibility for the death of the child must be the primary cause of death; the fact that the parent's negligence may have been a minor contributing cause of death is not enough to invoke the provisions of subdivision (f) especially if there has been an intervening, or superseding cause of death.

The first published case to even remotely consider these issues is ***In Re A. M.*** (2010) 187 Cal.App. 4th 1380, review denied on December 1, 2010, as case no. S-186493. The Court of Appeal in that case impliedly found that mere civil negligence was sufficient although there are suggestions in the case that the negligence in that case arose to the level of criminal negligence. An earlier, unpublished opinion, from the same court, ***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." ***A. M.*** also held that there need not be any present risk of harm to the surviving children before jurisdiction could be found.

The next case was the instant case which explicitly held that mere "civil negligence" sufficed, but the dissenting opinion, without reaching the question

of whether civil or criminal negligence was required, held that there must be a present risk of harm to the surviving children and, since the dissenting opinion, found no such risk, determined that there was no basis for invoking subdivision (f).

The next two cases, both of them unpublished, are case S-190230 and case S-190245, both entitled ***In Re L. L.***, review granted in both cases on March 30, 2011. As might be gleaned from the case name and that the two cases are sequentially numbered respectively in the Court of Appeal as cases F-059133 and F-059134, these cases are closely linked. They involve the same children and one case involves their mother and the other their father.[3] For the sake of clarity, petitioner will refer to these to cases jointly as "***L. L.***" and/or cases S-190230/190245. The orders granting review are identical in both cases and read as follows:

> "The petition for review is granted. The issue to be briefed and argued is limited to the following: is "criminal" negligence required to support jurisdiction under Welfare and Institutions Code section 300, subdivision (f) or is civil negligence sufficient?" (Court's website for S-190230 and190245).

The final opinion, also unpublished, is the case of ***In Re Lauren C.*** (2011), D-058381, decided March 28, 2011. A petition for review was filed in that case on April 13, 2011, as case S-192218, and was denied on June 8, 2011. The opinion of the appellate court largely followed ***Ethan C.*** However,

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[3] The cases were joined in the trial court. They became separated in the Court of Appeal due to a peculiar practice of the Fifth Appellate District which routinely assigns different case numbers to parents in dependency appeals despite the fact that the trial courts joined the cases of the parents together. This practice is not followed in other Districts all of which make special efforts to consolidate the appeals of parents in dependency cases when the same children are involved.

the parent who filed the petition was not the parent who negligently caused the death of the child and that may likely account for the denial of review by this Court.

Thus, the issues presented before this Court for resolution are substantial and have resulted in various approaches being taken both in the trial courts and in the appellate courts of this state. Petitioner anticipates that this case may generate amicus briefs as well as it involves issues not hitherto considered but which are increasingly being used to justify dependency proceedings in cases that do not need court supervision.

STANDARD OF REVIEW.

The issues that are presented in this case involve principles of statutory interpretation and are based on undisputed facts. As such they are issues of pure law and are subject to *de novo* review by this Court with no particular deference being given to the decisions of the trial and lower appellate courts. (***Dawson v. East Side Union High School District*** (1994) 28 Cal.App.4th 998, 1041; ***People v. Taylor*** (1992) 6 Cal.App.4th 1084, 1091).

I.

STATEMENT OF THE CASE AND FACTS.

Petitioner/appellant 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 five years old (DOB 1/28/06). The younger one is Jesus, who is now almost three years old (DOB 11/17/08). 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, two months later. (CT 1-3). At the time of the accident, Kimberly and petitioner were separated but the children were living with petitioner and members of petitioner's extended family. (CT 14). 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 crossing an intersection, 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 two other vehicles. Valerie was fatally injured in the accident. The social worker's reports claim that Valerie was thrown from the vehicle. She was not; the accident reports indicate that her grandmother was thrown from the vehicle. At the jurisdiction/disposition hearing, there was a stipulation that the child died inside the vehicle from blunt force trauma to the head. (CT 14-15, RT 18). The accident reports are part of the record on appeal. (CT 87 *et seq.*). 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. (CT 93). 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. (CT 94-95). Petitioner was never charged with any offenses, felony or misdemeanor, in connection with Valerie's death, a fact not contested by respondent.

Further investigation showed that petitioner and Kimberly engaged in various acts of domestic violence with Kimberly being the primary aggressor. (CT 46). There was also evidence that Kimberly has borderline personality disorder and generally functions at the level of a twelve to thirteen year old. A psychologist indicated serious reservations about her ability to care for young children. (CT 46, 77). She also has a history of suicide attempts. (CT 78). The jurisdiction report also indicated that Ethan was showing significant signs of developmental delays. (CT 78).

As noted, 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. (CT 7).

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. (CT 144). Although respondent indicated an initial unwillingness to

offer petitioner any reunification services, it later agreed to do so. (RT 23). 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. (RT 21-22, CT 159). Petitioner filed a timely notice of appeal and the Court of Appeal affirmed the decision of the trial court over a dissenting opinion. This petition for review followed and was granted on December 22, 2010.

ARGUMENT

II.

SUBDIVISION (f) OF WELFARE AND INSTITUTIONS CODE SECTION 300 REQUIRES THAT A PARENT BE CRIMINALLY NEGLIGENT OR ABUSIVE IN CAUSING THE DEATH OF A CHILD BEFORE A PETITION UNDER THAT SUBDIVISION MAY BE SUSTAINED.

Petitioner will acknowledge several things at the outset. He was driving a vehicle in which his young daughter was not restrained by a child car seat as required by Vehicle Code section 27360. He became involved in an accident and the child was killed in the accident. It is also clear that violations of section 27360 are treated as infractions carrying only a nominal fine or by participation in an educational program on the importance of using such restraints. Petitioner will also concede that section 27360 does not impermissibly infringe upon a parent's fundamental right to family privacy and child rearing. (***People v. Thomas*** (1984) 159 Cal.App.3d Supp. 18, 20).

It is equally true that petitioner was not responsible for the accident in which his daughter Valerie died. He was proceeding lawfully down Avalon Boulevard when he was broadsided by another vehicle that had illegally entered an intersection and at a sufficiently high rate of speed as to cause appellant's vehicle to spin around, strike another car and be struck by yet a fourth vehicle. There is no question about legal liability in this case. The driver of the other vehicle is clearly responsible, certainly under the civil law and almost certainly under the criminal law. No criminal charges were ever brought against petitioner.

The question is whether these undisputed facts permit a trial court to sustain a petition brought under Welfare and Institutions section 300, subdivision (f), which states that a petition may be filed and sustained if "the

child's parent or guardian caused the death of another child through abuse or neglect."

It is then a question of whether the "abuse and neglect" contemplated by section 300, subdivision (f), must be civil or criminal in nature. Petitioner argued that it must be "criminal" in nature both in the trial court and the Court of Appeal. Both courts ruled that mere "civil" abuse or neglect was sufficient. Petitioner based his argument on the history of the subdivision, an argument that the appellate court largely ignored by stating that the "plain meaning" of the words prevailed. Petitioner submits that the "plain meaning" of the statute is that only criminal liability for the death of the child is required. The question in this case is whether the Legislature incorporated principles of criminal liability into subdivision (f) of section 300 or whether mere principles of civil liability suffice. Prior to 2010, no published case addressed this point. The opinion of the Court of Appeal in this case was the first case to directly address the issue although the appellate court in ***A. M.***, assumed that mere "civil" negligence was sufficient to meet the statute.[4]

The history of subdivision (f) is very clear. 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). Automatically, that means that the Legislature intended that only criminal negligence would suffice for a true finding under subdivision (f). In other words, as originally enacted, the plain meaning of subdivision (f) was that it took criminal negligence to sustain a true finding and mere civil negligence

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[4] As noted, ***Jorgelina E.***, *supra*, did decide the issue and held that criminal negligence was required. Much of the analysis that follows is taken from that case. While the rules of court prohibit appellant from directly citing this case, it is perfectly proper to cite the authorities on which it relies and to present and/or supplement its reasoning.

was not enough. In 1996, the Legislature rewrote subdivision (f) in its present form. The legislative history revealed 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 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, hereafter Bill Analysis). The Legislature obviously wanted subdivision (f) to have the same standard of proof that is required in the other subdivisions. There is nothing in the legislative history that suggested that the Legislature wanted to change the definition of "negligence" or "neglect" to include "civil" as well as the preexisting "criminal" negligence. Indeed, the legislative history suggests precisely the opposite.

The Legislature was 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). 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.

It may also 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. In its opinion, the Court of Appeal failed to discuss this point. This Court, however, must confront the point directly.

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.[5] A court will not interpret a statute so as to render it meaningless or

[5] 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

largely duplicative of another statute. (***De Young v. San Diego*** (1983) 147 Cal.App.3d 11, 17).

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 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.

Thus, because both subdivision (f) of section 300 and subsection (4) of subdivision (b) of section 361.5 use identical language in precisely the same context, one must presume that the Legislature intended that the same meaning be accorded to that language. 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). Since 361.5 clearly intends that criminal negligence is required before reunification services can be denied, then so, too, must subdivision (f) require "criminal negligence" before jurisdiction can be found.

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300. This only supports a conclusion that subdivision (f) incorporates the criminal standards of neglect and abuse rather than the civil standards.

The imposition of mere civil negligence would also lead to absurd results. For example, a person is driving down the road and is talking away on a cell phone and thus distracted; a child darts out into the street and is struck and killed by that person. There is no question but that the driver is civilly liable due to his/her negligence. However, if subdivision (f) can be invoked by mere civil principles of negligence, the driver not only could lose custody of his children but perhaps even be denied reunification services under section 361.5, subdivision (b), subsection (4). Such a scenario would go far beyond what the Legislature intended and would doubtless be considered "absurd." 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 avoids any possibility of absurd results.

Another example will also suffice. A homeowner with minor children has a swimming pool; the fence surrounding the pool is defective. A neighbor child sneaks in through the defectively maintained fence and drowns. Clearly, the homeowner is very likely negligent under a variety of theories (attractive nuisance, and so on – ***King v. Lennen*** (1959) 53 Cal.2d 340, 343-344; Witkin, Summary of California Law, 10th Ed., Torts, Sections 1094-1099, 1154-1157 and cases cited therein) but should his/her children be made dependents of the court and removed from their parents' custody even if the homeowner promptly repairs the fence? Under the construction advocated by the Court of Appeal, the answer would be yes; a common sense approach would be to recognize that this was a tragic accident and no action would be taken. Any number of other examples of ordinary negligence can be imagined that would result in equally absurd results.

On the other hand, limiting the application of subdivision (f) to instances of criminal negligence will not result in absurd applications. If a parent has caused the death of a child through civil negligence and, as a result of such actions of the parent, his own children are at risk, the children can be made dependents under subdivisions (a) or (b) or even (j) of section 300. Petitioner will leave it to respondent to fashion a situation where an individual who was civilly negligent in the death of a child and whose children are currently at risk for harm but are not covered by any of the other provisions of section 300. Petitioner suspects that respondent will be unable to craft an example. In other words, application of 300, subdivision (f), to instances involving civil negligence will result, in many circumstances, in absurd results that will needlessly interfere with the rights of children to live with their parents; on the other hand, limiting it to instances involving criminal negligence will not result in any absurd situations.

It is a sad and unfortunate thing that children die as the result of the culpable actions of adults. However, the law recognizes various levels of culpability. There are actions based on malice and specific intent; there are actions based on implied malice; there are actions based gross or criminal negligence; and there are actions based on ordinary or civil negligence. The first three levels result in varying degrees of criminal culpability; the final one does not. Limiting subdivision (f) solely to instances of criminal culpability serves the basic purpose of protecting children while also safeguarding their right to be raised by their loving parents. Expanding it to cover instances of mere civil negligence unnecessarily disrupts the family especially where the negligence is a one-time event as opposed to a continuing course of conduct.

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. Kinkead*** (2000) 80 Cal.App.4th 1113, 1123).

Subdivision (f) was always intended to cover those situations in which the parent had criminal liability for the death of a child. That was its original purpose back when it was enacted in 1987. The Legislature realized that requiring an actual conviction impeded the ability of a trial court to apply this provision as the criminal courts move at a glacial pace, even in this day and age of global warming, compared to the dependency courts. It therefore eliminated the need for a conviction and reduced the burden of proof for proving that the parent was "criminally liable" for the death of another child but the Legislature had no intention of changing the basic purpose which was to permit a dependency court to make a finding that a particular child needed the protection of the courts if his/her parent was criminally liable for the death of another child. In other words, jurisdiction under subdivision (f) is permissible if (1) the parent was criminally negligent or abusive in causing the death of a child and (2) the Agency/Department proved that the parent was criminally negligent/abusive by a preponderance of the evidence. This is all that the Legislature intended by the 1996 amendments to subdivision (f) and this Court should so hold.

Another factor that must be considered is that subdivision (f) includes individuals who caused the death of a child through physical abuse. Child abuse of the sort contemplated by subdivision (f) is a form of battery and, as such, is punishable as a crime under Penal Code section 273a; if it results in death, it can be punished by life imprisonment under Penal Code section 273ab, depending on the age of the child. Since the abuse element of subdivision (f) must, perforce, be a crime, then, so, too, must the negligence element. Any other construction make little or no sense. There is simply no such thing as a "non-criminal" form of physical child abuse that results in death.[6] The CALCRIM instructions for the two relevant Penal Code sections cited above define the physical abuse as being wilful, unjustified infliction of physical pain. (CALCRIM instructions 820 and 821). This Court must adopt the only logical construction of subdivision (f) that is possible – namely, that since the abuse element always requires that the abuse be criminal in nature, then so, too, must the negligence element always be criminal in nature.

[6] Respondent is more than welcome to try and create a factual scenario wherein a child has died as a result of physical child abuse wherein the abuse was not also objectively criminal in nature without resorting to concepts of insanity, unconsciousness and so on. Petitioner suspects that the task will be an impossible one.

III.

PETITIONER WAS NOT CRIMINALLY NEGLIGENT IN CAUSING THE DEATH OF HIS DAUGHTER, VALERIE.

The Court of Appeal elected not to decide the issue of whether petitioner was "civilly" or "criminally" negligent in his failure to use a child restraint car seat. Its rationale was clear – mere civil negligence was sufficient to justify a true finding under subdivision (f) and the issue of whether failure to use a car seat was so flagrantly necessary as to constitute criminal negligence was unnecessary to its decision. However, because the question of whether civil or criminal negligence is necessary is before this Court, this Court must confront that question.

Petitioner has found no case on point on whether the mere failure to use a child car restraint seat is criminal or civil negligence; respondent, in its briefing, in the Court of Appeal, failed to identify any such cases as well. However, common sense tells us that it is not criminal negligence. First, any failure to use such a device is but an infraction punished by a nominal fine of $100.00. Vehicle Code section 27360 is what is known as a regulatory offense. It is not 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. Appellant 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 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. Failure to use one may increase 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 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.

At this point, petitioner will discuss the concept of *mens rea* which 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 appellant's conduct fell within the scope of subdivision (f). 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 factor, 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 respondent tacitly conceded in its briefing in the Court of Appeal, 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. Thus, petitioner's failure to use a child restraint seat, while arguably negligent, was not criminally negligent but merely a form of "civil negligence" that is not covered by subdivision (f). This Court should so hold.

IV.

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 appellate 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). The majority in this case agreed with that assessment. 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. One of the concerns of the dissent in this case was that a single incident of misconduct that was not likely or highly unlikely to be repeated could be used to justify intervention by the dependency courts and cited ***In Re J. N.*** (2010) 181 Cal.App.4th 1010; that case will be discussed *infra*. Suffice it to say that the case holds that a one time lapse of judgment does not necessarily justify the imposition of dependency proceedings – there driving a car, while intoxicated, with the children improperly restrained and causing an accident in which one of the children suffered minor injuries. There is also a secondary concern, namely that incidents of misconduct that may be years, even decades old, might be used to justify dependency.

Take a very ordinary situation. When Ms. W. was 17 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 ran a stop sign. In any event, a child died as a result thereof and a court found her civilly liable.[7] Ten-fifteen years later, she gives birth to her own child. Under the construction of subdivision (f) as 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 if the Agency/Department so requests. Such a decision seems completely irrational. Whatever Ms. W.'s failings as a teenager, those failings should have little bearing on her ability to be a good parent when she is in her 30's.[8] In other words, there must be a nexus between the long ago misconduct that led to the death of a child and the situation as it currently exists. That nexus is called "present risk of substantial harm."

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[7] It makes no difference if the child in question was a toddler who darted into the street or a teenager who was the driver of the other car. Both are children for purposes of subdivision (f). A "child" is anyone under the age of eighteen.

[8] Former First Lady Laura Bush, in her autobiography, tells of an incident in which she caused the death of a classmate while driving the family vehicle. The emotional scars remain with her to this day. It may be noted that the classmate was a minor. Petitioner's Ms. W. scenario is an adaptation of that account. (*See*, Bush, Laura, (2010) "Spoken from the Heart" and the account from the following website "www.snopes.com/politics/bush/laura.asp"). Under respondent's interpretation of subdivision (f), DCFS would have had the right to make Mrs. Bush's daughters dependents of the court. After all, Mrs. Bush had caused the "death of a child through negligence" albeit civil negligence and DCFS would have had no need to show a present risk of harm. While Laura Bush may be the most prominent person who meets the criteria of subdivision (f) as interpreted by the Court of Appeal, she is, by no means, the only one. Her situation illustrates to what absurd extremes respondent's interpretation of subdivision (f) can take it. Respondent will be hard pressed to argue that Mrs. Bush does not qualify under subdivision (f) had she been a resident of California at the time her daughters were born and had subdivision (f) been in effect in its present form.

A good illustration where long ago misconduct would justify a dependency petition 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 California Youth Authority and was then dishonorably discharged; was diagnosed with an antisocial personality disorder; and was determined to be a danger to society and to the child. (*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.[9] 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. It is clear that the trial court in ***Mardardo*** could rationally conclude that the father posed a present risk of harm to his child notwithstanding the fact that the act that led to the true finding under subdivision (f) occurred years before as the father had been dishonorably discharged from parole, was a

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

convicted sex offender who had raped a child and had a severe personality disorder.

In other words, dependency proceedings have always been based upon the presumption that the child is presently at risk for harm. If there is no risk, there is no need for supervision by the Department/Agency. The Department/Agency certainly has better things to do than supervise parents who pose no present risk to children.

Under respondent's interpretation of subdivision (f), juvenile courts will be empowered to make children dependents of the courts simply because one of their parents made a tragic mistake years, if not decades, earlier. Such an expansive interpretation makes no sense and advances no public policy. Courts will avoid absurd interpretations of statutes. (***California School Employees Association v. Governing Board of the Marin Community College District***, *supra* 8 Cal.4th at 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.

Not requiring a "present risk of harm" for petitions filed under subdivision (f) is rather like a *de facto* abolition of the statute of limitations. One of the policy reasons for a statute of limitations is to prevent the assertion of stale claims; it is a "favored defense" in the law. The United States Supreme Court has stated:

> "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories

> have faded and witnesses have disappeared. The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend with the period of limitation that the right to be free of stale claims in times comes to prevail over the right to prosecute them." (***Order of R. Telegraphers v. Railway Express Agency*** (1944) 321 U.S. 342, 347 [64 S.Ct. 582, 88 L.Ed. 788]

Removing children from their loving parents simply because the parent made a tragic mistake long before they were born when there is no present risk of harm to the children is very much akin to punishing the parents, once again, for that long ago mistake. Not only is it akin to a violation of the statute of limitations, it is akin to a kind of double jeopardy. Children should only be made dependents of the court if there is a "present risk" of harm to them and not because of some ancient mistake made by a parent.

In addition, not including a present risk of harm represents an unnecessary risk to children that their lives will be disrupted. The whole purpose of the juvenile dependency system is to protect and safeguard minors and their relationships with their parents. (Welfare and Institutions Code section 200). It is not to dredge up ancient history. Consistent with principles of due process, this Court must hold that subdivision (f), like all other provisions of section 300, has a "present risk" of harm element that must be proven before jurisdiction can be established.

V.

THE PARENT'S ACTIONS IN CAUSING THE DEATH OF A CHILD MUST HAVE BEEN A "SUBSTANTIAL" OR "PROXIMATE" CAUSE OF THE CHILD'S DEATH BEFORE JURISDICTION UNDER SECTION 300, SUBDIVISION (f), MAY BE FOUND FOR THE PARENT'S CHILDREN.

"Cause" is something of a loaded term in the law and is also a term of art. It requires culpability; that is, to cause something is to be legally responsible for the effects of the action. A simple illustration will suffice. A parent is pushing a baby in a stroller down a sidewalk in a prudent manner. Suddenly, a large pit bull jumps out from behind a bush and bites the baby in the neck, severing its jugular vein causing death. In one sense, the parent "caused" the death of the child by deciding to take the infant for a stroll down that particular street at that particular time. In another sense, the owner of the pit bull "caused" the death of the child by allowing the dog to roam free knowing that it had vicious tendencies. The law, however, will exonerate the parent from any causation and lay all responsibility, civil or criminal, on the dog owner. (*C.f.*, ***People v. Knoller*** (2007) 41 Cal.4th 139).

In other words, to "cause" something is to be legally responsible for something. This is true regardless of whether we are trying to assess criminal liability or civil liability under tort principles. Indeed, principles of causation are essentially the same in both criminal law and tort law. (*See, e.g.*, ***People v. Roberts*** (1992) 2 Cal.4th 271, 318–319 – relying upon tort cases for authority on the issue of causation in a homicide case; ***People v. Holmberg*** (2011) Cal.App.4th (May 26, 2011, H-035523) – principles of tort law causation applied to restitution orders; ***People v. Schmies*** (1996) 44

Cal.App.4th 38, 46–47 – relying upon Restatement 2d Torts, section 442A, for definition of superseding cause).

The law is also very careful about making distinctions between substantial cause and minor or secondary causes. Although many older cases use the term "proximate cause," the preferred term is "substantial factor." Both the civil and criminal jury instructions define the term. For example CACI 430, states that:

> "A substantial factor in causing harm is a factor that a reasonable person would have considered to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

In the context of involuntary manslaughter, CALCRIM 580 states that:

> "There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death."

In many respects, these two instructions are almost identical. However, the CACI instruction is probably more useful in this context as it makes it clear that if the harm would have occurred anyway because of another factor, then the act that is the subject of the lawsuit is not a "substantial factor." (*See also*, ***Vanderpol v. Starr*** (2011) 194 Cal.App.4th 385, 395).

There is no question but that the cause of Valerie's death was the automobile accident for which her father, petitioner herein, was not at fault. Both the police who investigated the accident and the social workers who

reviewed the reports agreed that the driver who ran the stop sign was solely at fault for the accident.

The question becomes to what extent, if any, was petitioner's failure to strap in his daughter into the car seat a proximate or substantial factor of the child's death. Appellant has found little case law on point that deals with child restraint seats *per se*. However, there is a considerable body of law on the use of seat belts. Since the purpose of a seat belt is essentially the same as a child car restraint seat – to reduce the likelihood of serious bodily injury or death in the event of an automobile accident – petitioner will accept the notion that the law regarding seat belts and liability/compensation is a useful, though very imperfect, analogy.

It has long been settled that a defendant in an automobile accident case can allege that some of the damages suffered by the plaintiffs were as the result of their failure to use seat belts. (***Truman v. Vargas*** (1969) 275 Cal.App.2d 976, 982-983; ***MeNeil v. Yellow Cab Co.*** (1978) 85 Cal.App.3d 116, 118-119; ***Lara v. Nevitt*** (2004) 123 Cal.App.4th 454, 459). However, it is the defendant that has the burden of proof to show (1) that the injuries were intensified as a result of the failure to use the seat belts and (2) the defendant must ordinarily (although not always) do so by the use of expert witnesses. (***Franklin v. Gibson*** (1982) 138 Cal.App.3d 340, 343; ***Housley v. Godines*** (1992) 4 Cal.App.4th 737, 744-745).

In the context of this case, it would be DCFS's burden to show that Valerie would not have died had she been properly placed in a car seat and DCFS should have presented expert testimony to that effect. Clearly DCFS did not present expert testimony so one is left to speculate as to whether Valerie would have survived this accident had she been properly restrained. One must first recognize that use of car restraint seats are no guarantee that the

child will survive a serious four-car accident, the car in which the child was a passenger was struck by violent forces no less than three times. The police diagrams make it very clear that this a very serious accident; petitioner's car was struck by a vehicle that spun him around 180°, pushed him forward more that a fair distance and caused two other vehicles, including a large van, to strike him with considerable force. Valerie was seated very near the principal points of impact. Had she been properly strapped in, she very likely might well have still died. It must be noted that Valerie was not thrown from the car; there was a stipulation that she remained in the car. Thus, one can definitely say that she did not die because she was thrown from the car. Thus, she was most likely in a position where death was quite likely regardless of whether or not she was strapped in place.

It must also be remembered that a car restraint seat is only a device that lessens the likelihood of death under certain circumstances; alone, it offers no guarantees. Children die in car seats all too often depending on the nature of the accident. It must also be remembered that failure to use a car restraint seat does not increase the likelihood that there will be an accident; petitioner could have driven to Boston and back again without using a car seat for Valerie and, without any accident, Valerie would have been safe and sound.

The car restraint seat is designed to reduce the risk of death or serious injury only in the event of an accident.[10] Without the accident, the use of the

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[10] However, it is quite possible to imagine situations in which the use of a car restraint seat might increase the risk of harm. It takes a certain amount of time to remove a child from a car restraint seat and from the car itself. There are situations in which time is of the essence in removing a child from the car as, for example, where there is a fire or the danger of an explosion or where the car might be dangling on a precipice. The extra ten, fifteen, or thirty seconds that it would take to remove a restrained, as opposed to an unrestrained, child may be critical to saving the child's life. However, petitioner believes that, on the whole, car restraint seats, like seat

car seat guarantees or minimizes nothing. The focus must be on what caused this fatal accident. It was not petitioner's failure to use a car restraint seat that caused the accident; rather the cause of the accident was the decision of another driver to run a stop sign at a high rate of speed, slamming into petitioner's car, spinning him around and causing two other vehicles to strike petitioner's car.

However, in the criminal law, the failure of the victim to wear a seat belt is not a defense nor can it reduce the level of a defendant's culpability. (***People v. Hansen*** (1992) 10 Cal.App.4th 1065, 1076-1077; ***People v. Wattier*** (1996) 51 Cal.App.4th 948, 953). In terms of assessing the *mens rea* of the defendant, the victim's failure to wear a seat belt or otherwise take proactive steps to prevent possible injury caused by third parties was deemed irrelevant. ***Wattier***, *supra at 953*, citing to ***People v. Autry*** (1995) 37 Cal.App.4th 351, 361). Thus, if one were to apply the rationale of these cases, petitioner's failure to use a child restraint seat would be irrelevant to the determination of whether he "caused" the death of his child as the primary and sole cause of the fatal accident was the culpable decision of the driver of the other car to run a stop sign at a high rate of speed.

The different approaches that the criminal law and tort law take to the failure to use restraints in cars show that it is somewhat awkward to try and graft principles of tort and criminal law onto dependency law. The purpose of tort law is to compensate people for injuries they have suffered as a result of

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belts and air bags, have proved far more beneficial and the comparatively few instances where they increase the possible danger to persons in a vehicle are far outweighed by the advantages they pose to such persons. Nevertheless, the possibility that a car restraint seat can pose a hazard in certain limited circumstances has to be a factor in considering whether failure to use one cam be a "substantial cause" of death.

other people's wrongful acts (civil or criminal). The purpose of criminal law is to punish people for violating the rights of other people. But the purpose of dependency law is to protect children from present risk of harm that are the results of actions of their parents/guardians.

That brings the discussion back to Welfare and Institutions Code section 300.2 and ***In Re J. N.***, *supra*. Section 300.2 makes it clear that the actions of the parents must pose an ongoing or present risk of harm to their children before dependency can be invoked. ***J. N.*** makes it clear that a one time lapse of judgment is not necessarily enough to sustain jurisdiction.

In ***J. N.***, 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 tree causing minor injuries to one of the children. There was no other evidence that either parent had a substance abuse problem; both parents showed extraordinary remorse for their actions, enrolled voluntarily in many programs and so on. 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).

In many respects the actions of the parents in ***J. N.*** were far more egregious than were petitioner's in this case. In ***J. N.***, the parents were highly intoxicated, the father's actions were clearly the proximate cause of the accident (and the mother bore considerable responsibility for letting him drive intoxicated) and the children were not properly strapped into their car seats although they were in use. Here, petitioner's actions were not the proximate cause of the accident; they were not even a contributory cause of the accident as that term is understood in the law. The most significant difference between

these two cases is that Valerie died whilst the children in ***J. N.*** suffered only very minor injuries. However, a comparison of the conduct of the parents in the two cases shows that petitioner's conduct, on an objective scale, was far less reprehensible than the parents' conduct in ***J. N.*** The injuries in ***J. N.*** did not require the intervention of any third party as the parents were solely at fault; in this case, it absolutely required the independent intervention of the third party running a stop sign before any injuries occurred.[11]

The question here is whether petitioner's one time failure to use a car seat continued to pose a threat to his surviving children or, whether, like the parents in ***J. N.***, did he learn his lesson and is it now highly unlikely that he will repeat his conduct of failing to make sure his children are properly restrained when he transports them in a car? The psychological evaluation of petitioner showed that he has no problems with alcohol or drugs and, indeed,

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[11] ***J. N.*** was critical of an earlier case, ***In Re J. K.*** (2009) 174 Cal.App.4th 1426 for suggesting that a one time lapse of judgment can be the basis for dependency jurisdiction. Petitioner does not read either case quite as broadly as others might. Petitioner believes that both cases can be reconciled for the proposition that a one time lapse of judgment can, but need not, form the basis for dependency jurisdiction. It all depends on what the lapse of judgment was and other circumstances. In ***J. K.***, jurisdiction was based on two incidents – the father's sexual assault (rape) of his daughter and striking her causing a dislocated shoulder. Those two incidents are indisputably far worse that the one time incident involved in ***J. N.*** and clearly far worse than petitioner's actions in this case.

In Re Nicholas B. (2001) 88 Cal.App.4th 1126, 1128, is another case in which a one-time incident was insufficient to warrant jurisdiction. In that case, the mother struck her troubled teenaged son in the face causing bruises and swelling that was labeled as "severe." After six months of voluntary services during which the mother clearly demonstrated remorse, a petition was filed because the child, who was in a voluntary out-of-family placement, refused to go home. The sole basis for the petition was this one incident which the Court of Appeal held was insufficient to sustain dependency jurisdiction. Again, it may be noted that the mother's actions were significantly more outrageous than the actions of petitioner herein as they involved an intentional infliction of injury.

rarely uses alcohol. (CT 112). He showed deep emotional distress at the death of his daughter and cried when discussing it with the evaluator. (CT 114). All in all, petitioner seems to have responded in an appropriate manner and taken appropriate responsibility for this matter. It is highly unlikely that he would ever expose his children to this kind of danger again.

Another way to look at causation is the concurrent or contributing actions problem. A classic example comes from a recent case decided by this Court -- ***People v. Jennings*** (2010) 50 Cal.4th 616. That case involved a horrific example of child abuse culminating in the child's death. The child in question was tortured, starved and ultimately died of a drug overdose. The coroner opined that the child's death was due to a culmination of the problems working together. (*Id.*, at 645). There was no question but that the defendant tortured the child but defendant claimed that he was not responsible for the drug overdose (which apparently was true) and, hence, could not be guilty of murder on a murder-by-torture theory.

This Court rejected Jennings' arguments and held that, if a defendant's actions were a concurrent cause of death, then he cannot escape liability:

> "If a defendant's acts of torture were a concurrent cause of the death, it is no defense that the conduct of some other person contributed to the death.' "When the conduct of two or more persons *contributes concurrently as the proximate cause of the death,* the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death." [Citation.] (***People v. Sanchez*** (2001) 26 Cal.4th 834, 847...'To be considered the proximate cause of the victim's death, the defendant's act must have been a substantial

> factor contributing to the result, rather than insignificant or merely theoretical.' (***People v. Briscoe*** (2001) 92 Cal.App.4th 568, 583–584).
>
> "For this reason, defendant's focus upon "but for" causation, and whether the drugs were the "primary cause" of Arthur's death, is misplaced. "But for" or "sine qua non" causation provides that "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." By comparison, the "substantial factor" rule for concurrent causes "was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result.' As we have stated in the civil context, the tests for "but for" and "substantial factor" causation usually produce the same result, but the "substantial factor" standard states a clearer rule that subsumes and reaches beyond the "but for" test to more accurately address situations in which there are independent concurrent causes of an event. (***Lineaweaver v. Plant Insulation Co.*** (1995) 31 Cal.App.4th 1409, 1415; *see also* ***Viner v. Sweet*** (2003) 30 Cal.4th 1232, 1239–1240)." (*Id.,* at 643-644, some citations and footnotes omitted).

From this case, one can draw the lesson that a substantial factor must be one that, in and of itself, could cause death or severe injury. It need not cause death but has the potential for causing death or severe injury without any intervening action by anyone else or any other culpable action on the part of the perpetrator. In ***Jennings***, the child could have died as a result of the drug overdose or the torture or the starvation. As the medical expert opined, it was

the combination of all three even though any one of the three could have caused death independently of the others.

In this case, petitioner's failure to properly utilize a car seat could not have independently caused the child's death or even any serious harm. Further action, whether by petitioner or, as actually occurred here, by a third party who illegally ran a stop sign at a high rate of speed, was necessary. Failure to use the child restraint seat could not be a cause of death in the same way that any one of the three causes of death in ***Jennings*** was. Therefore, petitioner's failure to use a child car restraint seat was not a significant factor in Valerie's death as that failure, absent any other actions, could not have caused death or injury in and of itself.

"Causation" as that term is understood in tort law and in criminal law is a difficult concept to apply to dependency law, especially in the context of subdivision (f) of section 300. Petitioner submits that something of a hybrid approach is most useful. Petitioner submits that the parent's actions must be of such a nature that death or serious injury is probable even in the absence of any other culpable actions by third parties or other actions by the parent himself/herself. If the parent's action requires other culpable actions either by himself/herself or by third parties, then the parent's original action does not qualify as a significant factor in the child's death under subdivision (f).

Had petitioner run a red light with a blood alcohol level well in excess of the legal limit causing the accident, petitioner would agree that scenario would present, at the minimum, an arguable case for a proper application of subdivision (f). A parent failed to properly use a child car restraint seat, was involved in an automobile accident for which he was criminally culpable (on at least a criminal negligence theory) and a child died as a result.

On the other hand, the instant case involves a situation in which the parent again failed to properly use a child car restraint seat but has absolutely no culpability, either under the civil or criminal law, for the ensuing accident. Under these circumstances, the failure to use the car seat should not be considered a "substantial factor" in Valerie's death as (1) there is evidence that the child would have died anyway; (2) petitioner bore no culpability for the actual accident that resulted in the death and (3) the failure to use the child car restraint seat was not something that, standing alone, could result in death or serious injury.

Another way to took at the causation issue is to ask the question of whether the parent's culpable actions that arguably contributed to the death of the child were of such a nature, standing alone, that a reasonable person would consider the children to be at risk for future harm under other provisions of section 300. In other words, had the accident not occurred would petitioner's failure to use a child car restraint seat alone justify a decision to file a dependency proceeding? If the answer is "no," then the failure to use the car seat was not a significant factor in the child's death as a matter of law. Petitioner submits that the failure to use a car seat is such a minimal failing that it would be unreasonable to have that as the sole basis for filing a petition under subdivision (b) of section 300 – the only other provision that seems remotely applicable.[12]

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[12] Here, petitioner wishes to make it clear that the alternative basis for making Jesus and Ethan dependents – Kimberly's mental health issues and the so-called mutual domestic violence issues between Kimberly and petitioner – had absolutely no role in causing Valerie's death. It is imperative to focus on only those factors that arguably played some role in Valerie's death. Petitioner is aware that the reason he was driving the car in the first place was that Valerie had an unspecified injury to her arm. The record is silent as to how that occurred and whether anyone was "culpable" for that injury by either directly causing it or by negligently supervising her or even

Consider this situation. Suppose petitioner had been stopped as part of a DUI sobriety checkpoint that afternoon. The only thing that the police note is the failure to use the child car restraint seat. Would the police do anything other than issue a citation? Would the police immediately call child protective services? Would CPS even respond? If so, would they immediately remove the child from the parents? In all probability, the answer is "no" to all of these questions. If social workers later found out about the citation, would they launch a full scale investigation and, finding nothing else, would a petition still issue? Again, the answer is almost certainly "no."

Few parents go through the eighteen years or so that it takes to raise a child without making some mistakes along the way. Some of those mistakes are grave, others less so. Some of the mistakes seem minor but, unfortunately, have severe consequences. However, the gravity of the mistake is not governed by the ultimate consequences but by the likelihood that very severe consequences will ensue. (*C.f.*, ***Somers v. Superior Court***, *supra*, 32 Cal.App.3d at 969). The likelihood that a failure to use a child car restraint seat on any one given occasion will result in death is very remote because the vast majority of automobile trips are themselves incident free. Therefore, on an objective basis, petitioner's failure to use a child car restraint seat cannot be considered a "significant fact

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negligently entrusting her to the car of others. In any event, petitioner submits that the relationship between the injured arm and the death is too remote for it to be considered as a "contributing cause" of death. To argue that it does requires a great deal of speculation and a leap into ontological causation that is wholly unnecessary to dependency law and is more akin to the concerns of medieval theologians arguing about how many angels can dance on a pinhead.

tor" in the death of Valerie and the sole significant cause of her death remains the decision of the other driver to run a stop sign at a very high rate of speed causing the accident.

Therefore, this Court, consistent with the principles discussed above, must hold that, unless the parent's actions, standing alone, could result in death or serious injury, those actions cannot result in a true finding under subdivision (f). Causation under subdivision (f) must be based on actions by a parent that, standing alone, have a significant probability of death or serious injury. If the parent's actions require further culpable actions on his/her part (as in the hypothetical extension of the facts of this case discussed *supra*) or culpable actions by a third party (as actually occurred in this case), then the parent's actions do not rise to the level of a substantial factor. Consistent with these principles, petitioner's failure to properly use a child car restraint seat was not a substantial cause of the death of Valerie and the trial court erred in its application of subdivision (f) to this case.

VI.

THE TORT DOCTRINE OF "INDEPENDENT INTERVENING FACTOR" HAS NO APPLICATION TO DEPENDENCY JURISDICTION AND, THUS, PLAYS NO ROLE IN THIS CASE.

This Court also asked for briefing on the issue of whether the tort concept of "independent intervening act" should apply to this case. This concept, as defined by Professor Witkin, is one where, subsequent to the defendant's original negligent act, an independent intervening force actively operates to produce injury to the victim. However, the chain of causation may be broken as to the defendant only if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen and, hence, not foreseeable. (Witkin, Summary of California Law, 10th Ed., Torts, Section 1197 *et seq.*, and cases cited therein). The cases collected by Professor Witkin make it clear that the doctrine is rarely invoked successfully as its application prevents a negligent defendant from being held liable for his negligence. Every effort is made to avoid its application even where a force of nature or act of God is involved. (***Southern Pacific Company v. Los Angeles*** (1936) 5 Cal.2d 545, 549 – the occasional heavy rainfall is a hazard that is reasonably foreseeable and is not a superseding cause exonerating the defendant from faulty design). Impulsive acts of children are not superseding causes. (***McKay v. Hedger*** (1923) 139 Cal.App. 266, 273). Generally, the subsequent negligent act of a third party is not considered to be a superseding cause but a contributory cause. (***Ferroggiaro v. Bowline*** (1957) 153 Cal.App.2d 759, 763 – defendant negligently struck traffic light pole rendering it inoperative; subsequent driver negligently drove through intersection causing plaintiff's injuries, original driver still liable as it was foreseeable that another driver would negligently drive through intersection).

Petitioner could cite case after case but the general consensus is that the subsequent act must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission. (***Merrill v. Los Angeles Gas and Electric Company*** (1910) 158 Cal. 499, 504). Petitioner cannot deny that any prudent driver can readily foresee that other drivers will act in a negligent or reckless manner and that steps must be taken to minimize hazards – so-called "defensive driving" maneuvers or using prophylactic devices such as seat belts.

However well the concept of intervening or superseding causes works in tort law (and criminal law),[13] it is not one that it at all suitable for dependency law. Compensating an injured victim is not an issue in a dependency case nor is holding someone liable for the consequences of their criminal acts; we are not worried that a negligent individual is going to escape liability for his negligence and thus leave an injured victim without any compensation for his injuries. We are also not concerned about vicious crimes going unpunished.

In the context of this case, the question that should be asked is whether petitioner's possible negligence in not using the child car restraint seat

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[13] Again, as Professor Witkin points out, there is a strong reluctance to exonerate persons from the effects of their criminal acts as long as the "intervening act" is a possible consequence that was foreseeable; the exact nature of the intervening act need not be foreseeable. (***People v. Harrison*** (1959) 176 Cal.App.2d 330, 334). For example, negligent medical treatment of a serious, potentially life-threatening, wound will not relieve the defendant of criminal liability for homicide. (***People v. McGee*** (1947) 31 Cal.2d 229, 240). Likewise, a defendant who leads police on a high speed chase is criminally liable for the deaths of third parties caused when the police vehicle strikes the innocent third party. (***People v. Harris*** (1975) 52 Cal.App.3d 419, 427). Indeed, a sexual assault by one robber can be imputed to his co-defendants even if they did not know about the assault. (***People v. Nguyen*** (1993) 21 Cal.App.4th 518, 542-533).

increased the likelihood of an accident in which the child would be injured. The answer is clearly "no." We are also concerned with the issue of whether petitioner's one time error in not using a car seat necessarily poses a substantial risk of harm to his other children in the future. In tort or criminal law, we are not at all concerned with the future actions of either the defendant or the plaintiff and whether they might pose a risk to others in the future. In dependency law, we are concerned about the future conduct of the parent or, more precisely, whether the parent poses a risk of harm to his/her children.

As ***J. N.*** makes so clear, a one-time lapse of judgment on the part of the parent does not necessarily justify dependency proceedings even if the lapse of judgment has tragic results. Indeed, one might say the more tragic the result, the less likely that the parent will repeat the mistake. Again, it cannot be stressed too much that the gravity of the lapse of judgment is not judged by the severity of the ensuing results but on the likelihood of severe results occurring. (*C.f.*, ***Somers v. Superior Court***, *supra*, 32 Cal.App.3d at 969).

Petitioner would also note that this Court has, from time to time, cautioned against the unbridled incorporation of concepts developed in the criminal law (or tort) law into dependency law. (***In Re Celine R.*** (2003) 31 Cal.4th 45, 58-59; ***In Re James F.*** (2008) 41 Cal.4th 901, 916-917). This does not mean that it is improper to apply some principles of criminal/tort law to dependency cases but a certain amount of caution must be exercised before doing so. Petitioner agrees that the general principles of causation have a limited role to play in the proper application of subdivision (f) and has demonstrated how that can be done *supra*. It is done carefully and with a fair amount of circumspection with a recognition that a wholesale application of those principles is not warranted.

Petitioner submits that the more particularized concept of superseding or intervening cause is one of those principles of criminal/tort law that is unsuitable for dependency law and should not be extended to dependency law. It was designed for particular purposes that are totally unrelated to the purposes of dependency law and cannot provide any guidelines for this Court to resolve the issue of whether petitioner's one time lapse of judgment is sufficient to justify a true finding under subdivision (f). This Court should not concern itself with whether there was any independent or intervening cause as that concept is irrelevant to dependency law.

VII.

JOINDER WITH BRIEFING IN L. L.

To the extent permissible, petitioner joins in the arguments raised by the petitioners/appellants in the companion cases of ***In Re L. L.***, case S-190230 and case S-190245 – California Rules of Court, Rule 8.200, subdivision (a), subsection (5). As noted, these two cases have also been granted review and this Court specifically limited the briefing on the issue of whether subdivision (f) of section 300 requires criminal negligence or whether mere civil negligence is sufficient to warrant jurisdiction.

VIII.

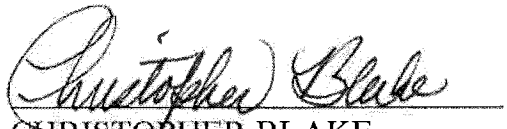
CONCLUSION.

For the reasons stated above, petitioner respectfully submits that the trial court applied the wrong standards in determining whether Welfare and Institutions Code section 300, subdivision (f), applied to this case.

Petitioner submits that subdivision (f) applies only if the parent has been criminally negligent or criminally abused a child in causing death. Furthermore, there must be a present risk of harm to the parent's children before subdivision (f) can apply and the parent's actions must be a "substantial cause" of the child's death before a true finding under subdivision (f) can be made.

The facts of this case show that petitioner's negligence, if any, did not rise to the level of criminal negligence; that his surviving children were not at any present risk for harm and that his actions were not a "substantial cause" of his daughter's death as the sole cause of death was the automobile accident of which he was wholly exonerated. In accord with these principles, the Court should reverse the findings of the trial court and the Court of Appeal.

Dated: June 13, 2011



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CERTIFICATE OF NUMBER OF WORDS IN BRIEF.

I hereby certify that this brief consists of 13,635 words, including footnotes, as counted in the word count function of WordPerfect X-4, the computer program used to prepare this brief.

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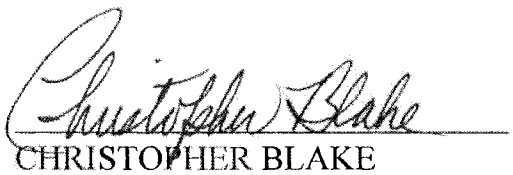

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I, CHRISTOPHER BLAKE, declare:

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:

Petitioner's Opening Brief on the Merits

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

Executed at San Diego, California.

Dated: June 13, 2011

Christopher Blake

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